IN THE COURT OF COMMON PLEAS
FOR HAMILTON COUNTY, OHIO

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS'SECOND MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This Court should deny the instant motion because Plaintiffs cannot show that they have a substantial likelihood of success on the merits of their claims. Plaintiffs do not have a property interest in their licenses, nor do they have a fundamental liberty interest in the continued operation of their businesses or professions. Ohio has never recognized any of the state constitutional right claimed here, and the scant authority provided in Plaintiffs' motion again only considered rights protected by the Federal Constitution. 2d Mot. PI at 17-18.

But even if they did have a property interest in their licenses, Plaintiffs have absolutely no property interest in a variance. To wit, Plaintiffs have no right to a variance at all because it is a "discretionary, optional, elective, and permissive decision" entrusted to Director Bruce Vanderhoff ("Director") of the Ohio Department of Health ("Department"). *Women's Med Ctr. of Dayton v. State Dept. of Health*, 2019-Ohio-1146, 133 N.E.3d 1047, ¶ 54 (2d Dist.) ("the [trial] court properly concluded that it lacked jurisdiction to address the variance [denial] issue."). Because the

section of SB 157, specifically 3702.305 ("Variance Statute"), at issue here deals solely with a variance, and implicates no fundamental rights, then it need only survive rational basis review.

Ohio's Constitution, adopted in 1851, did not enshrine a right to abortion. We know this because the Ohioans of that era viewed abortion as a crime, not a right. Ohio enacted a law in 1834 declaring that "any attempt to abort a pregnant woman unless necessary to preserve her life, actually or in the opinion of two doctors, to be a misdemeanor. Any attempt after quickening 'with intent thereby to destroy such child' was a high misdemeanor punishable by up to seven years imprisonment." Loren G. Stern, *Abortion: Reform and the Law,* 59 J. Crim. L. Criminology & Police Sci. 84 (1968), quoting Ohio Gen. Stat. §§ 111(1), 112 (2) at 252 (1834). And in 1850, right before the new Constitution was adopted, Ohio prosecuted a doctor for performing an abortion. *Wilson v. State*, 2 Ohio St. 319, 320 (1853) ("At the October Term, A.D., 1850, Wilson, the plaintiff in error, was indicted under the first section of the act of February 27, 1834, for administering medicine to Catharine Dunn, a pregnant woman, with intent thereby to procure miscarriage."). Nor did it develop later under Ohio's tradition or people, as prosecutions for abortion continued consistently for over a century, until *Roe* prevented the State from enforcing the will of Ohio's citizenry. *State v. Holden*, 28 Ohio Dec. 123, 123, 20 Ohio N.P.(n.s.) 200 (C.P.1917) ("Defendant [physician] was indicted for abortion, and was convicted before a jury."); *State v. Guerrieri*, 20 Ohio App.2d 132, 133, 252 N.E.2d 179 (7th Dist.1969) (Defendant "did unlawfully and knowingly, have in his possession or under his control a drug, medicine, article, or thing intended for causing an abortion, contrary to * * * R.C. 2904.34."). Yet Plaintiffs somehow conclude is direct opposition to these facts that Ohioans nonetheless hid a constitutional right to abortion in our Constitution. They are wrong.

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Only one Ohio court in one case has said that a right to abortion may be implicit in the Ohio Constitution, and in the three decades since that appellate court's decision, it has never been cited by any other court in support of a right to abortion. *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 627 N.E.2d 570 (10th Dist.1993). That case did, to be sure, treat the Constitution as having some substantive due process right under "liberty,"[1] but that court also expressly rejected any claimed fundamental right to abortion subject to strict scrutiny, *id.* at 695, and also rejected an equal protection challenge based on an alleged gender-based classification. *Id.* at 702 ("H.B. No. 108 does not violate the Equal Protection Clause of the Fourteenth Amendment solely because it is a gender-based classification in the sense that, because of the subject matter, it can apply directly only to women. Likewise, we find no reason to apply a different standard under the Ohio Constitution."). Plaintiffs nonetheless continue to assert throughout their motion that the right to abortion is both fundamental and subject to strict scrutiny in opposition to the very authority they say establishes the right.

But even if the Ohio Constitution protects an individual woman's right to abortion—it does not—Plaintiffs have no protected right to perform surgical abortions under either the Ohio or Federal Constitution. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir.2019) ("The Supreme Court has never identified a freestanding right to perform abortions.")

Here, Plaintiffs challenge a duly enacted state law that does what Plaintiffs concede was the General Assembly's purpose, 2d Mot. PI at 5, and the United States Supreme Court has held to be perfectly lawful: it prevents the use of public funds to subsidize abortion in any way. *Maher*

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[1] Defendants believe this single instance in Ohio case law to be error. Importantly, the 10th Circuit's holding was not reviewed or cited by the Ohio Supreme Court, which has declared that it is "the ultimate arbiter of the meaning of the Ohio Constitution," and the Court is "not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states constitutions." *State v. Mole*, 149 Ohio St. 3d 215, 220, 2016-Ohio-5124, P21, 74 N.E.3d 368, 376, 2016 Ohio LEXIS 1910, *11.

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v. Roe, 432 U.S. 464, 474, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). In fact, there is nothing under the current federal law that suggests any "limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* And the Sixth Circuit very recently reiterated that Ohio "may refuse to subsidize abortion services." *Hodges*, 917 F.3d at 912, citing *Rust v. Sullivan*, 500 U.S. 173, 192, 111 S.Ct. 1759, 114 L.Ed.2d 233, 201-02 (1991); *Harris v. McRae*, 448 U.S. 297, 315-17, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); *Maher,* 432 U.S, at 474. Ohio has enacted a regulatory scheme to ensure for the safety of all Ohioans having surgical procedures outside of a hospital at an ASF—including surgical abortion. And it is because an ASF may be unable to obtain a WTA but may still prove that it can provide for the safety of its patients (through compliance with the statutory scheme which also includes any additional conditions the Director may impose pursuant to R.C. 3702.3011) that the General Assembly enacted legislation providing for a variance which includes the Variance Statute.

But Plaintiffs now argue that the Variance Statute does not just limit the pool of potential doctors that can serve as backup physicians, but rather it prevents any doctor in their geographic area from meeting the requirements of the law. They say that any physician who may work with or instruct a resident or medical student at a privately-owned hospital is indirectly providing instruction at a state medical or osteopathic medical school. 2d Mot. PI at 8. That interpretation, however, is based on nothing more than naked speculation and falls far short of the required showing by clear and convincing evidence that injunctive relief is warranted. Plaintiffs cannot show that they have requested guidance from the Department on the application of this law, and indeed have not proffered any information regarding backup physicians to the Department in an attempt to comply with the Variance Statute. Plaintiffs failure to make any showing that the

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Department actually rejected additional doctors that were willing to serve as backup physicians is fatal to their motion.

In the utter void of authority substantiating Plaintiffs' claimed property and liberty interests, and having no property interest whatsoever in the variance that is the subject of the law they seek to enjoin, this Court need only find that the Variance Statute "bears a real and substantial relationship to public health, safety, morals or general welfare of the public and [that] it is not unreasonable or arbitrary." *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854, 860, 1957 Ohio LEXIS 337, *16, 4 Ohio Op. 2d 113, citing *City of Piqua v. Zimmerlin,* 35 Ohio St., 507, 511 (1880). Ohio's General Assembly enacted the Variance Statute as part of a larger regulatory scheme to protect the health and safety of patients receiving care at an Ohio ASF. That body also deemed it necessary to ensure that Ohio not subsidize abortion. Neither purpose offends the Ohio Constitution.

Moreover, Plaintiffs have failed to show that they have suffered or will suffer injury themselves, therefore they cannot avail themselves of third-party standing to bring claims on behalf of their patients either. Plaintiffs, then, have failed to show that they are substantially likely to prevail on any of their claims. This Court should deny Plaintiffs' motion.

FACTUAL AND PROCEDURAL BACKGROUND

Amended Substitute Senate Bill 157 ("SB 157"), enacting R.C. 3702.305 ("Variance Statute"), was signed intolaw on December 22, 2021, but would not go into effect until March 23, 2022. On February 25, 2022, Plaintiffs Women's Medical Group Professional Corporation (the "Dayton Clinic") and the Cincinnati Clinic filed this lawsuit seeking preliminaryinjunctive relief on behalf of the Dayton Clinic to prevent the Ohio Department of Health (the "Department") and its Director, Bruce Vanderhoff (the "Director") from "enforcing SB 157

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until 90 days after its effective date," and a permanent injunction against the statute's enforcement, claiming that the law violates the Ohio Constitution. On that same date, one of the plaintiffs, the Dayton Clinic, filed a motion for a temporary restraining order against the Department and Director, to enjoin them from "revoking or refusing to renew" the Dayton Clinic's license as an ambulatory surgical facility ("ASF") or otherwise preventing the Dayton Clinic from providing "procedural abortion services for reasons related to noncompliance with [S.B. 157] until at least June 21, 2022." Mot. TRO/PI at 1.

The written transfer agreement ("WTA") requirement has been in Ohio law for many years, initially in Ohio Adm. Code §3701-83-19(E), and later also added to Ohio Rev. Code §3702.303(A). If an ASF is unable to obtain a WTA, it may still get an ASF license by seeking a variance of the WTA requirement from the Director. *See* Ohio Adm. Code §3701-83-14; see also Ohio Rev. Code §3702.303(C)(2); Ohio Rev. Code §3702.304. A variance may be granted if the applicant demonstrates to the satisfaction of the Director that the purpose of a requirement (here, the requirement that an ASF have a WTA with a local hospital) has been met in another way. See Ohio Adm. Code §3701-83-14.

Here, the Director denied the Dayton Clinic's most recent request for a variance of the WTA requirement on January 28, 2022, because that facility's proposed backup physicians (to assist with any transfer of its patients to a hospital if needed), were affiliated with a state university. Existing law, Ohio Rev. Code §3727.60(B), prohibits a public hospital, including a state university hospital or state medical college hospital, from "[a]uthoriz[ing] a physician who has been granted staff membership or professional privileges at the public hospital to use that membership or those privileges as a substitution for, or alternative to, a written transfer agreement for purposes of a variance application described in section 3702.304 of the Revised Code." Ohio Rev. Code

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§3727.60(B). The requirement in the Variance Statute added a further clarification of the existing requirement, to prohibit doctors serving as backup to an ASF from "teach[ing] or provid[ing] instruction" at, or being "employed by or compensated pursuant to a contract with," a medical school . . . affiliated with a state university or college as defined in [Ohio Rev. Code §]3345.12[,] any state hospital, or other public institution." Ohio Rev. Code §3702.305(A)(1) and (2). Plaintiffs instigated this lawsuit on February 25, 2022, seeking injunctive and declaratory relief for enforcement of the Variance Statute. The Dayton Clinic contemporaneously filed a motion seeking a temporary restraining order and preliminary injunction.

The Cincinnati Clinic did not join the TRO and PI motion because

> [the Cincinnati Clinic] currently holds a variance that remains in effect, Affidavit of Kersha Deibel, attached as exhibit No. 3, at ¶ 19, it has until June 21, 2022 to comply with the substantive provisions of SB 157 and to submit the required documentation to ODH. However, ODH sent a letter to the Cincinnati Clinic on February 23, 2022 that, while recognizing that SB 157 does not even go into effect until late March, asks the Cincinnati Clinic to submit by Sunday, February 27, 2022 attestations that its back-up physicians meet SB 157's requirements. Affidavit of Lisa Pierce Reisz, attached as exhibit No. 4, Ex. A.

Mot. at 1, fn.1. Kersha Deibel, the Cincinnati Clinic's President and CEO, also referenced ODH's February 23 letter and stated that "[the Cincinnati Clinic] intends to respond to ODH to convey its understanding that, because the Cincinnati Clinic currently holds a variance from the WTA, it has until June 21, 2022 to comply with SB 157. . . [the Cincinnati Clinic] is already working to attempt to comply with SB 157." The Cincinnati Clinic contends that ODH's February 23 letter demonstrated that "ODH appears to be unilaterally and without basis moving the compliance deadline up approximately four months" (Compl. ¶ 73), and "[the Cincinnati Clinic] is at risk of ODH taking steps to prematurely enforce SB 157, rescind its variance and subsequently revoke its ASF license." *Id.*at ¶ 76.

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This Court's jurisdiction to hear Plaintiffs' claims was invoked under Civ.R.3(C)(6) "because Plaintiff [the Cincinnati Clinic] provides procedural abortions in Hamilton County, and thus the claims for relief arise in part in Hamilton County." Compl. ¶ 24.

A hearing was held on March 3, 2022, regarding the Dayton Clinic's motion for TRO. The Court granted the Motion and set a briefing and hearing schedule for the preliminary injunction. On March 26, 2022, Defendants filed a motion to dismiss the Cincinnati Clinic under Civil Rule 12(b)(6). All briefing on that motion was filed and before the Court on May 16, 2022. The Preliminary Injunction Hearing was held on April 15, 2022, at 11:00 am, and the Court enjoined enforcement of the Variance Statute against the Dayton Clinic until June 21, 2022.

On May 26, 2022, both Plaintiffs filed a motion for a second preliminary injunction to enjoin enforcement of the Variance Statute. A hearing on the motion is scheduled for June 12, 2022, at 1:00 pm.

LEGAL STANDARD

"An injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right. . ." *Garono v. State*, 37 Ohio St. 3d 171, 173, 524 N.E.2d 496 (1988). "Courts should take particular caution in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 604, 653 N.E.2d 646 (1995) (quotations omitted). "A party requesting a preliminary injunction must show by clear and convincing evidence that (1) there is a substantial likelihood that she/he will prevail on the merits, (2) she/he will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the

injunction." *Castillo-Sang v. Christ Hosp. Cardiovascular Assocs., LLC*, 1st Dist. Hamilton No. C-200072, 2020-Ohio-6865, ¶ 16, citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-268, 747 N.E.2d 268 (1st Dist.2000).

"The party seeking a permanent injunction must also demonstrate that the injunction is necessary to prevent irreparable harm and that no adequate remedy at law is available." *State v. City of Cincinnati Citizen Complaint Auth.,* 2019-Ohio-5349, P20-P21, 139 N.E.3d 947, 953, 2019 Ohio App. LEXIS 5432, *13-14, 2019 WL 7206321, citing *Stoneham*, 140 Ohio App.3d at 267. Speculative harm will not suffice. *Id.,* see *Camp Washington Community Bd., Inc. v. Rece*, 104 Ohio App.3d 750, 754, 663 N.E.2d 373 (1st Dist.1995) quoting *Miller v. W. Carrollton*, 91 Ohio App.3d 291, 296, 632 N.E.2d 582 (2d Dist.1993) ("Equity will not interfere where the anticipated injury is doubtful or speculative; reasonable probability of irreparable injury must be shown."); *Fodor v. First Nat. Supermarkets, Inc*., 8th Dist. Cuyahoga No. 58587, 1990 Ohio App. LEXIS 2779, 1990 WL 93210, *5 (July 5, 1990) (it is error to grant injunctive relief when "[a]ny damage which may have occurred was speculative and could not thereby be considered irreparable.").

It is further incumbent for a party to prove entitlement to the requested relief by clear and convincing evidence. *Stoneham* at 268. "'Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *City of Cincinnati Citizen Complaint Auth.* at 953, quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). But the Ohio Supreme Court has cautioned that a court "cannot employ equitable principles to circumvent valid legislative enactments." *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn*., 69 Ohio St. 3d 521, 526, 1994-Ohio-330, 634 N.E.2d 611 (1994).

ARGUMENT

To be entitled to a preliminary injunction, Plaintiffs must demonstrate that they have a substantial likelihood of success on the merits of their claims. *Paige v. Ohio High School Ath. Assn.*, 2013-Ohio-4713, 999 N.E.2d 1211, ¶ 65 (1st Dist.) A mere possibility of success does not suffice. Without showing a substantial likelihood of success, Plaintiffs' request fails—and this Court need not even consider the remaining elements required for a permanent injunction. *Aero Fulfillment Servs v Tartar*, 1st Dist. Hamilton No. C-060071, 2007-Ohio-174 ¶¶ 23, 41; *Intralot Inc. v Blair*, 2018-Ohio-3873, ¶ 47. Here, Plaintiffs have failed to establish that they are entitled to any relief under Ohio law, and fall far short of the required showing of substantial likelihood of success on the merits of their claims.

Plaintiffs' failure to provide any evidence that the Variance Statute disqualifies all physicians in each clinic's geographic area from serving as consulting physicians prevents this Court from granting the remedy they request here. Instead of seeking the advice of the Department, as the agency charged with enforcement of the law, Plaintiffs ask this Court to enjoin the Variance Statute on the bare assertion that no physician can comply with the law, but "the law does not recognize an injunction by accusation." *Aero Fulfillment Servs., Inc.,* ¶ 27. Having failed to show a likelihood of success on the merits of their claims and any evidence of concrete or threatened harm, the Court should deny Plaintiffs' motion.

I. Plaintiffs Cannot Succeed on the Merits of Their Claims.

A. Plaintiffs have failed to identify a liberty or property interest protected by the Ohio Constitution to support the Clinics' due process claims.

The Variance Statute at issue here concerns a single subject as reflected in its title: Variance application; attachments included by consulting physicians; variance rescinded. R.C. 3702.305.

That variance provides an exception from the requirement that all Ohio ASFs obtain "a written transfer agreement ("WTA") with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise." R.C. 3702.303. A variance is an exception and not the rule—it allows an ASF the opportunity to obtain a license when that ASF has failed to acquire a WTA.

Plaintiffs have no property interest in a variance, nor have they claimed one. And the Variance Statute only details requirements for obtaining a variance, not a license. Plaintiffs do not have any fundamental property interest in their ASF licenses either, but because the Variance Statute only addresses a variance, it need only survive rational basis review.

Plaintiffs claim that "[t]he Ohio Constitution protects Plaintiffs' liberty and property interests in their ASF licenses, in the continuation of their businesses, and in their staff's pursuit of their chosen professions." 2d Mot. PI at 17. They then point to several cases, none of which involve rights claimed under the Ohio Constitution. In *Asher v. City of Cincinnati*, the court, in deciding a § 1983 claim, found that the plaintiff had "a constitutionally protected property interest in running his business free from unreasonable and arbitrary interference from the government ***under the Due Process Clause***" of the Federal Constitution. 122 Ohio App.3d 126, 136, 701 N.E.2d 400 (1st Dist.1997). As before, every additional case cited in the Plaintiffs' motion invokes rights guaranteed by the Federal Due Process Clause. *See State v. Cooper*, 71 Ohio App.3d 471, 474, 594 N.E.2d 713 (4th Dist.1991) ("***The Fifth and Fourteenth Amendments to the United States Constitution*** state that no person shall be deprived of life, liberty, or property without due process of law. '[T]he right to engage in a lawful business

is a property right and * * * carries with it the right to appeal to the public for patronage, through bills, circulars, cards or other advertising matter.'"); *In re Thornburg*, 55 Ohio App. 229, 232, 9 N.E.2d 516 (1936) (A state's police power "is limited and confined by the [***federal***] ***constitutional provision*** that the citizen shall not thereby unreasonably, arbitrarily, or without due process of law, be deprived of his life, liberty or property. The constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulation.").

The rights claimed by Plaintiffs in their motion have never been held to be fundamental rights protected by the Ohio Constitution. The Ohio Supreme Court did find "among the liberty and property interests protected by [Article 1, Section 1 of the Ohio Constitution] a right to pursue a profession of one's choosing." *Ohio State Bar Ass'n v. Watkins Global Network, L.L.C.,* 159 Ohio St. 3d 241, 252, 2020-Ohio-169, P33, 150 N.E.3d 68, 78, 2020 Ohio LEXIS 196, *24, citing *State v. Williams*, 88 Ohio St.3d 513, 527, 2000-Ohio-428, 728 N.E.2d 342 (2000). But the right to pursue a profession is not fundamental, and is far different from the alleged fundamental right to continue in one's chosen profession that Plaintiffs assert here.

Not every right protected by the Ohio Constitution is deemed to be a fundamental right. Indeed, even rights *actually* protected by the Ohio Constitution are subject to regulation. It is well established in Ohio Courts that "an exercise of the police power [interfering with an Article 1, Section 1 right or deprivation of property] will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary." *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854, 860, 1957 Ohio LEXIS 337, *16, 4 Ohio Op. 2d 113, citing *City of Piqua v. Zimmerlin,* 35 Ohio St., 507, (1880). "Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions

which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them. *State, ex rel. Standard Oil Co., v. Combs, Dir*., 129 Ohio St., 251, 194 N. E., 875 (1935); *City of Dayton v. S. S. Kresge Co*., 114 Ohio St., 624, 151 N. E., 775, 53 A. L. R., 916 (1926); and *City of Cleveland v. Terrill*, 149 Ohio St., 532, 80 N. E. (2d), 115 (1948). Because the General Assembly codified the Variance Statute into law, and Plaintiffs have not shown that it is clearly erroneous, the Variance Statute is assumed to be a valid use of the state's police power.

Additionally, a license to operate a business does not create a property right subject to traditional due process. *WCI, Inc. v. Ohio Liquor Control Comm'n*, 116 Ohio St.3d 547, 2008-Ohio-88, ¶ 24, 880 N.E.2d 901, citing *State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 27, 196 N.E. 664 (1935) ("The holdings are uniformly to the effect that such a license does not create a property right within the constitutional meaning of that term, nor even a contract, and that it constitutes a mere permission to engage in the [] business, which may be revoked in the prescribed legislative manner"). But even traditional due process only requires "'notice and hearing, that is, an opportunity to be heard.'" *Crawford v. Ohio Dept. of Health*, 7th Dist. Mahoning No. 21 MA 0033, 2021-Ohio-4302, ¶ 13, quoting *Korn v. Ohio State Med. Bd.*, 61 Ohio App.3d 677, 684, 573 N.E.2d 1100 (1988). "A notice consistent with R.C. 119.07 'satisfies these procedural due process requirements because it sets forth a process reasonably calculated to apprise the party of the charges against him and the opportunity to request a hearing.'" *Id.,* quoting *Kellough v. Ohio State Bd. of Edn.,* 10th Dist. No. 10AP-419, 2011-Ohio-431, ¶ 36.

Plaintiffs also claim that they have a fundamental liberty interest in the continued operation of their surgical abortion businesses because this Court held in another case that "a person's right

to obtain an abortion is inextricably bound up with the doctor's ability to provide that care." 2d Mot. PI at 18. To support that decision, Plaintiffs provided as authority to this Court the very same federal case law that was provided to the Sixth Circuit to prove that abortionist have a constitutional right to perform abortions. The Sixth Circuit rejected those cases as authority to support a right to provide abortion for pay even under the Federal Constitution:

> *Planned Parenthood of Central & Northern Arizona v. Arizona*, 718 F.2d 938, 946 (9th Cir. 1983), another pre-*Casey* case, fares no better. It never held that providers have a constitutional right to perform abortions and indeed had no occasion to do so because it analyzed a broad, speech-centric claim about restrictions on a combination of abortion-related activities. *Planned Parenthood of Mid-Missouri & East Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461-64 (8th Cir. 1999), is to like effect. The Tenth Circuit, it is true, accepted the existence of a Fourteenth Amendment right to provide abortions. *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1260 (10th Cir. 2016). But it did so without meaningful analysis or authority, and most importantly it did so in a case in which the State did not challenge the existence of the right.

Hodges, 917 F.3d at 913.

Critically, no other Ohio court has ever recognized such a right. In contrast to the Ohio Supreme Court, the United States Supreme Court did affirmatively recognize an individual woman's right to abortion in the Federal Constitution. *See Roe v. Wade,* 410 U.S. 113, 116, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). But that same Court has never found that an abortionist has any due process right to perform abortions, and instead indicated that providers have no constitutional right to perform abortions in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality). *See Hodges*, 917 F.3d at 913. Certainly, since the Ohio Supreme Court has never held that the Ohio Constitution protects even an individual woman's right to abortion, there can be no due process right to perform abortions for pay in Ohio.

Even if Plaintiffs could show that they have a property interest in their licenses, sufficient process is conferred by 119.12 in the event that ODH would propose to revoke either clinic's

license, therefore no constitutional deprivation can occur. *Jefferson v. Jefferson Cnty. Pub. Sch. Sys*., 360 F.3d 583, 588 (6th Cir. 2004), citing *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) ("If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury.") And since the Variance Statute, the law Plaintiffs seek to enjoin in this case, only concerns a variance and not a license, such alleged right is inapplicable here.

Plaintiffs failure to provide any authority to demonstrate a protected interest under Ohio law also precludes success on the merits of their substantive due process claims. To properly plead a substantive due process claim, Plaintiffs must assert a "'proper characterization of the asserted right.'" *Stolz v. J & B Steel Erectors*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 14, quoting *Blau v. Fort Thomas Pub. School Dist*., 401 F.3d 381, 393 (6th Cir.2005), citing *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). It is axiomatic that Plaintiffs must also provide some evidence that the right identified is protected by law. *Stolz,* ¶ 15. If the right identified is not a fundamental right, government action need only be rationally related to a legitimate interest. *Id.,* citing *State v. Lowe,* 112 Ohio 3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18.

Plaintiffs have failed to prove that the Ohio Constitution protects any right to the continued operation of their business, nor can they. Ohio courts have never before found such a right in any of the provisions of the Ohio Constitution, and specifically those relied upon by Plaintiffs in this lawsuit. And the Ohio Supreme Court has made plain that even though the Ohio Constitution may provide greater protections of civil rights than does the Federal Constitution, "even if the provision were initially understood to provide functionally the same protections, we are not bound to mirror subsequent United States Supreme Court decisions delineating the scope of the protection." *State*

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v. Smith, 162 Ohio St. 3d 353, 359, 2020-Ohio-4441, P28, 165 N.E.3d 1123, 1130, 2020 Ohio LEXIS 2102, *14. Of course, while Ohio can afford greater or broader protections of civil rights under the Ohio Constitution, that does not militate that it do so, nor does it alleviate the Plaintiffs burden as the moving party to provide proper authority for the existence of the rights so claimed.

If the right to their license, the continued operation of their surgical abortion businesses, the continued pursuit of their chosen professions, or to perform surgical abortions for pay were indeed fundamental, Plaintiffs should be able to cite some Ohio case law illustrating these rights. They did not.

The structure of the statutory scheme disproves any claim to a property right in an ASF license: the license must be reapplied for annually, and is subject to regulation and revocation if certain requirements are not met. *See* Ohio Administrative Code § 3701-83-04. But rather than prove the right exists, Plaintiffs continue to assert federal precedent of federal law as authority. Under Ohio law, a licensee does not have a property interest in its license.

The Variance Statute, however, does not create a requirement for obtaining a license at all—it only creates an additional rule for an existing requirement to qualify for an exception from the law that all other ASFs must and, as Plaintiffs have acknowledged, do comply with. *See* R.C. 3702.303. The legislature has provided that exception from the general rule, and made the policy decision to vest the total authority to grant that exception in the Director. Because the right to seek a variance is created by statute, the legislature can lawfully exempt the Director's determination from judicial review.

Finally, Plaintiffs conflate their alleged rights with those protected under federal law of their individual patients. While the individual woman's right to abortion is protected under federal law, Plaintiffs have no equivalent right, nor can they derive any right to perform abortions from

the rights of their patients. The Supreme Court has never found such a right, and precedent suggests that exactly the opposite is true. The Sixth Circuit observed that the Supreme Court, in *Planned Parenthood of Se. Pa. v. Casey,* determined that "[a]bortion rights do not arise from the provider-patient relationship '[o]n its own[.]'" *Hodges*, 917 F.3d at 912. *Hodges* categorically stated that "*Casey* ended any speculation over whether providers have a constitutional right to offer abortion services. It indicated they do not." *Id.* at 913. After explaining that the law did not unduly burden women's rights, the plurality concluded that the law had no more constitutional import as to the providers than if its requirements dealt with 'a kidney transplant.'" *Id.* at 910, quoting *Casey,* 505 U.S. 833, 883-884, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality).

As masters of their Complaint, Plaintiffs chose to assert their claims under Ohio law and the Ohio Constitution, and those claims fail for want of a protectable right. Plaintiffs did not show that they have been denied due process, and did not plead any justiciable substantive due process claim entitling them to relief, therefore this court should deny the injunctive relief sought here.

B. SB 157 imposes neutral and legitimate requirements equally for any Ohio ASF seeking a variance from the WTA requirement.

Plaintiffs claim that the Variance Statute is discriminatory and specifically targets abortion ASFs. 2d Mot. PI at 20. They also claim that "[b]ecause this discrimination impinges on both Plaintiffs' patients fundamental right to privacy and Plaintiffs' fundamental property and liberty rights in their licenses and their occupations, it is subject to strict scrutiny." *Id.* But as demonstrated above, Plaintiffs have not established that they have any fundamental rights at all under the Ohio Constitution, and, indisputably, they have no right at all to a variance from the law that all ASFs must follow. Critically, Plaintiffs did not plead a violation of equal protection of their patient's fundamental rights in their complaint, and cannot now assert an entirely new claimed violation of their patient's rights to cure the utter deficiency of their own claims. *Id.*

"'[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, quoting *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d 443, 446, 613 N.E.2d 574, 577. "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.

To determine if a statute violates equal protection, a court "must examine the class distinction drawn to decide if a suspect class or a fundamental right is involved." *Roseman,* 66 Ohio St.3d at 447. Where no suspect class or fundamental right is at issue, the statute need only survive rational basis review. *Granzow v. Bur. of Support*, 54 Ohio St.3d 35, 37, 560 N.E.2d 1307 (1990). Plaintiffs may well be a politically unpopular group, 2d Mot. PI at 18, but abortion providers have never been identified as a suspect class under Federal or Ohio law, and Plaintiffs made no such claim. Because Plaintiffs have no fundamental right to a variance nor are they a suspect class, their claim that the Variance Statute violates equal protection of the law need only survive rational basis review.

Plaintiffs have, by their own admission, been unable to obtain a WTA from a local hospital in accordance with Ohio law. Compl. ¶ 45. They further acknowledge that they are the only ASFs that have been unable to do so. 2d Mot. PI at 19. Plaintiffs also complain that SB 157 "singles out procedural abortion providers with unnecessary and unreasonable restrictions that do not apply to similarly situated ASFs that do not provide abortions." 2d Mot. PI at 18. But those "restrictions"

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only apply to Plaintiffs because they failed to obtain a WTA, and even then, the application for a variance is entirely voluntary.

Plaintiffs claims of animus toward surgical abortion providers ignores that the other four ASFs in Ohio performing surgical abortions have obtained WTAs in compliance with the law. Those ASFs have been required to comply with the Variance Statute because they do not require an exception from the law as Plaintiffs do here. The Variance Statute does not even reference abortion in the text of the law. Simply because Plaintiffs are the only ASFs to seek a variance does not prove that the Variance Statute only applies to them. Any ASF that was unable to obtain a WTA would need to comply with the Variance Statute to obtain a variance.

Plaintiffs claim that the Variance Statute cannot survive rational basis review because it bears no relation to any possible legitimate government purpose. Plaintiffs concede that the stated purpose for the Variance Statute was to prevent public funds from subsidizing abortion, and equally concede that Ohio already prohibits the use of public funds for abortion. 2d Mot. PI at 21. But then they nonsensically claim that the Variance Statute cannot serve that end because backup doctors do not provide surgical abortion, and the law prevents even unpaid instruction at any public institution so it has no impact on public funds. *Id.* But Ohio can lawfully prohibit the use of public funds for abortion, and in this case, the Variance Statute does so by preventing physicians compensated in any way by public funds—and thereby cloaked in the authority of the state—from supporting abortion by acting as consulting physicians for ASFs that perform surgical abortion.

Plaintiffs claim that the Variance Statute does not involve public funds because it prohibits unpaid instruction at a public institution is, again, based purely on Plaintiffs speculative interpretation of that law. There is nothing at all in the factual record to support that assertion, as

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the Department has not had any communication with Plaintiffs regarding the Variance Statute, for compliance or otherwise, so it has not enforced the Variance Statute against either ASF.

The plurality opinion in *Planned Parenthood of Southeastern PA v. Casey* expressly states that "a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." 505 U.S. at 885, 112 S. Ct. at 2825, 120 L. Ed. 2d at 720. And of course, Ohio has a "profound interest in potential life." *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 693, 627 N.E.2d 570 (10th Dist.1993). Ohio also has an interest in protecting the health, safety, and welfare of its citizens. *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854, 860, 1957 Ohio LEXIS 337, *16, 4 Ohio Op. 2d 113. Those interests, in combination with Ohio's choice to prevent public funds from supporting abortion, are more than sufficient to serve as legitimate interests under the law that are served by the Variance Statute.

The requirement that an ASF have a WTA applies to all ASFs in Ohio. Indeed, all other ASFs in Ohio have a WTA with a local hospital in compliance with the law, including four ASFs that perform surgical abortions. A variance is entirely voluntary and provides an exception from the WTA requirement. Plaintiffs have shown nothing more here than that they are the only ones in need of the Variance Statute—they are not targeted by it. Because the Variance Statute bears a rational relationship to several legitimate purposes, Plaintiffs cannot succeed on their equal protection claim.

C. Plaintiffs do not have standing to bring a claim on behalf of their patients.

Plaintiffs assert in a footnote that they have third-party standing to press the substantive due process rights of their patients. 2d Mot. PI at 15. They provide only that this Court has held in another case that such standing for abortion providers "is available in circumstances like these." *Id.* at 15, fn 12. Plaintiffs, however, make no attempt to show how the circumstances in that case

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are similar to the instant case, but instead seem to suggest that third-party standing is always available to abortion providers in Ohio. That assumption is simply false.

While the federal courts have often granted abortionists third-party standing in federal court, Ohio does not. Ohio courts allow for a third-party exception in "'circumstances where it is necessary to grant a third party standing to assert the rights of another' [but] . . . [t]hird-party standing is 'not looked favorably upon[].'" *Util. Serv. Partners v. PUC*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49, quoting " *Kowalski v. Tesmer*, 543 U.S. 125, 129-130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004). In Ohio, "third party standing may be granted when 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." *Util. Serv. Partners* ¶ 49 (internal quotations omitted). Not only do Plaintiffs fail to show any facts necessary to demonstrate a sufficiently close relationship with their patients or a hindrance to those patients advancing their own claims, as demonstrated above, Plaintiffs also failed to show that they have suffered their own injury in fact that can be remedied by this Court.

Plaintiffs have previously cited several cases where the third-party standing exception was granted in other circumstances where the requirements were met, but Plaintiffs have not offered a single Ohio Supreme Court or appellate court decision that extended this exception to abortion providers under Ohio law.

And even if Plaintiffs could assert third-party standing to assert the right of their patients, as has already been shown, there is no right to abortion protected by the Ohio Constitution. While the Ohio Supreme Court must give effect to the decisions of the US Supreme Court, even those that conflict with Ohio's codified and constitutional law, our justices are not required to mirror

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those holdings in deciding cases brought under Ohio law. *See e.g., Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 697, 627 N.E.2d 570 (10th Dist.1993) ("Even though the United States Supreme Court has construed the Establishment Clause of the First Amendment to the United States Constitution to include nonreligion as well as religion (*see Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter* [1989], 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472), the language of Section 7, Article I, Ohio Constitution does not permit such a construction."). Abortion was a criminal offense by statute in 1834 and remained so until the adoption of the Ohio Constitution in 1851, and at all times until the US Supreme Court foisted abortion on Ohio. *See State v. Kruze*, 34 Ohio St.2d 69, 70, 295 N.E.2d 916 (1973) ("By reason of the holding and mandate of the Supreme Court of the United States in *Roe v. Wade* (1973), 410 U.S. , 35 L. Ed. 2d 147, which we are required to follow, the judgment of the Court of Appeals must be reversed.") Case law proves that Ohio readily enforced its abortion law. *See Moody v. State*, 17 Ohio St. 110, 111 (1866); *State v. McCoy*, 52 Ohio St. 157, 157, 39 N.E. 316 (1894); *State v. Springer*, 4 Ohio Dec. 169, 169 (C.P.1896); *State v. Tippie*, 89 Ohio St. 35, 43, 105 N.E. 75 (1913); *State v. Lehr*, 97 Ohio St. 280, 280, 119 N.E. 730 (1918); *State v. Holden*, 20 Ohio N.P.(n.s.) 200 (C.P.1917); *State v. Coran*, 87 Ohio App. 238, 238, 94 N.E.2d 562 (5th Dist.1948); *State v. Karcher*, 155 Ohio St. 253, 253, 98 N.E.2d 308 (1951); *State v. Roche*, 135 N.E.2d 789 (Ohio 2d Dist.1955); *State v. Brown*, 137 N.E.2d 609 (Ohio 2d Dist.1955); *State v. Smith*, 165 Ohio St. 247, 247, 135 N.E.2d 63 (1956); *State v. Allgood*, 171 N.E.2d 186 (Ohio 7th Dist.1959); *State v. Ball*, 1 Ohio App.2d 297, 298, 204 N.E.2d 557 (10th Dist.1964); *State v. Guerrieri*, 20 Ohio App.2d 132, 133, 252 N.E.2d 179 (7th Dist.1969). Given the substantial evidence that Ohioans, for at least 139 years, banned abortion within the state and prosecuted those who committed abortions, there can be absolutely no question that abortion is in no way "so deeply rooted in our history and

traditions" as to permit any court to find a right to abortion in the Ohio Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 727, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997); *Crawford v. Ohio Dept. of Health,* 7th Dist. Mahoning No. 21 MA 0033, 2021-Ohio-4302, ¶ 13. Because the Ohio Constitution plainly does not protect a right to abortion, Plaintiffs' patients do not have any right or interest here that Plaintiffs could assert on their patients' behalf.

Moreover, the Variance Statute here does not regulate women seeking abortion at all. Just as the court determined in *Preterm Cleveland v. Voinovich*, the Variance Statute "does not directly regulate the right of a woman to have an abortion but, instead, places certain duties upon a physician," or rather in this case, an ASF. 89 Ohio App.3d at 695. Because Plaintiffs' patients are not the subject, target, or entity that must prove compliance with the Variance Statute's requirements, those patients do not have standing to challenge the law. And because a variance is an exception to the rule, it can no more burden a right than does the actual rule.

Ohio's WTA requirement, even when analyzed under the Federal Constitution, does not unduly burden a woman's right to abortion.[2] *Women's Med. Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir.2006). The Sixth Circuit's analysis went so far as to say that the "application of the transfer agreement requirement to the Dayton clinic does not constitute an undue burden on a woman's right to choose an abortion even though it would close the only clinic providing late second trimester abortion services in southern Ohio, because women could still obtain this type of abortion in Cleveland or at other clinics providing this type of service." *Id.*at 607. That Court also found that speculative claims regarding how an Ohio regulation might affect a patient's right to

[2] In *Capital Care Network of Toledo v. Ohio Dept. of Health*, the Ohio Supreme Court cited federal case law supporting Ohio's WTA requirement, stating that "in *Women's Med. Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir.2006), the Sixth Circuit Court of Appeals held that applying the rule's written transfer agreement requirement to a Dayton abortion clinic did not impose an undue burden on abortion rights, *id*. at 609[.]" 153 Ohio St.3d 362, 2018-Ohio-440, 106 N.E.3d 1209, ¶ 29.

abortion "would be unduly conjectural, and unripe to boot, to imagine what would happen if the plaintiffs" stopped providing surgical abortions. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 916 (6th Cir.2019). That is especially true in this case where, based only on Plaintiffs' personal understanding of the law, they claim to be entirely unable to obtain any compliant physician in order to acquire a variance from the WTA requirement.

Today, there are four other licensed abortion ASFs operating in Ohio that provide surgical abortion services. Even if both the Cincinnati and Dayton Clinics failed to obtain a license renewal, just as in *Baird,* it would not unduly burden a woman's ability to have a surgical abortion in Ohio. Because Plaintiffs' patients would not have standing to challenge the Variance Statute nor do they have a fundamental right to assert under the Ohio Constitution, and because Plaintiffs have not met their burden to show that they meet the requirements of third-party standing in Ohio to assert claims on behalf of their patients, the Court should deny the motion at bar.

II. Plaintiffs Have Failed to Demonstrate Through Evidence That They Will Be Irreparably Harmed by the Enforcement of SB 157.

Plaintiffs ask this Court to enjoin the Variance Statute because they claim that they will suffer irreparable damage if the law is enforced, but Plaintiffs haven't shown that the harm they allege is caused by the Variance Statute. Despite having proffered several affidavits to support their motion, Plaintiffs do not provide any evidence that they ever contacted the Department regarding the Variance Statute or in any way attempted to provide proof of attempted compliance with the requirements of the Variance Statute as required by the law. Instead, the Dayton Clinic's sole shareholder, Dr. Haskell, determined that "as a result of [conducting outreach to local hospitals and physicians] I have learned that there are currently no physicians who qualify to serve as backup physicians for [the Dayton Clinic] if [the Variance Statute] is enforced." Haskell Aff. ¶ 46. Specifically, he concluded that

> All of the attending OB/GYN physicians (i.e., physicians who have completed their residencies) who are on staff at these hospitals work closely with and provide practical instruction to those residents and medical students. Under the terms of SB 157, it is my understanding that the attending physicians at these hospitals are at least "indirectly" providing instruction at Wright State University Medical School. Thus, all of the otherwise qualified physicians located within 25 miles of WMD are disqualified from serving as backup physicians by SB 157.

Id. ¶ 51. That conclusion, based only on Dr. Haskell's understanding of the Variance Statute, is mere speculation. But "[i]n an action for injunctive relief, where the threat of harm is speculative, the moving party must do more than make a conclusory allegation of the threat of harm. There must be evidence to support that allegation." *Aero Fulfillment Servs., Inc.,* ¶ 26.

Dr. Haskell's "understanding" that physicians employed by private hospitals that may hypothetically work closely with or provide practical instruction to residents and medical students are disqualified to serve as backup physicians by the Variance Statute is not only completely speculative but has not been demonstrated by any evidence. That speculative understanding—*not enforcement of the Variance Statute*—prevented the Dayton Clinic from contracting with any backup physicians or attempting to demonstrate to the Department that it meets *any* of the conditions necessary to obtain a variance from the WTA requirement for its ASF.

Both Plaintiffs advance that speculative understanding in support of their motion, insisting that "SB 157's language is so broad that it even prohibits clinics from contracting with a backup doctor who provides *unpaid* instruction—on any subject at all—at a public institution." 2d Mot. PI at 21. The plain language of the Variance Statute does not say that, and there is no proof at all that the Department has or will enforce Plaintiffs' speculative interpretation of the Variance Statute against Plaintiffs. Indeed, it is because Plaintiffs have chosen to avoid any engagement with the Department, the agency it concedes is charged with enforcing the Variance Statute, that there is simply no evidence that the Variance Statute will wreak the irreparable havoc that Plaintiffs claim.

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Furthermore, both Clinics have provided alternative reasons for their alleged harm that have nothing to do with the Variance Statute. For example, Kettering Health has refused the Dayton Clinic's requests to enter into any agreement with its ASF because it performs abortions there, nor will Kettering allow physicians it employs to do so either. Haskell Aff. ¶ 53. Additionally, despite having found several physicians willing to serve as backup doctors with admitting privileges at a Miami Valley Hospital, all of those doctors are clinical professors at a state medical school. *Id.* ¶ 55. The Cincinnati Clinic admits that it found two doctors employed by Christ Hospital willing to serve as backup physicians, but the hospital would not allow them to. Deibel Aff. ¶ 30. Another doctor was deemed to be disqualified by the Cincinnati Clinic because that physician "works with University of Cincinnati residents at another hospital." *Id.* ¶ 31. Other doctors were unwilling to serve as backup physicians for the Cincinnati Clinic because: "they didn't want their name in the press, they did not want to bring attention to their practices, and that being associated with an abortion provider would put them, their families, and their colleagues in danger. *Id.* ¶ 32. These reasons, whether they are the primary cause for Plaintiffs failure to comply with the law or they function in concert with the broader regulatory scheme to effect the same end, the Variance Statute is not the only factor limiting Plaintiffs ability to obtain backup doctors to qualify for a variance. And certainly, those independent reasons have nothing whatsoever to do with the Variance Statute, these Defendants, the state of Ohio, or the broader regulatory scheme for ASFs.

Plaintiffs' subjective understanding of the requirements of the Variance Statute highlights the importance of the administrative process in cases involving agency regulations and decisions, and the necessity for those procedures to be exhausted before Ohio courts intervene, even in cases questioning the constitutionality of a statute. Specifically, exhaustion prevents litigants from

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bypassing an agency proceeding with a declaratory judgement action which serves "only to circumvent an adverse decision of an administrative agency and to bypass the legislative scheme." *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 152, 586 N.E.2d 80 (1992). Exhaustion further operates to prevent premature interference with agency processes, so that the agency may function efficiently and have an opportunity to correct its own errors, to afford the parties and the courts the benefits of agency experience and expertise, and to compile a record adequate for judicial review. *State ex rel. Mansfield Motorsports Speedway, LLC v. Dropsey*, 2012-Ohio-968 (5th Dist.), ¶¶ 26–27.

In this case, not only has there been no enforcement of the Variance Statute against Plaintiffs, neither Plaintiff has even taken the predicate step of attempting to comply with the law. How, then, can this Court make any judgement on the merits of Plaintiffs' claims when Plaintiffs have not attempted to comply with the Variance Statute nor has the law *been applied* to Plaintiffs?

It is for this very reason that the Ohio Supreme Court has held that "a litigant must raise an *as-applied* constitutional challenge in the first instance during the proceedings before the [agency] in order to allow the parties to develop an evidentiary record." *City of Reading v. PUC*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 16. And even though exhaustion is not a jurisdictional defect, Defendants have properly raised it as an affirmative defense. *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 1997 Ohio 253, 674 N.E.2d 1388, syllabus.

But here, Plaintiffs do not merely seek to avoid an administrative appeal, rather they seek to have this Court grant them an ASF license by injunction, a license completely divorced from the Department vested by law with the authority to license and grant variances to ASFs. Plaintiffs seek this injunction to effectively avoid compliance with any of the relevant regulations that protect Ohioans--regulations they say are unnecessary anyway.

Bereft of any facts or administrative record, and left only with speculative assertions, this Court cannot enjoin enforcement of the Variance Statute.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Second Motion for Preliminary Injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify the foregoing was served upon the following via electronic mail this 9th day of June, 2022.

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