No. 16-4027

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD OF GREATER OHIO; PLANNED PARENTHOOD SOUTHWEST OHIO REGION, Plaintiffs-Appellees, v. AMY ACTON, M.D., IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH, Defendant-Appellant.	On Appeal from the United States District Court for the Southern District of Ohio, Western Division District Court Case No. 1:16-cv-00539

APPELLANT AMY ACTON'S RESPONSE IN OPPOSITION TO APPELLEES' MOTION FOR STAY OF THE MANDATE

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INTRODUCTION

Planned Parenthood is not entitled to a stay of the mandate, because it does not plan to petition for certiorari, and because it would not satisfy the requirements for a stay of the mandate even if it did.

Parties "may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." Fed. R. App. P. 41(d)(1). To prevail, the moving party "must show that the petition would present a substantial question and that there is good cause for a stay." *Id*. Good cause for a stay requires at least that the moving party actually plans to seek certiorari—without that, the Court has no assurance that the request to stay the mandate is anything more than a delay tactic. *See Boim v. Quranic Literacy Inst.*, 297 F.3d 542, 543–44 (7th Cir. 2002) (Rovner, J., in chambers); *Parker v. District of Columbia*, D.C.Cir. No. 04-7041, 2007 U.S. App. LEXIS 12467, at *4 (May 24, 2007) (opinion of Silberman, J.). Indeed, staying the mandate can be a very *effective* delay tactic, since certiorari petitions are due 90 days after judgment with the potential for 60 days of extensions. *See* 28 U.S.C. §2101(c); S. Ct. Rules 13.1 & 13.5. It is one thing to delay issuance of the mandate for 150 days when necessary to preserve the status quo pending further review. It is another thing entirely to stay the mandate simply to put off the date by which the losing party must follow the law. Planned Parenthood's 20-page mo-

tion never says that it plans to file a certiorari petition. That alone should defeat its motion.

But Planned Parenthood's request would fail even if the Court were to overlook this defect. That is because, in considering whether this case presents a "substantial question" for Supreme Court review and whether there is "good cause" for a stay," this Court must consider: (1) Planned Parenthood's likelihood of prevailing before the Supreme Court, (2) whether it will suffer irreparable injury without a stay, (3) any harm to other interested parties, and (4) the public interest. *O'Brien v. O'Laughlin*, 557 U.S. 1301, 1302 (2009) (Breyer, J., in chambers). Each factor militates against a stay.

Most importantly, Planned Parenthood falls well short of showing a likelihood of success. It is unlikely to prevail on the merits, because the Supreme Court is extremely unlikely to review the Sixth Circuit's correct application of unconstitutional-conditions doctrine; there is no well-developed circuit split that would justify review. Even if Planned Parenthood convinced the Court to grant review, the odds that it would prevail—an outcome that would require convincing the Court to recognize, for the first time ever, a constitutional right to perform an abortion—is vanishingly small.

As to the remaining factors, enforcing the law now will not harm Planned Parenthood, as it breaks even or loses money on the disputed programs. And a stay

will exacerbate the injury that Ohio and its taxpayers have already suffered from the District Court's erroneous injunction of state law. Finally, the public interest in favor of enforcing Ohio's democratically adopted policy choice is not undercut by the public interest in ensuring that program beneficiaries receive public services, as Ohio is working even now to ensure a smooth transition with no interruptions

Planned Parenthood has had years to plan for life under the Funding Law. It should not get another 150 days.

ARGUMENT

The Appellee clinics, which this filing will refer to collectively as "Planned Parenthood," are entitled to a stay of the mandate *only if* they show that this case presents a "substantial question" for Supreme Court review and that there is "good cause" for a stay. Fed. R. App. P. 41(a). These questions presuppose that the moving party will seek Supreme Court review. After all, no "substantial question" arises for Supreme Court review unless the Supreme Court is allowed to review the question; and no "good cause" justifies a stay pending certiorari if there is no certiorari petition. *See Boim*, 297 F.3d at 543–44 (Rovner, J., in chambers); *Parker*, 2007 U.S. App. LEXIS 12467 at *4 (opinion of Silberman, J.).

Once a party clears the threshold requirement of actually planning to seek further review, the answer to the question whether the movant has shown a "substantial question" and "good cause" turns on four factors. *First*, "whether the stay

applicant has made a strong showing that he is likely to succeed on the merits, which, in this context, means that it is reasonably likely that four Justices of [the Supreme Court] will vote to grant the petition for writ of certiorari, and that, if they do so vote, there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Second*, "whether the applicant will be irreparably injured absent a stay." *Third*, "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Finally*, "where the public interest lies." *O'Brien*, 557 U.S. at 1302 (Breyer, J., in chambers). The moving party bears the burden as to each factor. *See* Fed. R. App. P. 41(d)(2)(B); Order Denying Stay of Mandate, *Tanner v. Yukins*, No. 15-1691, Doc. 46-1 (Sept. 7, 2017); *McBride v. CSX Transp., Inc.*, 611 F.3d 316, 317 (7th Cir. 2010) (Ripple, J., in chambers).

Planned Parenthood's motion fails at the threshold question of whether it plans to seek certiorari at all, because it has not yet said that it does. That should be the end of the matter. But Planned Parenthood's motion fails regardless, because every one of the four factors relevant to the decision weighs in favor of allowing Ohio's (mistakenly) long-delayed law to finally have effect.

I. PLANNED PARENTHOOD HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS, BECAUSE IT IS UNLIKELY TO GET SUPREME COURT REVIEW OR PREVAIL IF IT DOES

Planned Parenthood is unlikely to prevail on the merits. Proving likelihood of success requires Planned Parenthood to show: (1) a reasonable likelihood that four Justices will vote to grant certiorari; and (2) a "fair prospect" that the Court will reverse after granting. *O'Brien*, 557 U.S. at 1302 (Breyer, J., in chambers); *accord Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (citation omitted); *see also Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). Planned Parenthood cannot make either showing.

First, the Court is not reasonably likely to grant certiorari. Aside from the occasional issue of exceptional, national importance, *see, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Court rarely grants certiorari without a well-developed circuit split. *See* S. Ct. Rule 10; Shapiro, et al., Supreme Court Practice, Ch. 4.4(b), 247 (10th ed. 2013). This practice reflects the Justices' recognition that "periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by" the Supreme Court. *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Unless and until the Supreme Court has thoroughly reasoned decisions on both sides of an issue, it is unlikely to grant certiorari.

Here, if there is a split at all, it is far from well-developed. The *only* circuit that has recognized a right to perform abortions is the Tenth. *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1260 (10th Cir. 2016). It did so "without meaningful analysis or authority, and most importantly it did so in a case in which the State did not challenge the existence of the right." Op. 7 (citing *Herbert*, 828 F.3d at 1260). In contrast, the "only other circuit in the country to squarely address the issue"—the Seventh Circuit—"reached the same conclusion" as this Court. Op. 6; accord *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana Dep't of Health*, 699 F.3d 962, 986–88 (7th Cir. 2012). Planned Parenthood says the Ninth Circuit agrees with the Tenth, citing *Planned Parenthood of Central & Northern Arizona v. Arizona*, 718 F.2d 938, 946 (9th Cir. 1983). But that case did not even involve the right to perform an abortion, and instead "analyzed a broad, speech-centric claim about restrictions on a combination of abortion-related activities." Op. 7. Moreover, in a more recent Ninth Circuit *en banc* decision, the Court noted that "[n]ever has it been suggested . . . that if there were no burden on a woman's right to obtain an abortion, medical providers could nonetheless assert an independent right to provide the service for pay." *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc). Although that was dicta, reasoned dicta is binding in the Ninth Circuit. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012).

Even if Planned Parenthood had shown that review were likely, it still has failed to show likelihood of success because there is no "fair prospect" of the Supreme Court's reversing this Court. The en banc decision faithfully applied Supreme Court precedent and the Constitution's text. Ohio will not waste the Court's time repeating the arguments that it already made, and that the Court already accepted. Suffice it to say, Planned Parenthood could prevail at the Court only by convincing the Supreme Court to adopt precisely the right that *Casey*'s plurality refused to recognize: a right to *perform* abortions. *Planned Parenthood v. Casey*, 505 U.S. 833, 884-85 (1992) (plurality). The Supreme Court today is not likely to invent new constitutional rights—such as the right to perform abortions—with no grounding in the Constitution's text. Indeed, just last Term the Court read narrowly the already-recognized, judge-made right to a Fourth Amendment civil remedy. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017). And at least five Justices are on record stressing the "need for restraint in administering the strong medicine of substantive due process," with one expressly calling for its abandonment. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742, 811–12 (2010) (Thomas, J., concurring in part and in the judgment); *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015) (per Gorsuch, J.); *Doe v. District of Columbia*, 489 F.3d 376, 383 (D.C. Cir. 2007) (per Kavanaugh,

J.). Combine this skepticism toward substantive due process with the novel nature of Planned Parenthood's claimed right, and Planned Parenthood's odds of success on the merits are miniscule, not "fair."

II. PLANNED PARENTHOOD WILL NOT BE IRREPARABLY INJURED ABSENT A STAY, AS THE FUNDING CHANGE WILL NOT COST IT SIGNIFICANT FUNDS OR OTHERWISE IMPAIR IT.

Planned Parenthood will not be irreparably injured if no stay issues. Indeed, *it* will not be injured at all. Planned Parenthood claims that it will have to cut programs if it loses state funding. That claim is dubious. Every party here agrees that the funding at issue composes only a small fraction of its revenue—just 5 percent in the case of Planned Parenthood of Greater Ohio. *See* PPGOH Report, R.36-2, PageID#583; Compl. R.1, PageID#18; *see also* PPSWO Report, R.36-1, PageID#566. And since Planned Parenthood has used Ohio's law as a fundraising tool, there is reason to believe that private donations will fill whatever small gap defunding creates. *See* PPSWO Depo., R.37, Page ID#666–67. Perhaps all this is why Planned Parenthood's representatives testified that it will keep providing cancer screenings, HIV testing, and STD screening and treatment with or without state funding, PPSWO Depo., R.37, Page ID#664, 705; PPGOH Depo., R.35, Page ID#438, 445, 450. Planned Parenthood of Southwest Ohio's representative further testified that it did not need state funding to run its own educational programs in place of the State's. PPSWO Depo., R.37, PageID#654, 661, 695–96.

In addition to the fact that Planned Parenthood is unlikely to cut programs, the record shows that Planned Parenthood generally breaks even or *loses* money through these programs. *See, e.g.,* PPGOH Depo., R.35, PageID#408–09 (HIV Prevention Program); *see also id.*, PageID#414 (PPGOH has no VAWA Program). For its part, Planned Parenthood of Greater Ohio identified just one program that will result in a financial loss if discontinued (the STD program), and that loss would equal only about $200,000, which is less than 1 percent of its total revenue. *Id*., PageID#443; PPGOH Report, R.36-2, PageID#583; Compl., R.1, PageID#18.

Perhaps because Planned Parenthood faces no prospect of serious irreparable harm, the irreparable-injury section of its motion stresses alleged injuries to third parties rather than injuries to Planned Parenthood itself. Mot. 16–18. Such third-party injury is relevant to the third and fourth stay factors, not the second, so Ohio addresses them below.

A final note: If Planned Parenthood would somehow be injured by losing funds, that injury would be attributable entirely to its own failure to prepare over the past years for the possibility of an adverse ruling. Ohio's taxpayers should not be on the hook for additional payments—payments to which Planned Parenthood is not entitled, and that Ohio will be unable to reclaim—simply because Planned Parenthood failed to plan ahead.

III. A STAY WILL INJURE OHIO TAXPAYERS AND IS NOT NECESSARY TO PROTECT RECIPIENTS OF PUBLIC SERVICES, AS OHIO IS ENSURING THAT OTHER PROVIDERS WILL STEP IN WITH NO GAPS IN COVERAGE.

Granting a stay will injure other parties, while denying it will not. Begin with who a stay would hurt: the State of Ohio and its citizens, whose democratic will has been wrongfully thwarted since the District Court enjoined the Funding Law in 2016. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *King*, 133 S.Ct. at 3 (Roberts, C.J., in chambers) (citation omitted); *accord Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). Ohio taxpayers have already been made to hand over millions of dollars to entities with no rightful claim to that funding. Permitting that to continue any longer harms Ohio and Ohioans by preventing "the will of the people" from "being effected in accordance with [Ohio] law." *Coalition*, 473 F.3d at 252.

Planned Parenthood never addresses this concern, except to state without support that "because there are contracts between" the Ohio Department of Health and Planned Parenthood, the Department "will not incur any additional costs if the mandate is stayed." Mot. 19. It is true that the Department has contracts with Planned Parenthood in connection with the programs and grants affected by the Funding Law. But the State signed those contracts under compulsion of a mistaken injunction. What is more, those contracts allow the Department to void the

agreements with 30-days' notice. The Department is giving its 30-day notice contemporaneously with this filing, in preparation for the issuance of this mandate. Today, it will notify all contractors and grant recipients that ineligible recipients of state funds will have their contracts canceled within 30 days, or upon the occurrence of all court action needed to vacate the District Court's injunction if that has not occurred within the 30-day period. *See* Appendix 1 (Memo from Ohio Department of Health).

The 30-day period gives the Department even more time to ensure that other providers will be ready to provide services to Ohio's citizens with no gap in coverage. Planned Parenthood is thus wrong to insist that the *absence* of a stay will affect other interested parties by interrupting services. Planned Parenthood says that those receiving state-funded services through Planned Parenthood will be left in a lurch, and that the Department of Health "has failed to identify alternative providers to ensure continuity of service to Planned Parenthood's patients." Mot. 17. That is wrong. The Department had alternatives lined up long ago, and will finalize plans over the next 30 days. Ohio's Funding Law was supposed to go into effect in May 2016. Anticipating this, the Department worked to prevent gaps in program coverage. This proved easy in many cases. For example, over 700 entities unrelated to Planned Parenthood already participated in the Breast and Cervical Cancer Projects. Bickert Aff., R.17-3, PageID#273. And about 75 entities un-

related to Planned Parenthood already participated in the STD Prevention Program. *See* Dennison Aff., R.17-4, PageID#275; 2d Lawson Decl., R.40-4, Page ID#946. For those programs with fewer providers, the Department and county health districts worked to increase participation. *See, e.g.*, Norton Aff., R.17-5, PageID#277–78; Turner Aff., R.17-6, PageID#279–80. Mahoning County, for instance, agreed to hire community health workers to help administer the Infant Mortality Reduction Initiative in Mahoning and Trumbull Counties. Turner Aff., R.17-6, PageID#279–80. Hamilton and Summit Counties found and contracted with new entities for the HIV Prevention Program. PPSWO Depo., R.37, PageID#651; PPGOH Depo., R.35, PageID#406. The Department also received supplemental applications from entities interested in providing services under the Violence Against Women Act program. *See* Burke Depo., R.40-14, PageID#1068–69.

The Department was already doing all this when the District Court entered a temporary restraining order. *See* Burke Depo., R.40-14, PageID#1056–57; Op., R.19, PageID#327. The Department has now been updating this work—which it had already done three years ago—for the last week, and will continue to do so over the next 30 days. The result is that any gap in program coverage will be minimal if it exists at all.

With program beneficiaries safely covered, a stay cannot be justified by Planned Parenthood's assertion that it may fire some staff once the Funding Law

goes into effect. Mot. 16–17. Planned Parenthood has presented no evidence that those who are laid off will be unable to find work with other program providers. More fundamentally, Ohio passed its Funding Law in 2016. Because the District Court enjoined the law before it ever went into effect, Planned Parenthood and its employees have had *three years* to prepare for the possibility that certain funding streams might not be available. So any injury to Planned Parenthood's employees results not from the failure to stay the mandate, but from Planned Parenthood's failure to warn its employees (or their failure to heed its warning) about the consequences of an adverse decision.

IV. THE PUBLIC INTEREST FAVORS AN IMMEDIATE ISSUANCE OF THE MANDATE.

Finally, a stay of the mandate is not in the public interest. To the contrary, the public interest favors immediate issuance. As this Court has explained, the public interest lies in a correct application of the federal constitutional and statutory provisions relevant to this suit, "and ultimately … upon the will of the people of [Ohio] being effected in accordance with [Ohio] law." *Coalition*, 473 F.3d at 252 (internal quotation marks omitted). Ohio has already been forced to support Planned Parenthood and similar entities with three years of funding to which they were not entitled. Allowing that to go on any longer means further thwarting the will of the People. Since this Court can allow for the People's will be to given effect without materially harming anyone who would like to take advantage of the

programs Ohio funds, *see above* 10–12, the public interest weighs strongly against a stay.

CONCLUSION

This Court should deny Planned Parenthood's motion to stay the mandate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this document contains 3,200 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that a copy of this filing has been served through the Court's CM/ECF system on March 21, 2019. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Benjamin M. Flowers
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Counsel for Appellant Amy Acton, M.D.

Ohio Department of Health

Mike DeWine, Governor
Jon Husted, Lt. Governor

Amy Acton, M.D., MPH, Director

TO: All ODH Subrecipients and Contractors

FROM: Amy Acton, MD, MPH

DATE: March 21, 2019

SUBJECT: Termination of certain subgrants and contracts, by April 20, 2019 (or as court allows), which entities that perform or promote nontherapeutic abortions or contract or affiliate with any entity that performs or promotes nontherapeutic abortions

A federal court upheld Ohio's restrictions on funding certain programs through entities that perform elective abortions. More specifically, the law restricts funding to entities that perform or promote nontherapeutic abortions or contract with or affiliate with any entity that performs or promotes nontherapeutic abortions. As a result, the law imposing those restrictions – Ohio Revised Code 3701.034 – will now become effective as soon as a final court order implementing the decision is issued (as further detailed below). In light of this decision, the Ohio Department of Health (ODH), ODH subrecipients, and ODH contractors must now comply with R.C. 3701.034. Please find attached a copy of the law. Pursuant to the law, ODH must ensure that state funds it administers, along with certain federal funds, are not used to perform or promote nontherapeutic abortions, or to contract with any entity or its affiliate that performs or promotes nontherapeutic abortions. ODH, all ODH subrecipients, and contractors must comply with this law.

The ODH subgrants affected by R.C. 3701.034 include:

1. Violence Against Women Act (VAWA)
    a. Violence Against Women Act (VW) Grant
    b. Sexual Assault Services (SA)
2. Breast and Cervical Cancer Mortality Prevention Act
    a. Breast and Cervical Cancer Project (BC)
    b. Community Clinical Linkages (CL)
    c. Health System Quality Improvement (HS)
3. Infertility Prevention Project
    a. S.T.D. Control Program (ST)
4. Minority HIV/AIDS Initiative
5. Infant Mortality Reduction or Infant Vitality Initiatives
    a. Reproductive Health and Wellness (RH)
    b. Maternal and Child Health (MP)
    c. Infant Vitality Community Intensive Project (IV)
    d. Centering Pregnancy and Centering Parenting Startup and Expansion (CS)
    e. Moms and Babies First (MB)

In addition, the following non-grant funds are also affected by R.C. 3701.034:

1. Any funds received by ODH for breast and cervical cancer screening/diagnostic testing program
2. Any funds used by ODH for treatment associated with the Infertility Prevention Project
3. Any state (i.e., non-federal) funding received by ODH, e.g., HIV Prevention (HP)

ODH will terminate existing subgrants and contracts in **thirty (30) days** – by April 20, 2019 – if they do not comply with Ohio law. ODH is issuing this 30-day notice now to begin an orderly transition, in anticipation of a mandate from the court putting its decision into effect within the next 30 days. ODH notes, however, that plaintiffs in the case have asked the court to delay the effect of its ruling, which would in turn prevent Ohio's law from going into effect. If court action delays the effective date, ODH will be unable to terminate subgrants or contracts until the court allows. ODH will update you on further developments but will meanwhile continue preparing for an intended April 20 termination date.

ODH will arrange how for the orderly transition of services to new subrecipients or contractors not affected by R.C. 3701.034, thus ensuring continuity of services to Ohioans. ODH staff will directly contact current subrecipients and contractors affected by this law to coordinate transition of services to alternative providers, as appropriate. Likewise, subrecipients and contractors should review their contracts to determine if they contract with an entity that is affected by this law. If you believe an existing subcontractor may be affected by this law, ODH encourages you to immediately identify other eligible subcontractors to ensure continuity of service. Subrecipients and contractors will be required to submit the final expense report or invoice by a date to be determined by ODH after consulting with subrecipients and contractors. Finally, ODH may require additional support documentation be submitted to verify no additional work or payments are being requested after the subgrant or contract termination date.

In addition, in future contracts and subgrants, ODH will add additional assurance language and require acknowledgment signatures to ensure compliance with this law. Please feel free to contact the ODH Office of Financial Affairs if you have any further questions or need clarification regarding ODH subgrants or contracts.