Supreme Court of Ohio Clerk of Court - Filed July 06, 2023 - Case No. 2023-0004

In the
Supreme Court of Ohio

PRETERM-CLEVELAND, ET AL.	:	Case No. 2023-0004
	:	
Appellees,	:	On appeal from the Hamilton County
	:	Court of Appeals,
v.	:	First Appellate District
	:	
DAVE YOST, ATTORNEY GENERAL	:	Court of Appeals
OF OHIO, ET AL.,	:	Case No. C-220504
	:	
Appellants.	:	

REPLY BRIEF OF APPELLANTS DAVE YOST, ET AL.

ALAN E. SCHOENFELD
MICHELLE NICOLE DIAMOND
PETER NEIMAN
Wilmer Cutler Pickering Hale
and Dorr LLP
7 World Trade Center
New York, NY 10007
212-230-8800
alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com
peter.neiman@wilmerhale.com

DAVINA PUJARI
CHRISTOPHER A. RHEINHEIMER
Wilmer Cutler Pickering Hale
and Dorr LLP
One Front Street
San Francisco, CA 94111
davina.pujari@wilmerhale.com
chris.rheinheimer@wilmerhale.com

DAVE YOST (0056290)
Ohio Attorney General

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
MATHURA J. SRIDHARAN (0100811)
Deputy Solicitors General
AMANDA L. NAROG (0093954)
ANDREW D. MCCARTNEY (0099853)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
benjamin.flowers@OhioAGO.gov

Counsel for Defendants-Appellants
Attorney General Dave Yost, Director
Bruce Vanderhoff, Kim Rothermel, and
Bruce Saferin

ALLYSON SLATER
Wilmer Cutler Pickering Hale
and Dorr LLP
60 State Street
Boston, MA 02109
allyson.slater@wilmerhale.com

B. JESSIE HILL
FREDA J. LEVENSON
REBECCA KENDIS
ACLU of Ohio Foundation
4506 Chester Ave.
Cleveland, OH 44103
bjh11@cwru.edu
flevenson@acluohio.org
rebecca.kendis@case.edu

MEAGAN BURROWS
American Civil Liberties Union
125 Broad St., 18th Fl.
New York, NY, 10004
mburrows@aclu.org

MELISSA COHEN
Planned Parenthood Federation
of America
123 William Street, Floor 9
New York, NY 10038
Melissa.cohen@ppfa.org

Counsel for Plaintiffs-Appellees
Preterm-Cleveland, et al.

MATTHEW T. FITZSIMMONS
KELLI K. PERK
Assistant Prosecuting Attorney
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
mfitzsimmons@
prosecutor.cuyahogacounty.us
kperk@
prosecutor.cuyahogacounty.us

Counsel for Defendant-Appellee
Michael C. O'Malley,
Cuyahoga County Prosecutor

MELISSA A. POWERS
Hamilton County Prosecutor
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202

Defendant-Appellee

JEANINE A. HUMMER
AMY L. HIERS
Assistant Prosecuting Attorneys,
373 S. High Street, 14th Floor
Columbus, OH 43215
jhummer@franklincountyohio.gov
ahiers@franklincountyohio.gov

Counsel for Defendant-Appellee
G. Gary Tyack,
Franklin County Prosecutor

WARD C. BARRENTINE
Assistant Prosecuting Attorney
301 West Third Street
PO Box 972
Dayton, OH 45422
barrentinw@mcohio.org

Counsel for Defendant-Appellee
Mat Heck, Jr.,
Montgomery County Prosecutor

JOHN A. BORELL
KEVIN A. PITUCH
EVY M. JARRETT
Assistant Prosecuting Attorney
Lucas County Courthouse, Suite 250
Toledo, OH 43624
jaborell@co.lucas.oh.us
kpituch@co.lucas.oh.us
ejarrett@co.lucas.oh.us

Counsel for Defendant-Appellee
Julia R. Bates,
Lucas County Prosecutor

CARRIE HILL
Attorney for Summit County Prosecutor
Assistant Prosecuting Attorney
53 University Ave., 7th Floor
Akron, OH 44308-1680
chill@prosecutor.summitoh.net

Counsel for Defendant-Appellee
Sherri Bevan Walsh,
Summit County Prosecutor

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INTRODUCTION

The First District erred twice over. First, it wrongly held that Ohio lacked any right to appeal the trial court's order enjoining the Heartbeat Act. Then, because the First District believed it lacked appellate jurisdiction, it failed to vacate an injunction that the plaintiffs lacked standing to seek. This Court should correct both errors: it should hold that the State had a right to appeal the preliminary-injunction order, and it should vacate that order on the ground that the plaintiffs lacked standing to seek it. A holding along those lines would establish that the same jurisdictional principles apply in all cases, regardless of whether they involve abortion. Far from undermining "this Court's legitimacy," Pl.Br.1–2, a decision along these lines would reaffirm the Court's commitment to "observ[ing] the utmost fairness," and to acting in a "perfectly and completely independent" manner, without regard to the nature of the parties before it. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015) (quoting Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830)).

ARGUMENT

I. Ohio law permits the State to immediately appeal an order preliminarily enjoining its laws.

The State properly appealed the trial court's preliminary-injunction order on an interlocutory basis. This follows from the Revised Code, which permits interlocutory appeals of preliminary-injunction orders whenever the "appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment." R.C.

2505.02(B)(4)(b). Stated differently, parties may immediately appeal a preliminary injunction whenever "an appeal after final judgment on the merits will" fail to "rectify the damage" done in the meantime. *State v. Muncie*, 91 Ohio St. 3d 440, 451, 2001-Ohio-93 (quotation omitted).

The appealed-from order in this case inflicted three forms of injury that "only an interlocutory appeal" can prevent. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). *First*, because the injunction forbids the State "from effectuating statutes enacted by representatives of its people," the injunction inflicts "a form of irreparable injury" as a matter of law. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (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)); *accord Abbott*, 138 S. Ct. at 2324; *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (*per curiam*). *Second*, because the injunction bars the State from enforcing a law passed to regulate an irreversible medical procedure, it interferes irreparably with the State's authority to regulate the medical profession. *Cf. Muncie*, 91 Ohio St. 3d at 451. *Third*, because abortions are irreversible—because the lives lost as a result of the injunction are lost forever—the injunction interferes irreparably with the State's right to protect innocent life. *See* Appellants' Opening Br. ("Ohio Br.") 16–21.

The plaintiffs oppose allowing the State to appeal, but offer no good argument.

A. Any attempt to shield the injunction from review by calling it *status-quo*-preserving fails legally and factually.

The plaintiffs begin their defense of the First District's ruling by stressing a legally

irrelevant and factually incorrect point: they say the preliminary injunction cannot be immediately appealed because it simply "maintain[s] the status quo pending a ruling on the merits." Plaintiffs' Brief ("Pl.Br.") 8 (quotation omitted); *id*. at 8–11.

Consider first the problem of legal irrelevance. As the State explained in its opening brief, *see* Ohio Br.24, the text of R.C. 2505.02 does not forbid the immediate appeal of injunctions that "maintain the status quo pending a ruling on the merits." *Id*. (quotation omitted). For that reason, this Court has never held that *status-quo*-preserving injunctions are unappealable.

The plaintiffs do not argue otherwise. Instead, they cite lower-court opinions with language suggesting that *status-quo*-preserving injunctions may not be appealed. Pl.Br. 8–9. But those decisions neither bind this Court nor give the Court license to ignore the statutory text. Further, the broad language in the lower-court decisions is easily explained as an overly general statement. It is true that, in many cases, a *status-quo*-preserving injunction does not leave the enjoined party without "a meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4)(b). For example, a property owner sustains no permanent, irreparable harm if he is enjoined from selling or altering property before a case's resolution. *McHenry v. McHenry*, 2013-Ohio-3693 ¶¶6, 18 (5th Dist.). Similarly, preliminarily enjoining a city from annexing land, and thus preserving the *status quo*, does not leave the city without recourse—it can go forward with the annexation should it prevail. *Deyerle v. City of Perrysburg*, 2004-Ohio-4273 ¶15 (6th

Dist.). But while many *status-quo*-preserving injunctions inflict no irreparable harm, it hardly follows that *no* such injunctions inflict irreparable harm.

In any event, the injunction here did not preserve the *status quo*. The Heartbeat Act was in effect for months before the Hamilton County Court of Common Pleas enjoined it. *See* Ohio Br.24. The plaintiffs insist that an injunction can somehow preserve the *status quo* by altering the law, Pl.Br.10, though they never explain how. Instead, they cite two lower-court decisions involving injunctions sought slightly after the contested law went into effect. *See Taxiputinbay, LLC v. Put-in-Bay*, 2021-Ohio-191 (6th Dist.); *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805 (Hamilton C.P. 2018). Even assuming those courts correctly analyzed that issue, this case presents no comparable circumstances, since the Heartbeat Act was in effect for months before the plaintiffs filed this action on September 2, 2022.

And as a practical matter, a *status-quo* standard is a poor guide for determining appealability. This case shows why. The plaintiffs say the "status quo" for these purposes "is the 'last, actual, peaceable, uncontested status which preceded the current controversy.'" Pl.Br.9 (quoting *Taxiputinbay*, 2021-Ohio-191 at ¶17). But when was the status of abortion's legality "peaceable" and "uncontested"? The state of abortion law has been vigorously contested ever since *Roe v. Wade*. So if the plaintiffs are right about the best way to define *status quo*, the relevant *status quo* occurred during the many years predating *Roe*, when no one imagined the Constitution guaranteed a right to abortion. The fact that

lower-court caselaw permits the plaintiffs to argue that an order preserved the *status quo* by enjoining an abortion law that had been in effect for months shows how malleable and useless the *status-quo* test is.

B. The plaintiffs cannot refute the irreparable harms Ohio identified, each of which is independently sufficient to allow an immediate appeal.

Recall that the injunction imposes three ongoing, irreparable harms on Ohio, each of which independently establishes that Ohio has no "meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4). They are the harm the injunction poses to Ohio's sovereign interest in enforcing its laws; the harm to Ohio's interest in regulating the medical profession; and the harm to Ohio's interest in protecting innocent lives. *See above* 2. The plaintiffs dispute all three injuries, to no avail.

Sovereign harm. Every order enjoining the enforcement of a state law inflicts irreparable harm on the State. *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers); *Abbott*, 138 S. Ct. at 2324 & n.17; *Thompson*, 976 F.3d at 619. The plaintiffs disagree, but give no good reason for doing so. They first object that the State's position creates a bright line, which they say is at odds with the "fact-intensive inquiry" that R.C. 2505.02(B)(4) requires. Pl.Br.13. That is a strange thing for the plaintiffs to complain about, since their rule regarding *status-quo*-preserving objections also draw a bright line, as does their proposed rule banning the State from ever immediately appealing preliminary injunctions to prevent third-party harm, *see below* 9–10. More substantively, however, the State's bright-line rule accords with R.C. 2505.02(B)(4). Although the question whether an

appellant has a "meaningful or effective remedy by an appeal following final judgment" is context-dependent, the State's rule recognizes one context in which that requirement is always satisfied: cases involving an appeal from an order enjoining a state law. Courts often adopt "categorical rules" to guide application of totality-of-the-circumstances tests. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 398 (2014). That is true even in the context of R.C. 2505.02. To take one relevant example, the deprivation of the constitutional right, even for a brief period of time, constitutes a *per se* irreparable harm. *See United Auto Workers, Local Union 1112 v. Philomena*, 121 Ohio App. 3d 760, 781 (10th Dist. 1998). If that bright-line rule is consistent with R.C. 2505.02(B)(4)(b)—and the plaintiffs surely believe it is—so is the one the State proposes.

The plaintiffs next say that the State's proposed rule would undermine the purposes of R.C. 2505.02(B), which exists to prevent piecemeal litigation. Not so. This Court and others have already entertained such appeals without opening the floodgates to piecemeal litigation. *See, e.g.*, *Newburgh Heights v. State*, 168 Ohio St. 3d 513, 2022-Ohio-1642 ¶36 (2022); *Columbus v. State*, 2023-Ohio-195 ¶18 (10th Dist.). And the State's rule applies only to a small subcategory of one category of provisional remedies; namely, orders preliminarily enjoining state laws. Within that group, the State may have good reason *not* to seek an immediate appeal in some cases. In any event, the statute's text provides the best evidence of the statute's purpose. *See State v. Faggs*, 159 Ohio St. 3d 420, 2020-Ohio-523 ¶15. That text shows that the statue's purpose is to permit appeals when

provisional remedies inflict irreparable harm. Because orders enjoining state laws inflict such harm, the statutory purpose *supports* allowing immediate appeals from such orders.

Next, the plaintiffs argue that the State's theory requires courts to "prematurely address the underlying merits" of the appeal in order to determine whether they have jurisdiction. Pl.Br.15. The opposite is true. The State's bright-line rule *prevents* courts from conflating jurisdiction and the merits. *See* Ohio Br.19. Because an order enjoining a constitutionally permissible law always threatens irreparable harm, *see Abbott*, 138 S. Ct. at 2324, every case in which the State appeals such an order will seek relief from irreparable harm. The bright-line rule allows courts to say so, and to assert jurisdiction, without touching the merits.

The plaintiffs additionally fault the State for supporting its position "through inapposite federal case law." Pl.Br.16. Following the First District's lead, the plaintiffs insist that, because federal law permits parties to appeal all preliminary-injunction orders, *see* 28 U.S.C. 1292(a)(1), federal cases holding that such orders necessarily impose irreparable harm are irrelevant in Ohio courts. Pl.Br.16; *accord Preterm-Cleveland v. Yost*, 2022-Ohio-4540 ¶16 (1st Dist.). The plaintiffs' argument is, as the State already explained, a non-sequitur. Ohio Br.21. Each of the cited cases addresses irreparable harm when deciding whether to issue a stay pending appeal, *see, e.g.*, *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers), or whether to reverse entry of a preliminary injunction, *Abbott*, 138 S. Ct. at 2324; *Thompson*, 976 F.3d at 619. In those contexts, the federal courts say orders

enjoining state laws always inflict irreparable harm. The plaintiffs do not, and could not possibly, explain why that reasoning is inapplicable here.

According to the plaintiffs, allowing immediate appeals would interfere with the separation of powers. Pl.Br.17–18. This argument forgets the question at hand: whether the statute permits immediate appeal of the order in question. The State has argued that R.C. 2505.02(B)(4), a validly enacted state law, permits immediate appeals of orders enjoining state laws. The courts' hearing a legislatively authorized appeal cannot interfere with the separation of powers.

In sum, and as the Tenth District recently recognized, "the state can claim some harm whenever a trial court enjoins a statute." *Columbus*, 2023-Ohio-195 at ¶18. That harm is irreparable by definition, since the State cannot later reverse the damage to its sovereign interests. That irreparable harm satisfies R.C. 2505.02(B)(4)(b).

Regulating the medical profession. The plaintiffs likewise fail to rebut the State's argument that the injunction interferes with its power to regulate the medical profession. They claim that the State "provides no support for this assertion beyond a cursory citation to [*Muncie*, 91 Ohio St. 3d at 451–52], in which the Court recognized that an order compelling the involuntary administration of psychotropic medication constitutes a 'particularly severe interference with an individual's liberty interest.'" Pl.Br.22 (quoting *Muncie*, 91 Ohio St. 3d at 451–52). But the State did not rely on *Muncie*. Instead, it noted that the federal and Ohio constitutions empower the legislature to regulate the medical

profession, observed that the Heartbeat Act does just that, and concluded that the injunction of that Act therefore infringes the State's lawful exercise of its authority. Ohio Br.20 (citing Ohio Const., art. I, §21(D), *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). *Muncie* simply bolsters the argument by confirming that parties suffer irreparable harm from injunctions that ring a "bell [that] cannot be unrung." 91 Ohio St.3d at 451. *Muncie* further shows that irreversible medical procedures ring such a bell. *Id*. So allowing doctors to perform irreversible procedures that the State has constitutionally prohibited irreparably interferes with the State's interest in regulating the medical profession. *Contra* Pl.Br.23.

Protection of innocent, unborn lives. The State may legislate to protect innocent life. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). The injunction interferes with the State's ability to do so. The plaintiffs insist this does not matter, first by arguing that the State cannot satisfy R.C. 2505.02(B)(4)(b) by appealing to harms sustained by third parties. Pl.Br.20. Even assuming that is right, the State is not pointing to such harms: it is pointing to the harm *the State itself* sustains when it is impermissibly barred from exercising its lawful authority. This is the same harm the State would suffer if a law prohibiting murder, assault, or any other criminal activity were enjoined. The plaintiffs simply ignore this point. And they further ignore the absurdity that would result from holding that the State may not appeal from orders enjoining laws aimed at protecting Ohio citizens. Specifically, the plaintiffs' rule would mean that, although a

single defendant may immediately appeal an order that threatens to irreparably harm him, *see* Pl.Br.12, the State *may not* immediately appeal an order enjoining a law protecting every Ohioan from the very same harm. *See* Ohio Br.23. Any rule that leads to so bizarre a result cannot be right.

The plaintiffs also err by faulting the State for failing "to show how many—if any—abortions would be prevented by immediate review of the preliminary injunction." Pl.Br.21. This criticism is quite an about-face. The injunction rests on *the plaintiffs*' argument, which the trial court accepted, that the Heartbeat Law would block many abortions. The State does not challenge that finding. And the State may use that finding to the same extent as the plaintiffs themselves. Indeed, having successfully argued below that the Heartbeat Act prevents abortions, the plaintiffs are estopped from denying that an order enjoining the Act increases the number of abortions. *See Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6442 ¶25.

Finally, the plaintiffs argue that the Heartbeat Act is not the best way for the State to go about promoting its interest in protecting innocent life. Pls.Br.21. That, however, is a policy question for the legislature. It has no bearing on the question whether the injunction here interferes with the State's prerogative to protect innocent life in accordance with validly enacted state laws.

*

In sum, none of the plaintiffs' attempts to negate the State's irreparable harm

carries the day. But before moving on, the consequences of the plaintiffs' argument deserve emphasis. Affirming the First District's jurisdictional holding means establishing "a precedent empowering trial courts around the State to hold state laws hostage." Ohio Br.3. A court could issue a preliminary injunction and then drag out proceedings for years, depriving Ohio of the ability to enforce its laws—even laws that are unquestionably constitutional and eventually upheld. The plaintiffs deny *this case* presents any such circumstances. Pl.Br.12, n.2. That is irrelevant; their rule would allow *future* courts to do exactly what the State fears. And at any rate, the plaintiffs sidestep the fact that they asked the trial court to drag this case out for years, *see* Ohio Br.3—a request that, if granted, would assure the plaintiffs years of unwarranted relief at the expense of Ohio's sovereign interests. Their tactics confirm the danger of the non-appealability rule they propose.

II. The plaintiffs lacked third-party standing to seek the preliminary injunction that the trial court entered.

A. The plaintiffs fail two prongs of the third-party-standing test.

The plaintiffs are one abortionist and several abortion clinics. The preliminary injunction here rested solely on third-party standing; the plaintiffs did not claim they had standing on their own. *See* Order Granting Preliminary Injunction, ¶¶73–80. That is, they did not seek to enjoin the Heartbeat Act on the ground that it violates any right to perform abortions—understandably so, since they lack any such right. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (*en banc*); *Cf. State v. Coleman*, 124

Ohio App. 3d 78, 81 (10th Dist. 1997). Thus, the injunction is proper only if the plaintiffs had standing to seek an injunction protecting *their patients*' supposed right to abortion.

The plaintiffs lacked standing to seek this relief. A plaintiff has standing to vindicate a third party's rights only if the plaintiff "(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 [right-holder's] seeking relief." *Util. Serv. Partners, Inc. v. Pub. Utils. Comm'n*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶49 (quotation omitted). The plaintiffs cannot make the second or third showings.

As to the second factor, the plaintiffs have not introduced any evidence that they have a "close relationship" with the patients whose rights they purport to defend. After all, "a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure." *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting), *overruled by Dobbs*, 142 S. Ct. 2228. And these plaintiffs do not even know who their future patients are—they assert the rights of unknown individuals who will need services in the future. Future clients are routinely rejected as a basis for third-party standing. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004); *Juv. Matters Trial Laws. Ass'n v. Jud. Dep't*, 363 F. Supp. 2d 239, 249 (D. Conn. 2005); *Gelb v. Fed. Reserve Bank of N. Y.*, No. 1:12-CV-4880 (ALC), 2016 WL 4532193, at *4 (S.D.N.Y. Aug. 29, 2016). Finally, any close relationship that might otherwise exist is vitiated by a glaring conflict of interest: the Heartbeat Act permits the plaintiffs' patients to sue the

plaintiffs for performing abortions the Act prohibits. "Consequently, the abortion providers' interest in not being" subject to the Heartbeat Act "appears to potentially conflict"—indeed, it *does* conflict—"with a pregnant woman's interest in" having the right to enforce the Act. *Cameron v. EMW Women's Surgical Center*, 664 S.W.3d 633, 658 (Ky. 2023).

As to the third factor, even assuming an abortion right exists, no "hindrance … stands in the way" of women asserting that right on their own. *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49. For decades, women have asserted their own abortion rights. The plaintiff in *Roe v. Wade* was an individual, not a provider suing on a patient's behalf. And juveniles have long sued for orders enabling them to get abortions. *See* Ohio Br.32–33 (collecting cases). To be sure, women may not want to reveal that they seek an abortion. But women could "challenge the bans pseudonymously" and obtain a court order requiring secrecy. *Cameron*, 664 S.W.3d at 658. And regardless, a desire for privacy is not sufficient to satisfy the third-party standing's "hindrance" prong. *See Nicdao v. Two Rivers Public Charter School*, 275 A. 3d 1287, 1293 (D.C. App. 2022).

B. The plaintiffs do not overcome these flaws and thus do not meet the "close relationship" or "hindrance" requirements.

1. The plaintiffs' response consists largely of undisputed points. For example, they dedicate much space to arguing that Ohio recognizes third-party standing. *See* Pl.Br.24–26. They further stress that *federal courts* have long made an exception to their usual third-party standing principles for abortion cases, uncritically allowing abortion clinics and abortionists to assert the alleged rights of their patients. *See* Pl.Br.26–29.

Finally, the plaintiffs stress that some lower courts have similarly twisted third-party standing principles to permit suits by abortion providers. *See* Pl.Br.30.

None of that matters. First, no one disputes that Ohio courts recognize third-party standing. This Court has held that the doctrine, while "not looked favorably upon," applies in narrow circumstances. *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49 (quotation omitted). The question presented is whether this case presents such circumstances. It does not. *See above* 12–13; Ohio Br.30–34.

Second, everyone agrees that federal courts traditionally allowed abortionists to sue to vindicate the alleged abortion rights of their patients. But why should that matter here? The plaintiffs say "it is well established that Ohio courts *do* follow their federal counterparts on matters related to standing." Pl.Br.26–27. That is wrong. This Court has never held that Ohio's third-party standing doctrine tracks federal doctrine. For good reason. The Ohio Constitution "is a document of independent force." *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St. 3d 255, 2022-Ohio-65 ¶328 (Fischer, J., dissenting) (quotation omitted). And here, the doctrines have different textual bases. Ohio's standing doctrine stems from the nature of "judicial power." *See* Ohio Const. art. IV, §1. In contrast, the federal standing doctrine derives from Article III, §2 of the U.S. Constitution, which permits courts to hear only "Cases" and "Controversies"—a limitation that does not appear in Ohio's constitution. Beyond this, the U.S. Supreme Court recently acknowledged that it had unjustifiably warped third-party standing to

accommodate abortion litigants. *Dobbs*, 142 S. Ct. at 2275. "This Court" thus "finds itself in the exceedingly rare position of being able to learn from a mistake in applying the law that [its] esteemed brothers and sisters on the U.S. Supreme Court have openly acknowledged making." *Cameron*, 664 S.W.3d at 659. The plaintiffs offer no sound reason for refusing to do so.

Finally, the plaintiffs identify a few pre-*Dobbs* cases from trial and intermediate-appeals courts in Ohio allowing abortion providers to sue on behalf of their patients. Pl.Br.30. These thinly reasoned cases ought not move the Court. The question whether abortionists have third-party standing to assert their patients' rights is a question of first impression for this Court. Its hands are not tied by a few lower-court decisions.

2. Having cleared away that underbrush, the State turns to the plaintiffs' arguments concerning the application of the third-party standing doctrine to this case.

Right off the bat, the plaintiffs' arguments suffer from a glaring problem. The plaintiffs, like the trial court, assert standing to challenge the Heartbeat Act *in toto*. But standing is not "dispensed in gross." *Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St. 3d 157, 2018-Ohio-441 ¶30 (quotation omitted). Thus, the plaintiffs needed to establish standing as to each individual provision in the Heartbeat Act they seek to challenge. They never did that. And it is unclear how they could. Consider, for example, the provision in the Act requiring doctors to check for a heartbeat before performing an abortion. As the State noted in its opening brief, Ohio required abortionists to check for heartbeats long before

its legislature enacted the Heartbeat Act. *See* Ohio Br.35. And for years, abortionists easily complied with this requirement. *Id*. How, then, are the plaintiffs or patients even conceivably harmed by the provision in the Heartbeat Act requiring them to do what pre-Act law already required? And how would an order enjoining the Act's enforcement redress any such injury? The plaintiffs never say. And that is fatal to their argument.

Regardless, the plaintiffs' arguments regarding their ability to satisfy the second and third requirements of the third-party standing analysis all fail.

Close relationship. Recall the reasons the plaintiffs cannot establish the requisite "close relationship" with the patients on whose behalf they wish to sue. *First*, "a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure." *June Med.*, 140 S. Ct. at 2168 (Alito, J., dissenting). *Second*, the plaintiffs cannot have a close relationship with the patients whose rights they assert because they do not know who their future patients are. *See Kowalski*, 543 U.S. at 130–31. *Finally*, and most important of all, the plaintiffs are laboring under a conflict of interest. *Cameron*, 664 S.W.3d at 658.

The plaintiffs fail to rebut any of these problems. *First*, with respect to the lack of any close relationship between abortionists and patients, the plaintiffs appeal exclusively to *federal* cases holding that abortionists and clinics can sue on behalf of their patients. Those cases are doubly irrelevant. For one thing, there is no reason this Court's third-party standing doctrine should track the pre-*Dobbs* federal doctrine. And that is

especially true now that the U.S. Supreme Court has recognized that the cases on which the plaintiffs rely misapplied third-party standing doctrine in service of abortion rights. *Dobbs*, 142 S. Ct. at 2275. Aside from rattling off these misguided precedents, the plaintiffs offer no reason to think that abortionists have a close relationship with their patients. And the plaintiffs, not the State, bore the burden of proof with respect to standing. *See Ohioans for Concealed Carry, Inc. v. Columbus*, 164 Ohio St. 3d 291, 2020-Ohio-6724 ¶41 (2020).

Second, the plaintiffs stress that "Ohio abortion providers *do* know who their patients are at the time of the procedure." Pl.Br.32–33. That is presumably true, at least in clinics that do not operate like assembly lines. It is also irrelevant. The plaintiffs do not know *today* the patients on whose behalves they claim to be acting *today*. How can they have close relationships with people whose identities they do not know? The plaintiffs provide no answer. Nor could they without rejecting the cases holding that pediatricians have no standing to challenge, on behalf of future patients whose identities they do not know, laws *permitting* abortion. *See Diamond v. Charles*, 476 U.S. 54, 66 (1986).

Third, the plaintiffs dismiss the State's conflict-of-interest argument as "threadbare." Pl.Br.33–35. But saying it does not make it so. As the State has explained, *see above* 12–13; Ohio Br.31–32, the plaintiffs are suing to enjoin a law that *both* prohibits certain abortions *and* gives patients a cause of action to sue doctors who perform such abortions. The conflict of interest could not be clearer: the plaintiffs are seeking to enjoin a law that

gives the very patients on whose behalves they are purporting to act a cause of action against them. The Kentucky Supreme Court recently noted the conflict of interest in a case involving materially indistinguishable facts. *Cameron*, 664 S.W.3d at 658–59.

Hindrance. The plaintiffs fare no better when attempting to rebut the State's argument that no "hindrance … stands in the way" of women asserting an abortion right on their own. *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49.

First, the plaintiffs have no good response to the fact that many women, and even many juvenile girls, *have* sued to vindicate their own alleged abortion rights, usually pseudonymously. *See, e.g.*, Ohio Br.32–33 (collecting cases). This proves that no "hindrance … stands in the way" of women who wish to vindicate their alleged rights in court. *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49.

The State does not dispute that many women seeking abortions are in "great distress," Pl.Br.35 (quoting TRO Order at 9), that they desire privacy, and that they would prefer to have third-parties assert their rights for them. But the same is true of many litigants that everyone agrees have no recourse to third-party standing—consider, for example, employees fired from their jobs for refusing a superior's sexual advances. The law accommodates such concerns not through the third-party standing doctrine, but rather by allowing litigants to proceed pseudonymously. The plaintiffs respond that "patients 'are bound to be skeptical that redaction will conceal their identity.'" Pl.Br.37 (quoting *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 928–29 (7th Cir. 2004)). But the

plaintiffs bear the burden of proving their standing to sue, and "they have provided no argument as to why their patients would be *unable* to challenge the bans pseudonymously, nor have they explained why a court order would be insufficient to ensure their patients' identities remain protected." *Cameron*, 664 S.W.3d at 658. Speculation that women would *prefer* not to seek relief on their own hardly establishes a hindrance—if it did, the hindrance requirement could be met in every case.

The plaintiffs next claim that individual parties' claims may be mooted before this Court can weigh in, given the short duration of pregnancy and the potentially long duration of a full appeals process. Pl.Br.36. That is incorrect; precisely because pregnancies last only nine months, abortion cases have long been held to fall within the exception to mootness for cases capable of repetition yet evading review. *See Ashtabula Cnty. Joint Vocational Sch. v. O'Brien*, 2006-Ohio-1794 ¶32 (11th Dist.). Further, even when a case is "moot with respect to … the litigants," precedent allows courts to continue adjudicating any appeal if there remains "a debatable constitutional question to resolve, or [if] the matter appealed is one of great public or general interest." *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St. 3d 28 syl.1 (1987). That exception would no doubt apply to a case raising the question whether the Ohio Constitution guarantees a right to abortion.

In any event, the plaintiffs' concerns with mootness have no bearing on the question whether some "hindrance … stands in the way" of individual women asserting their right to abortion. *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49. The plaintiffs' concerns

instead implicate the question whether any relief the individual women win will set a precedent useful to other women. In other words, the plaintiffs are concerned that, although individual women may win relief, they will obtain an abortion before being able to litigate all the way to the Supreme Court of Ohio. But whether parties can litigate to secure precedents that might benefit others is irrelevant to the third-party-standing inquiry.

CONCLUSION

The Court should vacate the trial court's preliminary injunction and remand for further proceedings consistent with its decision.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General
/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
MATHURA J. SRIDHARAN (0100811)
Deputy Solicitors General
AMANDA L. NAROG (0093954)
ANDREW D. MCCARTNEY (0099853)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
benjamin.flowers@OhioAGO.gov

Counsel for Defendants-Appellants Attorney General Dave Yost, Director Bruce Vanderhoff, Kim Rothermel, and Bruce Saferin

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellants was served by e-mail this 6th day of July, 2023 upon the following:

Alan E. Schoenfeld
Michelle Nicole Diamond
Peter Neiman
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
New York, NY 10007
alan.schoenfeld@wilmerhale.com
michelle.diamond@wilmerhale.com
peter.neiman@wilmerhale.com

Matthew T. Fitzsimmons
Kelli K. Perk
Assistant Prosecuting Attorney
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
mfitzsimmons@prosecutor.cuyahogacounty.us
kperk@prosecutor.cuyahogacounty.us

Davina Pujari
Christopher A. Rheinheimer
Wilmer Cutler Pickering Hale and Dorr LLP
One Front Street
San Francisco, CA 94111
davina.pujari@wilmerhale.com
chris.rheinheimer@wilmerhale.com

Jeanine A. Hummer
Amy L. Hiers
Assistant Prosecuting Attorneys,
373 S. High Street, 14th Floor
Columbus, OH 43215
jhummer@franklincountyohio.gov
ahiers@franklincountyohio.gov

Allyson Slater
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
allyson.slater@wilmerhale.com

Ward C. Barrentine
Assistant Prosecuting Attorney
301 West Third Street
PO Box 972
Dayton, OH 45422
barrentinw@mcohio.org

B. Jessie Hill
Freda J. Levenson
Rebecca Kendis
ACLU of Ohio Foundation
4506 Chester Ave.
Cleveland, OH 44103
bjh11@cwru.edu
flevenson@acluohio.org
rebecca.kendis@case.edu

Meagan Burrows
American Civil Liberties Union
125 Broad St., 18th Fl.
New York, NY, 10004
mburrows@aclu.org

Melissa Cohen
Planned Parenthood Federation
of America
123 William Street, Floor 9
New York, NY 10038
Melissa.cohen@ppfa.org

John A. Borell
Kevin A. Pituch
Evy M. Jarrett
Assistant Prosecuting Attorney
Lucas County Courthouse, Suite 250
Toledo, OH 43624
jaborell@co.lucas.oh.us
kpituch@co.lucas.oh.us
ejarrett@co.lucas.oh.us

Carrie Hill
Attorney for Summit County Prosecutor
Assistant Prosecuting Attorney
53 University Ave., 7th Floor
Akron, OH 44308-1680
chill@prosecutor.summitoh.net

Additionally, the foregoing Reply Brief of Appellants was served by U.S. mail this 6th day of July, 2023, upon the following:

Melissa Powers
Hamilton County Prosecutor
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General