

ENTERED
APR 05 2021

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD
SOUTHWEST OHIO REGION, *et al.*,

Plaintiffs,

v.

OHIO DEPARTMENT OF HEALTH, *et al.*,

Defendants.

Case No. A21 00870
Judge Alison Hatheway

ENTRY GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

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

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



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

I. BACKGROUND

Plaintiffs Planned Parenthood Southwest Ohio Region (“PPSWO”), Dr. Sharon Liner, Planned Parenthood of Greater Ohio (“PPGOH”), Preterm-Cleveland (“Preterm”), Women’s Med Group Professional Corporation (“WMGPC”), and Northeast Ohio Women’s Center (“NEOWC”) are health care providers in the state of Ohio who provide reproductive health care, including procedural abortions. Plaintiffs represent all providers of procedural abortion in the state. They challenge SB27, which was signed into law on December 30, 2020, and is set to take effect on April 6, 2021, raising due process and equal protection claims under the Ohio Constitution and pursuant to the Declaratory Judgment Act. Defendants are the Ohio Department of Health (“ODH”), ODH Director Stephanie McCloud, the State Medical Board of Ohio, and county and city prosecutors charged with enforcing the criminal penalties set forth in the law.

A. Abortion Provision in Ohio

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

B. SB27

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

procedural abortion can only be disposed of by cremation or interment. A patient who has a procedural abortion may decide whether to dispose of fetal remains by cremation or interment and may determine the location of such disposition. R.C. 3726.03(A).¹ Before the procedural abortion, the patient must be provided with an ODH-prescribed “notification form.” R.C. 3726.03(B). If the patient elects to determine the method of disposition, then that decision must be documented on an ODH-prescribed “consent form.” R.C. 3726.04(A)(1). A crematory operator may not cremate the embryonic or fetal tissue without first receiving a properly executed “detachable supplemental form.” R.C. 4717.271(A)(1).

SB27 requires ODH, within 90 days of the law’s effective date, to adopt rules via Chapter 119 notice-and-comment rulemaking to carry out its requirements, including rules that prescribe the notification, consent, and detachable supplemental forms described above. R.C. 3726.14. It is undisputed that at this time, ODH has not promulgated any rules related to SB27, including rules prescribing the three forms, nor even initiated the notice-and-comment process. Defendants ODH, Director McCloud, and State Medical Board of Ohio (together “State Defendants”) admit rules and forms are needed to implement SB27 and represent that the promulgation of these rules, including forms, will take months and will not be final for more than two months after the process is started. *See* R.C. 119.03 (“The proposed rule, amendment, or rescission and public notice shall be filed as required by this division at least sixty-five days prior to the date on which the agency * * * issues an order adopting the proposed rule”); *see also* State Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order at 5 (“Essentially, ODH has an additional three months after April 6 to adopt and promulgate rules, and namely, three months to

¹ If the patient does not make an election under R.C. 3726.03, the abortion facility must determine the disposition (by cremation or interment only). R.C. 3726.04(A)(2).

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

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

Plaintiffs represent that they credibly fear immediate enforcement after the law takes effect, despite the impossibility of compliance without the implementing forms, because of the history of aggressive enforcement actions against abortion providers. Plaintiffs represent, and Defendants do not dispute, that Plaintiffs contacted the Attorney General’s Office multiple times to ensure that Plaintiffs will not be civilly penalized for their inability to comply with SB27 until after ODH issues the necessary rules, but were unable to get such assurances. Plaintiffs contend that they will thus be forced to stop all procedural abortions in Ohio beginning on April 6, which will, in effect, ban abortion in the state after ten weeks of pregnancy.

II. ANALYSIS AND DISCUSSION

A. Standard

A party seeking a preliminary injunction must demonstrate that “that the moving party has a substantial likelihood of success in the underlying suit; that the moving party will suffer irreparable harm if the order does not issue; that no third parties will be harmed if the order is

issued; that the public interest is served by issuing the order.” *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267–68, 747 N.E.2d 268 (1st Dist.2000).

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

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

It is undisputed that, at a minimum, the Ohio Constitution protects the right to access abortion to the same extent as the federal Constitution. *See Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) (“In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.”). By forcing Plaintiffs to stop providing procedural abortions because of the real threat of severe sanctions for failure to comply with a law that is impossible to comply with, Defendants have violated Plaintiffs’ patients’ rights to access abortion under the Ohio Constitution.²

Nearly five decades ago, the United States Supreme Court held that the Due Process Clause of the federal Constitution’s Fourteenth Amendment protects a woman’s right to decide to have an abortion, and, prior to viability, the State has no interest sufficient to justify a ban on abortion, *Roe v. Wade*, 410 U.S. 113, 153–54, 163–65, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion) (reaffirming *Roe*’s “essential holding” that, “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion”). Indeed, the Supreme Court reiterated the holding of *Roe* and *Casey* just last year. *See June Med. Servs., LLC v. Russo*, ___ U.S. ___, 140 S.Ct. 2103, 2135, 207 L.Ed.2d 566 (2020) (Roberts, C.J.,

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

concurring), *quoting Casey* at 871 (“Casey reaffirmed ‘the most central principle of *Roe v. Wade*,’ ‘a woman’s right to terminate her pregnancy before viability.’”); *see also Whole Woman’s Health v. Hellerstedt*, ___ U.S. ___, 136 S.Ct. 2292, 2309, 195 L.Ed.2d 665 (2016). Since *Roe*, courts have consistently invalidated laws that ban abortions prior to viability.

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

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

SB27 will also violate Plaintiffs’ substantive due process rights because, even under the rational basis standard, ODH’s actions—in not issuing rules prior to SB27 taking effect and refusing to assure Plaintiffs that they will not be penalized for their inability to comply with the law, and thereby preventing Plaintiffs from providing procedural abortions—are not reasonably related to any legitimate government interest, and instead, are arbitrary and irrational. *See Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, at ¶ 28, *quoting Conley v. Shearer*, 64 Ohio St.3d 284, 288, 595 N.E.2d 862 (1992) (the state “may not ‘subject individuals to an arbitrary exercise of power’”); *see also Campbell v. Bennett*, 212 F.Supp.2d 1339, 1343 (M.D.Ala.2002) (“[A]ny law that requires you to do something by a certain date must give you adequate time to do it; otherwise, the law would be irrational and arbitrary for compliance with it would be impossible.”); *Landgraf v. USI Film Products*, 511 U.S. 244, 264, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir.2013) (“The impossibility of compliance with the statute” by abortion providers “is a compelling reason for the preliminary injunction * * *”).

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

interests in the operation of their businesses and in the continuation of their chosen professions. *See, e.g., Asher Invest. Inc. v. City of Cincinnati*, 122 Ohio App.3d 126, 136, 701 N.E.2d 400 (1st Dist.1997), citing *State v. Cooper*, 71 Ohio App.3d 471, 594 N.E.2d 713 (4th Dist.1991) (stating that a party has “a constitutionally protected property interest in running his business free from unreasonable and arbitrary interference from the government”). Defendant’s failure to adopt rules and forms effectively prevents the Plaintiffs from complying with SB27. This failure thereby prevents Plaintiffs from continuing to provide procedural abortions without risk enforcement of noncriminal sanctions, which unlawfully deprives Plaintiffs of their protected interests with no process whatsoever. *See Hodes & Nauser, MD’s, PA, v. Moser*, D.Kan. No. 11- 2365-CM at 40:16-19 (July 1, 2011) (temporarily enjoining state regulations where abortion providers were given only nine days to comply with onerous physical plant requirements); *Women’s Med. Professional Corp. v. Baird*, 438 F.3d 595, 611–13 (6th Cir.2006) (immediate shutdown of abortion provider’s practice violated procedural due process, notwithstanding the availability of post-deprivation remedies).

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

In light of the Court’s findings above that Plaintiffs and their patients will be deprived of their constitutional right to due process, unless SB27 is enjoined, a finding of irreparable harm follows. *Magda v. Ohio Elections Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.), citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001) (“A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury.”). Without relief, Plaintiffs will have to cease providing procedural abortions, because it is impossible to comply with SB27 without the necessary rules and forms. If this occurs, patients in Ohio seeking to terminate their pre-viable pregnancies after ten weeks will be deprived of their constitutional right to abortion. The Court also finds that Plaintiffs will be harmed by having to stop providing

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

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

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


Finally, the public interest will be served by allowing Plaintiffs to continue providing, and their patients to continue accessing, essential and constitutionally protected health care. “When a constitutional violation is likely * * * the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party’s constitutional rights.” *Am. Civ. Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir.2015), quoting *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir.2010).

III. CONCLUSION

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

IT IS SO ORDERED.

Dated: 4-5-2021

COURT OF COMMON PLEAS
ENTER

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