IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Preterm-Cleveland, *et al.*,	:	
	:	**Case No. 24 CV 2634**
Plaintiffs,	:	
	:	
v.	:	**Judge David C. Young**
	:	
Dave Yost, *et al.*,	:	
	:	
Defendants.	:	

Decision

I. Introduction

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction filed March 29, 2024. Defendants[1] filed a response in opposition on May 1, 2024. Plaintiffs filed a Reply in Support on May 10, 2024. The Ohio Women's Alliance filed a brief of amicus curiae in support of Plaintiffs' Motion on July 11, 2024. An oral argument was held on August 16, 2024.

II. Background & Facts

The people of Ohio voted to enshrine a right to reproductive freedom in the Ohio Constitution. Oh. Const. Art. I, § 22 ("the Amendment"). This includes the right to abortion care. *Id*. The Amendment provides as follows:

> A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
>
> 1. contraception;
>
> 2. fertility treatment;
>
> 3. continuing one's own pregnancy;

[1] This filing was made on behalf of Ohio Attorney General Dave Yost; Director of the Ohio Department of Health, Dr. Bruce T. Vanderhoff; Secretary of the State Medical Board of Ohio, Dr. Kim G. Rothermel; and Supervising Member of the State Medical Board of Ohio, Dr. Harish Kakarala. The remaining municipal prosecutor defendants filed a stipulation, on April 18, 2024, noting that they are necessary defendants, but will not be actively defending in this case.

> 4. miscarriage care; and
>
> 5. abortion.
>
> B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
>
> 1. An individual's voluntary exercise of this right or
>
> 2. A person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.
>
> However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.
>
> C. As used in this Section:
>
> 1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
>
> 2. "State" includes any governmental entity and any political subdivision.
>
> D. This Section is self-executing.

Id.

Plaintiffs in this case are five reproductive health care clinics (collectively "the clinic Plaintiffs") and one doctor who provides reproductive care to patients, Dr. Catherine Romanos. Plaintiffs challenge R.C. 2317.56; 2919.192; 2919.193; and 2919.194 arguing that these statutes violate the Ohio Constitution. Specifically, Plaintiffs challenge the statutes, under the Amendment, with respect to (1) Ohio's waiting period; (2) the in-person visit requirement; and (3) the state-mandated information requirements for abortion care.

R.C. 2317.56 mandates that physicians meet with pregnant patients seeking an abortion in person at least 24 hours prior to an abortion being performed or induced to provide certain state-mandated information. R.C. 2317.56(B)(1), (B)(2)(b). A patient then must certify in writing that they have received the required information and materials before they can receive abortion care. R.C. 2317.56(B)(4)[2]. The only exception is in narrowly defined cases of medical emergency or medical necessity. R.C. 2317.56(E). That statute reads as follows:

> (A) As used in this section:
>
> (1) "Medical emergency" has the same meaning as in section 2919.16 of the Revised Code.
>
> (2) "Medical necessity" means a medical condition of a pregnant woman that, in the reasonable judgment of the physician who is attending the woman, so complicates the pregnancy that it necessitates the immediate performance or inducement of an abortion.
>
> (3) "Probable gestational age of the zygote, blastocyte, embryo, or fetus" means the gestational age that, in the judgment of a physician, is, with reasonable probability, the gestational age of the zygote, blastocyte, embryo, or fetus at the time that the physician informs a pregnant woman pursuant to division (B)(1)(b) of this section.
>
> (B) Except when there is a medical emergency or medical necessity, an abortion shall be performed or induced only if all of the following conditions are satisfied:
>
> (1) At least twenty-four hours prior to the performance or inducement of the abortion, a physician meets with the pregnant woman in person in an individual, private setting and gives her an adequate opportunity to ask questions about the abortion that will be performed or induced. At this meeting, the physician shall inform the pregnant woman, verbally or, if she is hearing impaired, by other means of communication, of all of the following:
>
> (a) The nature and purpose of the particular abortion procedure to be used and the medical risks associated with that procedure;

[2] R.C. 2317.56(B)(4)(c)-(d) are not at issue in this case. Those provision are subject to a separate lawsuit in the Hamilton County Court of Common Pleas.

(b) The probable gestational age of the zygote, blastocyte, embryo, or fetus;

(c) The medical risks associated with the pregnant woman carrying the pregnancy to term.

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.

(2) At least twenty-four hours prior to the performance or inducement of the abortion, the physician who is to perform or induce the abortion or the physician's agent does each of the following in person, by telephone, by certified mail, return receipt requested, or by regular mail evidenced by a certificate of mailing:

(a) Inform the pregnant woman of the name of the physician who is scheduled to perform or induce the abortion;

(b) Give the pregnant woman copies of the published materials described in division (C) of this section;

(c) Inform the pregnant woman that the materials given pursuant to division (B)(2)(b) of this section are published by the state and that they describe the zygote, blastocyte, embryo, or fetus and list agencies that offer alternatives to abortion. The pregnant woman may choose to examine or not to examine the materials. A physician or an agent of a physician may choose to be disassociated from the materials and may choose to comment or not comment on the materials.

(3) If it has been determined that the unborn human individual the pregnant woman is carrying has a detectable fetal heartbeat, the physician who is to perform or induce the abortion shall comply with the informed consent requirements in section 2919.194 of the Revised Code in addition to complying with the informed consent requirements in divisions (B)(1), (2), (4), and (5) of this section.

(4) Prior to the performance or inducement of the abortion, the pregnant woman signs a form consenting to the abortion and certifies all of the following on that form:

(a) She has received the information and materials described in divisions (B)(1) and (2) of this section, and her questions about the abortion that will be performed or induced have been answered in a satisfactory manner.

(b) She consents to the particular abortion voluntarily, knowingly, intelligently, and without coercion by any person, and she is not under the influence of any drug of abuse or alcohol.

(c) If the abortion will be performed or induced surgically, she has been provided with the notification form described in division (A) of section 3726.14 of the Revised Code.

(d) If the abortion will be performed or induced surgically and she desires to exercise the rights under division (A) of section 3726.03 of the Revised Code, she has completed the disposition determination under section 3726.04 or 3726.041 of the Revised Code.

A form shall be completed for each zygote, blastocyte, embryo, or fetus to be aborted. If a pregnant woman is carrying more than one zygote, blastocyte, embryo, or fetus, she shall sign a form for each zygote, blastocyte, embryo, or fetus to be aborted.

The form shall contain the name and contact information of the physician who provided to the pregnant woman the information described in division (B)(1) of this section.

(5) Prior to the performance or inducement of the abortion, the physician who is scheduled to perform or induce the abortion or the physician's agent receives a copy of the pregnant woman's signed form on which she consents to the abortion and that includes the certification required by division (B)(4) of this section.

(C) The department of health shall publish in English and in Spanish, in a typeface large enough to be clearly legible, and in an easily comprehensible format, the following materials on the department's web site:

(1) Materials that inform the pregnant woman about family planning information, of publicly funded agencies that are available to assist in family planning, and of public and private agencies and services that are available to assist her through the pregnancy, upon childbirth, and while the child is dependent, including, but not limited to, adoption agencies. The materials shall be geographically indexed; include a comprehensive list of the available agencies, a description of the services offered by the agencies, and the telephone numbers and addresses of the agencies; and inform the pregnant woman about available medical assistance benefits for prenatal care, childbirth, and neonatal care and about the support obligations of the father of a child who is born alive. The department shall ensure that the materials described in division (C)(1) of this section are

comprehensive and do not directly or indirectly promote, exclude, or discourage the use of any agency or service described in this division.

(2) Materials that inform the pregnant woman of the probable anatomical and physiological characteristics of the zygote, blastocyte, embryo, or fetus at two-week gestational increments for the first sixteen weeks of pregnancy and at four-week gestational increments from the seventeenth week of pregnancy to full term, including any relevant information regarding the time at which the fetus possibly would be viable. The department shall cause these materials to be published after it consults with independent health care experts relative to the probable anatomical and physiological characteristics of a zygote, blastocyte, embryo, or fetus at the various gestational increments. The materials shall use language that is understandable by the average person who is not medically trained, shall be objective and nonjudgmental, and shall include only accurate scientific information about the zygote, blastocyte, embryo, or fetus at the various gestational increments. If the materials use a pictorial, photographic, or other depiction to provide information regarding the zygote, blastocyte, embryo, or fetus, the materials shall include, in a conspicuous manner, a scale or other explanation that is understandable by the average person and that can be used to determine the actual size of the zygote, blastocyte, embryo, or fetus at a particular gestational increment as contrasted with the depicted size of the zygote, blastocyte, embryo, or fetus at that gestational increment.

(D) Upon the submission of a request to the department of health by any person, hospital, physician, or medical facility for one copy of the materials published in accordance with division (C) of this section, the department shall make the requested copy of the materials available to the person, hospital, physician, or medical facility that requested the copy.

(E) If a medical emergency or medical necessity compels the performance or inducement of an abortion, the physician who will perform or induce the abortion, prior to its performance or inducement if possible, shall inform the pregnant woman of the medical indications supporting the physician's judgment that an immediate abortion is necessary. Any physician who performs or induces an abortion without the prior satisfaction of the conditions specified in division (B) of this section because of a medical emergency or medical necessity shall enter the reasons for the conclusion that a medical emergency or medical necessity exists in the medical record of the pregnant woman.

(F) If the conditions specified in division (B) of this section are satisfied, consent to an abortion shall be presumed to be valid and effective.

(G) The performance or inducement of an abortion without the prior satisfaction of the conditions specified in division (B) of this section does not constitute, and shall not be construed as constituting, a violation of division (A) of section 2919.12 of the Revised Code. The failure of a physician to satisfy the conditions of division (B) of this section prior to performing or inducing an abortion upon a pregnant woman may be the basis of both of the following:

(1) A civil action for compensatory and exemplary damages as described in division (H) of this section;

(2) Disciplinary action under section 4731.22 of the Revised Code.

(H)(1) Subject to divisions (H)(2) and (3) of this section, any physician who performs or induces an abortion with actual knowledge that the conditions specified in division (B) of this section have not been satisfied or with a heedless indifference as to whether those conditions have been satisfied is liable in compensatory and exemplary damages in a civil action to any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property as a result of the failure to satisfy those conditions. In the civil action, the court additionally may enter any injunctive or other equitable relief that it considers appropriate.

(2) The following shall be affirmative defenses in a civil action authorized by division (H)(1) of this section:

(a) The physician performed or induced the abortion under the circumstances described in division (E) of this section.

(b) The physician made a good faith effort to satisfy the conditions specified in division (B) of this section.

(3) An employer or other principal is not liable in damages in a civil action authorized by division (H)(1) of this section on the basis of the doctrine of respondeat superior unless either of the following applies:

(a) The employer or other principal had actual knowledge or, by the exercise of reasonable diligence, should have known that an employee or agent performed or induced an abortion with actual knowledge that the conditions specified in division (B) of this

> section had not been satisfied or with a heedless indifference as to whether those conditions had been satisfied.
>
> (b) The employer or other principal negligently failed to secure the compliance of an employee or agent with division (B) of this section.
>
> (4) Notwithstanding division (E) of section 2919.12 of the Revised Code, the civil action authorized by division (H)(1) of this section shall be the exclusive civil remedy for persons, or the representatives of estates of persons, who allegedly sustain injury, death, or loss to person or property as a result of a failure to satisfy the conditions specified in division (B) of this section.
>
> (I) The department of job and family services shall prepare and conduct a public information program to inform women of all available governmental programs and agencies that provide services or assistance for family planning, prenatal care, child care, or alternatives to abortion.

R.C. 2317.56.

Violations of the above statute subject abortion providers to professional and civil penalties for noncompliance. A physician's medical license may be revoked or suspended. R.C. 2317.56(G)(2); 4731.22(B)(23). A patient may also bring a civil action for compensatory and exemplary damages. R.C. 2317.56(G)(1).

R.C. 2919.192, 2919.193, and 2919.194 relate to testing for fetal or embryonic cardiac activity prior to an abortion. In fact, the statutes compel testing and, if such activity is detected, pregnant patients must receive additional state-mandated information, followed by a 24-hour delay. R.C. 2919.192; 2317.56(B)(2)(c)-(B)(3). If fetal or embryonic cardiac activity is detected, a physician must do all of the following at least 24 hours before providing an abortion: (1) give the patient written confirmation of cardiac activity; (2) inform the patient of the statistical probability of bringing the embryo or fetus to term based on gestational age; and (3) have the patient sign a form acknowledging that they received that information. R.C. 2919.194(A)(1)-(3). The physician is also required to record the estimated gestational age of the embryo or fetus, the

method used to test for cardiac activity, the date and time of the test, and the results in the patient's medical chart. R.C. 2919.192(A). The only exception is in defined cases of medical emergency. R.C. 2919.193(B). These statutes read as follows:

> R.C. 2919.192: Determination of presence of fetal heartbeat:
>
> (A) A person who intends to perform or induce an abortion on a pregnant woman shall determine whether there is a detectable fetal heartbeat of the unborn human individual the pregnant woman is carrying. The method of determining the presence of a fetal heartbeat shall be consistent with the person's good faith understanding of standard medical practice, provided that if rules have been adopted under division (B) of this section, the method chosen shall be one that is consistent with the rules. The person who determines the presence or absence of a fetal heartbeat shall record in the pregnant woman's medical record the estimated gestational age of the unborn human individual, the method used to test for a fetal heartbeat, the date and time of the test, and the results of the test.
>
> The person who performs the examination for the presence of a fetal heartbeat shall give the pregnant woman the option to view or hear the fetal heartbeat.
>
> (B) Not later than one hundred twenty days of the effective date of S.B. 23 of the 133rd general assembly, the director of health shall adopt rules pursuant to section 111.15 of the Revised Code specifying the appropriate methods of performing an examination for the purpose of determining the presence of a fetal heartbeat of an unborn individual based on standard medical practice.
>
> (C) A person is not in violation of division (A) of this section if that person has performed an examination for the purpose of determining the presence of a fetal heartbeat of an unborn human individual utilizing standard medical practice in accordance with rules adopted under division (B) of this section, that examination does not reveal a fetal heartbeat or the person has been informed by a physician who has performed the examination for a fetal heartbeat that the examination did not reveal a fetal heartbeat, and the person notes in the pregnant woman's medical records the procedure utilized to detect the presence of a fetal heartbeat.
>
> 2919.193: Determination of detectable fetal heartbeat; penalties:

(A) Except as provided in division (B) of this section, no person shall knowingly and purposefully perform or induce an abortion on a pregnant woman before determining in accordance with division (A) of section 2919.192 of the Revised Code whether the unborn human individual the pregnant woman is carrying has a detectable heartbeat.

Whoever violates this division is guilty of performing or inducing an abortion before determining whether there is a detectable fetal heartbeat, a felony of the fifth degree. A violation of this division may also be the basis of either of the following:

(1) A civil action for compensatory and exemplary damages;

(2) Disciplinary action under section 4731.22 of the Revised Code.

(B) Division (A) of this section does not apply to a physician who performs or induces the abortion if the physician believes that a medical emergency, as defined in section 2919.16 of the Revised Code, exists that prevents compliance with that division.

(C) A physician who performs or induces an abortion on a pregnant woman based on the exception in division (B) of this section shall make written notations in the pregnant woman's medical records of both of the following:

(1) The physician's belief that a medical emergency necessitating the abortion existed;

(2) The medical condition of the pregnant woman that assertedly prevented compliance with division (A) of this section.

For at least seven years from the date the notations are made, the physician shall maintain in the physician's own records a copy of the notations.

(D) A person is not in violation of division (A) of this section if the person acts in accordance with division (A) of section 2919.192 of the Revised Code and the method used to determine the presence of a fetal heartbeat does not reveal a fetal heartbeat.

2919.194: Procedures after detection of fetal heartbeat:

(A) Notwithstanding division (A)(3) of this section, if a person who intends to perform or induce an abortion on a pregnant woman has determined, under section 2919.192 of the Revised Code, that the unborn human individual the pregnant woman is carrying has a detectable heartbeat, the person shall not, except as provided in

division (B) of this section, perform or induce the abortion without meeting all of the following requirements and without at least twenty-four hours elapsing after the last of the requirements is met:

(1) The person intending to perform or induce the abortion shall inform the pregnant woman in writing that the unborn human individual the pregnant woman is carrying has a fetal heartbeat.

(2) The person intending to perform or induce the abortion shall inform the pregnant woman, to the best of the person's knowledge, of the statistical probability of bringing the unborn human individual possessing a detectable fetal heartbeat to term based on the gestational age of the unborn human individual the pregnant woman is carrying or, if the director of health has specified statistical probability information pursuant to rules adopted under division (C) of this section, shall provide to the pregnant woman that information.

(3) The pregnant woman shall sign a form acknowledging that the pregnant woman has received information from the person intending to perform or induce the abortion that the unborn human individual the pregnant woman is carrying has a fetal heartbeat and that the pregnant woman is aware of the statistical probability of bringing the unborn human individual the pregnant woman is carrying to term.

(B) Division (A) of this section does not apply if the person who intends to perform or induce the abortion believes that a medical emergency exists that prevents compliance with that division.

(C) The director of health may adopt rules that specify information regarding the statistical probability of bringing an unborn human individual possessing a detectable heartbeat to term based on the gestational age of the unborn human individual. The rules shall be based on available medical evidence and shall be adopted in accordance with section 111.15 of the Revised Code.

(D) This section does not have the effect of repealing or limiting any other provision of the Revised Code relating to informed consent for an abortion, including the provisions in section 2317.56 of the Revised Code.

(E) Whoever violates division (A) of this section is guilty of performing or inducing an abortion without informed consent when there is a detectable fetal heartbeat, a misdemeanor of the first degree on a first offense and a felony of the fourth degree on each subsequent offense.

Violation of R.C. 2919.192, failure to test for fetal or embryonic cardiac arrest, is a fifth-degree felony. R.C. 2919.193(A). Failure to provide a pregnant patient with the state-mandated information and obtain written acknowledgement at least 24 hours before an abortion where fetal or embryonic cardiac arrest is detective is a first-degree misdemeanor on the first offense and a fourth-degree felony on each subsequent offense. R.C. 2919.194(E). Further, providers are also subject to civil claims for compensatory and exemplary damages if they fail to comply with the cardiac testing requirement. R.C. 2919.193(A)(1). The medical board may also take action against the physician's medical license for failing to comply with the statutes. R.C. 2919.193(A)(2).

In support of the instant motion, Plaintiffs submitted the Affidavits of (1) Dr. Sharon Liner, Medical Director of Planned Parenthood Southwest Ohio Region; (2) Dr. Romanos, family medicine physician employed at Women's Med Center Dayton; (3) Dr. David Burkons, Medical Director of Northeast Ohio Women's Center; (4) Dr. W.M. Martin Haskell, Medical Director of Women's Med Group Dayton; (5) Dr. Adarsh E. Krishen, Chief Medical Officer of Planned Parenthood of Greater Ohio; and (6) Aimee Maple, Director of Finance for Preterm-Cleveland.

III. Preliminary Injunction Standard

A court must consider the following factors in determining whether to grant a preliminary injunction:

> 1) whether there is a substantial likelihood that plaintiff will prevail on the merits; 2) whether plaintiff will suffer irreparable injury if the injunction is not granted; 3) whether third parties will be unjustifiably harmed if the injunction is granted; and 4) whether the public interest will be served by the injunction.

Intralot, Inc. v. Blair, 10th Dist. Franklin No. 17AP-444, 2018-Ohio-3873, ¶ 31, quoting *Youngstown City School Dist. Bd. of Edn. v. State*, 10th Dist. No. 15AP-941, 2017-Ohio-555, ¶ 50, quoting *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d

786, 790, 673 N.E.2d 182 (10th Dist.1996). No one factor is dipositive. *Id.* Instead, the factors must be balanced. *Id.* The party seeking a preliminary injunction has the burden and must establish a right to the preliminary injunction by clear and convincing evidence. *Id*.

i. Likelihood of Success on the Merits

Before a court can consider the merits of a claim, the party seeking relief must establish standing. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Id.*, quoting Black's Law Dictionary (8th Ed.2004) 1442. To establish traditional standing, a party must show that they have suffered "(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Ohio Democratic Party v. LaRose*, 2020-Ohio-4778, 159 N.E.3d 1241, ¶ 14 (10th Dist.), quoting *ProgressOhio.org., Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 7, 13 N.E.3d 1101, quoting *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22.

The issue here is whether Plaintiffs have the right to challenge the statutes under the Amendment. First, the Court will address whether Dr. Romanos has standing. Defendants concede that the Amendment creates rights for both the individual person and a person or entity that assist in exercising their reproductive rights. (Defs.' Opp. at pg. 8.) The Amendment provides that the State may not "directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against * * * [a] person * * * that assists an individual exercising [their] right." Oh. Const. Art. I, § 22.

The plain language of the Amendment confers rights to Dr. Romanos because she is a person assisting individuals exercising their reproductive rights. Dr. Romanos has alleged direct injuries. The challenged statutes interfere with Dr. Romanos's ability to provide high quality,

trauma informed abortion care, they negatively impact Dr. Romanos's relationship with pregnant patients, and cause emotional distress. (Romanos Aff. at ¶ 76-79.) Dr. Romanos is also subject to the threat of civil and criminal penalties for violating the challenged statutes. These injuries are fairly traceable to the challenged statutes and can be redressed by the relief sought. Therefore, Dr. Romanos has standing. Defendants argue that Dr. Romanos cannot proceed based on her own alleged harms. However, no legal citation was provided in support of that assertion.

The presence of one party with standing assures that a controversy before the court is justiciable. *Ohio Democratic Party v. LaRose*, 2020-Ohio-4778, 159 N.E.3d 1241, ¶ 15 (10th Dist.), citing *Dept. of Commerce v. United States House of Representatives*, 525 U.S. 316, 330, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999) and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), fn. 2. *Accord Siliko v. Miami Univ.*, 12th Dist. Butler No. CA2021-12-162, 2022-Ohio-4133, ¶ 17, quoting *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, ¶ 16, 983 N.E.2d 1317. Because Dr. Romanos has standing, the clinic Plaintiffs need not be addressed at this time.[3] However, the undersigned notes that Plaintiffs' argument on standing as to the clinic Plaintiffs was also persuasive.

Next, the Court must determine the appropriate legal standard that applies to the challenged laws under the Amendment. When interpreting voter-enacted constitutional provisions, Ohio courts must first consider the plain language of the text. *State v. Yerkey*, 171 Ohio St.3d 367, 2022-Ohio-4298, 218 N.E.3d 749, ¶ 9, quoting *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22. A court should consider "how the language would have been understood by the voters who adopted the amendment." *Id.,* quoting *Knab* at ¶ 22. If the language of the provision is unclear or ambiguous, the "analysis may also include a review of the

[3] A motion to dismiss based upon lack of standing is also pending. A separate ruling will be issued on that motion.

'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.'" *Id.,* quoting *Knab* at ¶ 22.

Plaintiffs argue that the test is set forth in the plain language of the Amendment. Defendants then argue that the Court should look to the context surrounding the passage of the Amendment and apply the pre-*Dobbs* legal regime. In this case, the language of the Amendment is clear and unambiguous. A person's right to reproductive freedom is now enshrined in the Ohio Constitution. Pregnant patients are afforded the right to make certain reproductive choices. This includes abortion care.

The plain language of the Amendment clearly sets forth the applicable legal standard. "The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either: 1. An individual's voluntary exercise of this right or 2. A person or entity that assists an individual exercising this right, *unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care*." (Emphasis added.) Oh. Const. Art. I, § 22. This language is easily understood and clear.

Prior to the Amendment passing, Attorney General Yost agreed with Plaintiffs' argument as to the applicable legal standard. Issue 1 on the November 2023 Ballot: A legal analysis by the Ohio Attorney General, https://www.ohioattorneygeneral.gov/SpecialPages/FINAL-ISSUE-1-ANALYSIS.aspx. Attorney General Yost specifically stated as follows:

> "The proposed Amendment appears to borrow some concepts from the *Roe* era, but also creates a new, legal standard that goes beyond what *Roe* and *Casey* said."
>
> "The proposed abortion Amendment would create a new standard that goes further than *Casey*'s "undue burden" test or *Roe'*s original "strict scrutiny" test and will make it harder for Ohio to maintain the

> kinds of law already upheld as valid prior to last year's decision in *Dobbs*."
>
> "The Amendment would not return things to how they were before *Dobbs* overruled *Roe,* and is not just "restoring *Roe.*" It goes further."
>
> "All told, the Amendment's new standard goes beyond pre-*Dobbs* law under *Roe* and *Casey*."

Id. at pgs. 3, 5-6, 8. Now, instead of following the plain language of the Amendment, Defendants argue that the pre-*Dobbs* legal standard applies.

The *Dobbs* decision shifted much of the attention on abortion to state courts and constitutions. *See Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022). Before *Dobbs,* Ohio courts used the undue-burden test adopted in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The *Casey* Court stated as follows:

> "(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> "(b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential [***18] life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.
>
> "* * *
>
> "(d) * * * Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> "(e) We also reaffirm *Roe's* holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it

> is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"

Preterm Cleveland v. Voinovich, 89 Ohio App.3d 684, 694, 627 N.E.2d 570 (10th Dist.1993), quoting *Casey* at 715-716.

Defendants' argument that the pre-*Dobbs* standard is applicable is unpersuasive. It is well-established that the plain language of an enacted text is the best indicator of intent. *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 17, quoting *Nixon v. United States*, 506 U.S. 224, 232, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993). The Ohio Supreme Cout has explained that a court "may go beyond the text to consider other sources of meaning, such as the purpose of an amendment, the history of its adoption, or its attending circumstances, *only 'when the language being construed is 'obscure or of doubtful meaning*[.]'" (Emphasis added.) *Id.*, quoting *State ex rel. Wallace v. Celina*, 29 Ohio St.2d 109, 112, 279 N.E.2d 866 (1972), quoting *Cleveland v. Bd. of Tax Appeals*, 153 Ohio St. 97, 103, 91 N.E.2d 480 (1950). A court will not look at the history of a provision where the language is clear. *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 522, 644 N.E.2d 369 (1994), citing *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902). Canons of interpretation should not be used to create ambiguity that does not exist in the plain language. *City of Cleveland* at ¶ 17.

The pre-*Dobbs* legal standard is less rigorous than the test set forth in the plain language of the Amendment. Defendants attempt to create ambiguity where it does not exist. The people of Ohio voted to enshrine their reproductive freedom in the Constitution through the clear language of the Amendment. Doing so followed the path set forth by the Supreme Court in *Dobbs:*

> "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." That is what the Constitution and the rule of law demand.

Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022), quoting *Casey* at 979 (Scalia, J. concurring in judgment in part and dissenting in part). It is inappropriate for the State to second guess the will of the voters. The Ohio Supreme Court has explained that

> [t]he Constitution is the supreme law; it is the expression of the will of the people, subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression or destroy the plain language and meaning of the Constitution, otherwise there would be no purpose in having a Constitution.

State ex rel. One Pers. One Vote v. LaRose, 2023-Ohio-1992, ¶ 23, quoting *Hoffman v. Knollman*, 135 Ohio St. 170, 181, 20 N.E.2d 221 (1939).

The Amendment's plain text sets forth the standard that is applicable to the challenged statutes. "The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either [] [a]n individual's voluntary exercise of this right or [] [a] person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Oh. Const. Art. I, § 22.

Plaintiffs' arguments with respect to the applicable legal standard are persuasive. Further, Plaintiffs have shown, through clear and convincing evidence, that the challenged statutes burden, penalize, prohibit, interfere with, and discriminate against patients in exercising their right to an abortion and providers for assisting them in exercising that right. They submitted ample evidence to meet their burden through the affidavits. Defendants did not offer argument or evidence defending the challenged statutes under the applicable standard in the Amendment.

The 24-hour waiting period directly or indirectly burdens, penalizes, prohibits, interferes with, and discriminates against a pregnant patient's voluntary exercise of their reproductive rights.

The mandatory delay exacerbates the burdens that patients experience in seeking abortion care. These include increasing costs, prolonging wait times, and potentially preventing a patient from receiving the type of abortion they would prefer. (Romanos Aff. at ¶ 54; Krishen Aff. at ¶ 22; Liner Aff. at ¶ 37-38, 41; Haskell Aff. at ¶ 28-30.) Further, the unnecessary delay can increase the medical risk to the patient's health. (*Id.*) Emotional harm may also result in a patient being forced to wait. For example, it is incredibly distressing for a person who is pregnant as a result of rape or incest to be mandated to continue the pregnancy for longer than necessary for no medical reason. (Maple Aff. at ¶ 29; Burkons Aff. at ¶ 35; Liner Aff. at ¶ 35; Haskell Aff. at ¶ 28.)

The waiting period also directly or indirectly burdens, penalizes, prohibits, interferes with and discriminates against providers of abortion care. Physicians have an ethical duty to act in accordance with their patients' best interests. The waiting period forces abortion care providers to depart from that duty by denying time sensitive care for a specified minimum period putting patients' health and wellbeing at risk. (Romanos Aff. at ¶ 38, 56-57; Haskell Aff. at ¶ 34.) Providers are often blamed for the mandatory waiting period which undermines the patient-physician relationship and causes emotional stress on providers and their staff. (Haskell Aff. at ¶ 34-35; Burkons Aff. at ¶ 23.)

Next, the in-person visit requirement also directly or indirectly burdens, penalizes, prohibits, interferes with and discriminates against patients and providers of abortion care. The in-person visit requirements compound upon the harms created by the waiting period. It places extra economic burdens on patients who must arrange time off work, childcare, and transportation for each visit, in addition to paying for the medical care. (Romanos Aff. at ¶ 44; Krishen Aff. at ¶ 16, 19; Liner Aff. at ¶ 13, 29, 31; Haskell Aff. at ¶ 23.) This requirement is especially burdensome to pregnant patients facing intimate partner violence who may need to conceal their visits.

(Romanos Aff. at ¶ 66; Krishen Aff. at ¶ 17; Liner Aff. at ¶ 30; Haskell Aff. at ¶ 24; Maple Aff. at ¶ 31.) The in-person requirement may also prevent a patient from receiving the type of abortion they would prefer due to delay. (*See* Romanos Aff. at ¶ 43; Maple Aff. at ¶ 36; Haskell Aff. at ¶ 26.)

As to the providers, the in-person visit requirement interferes with their ability to provide timely abortion care in accordance with the standard of care. Specifically, providers are forced to send patients away for absolutely no medical reason and against their best judgment. (Romanos Aff. at ¶ 28; Maple Aff. at ¶ 30; Krishen Aff. at ¶ 79.) This delays time sensitive medical care and risks patients' health. (*Id.*) Further, the additional medically unnecessary, in-person appointments inhibit the providers ability to manage their schedules and provide care to the volume of patients who seek it. (Romanos Aff. at ¶ 41; Krishen Aff. at ¶ 29; Liner Aff. at ¶ 40.)

The state-mandated information requirements for abortion care directly or indirectly burden, penalize, prohibit, interfere with and discriminate against pregnant patients seeking that care. Mandatory state-mandated information that may be irrelevant or unnecessary to a pregnant patient burdens their access to abortion care. (*See* Romanos Aff. at ¶ 13; Burkons. at ¶ 39.) Providing the information may cause emotional distress to the patient. (Romanos Aff. at ¶ 62, 74; Haskell Aff. at ¶ 31.) Further, some of the state-mandated information is misleading to patients because it is not grounded in evidence based medical practice. (Romanos Aff. at ¶ 71.) This may confuse or upset the patient and serve to undermine their relationship with the provider. (*Id.*)

The state-mandated information requirements for abortion care also directly or indirectly burdens, penalizes, prohibits, interferes with and discriminates against providers of abortion care. This requirement mandates that providers give each pregnant patient one-size-fits all material. They are foreclosed from exercising their own professional judgment and considering a pregnant

patient's individual circumstances. (Romanos Aff. at ¶ 77.) This is contrary to the applicable standard of care and informed consent practice, and it serves to undermine the physician-patient relationship. (Romanos at ¶ 78; Burkons Aff. at ¶ 40.)

Having determined that the challenged statutes appear highly likely to directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against pregnant patients seeking abortion care and abortion providers, the next step is to determine whether the State has used the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care. Plaintiffs have provided affidavit evidence from providers who have demonstrated that the challenged statutes do not advance the individual patient's health and are, in fact, contrary to accepted clinical standards and evidence-based standards of care. Defendants have not provided any evidence that the challenged statutes advance patient health or that they are the least restrictive means to do so. Therefore, the challenged statutes fail under the Amendment because there is no evidence or support to find that they are the least restrictive means to advance the individual's health in in accordance with widely accepted and evidence-based standards of care.

Arguments that rely on cases decided before the Amendment passed are unpersuasive. As the Supreme Court in *Dobbs* instructed, the people of Ohio resolved the important question of permissibility of abortion care through the Amendment. *See Dobbs*, 597 U.S. at 232, quoting *Casey* 505 U.S. at 979 (Scalia, J. concurring in judgment in part and dissenting in part). Further, any argument that the challenged statutes are necessary to ensure informed consent is not well-taken. As Dr. Liner explained: "As a health care provider, it is my duty to obtain informed consent from patients – I don't need the state to mandate this." (Liner Aff. at ¶ 41.)

ii. Irreparable Harm

Irreparable harm is defined as "an injury 'for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete.'" *Prince-Paul v. Ohio Bd. of Nursing*, 2015-Ohio-3984, 43 N.E.3d 13, ¶ 14 (10th Dist.), quoting *Dimension Serv. Corp. v. First Colonial Ins. Co.*, 10th Dist. No. 14AP-368, 2014-Ohio-5108, quoting *Union Twp. v. Union Twp. Professional Firefighters' Local 3412*, 12th Dist. No. CA99-08-082, 2000 Ohio App. LEXIS 475 (Feb. 14, 2000). "A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well." *Magda v. Ohio Elections Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.), citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001), citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). *Accord Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir.2016), quoting *Mich. State A. Philip Randolph Inst.*, 2016 U.S. Dist. LEXIS 95107, 2016 WL 3922355, at *13, quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir.2012). The constitutional rights of Plaintiffs and their patients are threatened. Thus, irreparable harm is presumed.

iii. Harm to Third Parties & Public Interest

Plaintiffs have established that third parties will not be unjustifiably harmed if an injunction is issued and that the public interest will be served. Proper application of the Ohio Constitution serves the public interest. *See Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 736 (6th Cir.2021). "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *Id.,* quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). *Accord Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 829 (Ohio C.P.2018), quoting *Miller v. City of Cincinnati*, 709 F.Supp.2d 605, 627 (S.D. Ohio

2008), quoting *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) and *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). quoting *G & V Lounge* at 1079.

iv. Balancing the Factors

Upon a balancing of the factors, the Court finds that the movants have met their burden and a preliminary injunction is appropriate. There is a strong likelihood of success on the merits. A finding of irreparable harm is mandated because a constitutional right has been threatened or impaired, and the public interest favors proper application of the Ohio Constitution. All of these factors weigh in favor of granting a preliminary injunction.

"In general, the purpose of a preliminary injunction is to preserve the status quo between the parties pending a trial and decision on the merits." *City of Columbus v. State*, 2023-Ohio-2858, 223 N.E.3d 540, ¶ 17 (10th Dist.). However, "[t]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Student Resource Ctr. v. E. Gateway Community College*, S.D.Ohio No. 2:22-cv-2653, 2022 U.S. Dist. LEXIS 184877, at *14 (Aug. 23, 2022), quoting *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978).

> [It] often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Id., quoting *Stenberg* at 925.

Defendants argue that granting an injunction will disrupt the status quo. However, Plaintiffs are suffering injury each day their constitutional rights are infringed upon.[4] It would be unjust to deny the request simply because it does not maintain the status quo. As the Sixth Circuit observed, the focus should be on the prevention of injury. *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 348 (6th Cir.1998), quoting *Stenberg* at 925. *Accord Canal Auth. of Florida v. Callaway,* 489 F.2d 567, 576 (5th Cir.1974). "It must not be thought * * * that there is any particular magic in the phrase 'status quo.'" *Id.,* quoting *Stenberg* at 925. This is especially true in a case such as this where the rights at issue were only recently enshrined in the Ohio Constitution by passage of the Amendment.

v. <u>Bond</u>

Finally, Plaintiffs argue against posting a monetary bond. Civ.R. 65(C) requires setting a bond to effectuate a preliminary injunction. Setting bond is within the discretion of the trial court, including the option to set bond at a nominal amount or zero. *Vanguard Transp. Sys. v. Edwards Transfer & Storage Co. Gen. Commodities Div.*, 109 Ohio App.3d 786, 793, 673 N.E.2d 182 (10th Dist.1996).

The issuance of a bond is unnecessary in this case. The injunction is sought to protect constitutional rights. Waiving the bond requirement in cases alleging infringement of fundamental constitutional rights is particularly appropriate. *See Lamar Advantage GP Co.,* 114 N.E.3d at 831, citing *Baca v. Moreno Valley Unified School Dist.*, 936 F.Supp. 719, 738 (CD. Cal. 1996) and *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009).

[4] Defendants cited to *Thomson v. Ohio Dept. of Rehab. & Correction*, 10th Dist. Franklin No. 09AP-782, 2010-Ohio-416. However, that case is distinguishable because the Tenth District found that the movant did not allege irreparable imminent harm. *Thomson* at ¶ 24-25.

IV. Conclusion

The Court hereby **GRANTS** Plaintiffs' Motion for a Preliminary Injunction filed March 29, 2024. An Order shall be issued contemporaneously with this Decision.

IT IS SO ORDERED.

Copies electronically to counsel of record for the parties.

Franklin County Court of Common Pleas

Date: 08-23-2024

Case Title: PRETERM-CLEVELAND ET AL -VS- DAVE YOST ET AL

Case Number: 24CV002634

Type: DECISION

It Is So Ordered.

/s/ Judge David C. Young