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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.*	A2100870 Case No. _____ Judge: _____ **PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION; REQUEST FOR HEARING**

Under Civ.R. 65, Plaintiffs Planned Parenthood Southwest Ohio Region ("PPSWO"), Dr. Sharon Liner, Planned Parenthood of Greater Ohio ("PPGOH"), Preterm-Cleveland ("Preterm"), Women's Med Group Professional Corporation ("WMGPC"), and Northeast Ohio Women's Center ("NEOWC") (collectively "Plaintiffs") respectfully move this Court for a temporary restraining order followed by preliminary injunction to enjoin Defendants from enforcing Am.S.B. No. 27, 2020 Ohio Laws File 77 ("SB27"), until such reasonable time after Defendant Ohio Department of Health ("ODH") issues rules, including those prescribing the necessary forms, as required by SB27, so that Plaintiffs are able to determine whether and how they can comply with the law.

As explained in the accompanying Memorandum in Support, its attached Affidavits, the Complaint, and its attached exhibits, injunctive relief is necessary to prevent irreparable harm to Plaintiffs and their patients. Without relief from this Court, Plaintiffs will be forced to stop providing most abortions, leaving patients in the state without *any* access to abortion after the tenth week of pregnancy, and resulting in irreparable injury and an unquestionable violation of Plaintiffs' and their patients' constitutional rights. Plaintiffs request a hearing on this Motion.

A Proposed Order is filed separately.

Dated: March 9, 2021

Respectfully submitted,

/s/ Maithreyi Ratakonda

Maithreyi Ratakonda* PHV #23846
Trial Attorney
Planned Parenthood Federation of America
123 William Street, Floor 9
New York, NY 10038
(212) 261-4405
(212) 261-4405 (fax)
mai.ratakonda@ppfa.org
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Planned Parenthood of Greater Ohio, and Sharon Liner, M.D.

Fanon A. Rucker #0066880
The Cochran Firm
119 E. Court St., Suite 102
Cincinnati, OH 45202
(513) 381-4878
(513) 381-7922 (fax)
frucker@cochranohio.com
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Planned Parenthood of Greater Ohio, and Sharon Liner, M.D.

Richard Muniz* PHV #23847
Planned Parenthood Federation of America
1110 Vermont Ave. NW, Suite 300
Washington, DC 20005
(202) 973-4997
(202) 973-4997 (fax)
richard.muniz@ppfa.org
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Planned Parenthood of Greater Ohio, and Sharon Liner, M.D.

B. Jessie Hill #0074770
Freda J. Levenson #0045916
American Civil Liberties Union of Ohio Foundation, Inc.
4506 Chester Ave.
Cleveland, OH 44103
(216) 368-0553 (Hill)
(614) 586-1972 x125 (Levenson)
(614) 586-1974 (fax)
bjh11@cwru.edu
flevenson@acluohio.org
Counsel for Plaintiffs Preterm-Cleveland, Women's Med Group Professional Corporation, Northeast Ohio Women's Center LLC

Jennifer Dalven* PHV #23858
Rachel Reeves* PHV #23855
Clara Spera* PHV #23851
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
(212) 549-2650 (fax)
jdalven@aclu.org
rreeves@aclu.org
cspera@aclu.org
Counsel for Plaintiffs Preterm-Cleveland, Women's Med Group Professional Corporation Northeast Ohio Women's Center LLC

*Application for *pro hac vice* in this Court forthcoming

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

Plaintiffs are health care providers who have been providing high-quality reproductive health care, including abortion, to patients in Ohio for decades. For years, the State of Ohio has taken action after action to make it more difficult, if not impossible, for Plaintiffs to provide and patients to obtain abortion care, including by passing in 2019 a law banning abortion from the earliest days of pregnancy.[1] In the most recent legislative session, the State passed Am.S.B. No. 27, 2020 Ohio Laws File 77 ("SB27") which imposes extremely onerous provisions that require a sea-change in how Plaintiffs dispose of embryonic and fetal tissue after a procedural abortion (also known as a surgical abortion). Despite Plaintiffs having consistently and scrupulously followed the applicable regulations on the disposal of infectious waste, which have been in place for years, SB27 would require all such tissue to be either cremated or interred (buried). On December 30, 2020, Governor Mike DeWine signed SB27 into law, and it is set to take effect on April 6, 2021.

Upon SB27's passage, Plaintiffs immediately started to determine whether and how they could comply with it but were hampered by at least one major obstacle: SB27 requires the director of the Ohio Department of Health ("ODH") to issue rules—including rules prescribing certain forms—to implement the law pursuant to Chapter 119 of the Ohio Revised Code, requiring notice-and-comment rulemaking. R.C. 3726.14; *see also* R.C. 119.03. But the director has up to "ninety days *after the effective date*" of SB27 to issue the requisite rules. (Emphasis added.) R.C. 3726.14. To Plaintiffs' knowledge, the notice and comment rulemaking process to issue the required rules

[1] This law was enjoined by a federal court. *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796 (S.D.Ohio 2019).

has not commenced, making the issuance of the rules before the April 6th effective date an impossibility.[2]

Without the rules and forms, compliance with SB27 is impossible. Before any procedural abortion, patients must certify that they have received a state-prescribed "notification form" informing them of their option to determine how embryonic and fetal tissue will be disposed, and if a patient makes an election, SB27 requires the determination be made on a separate state-prescribed "consent form." Additionally, crematory operators must obtain a state-prescribed "detachable supplemental form" that the patient has properly executed before cremation. While Section 3 of SB27 provides that the criminal penalties specified in SB27 will not take effect until after the rules are issued, there is no such provision stating that civil penalties—including revocation or suspension of the licenses of Plaintiff health centers and physicians, as well as significant monetary penalties—are similarly suspended. Given the long history of aggressive enforcement by the State, Plaintiffs credibly fear being penalized if they are not in compliance with SB27 when it takes effect. Indeed, Plaintiffs have made repeated efforts to ascertain that they will not be civilly penalized for violating SB27 until after the necessary rules and forms are issued, but the State of Ohio has refused to give such assurances.

Defendants have placed Plaintiffs in an impossible position: they cannot comply with SB27's requirements, but if they continue providing procedural abortions after April 5, they face severe sanctions. Without relief from this Court, Plaintiffs will have to abruptly stop providing all procedural abortions on April 6 and may be forced to stop making appointments well ahead of the

[2] *See* R.C. 119.03 (describing timeline for rulemaking process, including that "[r]easonable public notice shall be given in the register of Ohio at least thirty days prior to the date set for a hearing" on a proposed rule and that a "proposed rule, amendment, or rescission and public notice shall be filed as required by this division at least sixty-five days prior to the date on which the agency . . . issues an order adopting the proposed rule").

April 6 effective date due to the state's mandatory counseling requirement, leaving some patients with no access to abortion *at all* and all patients without any access to abortions in the State of Ohio after the tenth week of pregnancy. To avoid this unprecedented and clear violation of their and their patients' constitutional rights, Plaintiffs ask this Court to enjoin Defendants from enforcing SB27 until such reasonable time after ODH issues rules and forms, so that Plaintiffs are able to determine whether and how they can comply with its requirements.

I. FACTUAL BACKGROUND

A. Abortion in Ohio

Legal abortion is one of the safest medical procedures in the United States. Affidavit of Sharon Liner, M.D. ("Liner Aff."), attached as exhibit No. 1, at ¶ 15. There are two main methods of abortion: medication abortion and procedural abortion. Both medication abortion and procedural abortion are effective in terminating a pregnancy. *Id.* at ¶ 16.

Medication abortion involves a combination of two pills, mifepristone and misoprostol, which expel the contents of the uterus in a manner similar to a miscarriage after the patient has left the clinic and in a location of the patient's choosing, typically their own home. *Id.* at ¶ 17. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery," as it involves no incisions. In a procedural abortion, the clinician uses suction from a thin, flexible tube and, in some instances, other instruments, to empty the contents of the patient's uterus. *Id.* at ¶ 18.

Plaintiffs provide reproductive health care, including procedural abortions, at licensed ambulatory surgical facilities ("ASFs") throughout the state. Because legal abortion is so safe, the vast majority of abortions can be and are safely provided in an outpatient setting. In 2019, 93

percent of abortions in Ohio were performed in an ASF, and another 6.75 percent were provided in another type of outpatient facility.[3]

Patients seek abortion for a multitude of personal and complex reasons. By way of example, some patients have abortions because they conclude that it is not the right time to become a parent or have additional children, they desire to pursue their education or career, or they lack the financial resources or level of partner or familial support or stability they would want before having a child or additional children. Liner Aff. at ¶ 22. Other patients seek abortions because existing medical conditions put them at greater than average risk of medical complications. *Id.*

Because Ohio law restricts medication abortion to the first ten weeks of pregnancy (or ten weeks LMP),[4] procedural abortion is the only method of abortion available after ten weeks LMP, and for some patients, it is the only method available at any gestation. Liner Aff. at ¶ 20. For example, a patient may be allergic to one of the medications used in medication abortion, or may have medical conditions that make procedural abortion relatively more safe. *Id.* According to the latest data from ODH in 2019, more than 61 percent of abortions in the state were procedural abortions.[5] Plaintiffs provide procedural abortion up to maximum gestations between 16 weeks and 6 days and 21 weeks and 6 days LMP.

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[3] ODH, Induced Abortions in Ohio, 2019, at 22 (2020), https://bit.ly/386HyzK.

[4] Pregnancy is commonly measured from the first day of a woman's last menstrual period ("LMP"). A full-term pregnancy is approximately 40 weeks LMP. R.C. 2919.201 prohibits abortions after 22 weeks LMP. R.C. 2919.123 restricts Ohio abortion providers to prescribing the first drug used in medication abortion according to the federally approved label, which allows use of mifepristone only up to 10 weeks LMP. *See* U.S. Food & Drug Administration, *Mifeprex (mifepristone) Information* (last updated Feb. 5, 2018), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information. Accordingly, Plaintiffs provide medication abortion up to 10 weeks LMP (through 70 days).

[5] ODH, Induced Abortion Report 2019, *supra* note 3, at 23.

B. Preexisting Laws Related to Disposition of Human Tissue

After a procedural abortion, Plaintiffs safely dispose of the products of conception—along with other pregnancy tissue, such as placenta, gestational sac, and umbilical cord—through a licensed vendor who incinerates the tissue. This is in accordance with all laws and regulations and consistent with the methods used by other medical facilities and hospitals in Ohio. Liner Aff. at ¶ 19; Affidavit of Iris E. Harvey ("Harvey Aff."), attached as exhibit No. 2, at ¶ 9; Affidavit of Chrisse France ("France Aff."), attached as exhibit No. 3, at ¶ 10; Affidavit of W.M. Martin Haskell, M.D. ("Haskell Aff."), attached as exhibit No. 4, at ¶ 12; Affidavit of David Burkons, M.D. ("Burkons Aff."), attached as exhibit No. 5, at ¶ 11.

As part of their licensure requirements, Plaintiffs' ASFs must establish and follow written infection control policies and procedures that address the "disposal of biological waste; including blood, body tissue; and fluid in accordance with Ohio law." Ohio Adm.Code 3701-83-09(D)(3). The disposition of embryonic and fetal tissue is subject to regulation as infectious waste. *See* R.C. 3734.01(R); Ohio Adm.Code 3745-27-01(I)(6)(c). Infectious waste must be treated by incineration, autoclaving, chemical treatment, or an alternative treatment technology approved by the director of the Ohio Environmental Protection Agency ("EPA") and then disposed as solid waste. Ohio Adm.Code 3745-27-32(A) and (I)(18). Upon information and belief, neither cremation nor interment has been approved as an alternative treatment technology.[6]

Separate from the laws that currently govern tissue disposition, there are rules that govern disposition of dead human bodies and body parts. For instance, a crematory operator generally may not cremate a dead human body unless it has obtained a death certificate, burial permit, and

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[6] *See* Ohio EPA, *Currently Approved Infectious Waste Alternative Treatment Technologies*, https://epa.ohio.gov/dmwm/Home/NonHW-Facility-List/LiveAccId/131642#131647707-currently-approved-infectious-waste-alternative-treatment-technologies (last accessed Feb. 21, 2021).

cremation authorization form. R.C. 4717.23(A). A crematory may not simultaneously cremate more than one decedent unless the decedents were related by consanguinity or affinity or were common-law married or otherwise cohabiting in the year preceding their deaths. R.C. 4717.24(A)(7) and 4717.26(D). Tissue from more than one living individual that has been removed for medical purposes during biopsy, treatment, or surgery may be cremated simultaneously only if authorized on a cremation authorization form. R.C. 4717.20(C) and 4717.26(D). Similarly, a burial permit is required before a dead body (or a dead fetus of at least twenty weeks gestation) is interred, and a death certificate is needed to obtain a permit. R.C. 3705.17 (dead body) and 3705.20(B) (fetal death).

C. Senate Bill 27

SB27 drastically alters the disposition requirements for "fetal remains," which SB27 defines as "the product of human conception that has been aborted," i.e., a "zygote, blastocyte, embryo, or fetus." R.C. 3726.01(C).[7] Under SB27, abortion facilities may only dispose of embryonic or fetal tissue by cremation or interment.[8] R.C. 3726.02(A). The bill provides that a patient who has a procedural abortion may decide whether to dispose of fetal remains by cremation or interment and may determine the location of such disposition. R.C. 3726.03(A). Before the procedural abortion, the patient must be provided with an ODH-prescribed "notification form." R.C. 3726.03(B). Patients must certify in writing that they have received the notification form.

[7] "Zygotes" and "blastocytes" refer to fertilized cells within hours or days after fertilization. These are extremely early developmental stages, and prior to the implantation of a fertilized egg in the uterus, which is the point at which pregnancy is generally considered to begin in medicine. Liner Aff. at ¶ 4 fn. 1.

[8] "Cremation" means "the technical process of using heat and flame to reduce human or animal remains to bone fragments or ashes or any combination thereof," R.C. 3726.01(C) 4717.01(M), and "interment" means "the burial or entombment of fetal remains," R.C. 3726.01(D). Although incineration is generally the same process as cremation, incineration is not allowed in a crematory facility, *see* R.C. 4717.01(K), and SB27 requires cremation in a licensed crematory facility, R.C. 3726.02(B).

R.C. 2317.56(B)(4)(c). If the patient elects to determine the method of disposition, then that decision must be documented on an ODH-prescribed "consent form." R.C. 3726.04(A)(1).[9] As with the notification form, the consent form must be completed before the abortion. R.C. 2317.56(B)(4)(d). If the patient does not make an election under R.C. 3726.03, the abortion facility must determine the disposition (by cremation or interment only). R.C. 3726.04(A)(2).

SB27 requires routine reporting of the method of disposition, along with other detailed data of abortion patients, to ODH. R.C. 3701.79(C). An abortion facility may not release the tissue or arrange for disposition until the patient has decided whether to determine the method of disposition (and if they have, until after the patient has provided consent on the ODH form). R.C. 3726.05. Abortion facilities must document the patient's determination (and if applicable, consent) in the patient's medical record, R.C. 3726.10, and "maintain evidentiary documentation demonstrating the date and method of the disposition," R.C. 3726.11. An abortion facility must also establish and maintain written policies and procedures addressing cremation or interment. R.C. 3726.12. A crematory operator may not cremate the embryonic or fetal tissue without first receiving a properly executed "detachable supplemental form." R.C. 4717.271(A)(1).

SB27 requires ODH, within 90 days of the bill's effective date, to adopt rules to carry out its requirements, including rules that prescribe the notification, consent, and detachable supplemental forms. R.C. 3726.14. Despite that SB27 was signed into law on December 30, 2020, to date, ODH has not promulgated any rules related to SB27, including rules prescribing the three forms SB27 requires prior to performing a procedural abortion. Because of the statutorily

[9] If the patient is an unmarried, unemancipated minor, SB27 requires parental consent to the patient's disposition determination, unless the patient has obtained a judicial bypass order. R.C. 3726.04(B)(2).

mandated notice-and-comment period, it is now too late for the rulemaking process to be completed before the bill's April 6 effective date.

Failure to comply with SB27 subjects Plaintiffs and their physicians to significant penalties. A knowing violation of R.C. 3726.02, 3726.05, 3726.10, or 3726.11 is a first-degree misdemeanor. R.C. 3726.99. Although SB27 suspends criminal penalties until ODH has adopted rules, the bill does not stay any noncriminal sanctions. There are severe noncriminal penalties that can apply as soon as SB27 takes effect on April 6. A physician who provides an abortion without first obtaining the patient's written certification that they have received the SB27-required notification form (and consent form, if applicable) could be subject to disciplinary action, including having their medical license limited, suspended, or revoked. R.C. 2317.56(G)(2), 4731.22(B)(21) and (23). If ODH finds that a physician in an ASF violated any law relating to informed consent, such as R.C. 2317.56, ODH must report that finding to the State Medical Board of Ohio ("Medical Board"). R.C. 3702.30(E)(2). The Medical Board may impose a civil penalty up to $20,000. R.C. 4731.225(B).

The non-physician Plaintiffs also face revocation, suspension, or refusal to renew their ASF licenses for a violation of SB27. Ohio Adm.Code 3701-83-05(C) and 3701-83-05.1(C)(2). And they face a civil penalty of up to $250,000. Ohio Adm.Code 3701-83-05.1(C)(4) and 3701-83-05.2(B); *see also* R.C. 3702.32(D). In addition, ODH may order the ASF to cease operations and obtain an injunction enjoining the ASF from providing services. Ohio Adm.Code 3701-83-05.1; *see also* R.C. 3702.32(D)(3) and (E). The ASF is also subject to a civil penalty of up to $50,000 per patient for such violation. R.C. 3701-83-05.1(F); 3701-83-05.2(F).

For any violation of SB27's reporting requirement, the director of ODH may "apply to the court of common pleas for temporary or permanent injunctions restraining a violation or threatened

violation." R.C. 3701.79(J). The director of ODH may also "apply to the court of common pleas for temporary or permanent injunctions restraining a violation or threatened violation of the [abortion] rules" including the rules on the "[h]umane disposition of the product of human conception" and "[c]ounseling." R.C. 3701.341. Finally, a physician who violates the informed-consent requirements is liable in a civil action for compensatory and exemplary damages. R.C. 2317.56(G)(1). Plaintiffs may also be civilly liable as the employer or other principal of their physicians. R.C. 2317.56(H)(3).

D. Plaintiffs' Compliance Efforts and Outreach to the State

In light of the severe penalties enumerated above, and recognizing that SB27 completely alters the way in which tissue from a procedural abortion may be disposed, after the bill passed, Plaintiffs began exploring compliance, including contacting funeral homes, crematories, and cemeteries. Liner Aff. at ¶ 25; Harvey Aff. at ¶ 11; France Aff. at ¶ 16; Haskell Aff. at ¶ 18; Burkons Aff. at ¶ 17. Plaintiffs soon learned that providers of cremation and burial services were reluctant to work with them, including because of ambiguities in the law—such as whether embryonic or fetal tissue can be simultaneously cremated, what forms are needed to be completed prior to interment, and whether tissue can be sent to a crime lab or to a pathologist for testing—which may be addressed in rulemaking. Liner Aff. at ¶ 25–26; Harvey Aff. at ¶ 11; France Aff. at ¶ 16–17; Haskell Aff. at ¶ 18–19; Burkons Aff. at ¶ 17–18.

Given that abortion is highly regulated, Plaintiffs credibly fear immediate enforcement after the law takes effect. Indeed, just last year, about one week after ODH issued an order barring "all non-essential surgeries and procedures" during the COVID-19 emergency, ODH sent six inspectors to Plaintiffs Parenthood Southwest Ohio Region ("PPSWO"), Women's Med Group Professional Corporation ("WMGPC"), and Preterm-Cleveland ("Preterm"), to investigate those clinics' compliance with the non-essential surgery ban. Liner Aff. at ¶ 28; France Aff. at ¶ 20;

Haskell Aff. at ¶ 23. At the same time, the Attorney General threatened "quick enforcement action" against the providers. Plaintiffs repeatedly sought assurances from ODH that their practices were compliant with the order, but ODH refused, forcing the providers to sue. Liner Aff. at ¶ 28; Harvey Aff. at ¶ 13; France Aff. at ¶ 20; Haskell Aff. at ¶ 23. A federal court later partially restrained enforcement of the order. Liner Aff. at ¶ 28; Harvey Aff. at ¶ 13; France Aff. at ¶ 20; Haskell Aff. at ¶ 23.

In December 2015, without any notice of violation or an opportunity to respond, the Attorney General announced to the media that his office, on behalf of ODH, would sue Plaintiffs PPSWO and Planned Parenthood of Greater Ohio ("PPGOH") for allegedly violating the fetal tissue disposal regulation, Ohio Adm.Code 3701-47-05. Liner Aff. at ¶ 29; Harvey Aff. at ¶ 14. PPSWO and PPGOH obtained a federal temporary restraining order enjoining ODH from commencing any enforcement action, because enforcement would have deprived them of due process. Liner Aff. at ¶ 29; Harvey Aff. at ¶ 14; *PPSWO v. Hodges*, No. 2:15-cv-03079-EAS-TPK (S.D.Ohio Dec. 14, 2015). In light of the federal court's determination that the regulation was likely unconstitutionally vague, ODH and the Attorney General agreed not to enforce the regulation against PPSWO or PPGOH or any other provider. Liner Aff. at ¶ 29; Harvey Aff. at ¶ 14.

ODH has also previously threatened to revoke some of Plaintiffs' ASF licenses. Ohio requires ASFs to have a written transfer agreement with a local hospital, but Ohio forbids any public hospital from entering into such agreement with any ASF that provides abortion. Liner Aff. at ¶ 30. And although those providers could meet an alternative requirement to have back-up arrangements with local physicians, ODH repeatedly, unilaterally changed the number of back-up physicians required, then denied their variance applications, and moved to revoke their licenses.

Liner Aff. at ¶ 30; Haskell Aff. at ¶ 22. The providers sued, and the matter is pending in federal court. Liner Aff. at ¶ 30; Haskell Aff. at ¶ 22; *PPSWO v. Hodges*, No. 1:15-cv-00568-TSB (S.D.Ohio filed Nov. 1, 2015).

In light of these and other aggressive enforcement actions and investigations by the State of Ohio, Plaintiffs credibly fear being penalized for noncompliance immediately after SB27 takes effect if they continue to provide procedural abortion. Liner Aff. at ¶ 7; Harvey Aff. at ¶ 6; France Aff. at ¶ 18; Haskell Aff. at ¶ 20; Burkons Aff. at ¶ 19. Plaintiffs' counsel thus contacted the Attorney General's Office multiple times to ensure that Plaintiffs will not be civilly penalized for their inability to comply with SB27 until after ODH issues the necessary rules. Affidavit of B. Jessie Hill ("Hill Aff."), attached as exhibit No. 6, at ¶ 5–14. Despite repeated attempts to obtain such an assurance, the Attorney General has refused to give any. *See id.*

E. Impact of SB27 on Plaintiffs and Their Patients

Plaintiffs and their physicians will thus be forced to stop all procedural abortions in Ohio beginning on April 6, absent an injunction from this Court. Liner Aff. at ¶ 31; Harvey Aff. at ¶ 12; France Aff. at ¶ 18; Haskell Aff. at ¶ 20; Burkons Aff. at ¶ 19. Indeed, because of the great need for abortion care in the state coupled with the state's requirement that patients make a separate visit to the health center prior to their abortion to receive state-mandate information, *see* R.C. 2317.56(b), Plaintiffs may be forced to stop making appointments well ahead of the April 6 effective date. Liner Aff. at ¶ 31; Harvey Aff. at ¶ 15; France Aff. at ¶ 19; Haskell Aff. at ¶ 21; Burkons Aff. at ¶ 20. ODH's failure to adopt rules in the three months leading up to SB27's effective date and the State's refusal to assure Plaintiffs they will not be penalized for failure to comply until the necessary rules and forms are issued will amount to a ban on all procedural abortions in Ohio. As a result, Ohioans will be deprived of their constitutional right to abortion, and Plaintiffs will be deprived of their right to due process.

A ban on procedural abortion would have a devastating impact on the lives of individuals who need access to abortion in Ohio. Approximately one in four women in this country will have an abortion by age 45. Liner Aff. at ¶ 15. Legal abortion is one of the safest medical procedures in the United States and is substantially safer than continuing a pregnancy through to childbirth. *Id.* at ¶ 34. The risk of death associated with childbirth is approximately 12 times higher than that associated with abortion, and every pregnancy-related complication is more common among women giving birth than among those having abortions. *Id.* If an individual is forced to continue a pregnancy against their will, it can pose a risk to their physical, mental, and emotional health, as well as to the stability and wellbeing of their family, including existing children. *Id.* at ¶ 33.

Preventing an individual who wants an abortion from having one can place economic and emotional strain on a family and may interfere with their life goals.[10] Liner Aff. at ¶ 35. As most patients who seek abortion already have at least one child, families must consider how an additional child will impact their ability to care for the children they already have. *Id.* Even for someone who is otherwise healthy and has an uncomplicated pregnancy, carrying that pregnancy to term and giving birth poses serious medical risk and can have long-term medical and physical consequences. *Id.* at ¶ 34. These risks are greater for individuals with a medical condition caused or exacerbated by pregnancy or for some who learn that the fetus has been diagnosed with a severe or lethal anomaly. *Id.* Pregnancy, childbirth, and an additional child may exacerbate an already

[10] A majority of abortion patients have a household income at or below the federal poverty level, and another 25 percent have incomes from 100 to 199 percent of the federal poverty level. *See* Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. Journal of Pub. Health 1904, 1906, *available at* https://doi.org/10.2105/AJPH.2017.304042. For a family of three, the federal poverty level is $21,960. *See* U.S. Dept. of Health & Human Servs., *Federal Poverty Level (FPL)*, https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ (last accessed Feb. 25, 2021).

difficult situation for those who have suffered trauma, such as sexual assault or domestic violence. *Id.* at ¶ 36.

A ban on procedural abortion will have a disproportionate impact on the lives of Black people, other people of color, and people with low incomes in Ohio. *Id.* at ¶ 37. Recent ODH statistics show that Black women are 2.5 times more likely than white women to die of causes related to pregnancy. *Id.*

Being forced to stop providing procedural abortions will also irreparably harm Plaintiffs. If Plaintiffs are forced to stop providing procedural abortions, this will have a long-term detrimental impact on patients, physicians, and other staff, as well as on Plaintiffs themselves. Liner Aff. at ¶ 38; Harvey Aff. at ¶ 17; France Aff. at ¶ 24; Haskell Aff. at ¶ 27; Burkons Aff. at ¶ 24. Forcing Plaintiffs to stop providing procedural abortions threatens Plaintiffs' ability to keep their health centers open and operating. Staff will have to be terminated or furloughed. Liner Aff. at ¶ 38; Harvey Aff. at ¶ 17; France Aff. at ¶ 24; Haskell Aff. at ¶ 27; Burkons Aff. at ¶ 24. And even supposing Plaintiffs can survive the pendency of this litigation without having to close their doors, they cannot repair the damage to their reputation in the community as providers of reproductive health care, including abortions. Liner Aff. at ¶ 40; Harvey Aff. at ¶ 19; France Aff. at ¶ 25; Haskell Aff. at ¶ 28; Burkons Aff. at ¶ 25. Many of Plaintiffs' physicians and staff have committed their professional careers to providing reproductive health care—of which procedural abortion is an essential part. Having to abruptly stop providing this necessary health care would be extremely damaging to them. Liner Aff. at ¶ 39; Harvey Aff. at ¶ 18.

II. ARGUMENT

A. Standard of Review

A party seeking a temporary restraining order and/or preliminary injunction must demonstrate that "that the moving party has a substantial likelihood of success in the underlying

suit; that the moving party will suffer irreparable harm if the order does not issue; that no third parties will be harmed if the order is issued; that the public interest is served by issuing the order." *City of Cincinnati v. City of Harrison*, 1st Dist. Hamilton No. C-090702, 2010-Ohio-3430, ¶ 8, citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267–68, 747 N.E.2d 268 (1st Dist.2000). The purpose of a temporary restraining order and/or preliminary injunction is to preserve the status quo. *Martin v. Flick*, 150 N.E.2d 314, 316 (1st Dist.1958). For the reasons stated below, Plaintiffs meet the standard, and the grant of injunctive relief by this Court will preserve the status quo and allow Plaintiffs to continue providing high-quality health care to their patients while ensuring the disposition of embryonic and fetal tissue in a safe manner, as they have been doing for years.

B. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claims.

Section 16, Article I of the Ohio Constitution states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." The "due course of law" provision affords both procedural and substantive due process protections, including protections of the liberty and property rights enumerated in Section 1, Article I, which provides: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." *See In re Raheem L.*, 2013-Ohio-2423, 993 N.E.2d 455, ¶ 4 (1st Dist.). Plaintiffs have a substantial likelihood of succeeding on the merits of their claims that SB27 will violate Plaintiffs' patients' substantive due process rights, as well as Plaintiffs' substantive and procedural due process rights, under the Ohio Constitution.

1. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claim That SB27 Violates Their Patients' Substantive Due Process Right to Access Abortion.

Unless Defendants are enjoined, SB27 will result in a ban on abortion in Ohio after ten weeks LMP, as compliance with the law is impossible. This is a blatant violation of Plaintiffs' patients' substantive due process rights under the Ohio Constitution.

The Ohio Supreme Court has recognized that "the Ohio Constitution is a document of independent force" and that Ohio is "joining the growing trend in other states" and relying on the state constitution "when examining personal rights and liberties." *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). *Accord State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 16–20. While there is strong support for the proposition that the Ohio Constitution provides greater protections for the right of patients to access abortion than the federal Constitution, including in decisions examining due process protections afforded by the Ohio Constitution, *see Mole* at ¶ 20, citing *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, this Court need not reach that question at this time. At a minimum, the Ohio Constitution protects the right to access abortion to the same extent as the federal Constitution. *See Arnold* at 169 ("In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall."). A ban on abortion after ten weeks LMP is a clear violation of Ohioans' constitutional rights.

Nearly five decades ago, the United States Supreme Court held that the Due Process Clause of the federal Constitution's Fourteenth Amendment protects a woman's right to decide to have an abortion, and, prior to viability, the State has no interest sufficient to justify a ban on abortion, *Roe v. Wade*, 410 U.S. 113, 153–54, 163–65, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion) (reaffirming *Roe*'s "essential holding" that, "[b]efore

viability, the State's interests are not strong enough to support a prohibition of abortion").[11] Indeed, the Supreme Court reiterated the holding of *Roe* and *Casey* just last year. *See June Med. Servs., LLC v. Russo*, ___ U.S. ___, 140 S.Ct. 2103, 2135, 207 L.Ed.2d 566 (2020) (Roberts, C.J., concurring), quoting *Casey* at 871 ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,' 'a woman's right to terminate her pregnancy before viability.'"); *see also Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S.Ct. 2292, 2309, 195 L.Ed.2d 665 (2016).

Since *Roe*, courts have consistently invalidated laws that ban abortions prior to viability. *See, e.g., Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir.2020) (per curiam); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir.2019); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th Cir.2015); *Edwards v. Beck*, 786 F.3d 1113, 1115 (8th Cir.2015) (per curiam); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir.2015); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir.2013); *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir.1996); *Sojourner T v. Edwards*, 974 F.2d 27, 31 (5th Cir.1992); *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69 (9th Cir.1992); *Preterm-Cleveland*, 394 F.Supp.3d at 803. Because SB27 will, in effect, ban previability abortions in Ohio, it is unquestionably

[11] Although a plurality in *Casey* announced an "undue burden" standard, under which "a provision of law [restricting previability abortion] is invalid[] if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion," 505 U.S. at 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (plurality opinion), it emphasized: "Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879; *see also id.* at 871 (stating that any state interest is "insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions"). SB27's effect of banning abortions prior to viability is unconstitutional under the "central holding" of *Roe*. The law is also unconstitutional under *Casey*'s undue burden standard, as it has the effect of placing a substantial—here, an insurmountable—obstacle in the path of all patients seeking abortion after ten weeks LMP. And it cannot have a proper purpose, where compliance is impossible.

unconstitutional, irrespective of any interest the State may assert to support it. *See Casey* at 846; *Roe* at 164–65.

2. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claim That SB27 Violates Their Substantive Due Process Rights.

Not only will SB27 likely result in a violation of Plaintiffs' patients' substantive due process rights, but it is substantially likely to violate Plaintiffs' substantive due process rights as well. The "touchstone" of due process "is the protection of private parties from arbitrary actions by the state." *Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St.2d 256, 263, 416 N.E.2d 614 (1980). Where a constitutionally protected right is not implicated, a court must determine whether government action is "reasonably related to a legitimate government interest." *In re Raheem L.*, 2013-Ohio-2423, 993 N.E.2d 455, at ¶ 8, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18; *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (substantive due process prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").[12]

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[12] While this Court need not decide this question, Plaintiffs note that here, a constitutionally protected right *is* implicated and thus strict scrutiny is warranted. Recognizing that a patient's right to choose to have an abortion is of little use without abortion providers, courts have concluded that providers have their own constitutionally protected interest in providing abortions. *See Planned Parenthood Assn. of Utah v. Herbert*, 828 F.3d 1245, 1260 (10th Cir.2016), quoting *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 427, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (recognizing that "'because abortion is a medical procedure, * * * the full vindication of the woman's fundamental right necessarily requires that her' medical provider be afforded the right to 'make his best medical judgment,' which includes 'implementing [the woman's decision] should she choose to have an abortion'"); *Planned Parenthood of Mid-Missouri & E. Kansas*, 167 F.3d 458, 464 (8th Cir.1999) (addressing the effect of a Missouri law on "Planned Parenthood's constitutional right[]" to "provide abortion services"); *Planned Parenthood of Cent. & N. Arizona v. Arizona*, 718 F.2d 938, 944 (9th Cir.1983) (analyzing "whether the State unduly interfered with Planned Parenthood's exercise of its right to perform abortion and abortion-related services"); *Planned Parenthood of Cent. North Carolina v. Cansler*, 877 F.Supp.2d 310, 318 (M.D.N.C.2012) (holding that a North Carolina law violated Planned Parenthood affiliate's Fourteenth Amendment rights when it penalized the organization for engaging in the "constitutionally protected activity of providing abortion services"). *But see Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d

ODH's actions—in not issuing rules prior to SB27 taking effect and refusing to assure Plaintiffs that they will not be penalized for their inability to comply with the law, and thereby preventing Plaintiffs from providing procedural abortions—are not reasonably related to any legitimate government interest, and instead, are arbitrary and irrational. Putting aside whether Defendants have a legitimate government interest in restricting the manner in which Plaintiffs dispose of embryonic or fetal tissue from a procedural abortion—when Plaintiffs have been safely and lawfully disposing of all biological waste under Ohio law in a manner similar to other health care providers in the state for years—effectively barring Plaintiffs from providing necessary health care to their patients without giving them any opportunity to comply with the new restrictions is arbitrary and violates their constitutional rights. As one court explained, "any law that requires you to do something by a certain date must give you adequate time to do it; otherwise, the law would be irrational and arbitrary for compliance with it would be impossible." *Campbell v. Bennett*, 212 F.Supp.2d 1339, 1343 (M.D.Ala.2002) (finding due process violation where defendants changed deadline for independent candidate registration without leaving plaintiff sufficient time to meet the deadline); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 264, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir.2013) ("The impossibility of compliance with the statute" by abortion providers "is a compelling reason for the preliminary injunction"); *United States v. Dumas*, 94 F.3d 286, 291 fn. 3 (7th Cir.1996) ("[T]he validity of a law with which it is impossible

908, 913–14 (6th Cir.2019). However, given that the government actions at issue here fail the less restrictive rational basis test, this question need not detain the Court.

to comply may be questioned."); *compare Planned Parenthood of Tennessee & N. Mississippi v. Slatery*, M.D.Tenn. No. 3:20-cv-00740, 2020 WL 5797984, at *5 (Sept. 29, 2020) (temporarily enjoining abortion restriction where state had up to 90 days after law's effective date to make required materials available and had not done so when law took effect).

The "rational basis" standard is not "toothless," *Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, at ¶ 28, and courts have not hesitated to strike down irrational and arbitrary state action. *See id.*, quoting *Conley v. Shearer*, 64 Ohio St.3d 284, 288, 595 N.E.2d 862 (1992) (the state "may not 'subject individuals to an arbitrary exercise of power'"); *see also Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir.1998) (holding city had not "successfully articulated any rational basis to justify the onerous requirements imposed" and striking down law); *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (striking down law under rational basis standard); *Jiminez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974) (same); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973) (same); *Roe v. Shanahan*, 359 F.Supp.3d 382, 416 (E.D.Va.2019), *aff'd sub nom. Roe v. United States Dept. of Defense*, 947 F.3d 207 (4th Cir.2020) (same). This Court should do the same.

3. *Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claim That SB27 Violates Their Rights to Procedural Due Process.*

Defendants' enforcement of SB27 is also substantially likely to violate Plaintiffs' procedural due process rights. Ohio courts have held that procedural due process protections afforded by Section 16, Article I of the Ohio Constitution are coextensive with those provided by the Fourteenth Amendment to the United States Constitution. *See, e.g., Logue v. Leis*, 169 Ohio App.3d 356, 2006-Ohio-5597, 862 N.E.2d 900, ¶ 5 (1st Dist.). "A procedural-due-process challenge concerns the adequacy of the procedures employed in a government action that deprives

a person of life, liberty, or property." *Ferguson v. State*, 151 Ohio St.3d 265, 2017-Ohio-7844, 87 N.E.3d 1250, ¶ 42. Procedural due process "expresses the requirement of 'fundamental fairness.'" *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, 950 N.E.2d 931, ¶ 11, quoting *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina.*, 452 U.S. 18, 24–25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

To establish a procedural due process claim, a plaintiff must show that he has a protected interest at stake, has been deprived of that interest, and the State's procedures in depriving him of his interest do not comport with due process. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). Plaintiffs have both property and liberty interests in maintaining their long-established businesses and in continuing in their chosen profession of providing reproductive health care, including abortion. As Defendants will deprive Plaintiffs of their protected interests without any process at all, they must be enjoined.

a. Plaintiffs Have Protected Property and Liberty Interests at Stake.

Plaintiffs readily meet the first step in the inquiry: showing that they have protected interests at stake. Property and liberty interests derive from both "existing rules or understandings that stem from an independent source such as state law," *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *see also Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Roth* for same), and from the United States Constitution itself, *see Schware v. Bd. of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 238–39, 77 S.Ct. 752, 1 L.Ed.2d 796.

The United States Supreme Court has repeatedly recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause." (Citation omitted.) *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

Thus, as the Supreme Court has noted, "in regulating eligibility for a type of professional employment, [states] cannot foreclose a range of opportunities 'in a manner * * * that contravene(s) * * * Due Process,'" *Roth* at 574 (quoting *Schware* at 238).

Ohio courts have followed this clear precedent. *See, e.g., Asher Invest. Inc. v. City of Cincinnati,* 122 Ohio App.3d 126, 136, 701 N.E.2d 400 (1st Dist.1997), citing *State v. Cooper*, 71 Ohio App.3d 471, 594 N.E.2d 713 (4th Dist.1991) (stating that a party has "a constitutionally protected property interest in running his business free from unreasonable and arbitrary interference from the government"); *see also Cooper* at 474, quoting *In re Thornburg*, 55 Ohio App. 229, 234, 9 N.E.2d 516 (8th Dist. 1936) ("[T]he right to engage in a lawful business is a property right.").

Courts have previously recognized that abortion providers, including some of the Plaintiffs in this case, have protected interests in continuing in their chosen professions. In *WMGPC v. Baird*, the Sixth Circuit held that plaintiff Dr. Haskell, who provides abortion care at WMGPC, "had a property right in the ongoing operation of his clinic," 438 F.3d 595, 611 (6th Cir.2006), and an Ohio federal court held a property interest "plainly exists in the continued operation of" Plaintiff PPSWO's health center. *Planned Parenthood Southwest Ohio Region v. Hodges*, 138 F.Supp.3d 948, 954 (S.D.Ohio 2015), citing *Baird* at 612; *see also Hodes & Nauser, MD's, PA, v. Moser*, D.Kan. No. 11-2365-CM at 40:16–24 (July 1, 2011), attached as exhibit No. 7 (holding that "[t]he right to pursue a lawful business has long been recognized as a property right within the protection of the Fourteenth Amendment" and that abortion providers "have a protected interest in maintaining their business"); *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 380 F.Supp. 1153, 1158 (E.D.N.C.1974) (holding, in the abortion context, that "[t]he Supreme Court

long ago held that due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim").

There is thus no question that Plaintiffs have protected property and liberty interests in pursuing their lawful businesses and professions. Plaintiffs PPSWO, PPGOH, Preterm, WMGPC, and Northeast Ohio Women's Center, LLC ("NEOWC") have operated their health centers in the state of Ohio for years, during which time their providers, including Dr. Liner, have provided high-quality reproductive health care, including procedural abortions. Since long before the enactment of SB27, Plaintiffs had secured protected property and liberty interests in operating their clinics and pursuing their professions. As the Ohio Supreme Court has held, "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 38.

b. Plaintiffs Will Be Deprived of Their Property and Liberty Interests.

Plaintiffs will be deprived of their protected interests without relief from this Court. The notice-and-comment rulemaking process that is required by SB27 before rules, including those prescribing the necessary forms, are issued has not yet commenced, meaning that rules cannot be issued before April 6, when the law takes effect. Liner Aff. at ¶ 5; Harvey Aff. at ¶ 4; France Aff. at ¶ 14; Haskell Aff. at ¶ 16; Burkons Aff. at ¶ 15. Without the requisite rules and forms, it is impossible to comply with SB27, and to consent patients for procedural abortions. Liner Aff. at ¶ 25–26; Harvey Aff. at ¶ 11; France Aff. at ¶ 16–17; Haskell Aff. at ¶ 18–19; Burkons Aff. at ¶ 17–18. And despite repeatedly seeking assurances from the state that Plaintiffs will not be subject to civil penalties, including revocation or suspension of their health center and physician licenses, if they cannot comply with SB27 starting on April 6, Plaintiffs were not able to obtain any such assurances. Hill Aff. at ¶ 5–14. Plaintiffs credibly fear being penalized if they cannot comply with

the law starting on April 6, despite it being impossible for them to do so. Liner Aff. at ¶ 7; Harvey Aff. at ¶ 6; France Aff. at ¶ 18; Haskell Aff. at ¶ 20; Burkons Aff. at ¶ 19. Thus, Plaintiffs will be forced to cease providing procedural abortions in order to avoid risking revocation or suspension of their licenses. The inability of Plaintiffs PPSWO, PPGOH, Preterm, WMGPC, and NEOWC to continue operating their businesses and the inability of Plaintiff Dr. Liner to pursue her profession of providing reproductive health care services, including the full scope of abortion care, in this manner clearly constitutes a deprivation of Plaintiffs' protected property and liberty interests. *See, e.g., Baird*, 438 F.3d at 611 (abortion provider ordered to cease operations was deprived of protected interests in violation of procedural due process); *Hodges*, 138 F.Supp.3d at 954 (the potential for health center being denied a variance and having to cease provision of abortion constituted a deprivation of protected interests).

c. . Plaintiffs Will Be Deprived of Their Rights Without Any Process.

Plaintiffs likewise meet the third step in the inquiry: Defendants seek to eviscerate Plaintiffs' protected interests without any pre-deprivation procedural protections, and can point to no justification for such severe and unreasonable actions.

"Although due process is 'flexible and calls for such procedural protections as the particular situation demands,'" *Fairfield Cty. Bd. of Commrs. v. Nally*, 143 Ohio St.3d 93, 2015-Ohio-991, 34 N.E.3d 873, quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), providing *no* opportunity to comply with new requirements before depriving a party of its protected interests is a constitutional violation.[13] *See Campbell*, 212 F.Supp.2d at 1343;

[13] Courts traditionally consider several factors to determine whether the procedural protections afforded before a deprivation are adequate. *See, e.g., Ohio Assn. of Pub. School Emps., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.*, 68 Ohio St.3d 175, 177, 624 N.E.2d 1043 (1994), quoting *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987) ("Determining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private

Van Hollen, 738 F.3d at 789; *Dumas*, 94 F.3d at 291 fn. 3. Under these principles, it is clear that SB27 violates due process because it imposes new requirements on Plaintiffs with no opportunity or ability to comply, and therefore deprives Plaintiffs of protected interests—not simply with inadequate process—but with no process whatsoever. Courts have not hesitated to find a due process violation under these circumstances, including in the abortion context. *See Moser*, No. 11-2365-CM at 40:16-19 (temporarily enjoining state regulations where abortion providers were given only nine days to comply with onerous physical plant requirements); *Baird*, 438 F.3d at 611–13 (immediate shut-down of abortion provider's practice violated procedural due process, notwithstanding the availability of post-deprivation remedies); *compare Planned Parenthood of Kansas v. Drummond*, W.D.Mo. No. 07-4164-CV-C-ODS, 2007 WL 2669089 (Sept. 6, 2007) (issuing temporary restraining order to ensure adequate time for plaintiffs to work out compliance issues with defendants).

C. Plaintiffs and Their Patients Will Suffer Irreparable Harm Without Relief from This Court and Granting a Temporary Restraining Order Will Not Harm Third Parties.

Plaintiffs and their patients will suffer severe and irreparable harm unless Defendants are enjoined from enforcing SB27. As stated above, without relief from this Court, Plaintiffs will have to cease providing procedural abortions to their patients, or otherwise face severe penalties. Because it is impossible to comply with SB27, at least prior to ODH issuing the necessary rules,

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interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards."). Courts have generally held that "[p]arties whose rights are to be affected are entitled to be heard; and * * * the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." (Citation omitted.) *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Here, however, no process has been afforded Plaintiffs, and the State gave them no opportunity to be heard; indeed, the State has refused to provide any process or assurances in response to Plaintiffs' repeated communications.

this will leave patients in Ohio seeking to terminate their previability pregnancies after ten weeks LMP with no ability to do so in the state, in violation of their constitutional rights.

Courts have long made clear that "[a] finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well." *Magda v. Ohio Elections Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.), citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001); *see also Am. Civ. Liberties Union of Kentucky v. McCreary Cty.*, 354 F.3d 438, 455 (6th Cir.2003), citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Michigan State A. Phillip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir.2016) ("[W]hen constitutional rights are threatened or impaired, irreparable injury is presumed." (Citation omitted.)); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir.2012), citing *Am. Civ. Liberties Union of Kentucky*, at 445 (same); *see also Taubman Co. v. Webfeats,* 319 F.3d 770, 778 (6th Cir.2003), citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) ("[T]he loss of constitutional rights for even a minimal amount of time constitutes irreparable harm."). Because both Plaintiffs' and their patients' constitutional rights will be impaired without relief from this Court, they will suffer irreparable injury if Plaintiffs are forced to stop providing procedural abortions when the law takes effect.

Moreover, Plaintiffs' patients will be prohibited from obtaining needed abortion care, which can result in physical, emotional, and psychological harms, all of which are irreparable. Liner Aff. at ¶ 33–36. As many medical professional organizations, including the American College of Obstetricians and Gynecologists ("ACOG"), have concluded, abortion is "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible." ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020),

https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak; *see also* R.C. 2919.201 (prohibiting abortions after 22 weeks LMP). Forcing patients to forgo abortion care and remain pregnant against their will inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. *See e.g.*, *Planned Parenthood of Arizona, Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir.2014); *Van Hollen*, 738 F.3d at 795–96; *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F.Supp.3d 807, 825 (W.D.Ky.2019), *aff'd sub nom. EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785 (6th Cir.2020).

Plaintiffs will also be harmed by having to stop providing procedural abortions at least until ODH issues the necessary rules and Plaintiffs have reasonable time to attempt to come into compliance with SB27. That harm is also irreparable—i.e., it cannot be compensated once this challenge is concluded. As stated above, Plaintiffs will have to severely scale back operations, terminate or furlough staff, and even close their doors. Moreover, if forced to stop providing procedural abortions, Plaintiffs will not be able to repair the damage to their reputation in the community as trusted providers of reproductive health care. *See, e.g.*, *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir.1977), citing *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1328 (8th Cir.1973) (finding of irreparable harm justified because "Planned Parenthood's good will was imperiled by the prospect of having to interrupt its services"); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir.2001), citing *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir.1992) (loss of "established goodwill" constitutes irreparable harm).

On the other hand, no third parties will be harmed if Defendants are enjoined. Plaintiffs have been providing health care safely and in accordance with all applicable laws, including

infectious waste disposal laws, for decades. Defendants cannot claim any threat to public health or safety. *See Van Hollen,* 738 F.3d at 793 (finding no harm to state in delaying implementation of new requirements where abortion providers had been safely providing care for decades). Moreover, any harm the State of Ohio may claim is due to its own inaction. By not issuing rules, including those prescribing the necessary forms, ODH has ensured that no one can comply with SB27 when it takes effect. Finally, "the state cannot be harmed when an unconstitutional law does not go into effect." *Village of Newburgh Heights v. State*, 8th Dist. Nos. 109106 and 109114, 2021-Ohio-61, ¶ 76; *see also Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 771 (10th Cir.2010).

D. The Public Interest Will Be Served by Enjoining Defendants.

The public interest will be served by allowing Plaintiffs to continue providing, and their patients to continue accessing, essential and constitutionally protected health care. "When a constitutional violation is likely * * * the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *Am. Civ. Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir.2015), quoting *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir.2010). *Accord Michigan State*, 833 F.3d at 669; *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp.*, 698 F.3d 885, 896 (6th Cir.2012) ("[T]he public interest is promoted by the robust enforcement of constitutional rights * * *"); *G & V Lounge, Inc. v. Michigan Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir.1994).

E. A Bond Is Not Necessary.

This Court should use its discretion to waive the Civ.R. 65(C) bond requirement here, where the relief sought will result in no monetary loss to Defendants. *See Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio App.3d 786, 793, 673

N.E.2d 182 (10th Dist.1996) (recognizing courts have discretion to issue preliminary injunctions without requiring bond); *see also Molton Co. v. Eagle-Picher Industries*, 55 F.3d 1171, 1176 (6th Cir.1995) (affirming decision to require no bond because of "the strength of [the plaintiff's] case and the strong public interest involved"); *Preterm-Cleveland*, 394 F.Supp.3d at 804 (waiving bond).

III. CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court issue a temporary restraining order followed by a preliminary injunction, and enjoin Defendants from enforcing SB27.

Dated: March 9, 2021

Respectfully submitted,

/s/ Maithreyi Ratakonda

Maithreyi Ratakonda* PHV #23846
Trial Attorney
Planned Parenthood Federation of America
123 William Street, Floor 9
New York, NY 10038
(212) 261-4405
(212) 261-4405 (fax)
mai.ratakonda@ppfa.org
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Planned Parenthood of Greater Ohio, and Sharon Liner, M.D.

B. Jessie Hill #0074770
Freda J. Levenson #0045916
American Civil Liberties Union of Ohio Foundation, Inc.
4506 Chester Ave.
Cleveland, OH 44103
(216) 368-0553 (Hill)
(614) 586-1972 x125 (Levenson)
(614) 586-1974 (fax)
bjh11@cwru.edu
flevenson@acluohio.org
Counsel for Plaintiffs Preterm-Cleveland, Women's Med Group Professional Corporation, Northeast Ohio Women's Center LLC

Jennifer Dalven* PHV #23858
Rachel Reeves* PHV #23855
Clara Spera* PHV #23851
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
(212) 549-2650 (fax)
jdalven@aclu.org

Fanon A. Rucker #0066880
The Cochran Firm
119 E. Court St., Suite 102
Cincinnati, OH 45202
(513) 381-4878
(513) 381-7922 (fax)
frucker@cochranohio.com
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Planned Parenthood of Greater Ohio, and Sharon Liner, M.D.

Richard Muniz* PHV #23847
Planned Parenthood Federation of America

rreeves@aclu.org
cspera@aclu.org
Counsel for Plaintiffs Preterm-Cleveland, Women's Med Group Professional Corporation Northeast Ohio Women's Center LLC

1110 Vermont Ave. NW, Suite 300
Washington, DC 20005
(202) 973-4997
(202) 973-4997 (fax)
richard.muniz@ppfa.org
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Planned Parenthood of Greater Ohio, and Sharon Liner, M.D.

*Application for *pro hac vice* in this Court forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2021, 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:

OHIO DEPARTMENT OF HEALTH
Email: ara.mekhijian@ohioattorneygeneral.gov

STEPHANIE MCCLOUD
Ohio Department of Health Director
Email: ara.mekhijian@ohioattorneygeneral.gov

STATE MEDICAL BOARD OF OHIO
Email: ara.mekhijian@ohioattorneygeneral.gov

JOSEPH T. DETERS
Hamilton County Prosecutor
Email: Kathy.Bailey@hcpros.org

ANDREW W. GARTH
Cincinnati City Solicitor
Email: kevin.tidd@cincinnati-oh.org
Email: Jacklyn.martin@cincinnati-oh.org

G. GARY TYACK
Franklin County Prosecutor
Email: jhummer@franklincountyohio.gov

ZACH KLEIN
Columbus City Attorney
Email: rncoglianese@columbus.gov
Email: ksaukerman@columbus.gov

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
Email: dlambert@prosecutor.cuyahogacounty.us

BARBARA A. LANGHENRY
Cleveland Director of Law
Email: eboop@city.cleveland.oh.us
Email: blanghenry@city.cleveland.oh.us

ROSS CIRINCIONE
Bedford Heights Director of Law
Email: rossc@bedfordheights.gov

MATHIAS HECK, JR.
Montgomery County Prosecutor
Email: heckm@mcohio.org
Email: Barrentinw@mcohio.org

THEODORE A. HAMER
Kettering Director of Law
Email: Theodore.Hamer@ketteringoh.org

SHERRI BEVAN WALSH
Summit County Prosecutor
Email: galonski@prosecutor.summitoh.net
Email: mevans@prosecutor.summitoh.net

JANET CIOTOLA
Cuyahoga Falls Director of Law
Email: ciotola@cityofcf.com

/s/ Maithreyi Ratakonda
Maithreyi Ratakonda, PHV #23846

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. _____ Judge: _____

AFFIDAVIT OF SHARON LINER, M.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

I, Sharon Liner, M.D., being duly sworn on oath, do depose and state as follows:

1. I am the Medical Director of Planned Parenthood Southwest Ohio Region ("PPSWO"). I am also PPSWO's Director of Surgical Services. I have worked as a physician for PPSWO since 2004. Throughout that time, I have provided comprehensive sexual and reproductive health care, including abortion, to our patients.

2. The facts I state here and the opinions I offer are based on my education, years of medical practice, my expertise as a doctor and specifically as an abortion provider, my personal knowledge, my review of PPSWO business records, information obtained through the course of my duties at PPSWO, and my familiarity with relevant medical literature and statistical data recognized as reliable in the medical profession.

3. A copy of my *curriculum vitae* is attached as Exhibit A.

4. I submit this affidavit in support of Plaintiffs' Motion for a Temporary Restraining Order Followed by Preliminary Injunction to prevent enforcement of Senate Bill 27 ("SB27"), which regulates how "fetal remains," defined as "the product of human conception that has been

aborted," i.e., a "zygote, blastocyte, embryo, or fetus,"[1] will be disposed following a procedural abortion. SB27 requires "fetal remains" to be cremated or interred.

5. I understand SB27 requires that, before any procedural abortion, patients must certify that they have received a state-prescribed "notification form" informing them of their option to determine how "fetal remains," which includes embryonic or fetal tissue, is disposed, and if a patient elects to make such a determination, SB27 requires the determination be made on a separate state-prescribed "consent form." Additionally, crematory operators must obtain from the abortion provider a state-prescribed "detachable supplemental form" that the patient has executed before cremation (if the embryonic or fetal tissue is to be cremated). However, I understand that the state-prescribed forms are not currently available and that, because the Ohio Department of Health ("ODH") has not started the rulemaking process to issue the forms, they will not be available by the time SB27 takes effect on April 6, 2021.

6. I understand that SB27 imposes numerous penalties on physicians, like myself, and entities, like PPSWO, who provide procedural abortion for failure to comply with SB27. While the criminal penalties specified in SB27 will not take effect until after the rules are issued, there is no such provision stating that civil penalties—which can include licensure and other action—are similarly suspended. Furthermore, I understand that the State of Ohio has refused to give assurances that the civil penalties will not apply until the necessary rules and forms are issued.

7. Given this and the history of aggressive enforcement by the State of Ohio against abortion providers, I and others at PPSWO credibly fear being penalized if we continue to provide procedural abortions after SB27 takes effect, if ODH has not yet issued the required rules and

[1] "Zygotes" and "blastocytes" refer to fertilized cells within hours or days after fertilization. These are extremely early developmental stages, and prior to the implantation of a fertilized egg in the uterus, which is the point at which pregnancy is generally considered to begin in medicine.

forms. Without relief from this Court or explicit assurances from the State that we will not be penalized for noncompliance until after ODH issues rules, my PPSWO colleagues and I have no choice but to stop providing procedural abortions.

8. This will have a devastating impact on our patients and on providers, like myself, who have dedicated our careers to providing comprehensive reproductive health care. I am gravely concerned about the effect SB27 will have on Ohioans' emotional, physical, and financial wellbeing and the wellbeing of their families.

My Background

9. I am a board-certified family physician with 17 years of experience in women's health. I am licensed to practice medicine in the State of Ohio. I earned a B.S. in Medical Technology from Michigan State University and graduated from medical school at Michigan State University, College of Human Medicine. I completed my residency in Family Medicine at the University of Cincinnati.

10. Since 2002, I have provided abortions, including procedural abortions, in outpatient settings. In my current practice, I provide medication abortions up to 70 days (or 10 weeks) of pregnancy as measured from the first day of a patient's last menstrual period ("LMP") and procedural abortions through 21 weeks, 6 days LMP.

11. In my current roles as the Director of Surgical Services and Medical Director at PPSWO, I oversee all medical services that we provide, including abortion. My responsibilities include supervision of the physicians and clinicians who provide care and the development of PPSWO's medical policies and procedures.

PPSWO and Its Services

12. PPSWO and its predecessor organizations have provided care in Ohio since 1929. PPSWO is a nonprofit corporation organized under the laws of the State of Ohio and headquartered in Cincinnati, Ohio.

13. PPSWO provides affordable, respectful, and high-quality health care to tens of thousands of patients in southwest Ohio. PPSWO provides a broad range of medical services, including birth control; annual gynecological examinations; cervical pap smears; diagnosis and treatment of vaginal infections; testing and treatment for certain sexually transmitted diseases; HIV testing; pregnancy testing; and abortion. We provide procedural abortions at our ambulatory surgical facility ("ASF") in Cincinnati.[2] PPSWO or a predecessor organization has provided procedural abortions in this location since 1974.

14. We strive to make our services as accessible as possible, particularly for patients in historically underserved communities who may not be able to reach us otherwise. The vast majority—approximately 75%—of abortion patients nationwide are poor or have low incomes.[3] In calendar year 2020, 68% of our patients reported living at or below 110% of the federal poverty level.

[2] Under Ohio law, all procedural abortions must occur in a licensed ASF or a hospital and the Cincinnati facility is PPSWO's only ASF.

[3] Jenna Jerman et al., Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, at 7 (Guttmacher Inst. 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

Abortion Provision in Ohio

15. Legal abortion is one of the safest medical procedures in the United States.[4] It is also very common: Approximately one in four women in this country will have an abortion by age 45.[5]

16. There are two main methods of abortion: medication abortion and procedural abortion. Both methods are effective in terminating a pregnancy.[6]

17. Medication abortion involves a combination of two medications: mifepristone and misoprostol.[7] Patients take the first medication in the health center and then, typically 24 to 48 hours later, take the second medication at a location of their choosing, most often at home, after which the contents of the pregnancy pass in a manner similar to a miscarriage. Medication abortion is available in Ohio in the first ten weeks of pregnancy.[8]

18. While sometimes called "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incisions. In a procedural abortion, clinicians use suction from a thin, flexible tube, and in some instances, other instruments, to empty the

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[4] Natl. Academies of Sciences, Eng. & Medicine, The Safety & Quality of Abortion Care in the United States 77–78, 161–62 (2018), *available at* https://www.nap.edu/catalog/24950/the-safety-and-quality-of-abortion-care-in-the-united-states.

[5] *See* Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. Journal of Pub. Health 1904, 1907 (2017).

[6] Luu Doan Ireland et al., *Medical Compared With Surgical Abortion for Effective Pregnancy Termination in the First Trimester*, 126 Obstetrics & Gynecology 22 (2015).

[7] Natl. Academies of Sciences, Eng. & Medicine, *supra* note 4, at 51.

[8] Current medical evidence demonstrates that medication abortion is safe and effective through 11 weeks of pregnancy, as measured from the first day of a pregnant patient's last menstrual period ("LMP"). However, Ohio law (R.C. 2919.123) restricts the first drug used in medication abortion to use as described in the federally approved label, which is for pregnancies less than ten weeks. *See* U.S. Food & Drug Administration, *Mifeprex (mifepristone) Information* (last updated Feb. 5, 2018), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information.

contents of the patient's uterus. PPSWO performs procedural abortion up to 21 weeks, 6 days LMP.

19. After a procedural abortion, PPSWO safely disposes of the products of conception—along with other pregnancy tissue, such as placenta, gestational sac, and umbilical cord—through a licensed vendor who incinerates the tissue. This is in accordance with all applicable laws and regulations, and in a manner which I understand is consistent with the methods used by other medical facilities and hospitals in Ohio.

20. Given the gestational age of their pregnancies, many patients—all those above ten weeks LMP—are only eligible for procedural abortion. Moreover, for some patients with pregnancies less than ten weeks LMP, medication abortion is not available because it is medically contraindicated or there are other factors that necessitate a procedural abortion, such as where the patient has an allergy to the medications, or other medical conditions, such as a bleeding disorder or low hemoglobin, that make procedural abortion relatively more safe.[9]

21. In calendar year 2019, 77% of the abortions provided at PPSWO's ASF were procedural abortions. In calendar year 2020 this number declined for reasons related to the COVID-19 pandemic and 64% of abortions provided at PPSWO's ASF were procedural abortions. Similarly, in calendar year 2019, 61% of the abortions I provided at PPSWO were procedural abortions. And in calendar year 2020, 60% of the abortions I provided were procedural abortions.

22. Individuals seek abortion for a multitude of complicated and personal reasons, which may all be compounded by the current pandemic. By way of example, some patients have abortions because they conclude it is not the right time to become a parent or have additional children. In 2019, more than 62% of all abortions in Ohio were performed for patients who already

[9] Natl. Academies of Sciences, Eng. & Medicine, *supra* note 4, at 51–52.

had at least one child.[10] Others desire to pursue their education or career, or they lack the necessary financial resources or a sufficient level of partner or familial support or stability. Other patients seek abortions because continuing with the pregnancy could pose a greater risk to their health.[11]

23. Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion services. Patients will need to schedule an appointment, gather the resources to pay for the abortion and related costs,[12] and arrange transportation to a clinic, time off of work (often unpaid, due to a lack of paid time off or sick leave), and possibly childcare during appointments.[13]

SB27

24. I understand that SB27 restricts the manner in which embryonic or fetal tissue from a procedural abortion can be disposed, requiring this tissue to be cremated or interred. It also states that a pregnant patient who has a procedural abortion has the option to determine how embryonic or fetal tissue is disposed and to determine the location of such disposition. Patients seeking procedural abortions must be provided with certain forms prescribed by ODH before they can have

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[10] ODH, Induced Abortions in Ohio, 2019, at 10 (2020), https://bit.ly/386HyzK; *see also* Jones & Jerman, *supra* note 5, at 1906 (in 2014, 59% of all abortions in the United States were performed for patients who already had at least one child).

[11] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health 1, 7 (2013).

[12] Ohio prohibits public insurance, including Medicaid, and insurance purchased on the state health exchange from covering abortion services except in the very limited circumstances where a patient's physical health or life is at risk, or where the pregnancy is a result of rape or incest that has been reported to law enforcement. R.C. 9.04 and R.C. 3901.87; Ohio Adm.Code 5160-17-01.

[13] Guttmacher Inst., *Induced Abortion in the United States* (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states; Sarah E. Baum et al., *Women's Experience Obtaining Abortion Care in Texas After Implementation of Restrictive Abortion Laws: A Qualitative Study*, 11 PLoS One 1, 7–8, 11 (2016); Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 Contraception 334, 335, 341–42 (2006).

the abortion. Crematory operators must also be given state-prescribed forms before they can cremate the tissue.

25. After SB27 was passed, PPSWO immediately began determining whether we are able to comply with the law, including spending hours of staff time contacting funeral homes, crematories, and cemeteries. A number of questions were raised about compliance, including whether SB27 allows embryonic or fetal tissue to be simultaneously cremated, what forms are needed to be completed prior to interment, whether tissue can be sent to a crime lab (such as in the case of a sexual assault investigation) or to a pathologist for testing (for medical indications, such as suspected molar pregnancy, which if left undiagnosed or unmonitored can lead to a patient developing cancer and/or result in a hysterectomy) in compliance with the law, and apparent conflicts between SB27 and infectious waste requirements (which apply to products of conception and other pregnancy tissue).

26. We also soon ran into at least one insurmountable obstacle: without the necessary forms, which must be provided to patients and crematories in order to be in compliance with the law, neither the abortion providers nor the crematories and funeral directors will be able comply when the law takes effect.

27. If SB27 takes effect on April 6, my PPSWO colleagues and I will have to stop providing procedural abortions. My colleagues and I simply cannot risk the severe penalties that would apply to those who violate the law—despite the impossibility of compliance—especially given the history of aggressive enforcement of abortion regulations by the State of Ohio.

28. Just last year, about one week after ODH issued an order barring "all non-essential surgeries and procedures" during the COVID-19 pandemic, ODH sent two inspectors to PPSWO's ASF to investigate our compliance with the non-essential surgery ban. At the same time, the

Attorney General threatened "quick enforcement action" against us and other providers. We repeatedly sought assurances from ODH that our practices were compliant with the order, but ODH refused, forcing us and other providers to sue. I was a plaintiff in that case, and a federal court later partially restrained enforcement of the order.

29. In December 2015, without any notice of violation or an opportunity to respond, the Attorney General announced to the media that his office, on behalf of ODH, would sue PPSWO for allegedly violating a regulation requiring fetal tissue be disposed of in a "humane manner." PPSWO, along with Planned Parenthood of Greater Ohio ("PPGOH"), sued and got a temporary restraining order in federal court, preventing ODH from starting enforcement action against us. I understand that ODH and the Attorney General later agreed not to enforce the regulation against PPSWO or PPGOH or any other provider.

30. ODH has also previously threatened to revoke PPSWO's ASF license. Ohio requires ASFs to have a written transfer agreement with a local hospital, but Ohio forbids any public hospital from entering into such agreement with any ASF that provides abortion. And although PPSWO could meet an alternative requirement to have a back-up arrangement with local physicians, ODH repeatedly, unilaterally changed the number of back-up physicians required, then denied our variance applications and moved to revoke our license. We again had to sue, and the matter is pending in federal court.

31. In relation to SB27, I understand that the State of Ohio has refused to provide assurances that we will not be penalized for not complying with SB27 until after ODH issues rules. In light of this, I and other providers at PPSWO have no choice but to stop providing procedural abortions. In fact, we may be forced to stop counseling patients for procedural abortions well ahead of the April 6 effective date. Ohio law requires patients be given certain state-mandated

information at least 24 hours before the abortion. But because of delays in scheduling, patients usually have to obtain the state-mandated information around a week before the abortion procedure. Therefore, without relief, our patients seeking procedural abortions will be impacted in advance of SB27's effective date.

The Impact of Having to Stop Providing Procedural Abortions

32. If SB27 takes effect and we have to stop providing procedural abortions, this will be devastating to our patients. I understand that SB27 will result in all abortion providers in the state having to stop providing procedural abortions, since no one can comply. All patients seeking abortion after ten weeks LMP (and some at any gestational age, as I stated above) will thus be prevented from accessing that care.

33. If an individual is forced to continue a pregnancy against their will, it can pose a risk to their physical, mental, and emotional health, as well as to the stability and wellbeing of their family, including existing children.

34. Abortion is substantially safer than continuing a pregnancy through to childbirth. The risk of death associated with childbirth is approximately 12 times higher than that associated with abortion, and every pregnancy-related complication is more common among women giving birth than among those having abortions.[14] Even for a patient who is otherwise healthy and has an uncomplicated pregnancy, carrying that pregnancy to term and giving birth poses serious medical risk and can have long-term medical and physical consequences. These risks are greater for individuals with a medical condition caused or exacerbated by pregnancy or for some who learn that the fetus has been diagnosed with a severe or lethal anomaly.

[14] Natl. Academies of Sciences, Eng. & Medicine, *supra* note 4, at 74–75.

35. Preventing an individual who wants an abortion from having one can place economic and emotional strain on a family and may interfere with an individual's life goals. As most patients who seek abortion already have at least one child, families must consider how an additional child will impact their ability to care for the children they already have.

36. Pregnancy, childbirth, and an additional child may exacerbate an already difficult situation for those who have suffered trauma, such as sexual assault or domestic violence.

37. A ban on procedural abortion will have a disproportionate impact on the lives of Black people, other people of color, and people with low incomes in Ohio.[15] Recent ODH statistics show that Black women are 2.5 times more likely than white women to die of causes related to pregnancy.[16]

38. Being forced to stop providing procedural abortions will also have a detrimental impact on me and the other staff at PPSWO, as well as PPSWO as an entity. If we have to stop providing procedural abortions, we will have to severely scale back our operations and furlough staff. Given the uncertainty of when we may be able to provide procedural abortions again, some staff are likely to seek other employment opportunities.

39. Many of our staff, including myself, have committed our professional careers to providing the full range of reproductive health care—of which procedural abortion is an essential part. Early in my medical career, I was compelled to learn to provide abortions and safeguard patient access to abortion after the murder of Dr. Barnett Slepian, who was killed in his home by

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[15] ODH, A Report on Pregnancy-Associated Deaths in Ohio 2008–2016, at 19 (2019), https://bit.ly/3uZraej. In 2019, Black people made up only 13.4% of Ohio's population but over 46% of people who obtained abortions in Ohio. *See* ODH, Induced Abortions in Ohio, 2019, *supra* note 10, at 3; U.S. Census Bureau, *Quick Facts: Ohio*, https://www.census.gov/quickfacts/oh (last accessed Feb. 23, 2021).

[16] ODH, A Report on Pregnancy-Associated Deaths in Ohio 2008–2016, at 19 (2019), https://bit.ly/3uZraej.

an anti-abortion extremist. Since then, I have spent significant time ensuring I am providing the highest-quality care. I regularly review medical literature regarding abortion care to make certain I am up to date on the most recent developments, and attend conferences and trainings regarding abortion provision. Having to abruptly stop providing this necessary health care will be devastating.

40. Moreover, PPSWO is well-known in our community as an entity that welcomes all patients and provides the full range of reproductive health care. Patients choose PPSWO as their reproductive health care provider because they trust us to provide culturally sensitive, nonjudgmental, and comprehensive care, including, importantly, abortion care. And because all procedural abortions in Ohio must occur in a licensed ASF, we are one of a handful of providers in the state to offer this care. Patients often tell us how grateful they are to be able to access this care, and that they would not know where else to turn if we did not exist. Suddenly stopping our provision of procedural abortions will severely damage our reputation as a trusted health care provider and cause further confusion around access to care for our patients.[17]

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41. For all of these reasons, if SB27 takes effect on April 6, it will have a harmful impact on PPSWO, our staff, and our patients. This Court's intervention to bar enforcement of SB27 and prevent these grave harms is urgently needed.

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[17] *See* Maria F. Gallo et al., *Passage of Abortion Ban and Women's Accurate Understanding of Abortion Legality*, Am. Journal of Obstetrics & Gynecology (forthcoming 2021), *available at* https://doi.org/10.1016/j.ajog.2021.02.009 (concluding that "[e]ven if unsuccessful, attempts to restrict abortion access could contribute to women mistakenly believing that abortion is illegal").

FURTHER AFFIANT SAYETH NAUGHT

Sharon Liner, M.D.

Signed before me this 5 day of March, 2021

Notary Public

NOTARY PUBLIC STATE OF OHIO

MICHAEL P. ROLFES
Notary Public, State of Ohio
My Comm. Expires May 30, 2021
Recorded in Hamilton County

Sharon A. Liner

2314 Auburn Ave
Cincinnati, OH 45219
sliner@ppswo.org
513-824-7866

Education:

Michigan State University, East Lansing, Michigan 48824. B.S. - Medical Technology, May 1997.

Michigan State University, College of Human Medicine, East Lansing, Michigan 48824 - Doctor of Medicine, May 2001

University of Cincinnati, Family Medicine Residency, Cincinnati, Ohio 45211 - Family Medicine Board certified since 2004

Work Experience:

Laboratory Assistant, Vitamin A Research Laboratory, 229 G.M. Trout Bldg., Michigan State University, East Lansing, Michigan 48824 February 1995-May 1997.

Direct Care Worker, Harris Development Center, 1391 East Haslett Road, Williamston, MI, 48895 May 1997-January 1999.

Western Family Physicians, 2450 Kipling Ave Ste 108, Cincinnati, OH 45239. May 2004 to July 2004.

Women's Medical Center, 3219 Jefferson Ave., Cincinnati, OH 45220 June 2009 to June 2010.

Planned Parenthood, 2314 Auburn Ave. Cincinnati, OH 45219 July 2004 to present.
Medical Director of Surgical Services 2007-2018. Medical Director 2018-present.

Community Involvement:

Family Practice Clinic - Michigan State University May 1994-August 1994.
Lansing Area AIDS Network Holiday Gift Project December 1995 and 1996.
Michigan Capitol Medical Center Surgery Volunteer May 1995-August 1995.
Family Practice Clinic – Lansing January 1996-May 1996.
Cristo Rey Clinic – Lansing September 1997-12/97.
Immunization Clinic - E. Lansing November 1998-5/99.
Friendship Clinic - Lansing September 1997-5/99.

Honors and Awards:

Outstanding Senior Award 1997.
1997 College of Human Medicine Health Professions Open Scholarship.
1999 Michael J. Ptasnik, MD and Family Scholarship.
Chief Resident Family Practice 2003-2004.
Family Medicine Residency OB Award 2004
Cincinnati Women's Political Caucus Outstanding Achievement Honoree 2011
Planned Parenthood Southwest Ohio Region Employee of the Year Award 2015

Activities and Organizations:

Honduras Trip Clinic Team Leader 2002.
American Academy of Family Physicians. August 1997-present.
Sycamore Community Band. September 2007 – present.

Skills:

Typing and some computer skills.
D & C/ D & E up to 22 weeks LMP
IUD insertion and removal
Implant insertion and removal
Basic biopsy including endometrial
Basic ultrasound for pregnancy dating and IUD placement
ACLS certified

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. _____ Judge: _____

AFFIDAVIT OF IRIS E. HARVEY, IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

I, Iris E. Harvey, being duly sworn on oath, do depose and state as follows:

1. I am the President and Chief Executive Officer of Planned Parenthood of Greater Ohio ("PPGOH"). PPGOH is a not-for-profit organization with headquarters in Columbus.

2. My responsibilities at PPGOH involve overseeing the services and programs provided by our health centers. I am therefore familiar with the services we provide and the patients we treat. This affidavit is based upon my personal knowledge and knowledge I have acquired in the course of my duties with PPGOH.

3. I submit this affidavit in support of Plaintiffs' Motion for a Temporary Restraining Order Followed by Preliminary Injunction to prevent enforcement of Senate Bill 27 ("SB27"), which regulates how "fetal remains," defined as "the product of human conception that has been aborted" (including embryonic and fetal tissue), will be disposed following a procedural abortion. SB27 requires "fetal remains" to be cremated or interred (buried).

4. I understand SB27 requires that patients must receive a state-prescribed "notification form" informing them of their option to determine how embryonic or fetal tissue is disposed and that certain state-prescribed forms regarding the disposition method must be filled

northern, eastern, and central Ohio, and provides a broad range of medical services, including birth control, gynecological examinations, cervical pap smears, diagnosis and treatment of vaginal infections, vasectomies, testing and treatment for sexually transmitted infections, HIV testing, pregnancy testing, and abortions.

9. PPGOH provides procedural abortions at our ambulatory surgical facilities ("ASFs") in East Columbus and Bedford Heights. After a procedural abortion, we safely dispose of the products of conception—along with other pregnancy tissue, such as placenta, gestational sac, and umbilical cord—through a licensed vendor who incinerates the tissue. This is in accordance with all applicable laws and regulations, and, I understand, is consistent with the methods used by other medical facilities and hospitals in Ohio.

10. In calendar year 2019, 60% of the abortions provided at PPGOH's ASFs were procedural abortions. In calendar year 2020, this number declined for reasons related to the COVID-19 pandemic and 51% of abortions provided were procedural abortions.

SB27 and Previous Actions by the State

11. After SB27 was passed, PPGOH staff started to determine whether and how we could comply with its requirements. Our staff spent hours contacting funeral homes, crematories, and cemeteries, but without the implementing rules, we were unable to answer some of the compliance-related questions that were raised. And without the necessary forms, which must be provided to patients and crematories in order to be in compliance with the law, neither the abortion providers nor the crematories and funeral directors will be able comply when the law takes effect.

12. If SB27 takes effect on April 6, PPGOH will have to stop providing procedural abortions. Our physicians and staff cannot risk the severe penalties that would apply to those who

violate the law—despite the impossibility of compliance—especially given the history of aggressive enforcement of abortion regulations by the State of Ohio.

13. Last year, in the midst of the COVID-19 pandemic, about a week after ODH issued an order barring "all non-essential surgeries and procedures," the Attorney General threatened "quick enforcement action" against us. We repeatedly sought assurances from ODH that our practices were compliant with the order, but ODH refused, forcing us and other providers to sue. A federal court later partially restrained enforcement of the order.

14. Previously, in December 2015, without any notice of violation or an opportunity to respond, the Attorney General announced to the media that his office, on behalf of ODH, would sue PPGOH for allegedly violating a regulation requiring fetal tissue be disposed of in a "humane manner." PPGOH and another Planned Parenthood affiliate, Planned Parenthood Southwest Ohio ("PPSWO"), sued and got a temporary restraining order, preventing enforcement action. ODH and the Attorney General later agreed not to enforce the regulation against us or other abortion providers.

15. Now, because the State of Ohio refuses to provide assurances that we will not be penalized for not complying with SB27 until after ODH issues rules, PPGOH has no choice but to stop providing procedural abortions. In fact, we may be forced to stop counseling patients for procedural abortions well ahead of the April 6 effective date. This is because Ohio law requires patients be given certain state-mandated information at least 24 hours before the abortion. But because of delays in scheduling, our patients usually have to obtain the state-mandated information more than 24 hours before the abortion procedure. Therefore, without relief, our patients seeking procedural abortions will be impacted in advance of SB27's effective date.

The Impact of Having to Stop Providing Procedural Abortions

16. If SB27 takes effect and we have to stop providing procedural abortions entirely, this will be terrible for our patients. All of our patients seeking procedural abortions will be prevented from accessing that care.

17. Having to stop providing procedural abortions will also have a devastating impact on PPGOH and its staff. We will have to severely scale back our operations and since we will not know when we can provide procedural abortions again, we will very likely have to terminate staff.

18. Many of our staff have committed their professional careers to providing the full range of reproductive health care—of which procedural abortion is an essential part. Having to abruptly stop providing this necessary health care will be extremely damaging to them.

19. Moreover, PPGOH will also suffer severe reputational harm, and the trust we've built in our community as a trusted provider of comprehensive reproductive health care will be broken. Patients choose PPGOH as their health care provider because they know we provide nonjudgmental and comprehensive reproductive care, including, importantly, abortions. Being suddenly unable to provide procedural abortions will result in great harm to us and our patients, and we seek relief from the Court to prevent this harm.

FURTHER AFFIANT SAYETH NAUGHT

Iris E. Harvey

Signed before me this 4 day of March, 2021

Notary Public

LC PENCE, Notary Public
Residence - Summit County
State Wide Jurisdiction, Ohio
My Commission Expires July 19, 2023

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. _____ Judge: _____

AFFIDAVIT OF CHRISSE FRANCE IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

I, Chrisse France, being duly sworn on oath, do depose and state as follows:

1. I am the Executive Director of Preterm-Cleveland ("Preterm"), a nonprofit corporation organized under the laws of the State of Ohio, which is a plaintiff in this case. I have held this position since 1999.

2. As Executive Director, I am ultimately responsible for Preterm's administrative, financial, and clinical operations. Thus, I am responsible for developing and implementing Preterm's policies and procedures.

3. I submit this affidavit in support of Plaintiffs' Motion for a Temporary Restraining Order Followed by Preliminary Injunction to prevent enforcement of Senate Bill 27 ("SB 27"), which requires that "fetal remains" from procedural abortions be cremated or interred. SB 27 defines "fetal remains" as "the product of human conception that has been aborted."

4. The facts I state here are based on my experience, my review of Preterm's business records, information obtained in the course of my duties at Preterm, and personal knowledge that

I have acquired through my service at Preterm. If called and sworn as a witness, I could and would testify competently thereto.

Preterm's Provision of Abortion Care

5. Preterm has operated a reproductive health care clinic located in Cleveland, Ohio since 1974. This facility is licensed as an ambulatory surgical facility ("ASF") under Ohio law. *See* Ohio Rev. Code § 3702.30. All abortions performed by Preterm take place in this facility.

6. Preterm performs medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and procedural abortion through 21 weeks and 6 days LMP.

7. Preterm performed 4365 total abortions in 2020, 3430 of which were procedural abortions. So far this year, Preterm has performed 1263 total abortions through March 2, 2021, 1014 of which were procedural abortions.

8. Of the 4365 abortions that Preterm performed in 2020, 36.4 percent were performed after 70 days (or 10 weeks) LMP. (It is likely that the percentage of medication abortions was slightly higher in 2020 than in a typical year, for reasons related to the COVID-19 pandemic.)

Preterm's Current Policies and Procedures for Management of Fetal and Other Tissue

9. As required for ASF licensure, Preterm maintains written infection control policies and procedures regarding the disposal of biological waste. Preterm's policies and procedures comply with Ohio regulations regarding the treatment of infectious waste as well as all other applicable laws and regulations.

10. After a procedural abortion, Preterm staff safely dispose of the tissue removed during the procedure in accordance with all applicable laws and regulations. This tissue includes embryonic and fetal tissue, along with other biological tissue from the uterus.

11. Preterm contracts with a licensed medical waste company that disposes of the tissue from procedural abortions. The company disposes of this tissue by incineration.

12. If appropriate in a particular case, Preterm will send tissue from a procedural abortion to a pathologist to test for certain medical indications, or to a crime lab if required as evidence in a criminal case (such as in the case of a sexual assault investigation).

SB 27

13. I understand that SB 27 requires that embryonic and fetal tissue from procedural abortions be disposed of by cremation or interment.

14. I also understand SB 27 requires that, before any procedural abortion, patients must certify that they have received a state-prescribed "notification form" informing them of their option to determine how embryonic or fetal tissue is disposed, and if a patient elects to make such determination, SB 27 requires the determination be made on a separate state-prescribed "consent form." I also understand that these mandatory forms will not be available by the time SB 27 takes effect on April 6, 2021, because the Ohio Department of Health ("ODH") has not started the rule-making process to issue the forms.

15. SB 27 imposes severe criminal and noncriminal penalties for failing to follow its requirements. While the criminal penalties specified in SB 27 are suspended until ODH adopts rules and issues the required forms, I understand there is no such provision suspending noncriminal penalties until the rules and forms are promulgated. Noncriminal penalties under SB 27 may include the loss of professional and facility licenses, civil suits, and financial penalties. I understand that the State of Ohio has refused to give assurances that the noncriminal penalties will not apply until the necessary rules and forms are issued.

16. After SB 27 was passed, Preterm began attempting to make arrangements to comply with the law. As part of this effort, I personally contacted several crematories and funeral

homes to inquire into their capability and willingness to meet SB 27's requirements regarding cremation and interment, and to ask for estimates of how much these services would cost. Thus far, neither I nor any other member of my staff have been able to obtain a concrete proposal from any of these entities. In addition, during this process, several questions arose about compliance with SB 27, including whether the law allows embryonic or fetal tissue to be simultaneously cremated, what forms are needed to be completed prior to interment, whether tissue can be sent to a crime lab or to a pathologist for testing in compliance with the law, and apparent conflicts between SB 27 and infectious waste requirements that govern the treatment and disposal of products of conception and other pregnancy tissue.

17. Moreover, it is clear that Preterm cannot comply with SB 27 without the required forms that must be issued by ODH.

18. I am concerned that Preterm could lose its license, and our physicians credibly fear losing their licenses and being subjected to other civil penalties for non-compliance with SB 27—even though compliance is impossible without the required forms from ODH. We cannot risk these severe penalties. Thus, if SB 27 takes effect on April 6, 2021, Preterm will have to stop performing procedural abortions, because it is presently impossible to comply with the law and the State of Ohio refuses to guarantee that the severe noncriminal penalties for noncompliance with SB 27 will not apply until the required rules and forms are adopted.

19. Under Ohio law, patients must be provided certain state-mandated information at least 24 hours before the abortion. See R.C. 2317.56(b). However, patients often have to receive this information several days, and sometimes even a week before their abortion, due to the demand for our services and delays in scheduling. This means that Preterm may need to stop scheduling this initial counseling appointment for patients who need a procedural abortion, well before the April 6 effective date, unless this Court grants relief.

20. In light of the State of Ohio's history of aggressive enforcement against abortion providers, I fear that Preterm, its physicians, and/or its staff will be penalized for failure to comply with SB 27, even though compliance is impossible. For example, in March of 2020, about one week after ODH issued an order barring "all non-essential surgeries and procedures" during the COVID-19 emergency, ODH sent two inspectors to Preterm's ASF to investigate our compliance with the non-essential surgery ban. At the same time, the Ohio Attorney General threatened "quick enforcement action" against us and other providers. We repeatedly sought assurances from ODH that our practices were compliant with the order, but ODH refused, forcing us and other providers to sue. Preterm was a plaintiff in that case, and a federal court later partially restrained enforcement of the order.

Harms Caused by SB 27

21. If Preterm stops providing procedural abortions on or before April 6, 2021, it will have a profoundly harmful effect on Preterm's patients and on Preterm itself.

22. Many of Preterm's patients are only eligible for procedural abortion, including all of Preterm's patients who are above ten weeks LMP. In addition, some patients with pregnancies earlier than ten weeks LMP are only able to have a procedural abortion because medication abortion is medically contraindicated. Thus, if Preterm is forced to stop providing procedural abortions, all patients seeking abortion after 10 weeks LMP, and some at any gestational age, will be prevented from accessing that care. These patients will need to travel out of state to have an abortion or will be forced to carry their pregnancy to term.

23. Patients face a number of logistical obstacles that delay their ability to get a legal abortion. Ohio law imposes a 24-hour waiting period before an abortion. Patients need to gather the resources to pay for their abortion and related costs, arrange transportation to a clinic for at least two appointments, take time off of work, and potentially arrange for childcare during

appointments. These obstacles are greatest for patients with limited financial resources. Thus, many of our patients are not able to access abortion before 10 weeks LMP.

24. If Preterm is forced to stop providing procedural abortions, this will also have a detrimental impact on Preterm's physicians and other personnel, as well as Preterm as an entity. Although we could continue to provide medication abortion, because the majority of abortions we provide are procedural abortions, we would have to lay off or terminate approximately 80% our staff. If this happens, some staff would likely seek employment elsewhere, making it difficult for Preterm to resume normal operations.

25. Moreover, Preterm is a valued member of its community. We provide not only abortion care but the full spectrum of reproductive and sexual health care, including LGBT-sensitive sexual health care. Patients rely on Preterm for nonjudgmental, affirming reproductive and sexual health care. Preterm is also the only abortion provider in Ohio north of Dayton that offers procedural abortions up to the legal limit of 21 weeks, 6 days LMP. We have never closed our doors since we opened in 1974; to close them to our abortion patients now would have a severe and devastating impact on our patients and our standing in the community.

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26. For all of these reasons, if SB 27 takes effect on April 6, 2021, it will cause grave harm to Preterm, our staff, and our patients. This Court's intervention to bar enforcement of SB 27 and prevent these harms is therefore urgently needed.

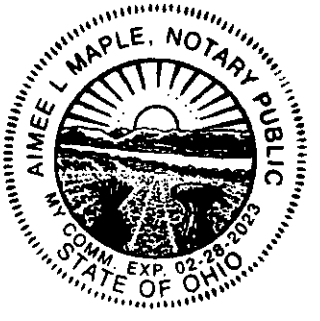
FURTHER AFFIANT SAYETH NAUGHT.

Executed this 3 th day of March, 2021.

Chrisse France

Signed before me this 3 day of March, 2021

aimee l maple
Notary Public



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. _____ Judge: _____

AFFIDAVIT OF W.M. MARTIN HASKELL, M.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

I, W.M. Martin Haskell, M.D., being duly sworn on oath, do depose and state as follows:

1. I am the sole shareholder of Women's Med Group Professional Corporation (WMGPC), which has owned and operated Women's Med Center of Dayton (WMCD) in Kettering, Ohio since 1983. WMGPC was formerly Women's Medical Professional Corporation.

2. I am a physician with over 40 years' experience in women's health. I have been a licensed physician in the state of Ohio since 1974.

3. I earned a B.A. from Ohio Wesleyan University in 1968 and a Doctorate of Medicine from the University of Alabama in 1972. I received five and one-half years of residency (post graduate) training in anesthesia, general surgery and family practice, completing my residency and passing my Board exam in family medicine in 1978.

4. I have been the Medical Director of WMCD since 1983. As Medical Director I supervise physicians and clinicians and provide direct reproductive health care to patients. I also supervise and manage the provision of all abortion care at WMGPC facilities and am responsible

for developing and approving WMGPC's policies and procedures. I also personally provided abortions in an outpatient setting from 1978 until 2019.

5. I submit this affidavit in support of Plaintiffs' Motion for a Temporary Restraining Order Followed by Preliminary Injunction to prevent enforcement of Senate Bill 27 ("SB 27"), which requires that "fetal remains" from procedural abortions be cremated or interred, defined as "the product of human conception that has been aborted."

6. The facts I state here are based on my experience, information obtained in the course of my duties at WMCD, and personal knowledge that I have acquired through my service at WMCD. If called and sworn as a witness, I could and would testify competently thereto.

WMCD's Provision of Abortion Care

7. WMCD operates a facility licensed as an ambulatory surgical facility ("ASF") under Ohio law. *See* Ohio Rev. Code § 3702.30. It is located in Kettering, Ohio.

8. WMCD provides medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and procedural abortion through 21 weeks and 6 days LMP.

9. WMCD performed 2701 total abortions in 2020, 1570 of which were procedural abortions. So far this year, WMCD has performed 509 total abortions through February 28, 2021, of which 317 were procedural abortions.

10. Of the 2701 abortions that WMCD performed in 2020, 638, or 23.6 percent, were performed after 70 days (or 10 weeks) LMP. (It is likely that the percentage of medication abortions was slightly higher in 2020 than in a typical year, for reasons related to the COVID-19 pandemic.)

WMCD's Current Policies and Procedures for Management of Fetal and Other Tissue

11. As required for ASF licensure, WMCD maintains written infection control policies and procedures regarding the disposal of biological waste. WMCD's policies and procedures comply with Ohio regulations regarding the treatment of infectious waste as well as all other applicable laws and regulations.

12. After a procedural abortion, WMCD staff safely dispose of the tissue removed during the procedure in accordance with all applicable laws and regulations. This tissue includes embryonic and fetal tissue, along with other biological tissue from the uterus.

13. WMCD contracts with a licensed medical waste company that disposes of the tissue from procedural abortions. The company disposes of this tissue by incineration.

14. If appropriate in a particular case, WMCD will send tissue from a procedural abortion to a pathologist to test for certain medical indications, or to a crime lab if required as evidence in a criminal case (such as in the case of a sexual assault investigation).

SB 27

15. I understand that SB 27 requires that embryonic and fetal tissue from procedural abortions be disposed of by cremation or interment.

16. I also understand SB 27 requires that, before any procedural abortion, patients must certify that they have received a state-prescribed "notification form" informing them of their option to determine how embryonic or fetal tissue is disposed, and if a patient elects to make such determination, SB 27 requires the determination be made on a separate state-prescribed "consent form." I also understand that these mandatory forms will not be available by the time SB 27 takes effect on April 6, 2021, because the Ohio Department of Health ("ODH") has not started the rule-making process to issue the forms.

17. SB 27 imposes severe criminal and noncriminal penalties for failing to follow its requirements. While the criminal penalties specified in SB 27 are suspended until ODH adopts rules and issues the required forms, there is no such provision suspending noncriminal penalties until the rules and forms are promulgated. Noncriminal penalties under SB 27 may include the loss of professional and facility licenses, civil suits, and financial penalties. I understand that the State of Ohio has refused to give assurances that the noncriminal penalties will not apply until the necessary rules and forms are issued.

18. After SB 27 was passed, WMCD began attempting to make arrangements to comply with the law. As part of this effort, a member of my staff began contacting crematories and funeral homes to inquire into their capability and willingness to meet SB 27's requirements regarding cremation and interment, and to ask for estimates of how much these services would cost. Thus far, neither I nor any other member of my staff have been able to obtain a concrete proposal from any of these entities. In addition, during this process, several questions arose about compliance with SB 27, including whether the law allows embryonic or fetal tissue to be simultaneously cremated, what forms are needed to be completed prior to interment, whether tissue can be sent to a crime lab or to a pathologist for testing in compliance with the law, and apparent conflicts between SB 27 and infectious waste requirements that govern the treatment and disposal of products of conception and other pregnancy tissue.

19. Moreover, it is clear that WMCD cannot comply with SB 27 without the required forms that must be issued by ODH.

20. I am concerned that WMCD could lose its license, and our physicians credibly fear losing their licenses and being subjected to other civil penalties for non-compliance with SB 27—even though compliance is impossible without the required forms from ODH. We cannot

risk these severe penalties. Thus, if SB 27 takes effect on April 6, 2021, WMCD will have to stop performing procedural abortions, because it is presently impossible to comply with the law and the State of Ohio refuses to guarantee that the severe noncriminal penalties for noncompliance with SB 27 will not apply until the required rules and forms are adopted.

21. Under Ohio law, patients must be provided certain state-mandated information at least 24 hours before the abortion. See R.C. 2317.56(b). However, patients often have to receive this information as much as a week before their abortion, due to the demand for our services and delays in scheduling. This means that WMCD may need to stop scheduling this initial counseling appointment for patients who need a procedural abortion, well before the April 6 effective date, unless this Court grants relief.

22. In light of the State of Ohio's history of aggressive enforcement against abortion providers, I fear that WMCD, its physicians, and/or its staff will be penalized for failure to comply with SB 27, even though compliance is impossible. Indeed, ODH has a history of changing its rules without notice, thereby forcing clinics to stop providing abortion care and/or go to court. For example, Ohio requires ASFs to have a written transfer agreement with a local hospital, but Ohio forbids any public hospital from entering into such agreement with any ASF that provides abortion. And although WMCD could meet an alternative requirement to have a back-up arrangement with local physicians, ODH repeatedly, unilaterally changed the number of back-up physicians required, then denied our variance applications and moved to revoke our license. We had to sue, and after stopping all procedural abortions for a period of two weeks due to our ASF license being revoked, we ultimately obtained a new ASF license.

23. In addition, in March of 2020, about one week after ODH issued an order barring "all non-essential surgeries and procedures" during the COVID-19 emergency, ODH sent two

inspectors to WMCD to investigate our compliance with the non-essential surgery ban. At the same time, the Ohio Attorney General threatened "quick enforcement action" against us and other providers. We repeatedly sought assurances from ODH that our practices were compliant with the order, but ODH refused, forcing us and other providers to sue. WMCD was a plaintiff in that case, and a federal court later partially restrained enforcement of the order.

Harms Caused by SB 27

24. If WMCD stops providing procedural abortions on or before April 6, 2021, it will have a devastating effect on WMCD's patients and on WMCD itself.

25. Many of WMCD's patients are only eligible for procedural abortion, including all of WMCD's patients who are above ten weeks LMP. In addition, some patients with pregnancies earlier than ten weeks LMP are only able to have a procedural abortion because medication abortion is medically contraindicated. Thus, if WMCD is forced to stop providing procedural abortions, all patients seeking abortion after 10 weeks LMP, and some at any gestational age, will be prevented from accessing that care. These patients will need to travel out of state to have an abortion or will be forced to carry their pregnancy to term.

26. Patients face a number of logistical obstacles that delay their ability to get a legal abortion. Ohio law requires that patients come to the clinic at least 24 hours before their abortion to receive state-mandated information. Patients need to gather the resources to pay for their abortion and related costs, arrange transportation to a clinic for at least two appointments, take time off of work for both appointments, and potentially arrange for childcare during appointments. These obstacles are greatest for patients with limited financial resources, and approximately 50% of WMCD's patients are low-income. Thus, many of WMCD's patients will be unable to access abortion before 10 weeks LMP.

27. If WMCD is forced to stop providing procedural abortions, this will also have a detrimental impact on WMCD's physicians and other personnel, as well as WMCD itself. Although we could continue to provide medication abortion, because the majority of abortions we provide are procedural abortions, we would eventually have to close our clinic. If this happens, some of our staff would likely seek employment elsewhere, making it difficult for WMCD to resume normal operations even if we were ultimately able to resume providing procedural abortions.

28. Moreover, WMCD is a valued member of its community. Patients rely on WMCD for safe, caring reproductive and sexual health care. WMCD is also one of the few abortion providers in the state of Ohio that offer procedural abortions up to the legal limit of 21 weeks, 6 days LMP.

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29. For all of these reasons, if SB 27 takes effect on April 6, 2021, it will cause grave harm to WMCD, our staff, and our patients. This Court's intervention to bar enforcement of SB 27 and prevent these harms is therefore urgently needed.

FURTHER AFFIANT SAYETH NAUGHT.

Executed this 4th day of March, 2021.

W.M. Martin Haskell, M.D.

Signed before me this 4th day of March, 2021

Notary Public

KELLY MARIE NAPIER
Notary Public
In and for the State of Ohio
My Commission Expires
May 03, 2023

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. _____ Judge: _____

AFFIDAVIT OF DAVID BURKONS, M.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

I, David Burkons, M.D., being duly sworn on oath, do depose and state as follows:

1. I am a board-certified obstetrician-gynecologist. I received my M.D. degree from the University of Michigan in 1973.

2. I am licensed to practice medicine in the state of Ohio. In 2014, I founded the Northeast Ohio Women's Center (NEOWC), where I serve as Medical Director. Prior to starting NEOWC, I was in private practice with University Hospitals in Cleveland, and I also served as Medical Director of Preterm for approximately ten years.

3. As NEOWC's Medical Director, I supervise physicians and clinicians and provide direct reproductive health care to patients. I also oversee the provision of all abortion services at NEOWC, and I am responsible for developing and approving NEOWC's policies and procedures. In addition, I personally provide both medication and procedural abortions at NEOWC.

4. I submit this affidavit in support of Plaintiffs' Motion for a Temporary Restraining Order Followed by Preliminary Injunction to prevent enforcement of Senate Bill 27 ("SB 27"),

which requires that "fetal remains" from procedural abortions, defined as "the product of human conception that has been aborted," must be cremated or interred.

5. The facts I state here are based on my experience, information obtained in the course of my duties at NEOWC, and personal knowledge that I have acquired through my role at NEOWC. If called and sworn as a witness, I could and would testify competently thereto.

NEOWC's Provision of Abortion Care

6. NEOWC operates a facility located in Cuyahoga Falls, Ohio, which is licensed as an ambulatory surgical facility ("ASF") under Ohio law. *See* Ohio Rev. Code § 3702.30.

7. NEOWC provides medication abortion through 70 days (or 10 weeks) of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and procedural abortion through 16 weeks and 6 days LMP.

8. NEOWC performed 2948 total abortions in 2020, 1432 of which were procedural abortions. So far this year, NEOWC has performed 637 total abortions through March 4, 2021, of which 282 were procedural abortions.

9. Of the 2948 abortions that NEOWC performed in 2020, approximately 38% percent were performed after 70 days (or 10 weeks) LMP.

NEOWC's Current Policies and Procedures for Management of Fetal and Other Tissue

10. As required for ASF licensure, NEOWC maintains written infection control policies and procedures regarding the disposal of biological waste. NEOWC's policies and procedures comply with Ohio regulations regarding the treatment of infectious waste as well as all other applicable laws and regulations.

11. After a procedural abortion, NEOWC staff safely dispose of the tissue removed during the procedure in accordance with all applicable laws and regulations. This tissue includes

embryonic and fetal tissue, along with other biological tissue from the uterus.

12. NEOWC contracts with a licensed medical waste company that disposes of the tissue from procedural abortions. The company disposes of this tissue by incineration.

13. If necessary in a particular case, NEOWC will send tissue from a procedural abortion to a pathologist to test for certain medical indications, or to a crime lab if required as evidence in a criminal case (such as in the case of a sexual assault investigation).

SB 27

14. I understand that SB 27 requires that embryonic and fetal tissue from procedural abortions be disposed of by cremation or interment.

15. I also understand SB 27 requires that, before any procedural abortion, patients must certify that they have received a state-prescribed "notification form" informing them of their option to determine how embryonic or fetal tissue is disposed of, and if a patient elects to make such determination, SB 27 requires the determination be made on a separate state-prescribed "consent form." I also understand that these mandatory forms will not be available by the time SB 27 takes effect on April 6, 2021, because the Ohio Department of Health ("ODH") has not started the rule-making process to issue the forms.

16. SB 27 imposes severe criminal and noncriminal penalties for failing to follow its requirements. While the criminal penalties specified in SB 27 are suspended until ODH adopts rules and issues the required forms, there is no such provision suspending noncriminal penalties until the rules and forms are promulgated. Noncriminal penalties under SB 27 may include the loss of professional and facility licenses, civil suits, and financial penalties. I understand that the State of Ohio has refused to give assurances that the noncriminal penalties will not apply until the necessary rules and forms are issued.

17. After SB 27 was passed, NEOWC began attempting to make arrangements to comply with the law. As part of this effort, a member of my staff began reaching out to crematories and funeral homes to inquire into their capability and willingness to meet SB 27's requirements regarding cremation and interment, and to ask for estimates of how much these services would cost. Thus far, neither I nor any other member of my staff have been able to obtain a concrete proposal from any of these entities. In addition, during this process, several questions arose about compliance with SB 27, including whether the law allows embryonic or fetal tissue to be simultaneously cremated, what forms are needed to be completed prior to interment, whether tissue can be sent to a crime lab or to a pathologist for testing in compliance with the law, and apparent conflicts between SB 27 and infectious waste requirements that govern the treatment and disposal of products of conception and other pregnancy tissue.

18. Moreover, it is clear that NEOWC cannot comply with SB 27 without the required forms that must be issued by ODH.

19. I am concerned that NEOWC could lose its license, and I and our other physicians credibly fear losing our licenses and being subjected to other civil penalties for non-compliance with SB 27—even though compliance is impossible without the required forms from ODH. Because we cannot risk these severe penalties, if SB 27 takes effect on April 6, 2021, NEOWC will have to stop performing procedural abortions, since it is presently impossible to comply with the law, and the State of Ohio refuses to guarantee that the severe noncriminal penalties for noncompliance with SB 27 will not apply until the required rules and forms are adopted.

20. Under Ohio law, patients must be provided certain state-mandated information in person at least 24 hours before the abortion. See R.C. 2317.56(b). However, patients often have to

receive this information as much as a week before their abortion, due to the demand for our services and delays in scheduling. This means that NEOWC may need to stop scheduling this initial counseling appointment well before the April 6 effective date for patients who need a procedural abortion, unless this Court grants relief.

Harms Caused by SB 27

21. If NEOWC stops providing procedural abortions on or before April 6, 2021, it will severely harm NEOWC's patients and NEOWC itself.

22. Many of NEOWC's patients are only eligible for procedural abortion, including all of NEOWC's patients who are above ten weeks LMP. In addition, some patients with pregnancies earlier than ten weeks LMP are only able to have a procedural abortion because medication abortion is medically contraindicated. Thus, if NEOWC is forced to stop providing procedural abortions, all patients seeking abortion after 10 weeks LMP, and some at any gestational age, will be prevented from accessing that care. These patients will need to travel out of state to have an abortion or will be forced to carry their pregnancy to term.

23. Patients face a number of logistical obstacles that delay their ability to get a legal abortion. Ohio law requires that patients come to the clinic at least 24 hours before their abortion to receive state-mandated information. Patients need to gather the resources to pay for their abortion and related costs, arrange transportation to a clinic for at least two appointments, take time off of work for both appointments, and potentially arrange for childcare during appointments. These obstacles are greatest for patients with limited financial resources. A large percentage of our patient population is low-income; approximately 55% of our patients receive financial assistance. Thus, many of NEOWC's patients will be unable to access abortion before 10 weeks LMP.

24. If NEOWC is forced to stop providing procedural abortions, this will also have a detrimental impact on NEOWC's physicians and other personnel, as well as NEOWC itself. Although we could continue to provide medication abortion, because a large percentage of the abortions we provide are procedural abortions, we would have to cut our staff substantially, including our physicians. If this happens, some of our staff would likely seek employment elsewhere, making it difficult for NEOWC to resume normal operations even if we were ultimately able to resume providing procedural abortions.

25. Moreover, NEOWC is a valued member of its community. Patients rely on NEOWC for safe, caring reproductive and sexual health care.

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26. For all of these reasons, if SB 27 takes effect on April 6, 2021, it will cause grave harm to NEOWC, our staff, and our patients. This Court's intervention to bar enforcement of SB 27 and prevent these harms is therefore urgently needed.

FURTHER AFFIANT SAYETH NAUGHT.

Executed this 4th day of March, 2021.

David Burkons, M.D.

Signed before me this 4 day of March, 2021

Notary Public

ANNETTE BEAMER
Notary Public. State of Ohio
My Commission Expires
September 22, 2022

ANNETTE BEAMER
Notary Public. State of Ohio
My Commission Expires
September 22, 2022

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. _____ Judge: _____

AFFIDAVIT OF B. JESSIE HILL IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

I, B. Jessie Hill being duly sworn on oath, do depose and state as follows:

1. I am an attorney licensed to practice in the State of Ohio. I am also the Judge Ben C. Green Professor of Law and Associate Dean for Research and Faculty Development at Case Western Reserve University School of Law in Cleveland, Ohio. I represent Plaintiffs Preterm, Women's Med Group Professional Corporation, and Northeast Ohio Women's Center in this case.

2. I have carefully read Ohio S.B. 27, which was passed by the Ohio General Assembly on December 9, 2020, and signed by Governor Mike DeWine on December 30, 2020. I am aware that, according to the Ohio General Assembly's website, S.B. 27 has an effective date of April 6, 2021. https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-SB-27.

3. S.B. 27 provides that "Not later than ninety days after the effective date of this section"—that is, by July 5, 2021—"the director of health, in accordance with Chapter 119. of the Revised Code, shall adopt rules necessary to carry out [the newly enacted provisions of the bill], including rules that prescribe" the forms that abortion providers must use in order to fulfill the bill's requirements. R.C. 3726.14.

4. Some of S.B. 27's provisions rely on the existence of the forms to be created by the director of health in order to be able to comply with them. For example, Section 3726.03(B) requires that "[a] pregnant woman who has a surgical abortion shall be provided with a notification form described in division (A) of section 3726.14 of the Revised Code." Sections 3726.04 and 3726.041 similarly require the existence of forms for compliance.

5. Because it appeared that it would be impossible for my clients to comply with S.B. 27 as of its effective date unless the above-referenced regulations and forms were also adopted by April 6, I reached out to attorneys in the Office of the Ohio Attorney General shortly after the bill's passage in order to try to gain clarity about when the regulations would be adopted and, if they were not adopted before April 6, whether abortion providers would still be expected to comply with the bill.

6. I also hoped to gain clarity about how fetal and embryonic tissue that is sent to a pathology laboratory would be disposed of under the bill, because the bill did not address this issue.

7. Jennifer Branch, who was an attorney representing Planned Parenthood of Southwest Ohio and Women's Med Group Professional Corporation before she ascended to the Hamilton County Common Pleas Court bench on February 9, 2021, initially reached out to Bridget Coontz, Section Chief of the Constitutional Offices Section. The reason for contacting Ms. Coontz in particular was that Ms. Branch had worked with Ms. Coontz on several cases and expected that Ms. Coontz would be involved in any litigation that might arise over the constitutionality of S.B. 27.

8. Ms. Coontz agreed to a phone call with Ms. Branch and myself, which occurred on Thursday, January 14, 2021. We were joined on that call by Ara Mekhjian, Section Chief of the Health & Human Services Section.

9. During that phone conversation, I explained my concerns about compliance with S.B. 27 and asked for assurances that clinics would not be required to comply with S.B. 27 before forms or regulations were adopted. Mr. Mekhjian asked me to explain my concern in writing and email it to him, which I did, on Friday, January 15, 2021. See Exh. A. (After this phone call, Ms. Branch was no longer involved in discussions regarding S.B. 27.)

10. Mr. Mekhjian responded that he would "take a look this weekend." When I had still received no response to my concerns a week later, I sent a brief follow-up email on Friday, January 22 repeating my request and adding one more concern—specifically, regarding who would be responsible for disposal of tissue that was needed as evidence for a criminal investigation (again, because the bill contained no exception for such tissue). Mr. Mekhjian responded on January 25 that he did not have an answer for me yet. See Exh. A.

11. On February 1, I called Mr. Mekhjian and spoke briefly with him by phone, but he informed me that he had no further information relevant to my concerns. I asked if he might know when regulations would be promulgated, since it was likely already too late for the rulemaking process to play out in advance of the April 6 effective date, and he said he would try to see if he could find out.

12. A similar email exchange occurred again on February 9-10, 2021, in which I asked Mr. Mekhjian if he had any information he could share and he responded that he did not. See Exh. A.

13. Finally, on Friday, February 26, 2021, I wrote one last time to ask Mr. Mekhjian for updates and to let him know that if we could not receive assurances that we would be immune from any negative consequences for noncompliance with S.B. 27 until regulations were adopted, we would have no choice but to sue. Specifically, I stated:

> We're now at the point where we are going to have to file a lawsuit very soon in order to ensure we can protect our clients. Since we believe it's impossible for them to comply with the law without regulations and forms (as explained in my prior email), all we are asking for right now is assurance that we won't be penalized for not complying with SB 27 until rules and forms are in place. But if we can't get this assurance, we feel that we have no choice but to sue (with sufficient lead time before the April 6 effective date).

In response, Mr. Mekhjian asked to speak by phone on Monday, March 1.

14. I spoke briefly by phone with Mr. Mekhjian on March 1. He told me he didn't have any more information for me. We then discussed some of the clinics' concerns about the substantive provisions of S.B. 27, which might be addressed by the eventual regulations. I informed Mr. Mekhjian that, regardless of the content of the regulations that would ultimately be adopted, in the absence of assurances that the clinics would not suffer negative consequences for failure to comply with S.B. 27 in the absence of any regulations, the clinics would almost certainly have to sue very soon, so that they could seek relief from having to begin complying with the law on April 6.

FURTHER AFFIANT SAYETH NAUGHT.

FURTHER AFFIANT SAYETH NAUGHT.

B. Jessie Hill

Signed before me this 4th day of March, 2021

Notary Public

TROY BROWN, NOTARY PUBLIC
Residence - Summit County
State Wide Jurisdiction, Ohio
Expiration Date June 17, 2023

CASE WESTERN RESERVE UNIVERSITY

Jessie Hill <bjh11@case.edu>

Question regarding SB 27

Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov> Fri, Feb 26, 2021 at 11:52 AM
To: Jessie Hill <bjh11@case.edu>
Cc: Bridget Coontz <bridget.coontz@ohioattorneygeneral.gov>

Jessie:

Are you free to talk on Monday at 12:15?

Ara

Sent with BlackBerry Work
(www.blackberry.com)

From: Jessie Hill <bjh11@case.edu>
Date: Friday, Feb 26, 2021, 9:43 AM
To: Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov>
Cc: Bridget Coontz <bridget.coontz@ohioattorneygeneral.gov>
Subject: Re: Question regarding SB 27

Hi Ara,

I'm writing to check in again. We're now at the point where we are going to have to file a lawsuit very soon in order to ensure we can protect our clients. Since we believe it's impossible for them to comply with the law without regulations and forms (as explained in my prior email), all we are asking for right now is assurance that we won't be penalized for not complying with SB 27 until rules and forms are in place. But if we can't get this assurance, we feel that we have no choice but to sue (with sufficient lead time before the April 6 effective date).

I'm happy to get on a phone call to discuss this if you prefer.

Best,
Jessie

On Wed, Feb 10, 2021 at 3:07 PM Jessie Hill <bjh11@case.edu> wrote:

> Hi Ara,
>
> Thanks for letting me know. Of course, I understand that these things can take time, but I'm sure you also realize that if we aren't able to get an answer to our question about when/what kind of compliance is expected, we will almost certainly have to sue, and relatively soon. We are not sure how we can comply with this law if there are no regulations.
>
> Thanks,
> Jessie
>
> On Wed, Feb 10, 2021 at 1:41 PM Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov> wrote:
>
> > Jessie:
> >
> > Thanks for checking in. I don't have any further information at this time.
> >
> > Ara

From: Jessie Hill <bjh11@case.edu>
Sent: Tuesday, February 9, 2021 2:08 PM
To: Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov>
Subject: Re: Question regarding SB 27

Hi Ara -

I'm sorry to keep bugging you about this. Just wanted to check in again. Let me know if you want to discuss it. I am out later this week (Thursday - Monday).

Thanks,
Jessie

On Mon, Jan 25, 2021 at 1:49 PM Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov> wrote:

> Jessie:
>
> Thanks for the follow-up. Still waiting to hear back.
>
> Ara Mekhjian
> Section Chief - Health & Human Services Section
> Office of Ohio Attorney General David Yost
> Office number: 614-644-8993
> Fax number: 866-478-7791
> Work Cell: 614-648-8114
> Ara.Mekhjian@OhioAttorneyGeneral.gov
>
> **From:** Jessie Hill <bjh11@case.edu>
> **Sent:** Friday, January 22, 2021 1:06 PM
> **To:** Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov>
> **Cc:** Bridget Coontz <bridget.coontz@ohioattorneygeneral.gov>
> **Subject:** Re: Question regarding SB 27
>
> Hi Ara -
>
> I'm just following up on this question. I know you probably need time to communicate with ODH. I just don't want it to fall off your radar.
>
> Also, one additional question that is similar to the pathology question: what about fetal tissue that is needed as evidence in a criminal case?

Thanks and have a good weekend.

Best,
Jessie

On Fri, Jan 15, 2021 at 5:26 PM Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov> wrote:

> Thanks. I'll take a look this weekend.
>
> Ara
>
> Sent with BlackBerry Work
> (www.blackberry.com)
>
> ---
>
> **From:** Jessie Hill <bjh11@case.edu>
> **Date:** Friday, Jan 15, 2021, 5:22 PM
> **To:** Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov>
> **Cc:** Bridget Coontz <bridget.coontz@ohioattorneygeneral.gov>, Jennifer Branch <JBranch@gbfirm.com>
> **Subject:** Question regarding SB 27
>
> Dear Ara,
>
> Thanks for your patience. Here is a short write-up of the question we wanted to ask about SB 27:
>
> Section 3726.14 requires ODH to adopt rules and also to adopt "rules that prescribe" certain forms (namely, a "notification form," a "consent form," and a "detachable supplemental form"), within 90 days of the effective date of the law. The effective date for SB 27 is April 6, so ODH has until July 5 to issue the relevant rules and forms.
>
> Section 3 of SB 27 says the criminal penalty provision (3726.99) doesn't take effect until ODH adopts the rules under Section 3726.14 (including, presumably, the rules that prescribe the forms). Section 3726.99 provides that it is a first-degree misdemeanor to violate Sections 3726.02, 3726.05, 3726.10, or 3726.11. So, it seems that those four provisions cannot be criminally enforced until there are rules and forms created by ODH.

But there are other provisions that are not mentioned in 3726.99, and therefore do not appear to be suspended until the rules are promulgated. These provisions require abortion providers to take actions that are or could be dependent on the rules or forms ODH must issue under 3726.14. For example, sections 3726.03, 3726.04, and 3726.041 require patients to be provided with forms described in Section 3726.14.

It is not clear how the clinics can comply with the provisions not mentioned in 3726.99 if ODH has not yet issued the rules or forms by the time the statute takes effect on April 6. And even if failing to comply with those provisions would not subject the clinics to criminal liability (because the statute does not specify that failing to comply with them carries criminal penalties), the clinics must have assurance that failing to comply will not have any other negative consequences – such as affecting licensing and/or variance decisions, and/or subjecting them to a possible injunction under Section 3701.341. Will ODH adopt rules and forms before SB 27's effective date? If not, then will ODH provide assurance that there will be no consequences for abortion providers and facilities for their inability to comply based on the lack of adopted rules and forms?

Thanks for any guidance you can provide. In addition, just a reminder that we are also wondering how tissue that must be sent to a pathology lab must be handled, and who is responsible for final disposition of the tissue in that situation.

Best,
Jessie

B. Jessie Hill

Associate Dean for Research and Faculty Development

Judge Ben C. Green Professor of Law

(she/her/hers)

Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106
ph: 216.368.0553
f: 216.368.2086
jessie.hill@case.edu

http://ssrn.com/author=372606

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Associate Dean for Research and Faculty Development

Judge Ben C. Green Professor of Law

(she/her/hers)

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UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS,

HODES & NAUSER, MD's, PA,
et al.,

Plaintiff,

v.

ROBERT MOSER, et al,

Defendants.

.....

Docket No. 11-2365-CM

Kansas City, Kansas
Date: 7/1/11

TRANSCRIPT OF
TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE CARLOS MURGUIA,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: Teresa A Woody
Woody Law Firm, PC
1621 Baltimore Avenue
Kansas City, MO 64108

Bonnie Scott Jones
Center for Reproductive Rights - NY
120 Wall Street - 14th Floor
New York, NY 10005

For the Defendants: Jeffrey A Chanay & Steve R Fabert
Office of Attorney General - Topeka
120 SW 10th Avenue - 2nd Floor
Topeka, KS 66612-1597

Movant: Cheryl A Pilate
Morgan Pilate LLC
142 N Cherry
Olathe, KS 66061

Court Reporter: Nancy Moroney Wiss, CSR, RMR, FCRR
Official Court Reporter
558 US Courthouse
500 State Avenue
Kansas City, KS 66101

THE COURT: Give me a moment please just to set up here. Let the record show we're here regarding Case Number 11-2365. It's a case entitled -- may have to help me with the pronunciation of the plaintiffs' names.

MS. WOODY: Doctors Hodes and Nauser.

THE COURT: Hodes and Nauser versus Moser, et al. Would the parties please enter their appearance?

MS. WOODY: Your Honor, Teresa Woody on behalf of the plaintiffs, and here are Doctor Hodes and Doctor Nauser, and with me is Bonnie Scott Jones who's been admitted pro hac vice this morning.

THE COURT: Thank you.

MR. CHANAY: Your Honor, on behalf of the defendant, it's Jeffrey Chanay, Deputy Attorney General of Kansas, and with me is Steve Fabert, Assistant Attorney General.

THE COURT: Thank you. Appreciate the parties accommodating the court with the scheduling of this hearing on very short notice. There is something before and pending at this time, which would be plaintiffs' motion for temporary restraining order and/or preliminary injunction, which is Document Number Four. This morning, the court granted Aid For Women's motion to intervene as well as Aid for Women has filed a

motion to join plaintiff's motion for temporary restraining order and/or preliminary injunction, which is Document 27. Upon review of the motion, the court grants Aid for Women's motion. As a result, for our record, Miss Pilate, if you could enter your appearance as well here at this hearing.

MS. PILATE: Thank you, Your Honor. Good afternoon. Cheryl Pilate for intervenors Central Family Medical, LLC, doing business as Aid for Women, and also representing Doctor Ronald Yeomans who is present with me at counsel table. Thank you.

THE COURT: In regards to our court appearance this afternoon, the court has scheduled this to be heard, but with that, there's some time limitations the court has informed the parties about regarding their arguments or however you want to use your time. Hopefully, you both were -- all of you were informed, and you have 30 minutes per party, and we actually have set up a timer that will be placed in front of the podium that I would trust and ask that you monitor and keep track of, and what I'll do is let you know if you want a warning when you're about to have your time expire. I would request please that when that timer shows that you have zero time remaining, that you stop. If not, I will have to interrupt you with

whatever is being presented or being argued. Yes?

MS. WOODY: Your Honor, we would like to divide the argument and provide at least a short period of time for intervenors to make a comment to the court with respect to the argument.

THE COURT: That's fine. If there's nothing else, we'll start at this time. Miss Woody.

MS. WOODY: Good afternoon, Your Honor. May it please the court. We are here on behalf of Doctors Hodes and Nauser requesting injunctive relief of the licensing process and temporary regulations promulgated under Senate Bill 36. Doctor Hodes and Doctor Nauser are very well respected physicians with a clinic located in Overland Park, Kansas where they operate an obstetrics and gynecology practice. Doctor Hodes has been practicing in this field for over 30 years. Doctor Nauser has been practicing with Doctor Hodes for 13 years, and he is her father. Doctor Nauser and Doctor Hodes have a full OB/GYN practice which includes a full range of services including gynecological surgeries. They also perform abortions in their practice, and especially are referred to by other physicians in instances where there are complications, medical complications for the woman, or where there is a fetal anomaly that would require an abortion. They have

been providing these services at their same clinic in Overland Park for over 24 years without incident. Since 2002, their practice like all other practices in the state of Kansas where office surgeries are performed in a physician's office have been regulated by the Kansas Board of Healing Arts, which in 2002 had a panel of some 35 doctors who promulgated standards for offices in Kansas where office surgeries were performed. With respect to these regulations which apply to all surgical procedures and offices, whether -- not just abortions, but other procedures for dental procedures, gastroenterology, all those sorts of surgeries that can be performed in an outpatient basis at a doctor's office, many of which are far more risky and invasive than abortion procedures performed at Doctor Hodes and Doctor Nauser's office, they've been regulated under these -- these standards promulgated by the board of healing arts for some eight years, and they are inspected routinely with respect to these procedures by representatives of the Kansas Board of Healing Arts.

On May 16th of this year, however, the Kansas legislature enacted Senate Bill 36, and under that bill, said that it would become effective July 1st, and that anyone who was not licensed, any provider who was not licensed as of that date would not be allowed to

perform abortions, and that any abortions performed after that date without a license would be considered a crime. KDHE was charged with implementing regulations under that act, and it is those temporary regulations and the licensing procedure that we are asking the court to enjoin today.

That occurred on May 16th, the act was enacted. Doctor Hodes and Doctor Nauser immediately reached out to the KDHE to say it's going to be impossible for you to both promulgate regulations and give the providers an opportunity to comply in a very limited time before July 1st. They basically heard nothing until May 26th when they were told that temporary regulations would be forthcoming. On July 9th, they did receive a copy of draft regulations from the KDHE.

THE COURT: June 9th? June 9th?

MS. WOODY: June 9th. I'm sorry, on June 9th, they received -- they received the draft of the temporary regulations from the KDHE, and these imposed stricter regulations, more stringent regulations on their facility than had previously been -- that they had previously been subject to under the standards of the board of healing arts. They were also told that they would have a licensing application, that the

licenses would -- application would be available on June 13th, and that they were to have their -- their license application submitted no later than June 17th. On June 13th, in the intervening time-frame, they -- in addition to getting the license application, they also received notice that the regulations, the draft regulations they had initially been provided on June 9th were being revised, and that they would get revised copies of those regulations at some point in the future, those temporary regulations.

That occurred after they had actually submitted their application on June 17th, as was required procedurally. They then received on the morning of June 20th new regulations that -- new temporary regulations and were told that these temporary regulations would be the ones that would be applied to determine whether they were able to get a license on July 1st. These new regulations were far more stringent even than the draft regulations that had been provided to them on June 9th. They had extremely strict standards, provided, for instance, for two hours of recovery for any patient of an abortion procedure, an amount of recovery time far in excess of anything required either at the Kansas hospitals or Kansas ambulatory surgical centers for much more invasive and

risky surgical procedures. They also imposed extremely strict physical plan regulations mandating the size of the rooms in which procedures could be performed, mandating that each room have its own washing -- hand washing and facilities, sink and a lavatory by itself attached to each procedure room, and standards such as requiring 50 square feet of janitorial storage for each procedure room which for the Hodes practice and Nauser practice would have meant 350 square feet of janitorial storage alone.

Upon reviewing these regulations, Doctor Hodes and Doctor Nauser reached out to the KDHE, and asked if there would be waivers available, because it was impossible for them to comply by July 1st. It would have required them essentially to tear down their building and re-build it, totally reconfigure it and -- and make it larger. They were told there would be no waivers, and that they -- if they were -- failed to be in compliance by July 1st, their license would be denied. This is inconsistent with the way other Kansas state regulations have been applied, particularly ones for hospitals where when there's a change in the physical plan for a hospital facility, they've been given up to two years to make those changes. But for these providers, and there are only three providers of

abortions in the state of Kansas that were affected by these, for these three providers, there was a -- they were to comply with these regulations within nine days of having received these regulations or their license would be denied.

Obviously, there was an inspection scheduled for even sooner than that. The original inspection was scheduled for June 27th, and they asked to have that moved until June 29th, but even so, recognized that it would be totally impossible for them to comply with these regulations, come the physical plan status alone, and so, they have moved this court for temporary injunction. They knew there's -- the state has raised an argument that there's some potential waiver because they didn't go through and exhaust their administrative remedies, but there was absolutely no purpose for them going in that manner. They'd all ready been told that they would not get a waiver, and they knew that they would not be able to comply with those regulations by July 1st.

And indeed, this morning, even though this motion for temporary restraining order and preliminary injunction was pending before this court, they received from the KDHE notice of intent to deny their license which came in at about 10:15 or 10:30 this morning.

It's clear that these regulations -- these temporary regulations and this licensing process infringe on the plaintiff's due process. There is absolutely no way that they could have complied with this -- with these requirements in the very limited, very quick time-frame provided to them, and there was absolutely no way that they were going to be able to continue providing services to women who needed those services without -- without -- they simply would have to close, and indeed they were denied a license, and now are unable to provide those -- those abortions at their facility under the licensing today.

So, it's clear that there's irreparable harm to them, there's irreparable harm to the women that they serve. For instance, just in the last couple of days -- and we've submitted this in our supplemental declaration of Doctor Hodes -- just in the last couple of days, he has been referred patients by referring physicians because of his expertise in this area where there were serious medical conditions for the woman or a medical anomaly for the fetus, in both of those instances, he has been unable to perform the abortions that the referring physician requested because these regulations are now in place. This has put these women in a position where they are unable to get the medical

treatment they need in the state of Kansas, and so, despite the -- despite the state's argument that this will heighten medical processes and medical procedures for women in Kansas, it in fact is denying women who very much need these services, the ability to access an abortion in Kansas, because they can't get them at Planned Parenthood, and Doctor Hodes and the referring physicians are unaware of any other abortion provider who can provide those services in the state of Kansas for women who have these kind of complications or these kind of fetal anomalies.

So, there is -- there -- you can quickly see that there is an undue burden both on the doctors and on the patients who are unable to access these procedures, even though they need them. In addition, it is clear that these regulations really were designed to make access to abortion more difficult in the state of Kansas.

Now, the state tries to argue that because they have granted Planned Parenthood a last minute license, that -- that there is adequate access, and there isn't a problem with the regulations, and they cite to the court the Greenville case, and say that regulations on facilities are okay, and basically imply that anything that the state wants to do, any kind of

regulations that the state wants to impose should not be unconstitutional.

We've cited to the case -- a case very similar to this in 2007 where Judge Smith in the Western District of Missouri, in examining some regulations very, very similar to those here, only those here are actually even more onerous and more burdensome than the ones that were being addressed by the court with the Missouri regulations, he did find that there was both a likelihood that it violated plaintiff's due process, and that it imposed an undue burden on both the doctors and the women with respect to the constitutionality of those regulations, and granted a preliminary injunction on that matter.

If you look at the regulations in the chart that we've provided, you can see that the regulations far exceed anything that is required for Kansas ambulatory surgical centers, for Kansas hospitals, and certainly, even the case that they cite, the Greenville versus South Carolina case, the regulations in those cases -- in that case, the physical regulations were far less stringent, far less onerous, far less specific and particular than we have here in the -- in the case of these temporary regulations with respect to Kansas.

So, there clearly is, we believe, a showing

of irreparable harm on behalf of the plaintiffs and the doctors and their patients, and that's balanced against any harm to the state in continuing things the way they are, continuing the status quo.

And we submit that there really is no -- no injury to the state whatsoever in continuing things the way they were. The facilities are all ready regulated. They're regulated like any other facility that provides surgical procedures at a doctor's office under the standards developed by the Kansas Board of Healing Arts. They have been in compliance with those standards, they've been performing procedures like this at their office for over 24 years. If the injunction is put in place, they will still be subject to those regulations by the board of healing arts, and still be subject to those inspections and still be subject to the high standards of medical care for women that those standards impose on all providers of surgical procedures in a doctor's office. This is -- this has been going on for eight years. They've had no issues with that. And they will continue to have that oversight by the Kansas Board of Healing Arts if this injunction is granted. So, there is really no detriment to the state.

On the other hand, the detriment to the doctors both in having to shut down that part of their

practice, to lose the revenue from that part of their practice, to lose patients, and in the patients themselves from their inability to access these services, is -- is very much impacted. And the fact that there's one abortion provider that's licensed in the state of Kansas is not sufficient to meet the needs of those women, and to in effect spirit away the undue burden, Doctors -- Doctor Hodes and Nauser perform some 25 percent of the abortions in the state of Kansas. It's -- it is really -- it's imaginary -- it's -- it's imaginary to presume that the women who otherwise were treated by them can simply go to Planned Parenthood just as it would be if -- as we said in our briefs, if there was only -- if you had three hospitals, and went down to one hospital, and said, well, that's fine, because everybody who went to the other two hospitals can just go to the first one. There simply isn't enough -- enough, there aren't enough providers, and there simply isn't the expertise at the Planned Parenthood facility for some of the more serious complications that Doctors Hodes and Nauser treat.

So, the fact that there's one -- one facility left in the state that's licensed does not take away either the -- does not take away the undue burden for -- for women who are seeking these procedures. So,

it's clear that there's irreparable harm to the doctors and to their patients. It's clear that there is not any sort of irreparable harm to the state. Status quo will be maintained. They'll be able to regulate these providers just as they have been doing, and in the -- they'll have -- they can go through the regular licensing process and -- and develop what happens there.

There's no medical emergency, no health emergency that mandates that these regulations have to go into effect on July 1st as they're currently drafted. There's no reason to believe that they should go into effect without waivers.

And there's -- then there's the public interests, and as we've just cited to the court, there's ample interest in the public in having these -- this facility open to the public so that they can obtain abortion procedures there. Abortion is a lawful procedure. And -- and these doctors are highly experienced doctors that provide sophisticated services to some women with the most serious complications that require abortions.

Finally, likelihood of success. Clearly, I don't see how there can be any question that there is -- that they're likely to prevail on their due process claim. And again, we would draw the court's attention

to Judge Smith's opinion in the Planned Parenthood case in the Western District of Missouri where he clearly found that there -- the same kind of thing, where there were no waivers implemented, very strict -- very strict physical plan requirements implemented with no opportunity for waivers and no ample time-frame to meet those, that that was an infringement on the plaintiff's due process, and that he believed it likely that -- that those statute -- those regulations would be unconstitutional under the due process clause.

Finally, there is the likelihood of success, the merits of undue burden, and it was -- as we've just outlined, there is an undue burden both to the plaintiff doctors and to plaintiffs seeking abortion in the state of Kansas if these regulations are not enjoined.

I'm going to turn my time over now to intervenors to -- to take a -- to explain to the court their position and how it might differ from ours, but we are respectfully asking this court to enter -- to enter injunctive relief, enjoining the licensing process and the temporary regulations currently promulgated under Senate Bill 36. Thank you.

MS. PILATE: Thank you, Your Honor. I will be fairly brief. I'd like to say at the outset that we would like to adopt and incorporate into our argument

all of the arguments so ably made by Miss Woody and her co-counsel both in their pleadings and in the oral argument. Your Honor, I'd like to say at the outset that my clients are concerned about the health and safety of women, but that's not what these regulations are about. If these regulations were about the health and safety of women, they might contain something to address the one part of the process where this very vulnerable population that my clinic serves might suffer some harm, which is between the parking lot and the front door. And it is during that passage when they suffer the screamers, the shouters, the hecklers who are saying things that I won't repeat. But when they make it to the clinic, that is their safe place. It is the parking lot to the front door that poses the risk, not the clinic. Your Honor, my client is the only provider in Wyandotte County. They serve a vulnerable under-served population that needs access to affordable services. These regulations, like so many decisions by governments, business, and other entities fall most heavily and burden the most poor women. The vast majority, between 90 and 95 percent of the people that my clinic serves are poor women. A good half, maybe a little bit more are African American and Latino. The Latino part is very important, because my clinic has

three bilingual staff members, and as far as I know, it is the only place where many members of the Latino population feel like they can communicate and feel comfortable. Our clinic does only first trimester abortions. It is set up to do a very simple, frankly, medical procedure that does not take much time. Many of the regulations are simply inapplicable to our clinic. And so, we would ask the court to take that into account as well. Your Honor, abortions have been safely performed in the building at 7th and Central for 21 years. The time line that has been set up in this case is absurd. The final regulations were received on June 20th, and compliance in full was expected by July 1st. Frankly, Your Honor, that would require the skills of a magician, and what my clinic has is a dedicated staff, a registered nurse, and a very dedicated physician. There are no magicians there. So, Your Honor, we respectfully request that you enter the emergency relief requested, and that these clinics and other providers are able to continue providing this very necessary service to the women of Kansas. Again, we don't believe this has anything to do with the health and safety. There has been no time to comply. My client desires to comply, frankly, and was denied even an inspection.

Your Honor, I will draw your attention to one fact that we are addressing rapidly. The statute requires the physician to have clinical privileges at a hospital within 30 miles. We anticipate that that issue is going to be resolved within days, perhaps within, you know, the next week or so. We've been working very hard on that. There has been no more need for our physician to have clinical privileges at a hospital than a dermatologist who treats teen-age acne, but we are complying with that, don't seek to litigate that, and do seek Your Honor's order as requested. Thank you.

THE COURT: At this time, Mr. Chanay, on behalf of -- Mr. Fabert?

MR. CHANAY: Mr. Fabert will be arguing.

THE COURT: Mr. Fabert.

MR. FABERT: Thank you, Your Honor. I want to distinguish here today the statute and the regulations. As I understand their motion and the argument, the challenge is to the regulations, but there is no challenge being made to the statute. I don't read the statute the same way the plaintiffs do. And I'm not sure I read the primary case that they rely on the same way either. We have a statute here whose most important provision is the Statute Seven that relates to the limitation on lawfully performed abortions. It starts

with an exemption for all true medical emergencies. If we have any women who are suffering from true medical emergency, those abortions can go forward unregulated without the requirement of the license for the facility. The statute creates a regimen of facilities licensing. That is different from the board of healing arts which has regulatory authority over physicians, and which regulates the conduct of the doctors. The facilities are going to have separate licensing, and separate oversight by the department of health and environment. And that's why it misses the point to talk about the extent to which the doctors are all ready subject to regulations by the board of healing arts. They always have been subject to regulation by the board of healing arts. They're going to continue to be subject to that regulation. Those regulations and that agency have nothing to do with overseeing the facilities. It just so happens, coincidentally, the plaintiffs in this case are both the physicians who perform the abortions and the owners of the facilities. That could be otherwise. We could have a circumstance where a new applicant for licensing does not have the coincidence where the physicians performing the abortion are also the owners and operators of the facility. The regulations that have to be adopted by the department of health and

environment have to address not just the specialized concerns of these plaintiffs, they have to also address the issue of any and all future applicant for licensing under the statute. We need sufficiently explicit, clear, understandable regulations that can be complied with not just by these individuals but also by all future applicants. We are, of course, caught coming and going between a potential objection that the regulations are too vague and objection that the regulations are too specific. If the regulations did not include definitions of what the facilities ought to look like, they would be challenged as unreasonably vague. Because the temporary regulations do specify what the facilities ought to look like, they're now challenged as being too specific. I think the fact that these plaintiffs are not pursuing their administrative remedies in front of the KDHE is proof that the real grievance here is against the statute, not against the regulations. There is no grievance that arises from the lack of sufficient time to comply with this statute. They do not want to comply with the statute ever. They do not want additional time to comply with the statute. They want to be permanently relieved of the obligation ever to comply with the statute. That is something the department of health and environment cannot do for them

under any circumstances.

There is no fair reading of this statute that would authorize the department of health and environment to create out of thin air a process for granting case by case exceptions and waivers. No such waiver provision has been included in the statute. And for that reason, you can't criticize KDHE for failing to grant waivers and exception. The ultimate question, because we are in US District Court and the state of Kansas is the defendant, is whether there is a constitutional violation, not merely is there an arguable harm that could be addressed in a court case. Court does not have jurisdiction to award tort damages under the Eleventh Amendment. We're here solely for injunctive relief consistent with the Eleventh Amendment, and the question is whether the state is acting unconstitutionally, enacting and enforcing this statute.

Now, as I read the Planned Parenthood versus Drummond case, the Missouri case that's been relied on, Judge Smith specifically held that he believed those plaintiffs would fail in their facial challenge to the statute. That statute required all abortion providers in the state of Missouri to comply with the standard for ambulatory surgical centers. I'm looking at the

September 24, 2007 decision in that case, 2007 Westlaw 2811407. The fourth page of that opinion states, the court holds that PPK does not have a probability of success of establishing these facial claims. It goes on further to say, for plaintiffs to succeed, the court would have to determine the statute, and intended regulations cannot be justified as a legitimate health or safety measure. The court does not believe plaintiffs will carry their heavy burden. Further into that opinion, the judge pointed out that it is reasonable to have regulations that require all facilities where surgery is performed to abide by the same regulations. What we're really here today about is an argument that these plaintiffs are entitled to a grandfather provision that is not in the statute, that they are constitutionally entitled to a grandfather provision that tells them that they are never, ever going to be required to comply with current law, that the law cannot be updated in any way that would restrict their ability to keep performing their day to day activities in the way they've been accustomed to. Kansas law has never recognized a right protected by law to perform medicine the way these plaintiffs have been performing it. To the extent they've been lawfully performing it, that's been primarily as a result of

judicial decisions that restrict past statutes that made abortion illegal. We don't have a protected property interest here in the business that these plaintiffs are engaging in. They do not have existing licenses that tell them that they have a -- a state guaranteed right to engage in the business of providing abortions. The state of Kansas does have the right to regulate abortions. Judge Smith noted that in his decision.

The only question is whether they're going to regulate abortions under a uniform rule applicable both to these plaintiffs and to ambulatory surgical centers, or whether instead, this court is going to compel the state to create exceptions that apply only to these plaintiffs and to no one else, to let them operate the way they want to, free of all oversight and regulation of the way their facilities are structured, maintained and operated.

The standard for a temporary injunction, the standard for temporary restraining order require there to be a finding of irreparable harm, not just some harm, but irreparable harm. The statute says that all medical emergencies can go forward unlicensed. Statute also says that unlicensed facilities can perform five first trimester abortions every month without transgressing the regulations or the statute. I think I have a

different idea of what irreparable harm is than the plaintiffs have put forward. It is not enough to show that there is some harm. The harm must be a harm that cannot be remedied in any other way other than the issuance of the temporary restraining order, and that simply is not true in this case.

We cited the court to the case of State, ex rel, Schneider versus Liggett. One of the key holdings of that case from 1976 was the Kansas administrative agencies have no jurisdiction to decide constitutional challenges. The constitutional challenges must be brought for the first time when an administrative case has first been transferred to the district court on appeal. That's what ought to be done in this case. These plaintiffs should proceed to exhaust their administrative remedies, and then if they don't get a license, they should appeal to the district court. The district court can then entertain their constitutional challenges and decide whether this statute needs to have a grandfather clause read into it in order to comply with due process. KDHE cannot do that for them. It lacks the authority to do it.

I have never heard of a regulated industry being granted a due process right to craft the regulations that apply to them, which is what I see in

the motion, that due process would require that these regulations actually result from a meet and confer of some kind with the regulated businesses. That is not my understanding of due process. Due process comes when the protected interest, whether it's the liberty interest or property interest, is threatened, or the government takes action, the government affords due process at that time.

The government does not afford due process to everyone by inviting their lobbyists into the legislative process. That is not where due process applies. Likewise, due process does not mandate that there be a -- a prior comment period before a regulation is made effective. I see no evidence whatever to support the contention that either the statute or the regulation was designed to make access more difficult. In fact, the reply brief that was filed today agrees with my own reading of the statute that the real purpose is to try to bring all abortion clinics under a single standard of professionalism, that being the standard of professionalism historically present in ambulatory surgical centers. If there is no medical emergency in this case, there is no irreparable harm. If there were a true medical emergency, the statute would not even apply.

This statute, these regulations, have nothing whatever to do with abortion protesters at all. The fact that this statute does not address that completely distinct and separate subject has nothing to do with the lawfulness of these regulations. I think if the purpose here is to avoid any potential risk of prosecution for violation of the statute, we're probably missing at least one party. That would, I assume, be the prosecutor in Wyandotte County. But again, I don't really think that that's why we're here today. What we're here today is to address whether the department of health and environment ought to be restrained and prevented from going forward with the administrative process of hearing the administrative appeal from denial of the application for permits. I think that would be a mistake. I think it would be an unnecessary complication in the procedural posture of this case. I think the right thing to do is not to restrain the department of health and environment, to go ahead and have the appeals prosecuted in the normal course so that we can see what the outcome of those administrative appeals are. Then whichever party feels aggrieved by the outcome of the administrative appeal can pursue additional relief in the district court, presumably the District Court of Shawnee County, and at that time,

constitutional challenges to the interpretation and application of the statute can properly be raised, and the court can hear what a Kansas judge thinks this statute really means.

If I read the -- the factual materials correctly, I think the witnesses that are being offered in support of this motion are in agreement with me. If I read the contractor's affidavit, it's the first attachment, the contractor says he's looked at the regulations, and they -- he says these regulations appear to him to be perfectly ordinary and normal requirements for an ambulatory surgical center. He said, that's right. That's -- that means they've done their job correctly. The purpose of the regulations is essentially to bring into alignment the practice in individual doctor's offices with the practice in ambulatory surgical centers, that that's the level of health care that the legislature of the state wants to see afforded in every abortion facility operating in this state. To the extent that is inconsistent with operating a comparatively small doctor's office, that grievance would have to be taken up with the Kansas legislature, not with the department of health and environment.

There is no way for the KDHE to draft and

adopt regulations that carry out the orders of the Kansas legislature without having substantially what these regulations say. If there is any wiggle room there, I'm sure that all the proceedings in this case will be taken into account in drafting any changes of the permanent regulations that will take the place of the temporary regulation. But the notion that this is somehow a facially obvious due process violation, I think is clearly erroneous. There is not a single case that has been offered up here that holds that this kind of statute and these regulations, regulations similar to this, are due process violations. I might point out that what the Planned Parenthood case really held was that to the extent non-surgical abortions were being performed in one of those plaintiffs' facilities, those would not appropriately be subject to the same rules and regulations as the -- the rules applicable to surgical facilities. But in the course of that holding, Judge Smith specifically included that everyone who performs surgical abortions deserves to be subjected to the same rules and regulations as every other surgical facility in the state of Missouri.

I don't know how that case can be cited for the proposition that there is some sort of property right in continuing to operate a private medical office

that falls far short of the requirements of an ambulatory surgical center as an abortion facility. We have a lot of speculation about patients who might or might not be allowed to go to the place they would prefer to go for their abortion.

I am not aware of any irreparable harm that is suffered by being required to go to an ambulatory surgical center rather than going to a doctor's office for an abortion. I do not know that one facility is any more subject to the potential for screaming protesters as opposed to the other.

The standard in the Tenth Circuit for the issuance of temporary restraining order is plain, and it is what we've cited the court to, the Aid for Women case from 1996. It is not enough to just say that some privacy interest is implicated in the enforcement of the statute. Considerably more detailed showing is required before the TRO can be issued by a US District Court here in the state of Kansas, unlike apparently, the standard they're applying in Missouri.

We think it would be a mistake to bring to a halt the administrative process at the state level. We think it's extremely important that this administrative process be allowed to play itself out. I am aware of no threat of prosecution of any of these plaintiffs. We

have nothing from any of the interested prosecutorial agencies suggesting that they're waiting to swoop down on someone, close their building, arrest them and throw them in jail. Kansas courts are perfectly competent to address due process concerns. If there really are grandfather clause concerns under the statute, they can be addressed by the Shawnee County District Court. They don't have to be addressed first and foremost here in this court.

Without a fully developed administrative record, we will never know whether either of the facilities operated by these plaintiffs has any hope ever of being licensed consistent with the statute and the regulations. They have outlined what they consider the reasons that they think would probably impose a burden on them in seeking to be licensed, but we will never know until we've seen the entire administrative record filled out whether the real reason they don't have a license issued, assuming there is no license issued, is because they didn't have enough time, or whether instead, their grievance is that no matter how much time they're allowed, they have no intention of complying with the statute.

I'd like to see this case resolved in as expeditious and final a way as possible, I think it

would be a mistake to shut down the administrative process prematurely, and that's why I think that because there is no threat of eminent enforcement, no one is being threatened with going to jail, medical emergencies are all ready addressed in the statute, we do not have any reason to believe that irreparable harm will follow if we let the administrative process play out, that that's the right course. And if expedited hearings are needed, all plaintiffs need do is ask for them. We have a highly cooperative office of administrative hearings, and we can do what it takes to get the issues resolved as quickly as possible, and then come back to this court, if necessary, with a fully developed administrative record. Thank you.

THE COURT: Court had given 30 minutes per side. In light of the time that we've used, I am going to ask the parties if they wish, they can respond to each other's arguments at this time. Give you some additional time. Five minutes.

MS. WOODY: Sure. Your Honor, I just want to address a couple of things that Mr. Fabert mentioned. First of all, the defendants cannot prevail in this case by mischaracterizing the plaintiff's claims. This is not a facial challenge to the statute. This is an as applied statute to the -- the particular way the KDHE

has implemented the licensing provisions of the act and the temporary regulations as adopted. Secondly, Mr. Fabert argues that there's no irreparable harm to patients because they can simply choose another abortion facility or they can get a medical emergency exception, and implies somehow that the two women that we discussed in the first part of the argument could somehow get some kind of a waiver in that respect. But if you look at the statute, it says only where there's -- the woman is in danger of eminent death or impairment of a major bodily function could she get a waiver for an emergency abortion.

In this instance, these abortions are medically indicated, but would not fall within the definition of the regulations, and therefore, would not be able to -- she would not able to get an abortion -- would not be able to get an abortion on a medical emergency basis.

I want to take issue with the idea that the board of healing arts does not regulate the facilities. As the court looks at the chart that we've given the court, clearly it does. That's the reason for the inspections coming out. If you look at the -- for instance, at the issue of procedure room size, you can see that the procedure room size is spoken to in the

Kansas regulations for office space surgery. It is, of course, not nearly as stringent as the 150 square feet requirement that's in the -- the temporary regulations, but nor is that as stringent as -- nor is the one for hospitals as stringent. There's nothing about that regulation that is appropriate in this case, and there's nothing that would mandate such a regulation in light of the other regulations specifically for office space surgeries.

With respect to the argument that there's no due process argument here, and that we should go through the administrative route, it is the court's obligation to address the constitutional issues under due process. The idea that the plaintiffs here are seeking some special treatment is not -- is not true. Here you have regulations that were adopted that gave the providers nine days to come in compliance with regulations that would have totally meant total remodeling of their facilities. There is no due process in that. The regular -- the regular procedure for adopting regulations, with public comment going forward with that, and then having permanent regulations entered at some time in the future, that's the regulations that we are asking the court to have the Kansas -- the state of Kansas follow, not that they adopt some temporary

regulations that in effect shut these folks down.

There is irreparable harm to the doctors. If you look at Judge Smith's opinion, he clearly says that because of the Eleventh Amendment, as it's stated -- as stated, they don't have an opportunity to come in here for tort damages. So, for instance, any lost revenues to the -- to the doctors are irreparable harm because they can never recoup those while they go through the administrative procedures that the state is talking about. So, clearly there is irreparable harm there. There clearly is irreparable harm to women seeking abortions and access to abortions in this state by way of the temporary regulations. And as we've said, there is absolutely no reason for the court to let them -- to not give injunction in this case and let the case go forward, if there is any other information the court needs, that it will be developed throughout -- throughout this procedure, it's clear, and plaintiff stated in their brief, this court has discretion to enter injunctive relief when it's appropriate. If ever there was a case where injunctive relief is appropriate, where the state should be restrained from enforcing these temporary regulations in nine days when it's impossible for the plaintiffs to comply, this is such a case. If you look at Judge Smith's opinion, it doesn't

say what the state said. There, he found that the same kinds of regulations, the same kinds of restrictions, because they didn't provide for ámple time for the plaintiffs to comply and because they didn't provide for an opportunity for them to seek waivers, likely would be unconstitutional.

There's no difference between the regulations at issue here and those that were at issue in front of the Western District of Missouri with respect to the -- the constitutionality of those -- those issues.

Clearly, we believe that there is likelihood of success on both the due process and the undue burden issues, and we respectfully request that the court grant injunctive relief.

THE COURT: Mr. Fabert?

MR. FABERT: Well, I just want to address this notion that we are mischaracterizing the relief that was being requested here. Umm, the relief that's being requested here is permanent, permanent, non-enforcement of the statute. Plaintiffs are not asking for a schedule, for a reasonable length of time for the KDHE to tell them exactly what they need to do to come into compliance and to get licenses. They have made it very plain that the reason they consider their

harm to be irreparable is the fact that they cannot under any reasonable circumstances comply with any anticipated version of the regulations. This nine day argument is, therefore, a red herring. We could have given them nine months, and their objection would be identical.

They do not care how much time they're allowed. They do not want to come into compliance ever. They want this court to tell them they don't ever have to remodel their facilities to make them look more like an ambulatory surgical center.

The only reason -- the only reason damages are not available is because these plaintiffs have chosen the forum of US District Court. If they thought they needed a money damages remedy, all they needed to do was to start the proceedings in state court, because there is no Eleventh Amendment immunity in state court. It is their decision to choose this forum of limited jurisdiction that limits the extent of their remedy, not anything the state has done.

Once more, if the issue is the regulations and the behavior of the Kansas Department of Health and Environment, there can be no criticism of their conduct. It is not due process for them to overstep the authority entrusted them by the legislature of the state of

Kansas. They have no power to grant waivers. They have no power to grant grandfather clauses. They have no power to entertain constitutional challenges to this statute. Only the District Court of Shawnee County can entertain the constitutional challenges in the first instance. That is what needs to occur here to give these plaintiffs all the remedy that they're entitled to, and the sooner we reach that point, then they will get all the remedy the law will ever allow them. Thank you.

THE COURT: What the court would like to do at this time is then -- appreciate the parties accommodating the court's schedule -- if I could take a recess to consider the arguments that have been made this afternoon, and then return and give you the court's ruling. Thank you.

(Whereupon court took a recess. Proceedings then continued as follows:)

THE COURT: We're back on the record. I want to thank the parties, counsel, for again accommodating the court in regards to our schedule for this afternoon, and also in regards to the expedited briefing that the court made a request of the parties. So, thank you for that. As I begin with the court's ruling, I will mention this for the record. We're at a

very early stage of these proceedings. The record has not been fully developed, and what is before the court is a request for preliminary relief. The court has reviewed the briefs, the evidence, and the relevant law. Court has heard the parties' arguments, and again, is now prepared to rule. I'd ask the parties to follow along. This will take me a little while here to get through.

To begin with, because defendants had notice of this hearing, filed written arguments and authorities regarding their position and are present, the court will consider plaintiff's motion which was entitled motion for a temporary restraining order and/or preliminary injunction, the court will consider it as one for a preliminary injunction.

The purpose of a preliminary injunction is to maintain the status quo pending the outcome of the case. Plaintiffs as the parties seeking the preliminary injunction bear the burden to establish, number one, a substantial likelihood of prevailing on the merits. Number two, irreparable harm unless the injunction is issued. Number three, the threatened injury outweighs the harm that the injunction may cause the opposing party. And number four, an injunction, if issued, will not adversely affect the public interest.

First, the court looks at the likelihood that plaintiffs will succeed on the merits of their claims. Plaintiffs base their injunction request on their claims that defendants violated plaintiffs' procedural and substantive due process rights and their patient's right to privacy. To succeed on the procedural due process claim under the Fourteenth Amendment, plaintiffs must establish that they possessed a protected interest such that the due process protections were applicable. If they make such showing, then they must show that they were not afforded an appropriate level of process. It's a case of Farthing versus City of Shawnee at 39 Fed 3rd 1131, an 1135, a Tenth Circuit case from 1994. Plaintiffs argue they have a property and liberty interest in the continued operation of their medical practice. The right to pursue a lawful business has long been recognized as a property right within the protection of the Fourteenth Amendment. Plaintiffs have provided evidence that their medical practice has been in operation, that they have been providing abortion services for approximately 24 years. Based on the record presented, it appears plaintiffs have a protected interest in maintaining their business. Procedural due process requires notice and a pre-deprivation hearing before property interests

are negatively affected by governmental actors. At this stage of the litigation, plaintiffs have also provided the court with evidence to suggest that defendants did not afford them an appropriate level of process implementing the temporary regulations and licensing process. On the record presented, it appears defendants failed to provide plaintiffs with, arguably, any process, let alone adequate process. According to the record presented, plaintiffs wrote to KDHE regarding the act on May 17th, 2011, the day after the act was enacted. KDHE responded on May 26th, informing plaintiffs that the new regulations and licenses would become effective July 1st, which is today's date. Plaintiffs did not receive regulations until June 9th when they were given until Friday, June 17th to become familiar with the regulations, confirm compliance, and apply for a license. After the close of business on June 17th, KDHE sent plaintiffs a copy of the final temporary regulations and licensing process. These regulations imposed more, arguably, onerous requirements than the June 9th draft regulations. Plaintiffs asked for waivers, but were told no waivers would be given. There's no evidence in the record that plaintiffs were provided a meaningful notice or opportunity to be heard or give comment on the regulations. In addition to

guaranteeing fair procedures, the due process clause of the Fourteenth Amendment, quote, covers a substantive sphere as well, barring certain government actions, regardless of the fairness of the procedures used to implement them, end quote, case of Diaz versus City and County of Denver at 567 Fed 3rd 1169, at 1181, a Tenth Circuit case from 2009 which is quoting County of Sacramento versus Lewis at 523 U S 833 at 845, 1998 Supreme Court case. In this case, the legislative enactment is required to bear a rational relation to the legitimate government interest. Plaintiffs argue the temporary regulations and licensing process requirements are medically unnecessary, unattainable and harmful to public health. Plaintiffs further argue that defendants have violated their substantive due process rights by implementing the requirements in a manner that prohibits plaintiffs from continuing to provide abortion services unless they meet onerous standards on a short amount of time. Plaintiffs contend number one, there's no medical need for the physical facility requirements; number two, it's impossible for them to comply with the physical facility requirements in time to obtain a license before the effective date of the act; number three, the physical facility requirements directly undermine public health by substantially impeding access to a lawful and

necessary medical procedure. Through affidavits, plaintiffs have presented evidence that the temporary regulations and licensing process requirements regarding the physical facilities where abortion services are performed are unique to those facilities, that the regulations for facilities to handle more complex and riskier procedures like hospitals do not contain physical facility requirements as strict and/or onerous as the temporary regulations and licensing process, and that the temporary regulations and licensing process physical facility requirements are not medically necessary. Defendants have not presented evidence that the additional requirements for the facilities where abortion services are provided are rationally related to a legitimate governmental interest. The evidence presented to the court is sufficient at this early stage of the proceedings to show a likelihood that plaintiffs will succeed on the merits of their due process claims. Because the court has found that plaintiffs have shown a likelihood that they will succeed on the merits of their due process claims, the court need not address plaintiff's right to privacy claim.

The court next considers whether plaintiffs will suffer irreparable harm if the court denies a preliminary injunction. The irreparable harm

requirement is satisfied if plaintiff shows a significant risk that it will experience harm that cannot be compensated after the fact by monetary damages. Irreparable harm can occur through loss of customer or good will as well as threats to a business's viability. Here, plaintiffs argue that absent an injunction, defendants will enforce the temporary regulations and licensing process immediately, harming plaintiffs by number one, forcing them to shut down their ongoing abortion services; number two, subjecting them to loss of revenues; number three, subjecting them to loss of future patients; and number four, damaging the professional standing. Plaintiffs also allege, in the absence of the requested injunction, their patients will be exposed to unnecessary health risks. The Kansas women will be unable to obtain abortion services in the state and/or in a private medical office setting, and public health will be threatened. Yesterday, KDHE issued a one year license to Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, one of only two other facilities in Kansas that provides abortion services. Defendants argue that because Planned Parenthood was licensed, women will still be able to obtain abortion services in Kansas. They also argue that plaintiffs can seek to get a license to

perform abortion services at another facility. Thus, the defendants argue, the only remaining harm of plaintiffs is the speculative harm that plaintiffs will lose revenue and future clients, receive damage to the professional standing, and that there will be a threat to public health. Plaintiffs presented evidence that without an injunction, they would have to cease providing medical services today. KDHE informed plaintiffs this morning that they would be denied a license. They have patients scheduled to receive these services within the next week. According to the affidavit submitted, these services are often medically necessary, and a delay in the services creates a health risk for patients. There is evidence in the record of at least two women with fetal anomalies and serious medical complications that will suffer irreparable harm if an injunction is not issued. At least one of the plaintiffs performs 25 percent of these services in the state of Kansas. One plaintiff has been licensed, but the record indicates that that clinic does not have the specific expertise of plaintiffs Hodes and Nauser in performing certain complicated procedures, and is unlikely to be able to absorb the patients of both plaintiffs in the manner that will address the health concerns involved with dealing with delaying the

services to patients. There's also evidence that plaintiffs will lose revenue through future clients, and good will, and suffer harm to their professional reputation if they are forced to stop providing legal medical services. Based on the record presented, the court finds that plaintiffs have sufficiently shown that they will suffer irreparable harm unless a temporary restraining order is issued.

Next, the court looks at whether the threatened injury outweighs the harm that the temporary restraining order may cause defendants. If the court were to issue the requested orders, defendants would be prohibited, at least temporarily, from enforcing the temporary regulations and licensing process. There's no evidence that an injunction will impose any affirmative obligations, administrative burden or cost to defendants. The delay in enforcing the state's laws that might result from an injunction is not as great as the threatened harm to plaintiffs and their patients. An injunction would not prevent the regulation of plaintiff's medical services entirely. Plaintiffs would remain subject to existing regulatory requirements and government oversight. Any delay or interruption from the issuance of an injunction will be temporary pending the resolution of this action. The court finds that the

significance, certainty and reparability of the threatened harm outweigh any potential harm to defendants.

Finally, court will consider whether the injunction, if issued, would adversely affect the public interest. This action involves access to and regulation of medical services that directly affect the public interest. Although regulation of medical services is a recognizable public interest that would be affected by issuing the requested injunction, the court believes that the public's interest lies in preserving the status quo pending resolution of this case. As the court mentioned, if an injunction is issued, plaintiffs would remain subject to the existing regulatory requirements and government oversight. The court finds that restraining action on the temporary regulations and licensing process until the merits of this action can be resolved would not adversely affect the public interest. As a result of considering these factors, the court finds plaintiffs have established entitlement to the requested preliminary injunction. Plaintiff's motion is granted. Defendants and their agents and successors and office are temporarily restrained from enforcing the licensing requirements of Senate Bill Number 36, 2011 bill, at Sections 2, 8 -- 2 and 8, and also enforcing

the temporary regulations and licensing procedures until a resolution of this action.

I would direct the parties to, in light of the court's ruling, contact the magistrate judge assigned to this case to request that a scheduling order regarding this case be set as soon as possible. Based on the court's ruling, at this time, is there any request or argument for a bond to be issued?

MR. FABERT: If it please the court, I think Federal Rule 65 C makes a posting of some bond mandatory, and there is no discretion to completely waive and dispense with the posting of a security bond.

THE COURT: Is there a request for a bond amount?

MR. FABERT: Umm, we think a nominal figure of $25,000 would be sufficient.

THE COURT: In regards to your statement that the bond is mandatory, is that based on your reading of the rule or some other source?

MR. FABERT: I think the language of the rule states the court may issue a preliminary injunction or a temporary restraining order only if the movant -- if the movant gives surety in an amount that the court considers proper. And so, the black letter language of the rule, I think, makes it obligatory to impose some

requirement on the security bond.

THE COURT: Thank you. Plaintiffs want to be heard in regards to a request that a bond be set at this time?

MS. WOODY: Yes, Your Honor. It's plaintiff's position that Rule 65 provides the court with discretion as to whether or not to enter a bond. Based on the court's finding that there is no affirmative action required by the state in this matter, and no damages -- that there would be no damages to the state from proceeding under the injunction, and as I believe that injunctions of this nature have been granted without bond as evidenced by the case that we have cited to you, which is Judge Smith in the Western District granted an injunction without a bond, and we would draw the court's attention to the Tenth Circuit case of Coquina Oil Corp versus Transwestern Pipeline Company, there's no bond necessary absent the proof of showing of likelihood of harm to the state.

THE COURT: Anything else?

MS. WOODY: No.

MR. FABERT: I don't believe so.

THE COURT: In regards to the rule, the rule has the language that you've put on the record, Mr. Fabert. I would tell you that courts have actually

weighed in, in regards to that language. I refer the record to a case of RoDa Drilling Company versus Siegal at 552 Fed 3rd 1203, at 1215, a Tenth Circuit case from 2009, noting wide latitude of trial courts in determining whether to require a bond, despite what appears to be the plain reading of the rule. It appears to be something which this court has discretion based on the court's interpretation of the rule. Again, the court made its ruling. I believe in good faith the state has asked for a bond to be imposed. At this time, again, it's an early stage of these proceedings. The record's not fully developed. The court under these circumstances does not believe that a bond should be required. I don't believe that there's been a sufficient showing of likelihood of harm by the court not issuing the bond. Bond request has been considered by the court. At this time, at this hearing, that request is denied. If there's nothing else from the parties, this hearing's adjourned. Thank you.

MR. CHANAY: I'm sorry, Your Honor, I just had one question. Is the state free to continue under process of developing its permanent regulations by taking evidence from the public and comment on the regulations as they have intended for the -- for the permanent application? I would certainly understand

your ruling to keep them from implementing them, but may they at least continue on in the development process and taking public comment and information for those regulations?

THE COURT: I don't know if I need to hear from plaintiffs in regards to that, because I would find the plaintiffs have specifically addressed what relief they were requesting. I don't think the relief the court has granted in any way would interrupt or interfere with that part of the process from continuing.

MR. CHANAY: All right. Very good.

THE COURT: Anything else?

MR. CHANAY: No, Your Honor.

THE COURT: If there's nothing else, this hearing's adjourned. Thank you.

(Whereupon court recessed proceedings.)

C E R T I F I C A T E

I, Nancy Moroney Wiss, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 52 typewritten pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED July 12, 2011.

S/ Nancy Moroney Wiss

Nancy Moroney Wiss, CSR, CM, FCRR