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 DIRECTOR BRUCE VANDERHOFF AND OHIO DEPARTMENT OF HEALTH'S RESPONSE IN OPPOSITION TO PLAINTIFF WOMEN'S MEDICAL GROUP PROFESSIONAL CORPORATION'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Women's Medical Group Professional Corporation (the "Dayton Clinic") has disregarded every proper forum provided under state law to seek relief from the decisions of the Ohio Department of Health (the "Department") and its Director Bruce Vanderhoff (the "Director") and to challenge the legislative scheme that vests such discretionary authority in the Director in order to avoid the very precedent the Dayton Clinic itself created and the administrative procedures necessary to appeal the revocation of its license.

Now it is here, where it doesn't belong.

And it has recruited another clinic onto its team to ensure it gets a second shot at the same regulatory net but in another Court. But the Dayton Clinic and its claims need not clog the docket

and strain the resources of this Court. The Cincinnati Clinic is not simply a reluctant teammate—it too does not belong here because it has no injuries to remedy. This Court can simply refuse to play ball, and sent the Dayton Clinic back to its home court.

FACTUAL AND PROCEDURAL BACKGROUND

Amended Substitute Senate Bill 157 ("SB 157"), enacting R.C. 3702.305, was signed into law on December 22, 2021, to become effective on March 23, 2022. On February 25, 2022, two abortion clinics in Dayton and Cincinnati—Plaintiffs Women's Medical Group Professional Corporation (the "Dayton Clinic") and Planned Parenthood of Southwest Ohio (the "Cincinnati Clinic" sued to challenge the law's enforcement. Both sued the Director and the Department, ultimately seeking a permanent injunction against the statute's enforcement, claiming that the law violates the Ohio Constitution. But only the Dayton clinic immediately sought a TRO and preliminary injunction that same day, seeking to block the Department and Director from "enforcing SB 157 until 90 days after its effective date," and to enjoin them from "revoking or refusing to renew" the Dayton Clinic's license as an ambulatory surgical facility ("ASF") or otherwise preventing the Dayton Clinic from providing "procedural abortion services for reasons related to noncompliance with [S.B. 157] until at least June 21, 2022." Mot. at 1.

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.

Here, the Director denied the 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 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). Plaintiffs instigated this lawsuit on February 25, 2022, seeking injunctive and declaratory relief for enforcement of SB 157. The Dayton Clinic contemporaneously filed a motion seeking a temporary restraining order ("TRO") and preliminary injunction ("PI"). The Cincinnati Clinic did not join the TRO and PI motion because

> [the Cincinnati Clinic] 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 the Department. However, the Department sent a letter to the Cincinnati Clinic on February 23, 2022 that, while recognizing that SB 157 does not even go into effect until late March, asks the Cincinnati Clinic 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.

Mot. at 1, fn.1. Kersha Deibel, the Cincinnati Clinic's President and CEO, also referenced the Department's February 23 letter and stated that "the Cincinnati Clinic intends to respond to the Department to convey its understanding that, because the Cincinnati Clinic currently holds a variance from the WTA, it has until June 21, 2022 to comply with SB 157. . . [the Cincinnati Clinic] is already working to attempt to comply with SB 157." The Cincinnati Clinic contends that the Department's February 23 letter demonstrated that "the Department appears to be unilaterally and without basis moving the compliance deadline up approximately four months" (Compl. ¶ 73), and "[the Cincinnati Clinic] is at risk of the Department taking steps to prematurely enforce SB 157, rescind its variance and subsequently revoke its ASF license." *Id.*at ¶ 76.

This Court's jurisdiction to hear Plaintiffs' claims was invoked under Civ.R.3(C)(6) "because Plaintiff [the Cincinnati Clinic] provides procedural abortions in Hamilton County, and thus the claims for relief arise in part in Hamilton County." Compl. ¶ 24.

A hearing was held on March 3, 2022, regarding the Dayton Clinic's motion for TRO. The Court granted the Motion and set a briefing and hearing schedule for the preliminary injunction. Defendants' memorandum contra was originally due on March 8, 2022, and the Injunction Hearing was scheduled for March 16, 2022. The parties subsequently filed an Agreed Entry resetting: Defendants' memorandum contra to March 25, 2022; the Dayton Clinic's reply to April 8, 2022; and the Preliminary Injunction Hearing to April 15, 2022, at 11:00 am.

LEGAL STANDARD

Ohio Civil Rule 65(B) provides for the issuance of a preliminary injunction only in limited circumstances. "An injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right . . ." *Garono v. State*, 37 Ohio St. 3d 171,

173, 524 N.E.2d 496 (1988). "Courts should take particular caution in granting injunctions, especially 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." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 604, 653 N.E.2d 646 (1995) (quotations omitted). "A party seeking a preliminary injunction must show by clear and convincing evidence: (1) a substantial likelihood that the party will prevail on the merits, (2) the party will suffer irreparable injury or harm if the requested injunctive relief is denied, (3) no unjustifiable harm to third parties will occur if the injunctive relief is granted, and (4) the injunctive relief requested will serve the public interest." *Paige v. Ohio High School Ath. Assn*, 2013-Ohio-4713, 999 N.E.2d 1211 (1st Dist.), ¶ 65. If a plaintiff "d[oes] not prevail on one of the required elements to secure a preliminary injunction, [the court] need not consider the remainder of the elements." *Intralot, Inc. v. Blair*, 10th Dist. Franklin No. 17AP-4444, 2018-Ohio-3873, ¶ 47; *see also Aero Fulfillment Servs., Inc. v. Tartar*, 1st Dist. Hamilton No. C-060071, 2007-Ohio-174, ¶¶ 23, 41.

"Mootness is a question of justiciability, and '[j]urisdiction and justiciability are threshold considerations in every case, without exception.'" *Miami Twp. Bd. of Trs. v. Weinle*, 2021-Ohio-2284, P24, 174 N.E.3d 1270, 1277, 2021 Ohio App. LEXIS 2259, *11, quoting *Saqr v. Naji*, 1st Dist. Hamilton No. C-160850, 2017-Ohio-8142, ¶ 20, quoting *Barrow v. New Miami*, 2016-Ohio-340, 58 N.E.3d 532, ¶ 12 (12th Dist.). "Mootness presents a question of jurisdiction because a lack of an actual case or controversy between the parties renders it necessarily impossible for a court to grant any meaningful relief." *Id.,* citing *Brown v. Dayton*, 2d Dist. Montgomery No. 24900, 2012-Ohio-3493, ¶ 10.

ARGUMENT

I. This Case Belongs in Montgomery County, Not Here, Because the Cincinnati Clinic Has No Standing, So the Dayton Clinic Has No Reason to be Here.

The simplest way for *this* Court to resolve this case is to send it where it belongs. This argument is detailed in Defendants' Motion to Dismiss, filed contemporaneously with this response. In that Motion, Defendants show that the Cincinnati Clinic has no standing to bring its claims, because it has suffered no actual, threatened or expected harm from the enforcement of SB 157. Indeed, the Cincinnati Clinic has confirmed to the Department that it will comply with the law (["the Cincinnati Clinic] will submit another variance request for its 2022 renewal with information that it ***is*** compliant with Ohio's existing variance requirements ***as further amended by S.B. 157.***" 12B Mot., Ex A, at 2**.** And without the Cincinnati Clinic as a hook for venue, the Dayton Clinic's challenge belongs in Montgomery County.

II. This Court Does Not Have Jurisdiction to Review the Merits of The Dayton Clinic's Claims.

A. Because There is No Right to Review the Denial of a Variance Under Ohio Law, This Court Lacks Subject Matter Jurisdiction Over This Case.

The Dayton Clinic seeks to challenge the Director's denial and withdrawal of its variance, but the General Assembly expressly ***bars*** courts from hearing such cases. O.R.C 3702.3011. Instead, the Assembly leaves variances *solely* to the Director's discretion. *Id.* If the loss of a variance leads to a subsequent revocation of an ASF license, then the license revocation may be appealed under R.C. 119.12, and the courts review that ultimate outcome.

The Dayton Clinic is well-aware of this jurisdictional bar, because it was confirmed and applied in the Clinic's own litigation against the Department a few years ago. *Women's Med Ctr. of Dayton v. State Dep't of Health*, 2019-Ohio-1146, ¶55, 133 N.E.3d 1047, 1062, 2019 Ohio

App. LEXIS 1205, *37, 2019 WL 1422869. Both the Montgomery County Common Pleas Court and the Second District Court of Appeals rejected the Dayton Clinic's attempt to appeal a variance denial. *See id.* Perhaps that is why the Dayton Clinic brought its claims here, and not in Montgomery County.

None of this is debatable as it is evident in the plain language of the statute:

> [t]he director of health may impose conditions on any variance the director has granted under section 3702.304 of the Revised Code. The director may, at any time, rescind the variance for any reason, including a determination by the director that the facility is failing to meet one or more of the conditions or no longer adequately protects public health and safety. ***The director's decision to rescind a variance is final.***

O.R.C 3702.3011 (emphasis added). Ohio's legislative branch vested "the authority to license ambulatory surgical facilities in the Ohio Department of Health and in defining the scope of judicial review of its decisions." *Capital Care Network of Toledo* at 363. The legislature has authority to alter any common law right—in fact, "the legislature may 'alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good.'" *Stolz v. J & B Steel Erectors,* 155 Ohio St. 3d 567, 571, 2018-Ohio-5088, P17, 122 N.E.3d 1228, 1233, 2018 Ohio LEXIS 3011, *10 (Ohio December 20, 2018), quoting *Stetter v. R.J. Corman Derailment Servs., L.L.C.,* 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 64, quoting *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 131 (internal quotations omitted).

Here, the Ohio General Assembly has by statute denied Ohio court jurisdiction over the "discretionary, optional, elective, and permissive decision" to deny a variance. As noted above, The Dayton Clinic appealed the decision of then Director Hodges to revoke and refuse to renew its license in 2015. There the Dayton Clinic exhausted its administrative remedies and filed an appeal in Montgomery County Common Pleas. On appeal in the 2nd District Court of Appeals,

the court determined that

> the nature of the denial of the variance is significant. [The Dayton Clinic] acknowledges that an adjudication order triggers the right to an appeal pursuant to R.C. 119.12. R.C. 119.12 provides that any party adversely affected by an adjudication order denying the issuance or renewal of a license may appeal to the court of common pleas, and R.C. 119.06 provides that "[n]o adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with section 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order * * *." The court's jurisdiction on [the Dayton Clinic]'s appeal arose from the adjudication order, which was expressly addressed to the revocation and refusal to renew [the Dayton Clinic]'s ASF license and not the denial of the variance. The variance issue was governed by Ohio Adm.Code 3701-83-14 and R.C. 3702.304 and was not a judicially reviewable determination. Since [the Dayton Clinic] did not have a WTA or a variance from the requirement to have one, the Department was entitled to "[r]evoke, suspend, or refuse to renew the license" pursuant to Ohio Adm.Code 3701-83-05.1(C)(2).

Women's Med Ctr. of Dayton v. State Dep't of Health, 2019-Ohio-1146, P55, 133 N.E.3d 1047, 1062, 2019 Ohio App. LEXIS 1205, *37, 2019 WL 1422869.

O.R.C. 119.12 also calls into question this Court's authority to even consider these matters:

> Except as provided in division (A)(2) or (3) of this section, any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 of the Revised Code may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident.

119.12(A)(1). Under this provision, the Dayton Clinic's complaints related to the licensing of its clinic should properly be before a Montgomery County court.

To be sure, the Dayton Clinic frames its claim as a declaratory-judgment action, not an administrative appeal, but that does not change the *substance* of the case. The Dayton Clinic asks this Court to second-guess a variance decision, and that is a decision that the legislature has

reserved to the Director, not the courts.

1. The Director lawfully imposed additional conditions for granting or denying a variance to ensure the safety of the public pursuant to the authority granted to the Director of Health by the Ohio General Assembly.

The Dayton Clinic claims that "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." Mot. at 3. The Dayton Clinic is wrong for at least two reasons.

First, 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 existed for more than two decades, since 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 requirementspertaining 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).

Second, the 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 independentbasis for Director's decision; declining to reach constitutional claims about statute). In addition, 3702.3011 states that "[t]he director of health may impose conditions on any variance the director has granted under section 3702.304 of the Revised Code." The General Assembly made a policy decision to vest "the authority to license ambulatory surgical facilities in the Ohio Department of Health and in defining the scope of judicial review of its decisions." *Capital Care Network of Toledo* at 363. The Directorhas exercised his judgment in granting or denying variances for over 25 years, before any statutory standards applied, so the Director has authority to consider factors he deems appropriate in deciding whether an ASF requirement has been satisfied in another manner. Notably, Ohio's ASF regulatory scheme has already survived a 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 60. Ohio's ASF transfer agreement requirement and variance provisions remain constitutional, and should be upheld.

Given the clear authority of the Director to impose conditions on any variance, the Dayton Clinic's assertions that "Ohio has adopted a medically unnecessary, burdensome and arbitrary licensing scheme that provides no health or safety benefits" (Mot. at 2), "SB 157 builds on this already unnecessary scheme" (*id.*at 3), and that denial of past variance applications were based on "requirements that the Department created out of whole cloth" (*id.* at 4), are without legal justification.

B. This Court Does Not Have Jurisdiction to Hear the Dayton Clinic's Claims Because the Dayton Clinic Failed to Request a Hearing and Exhaust Its Administrative Remedies.

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. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 152, 586 N.E.2d 80 (1992) (Where a party fails to exhaust available administrative remedies, allowing declaratory relief would serve "only to circumvent an adverse decision of an administrative agency and to bypass the legislative scheme."), *Binder v. Cuyahoga Cty.,* 161 Ohio St. 3d 395, 401, 2020-Ohio-5126, P25, 163 N.E.3d 554, 560, 2020 Ohio LEXIS 2438, *13-14, 2020 WL 6472540 ("the common pleas court lacked subject-matter jurisdiction over a class action seeking declaratory relief and the recovery of overpayments to the Department of Medicaid because the statute that created an administrative-review process for Medicaid participants expressly provides that the administrative procedure is the sole remedy for challenging an overpayment.")

Ohio Revised Code Chapter 119 provides for review 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 inaccordance 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.

Notably, the Department here notified the Dayton Clinic, separate from its variance-denial letter, that it *proposed* to revoke its license, and that the Clinic had a right to a hearing on that denial, with appellate rights flowing from any post-hearing action, too. But the Clinic deliberately ignored that option, running to this Court instead. But it knew that a special statutory process was

available—and indeed, the Clinic has used that hearing-and-appeal process before, keeping the Clinic open for years in previous litigation that way.

Moreover, the availability of that process not only triggers the above jurisdictional bar, but also means that the Dayton Clinic has waived its true appellate path and failed to exhaust its administrative remedies. 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).

While the Dayton Clinic sued before the deadline to request an administrative hearing, the failure make such a request now divests this Court of jurisdiction to hear the Dayton Clinic's claim regarding the variance or the license revocation Plaintiff must exhaust these administrative remedies before pressing it's as-applied constitutional claims. Although state administrative hearing officers cannot rule on constitutional issues, those issues canbe 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 Networkof Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362, ¶¶30–31, that does not change the fact thatconstitutional 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).

The Dayton Clinic argues that pursuing the administrative hearing would be a "vain act" and therefore exhaustion is not required. Ohio courts have held that "the rule that a party must exhaust administrative remedies is not absolute: there is no need to pursue administrative remedies if doing so would be a futile or a vain act. *Rural Bldg. of Cincinnati, LLC v. Vill. of Evendale*, 2015-Ohio-1614, P11, 32 N.E.3d 983, 986, 2015 Ohio App. LEXIS 1572, *6, citing *Driscoll v. Austintown Assocs.,* 42 Ohio St.2d 263, 275, 328 N.E.2d 395 (1975). But "[f]utility in this context means not that the administrative agency would not grant the requested relief, but that the administrative agency lacks the authority or power to grant the relief." *Id.,* citing *Nemazee v. Mt. Sinai Med. Ctr*., 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990). The Director's January 31, 2022 letter stated that "[i]f 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 the [Dayton Clinic]. Such a request must be made in writing and received within 30 days of this notice[.]" Compl. Ex. C. Simply based on the fact that the hearing would be conducted before the Director or his duly authorized representative (acting under this authority and in his capacity), such hearing would not constitute a vain act because the Director is vested with total authority to grant the relief sought by the Dayton Clinic.

The Dayton Clinic now seeks precisely the relief that it *could* get in the administrative process if it were successful there—maintaining its license—even though it failed to request a state

administrative hearing concerning the proposed revocation of its license. Because the proposed revocation action is squarely within the administrative hearing provisions of Ohio Rev. Code §§119.06 and 119.07, the Dayton Clinic was required to request a hearing on the proposed revocation to press its claimed deprivations in an Ohio Court. Indeed, the Dayton Clinic recently participated in that Chapter 119 hearing and appeal process and is well aware that a necessary requirement to appeal a license revocation is to request a hearing to preserve the right to challenge the agency's final order in the proper court. *See Women's Med Center of Dayton v. State Dept. of Health*,2d Dist. Montgomery App. No. 28132, 2019-Ohio-1146. Moreover, an existing remedy does not become inadequate simply because a party fails to timelyrequest it. This Court should deny the Dayton Clinic's motion as it does not have the jurisdiction to consider the merits of any of the Dayton Clinic's claims, and it is not entitled to any remedy at law.

C. This Court Lacks Jurisdiction Over the Clinics' Claims Brought on Behalf of Their Patients.

"Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action." *Bank of Am., N.A. v. Kuchta,* 141 Ohio St. 3d 75, 80, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 22. The Dayton Clinic has brought claims for relief solely on behalf of their patients in Count I (Compl. pp23-24), and on behalf of the Dayton Clinic and its patients in Counts II. and VII. Compl. pp. 24, 26-27. In the Dayton Clinic's motion, it seeks to vindicate both the Dayton Clinic's and its patients' rights. Mot. at 8-11 (procedural due process rights), Mot. at 12-14 (substantive due process rights). But the Dayton Clinic lacks standing to challenge SB 157 on behalf of its patients.

Neither the Ohio Supreme Court nor the First District Court of Appeals has held that abortion clinics have third-party standing to assert claims on behalf of their patients. And

applicable case law shows the Dayton Clinic lacks third-party standing here. *See In re Adoption of P.L.H.*, 151 Ohio St. 3d 554, 564, 2017-Ohio-5824, 91 N.E.3d 698, ¶ 40 (declining to address the merits of appellees' constitutional argument "because the appellees do not have standing to assert the constitutional rights of someone else"); *see also id*. ("a litigant must assert its own rights, not the claims of third parties" (quotations omitted)); *State v. Khamsi*, 2020-Ohio-1472, 153 N.E.3d 900 (1st Dist.), ¶ 50 ("Litigants may assert their own rights, not the rights of third parties."); *Util. Serv. Partners v. PUC*, 124 Ohio St. 3d 284, 294, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49 ("Third-party standing is not looked favorably upon[.]" (quotations omitted)). Of course, SB 157 is not a law implicating the right to abortion, and the Dayton Clinic's patients are not the target of the law's regulations—ASF's are. The law is directed at all ASF's in Ohio, not just abortion clinics. Accordingly, because the Dayton Clinic's patients' rights are not implicated here, and the patients themselves would lack standing to sue on their own behalf, the Dayton Clinic cannot claim standing on behalf of its patients.

Even assuming that a third-party standing doctrine could apply here, it would not give the Dayton Clinic third-party standing. Among other deficits, the Dayton Clinic cannot "show[] some hindrance that stands in the way of the claimant seeking relief." *PUC*, at ¶ 49 (quotations omitted). The third parties here—the Dayton Clinic's potential patients—"did not choose to file suit, nor ha[ve] [they] even attempted to intervene in this case, and nothing prohibited the third part[ies] from asserting [their] own claim." *Id*. at ¶ 52 (quotations omitted); *see also State ex rel. Harrell v. Bd. of Edn*., 46 Ohio St.3d 55, 63, 544 N.E.2d 924 (1989) ("Since [the board of education] is not a member of the class it identifies, it lacks standing to attack the statute's constitutionality on the ground that it violates others' rights to equal protection."); *Bernardini v. Bd. of Edn*., 58 Ohio St.2d 1, 3 n.1, 387 N.E.2d 1222 (1979) (similarly denying standing to a board of education

attempting to assert the equal-protection rights of third parties). Thus, the Dayton Clinic lack standing to challenge SB 157 on behalf of their patients, and the Court lacks jurisdiction over those claims.

III. The Dayton Clinics' Claims for Premature Enforcement of SB 157 Are Moot.

On March 23, 2022, SB 157 became enforceable law in Ohio. On that day and by operation of law, the Dayton Clinic held a variance for the WTA requirement. Because the Dayton Clinic seeks a preliminary injunction here on the claimed basis that "Defendants' premature enforcement of SB 157 blatantly violates Plaintiff's due process rights[]", and such due process violation "will cause irreparable constitutional, business, and financial harms and will result in constitutional harm, increased delay in obtaining care, health risks and emotional distress to Plaintiff's patients[]" an injunction is warranted. Mot. at 7. But such claims became moot this week when SB 157 became the law in Ohio. The claims advanced in the motion at bar all are related to the premature enforcement of SB 157, and are moot.

It is now impossible for Defendants to prematurely enforce SB 157 as of this filing. And by its very terms, SB 157 provides that

> Each ambulatory surgical facility that has been granted a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code shall, within ninety days of the effective date of section 3702.305 of the Revised Code as enacted by this act, submit to the Director of Health, in the form and manner specified by the Director, a signed statement in which the physician attests to compliance with the limitations established by section 3702.305 of the Revised Code, as enacted by this act. If the Director determines that a facility has failed to demonstrate compliance, the Director shall rescind the variance.

2021 Ohio SB 157. As a result of this Court's injunction, the Dayton Clinic qualifies as a facility that was granted a variance, and therefore injunctive relief is inappropriate when the same

meaningful relief is afforded the Dayton Clinic under the law it seeks to enjoin. This Court should deny the Dayton Clinic's motion.

IV. The Dayton Clinic is Not Likely to Succeed on the Merits of Its Claims.

To be entitled to a preliminary injunction, the Dayton Clinic must demonstrate that it has a substantial likelihood of success on the merits of its claims. *Paige*, 2013-Ohio-4713, ¶ 65. A mere possibility of success does not suffice. Without showing a substantial likelihood of success, the Clinics' request fails—and this Court need not even consider the remaining elements of a preliminary injunction. *Aero Fulfillment Servs*., 2007-Ohio-174, ¶¶ 23, 41; *Intralot*, 2018-Ohio-3873, ¶ 47. Here, the Dayton Clinic has failed to establish that it is entitled to any relief under Ohio law, and falls far short of the required showing of substantial likelihood of success on the merits of its claims.

A. The Ohio Constitution Does Not Provide a Right to Abortion or a Right to Perform Abortions.

The Dayton Clinic has brought claims for relief under the Ohio Constitution. Nowhere in the texts of Article I, Sections 1, 2, and 16, is an explicit right to abortion or a right to perform abortions found. Critically, the Dayton Clinic failed to provide any authoritative determination from the Supreme Court of Ohio that held that the Ohio Constitution protects the right to abortion or the right to perform abortions of any kind.[1]

[1] The Dayton Clinic points to this Court's determination that "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.'" Mot.at 13, fn7. The Court held that strict scrutiny applied to Plaintiffs' and their patients' equal protection claims. *Id.* The Court cited to the case law provided in briefing by Plaintiffs, all of which find such fundamental liberty interest in the *federal* Constitution. The Ohio Supreme Court has never found a similar right to abortion or to provide an abortion in the *Ohio* Constitution, and the Dayton Clinic offers no case law at all to establish such rights exist in our Ohio Constitution.

1. The Dayton Clinic has failed to meet its burden to show that it has a fundamental liberty or property interest protected by the Ohio Constitution that entitles them relief for its procedural due process claim.

The Dayton Clinic incorrectly believes that it has a right to a remedy by due course of law under Article I, Section 16, but "the right-to-remedy provision applies only to existing, vested rights and that the legislature determines what injuries are recognized and what remedies are available*." Stolz v. J & B Steel Erectors,* 155 Ohio St. 3d 567, 571, 2018-Ohio-5088, P17, 122 N.E.3d 1228, 1233, 2018 Ohio LEXIS 3011, *10 (Ohio December 20, 2018)*, Ruther v. Kaiser,* 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 13. "To violate the guarantee, a statute must be a 'serious infringement of a clearly preexisting right to bring suit.'" *Id.*, quoting *Fabrey v. McDonald Village Police Dept*., 70 Ohio St.3d 351, 355, 1994-Ohio-368, 639 N.E.2d 31 (1994). It is true that the Ohio Supreme Court has historically "held that the Ohio and federal Equal Protection Clauses 'are functionally equivalent and require the same analysis.'" *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 29; *see also Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60, 1999-Ohio-248, 717 N.E.2d 286 (1999) ("the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically"). But the Court has also made clear that because

> the Ohio Constitution is 'a document of independent force,' *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993), we are not bound to walk in lockstep with the federal courts when it comes to our interpretation of the Ohio Constitution. Indeed, there are good reasons why we might choose not to do so. *See generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). And even if the provisions were initially understood to provide functionally the same protections, we are not bound to mirror subsequent United States Supreme Court decisions delineating the scope of the protection.

State v. Smith, 162 Ohio St. 3d 353, 359, 2020-Ohio-4441, P28, 165 N.E.3d 1123, 1130, 2020 Ohio LEXIS 2102, *14-; *see also State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11 (the Ohio Constitution's Equal Protection Clause may be "stronger than" the

federal Equal Protection Clause); *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) (states can grant greater civil liberties under that state's constitution than does the US Constitution). In addition, the Court has also declared that it is the "the ultimate arbiter of the meaning of the Ohio Constitution," and the Court is "not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states constitutions." *State v. Mole*, 149 Ohio St. 3d 215, 220, 2016-Ohio-5124, P21, 74 N.E.3d 368, 376, 2016 Ohio LEXIS 1910, *11. "Federal opinions do not control our independent analyses in interpreting the Ohio Constitution, even when we look to federal precedent for guidance." *Id.,* citing to *Doe v. State,* 189 P.3d 999, 1007 (Alaska 2008).

The Dayton Clinic contends that "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." Mot. at 9, quoting *Asher Invs. 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 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 lawful business is a property right[.]"). In *Asher*, the court, in deciding a 42 U.S.C. § 1983 claim, found that the plaintiff had "a constitutionally protected property interest in running his business free from unreasonable and arbitrary interference from the government ***under the Due Process Clause***" of the federal Constitution. *Asher* at 136. In fact, nearly every case that the Motion cites deals with the federal Due Process Clause. *See Cooper,* at 474 ("***The Fifth and Fourteenth Amendments to the United States Constitution*** state that no person shall be deprived of life, liberty, or property without due process of law. '[T]he right to engage in a lawful business is a

property right and * * * carries with it the right to appeal to the public for patronage, through bills, circulars, cards or other advertising matter.' *In re Thornburg* (1936), 55 Ohio App. 229, 234 (1936).), *In re Thornburg*, (A state's police power "is limited and confined by the [***federal***] ***constitutional provision*** that the citizen shall not thereby unreasonably, arbitrarily, or without due process of law, be deprived of his life, liberty or property. The constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulation."), *Hodes & Nauser MDs, P.A. v. Moser,* D. Kan. No 11-2365-RDR-KGS Complaint ¶ 1 (attached as Exhibit 1) ("This is an action under the ***U.S. Constitution and 42 U.S.C. § 1983*** brought by a private obstetrics and gynecology practice and the father-daughter team of physicians who own and operate that practice, challenging the constitutionality of the licensing provisions of Kansas Senate Bill No. 36 (2011)"), *Women's Med. Prof'l Corp. v. Baird*, 277 F.Supp.2d. 862, 877 (S.D. OH 2003) ("Plaintiff's claim that Director Baird's denial of an ASF license for the Dayton Clinic and denial of his request for a waiver deprived him of his right to procedural due process as guaranteed by the ***Due Process Clause of the Fourteenth Amendment***."), *Hallmark Clinic v. North Carolina Dep't of Human Resources,* 380 F. Supp. 1153, 1158 (E.D.N.C. 1974) ("The Supreme Court long ago held that [federal] due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim."), *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989, 143 L. Ed. 2d 130 (1999) (For claims brought under 42 U.S.C. § 1983 "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' See ***U.S. Const., Amdt. 14***."), *In re Raheem L.*, 993 N.E.2d 455, 458 (1st App. Dist. 2013) (comparing only Article 1, Section 16 of the Ohio Constitution and the ***14th Amendment of the Federal Constitution***, and noting that "despite their different wording, the Ohio Supreme Court has held that these provisions

afford 'equivalent' protections. . . ." but the Court is also "extremely reluctant to recognize new fundamental rights "because guideposts for responsible decision making in this unchartered area are scarce and open-ended.").

The Ohio Supreme Court precedents stand in stark contrast to the Dayton Clinic's purported "constitutionally protected property interest in running his business free from unreasonable and arbitrary interference from the government[.]" Mot. at 9. The Court has found "among the liberty and property interests protected by [Article 1, Section 1 of the Ohio Constitution] a right to pursue a profession of one's choosing." *Ohio State Bar Ass'n v. Watkins Global Network, L.L.C.,* 159 Ohio St. 3d 241, 252, 2020-Ohio-169, P33, 150 N.E.3d 68, 78, 2020 Ohio LEXIS 196, *24, citing *State v. Williams*, 88 Ohio St.3d 513, 527, 2000-Ohio-428, 728 N.E.2d 342 (2000). But it is well established in Ohio Courts that "an exercise of the police power [interfering with an Article 1, Section 1 right or deprivation of property] will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854, 860, 1957 Ohio LEXIS 337, *16, 4 Ohio Op. 2d 113, citing *City of Piqua v. Zimmerlin,* 35 Ohio St., 507, 511 (1880). "Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them. *State, ex rel. Standard Oil Co., v. Combs, Dir*., 129 Ohio St., 251, 194 N. E., 875 (1935); *City of Dayton v. S. S. Kresge Co*., 114 Ohio St., 624, 151 N. E., 775, 53 A. L. R., 916 (1926); and *City of Cleveland v. Terrill*, 149 Ohio St., 532, 80 N. E. (2d), 115 (1948).

The only Ohio caselaw that the Dayton Clinic identified as recognizing that "Plaintiff and other abortion clinics 'have protected liberty and property interests in the operation and in the continuation of their chosen profession[]'" is this Court's Entry Granting Plaintiffs' Motion for Preliminary Injunction in *Planned Parenthood Southwest Ohio Region v. Department of Health*, Hamilton C.P. No. A21 00870 (April 05, 2021). That finding relied on the same authorities now cited by the Dayton Clinic (*Asher, Cooper, Hodes & Nauser, Baird*), all of which ground those protected interests in the Federal, and not the Ohio, Constitution.

In the absence of a single Ohio Supreme Court case that has found such a "protected liberty and property interests in the operation and in the continuation of their chosen profession[]", S.B. 157 and the Director's determination of conditions for a variance need only survive rational basis review. "Government actions that infringe upon a fundamental right are subject to strict scrutiny, while those that do not need only be rationally related to a legitimate government interest." *Stolz* at 570, citing *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18. Of course, the Ohio Supreme Court grants "'substantial deference' to the General Assembly's predictive judgment in making [rational basis] determinations. *Stolz* at 572, citing *State v. Williams*, 88 Ohio St.3d 513, 531, 728 N.E.2d 342 (2000).

The Dayton Clinic also quotes an Ohio case that states "[a]lthough due process is "'flexible and calls for such procedural protections as the particular situation demands,'" *Fairfield County Bd. of Comm'rs v. Nally*, 143 Ohio St. 3d 93, 104, 2015-Ohio-991, P42, 34 N.E.3d 873, 884, 2015 Ohio LEXIS 627, *23, quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 [47 L.Ed.2d 18] (1976)," Mot. at 11, but neglected to include the rest of the sentence: "the basic requirements of procedural due process are notice and an opportunity to be heard." *Nally* at 11., quoting *State v. Hudson*, 2013-Ohio-647, ¶ 48, 986 N.E.2d 1128 (3d Dist.).

Instead the Dayton Clinic claims that "providing no opportunity to comply with new requirements before depriving a party of its protected interest is a constitutional violation." Mot. at 11. But the cases claimed to support this statement again invoke provisions of the Federal Constitution: the first, *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343, 2002 U.S. Dist. LEXIS 17455, *9, states the general legal principle that any law that requires you to do something by a certain date must give you adequate time to do it; the second, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789, 2013 U.S. App. LEXIS 25460, *7, 2013 WL 6698596, only determined whether a preliminary injunction was proper, and the third, *United States v. Dumas*, 94 F.3d 286, 290, 1996 U.S. App. LEXIS 21941, *12, found no constitutional deprivation and made no mention of a new requirement at all.

The Dayton Clinic again has failed to properly provide the law applicable to this case, as none of the cases considered the Ohio Constitution, and none are binding upon this Court.

2. The Dayton Clinic has also failed to meet its burden to show that it has a fundamental liberty or property interest protected by the Ohio Constitution that entitles them relief for its substantive due process claim.

Ohio law provides that "[u]nder the Ohio Constitution, an enactment comports with due process "if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary."*Fabrey v. McDonald Vill. Police Dep't*, 70 Ohio St. 3d 351, 354, 639 N.E.2d 31, 34, 1994 Ohio LEXIS 2082, *5, 1994-Ohio-368 (citations omitted). **"**In a substantive-due-process challenge, "[t]he first (and often last) issue * * * is the proper characterization of the individual's asserted right." *Stolz* at 570, quoting *Blau v. Fort Thomas Pub. School Dist*., 401 F.3d 381, 393 (6th Cir.2005), citing *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). "Government actions that infringe upon a fundamental right are subject to strict scrutiny, while those that do not need only be rationally related to a

legitimate government interest." *Id.,* citing *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18.

The Dayton Clinic has not provided this court with a "proper characterization" of the right it asserts, as it has provided no authority under Ohio law that provides the Dayton Clinic with "liberty and property interests in the continued operation of its business." Mot. at 12. Without a right to assert under Ohio law, the Dayton Clinic cannot show that it is likely to succeed on its substantive due process claims.

V. The Dayton Clinic has Failed to Show That It is Likely to Succeed on the Merits of Its Claims, This Court Need Not Consider Whether the Dayton Clinic Meets the Other Factors as It Must Demonstrate All Four Factors to Obtain the Injunctive Relief It Seeks.

If a plaintiff "d[oes] not prevail on one of the required elements to secure a preliminary injunction, [the court] need not consider the remainder of the elements." *Intralot,* ¶ 47. The Dayton Clinic has failed to demonstrate any likelihood of success on either its procedural or substantive due process claims, therefore the Court need not consider if it has demonstrated the it has or will suffer irreparable harm from SB 157. Furthermore, the Dayton Clinic only claimed it would suffer irreparable harm from "the premature enforcement of SB 157," thus because SB 157 is now enforceable law, any possibility of irreparable harm based on premature enforcement has been vitiated.

The Dayton Clinic claims that a "finding of a threatened or impaired constitutional right amounts to irreparable injury[]" Mot. at 15, but again cites to cases that are decided under provisions of the Federal Constitution. *See Magda v. Ohio Elections Comm'n,* 2016-Ohio-5043, P38, 58 N.E.3d 1188, 1206, 2016 Ohio App. LEXIS 2837, *40 ("Since R.C. 3517.21(B)(1) is an excessive restriction on the freedom of speech guaranteed under the First and Fourteenth Amendments of the United States Constitution, enforcement of the statute should be permanently

enjoined"). Likewise, the additional citations listed thereafter cite to case law decided in the 6th and 8th Circuit Courts, neither of which is the authoritative source on the Ohio Constitution. But even if a violation of a constitutional right is sufficient to show irreparable injury, the Dayton Clinic has not demonstrated that it has any such right protected by the Ohio Constitution.

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers). An injunction preventing enforcement of S.B. 157 will harm the public by preventing the implementation of a state statute intended to provide for the health and safety of Ohio citizens. And in Ohio, because "legislation will be upheld if it bears a real and substantial relation to the public health, safety, morals, or general welfare," the substantial interests of the public are implicit in the text of the law. *State v. Williams*, 88 Ohio St. 3d 513, 513, 728 N.E.2d 342, 348, 2000 Ohio LEXIS 813, *5, 2000-Ohio-428.

Had the Dayton Clinic availed itself of the administrative process, that "vain" pursuit may have provided it with additional time to cure the defects in its application and it could have applied for a new variance to prevent all harms attendant a revocation of its license. As the Dayton Clinic has already experienced during its prior proposed license revocation, the administrative process can take an extended period of time to conclude, and in that case, it took over a year. But because it exhausted its administrative remedies, The Dayton Clinic preserved its right to appeal the final order. The appeals process took almost another three years. But from the September 25, 2015 proposed revocation until the August 21, 2019 conclusion of its appeal, the Dayton Clinic remained open for business in Montgomery County. During the interim, the Dayton Clinic was able to find another doctor to cure the defect that led to its variance denial in 2015, submitted the

new application, and was granted a variance by the Department. But here, the Dayton Clinic decided to avoid the administrative process entirely and try its luck in this forum—which is the only reason the Cincinnati Clinic is here.

Of course, there is no way to anticipate future events: there is no guarantee, much less any assurance, that the Dayton Clinic would have enough time to meet the requirements if it tried to invoke hearing and appeal rights, or even that it would stay open much longer at all. Nor does it mean that the Dayton Clinic has any prerogative to stay open beyond tomorrow. Such conjecture is immaterial now because this time it didn't even pretend to try. That failure is just one of many reasons that the Dayton Clinic loses on the merits, but given the Dayton Clinic's fatal decision to circumvent the process afforded to it, any alleged equitable harms cannot be attributed to the Department, because the legal quagmire the Dayton Clinic finds itself in is one of its own choosing.

Crucially, because the Dayton Clinic does not have a right to appeal the denial of a variance, and because the Dayton Clinic did not avail itself of the necessary administrative hearing required to establish this Court's subject matter jurisdiction to consider its claims, it cannot claim that the harm it may suffer is a result of Defendants' actions. All of the harms it now must face is unreservedly self-inflicted.

And to the extent that the Dayton Clinic seeks to rely on harm to its patients in obtaining abortions, and not to the Clinic's own business interests in providing them, it fails. And of the many irreparable harms it contrives on behalf of its patients--some are entirely conclusory, others are unequivocally speculative, and still others have been held not to be harms at all--the entity that can best protect the health, safety, and welfare of the Dayton Clinic's patients and all Ohioans have, here, been enjoined from doing so.

CONCLUSION

For the foregoing reasons, the Dayton Clinic's Motion for b Injunction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify the foregoing *Response in Opposition to the Dayton Clinic's Motion for Preliminary Injunction* was served upon the following via electronic mail this 25th day of March, 2022.

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Defendants Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HODES & NAUSER, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D., Plaintiffs, v. ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; STEPHEN HOWE, in his official capacity as District Attorney for Johnson County; and DEREK SCHMIDT, in his official capacity as Attorney General for the State of Kansas, Defendants.	)	CIVIL ACTION Case No. 11-2365-RDR-KGS PLACE OF TRIAL REQUESTED: KANSAS CITY, KANSAS

COMPLAINT

Plaintiffs, Hodes & Nauser, MDs, P.A. Herbert Hodes, M.D., Traci Nauser, M.D. (collectively "Plaintiffs"), by and through their undersigned attorneys, bring this complaint against above-named Defendants, their employees, agents, and successors in office ("Defendants") and in support thereof state the following:

I. Preliminary Statement

1. This is an action under the U.S. Constitution and 42 U.S.C. § 1983 brought by a private obstetrics and gynecology practice and the father-daughter team of physicians who own and operate that practice, challenging the constitutionality of the licensing provisions of Kansas Senate Bill No. 36 (2011) ("Act")[1], Act, at sec. 2, 8, as applied by Defendant Secretary of the Kansas Department of Health and Environment ("KDHE")[2] through a sham licensing process, in which KDHE promulgated onerous and medically unnecessary regulations ("Temporary

[1] A true and correct copy of the Act is attached hereto as Exhibit A.
[2] For the reader's convenience Secretary Moser is referred to as "KDHE" throughout.

Regulations") without giving regulated persons and entities notice or an opportunity to be heard, and imposed absurdly short deadlines for compliance with those regulations.[3] When the Act and Temporary Regulations take effect on July 1, 2011, Plaintiffs, and other medical practices, will be prohibited from performing virtually all abortions[4] in their medical offices unless they bring those offices into compliance with the Temporary Regulations, Act, at sec. 1(f), 2(a), which Plaintiffs received just nine business days before the effective date.

2. At every step of the challenged process, KDHE implemented the licensing provisions of the Act in ways that made it impossible for existing medical practices to obtain a license by the effective date: (a) KDHE drafted and finalized Temporary Regulations without giving the facilities to be regulated any opportunity to comment on the regulations, despite the lack of any urgent circumstances necessitating that course of action; (b) KDHE included in the Temporary Regulations medically unnecessary, burdensome and inappropriate requirements, such as rigid specifications as to the number, type and dimensions of rooms in the facility, that cannot possibly be achieved in a matter of weeks; (c) KDHE conditioned licensure upon compliance with the Temporary Regulations, which were not sent to abortion providers until after the close of business on June 17, 2011, less than two weeks before the Act was to take effect; and (d) KDHE refused to consider waiver requests, provisional licensing, or any other accommodations for existing facilities.

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[3] A true and correct copy of the regulations, which are to be codified at Kan. Admin. Regs. § 28-34-126 - 44 (2011), is attached hereto as Exhibit B.

[4] The Act applies to any facility that performs five or more first-trimester abortions in a month, or any second or third trimester abortions, excluding abortions performed due to a medical emergency. The Act defines a "medical emergency" as "a condition that, in a reasonable medical judgment [sic], so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy without first determining gestational age in order to avert her death, or for which a delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function." Act, at sec. 1(i). The Act specifies that a medical emergency does *not* include a situation in which there is a "claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function." *Id.*

3. For decades, Plaintiffs have provided safe, high-quality obstetrical and gynecological services, including abortion services, in their private medical office. That office meets the needs of their patients, the applicable standards of care, and the existing state regulations governing medical facilities that perform office-based surgeries. Nonetheless, that office cannot meet all of the requirements of the Temporary Regulations, and it is impossible to bring the facility into full compliance by the effective date. Accordingly, in the absence of relief from this Court, beginning on July 1, 2011, Plaintiffs will be forced to stop providing virtually all abortion services in their office, causing irreparable harm to Plaintiffs' medical practice and to the health and well-being of their patients seeking abortions. Plaintiffs seek temporary, preliminary and permanent injunctive relief against the Temporary Regulations and the licensing requirements of the Act as applied by KDHE through its adoption and implementation of the Temporary Regulations (referred to herein as the "Licensing Process"). Such injunctive relief is necessary to prevent irreparable harms and the violation of rights secured to Plaintiffs and their patients by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II. Jurisdiction and Venue

4. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

5. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

6. Venue in this court is proper under 28 U.S.C. 1391(b) because a substantial part of the events giving rise to this action occurred in this district.

III. Parties

A. Plaintiffs

7. Plaintiff Herbert C. Hodes, M.D., is a board-certified obstetrician-gynecologist licensed to practice medicine in Kansas. He is a fellow of the American College of Obstetricians and Gynecologists and holds admitting and clinical privileges at a number of hospitals in the Kansas City area. He has been providing a full range of obstetrical and gynecological services, including first and second-trimester abortions, in his private medical practice for 34 years.

8. Plaintiff Traci Lynn Nauser, M.D., is a board-certified obstetrician-gynecologist licensed to practice medicine in Kansas. She is a fellow of the American College of Obstetricians and Gynecologists and holds admitting and clinical privileges at a number of hospitals in the Kansas City area. She joined the medical practice of her father, Dr. Hodes, 13 years ago, and she has been providing a full range of obstetrical and gynecological services, including first and second-trimester abortions, in that practice ever since.

9. Plaintiff Hodes & Nauser, MDs, P.A. is the private medical practice owned and operated by Dr. Hodes and Dr. Nauser (the "practice"). The practice is located in Overland Park, Kansas, and advertises under the name "Center for Women's Health."

10. Plaintiffs Dr. Hodes and Dr. Nauser provide a full range of obstetrical and gynecological services at their practice, including family planning services, pap smears, obstetrical care, gynecological procedures and surgeries, screening for and treatment of sexually transmitted infections, abortion services, treatment of menopausal symptoms, and infertility treatments. The gynecological surgeries performed by Drs. Hodes and Nauser at their office include endometrial ablation, tubal ligation, diagnostic hysteroscopy and surgical completion of miscarriage.

11. Drs. Hodes' and Nauser's practice accepts all major forms of health insurance in the area, including private insurance plans, Medicaid, and Medicare.

12. Drs. Hodes and Nauser also provide hospital-based care to their patients who need services in that setting. Their hospital-based services include obstetrical and gynecological surgeries and delivering babies.

13. Drs. Hodes and Nauser regularly provide five or more first-trimester abortions a month, and second trimester abortions, that do not fall under the medical emergency exception contained in the Act. Their practice has offered such abortion services in the same physical facility for over 25 years. That facility meets the applicable standards of care, the existing Kansas regulations governing providers of office-based surgery, Kan. Admin. Regs. § 100-25-1 *et seq.*, and the clinical standards of the National Abortion Federation, a professional association for physicians and facilities providing abortions, of which Plaintiffs are members. The Practice is already subject to oversight and inspections by the Kansas Board of Healing Arts, KDHE (to the extent it administers, in Kansas, the federal Clinic Laboratory Improvement Amendments, governing laboratory testing), and the National Abortion Federation.

14. Plaintiffs perform approximately one-quarter of the total abortions reported in the State annually. *See* Kansas Dep't of Health & Environment – Abortions in Kansas 2010 (Preliminary Report), *available at* http://www.kdheks.gov/hci/abortion_sum/2010itop1.pdf (last visited June 26, 2011) (providing total number of reported abortions performed in the State). The vast majority of these abortions are performed in the first trimester of pregnancy.

15. Plaintiffs perform a significant number of abortions in situations where the woman has been diagnosed with a medical complication or condition and/or where the fetus has been diagnosed with a serious fetal anomaly. Many of the perinatology practices in the region refer their patients who seek terminations after receiving a diagnosis of fetal anomaly to Plaintiffs. Additionally, other outpatient abortion providers in the region also regularly refer

patients to Plaintiffs when the woman has been diagnosed with a medical complication or condition (e.g. hypertension, obesity, fibroids, uterine anomaly, moderately low hemoglobin, placenta previa). Upon information and belief, these referrals are made based on the referring providers' confidence in Dr. Hodes' and Dr. Nauser's ability to provide expert, high-quality care to patients in those circumstances.

16. Plaintiffs bring this action on their own behalf and on the behalf of their patients who seek abortion services presently or in the future.

B. Defendants

17. Defendant Robert Moser, M.D., is the Secretary of KDHE, the agency responsible for promulgating regulations under the Act, enforcing its licensing requirements, and determining violations thereunder. Act, at secs. 9, 6, 2. Secretary Moser is sued in his official capacity, as are his agents and successors.

18. Defendant Stephen Howe is the District Attorney for Johnson County, Kansas, in which the Practice is located. As District Attorney, Defendant Howe has the authority to prosecute violations of the Act occurring in Johnson County. *See* Kan. Stat. Ann. § 22a-104 (district attorney duties); Kan. Stat. Ann. § 22-2602 (place of trial). District Attorney Howe is sued in his official capacity, as are his agents and successors.

19. Defendant Derek Schmidt is the Attorney General for the State of Kansas. As Attorney General, Defendant Schmidt is the "chief law enforcement officer of the state" and "one of the state's prosecuting attorneys." *State v. Rohleder*, 208 Kan. 193, 194 (1971); Kan. Stat. Ann. § 22-2202(17). The Attorney General may assist a county attorney in the prosecution of a case and may take over the prosecution of such a case upon the county attorney's request.

State v. Reynolds, 234 Kan. 574, 578-79 (1984). Defendant Schmidt is sued in his official capacity.

V. Factual Allegations

A. Abortion Services

20. Legal abortion is one of the safest procedures in contemporary medical practice. At earlier gestational ages, abortion is significantly safer than carrying a pregnancy to term. Until the end of the second trimester, abortion is equally safe as carrying a pregnancy to term.

21. Women seek abortions for a variety of reasons, including psychological, emotional, medical, familial, social and economic.

22. The vast majority of abortions in this country, including those in Kansas, are performed in the first trimester of pregnancy.

23. Abortions may be performed by surgical or medical means. Medication abortion involves the administration of medications (in the form of pills) to induce an abortion. Surgical abortion involves the use of instruments to evacuate the contents of the uterus. Surgical abortion is short in duration (a first trimester abortion typically takes about five to eight minutes) and involves no incision into the woman's body.

24. Both surgical abortion and medication abortion are analogous to a number of other outpatient procedures in terms of risks, invasiveness, instrumentation, and duration. For example, first trimester surgical abortion is essentially the same procedure as surgical completion of miscarriage (a procedure performed when a women has experienced a spontaneous miscarriage but has not completely expulsed the contents of the uterus), which is also commonly performed in medical offices and other outpatient settings. Other analogous gynecological procedures performed in such settings include diagnostic dilation and curettage, endometrial

biopsy, and hysteroscopy. Analogous non-gynecological outpatient procedures performed in such settings include vasectomy, sigmoidoscopy and operative colonoscopy.

25. There is no medical basis for requiring that offices and clinics in which abortions are performed meet standards and requirements different from those in which analogous medical procedures are performed.

26. Although abortion is a very safe procedure, the risks of an abortion procedure increase with the duration of the pregnancy. Therefore any delay in obtaining an abortion may cause increased risk of morbidity (major complications) and mortality (death) for the patient.

27. Upon information and belief, there are only three medical facilities in the State of Kansas that regularly provide abortions: the Practice; a medical clinic in Kansas City, which was recently denied a license under the Act by KDHE; and Comprehensive Health Center, an ambulatory surgical center operated by Planned Parenthood of Kansas and Mid-Missouri, which Plaintiffs believe has been inspected but not granted a license by KDHE. The closest out-of-state provider is a Planned Parenthood clinic in Columbia, Missouri that offers only limited first-trimester abortion services. The closest out-of-state provider of second-trimester abortion services is a Planned Parenthood clinic in St. Louis, Missouri. On information and belief, no other physician in Kansas or any neighboring state provides abortions as part of a broader, office-based medical practice.

B . The Act

28. On May 16, 2011, S.B. 36 was enacted into law. The Act takes effect upon publication in the statute book, which is expected to occur on July 1, 2011. The Act makes it unlawful to operate an "abortion clinic" in the state without possessing a valid license issued by the Department pursuant to the Act. Act, at sec. 8(a). There is no *mens rea* requirement for that

crime. *Id.* Violation of this requirement is a Class A nonperson misdemeanor, Act, at sec. 8(c), punishable by one year of imprisonment and up to $2,500 in fines, Kan. Stat. Ann. § 21-4502(1)(A); Kan. Stat. Ann. § 21-4503(c)(1). Conviction of a Class A misdemeanor can give rise to the suspension, limitation, or revocation of a medical license by the Kansas Board of Healing Arts. Kan. Stat. Ann. § 65-2836(c). Violation of the Act's licensing provision also constitutes unprofessional conduct under Kan. Stat. Ann. § 65-2837(b), which can lead to suspension, limitation or revocation of a doctor's medical license by the Board of Healing Arts as well. Act, at sec. 8(c); Kan. Stat. Ann. § 65-2836(b).

29. The Act authorizes KDHE to license, inspect, and impose penalties on facilities subject to the Act. Act, at sec. 2-3, 5-6. With respect to licensing, the Act requires KDHE to issue a license to any facility that submits an application and meets all applicable laws and rules and regulations. Act, at sec. 2(c).

30. The Act also requires KDHE to adopt rules and regulations for the licensure of facilities that perform abortions. Act, at sec. 9. The rules and regulations adopted by KDHE under the Act must address "sanitation, housekeeping, maintenance, staff qualifications, emergency equipment and procedures to provide emergency care, medical records and reporting, laboratory, procedure and recovery rooms, physical plant, quality assurance, infection control, information on and access to patient follow-up care and any other areas of medical practice needed to carry out the purpose of [the Act]." *Id.*

31. The Act provides no deadline for when the rules and regulations under the Act must be adopted by KDHE; nor does the Act require or mention the adoption of temporary regulations.

32. Because the Act authorizes licensing on the basis of "applicable" laws, and imposes no deadline for the promulgation of regulations under the Act, KDHE could have provisionally licensed regulated facilities on the basis of their compliance with existing law and waited to apply new regulations until there had been adequate opportunity for notice and comment on them. KDHE could also have imposed flexible minimum standards in the Temporary Regulations especially as to the physical facility requirements.

C. The Licensing Process

33. On May 17, 2011, the day after the Act was signed into law, Plaintiffs, through counsel, wrote a letter to KDHE pointing out that insufficient time existed for the agency to both promulgate regulations and give providers a reasonable opportunity to comply with those regulations prior to the effective day of the Act. The letter therefore suggested that KDHE grant provisional licenses on the basis of compliance with existing law while the agency worked to develop regulations. [A true and correct copy of the letter is attached hereto as Exhibit C].

34. KDHE did not respond to Plaintiffs' letter until May 26, 2011, at which point the agency informed Plaintiffs that it planned to issue temporary regulations, inspect clinics, and make licensing decisions on or by the July 1st effective date of the bill. [A true and correct copy of the letter is attached hereto as Exhibit D]. At that point, Plaintiffs had not seen any draft of the temporary regulations.

35. On June 9, 2011, KDHE sent Plaintiffs a draft of the temporary regulations ("Draft Regs") which comprised more than 30 pages, as well as a license application form and cover letter. [A true and correct copy of the letter and enclosures is attached hereto as Exhibit E].

36. KDHE's letter instructed Plaintiffs to complete the application form and return it, along with an application fee and "written verification of compliance with all local codes and ordinances, fire codes and regulations, and arrangements for the removal of biomedical waste and human tissue" by June 17, 2011. The application form included a checklist requiring the facility to indicate that it met the statutory requirements in each of the enumerated areas. Thus, Plaintiffs were given six business days to review the draft regulations for the first time, affirm that they complied with all of the statutory requirements (which had been interpreted in the draft regulations), and gather the required materials, including documentation of their compliance with local codes and ordinances.

37. The June 9th draft of the temporary regulations included extensive requirements for all aspects of the medical facility, including staffing, procedures, equipment, and physical environment. With respect to the physical facility, the June 9th draft specified particular rooms and areas required in the facility, but it did not mandate the dimensions of those rooms and areas or their precise location within the facility. Ex. E, Draft Regs. § 28-4-133(b). With respect to patient recovery time, the June 9th draft required that the facility specify, in accordance with "the usual standards of medical practice," a minimum length of time for a patient to remain in the recovery room based on the type of abortion procedure, gestational age of the pregnancy, and the post-procedure condition of the patient. Ex. E, Draft Regs. § 28-34-139(1).

38. On June 13, 2011, KDHE sent a letter to Plaintiffs informing them that the June 9th draft of the temporary regulations had been changed by the Office of the Kansas Attorney General. KDHE did not at that time provide a copy of the revised regulations, or indicate what changes had been made, but it indicated that it would send them a revised version in the future. [A true and correct copy of the letter is attached hereto as Exhibit F].

39. On Friday, June 17, 2011, after the close of business, KDHE sent Plaintiffs a copy of the revised regulations, indicating that this was the final version of the temporary regulations ("Temporary Regulations"). [A true and correct copy of that correspondence is attached hereto as Exhibit G; *see also*, the Temporary Regulations, at Exhibit B]. Plaintiffs received the Temporary Regulations on the morning of Monday, June 20, 2011.

40. The Temporary Regulations are similar to the June 9th draft in a number of respects; in other respects, they impose far more rigid and onerous requirements.

41. As a whole, the Temporary Regulations impose burdensome and costly requirements that are not medically necessary or appropriate, and that are not imposed on Kansas medical providers performing other comparable procedures.

42. For example, the Temporary Regulations impose numerous physical facility requirements that are difficult or impossible for a medical office to meet, and that are not necessary for the provision of abortion services. These physical facility requirements were made significantly more onerous after the initial draft regulations were changed by the Attorney General's office. The medically unnecessary physical environment regulations include requirements that the facility have: procedure rooms of at least 150 square feet in size, Kan. Admin. Regs. § 28-34-133(b)(7); janitorial storage space of a size at least equivalent to 50 square feet per procedure room (i.e., a facility with 6 procedure rooms must have 300 sq. ft. of janitorial storage), Kan. Admin. Regs. § 28-34-133(b)(15); designated patient dressing rooms with a toilet, hand-washing station and storage for clothing and valuables, Kan. Admin. Regs. § 28-34-133(b)(2); designated staff dressing rooms with a toilet, hand-washing station and storage for clothing and valuables, Kan. Admin. Regs. § 28-34-133(b)(3); separate sets of toilet facilities specifically designated for use by patients, staff and the public, Kan. Admin. Regs. § 28-34-

133(b)(5); a toilet room that is adjacent to (not just accessible from) the area in which a patient recovers, Kan. Admin. Regs. § 28-34-133(b)(4); "separate facilities" for pre-procedure hand washing (as opposed to hand-washing facilities located in the procedure rooms), Kan. Admin. Regs. § 28-34-133(b)(6); separate soiled and clean workrooms for cleaning and sterilizing used instruments, and two separate sinks in the soiled (rather than just separate clean and soiled areas within one workroom containing one sink), Kan. Admin. Regs. § 28-34-133(b)(13)-(14).

43. The Temporary Regulations also require that every abortion patient remain in the recovery area for at least two hours after her abortion, regardless of the type of abortion procedure, the gestational age of the pregnancy, or the patient's post-procedure condition. Kan. Admin. Regs. § 28-34-139(1). This rigid and medically inappropriate requirement was added to the regulations after the Attorney General made changes to the first draft.

44. The Temporary Regulations also require regulated facilities to possess unnecessary and inappropriate equipment and supplies, including pediatric-sized ventilation masks, cannulas, pulse oximeter sensors, defibrillator paddles, and EKG electrode skin contacts. Kan. Admin. Regs. § 28-34-135(c)(3), (8), (e)(1), (f) (2), (3), (4). Plaintiffs do not have child-aged patients, do not deliver babies in their office, and only perform abortions there prior to fetal viability.

45. The Temporary Regulations impose a number of ambiguous and unclear requirements, such as requiring Plaintiffs to report "to the appropriate licensing agency" any incident that could "provide possible grounds for disciplinary action by the appropriate licensing agency," Kan. Admin. Regs. § 28-34-142(f)(1)(d), (f)(2), and to "make all reasonable efforts to ensure that [an abortion patient] returns for a subsequent examination," Kan. Admin. Regs. § 28-

34-141(d). This latter provision makes no indication of whether the reasonableness of a provider's efforts will be judged by a subjective or objective standard.

46. The Temporary Regulations impose more stringent requirements than those imposed by the State on providers of comparable medical procedures. Moreover, in many respects (including the physical facility requirements), the Temporary Regulations impose more stringent requirements than those imposed on providers that perform much more complex and risky procedures, such as hospitals and ambulatory surgical centers.

47. Despite the fact that it would be extremely costly, if not impossible, for Plaintiffs to bring their facility into compliance with the Temporary Regulations, and thus to continue providing abortions to their patients, KDHE issued an economic impact statement on June 20, 2011, that concluded that the temporary regulations "should not impose any unusual cost on regulated providers or consumers of provider services." [A true and correct copy of the statement is attached hereto as Exhibit H].

48. On June 21, 2011, the day after Plaintiffs received the Temporary Regulations, they received notice from KDHE indicating that their inspection was scheduled for June 27, 2011, six days later. [A true and correct copy of the email is attached hereto as Exhibit I].

49. The notice indicated that any change in that inspection date by Plaintiffs would require 30 days' advance notice.

50. On that same date, Plaintiffs wrote to KDHE, informing KDHE that they could not meet a number of the physical facility regulations that had been added in the revised version of the Temporary Regulations, and asking whether KDHE would entertain requests for waivers of any of those requirements. They further asked KDHE whether it would grant a provisional

license while it considered any such waiver requests. [A true and correct copy of the email is attached hereto as Exhibit J].

51. KDHE responded that same day, stating that it would not consider any waiver requests and would not grant provisional licensing. [A true and correct copy of the email is attached hereto as Exhibit K].

52. At that point, Plaintiffs wrote to KDHE to indicate that, in light of the new requirements, they could not be ready for inspection by June 27, 2011; they therefore requested that their inspection be moved to June 29, 2011. [A true and correct copy of the email is attached hereto as Exhibit L].

53. KDHE agreed to change Plaintiffs inspection date to June 29, 2011, but stated that as a result Plaintiffs might not be able to complete the licensing process by July 1, 2011. [A true and correct copy of the email is attached hereto as Exhibit M].

D. Application of the Temporary Regulations to the Practice

54. Plaintiffs cannot bring their existing office and practice into compliance with the Temporary Regulations prior to July 1, 2011, if ever. They simply do not have additional space in their building to meet the new requirements.

55. Plaintiffs use six procedure rooms in their busy ob-gyn practice; none of those rooms are 150 sq. ft. in size, and a room of that size is not medically necessary for abortions or any of the other procedures Plaintiffs perform.

56. Plaintiffs' office does not have anywhere near the required 300 sq. ft. of janitorial storage, and that amount of space is unnecessary for the safe performance of abortions and the other procedures they perform or the supplies necessary to keep the office clean.

57. Plaintiffs' office does not have designated patient dressing rooms; rather, a patient changes in the privacy of the procedure room in which she will undergo her procedure. The patient's clothes and valuables stay in the same room as the patient throughout the time she is in the facility. There is no medical basis for requiring such dressing rooms in medical practices that perform abortions.

58. Plaintiffs' office does not have designated staff dressing rooms; rather, the staff comes to work dressed, and if a staff member needs to change for any reason, he or she does so in an unoccupied room. There is no medical basis for requiring such dressing rooms in medical practices that perform abortions.

59. Plaintiffs' office patients recover in the privacy of the procedure room in which they underwent their procedures; a patient's recovery is monitored by a member of the staff present in the patient's room. A toilet room is accessible to patients recovering in procedure rooms, but is not located directly adjacent to the procedure rooms. Recovery time after an abortion is short, and patients are ambulatory shortly after the procedure and are able to walk to a bathroom if needed.

60. Plaintiffs' office does not have a separate pre-procedure hand-washing area; rather, Plaintiffs wash their hands in the hand-washing sink in each procedure room. No separate "scrub area" is needed in this setting because an abortion is performed in a clean space, but not a sterile space. This is because surgical abortion, like any other gynecological procedure in which instruments are introduced through the vagina, is not a sterile procedure – the sterile instruments cease to be sterile once they enter the vagina. Thus, the procedure rooms at Plaintiffs' practice are unlike a hospital operating theater, and medical personnel can wash their hands within the procedure rooms.

61. Plaintiffs' office has one workroom, with separate "soiled" and "clean" areas and one sink, for cleaning and sterilizing instruments after use. There is no medical basis for requiring that these areas or functions be contained in separate rooms, or that the workroom contain more than one sink.

62. After an abortion at Plaintiffs' office, a patient remains in her private procedure room under the monitoring of a staff member until such time as she meets Plaintiffs' discharge criteria. The patient's recovery time depends on such factors as the length of the pregnancy, the course of the procedure, and the patients' overall health condition. The vast majority of Plaintiffs' abortions patients meet the discharge criteria and are ready to go home well under an hour after the procedure. It is medically unnecessary and burdensome to the patient to try to force her to remain in recovery after she has met appropriate discharge criteria and is ready to go home. Keeping patients in the facility and under staff supervision for this unnecessary length of time will also greatly impair Plaintiffs ability to schedule and see patients, as their rooms will be occupied by patients who do not need them.

63. Had Plaintiffs been afforded the opportunity to comment on the Temporary Regulations, or seek waivers from particular physical facility regulations, they would have explained to KDHE that many of the regulatory requirements are medically unnecessary and unduly rigid; they would have shown KDHE that medical offices can meet the applicable standards of care and provide high-quality, safe health services without complying with these medically unnecessary and rigid requirements; and they would have provided KDHE with evidence of the negative impact that the Temporary Regulations and Licensing Process would have on their patients' health, specifically, and the public health generally.

64. The Temporary Regulations and Licensing Process will force Plaintiffs to cease providing virtually all abortion services in the Practice.

65. On June 28, 2011, Plaintiffs cancelled their inspection because it was apparent that they could not comply with the physical plant requirements as written, and that KDHE would grant no waivers or provisional licenses, or make any accommodations for existing facilities. Taking a further step in KDHE's unconstitutional licensing process would only have resulted in a license denial, which would have tarnished Plaintiffs' reputations and permanent records for purposes of future professional credentialing and licensing. Thus, Plaintiffs' only avenue of recourse for continuing to provide abortion services to their patients and protecting their practice was to file a lawsuit.

66. On information and belief, KDHE adopted and implemented the Temporary Regulations and Licensing Process in the ways described herein because of political pressure from the current State administration to close abortion clinics by any means necessary.

E. Harms Imposed by the Temporary Regulations and Licensing Process

67. Enforcement of the Temporary Regulations and Licensing Process will force Plaintiffs to cease their ongoing provision of abortion services in their practice, thereby unjustifiably delaying Plaintiffs' patients in obtaining abortions.

68. At the present time, these delays are exacerbated by the fact that Plaintiffs do not know of a single licensed abortion provider in the entire State to whom Plaintiffs can refer their patients.

69. The delays caused by the Temporary Regulations and Licensing Process will expose Plaintiffs' patients to unnecessary health risks.

70. Even if one or more of the other abortion providers in the State were able to become licensed, the application of the Temporary Regulations and Licensing Process to Plaintiffs would still cause significant delays for their patients seeking abortion who have complicating medical conditions and/or have received a diagnosis of fetal anomaly. Plaintiffs do not know of any other provider in the surrounding area to whom they can refer these patients.

71. Even if one or more of the other abortion providers in the State were able to become licensed, the application of the Temporary Regulations and Licensing Process to Plaintiffs would still leave Kansas women unable to obtain, or greatly hindered in trying to obtain, abortion services in a private medical office setting. Such a setting is preferred by some patients because it can be less cumbersome and stressful to obtain a medical procedure in that setting than in a hospital or ambulatory surgical center; because the patient already has a relationship with the physician in that setting; or because the patient can more conveniently use her health insurance in that setting. Plaintiffs know of no other physician in the area who provides abortions as part of a private medical practice, and to whom they could refer their patients if injunctive relief is not issued.

72. Enforcement of the Temporary Regulations and Licensing Process will cause immediate and irreparable harms to Plaintiffs' medical practice. These harms include loss of revenues, loss of future patients, and damage to Dr. Hodes' and Dr. Nauser's professional standing among their colleagues, patients, and potential patients.

73. By imposing medically unnecessary burdens on the provision of abortion services, the Temporary Regulations and Licensing Process will cause immediate and irreparable harms to public health.

F. Lack of Harm from Maintaining the Status Quo

74. Delaying enforcement of the Temporary Regulations and Licensing Process during the pendency of this lawsuit will not create any risk of harm to women in Kansas because the Temporary Regulations and Licensing Process are not designed to protect women's health and will not have the effect of protecting women's health; to the contrary, by imposing unnecessary requirements and impeding access to safe and legal abortion services, they will harm women's health.

75. While the Temporary Regulations and Licensing Process are enjoined, Plaintiffs will remain subject to inspections, regulation and oversight by the Kansas Board of Healing Arts, just like other medical offices that provide comparable services.

FIRST CLAIM FOR RELIEF (Patients' Right to Privacy)

76. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 75 above.

77. The Temporary Regulations and Licensing Process have the purpose and the effect of imposing an undue burden on Plaintiffs' patients who seek abortions presently or in the future, in violation of the Fourteenth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF (Plaintiffs' Right to Procedural Due Process)

78. Plaintiffs hereby re-allege and incorporate by references paragraphs 1 through 77 above.

79. The Temporary Regulations and Licensing Process violate Plaintiffs' right to procedural due process under the Fourteenth Amendment to the United States Constitution because they deprive Plaintiffs of protected property and liberty interests without providing Plaintiffs with any form of pre-deprivation hearing, including any opportunity to comment on the regulations or request waivers from KDHE.

THIRD CLAIM FOR RELIEF (Plaintiffs' Right to Substantive Due Process)

80. Plaintiffs hereby re-allege and incorporate by references paragraphs 1 through 79 above.

81. The Temporary Regulations and Licensing Process violate Plaintiffs' right to due process of law under the Fourteenth Amendment to the United States Constitution by: depriving them of property (including lost income and future patients) and liberty (including their ability to practice their profession) without serving any compelling, substantial, or legitimate state interest.

FOURTH CLAIM FOR RELIEF (Plaintiffs' Right to Due Process - Vagueness)

82. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 81 above.

83. The Temporary Regulations and Licensing Process violate Plaintiffs' right to due process of law under the Fourteenth Amendment to the United States Constitution by failing to give Plaintiffs fair notice of the requirements they must meet under the Temporary Regulations and encouraging arbitrary and discriminatory enforcement of those regulations.

FIFTH CLAIM FOR RELIEF (Plaintiffs' Right to Equal Protection)

84. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 83 above.

85. The Temporary Regulations and Licensing Process deprive Plaintiffs of equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution, by subjecting them to unique burdens not imposed on medical practices that provide comparable services, with no basis for the differential treatment other than animus.

REQUEST FOR RELIEF

WHEREFORE Plaintiffs request that this Court:

1. Issue a declaratory judgment that the Temporary Regulations (to be codified at Kan. Admin. Regs. § 28-34-126 - 44 (2011)) and the licensing requirements of the Act (Senate Bill No. 36 (2011), at sec. 2, 8) as applied by KDHE through its adoption and implementation of the Temporary Regulations violate rights of Plaintiffs and their patients protected by the Fourteenth Amendment to the United States Constitution;

2. Issue preliminary and permanent injunctive relief, without bond, restraining Defendants from: (a) enforcing the Temporary Regulations; and (b) enforcing the licensing requirements of the Act (Senate Bill No. 36 (2011), at sec. 2, 8) until such time as KDHE has implemented constitutionally adequate licensing procedures.

3. Grant Plaintiffs attorney's fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

4. Grant such other and further relief as this Court deems just and proper.

Place of Trial

Plaintiffs respectfully request that the trial of this matter be held in Kansas City, Kansas.

Respectfully submitted, this 28th day of June, 2011,

/S/ Teresa Woody

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