IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORPORATION, *et al.*, *Plaintiffs*, v. VANDERHOFF, *et al.*, *Defendants.*	Case No. A 2200704 Judge Alison Hatheway

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Defendants have effectively conceded that it was appropriate for this Court to enter a Temporary Restraining Order ("TRO") to stop Defendants' outlandish attempts to enforce SB 157 prior to its effective date. Defs.' Resp. Opp. Pl.'s Mot. Prelim. Inj. 16–17 ("Opp. Br."). Defendants further insist that "[a]s a result of this Court's injunction, the Dayton Clinic qualifies as a facility that was granted a variance, and therefore * * * meaningful relief is afforded the Dayton Clinic under the law it seeks to enjoin." *Id.* And yet, Defendants *have not* granted Plaintiff Women's Med Dayton's ("WMD") variance request. They *have not* rescinded their letter threatening Plaintiff with license revocation based solely on noncompliance with SB 157. And when Plaintiff's attorney reached out to seek an agreement to extend the current injunction through June 21, 2022, the compliance date set forth in the statute, Defendants declined to enter such an agreement. The *only* thing preventing Defendants from taking action that they themselves acknowledge would be in conflict with the law is the TRO currently in place. Thus, in order to prevent constitutional, business, financial and other harms to Plaintiff and its patients,

this Court must enter an order enjoining Defendants from revoking or refusing to renew Plaintiff's ambulatory surgical center ("ASF") license or otherwise preventing Plaintiff from providing procedural abortion care for reasons related to noncompliance with SB 157 until at least June 21, 2022.

ARGUMENT

Premature enforcement of SB 157 would violate Plaintiff's due process rights. Defendants do not deny that. While Defendants take issue with the strength of due process rights under the Ohio Constitution, they cannot deny that WMD has property and liberty interests in its license, the continued operation of its business, and its staff's ability to pursue their professions, and that depriving Plaintiff of those interests without due process would violate its rights. Instead of defending their actions on the merits, Defendants argue that this Court lacks the power to stop their unconstitutional deprivation of Plaintiff's property and liberty interests. But just as Defendants' actions have been indefensible, so too is their argument that this Court lacks jurisdiction. Contrary to their suggestion, Defendants must abide by the Constitution, which this Court has a duty to enforce. Defendants also insist Plaintiff start this claim in administrative court, but concede that the administrative court does not have the authority to resolve constitutional issues. Finally, venue in Hamilton County is appropriate because both Plaintiffs are subject to and allege constitutional defects of SB 157 in the Complaint, which is the only pleading relevant to venue, and Plaintiff Planned Parenthood of Southwest Ohio ("PPSWO") is located in Hamilton County. That Defendants chose to begin their unconstitutional premature enforcement of SB 157 with WMD—thus necessitating the instant motion—does not mean that venue here is lacking.

I. Defendants' Premature Enforcement of SB 157 Violates Plaintiff's Due Process Rights.

A. Defendants Concede that Enforcing SB 157 Prior to June 21, 2022 Would Violate the Law.

Plaintiff asked this Court to enjoin Defendants from revoking or refusing to renew Plaintiff's license or otherwise preventing Plaintiff from providing surgical abortion care for reasons related to noncompliance with SB 157 prior to June 21, 2022. Pl.'s Mot. for TRO Prelim. Inj.; Req. for Hr'g 1. As Defendants now concede, the Court's TRO requires Defendants to act consistently with the terms of SB 157 by enjoining them from enforcing the law against WMD until at least 90 days after its effective date. Opp. Br. 16–17. It seems that both parties agree that Defendants cannot enforce SB 157 prior to June 21. *Id.* Yet, Defendants refuse to bind themselves to this position and insist—incorrectly—that they have the unreviewable power to deprive Plaintiff of its constitutionally protected property and liberty interests. Opp. Br. 6–10. Given the circumstances, Plaintiff cannot trust that Defendants will not follow through with their proposed revocation of WMD's license or otherwise take action that would prevent WMD from providing procedural abortion care. Defendants must be enjoined from doing so.

Defendants' characterization of Plaintiff's request as "moot" because SB 157 is now in effect, Opp. Br. 16–17, ignores Plaintiff's actual request, the resulting injunction, and the text of the challenged statute. While it is true that SB 157 went into effect on March 23, 2022, it is undisputed that, by the terms of SB 157, Plaintiffs have an additional 90 days, or until June 21, 2022, to comply with it. *Id*. That is over two months from now. Any enforcement of this law before that date would be unconstitutionally premature in the same way and for the same reasons that enforcement before the effective date was unconstitutionally premature.

B. Defendants' Actions Violate Plaintiff's Due Process Rights.

Defendants' actions clearly violate Plaintiff's due process rights by prematurely enforcing SB 157 prior to June 21, 2022. Defendants offer no justification for this constitutional violation, and they avoid engaging directly with the blatantly irrational and arbitrary character of their actions. Instead, Defendants prefer to argue against unambiguous Ohio precedent and obscure what is at issue in this case. Plaintiff has well-established protected property and liberty interests under Ohio law. But for the intervention of this Court, Defendants will violate Plaintiff's due process rights.

Under Ohio law, Plaintiff has three distinct property and liberty interests that are impacted by SB 157: its license, the continuation of its business, and its staff's pursuit of their chosen professions. Pl.'s Mem. Supp. Mot. TRO Prelim. Inj. ("Opening Br.") 9–10. Defendants concede that Plaintiff has a property interest under the Ohio Constitution in its staff pursuing the professions of their choosing. Opp. Br. 21. Defendants also concede that Plaintiff's staff have protected property interests in the pursuit of their chosen profession under the federal due process standard. Opp. Br. 19–20. Defendants dispute, however, that these federally protected liberty interests are protected under the Ohio Constitution. Opp. Br. 21. While Defendants claim that Ohio's constitutional due process protections fall short of its federal counterpart, their own analysis betrays them. Indeed, the Ohio Constitution is not bound to walk in lockstep with the federal courts—it can grant "greater civil liberties" than the federal Constitution. Opp. Br. 18–19. Rather than standing in stark contrast to federal constitutional protections, as Defendants claim, Opp. Br. 21, the Ohio Constitution provides protections that are "stronger than" the

federal standard.[1] Opp. Br. 18 (quoting *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11). As this Court has recognized, Plaintiff has clear property and liberty interests at stake in the face of premature enforcement of SB 157. *See* Entry Granting Pl.s' Mot. for Prelim. Inj., *Planned Parenthood Sw. Ohio Region v. Dep't of Health*, Hamilton C.P. No. A21 00870, 6 (Apr. 05, 2021) (attached to Opening Br. as Exhibit 5); *see also Stone v. City of Stow*, 64 Ohio St.3d 156, 160–163, 593 N.E.2d 294 (1992).

In seeking to deprive Plaintiff of its property and liberty interests based on noncompliance with a law that is not yet in effect, Defendants failed to provide any process at all. Troublingly, Defendants do not dispute this and seem to suggest that this complete lack of process is justified because their premature enforcement action constitutes an exercise of the State's police power. Opp. Br. 21. However, Defendants admit that police power only comes into play when the Legislature deems the exercise of such power appropriate. *Id.* That has not happened here. The text of the statute itself indicates that the Ohio General Assembly determined that Plaintiff should have until June 21, 2022, to come into compliance with SB 157. Moreover, Defendants have yet to offer *any* explanation of how their actions relate to the public health and general welfare of Ohioans, much less an explanation that could justify flouting the General Assembly's policy directive and unconstitutionally depriving Plaintiff of the opportunity to comply with SB 157's requirements. Defendants' premature enforcement would deprive Plaintiff

[1] Defendants' argument, Opp. Br. 17–21, that Ohioans have no right to obtain or perform abortion under the state Constitution is incorrect and contrary to the findings of this Court. Opening Br. 13 n. 7 (citing cases). Moreover, Plaintiff's property interests in its business license, the continued of operation of its business, and the ability of its staff to continue in their chosen profession are not dependent on Plaintiff's status as an abortion provider and thus do not impact the procedural due process claim at all.

of its interests with no process whatsoever, clearly violating procedural due process protections under the Ohio Constitution.

Further, Plaintiff has been subject to irrational and arbitrary actions by the State in violation of its substantive due process rights. *See* Opening Br. 12–14. Defendants do not deny this, and seemingly concede that their actions should be subject to, at least, rational basis review, but then do not even attempt to explain their premature enforcement actions. Instead, they argue that Plaintiff is "[w]ithout a right to assert under Ohio law." Opp. Br. 22. As already established, Plaintiff has liberty and property interests at stake here. Regardless of whether those interests are deemed "fundamental,"[2] Plaintiff cannot be deprived of them without due process or as a result of an arbitrary and irrational use of official power. Opening Br. 14. Thus, by prematurely enforcing SB 157 before June 21, 2022, Defendants violated Plaintiff's substantive and procedural due process rights.

The intervention of this Court was and remains necessary to prevent Defendants from violating Plaintiff's due process rights.

II. This Court has Jurisdiction and Venue Is Proper in Hamilton County.

Unable to defend its actions on the merits, Defendants argue both that *no court* has jurisdiction to enjoin Defendants from taking these unconstitutional actions and that this Court, specifically, lacks such jurisdiction and is an improper venue. These arguments are easily disposed of. The Department of Health is not above the law. The administrative court cannot resolve constitutional questions. And Plaintiffs—including PPSWO, which is located in

[2] Plaintiff maintains that it does have a fundamental interest at stake and thus Defendants' actions are subject to strict scrutiny. Opening Br. 13 n. 7 (citing cases). But because Defendants have absolutely no rational basis for their premature enforcement action, the Court need not reach this question.

Hamilton County—have alleged that SB 157 violates their own and their patients' constitutional rights. For all of these reasons, this Court has jurisdiction to enjoin Defendants from enforcing SB 157 until at least June 21, 2022 and is a proper venue.

A. This Court Is Well Within Its Power to Vindicate Plaintiff's Due Process Rights.

Plaintiff has established property and liberty interests in its license, the continuation of its business and the ability of its staff to continue in their chosen profession.[3] Plaintiff's motion seeks to enjoin Defendants from revoking or refusing to renew Plaintiff's license or otherwise preventing Plaintiff from providing procedural abortion care. Contrary to what Defendants suggest, Opp. Br. 6, nowhere in the motion does Plaintiff demand that Defendants grant Plaintiff's variance request. Thus, Defendants' argument, Opp. Br. 6–9, that this Court lacks subject matter jurisdiction over the issuance or denial of a variance is inapposite.

To the extent the variance denial is functionally equivalent to the revocation or refusal to renew an ASF license, then Defendants' argument that this Court lacks jurisdiction over the variance decision is also inaccurate. As established in Plaintiff's opening brief and further elaborated on above, Plaintiff has property and liberty interests in its license, the continuation of its business, and the ability of its staff to continue in their chosen profession. If the denial of the variance alone deprives Plaintiff of these interests, then the variance denial is subject to due

[3] Defendants' argument, Opp. Br. 14–16, that Plaintiff "lacks standing to challenge SB 157 on behalf of its patients" is both inaccurate and inapposite. Decades of precedent, and this Court itself, have confirmed, "[t]hird-party standing is available in Ohio courts in circumstances like these." Entry Granting Pl.'s Mot. for a Prelim. Inj., *Planned Parenthood Sw. Ohio Region v. Ohio Dep't of Health,* Hamilton C.P. No. A 2101148, 5 (Apr. 20, 2021) (attached to Opening Br. as Exhibit 8)*; see also June Med. Servs. L.L.C. v. Russo*, ___ U.S. ___, 140 S. Ct. 2103, 2118, 207 L.Ed.2d 566 (2020) (plurality opinion); *id.* at 2139, n. 4 (Roberts, C.J., concurring). Further, in this motion Plaintiff asserts only its own due process rights, not those of its patients. Thus, the Court need not address this issue in resolving this motion.

process constraints. Indeed, there is no case, federal or state, that says otherwise. In *Women's Medical Professional Corp. v. Baird*, the Sixth Circuit found that Plaintiff had a property interest in its license and a variance was not a necessary prerequisite for a license.[4] 438 F.3d 595, 599, 610–612 (6th Cir. 2006). In previous state court cases involving the issue, courts found that the variance decision was not reviewable. But, as Defendants agree, Opp. Br. 12, questions of whether this system survives a due process analysis were not even before, let alone decided by, those courts. *Capital Care Network of Toledo v. Ohio Dep't of Health*, 2018-Ohio-440, 153 Ohio St. 3d 362, 106 N.E.3d 1209, ¶ 31 (declining to address constitutional issues); *Women's Med Center of Dayton v. State Dep't of Health*, 2019-Ohio-1146, 133 N.E.3d 1047, ¶ 56 (2d Dist.) (same).

Finally, Defendants assert—without argument—that their role in protecting the health and safety of Ohioans place them above the law here. *See, e.g.*, Opp. Br. 10, 26. Not only do they fail to cite a single case that would support such an unprecedented power grab, they do not even attempt to explain how SB 157 protects the health and safety of Ohioans. The idea that this law—which *prohibits* some doctors from working with abortion clinics in the rare event that a patient might require hospital care—serves to protect the health and safety of patients cannot withstand even the slightest scrutiny. Further, the only evidence in the record shows that Plaintiff has been providing safe, high-quality abortion care for decades. Aff. W.M. Martin Haskell, M.D. Supp. Pl.'s Mot. TRO & Prelim. Inj. (attached to Opening Br. as Exhibit 1) ¶¶ 5–13. Defendants'

[4] Ohio's licensing framework has changed since *Baird*. At the time of *Baird*, clinics were required to have a written transfer agreement ("WTA"), a waiver from the WTA requirement or a variance from the WTA requirement to obtain or maintain an ASF license. *Baird* at 599. Since *Baird*, Ohio eliminated the waiver possibility, thus clinics must have either a WTA or a variance from the WTA requirement to obtain or maintain a license. *See* R.C. 3702.303. No court, state or federal, has reviewed the constitutionality of this framework since the law changed.

argument that they have unreviewable authority to deprive Plaintiff of its property and other interests through premature enforcement of a law would be specious under any circumstances and is even more so here where the underlying law itself likely has constitutional defects.

B. The Administrative Court Lacks the Authority to Resolve Constitutional Issues.

Perhaps intuiting that asserting completely unreviewable authority is likely a bridge too far, Defendants suggest that Plaintiff should be required to take its complaint to administrative court. But, as Defendants freely admit, "state administrative hearing officers cannot rule on constitutional issues* * *." Opp. Br. 12 (citing cases). On this, Defendants are entirely correct. *Id*.; *see also Women's Med Center of Dayton v. Dep't of Health*, 2019-Ohio-1146, 133 N.E.3d 1047, ¶ 56 (2d Dist.) (explicitly declining to reach constitutional issues "because ODH had the authority to revoke [WMCD's] license based on" lack of variance alone). As Plaintiff explained it its opening brief and at the TRO hearing, the administrative process cannot provide adequate relief here. Opening Br. 14 n. 8. Thus, engaging in the administrative process is a vain act and not a necessary prerequisite for relief from this Court. *See e.g. Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990) (appellee participation in the administrative process is not required where "the administrative body lacks the authority to grant the relief he sought* * *"); *Herrick v. Kosydar*, 44 Ohio St. 2d 128, 130, 339 N.E.2d 626 (1975) (not requiring exhaustion where administrative proceedings would be "futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts" and "[a]dministrative proceedings could not provide or even consider the relief sought by these plaintiffs."); *Kaufman v. Vill. of Newburgh Heights*, 26 Ohio St.2d 217, 220, 271 N.E.2d 280 (1971) (declaratory judgment action allowed where there was "no effectual or adequate administrative remedy * * * available to the appellee"); *Gates Mills Inv. Co. v. Vill. of Pepper Pike*, 59 Ohio App.2d 155, 392 N.E.2d 1316

(8th Dist. 1978) (court should decide the merits when there is no serviceable administrative remedy).[5]

Further, while Defendants say it is *possible*—though, they note, not guaranteed—that engaging in the administrative process *might delay* some harm, Opp. Br. 25–26, they stop short of saying that the administrative process will result in the outcome that the Constitution requires here.[6] Indeed, the opposite is true. As Defendants assert in their brief multiple times, the denial of a variance is not reviewable. Opp. Br. 6–10. When reviewing Defendants' action to revoke the license of a facility without a WTA, the only issue the administrative court has the authority to review is whether a variance was granted or denied. *Women's Med Center of Dayton v. Dep't of Health*, 2019-Ohio-1146, 133 N.E.3d 1047, ¶ 55 (2d Dist.) ("Since WMCD did not have a WTA or a variance from the requirement to have one, ODH was entitled to '[r]evoke, suspend, or refuse to renew the license' pursuant to Ohio [law]."). If the variance was denied for whatever reason—constitutional or not—the license revocation will be upheld. *Id.* ¶ 56. Thus, administrative courts can neither address the constitutional issue nor provide the relief to which Plaintiff is entitled. Defendants' insistence that Plaintiff pursue the administrative process amounts to a request that this Court force Plaintiff to waste time and resources on a process that

[5] Moreover, as "the Supreme Court of Ohio and this court have clarified[,]" even when administrative remedies are adequate and available—and they are not here— "a party's failure to exhaust available administrative remedies is not a jurisdictional defect." *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 07AP-261, 2007 WL 3148684, ¶ 24 (Oct. 30, 2007) (quoting *Jones v. Vill. of Chagrin Falls,* 77 Ohio St.3d 456, 462, 1997-Ohio-253).

[6] Defendants forcing Plaintiff into administrative court through threatening to revoke its license for noncompliance with a law that, by its own terms, does not apply, violates Plaintiff's due process rights in and of itself and would constitute irreparable constitutional harm. *See* Opening Br. 15 (citing cases).

holds no prospect of relief and will land Plaintiff exactly where it is today—in the Common Pleas Court, the only tribunal that can review Plaintiff's constitutional claims.[7]

C. Venue in This Court is Appropriate.

Finally, Defendants argue that, if Plaintiff is allowed to bring a claim at all, it must bring it in the Montgomery County Common Pleas Court because PPSWO is not a proper Plaintiff. This argument borders on frivolous. Defendants do not deny that both Plaintiffs must comply with SB 157. Indeed, Defendants have already demanded that both Plaintiffs prove their compliance with SB 157 despite the fact that, by its own terms, compliance with S.B. 157 is not required until June 21, 2022. Indeed, Defendants' entire venue argument centers on a misreading of one sentence in a letter sent by PPSWO's attorney in response to Defendants' completely inappropriate demand that it show compliance with SB 157 months before such compliance is required. Opp. Br. Ex. A. Defendants' argument and their Motion to Dismiss disregards standing doctrine and the Ohio Rules of Civil Procedure.[8] Because PPSWO has standing to bring this case and is located in Hamilton County, venue is appropriate.

PPSWO clearly has standing to bring this case. Jurisdiction is based on the Complaint. *See Fed. Mgt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 398, 738 N.E.2d 842 (10th Dist.2000) (citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182

[7] Further, not only is going through an administrative process that cannot resolve the constitutional issue or provide adequate relief neither necessary nor required here, such a process would provide no benefit to the Court. While it is true that administrative review can sometimes allow a court to benefit from agency experience and expertise or assist in compiling a record to aid in judicial review, that is not the case here. The Court already has all the information necessary to rule on this motion and Defendants have not suggested otherwise.

[8] In the alternative, Defendants move for summary judgment against PPSWO. Plaintiffs note that Defendants' argument that this Court lacks jurisdiction to decide this case seems, at minimum, inconsistent with its request for summary judgment. But, as Plaintiffs have at least 28 days from the time it was filed to respond to Defendants' motion, Plaintiff limits its argument here to the overlapping issues that apply to both motions.

(1995)). In the Complaint, PPSWO alleges that "[b]ecause PPSWO's current variance relies on backup doctors who would be disqualified under SB 157, PPSWO is in danger of ODH denying its variance and revoking its ASF license if SB 157 is enforced." Compl. ¶ 20. Further, in declarations filed in support of the instant motion, PPSWO states that it is "working *to attempt to comply* with SB 157" and that "PPSWO's current variance relies on backup doctors that would be disqualified under SB 157, so PPSWO is in danger of ODH rescinding its current variance and revoking its ASF license if ODH goes further down the path of prematurely enforcing SB 157 against PPSWO and failing to allow it the time to which it is statutorily entitled to come into compliance." Aff. Kersha Deibel Supp. Pl.'s Mot. TRO & Prelim. Inj. (attached to Opening Br. as Exhibit 3) ¶¶ 23–24 (emphasis added). Clearly, PPSWO has an injury in fact caused by Defendants' enforcement of this law that would be redressed if the law was declared unconstitutional and/or enforcement of the law was enjoined.[9] Whether or not PPSWO joined this motion is irrelevant to the standing question.

Because PPSWO plainly has standing and will not be dismissed from this lawsuit, venue in Hamilton County is appropriate. "[I]f there are multiple plaintiffs and/or multiple defendants and venue is proper as to any one or more of the parties in any county * * * that becomes the proper forum." *Varketta v. Gen. Motors Corp.*, 34 Ohio App.2d 1, 7, 295 N.E.2d 219 (8th Dist.1973). Ohio Civil Rule 3(F) states that "[i]n any action, brought by one or more plaintiffs

[9] Further, both Plaintiffs also alleged that "SB 157 will require [their] staff to spend many hours that would otherwise be spent on patient care attempting to identify, recruit, contract with, and maintain new backup doctors who comply with SB 157's medically unnecessary requirements. And they must do so on an annual basis, or more frequently, as part of the annual variance process and any time a backup doctor resigns or succumbs to anti-abortion harassment." Compl. ¶ 19–20. These allegations—which must be taken as true for the purposes of a motion to dismiss—constitute sufficient injury to confer standing and would be sustained even if one or both Plaintiffs were able to find backup doctors that Defendants judged to be qualified under SB 157.

against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief." PPSWO alleges constitutional, business, financial and other harms on behalf of itself and its patients. It is therefore a proper plaintiff before this Court.

CONCLUSION

Because Defendants' premature enforcement of SB 157 would violate Plaintiff's due process rights and cause harm to Plaintiff, Plaintiff's patients and the general public, and because the vindication of constitutional rights is always in the public interest, this Court should grant Plaintiff's Motion for Preliminary Injunction and enjoin Defendants from revoking or refusing to renew Plaintiff's ASF license or otherwise preventing Plaintiff from providing procedural abortion care for reasons related to SB 157 until at least June 21, 2022.

Dated: April 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 8, 2022, a copy of the foregoing was electronically filed via the Hamilton County Court of Common Pleas' e-filing system. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

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