IN THE COURT OF APPEALS OF OHIO
FIRST APPELLATE DISTRICT
HAMILTON COUNTY

WOMEN'S MEDICAL GROUP PROFESSIONAL CORP., et al., Plaintiffs-Appellees, v. BRUCE VANDERHOFF, et al., Defendants-Appellants.	:	Case No. C 250549 **REGULAR CALENDAR** On Appeal from the Hamilton County Court of Common Pleas Case No. A 2200704

BRIEF OF STATE DEFENDANTS-APPELLANTS

DAVE YOST (0056290)
Attorney General of Ohio

AMANDA L. NAROG (093954)*
**Counsel of Record*
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 995-0326 | Fax: (855) 669-2155
Amanda.Narog@OhioAGO.gov

Counsel for State Defendants-Appellants Director Bruce Vanderhoff & Ohio Department of Health

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ASSIGNMENTS OF ERROR

1. The trial court erred in ordering Director of Health Bruce Vanderhoff to testify at a deposition about variance requirements and decisions because variance decisions have a protection from discovery akin to privilege as they are not subject to judicial or administrative review.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it ordered Director of Health Bruce Vanderhoff to testify at a deposition about the exercise of his discretion regarding variance requirements and decisions which the trial court lacks jurisdiction to review?

INTRODUCTION

This case is about the jurisdictional limits of trial courts, and this Court's authority to review provisional orders when lower courts transgress those limits. In this case, the trial court has ordered Bruce Vanderhoff, the Director of Health and top executive branch official at the Ohio Department of Health ("ODH"), to testify at deposition about variance requirements and decisions. *See* T.d. 92 (attached hereto as Exhibit A). In their motion, Plaintiffs asserted that preventing the deposition of "the only witness with relevant information and decision-making authority regarding the interpretation and enforcement of the Statutory Variance Requirements would unfairly prejudice Plaintiffs." T.d. 86 at 9. That authority, they claim, even as statutorily prescribed, was unknown to them until mere days before the close of discovery so they "could not have anticipated the need to depose Director Vanderhoff" earlier. *Id.* at 10.

Plaintiffs pointed to two specific topics necessitating the order: testimony regarding the rationale for all variance decisions made since 2017; and the reason for the minimum number of backup doctors, including all changes to that number, and the required qualifications for backup doctors to obtain a variance. T.d. 86 at 5. But variance decisions are not judicially or administratively reviewable, therefore any facts about how and why those decisions are made are not reviewable either. As such, those topics are

completely irrelevant to the claims the trial court has proper jurisdiction to consider.

The State has already admitted that Plaintiffs are the only two ASFs in Ohio to formally apply for a variance from the WTA Requirement. S*ee* T.d. 73 ¶ 46. So Plaintiffs already know that the only testimony they can obtain here is related to their own variance applications and decisions. Such an obvious attempt to circumvent the General Assembly's unambiguous choice to prevent judicial review of variance decisions—and now compelled by the trial court—should not be sanctioned here. That alone warrants reversal of the trial court's order.

There are, however, other reasons for reversal. For one thing, the trial court failed to consider relevance or jurisdiction when it ordered the Director's deposition. The trial court is statutorily prohibited from exercising any judicial authority over variance decisions, rendering any testimony on the topic irrelevant to this case. That same fact puts that testimony in a category protected as "akin to privilege." Under prevailing Ohio Supreme Court precedent, a discovery order compelling such protected material is within this Court's jurisdiction to review on appeal and provides additional grounds for reversing the discovery order.

Another reason for reversal is the Director's status as a high-ranking governmental official. Ohio's strong public policy mandates that such official

should only be deposed when the testimony sought is absolutely vital to prevent prejudice to the requesting party. Of course, because the Director's testimony on variance requirements and decisions is irrelevant and because the trial court lacks jurisdiction to consider the same, it is also not necessary under any criteria. For all these reasons, this Court should reverse the decision below.

STATEMENT OF THE CASE

Plaintiffs-two Ambulatory Surgical Facilities in Southwest Ohio-filed this lawsuit against Director of Health Bruce Vanderhoff and the Ohio Department of Health ("the State") in early 2022. Plaintiffs sought and obtained two preliminary injunctions barring enforcement of R.C. 3702.305. *See* T.d 31; 44.

Shortly thereafter, the case was stayed pending the outcome of another similar abortion case. T.d. 49. While stayed, voters added "The Right to Reproductive Freedom with Protections for Health and Safety" Amendment to the Ohio Constitution. Art. I, Sec 22. After the stay was lifted, Plaintiffs amended their Complaint.

Near the end of discovery, Plaintiffs served a notice to depose a 30(b)(5) representative of ODH. The first designee was unable to adequately answer all of the topics noticed by Plaintiffs, so the State agreed to hold open the deposition and immediately made a second designee available to testify.

Plaintiffs, however, insisted that the State also designate Director Vanderhoff as a 30(b)(5) representative, but the State refused.

Plaintiffs then moved to compel Director Vanderhoff's deposition as a party witness as their primary source of relief, and requested the court compel his 30(B)(5) designation in the alternative. Over the State's opposition, the trial court ordered the Director to appear for deposition and testify as a party witness. The State appealed.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to R.C. 2505.02 because the trial court's order compelling Director Vanderhoff's deposition is a provisional remedy that: compels testimony on subjects akin to those listed in R.C. 2505.02(A)(3); and determines the action with respect to the discovery dispute which cannot be meaningfully remedied by a judgment for the Director once the deposition has occurred. R.C. 2505.02(B)(4).

PROCEDURAL POSTURE

Plaintiffs moved to compel the deposition of Director Vanderhoff to take his testimony about variance requirements and decisions, and the trial court granted their motion. Therefore, this appeal is from a provisional judgment.

STATEMENT OF THE FACTS

The relevant facts here include the General Assembly's enactment of the bill and summary of the provisions at issue, some of the previous procedure in the case, and the briefing that led to the decision that is now on appeal.

I. Statutory and Administrative Framework Regulating All Ohio ASFs.

Ohio law contains several statutes that regulate the licensing and operation of each Ambulatory Surgical Facility ("ASF") within the State. Plaintiffs have challenged the constitutionality of several of these laws in this case.

A. The WTA Requirement

Written transfer agreements have been in Ohio law for many years, initially in Ohio Adm. Code §3701-83-19(E), and later also added to the Ohio Revised Code. Ohio's written transfer agreement ("WTA") requirement is contained in R.C. 3702.303 which mandates that an ASF "shall have a written transfer agreement 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).

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* R.C. §3702.303(C)(2); R.C. §3702.304. A variance may be granted if the applicant demonstrates to the satisfaction of the Director that the purpose of a requirement—that an ASF have a WTA with a local hospital—has been met in another way. *See* Ohio Adm. Code §3701-83-14.

B. The Variance Provision

Ohio Revised Code section 3702.304 sets forth the process for obtaining a variance from the WTA Requirement. Whether to grant a variance lies solely in the discretion of the Director of ODH. The director "may" grant a variance if the ASF submits a "complete variance application, prescribed by the director," and "the director determines after reviewing the application that the facility is capable of achieving the purpose of a written transfer agreement in the absence of one." R.C. §3702.304(A)(1). The Director's determination is final. Id. To be complete, a variance application must include a number of listed items, as well as "[a]ny other information the director considers necessary." *Id.* §3702.304(B)(5). Part of a complete variance application is documentation showing that an ASF has back-up physicians with admitting privileges at one or more local hospitals in case of an emergency. Id. §3702.304(B)(2).

The Director "may impose conditions on any variance the director has granted." *Id.* §3702.3011. Moreover, "[t]he director may, at any time, rescind the variance for any reason, including a determination by the director that the facility is failing to meet one or more of the conditions or no longer adequately protects public health and safety." *Id.*

C. The Public Hospital Limitation

Another existing law, R.C. §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 §3727.60(B).

D. The License Suspension Provision

Ohio Revised Code section 3702.309 contains the license suspension provision. This section provides that "[i]f a variance application is denied under section 3702.304 of the Revised Code, the license of such an ambulatory surgical facility is automatically suspended." Ohio Rev. Code §3702.309(A). However, the Director "shall" reinstate the license if any of the following occurs: (1) the ASF files a copy of a proper WTA; (2) the director grants the ASF a variance; or (3) the license must be reinstated

pursuant to an order arising from an administrative appeal of the license suspension. *Id.*

E. Backup Doctor Rule

The General Assembly then enacted R.C. 3702.305, which 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." R.C. §3702.305(A)(1) and (2).

II. Procedural History.

After the passage of Amended Substitute Senate Bill 157 ("SB 157"), enacting R.C. 3702.305, but before the law went into effect, Plaintiffs Women's Medical Group Professional Corporation ("WMC") and Planned Parenthood Southwest Ohio Region ("PPSWO") initiated a lawsuit seeking preliminary injunctive relief on behalf of WMC's Dayton Clinic to prevent the ODH and its Director, Bruce Vanderhoff (the "Director") from "enforcing SB 157 until 90 days after its effective date," and a permanent injunction against R.C. 3702.305's enforcement, claiming that the law violates the Ohio Constitution. WMC contemporaneously filed a motion seeking a temporary restraining order to be followed by a preliminary injunction.

The trial court granted both motions, with the preliminary injunction set to expire on June 21, 2022. On May 26, 2022, both Plaintiffs filed a motion for a second preliminary injunction to enjoin enforcement of R.C. 3702.305. The court granted that motion as well.

III. Plaintiffs move to depose Director Vanderhoff to obtain testimony related to variance decisions and requirements.

In the final few months of discovery, Plaintiffs served a "Notice of Rule 30(B)(6) [sic] Deposition of Representative(s) of the Ohio Department of Health" to the State on January 28, 2025. *See* T.d. 88, Ex. A. On February 13, Plaintiffs were informed that ODH had designated its Medical Director, Dr. Mary DiOrio, as its representative. The deposition was then scheduled for February 26. Early into the deposition, however, it became apparent that Dr. DiOrio could not answer Plaintiffs questions on certain program specific topics. During the first break and then on the record, counsel offered to make available James Hodge for deposition as well, even if it needed to be taken "out of time" after the close of discovery. *See* T.d. 86, Ex. C at 101:2-18.

The next day, Plaintiffs served three additional notices: a notice to depose James Hodge as a designee for ODH pursuant to 30(B)(5) as agreed to during Dr. DiOrio's deposition; a notice to depose James Hodge as a fact witness; and a notice to depose Director Vanderhoff as a designee for ODH pursuant to Rule 30(B)(5). The State objected to the two additional notices

when it provided available dates for deposing Mr. Hodge on the grounds that the parties had not agreed to continue the deposition to have Hodge testify as a fact witness, and that Director Vanderhoff was not an appropriate 30(B)(5) designee for ODH. Discovery was scheduled to close on March 3.

The parties conferred on the request to designate Director Vanderhoff as a representative for ODH on March 18, 2025, but could not resolve the disagreement. Two days later, on March 20, James Hodge was deposed.

Then on April 29, 2025, Plaintiffs served a notice of deposition for Director Vanderhoff to testify as a party opponent—almost two months after discovery closed in this case. The trial court met with the parties to discuss the discovery dispute and told Plaintiffs to file a motion to compel. Plaintiffs filed their motion on May 15, 2025, asking the trial court to "order Defendant Bruce Vanderhoff, M.D., to fully cooperate and participate in his deposition as a party and fact witness or, in the alternative, as a Rule 30(B)(5) witness on behalf of ODH." Plaintiffs pointed to Topics 4 and 11 as the basis for the motion:

> Topic 4: All ASF variance applications and decisions since 2017, including variances from the WTA requirement, as well as variances from any other ASF requirement …but especially:
> (d): Your decisions whether to grant any variances of an ASF requirement, including but not limited to, the WTA requirement, since 2017 and
> (e) the reasons for denying any variance applications from any ASF requirement since 2017.

> Topic 11: The minimum number of Backup Physicians with admitting privileges that are necessary in order for an ASF to obtain a variance of the WTA Requirement, and knowledge of whether and how such requirement advances patient health in accordance with widely accepted and evidence-based standards of care, since 2015.
>
> a. All changes in the minimum number of Backup Physicians required, and reason(s) for each minimum number and change.
>
> b. All changes in the minimum credentials or qualifications for eligible backup physicians required, and reason(s) for each required credential or qualification.

T.d. 86 at 5. Plaintiffs further cited the failure of both deponents to provide specific information related to variance requirements and decisions. *Id.* at 6-7. Plaintiffs nowhere stated any further basis in their motion to compel beyond the variance requirements and decisions. *Id.* at 8 ("Director Vanderhoff, by the State's own contention, is the only individual who 'has the authority to grant a variance from the WTA requirement.' The Director's *discretion* regarding the justification for, and enforcement of, the WTA and Statutory Variance Requirements are central to the claims asserted by Plaintiffs under the Ohio Constitution.") (internal citations removed) (emphasis added). They further claimed that "[p]reventing Plaintiffs from deposing the only witness with relevant information and decision-making authority regarding the interpretation and enforcement of the Statutory Variance Requirements would unfairly prejudice Plaintiffs." *Id.* at 9.

The State opposed the motion on several grounds. First, the testimony sought is irrelevant and not proportional to the needs of the case because

"unlike other decisions made by ODH, the authority designated to the Director of Health to grant variances is left solely to his discretion and that determination is both final and not subject to judicial review. *See* R.C. 3701.304, Adm.Code 3701-83-14; *see also Women's Med Ctr. of Dayton v. State Dept. of Health*, 2019-Ohio-1146, ¶ 55 (2d Dist.)." T.d. 88 at 5. Moreover, under Ohio Supreme Court precedent, a showing of "extraordinary circumstances" is necessary to depose a high-ranking governmental official. Director Vanderhoff, as Director of Health and the top executive official at ODH, is tasked with substantial statutory duties and authority to ensure the protection of public health and safety for the citizens of Ohio. Because the scope and importance of his position implicates the exact public policy concerns that warranted the adoption of the limitation on such discovery orders in the first place, the Director qualifies as a high-ranking official.

IV. The trial court orders Director Vanderhoff to appear for deposition as a party and fact witness.

Despite Plaintiffs' failure to make the requisite showing that the discovery sought was necessary to the case, and over the State's opposition, the trial court granted Plaintiffs' motion. *See* T.d. 92. In its entry, the court mischaracterized the discovery conflict between the parties as a simple and straightforward dispute: "Plaintiffs' request to depose Defendant

Vanderhoff," to which "Defendants have refused to produce Defendant Vanderhoff for a deposition." *Id.* at 1. While the trial court referenced the prior depositions of "representatives identified by Defendants," it did not distinguish between Plaintiffs insistence that the State designate the Director as a representative for ODH under 30(B)(5) from their subsequent request to depose him as a party and fact witness under 30(A).

To decide the motion, the trial court first reasoned that the Director could be deposed as a party to the case pursuant to Civ. R. 30(A). *Id.* It also found persuasive the fact that ODH's "designated representatives were unable to answer some of Plaintiffs' questions during their depositions and stated Director Vanderhoff would be the proper person to answer those questions." *Id.* at 1-2. Finally, the trial court noted that, because the parties agreed to hold open the original 30(B)(5) deposition to make available a second ODH designee even if the deposition concluded after the discovery cutoff, the State could not use the close of discovery to prevent further depositions: "Defendants cannot ignore the discovery deadline when it is convenient to them and then use the same deadline to refuse to comply with additional discovery requests." *Id.*

The trial court did not address the substance of the primary arguments made by the State in its Opposition briefing: the Director's inability to testify about variances on behalf of ODH as a 30(B)(5) designee; the Director's

status as a high-ranking government official must be weighed against the need for his testimony; the discretionary nature of variance requirements and decisions; and because variance decisions are final and not subject to judicial review, any testimony related to those discretionary decisions is not relevant to the case in any event. Nevertheless, the trial court's Entry ordered Director Vanderhoff "to fully cooperate and participate in his deposition as a *party and fact witness*." T.d. 92 at 2. The State appealed.

After both parties briefed the question of this Court's jurisdiction to consider this case on appeal, the Court provisionally determined that it has jurisdiction to hear the instant appeal pursuant to R.C. 2505.02(B)(4).

STANDARD OF REVIEW

"While a trial court has broad discretion to regulate discovery, that discretion is not boundless." *Weckel v. Cole + Russell Architects*, 2013-Ohio-2718, ¶ 25 (1st Dist.) (internal citations removed). Generally, "an appellate court reviews a trial court's discovery order for an abuse of discretion." *Schram v. Masadeh*, 2024-Ohio-1662, ¶ 16 (1st Dist.). However, "if the dispute involves an alleged privilege, it is a question of law, subject to de novo review." *Friedenberg v. Friedenberg*, 161 Ohio St.3d 98, 2020-Ohio-3345, ¶ 22. In such cases, "an appellate court may properly substitute its judgment for that of the trial court." *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, ¶ 82.

ARGUMENT

I. First Assignment of Error:

The trial court erred in ordering Director of Health Bruce Vanderhoff to testify about variance requirements and decisions without considering the relevance of his testimony or its necessity to the outcome of the case.

Issue Presented for Review

Did the trial court err when it ordered Director of Health Bruce Vanderhoff to testify at a deposition about the exercise of his discretion regarding variance requirements and decisions which the trial court lacks jurisdiction to review?

From the very outset of this litigation, the Director of Health's plenary and singular authority to grant or deny variances from the WTA requirement has not been in conflict. The statutory scheme makes this fact plain, and the State has over and again affirmed it in both the Director's notices of variance decisions, *see* T.d. 68, Ex. B-D, G and its briefings filed in the case. T.d. 28 at 9-10, T.d. 38 at 1.

But at the heart of this conflict is whether Director Vanderhoff can be compelled to testify on behalf of the Department of Health for decisions only the director of health is authorized to make. As both designated deponents' testimony confirms, ODH does not have any knowledge regarding variance requirements or decisions. The Director alone can evaluate and decide whether to grant a variance from the written transfer agreement requirement. R.C. 3702.304 announces that only the "director of health my

grant a variance from the written transfer agreement requirement," "the director shall consider each application for a variance independently without regard to any decision the director may have made on a prior occasion," and the "director's decision to grant, refuse, or rescind a variance is final." R.C. 3702.304(A)(1); (D); (C). But even if he could, or now should, be ordered to testify at deposition, that order could not compel testimony regarding variances because it is not relevant to this case. Indeed, ordering irrelevant testimony would take the Director away from the duties of his office without any justification.

Even though this appeal is provisional in nature, this Court's jurisdiction over it is proper. In certain cases, as here, Ohio law empowers litigants to immediately appeal an order granting or denying a provisional remedy if (1) the order "determines the action" as to the provisional remedy, and (2) the appealing party has no means of securing a "meaningful or effective remedy" if it must wait until final judgment before appealing. R.C. 2505.02(B)(4).

A. The trial court erred when it ordered discovery that is irrelevant to any claims or defenses it has jurisdiction to consider.

To begin, consider the "relevance" of the testimony Plaintiffs seek. Although Ohio's civil rules permit broad pretrial discovery, that scope is not unbounded. As Ohio Civ. R. 26(B)(1) provides: "Unless otherwise limited by

court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . .” Matters are considered relevant “at the discovery stage” if they may “reasonably lead to the discovery of admissible evidence.” *Weckel v. Cole + Russell Architects*, 2013-Ohio-2718, ¶ 23 (1st Dist.).

In addition to being relevant, discovery must also be proportional. *See* Ohio Civ. R. 26(B)(1). Ohio’s rule mirrors the federal standard. As now-Chief Judge Sutton explained for the Sixth Circuit, the federal rule “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality”; discovery is not intended to support “costly and delay-inducing efforts to look under every stone in” a “world populated by many stones.” *Helena Agri-Enterprises, LLC v. Great Lakes Grain, LLC*, 988 F.3d 260, 273 (6th Cir. 2021) (quotation omitted).

By its plain terms, the Director’s decision to grant or deny a variance is discretionary and not subject to administrative or judicial review. R.C. 3702.304 provides that

> “The director of health *may* grant a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code if the ambulatory surgical facility submits to the director a complete variance application, prescribed by the director, and the director determines after reviewing the

> application that the facility is capable of achieving the purpose of a written transfer agreement in the absence of one. *The director's determination is final.*"

R.C. 3702.304(A)(1) (emphasis added).

In addition to several statutory requirements for variance applications, the statute authorizes the Director to require "[a]ny other information the director considers necessary" before an application is deemed complete. *See* R.C. 3702.304(B)(5). To remove any doubt regarding the finality of such decisions, the statute reiterates: "[t]he director's decision to grant, refuse, or rescind a variance is final." *See* R.C. 3702.304(C) (emphasis added).

In cases challenging the constitutionality of R.C. 3702.304, both the Ohio Supreme Court and the Second District Court of Appeals have held that it is unnecessary to reach constitutional questions where the only relevant inquiry in reviewing an order revoking an ASF license—even one allegedly resulting from a denied variance—is whether the revocation order is "supported by reliable, probative, and substantial evidence and is in accordance with law." *See* R.C. 119.12(M); *see also Capital Care Network of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362, 2018-Ohio-440, ¶ 24; *Women's Med. Ctr. of Dayton v. State Dept. of Health*, 2019-Ohio-1146, ¶ 56.

In *Capital Care*, the Court noted the trial court's failure to evaluate the basis for the revocation order and held that "because ODH had authority to revoke Capital Care's license based on the failure to comply with [Ohio Adm. Code 3701-83-19(E)] requiring a written transfer agreement with a nearby hospital, it is not necessary to reach those constitutional issues." *Id.* ¶ 33. The dispositive issue was whether there was "reliable, probative, and substantial evidence" that Capital Care "operated without a written transfer agreement for five months and currently has no such agreement with a hospital that allows for the transfer of patients in the event of emergency situations." *Id.* ¶ 31.

That framework guided the Second District's analysis in *Women's Med. Ctr. of Dayton*, where WMC—a Plaintiff in this case—appealed a trial court decision affirming a license revocation order. WMC argued that the order was contrary to law because "the Director denied [WMC's] request for a variance from the licensing requirement without providing it with an opportunity for judicial review." *Id.* ¶ 31. The Second District affirmed, holding that the trial court "correctly distinguished the [] adjudication order revoking and refusing to renew [WMC]'s license from the discretionary, optional, elective and permissive decision denying [WMC]'s request for a variance" and "lacked jurisdiction to address the variance issue." *Id.* ¶ 54 (emphasis added). The court emphasized that jurisdiction "arose from the

adjudication order" and "not the denial of the variance," which "was governed by Ohio Adm. Code 3701-83-14 and R.C. 3702.304 and was not a judicially reviewable determination." *Id.* ¶ 55.

The legal question before the trial court—and the only claim it has jurisdiction to hear—is whether the statutory delegation of authority to the Director is constitutionally permissible under prevailing law—and, if so, whether that delegation violates Article I, Section 22(B) of the Ohio Constitution.

That fact is supported by the statutory scheme: the ability to obtain an ASF license does not rest on any discretionary decision of the Director in the first instance—the requirements for a WTA are statutorily prescribed. *See* R.C. 3702.303; *see also Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St.3d 157, 2018-Ohio-441, ¶ 45 ("The Written Transfer Agreement Provisions at issue generally provide that every ambulatory surgical facility ("ASF") 'shall have a written transfer agreement with a local hospital' specifying a procedure for transferring patients from the ASF to the hospital when necessary.") It is only after an ASF fails to obtain a WTA with a local hospital that it must rely on the Director's discretionary determination to grant or deny a variance from the WTA requirement under R.C. 3702.304. But a variance decision, on its own, doesn't constitute a final "adjudication" within the meaning of R.C. 119.12, which must be both: 1) that of the highest or

ultimate authority of an agency which; (2) determines the rights, privileges, benefits, or other legal relationships of a person." *Women's Med Ctr. of Dayton v. State Dept. of Health*, 2019-Ohio-1146, ¶ 53 (2nd Dist.) (internal citations removed).

The Director's determination of a variance application does nothing on its own—it can only serve as additional evidence that the applicant has failed to obtain both a WTA and a variance, so they are not entitled to obtain or keep an ASF license. That determination is subject to an administrative hearing, and the resulting determination is the final order which can then invoke a trial court's jurisdiction to review the revocation decision on appeal.

This further comports with the nature of a variance: it is a secondary opportunity for an ASF to obtain a license when it has failed to acquire a WTA in compliance with the primary law, R.C. 3702.303, and confirms that the trial court lacks jurisdiction over the Director's variance decisions.

B. The trial court's inability to review the Director's exercise of discretion over variance decisions operates as a type of immunity from suit that is akin to privilege.

Plaintiffs contend that the Director's compelled testimony is necessary for the State to meet its burden of demonstrating that the variance statute employs "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." They further assert that they are not challenging individual variance

decisions yet simultaneously claim to bring "facial and as-applied challenges to the written transfer agreement scheme laid out in the WTA and *Variance Requirements*." Pls. Juris. Br. at 9–10 (emphasis added). Plaintiffs also argue that no party contests the trial court's jurisdiction over those claims.

However, the State *does* dispute the trial court's authority to adjudicate any as-applied challenge to the Variance Provision. Entertaining such a challenge would necessarily require judicial review of specific facts related to the Director's discretionary determinations of Plaintiffs' own variance applications.

Crucially, Plaintiffs' assertion that the Director's testimony is essential to their case is undermined by their failure to challenge the Director's discretionary denial of variances through the proper legal mechanism and in the appropriate forum. The Supreme Court of Ohio has "repeatedly determined in a long line of cases in varying contexts that when an agency's decision is discretionary and, by statute, not subject to direct appeal, a writ of mandamus is the sole vehicle to challenge the decision, by attempting to show that the agency abused its discretion." *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, ¶ 23. As the Court further explained, "[a] declaratory judgment action is not a mechanism by which to review an alleged abuse of discretion of this type. Neither is injunctive relief." *Id.* ¶ 29.

Here, Plaintiffs not only failed to pursue, let alone exhaust, available administrative remedies—they also failed to obtain a final adjudication order necessary to invoke the trial court's jurisdiction over a license revocation. So even if they had done so in a mandamus action, the court would still lack jurisdiction absent such an order.

But because Plaintiffs seek the Director's testimony in a declaratory judgment action requesting permanent injunctive relief, any testimony concerning the discretionary variance requirements or decisions is irrelevant to the proceeding. That fact alone renders such testimony inadmissible, as the trial court lacks jurisdiction to consider it. Accordingly, the Director's testimony is functionally akin to a statutory and common-law privilege and is not subject to discovery.

To the extent Plaintiffs assert a facial challenge to the variance statute, that too does not justify the deposition. A facial constitutional challenge presents a pure question of law, and "[e]xtrinsic facts are not needed to determine whether a statute is unconstitutional on its face." *City of Reading v. PUC*, 109 Ohio St.3d 193, 2006-Ohio-2181, ¶ 15. Thus, regardless of the nature of Plaintiffs' claims, the testimony they seek is not discoverable.

C. As a high-ranking government official, any testimony about variance decisions, when weighed against the relevancy and reviewability of them, is not discoverable because it is afforded a protection akin to privilege.

The Ohio Supreme Court recently reaffirmed its longstanding precedent that "only under 'extraordinary circumstances,' when certain factors have been satisfied, may a high-ranking government official be deposed." *State ex rel. Ctr. for Media & Democracy v. Office of AG*, 2024-Ohio-2786, ¶ 26. Before compelling such a deposition, courts must "weigh" the necessity of the testimony "against, among other factors": (1) "the substantiality of the case in which the deposition is requested"; (2) "the degree to which the witness has first-hand knowledge or direct involvement"; (3) "the probable length of the deposition and the effect on government business"; and (4) "whether less onerous discovery procedures provide the information sought." *State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, ¶ 4 (quoting *Monti v. State*, 151 Vt. 609, 613 (1989)).

Ohio's policy disfavoring such depositions, and the test governing them, originated in state court decisions that drew guidance from federal precedent. These federal authorities are persuasive because Ohio's rule is materially aligned with the federal rule. *See* 1970 Staff Note, Ohio Civ. R. 30 ("Rule 30(B)(5) is a slight variant of proposed Federal Rule 30(b)(6). It

combines the proposed Federal Rule and a portion of § 2317.07, R.C. It establishes the procedure by which a party may depose 'a public or private corporation or a partnership or association....'"). For example, in *Monti v. State*, the Vermont Supreme Court cited thirteen federal court decisions applying the rule "to a variety of state and federal executive positions." 151 Vt. at 612 n.4.

Indeed, "[u]nder the apex doctrine, 'a district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding . . . .'" *In re Sec'y*, 11th Cir. No. 23-14115, 2024 U.S. App. LEXIS 453, at *3 (Jan. 5, 2024), quoting *In re USA*, 624 F.3d 1368, 1376 (11th Cir. 2010). That doctrine permits the deposition of a high-ranking official "only on a clear showing that the testimony of the official is necessary to prevent injustice to the party." *United States v. Northside Realty Assocs.*, 324 F. Supp. 287 (N.D. Ga. 1971).

The rationale is pragmatic: "public policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases." *Community Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983). That policy applies with full force here. The Director of Health bears extensive statutory responsibilities and exercises significant authority to safeguard the health and safety of Ohio's citizens. He leads an

executive agency with over a thousand employees and is frequently called upon to provide expert guidance on healthcare matters, particularly during public health emergencies.

Moreover, the implications of the trial court's order extend beyond the instant case. Conservatively, any order compelling the Director's deposition risks establishing a precedent that would make such depositions routine in litigation involving ODH. Since assuming office, Dr. Vanderhoff has been named in at least eight cases. Preparing for and sitting through a deposition—likely lasting at least seven hours—would divert substantial time and resources from the Department's core mission. That burden alone weighs heavily against permitting the deposition, especially where the issue before the Court is legal, not factual, in nature. Construed liberally, the precedent may be extended to all similar executive branch officials—effectively dismantling the policy's application to all but a few constitutional officers.

Where, as here, the compelled testimony involves discretionary authority, the reasoning in *Northside Realty* is particularly instructive:

> "It has been recognized that a member of the Cabinet or the head of a large executive department should not be called upon to give his deposition if such deposition is taken in order to probe the mind of the official to determine why he exercised his discretion as he did in regard to a particular matter. The case of *Wirtz v. Local 30, International Union of Operating Engineers*, 34 F.R.D. 13 (S.D., N.Y. 1963) extends this doctrine to allow the

> taking of personal testimony of a cabinet official only on a clear showing that the testimony of the official is necessary to prevent injustice to the party [requesting it]."

324 F. Supp. 287, 293 (N.D. Ga. 1971). That principle is especially applicable in this case because the facts Plaintiffs seek are immaterial to the legal question as to the constitutionality of the challenged provisions.

The State concedes that the Director is not a constitutional officer, but that concession does not alter the concern that burdensome and unnecessary discovery orders may interfere with the executive's ability to perform his duties. As the Court recognized in *Center for Media & Democracy*, "the judiciary has interfered with protections 'inherent in a system of separated powers, as such orders interfere with the executive offices' and officers' ability to discharge their duties." 2024-Ohio-2786, ¶ 27. That Court recognized the very kind of protection claimed now: "[w]hile not a statutory or common-law privilege, this claimed protection 'is akin to a privilege.'" *Id.* ¶ 27. And once the deposition has occurred, the harm cannot be remedied. This, in combination with the trial court's inability to assert any jurisdiction over the Director's exercise of discretion over variance requirements and decisions, is more than sufficient to nullify the discovery order here.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

DAVE YOST (0056290)
Attorney General of Ohio

/s/ Amanda L. Narog
AMANDA L. NAROG (093954)
**Counsel of Record*
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 995-0326
Fax: (855) 669-2155
Amanda.Narog@OhioAGO.gov

Counsel for State Defendants-Appellants Director Bruce Vanderhoff & Ohio Department of Health

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the word-count provision set forth in First District Local Rule 19(B)(1). This Brief is printed using Georgia 14-point typeface using Microsoft Word word processing software and contains 6110 words. (9000 words or 40 pages)

/s/ Amanda L. Narog
AMANDA L. NAROG

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellants was served by e-mail this 4th day of December, 2025 upon the following:

Rachel Reeves, PHV #23855
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: 610-217-3734 | Fax: 212-549-2650
rreeves@aclu.org

Brigitte Amiri PHV #25768
Jessica Quinter PHV #27567
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2633
Fax: (212) 549-2650
bamiri@aclu.org
jquinter@aclu.org

B. Jessie Hill #0074770
Rebecca Kendis #0099129
Amy Gilbert #0100887
American Civil Liberties Union of Ohio
Foundation, Inc.
4506 Chester Ave.
Cleveland, OH 44103
bjh11@cwru.edu
agilbert@acluohio.org
rebecca.kendis@case.edu

Counsel for Women's Med Group Professional Corporation

Kyla Eastling (Pro Hac Vice 27177)
Melissa Shube (Pro Hac Vice 27469)
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
Telephone: (212) 261-4649
Fax: (212) 247-6811
kyla.eastling@ppfa.org
melissa.shube@ppfa.org

Fanon A. Rucker #0066880
The Cochran Firm
119 E. Court St., Suite 102
Cincinnati, OH 45202
frucker@cochranohio.com

Counsel for Planned Parenthood Southwest Ohio Region

/s/ Amanda L. Narog
AMANDA L. NAROG (093954)
Assistant Attorney General

Exhibit A: *Entry Ordering Defendant Director Vanderhoff to Appear for a Deposition*

ENTERED
SEP 17 2025

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORP., ET AL.,	:	**Case No. A 2200704**
	:	**JUDGE ALISON HATHEWAY**
Plaintiffs,	:	
-VS.-	:	**ENTRY ORDERING DEFENDANT BRUCE VANDERHOFF TO APPEAR FOR A DEPOSITION**
BRUCE VANDERHOFF, ET AL.,	:	
Defendants.	:	

This matter came before the Court upon Plaintiffs' Motion to Compel, filed on May 15, 2025. A discovery conference was held on May 8, 2025, and the motion was fully briefed following the conference. The Court, having considered the motion and responsive briefs, and being fully apprised of the relevant facts and law, finds Plaintiffs' motion to be well-taken.

The discovery issue here stems from Plaintiffs' request to depose Defendant Bruce Vanderhoff. Ultimately, Plaintiffs deposed two representatives identified by Defendants, both of whom repeatedly stated that Defendant Bruce Vanderhoff is the appropriate party to answer Plaintiffs' questions. However, Defendants have refused to produce Defendant Vanderhoff for a deposition. Notably, Defendants did not object to Plaintiffs' examination topics. Rather, Defendants do not want Defendant Vanderhoff to be deposed. First, Defendant Vanderhoff is a party to this case. Civ. R. 30(A) states, "[a]fter commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." Second, Defendants' designated representatives were unable to answer some of Plaintiffs' questions during

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their depositions and stated that Defendant Vanderhoff would be the proper person to answer those questions.

In addition to not wanting Defendant Vanderhoff to be deposed, Defendants also argue that Plaintiffs' notice to depose Defendant Vanderhoff is untimely because it was served upon Defendants almost two months after the close of discovery. However, both parties had agreed to conduct depositions after the close of discovery. The Court does not appreciate that its deadlines are apparently being disregarded by all parties. At the same time, Defendants cannot ignore the discovery deadline when it is convenient to them and then use the same deadline to refuse to comply with additional discovery requests.

The Court, having considered Plaintiffs' motion and arguments from both Plaintiffs' and Defendant's attorneys, finds Plaintiffs' motion to be well taken. Plaintiffs' Motion to Compel is hereby **GRANTED**. Defendant Bruce Vanderhoff, M.D. is hereby **ORDERED** to fully cooperate and participate in his deposition as a party and fact witness.

IT IS SO ORDERED.

Judge Alison Hatheway

PRAECIPE TO THE CLERK: Please provide copies to counsel.