

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

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

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**REPLY BRIEF OF STATE DEFENDANTS-APPELLANTS**

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## INTRODUCTION

This case challenges the trial court's subject matter jurisdiction over the Director of Health's determination of Plaintiffs' individual applications for a variance from the valid and lawful requirement that all ASFs have a written transfer agreement to obtain an ASF license from the Department of Health ("ODH"). The core, underlying disagreement here is whether Director Vanderhoff can be compelled to testify in any capacity about decisions only the director of health is authorized to make—decisions that are not subject to judicial or administrative review of any kind.

In their motion, Plaintiffs asked for testimony on variance requirements and decisions, but in their brief to this Court, they conflate the various provisions they challenge into a single subject. Plaintiffs use the terms "WTA" and "Variance" interchangeably, which in one respect is correct, but in the other is disingenuous. In the first, Plaintiffs tacitly acknowledge the obvious connection between the two provisions: a variance 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. It is only in the absence of a WTA that a variance must be sought.

But in the second, Plaintiffs invite this Court to render the irrelevant discoverable. While they have already obtained fulsome testimony from ODH in the form of two representative witnesses regarding the WTA

requirements and licensing procedures of ASFs, Plaintiffs nonetheless say they now seek testimony regarding every law challenged in the trial court, which they collectively refer to as “the WTA and Variance Requirements.” See Pls. Br. at 4. In their motion to compel before the trial court, however, they claimed only to need testimony related to variance requirements and decisions. See T.d. 86 at 5, 8. But what Plaintiffs really seek is evidence showing some nefarious plan concocted by Director Vanderhoff to arbitrarily deny their variance applications without any reasonable justification. See Pls. Br. 28 (“this case concerns constitutional challenges to the WTA and Variance Requirements and the constitutionality of the arbitrary enforcement of those Requirements.”); see also *id.* at 2, 3, 4, 7, 15, 21, 28 n.5, 29, 30.

Plaintiffs say they need the compelled testimony because they have been completely blinded by an “informational black hole” about the State’s enforcement of these “challenged requirements,” *id.* at 17, but there is no black hole to speak of. Plaintiffs have each received letters from the Director which provided his determination of each of their variance applications and his reasoning for the same. See T.d. 96, Exs. B-F. Moreover, the justification for WTAs has been the subject of expert testimony and reports that have also been provided to Plaintiffs, and those justifications also support every variance decision as required by the plain language of R.C. 3702.304.

Although they have claimed this information is vital to their claims, Plaintiffs have not provided any authority that entitles them to any justification for variance decisions at all beyond what has already been provided to them. And since the trial court is without any authority to review variance decisions, that evidence is both irrelevant and inadmissible in any event.

The grave need for an additional justification—a question that Plaintiffs say is at the very core of this case—lacks any specificity whatsoever related to the alleged “arbitrary enforcement.” *See, e.g.*, Pls. Br. at 19. What enforcement was arbitrary? Plaintiffs never say. They simply say it, as though that alone is enough to authorize an unbounded deposition of the director of health constrained only by Plaintiffs’ curiosity. Such a claim, devoid of any actual fact or evidence, is nothing more than the kind of mere supposition that falls far short of anything likely to lead to admissible evidence. *See Weckel v. Cole + Russell Architects*, 2013-Ohio-2718, ¶ 23 (1st Dist.).

But the State isn’t engaged in that same sort of naked speculation. After all, the State has been actively litigating all but R.C. 3702.305 in federal court against these same Plaintiffs since 2015, with the case having completed extensive discovery and being decisional on cross motions for summary judgment since 2022. *See Planned Parenthood Southwest Ohio Region v.*

*Vanderhoff*, No. 1:15-cv-568, S.D. Ohio (Oct. 13, 2015) (Judge Barrett) (pending).

While Plaintiffs’ conflation of these laws is replete throughout their brief, that conflation distinctly ends where their central issue--the “health and safety justification, if any”—begins. They ignore entirely that a variance can only be granted if 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) (emphasis added). And that matters because, while they malign the State for not recreating the wheel in this case even though it considers the very same laws as the federal one, the expert opinions on Ohio’s WTA requirements in federal court remain just as persuasive under the Amendment as it did under *Roe* and *Casey*. *See* T.d. 88, Ex. C. Put plainly, the justification for a WTA is the same as the justification for a variance, and having received ample evidence about that justification, Plaintiffs cannot pretend to remain “in the dark as to the reasons or purported justifications the State may assert for the challenged laws at trial.” Pls Br. 20. This Court should reverse the decision below.

## **ARGUMENT**

**I. This Court has jurisdiction to determine the instant appeal.**

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).

For this Court to consider this appeal, the State need only make "a colorable claim that the order directs [Director Vanderhoff] to disclose information that might be protected." *State ex rel. Ctr. for Media & Democracy v. Off. of AG*, 176 Ohio St. 3d 624, 630. It need not "decide the merits of an appeal in order to decide whether it has the power to hear and decide the merits of an appeal." *Id.* The State already made such a showing, *see* State's Juris Memo, and this Court provisionally determined that it has jurisdiction over this appeal. Not only do they ignore clear precedent on this matter, but Plaintiffs have also failed to offer any compelling reason to conclude otherwise. Because the State has made a colorable claim of protection akin to privilege, this Court can decide this appeal.

**II. The Director's testimony is not necessary to determine any justiciable claim in this case.**

In their brief, Plaintiffs did not address the trial court's order at all, or the substance of its determination that Director Vanderhoff's testimony be compelled. That makes sense because the trial court did not consider any of the relevant law that now mandates reversal of the discovery order that is the subject of this appeal. But not only is the trial court's order erroneous, so too is Plaintiffs assertion that the trial court can consider the Director's variance decisions.

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

Despite their claim that they seek additional testimony from Director Vanderhoff beyond his determination of variance applications, Plaintiffs do not specifically dispute that the testimony they sought to compel below was related to variance requirements and decisions; indeed, they specifically point to Topics 4 and 11 in their Statement of Facts as the basis for their motion. Pls' Br. at 9. And they explicitly confirm it on the merits: "it stretches the bounds of reason to conclude that sitting for a single deposition to testify about two matters for examination constitutes the 'extremely burdensome discovery' that would unduly 'divert substantial time and resources from the Departments core mission.'" *Id.* at 23 (citations removed).

Topic 4 specifically seeks testimony on "All ASF variance applications and decisions since 2017" but "especially: Your decisions whether to grant

any variances of an ASF requirement, including but not limited to, the WTA requirement, since 2017 and the reasons for denying any variance applications from and ASF requirement since 2017.” *Id.* at 9. Because Plaintiffs know that are they only ASFs to ever apply for a variance from the WTA requirement, they also know that the testimony they seek would be about their own variance applications and decisions. See T.d. 73 ¶ 46.

Plaintiffs assert that the compelled testimony is necessary because “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,” Pls. Br at 18, but they first bear the burden of demonstrating that any of the laws they challenge are controlled by the Amendment, and if so, they must also make a *prima facie* showing that those provisions “burden, penalize, prohibit, interfere with, or discriminate against” them because they assist women in exercising their right to have a previability abortion. It is only then that the State must show any health justification. But as already recognized in *Women's Med Ctr. of Dayton v. State Dept. of Health*, “[a]lthough the trial court characterized this as ‘an abortion regulation case,’ it is more aptly characterized as an ambulatory surgical facility/written transfer case pursuant to ODH standards. We note that in *Capital Care*, the Ohio Supreme Court observed that all ambulatory surgical facilities in Ohio are required by

statute to obtain a health care facility license from ODH, conditioned on compliance with quality standards established by ODH.” 2019-Ohio-1146, ¶ 46 (2nd Dist.).

Plaintiffs also say that “the State has avoided providing any information about the health and safety justification behind the Variance Requirements and its implementation.” Br. at 16. The justification for the variance determinations are the same as those of WTAs: the director may grant a variance if “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).

Plaintiffs contend that 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,” Pls Br. at 18, but that is simply not true. They offer no citation in support of that entirely unfounded claim, and, in fact, the WTA requirements have been the subject of expert reports and testimony in the federal case—reports that the State intends to rely on in this case too. Thus, the Director is *not* the only individual who can speak on that subject. *See*, T.d. 88, Ex. C. And whether “Director Vanderhoff is the State” does not bolster that claim. Pls’ Br at 18.

**B. Any claim of arbitrary enforcement of the variance provision is not reviewable by the trial court.**

While it is unclear what constitutes the arbitrary enforcement Plaintiffs say is unconstitutional, they cannot avoid the reality that any review of arbitrary enforcement of the variance provision would necessarily require review of Plaintiffs' specific variance decisions. First, Plaintiffs' supplemental complaint proves that they only assert arbitrary enforcement of the variance law. T.d. 96 ¶8 ("These [challenged] requirements include . . . ODH's arbitrary enforcement and implementation of the requirements for a variance ("Statutory Variance Requirements"), R.C. 3702.304.") (emphasis added). And, again, the State has confirmed, and Plaintiffs well know, that Plaintiffs are the only two facilities of Ohio's almost 300 ASFs that have ever needed or sought a variance from the WTA requirement in Ohio.

Though Plaintiffs continue to claim this "case is not a 'challenge to a specific discretionary decision of an agency,'" their supplemental complaint directly contradicts that assertion. *See* T.d. 96 ¶38 ("When legislation alone has failed to close clinics, ODH has stepped in and invented its own arbitrary rules out of wholecloth specifically targeted to close Plaintiffs' ASFs."), T.d. 96 ¶90 ("When licensing action resumed, so too did ODH's practice of crafting new arbitrary, unnecessary, and improper requirements to deny variances, and therefore ASF licenses, to abortion clinics."). But even if they

could challenge the constitutionality of such arbitrary enforcement, they cannot do so in a court of common pleas, because 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 here, “[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. Because Plaintiffs seek the Director’s testimony as part of a declaratory judgment action seeking permanent injunctive relief in the trial court, any testimony related to the purely discretionary variance requirements or decisions is irrelevant to the proceeding. That fact alone renders useless any testimony related to variances because the trial court has no jurisdiction in this case to consider it. The Director’s testimony, then, is akin to a type of statutory and common law privilege, and thus not subject to discovery of any kind.

**C. Director Vanderhoff’s status as a high-ranking government official, when weighed against the relevancy and reviewability of his variance decisions, is also akin to privilege.**

“A common pleas court is a court of general jurisdiction, with subject-matter jurisdiction that extends to all matters at law and in equity that are

not denied to it.” *Ohio High School Ath. Assn. v. Ruehlman*, 157 Ohio St.3d 296, 2019-Ohio-2845, ¶ 7 (citations removed). Indeed, “it is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.” *In re K.K.*, 170 Ohio St.3d 149, 2022-Ohio-3888, ¶ 9 (citations removed). Subject matter jurisdiction can not be waived or forfeited and operates as “a condition precedent to a court's power to adjudicate and render judgment in a case, and ‘in the absence of subject-matter jurisdiction, a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss.’” *Id.* ¶ 49, quoting *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 21. When a court lacks subject matter jurisdiction over a claim, any order or judgment is void. *Id.* ¶ 12 The lack of subject matter jurisdiction over a claim expressly provided in statute, then, is precisely akin to privilege.

Plaintiffs offer an overly simplistic summary of the State’s protection akin to privilege argument, saying it is “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.’” Pls Br at 20. The State has explained several justifications for the privileged nature of Director’s testimony—and primary among them is the trial court’s lack of jurisdiction to review variance decisions. *See* State Br. at 18-25.

Nevertheless, Plaintiffs then knock down that strawman by applying the four-factor test announced in *State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner*, 117 Ohio St.3d 1210, 2008-Ohio-1035, ¶ 4:

“trial courts should weigh the necessity to depose or examine an executive official against, among other factors, the substantiality of the case in which the deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures provide the information sought.”

The inclusion of “among other factors” makes clear that this is not an exhaustive or mandatory list. Certainly, any order compelling testimony on a matter that is statutorily unreviewable by the court would fall within those “other factors.”

The General Assembly’s divestment of any judicial or administrative review of variance decisions is similar in operation to a statute of limitation. Specifically, as here, a “statute of limitations is a matter of substantive law representing a public policy decision by the legislature about the privilege to litigate.” *McQuade v. Mayfield Clinic*, 2022-Ohio-785, ¶ 17 (1st Dist.), citing *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶ 29 (“The existence and duration of a statute of limitations for a cause of action constitutes an issue of public policy for resolution by the legislative branch of government as a matter of substantive law.”

**D. The trial court cannot consider an as-applied challenge to the variance decisions in a declaratory judgment or injunctive relief action.**

Authoritative caselaw provides 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. The use of the abuse of discretion language is particularly instructive. “The standard for ‘abuse of discretion’ is readily defined as more than error of law or judgment, but implies an attitude . . . that is unreasonable, arbitrary or unconscionable.” *Boyd v. Sanders*, 1996 Ohio App. LEXIS 1442, at \*10 (1st Dist. Apr. 10, 1996) (internal citations removed). The Ohio Supreme Court has also defined “arbitrary” in the context of abuse of discretion to mean “without adequate determining principle \* \* \* not governed by any fixed rules or standard.” *Id.* citing Black’s Law Dictionary (5 Ed.).

There are two possible avenues for challenging arbitrary enforcement under the constitution. First, a law can be unconstitutional as vague if it fails to “provide sufficient standards to prevent arbitrary and discriminatory enforcement.” *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 358 (1992). The void-for-vagueness doctrine

“permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional.” *Perez v. Cleveland*, 78 *Ohio St.3d* 376, 378-379 (1997). Thus, because such cases challenge the law on its face, no extrinsic facts are necessary to decide the case.

The second challenge involving claims of arbitrary enforcement challenges are as-applied to specific facts of the particular case. See *City of Blue Ash v. Price*, 2018-Ohio-1062, ¶ 15 (1st Dist.). In this case, Plaintiffs allege that the actual application of the variance provision was arbitrarily used to target them as abortion clinics. See, e.g. T.d. 96 ¶ 38 (“ODH has stepped in and invented its own arbitrary rules out of wholecloth specifically targeted to close Plaintiffs’ ASFs.”) As in any such case, the “party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to his or her set of particular facts.” *Paganini v. Cataract Eye Ctr. of Cleveland*, 2025-Ohio-275, ¶ 49 (8th Dist.) citing *Groch v. Gen. Motors Corp.*, 117 *Ohio St.3d* 192, 2008-Ohio-546, ¶ 181, 883 *N.E.2d* 377. But as already shown, the trial court has no authority to review variance decisions, so it equally lacks the authority to compel the disclosure of facts related those claims the General Assembly has divested it of jurisdiction to consider.

Plaintiffs assertions that the statutory language is insufficient to divest the trial court from reviewing its as-applied challenge to the variance provision are easily disproven. Not only does the text of R.C. 3702.304 twice provide the director's variance decisions are final, R.C. 3702.3011 further state's that even the "director's decision to rescind a variance is final."

But even if that language is as deficient as Plaintiffs' claim, the administrative code's makes the matter obvious: "The refusal of the director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code." Ohio Adm.Code 3701-83-14(F). That same language has appeared in the administrative code since 1996—17 years before R.C. 3702.304 was codified into law. Had the General Assembly intended variance decisions to be administratively or judicially reviewable, it would have clearly said so in the later-enacted variance statute. After all, an administrative rule is "valid and enforceable unless unreasonable or in conflict with the statutory enactment covering the same subject matter." *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 39, quoting *Amoco Oil Co. v. Petroleum Underground Storage Tank Release Comp. Bd*, 89 Ohio St.3d 477, 484, 2000 Ohio 224, 733 N.E.2d 592 (2000).

Plaintiffs rely on cases that do not support the trial court's jurisdiction over variance decisions. For example, Plaintiffs say that *Binder v. Cuyahoga*

*Cty.* found jurisdiction over claims of reduction in pay, but that Court expressly held that “R.C. 124.34 does not authorize civil-service employees to file a civil action in common pleas court claiming that an alleged reduction in pay violated R.C. 124.34.” 161 Ohio St.3d 395, 2020-Ohio-5126, ¶ 28. Just as in *Binder*, none of the cases cited by Plaintiffs considered statutory language similar to the variance provision. *See* Pls. Br. at 31, n6. If they had, they would have found that Ohio law does not requires express exclusion when the General Assembly uses the word “final” according to its common meaning: “a fair reading of the enrollment-review statute leads to the conclusion that the General Assembly did not use ‘final’ as a legal term of art to indicate that the state board's decision under R.C. 3314.08(K)(2)(b) or (c) is appealable but, rather, in the ordinary sense of the word.” *Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn.*, 166 Ohio St.3d 96, 2021-Ohio-3445, ¶ 19.

That Court went on to point out that an express exclusion of jurisdiction is not mandatory as Plaintiffs claim: the argument that the legislature would use “final and not appealable” to remove jurisdiction falls apart

“when one considers that the that the legislature has also sometimes labeled orders as ‘final and subject to appeal.’ *See*, e.g., R.C. 3769.0810(I) (a decision by the state racing commission to impose certain assessments is “final” and subject to appeal under R.C. 119.12); R.C. 3905.14(G) (a decision by the

superintendent of insurance to issue a cease-and-desist [\*101] order is a "final order [that] may be appealed"); R.C. 3905.50(F) ("All final orders and decisions of the superintendent [of insurance] are subject to judicial review as provided in Chapter 119. of the Revised Code"); R.C. 4731.23(E) (a decision by the state medical board is "final \* \* \* except that the license or certificate holder may appeal in the manner provided by Chapter 119. of the Revised Code"); *see also Brookwood presbyterian Church v. Ohio Department of Educ.*, 127 Ohio St.3d 469, 2010-Ohio-5710, 940 N.E.2d 1256, at ¶ 24 (Brown, C.J., dissenting) (citing other examples)."

*Id.* ¶ 20.

In much the same way, Plaintiffs attempt to leverage dicta about policy concerns in the very case that provides a bright-line remedy to those concerns. They say that *Ohio Academy of Nursing Homes* "crystalizes why [the State's] 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." Pls Br. at 32, quoting 2007-Ohio-2620, ¶ 25. Plaintiffs, however, plainly ignore that

"In light of these very significant competing concerns, courts (including this court in many different situations) have determined that some level of review must be recognized. Furthermore, courts have determined that a writ of mandamus provides an appropriate balance between the extreme of allowing no challenge at all and the other alternative of completely ignoring the explicit directive that an agency's particular determination is not meant to be appealable. In such a mandamus action, the aggrieved party can challenge the agency's

decision, but must demonstrate an abuse of discretion before relief can be provided.

*Id.* ¶26. That clear precedent controls the outcome here.

### **CONCLUSION**

The Court should reverse the judgment below.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that this Reply 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 18 pages. (4500 words or 20 pages)

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