IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*, *Plaintiffs*, v. OHIO DEPARTMENT OF HEALTH, *et al.*, *Defendants.*	Case No. A 2100870 Judge Alison Hatheway

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hidden in the middle of their brief responding to Plaintiffs' Motion for Preliminary Injunction, State Defendants make a remarkable statement. They claim, for the first time, that "[u]ntil rules or forms[1] have been adopted, the Department of Health lacks the authority to enforce the challenged provisions against the Clinics." Resp. Br. at 20. State Defendants blithely make this statement less than three business days before SB27 takes effect, despite Plaintiffs having repeatedly requested assurances for almost four months that Plaintiffs and their providers will not be penalized for being unable to comply with Am.S.B. No. 27, 2020 Ohio Laws File 77 ("SB27") when it takes effect. Yet, while State Defendants claim Defendant Ohio Department of Health ("ODH") lacks enforcement authority, they do not assert the same argument for Defendant State

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[1] It is clear that both rules *and* forms must be issued to implement SB27. *See* R.C. 3726.14 (requiring the director of ODH "adopt rules * * * including rules that prescribe [the forms])." State Defendants have elsewhere conceded this. State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order at 2 ("For example, R.C. 3726.14 specifically states that not later than ninety days after the effective date of this section (April 6, 2021), the director of health, in accordance with Chapter 119 of the Revised Code, shall adopt rules necessary to carry out the provisions of SB27. This includes rules that prescribe the manner and substance for three informed consent forms which must be provided to patients before a surgical abortion."); State Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction ("[illegible] Br.") at 22 ("S.B. 27 requires that the Department of Health promulgate rules and forms nece[illegible] to implement the challenged statutory provisions.").

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Medical Board of Ohio ("Medical Board"), which has independent enforcement authority against the licensed physicians who provide procedural abortions. Due to the history of aggressive enforcement against abortion providers, the enforcement authority of the Medical Board, which State Defendants do not disclaim, and State Defendants' apparent gamesmanship for the last four months, Plaintiffs need preliminary injunctive relief from this Court. This is not a game for Plaintiffs and their patients, who need access to time-sensitive and essential health care. Because Plaintiffs cannot comply with SB27 without the necessary rules and forms, and will need a reasonable amount of time after the implementing rules and forms have been adopted to determine compliance, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin Defendants from enforcing SB27 until 30 days after implementing rules and forms have been adopted and have become effective pursuant to the notice-and-comment rulemaking process set forth in R.C. 119.03(A)–(F).

ARGUMENT

I. This Court Need Not Rule Now on State Defendants' Motion to Transfer Venue, and the Motion is Meritless.

At the hearing on Plaintiffs' motion for a temporary restraining order on March 11, this Court ordered State Defendants to file a response to Plaintiffs' preliminary injunction motion by March 18. But in lieu of filing a response, and in a successful attempt to delay the preliminary injunction hearing, State Defendants filed a baseless notice to remove the case to federal court, thus immediately depriving this Court of jurisdiction. The federal district court held that State Defendants' removal notice was not "objectively reasonable," remanded to this Court, and granted Plaintiffs leave to seek fees and costs associated with the removal. *See Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, S.D.Ohio No. 1:21-cv-00189, 2021 WL 1169102 (Mar. 29, 2021). Immediately after remand, in yet *another* meritless delay attempt, State

Defendants filed a motion to transfer venue to Franklin County, despite that their arguments in support of this motion had just been addressed and squarely rejected by the federal court. Defendants' filing of yet another frivolous paper should not delay a ruling on Plaintiffs' preliminary injunction motion any further.

As an initial matter, this Court can rule on Plaintiffs' preliminary injunction motion prior to ruling on State Defendants' motion to transfer venue. *See* Civ.R. 3(H) ("The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue * * *"). State Defendants point to no authority stating otherwise.

Moreover, State Defendants' venue arguments fail. As Plaintiffs explained in their Complaint, venue is proper in Hamilton County for at least two independent reasons. ***First***, venue is proper here because two of the Defendants in this case—Joseph Deters, Hamilton County Prosecutor, and Andrew Garth, Cincinnati City Solicitor—have their principal place of business in Hamilton County. *See* Civ.R. 3(C)(2). State Defendants claim Prosecutor Defendants are merely "nominal" parties, but the federal district court, relying on clear precedent, already held this argument was not "objectively reasonable" in its order remanding the case to this Court. *See Planned Parenthood Southwest Ohio Region* at *6 ("[T]he law is and was clear that the Prosecutor Defendants are *not* nominal defendants * * *" (Emphasis sic.)). State Defendants brazenly ignore this holding (despite the federal district court awarding Plaintiffs fees and costs due to State Defendants' improper removal based on this argument) and make the exact argument again. But as the federal district court explained, Plaintiffs' equal protection challenge to SB27 "challenges the statute as a whole," *id.* at *4, and not only based on ODH's failure to implement rules or assure

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Plaintiffs they will not be penalized.[2] "If a court were to agree, both the State Defendants *and* the Prosecutor Defendants would have to be enjoined, the latter to protect Plaintiffs from the criminal penalties within S.B. 27." *Planned Parenthood Southwest Ohio Region* at *4. (Emphasis sic.) "Plaintiffs here clearly have asserted an interest against the Prosecutor Defendants and just as clearly would be at risk 'of receiving inadequate relief' without them." *Id.*, citing *Beasely v. Wells Fargo Bank, N.A., for Certificate Holders of Park Place Secs., Inc.*, 744 Fed.Appx. 906, 915 (6th Cir.2018); *see also Women's Med. Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir.1997) (holding prosecutors necessary defendants in challenge to abortion restriction with criminal penalties). Prosecutor Defendants are therefore "necessary for a just and proper resolution of the claim(s) presented." *State ex rel. Yeaples v. Gall*, 141 Ohio St. 3d 234, 2014-Ohio-4724, 23 N.E.3d 1077, ¶ 22. And because they are necessary, not nominal, defendants, Plaintiffs have the right to bring this litigation in any county where any defendants, including any Prosecutor Defendants, are located. "[I]f venue is proper as to one defendant, it is proper as to all defendants." *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Edn.*, 86 Ohio St.3d 318, 321, 715 N.E.2d 127 (1999) (finding transfer of venue to where State Board of Education maintains its

[2] In their Complaint, Plaintiffs challenge SB27 on due process and equal protection grounds. In their motion seeking a temporary restraining order followed by a preliminary injunction, Plaintiffs moved only on due process grounds, and only because without implementing rules and forms, it is impossible for Plaintiffs to comply with the law. But Plaintiffs have also challenged the law as a whole, including on equal protection grounds. *See, e.g.*, Complaint at ¶ 102 ("By arbitrarily and irrationally singling out tissue from a procedural abortion, and treating tissue from procedural abortion differently than tissue from miscarriage, with no adequate justification, SB27 violates Plaintiffs' and their patients' right to equal protection under Article I, Section 2 of the Ohio Constitution."); *id.* at ¶ 107 ("Plaintiffs request that the Court find and issue a declaration that * * * SB27 violates Article I, Section 2 of the Ohio Constitution because it arbitrarily and irrationally singles out tissue from a procedural abortion and treats such tissue differently than tissue from miscarriage, with no adequate justification.").

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

principal office unnecessary because venue was proper based on location of other defendants); Civ.R. 3(F).[3]

Second, venue is proper in Hamilton County because it is a "county in which all or part of the claim for relief arose." Civ.R. 3(C)(6). Prior to the issuance of forms, Plaintiffs Planned Parenthood Southwest Ohio Region ("PPSWO") and Dr. Sharon Liner will be forced to stop providing abortion care in Hamilton County, thus being deprived of protected interests in Hamilton County and implicating the rights of Hamilton County patients. Even after the issuance of forms, Plaintiffs challenge SB27 as an unconstitutional violation of their equal protection rights, and the law's requirements will affect their provision of abortion care across the state, including in Hamilton County, thereby giving rise to Plaintiffs' claim for relief. Defendants' argument that the claim for relief can only arise where *defendants'* activity occurs fails for two reasons: (1) It is based on an entirely separate venue provision, *see* Civ.R. 3(C)(3) (stating proper venues lies in "[a] county in which the defendant conducted activity that gave rise to the claim for relief"); and (2) Prosecutor Defendants Deters and Garth can enforce criminal penalties in Hamilton County

[3] Defendants rely on a series of older cases in an attempt to avoid this inevitable result by arguing that this action "can be instituted only in Franklin County." Defendants Ohio Department of Health, Director Stephanie McCloud, and State Medical Board of Ohio's Motion to Transfer This Case to the Franklin County Court of Common Pleas at 4–6, citing *State ex rel. Hawley v, Indus. Comm.*, 137 Ohio St. 332, 30 N.E.2d 332 (1940); then citing *Meeker v. Scudder*, 108 Ohio St. 423, 140 N.E. 627 (1923); and then citing *State ex rel. McGann v. Evatt*, 63 Ohio App. 564, 27 N.E.2d 490 (1st Dist.1940). But these cases, dating to 1923 and 1940, assess venue pursuant to an older venue provision that mandated venue in certain cases against public officers, the language of which is notably absent from the current venue rule. Under the current venue rule, "the first nine provisions of Civ.R. 3([C])" including the two venue provisions Plaintiffs rely on here, Civ.R.(3)(C)(2) & (6), "are on an equal status, and any court specified therein may be a proper and initial place of venue." *Morrison v. Steiner*, 32 Ohio St.2d 86, 89, 290 N.E.2d 841 (1972); *see also Soloman v. Excel Marketing, Inc.*, 114 Ohio App.3d 20, 25, 682 N.E.2d 724 (2d Dist.1996) ("These provisions have equal status, and a plaintiff may choose among them with unfettered discretion.").

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

under Plaintiffs' challenge to SB27 as a whole, and therefore even under State Defendants' theory, Defendants' activity occurs in this county thereby giving rise to Plaintiffs' claim.

Denial of the motion to transfer is therefore warranted. However, as noted above, the Court need not rule on that motion today and Plaintiffs can provide further briefing on this motion in the normal time frame if it would assist the Court.

II. Plaintiffs Properly Bring Claims Under the Ohio Constitution.

Despite the fact that Ohio courts routinely adjudicate constitutional claims, State Defendants attempt to dispose of Plaintiffs' case by arguing that this Court is powerless to grant relief for constitutional violations by the government because, they claim, Article I, Section 16 is not self-executing and does not provide a cause of action. This argument ignores substantial precedent and is based on a misreading of other cases.[4] A proper reading of Ohio case law demonstrates that this Court is well within its authority to grant declaratory and injunctive relief for violation of Plaintiffs and their patients' due process rights.

"A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation." *State v. Williams*, 88 Ohio St.3d 513, 521, 728 N.E.2d 342 (2000). On the other hand, "a constitutional provision is not self-executing if its language, duly construed, cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment." *Id.*

Article I, Section 16 states in full: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and

[4] In fact, Plaintiffs have responded to Defendants' arguments on this issue twice already, once in their reply brief in support of their motion for preliminary injunction, and once in their reply brief in support of their motion to remand, both filed in federal district court. Defendants refused to engage with any of Plaintiffs' arguments before, and have refused to do so again in their response brief, citing the same irrelevant case law and making the same erroneous arguments for a third time.

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." Plaintiffs bring suit alleging violations of due process protections under the "due course of law" provision in the first sentence of article I, section 16. Defendants claim "[t]he case law is clear" that Article I, Section 16 is not self-executing. Resp. Br. at 8. But nearly all of the cases they cite hold that the *second* sentence of Article I, Section 16, regarding sovereign immunity, is not self-executing.[5]

The "due course of law" provision, on the other hand, is self-executing because it is "sufficiently precise in order to provide clear guidance to courts with respect to their application." *State v. Williams*, 88 Ohio St.3d at 521. Ohio courts have repeatedly held that the due process protections under the "due course of law" provision are, at a minimum, coextensive with the protections of the federal due process clause, and have clearly found that provision's specificity sufficient to apply to due process claims under the Ohio Constitution. *See, e.g.*, *In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 24–25 (analyzing procedural due process claim under due course of law provision and applying three-factor *Matthews v. Eldridge* test in determining whether adequate process was provided); *Arbino v. Johnson & Johnson*, 116

[5] *See* Resp. Br. at 8–9, citing *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 188–89, 74 N.E.2d 82 (1947); *Krause v. State*, 21 Ohio St.2d 132, 142–43, 285 N.E.2d 736 (1972); *Wiesenthal v. Wickersham*, 64 Ohio App. 124, 126–27, 28 N.E.2d 512 (2d Dist.1940); *Estate of Tokes v. Dept. of Rehab. & Corr.*, 2019-Ohio-1794, 135 N.E.3d 1200, ¶ 27, 29 (10th Dist.); *Riley v. Stephens*, 1st Dist. Warren No. CA 31, 1975 WL 181057 (Sept. 15, 1975); *Beck v. Adam Wholesalers of Toledo, Inc.*, 6th Dist. Sandusky No. S-99-018, 2000 WL 706796 (June 2, 2000).

While Ohio courts have repeatedly held the sovereign immunity clause of Article I, Section 16 is not self-executing, they have also recognized that the court of common pleas has jurisdiction over actions against the state for declaratory and injunctive relief—the precise relief sought here. *See Racing Guild of Ohio, Local 304, Serv. Emps. Internatl. Union, AFL-CIO, CLC v. Ohio State Racing Comm.*, 28 Ohio St.3d 317, 319–21, 503 N.E.2d 1025 (1986) (explaining that while the Court of Claims Act "waived sovereign immunity and created a Court of Claims to have exclusive jurisdiction over suits" against state actors, the court of common pleas retained jurisdiction over actions seeking declaratory and injunctive relief against the state).

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Ohio St.3d 469, 2007-Ohio-6498, 880 N.E.2d 420 (analyzing substantive due process claim not involving a fundamental right). But even if this Court were to hold that the due course of law provision is not self-executing, the Declaratory Judgment Act provides the necessary "legislative enactment" for Plaintiffs to raise due process claims under this provision.[6] *See* R.C. 2721.03 ("[A]ny person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule * * * may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule * * * and obtain a declaration of rights, status, or other legal relations under it."). *See Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 45 ("First, the declaratory-judgment chapter of the Revised Code broadly authorizes plaintiffs to bring actions for a declaration of 'rights, status, and other legal relations whether or not further relief is or could be claimed.' R.C. 2721.02. It is well settled that '[a]ctions for declaratory judgment may be predicated on constitutional or nonconstitutional grounds.' " (Citation omitted.)).

Here, Plaintiffs seek declaratory relief pursuant to the Declaratory Judgment Act. *See* Complaint at ¶ 104–07. Parties can also properly seek injunctive relief in a declaratory judgment action, as Plaintiffs have done here. *See* R.C. 2721.09 ("[W]henever necessary or proper, a court of record may grant further relief based on a declaratory judgment or decree previously granted under this chapter."); *see also Gannon v. Perk*, 46 Ohio St.2d 301, 310–11, 348 N.E.2d 342 (1976). And R.C. 2727.02 authorizes temporary injunctive relief.

Defendants cite only two Ohio cases dismissing claims brought under the "due course of law" provision, but these are easily distinguished. First, Defendants rely on *PDU, Inc. v. City of*

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[6] For the same reasons, Plaintiffs' reliance on other Ohio constitutional provisions is proper as well.

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Cleveland, 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671, where the court held plaintiffs failed to state a cause of action when they raised various claims, including due process and equal protection claims, under the Ohio Constitution. But another Ohio appellate court, in *City of Riverside v. State*, 2d. Dist. Montgomery No. 26024, 2014-Ohio-1974, explained why *PDU* is not applicable—for many reasons that are equally relevant here. The *Riverside* court noted that unlike in *PDU*, where the plaintiff sought damages, the plaintiff in *Riverside* was "not suing the State to recover damages in a private cause of action." *Id.* at ¶ 40. Rather, as in the instant case, the *Riverside* plaintiff challenged the constitutionality of a statute pursuant to the Declaratory Judgment Act. The *Riverside* court held that "[a] declaratory judgment action is the proper avenue for such challenges."[7] *Id.* at ¶ 38.

Second, Defendants cite *Autumn Care Center, Inc. v. Todd*, 2014-Ohio-5235, 22 N.E.3d 1105 (5th Dist.). But there, the plaintiff echoed the arguments in *Riverside*, stating "it is irrelevant whether Article 1, Sections 2 and 16, are or are not self-executing" because "as a private business, it may bring a claim under [the Declaratory Judgment Act], seeking the trial court to declare its constitutional rights were violated." *Id.* at ¶ 16. However, the *Autumn Care* court found the Declaratory Judgment Act did not confer standing when the plaintiff, as in that case, alleged no injury in the complaint. Here, Plaintiffs have plainly alleged imminent injury.

[7] Similarly, there is no indication that the three federal cases State Defendants cite in support, *see* Resp. Br. at 9–10, involved claims for declaratory and injunctive relief, rather than damages. *See* Appellant's Brief, *Calvey v. Village of Walton Hills*, 6th Cir. No. 20-3139, 2020 WL 4588207, at *26 (July 31, 2020) (claiming "the Ohio Constitution itself clearly provides for a civil damage remedy in Article I, Section 16"); Appellants' Brief, *Moore v. City of Cleveland*, 6th Cir. No. 19-3580, 2019 WL 4060496, at *8 (Aug. 19, 2019) ("Following their terminations, Appellants amended their suit to seek damages for violations of their procedural due process, including the liberty interest in their good names, and substantive due process").

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

State Defendants cannot deny Ohio courts have adjudicated innumerable constitutional challenges raising alleged violations of substantive and procedural due process under the Ohio Constitution, and have done so for decades. *See, e.g.*, *Arbino,* 116 Ohio St.3d 468, 880 N.E.2d 420; *Ferguson v. State*, 151 Ohio St.3d 265, 2017-Ohio-7844, 87 N.E.3d 1250; *In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803; *Moore*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977; *Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957); *Grieb v. Dept. of Liquor Control of State*, 153 Ohio St. 77, 90 N.E.2d 691 (1950). State Defendants' passing attempts to distinguish two of these cases (while ignoring the others) fail. First, State Defendants claim the plaintiff *In re Adoption of H.N.R.* raised both federal and state constitutional due process claims, Resp. Br. at 11 fn. 2, but nothing in the decision indicates that the Ohio Supreme Court limited its analysis to the plaintiff's federal claims. And the *Arbino* court specifically analyzed the constitutionality of state statutes under various state constitutional provisions, including Article I, Section 16. State Defendants are even forced to concede that binding appellate precedent, in *Logue v. Leis*, 169 Ohio App.3d 356, 2006-Ohio-5597, 862 N.E.2d 900 ¶ 5 (1st Dist.), negates their arguments. *See* Resp. Br. at 16 n.5. Plaintiffs' challenge to SB27 is proper.

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

A. Plaintiffs have a substantial likelihood of success on their claim that SB27 violates their patients' substantive due process rights.

State Defendants begin their response brief by claiming that "[t]his case is not about access to abortion." Resp. Br. at 1. Defendants repeatedly and disingenuously refuse to engage with the facts: that without relief from this Court or an unequivocal assurance from *all* State Defendants regarding enforcement—which they have refused to provide—SB27 will result in a total ban on procedural abortions in the state of Ohio. Defendants cannot legitimately contend that SB27 will

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

not result in a total ban of procedural abortions, while at the same time refusing to provide adequate assurance that Plaintiffs will not be penalized during the interim period between the law taking effect and rules being finalized through the notice-and-comment process. SB27 is therefore plainly an unconstitutional violation of Plaintiffs' patients' substantive due process rights.

State Defendants' effort to classify SB27 as a regulation that "is not about access to abortion" in order to merit rational basis review is not only contrary to the plain facts, but also mirrors arguments made and explicitly rejected in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir.2006). In that case, plaintiff Women's Medical Professional Corporation ("WMPC") challenged an Ohio restriction requiring all ambulatory surgical facilities (not just abortion providers) "enter into a written transfer agreement with a [local] hospital in order to meet the requirements necessary to obtain a license." *Id.* at 598. WMPC was unable to do so and defendant Nick Baird, the director of ODH, denied its request for a waiver and ordered it to cease operations, thereby resulting in WMPC's providers being unable to continue providing abortions. *Id.* In the ensuing lawsuit, defendant Baird argued that "*Casey*'s undue burden framework should not apply to this case, because 'this is not an abortion case' but instead a 'challenge to a neutral regulation of general applicability,' " and that therefore "rational or intermediate basis review should apply." *Id.* at 603 (quoting defendant's brief). The Sixth Circuit squarely rejected this argument, stating "[t]he generally applicable and neutral regulation in this case (the transfer agreement requirement) affects an abortion clinic, which is unable to satisfy the regulation's requirements," *id.* Because abortion access was thus affected, the law applicable to abortion restrictions applied.[8] *Id.*

[8] If State Defendants' arguments about rational basis review are not meritorious when looking at neutral regulations that do not explicitly target abortion providers, they certainly cannot prevail when applied to SB27, which applies *only* to abortion providers. *See* R.C. 3726.02 ("Final

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Courts have consistently held that regulations that restrict abortion must be accorded greater scrutiny and that rational basis review does not apply when access to abortion is impacted. *See Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 694–95, 627 N.E.2d 570 (10th Dist.1993) (stating in challenge to abortion restriction that Ohio state court must "apply the undue-burden standard to our interpretation of the Ohio constitutional provisions, except to the extent, if any, that they afford greater restrictions upon state action than are imposed by the federal constitution * * * we are not free to apply the rational-basis test"); *see also Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S.Ct. 2292, 2309, 195 L.Ed.2d 665 (2016) (striking down abortion restrictions and stating it is "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue" (Citation omitted.)).[9]

State Defendants' reliance on *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, ___ U.S. ___, 139 S.Ct. 1780, 204 L.Ed.2d 78 (2019), also fails. In that case, the U.S. Supreme Court explicitly and repeatedly acknowledged that the plaintiff abortion providers did not raise a substantive due process claim on behalf of their patients when challenging a restriction to the disposal of tissue following an abortion procedure. *See id.* at 1781 ("Respondents have never argued that Indiana's law creates an undue burden on a woman's right to obtain an abortion." (Citation omitted.)); *id.* at 1782 ("We reiterate that, in challenging this provision, respondents have

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disposition of fetal remains *from a surgical abortion at an abortion facility* shall be by cremation or interment." (Emphasis added.)).

[9] Plaintiffs reiterate that there is strong support for the proposition that the Ohio Constitution provides greater protections for the right of patients to access abortion than the Federal Constitution. *See* Plaintiffs' Motion for Temporary Restraining Order Followed by Preliminary Injunction ("TRO/PI Br.") at 15. However, this Court need not reach that issue at this time because SB27 is clearly unconstitutional under the federal undue burden standard. *See id.* at 15–17.

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

never argued that Indiana's law imposes an undue burden on a woman's right to obtain an abortion. This case, as litigated, therefore does not implicate our cases applying the undue burden test to abortion regulations."). That is plainly not the case here, where Plaintiffs *have* asserted a violation of their patients' substantive due process rights. *See Hopkins v. Jegley*, E.D. Ark. No. 4:17-cv-00404-KGB, 2021 WL 41927, at *111 (Jan. 5, 2021) (rejecting application of *Box* where plaintiffs challenged fetal tissue disposal law on substantive due process grounds on behalf of patients and preliminarily enjoining law). *Box*'s application of rational basis review thus has no bearing on Plaintiffs' patients' substantive due process claim here.

State Defendants do not deny, nor can they, that the Ohio Constitution provides "at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights." *Arnold*, 616 N.E.2d at 169. Laws that ban previability abortion have been consistently held invalid under the Federal Constitution, *see* TRO/PI Br. at 15–16. Because SB27 will result in a previability ban of abortion, Plaintiffs have a substantial likelihood of succeeding on their claim that the law violates their patients' substantive due process rights.

B. Plaintiffs have a substantial likelihood of success on their claim that SB27 violates their substantive due process rights.

Plaintiffs are also substantially likely to succeed on the providers' substantive due process claim, no matter the level of scrutiny applied.[10] Even under rational basis review, government action must be "reasonably related to a legitimate government interest." *In re Raheem L.*, 2013-

[10] State Defendants falsely claim Plaintiffs "concede[] that rational-basis review applies," Resp. Br. at 15, while in the next sentence, necessarily acknowledging Plaintiffs have asserted otherwise. As Plaintiffs point out in their opening brief, and as several courts have already held, strict scrutiny is warranted in analyzing Plaintiffs' substantive due process rights. TRO/PI Br. at 17 fn. 12. This Court is not bound by the analysis in *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908 (6th Cir.2019), which construed the federal Constitution, not the Ohio Constitution. But as Plaintiffs have previously stated, the Court need not reach this issue as the government actions here fail even rational basis review.

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Ohio-2423, 993 N.E.2d 455, ¶ 8 (1st Dist.), quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18. Here, prior to ODH issuing the necessary rules and forms and giving providers a reasonable opportunity to come into compliance, no provider in the state can possibly comply with SB27. No conceivable state interest can be furthered by enforcing a law that is impossible to comply with. Preventing Plaintiffs from providing procedural abortions while at the same time not providing them the opportunity to comply with the law is arbitrary and irrational, and cannot be reasonably related to any *legitimate* government interest.

State Defendants again blindly rely on *Box* to argue otherwise, but once again, *Box* does not apply. The underlying facts in *Box* were very different. There, unlike here, the Indiana tissue disposal law was not awaiting implementing rules. Abortion providers in Indiana were not in the catch-22 Ohio providers are here, where they are required to comply with a law with which it is impossible to comply. Indeed, the plaintiffs in *Box* did not claim that they could not comply with the Indiana law or that it would affect abortion access in any way. *See Box*, ___ U.S. ___, 139 S.Ct. at 1781, 204 L.Ed.2d 78. The plaintiffs in *Box* instead argued that "the State has no legitimate interest in ensuring that abortion providers treat fetal tissue in the same manner as human remains." *Planned Parenthood of Indiana & Kentucky, Inc. v. Commr., Indiana State Dept. of Health*, 265 F.Supp.3d 859, 870 (S.D.Ind.2017), *aff'd*, 888 F.3d 300 (7th Cir.2018), *cert. granted in part, rev'd in part*, ___ U.S. ___, 139 S.Ct. 1780, 204 L.Ed.2d 78 (2019). But that is not the claim here. Here, no legitimate government interest can be furthered where the State is not providing Plaintiffs the ability to comply with its own laws.

C. Plaintiffs have a substantial likelihood of success on their claim that SB27 violates their procedural due process rights.

By barring Plaintiffs from providing procedural abortions without any ability to comply with SB27, State Defendants unconstitutionally deprive them of protected interests without any

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

process whatsoever. State Defendants' arguments otherwise merely rehash their unsupported assertion that SB27 will not result in a ban of procedural abortions.

First, Plaintiffs have protected interests. While State Defendants claim there is no "freestanding right to perform abortions," Resp. Br. at 17, that is not the interest at issue here. As Plaintiffs have explained, they have protected interests in the ongoing operation of their health centers and in the continuation of their professions. State Defendants do not dispute these are protected interests, nor can they, in light of the extensive case law Plaintiffs cite in support.[11] *See* TRO/PI Br. at 20–22. Indeed, courts have previously held, and ODH has previously conceded, that an abortion provider has a protected interest in the continued operation of its health center. *See Planned Parenthood Southwest Ohio Region v. Hodges*, 138 F.Supp.3d 948, 954 (S.D.Ohio 2015).

Second, Plaintiffs will be deprived of their protected interests. State Defendants argue there is no deprivation because "[t]here is no order here for the Clinics to 'cease operations,' nor are the Clinics being forced to 'cease provision of abortion.' " Resp. Br. at 18. But as Plaintiffs have consistently argued, they *are* being forced to cease provision of abortion. State Defendants carefully claim Plaintiffs "have *as yet* been deprived of nothing," *id.* (Emphasis added.), but do not dispute deprivation is inevitable where State Defendants hold the power to assure Plaintiffs they can continue providing procedural abortions while waiting for the rules to be issued, but have refused to unequivocally do so. Plaintiffs need not wait to be deprived of protected interests before bringing suit. *See Hodges* at 954 (the potential for health center being denied a variance and having to cease provision of abortion constituted a deprivation of protected interests).

[11] State Defendants later argue there is no "protected property or liberty interest in a specific level of subjective comfort regarding the potential effects of a law that has yet to go into effect and be fully implemented." Resp. Br. at 18. Plaintiffs have never claimed such a convoluted interest.

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Third, Plaintiffs will be deprived of their protected interests with no process at all, much less due process. State Defendants can only claim they are not required to provide "affirmative assurances," Resp. Br. at 19, but this ignores both Plaintiffs' arguments and case law, which provides that Plaintiffs must be given adequate process prior to being deprived of their protected interests. TRO/PI Br. at 23–24. State Defendants do not even feign to provide such process, and only claim, without any support, that Plaintiffs "mischaracterize" SB27, *see* Resp. Br. at 19 fn. 6.

IV. Plaintiffs and Their Patients Will Be Irreparably Harmed.

State Defendants arrive at their argument that Plaintiffs have not shown irreparable harm via deliberate obfuscation. Rather than engage with the reality that, starting on April 6, Plaintiffs must stop providing procedural abortions or risk severe penalties—even though as State Defendants have repeatedly represented to this Court, the necessary rules and forms will not exist because they must go through the notice-and-comment rulemaking process, which can take months—State Defendants claim Plaintiffs' allegations of irreparable harm are merely "speculative." Resp. Br. at 20. This is incorrect, and State Defendants' last-minute statement that ODH "lacks the authority to enforce the challenged provisions against the Clinics," *id.*, until the rules and forms are issued does not negate Plaintiffs' strong showing of irreparable harm.

State Defendants have consistently refused, since mid-January, to say that they will not impose penalties on providers until they finalize the rules and forms necessary for compliance. *See* TRO/PI Br. Ex. 6, Affidavit of B. Jessie Hill, at ¶ 7–14. Indeed, they refused to respond to Plaintiffs' entreaties as recently as two weeks ago. Affidavit of Maithreyi Ratakonda at ¶ 2–3 (attached hereto as Ex. 1). Suddenly, on the evening of April 1, less than three business days before SB27 takes effect, they claim ODH does not have the authority to enforce penalties prior to rules being issued. But their only cite for this is a provision of SB27 that does not address this issue. *See* Resp. Br. at 20 (citing R.C. 3726.14). In addition, State Defendants do not suggest that the

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Medical Board lacks authority to enforce penalties against Plaintiffs' providers starting on April 6. Plaintiffs are thus more than justified in fearing enforcement, given the gaps in Defendants' last-minute assurances, the ambiguities in SB27 that require clarification through rulemaking in order for compliance to occur, and the past history of aggressive enforcement against Ohio abortion clinics. *See Preterm-Cleveland v. Atty. Gen. of Ohio*, 456 F.Supp.3d 917, 929 (S.D.Ohio 2020) (noting "the fluidity" of ODH's position and enjoining threatened enforcement action against plaintiff abortion providers, including Plaintiffs in this case); *Preterm-Cleveland v. Atty. Gen. of Ohio*, S.D.Ohio No. 1:19-CV-00360, 2020 WL 1932492, at *1 (Apr. 2, 2020) ("During the two telephonic conferences that the Court held with the parties on March 30, 2020, Defendants informed the Court that they would offer no such clarification."); *see also Pre-Term Cleveland v. Atty. Gen. of Ohio*, 6th Cir. No. 20-3365, 2020 WL 1673310, at *4 (Apr. 6, 2020) (Bush, J., concurring in part and dissenting in part) (stating that district court did not abuse its discretion in granting TRO, in part because "the State did not advance its interpretation of the Director's Order before the district court, despite apparently being given the opportunity in two telephonic conferences to do so").

As the federal district court held, the State's deliberate refusal to clarify whether Plaintiffs will face civil enforcement is an adequate basis for injunctive relief. In light of their past behavior, and their deliberate silence in this case (at least until yesterday and only potentially with regard to ODH, not the Medical Board), this Court, like the federal district court, should interpret their refusal as confirmation that Plaintiffs' fear of civil enforcement is credible, and that they and their patients thus face irreparable harm.

State Defendants further appear to suggest Plaintiffs must first violate the law and face enforcement before they can assert any injury. *See* Resp. Br. at 22 (contending Plaintiffs lack

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

"direct evidence" "as to what penalty will in fact occur once S.B. 27 takes effect"). But they cite no authority in support. That is because it is blackletter law that a plaintiff need not actually violate an unconstitutional law and expose themselves to penalties before obtaining an injunction. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." (Emphasis sic.)); *Waldman v. Pitcher*, 2016-Ohio-5909, 70 N.E.3d 1025, ¶ 24 (1st Dist.) (holding that a plaintiff is not required to " 'bet the farm' and risk monetary damages before seeking a declaration of its contested legal rights" (quoting *MedImmune* at 134)); *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 803 (S.D.Ohio 2019) (determining that "enforcement [of Ohio six-week abortion ban] would, per se, inflict irreparable harm" because law, if enforced, would violate an individual's right to abortion).

Finally, State Defendants appear to suggest the injury to Plaintiffs' businesses is not irreparable. Their arguments are misplaced. Plaintiffs' business injuries cannot be remedied with compensation, as State Defendants seem to suggest. *See* Resp. Br. at 22. Plaintiffs are seeking to prevent being forced to close their doors and let go or layoff staff. TRO/PI Br., at 20–22. Moreover, the "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir.1992) (Citation omitted.).[12] Tellingly, State Defendants do not dispute that the deprivation of constitutional rights is an irreparable injury. *See* TRO/PI Br. at 25.

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[12] *Sampson v. Murray*, 415 U.S. 61, 89, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), is inapposite. In that case, an employee alleged that she would suffer "humiliation and damage to her reputation" if the court did not enjoin her discharge. *Id.* at 91. The Supreme Court held that she would face "no significant loss of reputation" based on the "procedural irregularities" of the discharge and that any damage could be corrected by the agency following the proper process. *Id.* That is a far

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V. An Injunction Is in the Public Interest and Will Not Hamper ODH's Ability to Adopt Rules.

State Defendants finally contend an injunction "would likely put a roadblock in the path of clarifying and implementing S.B. 27." Resp. Br. at 23. They do not, however, explain what impediment an injunction will erect.[13] Nor do they explain how an injunction against enforcement of SB27 against Plaintiffs—the relief Plaintiffs seek—will deprive State Defendants from providing the "clarification and guidance" sought. *Id.* Finally, while a State may have a valid interest in enforcing a *constitutional* law, it has no interest in enforcing an *un*constitutional law. Indeed, "it is always in the public interest to prevent violation of a party's constitutional rights." *Am. Civ. Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir.2015), quoting *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir.2010).

CONCLUSION

For the reasons cited above and in Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order Followed by Preliminary Injunction, SB27 violates Plaintiffs' and their patients' rights under the Ohio Constitution and must be enjoined.

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different case than here. In this case, Plaintiffs will be forced to stop providing procedural abortions, close their health centers, and terminate and/or layoff staff—without any process whatsoever. The damage to their reputation as providers of essential reproductive care cannot be remedied by final judgment because, by the end of this case, Plaintiffs' health centers may not exist.

[13] State Defendants have rightly retreated from their argument to the federal district court that an injunction against enforcement of SB27 would prevent ODH from adopting implementing rules. Plaintiffs have not requested that the Court enjoin ODH from undertaking the rulemaking process or taking any other action except enforcement against them in the absence of rules and forms needed to comply.

E-FILED 04/02/2021 05:19 PM / CONFIRMATION 1052064 / A 2100870 / JUDGE HATHEWAY / COMMON PLEAS DIVISION / REPL

Dated: April 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing has been served by email upon all parties for whom counsel has not yet entered an appearance.

/s/ Maithreyi Ratakonda
Maithreyi Ratakonda

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EXHIBIT 1

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*, *Plaintiffs*, v. OHIO DEPARTMENT OF HEALTH, *et al.*, *Defendants.*	Case No. A 2100870 Judge Alison Hatheway

AFFIDAVIT OF MAITHREYI RATAKONDA

I, Maithreyi Ratakonda, declare as follows:

1. I am a Senior Staff Attorney in the Public Policy Litigation & Law department at Planned Parenthood Federation of America. I represent Plaintiffs Planned Parenthood Southwest Ohio Region, Dr. Sharon Liner, and Planned Parenthood of Greater Ohio in this case.

2. On Tuesday, March 16, 2021, I emailed attorneys representing Defendants Ohio Department of Health, Director Stephanie McCloud, and the State Medical Board of Ohio, and asked them to confirm that their clients would "agree not to enforce SB27 against Plaintiffs unless and until the Ohio Department of Health finalizes rules to implement SB27 pursuant to Chapter 119 of the Revised Code." *See* Ex. A.

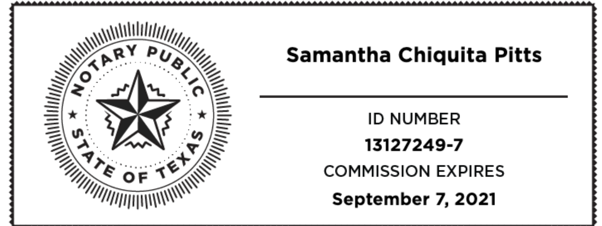
3. Receiving no response, I emailed again on Wednesday, March 17. Emily Pelphrey, Senior Assistant Attorney General responded: "We are in the process of discussing matters with our clients, and will get back to you promptly." *See* Ex. A. I have not received any further response.

4. A true copy of the email exchange described herein is attached as Exhibit A.

FURTHER AFFIANT SAYETH NAUGHT.

Maithreyi Ratakonda

State of Texas, County of Tarrant, Maithreyi Ratakonda
Signed before me on this 2nd day of April 2021.



Samantha Chiquita Pitts
Notary Public

This notarial act was an online notarization.

EXHIBIT A

Ratakonda, Mai <mai.ratakonda@ppfa.org>

PPSWO v. ODH, Hamilton County No. A2100870

Emily Pelphrey <Emily.Pelphrey@ohioattorneygeneral.gov> Wed, Mar 17, 2021 at 12:41 PM
To: Mai Ratakonda <mai.ratakonda@ppfa.org>, Andrew McCartney <Andrew.McCartney@ohioattorneygeneral.gov>, Bridget Coontz <bridget.coontz@ohioattorneygeneral.gov>, Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov>
Cc: Jennifer Dalven <JDALVEN@aclu.org>, Richard Muniz <richard.muniz@ppfa.org>, Clara Spera <cspera@aclu.org>, Rachel Reeves <RReeves@aclu.org>, Jessie Hill <bjh11@case.edu>, Freda Levenson <flevenson@acluohio.org>, Fanon Rucker <frucker@cochranohio.com>

Counsel,

Thank you for your email. We are in the process of discussing matters with our clients, and will get back to you promptly.

Thank you,

Emily

Emily Pelphrey
Senior Assistant Attorney General

Health & Human Services

Office of Ohio Attorney General Dave Yost
Office number: 614.466.8600

Fax number: 1-877-626-9290

Emily.Pelphrey@OhioAttorneyGeneral.gov

**Please note that, in adherence to best practices brought about in response to COVID-19, the Ohio Attorney General's office moved to a "remote work" status effective March 18, 2020. All members of the office remain available remotely during normal business hours. Thank you for your patience.*

From: Mai Ratakonda <mai.ratakonda@ppfa.org>
Sent: Wednesday, March 17, 2021 11:44 AM

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To: Andrew McCartney <Andrew.McCartney@ohioattorneygeneral.gov>; Bridget Coontz <bridget.coontz@ohioattorneygeneral.gov>; Emily Pelphrey <Emily.Pelphrey@ohioattorneygeneral.gov>; Ara Mekhjian <ara.mekhjian@ohioattorneygeneral.gov>
Cc: Jennifer Dalven <JDALVEN@aclu.org>; Richard Muniz <richard.muniz@ppfa.org>; Clara Spera <cspera@aclu.org>; Rachel Reeves <RReeves@aclu.org>; Jessie Hill <bjh11@case.edu>; Freda Levenson <flevenson@acluohio.org>; Fanon Rucker <frucker@cochranohio.com>
Subject: Re: PPSWO v. ODH, Hamilton County No. A2100870

Counsel,

I am following up on my email from yesterday, please let me know your response.

Additionally, it could be helpful to the court if we conferred prior to the hearing set for next week and agreed on procedure. Plaintiffs suggest 20 minutes of oral argument per side, with the movant allowed to reserve time for reply. Let me know if this works for you. We're also happy to schedule a phone call to discuss. Thank you.

On Tue, Mar 16, 2021 at 10:11 AM Mai Ratakonda <mai.ratakonda@ppfa.org> wrote:

> Counsel,
>
> In your Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order, you state on pages 2-3: "Because SB27 requires additional rule making pursuant to Chapter 119 of the Revised Code, SB27 cannot be enforced unless or until the Department of Health promulgates those rules."
>
> Please confirm that your clients, Defendants Ohio Department of Health, Director Stephanie McCloud, and the State Medical Board of Ohio, agree not to enforce SB27 against Plaintiffs unless and until the Ohio Department of Health finalizes rules to implement SB27 pursuant to Chapter 119 of the Revised Code.
>
> I look forward to hearing from you. Thank you.
>
> --
>
> Mai Ratakonda (she/her)
> Senior Staff Attorney, Public Policy Litigation & Law
> Planned Parenthood Federation of America
>
> 212.261.4405

--

Mai Ratakonda (she/her)
Senior Staff Attorney, Public Policy Litigation & Law
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