

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

WOMEN'S MEDICAL GROUP
PROFESSIONAL CORP., et al.,
Plaintiffs-Appellees,

vs.

BRUCE VANDERHOFF, et al.,
Defendants-Appellants.

: Case No. C-2500549
:
: **REGULAR CALENDAR**
: **ORAL ARGUMENT**
: **REQUESTED**
:
: On Appeal from the Hamilton
: County Court of Common Pleas
: Trial Case No. A-2200704
:
:
:

BRIEF OF PLAINTIFFS-APPELLEES

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ASSIGNMENTS OF ERROR

1. The State argues that the trial court erred in ordering Defendant Bruce Vanderhoff to testify at a deposition about the challenged Variance Requirements and his interpretation of them because variance decisions have a protection from discovery akin to privilege shielding them from judicial or administrative review.

INTRODUCTION

This appeal concerns a routine discovery order requiring a defendant to appear for deposition as a party and fact witness. Appellees have challenged the constitutionality of a regulatory scheme that imposes requirements on abortion-providing Ambulatory Surgical Facilities and the Ohio Department of Health's (ODH) arbitrary enforcement thereof. Appellees have brought claims under the Reproductive Freedom Amendment, as well as substantive and procedural due process claims under Article I, Sections 1, 16, and 20 of the Ohio Constitution. As required under Article I, Section 22 of the Ohio Constitution, the State must demonstrate that these requirements and the State's enforcement of them advance patients' health using the least restrictive means available, in accordance with widely accepted and evidence-based standards of care. The Director of ODH's testimony about how the challenged requirements are established and applied is directly relevant to this inquiry.

Yet Defendant Bruce Vanderhoff, the Director of ODH, seeks to avoid answering questions about the very regulatory scheme he administers—including questions that the two prior ODH 30(B)(5) designees testified that *only* he could answer. The State's position rests on a fundamental mischaracterization of both Appellees' claims and the nature of the required testimony. Appellees are entitled to discovery about how ODH and its Director interpret, implement, and enforce the

challenged provisions. The merits of this case cannot be resolved without Director Vanderhoff's testimony—it is therefore essential to prevent prejudice to Appellees.

Furthermore, Ohio Civ.R. 30(A) provides that any party can be deposed. Defendant Vanderhoff's single deposition is not exceptionally burdensome and would not interfere with his duties as ODH's Director. This is far from the type of situation in which the apex doctrine may protect a high-ranking government official from exceptionally burdensome discovery that would otherwise interfere with their ability to fulfill their role. Thus, contrary to the State's assertions, Appellees have established that Defendant Vanderhoff's testimony is warranted and appropriate, and the apex doctrine does not immunize him from the ordinary rules of discovery.

Lastly, the State's argument that the trial court lacks jurisdiction over any of Appellees' claims ignores the constitutional nature of the instant litigation. The trial court has jurisdiction over all of Appellees' constitutional challenges to the laws at issue and to ODH's arbitrary enforcement thereof.

Accordingly, the Court should affirm the trial court's order compelling Director Vanderhoff's deposition.

STATEMENT OF THE CASE

I. The Parties and Claims

Appellees are Women's Medical Group Professional Corporation (WMGPC) and Planned Parenthood of Southwest Ohio (PPSWO) (collectively, Provider Plaintiffs). PPSWO operates two licensed Ambulatory Surgical Facilities that provide abortion services in Southwest Ohio. Provider Plaintiffs filed this action challenging: the Written Transfer Agreement (WTA) Requirement, codified in R.C. 3702.303 and Adm.Code 3701-83-19(E); the Statutory Variance Requirements, codified in R.C. 3702.304, and ODH's arbitrary enforcement and implementation of these requirements; the Public Hospital Ban, codified in R.C. 3727.60; the Automatic Suspension Provision, codified in R.C. 3702.309; and Substitute Senate Bill 157 (SB 157), codified in R.C. 3702.305. T.d. 96 ¶ 8 (collectively, the WTA and Variance Requirements). Appellants are the state officials responsible for enforcing the challenged laws: the Ohio Department of Health, Ohio Director of Health Bruce Vanderhoff, M.D., and the State Medical Board of Ohio (collectively, the State).

A. The Statutory Framework

Health care facilities that provide procedural abortions must maintain an ambulatory surgical facility (ASF) license. To maintain an ASF license, a facility

must either have a WTA with a local hospital or be granted a variance from that requirement by ODH. R.C. 3702.303. The provisions at issue in this case are:

- **Written Transfer Agreement Requirement:** R.C. 3702.303 requires 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 [ASF] is necessary . . .” R.C. 3702.303(A). A “local” hospital must be within 30 miles of the ASF. R.C. 3702.3010.
- **Variance Requirements:** If an ASF cannot obtain a WTA, R.C. 3702.304 permits the ODH Director to grant a “variance.” A “complete variance application” must include agreements with “one or more” backup physicians who have admitting privileges at a minimum of one “local” hospital, and a verification that the hospital has been informed of the agreement. The statute provides that the Director “*may* grant a variance” if he determines “after reviewing the application that the facility is capable of achieving the purpose of a written transfer agreement in the absence of one.” (Emphasis added.) R.C. 3702.304(A)(1). The Director’s variance decision “is final.” *Id.*
- **Public Hospital Ban:** R.C. 3727.60(B) prohibits public hospitals from entering into WTAs with ASFs that provide abortions. It also prohibits physicians with privileges at public hospitals from using those privileges for variance applications. R.C. 3727.60(B)(1) and (2).
- **SB 157:** R.C. 3702.305(A) requires backup physicians for variance applications to attest that they do not teach at, are not employed by, and do not provide instruction or consultation to any medical school affiliated with a state university, any state hospital, or other public institution.
- **Automatic Suspension Provision:** R.C. 3702.309(A) provides that an ASF’s license will be automatically suspended if a WTA variance request is denied or deemed denied, and that a variance is automatically deemed denied after 60 days if not ruled upon. An ASF must cease operations immediately upon the suspension of its license. R.C. 3702.30(E)(1); Adm.Code 3701-83-03(A).

B. The Reproductive Freedom Amendment

In November of 2023, voters approved a constitutional amendment enshrining an explicit right to abortion in the Ohio Constitution. Article I, Section 22 (the

Reproductive Freedom Amendment or the Amendment), provides: “Every individual has a right to make and carry out one’s own reproductive decisions, including but not limited to decisions on contraception, fertility treatment, continuing one’s own pregnancy, miscarriage care, and abortion.” Ohio Const., art. I, § 22. The Amendment also specifically protects persons or entities that assist individuals in exercising this right:

The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either: (1) An individual’s voluntary exercise of this right or (2) A person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual’s health in accordance with widely accepted and evidence-based standards of care.

Ohio Const., art. I, § 22(B).

II. Statement of Jurisdiction

Upon review, this Court provisionally determined that it has jurisdiction to review the appeal of the trial court’s order compelling Defendant-Appellant Bruce Vanderhoff to appear for a deposition. Provisional Entry Finding Jurisdiction.

III. Procedural History

A. Case Initiation and Preliminary Injunctions

In December 2021, the Ohio Legislature passed SB 157, which provides that physicians who work with public medical schools or universities in a teaching or consulting capacity are prohibited from serving as backup doctors, even though teaching is a fundamental component of medical practice and education and thus

many doctors provide instruction to learners in some capacity. R.C. 3705.305. By its terms, SB 157 was scheduled to go into effect on March 23, 2022. T.d. 96 ¶¶ 96–101. Plaintiff Providers filed suit challenging SB 157 in the Hamilton County Court of Common Pleas on February 25, 2022, after ODH attempted to prematurely enforce SB 157 against Appellee WMGPC (formerly WMD). *Id.* ¶ 74. WMGPC filed a motion for a temporary restraining order and subsequent motion for a preliminary injunction against the premature enforcement of SB 157, arguing that the premature, arbitrary enforcement of SB 157 violated WMGPC’s substantive and procedural due process rights under the Ohio Constitution. T.d. 3. The trial court granted the TRO on March 2, 2022, T.d. 20, and the preliminary injunction on April 15, 2022. T.d. 31.

On May 26, 2022, both Plaintiff Providers filed a second motion for a preliminary injunction against enforcement of SB 157. T.d. 37. The trial court granted that motion on June 17, 2022, finding that Plaintiffs were likely to succeed on their claim that SB 157 violates Ohio’s constitutional right to privacy and that SB 157 likely failed even rational basis review. T.d. 44 at 4–5.

On April 15, 2024, after the passage of the Reproductive Freedom Amendment, Plaintiff Providers filed an Amended Complaint that includes additional claims against the WTA Requirement, the Statutory Variance Requirements, ODH’s arbitrary enforcement and implementation of the Statutory

Variance Requirements, the Public Hospital Ban, and the Automatic Suspension Provision. T.d. 68 ¶¶ 118–31.

B. The Discovery Dispute

On June 13, 2024, the trial court ordered that “[a]ll Discovery shall be completed by 03/03/2025 except as otherwise extended by the Court.” T.d. 76. Plaintiff Providers served their first set of discovery requests on July 29, 2024, but received no meaningful response until November 8, 2024—more than 60 days past the August 28, 2024 deadline, and only after repeated follow-up requests. T.d. 86, Ex. A ¶¶ 6–13. The responses consisted mostly of objections, omitted a substantial portion of the requested documents, and stated that the information sought regarding backup physician requirements would be appropriate material for depositions. *Id.* ¶ 14; T.d. 86, Ex. F.

The States’ expert disclosures were equally deficient. In a belated November 8 response, the State attached two expert reports from prior federal litigation—drafted years before SB 157 and the Reproductive Freedom Amendment took effect—without actually confirming that any experts had been retained for this case. T.d. 86, Ex. A ¶ 15. These reports did not comply with Ohio Civ.R. 26(B)(7). To date, the State has neither sought leave to extend their expert disclosure deadline nor supplemented their written discovery responses.

On January 28, 2025, Plaintiff Providers noticed the deposition of ODH under Civil Rule 30(B)(5). T.d. 86, Ex. B. The notice described the following topics for examination:

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): Your¹ 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.

Id. The notice further provided:

“ODH shall produce a representative(s) with the knowledge and ability to testify regarding the instant matter and all of the items described . . . which are known or reasonably available to ODH. The representative(s) so

¹ Plaintiff Providers’ Notice of Deposition defines “your” as meaning “Defendant Bruce Vanderhoff, Director of the Ohio Department of Health (“ODH”), the State of Ohio, ODH, and any employee, agent, representative, investigator, consultant, attorney, or any other person acting or purporting to act on behalf of Defendants, the State, or ODH.” T.d. 86, Ex. B ¶ 4.

designated shall be the representative(s) in ODH's control most knowledgeable regarding the subject matters. . . ."

Id. The State did not object to any of these topics.

The State designated ODH's Medical Director, Dr. Mary DiOrio, as the appropriate 30(B)(5) witness. T.d. 86, Ex. A (Ex. 5). The State offered February 26, 2025—five days before the close of discovery—as the date for her deposition. T.d. 86, Ex. A (Ex. 6). At her deposition, Dr. DiOrio first testified that she was prepared to discuss all of the noticed topics. T.d. 86, Ex. C, 14:12–15:7. But as the deposition proceeded, it became obvious that she was almost entirely unable to answer counsel's questions regarding most of the noticed topics, repeatedly stating that James Hodge, the Chief of Healthcare Compliance at ODH, would have the answers Plaintiff Providers sought, and that only ODH Director Vanderhoff had the authority to grant or deny ASF licenses. *See, e.g.*, T.d. 86, Ex. C 63:21–64:7, 65:1–36, 67:6–69:22, 68:24–69:15, 74:25–75:8, 82:7–83:11, 95:2–96:19, 103:10–105:15, 133:23–134:3, 155:16–22, 160:22–161:3, 170:20–24; Br. of State Defs.-Appellants 5. Dr. DiOrio could not provide specific information about the ASF licensure process or policies, T.d. 86, Ex. C 64:8–65:4, lacked basic knowledge about what kinds of facilities constituted ASFs, *Id.* at 55:19–56:5, 61:4–17, could not articulate ODH's standards or evaluation process for WTAs, *Id.* at 73:16–23, 72:10–75:4, and admitted that she had never seen or reviewed a WTA before Plaintiff Providers' counsel presented one during the deposition, *Id.* at 76:12–16. During the deposition,

counsel for Defendants volunteered to hold the deposition open due to Dr. DiOrio's inability to address the majority of the noticed topics and did not object to any of the topics noticed for deposition at that time. T.d. 86, Ex. C at 189:7–24; Br. of State Defs.-Appellants 5.

On February 27, 2025, Plaintiff Providers informed the State that they intended to depose James Hodge and Director Vanderhoff pursuant to the original January 28, 2025, Notice of 30(B)(5) Deposition, and provided appropriate notices. T.d. 86, Ex. A (Ex. 6). In response, the State agreed to provide James Hodge for deposition on March 20, 2025, despite that discovery had closed on March 3, 2025. T.d. 86, Ex. E. Again, the State did not object to any of the noticed topics for examination.

The parties' counsel conferred on March 18, 2025, to discuss the additional deposition notices. T.d. 86, Ex. A ¶ 24. Counsel for the State refused to produce Director Vanderhoff for a deposition, contending that he could not be a Civ.R. 30(B)(5) designee for ODH because he is a separate party in the litigation, and because ODH does not provide variances—rather, variances are granted solely at the individual Director's discretion. *Id.* Instead, the State's counsel argued that Director Vanderhoff, as a separate party to the litigation, should have been noticed for a deposition as a party and fact witness before the close of discovery. *Id.* This theory of separation between the actions of Director Vanderhoff in his professional capacity

as the head of ODH and the actions of ODH as an agency did not appear in any of the State’ discovery responses or in any previous correspondence between the parties. The State first presented it in a March 7, 2025, email—four days after the close of discovery, eight days after Plaintiffs had noticed the examination of Director Vanderhoff as an appropriate 30(B)(5) designee, and nearly eight months into the discovery process. T.d. 86, Ex. E.

During his March 20, 2025, deposition, James Hodge first testified that he was prepared to discuss all of the noticed topics. T.d. 86, Ex. D 10:2–9. But as the deposition proceeded, Mr. Hodge repeatedly testified that he was unable to answer questions about a variety of the noticed topics because the answers resided in the sole purview or discretion of Director Vanderhoff. *See e.g.*, T.d. 86, Ex. D 130:3–131:16, 156:10–159:15, 160:14–161:5, 175:13–25, 244:2–246:8.²

² Additionally, Mr. Hodge testified that several categories of information sought in Plaintiff Providers’ interrogatories were readily available for the State to produce. Plaintiff Providers had requested ODH records regarding complaints or inspections of any abortion provider in Ohio, including but not limited to WMGPC and PPSWO. T.d. 86, Ex. F. The State answered that because the ODH system “cannot search for the specific information requested . . . it would be unduly burdensome to conduct a search of all complaints received since 2017.” *Id.* at 13. Mr. Hodge testified that ODH categorizes records based on the specific provider, and the State’s counsel agreed to produce the ODH records regarding WMGPC and PPSWO at Plaintiff Providers’ request. T.d. 86, Ex. D 196:10–197:8. On April 1, 2025, the State provided the requested records to supplement their discovery. T.d. 86, Ex. A (Ex. 10).

On March 25, 2025, Plaintiff Providers notified the State that they intended to depose Director Vanderhoff as a fact witness and offered to meet and confer again. T.d. 86, Ex. A (Ex. 11). The State declined the offer. T.d. 86, Ex. A (Ex. 12). On April 29, 2025, Plaintiff Providers served an updated deposition notice on Director Vanderhoff as a fact witness. T.d. 86, Ex. A (Ex. 14).

C. Prior Motion to Compel and Underlying Order

On March 31, 2025, Plaintiff Providers informed the trial court that they intended to file a motion to compel and requested a discovery conference. T.d. 86, Ex. A ¶ 28. On May 8, 2025, the trial court held a conference with both parties to discuss the discovery dispute.

Plaintiff Providers' May 15, 2025, motion to compel requested the 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." T.d. 86 at 12. On September 17, 2025, the trial court granted Plaintiff Providers' motion, first noting that "Defendant Vanderhoff is a party to this case," and is therefore subject to deposition under Civ.R. 30(A). T.d. 92. The trial court also observed that "Plaintiffs deposed two representatives identified by Defendants, both of whom repeatedly stated that Defendant Bruce Vanderhoff is the appropriate party to answer Plaintiffs' questions." *Id.* The court

further noted that the State “did not object to Plaintiffs’ examination topics. Rather, Defendants do not want Defendant Vanderhoff to be deposed.” *Id.*

On May 23, 2025, Plaintiff Providers also filed a motion requesting a “120 day extension to ensure that the parties have sufficient time to complete discovery and coordinate scheduling the deposition with Defendants if this Court grants the pending motion to compel.” T.d. 87 at 2. The court granted Plaintiff Providers motion on September 18, 2025, setting a new discovery deadline of January 16, 2026. T.d. 93.

On October 3, 2025, the State appealed the trial court’s order compelling Director Vanderhoff’s deposition. T.d. 94. After both parties briefed the question of this Court’s jurisdiction to consider this appeal, the Court provisionally determined that it has jurisdiction to hear the instant appeal pursuant to R.C. 2505.02(B)(4).

First Assignment of Error

The State argues that the trial court erred in ordering Director of Health Bruce Vanderhoff to testify about variance requirements and decisions, even though the trial court appropriately considered the relevance of his testimony and its necessity to the outcome of the case.

Issue Presented for Review

Did the trial court correctly conclude that Director of Health Bruce Vanderhoff, a party to this case, must testify at a deposition about his interpretation and application of the WTA and Variance Requirements?

STANDARD OF REVIEW

Trial courts have inherent power to control discovery. Civ.R. 26(C); *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St.3d 94 (1990). “A trial court’s decisions concerning discovery will not be disturbed on review absent an abuse of discretion.” *Large v. Heartland-Lansing*, 2013-Ohio-2877, ¶ 11, citing *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469 (1998). Abuse of discretion “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

ARGUMENT

The State’s efforts to shield Director Vanderhoff from deposition—whether as a party deponent or as an agency designee—unjustly prejudice Plaintiff Providers’ trial preparation and contravene the rules governing civil discovery. Modern discovery procedures are designed to make civil trials “less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682

(1958); *see also Earl Evans Chevrolet, Inc. v. Gen. Motors Corp.*, 74 Ohio App.3d 266, 282 (11th Dist. 1991), quoting *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367, 370 (1986) (“This element of surprise is eliminated through ‘a discovery procedure which *mandates a free flow of accessible information* between the parties upon request” (Emphasis added.)). The Ohio Rules of Civil Procedure embody a liberal discovery policy, in service of the “narrowing and sharpening of the issues to be litigated.” *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 56 (1973).

The Reproductive Freedom Amendment requires the State to demonstrate that any law that “directly or indirectly, burden[s], penalize[s], prohibit[s], interfere[s] with, or discriminate[s] against” an individual exercising their right to reproductive freedom, or an entity assisting an individual in exercising that right, is the least restrictive means to advance the individual’s health in accordance with widely accepted and evidence-based standards of care. Ohio Const., art. I, § 22(B). Whether the WTA and Variance Requirements satisfy this constitutional standard is the fundamental issue of this case.

Yet, despite Plaintiff Providers’ good faith efforts during discovery to develop their claims regarding this central issue, the State has avoided offering *any* information about the health or safety justification, if any, behind the Variance Requirement and its implementation, or if any purported justifications are in accord

with evidence-based standards of care. Instead, the State ping-ponged from one 30(B)(5) witness to another, both of whom ultimately and repeatedly pointed to Director Vanderhoff as the only ODH representative uniquely situated to testify on behalf of the agency.

ODH Director Vanderhoff holds a singular role in interpreting and enforcing the WTA and Variance Requirements: the Director (and no other official) “*may* grant a variance” if he determines “after reviewing the application that the facility is capable of achieving the purpose of a written transfer agreement in the absence of one.” (Emphasis added.) R.C. 3702.304(A)(1). The Director’s variance decision “is final.” *Id.* Both ODH designees insisted that only he could answer questions about ASF variance standards and decisions. The States’ attempts to shield Director Vanderhoff from deposition are not supported by Ohio law and are antithetical to due process. Plaintiff Providers have established a strong need for Director Vanderhoff’s testimony, and the trial court has jurisdiction to consider all of Plaintiff Providers’ constitutional claims. Yet under the State’s theory, the one person with exclusive knowledge and authority to interpret and enforce the challenged requirements is absolutely immune from discovery, creating an informational black hole that would substantially prejudice Plaintiff Providers and impair the trial court’s ability to evaluate the central issues in this case.

I. The trial court appropriately ordered the Director of ODH to testify about variance requirements and decisions because his testimony is central to the merits of the instant case.

The constitutional standard established by the Reproductive Freedom Amendment dictates that any alleged health or safety justification for the challenged laws and actions must be at the center of this case. To determine whether the WTA, its related Variance Requirement scheme, and the enforcement thereof satisfy the amendment's legal standard, the court must understand how and why the Director makes variance decisions. For this reason alone, this Court should affirm the trial court's order compelling Director Vanderhoff's deposition.

Nonetheless, the State appears to argue that Director Vanderhoff and ODH should be shielded from discovery because Plaintiffs' challenge "presents a pure question of law" not subject to discovery at all. Br. of State Defs.-Appellants 25–26. On the contrary, the Ohio rules state that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ." Civ.R. 26(B). And the Reproductive Freedom Amendment specifically requires an examination into the justifications, if any, the State may present and whether they are tailored to advance the health of the pregnant individual. Ohio Const., art. I, § 22. The State agrees that Director Vanderhoff is the one individual who can speak to the health and safety justification, if any, of the challenged provisions. The "extrinsic facts" Plaintiff Providers seek in deposing Director Vanderhoff are the facts

contemplated by the text of the Reproductive Freedom Amendment as determinative of the Variance Requirements' constitutionality. Br. of State Defs.-Appellants 26. Whether as a 30(B)(5) witness or as a party and fact witness, for the purposes of the Variance Requirements, Director Vanderhoff *is* the State and must be produced.

The “purpose of discovery is to aid a party in his preparation of the case prior to trial” and “to facilitate an orderly and cogent presentation by both parties in front of the trier of fact.” *Rossman v. Rossman*, 47 Ohio App.2d 103, 109 (8th Dist. 1975) (holding that plaintiff was substantially prejudiced at trial in divorce dispute due to trial court’s failure to ensure compliance with pretrial discovery, including defendant’s refusal to answer deposition questions related to his earning capacity that were fundamental to determining alimony and child support).

Here, the State asks this Court to frustrate both purposes of pretrial discovery. Plaintiff Providers will be unjustly prejudiced if barred from obtaining all relevant facts as to the fundamental issue in this case: the health and safety justifications, if any, for the WTA and Variance Requirements and their implementation by ODH and Director Vanderhoff. As discussed *supra* pp. 8–13, Plaintiff Providers have engaged in good faith attempts to obtain this information from the State, including serving written interrogatories, sharing expert reports, and holding two depositions premised on the State’s representations of the knowledge of the chosen 30(B)(5) witnesses in responding to the noticed topics. With no exchange of information from

the State regarding the health or safety justifications for the WTA or Variance Requirement, if there are any, Plaintiff Providers will be left in the dark as to the reasons or purported justifications the State may assert for the challenged laws at trial. Beyond unjustly prejudicing Plaintiff Providers, this would also unduly impede the trial court's ability to fully consider all relevant facts. For these reasons, the trial court order compelling Director Vanderhoff to sit for a deposition should be affirmed.

II. There is no basis to excuse Director Vanderhoff from a deposition that is necessary to prevent injustice.

Raising this argument for the first time on appeal, the State contends that Director Vanderhoff should be entitled to protection “akin to privilege” because, as the Director of ODH, he “bears extensive statutory responsibilities and exercises significant authority to safeguard the health and safety of Ohio’s citizens.” Br. of State Defs.-Appellants 26–28. The Court should reject this position because the four factors the Ohio Supreme Court has determined courts must weigh in determining whether an official may be excused from appearing at a deposition weigh decisively in Plaintiff Providers’ favor.

The high-ranking official privilege is “‘founded on notions of the public’s interest in limiting unnecessary demands on the time of highly-placed public officials.’” *State ex rel. Ctr. for Media & Democracy v. Yost*, 2024-Ohio-2786, ¶ 26, quoting *Monti v. State*, 151 Vt. 609, 612–13 (1989). Accordingly, it is not the blanket

privilege the State claims, but rather a qualified privilege which protects against exceptionally burdensome discovery. The Ohio Supreme Court has held that high-ranking government officials may be compelled to sit for a deposition when the party seeking the testimony has established that “extraordinary circumstances” require it. *State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner*, 2008-Ohio-1035, ¶ 3. The Court outlined four factors that courts must weigh in determining whether such circumstances exist: (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.” *Id.* at ¶ 4, quoting *Monti* at 613–14. All four factors weigh heavily in Plaintiff Providers’ favor and establish a strong need for Director Vanderhoff’s testimony.

First, this case embodies a substantial public interest because it seeks to vindicate a new, fundamental constitutional right Ohio voters enshrined in 2023. The WTA and Variance Requirements, and the arbitrary enforcement thereof, determine Plaintiff Providers’ ability to maintain their ASF licenses, operate their clinics, employ their staff, and provide constitutionally protected care to their patients. The health and safety justifications, or lack thereof, for the WTA and Variance Requirements will determine whether these laws impermissibly violate Ohioans’

fundamental right to reproductive freedom and Plaintiff Providers’ right to be free of discrimination based on their provision of procedural abortions.

As to the second factor, both parties have extensively addressed “the degree to which the witness has first-hand knowledge or direct involvement,” and there is no dispute on this point. *Id.* By the State’s own account, Director Vanderhoff is the *only* individual with any accessible knowledge of the variance decision-making process. Br. of State Defs.-Appellants 17. The trial court specifically recognized in its order compelling Director Vanderhoff’s deposition that “Defendants’ designated representatives were unable to answer some of Plaintiffs’ questions during their depositions and stated that Defendant Vanderhoff would be the proper person to answer those questions.” T.d. 92 at 1–2. These are precisely the “extraordinary circumstances” contemplated in *Brunner*—which the State erroneously cites as supporting its position, *see* Br. of State Defs.-Appellants 26—where the compelled testimony of a high-ranking official is warranted and appropriate because the official’s “personal knowledge and thought process in arriving at her decision lies at the heart of this case.” *Brunner* at ¶ 6 (holding that Ohio’s Secretary of State could be deposed in part because no other party could provide the information). The only binding, relevant authority the State provides weighs in favor of compelling the Director’s deposition.

As to the third factor, the State has not provided any factual basis to support that the deposition would take an inordinate amount of time or be so burdensome as to have a notable effect on government business. *Brunner* at ¶¶ 3–4. Recent precedent from the Sixth Circuit, *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012), further supports Plaintiff Providers’ stance. *Serrano* held that courts cannot merely assume that the deposition of an official would be unduly burdensome. Instead, “enumerated harms ‘must be illustrated with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Id.* at 901, quoting *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004). The State simply has not offered any specific or particular burdens or enumerated harms that would arise from Director Vanderhoff’s deposition, nor can they.³

To the contrary, it stretches the bounds of reason to conclude that sitting for a single deposition to testify on two matters for examination constitutes the “extremely burdensome discovery,” *Yost*, 2024-Ohio-2786, at ¶ 4, that would unduly “divert substantial time and resources from the Department’s core mission.” Br. of State

³ For example, the State refers in passing to the Director being “frequently called upon to provide expert guidance on healthcare matters, particularly during public health emergencies.” Br. of State Defs.-Appellants 28. However, the State does not say what, if any, public health emergency Director Vanderhoff would be responsible for guiding ODH through or how a single deposition would affect these responsibilities whatsoever.

Defs.-Appellants 28. The issues and information sought through deposition are limited to the interpretation and implementation of the challenged provisions. *Supra* pp. 8–13; *see also Brunner* at ¶ 7. Both of the 30(B)(5) depositions that Plaintiff Providers took were scheduled according to the State’s convenience, were completed remotely, and within the time allotted by the Ohio Civil Rules. *See* Civ.R. 30(B)(5), 30(D)(1).

Federal precedent applying the high-ranking government official privilege reinforces Plaintiff Providers’ position on this third factor. In *Duncan v. Husted*, then-Secretary of State Jon Husted sought a protective order to avoid his deposition in a constitutional challenge in which he was a named defendant, as Director Vanderhoff is here. *Duncan v. Husted*, 2015 WL 631103 (S.D.Ohio Feb. 12, 2015). Secretary Husted argued that he made a requisite showing of harm based on the “Secretary’s ‘many obligations and time constraints’ and his ‘numerous official responsibilities.’” *Id.* at *3. The district court soundly rejected Husted’s vague assertions of harm, reasoning:

[o]bligations, time constraints, and official responsibilities are all part of the job of any busy official, [...] and cannot be used as a blanket pass against being deposed in any and all cases involving the duties of the office. Indeed, [Husted,] like any other elected official, should understand that no formulations of the “apex” doctrine places him above the law. To give legitimacy to the strained reading of the “apex” doctrine urged by Defendant Secretary upon the Court would undermine both public accountability and the system of checks and balances itself.

Id. Here, too, Director Vanderhoff is not entitled to avoid public accountability and evade this deposition.

Finally, as to the fourth factor, no “less onerous discovery procedures [will] provide the information sought.” *Brunner* at ¶ 4. Plaintiff Providers, as discussed *supra* pp. 8–13, have diligently attempted to obtain the information central to their case including through written discovery and depositions of other officials. As highlighted in *Brunner*, if the high-ranking official does not respond to these less burdensome discovery methods, “a deposition may indeed be the *least* onerous way to generate the necessary responses.” *Brunner* at ¶ 8. The only binding, relevant authority the State provides weighs in favor of compelling the Director’s deposition.

The State’s attempt to bolster its claim to privilege by drawing on *United States v. Northside Realty Assocs.*, 324 F.Supp. 287 (N.D.Ga. 1971) is similarly unfounded. Br. of State Defs.-Appellants 29. *Northside Realty* instructs that the apex doctrine specifically permits “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 information that implicates the official’s discretionary authority.⁴ 324 F.Supp. 287, 293 (N.D.Ga. 1971). Plaintiff Providers

⁴ Notably, *Northside Realty* involved the testimony of the United States Attorney General and a member of the President’s Cabinet, the Secretary of the Department of Housing and Urban Development. 324 F.Supp. at 293. This fact only reinforces how ill-suited the State’s invocation of the apex privilege is in the instant case—the

have made this exact showing here, *supra* pp. 18–20, in sharp contrast to *Northside Realty* where the court found information about the basis for the officials’ decision-making was otherwise available through interrogatories and requests for admissions. 324 F.Supp. 287 at 295. Thus, even under the State’s cited authority, Director Vanderhoff should still be required to testify.

III. The State has not presented a “colorable claim” to privilege sufficient to confer appellate jurisdiction for interlocutory relief.

As Plaintiff Providers argued in the Memorandum in Opposition to Jurisdiction, Mem. in Opp’n to Jurisdiction, the trial court’s order compelling Director Vanderhoff to appear for a deposition does not fall within the exception permitting appeals of provisional remedies for this Court’s appellate jurisdiction. R.C. 2505.02(B).

State court interlocutory orders, such as discovery orders, are only appealable in specific, narrow circumstances. *See* R.C. 2505.02(B)(4). The appealing party must demonstrate that the order concerns a “provisional remedy” that “in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy,” and that the “appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues,

Director of a state agency is far from a similarly situated “high-ranking government official.”

claims, and parties in the action.” *Id.* The appealing party must demonstrate a “colorable claim” that the appealed order directs someone to disclose protected information, which may be shown through identifying an existing privilege or protection akin to privilege, and show a harm that cannot be effectively remedied following final judgment in order to establish this Court’s jurisdiction over the appeal. *See State v. Glenn*, 2021-Ohio-3369, ¶ 22.

As discussed extensively above, the State has failed to show any privilege or protection akin to privilege which would be infringed upon by Director Vanderhoff’s deposition. Therefore, there is no harm that cannot be effectively remedied following final judgment and the State has failed to establish this Court’s jurisdiction over the instant appeal.

IV. The trial court has jurisdiction over Plaintiff Providers’ constitutional claims.

The State’s alternative attempt to avoid Director Vanderhoff’s deposition by arguing that it “is irrelevant to any claims or defenses [the trial court] has jurisdiction to consider,” Br. of State Defs.-Appellants 18, lacks any merit. The State’s underlying theory is that, because “the Director’s decision to grant or deny a variance is discretionary and not subject to administrative or judicial review,” *Id.* at 19, the

Court does not have jurisdiction over *any* challenges to the Variance Requirements.⁵

The State’s argument fails for at least three reasons.

First, this case concerns constitutional challenges to the WTA and Variance Requirements and the constitutionality of the arbitrary enforcement of those Requirements. It is not an appeal of an agency order or premised on an individual variance decision, as discussed in the cases the State cites. Br. of State Defs.-Appellants 20–21. And “administrative bodies have no authority to interpret the Constitution.” *Jones v. Chagrin Falls*, 1997-Ohio-253, ¶ 22. As the trial court found, administrative exhaustion was not necessary to establish its subject matter jurisdiction over the instant case “because of the constitutional claims asserted by Plaintiffs,” and because “[t]he administrative process could not provide or even consider the relief sought by Plaintiffs” T.d. 31 at 2; *see also, e.g., Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990) (appellee participation in the administrative process is not required where “an administrative body lacks the authority to grant the relief he sought . . .”); *Herrick v. Kosydar*, 44 Ohio St.2d 128,

⁵ Even assuming *arguendo* that the trial court did not have jurisdiction over Plaintiff Providers’ challenges to the arbitrary enforcement of the Variance Requirements—which it does—it is undisputed that the Court has jurisdiction over Plaintiff Providers’ facial constitutional claims. Br. of State Defs.-Appellants at 24. For the reasons set forth *supra* pp. 18–20, Director Vanderhoff’s testimony will be central to the trial court’s consideration of these facial claims for the same reasons it is central to Plaintiff Providers’ claims as to their arbitrary enforcement. And because that discovery issue is the only question this Court needs to resolve here, that alone disposes of the State’s baseless argument.

130 (1975) (not requiring exhaustion where administrative proceedings would be “futile preludes to the assertion of plaintiffs’ actual claim in a later appeal to the courts” and “[a]dministrative proceedings could not provide or even consider the relief sought by these plaintiffs.”); *Kaufman v. Village of Newburgh Heights*, 26 Ohio St.2d 217, 220 (1971) (declaratory judgment action allowed where there was “no effectual or adequate administrative remedy . . . available to appellee”); *Gates Mills Invest. Co. v. Village of Pepper Pike*, 59 Ohio App.2d 155 (8th Dist. 1978) (court should decide the merits when there is no serviceable administrative remedy). Moreover, as “the Supreme Court of Ohio . . . ha[s] clarified[,]” even when administrative remedies are adequate and available—and they are not here—“a party’s failure to exhaust administrative remedies is not a jurisdictional defect.” (Citation omitted.) *Derakhshan v. State Med. Bd. of Ohio*, 2007 WL 3148684, ¶ 24 (10th Dist. Oct. 30, 2007).

No state or federal case holds that the WTA, Variance Requirements, or their arbitrary enforcement, are excluded from constitutional scrutiny. Indeed, in the cases the State cites, Br. of State Defs.-Appellants 20–21, courts found variance decisions unreviewable, but none of those cases involved constitutional challenges even remotely similar to this one. See *Capital Care Network of Toledo v. Ohio Dept. of Health*, 2018-Ohio-440, ¶ 31 (holding the court lacked jurisdiction over constitutional challenge to a specific variance decision); *Women’s Med Ctr. of*

Dayton v. State Dept. of Health, 2019-Ohio-1146, ¶ 56 (2d Dist.) (same). And in *Women’s Med. Professional Corp. v. Baird*, 438 F.3d 595, 599, 610–612 (6th Cir. 2006), the Court of Appeals determined that the WTA requirement was subject to procedural due process constraints and therefore reviewable.

The State’s argument that a writ of mandamus is the proper legal mechanism for this case is similarly baseless. Br. of State Defs.-Appellants 25. Plaintiff Providers have validly pursued declaratory and injunctive relief to vindicate their and their patients’ constitutional rights. This case is not a “challenge to a specific discretionary decision of an agency” as in *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 2007-Ohio-2620, ¶ 30, but rather a request that the court declare the challenged requirements and ODH’s arbitrary enforcement thereof violate the Ohio Constitution. T.d. 96 at 36.

Second, even if the administrative remedies or a writ of mandamus could provide the relief Plaintiff Providers seek, that would not divest the trial court of jurisdiction over the constitutional claims of arbitrary enforcement. The common pleas courts have subject-matter jurisdiction over all civil cases that the General Assembly has not expressly excluded from their jurisdiction. *See Bank of Am., N.A. v. Kuchta*, 2014-Ohio-4275, ¶ 20. Courts will dismiss actions for lack of subject matter jurisdiction in circumstances where the General Assembly has made the exclusive jurisdiction of the administrative body expressly clear. *See, e.g., BCL*

Ents., Inc. v. Ohio Dept. of Liquor Control, 1997-Ohio-254, ¶ 18. Under Ohio law, the language the State cites as divesting the trial court of jurisdiction over Plaintiff Providers’ constitutional claims falls far short of meeting this express exclusion: “[t]he director’s decision to grant, refuse, or rescind a variance is final.” R.C. 3702.304(C).⁶ This is insufficient to divest the trial court of its jurisdiction over the as-applied constitutional challenges.⁷

⁶ See e.g., *Binder v. Cuyahoga Cty.*, 2020-Ohio-5126, ¶ 26 (finding jurisdiction over claims of reduction in pay by aggrieved civil-service employees, despite an established administrative process in R.C. 124.34(B) because “there is no express language stating that the administrative process . . . is the sole or exclusive remedy available to aggrieved employees.”); *Corder v. Ohio Edison Co.*, 2020-Ohio-5220, ¶ 18, quoting *State ex rel. Ohio Edison Co. v. Shaker*, 1994-Ohio-450, ¶ 8 (finding jurisdiction over claims against a public utility because Public Utilities Commission of Ohio’s “exclusive jurisdiction over service-related matters does not diminish ‘the basic jurisdiction of the court of common pleas in other areas of possible claims against utilities . . .’”); *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 2016-Ohio-478, ¶¶ 53–54 (acknowledging that a plaintiff “may raise in the common pleas courts rights that exist independently of R.C. Chapter 4117,” even though they touch on the rights created by R.C. Chapter 4117); cf. *Pivonka v. Corcoran*, 2020-Ohio-3476, ¶¶ 23–24 (concluding that the common pleas court lacked subject-matter jurisdiction over a class action seeking declaratory relief and the recovery of overpayments to the Department of Medicaid because the statute expressly provided that the administrative procedure was the “sole remedy” for challenging an overpayment); *State ex rel. Ohio Democratic Party v. Blackwell*, 2006-Ohio-5202, ¶ 10 (dismissing for lack of jurisdiction because the statute expressly provided that the complaints at issue “shall be filed with the Ohio elections commission.”).

⁷ To the degree that the State’s argument amounts to a claim that the statutory language operates as an absolute privilege exempting it from discovery, this, too, is in conflict with Ohio law. “When the legislature does create an absolute privilege, it does so explicitly. Examples of statutory privileges . . . share common characteristics: they are unambiguously identified as privileges and they explicitly define how the privilege may be asserted or defeated.” *Large v. Heartland-Lansing*, 2013-Ohio-2877, ¶ 19.

Third, the State’s argument that the Director of ODH has unreviewable authority to deprive Plaintiff Providers of their constitutionally guaranteed rights under the Reproductive Freedom Amendment and articles 1, 16, and 20 of the Ohio Constitution defies logic and principles of justice. The State fails to cite a single case that would support this position. Rather, the State cites a case that crystalizes why their position that Director Vanderhoff’s discretion is entirely exempt from judicial review is untenable: “if an agency’s discretionary decision were truly allowed to be absolutely unchallengeable, an aggrieved party would have no remedy whatsoever, giving the state agency unfettered discretion and raising fundamental due process concerns.” *Ohio Academy of Nursing Homes*, 2007-Ohio-2620, at ¶ 25; *cf.* Br. of State Defs.-Appellants 25. This concern carries particular weight here, where the Reproductive Freedom Amendment expressly assigns the State the burden to demonstrate that any regulation touching reproductive rights uses “the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.” Ohio Const., art. I, § 22(B).

CONCLUSION

In sum, Plaintiff Providers will be unjustly prejudiced if prevented from deposing Defendant Vanderhoff. Accordingly, this Court should uphold the trial court’s Order requiring Defendant Bruce Vanderhoff to appear for a deposition.

Respectfully submitted,

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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 Times New Roman 14-point typeface, using Microsoft Word processing software, and it contains 7,573 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2025, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

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