

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

PLANNED PARENTHOOD	:	
SOUTHWEST OHIO REGION, <i>et al.</i> ,	:	Case No. A 2100870
	:	
Plaintiffs,	:	Judge Alison Hatheway
	:	
v.	:	
	:	
OHIO DEPARTMENT OF HEALTH, <i>et</i>	:	
<i>al.</i> ,	:	
	:	
Defendants.	:	

**STATE DEFENDANTS’ RESPONSE TO PLAINTIFFS’
MOTION FOR JUDGMENT ON THE PLEADING**

The core provision challenged in this litigation requires that “[f]inal disposition of fetal remains from a surgical abortion at an abortion facility be by cremation or interment.” R.C. 3726.02. The law deals solely with what happens to fetal remains *after* an abortion. It says nothing to restrict, burden, or otherwise limit anyone’s right, in any circumstance, to *have* an abortion.

Nonetheless, in their motion for judgment on the pleadings, Plaintiffs assert that this law violates Article I, Section 22 of the Ohio Constitution—the amendment Ohio voters passed in 2023 to establish a right to abortion and other “reproductive decisions.” Specifically, in the words of Section 22, Plaintiffs assert that the fetal-remains law “discriminates against” an individual’s “voluntary exercise of [the] right” to “make and carry out one’s own reproductive decisions” on “abortion.” *See* Motion at 2 n.2; Ohio Const. Art. I, Section 22.

The fallacy of this assertion is self-evident. A person who chooses abortion necessarily “makes” this “reproductive decision” *before* the abortion takes place, and “carr[ies] out” the decision *at the time* the abortion takes place. By its very nature, a law that deals solely with what happens *after* an abortion takes place can have no bearing on the making or carrying out of that reproductive decision. Quite simply, Section 22 simply is not applicable to the fetal-remains law.

Attempting to avoid this fatal flaw and any potential factual dispute that would defeat their pre-trial motion, Plaintiffs, for purposes of the motion only, voluntarily disclaim any assertion that the law directly or indirectly “burden[s], penalize[s], prohibit[s], [or] interfere[s] with” an individual’s right to choose and carry out an abortion. *See* Motion 2 n.2; Ohio Const. Art. I, Section 22). Instead, they rely solely on Section 22’s prohibition against “discriminat[ing] against” the right. When the question is limited to whether the fetal-remains law “discriminates” between individuals who choose abortion and individuals who do not, Plaintiffs claim, the answer is that the law clearly does discriminate. After all, Plaintiffs argue, the law does not require fetal remains to be buried or cremated after identical procedures are employed in miscarriage management.

But this effort to avoid logic and factual disputes falls short, because Section 22 does not prohibit laws that discriminate *between* abortion and other similar situations. Rather, Section 22 prohibits laws that discriminate *against* individuals choosing abortion. This critical difference means that even when focusing solely on the amendment’s “*discrimination against*” language, Plaintiffs still must ultimately prove beyond a reasonable doubt that the law *has a negative effect on* an individual’s choice to have an abortion. But again, the law cannot have any effect on the abortion choice, because it does not become relevant until after the abortion is complete.

Indeed, only a small subset of provisions passed along with this core provision requiring

burial or cremation of fetal remains could possibly have any relevance before an abortion. Certain provisions establish that an individual who chooses an abortion also has the right—and must be informed of the right—to choose between burial or cremation (or to leave the choice to others). Even if Plaintiffs’ argument could be construed to assert that these provisions have the potential to negatively affect an individual’s exercise of the right to choose abortion, that conclusion is far from undisputed, and thus cannot be the path to judgment on the pleadings in their favor.

Beyond these fundamental substantive shortcomings, additional problems independently preclude granting Plaintiffs’ motion. First, no Plaintiff in this case is an individual who seeks to exercise their right to abortion. Instead, all Plaintiffs are providers. These Plaintiffs do not have standing to assert the right set forth in Section 22, which is specifically a right held by the individual making reproductive decisions. The amendment no doubt prohibits restrictions on abortion providers as well as patients, but the right is one possessed solely by the patients, and providers cannot claim standing themselves nor assert standing on patients’ behalf.

Finally, Plaintiffs seek invalidation of a wide swath of laws beyond the core fetal remains provision in R.C. 3726.02 or even the additional provisions establishing an individual’s right to choose burial or cremation. Though their motion challenges only the core provision, Plaintiffs nonetheless ask this Court to declare that “S.B. 27 violates Article 1, Section 22 of the Ohio Constitution” and issue an order that the State is permanently enjoined from “enforcing S.B. 27.” Proposed Entry Granting Plaintiffs’ Motion for Judgment on the Pleadings at 1. To be sure, the core provision was enacted into law through Senate Bill 27 in 2020. But many other statutory provisions were enacted through Senate Bill 27 beyond this core provision. This Court cannot invalidate or enjoin entire legislative bills just because one provision in a bill violates the

Constitution. Instead, this Court must sever any invalid provision and preserve remaining law, regardless whether that remaining law is found in the same section, chapter or code of the Ohio Revised Code or whether the remaining law was passed in the same legislative act. Accordingly, even if the core provision itself were invalid, which it is not, Plaintiffs' requested relief is woefully overbroad.

Accordingly, as fully explained below, the State respectfully requests that the Court deny Plaintiffs' motion for judgment on the pleadings.

FACTUAL AND PROCEDURAL BACKGROUND

On December 30, 2020, Governor DeWine signed into law Am. S.B. No. 27, 2020, Ohio Laws File 77 (S.B. 27). S.B. 27 amended three already existing statutes—R.C. 2317.56, R.C. 3701.341, and R.C. 3701.79—and enacted eighteen new ones: R.C. 3726.01, R.C. 3726.02, R.C. 3726.03, R.C. 3726.04, R.C. 3726.041, R.C. 3726.042, R.C. 3726.05, R.C. 3726.09, R.C. 3726.10, R.C. 3726.11, R.C. 3726.12, R.C. 3726.13, R.C. 3726.14, R.C. 3726.15, R.C. 3726.16, R.C. 3726.95, R.C. 3726.99, and R.C. 4717.271. R.C. 3701.02 governs “the final disposition of fetal remains from surgical abortions.” Am. Compl. Ex. A (April 15, 2024), at 1. S.B. 27 enacted R.C. 3726.02, which provides that “[f]inal disposition of fetal remains from a surgical abortion at an abortion facility shall be by cremation or interment.” R.C. 3726.02(A). Another statute within S.B. 27 independently requires that any patient who obtains a surgical abortion in Ohio must be informed prior to the procedure that she can choose the final disposition of the fetal remains. *Id.* 3726.03(B). That law creates a freestanding right for every patient having an abortion to, if she so chooses, determine both the manner and location of final disposition. *Id.* 3726.03(A). However, neither statute forces a patient to make either of these determinations. *Id.* A patient who chooses surgical

abortion is not required to cover any costs of final disposition unless she identifies a location for final disposition other than one provided by the abortion facility. *Id.* 3726.09.

S.B. 27 also enacted a law that provides that “[a] person who buries or cremates fetal remains from a surgical abortion is not liable for or subject to damages in any civil action, prosecution in any criminal proceeding, or professional disciplinary action related to the disposal of fetal remains,” so long as that person acts in “good faith compliance” with the statute, receives a copy of a properly executed detachable supplemental form, and “[a]cts in furtherance of the final disposition of the fetal remains.” R.C. 3726.15. Cremation of fetal remains is to occur in a crematory facility in compliance with Chapter 4717 of the Revised Code. *Id.* 3726.02(B). A crematory operator is not required to secure a death certificate, a burial or burial-transit permit, or a cremation authorization form to cremate fetal remains. *Id.* 4717.271(B).

S.B. 27’s effective date was April 6, 2021, but the law has never gone into effect. *See* The Ohio Legislature, Senate Bill 27, Status, *available at* <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-SB-27>. In March 2021, Plaintiffs filed their Complaint and motion for a temporary restraining order followed by a preliminary injunction. This Court denied the motion for a temporary restraining order but granted the motion for a preliminary injunction, enjoining S.B. 27 “until 30 days after implementing rules and forms have been adopted and have become effective pursuant to the notice-and-comment rulemaking process set forth in R.C. 119.03(A)–(F).” Entry Granting Plaintiffs’ Motion for Preliminary Injunction at 1-2 (Apr. 5, 2021). On October 25, 2021, the Ohio Department of Health issued proposed rules pursuant to S.B. 27. On January 9, 2022, the final rules became effective. Thus, this Court’s previous preliminary injunction was set to expire on February 8, 2022. On January 7, 2022, the Clinics filed their second motion for a

preliminary injunction.

This Court granted a second preliminary injunction on January 31, 2022. *See* Order Granting Second Preliminary Injunction, January 31, 2022. In so doing, it enjoined every law amended or enacted by S.B. 27. *Id.* at 13. The case was then stayed pending an appeal from a similar case in another Hamilton County Common Pleas Court from July 6, 2022, until April 16, 2024, when this Court granted Plaintiffs' motion to file their Second Amended Complaint in this case. *See* Entry Granting Plaintiff' Motion to Stay Proceedings, July 6, 2022, at 1; Entry Granting Plaintiffs' Unopposed Second Motion for Leave to Amend Complaint. The State answered the Second Amended Complaint on June 12, 2024. Plaintiffs have now asked this Court for judgment on the pleadings.

ARGUMENT

A. Legal Standard.

Plaintiffs' motion triggers two legal standards, as they seek both judgment on the pleadings and a permanent injunction. After pleadings are closed, a motion for judgment on the pleadings should be granted when a court, drawing all reasonable inferences from the material allegations of the complaint in favor of the nonmoving party, concludes that no set of facts would allow the non-moving party to prevail. *See, e.g., Calhoun v. Supreme Court of Ohio*, 61 Ohio App.2d 1, 6, 399 N.E.2d 559 (10th Dist.1978). Next, for that judgment to lead to an injunction, Plaintiffs must show that "the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law" by clear and convincing evidence. *P&G v. Stoneham*, 140 Ohio App.3d 260, 268, 747 N.E.2d 268 (1st Dist.2000).

Plaintiffs seek an expansive injunction barring the enforcement of every law contained in S.B. 27 but have failed to show entitlement to such an order. In fact, Plaintiffs are not entitled to

any relief here for several reasons. To start, Plaintiffs have challenged R.C. 3726.02 as a violation of their own rights and the rights of those they assist in obtaining an abortion, but they have not pleaded any facts to demonstrate that they have standing sufficient to assert the rights of others that are not parties in this case. The State has elsewhere acknowledged that “doctors and clinics will now have their own rights in the Ohio Constitution and will likely be able to articulate reasons for their own standing rather than rely on third-party standing.” Supp. Br. of Appellants on Effect of Constitutional Amendment, *Preterm-Cleveland, et al. v. Yost*, No. 2023-0004 (Dec 7, 2023). The Amendment, however, did not alter standing doctrine. Plaintiffs cannot pretend that the People enacted the Amendment with the intention of subverting the requirements of justiciability to facilitate not only a Clinic’s ability to challenge laws that do not concretely harm them, but also to assert third-party standing on behalf of their patients without any evidence at all—other than conclusory assertions—that they meet Ohio’s third-party standing test. But even if they had, that would not change the fact that they cannot prevail on the instant motion.

Regardless of that failure, Plaintiffs have not proven that any of the statutes amended or enacted by S.B. 27 infringe on any right created by the Amendment. While the Ohio Constitution now protects both the individual right to make and have an abortion and the right of others to assist in the exercise of that right, those protections end when the abortion is complete. It is only after a woman has had an abortion that the core provision regulates Plaintiffs’ conduct. Given the relevant purpose behind the enactment of Section 22—to protect the right to have an abortion—the Amendment’s protections cannot be stretched so far as to invalidate statutes that regulate only post-abortion policy. Nor can they show any of these laws discriminate against women who seek abortions or providers who assist such women.

B. R.C. 3726.02 does not affect any right created in the Amendment.

Article I, Section 22 of the Ohio Constitution provides that “Every individual has a right to make and carry out one’s own reproductive decisions,” including having an abortion. Art. I, Sec. 22(A). It goes on to say that

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.

Art. I, Sec. 22(B).

As an initial matter, Plaintiffs have failed to show that they have standing to challenge every law amended or enacted by S.B. 27. To have this Court hear their claims, Plaintiffs must show that they have “suffered or [are] threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury.” *Preterm-Cleveland, Inc. v. Kasich*, 2018-Ohio-441, ¶ 21 (internal citations removed). “The Ohio Constitution expressly requires standing for cases filed in common pleas courts.” *Preterm-Cleveland*, 153 Ohio St. 3d 157 at ¶20 (quotation omitted). For that reason, courts lack jurisdiction to award relief that no plaintiff has standing to seek. But standing “is not dispensed in gross . . . [r]ather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Id.* ¶ 30. Generally speaking, “to have standing to attack the constitutionality of a legislative enactment, the private litigant must . . . show that [1] he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, [2] that the law in question has caused the injury, and [3] that the relief requested will redress the injury.” *Id.* at ¶21 (quoting *Ohio Trucking Assn. v. Charles*, 134 Ohio St. 3d 502, 2012-Ohio-5679, ¶5). “Thus, a party challenging

multiple provisions in an enactment of the General Assembly ... must prove standing as to each provision the party seeks to have” held unconstitutional. *Id.* at ¶30.

Not only have Plaintiffs failed to demonstrate standing for themselves, but they have also failed to allege any facts to demonstrate that they have standing to assert the rights of their patients. Courts will allow a party to assert the right of nonparties only if the party “claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently close relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the” right’s holder “seeking relief.” *Id.* (quotation omitted). Without standing, this Court is without jurisdiction to consider those claims.

But even if they had the requisite standing, Plaintiffs’ claims still fail as a matter of law. Plaintiffs’ motion is expressly limited to the first count of that operative complaint: “Plaintiffs’ complaint also alleges, and Plaintiffs continue to maintain, that S.B. 27 directly and indirectly burdens, penalizes, prohibits, and interferes with access to abortion without any health benefit, but Plaintiffs focus solely on facial discrimination for the purposes of this 12(c) motion.” *MJP* at 2, fn2. That discrimination is based solely on the Amendment and no other constitutional provision. The Amendment, however, prohibits discrimination against only a woman’s voluntary right to decide to have an abortion (or other “reproductive decision”), and those assisting her in exercising that right. Because R.C. 3726.02 only regulates Plaintiffs’ conduct after a woman has already obtained an abortion, it does not come within the scope of the protections of the Amendment.

Plaintiffs concede as much in their Motion. They say that “S.B. 27’s regulations are targeted exclusively at the disposition of embryonic and fetal tissue. In other words, they relate to what happens after a procedural abortion. Nothing about S.B. 27 concerns the health care the

patient receives in connection with a procedural abortion.” MJP at 13 (emphasis in original). R.C. 3726.02’s plain language demonstrates that the statute has no legal effect until after a surgical abortion—in other words, until after a woman has carried out her decision to have an abortion. Indeed, the abortion facility has nothing further to do to assist her in exercising her constitutional right. The same is true for every other statute amended or enacted in S.B. 27.

Plaintiffs argue that “S.B. 27 discriminates against abortion by restricting the embryonic and fetal tissue disposition options available to procedural abortion patients.” MJP at 10. This conflates the right to have and assist in abortion with the abortion procedure itself. To be sure, the Amendment protects a woman’s right to have an abortion, and Plaintiffs’ right to assist her by performing the abortion, but its protection ends once the abortion procedure is completed.

1. Plaintiffs have failed to prove that R.C. 3726.02 discriminates against them.

Plaintiffs say that the requirements imposed by R.C. 3726.02 are facially invalid under the Amendment because the law discriminates against both the women who have a surgical abortion and the Plaintiffs themselves as abortion providers. They say the law targets these women by restricting the embryonic and fetal tissue disposal options only for those that have surgical abortion. They assert that only women that choose surgical abortion are forced to bury or cremate their tissue. They also claim that the law discriminates against abortion providers by requiring them to facilitate the disposal of fetal remains and to bear the cost of such disposal. But nothing in the law forces a woman to do anything. R.C. 3726.03(A).

First, the Amendment does not define discrimination, and Plaintiffs say only that the “‘normal definition’ of the term ‘discrimination’ is ‘differential treatment,’ or ‘less favorable’ treatment.” MJP at 8-9 (cleaned up). But that is only the beginning of the inquiry. The Ohio

Supreme Court has held that when “construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters who adopted the amendment.” *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 13. Courts should “give undefined words in the Constitution their common, everyday meaning, often relying of dictionary definition to do so.” *Id.* ¶ 24. This analysis includes considering definitions provided in other laws. *Id.* ¶ 28 (“As an additional tool to ascertain voters’ intent, we presume that the voters who approved an amendment were aware of existing Ohio law.”).

Some examples of definitions of discrimination in Ohio law are instructive here: R.C. 4112.01 provides that “‘Discriminate’ includes segregate or separate” and “‘Unlawful discriminatory practice’ means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code;” Adm.Code 3337-40-01 provides that “[d]iscrimination occurs when a person or group of people are denied rights, benefits, equitable treatment, or access to programs or facilities available to all others because of membership in a protected class. Members of protected classes have historically been denied access to or are underrepresented in educational and employment opportunities and are protected from discrimination by federal and state civil rights law, or university policy as listed in part (A) of this policy;” Adm.Code 3349-7-10 provides that “‘Discrimination’ occurs when an adverse employment or education action is taken that is based upon a protected class;” and Adm.Code 3339-3-06 provides “Discrimination: conduct that is based on a person’s age, color, disability, gender identity or expression, genetic information, military status, national origin (ancestry), pregnancy, race, religion, sex/gender, status as a parent or foster parent, sexual orientation or protected veteran status in its activities, programs, admission, and employment that: (a) Adversely affects a term or condition of a person’s employment, education,

living environment or participation in a university activity; or (b) Is used as a basis for or a motivating factor in decisions affecting the person’s employment, education, living environment or participation in a university activity.”

Even if Plaintiffs definition of discrimination were applicable here, that would not end the inquiry. Ohio court have held that a showing of differential, or even lesser, treatment, without more, cannot invalidate a duly enacted statute. “[D]iscrimination against individuals or groups is sometimes an inevitable result of the operation of a statute.” *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 362, 1995-Ohio-298, 653 N.E.2d 212 (cleaned up). “The mere fact that a statute discriminates does not mean that the statute must be unconstitutional.” *Id.*, quoting *Roseman*, 66 Ohio St.3d at 577. The General Assembly must be afforded substantial leeway because “[b]y the very nature of the work of the legislature, it must, if it is to act at all, impose special burdens upon or grant special benefits to special groups or classes of individuals.” *State ex rel. Doersam v. Indus. Comm.* (1989), 45 Ohio St.3d 115, 119, 543 N.E.2d 1169, 1173.

While the fetal disposition requirements in R.C. 3726.02 do impose special burdens upon Plaintiffs, they were not the targets of the bill. S.B. 27’s primary sponsor, State Senator Joseph Uecker, stated that S.B. 27’s enactments “seeks to honor the unborn by ensuring procedures are in place to properly dispose of aborted fetal remains.” Testimony of Senator Uecker, Senate Health, Human Services and Medicaid Committee, Feb. 26, 2019, at p. 1. See *The Ohio Legislature, Senate Bill 27, Committee Activity*, available at <https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-SB-27>. Senator Uecker further indicated that the purpose of S.B. 27 was to “protect[] the dignity of human life.” *Id.* Plaintiffs merely conclude, without any evidence, that R.C. 3726.02 discriminates against them because they are abortion providers. But such

conclusions are insufficient to prevail on their motion.

Finally, it is also “the duty of the court to ascertain and give effect to the intent of the people” when interpreting the Constitution. *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294, 114 N.E. 263, 14 Ohio L. Rep. 266 (1916). That often requires a court to consider “the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis.” *City of Centerville* ¶ 22. In this context, the reason and necessity for the Amendment was to protect the individual woman’s right to choose abortion in Ohio. That private right to make and carry out one’s own reproductive decisions is the primary purpose of the Amendment, and the rights for those who assist them were created in service of that primary right.

The right of others to assist a woman free from discrimination, then, cannot extend to conduct that occurs after that right has been fully exercised. As abortion providers, Plaintiffs seem to believe that any law is unconstitutional if it “regulat[es] and impos[es] severe penalties for noncompliance only on abortion providers and facilities” even if that conduct has no effect whatsoever on the exercise of the right, and where, as here, the law has no application until after a surgical abortion is completed. Such an expansive reading of the language of the Amendment would prevent nearly all laws that regulate abortion clinics without regard to the primary right to be exercised by the women of Ohio and would do nothing that the Amendment was enacted to protect. That interpretation would contravene the very purpose of the Amendment.

R.C. 3726.02 has no impact whatsoever on a woman’s ability to choose abortion as it does not regulate surgical abortion in any way. In Plaintiffs’ own words, none of the statutes amended or

enacted by S.B. 27 can infringe on any rights protected in the Amendment because they only “relate to what happens after a procedural abortion.” MJP at 13. As a result, the Amendment does not even apply here. Because R.C. 3726.02 cannot discriminate against woman who exercise their right to abortion or against those that assist them in having an of abortion, this Court must deny Plaintiffs’ motion.

C. Even if R.C. 3726.02’s requirement did violate the Amendment, and its enforcement were permanently enjoined, Plaintiffs have not shown any other relief is requested or proper.

If this Court determines that R.C. 3726.02 is unconstitutional under the Amendment, it need only enjoin that statute and any references to it elsewhere in the Revised Code. That would end this case and provides Plaintiffs the relief they seek. But rather than naming the specific statute that gives rise to their claims, Plaintiffs have chosen to challenge the entire bill package that enacted R.C. 3726.02. The State explains below why no broader relief is warranted here. But critically important to this Court’s consideration is that, when Plaintiffs’ claims are analyzed against the instant motion, Plaintiffs have only attempted to challenge the disposition requirements imposed by R.C. 3726.02. Every argument made in their motion asserts that disposition requirements for fetal remains from surgical abortions created by R.C. 3726.02 are unconstitutional.

Despite the broad use of “S.B. 27” throughout the motion, Plaintiffs repeatedly identify as their target the disposition of fetal remains requirement created by R.C. 3726.02. The motion says:

- “S.B. 27, discriminates against abortion patients, providers, and facilities by singling out tissue from procedural abortion for restrictive disposal requirements.” MJP at 1;
- “S.B. 27, which requires that embryonic and fetal tissue from a procedural abortion be cremated or interred,” *id.* at 1;
- “Plaintiffs respectfully request that this Court enter judgment on the pleadings and declare S.B. 27’s embryonic and fetal tissue disposal requirements unconstitutional,” *id.* at 2;

- “By mandating these disposition methods and foreclosing any other disposition method only for procedural abortion patients, S.B. 27 plainly discriminates against patients seeking abortion,” *id.* at 11;
- “S.B. 27’s regulations are targeted exclusively at the disposition of embryonic and fetal tissue,” *id.* at 13; and
- “S.B. 27 discriminates against abortion by restricting the embryonic and fetal tissue disposition options available to procedural abortion patients.” *Id.* at 10.

Given this language, Plaintiffs’ request is best read as seeking to enjoin only R.C. 3726.02—the provision that requires that fetal remains from a surgical abortion be cremated or interred.

Indeed, that reading is consistent with the pleading in this case. Plaintiffs’ narrow approach is demonstrated by reading the current motion alongside the Second Amended Complaint. Plaintiffs’ motion is expressly limited to the first count of that operative complaint: Plaintiffs focus solely on facial discrimination for the purposes of this 12(c) motion.” MJP at 2, fn2. That count, in turn, alleges that by “penalizing and discriminating against patients who choose abortion, including by regulating the disposition of pregnancy tissue from procedural abortion differently than the disposition of identical pregnancy tissue from other reproductive health care” and “discriminating against Plaintiffs, who assist patients in obtaining abortion,” the disposition requirement for fetal remains from a surgical abortion violates the Ohio Constitution. (Emphasis added). Thus, although that allegation opens with the broad phrase, “S.B. 27 infringes on the right the reproductive freedom,” it is limited by specifying that the constitutional violation springs from the regulation of “the disposition of pregnancy tissue from procedural abortion.” It does not cite any other statutory provision, either by code section or substantive description. (It bears noting that the remaining claims, while citing different constitutional bases, likewise challenge only the core provision.)

Finally, the motion is limited to the core provision itself because it nowhere identifies any

other specific provision as causing any alleged legal harm. For example, and as further detailed below, R.C. 3701.341 was amended by S.B. 27 to require the director of health to adopt rules for abortion regarding the disposition of fetal remains that are consistent with Chapter 3726 of the Revised Code. See R.C. 3701.341 (A), (A)(1). Because this requirement is directed solely to the director and does nothing to regulate any of Plaintiffs' conduct, it cannot harm them either, so they lack standing to challenge that law. Nor have they offered any evidence to establish that R.C. 3701.341 facially discriminates against them. As another example, like other medical recordkeeping requirements in the Revised Code, R.C. 3726.11 requires abortion facilities to maintain documentation demonstrating the date and method of disposition of fetal remains from surgical abortions performed or induced in the facility, and Plaintiffs do not challenge that expressly. These provisions are good examples of the provisions that would be improperly swept into any injunction of "S.B. 27" as a whole, even laws that Plaintiffs do not have standing to challenge. Given these realities, the only proper result is to specify that an injunction is aimed only at enforcement of R.C. 3726.02, and its reference in other enforcement statutes within the Revised Code, and not at the "bill" or "S.B. 27."

If the Court agrees, as it should, that Plaintiffs seek only an injunction against enforcement of R.C. 3726.02, then the Court can and should stop there. But if the Court somehow considers broader relief, or if Plaintiffs reply by expanding their request to truly challenge all statutory provisions affected by the passage of S.B. 27 four years ago, the Court should say no.

Such specificity is required by Ohio Civ. R. 65(D). That Rule provides that an "order granting an injunction and every restraining order shall . . . describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding

upon the parties to the action.” As that language makes clear, an injunction does not alter the passage of a bill or the text of codified law, but merely compels or prevents acts that enforce the written law. Under Ohio’s separation of powers doctrine, courts do not have the power to “repeal” or erase a bill or even a code provision. Instead, a court can only enjoin the enforcement of the specified provisions, while leaving the enactment itself unaffected. As the Supreme Court has explained:

We do not imply that the legal effect of a judicial decision “severing” a statutory provision from the remainder of the statute is to actually repeal the invalid statutory language. Only the General Assembly, the lawmaking branch of our constitutional government, has authority to repeal, as well as to enact, statutory language. Rather, a statutory provision that is held to be legally invalid, as here, becomes definitively unenforceable, and it is said to be “severed” in order to distinguish it from the re- maining portion of the statute, which remains valid and enforceable.

State v. Hodge, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 25 n.6 (citing R.C. 1.50 (“If any provision of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable”)). “A court can no more prohibit the General Assembly from enacting a law than it could compel the legislature to enact, amend, or repeal a statute—the judicial function does not begin until after the legislative process is completed.” *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶1. The inability of any court to prevent, or to undo, the enactment of legislation by the General Assembly demonstrates that it is not a “bill” that can be addressed, but only the enforcement of relevant provisions of code.

That fundamental principle makes all the difference here because Plaintiffs have not alleged any deficiency in any provision in S.B. 27 other than R.C. 3726.02.

1. Not only have Plaintiffs failed to identify other provisions in S.B. 27 in general, but also, they have not shown how they are harmed by any such statutes or why relief is warranted.

While Plaintiffs seek a much broader injunction, they have failed to prove they are entitled to such an injunction as a matter of law. The Second Amended Complaint, on its face, does not plead any facts necessary to prove that any remaining statutes (other than the core provision) are unconstitutional. Likewise, the Motion, although it refers broadly to “S.B. 27,” does not even refer to most of the statutory provisions enacted by that bill. Neither the operative complaint nor the Motion establishes that they are entitled to relief from enforcement of those statutes as a matter of law.

Plaintiffs assert only that there are “no material factual disputes” to be resolved in this case, MJP at 2, because they have pleaded facts to challenge only the legal requirements for disposition of fetal remain from surgical abortion, R.C. 3726.02. See MJP at 9 (“[T]here is no factual dispute that could alter the inevitable legal conclusion that S.B. 27 is unconstitutional because it violates the plain language of the Reproductive Freedom Amendment.”).

Indeed, in the proposed order submitted with the Motion, they ask this Court to join them in this fallacious oversimplification and announce that “[t]his case involves a challenge to 2020 Am.S.B. No. 27 (“S.B. 27”), which requires embryonic and fetal tissue from a procedural abortion to be cremated or interred.” But only the core provision itself creates this requirement. Everything else in S.B. 27 does something else.

Thus, even if this Court (wrongly) determines that the core provision is constitutionally invalid, it is required to sever that provision and preserve any accompanying law, regardless whether that accompanying law is part of the same section, chapter, or title of the revised code or happened to be passed in the same legislative act. If any other provision should be invalidated, it

was incumbent upon the Plaintiffs to explain which ones should be invalidated and why, with respect to any other provisions, they meet the high burdens of a motion for judgment on the pleadings seeking to invalidate statutory law. They have not even attempted to do so, and it is neither the burden of this Court nor the State to determine for Plaintiffs which additional provisions should or should not be invalidated in the event the core provision itself is invalid.

2. S.B. 27 enacted many provisions that are unchallenged and would survive even if challenged.

While no doubt should remain that Plaintiffs only challenge R.C. 3726.02, the State nonetheless itemizes here the many still-valid statutory provisions enacted or amended by S.B. 27, so that there is no question as to why the State is stressing so heavily the distinction between the singular statutory provision R.C. 3726.02 and “S.B. 27.” S.B. 27 amended three existing statutes and enacted eighteen new ones. But only one requires fetal remains be either interred or cremated.

Though the State maintains that none of these statutes facially discriminate against Plaintiffs, the other statutes should be left untouched, although enacted or modified by parts of S.B. 27, include:

- R.C. 2317.56, which was amended to include “zygote” and “blastocyte” alongside the terms “embryo” and “fetus” that already appeared in this provision. It was also amended to include subsections (4)(c) and (d), which requires a woman certify on the consent form that she was provided with a form that notified her of her right to choose humane disposal of her fetus and she completed a disposition determination to exercise her right to choose humane disposal of her fetus.
- R.C. 3701.341 was amended to require the director of health to adopt rules for abortion regarding the disposition of fetal remain that are consistent with Chapter 3726 of the Revised Code. Because this provision only imposes duties upon the director of health, Plaintiffs lack standing to challenge it.
- R.C. 3701.79 was amended to include: “zygote” and “blastocyte” alongside the terms “embryo” and “fetus” where already appearing in the statute; substituted the four terms for “abortion” twice; renumbered several subsections; and added the requirement that the previously required recordkeeping for each abortion also reflect the method of final

disposition of the fetal remains.

- R.C. 3726.01 provides four definitions applicable to Chapter 3726. Given that definitions have no force of law on their own, this statute cannot be enjoined.
- R.C. 3726.02 provides that the final disposition of fetal remains from surgical abortion be by cremation or interment. The State explained its validity above in Part (A).
- R.C. 3726.03 creates a freestanding right for any woman that has a surgical abortion to decide both whether the final disposition of fetal remains be by cremation or interment and the location of final disposition. This statute expands a woman's right to make decisions about her reproductive health, so it reinforces rather than conflicts with the purpose of Amendment.
- R.C. 3726.04 provides that if a woman desires to exercise her rights under 3726.03, she shall do so in writing and must clearly indicate the method and location of final disposition. Should she decline to exercise her right, the abortion facility shall do so for her. It also provides that minors must obtain written parental consent to any final disposition determination except when judicial bypass obviates parental consent for abortion.
- R.C. 3726.041 requires that a woman carrying more than one "zygote, blastocyte, embryo, or fetus" who desires to exercise her rights under 3726.03 must complete a separate form for each. If a minor must obtain parental consent under 3726.03, she also must obtain consent on a separate form for each.
- R.C. 3726.042 invalidates any form used under 3726.04 that covers more than one baby to be aborted.
- R.C. 3726.05 provides that "[a]n abortion facility may not release fetal remains from a surgical abortion, or arrange for the cremation or interment of such fetal remains, until it obtains a final disposition determination made, and if applicable, the consent made, under section 3726.04 or 3726.041 of the Revised Code."
- R.C. 3726.09 provides that the abortion facility shall pay for the disposition of the remains unless the mother identifies a location other than one provided by the abortion facility, in which case the mother is responsible for the costs of final disposition.
- R.C. 3726.10 requires the abortion facility to document in the woman's medical record the final disposition determinations made, and if applicable, the consent made under .04 and .041.
- R.C. 3726.11 provides that the "abortion facility shall maintain evidentiary documentation demonstrating the date and method of the disposition of fetal remains from surgical abortions performed or induced in the facility."
- R.C. 3726.12 provides that the "abortion facility shall have written policies and

procedures regarding cremation or interment of fetal remains from surgical abortions performed or induced in the facility.”

- R.C. 3726.13 provides that the “abortion facility shall develop and maintain a written list of locations at which it provides or arranges for the final disposition of fetal remains from surgical abortions.”
- R.C. 3726.14 requires the director of health to adopt rules to implement 3726.01-3726.13 and provides specific areas for rulemaking, including notification and consent forms. Because this provision only imposes duties upon the director of health, Plaintiffs lack standing to challenge it.
- R.C. 3726.15 exempts a person who buries or cremates fetal remains from liability or damages or disciplinary action if the person: (A) acted in good faith comply with this Chapter; (B) has proper forms under 3726.14; (C) acts in furtherance of final disposition of fetal remains. Because this provision does not impose any duty or penalty on Plaintiffs, Plaintiffs lack standing to challenge it.
- R.C. 3726.16 provides that other than 3705.20, “no conflicting provision of the Revised Code or conflicting procedure of an agency or board shall apply regarding a person who buries or cremates fetal remains in accordance with section 3726.15 of the Revised Code.” This provision also does not impose any duty or penalty on Plaintiffs, so they lack standing to challenge it.
- R.C. 3726.95 exempts the woman having the abortion from liability when the remains are not disposed of in compliance with this chapter. This provision also does not impose any duty or penalty on Plaintiffs, so they lack standing to challenge it.
- R.C. 3726.99 makes failure to dispose of fetal remains humanely a first-degree misdemeanor. As explained above, because R.C. 3726.02 has no operative effect until after surgical abortion has been completed, it does not conflict with the Amendment. Since the General Assembly can create a cause of action for a legal remedy for violation of a valid law, its enforcement is too. *See State v. Daniel*, 2023-Ohio-4035, ¶ 77.
- R.C. 4717.271 lists various requirements for crematory operators for the disposal of fetal remains. This provision also does not impose any duty or penalty on Plaintiffs, so they lack standing to challenge it.

Plaintiffs do mention some of the requirements and penalties created by these other statutes, but they have failed to demonstrate by clear and convincing evidence that any of these statutes facially discriminate against anyone seeking to exercise their primary right to have a surgical abortion or to help someone else obtain one. That failure forecloses any injunction of the

statutes here. Again, none of these statutes are even at issue because Plaintiffs have not put them at issue. To reiterate, nothing in the Motion or even the Complaint identifies any challenge to any of these provisions. The only law at issue in this case is R.C. 3726.02, as Plaintiffs themselves have said. If this Court determines however that R.C. 3726.02 violates the Amendment, the Court should limit its order to the statute alone. The State respectfully urges the Court not to prolong this case further with an overbroad injunction, so that this case can be closed once and for all.

CONCLUSION

For these reasons, the State Defendants respectfully request that the Court deny Plaintiffs' Motion for Judgment on the Pleadings.

Respectfully submitted,

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