IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*, *Plaintiffs,* v. OHIO DEPARTMENT OF HEALTH, *et al.*, *Defendants.*	Case No. A 2100870 Judge Alison Hatheway

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

S.B. 27—which forbids disposing of fetal tissue from a procedural abortion in the same way as all other tissue and instead requires that it be cremated or buried—runs head-first into Ohio's Reproductive Freedom Amendment because it discriminates against abortion patients and providers. Defendants admit that S.B. 27 imposes "special burdens" on Plaintiffs, State Defs.' Resp. to Pls.' Mot. for J. on the Pleading ("Opp'n") at 12, and do not contest that it treats fetal tissue from a procedural abortion differently than identical tissue from comparable health care services, like miscarriage management. They do not contest and therefore concede that they have the burden of demonstrating that an abortion restriction is "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Ohio Const., art. I, § 22(B)(2). They further concede that they have no constitutionally cognizable interest in S.B. 27 because the legislation was passed "to honor the unborn" and to "protect the dignity of human life," purposes that are not permissible under the Reproductive Freedom Amendment. Opp'n at 12. And by failing to raise the issue or identify any factual disagreements, Defendants implicitly acknowledge that no material facts remain in dispute and that the legal questions presented should be decided on the pleadings alone.

Knowing that S.B. 27 is textbook discrimination, Defendants argue that the Amendment does not apply—either because Plaintiffs lack standing or because the disposal of fetal tissue happens after an abortion. The former flies in the face of well-established standing doctrine, and the latter is a strained and unsupported reading of the Amendment's plain text. Defendants' fallback is to ask the Court to sever S.B. 27's provisions, but this rings equally hollow given that Defendants fail to cite—let alone apply—Ohio law governing severance. When properly applied, this law firmly closes the door to their severance argument.

S.B. 27 is an outdated abortion restriction that has no place in Ohio. Artificially limiting patients' decisions about the disposal of the tissue from their abortions, and forcing providers to dispose of this tissue differently than how they dispose of all other tissue, has nothing to do with patient health. For these and the reasons that follow, entry of judgment on the pleadings for Plaintiffs is appropriate in this case.

I. Plaintiffs Have Standing

Even before passage of the Reproductive Freedom Amendment, this Court held that Plaintiffs were likely to succeed in asserting third-party standing on behalf of their patients (albeit when considering different constitutional claims), pursuant to a long line of federal precedent and Ohio law. Third-party standing is appropriate where a claimant "(i) suffers its own injury in fact, (ii) possesses a sufficiently 'close relationship with the person who possesses the right,' and (iii) shows some 'hindrance' that stands in the way of the claimant seeking relief." *City of E. Liverpool v. Columbiana Cty. Budget Comm.*, 2007-Ohio-3759, ¶ 22, quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129–130 (2004). Plaintiffs meet each of these elements. *See* Entry Granting Pls.' Second Mot. for Prelim. Inj. at 3–5. If anything, the passage of the Reproductive Freedom Amendment has only strengthened Plaintiffs' third-party standing, for example by including explicit protections for

those, like Plaintiffs, who assist others in exercising their reproductive rights. *See, e.g.*, *Preterm-Cleveland v. Yost*, Franklin C.P. No. 24CV2634 at 3–5 (Oct. 29, 2024) (holding that plaintiffs challenging waiting period post passage of the Reproductive Freedom Amendment had traditional and third-party standing). Entry Granting Pls.' Second Mot. for Prelim. Inj. at 3–5.

Moreover, under the Amendment, Plaintiffs not only have third-party standing, but traditional, first-party standing as well. Defendants attempt to argue that Plaintiffs lack standing because they themselves are not attempting to exercise their right to abortion and because they are not harmed by S.B. 27. Opp'n at 3, 7–9. But the Amendment created a vehicle by which abortion providers can assert their own constitutional violations by providing an explicit right against State discrimination. Ohio Const., art. I, § 22(B) (State may not "directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against . . . [a] person or entity that assists an individual in exercising [their] right" to make and carry out their own decisions on abortion); *see also Cool v. Frenchko*, 2022-Ohio-3747, ¶ 29 (10th Dist.) (noting that standing may be conferred by statute); *State v. Beach*, 2021-Ohio-4497, ¶ 13 (10th Dist.) (observing that a newly enacted constitutional amendment, Marsy's Law, conferred standing on crime victims "where no such right existed before"). Defendants do not dispute that Plaintiffs are "person[s] or entit[ies] that assist[] an individual in exercising" their right to make "decisions on . . . abortion." Indeed, Defendants have acknowledged, as they must, that after the Amendment "'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.'" Opp'n at 7, quoting Supp. Br. of Appellants on Effect of Constitutional Amendment, *Preterm-Cleveland v. Yost*, No. 2023-0004 (Dec. 7, 2023).

Here, Plaintiffs more than meet the traditional standing requirements to bring claims under the Reproductive Freedom Amendment. "To succeed in establishing standing, plaintiffs must show

that they 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." *Moore v. Middletown*, 2012-Ohio-3897, ¶ 22. S.B. 27 forces Plaintiffs to dispose of fetal tissue from a procedural abortion differently than health care providers dispose of all other tissue, including taking on costs for such disposition and keeping the tissue for indeterminate periods of time if patients do not make an election about the tissue's disposition on pain of criminal, civil, and professional penalties. R.C. 3726.05, R.C. 3726.09. These harms are directly traceable to S.B. 27. Preventing Defendants from enforcing S.B. 27 would cure these harms. That is all that Plaintiffs need to show to assert standing to bring claims under the Reproductive Freedom Amendment.

II. The Reproductive Freedom Amendment Applies to S.B. 27

Defendants' main substantive arguments rise and fall on their claim that Ohio's Reproductive Freedom Amendment does not apply because S.B. 27 "deals solely with what happens *after* an abortion takes place" and therefore "can have no bearing on the making or carrying out of that reproductive decision." Opp'n at 2. Not only is Defendants' argument factually incorrect, but the temporal distinction they attempt to create is also immaterial to the Amendment's guarantees. Contrary to their assertions, the Amendment's plain text controls. Once the proper analysis is applied, it is clear that S.B. 27 discriminates against both abortion patients and the providers who assist them, and is therefore unconstitutional.

A. S.B. 27 affects patients' "decisions . . . on . . . abortion."

The Reproductive Freedom Amendment protects the "right to make and carry out one's own reproductive decisions, including . . . decisions on . . abortion." It prohibits the State from

"directly or indirectly" discriminating against a patient's exercise of that decisional autonomy.[1] That is precisely what S.B. 27 does. Defendants do not dispute that S.B. 27 removes patients' ability to dispose of the fetal tissue from their procedural abortions as they would tissue from any other procedure (including identical tissue from miscarriage management) and instead requires them to dispose of the tissue in a manner generally reserved for the disposal of human remains—cremation or burial. Nor do they dispute that abortion providers must explain this to patients seeking an abortion *before* the abortion and as part of the abortion decision-making process.[2] Opp'n at 2–3. Defendants also ignore that in order to provide procedural abortions at all, abortion providers must first have relationships in place with crematory operators and funeral homes to ensure the tissue's burial or cremation in accordance with S.B. 27. Defendants are thus simply wrong that S.B. 27 "does not become relevant until after the abortion is complete."[3] Opp'n at 2.

But, in any event, Defendants' attempt to erect a temporal distinction is deeply flawed. A few examples illustrate the point. Consider a law requiring every abortion patient's name to be published in the newspaper after they had an abortion. Such a requirement would plainly affect a

[1] Plaintiffs maintain that S.B. 27 also "burden[s], penalize[s], prohibit[s], interfere[s] with" the constitutional right to reproductive freedom and those who assist patients exercising that right. For purposes of this motion, however, Plaintiffs rely only on the "discrimination" clause.

[2] Specifically, Defendants note that under S.B. 27, patients must be informed of their "right" to choose between cremation or burial for their fetal tissue. State Defs.' Resp. to Pls.' Mot. for J. on the Pleading ("Opp'n") at 3. But Defendants fail to acknowledge that this "right" actually *limits* patient choice because these are the *only* disposition options available under the law. And this is a decision "on abortion," especially because it is a matter that the State forces abortion patients to confront as a condition of obtaining an abortion.

[3] And, of course, Defendants have not and could argue that this discrimination is "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Ohio Const., art. I, § 22(B). As Plaintiffs maintain, the State has no patient health interest in a law targeted at the disposition of fetal tissue following a procedural abortion, Pls.' Mot. for J. on the Pleadings at 13–14—nor have Defendants posited one. This is a separate question from whether S.B. 27 treats abortion patients differently based on their decisions "on abortion," or whether S.B. 27 facially discriminates against abortion providers.

person's decision on abortion. Yet, following the State's logic, such a requirement would fall outside the scope of the Amendment's protection for decisions on abortion because the publication does not occur until after the abortion. This argument makes a mockery of the people's overwhelming decision to enshrine protection for decisions on abortion in the Ohio Constitution.

B. S.B. 27 discriminates against patients "mak[ing] . . . decisions on . . . abortion," and against those who "assist [patients] exercising this right"

Unable to dispute the basic fact that S.B. 27 treats abortion providers and patients differently than those providing or receiving identical procedures, Opp'n at 2, Defendants grasp at straws by pointing to disparate areas of case law to argue that S.B. 27 can withstand constitutional scrutiny. Defendants reason that, although S.B. 27 discriminates "between" abortion patients and providers and patients and providers of other services, it doesn't discriminate "against them." Whatever the merits of this argument as a linguistic matter, it fails as a matter of fact. S.B. 27 indisputably discriminates *against* procedural abortion patients and providers because it treats them worse than other patients by restricting abortion patients' ability to dispose of the tissue in the same way as tissue from any other health care service would be handled. By removing or restricting patients' ability to make this "decision on . . . abortion," the State has "negatively" impacted only abortion patients. *Id*. at 3.

S.B. 27 also discriminates against Plaintiffs. Defendants admit that S.B. 27 imposes "'special burdens'" on abortion providers, Opp'n at 12, which would qualify as discrimination under their very own definitions, *see id.*, quoting *State ex rel. Doersam v. Indus. Comm.*, 45 Ohio St.3d 115, 119 (1989).[4] Defendants' chief complaint is that Plaintiffs "were not the targets of the

[4] Defendants attempt to further confuse the issue by waving around cherry-picked definitions from disparate areas of the law and claiming that these cases—not the plain text of the Amendment—are illustrative of voters' intent; indeed, several of the laws cited by Defendants appear to pertain only to Ohio's universities, *see* Adm.Code 3337-40-01 (Ohio University), Adm.Code 3349-7-10

bill." *Id.* In addition to being flatly untrue, as S.B. 27 specifically imposes penalties *only* on procedural abortion providers, Pls.' Mot. for J. on the Pleadings ("MJP") at 11–13, this is yet another shameless attempt by Defendants to move the goalposts. There is absolutely nothing in the Reproductive Freedom Amendment requiring Plaintiffs to show that they are "targets" of the bill they challenge under that constitutional protection. If there were any doubt, the Reproductive Freedom Amendment dispels it by prohibiting both "direct[] [and] indirect[]" discrimination. Imposing "special burdens" on Plaintiffs—on pain of steep criminal and civil penalties, no less—is surely, *at the very least*, a form of indirect discrimination. *See also supra* Section II.A.

Contrary to Defendants' assertions, finding that S.B. 27 discriminates against Plaintiffs honors the central purpose of the Reproductive Freedom Amendment. As discussed *supra* Section II.A, the Reproductive Freedom Amendment protects patients' decisional autonomy with regards to tissue disposition—these are "decisions on . . . abortion." And the Reproductive Freedom Amendment prohibits the State from passing laws that discriminate against abortion providers by "regulat[ing] and impos[ing] severe penalties for noncompliance only on abortion providers and facilities." Opp'n at 13. This reading is not "expansive"—it is entirely consistent with the plain text of the Amendment. A law that is targeted at and discriminates against both the abortion decision and the abortion providers who help patients exercising that decision is subject to the highest form of scrutiny under the Amendment. And the consequence of that scrutiny is not to

(Northeast Ohio Medical University), Adm.Code 3339-3-06 (Miami University). Opp'n at 11–12. But even if these definitions were relevant, all of them point to an understanding of "discrimination" as the act of treating one group less favorably than another, based on a shared characteristic. That is precisely what S.B. 27 does: it treats pregnant patients who decide to obtain a procedural abortion *worse* than any other health care patient by removing, only from this group, the ability to treat the tissue from their procedure as medical waste—as it is treated in every other comparable setting, including miscarriage management. It also treats abortion providers who help these patients *worse* by requiring them to have specific relationships in place to provide procedural abortion at all and by imposing "special burdens" on them. *Id.* at 12.

"prevent nearly all laws that regulate abortion clinics," *id*.—it is to demand that regulations actually further individual patient health.[5]

III. S.B. 27's Provisions Cannot Be Severed

Recognizing the weakness of their merits arguments, Defendants spend much of their opposition asking this Court to sever the cremation and burial requirement from the rest of S.B. 27's provisions, which are intimately tied to the underlying disposition requirement. *Id*. at 4. But in doing so, Defendants fail entirely to mention—let alone conduct—the applicable severability analysis under the three-part test established by *Geiger v. Geiger*, 117 Ohio St. 451 (1927), which demonstrates that the provisions are not severable. Relief against S.B. 27 in full is thus warranted regardless of whether S.B. 27's other provisions suffer from the same constitutional infirmity as the disposition requirement itself (though, as explained below, they do).

In *Geiger*, the Ohio Supreme Court articulated the now well-established three-part test to determine whether an unconstitutional statutory provision may be severed from the remaining portions of the law. *Geiger* directs courts to ask:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the

[5] Defendants also ignore that the standard articulated by the Reproductive Freedom Amendment is even more stringent than that under Ohio's Equal Protection Clause. Not only is it impermissible to discriminate against people making reproductive decisions; if such discrimination does occur—for example, "'[b]y the very nature of the … legislature,'" Opp'n at 12, quoting *State ex rel. Doersam v. Indus. Comm.*, 45 Ohio St.3d 115, 119 (1989), as Defendants propose—it can only be justified if the legislature "is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Ohio Const., art. I, § 22(B). Defendants have not even attempted to meet that burden here.

> constitutional part from the unconstitutional part, and to give effect to the former only?

Id. at 466 "A portion of a statute can be excised only when the answer to the first question is yes *and* the answers to the second and third questions are no." (Emphasis added.) *State v. Noling*, 2016-Ohio-8252, ¶ 35. Applying the *Geiger* test here clearly demonstrates that S.B. 27's other provisions regulating and/or restricting abortion must fall along with the unconstitutional disposition requirement because neither the first nor the second *Geiger* prongs can be satisfied.[6]

A. *Geiger* Prong One

The first prong of the *Geiger* test asks whether each part of the law "may be read and may stand by itself." *Geiger*, 117 Ohio St. at 466. In assessing this prong, Ohio courts look at the language of the statute to see whether—once the unconstitutional provision is struck—"each sentence of [the law] can stand by itself." *City of Cleveland v. State,* 2014-Ohio-86, ¶ 20. This prong is not satisfied where the "sentences depend[] on the other for any of its meaning." *Id*.

Here, when S.B. 27's disposition requirement is struck, the remaining provisions are emptied of meaning and therefore cannot stand on their own. Every provision of S.B. 27 either constitutes, contemplates, or expressly cross-references Chapter 3726, S.B. 27's new regulatory scheme for disposition of tissue from a procedural abortion at an "abortion facility." Absent the central, unconstitutional requirement that tissue from a procedural abortion be buried or cremated, these other provisions of S.B. 27 lack independent force.

S.B. 27's sections can be grouped into three general categories: (1) sections constituting the newly enacted Chapter 3726, which imposes or further effectuates the disposition

[6] The failure to satisfy these two prongs mean that the provisions of S.B. 27 are not severable, and the Court need not address the third prong.

requirement[7]; (2) sections that amend existing mandatory disclosure, reporting, rulemaking, and recordkeeping requirements to reflect the new requirement that tissue from a procedural abortion at an abortion facility be either buried or cremated[8]; and (3) a section imposing various obligations on "a crematory operator that cremates fetal remains *for an abortion facility under Chapter 3726*."[9] (Emphasis added.) Because all of these provisions logically depend upon S.B. 27's core requirement that fetal tissue from a procedural abortion at an abortion facility be either buried or cremated, R.C. 3726.02, none of these provisions can stand independently once that provision is struck. *City of Cleveland*, 2014-Ohio-86, ¶ 20.

Defendants attempt to flag certain provisions as capable of operating on their own, but without S.B. 27's disposition requirement, none of them makes sense. For example, R.C. 3701.341 requires the Ohio director of health to adopt "rules relating to abortions" and grants the director authority to enforce those rules by seeking an injunction against a violation or threatened violation of the rules. But S.B. 27 amended this provision to require the promulgation of rules that are "consistent with Chapter 3726" of the Revised Code, which of course was created by S.B. 27 and which the State itself characterizes as "regarding the disposition of fetal remains." *See Preterm-Cleveland v. Yost*, Hamilton C.P. No. A2203203, 2024 WL 4577118, at *19 (Oct. 24, 2024) (finding not severable a provision that "cannot stand on its own since it depends entirely upon its reference to the balance of S.B. 23 for any meaningful application").

[7] 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.

[8] R.C. 2317.56 (cross-referencing provisions of Chapter 3726); R.C. 3701.341 (cross-referencing Chapter 3726 in full); R.C. 3701.79 (cross-referencing provisions of Chapter 3726).

[9] R.C. 4717.271.

Defendants also cite R.C. 3726.11 as a potentially independent provision: S.B. 27 enacted this provision to require abortion facilities to maintain "documentation demonstrating the date and method of disposition of fetal remains from surgical abortions performed or induced in the facility." Opp'n at 16. This documentation requirement—along with the documentation and reporting requirements in R.C. 2317.56, R.C. 3701.79, R.C. 3726.04, R.C. 3726.041, R.C. 3726.042, R.C. 3726.10, R.C. 3726.12, and R.C. 3726.13—serves no purpose other than to facilitate enforcement of the disposition requirement in R.C. 3726.02. *Compare Preterm-Cleveland*, 2024 WL 4577118, at *16 ("[I]t makes no sense to require the reporting of information under other sections if those other sections are themselves unconstitutional.").[10]

R.C. 3726.05, which prevents abortion providers from releasing the tissue from a procedural abortion until they obtain "a final disposition determination," and R.C. 3726.09, which provides that abortion providers must pay for the burial or cremation of tissue from a procedural abortion unless the patient elects "a location for final disposition other than one provided by the abortion facility," likewise are predicated on the assumption that a patient's only disposition options are burial and cremation and that the abortion provider is bound to facilitate that disposition. Once the unconstitutional disposition requirement is struck, these provisions must fall, too.[11]

[10] Likewise, the definitions added by R.C. 3726.01 are not severable because they were enacted as part of Chapter 3726 "so that the terms could be used in the operative provisions also being added by [S.B. 27]," and therefore they "become meaningless" and "superfluous" once the "operative provisions are enjoined." *Preterm-Cleveland v. Yost*, Hamilton C.P. No. A2203203, 2024 WL 4577118, at *17–18 (Oct. 24, 2024). Provisions concerning liability for violations of Chapter 3726, *see* R.C. 3726.15; R.C. 3726.16; R.C. 3726.95; R.C. 3726.99, are similarly superfluous once the substantive disposition requirement is struck.

[11] Defendants do not analyze R.C. 3726.03 as a matter of severability, arguing instead that it "expands a woman's right to make decisions about her reproductive health" by granting patients the "right" to choose between the only two disposition methods that the State permits for tissue from a procedural abortion. Opp'n at 3, 20. Setting aside that R.C. 3726.03 facially violates the

Contrary to Defendants' suggestion, Opp'n at 18–22, the Court need not separately consider the constitutionality of each provision of S.B. 27 because, as explained above, they are all designed to effectuate the discriminatory disposition requirement and must therefore be enjoined along with it. *See State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs*., 2012-Ohio-4837, ¶¶ 40–41. But if the Court *did* separately analyze the constitutionality of these provisions, it is clear that all of the provisions facially discriminate against abortion patients and providers because they apply only to tissue from procedural abortions and not to identical tissue from miscarriage management. All of these provisions self-evidently discriminate against procedural abortion, as they are all part of a larger statutory framework that singles out tissue from a procedural abortion for unique—and uniquely onerous—regulation. As explained in Plaintiffs' opening brief, patients' decisions about pregnancy tissue resulting from other gynecological care are not limited in this way, even when the tissue and (in the case of miscarriage management) the procedure itself is identical. MJP at 12. Because S.B. 27 *in its entirety* therefore violates the Reproductive Freedom Amendment's anti discrimination clause, Plaintiffs have sought relief against S.B. 27 as a whole. *See, e.g.,* Second Am. Compl. for Declaratory & Injunctive Relief at 12–25 (describing the entire scheme of S.B. 27 and its effects on patients and on Plaintiffs); Opp'n

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Reproductive Freedom Amendment by prescribing the disposition options for procedural abortion patients alone, *see infra* Section III.B., this provision cannot stand without R.C. 3726.02's unconstitutional requirement that all tissue from a procedural abortion be either buried or cremated: if that disposition requirement falls and patients may in fact decide between a broader range of disposition options, which would include treating the tissue like all other medical tissue, then the information presented to patients by R.C. 3726.03 is incomplete because it is limited to only burial and cremation. *See State ex rel. Maurer v. Sheward,* 71 Ohio St. 3d 513, 523 (1994) ("In order to sever a portion of a statute, we must first find that such a severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part."); *State ex rel. Sunset Estate Properties v. Village of Lodi*, 2015-Ohio-790, ¶ 17 ("Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?").

at 14 (quoting Plaintiffs' allegation that "S.B. 27, discriminates against abortion patients, providers, and facilities by singling out tissue from procedural abortion for restrictive disposal requirements." (quoting MJP at 1)).

B. *Geiger* Prong Two

While failure at *Geiger* prong one suffices to resolve the severability analysis here, failure at prong two provides an additional, independent basis to enjoin S.B. 27 in full.

The second prong of the *Geiger* test asks whether the unconstitutional provision is "so essentially connected with the remainder of [the statute] that, if eliminated, the statute loses its intent." *State v. Hochhausler*, 76 Ohio St.3d 455, 465 (1996). Ohio courts will not sever the unconstitutional provision from a bill where "the unconstitutional part of [the bill] is so connected to the general scope of . . . [the] entire legislation as to make it impossible to give effect to the apparent intention of the General Assembly if that part is stricken." *State ex rel. Whitehead*, 2012-Ohio-4837, ¶ 37. This prong alone is also sufficient to resolve the severability analysis here.

The purpose of S.B. 27 is to require tissue from a procedural abortion to be disposed of by burial or cremation. The text of S.B. 27 itself characterizes the bill as "an act . . . to impose requirements on the final disposition of fetal remains from surgical abortions." And in the Ohio Revised Code, Chapter 3726 is titled "Disposition of Fetal Remains from Abortions." *See, e.g.*, *City of Middletown v. Ferguson*, 1985 WL 8660, at *9 (12th Dist. Apr. 29, 1985), *aff'd*, 25 Ohio St.3d 71 (1986) ("A reading of the ordinance's title also suggests such a legislative purpose."). Notably, S.B. 27 does not contain a severability clause—evidence that the legislature intended the bill's separate sections to work together as a whole.

The disposition requirement in R.C. 3726.02 anchors the intent motivating the whole statutory scheme, and it is too connected to the remainder of S.B. 27's provisions to be severed.

Considering specific provisions of S.B. 27 makes this clear. As explained above, the first category of S.B. 27 provisions, comprising the newly enacted Chapter 3726, is entirely concerned with ensuring that abortion providers dispose of tissue from a procedural abortion by either burial or cremation, and that patients obtaining a procedural abortion are confronted with those two specific disposition options (and no others).[12] All of Chapter 3726's other provisions are logically predicated on the existence of R.C. 3726.02's disposition requirement, which Defendants acknowledge as the "core provision" of S.B. 27, Opp'n at 1. *See, e.g.*, R.C. 3726.03 (providing that procedural abortion patients have the "right" to decide between cremation and burial—the only two disposition options permitted by R.C. 3726.02—for the disposition of the tissue from their abortion, as well as the location of final disposition); R.C. 3726.04 (providing that if a procedural abortion patient makes a determination between burial and cremation, they must do so in writing and must clearly indicate the method and location of final disposition); R.C. 3726.041 (requiring that procedural abortion patients carrying more than one "zygote, blastocyte, embryo, or fetus" must complete a separate disposition determination form for each); R.C. 3726.12 (requiring the "abortion facility" to "have written policies and procedures regarding cremation or interment of fetal remains from surgical abortions performed or induced in the facility"); R.C. 3726.99 (establishing criminal penalties for violations of the new provisions added by S.B. 27). In short, Chapter 3726's other provisions are so clearly dependent on the existence of R.C. 3726.02's disposition requirement that the Ohio legislature must have intended them to rise and fall together. *State ex rel. Whitehead*, 2012-Ohio-4837, ¶ 37.

[12] 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.

Similarly, the provisions in the second category, amending existing mandatory disclosure, recordkeeping, reporting, and rulemaking requirements to reflect Chapter 3726's new burial or cremation requirement, would be neither necessary nor functional if the disposition requirement itself were excised.[13]

Finally, R.C. 4717.271, the sole section in the third category, imposes various obligations on crematory operators that cremate tissue "*for an abortion facility under Chapter 3726.*" (Emphasis added.) Absent the disposition requirement in R.C. 3726.02 and the other effectuating provisions in Chapter 3726, there would be no need to impose these specific additional obligations on crematory operators, who are already regulated by other sections of the Ohio Revised Code, Chapter 4717.

All provisions of S.B. 27 thus depend on the existence of the disposition requirement, R.C. 3726.02, which, for procedural abortion patients *only*, limits patients' disposition options to the only two methods the State deems acceptable—burial or cremation. None of the provisions would make sense without that underlying "core provision." *See State ex rel. Whitehead*, 2012-Ohio-4837, ¶¶ 40–41 (enjoining as not severable separate statutory provisions enacted as part of a single bill because an otherwise constitutional "portion of the enactment is inseparably connected to the unconstitutional part of [the bill]"); *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F.Supp.2d 765, 804 (N.D.Ohio 2004) (holding that a provision could not be severed under the *Geiger* test because excising the unconstitutional provision would "fundamentally disrupt the current statutory scheme"); *see also Noling*, 2016-Ohio-8252, ¶ 40 (finding severance is proper under the second

[13] R.C. 2317.56 (cross-referencing provisions of Chapter 3726); R.C. 3701.341 (cross-referencing Chapter 3726 in full); R.C. 3701.79 (cross-referencing provisions of Chapter 3726).

prong because "the purpose of the statute is to outline the procedure for postconviction DNA testing, and the purpose of this specific [unconstitutional] section is to describe appellate rights").[14]

* * *

Applying Ohio's severability test therefore leads to the unavoidable conclusion that all of the remaining abortion restrictions in S.B. 27 are "so essentially connected" with the disposition requirement in R.C. 3726.02 that they cannot be severed and must be enjoined alongside that core provision. *Hochhausler*, 76 Ohio St.3d at 464–465.

CONCLUSION

This Court should grant Plaintiffs' motion for judgment on the pleadings because S.B. 27 is unconstitutional as a matter of law.

[14] To the extent Defendants are arguing that Ohio law precludes this Court from invalidating all of the statutory provisions amended in or created by a single bill, *see* Opp'n at 17, they present no support. In cases like *State ex rel. Whitehead v. Sandusky*, the Ohio Supreme Court has affirmed relief against multiple statutes enacted as part of a single bill after conducting the *Geiger* severability analysis. *See* 2012-Ohio-4837, ¶¶ 40–41. Indeed, the sole case Defendants appear to rely on for this proposition, *City of Toledo v. State*, merely holds that a court cannot enjoin the legislature from enacting new laws and that the trial court has no authority to enjoin a statute that has not been challenged by the plaintiffs. 2018-Ohio-2358, ¶ 32. Because Plaintiffs challenged all of the provisions contained within S.B. 27 in this case, this Court is well within its power to enjoin all of those provisions.

Dated: December 13, 2024

Respectfully submitted,

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*Application for *pro hac vice* granted

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2024, the foregoing was electronically filed via the Court's e-filing system and served on counsel for all Defendants via email.

/s/ Hannah Swanson
Hannah Swanson