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. A2100870 Judge Alison Hatheway

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF SECOND MOTION FOR PRELIMINARY INJUNCTION

State Defendants put forth no evidence to dispute Plaintiffs' extensive proof that Am.S.B. No. 27, 2020 Ohio Laws File 77 ("SB27") will devastate abortion access in Ohio: SB27's requirements will substantially increase the burdens patients face in accessing procedural (sometimes called surgical) abortions, leading them to be significantly delayed or prevented entirely from obtaining this essential health care, and will impose stigma and psychological harm on providers and patients alike. Instead, State Defendants rely on meritless threshold issues and inapplicable legal standards to claim that SB27's onerous mandates can be sustained. Under the analysis that actually applies to Plaintiffs' due-process and equal-protection claims, State Defendants bear the burden of proving that SB27 is narrowly tailored to further compelling state interests. This they do not attempt to do, and cannot do; and indeed, Plaintiffs' constitutional challenge would still be likely to succeed under a less protective standard. This Court should continue to enjoin Defendants from enforcing this harmful law.

ARGUMENT

I. Plaintiffs Have Standing To Assert Claims On Behalf Of Their Patients.

State Defendants claim Plaintiffs lack standing to challenge SB27 on their patients' behalf.[1] But as decades of precedent, and this Court itself, have confirmed, "[t]hird-party standing is available in Ohio courts in circumstances like these." *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148 (Apr. 19, 2021) ("PPSWO Telemedicine Op."), at 5; *see also June Med. Servs. L.L.C. v. Russo*, ___ U.S. ___, 140 S.Ct. 2103, 2118, 207 L.Ed.2d 566 (2020) (plurality opinion); *id.* at 2139 fn.4 (Roberts, C.J., concurring).

Indeed, the Ohio Supreme Court has stated that "[t]here may be, however, 'circumstances where it is necessary to grant a third party standing to assert the rights of another.'" *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49 ("PUC"), quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129–130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004); *see also, e.g.*, *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 95 (recognizing defendants may rely on "third-party standing to challenge on equal-protection grounds the exclusion of petit jurors on the basis of race or sex"), *cert. denied*, *sub nom. Madison v. Ohio*, ___ U.S. ___, 141 S.Ct. 2597, 209 L.Ed.2d 733 (2021) (mem.); *Cincinnati City School Dist. v. State Bd. of Edn.*, 113 Ohio App.3d 305, 314, 680 N.E.2d 106 (10th Dist.1996) (holding school district had third-party standing to assert equal-protection claims on behalf of its students); *compare Women's Med. Professional Corp. v. Voinovich*, 911 F.Supp. 1051, 1058 (S.D.Ohio 1995), citing *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion), *aff'd*, 130 F.3d 187 (6th Cir. 1997).

[1] State Defendants do not challenge Plaintiffs' standing to bring claims on their own behalf, however.

Further, a long line of federal precedent—which "this Court may look to by analogy," PPSWO Telemedicine Op. at 5–6—confirms that third-party standing is available both (1) to "abortion providers [who] invoke the rights of their actual or potential patients in challenges to abortion-related regulations," as well as (2) where "'enforcement of [a] challenged restriction against the litigant would result indirectly in the violation of third parties' rights,'" (Emphasis omitted.) *June Med. Servs.* at 2118–19 (plurality opinion), quoting *Kowalski* at 130; *see also id.* at 2139 fn.4 (Roberts, C.J., concurring) (joining plurality's third-party standing analysis); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881–87, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion); *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 440 fn.30, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), *overruled on other grounds by Casey* at 881–82; *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); *compare Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

State Defendants cite *PUC* for the proposition that third-party standing is appropriate "when a claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently close relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the claimant seeking relief." Defendants Ohio Dept. of Health, Director Bruce Vanderhoff, and State Medical Board of Ohio's Response in Opposition to Plaintiffs' Second Motion for a Preliminary Injunction ("Opp. Br.") at 7; *PUC* at ¶ 49. State Defendants do not dispute that Plaintiffs have satisfied the first two prongs. *See* Opp. Br. at 7. But they argue under the third prong that Plaintiffs' patients "did not choose to file suit, nor ha[ve] [they] even attempted to intervene

in this case, and nothing prohibited the third part[ies] from asserting [their] own claim." *Id.* (alterations in original), quoting *PUC* at ¶ 52.

But this argument ignores that Plaintiffs' claims on behalf of their patients fall within a well-established exception to this rule in Ohio courts, applicable where circumstances make it "necessary to grant a third party standing to assert the rights of another." *PUC*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, at ¶ 49, quoting *Kowalski*, 543 U.S. at 129–30, 125 S.Ct. 564, 160 L.Ed.2d 519. Indeed in *Kowalski*, the U.S. Supreme Court found that courts are "*quite forgiving with these criteria* in certain circumstances," including where, as here, "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." (Emphasis added.) 543 U.S. at 130, quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (citing, *inter alia*, *Bolton*, 410 U.S. at 179; *Griswold*, 381 U.S. at 481). As such, the three-factor test for third-party standing cited in *Kowalski* and *PUC* is deemed satisfied where the abortion provider plaintiffs would be subject to enforcement under the relevant regulation, which they challenge on behalf of their patients—a conclusion that the U.S. Supreme Court just affirmed in *June Medical Services*, 140 S.Ct. at 2118, 207 L.Ed.2d 566 (plurality opinion).

Nor can there be any doubt that abortion patients are hindered from asserting their own claims (if such a showing were required). As the U.S. Supreme Court has held,

> [f]or one thing, [a patient] may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual[]'s claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion, [their] right thereto will have been irrevocably lost. . . . And it may be that a class could be assembled, whose fluid membership always included some women with live claims. But if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician.

Singleton, 428 U.S. at 117–18, 96 S.Ct. 2868, 49 L.Ed.2d 826. State and federal courts across the country have allowed abortion providers to bring claims on behalf of their patients for decades, and this Court should do the same.

Finally, Defendants are incorrect in arguing that, if Plaintiffs lack third-party standing, this Court lacks subject-matter jurisdiction over Plaintiffs' claims on behalf of patients. Third-party standing is a prudential, not jurisdictional, consideration, even under federal law. *See, e.g.*, *June Med. Servs.*at 2117–20 (plurality opinion); *id.* at 2139 fn.4 (Roberts, C.J., concurring). And, unlike federal courts, Ohio courts may "dispense with the requirement for injury where the public interest so demands." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 470, 715 N.E.2d 1062 (1999).

II. Plaintiffs Properly Assert Their Claims For Violations of the Ohio Constitution.

State Defendants also argue that none of the constitutional provisions Plaintiffs cite "provide a cause of action for the Clinics' claims." Opp. Br. at 8. In effect, they claim that the Ohio Constitution provides constitutional rights to the Plaintiffs and their patients but leaves them without any effective remedy. As this Court—and countless others—have held, this is not the law in Ohio.

A. The Ohio Declaratory Judgment Act creates a cause of action to enforce constitutional rights and obtain declaratory and injunctive relief.

Despite having lost on this exact argument in front of this very Court last year, State Defendants "ignore the availability of relief under Ohio's Declaratory Judgment Act" ("DJA"). PPSWO Telemedicine Op. at 6 (citing R.C. 2721.03; *Pack v. City of Cleveland*, 1 Ohio St.3d 129, 438 N.E.2d 434 (1982), at paragraph one of the syllabus); *see also generally* Opp. Br. at 8–10. As this Court previously held, the DJA "provides a 'legislative enactment' on which Plaintiffs may rely to seek declaratory and injunctive relief for due-process and equal-protection violations[.]"

PPSWO Telemedicine Op. at 6; *see also State v. Williams*, 88 Ohio St.3d 513, 521, 728 N.E.2d 342 (2000); *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 45; *Riverside v. State*, 2d. Dist. Montgomery No. 26024, 2014-Ohio-1974, ¶ 30–38; R.C. 2721.09 ("[W]henever necessary or proper, a court of record may grant further relief based on a declaratory judgment or decree previously granted under this chapter."); R.C. 2727.02 (authorizing temporary injunctive relief).

Indeed, Ohio courts routinely hear due-process and equal-protection claims brought under the DJA. *See, e.g.*, *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (1988), paragraph one of the syllabus (holding in a case alleging state due-process violations that the "constitutionality of a zoning ordinance may be attacked" using "a declaratory judgment action pursuant to R.C. Chapter 2721"); *Stewart v. Woods Cove II, L.L.C.*, 2017-Ohio-8314, 99 N.E.3d 956, ¶ 7, 9, 23–24 (8th Dist.) (reversing dismissal order in state equal protection case seeking, inter alia, declaratory relief from tax lien statute); *Riverside* at ¶ 30–38 (recognizing that a litigant could seek declaratory and injunctive relief for violations of Ohio's equal protection guarantee through the DJA). This case is no different: The DJA provides a cause of action for Plaintiffs' claims, and State Defendants cite no authority to the contrary.[2]

[2] State Defendants weakly protest that neither *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, nor *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, "stands for the proposition the Clinics wish to establish—that the Clinics can sue under Article I, Sections 1, 16, and 21 without expressly bringing claims under 42 U.S.C. § 1983 and the federal Due Process Clause." Opp. Br. at 8, n.5 (citing Plaintiffs' Memorandum in Support of Second Motion for Preliminary Injunction ("Pls' Br.") at 18). But Plaintiffs cited those cases for a different proposition: that "[t]he Ohio Supreme Court has recognized that [Article I Section 16] protects substantive as well as procedural due process rights." Pls' Br. at 18 (citing *Stolz*, 155 Ohio St.3d at 567; *Arbino*, 116 Ohio St. at 468). State Defendants also cite *PDU*, Opp. Br. at 9, n.6, but, in that case, the plaintiffs sought damages. *PDU, Inc. v. City of Cleveland*, 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671, ¶ 14. Here, Plaintiffs instead are seeking declaratory and injunctive relief under the DJA.

B. Article I, Sections 1, 2, 16, and 21 of the Ohio Constitution are "sufficiently precise" so as to be self-executing and to provide a cause of action for Plaintiffs' claims.

Moreover, "[e]ven if the [DJA] did not supply a cause of action for the Plaintiffs to seek declaratory and injunctive relief," the Ohio Constitution's "guarantees of equal protection and substantive due process under Article I, Sections 1, 2, 16, 20, and 21 are self-executing because they are 'sufficiently precise . . . to provide clear guidance to courts with respect to their application.'" PPSWO Telemedicine Op. at 7, quoting *Williams* at 521; *see also Williams* at 521, citing *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 101 N.E.2d 289 (1951) (recognizing that a constitutional provision is not self-executing only where its language, when "duly construed, cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment").

First, Ohio courts—including this one—have held that the protections of Article I, Section 16's "due course of law" provision are sufficiently specific to apply to due-process claims under the Ohio Constitution, including because these protections are, at a minimum, coextensive with the federal constitutional due process right. *See, e.g.*, PPSWO Telemedicine Op. at 11; *In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 24–25; *Arbino* at ¶ 99–104. The cases cited by State Defendants do not help them. These cases hold that the *second* sentence of Article I, Section 16, addressing sovereign immunity—rather than due process—is not self-executing. *See* Opp Br. at 8–9; *see also, e.g.*, *Wiesenthal v. Wickersham*, 64 Ohio App. 124, 126–27, 28 N.E.2d 512 (2nd Dist.1940); *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 192, 194, 74 N.E.2d 82 (1947); *Krause v. State*, 31 Ohio St.2d 132, 132, 285 N.E.2d 736 (1972), paragraph three of the syllabus, *overruled on other grounds, Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St.2d 31, 426 N.E.2d 784 (1981); *Calvey v. Village of Walton Hills*,

N.D.Ohio No. 1:18 CV 2938, 2020 WL 224570, slip op. at *10–11 (Jan. 15, 2020), *aff'd on other grounds,* 841 Fed.Appx. 800 (6th Cir.2021). As such, these cases are inapplicable.

Second, although State Defendants, without any reasoning or analysis, argue that Article I, Section 21 is not self-executing, Opp. Br. at 9, Section 21 includes clear prohibitions on state action to protect freedom of choice in health care. *Third*, Ohio courts regularly enforce the Ohio Constitution's equal-protection guarantee in Article I, Section 2, by applying well-established legal standards. *See, e.g.*, *In the Matter of Adoption of Y.E.F.*, 163 Ohio St.3d 521, 2020-Ohio-6785, 171 N.E.3d 302, ¶ 15 (recognizing that "[t]he essence of the [Ohio and federal] Equal Protection Clauses 'require[s] that individuals be treated in a manner similar to others in like circumstances," quoting *McCrone v. Bank One Corp*., 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 6); *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 169, 545 N.E.2d 1256 (1989).

State Defendants cite non-binding decisions in *City of Columbus v. Sanders,* Delaware C.P. No. 10 CV C 05 0705, 2011 WL 7972398 (Jan. 13, 2011) and *Vagras v. Cimperman*, N.D.Ohio No. 1:04-cv-1002-LW, 2005 WL 8167592, *1 (July 7, 2005), for the proposition that an equal-protection claim cannot be asserted. Opp. Br. at 10. But, in both of those cases, the courts held that the provision was not self-executing "under the circumstances of [the] case" because the claimants had "fail[ed] to provide any case law which govern[ed] the type of claim asserted" there. *Sanders* (no counterclaim existed for violation of equal protection against plaintiff municipality as property owner, who had sued claimant for trespass); *Vagras* at *4 (no claim existed for selective enforcement in violation of equal protection). State Defendants also cite *Autumn Care*, but in that case, the complaint failed to "allege any injury or any punitive action taken by appellees," 2014-Ohio-5235, 22 N.E.3d 1105, ¶ 19 (5th Dist.). Here, by contrast, Plaintiffs have clearly alleged that

their claims are based on the State's intention to enforce SB27 against them and have fulsomely alleged how they would be injured by that enforcement. Plaintiffs properly bring claims under the Ohio Constitution and State Defendants' arguments to the contrary fail.

III. Plaintiffs Have a Substantial Likelihood of Success on Their Claims That SB27 Violates Their and Their Patients' Constitutional Rights.

A. Plaintiffs have a substantial likelihood of success on their claim that SB27 violates the Ohio Constitution's guarantee of due process.

As this Court has previously correctly held, the Ohio Constitution recognizes a fundamental right to privacy, bodily autonomy, and free choice in health care, including access to abortion. *See* PPSWO Telemedicine Op. at 10; Pls' Br. at 19–21. Under established Ohio law, strict scrutiny is the appropriate standard of constitutional review where a statute, like SB27, impinges on a fundamental right. *See, e.g.*, *In re Raheem L.*, 2013-Ohio-2423, 993 N.E.2d 455, ¶ 7 (1st Dist.). State Defendants make no effort to demonstrate that SB27 can survive the strict scrutiny standard, despite it being their burden to do so. Instead, they baselessly claim that the rational basis standard applies. State Defendants' arguments fail, and Plaintiffs are substantially likely to succeed on their due-process claim.

i. Strict scrutiny, not rational basis, applies to Plaintiffs' due process claim.

State Defendants argue that rational basis review applies because SB27 somehow "does not regulate abortion." Opp. Br. at 11. But SB27, on its face, applies to abortion providers who provide, and patients who obtain, procedural abortions. *See* R.C. 3726.02(A) ("Final disposition of fetal remains *from a surgical abortion at an abortion facility* shall be by cremation or interment." (Emphasis added.)). SB27 directly regulates how abortion providers must arrange for the disposition of tissue following a procedural abortion, and thereby imposes logistical, financial, and other burdens on abortion providers and their patients, as Plaintiffs have extensively detailed with evidence that State Defendants do not dispute. While State Defendants claim SB27 does not

regulate abortion because it "regulates the treatment of fetal remains *after* an abortion has taken place," (Emphasis sic.) Opp. Br. at 11, they cannot deny that abortion providers cannot provide procedural abortions without complying with SB27. State Defendants' argument that SB27 is not an abortion regulation is nonsensical.

State Defendants' argument mirrors one explicitly rejected in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir.2006). There, an abortion provider challenged an Ohio requirement that all ambulatory surgical facilities (not just abortion providers) "enter into a written transfer agreement with a [local] hospital in order to meet the requirements necessary to obtain a license." *Id.* at 598. The provider was unable to comply and therefore unable to continue providing abortions. *Id.* In the ensuing lawsuit, the defendant, the director of the Ohio Department of Health ("ODH"), argued that "*Casey*'s undue burden framework should not apply to this case, because 'this is not an abortion case'" but instead a "'challenge to a neutral regulation of general applicability,'" and that therefore "rational or intermediate basis review should apply." *Id.* at 603, quoting defendant's brief. The Sixth Circuit squarely rejected this argument, stating "[t]he generally applicable and neutral regulation in this case (the transfer agreement requirement) affects an abortion clinic, which is unable to satisfy the regulation's requirements." *Id*. Because abortion access was affected, the law applicable to abortion restrictions applied.[3] *Id.* Further, unlike the restriction in *Baird*, SB27 is not a "neutral regulation," since it *only* applies to abortion providers. Indeed, just last year this Court held that SB27 unconstitutionally burdens abortion access and

[3] State Defendants claim SB27 regulates clinics, "not patients," Opp. Br. at 11, but that was true in *Baird* as well, as well as in numerous cases where abortion providers have successfully challenged abortion restrictions on behalf of their patients. *See, e.g.*, *June Med. Servs.,* 140 S.Ct. at 2118–19, 207 L.Ed.2d 566 (plurality opinion); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016).

preliminarily enjoined Defendants from enforcing it. *See* Entry Granting Plaintiffs' Motion for Preliminary Injunction.

State Defendants next claim rational basis applies because there is no fundamental right to abortion under the Ohio Constitution, but they do not meaningfully engage with any of Plaintiffs' arguments. First, State Defendants ignore the numerous Ohio cases recognizing that the Ohio Constitution's Due Course clause is at least as protective of individual rights as the federal due process clause, including in the abortion context. *See* Pls' Br. at 19. Rational basis review would therefore be inapplicable to a due process challenge to abortion restrictions, even if the Ohio Constitution's protections were only coextensive with those of the federal constitution.[4]

But as Plaintiffs previously explained, the Ohio Constitution *does* provide greater protections for the right of patients to access abortion than the U.S. Constitution. The Ohio Supreme Court has already recognized a fundamental substantive due process right to privacy, procreation, bodily integrity, and bodily autonomy under the Ohio Constitution. *See* Pls' Br. at 19 (citing cases). That some of Plaintiffs' cited cases do not expressly refer to a right to "abortion," *see* Opp. Br. at 12 n.9, is irrelevant. These cases describe the scope of the Ohio Constitution's substantive due process guarantee in terms that necessarily encompass abortion. And State

[4] For this reason, State Defendants' repeated reliance on *Box* is inapposite. In that case, the U.S. Supreme Court applied the rational basis standard to evaluate a restriction on disposal of embryonic and fetal tissue, only after explicitly and repeatedly acknowledging that the plaintiff abortion providers did not raise a substantive due process claim on behalf of their patients. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, ___ U.S. ___, 139 S.Ct. 1780, 1781, 2014 L.Ed.2d 78 (2019) ("Respondents have never argued that Indiana's law creates an undue burden on a woman's right to obtain an abortion." (Citation omitted.)); *id.* at 1782. That is plainly not the case here, where Plaintiffs have asserted a violation of their patients' substantive due process rights. *See Hopkins v. Jegley*, 510 F.Supp.3d 638 (E.D.Ark.2021) (rejecting application of *Box* where plaintiffs challenged fetal tissue disposal law on substantive due process grounds on behalf of patients and preliminarily enjoining law), *appeal filed*, No. 21-1068 (8th.Cir.2021). *Box*'s application of rational basis review thus has no bearing on Plaintiffs' patients' substantive due-process claim here.

Defendants do not even address Plaintiffs' other arguments supporting broader protections under the Ohio Constitution than the U.S. Constitution. *See* Pls' Br. at 20 (explaining that textual differences between the due process provisions, together with the Ohio Constitution's Health Care Freedom Amendment, additionally support a finding that the Ohio Constitution provides greater protections).[5]

Because SB27 must be analyzed under the strict scrutiny standard, it can only survive if it is narrowly tailored to a compelling state interest. But State Defendants make no attempt to justify the law's onerous requirements under this standard. Nor could they. SB27 cannot advance any sufficient interest in "proper disposal" of embryonic and fetal tissue when Plaintiffs have been scrupulously following the applicable regulations on the disposal of medical waste, which have been in place for years. These regulations will still apply to tissue from other medical procedures even if Plaintiffs have to comply with SB27. This includes tissue from procedures providers use for management of miscarriage, which is *identical* to tissue from procedural abortion, and pre-implantation embryos collected for in vitro fertilization. *See* Pls' Br. Ex. 1, Second Affidavit of Sharon Liner, M.D. ("Liner Aff."), at ¶ 29 (explaining there is no medical or public health reason to dispose of tissue from a procedural abortion any differently from other medical waste). Moreover, incineration is generally the same process as cremation. Yet, State Defendants have articulated no rationale that can explain the differential treatment of fetal or embryonic tissue from

[5] State Defendants claim Article I, Section 21 is "not remotely applicable here" because it "prohibits compelling someone to participate in a health care system." Opp. Br. at 9. State Defendants focus only on section (A) of Article I, Section 21, and entirely ignore the provision that prohibits imposition of "a penalty or fine for the sale or purchase of health care," including imposition of "any civil or criminal" sanction "that is used to punish or discourage the exercise of rights protected" by the Amendment, which is directly applicable here. Ohio Constitution, Article I, Section 21(C), (E)(3); *see also* Pls' Br. at 20.

abortions and fetal or embryonic tissue from miscarriages (including those that are managed in medical facilities).

State Defendants also argue that "S.B. 27 ensures proper treatment of fetal remains and promotes respect for unborn life by requiring that fetal remains are disposed of in a 'dignified manner.'" Opp. Br. at 13, quoting R.C. 4717.271(A)(2); *see also id.* ("S.B. [27]'s key purposes are to honor the unborn and protect[] the dignity of human life." (internal quotation marks omitted)). But as noted above, the State does not require health care facilities to dispose of identical tissue after miscarriage and infertility treatments by cremation or interment, thus casting strong doubt on the State's motives. Rather than promoting respect for the "unborn," the State's decision to require the disposal methods typically reserved for human remains only for abortion patients seeks to shame and stigmatize abortion patients by forcing upon them, and them alone, the State's belief that life begins at conception—a belief that many of Plaintiffs' patients may not share, and one the State cannot compel upon them and justify under the guise of "dignity." *See, e.g.*, *In re Landis*, 5 Ohio App.3d 22, 23–24, 448 N.E.2d 845 (10th Dist.1982) (stating the Ohio Constitution "require[s] governmental neutrality in religious matters"); *see also Whole Woman's Health v. Hellerstedt*, 231 F.Supp.3d 218, 229 (W.D.Tex.2017) (striking down similar tissue disposal requirement because the State "appears to be inferentially establishing the beginning of human life as conception," which can undermine the constitutionally-protected interests at stake). Even if this Court finds there is a compelling state interest here, SB27 is not narrowly tailored to advance such an interest because it imposes more restrictions on the disposal of embryonic and fetal tissue than those regulating dead human bodies. *Compare* R.C. 3726.02(B) (requiring tissue be cremated at Ohio-licensed crematories) *and* Amended Complaint Ex. B, Ohio Adm.Code 3701-46-01(B)(1)(b) (stating abortion providers can only provide options for interment at Ohio-registered cemeteries)

with R.C. 3705.01(J) (stating human remains can be taken out of state for disposal, whether by interment, cremation, or otherwise).

Similarly, State Defendants make a half-hearted attempt to argue that SB27 furthers patients' "freedom to choose," Opp. Br. at 13, but, as Plaintiffs have explained, SB27 actually does the opposite. While patients were freely able to decide to cremate or inter tissue from a procedural abortion prior to SB27's enactment, the law restricts that choice by limiting disposition to *only* cremation or interment. For the many patients who do not wish to treat tissue from their procedural abortion like human bodies, for whom such treatment flies in the face of their strongly-held religious or moral beliefs, and who will be psychologically harmed by this requirement, this is no choice at all.

ii. SB27 fails even under a less protective standard.

Even if this Court does not apply strict scrutiny, the federal undue burden standard, and not rational basis, must apply. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) (explaining that, at a minimum, the Ohio Constitution is *at least* as protective of individual rights as the U.S. Constitution). State Defendants' attempts to argue that SB27 is not unduly burdensome fail.

State Defendants cite non-binding federal case law to claim that Chief Justice Roberts's concurring opinion in *June Medical Services v. Russo* sets forth the relevant undue burden standard. Opp. Br. at 14–15. But this Court has already recognized that Chief Justice Roberts' concurrence did not change the undue burden test as described in *Whole Woman's Health v. Hellerstedt*. This Court correctly held that under the federal undue burden standard, a court must "'consider the burdens a law imposes on abortion access together with the benefits those laws confer' and 'weigh[] the asserted benefits against the burdens.'" PPSWO Telemedicine Op. at 11,

quoting Whole Woman's Health, 136 S.Ct. at 2309, 2195 L.Ed.2d 665; *see also, e.g.*, *Capital Care Network of Toledo v. State Dept. of Health*, 2016-Ohio-5168, 58 N.E.3d 1207, ¶ 21, 29 (6th Dist.) (considering a federal constitutional claim involving the right to abortion and applying the balancing described in *Whole Woman's Health*), *rev'd on other grounds*, 153 Ohio St.3d 362, 2018-Ohio-440, 106 N.E.3d 1209; *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 991 F.3d 740 (7th Cir.2021) (holding *Whole Woman's Health* balancing test applies after *June Medical Services*), *petition for cert. docketed*, U.S. No. 20-1375 (Apr. 1, 2021). SB27 fails under the federal undue burden standard because its nonexistent benefits, *see* above at Section III(A)(i), are outweighed by its severe burdens, which State Defendants unsuccessfully try to minimize or ignore altogether.[6]

As Plaintiffs' extensive evidence demonstrates, SB27 will result in patients seeking procedural abortions being substantially burdened in obtaining that care, if they can obtain it at all. *See* Pls' Br. at 12–17, 25–26. SB27 will operate as an effective ban on procedural abortions before approximately 13 weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), when most patients obtain procedural abortions, and a complete ban on abortions between 10 and 13 weeks LMP. *Id.* at 12. Patients will be forced to delay their procedures until later in pregnancy, when abortion carries greater risks and is more expensive. *Id.* SB27 will also substantially increase the cost of obtaining an abortion, which many of Plaintiffs' patients will not be able to afford, and many will be forced to continue their pregnancies and give birth against their will. *Id.* at 12–14. And patients face a real risk that access to procedural abortion (and *all* abortions

[6] Even if this Court were to hold that Chief Justice Roberts's concurring opinion contains the relevant undue burden standard, Plaintiffs would still prevail because SB27 is not rationally related to a legitimate state interest, *see* above at Section III(A)(i), and it operates as a substantial obstacle to abortion for Plaintiffs' procedural abortion patients, as detailed below and in Plaintiffs' opening brief.

after 10 weeks LMP) will be suddenly cut off if the very few vendors who are willing to partner with the clinics decide that they can no longer do so because of anti-abortion pressure. *Id.* at 14; *see also Whole Woman's Health v. Smith*, 338 F.Supp.3d 606, 634 (W.D.Tex.2018) ("In sum, the challenged laws meaningfully inhibit women's access to pregnancy-related healthcare, especially abortion services, by requiring women's healthcare providers to use unreliable and nonviable waste disposal options."). In addition, the law will prevent abortion patients who are seeking to identify or convict a perpetrator of sexual assault or seeking to diagnose a medical condition from sending the tissue to a pathology or crime lab without providers risking violating SB27. Pls' Br. at 9. SB27's requirements reduce patient choice, and instead impose stigma and psychological harm. *Id.* at 16. And they force providers to violate bioethical principles, increase provider stigma, and otherwise irreparably harm Plaintiffs' physicians and staff. *Id.* at 17.

State Defendants do not seriously dispute these substantial harms.[7] Instead they state that these burdens are simply not sufficient to constitute a substantial obstacle—despite considerable precedent to the contrary. First, State Defendants callously claim that "some delay," Opp. Br. at 15, in obtaining an abortion is not sufficiently burdensome. This ignores the undisputed evidence that Plaintiffs' patients may be delayed for weeks—and will likely be pushed even later than 13 weeks LMP by the time they are able to receive care—at increased cost and risk to their health. Courts have repeatedly recognized that such burdens can be sufficient to invalidate abortion restrictions. *See, e.g.*, *June Med. Servs.*, 140 S.Ct. at 2129–30, 207 L.Ed.2d 566 (plurality opinion)

[7] As discussed below, *see* below at Section III(C), State Defendants assert that SB27 "makes clear" that all pregnancy tissue can be treated as fetal remains within the meaning of SB27, and for that reason (according to State Defendants) SB27 does not act as a practical ban on procedural abortion. Opp. Br. at 24. But, as detailed below, Plaintiffs should not be forced to rely on a mid-litigation assertion that is internally inconsistent with State Defendants' other arguments. At any rate, even if this assertion were sufficient, it does nothing to cure the other significant burdens imposed by SB27, including increased cost from cremating or interring tissue, nor does it remove the risk of access being cut off if vendors succumb to anti-abortion pressures.

(recognizing "longer waiting times," "increased crowding," and "delays," as cognizable burdens); *Pre-Term Cleveland v. Atty. Gen. of Ohio*, 6th Cir. No. 20-3365, 2020 WL 1673310, *2 (Apr. 6, 2020) (questioning whether the restriction at issue "deprives a woman of her right to an abortion during the optimal 15-week period during which the aspiration method can be performed"); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 918 (7th Cir.2015) (affirming injunction where law would delay access to abortion, causing some patients to need second-trimester abortions, "which are more expensive and present greater health risks"); *Am. College of Obstetricians & Gynecologists v. FDA*, 472 F.Supp.3d 183, 211 (D.Md.2020) ("courts have considered a range of relevant factors, including . . . additional costs associated with the abortion, the ability of abortion providers to keep up with patient demand, and other practical considerations in light of the reality on the ground"). And in contrast to State Defendants' unsupported statement that patients can "still obtain a surgical abortion well beyond the thirteenth week LMP," Opp. Br. at 16, Plaintiffs presented evidence that the law will prevent some patients from obtaining this care altogether, Pls' Br. at 12–14.

State Defendants fault Plaintiffs for not providing a "breakdown" of the increase in cost Plaintiffs' patients will face due to this law. Opp. Br. at 5. But Plaintiffs have asserted that SB27 will force them to raise the costs of abortion procedures both based on the cost of cremation or interment ($75–295)[8] and because of the increase in price of the abortion due to the delay patients will necessarily experience in obtaining care—increases in costs that could amount to hundreds of

[8] State Defendants mistakenly assert that Plaintiffs will face increases of $95 if they individually cremate the embryonic and fetal tissue from a procedural abortion. Opp. Br. at 5. But three of the five entity Plaintiffs have submitted evidence that they will face costs of $295 per embryo or fetus if they individually cremate tissue, because the crematory operators quoting lower prices do not have enough capacity to accommodate them. *See* Pls' Br. at 11–12.

dollars per patient.[9] Plaintiffs have further submitted undisputed evidence that, because most of their patients are poor or have low incomes and are often not able to have the cost of the procedure covered by insurance, *see* Pls' Br. Ex. 9, Affidavit of Carolette Norwood at ¶ 22, they will be severely burdened when faced with such increases in cost. These burdens include being further delayed in obtaining care at increased risk to their health, and that many will not be able to afford such increases and will be prevented from getting an abortion at all. *See* Pls' Br. at 12–14, 15–26; *see also Whole Woman's Health*, 136 S.Ct. at 2302, 2195 L.Ed.2d 665 (striking down restrictions that "erect a particularly high barrier for poor, rural, or disadvantaged women," quoting *Whole Woman's Health v. Lakey*, 46 F.Supp.3d 673, 683 (W.D.Tex.2014)). Plaintiffs have therefore easily demonstrated that SB27 fails under the federal undue burden standard and should be invalidated on this alternate ground.

B. Plaintiffs have a substantial likelihood of success on their claim that SB27 violates the Ohio Constitution's guarantee of equal protection.

State Defendants again make no attempt to grapple with the applicable analysis to determine whether SB27 violates Plaintiffs' and their patients' rights to equal protection under the Ohio Constitution. They claim that the strict scrutiny analysis should not apply, but their arguments do not hold water.

State Defendants first argue that because SB27 regulates abortion procedures, "the undue-burden test applies, and the equal-protection claims collapse into that analysis." Opp. Br. at 18. But Plaintiffs have brought constitutional claims under the Ohio Constitution, not the U.S.

[9] State Defendants claim "S.B. 27 generally requires clinics to cover the costs of cremation or interment." (Emphasis deleted.) Opp. Br. at 16. While SB27 states that "an abortion facility shall pay for and provide for the cremation or interment" of embryonic and fetal tissue, R.C. 3726.09(A), (and Plaintiffs will indeed have to contract with funeral directors and crematories to pay for disposal services in order to comply) the substantial increase in the cost of abortion procedures resulting from compliance—costing up to hundreds of thousands of dollars per provider—will necessarily result in an increase in the price of abortion.

Constitution. The Ohio Constitution provides distinct protections under the due course of law clause in Article I, Section 16 and the equal protection clause in Article I, Section 2. State Defendants point to no Ohio case law holding that an analysis of whether a regulation violates the equal protection provision "collapses" into the analysis of whether it violates a party's due process rights. Indeed, Ohio courts have applied distinct analyses under these two constitutional provisions. *See Morris v. Savoy*, 61 Ohio St.3d 684, 691–692, 576 N.E.2d 765 (1991) (holding Ohio statute imposing a medical malpractice cap was unconstitutional because it violated plaintiffs' due process—but not equal protection—rights); *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 319–20, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 45 (distinctly analyzing claims under due process and equal protection provisions).

And strict scrutiny must apply to this separate equal protection analysis because, as Plaintiffs have explained in their opening brief, SB27 burdens the exercise of fundamental rights of privacy, procreation, bodily integrity and autonomy, and freedom of choice in health care decision making, and because it expressly discriminates against a suspect class—women—and otherwise burdens them. *See* Pls' Br. at 27–28.

State Defendants claim that Plaintiffs' equal-protection claims are subject only to rational basis review because there is no constitutional right to perform abortions. Opp. Br. at 19. But a person's right to obtain an abortion is inextricably bound up with the doctor's ability to provide that care. *See* Pls' Br. at 19–20. And numerous courts have recognized as much even under federal law. *See Planned Parenthood Assn. of Utah v. Herbert*, 828 F.3d 1245, 1260 (10th Cir.2016) (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,'" 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)); *Planned Parenthood of Mid-Missouri & E. Kansas v. Dempsey*, 167 F.3d 458, 464 (8th Cir.1999); *Planned Parenthood of Cent. & N. Arizona v. Arizona*, 718 F.2d 938, 944 (9th Cir.1983); *Planned Parenthood of Cent. North Carolina v. Cansler*, 877 F.Supp.2d 310, 318 (M.D.N.C.2012).

Finally, State Defendants appear to argue that physicians who provide and patients who obtain procedural abortions are not similarly situated to those providing or obtaining other medical procedures. But they cannot succeed by relying solely on the *ipse dixit* that "abortion is unique." Opp. Br. at 19. State Defendants do not even attempt to explain why abortion providers performing, and patients obtaining, medical procedures *identical* to those performed or obtained in the context of miscarriages should be subject to onerous requirements, criminal penalties, and stigma when the doctors and patients providing and obtaining miscarriage care are not. The cases State Defendants cite do not help them. In fact, *Casey*'s plurality opinion asserted that abortion "is a unique act" in the context of emphasizing that the state *cannot* unduly restrict it. *See Casey*, 505 U.S. at 852, 112 S.Ct. 2791, 120 L.Ed.2d 674 (plurality opinion) ("Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.").[10]

[10] *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), also does not help State Defendants. There the U.S. Supreme Court recognized that "the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions," but asserted that "it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317–18. Because the restriction at issue in *Harris* related to government funding of certain abortion procedures, the Court held that it fell into the latter category and did not implicate the protected right to avoid government interference in the ability to access abortion, and that therefore the rational basis standard applied. *Id.* Here, however, SB27 undoubtedly interferes with patients' ability to access procedural abortion, as Plaintiffs' evidence demonstrates, and must be subject to higher scrutiny under the Ohio Constitution. The *Harris* Court went on to say that abortion is different from other medical procedures in that "the State has an important and legitimate interest

State Defendants make no effort to explain what compelling interest SB27 is narrowly tailored to further by imposing severe and unique restrictions on providers who perform and patients who obtain procedural abortions. *See* Pls' Br. at 29–30. SB27 violates Plaintiffs' and their patients' rights to equal protection under the Ohio Constitution even under the rational basis standard, *see* Pls' Br. at 30–31, and certainly cannot be upheld under strict scrutiny review.

C. Plaintiffs have a substantial likelihood of success on their claim that SB27 is unconstitutionally vague.

Plaintiffs have explained how several aspects of SB27 render it unconstitutionally vague. *See* Pls' Br. at 32–35. State Defendants' arguments to the contrary do nothing to demonstrate that SB27 provides "fair warning" to abortion providers on how to comply with the law so that they are not at risk of "arbitrary, capricious, and generally discriminatory enforcement," *State v. Tanner*, 15 Ohio St.3d 1, 3, 472 N.E.2d 689 (1984), or that they will not have to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked,'" *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), quoting *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Plaintiffs do not raise mere "potential complexit[ies]," Opp. Br. at 21, of the law and its implementing rules. Rather, SB27's impermissibly vague standards will result in substantial burdens to Plaintiffs and their patients. And because, as explained above, SB27 implicates a constitutionally-protected right, *see supra* Section III(A)(i), a "more stringent vagueness test" must be applied. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 85, *quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99, 102 S.Ct. 1186, 71 L.Ed.2d. 362 (1982).

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in protecting the potentiality of human life" and the restriction at issue was rationally related to that interest. *Id.* at 324 (internal quotation marks omitted). SB27 is again distinguishable, as it regulates the disposal of embryonic and fetal tissue at a point where there is no potential life.

First, State Defendants claim that SB27 "clearly" requires individual cremation, Opp. Br. at 21, but it is impossible to see how this is so. SB27 is silent on whether individual cremation is required or whether simultaneous cremation of multiple embryos or fetuses is permissible. Unable to point to any explicit language in the law or its implementing rules regarding the type of cremation permitted, State Defendants are left to argue that because SB27 defines each embryo or fetus as a "'separate product of human conception,'" it "necessarily" follows that each embryo or fetus must be cremated separately. Opp. Br. at 22, quoting R.C. 3726.01(C). But there is no requirement in the law that each "separate product of human conception" be cremated separately. And the fact that patients are required to fill out separate forms for each embryo or fetus indicating whether they want to inter or cremate the tissue has nothing to do with whether tissue that is designated to be cremated can later be cremated simultaneously. Finally, State Defendants claim individual cremation is required to further SB27's supposed purpose of "honor[ing] the unborn and protect[ing] the dignity of human life." Opp. Br. at 23 (internal quotation marks omitted). But it is unclear why a requirement of individual cremation follows from this purpose where incineration (the process currently used by Plaintiffs to dispose of embryonic and fetal tissue) is generally the same process as cremation and Ohio law permits simultaneous cremation of human bodies and body parts in some circumstances. *See* R.C. 4717.24(7).[11]

With SB27 silent on whether simultaneous cremation is permissible, Plaintiffs and their vendors examined pre-existing Ohio crematory regulations for guidance—regulations State

[11] Nothing in pre-existing Ohio law prohibits the simultaneous interment of human bodies or body parts, further undercutting State Defendants' arguments regarding "dignity." Nothing in SB27 prohibits simultaneous interment either. If State Defendants were to suddenly take the position that individual interment is required under the law, this is entirely unsupported and would exponentially add to the burdens imposed by SB27, as it is unclear whether Plaintiffs would be able to find vendors who could individually inter embryonic and fetal tissue from procedural abortions at all. Even if they were able to find vendors who can do so, the cost of interment would increase significantly beyond the quote Plaintiffs have received.

Defendants do not bother to analyze in their response—but these regulations, enacted prior to SB27, do not provide clarity regarding what can be done with embryonic and fetal tissue.[12] The Ohio crematory regulations permit simultaneous cremation in some limited circumstances, including for "[b]ody parts," defined as "limbs or other portions of the anatomy that are removed from a living person for medical purposes during biopsy, treatment, or surgery." R.C. 4717.20(C). But without further guidance or clarity as to whether embryonic and fetal tissue would come under this definition, crematory operators could not risk serious penalties by simultaneously cremating tissue from procedural abortions, thereby forcing Plaintiffs to "steer far wider of the unlawful zone" with tremendous resulting burdens on their patients.

Second, Plaintiffs explained that SB27 is vague as to whether abortion providers would risk severe penalties by sending tissue from a procedural abortion to a pathology lab or a crime lab, as they cannot control how those third parties will dispose of the tissue and whether they will do so in compliance with SB27's requirements. Pls' Br. at 34. This is especially true where pathology labs may be located out of state. *Id.* at 9. State Defendants respond with confusion regarding the type of tissue that would be sent to a pathologist or crime lab. Opp. Br. at 23–24. But Plaintiffs will have to send both embryonic or fetal tissue and other pregnancy tissue to a pathologist or crime lab in certain circumstances including because, as Plaintiffs have explained, during the first approximately 13 weeks of pregnancy—during which the vast majority of patients obtain abortion procedures—it is not always possible to separate embryonic or fetal tissue from other pregnancy tissue. Liner Aff. at ¶ 34. Although it is not entirely clear from their response,

[12] State Defendants incorrectly assert that Plaintiffs' expert Poul Lemasters' affidavit suggests that individual cremation is required. Opp. Br. at 21–22. But Lemasters states that "it is not entirely clear" how existing crematory regulations would interact with SB27, "as Ohio has never required cremation of embryonic and fetal tissue before." Pls' Br. Ex. 7, Affidavit of Poul Lemasters at ¶ 20.

State Defendants appear to take the position that Plaintiffs *will* be held liable if third party laboratories do not dispose of embryonic and fetal tissue in compliance with SB27. *See* Opp. Br. at 23–24. This interpretation will in effect prohibit Plaintiffs from sending tissue from procedural abortions to a pathologist for testing—even when such testing may be needed to diagnose conditions such as cancer. Liner Aff. at ¶ 31. And it will prohibit Plaintiffs from sending tissue to a crime lab when patients request tissue be sent there to aid a sexual assault investigation and will force Plaintiffs to risk violating a subpoena or warrant requesting tissue. Liner Aff. at ¶ 32; Pls' Br. Ex. 6, Affidavit of Suzanne Bertuleit at ¶ 26; Pls' Br. Ex. 2, Affidavit of Holly Myers ("Myers Aff.") at ¶ 23. State Defendants' willingness to readily interpret a vague law to be even more onerous demonstrates a stunning disregard for patient health and wellbeing.

Third, in response to Plaintiffs' argument that it is unclear whether SB27's definition of "fetal remains"—the tissue that must be interred or cremated—encompasses other pregnancy tissue such as the placenta, gestational sac, and umbilical cord (which is not *permitted* to be interred or cremated, *see* Pls. Br. at 9–10), State Defendants respond that it is "quite clear" that this other pregnancy tissue falls within the definition of "fetal remains" and must therefore be cremated or interred. Opp. Br. at 24–25. This is curiously in tension with State Defendants' arguments in the immediately preceding section of their brief, which suggest that some tissue (but not tissue that must be cremated or interred under SB27) can be sent to a pathologist or crime lab without violating the law. *Id.* at 23–24; *see also id.* at 23 ("S.B. 27 clearly distinguishes between fetal tissue and non-fetal tissue.").

In any case, Plaintiffs are not required to rely on State Defendants' mid-litigation assurance, offered for the first time in their response brief despite Plaintiffs repeatedly asking ODH for clarification on this very issue for months. "[M]id-litigation assurances are all too easy to make

and all too hard to enforce, which probably explains why the Supreme Court has refused to accept them." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 806 (6th Cir.2020), quoting *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310, 1328 (11th Cir.2018); *see also Williamson* at 1328, citing *Stenberg v. Carhart*, 530 U.S. 914, 940–41, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000)); *Planned Parenthood Southwest Ohio Region v. Yost*, 375 F.Supp.3d 848, 868 (S.D.Ohio 2019). Plaintiffs should not be forced to rely on State Defendants' litigation position that they do not risk penalties if they do not separate embryonic and fetal tissue from other pregnancy tissue without an authoritative interpretation from this Court stating so.

Fourth and finally, Plaintiffs pointed out that it is unclear under SB27 and its implementing rules whether *all* tissue from procedural abortions must be disposed in state, or whether the law requires only that the tissue that *is* disposed in state must be at a licensed or registered entity. Pls' Br. at 35. State Defendants respond in a footnote, Opp. Br. at 25 n.15, and fail to shed any clarity on the issue, instead only quoting statutory language before summarily concluding that the "law is clear." *Id.* State Defendants do not sufficiently address any of Plaintiffs' arguments that SB27 is impermissibly vague, and the law must therefore be enjoined for this reason as well.

IV. SB27 Will Irreparably Harm Plaintiffs and Their Patients.

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* Pls' Br. at 35–36. Plaintiffs have shown a likelihood of success on the merits of their claims that enforcement of SB27 will deprive them and their patients of their constitutional rights of due process and equal protection, and so "a finding of irreparable harm follows." PPSWO Telemedicine Op. at 11.

State Defendants in their opposition nakedly assert that SB27 "is not an abortion restriction," Opp. Br. at 26, but this argument fails for the reasons stated above at Section III(A). SB27 would severely impede access to abortion, and its enforcement would irreparably harm Plaintiffs and their patients. State Defendants also claim there is no irreparable harm because "[a]ny economic cost retrospectively determined to be improper is compensable and therefore not irreparable harm." Opp. Br. at 27. This ignores the ample evidence Plaintiffs have submitted detailing the non-financial harms SB27 will cause to themselves and to their patients, including significantly delaying patients in obtaining abortions and preventing patients from obtaining abortions entirely. *See* Pls' Br. at 12–17; *see also* above at Section III(A). SB27 also imposes a particular set of views of when life begins on all Ohioans, which may conflict with their own strongly-held beliefs and result in grave moral and psychological injury. Pls' Br. Ex. 10, Affidavit of Reverend Terry Williams at ¶ 4, 10, 19; *see also id*. at ¶ 5–9, 11–12; Pls' Br. Ex. 8, Affidavit of Thomas V. Cunningham ("Cunningham Aff.") at ¶ 10, 16–17, 25–26. SB27 will also irreparably harm Plaintiffs themselves because it will force them to deny or delay requested care—in direct violation of their bioethical duties as providers. Cunningham Aff. at ¶ 22–23, 31–32. Further, because SB27 will force Plaintiffs to raise costs and given that many of Plaintiffs' patients are poor or have low incomes, Plaintiffs will be irreparably harmed by the fact that they will be prevented from serving their patients, who often do not have other options for obtaining care. Liner Aff. at ¶ 56–57; Myers Aff. at ¶ 32. These harms are irreparable and cannot be compensated by money damages.

V. The Public Interest Will Be Served By Enjoining Enforcement of SB27.

"[T]he state cannot be harmed when an unconstitutional law does not go into effect." *Newburgh Heights v. State*, 2021-Ohio-61, 166 N.E.3d 632, ¶ 76 (8th Dist.); *see also* PPSWO Telemedicine Op. at 13. Plaintiffs have demonstrated that they are substantially likely to succeed

on their due-process and equal-protection claims, and preventing this violation of their and their patients' constitutional rights is in the public interest.

CONCLUSION

For the foregoing reasons and the reasons stated in their opening brief, Plaintiffs ask this Court to issue a preliminary injunction, and continue to enjoin Defendants from enforcing SB27.

Dated: January 26, 2022

Respectfully submitted,

/s/ Maithreyi Ratakonda

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2022, the foregoing was electronically filed via the Court's e-filing system.

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