IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*, *Plaintiffs*, v. OHIO DEPARTMENT OF HEALTH, *et al.*, *Defendants.*	Case No. A 2101148 Judge Alison Hatheway **PLAINTIFFS' OMNIBUS REPLY IN SUPPORT OF THIRD MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

In their third motion for a preliminary injunction, Plaintiffs asked this Court to enjoin three provisions of Ohio law—R.C. 4723.28(B)(30), R.C. 4730.25(B)(24), and Ohio Adm.Code 3701-47-01 (the "Provisions")—that restrict the ability of duly qualified advanced practice clinicians ("APCs")[1] to provide medication abortions. Pls.' Mem. in Support of Third Mot. for Prelim. Inj. ("Third PI Mem."). This Court has already preliminarily enjoined several provisions that also limit APCs' ability to provide reproductive care (the "APC Ban"), which the Court found likely to violate the Ohio Constitution. Decision and Order Granting Plaintiffs' Second Mot. for Prelim. Inj. **Nunc Pro Tunc Aug. 29, 2024** ("Second PI Order").

In their opposition, the State Defendants acknowledge that "[t]he Court has unquestionably enjoined enforcement of laws that prohibit advanced practice clinicians from providing medication abortion." Opp. at 7. It is no surprise then that the State Defendants make no serious effort to rebut Plaintiffs' clear showing of likelihood of success on the merits. They do not dispute that the Provisions burden, penalize, prohibit, interfere with, and discriminate against Ohioans' right to

[1] "APCs are health care professionals who have completed advanced education in a specific area of health care." Proposed Second Am. Compl. ¶ 105. APCs include nurse practitioners, certified nurse midwives, and physician assistants. *Id.*

choose medication abortion and Plaintiffs' ability to assist them in doing so. And they offer no evidence or argument to suggest that the Provisions are the "least restrictive means" of advancing patient health or that they do so "in accordance with widely accepted and evidence-based standards of care," as the State Defendants are required to do in order to satisfy the Ohio Constitution. Ohio Const., art. I, § 22(B). Lacking any legally legitimate basis to contest Plaintiffs' request, the State Defendants resort to strawman arguments bordering on the absurd, conjuring the specter of dialysis technicians providing procedural abortion services to suggest that Plaintiffs are pursuing a broader remedy than what they clearly seek here. Opp. at 9-10.

Plaintiffs respectfully request that this Court grant their request for preliminary injunctive relief without a hearing and enjoin enforcement of the Provisions while this litigation is pending.[2]

I. The State Defendants Do Not Address the Unconstitutionality of the Provisions

The Provisions burden, penalize, prohibit, interfere with, and discriminate against Ohioans' access to safe, effective reproductive health care with no countervailing benefit to patient health. Third PI Mem. at 2. The State Defendants do not dispute that Plaintiffs are likely to succeed on the merits of their claim that the Provisions are unconstitutional, beyond "invit[ing]" the Court to consider their prior arguments against Plaintiffs' second motion for a preliminary injunction again here. Opp. at 2. The Court rejected the State Defendants' arguments then, and it should adhere to that same reasoning here.

The State Defendants also make no effort to carry their burden under Article I, Section 22(B) of the Ohio Constitution. They do not address how the Provisions constitute the "least restrictive means" of advancing patient health or how they do so "in accordance with widely

[2] In their opposition, the State Defendants "do[] not oppose" Plaintiffs' motion for leave to file a second amended complaint. Opp. at 1. Plaintiffs thus consider their motion for leave to file a second amended complaint unopposed and respectfully request that the Court grant it.

accepted and evidence-based standards of care." Ohio Const., art. I, § 22(B). Nor do they submit anything to refute Plaintiffs' ample evidence that APCs can and do provide medication abortion just as safely and effectively as physicians, *see* Third PI Mem. at 5-6, similar to evidence that this Court previously credited, *see* Second PI Order at 14.

Accordingly, because the Provisions effectively prevent qualified "APCs from prescribing medication to induce an abortion," Plaintiffs "are substantially likely to succeed on their claim" that the Provisions "violate[] Ohioans' constitutional right to abortion." Second PI Order at 12, 14; *see also* Third PI Mem. at 8-11.

II. The Requested Injunctive Relief Is Appropriately Tailored

The State Defendants' main argument as to why this Court should deny Plaintiffs' requested relief appears to boil down to an assertion that the scope of the requested relief is not commensurate with the constitutional harms Plaintiffs and their patients face. This argument fails on multiple fronts and fundamentally misconstrues what Plaintiffs are seeking.

First, the State Defendants argue that enjoining the Provisions would mean that all registered nurses and dialysis technicians would be permitted to provide abortions insulated from disciplinary consequences, including "surgical abortions" and "the prescription of other potentially untested or proven and potentially dangerous drugs for medication abortion." Opp. at 8-10. This is nonsense. To begin, as made abundantly clear in Plaintiffs' memorandum in support of their motion, Plaintiffs seek to enjoin the Provisions *only* as to APCs and *only to the extent* that the Provisions prevent APCs from providing medication abortion. *See* Third PI Mem. at 1 (requesting injunction of Provisions to the extent they "prohibit qualified and skilled *advanced practice clinicians* ("APCs") from providing *medication abortion*" (emphasis added)); *see also id.* at 2 ("Defendants have refused to agree not to enforce [the Provisions] *against APCs*." (emphasis added)); *id*. ("Plaintiffs now seek a modest extension of this Court's existing injunction to ensure

that *APCs* are able to provide essential health care without facing sanction by their licensing boards." (emphasis added)). Moreover, all medical providers, including registered nurses and dialysis technicians, are still subject to discipline for practicing outside of their scope of practice.[3]

Second, the State Defendants claim that Plaintiffs seek an "inappropriate" "expansion" of relief for seeking to enjoin "'any later enforcement action premised on conduct that occurred while such relief was in effect.'" Opp. at 8 (quoting Third PI Mem. at 14). Defendants' claim is simply wrong. The quoted language is consistent with what Plaintiffs sought in their Second Motion for Preliminary Injunction, *see* Pls.' Mem. in Support of Second Mot. for Prelim. Inj. at 32, and consistent with language in other preliminary injunctions issued by this Court, *see, e.g.*, Prelim. Inj. Order, *Preterm-Cleveland v. Yost*, Hamilton C.P. No. A2203203, ¶ 134 (Oct. 12, 2022) (enjoining defendants from "later taking any enforcement action premised on a violation of [the challenged law] that occurred while such relief was in effect"); *accord* Order Granting Pls.' Mot. for Prelim. Inj., *Preterm-Cleveland v. Yost*, Franklin C.P. No. 24CV2634 at 2 (Aug. 23, 2024) (enjoining defendants from "undertaking any future enforcement action premised on conduct that occurred while this Order was in effect").

The State Defendants argue that this language "bind[s] the State to [the injunction] long after its expiration." Opp. at 8. On the contrary, it merely reiterates the well-established principle that, under both the Ohio and the United States Constitutions, the government cannot impose liability for conduct that was lawful when it occurred. *See Marks v. United States*, 430 U.S. 188, 196 (1977) (holding that the Due Process Clause prohibits imposition of criminal liability for

[3] *See, e.g.*, R.C. 4723.43, 4723.72, 4723.28(B)(19) (threatening various licensing consequences for nursing or dialysis technician certificate-holders for "fail[ing] to practice in accordance with acceptable and prevailing standards of safe . . . care"), 4723.28(B)(20) (setting restrictions on registered nurses), 4723.28(B)(21) (setting restrictions on licensed practical nurses), 4723.28(B)(22) (setting restrictions on dialysis technicians), 4723.28(B)(27) (setting restrictions on advanced practice registered nurses), 4723.28(B)(29) (setting restrictions on clinical nurse specialists, certified nurse midwifes, or certified nurse practitioners), 4723.151 (prohibiting nurses from performing surgery).

conduct not punishable under law as it existed at the time the relevant conduct occurred); *cf. State v. Gleason*, 110 Ohio App.3d 240, 246 (9th Dist. 1996) (stating that the U.S. and Ohio Constitutions "forbid 'any statute which punishes as a crime an act previously committed, which was innocent when done'" (citation omitted)).

III. Plaintiffs and Their Patients Face Concrete, Irreparable Harm Absent Relief

Plaintiffs and their patients face irreparable harm absent injunctive relief. With respect to the APC Ban generally, this Court has already found that Plaintiffs are "substantially likely to succeed on their claim" and that absent an injunction, they and their patients will suffer irreparable harm. Second PI Order at 16-17 (citing *Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.) ("'[I]mpair[ment]' of a constitutional right 'mandates a finding of irreparable injury.'"). Specifically, the Court found that without preliminary relief, "Plaintiffs will still be limited in their ability to provide reproductive care to their patients, contrary to the Amendment's broad protections," and patients "will still be irreparably harmed by obstacles to care and regulations that are more restrictive than the Amendment allows." *Id.* at 17. In fact, the Court found that these harms were not speculative but *actually happening*. *See id.* ("Each day these Bans remain in place, Plaintiffs[] and their patients continue to suffer irreparable harm.").

The Provisions impose the exact same harms because they—just like the APC Ban—limit Plaintiffs' "ability to provide reproductive care to their patients." Second PI Order at 17; *see* Third PI Mem. at 12-13. The State Defendants attempt to cast this existing constitutional harm as "speculat[ive]" because Plaintiffs "claim that they are threatened with enforcement" without saying how they learned of the threat. Opp. at 6. This is a red herring. On their face, these Provisions clearly restrict APCs' ability to provide medication abortion. *See* R.C. 4723.28(B)(30) (threatening to "deny, revoke, suspend, or place restrictions on any nursing license . . . issued by the board; reprimand or otherwise discipline a holder of a nursing license . . .; or impose a fine of

not more than five hundred dollars per violation" for nurse practitioners or certified nurse midwives who prescribe medication abortion); *see also* R.C. 4730.25(B)(24) (threatening to "limit, revoke, or suspend an individual's license to practice as a physician assistant or prescriber number, refuse to issue a license to an applicant, refuse to renew a license, refuse to reinstate a license, or reprimand or place on probation the holder of a license" for physician assistants who prescribe medication abortion). By "penaliz[ing]" the provision of medication abortion by APCs, the Provisions violate Article I, Section 22(B) of the Ohio Constitution—an actual, irreparable harm. *See* Second PI Order at 16-17. Indeed, this Court has already found that such restrictions are sufficient to establish irreparable harm. *Id*. at 17 (holding that Plaintiffs suffer actual harm when they are "limited in their ability to provide reproductive care to their patients, contrary to the Amendment's broad protections").

Moreover, the State Defendants have expressly refused to stipulate not to enforce the Provisions as to APCs. *See* Third PI Mem. at 4-5. This refusal alone makes clear that Plaintiffs' harm is not speculative. *See, e.g.*, *S. Bay Rod & Gun Club, Inc. v. Bonta*, No. 22CV1461-BEN (JLB), 2022 WL 17363890, at *5 (S.D. Cal. Dec. 1, 2022) (finding a "chilling effect" persists where defendant attorney general did not enter an unconditional commitment of non-enforcement); *c.f. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Labrador*, 122 F.4th 825, 838 (9th Cir. 2024) (finding, in the standing context, that plaintiffs faced "substantial threat of enforcement" where attorney general refused to disavow interpretation of abortion restriction).

Therefore, for the same reasons stated in the Court's Second PI Order, Plaintiffs and their patients will continue to suffer irreparable harm absent injunctive relief. *See* Second PI Order at 14.

IV. The Public Interest Favors Enjoining the Provisions

The State Defendants also contend that an injunction would not serve the public interest. Opp. at 10-11. To start, they re-raise their claim that enjoining the State from enforcing an unconstitutional law somehow harms Ohioans. *Id.* at 10. This Court already rejected that argument in issuing its prior preliminary injunction and should do so again for the same reasons. Second PI Order at 17; *see also Lamar Advantage GP Co., LLC v. City of Cincinnati*, Hamilton C.P. No. A-18-04105, 114 N.E.3d 805, 829 (Oct. 17, 2018) (quoting *Miller v. City of Cincinnati*, 709 F.Supp.2d 605, 627 (S.D.Ohio 2008)) ("[I]t is always in the public interest to prevent violation of a party's constitutional rights."), *judgment aff'd in part, rev'd in part*, 2020-Ohio-3377 (1st Dist.), *rev'd* 2021-Ohio-3155.

With that, all that is left is the State Defendants' claim that the requested relief would harm the public because it would go "far beyond" that already issued by this Court, Opp. at 11—a claim that is premised entirely on the State Defendants' misconstruction of the scope of relief requested and, as already explained above, patently false, *see supra* at 3-5.

Thus, for the reasons already set forth in Plaintiffs' opening brief, *see* Third PI Mem. at 13, a preliminary injunction against the Provisions will prevent future constitutional violations and will therefore serve the public interest.

CONCLUSION

For the foregoing reasons, and the reasons stated in their opening brief, Plaintiffs respectfully ask this Court to grant their Third Motion for Preliminary Injunction, enjoining enforcement of R.C. 4723.28(B)(30), R.C. 4730.25(B)(24), and Ohio Adm.Code 3701-47-01, and their Motion for Leave to File a Second Amended Complaint.

Respectfully submitted,

/s/ *Michelle Nicole Diamond*
Michelle Nicole Diamond (Pro Hac Vice)
Peter Neiman (Pro Hac Vice)
Cassandra Mitchell (Pro Hac Vice)
Maura Douglas (Pro Hac Vice)
Zach Blair (Pro Hac Vice)
Nicole Castillo (Pro Hac Vice)
WilmerHale LLP
7 World Trade Center
New York, NY 10007
(212) 230-8800
michelle.diamond@wilmerhale.com
peter.neiman@wilmerhale.com
Counsel for Plaintiffs

Taylor Gooch (Pro Hac Vice)
WilmerHale LLP
50 California St., Ste. 3600
San Francisco, CA 94111
(628) 235-1000
taylor.gooch@wilmerhale.com
Counsel for Plaintiffs

Alyssa Milstead (Pro Hac Vice)
WilmerHale LLP
2600 El Camino Real, Suite 400
Palo Alto, CA 94306
(650) 858-6000
alyssa.milstead@wilmerhale.com
Counsel for Plaintiffs

Catherine Humphreville (Pro Hac Vice)
Vanessa Pai-Thompson (Pro Hac Vice)
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
(212) 541-7800 (Pai-Thompson)
(212) 247-6811 (fax)
catherine.humphreville@ppfa.org
vanessa.pai-thompson@ppfa.org
Counsel for Planned Parenthood Southwest Ohio Region, Sharon Liner,

B. Jessie Hill (0074770)
Margaret Light-Scotece (0096030)
Freda J. Levenson (0045916)
ACLU of Ohio Foundation
4506 Chester Ave.
Cleveland, OH 44103
(216) 368-0553
(614) 586-1974 (fax)
bjh@cwru.edu
margaret.light-scotece@case.edu
flevenson@acluohio.org
Counsel for Preterm-Cleveland and Women's Med Group Professional Corporation

David J. Carey (0088787)
ACLU of Ohio Foundation
1108 City Park Ave., Ste. 203
Columbus, OH 43206
(380) 215-0997
dcarey@acluohio.org
Counsel for Preterm-Cleveland and Women's Med Group Professional Corporation

Meagan Burrows (Pro Hac Vice)
Johanna Zacarias (Pro Hac Vice)
American Civil Liberties Union
125 Broad St., 18th Fl.
New York, NY 10004
(212) 549-2601
mburrows@aclu.org
jzacarias@aclu.org
Counsel for Preterm-Cleveland and Women's Med Group Professional Corporation

Fanon A. Rucker (0066880)
The Cochran Firm
527 Linton Street
Cincinnati, OH 45219
(513) 381-4878

M.D., Julia Quinn, and Planned Parenthood of Greater Ohio

(513) 672-0814 (fax)
frucker@cochranohio.com
Counsel for Planned Parenthood Southwest Ohio Region, Sharon Liner, M.D., Julia Quinn, and Planned Parenthood of Greater Ohio

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CERTIFICATE OF SERVICE

I certify the foregoing was filed electronically and served upon the following via electronic mail this 19th day of March, 2025:

OHIO DEPARTMENT OF HEALTH
246 N. High Street
Columbus, OH 43215
Email: Amanda.Narog@OhioAGO.gov

BRUCE T. VANDERHOFF, M.D., MBA
Director, Ohio Department of Health
246 N. High Street
Columbus, OH 43215
Email: Amanda.Narog@OhioAGO.gov

KIM G. ROTHERMEL, M.D.
Secretary, State Medical Board of Ohio
30 E. Broad Street, 3rd Floor
Columbus, OH 43215
Email: Amanda.Narog@OhioAGO.gov

HARISH KA KARALA, M.D.
Supervising Member, State Medical Board of Ohio
30 E. Broad Street, 3rd Floor
Columbus, OH 43215
Email: Amanda.Narog@OhioAGO.gov

ERIN KEELS, DNP, APRN-CNP
President, Ohio State Board of Nursing
8995 East Main Street
Reynoldsburg, OH 43068
Email: Amanda.Narog@OhioAGO.gov

CANDY SUE RINEHART, DNP, APRN-CNP
Supervising Member for Disciplinary Matters, Ohio State Board of Nursing
8995 East Main Street
Reynoldsburg, OH 43068
Email: Amanda.Narog@OhioAGO.gov

CONNIE PILLICH
Hamilton County Prosecutor
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202
Email: connie.pillich@hcpros.org

SHAYLA D. FAVOR
Franklin County Prosecutor
373 S. High Street, 14th Floor
Columbus, OH 43215
Email: sfavor@franklincountyohio.gov

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, OH 44113
Email: mcomalley@prosecutor.cuyahogacounty.us

MATHIAS H. HECK, JR.
Montgomery County Prosecutor
301 W. Third St., 5th Floor
P.O. Box 972
Dayton, OH 45402
Email: heckm@mcohio.org

ELLIOT KOLKOVICH
Summit County Prosecutor
175 S. Main Street
Akron, OH 44308
Email: ekolkovich@prosecutor.summitoh.net

KELLER J. BLACKBURN
Athens County Prosecutor
Athens County Courthouse
1 South Court Street, First Floor
Athens, OH 45701
Email: tl@athenscountyprosecutor.org; katie@athenscountyprosecutor.org

KYLE L. STONE
Stark County Prosecutor
110 Central Plaza South, Suite 510
Canton, OH 44702
Email: klstone@starkcountyohio.gov

CONNIE J. LEWANDOWSKI
Portage County Prosecutor
The Portage County Prosecutor's Office
241 South Chestnut Street
Ravenna, OH 44266
Email: clewandowski@portageco.com

JODIE M. SCHUMACHER
Richland County Prosecutor
38 South Park Street, 2nd Floor
Mansfield, OH 44902
Email: Jschumacher@richlandcountyoh.us

JULIA R. BATES
Lucas County Prosecutor
Common Pleas Court
700 Adams Street
Toledo, OH 43604
Email: jbates@co.lucas.oh.us; jaborell@co.lucas.oh.us; kpituch@co.lucas.oh.us

LYNN MARO
Mahoning County Prosecutor
21 W Boardman Street, 6th Floor
Youngstown, OH 44503
Email: lynn.maro@mahoning.gov

MICHAEL T. GMOSER
Butler County Prosecutor
315 High Street, 11th Floor
P.O. Box 515
Hamilton, OH 45012
Email: gmosermt@butlercountyohio.org

DANIEL P. DRISCOLL
Clark County Prosecutor
50 E. Columbia Street, Suite 449
Springfield, OH 45502
Email: ddriscoll@clarkcountyohio.gov

Respectfully submitted,

/s/ *Michelle Nicole Diamond* _____
Michelle Nicole Diamond (Pro Hac Vice)