IN THE COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

D134264676

WOMEN'S MEDICAL GROUP PROFESSIONAL CORPORATION, *et al.*, *Plaintiffs*, v. VANDERHOFF, *et al.*, *Defendants.*	Case No. A 2 2007 04 Judge: _____ **PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION; REQUEST FOR HEARING**

MOTION FOR TEMPORARY RESTRAINING ORDER FOLLOWED BY PRELIMINARY INJUNCTION

Pursuant to Civ.R. 65, Plaintiff Women's Medical Professional Group Corporation d/b/a Women's Med Dayton ("WMD") respectfully moves this Court for a temporary restraining order followed by a preliminary injunction to enjoin Defendants from revoking or refusing to renew WMD's license or otherwise preventing WMD from providing procedural abortion services for reasons related to noncompliance with 2021 Am.S.B. No. 157 ("SB 157"), until at least June 21, 2022, the date by which the law requires compliance.[1]

[1] This motion is made only on behalf of WMD. Because Plaintiff Planned Parenthood Southwest Ohio Region ("PPSWO") currently holds a variance that remains in effect, Affidavit of Kersha Deibel, attached as exhibit No. 3, at ¶ 19, it has until June 21, 2022 to comply with the substantive provisions of SB 157 and to submit the required documentation to ODH. However, ODH sent a letter to PPSWO on February 23, 2022 that, while recognizing that SB 157 does not even go into effect until late March, asks PPSWO to submit by Sunday, February 27, 2022 attestations that its back-up physicians meet SB 157's requirements. Affidavit of Lisa Pierce Reisz, attached as exhibit No. 4, Ex. A. ODH appears to be unilaterally and without basis

As explained in the accompanying Memorandum in Support, its attached Affidavits, the Complaint, and its attached exhibits, injunctive relief is necessary to prevent immediate and irreparable injury to Plaintiff and its patients. Without relief from this Court, Defendants will be able to revoke Plaintiff's ambulatory surgical facility ("ASF") license as early as March 3, 2022, depriving Plaintiff of its liberty and property interests in its license, the continuation of its business providing constitutionally protected reproductive care in its community, and the continuation of its staff members' chosen profession.

Plaintiff requests a hearing on this Motion, and Plaintiff requests that this Court waive the bond requirement.

Dated: February 25, 2022

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moving the compliance deadline up approximately four months, indicating that it may soon prematurely enforce SB 157 against PPSWO as well.

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

Plaintiff Women's Medical Professional Group Corporation d/b/a Women's Med Dayton ("WMD") has provided high-quality, constitutionally protected reproductive health care—including procedural abortion—to the people of Southwest Ohio at its clinic and its predecessor entities for decades.[1] If this Court does not act immediately, that care will abruptly stop. Defendants intend to revoke WMD's ambulatory surgical facility ("ASF") license as early as March 3, 2022. If this license is revoked, WMD will no longer be able to provide procedural abortion care. The sole reason for the proposed revocation is failure to comply with a recently passed—and likely unconstitutional—law, 2021 Am.S.B. No. 157 ("SB 157"), which is scheduled to take effect on March 23, 2022. SB 157 prohibits ASFs from contracting with backup doctors who teach or provide instruction, directly or indirectly, at a medical school affiliated with a state university or college, or with backup doctors who are employed by and compensated pursuant to a contract with, and provide instruction or consultation to, a medical school affiliated with a state university or college, for the purposes of supporting the ASF's request for a variance from Ohio's written transfer agreement ("WTA") requirement. By its terms, SB 157 grants clinics 90 days from the effective date—that is, until June 21, 2022—to demonstrate compliance with SB 157. But Defendants are enforcing this new law now, before it even takes effect. Defendants' attempt to revoke WMD's license based solely on its noncompliance with a law that is not in effect is a blatant violation of Plaintiff's due process rights. This Court should step in immediately to prevent this unconstitutional deprivation of

[1] WMD has had different business names, but has had the same ownership and offered substantially similar services since 1983.

Plaintiff's property and liberty interests. If it does not, Plaintiff faces constitutional, business and other harm, and Plaintiff's patients will be delayed in, face additional barriers to, or be altogether prevented from, obtaining constitutionally protected abortion care.

FACTUAL BACKGROUND

A. Abortion Safety

Abortion is very safe, much safer than giving birth. Affidavit of W.M. Martin Haskell, M.D. ("Haskell Aff."), attached as exhibit No. 1, at ¶ 11. Complications rarely occur and complications requiring hospital-based care are extremely rare. *Id.* If a complication requiring hospital care does occur, federal law, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd(b), and WMD's policies and procedures ensure that the patient will receive the best available care as quickly as possible. Haskell Aff. ¶¶ 13–15.

B. Pre-Existing Licensing Framework & SB 157

Despite the well-documented safety of abortion provision nationally and in Ohio, Ohio has adopted a medically unnecessary, burdensome and arbitrary licensing scheme that provides no health or safety benefits to patients and that the Ohio Department of Health ("ODH") attempts to exploit at every turn to unfairly and arbitrarily deny WMD its ASF license. Every time WMD adjusts to comply with the scheme, ODH imposes new, arbitrary requirements without notice in an attempt to close WMD's business and prevent it from providing constitutionally protected care to the patients it serves.

Clinics that provide procedural abortion must maintain an ASF license. Haskell Aff. ¶ 16. To maintain an ASF license, a clinic must either have a WTA with a local hospital or be granted a variance from that requirement by the Director of ODH. R.C. 3702.303. To obtain a variance from the WTA requirement a clinic must have, among other things, a written agreement with at

least one backup doctor who has admitting privileges at a local hospital. R.C. 3702.304. ODH has expanded the scope of the current statutes and regulations governing licensing by requiring that abortion clinics seeking a variance have at least four backup doctors, all of whom must be obstetrician/gynecologists ("OBGYN"s) and have voting privileges at their hospital. *See* Compl. ¶¶ 50–60.

SB 157 builds on this already unnecessary scheme and makes it even more difficult, if not impossible, for abortion clinics to obtain a variance—and therefore an ASF license—by drastically limiting the pool of potential backup physicians. Under SB 157, backup physicians may not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college. The bill further states that backup physicians may not be employed by or compensated pursuant to a contract with, and may not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college. SB 157 was passed by the Ohio Legislature on December 22, 2022 and becomes effective 90 days after passage, on March 23, 2022. By its terms, SB 157 gives clinics with variances an additional 90 days—until June 21, 2022—to comply with its requirements.

C. WMD's Recent Licensing History

Despite WMD's best efforts, it has not been able to obtain a WTA with a local hospital. Haskell Aff. ¶¶ 17–18. Thus, it must be granted a variance to maintain an ASF license and continue providing procedural abortion care. R.C. 3702.303.

Despite operating safely for nearly forty years, WMD has been in licensing disputes with Defendants for decades. Haskell Aff. ¶¶ 19-28. As relevant to this motion, after ODH resumed licensing action following a COVID-related pause, ODH suddenly found Plaintiff's then-most-

recent variance request from September 14, 2020 insufficient based on requirements that ODH created out of whole cloth and with no notice to WMD. In a letter dated August 30, 2021, ODH denied WMD's variance request stating that one doctor—who had been approved as part of WMD's 2019 variance request—was no longer an acceptable backup doctor because she was not an OBGYN, and another doctor was not acceptable because he did not have staff voting privileges at the hospital where he had admitting privileges.[2] Haskell Aff., Ex. C. WMD sent a request to ODH to reconsider its decision on September 13, 2021, explaining that neither a backup doctor's specialty nor their ability to vote on staff policy impacted their ability to admit patients to hospitals and that the doctor without staff voting privileges had since gained them. Haskell Aff. Ex. D. In a letter dated November 12, 2021, ODH acknowledged that the doctor who had gained staff voting privileges was now acceptable, but denied the variance request because one of the four backup doctors was not an OBGYN. Haskell Aff. Ex. E.

D. Defendants' Premature Enforcement of SB 157 Before Its Effective Date

On November 30, 2021, WMD sent ODH yet another revised variance request. Haskell Aff. ¶ 39. This one included four OBGYNs with staff voting privileges as well as admitting privileges at a local hospital. *Id.* On January 28, 2022, ODH denied this request. *Id.* ¶ 42; Affidavit of B. Jessie Hill ("Hill Aff."), attached as exhibit No. 2, at ¶ 3. Despite acknowledging in the denial letter that SB 157 was not yet in effect,[3] the sole reason given for the denial was as

[2] The denial letter stated that the doctor was rejected because he had "affiliate status," rather than "active status" admitting privileges. Haskell Aff. Ex. C. The only difference between the two is that a physician with active status privileges can vote on matters affecting the medical staff and physicians with affiliate status admitting privileges cannot. Haskell Aff. ¶ 34.

[3] The letter states that SB 157's effective date is March, 22, 2022, but ODH appears to have been one day off. According to the Ohio Legislative Counsel's website, the law goes into effect March 23, 2022. The Ohio Legislature, *Senate Bill 157*, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-157 (accessed Feb. 24, 2022).

follows: "Given the four backup physicians' clear relationship with Wright State Physicians and the clear public policy directives contained within Sub. S.B. 157, I am denying Women's Med Dayton's November 30, 2021 variance request."[4] Hill Aff. Ex. A. ODH will be able to revoke WMD's license based solely on this variance denial as early as March 3, 2022. Haskell Aff. Ex. H.

Plaintiff's November 30 variance request meets all of ODH's requirements. Because ODH's enforcement of SB 157 before its effective date is clearly unlawful and is the sole reason for denying WMD's November 30, 2021 variance request, WMD should have a variance now, and, consistent with the terms of SB 157, should have until June 21, 2022, 90 days after SB 157's effective date, to comply with SB 157. This Court should thus enjoin Defendants from taking any action to revoke or refuse to renew Plaintiff's license or otherwise prevent it from providing services for noncompliance with SB 157 until at least June 21, 2022.

E. Impact of Defendants' Premature Enforcement of SB 157 Before its Effective Date

As described above, the sole reason ODH denied WMD's November 30, 2021 variance request is failure to comply with SB 157. Absent action from this Court, ODH will be able to revoke WMD's license based solely on ODH's January 28 variance denial—forcing WMD to abruptly cease providing procedural abortion care—as early as March 3, 2022.

ODH's premature enforcement of SB 157 without notice to WMD will thus deprive WMD of its right to due process. Being forced to stop providing procedural abortions irreparably harms WMD with a devastating long-term impact on patients, physicians, and other staff, as well as on WMD itself. Haskell Aff. ¶ 48. Forcing WMD to stop providing procedural abortions

[4] All four of the backup physicians who supported WMD's November 30, 2021 variance request are on the faculty of, provide instruction for, and are compensated in part under contracts with Wright State University, which is a state university. Haskell Aff. ¶ 41.

threatens WMD's ability to remain in operation. Staff will have to be laid off almost immediately, and WMD might eventually be forced to permanently close its doors. Haskell Aff. ¶¶ 48–50. WMD is a valued member of its community, and patients rely upon WMD for comprehensive reproductive health care—of which procedural abortion is an essential part. Haskell Aff. ¶¶ 51–52. Even if WMD's ability to provide procedural abortions is restored, it cannot repair the damage to patients' trust and its reputation in the community as a provider of reproductive health care, including abortions, that the interruption will case. Haskell Aff. ¶ 49. Because of the great need for abortion care in Ohio, coupled with the state's requirement that patients make a separate visit to the health center prior to their abortion to receive state-mandated information, *see* R.C. 2317.56(b), WMD will in fact be forced to cancel existing appointments and stop scheduling future procedural abortion appointments in advance of March 3, 2022. Haskell Aff. ¶ 48. Such a disruption in abortion access for Dayton-area patients would gravely impact the lives of people who need access to abortion, with disproportionate harm falling on Black people, other people of color, and people with low incomes.[5]

[5] In 2021, Black people made up only 13.1 percent of Ohio's population but more than 48 percent of people who obtained abortions in Ohio. Ohio Dept. of Health, *Induced Abortions in Ohio, 2020*, 3 (2020), https://odh.ohio.gov/know-our-programs/vital-statistics/resources/vs-abortionreport2020 (accessed Feb. 24, 2022) ("ODH 2020 Report"); United States Census Bureau, Quick Facts: Ohio, https://www.census.gov/quickfacts/fact/table/OH/ (accessed Feb. 24, 2022). Over 60% of WMD's patients have incomes at or below 120% of the federal poverty line. Haskell Aff. ¶ 53. Black women are more likely to face structural barriers to obtaining quality health care throughout their lives. These barriers, including racial discrimination, economic inequality, lack of access to comprehensive health education, and other social determinants of health severely limit Black women's access to health care in general, and exacerbate difficulties in accessing reproductive health care, including abortion. *See, e.g.*, Center for Reproductive Rights, National Latina Institute for Reproductive Health, and SisterSong Women of Color Reproductive Justice Collective, *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care* (2014), https://reproductiverights.org/wp-content/uploads/2020/12/CERD_Shadow_US_6.30.14_Web.pdf (accessed Feb. 24, 2022).

ARGUMENT

Defendants' premature enforcement of SB 157 blatantly violates Plaintiff's due process rights. Plaintiff has liberty and property interests in the continued operation of its business and allowing staff to continue their chosen profession of providing constitutionally protected reproductive healthcare. Defendants have deprived Plaintiff of these interests without any process whatsoever, and cannot justify this action with rational relation to a legitimate state interest, thus violating Plaintiff's due process rights. This violation will cause irreparable constitutional, business, and financial harms to Plaintiffs and will result in constitutional harm, increased delay in obtaining care, health risks, and emotional distress to Plaintiff's patients. Because Plaintiff is likely to succeed on the merits, Plaintiff will sustain irreparable harm without an injunction, no third parties will be harmed by an injunction, and the public interest favors an injunction, this Court should enjoin Defendants from revoking or refusing to renew WMD's license or otherwise preventing WMD from providing procedural abortion services for reasons related to noncompliance with SB 157 until at least June 21, 2022, the date by which the law requires compliance.

A. Standard of Review

A party seeking a temporary restraining order and/or preliminary injunction must demonstrate "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; [and] 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, WMD meets this standard. The grant of injunctive relief by this Court will preserve the status quo by requiring ODH to act consistently with Ohio law and the terms of SB 157 and by ensuring WMD's ability to continue to provide safe, time-sensitive, constitutionally protected health care to its patients without interruption.

B. Likelihood of Success on the Merits

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.). Plaintiff has a substantial likelihood of succeeding on the merits of its claims that Defendants' premature, arbitrary enforcement of SB 157, before its effective date, will violate Plaintiff's substantive and procedural due process rights under the Ohio Constitution.

1. Defendants' Premature Enforcement of SB 157 Before It Becomes Effective Violates Plaintiff's Procedural Due Process Rights.

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).

The issue here is substantially similar to one this Court heard last year in *Planned Parenthood of Southwest Ohio v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870, Entry Granting Pls.' Mot. for Prelim. Inj. (April 5, 2021) ("PPSWO SB 27 First PI Op."), attached as exhibit No. 5. There, this Court preliminarily enjoined Defendant ODH from enforcing a law regarding disposition of fetal tissue from an abortion until 30 days after regulations that were necessary for compliance had been adopted. *Id.* at 8. This Court held that Plaintiff and other abortion clinics "have protected liberty and property interests in the operation of their businesses and in the continuation of their chosen profession" and that Defendant ODH's enforcement of the law when clinics had not even had the opportunity to comply prevented clinics "from continuing to provide procedural abortion without risk of enforcement of noncriminal sanctions[,]" which "unlawfully deprive[d] Plaintiffs of their protected interest with no process whatsoever." *Id.* at 6–7 (citing *Hodes & Nauser, M.D. PA, v. Moser*, D. Kan. No 11-2365-CM at 40:16-19 (July 1, 2011) and *Women's Med. Professional Corp. v. Baird.*, 438 F.3d 595, 611-613 (6th Cir. 2006)). The same is true here.

Plaintiff has both property and liberty interests at stake: maintaining its long-established business and allowing staff to continue in their chosen profession of providing constitutionally protected reproductive health care, including procedural abortion. Ohio courts have long recognized that a party has "a constitutionally protected property interest in running his business free from unreasonable and arbitrary interference from the government[.]" *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); *see also, e.g.*, *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[.]").

And this Court, along with others, has previously recognized that abortion providers, including Plaintiff, have protected interests in continuing in their chosen professions. Just recently, this Court recognized that Plaintiff and other abortion clinics "have protected liberty and property interests in the operation of their businesses and in the continuation of their chosen profession." PPSWO SB 27 PI Op. at 6-7. Likewise, in *Women's Med. Professional Corp. v. Baird*, the Sixth Circuit held that plaintiff Dr. Haskell, who provides abortion care at WMD, "had a property right in the ongoing operation of his clinic[.]" 438 F.3d 595, 611 (6th Cir.2006); s*ee 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. 6 (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) ("due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim").

There is thus no question that Plaintiff has protected property and liberty interests in pursuing their lawful businesses and professions. WMD has been providing safe legal constitutionally protected abortion care for decades. Since long before the enactment of SB 157, Plaintiff has secured protected property and liberty interests in operating WMD and allowing staff to pursue their professions and patients to obtain constitutionally protected care there.

Plaintiff will be deprived of its protected interest without relief from this Court. Defendants have already proposed to revoke Plaintiff's ASF license as early as March 3, 2022 based solely on Plaintiff's noncompliance with SB 157, a law for which Plaintiffs should rightly have until June 21, 2022 to comply. The inability of Plaintiff to continue operating its businesses and providing reproductive health care services, including the full scope of abortion care, clearly constitutes a deprivation of Plaintiff's 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); *Planned Parenthood Southwest Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 954 (2015) (the potential for health center being denied a variance and having to cease provision of abortion constituted a deprivation of protected interests).

Defendants seek to eviscerate Plaintiff's 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, ¶ 42, quoting *Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18, providing no opportunity to comply with new requirements before depriving a party of its protected interests is a constitutional violation. *See Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002); *Planned Parenthood Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir.2013); *United States v. Dumas*, 94 F.3d 286, 291, n. 3 (7th Cir.1996). Under these principles, it is clear that ODH's enforcement of SB 157 prior to its effective date violates due process because it imposes new—and likely unconstitutional—requirements on Plaintiff with no opportunity to comply, and therefore deprives Plaintiff of protected interests not simply with inadequate process but with no process whatsoever. Courts, including this Court, have not hesitated to find a due process violation under these circumstances. PPSWO SB 27 PI Op. at 6-7; *see also 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).[6]

2. Defendants' Enforcement of SB 157 Before It Becomes Effective Violates Plaintiff's Substantive Due Process Rights.

Without relief from this Court, Defendants will deprive Plaintiff of its liberty and property interests in the continued operation of its business—which provides constitutionally protected reproductive healthcare to its patients—in violation of Plaintiff's substantive due process rights. "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). "Substantive due process 'protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action.'" *MSI Regency Ltd. v. Jackson*, 433 Fed. Appx. 420, 429 (6th Cir.2011), quoting *Sutton v. Cleveland Bd. of Edn.*, 958 F.2d 1339, 1350 (6th Cir.1992); *see also Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 354, 639 N.E.2d 31 (1994). Defendants' enforcement of SB 157 prior to the effective date is an exercise of state power that arbitrarily

[6] Defendants will, no doubt, protest that Plaintiff has no property interest in the granting of its variance request and that ODH's decision on a variance request is not subject to review. The constitutionality of that system is under review in a separate case, but this need not stop this Court from enjoining Defendants from revoking Plaintiff's ASF license. It is abundantly clear that Plaintiff has a property interest in its ASF license, the continued operation of its business, and its staff's ability to pursue their professions. It is also clear that Defendants intended to deprive Plaintiff of those interests without due process. It is well within this Court's power to prevent that unlawful deprivation. Whether it does so by ordering ODH to grant the variance and thus the license, enjoining ODH from revoking Plaintiff's license, or enjoining ODH from enforcing any penalties that Plaintiff would incur from operating without a license, is a matter of this Court's discretion. *Whole Woman's Health All. v. Hill*, 937 F.3d 864, 879 (7th Cir. 2019) (instructing district court to modify its preliminary injunction of a likely unconstitutional abortion clinic licensing scheme by "enjoining the state either to treat [the clinic] as if it had a provisional license. . . or actually to grant such a provisional license, to be effective (in the absence of a failure to comply with valid licensing criteria) until the district court issues a final judgment on the merits of the case").

deprives Plaintiff of its liberty and property interests and blatantly violates its substantive due process rights.

Government action must at least be "rationally related to a legitimate state interest." *Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir.2000); *see also Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Desenco, Inc. v. City of Akron*, 84 Ohio St.3d 535, 706 N.E.2d 323 (1999).[7] This rational basis review "serves the goal of preventing 'government power from being used for purposes of oppression,' regardless of the fairness of the procedures used." *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir.1996), quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) ("The touchstone of due process is protection of the individual against arbitrary action of government, [including] the exercise of power without any reasonable justification in the service of a legitimate government objective[.]").

Defendants have no rational basis for premature enforcement of SB 157. Indeed, ODH's premature enforcement directly contradicts the Ohio General Assembly's clear intention that SB 157 not be enforced until its effective date—March 23, 2022—and SB 157 explicitly provides ASFs *additional* time beyond the effective date—another ninety days—to comply with SB 157, further demonstrating the General Assembly's judgment that no emergent conditions warranted immediate enforcement. SB 157 § 3. The plain language of the statute and the legislature's

[7] As this Court recently held, abortion providers have a fundamental liberty interest at stake here "as a person's right to obtain an abortion is inextricably bound up with the doctor's ability to provide that care." *Planned Parenthood of Southwest Ohio v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870, Entry Granting Pls.' Second Mot. for Prelim. Inj., at 10 (Jan 31, 2022), attached as exhibit 7. Thus, Defendants' premature enforcement actions are subject to strict scrutiny "and will be upheld only when they are narrowly tailored to a compelling government interest." *Seal*, 229 F.3d at 574, citing *United States v. Brandon*, 158 F.3d 947, 956 (6th Cir.1998). Defendants clearly cannot meet this high bar, but because Defendants have absolutely no rational basis for their premature enforcement action, this Court need not reach this question.

actions belie any argument that Defendants might make about having a legitimate interest in the premature enforcement of this statute. *See, e.g., Walter v. Fairfield City School*, S.D. Ohio No. 1:09-CV-462, 2011 WL 13202536, at *13 (July 18, 2011) (when a law does not apply based on its plain language, the state "cannot show a reason rationally related to legitimate government interests why they applied it").

Moreover, "the failure to provide due process, where the government is constitutionally required to do so, is in itself an arbitrary and unfair use of official power[.]" *Howard*, 82 F.3d at 1350. That is exactly what is happening here. As established above, Plaintiff has protected interests, and Defendants have deprived it of those interests without due process. Thus, Defendants' actions violate both Plaintiff's procedural and substantive due process rights.

C. Plaintiff Will Suffer Irreparable Harm If Defendants Are Not Enjoined from Enforcing SB 157.

Plaintiff has demonstrated that this premature enforcement of SB 157 will cause irreparable injury to it, its physicians and other staff, and its patients. Without relief from this Court, WMD faces the risk of being forced to immediately cease procedural abortion care because of ODH's enforcement of a law that had not even been passed by the General Assembly at the time WMD submitted its variance application.[8] This arbitrary enforcement plainly violates WMD's due process rights.

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[8] While Plaintiff may seek an administrative hearing to determine whether it is entitled to a license, exhaustion of administrative remedies is not required when proceeding with the administrative process would constitute a "vain act," including where an administrative hearing could not "provide or even consider" the protection of constitutional rights that Plaintiff seeks. *See Herrick v. Kosydar*, 44 Ohio St.2d 128, 130, 339 N.E.2d 626 (1975); *Consol. Land Co. v. Capstone Holding Co.*, 2002-Ohio-7378, ¶ 34-40 (7th Dist.). Here, the administrative process does not allow for substantive review of the variance denial, "which shall be final." Ohio Adm. Code 3701-83-14(F); R.C. 3702.304(A) and (C). Further, agencies may not rule on the constitutionality of a statute, and thus Plaintiff's due process claims cannot be adjudicated in an administrative hearing. *Herrick*, 44 Ohio St. 2d at 130.

It is axiomatic that a finding of a threatened or impaired constitutional right amounts to irreparable injury. *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, 445 (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). Because Plaintiff's constitutional rights will be impaired without relief from this Court, Plaintiff will suffer irreparable injury if the enforcement of SB 157 is not enjoined.[9]

If WMD is required to stop providing procedural abortion, it faces further irreparable harm that cannot be compensated once this litigation is concluded. WMD will have to immediately scale back the majority of its operations by laying off staff and may be forced to permanently close. WMD faces damage to its reputation as a trusted provider of reproductive healthcare in the Dayton community. Haskell Aff. ¶¶ 47–51. Such damage cannot be repaired. *See, e.g., Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir.1977) (finding of irreparable harm justified because "Planned Parenthood's

[9] An assertion that such harms are compensable would disregard not only Plaintiff's constitutional challenge to protect its constitutional rights but also courts' recognition that monetary harm can amount to irreparable injury when Plaintiff cannot obtain monetary damages from the State. *See Hodges*, 138 F.Supp.3d at 960 ("[T]hreatened constitutional violation is a sufficient ground upon which to find irreparable harm [and] the inability to operate an ongoing business for an unknown period of time constitutes irreparable harm that cannot be fully compensated by monetary damages."), citing *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1382 (6th Cir. 1995); *see also United States v. New York*, 708 F.2d 92, 93–94 (2nd Cir. 1983).

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). Dr. Haskell, WMD's owner, could find that he is forced to close a business that he spent nearly his entire professional life building and running. All of these harms will have a devastating impact on Plaintiff's current patients as well as anyone seeking abortion in Dayton. Haskell Aff. ¶¶ 53–58. An order enjoining preemptive, arbitrary enforcement of SB 157 is warranted to avoid these imminent, grave, and irreparable harms.

D. No Third Parties Will Be Harmed and The Public Interest Will Be Served.

No third parties will be harmed if Defendants are enjoined. Plaintiff has been providing safe, constitutionally protected health care in accordance with all applicable laws for decades. Haskell Aff. ¶ 13. Indeed, Plaintiff's most recent variance application meets all of ODH's requirements. *Id.* Ex. F. Defendants cannot claim any threat to public health or safety due to WMD's noncompliance with a law that is not yet in effect. *See Van Hollen*, 738 F.3d at 793 ("The state can without harm to its legitimate interests wait a few months more to implement its new law" where abortion providers had been safely providing care for decades). Even the General Assembly itself saw no harm in allowing affected parties months to come into compliance with SB 157, as it passed the law with a March 23, 2022 effective date and provided an additional three months for ASFs to comply with its requirements.

As this Court has said before, "the public has a particularly strong interest in a speedy injunction. . . where temporary relief would merely preserve the status quo on which Ohioans seeking [abortion] have come to rely. In fact, the public interest will be served by allowing [abortion providers] to continue providing, and their patients to continue accessing, essential and

constitutionally protected health care[.]" *Planned Parenthood Southwest Ohio Region. v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148, Entry Granting Pls.' Mot. for A Prelim. Inj., at 13 (Apr. 20, 2021), attached as exhibit No. 8.

Moreover, "a great[] public interest exists in ensuring governments and governmental officials operate within the confines of constitutional restrictions and prohibitions. . . . '[I]t is always in the public interest to prevent violation of a party's constitutional rights.'" *Lamar Advantage GP Co., LLC v. City of Cincinnati*, Hamilton C.P. No. A-18-04105, 114 N.E.3d 805, 829 (Oct. 17, 2018), quoting *Miller v. City of Cincinnati,* 709 F. Supp. 2d 605, 627 (S.D. Ohio 2008); *see also 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) ("[I]t is always in the public interest to prevent violation of a party's constitutional rights."); *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) (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 v. Yost*, 394 F. Supp.3d 796, 804 (S.D. Ohio 2019) (waiving bond).

CONCLUSION

For the foregoing reasons, Plaintiff asks this Court to issue a temporary restraining order followed by a preliminary injunction, to enjoin Defendants from revoking or refusing to renew Plaintiff's ASF license or otherwise preventing Plaintiff from providing procedural abortion services because of noncompliance with SB 157 until at least June 21, 2022, the date by which SB 157 requires compliance.

Dated: February 25, 2022

Respectfully submitted,

/s/ Elizabeth Watson

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CERTIFICATE OF SERVICE

I certify that on February 25, 2022 a copy of the foregoing Motion for Temporary Restraining Order Followed by Preliminary Injunction: Request for Hearing has been filed with the Hamilton County Clerk of Courts. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

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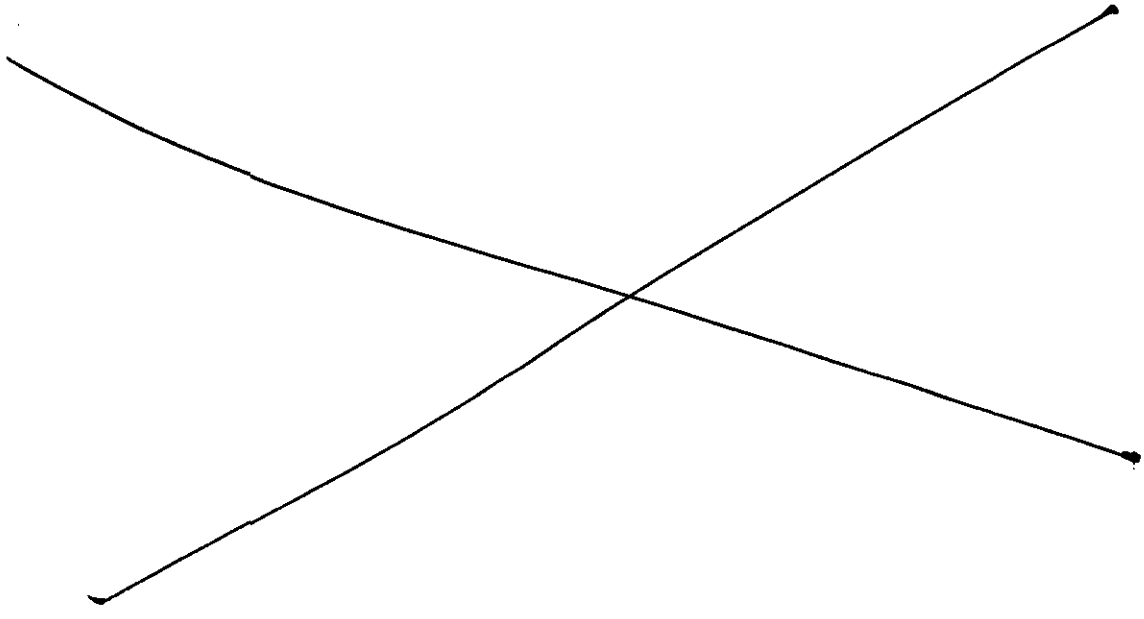
EXHIBIT 1



IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORP., *et al.*, *Plaintiffs*, v. VANDERHOFF, *et al.*, *Defendants.*	Case No. _____ Judge _____

AFFIDAVIT OF W.M. MARTIN HASKELL, M.D. IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND 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 and Medical Director of Women's Med Group Professional Corporation ("WMGPC"), which has owned and operated a clinic that provides abortion care in Kettering, Ohio since 1983. WMGPC currently holds an Ambulatory Surgical Facility ("ASF") license under the business name Women's Med Dayton ("WMD").[1]

2. I submit this affidavit in support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction to prevent the Ohio Department of Health from revoking or refusing to renew WMD's license or otherwise preventing WMD from providing procedural abortion services for reasons related to noncompliance with SB 157 until at least June 21, 2022.

3. I am over the age of eighteen, I am competent to testify, and I make this affidavit

[1] Prior to 2019, the business was named Women's Med Center Dayton. I will use WMD throughout this affidavit to refer to WMD and WMCD, since the clinic and its ownership have remained the same since 1983.

based on personal knowledge. As Medical Director of WMD, I supervise physicians and clinicians and provide reproductive health care to patients. I also supervise and manage the provision of all abortion care at WMD and am responsible for developing and approving WMD's policies and procedures.

4. As explained below, despite my clinic's longstanding record of providing high-quality, safe, and compassionate abortion care in Dayton, the State of Ohio has engaged in an unrelenting campaign to shut it down through increasingly arbitrary application to WMD of unwritten, surprise requirements relating to the licensing of ASFs.

WMGPC and Abortion Care

5. WMGPC and its predecessor organizations have provided reproductive health care in Ohio since 1973. WMGPC is a corporation organized under the laws of the State of Ohio.

6. WMGPC provides pregnancy testing, abortion, and birth control.

7. WMGPC has operated a licensed ASF providing abortions at 1401 E. Stroop Road in Kettering, Ohio, since 2008. Prior to that date, since 1983, WMGPC and its predecessor organizations provided abortions without needing to obtain an ASF license. Currently, WMD provides abortions up to 21 weeks, 6 days of pregnancy as dated from the first day of the patient's last menstrual period ("LMP").

8. In 2021, 3378 abortions were performed at WMD, of which 1979 were procedural abortions. 37% (736) of those procedural abortions were performed after 10 weeks LMP.

9. Patients seek abortion for a variety of deeply personal reasons, including familial, medical, financial, and personal. Some people have abortions because they conclude that it is not the right time in their lives to have a child or to add to their families; some to preserve their

life or health; some because they receive a diagnosis of a severe fetal medical condition or anomaly; some because they have become pregnant as a result of rape; and others because they choose not to have children.

10. Patients in Ohio may obtain two types of abortion: medication abortion and surgical (or "procedural") abortion. Medication abortion is a method of ending an early pregnancy by taking medications that cause the woman to undergo a process similar to an early miscarriage. Medication abortion is available in Ohio through 70 days LMP. Surgical abortion, despite its name, does not involve any incision, but rather involves the removal of the contents of the uterus with suction aspiration, alone or in conjunction with instruments.

11. Legal abortion is one of the safest and most common procedures in contemporary medicine, and complications are rare both at WMD and nationwide. Nationwide, "only a fraction of a percent" of abortion patients experience a complication requiring hospitalization. National Academies of Sciences, Engineering, and Medicine, The Safety and Quality of Abortion Care in the U.S. 55 (2018). In fact, the risk of mortality from abortion is approximately 12.5 times lower than from childbirth. *Id.* at 74 (estimating that the risk of death is 0.7 per 100,000 after a legal abortion, and 8.8 per 100,000 for childbirth).

12. The overwhelming majority of abortions are performed during the first trimester of pregnancy, when the gestational age of the fetus is at or less than fourteen weeks LMP. And because abortions are so safe, they are almost always provided in an outpatient setting.

13. The vast majority of the rare complications from abortion are minor and are treated successfully in an outpatient setting, including at our ASF by our excellent physicians. Notwithstanding the fact that more serious complications requiring hospital treatment are exceedingly rare, our ASF is prepared for them. My staff follows established, written protocols

that are consistent with the highest standard of medical care for each patient transferred. Over the past 10 years, physicians at WMD performed 20,887 procedural abortions. Of those, 9 (less than .05%) required transfer to a hospital where the patients were successfully treated and released. There has never been a death from an abortion performed at any WMGPC-operated facility.

WMD's ASF License and Written Transfer Agreement

14. Ohio law requires ASFs, including abortion clinics, to obtain a written transfer agreement ("WTA") with a nonpublic hospital within thirty miles of the clinic or to seek a variance from that WTA requirement.

15. Before WMD was required to have a WTA, any patient needing hospitalization from any clinic I owned or operated was treated by physicians to whom I made direct referrals.[2] But even if I had not made those direct referrals, my patients would have received the necessary care. Indeed, virtually all hospitals—and certainly those in Dayton—must comply with the federal Emergency Medical Treatment & Labor Act, which requires hospitals to stabilize all emergency patients, and treat them unless transfer to another facility is indicated. 42 U.S.C. § 1395dd(b) (commonly referred to as EMTALA). In addition, Miami Valley Hospital has assured WMD that it would treat WMD patients in an emergency. Exhibit ("Ex.") A.

16. In 2002, the ASF rules were first applied to WMD. In October 2002, WMD applied to ODH for an ASF license. The application met the statutory requirements for a license in all respects.

[2] I previously owned a clinic in Cincinnati, and I currently also operate a clinic in Indianapolis, Indiana. My Cincinnati clinic stopped providing procedural abortion in 2014 after ODH revoked its ASF license, and I closed that clinic completely in 2017.

17. At the time of its application, WMD had a WTA with Miami Valley Hospital. However, the following month, in November 2002, Miami Valley Hospital rescinded the WTA after pressure from a Board member who did not want the hospital to be associated with an abortion clinic.

18. Thus, while WMD's ASF application was pending, WMD requested a waiver of the WTA Requirement because it had alternative arrangements in place for admitting patients to a hospital in emergency and non-emergency situations. WMD met all the other statutory requirements for an ASF license except the WTA Requirement.

19. Nonetheless, in January 2003, ODH denied WMD's waiver request and ASF license application and issued a cease-and-desist order demanding that the clinic close immediately. Litigation over ODH's actions ensued, and the U.S. Court of Appeals for the Sixth Circuit ultimately decided that the State had violated WMGPC's right to procedural due process by attempting to shut the clinic down without first affording us a hearing. *See Women's Med. Prof'l Corp v. Baird*, 438 F.3d 595 (6th Cir. 2006); *Women's Med. Prof'l Corp v. Baird*, SDOH Case No. 2:03-cv-162. After that decision, WMGPC appealed ODH's order through the administrative process while seeking backup physicians. WMGPC was unsuccessful in its administrative appeal, but before we could seek judicial review and a stay from the Montgomery County Court of Common Pleas, ODH again attempted to shut us down by prematurely issuing a cease-and-desist order. We sought and received a temporary restraining order from a federal court preventing enforcement of that order.

20. In 2008, WMGPC applied for a variance to the WTA Requirement, identifying 3 backup physicians who could admit our patients to a local hospital and setting out our hospital transfer protocol. ODH granted this variance request.

21. ODH also granted a variance to my Cincinnati clinic in 2010 based on the fact that I and another doctor working at the clinic had courtesy admitting privileges at a Cincinnati hospital, without requiring *any* additional backup physicians. Ex. B.

22. In December 2011, ODH changed its internal rules for processing variance requests and required ASFs to apply for a variance annually at the time that the ASF applied for its license renewal. Since this rule change, WMD has filed timely license renewal and variance applications each year. Under Ohio law, ASFs with pending license renewal applications can continue operating as long as the renewal application is timely filed. Ohio Rev. Code § 119.06.

23. On June 30, 2015, Ohio's biennial budget bill, H.B. 64, was enacted. That law provided that, if ODH fails to act on a variance request within 60 days or if it denies a variance request, ODH will automatically suspend the clinic's ASF license ("Automatic Suspension Provision"). Absent the Automatic Suspension Provision in H.B. 64, as noted above, ASFs with pending license renewal applications could continue operating as long as the renewal application was timely filed.

24. WMD joined with Planned Parenthood of Southwest Ohio in challenging the constitutionality of H.B. 64 in federal court. WMD and PPSWO moved for, and received, a temporary restraining order, and subsequently a preliminary injunction, preventing enforcement of the Automatic Suspension Provision on the ground that it deprived the clinics of their property interest in the continuation of their businesses without due process. *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 961 (S.D. Ohio 2015).

25. On September 25, 2015, after the federal lawsuit was filed and a mere four days before the Automatic Suspension Provision was scheduled to go into effect, ODH denied WMD's variance application. Although WMD had listed three backup doctors in its variance

application (as it had on the previous variance that had been granted), ODH arbitrarily decided, in denying that application, that it would now require *four* backup doctors. WMD appealed that decision through the administrative process and thus was able to remain in operation until all of its administrative and judicial remedies were exhausted, in 2019.

26. While administrative review of ODH's denial of WMD's 2015 variance application was pending, it diligently searched for a fourth backup doctor. In June of 2019, it found one when a local physician became eligible to serve as a backup physician due to a change in employment.

27. WMD submitted its application for license renewal, including a variance request listing four backup doctors, on July 25, 2019. On August 27, 2019, out of an abundance of caution in case the state decided that it could not renew WMD's earlier license because the administrative and judicial review process for that license had ended, WMD applied for a new license, supported by a complete variance application listing four backup doctors. On September 23, 2019, sixty days after WMD filed a variance request listing four backup doctors as part of its license renewal application, ODH rejected the renewal application and declined to rule on the variance request. ODH deemed the application "no longer relevant" because it took the position that the license had expired after judicial review ended and therefore it could not be renewed. In the same letter, ODH informed WMD it would "promptly" rule on the new license application and variance request that had been filed by WMD on August 27, 2019.

28. On October 25, 2019, exactly sixty days after it was filed, ODH approved the variance request that was part of the new license application (but did not issue a new license). Despite the fact that WMD has been safely treating patients for decades, this was only the second time in its history that ODH has granted WMD a variance from the WTA requirement that it has

been unable to meet since 2002. On both occasions in which ODH granted the variances, WMD had been litigating in federal court against ODH's attempts to shut it down.

29. On October 29, 2019, WMD exhausted its administrative remedies as to the 2015 license under which it had been operating, thus finalizing the revocation of its license. Having lost the license under which it had been providing safe, legal care and unable to obtain a new license despite meeting every requirement, including ODH's arbitrary four backup physician rule, WMD was forced to abruptly stop providing surgical abortion services on October 29, 2019.

30. Despite being aware that the license WMD had been operating under had been revoked and that WMD's application, including a variance that had been granted days earlier, was pending, ODH delayed issuing the new license. As a result, WMD was unable to provide any patients with surgical care for two weeks.

31. Recognizing that the loss of its current ASF license was imminent and ODH would not imminently issue a new license, WMD moved for emergency relief from a federal court so that no patients would be denied care. That request was ultimately denied as moot after WMD finally received notice on November 12, 2019 that ODH issued WMD a new license effective November 5, 2019, through November 20, 2020.

32. From March 25, 2020 through July 1, 2021, ODH suspended all licensing action, including renewals and revocations, due to the COVID-19 health emergency. As a result, WMD is currently operating under the license issued in 2019.

33. In September 2020, WMD submitted a variance request and license renewal request for 2020, listing four backup doctors with admitting privileges at Miami Valley Hospital ("MVH"), which is approximately 5 miles away from WMD.

34. Even though the variance request included four backup doctors who each had admitting privileges at a local hospital and met all of the statutory variance requirements, ODH denied WMD's variance request on August 30, 2021. In the letter explaining the denial, ODH claimed that two of the four listed backup doctors were not qualified. According to ODH, one was disqualified, even though she had previously been accepted as a backup doctor, because she was not an OBGYN, but rather a general surgeon, and the other physician was disqualified because, although he possessed full clinical privileges at MVH, he lacked hospital staff voting rights.[3] In a letter dated August 30, 2021, ODH informed WMD it proposed to revoke and not to renew WMD's ASF license.[4]

35. The two physicians who were disqualified by ODH are more than capable of caring for WMD patients in the extremely rare event that hospital care is needed.

36. On September 13, 2021 WMD submitted a new variance request and simultaneous request that ODH reconsider the August 30 variance denial, explaining (1) that the non-OBGYN was a general surgeon who is well-qualified to treat WMD's patients, and OBGYN specialization was neither medically necessary nor legally required; and (2) staff voting rights have nothing to do with a doctor's qualifications or ability to admit or treat patients at the hospital where they have admitting privileges. WMD further informed ODH that the doctor who lacked voting rights had acquired them in August 2021. Ex. D.

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[3] The August 30 letter from ODH stated that one of WMD's backup doctors had "affiliate status," not "active status" admitting privileges. Ex. C. Our September 13 response explained that the only difference between affiliate status and active status was the inability to vote on matters affecting the medical staff. Ex. D.

[4] WMD requested a hearing on the proposed 2020 license revocation decision on September 20, 2021. A hearing has not yet been scheduled. However, because action on the license is stayed until all administrative remedies are exhausted, WMD is able to continue providing procedural abortion services.

37. On October 13, 2021, WMD filed its annual ASF license renewal application for 2022, relying on the pending renewed variance request.

38. On November 12, 2021, ODH notified WMD that it would not reconsider its decision on the variance and denied the renewed variance request WMD submitted on September 13, 2021. While the Director agreed that his objection based on one backup doctor's lack of voting rights was no longer an issue, he continued to maintain that the general surgeon who had previously qualified was no longer an acceptable backup doctor. Ex. E.

39. On November 30, 2021, WMD requested a new variance. That variance request listed four backup doctors, all of whom are OBGYNs with voting rights at Miami Valley Hospital, where they all have full, active admitting privileges and voting rights. Ex. F.

40. In December, I learned that the Ohio General Assembly had passed Senate Bill 157 ("SB 157"), which (among other things) provides that backup physicians may not work, consult, or teach, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college. Governor Mike DeWine signed SB157 into law, with an effective date of March 23, 2022.

41. All four of the backup physicians who supported our November 30, 2021 variance request are on the faculty of, provide instruction for, and are compensated in part under contracts with Wright State University, which is a state university.

42. On January 28, 2022, my attorney forwarded me ODH's decision on my November 30 variance request, which had been emailed to her that day. The letter stated that WMD's variance request was denied. It noted that all four of the backup physicians listed on the request were "credentialed as obstetrician/gynecologists with full active status admitting privileges at Miami Valley Hospital." However, it stated that the Director of the Department of

Health was nonetheless denying the variance because of "the four backup physicians' clear relationship with Wright State Physicians and the clear public policy directives contained within" SB 157, while also admitting that "S.B. 157 becomes effective March 22, 2022 [*sic*]." Ex. G.

43. Based on this letter, it appears that the Director of Health is enforcing SB 157 before it has taken effect. That is, ODH wrongfully denied my variance request based solely on noncompliance with SB 157, even though the law was not in effect then and still is not in effect now.

44. SB 157 also grants ASFs with existing variances 90 days from the effective date of March 23, 2022—that is, until June 21, 2022—to come into compliance with the law's new requirements.

45. Thus, if ODH had granted our November 30, 2021 variance request, we would have had until June 21, 2022 to find backup physicians to support our variance request. Instead, because of the arbitrary and unfounded denial of WMD's variance request, I received a letter from ODH Director Vanderhoff on January 31, 2022, "propos[ing] to issue an Order revoking and refusing to renew" WMD's ASF license. The letter further advised me that the Director may revoke my health care facility license after March 2, 2022. Ex. H.

46. Although the Director's January 31 letter noted that I have the option of pursuing administrative remedies to forestall the revocation of my license, in my experience, and as demonstrated by the long history of ODH's ceaseless efforts to shutter WMD, the administrative process does not provide meaningful review. Indeed, WMD has never prevailed in administrative proceedings pertaining to its licensing, because the only consideration in that process is the narrow factual question whether it has acquired a written transfer agreement or a variance—not

the reasons why the variance was denied or whether the purpose of requiring a variance (to ensure patient safety) has been met.

Impact of WMD Losing Its ASF License

47. If WMD loses our ASF license, we will be unable to provide procedural abortions. Thus, the Greater Dayton area will be left without a procedural abortion provider.

48. If we do not receive protection against WMD's license being revoked by ODH, we will have to stop providing procedural abortions immediately on March 3, 2022. In fact, because some abortion procedures—particularly, those that take place at or after 15 weeks LMP—take more than one day to complete, I will have to stop scheduling those patients for procedures before March 3, 2022, since ODH can revoke my license at any time beginning on that day. In addition, I will likely need to lay off numerous staff members almost immediately.

49. If WMD has to suddenly cease providing procedural abortions, we will suffer loss of patient trust, and loss of our ability to provide abortions to our patients.

50. I am certain that, without the ability to provide procedural abortions, WMD would not be able to stay open for very long. In fact, my Cincinnati clinic closed in large part because it could no longer offer procedural abortions. Thus, if I knew there was no prospect of regaining an ASF license, I would close WMD permanently.

51. Our patients – the vast majority of whom have low incomes and extremely limited resources – will suffer significant harm if our ASF is closed. It is unlikely that the nearest procedural abortion clinic–PPSWO–would be able to absorb all of WMD's procedural abortion patients. In fact, some clinics in Ohio already have wait times of two weeks or more. Thus, some patients who would ordinarily have sought a surgical abortion at WMD could be forced to travel hundreds of miles to clinics in other parts of the state.

52. WMD's closure would harm our patients greatly. Our patients have written numerous letters over the years, thanking us and our backup physicians for keeping WMD open. These letters demonstrate the range of circumstances that our patients are facing. For example, the partner of one patient wrote, "We needed this... Without this, my life, her life, and the fetus' life would never have the chance to reach the full potential any person has the right to....So THANK YOU a million times and I hope you keep helping people just like us." Another patient wrote, "I am a cancer patient and have lupus so being pregnant is not safe for me. I have done treatments during my 7 weeks of pregnancy. Thank you for keeping the choice alive." Another patient simply wrote, "Thank you for keeping this clinic open and giving me my choice."

53. Most of WMCD's patients live in poverty or have low incomes; in 2021, approximately 61% of our patients had incomes at or below 120% of the poverty line. Consequently, many of our patients already struggle to afford an abortion, to make child care arrangements, and to arrange time off from work to reach our ASF, making travel to another city a significant hurdle to obtaining an abortion.

54. Even if the other procedural abortion clinics in Ohio could accept some of our patients, wait times for all patients will grow, delaying the procedure for some of our patients.

55. Although abortion is an extremely safe procedure, the risks do increase as the pregnancy advances.

56. Further, the costs of an abortion procedure also increase with gestational age. Thus, as patients are forced to delay their procedure due to long wait times at clinics, they may also be forced to come up with more money, causing them to delay their procedure even further, as they acquire the additional funds to cover the additional costs of the procedure and the accompanying travel, childcare, and lost wages.

57. For some women, these additional logistical and financial burdens may be too great, and they may be unable to travel to another clinic in the state to receive an abortion.

58. My training in medicine began in 1968 and I received my medical license in Alabama in 1973. I have seen first-hand the devastating infections, complications, sterility, and even death that resulted from illegal abortions and self-abortions prior to 1973 when abortions were legalized in this country. Though some may continue to have access to abortion, I am concerned that some other patients will resort to desperate measures and attempt to obtain abortions under conditions that are not safe. This number will surely grow as safe and legal surgical abortions become unavailable in Southwest Ohio.

FURTHER AFFIANT SAYETH NAUGHT.

W.M. Martin Haskell, M.D.

Signed before me this 24th day of February, 2022

Karen A. Rucker
Attorney-at-law
Notary has no expiration date,

MVH Miami Valley Hospital

One Wyoming Street
Dayton, Ohio 45409
Telephone: 937 208 8700

November 19, 2002

Martin Haskell, M.D.
Women's Medical Center
1401 E. Stroop Rd.
Kettering, Ohio 45429

RE: Termination of Transfer Agreement

Dear Dr. Haskell:

Pursuant to the Term and Termination section of the Transfer Agreement Between Miami Valley Hospital and Women's Medical Center, Miami Valley Hospital is hereby providing thirty days written notice of its intent to terminate the Agreement. As of December 20, 2002, the Transfer Agreement will no longer be in effect. Of course, the Miami Valley Hospital Emergency and Trauma Center will be available to any of your patients that have an emergency medical condition.

Sincerely,

Deb Mals
Vice-President of Operations

EXHIBIT A

OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

614/466-3543
www.odh.ohio.gov

Ted Strickland/Governor

Alvin D. Jackson, M.D./Director of Health

OCT 2 1 2010

Ms. Valerie Haskell
Lebanon Road Medical Building, LLC
6650 Given Road
Cincinnati, Ohio 45243

Subject: **Variance Request of Lebanon Road Medical Center LLC dba Lebanon Road Surgery Center**

Dear Ms. Haskell,

This letter is in response to your September 15, 2010, correspondence on behalf of Lebanon Road Medical Center LLC dba Lebanon Road Surgery Center requesting a variance from the transfer agreement requirement set forth in paragraph (E) of the Ohio Administrative Code ("O.A.C.") rule 3701-83-19. Paragraph (E) of O.A.C. rule 3701-83-19 requires every ambulatory surgery facility ("ASF") to "have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, or for other needs as they arise." However, O.A.C. rule 3701-83-14 gives me the discretion to grant a variance from the transfer agreement requirement upon a showing that an ASF meets the intent of the requirement in an alternate manner.

In your September 15, 2010 letter, you specifically identified Drs. Haskell and Kade as having admitting privileges at The Jewish Hospital (Dr. Haskell) and The Christ Hospital (Dr. Kade). You have provided evidence of each physician's appointment to the courtesy staff of these hospitals and this information along with admitting privileges of these two physicians has been verified by a member of my staff with each hospital's medical staff office. You have further provided a copy of the Lebanon Road Surgery Center Emergency Medical Protocol to be followed where a Lebanon Road Surgery Center emergency patient is in need of hospital services.

After reviewing your correspondence and evaluating the information contained therein, I find that the proposed alternative to a written transfer directly between the ASF and a hospital provides for the continuity of care and the timely and unimpeded acceptance and admission of the ASF's emergency patients at a Cincinnati area hospital. Because the intent of the transfer agreement requirement is being met in an alternative manner, I hereby grant Lebanon Surgery Center a conditional variance from the requirement. This variance is conditioned upon: 1) the continued association with Lebanon Road Surgery Center of the two physicians named with admitting privileges to a Cincinnati area hospital; 2)

EXHIBIT B

the strict adherence to the Lebanon Road Surgery Center Emergency Protocol by all staff of the ASF; 3) the continued provision of timely and quality back-up emergency care by the physicians who provide services at this ASF; and 4) the provision of the letters of courtesy staff reappointments to The Jewish Hospital and The Christ Hospital medical staff as approved by the respective hospitals' medical staff offices.

Should the reappointment letters not be provided to this department in a timely manner, this variance will no longer be valid after September 30, 2011, the expiration date for the current privileges for Dr. Haskell at The Jewish Hospital. It is noted that the current privileges for Dr. Kade at The Christ Hospital expire February 28, 2012, at which time a reappointment letter must be sent to this department.

If you have any questions concerning this matter, please contact Roy Croy, R.S., C.P.H.Q., Chief of the Bureau of Community Health Care Facilities and Services, at (614)387-0801.

Sincerely,

Alvin D. Jackson, M.D.
Director of Health

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

August 30, 2021

Via e-mail and regular U.S. mail
Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106

Re: Women's Med Dayton
2020 Variance Request and April 21, 2020 Variance Modification

Dear Ms. Hill:

Pursuant to RC. 3702.304, O.A.C. 3701-83-14, and 3701-83-19 and after careful review and consideration, I am denying the variance request of Women's Med Dayton submitted on September 14, 2020, for its 2020 license renewal. I am also denying the 2020 variance modification submitted on April 21, 2020, substituting Dr. David Dhanraj for Dr. Jerome Yaklic, whose admitting privileges at Miami Valley Hospital ended on April 30, 2020.

As you know, the written transfer agreement (WTA) requirements in R.C. 3702.303 and O.A.C. 3701-83-19 are designed to protect patient health and safety. Variances from these requirements are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the statute and rule. R.C. 3702.304. Women's Med Dayton's use of Dr. Dhanraj as a backup physician is not sufficient as Dr. Dhanraj currently has affiliate status privileges at Miami Valley Hospital and not active status privileges.

As an additional reason for the denial, Dr. Dunn is not credentialed as an obstetrician/gynecologist with full active privileges at Miami Valley Hospital.

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14, the denial of Women's Med Dayton's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

246 North High Street
Columbus, Ohio 43215 U.S.A.
614 | 466-3543
www.odh.ohio.gov

EXHIBIT C

If you have any questions regarding this variance, please contact Lisa Eschbacher, General Counsel, at 614-466-4882.

Sincerely,

Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations
Lisa Eschbacher, General Counsel

SCHOOL OF LAW
CASE WESTERN RESERVE
UNIVERSITY

B. Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law

11075 East Boulevard
Cleveland, Ohio 44106-7148

phone 216.368.0553
fax 216.368.2086
jessie.hill@case.edu

law.case.edu

September 13, 2021

Mr. James Hodge
Chief, Bureau of Regulatory Operations
Ohio Department of Health
246 North High Street
Columbus, OH 43215

Re: Women's Med Dayton
Request for Variance to the Hospital Transfer Agreement Requirement

Dear Mr. Hodge:

I represent Women's Med Group Professional Corporation (WMGPC) and Women's Med Dayton (WMD).

Jennifer Branch, who previously represented WMGPC and WMD, wrote on September 14, 2020 to request a variance to O.R.C. § 3702.303, which requires ASFs have a written transfer agreement (WTA) with a local hospital. A variance is necessary because WMD, a facility that provides surgical abortions, has requested a written transfer agreement with all of the local hospitals, but none has agreed to provide a WTA. By letter dated August 30, 2021, Director Bruce Vanderhoff denied this variance request.[1]

It is my understanding that WMD does not have a right to request a hearing from ODH regarding the variance denial. O.R.C. § 3702.304(C); O.A.C. 3701-83-14; *Women's Med Ctr. of Dayton v. Dep't of Health*, 133 N.E.3d 1047, 1049 (Ohio Ct. App.), *appeal not allowed*, 156 Ohio St. 3d 1492 (2019). However, because the August 30 variance denial was based on incorrect understandings of the factual premises underlying WMD's request, and because ODH's consideration of this variance request may benefit from addition information provided herein, I

[1] It is my understanding that Ohio HB 197 (133rd Gen. Assem.) and Ohio HB 404 (133rd Gen. Assem.) had extended ODH's time for responding to this request to August 30, 2021 (sixty days after July 1, 2021).

EXHIBIT D

am now writing to re-apply for a variance on behalf of WMD, or in the alternative, to request reconsideration of the August 30 variance denial.

For the following reasons, WMD meets the requirements for a variance from the WTA requirement set forth in O.R.C. § 3702.304(B):

1. Application of the WTA requirement to WMD would cause it undue hardship, because as noted above, WMD has been unable to obtain a WTA from any local hospital. If the WTA requirement were applied to WMD, it would therefore be unable to continue operating, resulting in closure of the business and loss of its and its owner's constitutionally protected property rights. As explained in more detail below, WMD's alternative to a written transfer agreement provides patients with the same or higher level of safety and protection as a written transfer agreement would provide.

WMD has contracted with Drs. Barhan, Duke, Dunn, and Dhanraj to provide backup physician services (Attachment 1). WMD also has a contract with Wright State Physicians Women's Health Care (WSPWHC) to provide backup coverage. (Attachment 2). The four backup physicians have full, unrestricted, and active admitting privileges at Miami Valley Hospital (MVH) and have agreed to exercise those privileges to provide for the continuity of care and the timely, unimpeded acceptance and admission of WMD's emergency patients.

Drs. Barhan, Duke, and Dhanraj are credentialed with admitting privileges in Obstetrics and Gynecology without restrictions at Miami Valley Hospital and will arrange patient admission and care for each patient needing medical services according to each patient's need. (Attachment 3). Dr. Dunn is credentialed with admitting privileges in General Surgery without restrictions at Miami Valley Hospital and will arrange patient admission and care for each patient needing medical services according to each patient's need. (Attachment 3).

The Director's August 30 letter explains that a variance was denied in part because Dr. Dhanraj, one of WMD's four backup physicians, "currently has affiliate status privileges at Miami Valley Hospital and not active status privileges." WMD respectfully submits that this statement does not accurately reflect Dr. Dhanraj's ability to admit patients and is not a proper basis for denying the variance. At the time of application, Dr. Dhanraj possessed full, unrestricted privileges in obstetrics and gynecology at MVH.[2] Although Dr. Dhanraj was listed

[2] By email dated August 23, 2021, at 4:00 p.m., you requested the following information, to be provided by the close of business on August 25, 2021:

- Documentation that explains what each backup physician is permitted to do under their respective admitting privileges at Miami Valley Hospital, including any restrictions on procedures that can be performed or areas of the hospital that are restricted.
- The number of miles between each backup physician's clinical practice and Women's Med Dayton.

as "Affiliate (non-vote)" on the admitting privileges list submitted to Mr. Hodge on August 25, 2021, his inability to vote on matters affecting the medical staff was entirely due to the fact that he first joined the MVH staff in April 2020 and, according to the MVH Bylaws, physicians must be on staff for at least one year in order to acquire voting rights. (Attachment 4). Dr. Dhanraj's non-voting status had no impact whatsoever on the scope of his clinical privileges at MVH or his ability to admit and care for patients. In fact, Dr. Dhanraj was hired to chair the Obstetrics and Gynecology Department at Wright State School of Medicine with responsibility for overseeing the training of resident physicians at Miami Valley Hospital. (Attachment 11). Therefore, Dr. Dhanraj's non-voting status was not a proper basis for denial of the variance.

In addition, since Dr. Dhanraj was re-credentialed by MVH in August 2021, he has now acquired voting rights and his current status is therefore "Active (voting)." (Attachment 3).

The Director denied WMD's variance for the additional reason that Dr. Dunn "is not credentialed as an obstetrician/gynecologist with full active privileges at Miami Valley Hospital." As indicated by the attached Privileges List for Dr. Dunn (Attachment 3), and as confirmed in my email to you dated August 25, 2021, she has full, active privileges in general surgery at MVH. She is also board certified in general surgery. (Attachment 5). The fact that Dr. Dunn's privileges and credentials are in general surgery rather than obstetrics/gynecology does not undermine patient health and safety. There would be no greater benefit to patient safety if WMD had a WTA. A WTA would entail that a patient facing a complication would be sent to the emergency room to be evaluated by an emergency room physician and the appropriate specialist consulted by the emergency room physician. Dr. Dunn, who is the former Dean of the Wright State Boonshoft School of Medicine, is able to admit patients to MVH and consult the relevant specialist in the case of a complication that would be beyond her expertise, just as an emergency room physician would do.[3] (Attachment 12). Indeed, ODH accepted Dr. Dunn as a backup physician for WMD in support of its 2019 variance application, which was granted.

WMD also has a written policy ensuring coverage by the backup physicians who can admit patients to a hospital in the event that a patient experiences a surgical complication, an

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- The number of miles between Miami Valley Hospital and Women's Med Dayton.
- Board certification(s) held by each backup physician

On August 24, 2021, you also asked me "to confirm the privilege status for both Dr. Barhan and Dr. Duke[.] Are their statuses, 'active,' or 'affiliated? It is not clear from the letter provided." By email dated August 25, 2021, I responded to all of these requests and confirmed that "all 4 doctors have active privileges at MVH," because I understood the question to refer to the physicians' ability to admit patients and treat them at the hospital, not their medical staff voting status.

[3] In fact, some complications that could arise—such as bowel perforation—would be managed by a general surgeon rather than an OB/GYN.

emergency, or other medical need and needs to be transferred from WMD to the hospital. (Attachment 6).

2. The contracts between WMD and its four backup physicians who have admitting privileges at MVH, memorializing their agreement to provide backup coverage when medical care beyond the level the facility can provide is necessary, are attached. (Attachment 1).

3a. Drs. Barhan, Dhanraj, Duke, and Dunn are familiar with WMD and its operations and its policy. Each backup physician contract verifies this. (Attachment 1).

3b. All four physicians' primary practice location is Five Rivers Center for Women's Health, which is on the Miami Valley Hospital campus. It is about a 5-minute walk to the hospital. They have a secondary practice location in the Sugar Camp Medical Building, 400 Sugar Camp Circle, which is 1.6 miles or about a 5-minute drive to MVH. The distance from WMD to MVH is 5.8 miles, or approximately a 14-minute drive. (Attachment 7).

3c. WMD has a record of the name, telephone numbers, and practice specialties of each backup physician. (Attachment 6).

3d. Drs. Barhan, Dhanraj, Duke, and Dunn currently have active status with the Ohio State Medical Board and possess current medical licenses. None of the four backup physicians has had any action taken against them by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. Nor does any physician have a pending action or a complaint under review by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. (Attachment 8).

3e. All backup physicians are credentialed with admitting privileges in Gynecology or General Surgery without restrictions at Miami Valley Hospital. All backup physicians have notified MVH that they are consulting for WMD and that they have agreed to provide backup services. (Attachment 9).

4a. WMD's patient hospital transfer protocol (Attachment 6) and backup physician credentialing protocol (Attachment 10), which ensure continuity of care for any patient who may need to be transferred to a hospital, are attached. The facility's written policy explains how the attending physician will use the backup physicians to admit patients to a local hospital in an emergency, complication, or other medical need. The policy includes a plan which ensures that a substitute doctor is available to admit patients to

local hospitals in the event the four named backup physicians are temporarily unavailable and unable to admit patients to local hospitals. Drs. Barhan, Dhanraj, Duke, and Dunn affirm that they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

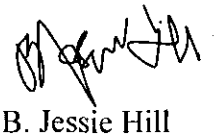
4b. Drs. Barhan, Dhanraj, Duke, and Dunn agreed in their contracts to immediately inform WMD of any circumstances that may impact their ability to provide for continuity of care and the timely, unimpeded acceptance and admission of the WMD's emergency patients. (Attachment 1). Drs. Barhan, Duke, Dhanraj, and Dunn agree they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

4c. WMD's written protocol ensures that a copy of the patient's medical record is transmitted contemporaneously with the patient to hospital. (Attachment 6)

This variance request is a good faith attempt to comply with Ohio law. WMD has not been informed by ODH of any additional rules or regulations that apply to a variance request. If ODH implements any additional rules, WMD requests ODH to notify WMD.

If you need any additional information or have any questions, please contact me at the address and phone number above, or by email to bjh11@case.edu

Sincerely,



B. Jessie Hill

C: Heather Coglianese

Encls. Attachment 1 Backup physician agreements
Attachment 2 WSPWHC agreement
Attachment 3 Privilege lists
Attachment 4 MVH Medical Staff Bylaws
Attachment 5 Board certifications
Attachment 6 WMD Backup Physician and Hospital Transfer protocol dated 4/2020
Attachment 7 Maps
Attachment 8 Verifications of license status with the Ohio Medical Board

Attachment 9 Notifications
Attachment 10 WMD Backup Physician credentialing protocol dated 8/26/19
Attachment 11 Dhanraj CV
Attachment 12 Dunn CV

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

November 12, 2021

Via e-mail and regular U.S. mail
Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106

Re: Women's Med Dayton
2020 Variance Request Resubmission

Dear Ms. Hill:

Pursuant to RC. 3702.304, O.A.C. 3701-83-14, and 3701-83-19 and after careful review and consideration, I am denying the September 13, 2021 request for reconsideration of my August 30, 2021, decision to deny Women's Med Dayton's variance request for its 2020 license renewal

As you know, the written transfer agreement (WTA) requirements in R.C. 3702.303 and O.A.C. 3701-83-19 are designed to protect patient health and safety. Variances from these requirements are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the statute and rule. R.C. 3702.304. Documentation provided by Women's Med Dayton showed that Dr. Dhanraj currently has active privileges at Miami Valley Hospital. I find that Dr. Dhanraj's privileges are acceptable.

However, the request for reconsideration did not provide sufficient additional information to resolve my concern that Dr. Dunn is not credentialed as an obstetrician/gynecologist with full active privileges at Miami Valley Hospital. Because Dr. Dunn is not an obstetrician/gynecologist, I am denying the request for reconsideration and my decision to deny the variance request remains unchanged.

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14, the denial of Women's Med Dayton's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

246 North High Street
Columbus, Ohio 43215 U.S.A

614 1466-3543
www.odh.ohio.gov

EXHIBIT E

If you have any questions regarding this variance, please contact James Hodge, Bureau Chief, Bureau of Regulatory Operations, at 614-644-6220.

Sincerely,

Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations

SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

B. Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law

11075 East Boulevard
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jessie.hill@case.edu

law.case.edu

November 30, 2021

Mr. James Hodge
Chief, Bureau of Regulatory Operations
Ohio Department of Health
246 North High Street
Columbus, OH 43215

VIA EMAIL

Re: Women's Med Dayton
Request for Variance to the Hospital Transfer Agreement Requirement

Dear Mr. Hodge:

I represent Women's Med Group Professional Corporation (WMGPC) and Women's Med Dayton (WMD).

I write to request a variance to O.R.C. § 3702.303, which requires ASFs have a written transfer agreement (WTA) with a local hospital. A variance is necessary because WMD, a facility that provides surgical abortions, has requested a written transfer agreement with all of the local hospitals, but none has agreed to provide a WTA. Please consider this variance application in support of WMD's pending license renewal application.

For the following reasons, WMD meets the requirements for a variance from the WTA requirement set forth in O.R.C. § 3702.304(B):

1. Application of the WTA requirement to WMD would cause it undue hardship, because as noted above, WMD has been unable to obtain a WTA from any local hospital. If the WTA requirement were applied to WMD, it would therefore be unable to continue operating, resulting in closure of the business and loss of its and its owner's constitutionally protected property rights. As explained in more detail below, WMD's alternative to a written transfer agreement provides patients with the same or higher level of safety and protection as a written transfer agreement would provide.

EXHIBIT F

WMD has contracted with Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle to provide backup physician services (Attachment 1). WMD also has a contract with Wright State Physicians Women's Health Care (WSPWHC) to provide backup coverage. (Attachment 2). The four backup physicians have full, unrestricted, and active admitting privileges at Miami Valley Hospital (MVH) and have agreed to exercise those privileges to provide for the continuity of care and the timely, unimpeded acceptance and admission of WMD's emergency patients.

Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle are credentialed with active admitting privileges in Obstetrics and Gynecology without restrictions at Miami Valley Hospital and will arrange patient admission and care for each patient needing medical services according to each patient's need. (Attachment 3).

WMD also has a written policy ensuring coverage by the backup physicians who can admit patients to a hospital in the event that a patient experiences a surgical complication, an emergency, or other medical need and needs to be transferred from WMD to the hospital. (Attachment 4).

2. The contracts between WMD and its four backup physicians who have admitting privileges at MVH, memorializing their agreement to provide backup coverage when medical care beyond the level the facility can provide is necessary, are attached. (Attachment 1).

3a. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle are familiar with WMD and its operations and its policy. Each backup physician contract verifies this. (Attachment 1).

3b. All four physicians' primary practice location is Five Rivers Center for Women's Health, which is on the Miami Valley Hospital campus. It is about a 5-minute walk to the hospital. They have a secondary practice location in the Sugar Camp Medical Building, 400 Sugar Camp Circle, which is 1.6 miles or about a 5-minute drive to MVH. The distance from WMD to MVH is 5.8 miles, or approximately a 14-minute drive. (Attachment 5).

3c. WMD has a record of the name, telephone numbers, and practice specialties of each backup physician. (Attachment 4).

3d. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle currently have active status with the Ohio State Medical Board and possess current medical licenses. None of the four backup physicians has had any action taken against them by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. Nor does any physician have a pending action or a complaint under review by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. (Attachment 6).

3e. All backup physicians are credentialed with admitting privileges in Gynecology or General Surgery without restrictions at Miami Valley Hospital. All backup physicians have

notified MVH that they are consulting for WMD and that they have agreed to provide backup services. (Attachment 7).

4a. WMD's patient hospital transfer protocol (Attachment 4) and backup physician credentialing protocol (Attachment 8), which ensure continuity of care for any patient who may need to be transferred to a hospital, are attached. The facility's written policy explains how the attending physician will use the backup physicians to admit patients to a local hospital in an emergency, complication, or other medical need. The policy includes a plan which ensures that a substitute doctor is available to admit patients to local hospitals in the event the four named backup physicians are temporarily unavailable and unable to admit patients to local hospitals. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle affirm that they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

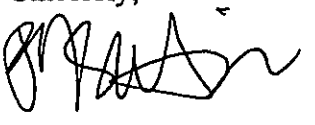
4b. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle agreed in their contracts to immediately inform WMD of any circumstances that may impact their ability to provide for continuity of care and the timely, unimpeded acceptance and admission of the WMD's emergency patients. (Attachment 1). Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle agree they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

4c. WMD's written protocol ensures that a copy of the patient's medical record is transmitted contemporaneously with the patient to hospital. (Attachment 4)

This variance request is a good faith attempt to comply with Ohio law. WMD has not been informed by ODH of any additional rules or regulations that apply to a variance request. If ODH implements any additional rules, WMD requests ODH to notify WMD.

If you need any additional information or have any questions, please contact me at the address and phone number above, or by email to bjh11@case.edu.

Sincerely,



B. Jessie Hill

cc: Heather Coglianese

Encls. Attachment 1 Backup physician agreements
Attachment 2 WSPWHC agreement

Attachment 3 Privilege lists
Attachment 4 WMD Backup Physician and Hospital Transfer protocol dated 4/2020
Attachment 5 Maps
Attachment 6 Verifications of license status with the Ohio Medical Board
Attachment 7 Notifications
Attachment 8 WMD Backup Physician credentialing protocol dated 8/26/19

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

January 28, 2022

Via e-mail and regular U.S. mail
Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106

Re: Women's Med Dayton
2021 License Renewal Variance Request

Dear Ms. Hill:

Pursuant to R.C. 3702.304, O.A.C. 3701-83-14, and 3701-83-19, Sub. S.B. 157 (134th General Assembly), and after careful review and consideration, I am denying Women's Med Dayton's November 30, 2021 request for a variance for its 2021 license renewal.

As you know, the written transfer agreement (WTA) requirements in R.C. 3702.303 and O.A.C. 3701-83-19 are designed to protect patient health and safety. Variances from these requirements are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the statute and rule. R.C. 3702.304. Four of the backup physicians submitted, Dr. Sheela Barhan, Dr. Janice Duke, Dr. David Dhanraj, and Dr. Reisinger-Kindle are credentialed as obstetrician/gynecologists with full active status admitting privileges at Miami Valley Hospital.

In addition, based on information contained in the November 30th application and publicly available information, all four proposed back-up physicians are employed by or compensated pursuant to a contract with, or provide instruction and consultation to Wright State University Boonshoft School of Medicine via their employment by and/or affiliation with Wright State Physicians. Wright State Physicians is composed of more than 100 physicians affiliated with the Wright State University Boonshoft School of Medicine. (https://wrightstatephysicians.org/find-a-doctor/) The Wright State University Boonshoft School of Medicine and Wright State Physicians are partners in providing training to medical students and delivering health care to the region. (https://wrightstatephysicians.org/about/)

According to the Wright State Physicians website (https://wrightstatephysicians.org/ob-gyn/physicians/):

- Sheela M. Barhan, M.D. is Associate Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

246 North High Street
Columbus, Ohio 43215 U.S.A.
614 I 466-3543
www.odh.ohio.gov

EXHIBIT G

- Janice M. Duke, M.D. is Associate Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- David N. Dhanraj, M.D. is Chair and Assistant Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- Keith Reisinger-Kindle, D.O. is Instructor/Faculty, WSU Boonshoft School of Medicine

Sub. S.B. 157 (134th General Assembly) was signed by Governor DeWine on December 22, 2021. The bill, among other provisions, provides that backup physicians may not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college. The bill further provides that backup physicians may not be employed by or compensated pursuant to a contract with, and may not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college. The bill specifically provides that if, at any time, the director of health determines that a consulting physician for an ambulatory surgical facility that has been granted a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code has violated the prohibition in division (B) of this section [teaching, providing instruction, being employed by, under contact or affiliated with a state university or college], the director shall rescind the variance. Sub. S.B. 157 becomes effective March 22, 2022.

Given the four backup physicians' clear relationship with Wright State Physicians and the clear public policy directives contained within Sub. S.B. 157, I am denying Women's Med Dayton's November 30, 2021 variance request.

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14, the denial of Women's Med Dayton's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

If you have any questions regarding this variance, please contact James Hodge, Bureau Chief, Bureau of Regulatory Operations, at 614-644-6220.

Sincerely,

Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations
Lance Himes, Interim General Counsel

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

January 31, 2022
Via e-mail and certified U.S. mail

Women's Med Dayton
Attn: Aerin Trick, Administrator
1401 E. Stroop Rd
Dayton Ohio 45429

Martin Haskell, MD
P.O. 43100
Cincinnati, OH 45243

Re: Women's Med Dayton
License Number: 1247AS
Case Number:
Proposed Denial and Revocation of License

Dear Ms. Trick and Dr. Haskell:

On August 30, 2021, I denied a variance for reasons related to Women's Med Dayton's health care facility license (ambulatory surgical facility), "Women's Med Dayton" Written Transfer Agreement, "WTA" requirements and Women's Med Dayton's use of Dr. Dhanraj as a backup physician and Dr. Dunn's credentials. By separate letter on the same date, I proposed to issue an Order revoking and refusing to renew the 2021 license. On September 20, 2021, Women's Med Dayton timely requested a hearing. On October 13, 2021, Women's Med Dayton submitted its license renewal application for November 5, 2021 - November 5, 2022. On November 12, 2021, I again denied a variance of the WTA requirements upon finding Dr. Dunn was not credentialed as an OB/GYN. On January 28, 2022, I denied Women's Med Dayton's November 30, 2021 request for a variance for its license renewal because the doctors in Women's Med Dayton's proposed variance are affiliated with Wright State and the public policy directives contained within Sub. S.B. 157 (134th General Assembly) precludes a backup from being affiliated with a state university or college.

In this communication, I hereby propose to issue an Order revoking and refusing to renew Women's Med Dayton's license in accordance with Revised Code (R.C.) Chapter 119 and R.C. 3702.32(D)(2) and Ohio Administrative Code (O.A.C.) 3701-83-05.1(C)(2) due to violations of R.C. 3702.303, 3702.304 and OA.C. 3701-83-1(E). R.C. 3702.303(A) requires an ambulatory surgical facility have a written transfer agreement with a local hospital for the safe and immediate transfer of patients when medical care is needed beyond that which can be provided in the facility. O.A.C. 3701-83-1(E) requires an

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EXHIBIT H

ambulatory surgical facility have a written transfer agreement with a hospital for the transfer of patient in the event of medical complications, emergency situations, and for other needs as they arise.

Specifically, Women's Med Dayton does not meet the requirements of R.C. 3702.303 because it does not have a written transfer agreement with "a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur, or medical complications arise." The inability to meet the requirements of R.C. 3702.303 is a result of the denial of the variance in the January 28, 2022 letter, because Women's Med Dayton's WTA physicians are associated with a state university. R.C. 3702.304, Sub. S.B. 157 (134th General Assembly). Additionally, Women's Med Dayton does not meet the requirements of OAC 3701-83-19(E) because it does not have a written transfer agreement "with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise."

If you wish to have a hearing, **you must request a hearing** before me or my duly authorized representative concerning my proposal to revoke, and refuse to renew the license to operate Women's Med Dayton. **Such a request must be made in writing and received within 30 days of receipt of this notice** and should be directed to Ohio Department of Health, Office of General Counsel 246 North High Street Columbus Ohio 43215. A request is considered timely if it is received by the Department of Health via facsimile at 614-564-2509, email to ODHlegal@odh.ohio.gov, hand-delivery or ordinary United States mail within 30 days of the date of receipt of this letter.

At any hearing, you may appear in person or be represented by your attorney, you may present evidence, and you may examine witnesses appearing for and against you. You also may present your position, contentions, and arguments in writing. If you are a corporation or LLC, you must be represented at the hearing by an attorney licensed to practice in the state of Ohio. Pursuant to R.C. 119.07 you may remain in operation while the administrative proceedings take place. Please be advised that if you do not request a hearing within thirty days of receipt of this letter, I may revoke and/or refuse to renew Women's Med Dayton's health care facility license.

If you have questions about this notice, please contact the Bureau of Regulatory Operations at 614-644-6220.

Sincerely,

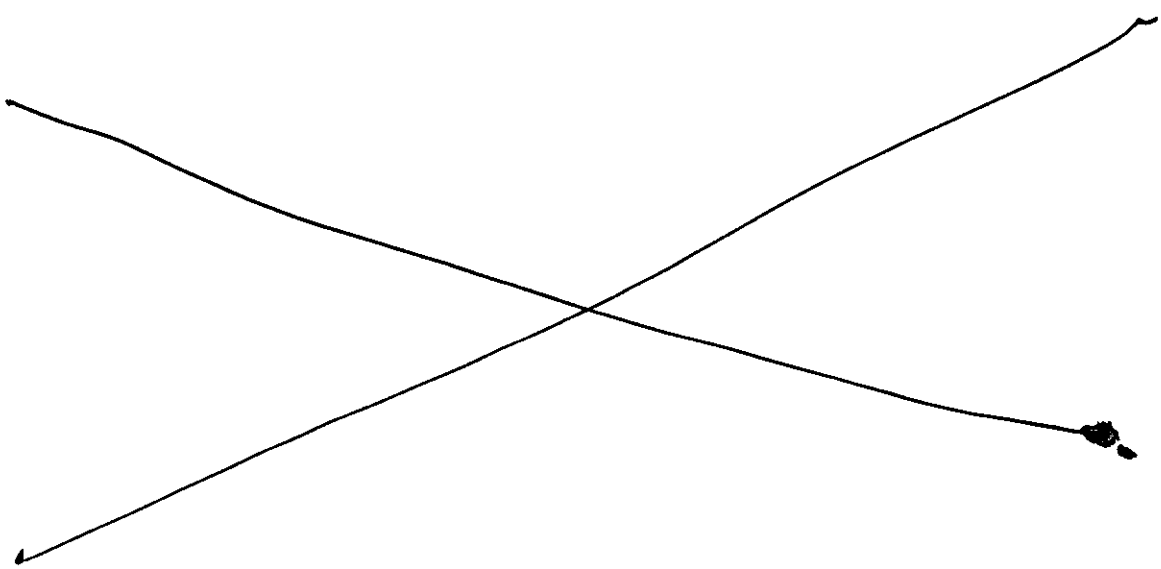
Bruce Vanderhoff, M.D., MBA
Director of Health

Enclosures: August 30, 2021 ODH Variance Denial Notice, August 30, 2021 ODH License Denial and Proposed Revocation, November 12, 2021 ODH Variance Renewal Resubmission Denial Notice, January 28, 2022 ODH Variance Renewal Resubmission Denial Notice

C: Jessie Hill

CMRR: 7017 3380 0000 3163 3874 (Women's Med Dayton)
7017 3380 0000 3163 3867 (Martin Haskell, MD)

EXHIBIT 2



IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MED GROUP PROFESSIONAL CORP., *et al.*, *Plaintiffs*, v. VANDERHOFF, *et al.*, *Defendants.*	Case No. _____ Judge _____

AFFIDAVIT OF B. JESSIE HILL IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND 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 Ohio. I represent Plaintiff Women's Med Group Professional Corporation d/b/a Women's Med Dayton ("WMD") in this action. Since January 2021, I have also represented WMD in connection with its Ambulatory Surgical Facility licensing and variance applications.

2. I submit this affidavit in support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction to prevent the Ohio Department of Health from revoking and/or refusing to renew WMD's ASF license.

3. On January 28, 2022, I received a letter via email from Ohio Director of Health Bruce Vanderhoff, M.D., M.B.A., informing me that WMD's November 30, 2021 request for a variance from the Written Transfer Agreement ("WTA") requirement, in support of WMD's 2021 license application, was denied. That letter is attached as Exhibit A.

FURTHER AFFIANT SAYETH NAUGHT.

B. Jessie Hill

Signed before me this 24 day of February, 2022

JENNIFER HINES, NOTARY PUBLIC
Recorded in Lake County
Comm. Exp. 08-16-2022
STATE OF OHIO

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

January 28, 2022

Via e-mail and regular U.S. mail
Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106

Re: Women's Med Dayton
2021 License Renewal Variance Request

Dear Ms. Hill:

Pursuant to R.C. 3702.304, O.A.C. 3701-83-14, and 3701-83-19, Sub. S.B. 157 (134th General Assembly), and after careful review and consideration, I am denying Women's Med Dayton's November 30, 2021 request for a variance for its 2021 license renewal.

As you know, the written transfer agreement (WTA) requirements in R.C. 3702.303 and O.A.C. 3701-83-19 are designed to protect patient health and safety. Variances from these requirements are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the statute and rule. R.C. 3702.304. Four of the backup physicians submitted, Dr. Sheela Barhan, Dr. Janice Duke, Dr. David Dhanraj, and Dr. Reisinger-Kindle are credentialed as obstetrician/gynecologists with full active status admitting privileges at Miami Valley Hospital.

In addition, based on information contained in the November 30th application and publicly available information, all four proposed back-up physicians are employed by or compensated pursuant to a contract with, or provide instruction and consultation to Wright State University Boonshoft School of Medicine via their employment by and/or affiliation with Wright State Physicians. Wright State Physicians is composed of more than 100 physicians affiliated with the Wright State University Boonshoft School of Medicine. (https://wrightstatephysicians.org/find-a-doctor/) The Wright State University Boonshoft School of Medicine and Wright State Physicians are partners in providing training to medical students and delivering health care to the region. (https://wrightstatephysicians.org/about/)

According to the Wright State Physicians website (https://wrightstatephysicians.org/ob-gyn/physicians/):

- Sheela M. Barhan, M.D. is Associate Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

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EXHIBIT A

- Janice M. Duke, M.D. is Associate Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- David N. Dhanraj, M.D. is Chair and Assistant Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- Keith Reisinger-Kindle, D.O. is Instructor/Faculty, WSU Boonshoft School of Medicine

Sub. S.B. 157 (134th General Assembly) was signed by Governor DeWine on December 22, 2021. The bill, among other provisions, provides that backup physicians may not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college. The bill further provides that backup physicians may not be employed by or compensated pursuant to a contract with, and may not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college. The bill specifically provides that if, at any time, the director of health determines that a consulting physician for an ambulatory surgical facility that has been granted a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code has violated the prohibition in division (B) of this section [teaching, providing instruction, being employed by, under contact or affiliated with a state university or college], the director shall rescind the variance. Sub. S.B. 157 becomes effective March 22, 2022.

Given the four backup physicians' clear relationship with Wright State Physicians and the clear public policy directives contained within Sub. S.B. 157, I am denying Women's Med Dayton's November 30, 2021 variance request.

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14, the denial of Women's Med Dayton's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

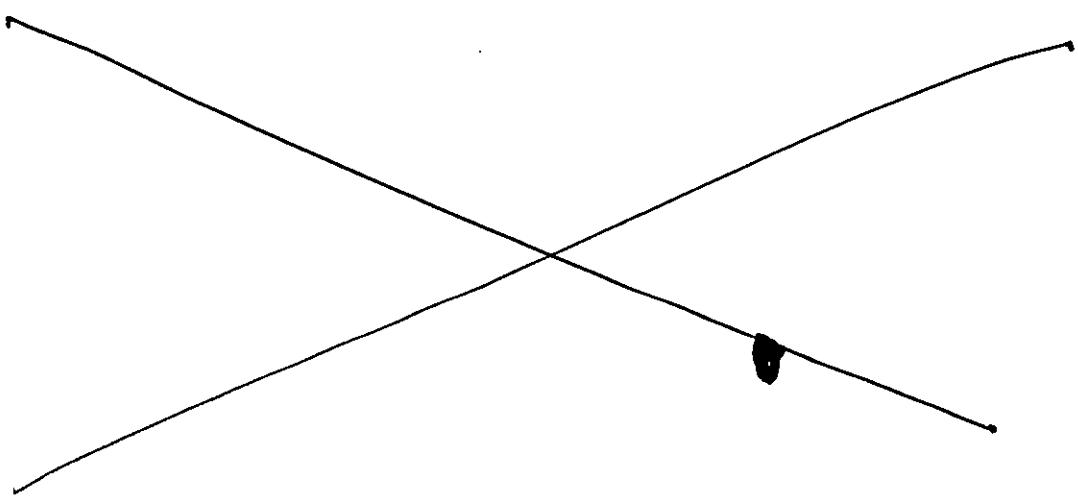
If you have any questions regarding this variance, please contact James Hodge, Bureau Chief, Bureau of Regulatory Operations, at 614-644-6220.

Sincerely,

Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations
Lance Himes, Interim General Counsel

EXHIBIT 3



IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORP., *et al.*, *Plaintiffs*, v. VANDERHOFF, *et al.*, *Defendants.*	Case No. _____ Judge _____

AFFIDAVIT OF KERSHA DEIBEL IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Kersha Deibel, being duly sworn on oath, do depose and state as follows:

1. I am the President and Chief Executive Officer of Planned Parenthood Southwest Ohio Region ("PPSWO").

2. My responsibilities at PPSWO 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 PPSWO.

3. I submit this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

PPSWO and Its Services

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

5. PPSWO provides affordable, respectful, and high-quality 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 infections; HIV testing; pregnancy testing; and medication and procedural abortion.

6. We provide procedural abortions at our ambulatory surgical facility ("ASF") in Cincinnati. PPSWO or a predecessor organization has provided procedural abortions in this location since 1974. Currently, PPSWO provides procedural abortions up to 21 weeks, 6 days of pregnancy as dated from the first day of the patient's last menstrual period ("LMP"). PPSWO provides medication abortion up to 70 days, or 10 weeks, LMP.

7. In calendar year 2019, 75% 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. In 2019, 1,321 procedural abortions were performed after 10 weeks LMP, and in 2020, 1,239 procedural abortions were performed after 10 weeks LMP.

8. Abortion is extremely safe and complications rarely occur. When complications do occur, the vast majority are minor and are successfully treated at our ASF. Notwithstanding that more serious complications are extremely rare, our ASF is prepared for them. In the past five years we have provided over 16,334 abortions, and only four of those patients needed to be transferred to a hospital.

PPSWO's ASF License

9. PPSWO has operated with an ASF license since 2000, after it was informed by the Ohio Department of Health ("ODH") that its provision of abortion services qualified it as an ASF. Ohio law requires that ASFs have a written transfer agreement ("WTA") with a local hospital, or obtain a variance from that requirement from ODH.

10. Until 2013, PPSWO complied with that requirement by having a WTA with University of Cincinnati Medical Center ("UCMC"), but UCMC was forced to terminate that agreement in 2013 when Ohio passed a law prohibiting public hospitals from entering into a WTA with an ASF that provides abortions. R.C. 3727.60(B)(1). PPSWO has been unable to secure a WTA with another local hospital since that time, despite approaching all the local hospitals that qualify repeatedly over the years. PPSWO has therefore needed to re-apply annually for a variance from the WTA requirement.

11. Prior to the expiration of the WTA with UCMC, PPSWO submitted an application for a variance supported by contracts with several back-up doctors with privileges at a local hospital who agreed to provide care to PPSWO's patients. However, in October 2014, ODH—apparently ignoring that application—informed PPSWO that PPSWO was not in compliance with the ASF licensing requirements because of the lack of a WTA and threatened to revoke PPSWO's license.

12. Because of ODH's threatened revocation of PPSWO's ASF license and PPSWO's exposure to substantial civil penalties, PPSWO was forced to file litigation seeking to enjoin ODH from taking actions to revoke its ASF license. *See* Complaint, *Planned Parenthood Southwest Ohio Region v. Hodges*, No. 1:14-cv-00867 (S.D. Ohio Nov. 10, 2014), ECF No. 1. In response to this litigation, ODH granted PPSWO's variance request in November 2014, and the litigation was dismissed without prejudice.

13. PPSWO's next license-renewal request and new variance request were submitted in May 2015. In September 2015, ODH denied PPSWO's request for a variance, stating that the three back-up doctors PPSWO had identified in support of its application were insufficient, and appearing to require four back-up doctors, even though ODH had approved previous PPSWO

variances with only three. That same month ODH proposed to revoke and not renew PPSWO's ASF license.

14. When ODH informed PPSWO of the need for a fourth back-up doctor, PPSWO began a search, signed a contract with a fourth back-up doctor, and submitted a new variance request to ODH, which ODH granted in November 2015. At the same time, ODH notified PPSWO that it would be required to submit a new variance request by April 1, 2016, sixty days in advance of the expiration of PPSWO's license, due to R.C. 3702.304(A)(2).

15. PPSWO diligently applied for new variances on March 31, 2016, March 31, 2017, March 31, 2018, and March 21, 2019, each time listing four back-up doctors. ODH granted each of these variances.

16. On December 20, 2019, PPSWO notified ODH that one of its back-up doctors had resigned. As a result, ODH rescinded PPSWO's variance on December 26, 2019. PPSWO contracted with a replacement back-up doctor less than two weeks later on January 8, 2020, and submitted a new variance request that same day.

17. ODH never ruled on PPSWO's January 8, 2020, variance request. Therefore, PPSWO re-filed this variance request sixty days later on March 30, 2020, and again on March 31, 2021, and July 2, 2021.

18. During this same time period, ODH suspended all licensing action, including renewals and revocations, from March 25, 2020, through July 1, 2021, due to the COVID-19 health emergency.

19. On August 30, 2021, ODH granted PPSWO's July 2, 2021, variance request, which was consolidated with all other pending variance requests. Under current law, that variance remains in effect through the end of PPSWO's next license-renewal period.[1]

20. In July 2021, the Ohio legislature passed Am. Sub. H.B. 110 ("HB 110"), 134th Gen. Assemb. (2021), which modified several requirements for a variance, including the maximum distance between an ASF and its back-up physicians' practice locations and hospitals. *See* R.C. 3702.304(B). HB 110 further required that ASFs that had been granted a variance submit documentation demonstrating compliance with HB 110's new requirements within ninety days of its September 30, 2021, effective date, and permits ODH to rescind the variance if the ASF fails to demonstrate compliance. HB 110, § 291.80. The backup physicians who support PPSWO's current variance complied with HB 110, so PPSWO submitted the required documentation to ODH on December 29, 2021.

21. Earlier this week, on February 23, 2022, ODH sent a letter to PPSWO in response to its December 2021 submission. The letter does not raise any concern with PPSWO's compliance with HB 110, but instead inquires about PPSWO's compliance with Ohio S.B. 157, 134th Gen. Assemb. (2021) ("SB 157"), which I understand goes into effect on March 23, 2022, and provides, among other things, that back-up physicians may not work, consult, or teach, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college.

[1] ODH has not informed PPSWO when its current renewal period expires, and, while the ODH website shows that PPSWO has an active ASF license, it does not list relevant dates for the current renewal period. Given the suspension of licensing actions due to the COVID-19 health emergency through July 1, 2021, PPSWO's July 2, 2021, application and ODH's August 30, 2021, grant of PPSWO's current variance, PPSWO believes that its current renewal period should run through August 2022.

22. ODH's letter, while recognizing that SB 157 does not go into effect until late March,[2] asks PPSWO to submit by Sunday, February 27, 2022, attestations that its back-up physicians meet SB 157's requirements. SB 157 itself states that ASFs that hold a variance from the WTA requirement, as PPSWO does, shall submit attestations of compliance with SB 157 within ninety days of SB 157's March 23, 2022, effective date, which gives PPSWO until June 21, 2022, to comply with SB 157 and submit required documentation to ODH. ODH appears to be unilaterally and without basis moving that deadline up approximately four months.

23. PPSWO intends to respond to ODH to convey its understanding that, because PPSWO currently holds a variance from the WTA, it has until June 21, 2022, to comply with SB 157 and to submit documentation of that compliance with ODH. In the meantime, PPSWO is already working to attempt to comply with SB 157.

Impact

24. PPSWO's current variance relies on back-up doctors who would be disqualified under SB 157, so PPSWO is in danger of ODH rescinding its current variance and revoking its ASF license if ODH goes further down the path of prematurely enforcing SB 157 against PPSWO and failing to allow it the time to which it is statutorily entitled to come into compliance.

25. If PPSWO loses its ASF license, it will no longer be able to provide procedural abortions, and therefore will be unable to provide abortion after 10 weeks LMP, and will be forced to deny care to any patients whose pregnancies are earlier than 10 weeks LMP for whom a medication abortion is contraindicated. If both PPSWO and Women's Med Dayton ("WMD") lose their licenses and are both unable to provide procedural abortions, there will be no procedural abortion provider, and no abortion access at all after 10 weeks LMP, in Ohio south of Columbus.

[2] ODH mistakenly lists March 22, 2022, as SB 157's effective date.

26. Patients who must travel long distances to obtain procedural abortions will face physical, financial, and emotional obstacles to obtaining abortion care. This will result in patients being delayed or prevented entirely from obtaining abortions.

27. If PPSWO loses its ASF license, it will be forced to lay off staff and shut down its ASF.

28. PPSWO staff are already spending many hours that would otherwise be spent on patient care attempting to identify, recruit, contract with, and maintain new back-up doctors who comply with SB 157's medically unnecessary requirements.

29. If WMD loses its ASF license and is unable to provide procedural abortions while PPSWO continues to hold a license, PPSWO will not be able to absorb all of the patients who would otherwise have obtained care at WMD without patients facing significant delays in obtaining the care they need.

FURTHER AFFIANT SAYETH NAUGHT.

Kersha Deibel

STATE OHIO
COUNTY Hamilton

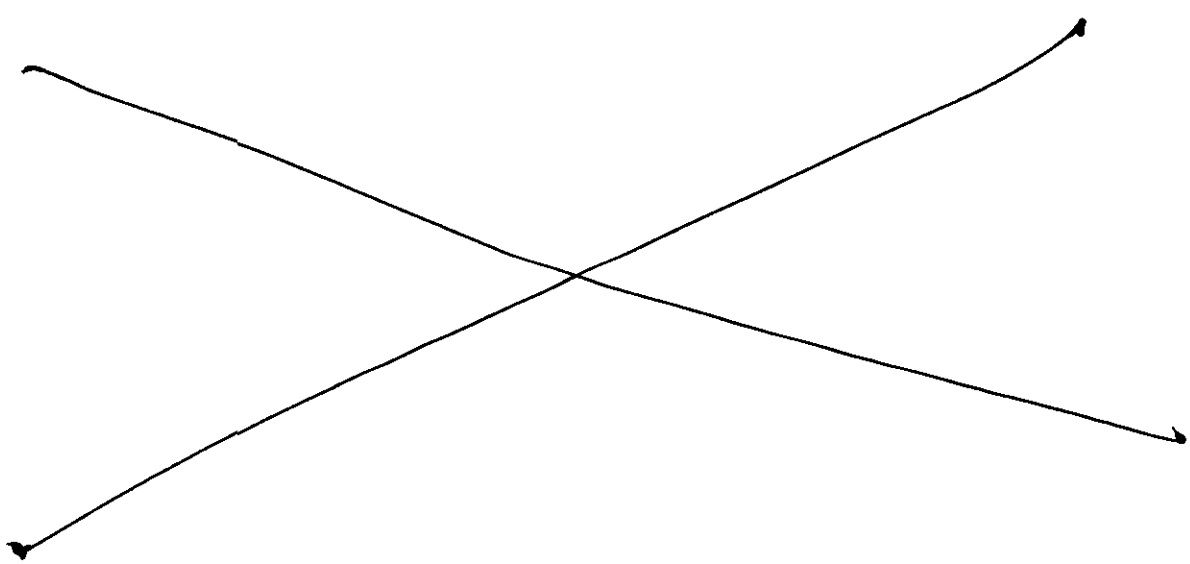
Signed before me this 25 day of February, 2022 By Kersha Deibel

LaToshia Pratt, Notary Public

NOTARIAL SEAL
STATE OF OHIO

LaToshia Pratt
Notary Public, State of Ohio
My Commission Expires 03-14-2024

EXHIBIT 4



IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MED GROUP PROFESSIONAL CORP., *et al.*, *Plaintiffs*, v. VANDERHOFF, *et al.*, *Defendants.*	Case No. _____ Judge _____

AFFIDAVIT OF LISA PIERCE REISZ IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Lisa Pierce Reisz, being duly sworn on oath, do depose and state as follows:

1. I am an attorney licensed to practice in Ohio. I represent Planned Parenthood Southwest Ohio Region ("PPSWO") in connection with its Ambulatory Surgical Facility ("ASF") licensing process, including its applications for variances from the requirement that ASFs have a written transfer agreement with a local hospital. PPSWO operates an ASF in Cincinnati, where it provides procedural abortions, among other services.

2. I submit this affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

3. On February 23, 2022, I received a letter via email from James Hodge, Chief, Bureau of Regulatory Operations for the Ohio Department of Health requesting that PPSWO provide to ODH by Sunday, February 27, 2022 attestation that the backup physicians who support PPSWO's current variance from the WTA requirement comply with 134th Ohio General Assembly's Substitute Senate Bill No. 157 ("SB 157"). That letter is attached as Exhibit A.

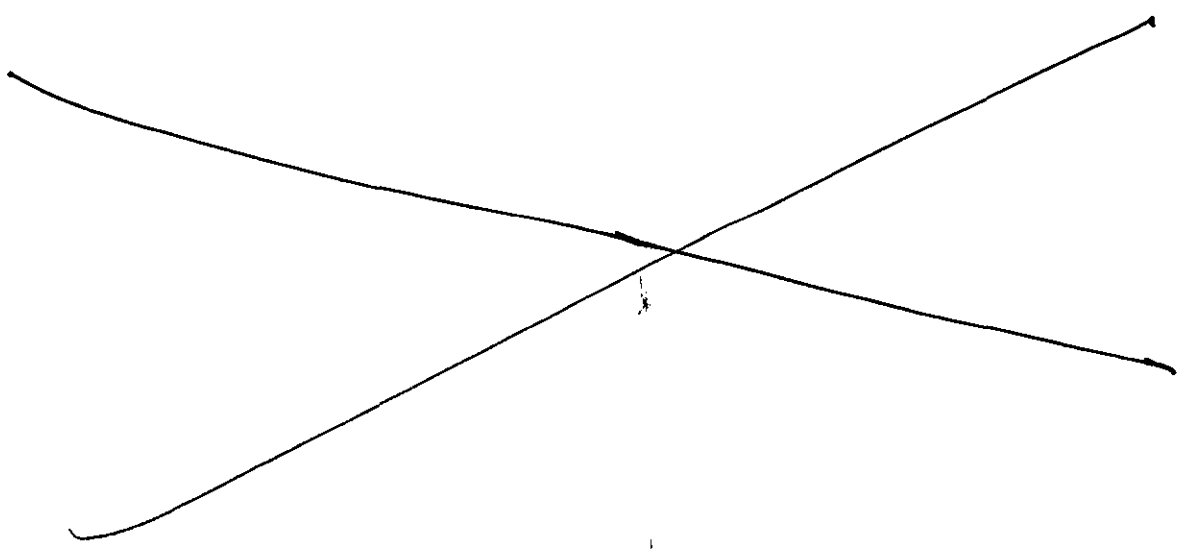
FURTHER AFFIANT SAYETH NAUGHT.

Lisa Pierce Reisz

Signed before me this 24th day of February, 2022

STACY L. MILLER
Notary Public, State of Ohio
My Commission Expires
11/03/2024

EXHIBIT A



Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

February 23, 2022

Via email only:
Lisa Pierce Riez
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
lpreisz@vorys.com

Re: Planned Parenthood of Southwest Ohio - December 29, 2021, Application for Existing Variance to the Hospital Transfer Agreement Requirement and application of S.B. 157, effective March 22, 2022.

Dear Attorney Pierce Riesz,

The Department is requesting additional information related to Planned Parenthood of Southwest Ohio's pending Application for Variance to the hospital transfer agreement received December 29, 2021. Please provide the Department with the following by February 27, 2022.

- Attestation by the physicians and the facility that the backup physicians identified in the application (p.4/138) comply with Sub. S.B. 157 (134th General Assembly).

Sub. S.B. 157 (134th General Assembly) was signed by Governor DeWine on December 22, 2021. The bill, among other provisions, provides that backup physicians may not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a sate university or college. The bill further provides that backup physicians may not be employed by or compensated pursuant to a contract with, and many not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college. The bill specifically provides that if, at any time, the director of health determines that a consulting physician for an ambulatory surgical facility that has been granted a variance from the written transfer agreement requirement of section of 3702.303 or the Revised Code has violated the prohibition in division (B) of the this section [teaching, providing instruction, being employed by, under contract or affiliated with a state university or college], the director shall rescind the variance. Sub. S.B. 157 becomes effective March 22, 2022. Given the clear public policy directives contained with Sub.S.B. 157, the Department requests information that details the physicians' status vis a vis state universities and colleges.

Please submit this information to me in writing at the following email address: James.Hodge@odh.ohio.gov

Please feel free to contact me if you have any questions.

Sincerely,

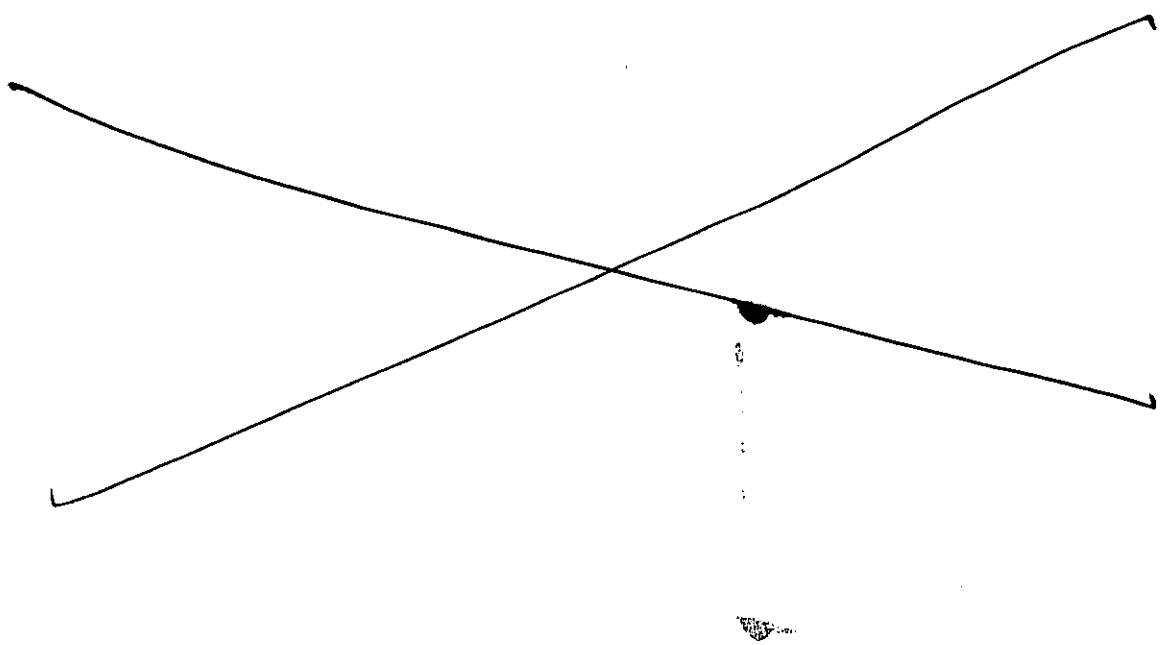
James Hodge

James Hodge, Chief
Bureau of Regulatory Operations

246 North High Street
Columbus, Ohio 43215 U.S.A.

614 I 466-3543
www.odh.ohio.gov

EXHIBIT 5



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. A21 00870 Judge Alison Hatheway **ENTRY GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This matter comes before the Court on Plaintiffs Planned Parenthood Southwest Ohio Region, et al.'s Motion for Preliminary Injunction. This case involves a challenge to Am. S.B. No. 27, 2020 Ohio Laws File 77 ("SB27"), which requires embryonic and fetal tissue after a procedural abortion (also known as a surgical abortion) to be cremated or interred. Because rules, including those prescribing forms necessary to implement SB27, have not been adopted prior to SB27's effective date, Plaintiffs are unable to comply with the law when it takes effect and will therefore have to stop providing procedural abortions. The Court thus finds Plaintiffs have met their burden of showing that SB27 is substantially likely to violate Plaintiffs' and their patients' constitutional rights and will cause irreparable harm. The Court further finds that enjoining Defendants from enforcing a law with which Plaintiffs are unable to comply does not harm third parties, and preventing the violation of constitutional rights is in the public interest.

The Court, having considered Plaintiffs' Motion, State Defendants' Brief in Opposition, and Plaintiffs' Reply, and having fully reviewed the positions of the parties herein, hereby **GRANTS** Plaintiffs' Motion for Preliminary Injunction. Defendants and their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are **PRELIMINARILY ENJOINED** from enforcing SB27 until 30 days after implementing n

and forms have been adopted and have become effective pursuant to the notice-and-comment rulemaking process set forth in R.C. 119.03(A)–(F). The Court hereby sets Plaintiffs' Civ.R. 65(C) bond requirement at $0.00.

I. BACKGROUND

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") are health care providers in the state of Ohio who provide reproductive health care, including procedural abortions. Plaintiffs represent all providers of procedural abortion in the state. They challenge SB27, which was signed into law on December 30, 2020, and is set to take effect on April 6, 2021, raising due process and equal protection claims under the Ohio Constitution and pursuant to the Declaratory Judgment Act. Defendants are the Ohio Department of Health ("ODH"), ODH Director Stephanie McCloud, the State Medical Board of Ohio, and county and city prosecutors charged with enforcing the criminal penalties set forth in the law.

A. Abortion Provision in Ohio

Plaintiffs represent the following facts regarding abortion provision in Ohio, which Defendants do not dispute. Plaintiffs state there are two main methods of abortion: medication abortion and procedural abortion, and that both are effective in terminating a pregnancy. Procedural abortion is the only method of abortion available after ten weeks in pregnancy, and for some patients, it is the only method available at any gestation. According to ODH data, in 2019, more than 61 percent of abortions in the state were procedural abortions.

B. SB27

SB27 requires that "fetal remains" (which it defines as "the product of human conception that has been aborted," i.e., a "zygote, blastocyte, embryo, or fetus," R.C. 3726.01(C)) from a

procedural abortion can only be disposed of by cremation or interment. 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).[1] Before the procedural abortion, the patient must be provided with an ODH-prescribed "notification form." R.C. 3726.03(B). 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). 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 law's effective date, to adopt rules via Chapter 119 notice-and-comment rulemaking to carry out its requirements, including rules that prescribe the notification, consent, and detachable supplemental forms described above. R.C. 3726.14. It is undisputed that at this time, ODH has not promulgated any rules related to SB27, including rules prescribing the three forms, nor even initiated the notice-and-comment process. Defendants ODH, Director McCloud, and State Medical Board of Ohio (together "State Defendants") admit rules and forms are needed to implement SB27 and represent that the promulgation of these rules, including forms, will take months and will not be final for more than two months after the process is started. *See* R.C. 119.03 ("The 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"); *see also* State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order at 5 ("Essentially, ODH has an additional three months after April 6 to adopt and promulgate rules, and namely, three months to

[1] 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).

produce the forms which Plaintiffs are required to provide to women before performing a procedural abortion.").

Failure to comply with SB27 subjects Plaintiffs and their physicians to significant penalties. Although SB27 suspends criminal penalties until ODH has adopted rules, the law does not stay any noncriminal sanctions. Noncriminal penalties can apply as soon as SB27 takes effect on April 6, and include license suspension or revocation for both abortion facilities and physicians, fines, damages, and court injunctions. *See* Ohio Admin. Code 3701-83-05(C); Ohio Admin. Code 3701-83-05.1(B), (C)(2), (C)(4), and (F); Ohio Admin. Code 3701-83-05.2(F); R.C. 3702.32(D); R.C. 2317.56(G)(1) and (2); R.C. 4731.22(B)(21) and (23); R.C. 4731.225(B); R.C. 3701.79(J). Defendants ODH and the State Medical Board have independent enforcement authority.

Plaintiffs represent that they credibly fear immediate enforcement after the law takes effect, despite the impossibility of compliance without the implementing forms, because of the history of aggressive enforcement actions against abortion providers. Plaintiffs represent, and Defendants do not dispute, that Plaintiffs 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, but were unable to get such assurances. Plaintiffs contend that they will thus be forced to stop all procedural abortions in Ohio beginning on April 6, which will, in effect, ban abortion in the state after ten weeks of pregnancy.

II. ANALYSIS AND DISCUSSION

A. Standard

A party seeking a 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." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267–68, 747 N.E.2d 268 (1st Dist.2000).

B. Plaintiffs Are Substantially Likely to Succeed on Their Claims.

i. Plaintiffs are substantially likely to succeed on their claim that SB27 will violate their patients' constitutional rights.

It is undisputed that, at a minimum, the Ohio Constitution protects the right to access abortion to the same extent as the federal Constitution. *See Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) ("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."). By forcing Plaintiffs to stop providing procedural abortions because of the real threat of severe sanctions for failure to comply with a law that is impossible to comply with, Defendants have violated Plaintiffs' patients' rights to access abortion under the Ohio Constitution.[2]

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"). 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.,

[2] This Court therefore need not reach the issue of whether the Ohio Constitution protects patients' rights to access abortion to a greater extent than the federal Constitution at this time.

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.

Under this precedent, SB27 must be enjoined because it will ban pre-viability abortion, and therefore is substantially likely to violate Ohioans' constitutional rights.

ii. Plaintiffs are substantially likely to succeed on their claim that SB27 will violate their constitutional rights.

SB27 will also violate Plaintiffs' substantive due process rights because, even under the rational basis standard, 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. *See Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, at ¶ 28, *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 Campbell v. Bennett*, 212 F.Supp.2d 1339, 1343 (M.D.Ala.2002) ("[A]ny 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."); *Landgraf v. USI Film Products*, 511 U.S. 244, 264, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *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 * * *").

Finally, SB27 will violate Plaintiffs' procedural due process rights by depriving them of protected interests without adequate process. Plaintiffs have protected liberty and property

interests in the operation of their businesses and in the continuation of their chosen professions. *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"). Defendant's failure to adopt rules and forms effectively prevents the Plaintiffs from complying with SB27. This failure thereby prevents Plaintiffs from continuing to provide procedural abortions without risk enforcement of noncriminal sanctions, which unlawfully deprives Plaintiffs of their protected interests with no process whatsoever. *See Hodes & Nauser, MD's, PA. v. Moser*, D.Kan. No. 11-2365-CM at 40:16-19 (July 1, 2011) (temporarily enjoining state regulations where abortion providers were given only nine days to comply with onerous physical plant requirements); *Women's Med. Professional Corp. v. Baird*, 438 F.3d 595, 611–13 (6th Cir.2006) (immediate shutdown of abortion provider's practice violated procedural due process, notwithstanding the availability of post-deprivation remedies).

C. Plaintiffs and Their Patients Will Suffer Irreparable Harm Absent Relief.

In light of the Court's findings above that Plaintiffs and their patients will be deprived of their constitutional right to due process, unless SB27 is enjoined, a finding of irreparable harm follows. *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) ("A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury."). Without relief, Plaintiffs will have to cease providing procedural abortions, because it is impossible to comply with SB27 without the necessary rules and forms. If this occurs, patients in Ohio seeking to terminate their pre-viable pregnancies after ten weeks will be deprived of their constitutional right to abortion. The Court also finds that Plaintiffs will be harmed by having to stop providing

procedural abortions and by enforcement of SB27 until 30 days after implementing rules and forms have been adopted and have become effective pursuant to the notice-and-comment rulemaking process set forth in R.C. 119.03(A)–(F).

D. No Third Parties Will Be Harmed and the Public Interest Will Be Served.

"[T]he state cannot be harmed when an unconstitutional law does not go into effect." *Village of Newburgh Heights v. State*, 8th Dist. Cuyahoga Nos. 109106 and 109114, 2021-Ohio-61, ¶ 76.

Finally, 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).

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is hereby **GRANTED.** Defendants and their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are **PRELIMINARILY ENJOINED** from enforcing SB27 until 30 days after implementing rules and forms have been adopted and have become effective pursuant to the notice-and-comment rulemaking process set forth in R.C. 119.03(A)–(F). Because relief granted to Plaintiffs will not result in monetary loss to Defendant, this Court hereby sets the Plaintiffs' Civ.R. 65(C) bond requirement at $0.00.

IT IS SO ORDERED.

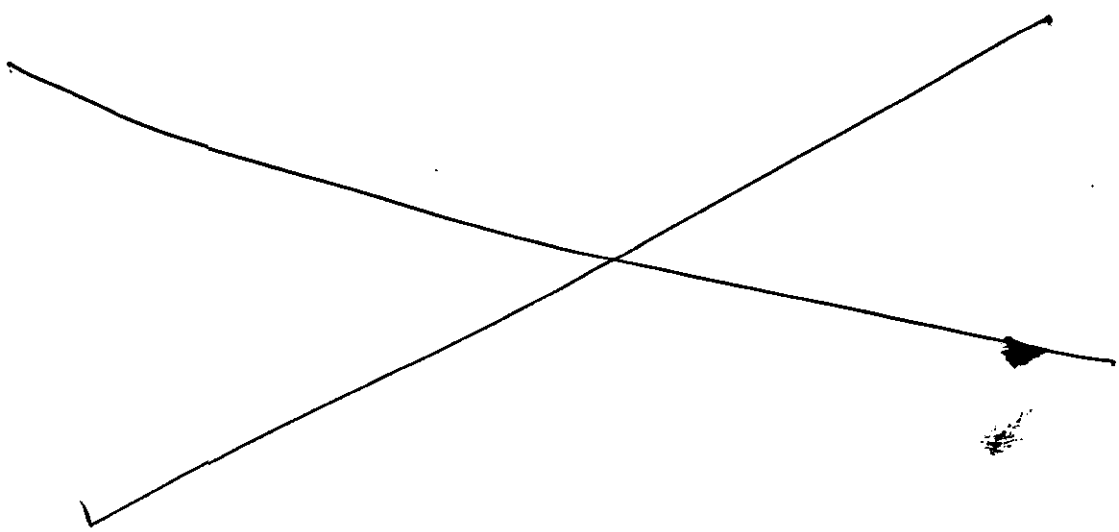
Dated: 4-5-2021

COURT OF COMMON PLEAS
ENTER

HON. ALISON HATHEWAY
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

Judge Alison Hatheway

EXHIBIT 6



UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS,

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

Plaintiff,

v.

ROBERT MOSER, et al,

Defendants.

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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.

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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 ample 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.

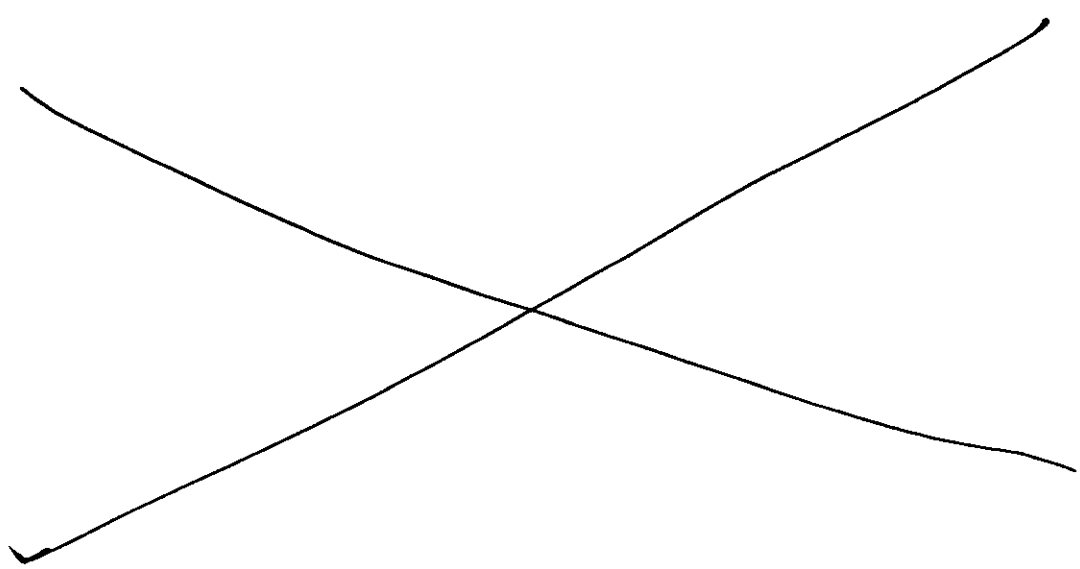
I further certify that the foregoing transcript, consisting of 52 typewritten pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED July 12, 2011.

S/ Nancy Moroney Wiss

Nancy Moroney Wiss, CSR, CM, FCRR

EXHIBIT 7



D134029885

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
JAN 31 2022

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *ET AL.*, *Plaintiffs*, -VS.- OHIO DEPARTMENT OF HEALTH, *ET AL.*, *Defendants.*	CASE NO. A 2100870 JUDGE ALISON HATHEWAY ENTRY GRANTING PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs Planned Parenthood Southwest Ohio Region, et al.'s Second Motion for Preliminary Injunction. This case involves a challenge to Am.S.B. No. 27, 2020 Ohio Laws File 77 ("SB27"), which requires embryonic and fetal tissue after a procedural abortion (also known as a surgical abortion) to be cremated or interred. On January 28, 2022, the Court heard Oral Arguments on the Motion.

The Court, having considered Plaintiffs' Second Motion for Preliminary Injunction, State Defendants' Brief in Opposition, and Plaintiffs' Reply and having fully reviewed the positions of the parties, hereby **GRANTS** Plaintiffs' Second Motion for Preliminary Injunction. Defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are **PRELIMINARILY ENJOINED** from enforcing SB27 until final judgment is entered in this case.

I. BACKGROUND

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") are health care providers in the state of Ohio who provide reproductive

health care, including procedural abortions. Plaintiffs, who represent all providers of procedural abortion in the state, raise due-process and equal-protection claims under the Ohio Constitution and pursuant to the Declaratory Judgment Act, R.C. 2721.03, against SB 27, which was signed into law on December 30, 2020. Under this Court's previous order, Defendants are currently enjoined from enforcing the law until 30 days after the implementing rules took effect—that is, until February 8, 2022. Defendants are the Ohio Department of Health ("ODH"), ODH Director Bruce Vanderhoff, the State Medical Board of Ohio, and county and city prosecutors charged with enforcing the criminal penalties set forth in the law.

A. Abortion Provision in Ohio

Plaintiffs represent the following facts regarding abortion provision in Ohio, which Defendants do not dispute. Plaintiffs state there are two main methods of abortion: medication abortion and procedural abortion, and that both are effective in terminating a pregnancy. Procedural abortion is the only method of abortion available after ten weeks in pregnancy, and for some patients, it is the only method available at any gestation. According to ODH data, in 2019, more than 61 percent of abortions in the state were procedural abortions.

B. SB27

SB27 requires that "fetal remains" (which it defines as "the product of human conception that has been aborted," R.C. 3726.01(C)) from a procedural abortion be disposed of only by cremation or interment. 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).

Failure to comply with SB27 would subject Plaintiffs and their physicians to significant penalties, including criminal penalties. Noncriminal penalties include license suspension or

revocation for both abortion facilities and physicians, fines, damages, and court injunctions. *See* Ohio Adm.Code 3701-83-05(C); Ohio Adm.Code 3701-83-05.1(B), (C)(2), (C)(4), and (F); Ohio Adm.Code 3701-83-05.2(F); R.C. 3702.32(D); R.C. 2317.56(G)(1) and (2); R.C. 4731.22(B)(21) and (23); R.C. 4731.225(B); R.C. 3701.79(J). Defendants ODH and the State Medical Board have independent enforcement authority.

II. ANALYSIS & DISCUSSION

A. Standard

A party seeking a preliminary injunction must demonstrate "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." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267–68, 747 N.E.2d 268 (1st Dist.2000).

B. Plaintiffs Are Substantially Likely to Succeed on Their Claims.

1. Plaintiffs are likely to prevail against Defendants' threshold challenges to their standing and the availability of relief they seek.

State Defendants raise two threshold challenges to Plaintiffs' claims, but Plaintiffs are likely to prevail on both issues.

First, State Defendants argue that Plaintiffs lack third-party standing to bring claims on behalf of their patients. But, as decades of precedent have confirmed and as this Court has previously held, "[t]hird-party standing is available 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; *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 . . . '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, *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); *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).

Further, a long line of federal precedent—which this Court may look to by analogy—confirms 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," ands (2) where "enforcement of [a] challenged restriction against the litigant would result indirectly in the violation of third parties' rights." (Emphasis deleted.) *June Med. Servs.* at 2118–19 (plurality opinion), quoting *Kowalski* at 130; *see also id.* at 2139 fn.4 (Roberts, C.J., concurring); *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 claim that Plaintiffs have not shown that their patients are hindered from bringing claims of their own. Defendants Ohio Dept. of Health, Director Bruce Vanderhoff, and State Medical Board of Ohio's Response in Opposition to Plaintiffs' Second Motion for Preliminary Injunction ("Opp. Br.") at 7. Even if such a separate showing were required, precedent establishes that abortion patients are hindered from asserting their own claims, given the time-sensitive and private nature of pregnancy and the decision to have an abortion. *See Singleton* at 117–18 (plurality opinion). In any case, third-party standing is a prudential—not jurisdictional—consideration even under federal law. *See, e.g., June Med. Servs.*, 140 S.Ct. at 2117–20 (plurality opinion); *id.* at 2139 fn.4 (Roberts, C.J., concurring). Plaintiffs are therefore likely to prevail against Defendants' third-party standing argument.

Second, State Defendants argue that Plaintiffs lack a cause of action for their claims. 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 and other Ohio courts have 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; R.C. 2721.09; R.C. 2727.02; *see also, e.g., 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. 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 In re Adoption of H.N.R.*., 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 24–25; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 469, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 99–104; *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶13, citing *Arbino* at ¶ 48–49; *In the Matter of Adoption of Y.E.F.*, 163 Ohio St.3d 521, 2020-Ohio-6785, 171 N.E.3d 302, ¶ 15.

2. Plaintiffs are substantially likely to succeed on their claims that SB27 violates the Ohio Constitution's guarantee of due process.

The Ohio Supreme Court has on numerous occasions recognized a fundamental substantive-due-process right under the Ohio Constitution that extends to matters involving privacy, procreation, and bodily integrity and autonomy. *See, e.g., Stone v. City of Stow*, 64 Ohio St.3d 156, 160–63, 593 N.E.2d 294 (1992). The Ohio Constitution's protection for substantive-due-process rights is distinct from that accorded under the U.S. Constitution because the Ohio Constitution provides a "remedy by due course of law" to "every person, for an injury done to him in his land, goods, *person*, or reputation." (Emphasis added.) Ohio Constitution, Article I, Section 16. Deprivation of reproductive autonomy falls squarely within the meaning of an injury done to one's person under the Ohio Constitution. Moreover, Article I, Section 21 of the Ohio Constitution, which "[p]reserv[es] [] the freedom to choose health care and health care coverage" for Ohioans, confirms that freedom of choice in health care is a fundamental right. Given the breadth of the Ohio Constitution's guarantees of bodily autonomy, privacy, and freedom of choice in health care, strict scrutiny must apply to a law that infringes on this protection for patients and their medical providers. *See also* PPSWO Telemedicine Op. at 8–9.

State Defendants argue that rational basis review applies because SB27 does not regulate abortion. But SB27, on its face, applies to abortion providers who provide, and patients who obtain,

procedural abortions. Abortion providers cannot provide procedural abortions without complying with SB27. *See Women's Med. Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir.2006). Strict scrutiny applies, and State Defendants have not shown that SB27 meets its demands. Indeed, they make no arguments at all under the strict scrutiny standard, despite the burden being on them to show SB27 survives strict scrutiny.

SB27 is not narrowly tailored to serve a compelling state interest. State Defendants argue SB27 furthers an interest in proper disposal of tissue after a procedural abortion. But it is unclear why this is so when Plaintiffs' current method of disposing of this tissue—incineration—is generally the same process as cremation, and infectious waste requirements that applied to this tissue before SB27 still apply to disposal of tissue removed from a patient's body after a medical procedure, including tissue from the identical procedure providers utilize to aid patients after a miscarriage.

State Defendants also argue that SB27 furthers an interest in "respect for unborn life." Opp. Br. at 13. But 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 claimed purposes. Finally, while State Defendants claim SB27 increases patient choice in disposition of tissue, it actually does the opposite by limiting disposition to *only* cremation or interment—disposition options that patients can already choose under the requirements that previously applied to disposal of tissue from a procedural abortion. In sum, SB27 is not narrowly tailored to serve any compelling state interest.

Even if strict scrutiny did not apply, SB27 could not survive the federal undue burden standard.[1] That standard requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer" and "weigh[] the asserted benefits against the burdens." *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309–10, 2195 L.Ed.2d 665 (2016). As explained above, SB27 imposes substantial burdens on patients seeking procedural abortion. Plaintiffs present convincing evidence that 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"),[2] when most patients obtain procedural abortions, and a complete ban on abortions between 10 and 13 weeks LMP; that patients will be forced to delay their procedures until later in pregnancy, when abortion carries greater risks and is more expensive; and that the law will otherwise substantially increase the cost of obtaining an abortion. Additionally, the law may prevent abortion patients seeking to identify or convict a perpetrator of

[1] Ohio precedent recognizes 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, e.g., Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993).

[2] Plaintiffs present convincing evidence, which State Defendants do not dispute, that they cannot reliably separate embryonic and fetal tissue (which must be cremated or interred under SB27) from other pregnancy tissue (which remains subject to infectious waste regulations and cannot be cremated or interred) prior to around 13 weeks of LMP, and thereby risk violating either SB27 or infectious waste regulations if they provide procedural abortions prior to that time. State Defendants appear to take the position that pregnancy tissue from a procedural abortion need not be separated, and that all of it must be cremated or interred, thereby potentially relieving Plaintiffs and their patients of the burden of not being able to provide or obtain procedural abortions until approximately 13 weeks LMP. Opp. Br. at 24–25. But State Defendants' statements on this point are muddled and in tension with arguments they make elsewhere indicating that some tissue from procedural abortions can be sent to third parties without violating SB27's requirements. In any case, Plaintiffs are not required to rely on State Defendants' mid-litigation assurances. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 805–06 (6th Cir.2020) (subsequent history omitted). Moreover, even if this particular burden is mitigated, Plaintiffs' evidence demonstrates that SB27 would still impose significant burdens, such that Plaintiffs are substantially likely to succeed on their due-process claim.

sexual assault or seeking to diagnose a medical condition from sending the tissue to a pathology or crime lab without providers risking violating SB27.

3. Plaintiffs are substantially likely to succeed on their claims that SB27 violates the Ohio Constitution's guarantee of equal protection.

The Ohio Constitution's guarantee of equal protection, found in Article I, Section 2, "requires that the government treat all similarly situated persons alike." *Sherman v. Ohio Pub. Emps. Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602, slip op. ¶ 14, citing *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 6. SB27 does not do so. Instead, it singles out patients who obtain and providers who perform procedural abortion for unnecessary restrictions that do not apply to similarly situated persons—including those who obtain or perform other medical procedures such as miscarriage management or in vitro fertilization that involve the disposition of identical embryonic or fetal tissue. It imposes severe burdens on "pregnant wom[e]n" who need procedural abortions, R.C. 3726.03, without any countervailing benefit. And SB27 targets abortion providers with severe sanctions for violations of its requirements that do not apply to other medical providers, including providers who treat miscarriage using the same medical procedure.

The parties again disagree as to the appropriate level of review to apply. The Court agrees with Plaintiffs that SB27 warrants strict scrutiny because it burdens a fundamental right to substantive due process in matters involving privacy, procreation, bodily autonomy, and freedom of choice in health care decision making, *see* above, and because it expressly discriminates against women—a suspect class. *Williams*, 88 Ohio St.3d at 530, 728 N.E.2d 342, quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). State Defendants argue instead that "the undue-burden test applies, and the equal-protection claims collapse into that analysis." Opp. Br. at 18. But Plaintiffs bring constitutional claims under the

Ohio Constitution, which 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, and the claims must be analyzed separately. *See Morris v. Savoy*, 61 Ohio St.3d 684, 691–692, 576 N.E.2d 765 (1991); *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 45. Finally, strict scrutiny applies to both Plaintiffs' and their patients' equal-protection claims, as a person's right to obtain an abortion is inextricably bound up with the doctor's ability to provide that care. *See, e.g., Planned Parenthood Assn. of Utah v. Herbert*, 828 F.3d 1245, 1260 (10th Cir.2016); *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).

SB27 does not survive strict scrutiny—and once again State Defendants make no arguments that it does. There is no compelling state interest in applying SB27's requirements only to tissue from procedural abortion and not to identical tissue resulting from physician management of miscarriage, during which providers utilize a procedure identical to procedural abortion to remove embryonic or fetal tissue (and other pregnancy tissue) from a patient undergoing a miscarriage. In vitro fertilization ("IVF") clinics are not required to comply with SB27's mandates when they dispose of pre-implantation embryos either. *See Whole Woman's Health v. Smith*, 338 F.Supp.3d 606, 641–42 (W.D.Tex.2018), *appeal filed*, No. 18-50730 (5th Cir. Sep. 7, 2018). Indeed, SB27's requirements appear even more restrictive than pre-existing disposal requirements for human bodies under Ohio law, by limiting disposal options to interment or cremation and requiring that cremation of tissue from a procedural abortion be at an Ohio-licensed crematory, R.C. 3726.02(B), and that locations for interring tissue provided by the abortion provider be at Ohio-registered cemeteries, Ohio Adm.Code 3701-46-01(B)(1)(b). *Compare* R.C. 3705.01(J) (stating dead human bodies can be interred or cremated, can be removed from the state, donated,

or disposed of pursuant to "other authorized means"). There is no compelling state interest to which SB27 is narrowly tailored for such differential treatment. Even if this Court were to hold that strict scrutiny did not apply here, it would nevertheless enjoin SB27 because the law could not satisfy even rational-basis review for these same reasons.

4. Plaintiffs are substantially likely to succeed on their claims that SB27 is unconstitutionally vague.

This Court preliminarily enjoins Defendants from enforcing SB27 for the additional reason that it is impermissibly vague in several key respects. First, the Court agrees with Plaintiffs that the term "fetal remains" is vague because it does not specify whether it includes pregnancy tissue such as the placenta, gestational sac, and umbilical cord, and therefore does not provide "fair notice" to Plaintiffs as to how they must dispose of this other, non-embryonic or fetal tissue, *see State v. Tanner*, 15 Ohio St.3d 1, 3, 472 N.E.2d 689 (1984), and will force them to "steer far wider of the unlawful zone" than if the law were not vague by not providing procedural abortions until around 13 weeks LMP. *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Second, SB27 invites "arbitrary, capricious and generally discriminatory enforcement," *Tanner* at 3, because it leaves providers unsure of whether they can send embryonic and fetal tissue from procedural abortion to pathologists and crime labs without risking the law's penalties. Plaintiffs represent (and State Defendants do not dispute) that they cannot control whether the pathologists—who are sometimes located in another state—and crime labs to whom they send tissue will cremate and inter the tissue, and it is unclear under the statute whether Plaintiffs will be subject to penalties if these third parties fail to do so.

Third, SB27 does not address whether embryonic and fetal tissue can be simultaneously cremated. Despite State Defendants' claims that individual cremation is required, such a

requirement is not apparent from either the face of the law itself nor from the pre-existing regulations in Ohio law governing cremation. Plaintiffs represent that they will thus be forced to "steer far wider of the unlawful zone" by contracting with vendors to individually cremate tissue, thereby burdening their patients. *Grayned* at 109.

Finally, SB27 states that cremation must occur at Ohio-licensed crematories. R.C. 3726.02(B). And the law's implementing rules require that the interment options provided by abortion providers be at Ohio-registered cemeteries. Ohio Adm.Code 3701-46-01(B)(1)(b). But it is unclear whether this means that all tissue from procedural abortions must be disposed in state, or whether it requires only that the tissue that is disposed in state must be disposed at a licensed or registered entity.

Because SB27 fails to provide fair notice, invites arbitrary enforcement, and forces Plaintiffs to steer far wider of the unlawful zone than if the law provided clear guidelines, resulting in severe burdens to Plaintiffs and their patients, it is unconstitutionally vague.

C. Plaintiffs and Their Patients Will Suffer Irreparable Harm Absent Relief.

"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). 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.

Contrary to State Defendants' assertion, and as this Court holds above, SB27 is a restriction on abortion. SB27 would severely impede access to abortion, and its enforcement would irreparably harm Plaintiffs and their patients. Plaintiffs have submitted ample evidence detailing the non-compensatory harms SB27 will cause to themselves and to their patients, including

significantly delaying patients in obtaining abortions and preventing patients from obtaining abortions. SB27 will also irreparably harm Plaintiffs because it will force them to deny or delay requested care.

D. No Third Parties Will Be Harmed and the Public Interest Will Be Served.

"[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 therefore preventing this violation of their and their patients' constitutional rights is in the public interest.

III. CONCLUSION

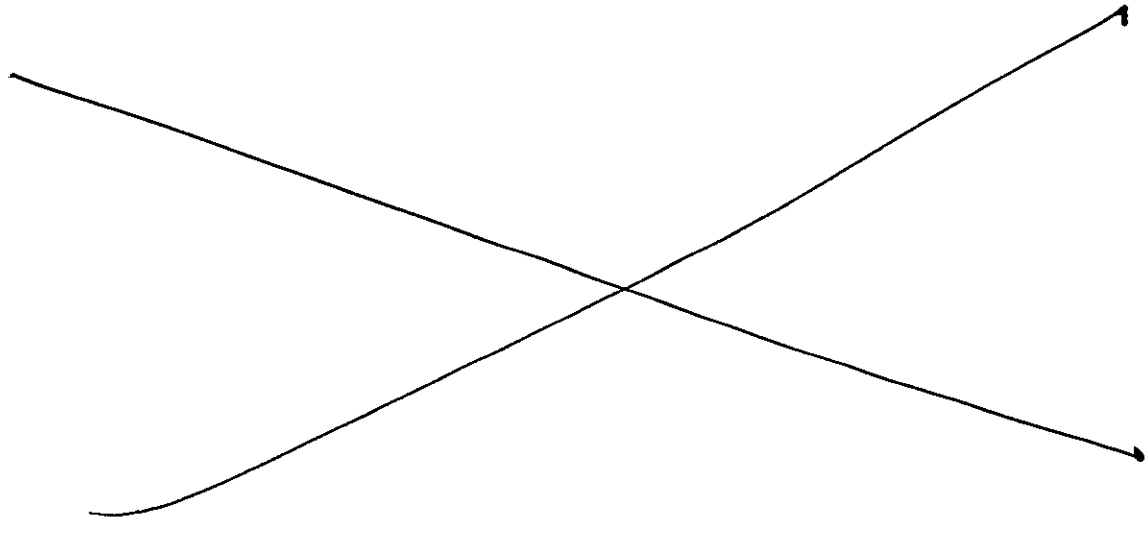
For the foregoing reasons, Plaintiffs' Second Motion for Preliminary Injunction is hereby **GRANTED**. Defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are **PRELIMINARILY ENJOINED** from enforcing SB27 until final judgment is entered in this case. The Court hereby sets the Civ. R. 65(C) bond requirement at $0.00.

IT IS SO ORDERED.

Dated: 1-31-2022

Judge Alison Hatheway

EXHIBIT 8



IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*, *Plaintiffs*, v. OHIO DEPARTMENT OF HEALTH, *et al.*, *Defendants.*	Case No. A 2101148 Judge Alison Hatheway

ENTRY GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs Planned Parenthood Southwest Ohio Region, et al.'s Motion for a Preliminary Injunction. This case involves a challenge to Senate Bill 260 (adding R.C. 2919.124(A)(1), (B)) ("SB 260" or "the Act"), which will bar a physician from providing an "abortion-inducing drug" to a "pregnant woman," unless the doctor is "physically present at the location where the initial dose of the drug or regimen of drugs is consumed" when the patient consumes that dose. In effect, SB 260 bars the provision of medication abortion via telemedicine ("TMAB").

This Court previously entered a temporary restraining order preventing Defendants from enforcing SB 260, which was slated to take effect on April 12, 2021. Defendants Ohio Department of Health ("ODH"), Ohio State Medical Board, and ODH Director Stephanie McCloud filed an opposition to the motion for a preliminary injunction. The local prosecutors named as Defendants did not file an opposition but were provided notice of the pending motion and an opportunity to be heard at the preliminary-injunction hearing. Upon review of the parties' additional filings, exhibits, and applicable law, and consideration of the parties' arguments during the hearing before this

Court on April 19, 2021, the Court now enjoins all Defendants in this case from enforcing SB 260 until such time as the Court enters final judgment.

As discussed in more detail below, the Court finds that Plaintiffs have met their burden of showing that SB 260 is substantially likely to violate the equal-protection and substantive-due-process rights of Plaintiffs and their patients and will cause irreparable harm. The Court further finds that the preliminary injunction will not harm third parties, and that preventing enforcement of a statute likely to be held unconstitutional is in the public interest.

I. BACKGROUND

Plaintiffs Planned Parenthood Southwest Ohio Region ("PPSWO"), Planned Parenthood of Greater Ohio ("PPGOH"), and Dr. Sharon Liner are health care providers in the state of Ohio who provide reproductive health care, including TMAB. Plaintiffs challenge SB 260, raising equal-protection and substantive-due-process claims under the Ohio Constitution. Defendants are the ODH, ODH Director Stephanie McCloud, the State Medical Board of Ohio, and county prosecutors charged with enforcing the criminal penalties set forth in the law. SB 260 was originally set to take effect April 12, 2021. The Court issued a temporary restraining order on April 7, 2021, and heard argument on the preliminary injunction motion on April 19, 2021.

A. Abortion in Ohio and Plaintiffs' TMAB Services

Plaintiffs have presented evidence to support the following facts regarding abortion provision in Ohio and their TMAB services, which Defendants do not dispute. Plaintiffs state there are two main methods of abortion, medication abortion and procedural abortion, and that both are effective in terminating a pregnancy. Medication abortion is available in Ohio up to 10 weeks of pregnancy, and involves patients taking two different medications one to two days apart. Because of state law requirements, patients must make two visits to a health center to obtain an abortion, at least 24 hours apart: the first for state-mandated informed consent and an ultrasound, and the

second for the abortion itself, or in the case of medication abortion, to receive and take the initial medication in the regimen. State law requires that the first visit be in person with a physician, so for their initial visit all of Plaintiffs' patients visit one of Plaintiffs' surgical facilities, in either Cincinnati, East Columbus, or Bedford Heights, which have a physician present at all times. Patients obtaining a medication abortion have the option for their second visit to return to a surgical facility or to visit one of Plaintiffs' TMAB locations in Dayton or Hamilton (for PPSWO patients), or in Mansfield or Youngstown (for PPGOH patients), where they can have their second appointment via video conference with a physician located at one of the surgical facilities. At that second visit, Plaintiffs confirm patients are certain in their decision to have an abortion, and the physician dispenses the first of the two medications (mifepristone). Patients take the second medication in the regimen (misoprostol) one to two days after the second visit at a location of their choosing, usually at home.

B. SB 260

SB 260 bars a physician from providing an "abortion-inducing drug" to a "pregnant woman," unless the doctor is "physically present at the location where the initial dose of the drug or regimen of drugs is consumed" when the patient consumes that dose. SB 260, § 1 (adding R.C. 2919.124(B)). The law effectively bans the TMAB services described above. A violation of SB 260 is a fourth-degree felony, which in Ohio carries a potential prison term of between six and eighteen months. *Id.* (adding R.C. 2919.124(E)); *see* R.C. 2929.14(A)(4). SB 260 likewise provides that licensed physicians are "subject to sanctioning" by the state medical board for violations of the Act. SB 260, § 1 (adding R.C. 2919.124(E), which cross-references R.C. 4731.22); *see also* R.C. 2925.01(W)(17).

SB 260 does not affect the provision by telemedicine of medication used to manage miscarriage, *see* SB 260, § 1 (adding R.C. 2919.124(B) (applying only where medication is given

to a "pregnant woman")); *id.* (adding R.C. 2919.124(C) (applying only where medication is given for the purpose of inducing abortion)), even though Plaintiffs treat miscarriage using the exact same medication regimen they use to provide medication abortion, and the health risks of these two treatments are comparable, if not higher among miscarriage patients. Nor does SB 260 restrict the use of telemedicine for other healthcare services. Instead, in recent years, Ohio has taken steps to reduce legal and regulatory barriers to telemedicine, including by requiring insurance coverage for telemedicine services and adopting flexible licensing and prescribing rules to facilitate telemedicine services. Ohio allows medications with far more serious risk profiles than those used in medication abortion to be prescribed via telemedicine, including controlled substances and opioids. To date, neither party has identified any other provision of state law that restricts the use of telemedicine only for a particular type of care, or that requires a physician to be physically present when a patient takes a medication prescribed by the physician.

Plaintiffs have presented party and expert affidavits demonstrating that SB 260's enforcement would completely eliminate access to the second-day medication abortion visits in Butler, Mahoning, and Richland counties, and would force patients in those areas to travel significantly farther to obtain an abortion, possibly well over 100 miles. Plaintiffs have also submitted evidence, based on high-quality research, that increases in travel distance to an abortion provider, even increases significantly less than those at issue here, reduce abortion attainment and carry other financial, physical and emotional costs for patients. These costs will delay patients' access to abortion, some to such an extent that they are no longer eligible for medication abortion, if they remain eligible for abortion in Ohio at all.

II. ANALYSIS AND DISCUSSION

As final relief, Plaintiffs seek an Order from this Court declaring the Act unconstitutional, and a permanent injunction barring its enforcement. The purpose of a preliminary injunction is to preserve the status quo prior to entry of the final order. *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist. 2000). A party seeking preliminary relief must demonstrate 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; and that the public interest is served by issuing the order. *Id.* at 267–68.

A. Plaintiffs Are Substantially Likely to Succeed on Their Claims.

1. Plaintiffs are likely to prevail against Defendants' threshold challenges to their standing and the availability of relief they seek.

At the outset, the Court addresses two threshold arguments made by Defendants as to the availability of relief for Plaintiffs' claims. First, Defendants contend that, to the extent Plaintiffs bring claims on behalf of their patients, those claims are barred because Plaintiffs lack third-party standing. As Plaintiffs explain, and Defendants appear to agree, this argument applies only to a subset of claims brought by Plaintiffs. Plaintiffs also bring equal-protection and due-process claims on their own behalf, and Defendants do not challenge the standing of Plaintiffs with respect to those claims.

As to Plaintiffs' equal-protection and due-process claims on behalf of their patients, the Court concludes that the Plaintiffs have third-party standing. SB 260 imposes criminal and civil penalties on abortion providers, and, if enforced, will result in a deprivation of patients' rights under the Ohio Constitution. Third-party standing is available in Ohio courts in circumstances like these, as confirmed by Ohio case law and federal court precedent, which Defendants agree this

Court may look to by analogy to interpret the third-party standing doctrine as it applies in Ohio state courts. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19, 207 L.Ed.2d 566 (2020) (plurality opinion), citing *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S. Ct. 564, 160 L.Ed.2d 519 (2004); *see also id.* at 2139 fn. 4 (Roberts, C.J., concurring); *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 95, *reconsideration denied*, 160 Ohio St.3d 1410, 2020-Ohio-4574, 153 N.E.3d 116 (Table), ¶ 20, *petition for cert. docketed, sub nom. Madison v. Ohio*, U.S. No. 20-1171 (Feb. 25, 2021).

Second, Defendants contend that the constitutional rights asserted by Plaintiffs cannot be remedied in this lawsuit because the provisions on which Plaintiffs rely are not self-executing. The Court rejects this argument on two grounds. First, Defendants ignore the availability of relief under Ohio's Declaratory Judgment Act, which provides that "any person whose rights, status, or other legal relations are affected by" a constitutional provision or statute "may have determined any question of construction or validity arising under the" constitutional provision or statute "and obtain a declaration of rights, status, or other legal relations under it." 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. This statute provides a "legislative enactment" on which Plaintiffs may rely to seek declaratory and injunctive relief for due-process and equal-protection violations in this case. *See 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; *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (1988), at paragraph one of the syllabus; *Riverside v. State*, 2d. Dist. Montgomery No. 26024, 2014-Ohio-1974, ¶ 30–38; *see also* 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."). Plaintiffs therefore need not show that the constitutional provisions on which they rely are self-executing.

Second, even if the Declaratory Judgment Act did not supply a cause of action for the Plaintiffs to seek declaratory and injunctive relief, however, 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." *Williams* at 521; *see, e.g., In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 24–25; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 469, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 99–104; *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 13, citing *Arbino* at ¶ 48–49; *In the Matter of Adoption of Y.E.F.*, Slip Opinion No. 2020-Ohio-6785, ¶ 15; *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 169, 545 N.E.2d 1256 (1989).

2. Plaintiffs are substantially likely to succeed on their claim that SB 260 will violate their and their patients' constitutional right to equal protection.

The Ohio Constitution's guarantee of equal protection, found in Article I, Section 2, "requires that the government treat all similarly situated persons alike." *Sherman v. Ohio Pub. Emps. Retirement Sys.*, Slip Opinion No. 2020-Ohio-4960, ¶ 14, citing *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 6.

SB 260 does not do so. Instead, it imposes felony criminal penalties and professional sanctions on abortion providers for providing medication abortion using telemedicine, while leaving other physicians, including physicians who treat miscarriage using the exact same medications, unrestricted in their telemedicine delivery. SB 260 also denies "pregnant wom[e]n" access to safe, effective health care via telemedicine, and all the benefits such care brings, without any countervailing benefit. SB 260, § 1 (adding R.C. 2919.124(B)).

Although Defendants contend that abortion providers are not similarly situated to other medical providers, including doctors treating miscarriage or offering comparable or higher-risk services by telemedicine, the Court disagrees. A disfavored class need not identify its mirror image to demonstrate that a similarly situated class of people is treated more favorably than the litigant. Rather, the question is whether the two classes are similarly situated with respect to the purpose of the challenged law. *See, e.g., Conley v. Shearer,* 64 Ohio St.3d 284, 288–89, 595 N.E.2d 862 (1992) (emphasizing that laws "shall have an equality of operation on persons according to their relation," quoting *City of Dayton v. Keys*, 21 Ohio Misc. 105, 114, 252 N.E.2d 655 (C.P.1969)); *see also, e.g., LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860 (Iowa 2015) (cautioning that if courts make "intricate distinctions between purported classes of similarly situated individuals," "almost every equal protection claim could be resolved against the plaintiffs on the 'similarly situated' requirement"). The distinctions on which Defendants rely between miscarriage and abortion have nothing to do with the purpose of protecting women, for which SB 260 is advanced.

The parties disagree as to the appropriate level of review to apply to Plaintiffs' equal-protection challenge to SB 260. The Court agrees with Plaintiffs that SB 260 warrants strict scrutiny. By effectively banning a method of abortion, SB 260 burdens a fundamental right to substantive due process in matters involving privacy, procreation, bodily autonomy, and freedom of choice in health care decision making, *see, e.g., Stone v. City of Stow*, 64 Ohio St.3d 156, 160–63, 593 N.E.2d 294 (1992).

SB 260 cannot survive strict scrutiny, which requires a compelling government interest and narrow tailoring of a statute to further that interest, because Defendants have not shown any medical benefit from SB 260, and the record evidence instead shows that SB 260 will harm patients' health by reducing access to abortion. Defendants have the burden of demonstrating SB

260's permissibility under strict scrutiny, *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 168, 545 N.E.2d 1256 (1989); *Conley* at 289, but they do not dispute that any complications from medication abortion would occur long after a patient leaves a health center and takes mifepristone, such that the physical (instead of virtual) presence of a doctor during a TMAB patient's second-day appointment would have no impact on how such complications would be treated. Defendants' only evidence at this stage of litigation are U.S. Food and Drug Administration ("FDA") documents. Those documents support, rather than refute, Plaintiffs' contention that SB 260 is unnecessary to protect patient health. They confirm that, despite the FDA's regulation of mifepristone, the agency does not prohibit dispensing of this medication via telemedicine. Defendants' Response in Opposition to Plaintiffs' Motion, Exhibit 2. Indeed, as support for the FDA's most recent approval of mifepristone, the agency reviewed studies on the drug's safety, including a study that assessed outcomes of TMAB specifically, and found those studies supported the conclusion that mifepristone is safe and effective for its intended use.

Even if this Court were to hold that strict scrutiny did not apply here, it would nevertheless enjoin SB 260 because the law could not satisfy even rational-basis review, much less intermediate scrutiny. For the same reasons as with strict scrutiny, the State would fail to meet its burden under intermediate scrutiny of demonstrating an "exceedingly persuasive" justification for SB 260's sex-based classification and that the classification is "substantially related" to the State's interests in the law. *See United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996).

Under rational basis review, despite purportedly advancing an interest in patient safety, in application, SB 260 imposes differential treatment on individuals engaged in like conduct, including through the application of severe criminal penalties and professional sanctions. In particular, that SB 260 bans telemedicine for dispensing mifepristone to a patient seeking an

abortion, but permits telemedicine for dispensing mifepristone to a patient experiencing a miscarriage, reveals that it is in no way responsive to the purported risks of mifepristone. Even with the benefit of Defendants' defense of SB 260, the Court cannot discern any rational basis for SB 260. *Conley*, 64 Ohio St.3d at 289, 595 N.E.2d 862; *see also State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 22; *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.*, 22 Ohio St.3d 1, 488 N.E.2d 181 (1986), paragraph 2 of the syllabus.

SB 260, therefore, must be enjoined, as it is substantially likely to violate Plaintiffs' and their patients' right to equal protection under the Ohio Constitution.

3. Plaintiffs are substantially likely to succeed on their claim that SB 260 will violate their and their patients' constitutional right to substantive due process.

The Ohio Supreme Court has on numerous occasions recognized a fundamental substantive-due-process right under the Ohio Constitution that extends to matters involving privacy, procreation, and bodily integrity and autonomy. *See, e.g., Stone*, 64 Ohio St.3d at 160–63, 593 N.E.2d 294. The Ohio Constitution's protection for substantive-due-process rights is distinct from that accorded under the U.S. Constitution because the Ohio Constitution provides a "remedy by due course of law" to "every person, for an injury done to him in his land, goods, *person*, or reputation." Ohio Constitution, Article I, Section 16 (emphasis added). Deprivation of reproductive autonomy falls squarely within the meaning of an injury done to one's person under the Ohio Constitution. Moreover, Article I, Section 21 of the Ohio Constitution confirms that freedom of choice in health care is a fundamental right. Given the breadth of the Ohio Constitution's guarantee of bodily autonomy, privacy, and freedom of choice in health care, strict scrutiny must apply to a law that infringes on this protection for patients and their medical providers. As explained above, SB 260 does not meet the demands of strict scrutiny.

Even under the federal undue-burden standard, SB 260 could not survive. That standard requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer" and "weigh[] the asserted benefits against the burdens." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309, 2195 L.Ed.2d 665 (2016). Under this standard, Plaintiffs are likely to succeed on their substantive due process claim. As previously explained, there is no medical benefit from SB 260, that would outweigh the burden placed on patients seeking medication abortion, such as increasing their travel distance to obtain an abortion and by imposing numerous other attendant harms, which will delay patients in obtaining an abortion and prevent some from obtaining a medication abortion altogether.

Defendants urge this Court to instead jettison balancing of benefits and burdens under the federal undue-burden standard, citing a recent concurrence by Chief Justice Roberts in *June Medical Services*. After the Court's own review of the precedent in this area, it does not agree that the Chief Justice Roberts's concurrence changed the undue-burden test. *See, e.g., Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 991 F.3d 740 (7th. Cir.2021), *petition for cert. docketed*, U.S. No. 20-1375 (Apr. 1, 2021). Even if it did, however, SB 260 would still fail that test because (as the Court concluded above) it is not reasonably related to a legitimate state interest and it imposes a substantial obstacle to pre-viability abortion. *June Med. Servs.*, 140 S. Ct. at 2138, 207 L.Ed.2d 566 (Roberts, C.J., concurring in the judgment), quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877, 112 S. Ct. 2791, 120 L.Ed.2d (1992) (plurality opinion).

B. Plaintiffs and Their Patients Will Suffer Irreparable Harm Absent Relief.

In light of the Court's findings above that Plaintiffs and their patients will be deprived of their constitutional rights to due process and equal protection unless SB 260 is enjoined, a finding of irreparable harm follows. "[I]mpair[ment]" of a constitutional right "mandates a finding of

irreparable injury." *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). Moreover, the record demonstrates that without relief, Plaintiffs will be forced to cease providing TMAB. *See, e.g.*, Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order Followed by Preliminary Injunction Exhibit 1, Affidavit of Sharon Liner, M.D., ¶ 52; *id.* Exhibit 2, Affidavit of Adarsh Krishen, M.D., M.M.M., ¶ 24; Plaintiffs' Reply in Support of Preliminary Injunction Exhibit 4, Reply Affidavit of Adarsh Krishen, M.D., M.M.M., ¶ 5–9. Many patients will have to travel significantly farther to obtain an abortion, in some cases up to 100 miles or more, thus encountering barriers to care that will delay and that may ultimately preclude patients from accessing constitutionally protected care. The record also demonstrates that increased travel will carry other financial, physical, and emotional costs for patients for which they cannot be made whole after judgment.

Although Defendants refer to these harms as speculative, the Court sees nothing speculative about them. Plaintiffs have submitted sworn affidavits from health care providers based on their experience working with abortion patients and providing abortion care, along with expert affidavits from national experts, including individuals who are experts in telemedicine and medication abortion. The Court also takes notice of the State's own data, which shows that thousands of patients who obtain abortions in Ohio each year reside in the counties where the Plaintiffs currently offer TMAB. *See id.* Exhibit 3, ODH, *Induced Abortions in Ohio, 2019*, at 14–15 table 4 (Sept. 2020). Plaintiffs' evidence of irreparable harm is more than sufficient at this stage of litigation.

D. No Third Parties Will Be Harmed and the Public Interest Will Be Served by an Injunction.

No third parties would be harmed if Defendants are enjoined. Plaintiffs have been providing TMAB safely for more than a year, so Defendants cannot claim any threat to public health or safety. Moreover, "the state cannot be harmed when an unconstitutional law does not go into effect." *Newburgh Heights v. State*, 8th Dist. Cuyahoga Nos. 109106 and 109114, 2021-Ohio-61, ¶ 76.

In addition, the public has a particularly strong interest in a speedy injunction here where temporary relief would merely preserve the status quo on which Ohioans seeking TMAB have come to rely. In fact, the public interest will be served by allowing Plaintiffs to continue providing, and their patients to continue accessing, essential and constitutionally protected health care, particularly in the midst of the COVID-19 pandemic.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction is hereby **GRANTED.** All Defendants and their officers, successors, agents, servants, employees, attorneys and those persons in active concert or participation with them are **PRELIMINARILY ENJOINED** from enforcing SB 260 until final judgment is entered in this case.

Because Defendants face no risk of financial loss from the injunction, and in light of the Plaintiffs' role as nonprofit health care providers, the Court hereby sets Plaintiffs' Civ.R. 65(C) bond requirement at $0.00.

IT IS SO ORDERED.

Dated: 4-19-2021

Judge Alison Hatheway
Court of Common Pleas
Hamilton County, Ohio