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 **REPLY IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs have demonstrated that they are entitled to a preliminary injunction, and Defendants' arguments to the contrary are unavailing. First, Plaintiffs have shown that they are unable to meet the variance requirements under the plain language of SB 157; Defendants provide no authority for their assertion that Plaintiffs were first required to seek the guidance and advice of Defendants regarding the meaning of the statute or for their suggestion that individuals who train residents might not be providing instruction under the terms of the statute. Defs.' Opp. to Pls.' Second Mot. for Prelim. Inj. ("Opp.") at 25. Second, SB 157 violates the substantive due process rights of Plaintiffs' patients to terminate a pregnancy, which the Ohio Constitution protects, as this Court has already recognized. Third, Ohio law has clearly recognized fundamental property and liberty interests in one's ongoing business, occupation, and business license, and Plaintiffs have shown that they and their staff will be deprived of those interests if SB 157 is enforced. Finally, as Defendants' own brief implicitly concedes, SB 157 was designed to single out Plaintiffs as abortion-providing ASFs and force them to cease providing procedural abortions, in violation of equal protection principles. Opp. at 19-20 (arguing that SB 157 is intended to avoid public subsidization of abortion and that it promotes the state's interest in

potential life). Defendants have presented no alternative explanation for SB 157 that is even remotely plausible.

For all of these reasons, Plaintiffs are certain to succeed on the merits of their claims that SB 157 is unconstitutional, and this Court should preliminarily enjoin Defendants from revoking or refusing to renew Plaintiffs' licenses or otherwise preventing Plaintiffs from providing procedural abortion services for reasons related to noncompliance with SB 157.

LAW AND ARGUMENT

A. Plaintiffs Have Demonstrated that They Cannot Meet the Requirements of SB 157, Whose Language Is Clear.

Under the guise of disputing Plaintiffs' overwhelming showing of irreparable harm to Plaintiffs' and their patients' constitutionally protected liberty and property interests if SB 157 is enforced, Defendants suggest Plaintiffs are engaging in "speculation" when Plaintiffs assert that they have been unable to find any backup physicians who are eligible to support their variance applications if SB 157 is enforced. Defendants complain that Plaintiffs provide no "evidence that they ever contacted the Department [of Health] regarding the Variance Statute." Opp. at 24-25. There is no basis for Defendants' suggestion that Plaintiffs were required to seek Defendants' guidance regarding the meaning of SB 157, which is clear on its face, or that they were legally obligated to engage in the futile exercise of submitting a variance application that would not meet SB 157's requirements before pursuing their constitutional challenge to SB 157 and seeking emergency relief from this Court.

Defendants first imply—without actually asserting—that physicians who provide training and instruction to residents and medical students might not actually qualify as "provid[ing] instruction, directly or indirectly, at a [public] medical school" under the terms of SB 157. SB

157 § 3702.305(A)(1); *see* Opp. at 4, 25.[1] It is unclear how providing training and instruction to residents and medical students from public medical schools would fail to qualify as at least indirectly, if not *directly*, providing instruction for those schools. Indeed, Defendants are careful not to actually state that this form of instruction does not count as instruction under SB 157—they simply complain that Plaintiffs have not *asked* whether it does.[2] If Defendants actually read SB 157 to allow physicians who provide training and instruction to medical students and residents to serve as backup physicians, they had ample opportunity to say so in their brief. They did not.[3]

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[1] Defendants mischaracterize the affidavits Plaintiffs have submitted as stating that the otherwise willing and qualified physicians "may work with or instruct a resident or medical student" or "may hypothetically" provide instruction to residents and medical students. Opp. at 4, 25. On the contrary, the affidavits of Kersha Deibel and Martin Haskell both unequivocally stated that the otherwise eligible physicians disqualified by SB 157 do work closely with and provide instruction to medical students and residents. Haskell Aff. ¶ 51 ("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."); Deibel Aff. ¶¶ 26-31.

[2] Moreover, Dr. Haskell's affidavit notes that all of the otherwise eligible OB/GYN physicians who are willing to enter into a backup agreement with WMD also have clinical professor titles at Wright State University precisely because they work with residents and medical students. Haskell Aff. ¶ 55. The fact that WMD's current backup doctors possess academic titles was the stated reason why the ODH Director found WMD's current four backup doctors not to meet the requirements of SB 157. Haskell Aff. Exh. G.

[3] In any case, ODH would not be permitted to adopt an interpretation of SB 157 that conflicts with the plain meaning of the statute. *See, e.g., Lang v. Dir., Ohio Dept. of Job & Family Servs*., 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 12 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (explaining that when the meaning of a law is clear, courts and agencies "must give effect to the unambiguously expressed intent of [the legislature]"); *Employer's Choice Plus, Inc. v. Ohio Dep't of Job & Family Servs.*, 2019-Ohio-4994, ¶ 24, 137 N.E.3d 174, 181 (10th Dist.) (citing *Lang* at ¶ 12) ("[C]ourts grant no deference to an administrative agency's interpretation of a statute when that interpretation conflicts with the express terms of an unambiguous statute."); *cf. AMOCO v. Petroleum Underground Storage Tank Release Comp. Bd.*, 2000-Ohio-224, 89 Ohio St.3d 477, 484, 733 N.E.2d 592 ("[A]n administrative rule cannot add or subtract from the legislative enactment.").

Second, Defendants imply—again without actually asserting—that providing unpaid instruction might not disqualify a physician under SB 157. Opp. at 25. But SB 157 contains no language differentiating between paid and unpaid instruction, so it is unclear how a compensation requirement could be read into the statute. In fact, while Section 3702.305(A)(1) simply disqualifies a physician who "teach[es] or provide[s] instruction, directly or indirectly," at a public medical or osteopathic school, Section 3702.305(A)(2) explicitly requires backup physicians affirm that they are not "employed by *or* compensated pursuant to a contract with" a public medical or osteopathic school, "*and* do[] not provide instruction or consultation to" such a school. R.C. § 3702.305 (emphasis added). The existence of compensation is thus, under the plain terms of the statute, a sufficient but not necessary basis for disqualification of a backup physician—*i.e.*, SB 157 clearly dictates that a backup physician who receives compensation from a public medical school is disqualified, but a physician may also be disqualified if they provide instruction or consultation to a public medical school, whether or not they are compensated.[4]

Ultimately, because Defendants stop short of asserting that Plaintiffs' reading of the plain terms of SB 157 is actually incorrect—arguing instead that Plaintiffs should have given ODH an opportunity to rule on the issue—their argument ultimately amounts to yet another attempt to keep Plaintiffs from challenging the facial constitutionality of SB 157 in this Court and obtaining the relief to which they are constitutionally entitled. Opp. at 27. This Court has already rejected that attempt. Entry Granting Plaintiffs' Mot. for Prelim. Inj. at 2 (rejecting Defendants' argument

[4] Defendants also argue there are "alternative reasons" why Plaintiffs are unable to meet the variance requirements, such as the religious affiliation of a hospital and concerns about anti-abortion harassment. But given that Plaintiffs had four qualifying physicians to support their variance applications before SB 157, who because of SB 157 are no longer eligible to serve, Defendants' assertion that Plaintiffs' harm "ha[s] nothing to do with" SB 157 is nonsensical. Opp. at 26.

that exhaustion was required before Plaintiffs could pursue their constitutional challenge to SB 157).

B. Plaintiffs' Patients Will Be Deprived of Their Fundamental Right to Privacy If SB 157 Is Enforced, in Violation of Their Substantive Due Process Rights.

As this Court has already held, the Ohio Constitution protects a right to privacy, which includes the right to terminate a pregnancy, independent of the U.S. Constitution. *Planned Parenthood Sw. Ohio Region v. Ohio Dep't. of Health*, Hamilton C.P. No. A 2100870, Entry Granting Pls.' Second Mot. for Prelim. Inj., at 6 (Jan. 31, 2022); *Planned Parenthood Sw. Ohio Region v. Ohio Dep't. of Health*, Hamilton C.P. No. A 2101148, Entry Granting Pls.' Mot. for a Prelim. Inj., at 8-9 (Apr. 20, 2021); *see also Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 691, 627 N.E.2d 570 (10th Dist. 1993) ("In light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection."); *see also State v. Boeddeker*, 1st Dist. Hamilton No. C-970471, 1998 WL 57234, *2 (Feb. 13, 1998) (recognizing that substantive due process under the Ohio Constitution includes a right to privacy that, in the context of "sexual and reproductive matters," is "fundamental"). While Defendants argue that the Ohio Constitution cannot be read to protect a right to abortion given that abortion was criminalized in Ohio throughout much of the nineteenth and early twentieth centuries, Opp. at 22-23, they studiously ignore the plain text of the Ohio Constitution, which recognizes a right to freedom in health care decision-making. The Ohio Health Care Freedom Amendment, which was passed with overwhelming support by the citizens of Ohio in 2011,[5] and which bars any law that

[5] The Health Care Freedom Amendment was approved with nearly 2 to 1 support, with 65.58% voting to adopt the amendment. Ohio Secretary of State, State Issue 3: November 8, 2011: Official Results, https://www.ohiosos.gov/elections/election-results-and-data/2011-elections-

"impose[s] a penalty or fine for the sale or purchase of health care," supports Plaintiffs' reading of Article I, sections 1, 16, and 20 as protecting the fundamental right to make personal reproductive health-care decisions. Ohio Const. Art. I, sec. 21(C).

Plaintiffs have likewise demonstrated—and this Court has found—that Plaintiffs possess third-party standing to assert these substantive due process claims on behalf of their patients. *Planned Parenthood Sw. Ohio Region v. Ohio Dep't. of Health*, Hamilton C.P. No. A 2100870, Entry Granting Pls.' Second Mot. for Prelim. Inj., at 3-4 (Jan 31, 2022). Defendants suggest that while Ohio law recognizes third-party standing, it does not recognize that abortion providers have third-party standing. Yet, Ohio third-party standing law contains the same requirements as federal third-party standing law, which has consistently been found to confer standing on abortion providers to assert the rights of their patients. *See June Med. Servs. L.L.C. v. Russo*, 591 U.S. ___, 140 S.Ct. 2103, 2118–19; 207 L.Ed.2d 566 (2020) (plurality opinion); *id.* at 2139 fn. 4 (Roberts, C.J., concurring); *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 294 (2009) (listing the requirements for third-party standing under Ohio law). And contrary to Defendants' assertion that no appellate Ohio case law supports this view, a Tenth District case cited by Defendants—*Preterm-Cleveland v. Voinovich*—involved third-party standing by abortion providers asserting their patients' substantive due process claims. 89 Ohio App.3d 684, 688 (1993).[6]

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results/state-issue-3-november-8-2011/#:~:text=Issue%203%20%2D%20Proposed%20Constitutional%20Amendment,care%20and%20health%20care%20coverage.

[6] Although the Court in that case noted that "[n]o issue ha[d] been raised as to the standing of the plaintiffs to maintain this action," *id.*, standing is a jurisdictional issue in the Ohio courts, and the case would have had to be dismissed if the court thought it lacked standing. *See Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 419 (2015) ("Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action." (quoting *Bank of Am., N.A. v. Kuchta,* 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶

Moreover, Defendants have not attempted to demonstrate or even to argue that SB 157 can meet the stringent requirements of strict scrutiny. They have not proffered any legitimate, much less compelling, interest actually advanced by SB 157, and they have not even attempted a narrow tailoring analysis. Of course, the State cannot show that SB 157 advances any purported interest in avoiding public subsidies for abortion, even if it could demonstrate that such an interest were sufficiently profound and pressing as to overcome the patient's right to reproductive autonomy. SB 157 only regulates backup physicians, who contract with clinics to provide care in the event of an emergency—not to provide abortions. Moreover, as explained above, SB 157 does not even require that the physician engage in *paid* instruction or consultation with a public medical school in order to be disqualified. Finally, while patient health and safety may be compelling interests, the state cannot simply invoke the police power in order to restrict a fundamental right, without explaining at all how SB 157 advances patient health and safety. Therefore, because strict scrutiny is the applicable standard to Plaintiffs' substantive due process claim, Plaintiffs are certain to prevail on the merits of that claim.

C. Plaintiffs Will Be Deprived of Their Fundamental Property and Liberty Interests If SB 157 Is Enforced, in Violation of Their Substantive Due Process and Equal Protection Rights.

Defendants argue, in the face of decades of precedent to the contrary, that Plaintiffs possess no fundamental property interests in their licenses, their occupations, or their existing businesses. This argument has already been considered and rejected by this Court in this case.

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22)); *Diley Ridge Med. Ctr. v. Fairfield Cnty. Bd. of Revision*, 141 Ohio St.3d 149, 154 (2014) ("As a general matter, jurisdictional issues not flagged by the parties may, and sometimes must, be raised by the reviewing tribunal sua sponte." (citing *Fox v. Eaton Corp*., 48 Ohio St.2d 236, 238, 358 N.E.2d 536 (1976), *overruled on other grounds, Manning v. Ohio State Library Bd.,* 62 Ohio St.3d 24, 577 N.E.2d 650 (1991); *Chef Italiano Corp. v. Kent State Univ.,* 44 Ohio St.3d 86, 87, 541 N.E.2d 64 (1989)).

Entry Granting Pls.' Mot. for Prelim. Inj. at 1. Moreover, Plaintiffs have cited numerous cases finding a property interest in business licenses and in an existing business under Ohio state law. *See* Pls.' Brief at 17 (citing *Asher Invest. Inc. v. City of Cincinnati*, 122 Ohio App.3d 126, 136, 701 N.E.2d 400 (1st Dist.1997); *State v. Cooper*, 71 Ohio App.3d 471, 474, 594 N.E.2d 713 (4th Dist.1991), quoting *In re Thornburg*, 55 Ohio App. 229, 234, 9 N.E.2d 516 (8th Dist. 1936); *see also Baird,* 438 F.3d at 612. Indeed, even when a federal Due Process Clause violation is asserted, courts must look to state law to determine whether a property interest exists, because the existence of a property interest is a question of state law. *Asher*, 122 Ohio App.3d at 136; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement *grounded in state law*…." (emphasis added)). And since a license constitutes a property interest subject to due process constraints, the Ohio Revised Code provides that licensees may continue to operate pending a final hearing and adjudication of an administrative agency's proposed license revocation. R.C. § 119.06.

The two cases cited by Defendants for the proposition that Plaintiffs lack a property interest in their licenses—*WCI, Inc. v. Ohio Liquor Control Comm'n*, 116 Ohio St.3d 547, 2008-Ohio-88, 880 N.E.2d 901, and *State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 27, 196 N.E. 664 (1935)—are easily distinguishable. As the Ohio courts have recognized, liquor licenses are uniquely subject to regulation for reasons that are not applicable to other kinds of licenses. *See, e.g.*, *Scioto Trails Co. v. Ohio Dep't of Liquor Control*, 11 Ohio App.3d 75, 76, 462 N.E.2d 1386 (10th Dist. 1983) ("Since the advent of the Eighteenth and Twenty-First Amendments to the United States Constitution, it is generally recognized that intoxicating liquor is peculiarly subject to regulation by the state and is not afforded the same type of constitutional rights as might be afforded other business pursuits….").

Finally, although Defendants correctly assert that Plaintiffs have not asserted a property interest in a variance, Opp. at 11, this observation is irrelevant. SB 157 directly threatens Plaintiffs' existing property and liberty interests in their occupations, existing businesses, and licenses because Plaintiffs cannot maintain their licenses—and therefore their ASFs, which they have safely operated for decades—without a variance. And as Plaintiffs have demonstrated, SB 157 makes it impossible for Plaintiffs to obtain the variances upon which their licenses depend. Pls.' Second Mot. for Prelim. Inj. ("Pls.' Br.") at 6-10.

The unquestionable existence of Plaintiffs' fundamental liberty and property interests under Ohio law require this Court to apply strict scrutiny to Plaintiffs' substantive due process and equal protection claims. As noted above, Defendants have not even attempted to argue that SB 157 can satisfy this demanding test. Instead, they act as though Plaintiffs have asserted a *procedural* due process claim. Yet, although Plaintiffs have asserted procedural due process claims in their Complaint, Compl. ¶¶ 96-101, they have moved here for a preliminary injunction only on their substantive due process and equal protection claims.[7]

Finally, Plaintiffs have not asserted a freestanding constitutional "right to perform abortions," Opp. at 14, but have instead explained that the patient's right to obtain an abortion is logically intertwined with the physician's ability to provide them, Pls.' Brief at 17. Indeed, numerous courts have recognized that a law need not directly regulate patients or abortion procedures to infringe on patients' substantive due process rights. *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 603 (6th Cir. 2006) (rejecting defendants' argument that, because the

[7] Plaintiffs nonetheless maintain that, by depriving them of their constitutionally protected liberty and property interests without a meaningful opportunity to contest that deprivation, SB 157 denies Plaintiffs procedural due process as well. *See* Pls. Opp. to Defs.' MTD/MSJ at 7-8; *Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir. 2004) ("Due process requires notice ... and a meaningful opportunity to contest the evidence.").

written transfer agreement requirement for ASFs was a "generally applicable and neutral" one, the law pertaining to abortion restrictions did not apply) (citing *Planned Parenthood of Greater Iowa, Inc. v. Atchison,* 126 F.3d 1042, 1048–49 (8th Cir. 1997), and *Birth Control Ctrs., Inc. v. Reizen,* 743 F.2d 352, 361–62 (6th Cir. 1984)); *see also Planned Parenthood Sw. Ohio Region*, Hamilton C.P. No. A 2100870, Entry Granting Pls.' Second Mot. for Prelim. Inj., at 10 (applying strict scrutiny to a law regulating procedural abortion providers, stating "a person's right to obtain an abortion is inextricably bound up with the doctor's ability to provide that care.").

D. SB 157 Violates Plaintiffs' Right to Equal Protection and Benefit of the Laws.

Defendants attempt to attack Plaintiffs' equal protection argument by asserting that SB 157 is a "neutral" requirement applicable to all ASFs that just happens to burden Plaintiffs uniquely. Opp. at 17-18. They then argue that SB 157—a supposedly neutral statute governing all ASFs—is justified by the State's desire "to prevent public funds from subsidizing abortion,"[8] together with the state's desire to favor childbirth over abortion. Opp. at 19-20. This argument is incoherent if SB 157 does not single out abortion-providing ASFs. If SB 157 is a requirement that is meant to apply to all ASFs, then the State has pointed to no legitimate interest that it could serve, other than a purported interest in "the health, safety, and welfare of [Ohio] citizens," which Defendants do not and cannot explain. Opp. at 20. Defendants have not articulated how SB 157 is even rationally related to either of these asserted purposes.

[8] Defendants also cite R.C. § 3727.60, which prohibits public hospitals from entering into written transfer agreements with abortion clinics and prohibits backup physicians from using their admitting privileges at a public hospital to support a variance application for an abortion clinic. Opp. at 6-7. That law, like SB 157, limits the pool of qualified physicians who can serve as backup doctors for Plaintiffs. However, all of the backup doctors who supported Plaintiffs' variances before the enactment of SB 157 had admitting privileges at private hospitals, not public hospitals. Haskell Aff. ¶ 34; Deibel Aff. ¶¶ 12, 14-21, 28, Exh. B. It is therefore unclear in what sense SB 157 is a "further clarification" of R.C. § 3727.60, as Defendants claim. Opp. at 7.

Moreover, in addition to the lack of even a rational basis—much less a compelling interest—supporting this law, Plaintiffs have provided ample evidence that SB 157 was motivated by animus toward Plaintiffs as abortion-providing ASFs. Pls.' Br. at 4-5, 21-22. The legislative record contains multiple references to abortion providers and no references to any other ASFs. *Id.* One supporter of the bill went so far as to bemoan the fact that "unfortunately," Plaintiff WMD's ASF has continued to operate despite attempts to shut it down. *Id.* And of course, this Court need not ignore this substantial evidence of the General Assembly's purpose to target abortion-providing ASF's simply because SB 157 does not on its face single out abortion providers. *See, e.g.*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (noting "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Twp. of Wakefield,* 247 U.S. 350, 352 (1918))).

CONCLUSION

For the foregoing reasons, this Court should preliminarily enjoin Defendants from revoking or refusing to renew Plaintiffs' ASF licenses or otherwise preventing Plaintiffs from providing procedural abortion services for any reason related to noncompliance with SB 157.

Dated: June 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 13, 2022 a copy of the foregoing Motion for Preliminary Injunction has been filed with the Hamilton County Clerk of Courts. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

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