IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

PRETERM-CLEVELAND, *et al.*, *Plaintiffs,* v. ANDY WILSON, *et al.*, *Defendants.*	Case No. 24 CV 002634 Judge David C. Young

PLAINTIFFS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

Confronted with extensive, undisputed evidence showing that the Challenged Requirements burden, penalize, prohibit, interfere with, and/or discriminate against individuals' abortion decisions, and unable to overcome the heavy burden of justification imposed on it by the Reproductive Freedom Amendment, the State purports to identify factual disputes based on mischaracterizations of the expert testimony in this case. Yet the State can point to no actual evidence in the record that undermines Plaintiffs' clear showing that the Challenged Requirements violate the Reproductive Freedom Amendment. Nor has the State put forth anything that could create a genuine dispute as to whether the Challenged Requirements advance patient health according to widely accepted and evidence-based standards of care, much less using the least restrictive means. Plaintiffs are therefore entitled to summary judgment on their claims that each of the Challenged Requirements violates the Reproductive Freedom Amendment and must be permanently enjoined.

ARGUMENT

I. The State Misconstrues the Applicable Legal Standard

As this Court has recognized, the Reproductive Freedom Amendment ("the Amendment") establishes a burden-shifting framework. PI Dec. at 18, 21. First, the plaintiffs bear an initial threshold burden to support their *prima facie* case by showing that the Challenged Requirements "directly or indirectly[] burden, penalize, prohibit, interfere with, or discriminate against" individuals' reproductive decisions, including the decision to have an abortion. Ohio Const., art. I, § 22(B). Once the plaintiffs have done so, the burden shifts to the State to "demonstrate[] 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." *Id.*; PI Dec. at 21. If the State cannot do so, the law is unconstitutional and must be enjoined.

Thus, in moving for summary judgment here, it was Plaintiffs' initial burden to show that (1) the undisputed facts make clear that the Challenged Requirements burden, penalize, prohibit, interfere with, and/or discriminate against individuals' abortion decisions and/or those who assist them, to any degree; and (2) no facts in the record would support a finding that the Challenged Requirements both (a) advance patient health in accordance with widely accepted and evidence-based standards of care, and (b) are the least restrictive means of doing so. Since Plaintiffs have met and far exceeded their initial burden, in order to avoid summary judgment, the *State* must put forth "*specific facts* showing that there is a genuine issue for trial." (Emphasis added.) Civ.R. 56(E). That is, the State must put forth specific facts that create a genuine dispute as to whether (1) the Challenged Requirements burden, penalize, prohibit, interfere with, and/or discriminate against individuals' abortion decisions and/or those who assist them, *or* (2) the Challenged Requirements are nevertheless justified because they *both* (a) advance patient health in accordance with widely accepted and evidence-based standards of care, *and* (b) do so using the least restrictive

means. Notably, since the State bears the burden to refute Plaintiffs' *prima facie* case, if it fails to adduce any evidence from which a reasonable trier of fact could find for the State on either prong—the health justification for the Challenged Requirements or the least restrictive means—the State cannot prevail as a matter of law. *Id.*

In the face of the Amendment's clear language and that of Civil Rule 56, the State wrongly attempts to shift its burden to Plaintiffs, counter-textually arguing that at this stage *Plaintiffs* must affirmatively prove that the Challenged Requirements lack a health justification and are not the least restrictive means to advance that justification. *See, e.g.*, State's Opp. to Pls.' Mot. for Summ. J. ("Opp.") at 2 ("*Plaintiffs* have offered no less restrictive alternative…." (Emphasis added.)); *id.* at 13 ("Even assuming Plaintiffs could show that the [Challenged Requirements] impose a burden, *they cannot satisfy* the Amendment's textual requirement that such burdens be unjustified." (Emphasis added.)). That is not the standard. *See, e.g.*, *Sibberson v. Mercy Hosp.*, No. L-88-236, 1989 WL 29846, at *1 (6th Dist. 1989). ("Under Civ.R. 56(C), when the moving party does not bear the burden of proof of an issue at trial, he may move for summary judgment by merely indicating that there is insufficient evidence in the record to support the non-moving party's claim."); *Paul v. Uniroyal Plastics Co.*, 62 Ohio App.3d 277, 282 (6th Dist. 1988) ("The moving party need not introduce affirmative evidence to refute the non-moving party's claims. Instead, if the moving party does not bear the burden of proof at trial, he may merely point to the lack of sufficient evidence in the record to support the non-moving party's claim."). This Court should reject the State's attempts to flout the Constitution and Civil Rules, and keep the burden squarely where the Amendment's text and Rule 56 have placed it—on the State.[1]

[1] The State also improperly invokes *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), to suggest that the Amendment merely returned Ohio law to the pre-*Dobbs* "status quo." Opp. at 10, 29. But this Court has already rejected that

II. The State Misconstrues the Record[2]

The State claims to identify several factual disputes that preclude the entry of summary judgment for Plaintiffs. Opp. at 5–7. Not so. As explained below, the State's purported disputes are either not material to Plaintiffs' claims on their face, or they are based on blatant mischaracterizations of the record that, once examined, reveal there to be no genuine, material dispute of fact. These claimed "disputes" therefore do not change Plaintiffs' entitlement to judgment as a matter of law.[3]

First, regarding certain purportedly disputed medical facts, such as "the comparative medical safety of abortion versus childbirth," Opp. at 6 (A), and "the alleged mental-health consequences of abortion," Opp. at 6 (B), even if the State's factual claims were taken as true (which they are not), this would not undermine the Plaintiffs' showing that the Challenged Requirements burden, penalize, prohibit, interfere with, and/or discriminate against individuals' reproductive decisions. Nor do these purportedly disputed facts create a genuine issue as to whether requiring *all* abortion patients to make two trips to their provider, delay their care for at

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argument, PI Dec. at 16–17 ("Defendants' argument that the pre-*Dobbs* standard is applicable is unpersuasive.").

[2] Parts I and II of the State's Statement of Facts, Opp. at 2–5, do not discuss the facts of this case and instead refer to an entirely different case: *Planned Parenthood Sw. Ohio Region v. Ohio Dep't of Health*, Hamilton C.P. No. A 2101148 (filed April 1, 2021). These facts, such as the citation to the Expert Report of Daniel Grossman (Opp. at 3), cannot be considered here, since they are not in the record in this case. Indeed, the inclusion of these irrelevant facts further demonstrates the State's utter failure to meaningfully respond to Plaintiffs' undisputed facts or to raise any genuine issue with respect to the actual facts in the record.

[3] The State has also separately filed a motion to strike Plaintiffs' rebuttal expert reports, which Plaintiffs have opposed. However, even if these reports were stricken—and they should not be—Plaintiffs would still be entitled to summary judgment, given the substantial body of undisputed evidence proffered in support their motion, coupled with the State's utter failure to introduce any specific facts at this stage that would enable it to satisfy its own burden.

least twenty-four hours, or receive potentially misleading and harmful information is the least restrictive means of advancing any purported interest in patients' physical or mental health according to widely-accepted and evidence-based standards of care.[4]

As for the alleged "medical necessity and appropriateness of mandatory ultrasounds and cardiac-activity disclosures," Opp. at 6 (C), the State misrepresents the record evidence. Nothing in the record indicates that these practices are "medically necessary." Indeed, the cited paragraphs from Dr. Valley's Report merely show that information should not be withheld from patients under the practice of "therapeutic privilege," Valley Rpt. ¶¶ 17–19, which is not disputed. All parties agree that informed consent requires disclosure of material information, and there is no evidence in the record disputing Plaintiffs' practices of disclosing such information. Mem. in Supp. of Pls.' Mot. for Summ. J. ("MSJ") at 6–7. Dr. Coleman's Report does not even address medical necessity; the cited paragraphs focus on studies regarding mental health, abortion decision-making, and the risk of coercion for victims of intimate partner violence. Coleman Rpt. ¶¶ 39–65. The only connection to the Challenged Requirements is Dr. Coleman's statement that gestational age and cardiac activity "represent vital elements of decision-making." *Id.* ¶ 65. But this bare, unsupported assertion cannot create a genuine issue of fact as to whether the State can justify the Challenged Requirements as the least restrictive means of advancing patient health according to widely accepted and evidence-based standards of care.

The State's asserted conflict regarding "the actual effects and necessity of the [Waiting Period] and [In-Person R]equirement[s]" is nonexistent. Opp. at 7 (D). To start, any evidence

[4] To be clear, the Challenged Requirements do not require patients be told that childbirth is safer than abortion, or that abortion causes mental health harms, so it is unclear how these purported factual disputes—even if resolved in the State's favor—help to justify any of the Challenged Requirements.

indicating that, for *some* patients, taking longer to think about their abortion decision or seeing a provider in person *could* be beneficial does not invalidate Plaintiffs' substantial showing that the Challenged Requirements cause harm by imposing a mandatory delay and in-person visit on *all* patients. As noted above, this evidence is not disputed and in fact is admitted by the State's experts. *Supra* Part II; MSJ at 21–22, 24–25, 28–30. Indeed, the cited portions of Dr. Coleman's report merely discuss studies regarding pre-abortion counseling in general terms, without any meaningful references to Ohio law or Plaintiffs' practices. Coleman Rpt. ¶¶ 66–99. Dr. Valley's report likewise does not respond specifically to Plaintiffs' practices or the impact on Ohio patients. Valley Rpt. ¶¶20, 25–27.[5] Again, even if the State could show that the Challenged Requirements may have *some* health benefits for *some* patients in certain circumstances, the cited evidence comes nowhere near raising a genuine dispute as to whether a blanket 24-hour waiting period and in-person counseling requirement for *all* Ohio patients advances patient health generally according to widely accepted and evidence-based standards, let alone is the least restrictive means of achieving that benefit—particularly given the undisputed evidence of the harms inflicted on patients and providers.

Similarly, the purported dispute over whether "miscarriage management and abortion procedures are medically distinguishable" is irrelevant. Opp. at 7 (E). The State does not even try to explain why this matters. It remains undisputed, however, that miscarriage care and abortion

[5] Dr. Valley asserts that the waiting period is "not a burden" because "it protects [a patient's] right to 'continue one's own pregnancy,' a right the Amendment explicitly protects"—which is simply a non sequitur. Valley Rpt. ¶ 20. Other than this, the only statement regarding the harm of the Challenged Requirements is that "Ohio has had [the Waiting Period R]equirement for over 30 years and there has been no documented patient harm." *Id.* ¶ 26. Such a general and unsupported statement is not sufficient to raise a genuine factual dispute in the face of Plaintiffs' detailed factual showings, which Dr. Valley did not directly dispute. *Infra* Part III.A.

care are the same "in terms of both technique and physical risks,"[6] and that nothing in Ohio law prevents providing miscarriage care, or any other treatment carrying similar physical risks, on the same day that patients present for treatment. MSJ at 12.

The State's final claimed factual dispute pertains to the "accuracy, relevance, and feasibility of providing the 'statistical probability of carrying to term.'" Opp. at 7 (F). But again, the State-Mandated Information Requirement on its face clearly mandates that this calculation be made based on gestational age *alone*, and—as the State's own expert Dr. Valley has already admitted—such a calculation would not be accurate. MSJ at 17. Dr. Valley's unsupported legal assertion that the statute allows consideration of other factors, which belies the clear statutory text, cannot raise a genuine issue of material fact on this point. Valley Rpt. ¶ 14.

The State also makes invalid claims of "bias" to suggest Plaintiffs' experts' testimony should be disregarded. Opp. at 22–26. This argument misconceives the legal standards applicable at the summary judgment stage and attempts to skirt its duty to introduce evidence, not mere allegations, showing a genuine issue of material fact. *See* Civ.R. 56(E). Setting aside that the State's claims of bias are entirely unwarranted, its arguments are irrelevant to this Court's deliberations. "[T]he credibility of an affiant [or deponent] is not generally considered when a court determines whether genuine issues of material fact exist…." *Havely v. Franklin Cty.*, 2008-Ohio-4889 (10th Dist.). *See also Tera, L.L.C. v. Rice Drilling D, L.L.C.*, 2024-Ohio-1945 ("[I]t is no more proper for this court to weigh evidence and the credibility of witnesses to decide issues of fact at the summary-judgment stage than it is for a trial court to do so.").

[6] The cited portion of Dr. Coleman's Report does not reference miscarriage care at all. Opp. at 7 (citing Coleman Rpt. ¶ 145). The cited portion of Dr. Valley's report suggests that he believes there is a moral distinction between miscarriage and abortion, but it does not dispute that the physical risks and techniques are the same for both procedures. *Id.* (citing Valley Rpt. ¶¶ 21–24).

III. Plaintiffs Are Entitled to Summary Judgment

A. The Undisputed Facts Clearly Show That Each of the Challenged Requirements Burdens, Penalizes, Prohibits, Interferes with, and/or Discriminates Against Individuals' Reproductive Decisions

The State has identified nothing that could raise a genuine dispute as to whether the Challenged Requirements burden, penalize, prohibit, interfere with, and/or discriminate against individuals' abortion decisions and those who assist them. MSJ at 8–18. Plaintiffs have pointed to extensive evidence in the record demonstrating that the Challenged Requirements result in delayed health care, thereby elevating medical risk; imposing logistical and financial burdens on many patients, and particularly low-income patients or those facing homelessness or intimate partner violence; and interfering with the provider-patient relationship by requiring providers to give inaccurate and harmful information or to interpose medically unnecessary delays, among other harms. *Id.*

The State's attempts to undermine these harms are cursory at best and are not supported by the record. For example, the State asserts that Plaintiffs have offered no evidence of "concrete patient harm." Opp. at 27–28. Specifically, the State takes issue with the fact that Plaintiffs have not identified individual patients that have been harmed by the Challenged Requirements. *Id.* at 27. But the plain text of the Amendment does not require Plaintiffs to name individual patients in order to prevail. Dr. Romanos' and Dr. Liner's expert reports are based on their personal knowledge and experiences as abortion providers in Ohio. Liner Rpt. ¶¶ 3–15; Romanos Rpt. ¶¶ 3–12. The State cannot call their testimony into dispute simply by labeling their assertions as "[s]peculative, [a]necdotal, and [u]nsupported," Opp. at 27, without pointing to *any* evidence in the record that contradicts their expert opinions. *See* Civ.R. 56(E) (requiring the party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial").

Next, in response to Plaintiffs' evidence demonstrating that abortion care is often delayed *more* than twenty-four hours as a result of the Challenged Requirements, the State attempts to blame Plaintiffs' own scheduling practices. Opp. at 14, 17. In particular, it cites portions of Plaintiffs' expert reports and deposition testimony explaining how the Challenged Requirements interact with and aggravate pre-existing external factors—such as scheduling practices for specific procedures and patients' financial barriers and personal circumstances—resulting in *additional* delay. *Id.* But the State does not—and cannot—dispute that the Waiting Period Requirement facially delays abortion care *at least* twenty-four hours. And the Amendment does not call for courts to consider the impact of state action in a vacuum, divorced from real-world context. *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1002 (Alaska 2019) ("Planned Parenthood is not required to prove that the [challenged requirement] is the only barrier to patients seeking abortion care in order to prevail on its claim. Other barriers are part of the real world the court must consider in determining whether the [challenged] requirement actually burdens the right." (citing *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 910 (Alaska 2001))). The Challenged Requirements self-evidently *increase* any pre-existing delay for abortion care. It is also undisputed that no other medical care is subject to a similar mandatory delay under Ohio law and thus that the Plaintiffs have shown discrimination under the Amendment. MSJ at 11–12.[7]

[7] The State also claims that Dr. Romanos testified that "none of the Challenged Requirements actually affects patient decision-making," and suggests that this testimony "defeat[s] any claim of patient harm." Opp. at 27. But it is not clear why this would be so. If the Challenged Requirements do not cause patients to change their minds, this fact would not mitigate the harm they cause—it just shows that the Challenged Requirements bring no benefit that could justify that harm.

Because the State has not pointed to any specific record evidence that raises a genuine dispute as to these facts, they should be accepted as true at this stage, and Plaintiffs should be found to have satisfied their burden under the Amendment as a matter of law. *Stemen v. Shibley*, 11 Ohio App.3d 263, 268 (6th Dist. 1982) ("[W]here the [non-movant] has not produced countering affidavits, [the movants'] affidavits are accepted as true."); *Kay Way, Inc. v. Navistar Int'l Transp. Corp.*, No. 88AP-1112, 1989 WL 57587, at *2 (10th Dist. May 30, 1989).

B. There Is No Genuine Issue of Material Fact as to Whether the Waiting Period Requirement Advances Patient Health in Accordance with Widely Accepted and Evidence-Based Standards of Care, Using the Least Restrictive Means

Unable to raise a genuine dispute as to whether the Waiting Period Requirement burdens, penalizes, prohibits, interferes with, and/or discriminates against individuals' reproductive decisions, the State attempts to justify this harm by contending that it advances patient health in two ways. The State alleges that the Waiting Period Requirement is necessary to (1) ensure informed consent and voluntary reproductive decision-making, Opp. at 17, and (2) address a claimed "critical gap" due to a "systemic lack of reliable follow-up data," *id.* at 18.

First, the State's argument that the Waiting Period Requirement is necessary to ensure voluntariness and informed consent runs contrary to the undisputed record evidence. Indeed, the State points to no actual evidence showing that, nor does it explain how, a mandatory delay for *all* patients bears any relationship to informed consent. This is especially glaring since all parties agree that informed consent is an individualized process of making each patient aware of the nature of the chosen treatment, as well as its material risks, benefits, and alternatives. MSJ at 6–8. Indeed, the only citations provided by the State reveal that Plaintiffs are committed to ensuring informed consent and meeting their patients where they are in terms of medical literacy and capacity. Opp. at 17 (citing Romanos Dep. 125:3–8, 147:2–148:3 (discussing how she ensures informed consent); Romanos Rpt. ¶ 30 (discussing why the Waiting Period Requirement is unnecessary)). Moreover,

the State's experts admitted they were unfamiliar with Plaintiffs' informed consent practices. MSJ at 7. Thus, it is undisputed that Plaintiffs' informed consent practices comply with the legal and ethical requirements for informed consent, and nothing in the record demonstrates that a 24-hour delay for all patients will improve the informed consent process.

Regarding the State's claim that the Waiting Period Requirement ensures patients' informed consent decisions are made voluntarily, the State again mischaracterizes the record. Contrary to the State's implication, Opp. at 11, nothing in the record indicates that Plaintiff providers improperly assume that all patients are certain of their decision to have an abortion. Rather, it is undisputed that each patient is provided detailed information regarding the nature of their chosen treatment including the material risks, benefits, and alternatives; given the opportunity to ask questions; screened for signs of coercion or uncertainty and to ensure voluntariness; and if the provider senses any hesitation, the patient is encouraged to reschedule and provided with additional resources. MSJ at 6–8. *See also* Liner Rpt. ¶ 67 (stating that some patients continue to avail themselves of extra time, even in the absence of the Waiting Period Requirement, "[b]ut now it is the patient's choice"). The State does not explain how a mandatory waiting period for all patients will somehow make their decisions more voluntary, much less point to any evidence in the record showing the same.

Attempting to distract from its lack of evidence to support a claimed health justification for the Challenged Requirements, the State cites irrelevant informed consent cases, claiming that informed consent "turns on whether a reasonable patient would find *time for reflection* material to the decision at hand." (Emphasis added.) Opp. at 18. But these cases apply a tort law standard that bears no relationship to the new legal standard established by the Amendment. Furthermore, these cases simply stand for the proposition that informed consent is required, and they set forth the

elements of informed consent—points on which all parties agree. MSJ at 5–8.[8] Moreover, no case cited by the State mentions "time for reflection"—much less a mandatory 24-hour delay after providing written informed consent—as an element of informed consent. *See* Opp. at 17. Even so, it remains undisputed that if one of Plaintiffs' patients is unsure of their decision or needs additional time, Plaintiffs encourage them to take that time and reschedule their appointment. MSJ at 7–8.

Second, the State argues that, due to a purported lack of "systemic tracking" of abortion patients after they receive care, Plaintiffs cannot determine "how many patients later experience regret, conflict, coercion, or medical complications"; therefore, "the State is fully justified in requiring a brief interval that allows for contemplation, clarification, and voluntary commitment to the decision" as "the least restrictive means of promoting voluntariness." Opp. at 18. The State does not explain the purported nexus between the Waiting Period Requirement and the alleged lack of follow-up data. However, to the extent the State's position is that lack of granular follow-up data documenting instances of "regret, conflict, coercion, or medical complications" somehow justifies the State paternalistically forcing *all* patients to delay their desired abortions by at least twenty-four hours to protect them from later, unspecified potential harm, that is both nonsensical and entirely unsupported. Indeed, the State seemingly forgets its own regulatory scheme for mandating the tracking and reporting of complications from abortions in Ohio, *see* R.C. 3701.79,

[8] Specifically, the State cites *Truman v. Thomas*, 27 Cal.3d 285 (1980), *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *Nickell v. Gonzalez,* 17 Ohio St.3d 136 (1985), *Cobbs v. Grant*, 8 Cal.3d 229 (1972), and *Acuna v. Turkish*, 192 N.J. 399 (2007). Other than *Nickell*, all are out-of-state cases. The State additionally cites *Largey*, though it fails to provide any citation beyond this name. To the extent the state intended to cite *Largey v. Rothman*, 540 A.2d 504 (1988), the authority is equally unbinding and only reiterates the previously discussed aspects of informed consent.

which exists entirely apart from the Waiting Period Requirement. Ultimately, the State is trying to usurp the text of the Amendment—which is explicitly aimed at restricting the State from substituting its judgment for Ohioans' judgment about their personal, constitutionally protected reproductive choices—to argue that it is entitled to insert itself into patients' decisionmaking under the guise of ensuring "voluntariness."

While the lack of health justification alone entitles Plaintiffs to summary judgment, the State also utterly fails to proffer any factual basis for concluding that the Waiting Period Requirement is the least restrictive means of advancing any purported health interest. Despite repeatedly assuring this Court that the Waiting Period Requirement is "minimal," "tailored," or a "modest safeguard," the State provides no citations to support any of those claims. Opp. at 14–15. Even if it did, none of these terms represents the *actual* constitutional standard. By failing to engage with the plain textual command of the Amendment, requiring a showing of least restrictive means, the State concedes that it cannot meet it. Beyond this, the State ignores the extensive, undisputed evidence demonstrating that Plaintiffs' clinicians and staff already ensure that patients are fully informed and that they obtain care voluntarily and without coercion. MSJ at 6–8. This individualized screening is a far less restrictive means of advancing any state interest in voluntariness than an inflexible state mandate requiring a 24-hour delay in every case. *Id.* The State's refusal to engage with this extensive evidence does not negate its validity—rather, it renders it undisputed.

C. There is No Genuine Issue of Material Fact as to Whether the In-Person Requirement Advances Patient Health in Accordance with Widely Accepted and Evidence-Based Standards of Care, Using the Least Restrictive Means

Attempting to raise a question of material fact as to whether the In-Person Requirement advances patient health, the State argues that (1) it is medically necessary and (2) it is necessary to ensure voluntariness. Both are unsupported by the record.

First, the State's argument that the In-Person Requirement is a "medical necessity" relies entirely on Dr. Valley's expert report, which asserts that in-person ultrasound is required in order to "determin[e] gestational age, identify[] ectopic pregnancy, [and] evaluat[e] for contraindications." Opp. at 19 (citing Valley Rpt. ¶¶ 9–13). Both this argument and Dr. Valley's expert testimony are entirely divorced from the In-Person Requirement's actual statutory mandates. *See* R.C. 2317.56(B)(2) (requiring a physician to provide certain state-mandated information to abortion patients during a separate "in person" visit); R.C 2919.192–194 (requiring the provider to test for embryonic and fetal cardiac activity—something that can only be done in person—during the initial visit). There is *no* statute requiring abortion providers to perform an ultrasound to "determin[e] gestational age, identify[] ectopic pregnancy, [or] evaluat[e] for contraindications." Opp. at 19. Thus, because the In-Person Requirement does not mandate performing these other tests, the fact that these tests may be medically appropriate in individual instances is irrelevant, and does not demonstrate that the In-Person Requirement advances patient health. Furthermore, the State fails to point to any evidence supporting this blanket requirement, as opposed to allowing healthcare providers to use their judgment to determine whether these tests are medically appropriate for each patient.[9]

[9] The record demonstrates that while ultrasound is one method used for determining gestational age and screening for ectopic pregnancy, it is not the only method. Gestational age can be determined using the date of the first day of the patient's last menstrual period. *See* Lappen Dep. 299:14–300:1. And Plaintiffs have produced unrebutted evidence demonstrating that telemedicine abortion providers safely use remote screening tools for assessing risk of ectopic pregnancy and contraindications for medication abortion, with no negative impact on patient health. Lappen Rpt. ¶¶ 42–43. Dr. Valley's claim that ultrasound is the *most* reliable method of determining gestational age and screening for ectopic pregnancy, even if credited, does not mean that ultrasound is medically necessary, nor does it negate the overall reliability and medical appropriateness of other methods. The State cannot argue that a blanket requirement is medically necessary—let alone the least restrictive means—when the record contains no evidence refuting the medical appropriateness of these less restrictive alternatives.

Second, the State contends that the In-Person Requirement, like the Waiting Period Requirement, is necessary for obtaining informed consent and ensuring "voluntariness." Opp. at 19–20. The State cites nothing other than several paragraphs from its expert Dr. Coleman's report, simply for the proposition that "women seeking abortions experience disproportionately high rates of intimate partner violence, reproductive coercion, or relational pressure." Opp. at 19 (citing Coleman Rpt. ¶¶ 44–65). According to the State, "[b]ecause coercion directly nullifies voluntariness, a requirement designed to screen for it falls squarely within the State's constitutional authority." *Id.* Yet the State fails to explain how the In-Person Requirement is "designed to screen for [coercion]." *Id.* Once again, the State's purported health justification is entirely divorced from the laws at issue—none of the statutes that make up the In-Person Requirement mentions coercion screening. *See* R.C 2317.56, 2919.192–194. Nor does the State point to any evidence showing that a physician cannot engage in this type of counseling and make these assessments remotely. As noted above, *supra* Part III.B, the State has not disputed, and cannot dispute, that Plaintiffs already ensure both voluntariness and informed consent—including screening for coercion—as they are legally and ethically obligated to do apart from the Challenged Requirements.[10]

These deficiencies, alone, show that the State cannot meet its burden of justifying the In-Person Requirement as advancing an interest in patient health according to widely accepted and

[10] The State makes a number of sweeping statements rejecting the use of telemedicine as a valid means of obtaining informed consent in arguing that the In-Person Requirement is necessary for ensuring voluntariness. Opp. at 19–20. These assertions are not specific to the use of telemedicine in abortion, and they conflict with both standard medical practice and Ohio law, which permits informed consent to be obtained remotely for all other medical care. MSJ at 15 (citing R.C. 4743.09 and O.A.C. 4731-37-01). And the State has not submitted *any* evidence of a health justification for Ohio's discriminatory carve-out for abortion.

evidence-based standards of care. The lack of a health justification means that Plaintiffs are entitled to summary judgment.

Additionally, the In-Person Requirement is also unconstitutional because the State cannot show—and indeed, has barely attempted to argue—that the In-Person Requirement is the least restrictive means of furthering any such interest. The State's only argument on this front is a cursory, one-paragraph claim that the In-Person Requirement is the least restrictive means because "[r]emote evaluation cannot reliably assess a patient's affect, safety, or privacy; it cannot prevent the possibility that an abusive partner is off-camera; and it cannot ensure accurate medical screening," and because the In-Person Requirement "verif[ies] voluntariness through direct, professional assessment." Opp. at 20 (citing Coleman Rpt. ¶¶ 86–99). But this assertion falls far short of raising a genuine dispute of fact as to whether the In-Person Requirement is the least restrictive means. While the State's expert criticizes the use of telemedicine as compared to in-person care and suggests that only in-person visits can ensure voluntariness, the record citations that the State relies upon do not actually support these claims. *See* Coleman Rpt. ¶ 86 (discussing technological glitches and communication challenges that arise when using telemedicine generally); *id.* ¶ 88 (citing studies exploring challenges that COVID-19 created for victims of interpersonal violence);[11] *id.* ¶¶ 89–98 (discussing the mental health of medication abortion patients and the substance of counseling for medication abortion—*not* the mode of counseling delivery); *id.* ¶ 99 (opining on how the term "Reproductive Freedom" should be interpreted). The sole relevant paragraph from Dr. Coleman's report merely asserts, without citation, that "[g]iven

[11] The two articles that Dr. Coleman relies upon do not address telemedicine for abortion care. Moreover, neither suggests that telemedicine should not be used when treating patients experiencing intimate partner violence. On the contrary, the articles suggest ways to screen for coercion when using telemedicine.

the potential problems associated with telemedicine and the significance of pre-abortion counseling for the average woman seeking abortion, the vital need for individualized in-person counseling, wherein women who are confronting abortion decisions under unusually stressful circumstances cannot be understated [*sic*]." *Id.* ¶ 87. This bare assertion falls far short of raising a genuine issue of material fact as to whether a blanket in-person visit requirement for *all* patients—which the State has not shown to be necessary to ensure voluntariness even for victims of intimate partner violence—is the least restrictive means of advancing patient health.

D. There Is No Genuine Issue of Material Fact as to Whether the State-Mandated Information Requirement Advances Patient Health in Accordance with Widely Accepted and Evidence-Based Standards of Care, Using the Least Restrictive Means

The State contends that the State-Mandated Information Requirement "furthers two intertwined constitutional interests: it ensures that patients receive material medical information necessary to make an informed decision, and it prevents physician-based suppression of information that has decisive significance for many reasonable patients."[12] Opp. at 20. Neither party disputes that informed consent requires patients to be told of material risks of a medical treatment. MSJ at 5–7. However, the State does not come close to showing that there is a genuine issue of material fact as to whether the State-Mandated Information Requirement advances these

[12] In addition, the State asserts that this requirement "advance[s] … the right to 'continue one's own pregnancy,'" which is also protected by the Amendment. Opp. at 22. Plaintiffs understand this argument to be a variation on the State's argument that the state-mandated information is necessary to ensure voluntariness and informed consent in connection with patients' abortion decisions; it is therefore not addressed separately here. The State also argues, relying on *NIFLA v. Becerra*, 585 U.S. 755 (2018), that the State-Mandated Information Requirement does not constitute compelled speech under the First Amendment. Opp. at 20–21. While Plaintiffs do not concede that the State-Mandated Information Requirement would survive scrutiny under the standard set forth in *NIFLA*, they did not raise a free-speech claim in this case. The State's argument on this point is therefore irrelevant.

interests according to widely accepted and evidence-based standards of care, let alone by the least restrictive means.

First, regarding the State's purported health justification for the State-Mandated Information Requirement, as Plaintiffs demonstrated in their opening brief, both parties agree that informed consent does *not* require patients to be informed of potentially upsetting, medically irrelevant information. MSJ at 17–18. The State has pointed to nothing in the record to dispute this fact. Rather, the State argues only that "Dr. Valley asserts that [estimates of the statistical probability of carrying a pregnancy to term] are feasible, meaningful, and necessary." Opp. at 7. However, as explained above, Dr. Valley concedes that the statistical probability of carrying a pregnancy to term is impossible to calculate accurately based *solely* on gestational age, which is what the State-Mandated Information Requirement mandates. MSJ at 17–18; R.C. 2317.56(B)(1). Even if the statistical probability could be accurately calculated, the State has introduced no evidence showing that it is necessary for every patient. Indeed, its own medical expert admitted that he only sometimes provides the statistical probability of carrying a pregnancy to term to his pregnant patients. MSJ at 17. Moreover, this is only one piece of the State-Mandated Information Requirement; the State has done nothing to justify the requirement of providing all of the other information mandated by statute, in light of the fact that Plaintiffs already ensure informed consent in every case. Thus, the State has not raised a genuine issue of material fact as to whether the State-Mandated Information Requirement advances patient health by supporting informed consent.

The State cites two cases, *Nickell v. Gonzalez*, 17 Ohio St. 3d 136 (1985), and *Canterbury v. Spence,* 464 F.2d 772 (1972), to suggest that the state-mandated information is "material." Opp. at 21. But as already explained above, these cases merely stand for a proposition with which all parties agree: That informed consent requires material risks be disclosed, which Plaintiffs already

do. *See supra* Part III.B. They do nothing to justify requiring that the specific information mandated to be disclosed under the State Mandated Information Requirement be thrust upon all Ohio patients, without regard for their individual circumstances.

Finally, the State misstates the holding in *Acuna v. Turkish,* 192 N.J. 399 (2007)—a case that supports Plaintiffs, not the State. The State asserts that *Acuna* holds "physicians must disclose all medical information material to the decision, even if the decision implicates moral, relational, or emotional factors." Opp. at 25. However, contrary to the State's description, *Acuna* holds that while "a physician unquestionably has a common law duty to provide a woman with material information concerning the medical risks of a procedure terminating a pregnancy," there is "no common law duty requiring a physician to" make moral, as opposed to medical, assertions during the informed consent process. *Acuna* at 403. Indeed, what *Acuna* and other cases cited by the State show is that healthcare providers have a preexisting common law duty to provide their patients with individually tailored informed consent. And it is undisputed that Plaintiffs continue to do so even without the Challenged Requirements. MSJ at 6–7.[13]

Once again, in addition to failing to show a genuine issue of material fact as to any purported health justification, the State fails to demonstrate that there is a genuine issue of material fact as to whether a one-size-fits-all information requirement is the least restrictive means, particularly given the existing legal and ethical requirement to ensure appropriately tailored informed consent before any medical treatment. MSJ at 5–7. In fact, the State does not offer a single citation to the record in support of its claim that the State-Mandated Information

[13] Contrary to the State's claims that Plaintiffs' experts "withhold" certain information from patients, Opp. at 21, the undisputed evidence shows that Plaintiffs ensure that every patient is informed of the nature and purpose of abortion, as well as its risks, benefits, and alternatives, through an individualized informed consent discussion. MSJ at 7.

Requirement uses the least restrictive means to advance its claimed interests. Opp. at 22. Preexisting common law and ethical informed consent requirements apply to Plaintiffs' providers—just as they apply to all clinicians providing medical care—and it is undisputed that Plaintiffs already follow the law by giving each patient individually tailored information to ensure that each patient's consent to receive medical treatment is voluntary and informed. That the State repeatedly cites cases stating that health care providers may be held liable for failing to secure a patient's informed consent in fact demonstrates that the State-Mandated Information Requirement is not the least restrictive means of advancing patient health. The State has done nothing to show that this existing informed consent doctrine fails to sufficiently protect the State's claimed interests.

CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs' opening brief, Plaintiffs respectfully ask this Court to enter summary judgment for Plaintiffs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2026, a copy of the foregoing was electronically filed via the Court's e-filing system. Notice of this filing will be sent to all parties by function of that system, and it may be accessed through that system.

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