IN THE COURT OF COMMON PLEAS
FOR HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORPORATION, *et al.*,	:	Case No. A 2200704
Plaintiffs,	:	Judge Alison Hatheway
v.	:	
BRUCE VANDERHOFF, *et al.*,	:	
Defendants.	:	

DEFENDANTS BRUCE VANDERHOFF AND THE OHIO DEPARMENT OF HEALTH'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

No TRO is needed for the next weeks or month, because nothing will happen to the Dayton Clinic in that time. Indeed, nothing will happen to them for months, at least – as long as the Dayton Clinic continues the administrative process, which is a choice the Dayton Clinic controls. We know that this will take months because we have concrete examples, including with *this* clinic and with others. For example, in *Capital Care Network of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362 (2018), the Ohio Supreme Court upheld an ASF license revocation (for lack of a written transfer agreement) in 2018, following the then-Director of Health's August 2013 and February 2014 proposals to revoke the facility's license, and the administrative hearing requested by the facility. The Director issued an adjudication order revoking the license in late July 2014. And in *Women's Med Center of Dayton v. State Dept. of Health*, 2d Dist. Montgomery No. 28132, 2019-Ohio-1146, this Dayton Clinic in 2015 was denied a variance from the written transfer agreement

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requirement for ambulatory surgical facilities (ASFs) by the then-Director of Health, and a proposed revocation of its ASF license, and the Dayton Clinic timely sought an administrative hearing to contest the revocation. The adjudication order from that hearing was issued in November 2016, over a year later. *Id.* at ¶¶3–4.

Amended Substitute Senate Bill 157 ("SB 157"), enacting R.C. 3702.305, was signed into law on December 22, 2021, and is scheduled to go into effect on **March 23, 2022**. Plaintiffs, Women's Medical Group Professional Corporation ("Dayton Clinic") and Planned Parenthood Southwest Ohio Region ("PPSWO") on February 25, 2022, filed this lawsuit seeking preliminary injunctive relief to prevent the Ohio Department of Health (the "Department") and its Director, Bruce Vanderhoff (the "Director") from "enforcing SB 157 until 90 days after its effective date," and a permanent injunction against the statute's enforcement, claiming that the law violates the Ohio Constitution. On that same date, one of the plaintiffs, Dayton Clinic, filed a motion for a temporary restraining order against the Department and Director, to enjoin them from "revoking or refusing to renew" Dayton Clinic's license as an ambulatory surgical facility ("ASF") or otherwise preventing Dayton Clinic from providing "procedural abortion services for reasons related to noncompliance with [S.B. 157] until at least June 21, 2022." Motion for TRO, at 1.

But because Dayton Clinic can still seek a hearing on the January 31, 2022, proposed revocation order, the facility can continue to operate during the pendency of those proceedings, pursuant to Ohio Rev. Code §119.07. The Director's letter advises that Dayton Clinic may request a hearing "concerning my proposal to revoke, and refuse to renew [its] license to operate. . ., [which must be] in writing and received within 30 days of receipt of this notice." Complaint, Ex. C, at 2 (emphasis omitted). Indeed, that very letter advises that "[p]ursuant to R.C. 119.07 *you may remain in operation while the administrative proceedings take place*." *Id.* (emphasis added). The

letter goes on to say "if you do not request a hearing within thirty days of receipt of this letter, I may revoke and/or refuse to renew Dayton Clinic's health care facility license." *Id.* Thus, if Dayton Clinic requests a hearing before the Director or his designee within 30 days of the facility's receipt of the January 31, 2022 notice, the facility may continue to operate during the pendency of those proceedings. Dayton Clinic's affiant, Dr. Haskell, tacitly admits that an administrative hearing is available. *See* Motion for TRO, Affidavit of Martin Haskell, at ¶46, p.11. Dayton Clinic needs no TRO to allow it to continue in operation during review of its proposed revocation; it holds the keys to its own continued operation.

Additionally, because the Director's order does not become final until after that 30-day period and the time that it takes to complete any requested administrative hearing proceedings, Dayton Clinic's request for a TRO is premature. Ohio statutes provide a procedure for review of the proposed revocation decision before it becomes final, and that procedure allows the facility to remain open during that time. Because there is a statutory hearing opportunity provided for the revocation decision before it becomes final, Dayton Clinic's challenge is premature before that process is complete.

For the same reason, Dayton Clinic cannot show that it will be irreparably harmed if a TRO is not granted, or that the harm to the public in enjoining the Director's order is outweighed by any harm to the facility in denying the TRO. And because Dayton Clinic has an administrative appeal remedy, and the statute and Director's action of which it complains are lawful, the plaintiff has not shown a strong likelihood of success on the merits, either.

For all these reasons, Dayton Clinic's motion for a TRO must be denied.

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II. FACTUAL BACKGROUND

In its motion for a TRO, Plaintiff Dayton Clinic seeks to challenge the Director's January 31, 2022, proposed revocation of its ASF license based on its failure to have a written transfer agreement with a local hospital (to transfer a patient in the event of a medical complication or emergency), or a variance of that requirement. The written transfer agreement ("WTA") requirement has been in Ohio law for many years, initially in Ohio Adm. Code §3701-83-19(E), and later also added to Ohio Rev. Code §3702.303(A). If an ASF is unable to obtain a WTA, it may still get an ASF license by seeking a variance of the WTA requirement from the Director. *See* Ohio Adm. Code §3701-83-14; *see also* Ohio Rev. Code §3702.303(C)(2); Ohio Rev. Code §3702.304. A variance may be granted if the applicant demonstrates to the satisfaction of the Director that the purpose of a requirement (here, the requirement that an ASF have a WTA with a local hospital) has been met in another way. *See* Ohio Adm. Code §3701-83-14.

In this instance, the Director denied Dayton Clinic's most recent request for a variance of the WTA requirement on January 28, 2022, because that facility's proposed backup physicians (to assist with any transfer of its patients to a hospital if needed), were affiliated with a state university. Existing law, Ohio Rev. Code §3727.60(B), prohibits a public hospital, including a state university hospital or state medical college hospital, from "[a]uthoriz[ing] a physician who has been granted staff membership or professional privileges at the public hospital to use that membership or those privileges as a substitution for, or alternative to, a written transfer agreement for purposes of a variance application described in section 3702.304 of the Revised Code." Ohio Rev. Code §3727.60(B). The requirement of SB 157 added a further clarification of the existing requirement, to prohibit doctors serving as backup to an ASF from "teach[ing] or provid[ing] instruction" at, or being "employed by or compensated pursuant to a contract with," a medical school . . . affiliated

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with a state university or college as defined in [Ohio Rev. Code §]3345.12[,] any state hospital, or other public institution." Ohio Rev. Code §3702.305(A)(1) and (2).

III. LAW AND ARGUMENT

Ohio Civil Rule 65 allows for the issuance of a temporary restraining order ("TRO") only in very limited circumstances. To obtain a TRO, or a preliminary injunction, must establish, by clear and convincing evidence, that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction. *See Keefer v. Ohio Dept. of Job and Family Servs.*, 10th Dist No. 03AP-391, 2003-Ohio-6557, ¶14; *P & G v. Stoneham*, 140 Ohio App.3d 260, 267–68 (1st Dist. 2000); *City of Cincinnati v. City of Harrison*, 1st Dist. Hamilton No. C-090702, 2010-Ohio-3430, ¶ 8. Additionally, "[c]ourts should take particular caution . . . in granting injunctions . . . in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Intralot v. Blair*, 10th Dist. Franklin No. 17AP-444, 2018-Ohio-3873, ¶31 (quoting *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604 (1995)).

A. This Court should deny the request for a TRO because the proposed ASF license revocation is subject to administrative hearing and appeal rights under Chapter 119 of the Ohio Revised Code, so the Dayton Clinic's constitutional claims are premature and unripe. If Dayton Clinic requests an administrative hearing on the proposed license revocation, the Clinic can operate while the case proceeds.

When a special statutory proceeding for review of a matter exists, a litigant may not bypass that proceeding by seeking a declaratory judgment and injunction. *State ex rel. Albright v. Court of Common Pleas of Delaware Cty.*, 60 Ohio St.3d 40, 42 (1991); *State ex rel. Director v. Forchione*, 148 Ohio St.3d 105 (2016), ¶22. Ohio Revised Code Chapter 119 provides for review

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of certain state licensure decisions, and requires that with certain exceptions, orders adjudicating a person's right to a license must provide an opportunity for a hearing. Ohio Rev. Code §119.06 provides: "[n]o adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order . . ." Ohio Rev. Code §119.07 provides for notice of hearing before the agency before an adjudication order may take effect. Dayton Clinic cannot bypass that administrative hearing and appeal opportunity to bring their claims contesting the proposed revocation of their ASF license.

Additionally, it is well-established under Ohio law that, "prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal." *Noernberg v. City of Brook Park*, 63 Ohio St.2d 26, 29 (1980). Exhaustion is required generally to prevent premature interference with agency processes, so that the agency may function efficiently and have an opportunity to correct its own errors, to afford the parties and the courts the benefits of agency experience and expertise, and to compile a record adequate for judicial review. *State ex rel. Mansfield Motorsports Speedway, LLC v. Dropsey*, 2012-Ohio-968 (5th Dist.), ¶¶26–27. While there are exceptions to the rule of exhaustion, they are inapplicable to the proposed license revocation here. *See Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 17 (1988).

What Dayton Clinic seeks in its motion for a TRO is an order that would prevent the Director from revoking or refusing to renew its license based on the facility's noncompliance with the requirements of S.B. 157, "until at least June 21, 2022." Dayton Clinic seeks to bypass state administrative hearing proceedings concerning the proposed revocation of its license by filing an action in common pleas court asserting constitutional claims regarding that proposed revocation.

But Dayton Clinic's suit filed before the administrative hearing process is complete is premature and unripe. The Director's order is not final until after the opportunity for a hearing, and any hearing and decision on the hearing, are complete. *See* Complaint, Ex. C at 2. Plaintiff must exhaust these administrative remedies before pressing its as-applied constitutional claims. Although state administrative hearing officers cannot rule on constitutional issues, those issues can be raised during administrative hearings and addressed on appeal. *See generally Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 174 (2012). While some constitutional issues on appeal need not be addressed because a decision can be affirmed on other grounds, *see Capital Care Network of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362, ¶¶30–31, that does not change the fact that constitutional issues may be addressed on appeal when resolution of the issues requires it. In fact, as-applied constitutional challenges, like the ones here, must be raised during an administrative hearing and preserved for appeal, if they are to be heard at all. *See Wymyslo v. Bartec,* , 132 Ohio St.3d at 174. The opportunity to raise constitutional claims in an appeal from an administrative decision satisfies procedural due process. *Ohio Civil Rights Comm. v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986).

Because the proposed revocation action is squarely within the administrative hearing provisions of Ohio Rev. Code §§119.06 and 119.07, Dayton Clinic must exhaust that remedy by requesting a hearing on the proposed revocation. As the Director's letter advising of the proposed revocation explicitly noted, "[p]ursuant to R.C. 119.07 you may remain in operation while the administrative proceedings take place." Complaint, Ex. C, at 2. That letter also advised that the Director's decision was not final until after the 30-day time period to request a hearing had lapsed. *Id.* The Director's denial of the requested variance, while a final decision of the Director, is not

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the action that the TRO is sought to prevent—it is the license revocation and consequent shutting down of Dayton Clinic's business until at least June 21, 2022.

Dayton Clinic can request an administrative hearing on the Director's proposed revocation hearing, which would allow the facility to continue to operate throughout the pendency of the administrative proceedings. *See* Complaint, Ex. C at 2; *see generally Capital Care Network of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362 (2018) (an administrative appeal of an ASF license revocation order under Ohio Rev. Code Ch. 119). Indeed, Dayton Clinic recently has participated in that Chapter 119 hearing and appeal process before without having been shut down during the pendency of proceedings. *See Women's Med Center of Dayton v. State Dept. of Health*, 2d Dist. Montgomery App. No. 28132, 2019-Ohio-1146. Thus, Dayton Clinic's claims challenging a proposed license revocation are premature and unripe. Additionally, by invoking that administrative hearing procedure would avoid the harm that plaintiff complains of in its TRO motion. And an existing remedy does not become inadequate simply because a party fails to timely request it. The motion should be denied.

B. This Court should deny the request for a TRO because Ohio's ambulatory surgical facility requirements are neutral, reasonable and longstanding, and the Director's proposed license revocation order is lawful.

Dayton Clinic also fails to show a likelihood of success on the merits sufficient to warrant granting a TRO.

Contrary to the Dayton Clinic assertions at page 7 of the TRO motion, the Director and Department have *not* deprived them of their interests in continuing their business "without any process"—as outlined above, and in the Director's January 31, 2022 letter, the Dayton Clinic has the ability to request an administrative hearing on the Director's proposed license revocation and their facility would be able to continue to operate during the pendency of those proceedings.

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Dayton Clinic itself has the ability to "preserve the status quo" by requesting an administrative hearing on the proposed revocation. That fact alone defeats Dayton Clinic's request for a TRO. Further, as discussed above, Dayton Clinic's claims here are premature until after that hearing and appeal have concluded.

Additionally, the Ohio legal requirements that all outpatient surgical facilities have a transfer agreement with a local hospital or an acceptable alternative (i.e., a variance granted by the Director), have been around, in some form, for over twenty years, when Ohio began regulating ambulatory surgical facilities (ASFs). *See* Ohio Adm. Code 3701-83-19(E) (originally effective in 1996) (transfer agreement requirement); Ohio Adm. Code 3701-83-14(C)(1) (variance requirements). Those regulations are both still in effect today, in addition to statutory requirements pertaining to transfer agreements and variances. *See generally Capital Care of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362, ¶¶30, 32–33; Ohio Rev. Code 3702.30 (regulating ambulatory surgical facilities, i.e., outpatient surgery centers). During all those years, Ohio's ambulatory surgical facilities requirements have covered a wide variety of outpatient facilities, including cosmetic and laser surgery, plastic surgery, abortion, dermatology, digestive endoscopy, gastroenterology, lithotripsy, urology, and orthopedics. *See Women's Medical Prof'l Corp. v. Baird*, 438 F.3d 595, 598 n.1 (6th Cir. 2006).

And Ohio's ASF regulatory scheme has already stood up to constitutional challenge. In 2006, the Sixth Circuit upheld Ohio's transfer-agreement requirement after substantive-due-process review. *Id.* at 602–10. In upholding these "neutral" and "legitimate" requirements, *id.* at 607, 609, the court held that the closure of a single Dayton clinic did not constitute a substantial obstacle to women seeking abortions given the availability of other clinics in Ohio. *Id.* at 605.

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Ohio's ASF transfer agreement requirement and variance provisions remain constitutional, and should be upheld.

Plaintiffs here base their claims for relief solely on the Ohio Constitution. (As they point out, federal constitutional claims concerning R.C. 3702.303 and 3702.304 remain pending before a federal district court in Cincinnati, involving the same parties as in this case. Despite the pendency of that case, Plaintiffs did not bring their claim there. Nor did they seek this TRO relief in the common pleas court in Dayton, where Dayton Clinic is located.) This Court should not grant Dayton Clinic a TRO or any relief based on their Ohio Constitutional claims. The Director's authority to grant variances of ASF requirements under Ohio Adm. Code 3701-83-14 existed before either Ohio Rev. Code 3702.304, or SB 157. Cf. *Capital Care Network of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362, ¶34 (transfer agreement in regulation provided independent basis for Director's decision; declining to reach constitutional claims about statute). The Director has exercised his judgment in granting or denying variances for over 25 years, before any statutory standards applied, so has authority to consider factors he deems appropriate in deciding whether an ASF requirement has been satisfied in another manner.

Additionally, any claimed harm from the prospect (as yet unrealized) of closure of plaintiff's Dayton clinic, should the revocation become final in the future, is not only speculative at this point, the federal Sixth Circuit Court of Appeals has found such similar alleged harm to be insufficient to create an undue burden on women seeking abortions in Ohio, given the availability of other abortion clinics in Ohio. *See Baird*, 438 F.3d at 605. It is far too speculative at this point to determine that that situation is any different today.

For all of these reasons, Dayton Clinic has failed to show by clear and convincing evidence that it is likely to succeed on the merits of its challenges, or that it will suffer irreparable harm if it

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is not granted a TRO. By contrast, the State (and the public interest) suffers harm when courts enjoin state actions based on state laws and regulations. The harm to the State, and to third parties, whom the State's laws and regulations are designed to protect, outweighs the claimed harm to Plaintiff, as discussed above.

IV. CONCLUSION

Because Dayton Clinic cannot show by clear and convincing evidence that it is entitled to a temporary restraining order, its motion for a TRO should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order** was served via electronic mail this 1st day of March 2022 to the following:

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