IN THE COURT OF COMMON PLEAS
FOR HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*,	:	
Plaintiffs,	:	Case No. A21 00870
v.	:	Judge Alison Hatheway
OHIO DEPARTMENT OF HEALTH, *et al.*,	:	
Defendants.	:	

DEFENDANTS OHIO DEPARTMENT OF HEALTH, DIRECTOR BRUCE VANDERHOFF,[1] AND STATE MEDICAL BOARD OF OHIO'S RESPONSE IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR A PRELIMINARY INJUNCTION

Respectfully submitted,

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[1] Bruce Vanderhoff has been named the Director of the Ohio Department of Health and automatically substitutes as a defendant in this case. Civ. R. 25(D)(1).

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INTRODUCTION

As the U.S. Supreme Court made clear in unanimously upholding the State of Indiana's fetal-remains law, "a State has a legitimate interest in proper disposal of fetal remains." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) (quotations omitted). The State of Ohio does not violate any constitutional guarantee by "prohibit[ing] abortion providers from treating the bodies of aborted children as 'infectious waste' and incinerating them alongside used needles, laboratory-animal carcasses, and surgical byproducts." *See id.* at 1782-83 (Thomas, J., concurring).

S.B. 27 is not a regulation of women. It is not a regulation of abortion. It regulates the disposition of fetal remains after a clinic aborts a fetus. The Clinics' contentions in their Second Motion for a Preliminary Injunction (Motion) amount to policy critiques inappropriate for constitutional analysis. *See, e.g.*, Mot. at 5 (claiming that "[t]here is no medical or public health reason to require embryonic and fetal tissue be disposed any differently from other tissue"). If the Clinics wish to alter the will of the People regarding the humane disposition of fetal remains, they are free to advocate accordingly. But a preliminary-injunction motion does not give the Clinics the license to play legislator.

Even assuming the Clinics can overcome jurisdictional and cause-of-action defects (which they cannot), the Clinics cannot show irreparable harm and have no substantial likelihood of success on the merits. Regarding irreparable harm, the Clinics' affidavits show that compliance with S.B. 27 is feasible. The Clinics have found vendors for both cremation and interment. Moreover, the Clinics provide no evidence of any specific increased costs that patients will face as a result of the Clinics complying with S.B. 27. Even as to the *Clinics'* projected expenses, the evidence the Clinics have submitted show costs as low as $75 for interment and $95 for cremation.

As to the merits, none of the Clinics' arguments succeeds. The Clinics make three primary merits arguments: (1) substantive due process; (2) equal protection; and (3) vagueness.

First, as to substantive due process, the Clinics apply the wrong standard of review. S.B. 27 is not a regulation of abortion, so rational-basis review applies. Because States have legitimate interests in the proper disposal of fetal remains, S.B. 27 is constitutional. Moreover, even if S.B. 27 is viewed as an abortion regulation, the undue-burden standard—not strict scrutiny—would apply. The Clinics' arguments for strict scrutiny might have made sense half a century ago in 1972—but not in 2022. Decades of abortion jurisprudence dictate that the current standard for abortion regulations is the undue-burden test, and under that test, S.B. 27 is constitutional.

Second, as to equal protection, the Clinics are essentially attempting a second bite at the apple. The Clinics are trying to use equal-protection theories as a back door to again attack S.B. 27 as an unconstitutional burden on patients seeking abortions. This attempt lacks a proper basis in law. In any event, the General Assembly does not violate any equal-protection principle by providing for the humane treatment of fetal remains.

Third, as to vagueness, the Clinics' contentions reduce to policy critiques of S.B. 27, not constitutional arguments. To show unconstitutional vagueness, the Clinics must establish that S.B. 27 contains "no standard of conduct . . . at all"—not simply that it is not as precise as the Clinics would like. *State v. Anderson*, 57 Ohio St. 3d 168, 171, 566 N.E.2d 1224 (1991). S.B. 27 is quite clear; it is the Clinics who wish to make it appear ambiguous.

Neither the Motion nor affidavits meet the Clinics' heavy burden to show a substantial likelihood of success on the merits, irreparable harm, or any of the other injunction requirements by clear and convincing evidence. The Clinics' second motion for a preliminary injunction should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

I. Ohio Enacts S.B. 27 To Provide for the Humane Treatment of Fetal Remains.

On December 30, 2020, Governor DeWine signed into law Am. S.B. No. 27, 2020, Ohio Laws File 77 (S.B. 27). The statute governs "the final disposition of fetal remains from surgical abortions." Compl. Ex. A (Mar. 9, 2021), at 1. S.B. 27 therefore provides that "[f]inal disposition of fetal remains from a surgical abortion at an abortion facility shall be by cremation or interment." R.C. 3726.02(A). Under S.B. 27, any patient who obtains a surgical abortion in Ohio must be informed prior to the procedure that she can choose the final disposition of the fetal remains. *Id.* 3726.03(B). S.B. 27 gives the patient the right, if she so chooses, to determine both the manner and location of final disposition. *Id.* 3726.03(A). However, S.B. 27 does not require the patient to make either of these determinations. *Id.* A patient who chooses surgical abortion is not required to cover any costs of final disposition unless she identifies a location for final disposition other than one provided by the abortion facility. *Id.* 3726.09.

S.B. 27 provides that "[a] person who buries or cremates fetal remains from a surgical abortion is not liable for or subject to damages in any civil action, prosecution in any criminal proceeding, or professional disciplinary action related to the disposal of fetal remains," so long as that person acts in "good faith compliance" with the statute, receives a copy of a properly executed detachable supplemental form, and "[a]cts in furtherance of the final disposition of the fetal remains." R.C. 3726.15. Under S.B. 27, cremation of fetal remains is to occur in a crematory facility in compliance with Chapter 4717 of the Revised Code. *Id.* 3726.02(B). A crematory operator is not required to secure a death certificate, a burial or burial-transit permit, or a cremation authorization form to cremate fetal remains. *Id.* 4717.271(B).

S.B. 27's primary sponsor, State Senator Joseph Uecker, stated that S.B. 27 "seeks to honor the unborn by ensuring procedures are in place to properly dispose of aborted fetal remains."

Testimony of Senator Uecker, Senate Health, Human Services and Medicaid Committee, Feb. 26, 2019, at p. 1.[2] Senator Uecker further indicated that the purpose of S.B. 27 was to "protect[] the dignity of human life." *Id.*

II. S.B. 27 Has Never Gone into Effect, and the Clinics' Second Request for a Preliminary Injunction Would Thwart the Will of the People of Ohio with No Proper Justification.

S.B. 27's effective date was April 6, 2021, but the law has never gone into effect.[3] In March 2021, the Clinics filed their Complaint and motion for a temporary restraining order followed by a preliminary injunction. This Court denied the motion for a temporary restraining order but granted the motion for a preliminary injunction, enjoining S.B. 27 "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)." Entry Granting Plaintiffs' Motion for Preliminary Injunction at 1-2 (Apr. 5, 2021). On October 25, 2021, the Ohio Department of Health issued proposed rules pursuant to S.B. 27. On January 9, 2022, the final rules became effective. Thus, this Court's previous preliminary injunction will expire on February 8, 2022. On January 7, 2022, the Clinics filed their second motion for a preliminary injunction.

The Clinics' Motion reveals several important factual developments since this Court last considered S.B. 27. First, the Clinics are able to comply with Ohio's law for the humane treatment of fetal remains. The Clinics were able to find several vendors to work with: three providing cremation services and another providing interment services. *See* Mot. at 11; Bertuleit Aff. ¶ 15 ("[T]wo vendors indicated they had capacity to take tissue from PPSWO for individual cremation."); Conrow Aff. ¶ 11 (funeral home and crematory that Preterm has worked with in the

[2] The Ohio Legislature, Senate Bill 27, Committee Activity, https://www.legislature.ohio.gov/legislation/ legislation-committee-documents?id=GA133-SB-27.

[3] The Ohio Legislature, Senate Bill 27, Status, https: //www.legislature.ohio.gov/legislation/ legislation-status?id=GA133-SB-27.

past "produced a proposal that include[d] a price of $117 per fetus or embryo for individual cremation."). These vendors provided quotes for individual cremation of fetal remains. Bertuleit Aff. ¶ 15; Conrow Aff. ¶ 11. Taken together, the vendors have capacity to meet the Clinics' needs for both cremation and interment. *See* Conrow Aff. ¶ 11 (vendor stated it could "likely cremate all of the tissue from Preterm"); Bertuleit Aff. ¶ 15 (one vendor indicated it "could individually cremate the embryonic and fetal tissue from the other providers in the state"); *id.* (another vendor "indicated it had capacity to inter tissue from procedural abortion").

The Clinics provide no evidence of how much additional cost, if any, would be passed on to patients, given that S.B. 27 generally requires clinics to cover the costs of cremation or interment. R.C. 3726.09. Based on the Clinics' affidavits, the cost to the Clinics of individual interment could be as low as $75, and the cost of individual cremation as low as $95. Bertuleit Aff. ¶ 15. The Clinics provide no breakdown of how much of these asserted costs, if any, would be passed on to patients, or whether the Clinics would make any effort to keep costs constant for those patients with fewer financial resources. Moreover, none of the Clinics' affidavits states that the increased costs to the Clinics will result in clinic closures.

LEGAL STANDARD

"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.

ARGUMENT

I. This Court Lacks Jurisdiction over the Clinics' Claims 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 Clinics bring claims both on their own behalf and on behalf of their patients. *See, e.g.*, Compl. ¶¶ 92-94 (substantive-due-process claims), 101-03 (equal-protection claims); Mot. at 19-26 (substantive-due-process claims), 27-31 (equal-protection claims). But the Clinics lack standing to challenge S.B. 27 on their patients' behalf. 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 Clinics lack 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)).

Even assuming that a third-party standing doctrine could potentially apply here, it would not give the Clinics third-party standing. Among other problems, the Clinics cannot "show[] some hindrance that stands in the way of the claimant seeking relief." *PUC*, at ¶ 49 (quotations omitted). The third parties here—the Clinics' 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 Clinics lack standing to challenge S.B. 27 on behalf of their patients, and the Court lacks jurisdiction over those claims.

II. The Clinics Lack a Substantial Likelihood of Success on the Merits.

Even assuming for the sake of argument that this Court has jurisdiction over all the alleged claims (which it does not), the Clinics still lack a substantial likelihood of success on the merits. 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, at ¶¶ 23, 41. Here, the Clinics have not shown that they are likely to succeed on the merits of their claims at all—let alone with a substantial likelihood of success.[4]

[4] The Clinics cite to this Court's opinion at the preliminary-injunction stage in a *different* case, *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A

A. The Clinics' alleged state constitutional bases do not provide causes of action.

The Clinics allege substantive-due-process claims under Article I, Sections 1, 16, and 21 of the Ohio Constitution and equal-protection claims under Article I, Section 2. *See* Compl. ¶¶ 93, 96, 102; Mot. at 18, 20, 26. None of these constitutional provisions provide a cause of action for the Clinics' claims.[5] The Ohio Supreme Court has held that a provision of the Ohio Constitution creates a private cause of action only if it is self-executing. *See Provens v. Stark Cty. Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St.3d 252, 261, 594 N.E.2d 959 (1992). 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).

1. Article I, Sections 1, 16, and 21 do not provide a cause of action for the Clinics' due-process claims.

First, Article I, Section 1 of the Ohio Constitution is not self-executing. *See Williams*, 88 Ohio St.3d at 524 ("It is the absence of a precise standard subject to judicial enforcement that precludes Section 1, Article I from being a self-executing provision.").

Second, Article I, Section 16 does not provide a cause of action for the Clinics. "The Supreme Court of the state of Ohio has definitely determined that [Article I, Section 16] of the

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2101148 (Apr. 19, 2021). *See, e.g.*, Mot. at 21. However, a preliminary injunction is not a "judgment on the merits," but merely "a provisional remedy," so it does not resolve factual or legal issues conclusively. *Empower Aviation, LLC v. Butler Cty. Bd. of Commrs*, 185 Ohio App. 3d 477, 2009-Ohio-6331, 924 N.E.2d 862 (1st Dist.), ¶ 9; *see also* R.C. 2505.02.

[5] Neither *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, nor *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, says otherwise. *See* 2d PI Mot. at 18. Neither case discusses the non-self-executing issue or the Ohio Supreme Court precedent cited below holding that Ohio's due-course-of-law provision is not self-executing. Thus, neither case stands for the proposition the Clinics wish to establish—that the Clinics can sue under Article I, Sections 1, 16, and 21 without expressly bringing claims under 42 U.S.C. § 1983 and the federal Due Process Clause.

Constitution is not self-executing." *Wiesenthal v. Wickersham*, 64 Ohio App. 124, 126, 28 N.E.2d 512 (10th Dist. 1940); *see, e.g.*, *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947), paragraph one of the syllabus ("Section 16 of Article I of the state Constitution is not self-executing"); *Krause v. State*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *overruled on other grounds*. "Ohio courts, in reviewing [Article I, Section 16], have consistently found that it is not self-executing and, therefore, does not create a private course of action." *Calvey v. Village of Walton Hills*, N.D. Ohio No. 1:18 CV 2938, 2020 U.S. Dist. LEXIS 6499, at *27-28 (Jan. 15, 2020), *aff'd on other grounds*, 841 F. App'x 880 (6th Cir. 2021).[6]

Third, Article I, Section 21 does not provide a cause of action by which the Clinics can challenge S.B. 27's provision for the humane treatment of fetal remains. Section 21, crafted in response to the federal Affordable Care Act,[7] prohibits compelling someone to participate in a health care system. Ohio Const. Art. I, § 21. Section 21 is not remotely applicable here.

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[6] Specifically, case law from at least the First, Fifth, Sixth, Eighth, and Tenth Districts holds that Article I, Section 16 is not self-executing and therefore does not provide a private cause of action. *See, e.g.*, *Riley v. Stephens*, 1st Dist. Warren No. CA 31, 1975 Ohio App. LEXIS 7284, at *4, 7 (Sept. 15, 1975) ("A litigant is not denied due process just because his claim is dismissed where it states no claim as a matter of law against the State."); *Autumn Care Ctr., Inc. v. Todd*, 2014-Ohio-5235, 22 N.E.3d 1105 (5th Dist.), ¶ 14 (relying on "explicit guidance" from the Ohio Supreme Court to conclude that "Article I, Sections 2 and 16, are not self-executing") (discussing *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 150-52, 101 N.E.2d 289 (1951)); *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000)); *Beck v. Adam Wholesalers of Toledo, Inc.*, 6th Dist. Sandusky Court of Appeals No. S-99-018, 2000 Ohio App. LEXIS 2328, at *11-12 (June 2, 2000); *PDU, Inc. v. City of Cleveland*, 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671, ¶ 21 ("The language of Article I, Sections 2, 11, and 16 is not sufficiently precise to provide clear guidance to the courts with respect to enforcement of its terms or application of its provisions"); *Estate of Tokes v. Dept. of Rehab. and Correction*, 2019-Ohio-1794, 135 N.E.3d 1200, 1208 (10th Dist.) (holding, in light of the "clear pronouncement" from the Ohio Supreme Court, that "Section 16 is not self-executing under its own plain language").

[7] *See, e.g.*, Ed Meese & Jack Painter, *Ohio's battle for health care freedom*, POLITICO (Nov. 7, 2011), https://www.politico.com/story/2011/11/ohios-battle-for-health-care-freedom-067727 (explaining that, in response to "passage of President Barack Obama's health care legislation in March 2010," Ohio citizens "circulat[ed] petitions for an amendment to their state's constitution

2. Article I, Section 2 does not provide a cause of action for the Clinics' equal-protection claims.

"Ohio courts have clearly held that parties do not have a private cause of action for alleged violations of Article I, Section 2." *City of Columbus v. Sanders*, C.P. No. 10 CV C 05 0705, 2011 Ohio Misc. LEXIS 788, at *17 (Jan. 12, 2011); *see, e.g.*, *PDU, Inc. v. City of Cleveland*, 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671, ¶ 21 ("The language of Article I, Sections 2 . . . is not sufficiently precise to provide clear guidance to the courts with respect to enforcement of its terms or application of its provisions"); *Autumn Care Ctr., Inc. v. Todd*, 2014-Ohio-5235, 22 N.E.3d 1105, ¶ 14 (5th Dist.) (determining based on the "explicit guidance" from the Ohio Supreme Court that "the language in Article I, Sections 2 and 16, 'lacks the completeness required to offer meaningful guidance for judicial enforcement.'" (quoting *Williams*, 88 Ohio St.3d at 523)); *see also Vagras v. Cimperman*, N.D. Ohio No. 1:04 CV 1002, 2005 U.S. Dist. LEXIS 51794, at *11 (July 7, 2005).

B. The Clinics have no substantial likelihood of success on their substantive-due-process claims.

1. S.B. 27 is a regulation of private clinics—not a regulation of patients or abortion—so rational-basis review applies.

The first question is what test applies for evaluating S.B. 27's constitutionality. Rational-basis review is the default standard for constitutional review of a challenged statute, and requires merely that the statute "rationally advances legitimate governmental interests." *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 38. "The party challenging the constitutionality of a statute 'bears the burden to negate every conceivable basis that might support the legislation.'" *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-

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to protect health care freedom," which "has implications for the constitutionality of . . . Obama's Affordable Care Act").

Ohio-4908, 936 N.E.2d 944, ¶ 20, quoting *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 91. Strict scrutiny applies only when a challenged law impinges on a fundamental constitutional right or discriminates based on race or national origin. *State v. Thompson*, 95 Ohio St. 3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13.

Rational-basis review applies here for two independent reasons. First, rational-basis review applies because S.B. 27 does not regulate abortion. It regulates the treatment of fetal remains *after* an abortion has taken place. Nor does it regulate patients. Instead, S.B. 27 regulates clinics, requiring clinics—not patients—to cover the cost of humane treatment of fetal remains.[8] R.C. 3726.09. The Clinics do little to explain how S.B. 27 regulates abortion, other than assuming that it does and then proceeding to a strict-scrutiny analysis. *See, e.g.*, Mot. at 18-19.

As for the Clinics' assertion that S.B. 27 will "result in" increased costs for patients, the Clinics never establish this point through evidence. Even assuming that S.B. 27 will increase abortion costs for patients, many state regulations may have such incidental effects. That does not make those regulations direct regulations of abortion. By contrast, other state laws do directly regulate abortion, such as the 2019 law mentioned on page 1 of the Clinics' Motion—a law that would have prohibited abortion after a fetal heartbeat is detected. *See Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 798 (S.D. Ohio 2019). But S.B. 27 is not that kind of law. Tellingly, other Planned Parenthood entities have recognized that fetal-disposition laws do not impinge on fundamental rights. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 869 (S.D. Ind. 2017) ("The parties agree that the fetal tissue disposition provisions do not implicate a fundamental right.").

[8] That is, unless a patient identifies a location for final disposition other than one provided by the clinic. R.C. 3726.09.

Second, there is no state-law fundamental right in Ohio to abort a pre-viability fetus, so rational-basis review applies to S.B. 27 regardless. Put another way, no fundamental right is affected even if S.B. 27 is viewed as impinging on abortion—because the Ohio Supreme Court has never recognized a state-law right to abort a pre-viability fetus. The most the Clinics can do is cite inapplicable cases they say establish state-law rights to procreation, privacy, bodily integrity, and autonomy. Mot. at 19. But none of those cases do the work the Clinics want.[9] For this additional, independent reason, rational-basis review applies.

S.B. 27 easily passes constitutional muster under rational-basis review. In 2019, in a short, unanimous opinion, the U.S. Supreme Court upheld the State of Indiana's fetal-disposition law under rational-basis review. *Box*, 139 S. Ct. at 1782. Indiana's law, like Ohio's, "prohibits abortion providers from treating the bodies of aborted children as 'infectious waste' and incinerating them alongside used needles, laboratory-animal carcasses, and surgical byproducts." *Id.* at 1782-83 (Thomas, J., concurring); *cf.* R.C. 3734.01(R). In *Box*, the U.S. Supreme Court reiterated that "a State has a 'legitimate interest in proper disposal of fetal remains.'" *Id.* at 1782,

[9] *Stone*, *Williams*, and *Holeton* do not even mention the word "abortion." And *Stone*, *Aalim*, and *Williams* actually undermine the Clinics' generic claims regarding rights to privacy. *See Stone v. Stow*, 64 Ohio St. 3d 156, 160, 163, 166, 593 N.E.2d 294 (1992) (choosing "not to apply any type of heightened scrutiny" and holding that a statutory and administrative scheme permitting the inspection of pharmacy prescription records without a warrant "d[id] not violate a right of privacy contained in the United States and Ohio Constitutions"); *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶¶ 18, 38 (stating that "since *Casey*, the court has been reluctant to expand the concept of substantive due process" and holding that a mandatory bindover of certain juvenile offenders complied with due process and equal protection under state and federal constitutions (quotations omitted)); *Williams*, 88 Ohio St. 3d at 534 (rejecting constitutional challenges to state statute). *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 748 N.E.2d 1111 (2001), *superseded by statute as stated in McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271, 866 N.E.2d 527 (4th Dist.), is a workers' compensation case that does not even mention the words "privacy," "procreation," "bodily integrity," or "autonomy." Finally, *State v. Boeddeker*, 1st Dist. Hamilton No. C-970471, 1998 Ohio App. LEXIS 480 (Feb. 13, 1998), is an unpublished opinion of questionable validity. *See State v. Worst*, 12th Dist. Butler No. CA2004-10-270, 2005-Ohio-6550, ¶ 33 ("*Boedekker* and *Anthony* have been overruled.").

quoting *Akron v. Akron Center for Reproductive Health*, *Inc.*, 462 U. S. 416, 452, n.45, 103 S. Ct. 2481, 76 L.Ed.2d 687 (1983). The Court then held that the U.S. Court of Appeals for the Seventh Circuit "clearly erred in failing to recognize that interest as a permissible basis for Indiana's disposition law." *Id.*; *see also Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) (vacating the district court's preliminary injunction preventing enforcement of an amendment concerning the disposition of fetal remains and remanding for reconsideration in light of the Supreme Court's decision in *Box*).

S.B. 27 "rationally advances" Ohio's "legitimate interest in proper disposal of fetal remains." *McCrone*, 2005-Ohio-6505, at ¶ 38; *Box*, 139 S. Ct. at 1782. A "straightforward reading of the . . . text demonstrates its purpose." *Gonzales v. Carhart*, 550 U.S. 124, 146, 127 S. Ct. 1610, 167 L.Ed.2d 480 (2007). S.B. 27 ensures proper treatment of fetal remains and promotes respect for unborn life by requiring that fetal remains are disposed of in a "dignified manner." R.C. 4717.271(A)(2). S.B. 27's legislative history demonstrates that S.B.'s key purposes are to "honor the unborn" and "protect[] the dignity of human life." Testimony of Senator Uecker, Feb. 26, 2019, at p. 1. And States have "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

S.B. 27 and its implementing rules rationally—and indeed, precisely—advance those legitimate state interests by requiring cremation of fetal remains at a crematory facility or interment at an Ohio-registered cemetery, while also giving patients the freedom to choose one or the other. R.C. 3726.02(B); R.C. 3726.03; Ohio Adm.Code 3701-46-01(B)(1)(b).[10] Moreover, as discussed

[10] As the Clinics state, it is rare for patients to express any interest in the handling of fetal remains at all, and S.B. 27 goes out of its way to honor patients' choices despite their decisions to end the lives of the unborn. This addresses the Clinics' unfounded criticism that S.B. 27 "only serves to take away patient choice." Mot. at 6, 22. After stating that very few patients express any interest in the disposition of fetal remains, it is disingenuous to characterize S.B. 27 as somehow limiting

in detail below, S.B. 27 further promotes the dignity of unborn life by requiring *individual* cremation of fetal remains, thus mirroring the treatment of adult remains, which in general must be individually cremated. *See* R.C. 4717.20(C), 4717.24(A)(7), and 4717.26(D).

2. Even assuming for the sake of argument that S.B. 27 counts as a state regulation of abortion, the undue-burden test would apply.

As discussed above, S.B. 27 is easily constitutional under the applicable rational-basis test and the U.S. Supreme Court's decision in *Box*. But even assuming for the sake of argument that S.B. 27 is an abortion regulation, strict scrutiny would still not apply. Applying strict scrutiny to state regulations of abortion might have been appropriate half a century ago in 1972, but not in 2022. This Court need not invent a new test for state regulations of abortion or ignore decades of U.S. abortion jurisprudence. If the Court finds that S.B. 27 is a state regulation of abortion, it should apply the applicable undue-burden standard.

S.B. 27 easily survives constitutional scrutiny under the applicable "undue burden" or "substantial obstacle" standard. As the en banc Sixth Circuit recently held:

> Under the Chief Justice's controlling opinion in [*June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 207 L.Ed.2d 566 (2020)], a law regulating abortion is valid if it satisfies two requirements.
>
> First, it must be reasonably related to a legitimate state interest. Because we are to apply the traditional rule of deference to the state's medical and scientific judgments, this requirement is met whenever a state has a rational basis to use its regulatory power.
>
> Second, the law must not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

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the functional sphere of choice patients are interested in exercising. *See* Liner Aff. ¶ 42 ("Patients rarely bring up the disposal of the tissue of their embryo or fetus."). S.B. 27 advances the State's legitimate interest in promoting respect for unborn life. And it expands patient choice by informing patients of their rights to choose cremation or interment rather than leaving those who ask with the vague assertion that "we dispose of the tissue like all other human tissues removed in medical procedures." *Id.*

Preterm-Cleveland v. McCloud, 994 F.3d 512, 524-25 (6th Cir. 2021) (en banc), quoting *EMWomen's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 432-33 (6th Cir. 2020). "Even if a law regulating abortion is unconstitutional in some applications, the law remains facially valid so long as it does not impose an undue burden in a large fraction of the cases in which the regulation is relevant." *Id.*

First, as discussed in detail above, S.B. 27 is constitutional because it is "reasonably related to a legitimate state interest." *Id.* Second, S.B. 27 is constitutional because it "does not impose an undue burden in a large fraction of the cases in which the regulation is relevant." *Id.* at 525. Because S.B. 27 serves valid state purposes, the fact that it might "mak[e] it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992) (joint opinion). The Clinics are complaining about, at most, a three-week delay in performing abortions (between 10 and 13 weeks LMP), due to their alleged concern that they will not be able to distinguish fetal tissue from other tissue until 13 weeks LMP. *See, e.g.*, Mot. at 1-2, 34.

However, the fact that a law may cause some delay in obtaining an abortion does not mean that the law constitutes a substantial obstacle. *See, e.g.*, *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 513-14, 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990) (upholding parental-consent provision even if it could result in "a 3-week delay" that "could increase by a substantial measure both the costs and the medical risks of an abortion"). Moreover, S.B. 27 does not impact medication abortions, which patients may obtain in Ohio until 10 weeks LMP. Mot. at 3; Haskell Aff. ¶ 5. As the Clinics acknowledge, "[t]here are two main methods of abortion: medication abortion and procedural abortion," and "[b]oth . . . are effective in terminating a pregnancy." Mot. at 2. The Clinics perform surgical abortions "up to maximum gestations between *16 weeks* and 6

days LMP *and 21 weeks* and 6 days LMP." Mot. at 3 (emphases added). Thus, even if the Clinics decide not to perform surgical abortions between 10 and 13 weeks, this does not—as a matter of law—create a "substantial obstacle" because a patient may still obtain a surgical abortion well beyond the thirteenth week LMP.

As to costs, again, the fact that S.B. 27 might "mak[e] it . . . more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874. Importantly, the Clinics' Motion provides no evidence of what specific costs, if any, would be passed on to patients, given that S.B. 27 generally requires *clinics* to cover the costs of cremation or interment. R.C. 3726.09. Instead, the Clinics' Motion vaguely repeats that increased costs to patients will be "substantial" and "significant." *See, e.g.*, Mot. at 13, 18. But "substantial" and "significant" are legalese—not evidence. And the Clinics have the burden to show they are entitled to an injunction by clear and convincing evidence. *Paige*, 2013-Ohio-4713, at ¶ 65. Based on the Clinics' affidavits, the cost to the Clinics of individual interment could be as low as $75, and the cost of individual cremation as low as $95. Bertuleit Aff. ¶ 15. The Clinics provide no breakdown of how much of these asserted costs, if any, would be passed on to patients, or whether the Clinics would make any effort to keep costs constant for those patients with fewer financial resources. Moreover, none of the Clinics' affidavits state that the increased costs to the Clinics will result in clinic closures.

Thus, the Clinics' Motion fails to show that S.B. 27 would impose any undue burden on *patients* seeking to abort pre-viability fetuses. S.B. 27 does not regulate a patient's decision to have an abortion, only the treatment of fetal remains *after* an abortion. The Clinics have failed to meet their burden to show that S.B. 27 creates the kinds of hindrances that would count as undue burdens under applicable case law. *Compare Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 195 L.Ed.2d 665 (2016) (noting that the challenged law had caused nearly half the

clinics in the State to close), *with Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 171 (4th Cir. 2000) (finding no undue burden where regulation had potential to increase cost of abortion by $75 and require some patients to travel an additional 70 miles). Therefore, S.B. 27 "does not impose an undue burden in a large fraction of the cases in which the regulation is relevant." *Preterm-Cleveland*, 994 F.3d at 525.

S.B. 27 easily survives constitutional scrutiny. The Clinics have no substantial likelihood of success on the merits of their substantive-due-process contentions.

C. The Clinics have no substantial likelihood of success on their equal-protection claims.

First, the Clinics lack standing to bring equal-protection claims on behalf of their patients. *See supra* Section I. Regardless, as discussed above, Article I, Section 2 of the Ohio Constitution does not provide a cause of action for any of the Clinics' equal-protection claims. *See supra* Section II.A.2. And even assuming that Article I, Section 2 provided a cause of action for the Clinics' equal-protection claims (which it does not), these claims would still fail on the merits as a matter of law.

The Clinics contend that S.B. 27 "singles out patients who obtain and providers who perform procedural abortion for unnecessary restrictions that do not apply to similarly situated persons—including those who obtain or perform other medical procedures such as miscarriage management or in vitro fertilization." Mot. at 27. The Clinics also assert that S.B. 27 regulates abortion providers in ways that "do not apply to other medical providers, including providers who treat miscarriage using the same medical procedure." *Id.* Neither the patient-specific nor the clinic-specific claims make out a cognizable equal-protection claim.

1. The equal-protection claims on behalf of the Clinics' patients fail as a matter of law.

Should this Court view S.B. 27 as a regulation of abortion, the undue-burden test applies, and the equal-protection claims collapse into that analysis. This is because "[p]laintiffs cannot expand the substantive scope of the [federal] abortion right by resort to the Equal Protection Clause." *Whole Woman's Health Alliance v. Hill*, 493 F. Supp. 3d 694, 760-61 (S.D. Ind. 2020). "[T]he Equal Protection Clause is not itself 'a source of substantive rights'" and "cannot be more protective of the abortion right than is the Due Process Clause." *Id.*, quoting *Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980); *see also San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

The U.S. Supreme Court's landmark decision in *Casey* "defined a new standard of judicial review for determining when courts can recognize burdens on [the abortion] right as unconstitutional, and when they cannot, replacing the traditional scrutiny analysis with the undue burden test" described above. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004). This undue-burden test replaced "the traditional equal protection scrutiny analysis for laws impacting fundamental rights." *Id.* at 539; *see also Whole Woman's Health All.*, 493 F. Supp. 3d at 760 ("[T]he standard under the Equal Protection Clause is the same as that under the Due Process Clause, that is, the undue-burden standard.").

"Thus, with respect to burdens on patients' abortion rights, this equal protection claim collapses with the undue burden claim" addressed above. *Tucson Woman's Clinic*, 379 F.3d at 544-45; *see also Whole Woman's Health All.*, 493 F. Supp. 3d at 760 (holding that "Plaintiffs'

gender discrimination claims are not judicially cognizable apart from the undue burden analysis.").[11] And as discussed above, these claims fail. *See supra* Section II.B.

2. The Clinics' own equal-protection claim fails as a matter of law.

"In the absence of a constitutional right to perform abortions," the Clinics' equal-protection claim is not cognizable. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (rejecting plaintiffs' unconstitutional-conditions claim). "'[A]s long as the difference in treatment does not unduly burden a woman's right to obtain an abortion, the government is free to treat abortion providers differently' than other entities." *Id.* at 913 (quoting *Planned Parenthood of Ind.*, 699 F.3d at 988). Such regulation does not violate equal-protection principles in part because abortion is unique; it is not analogous to miscarriage or any other medical circumstance mentioned in the Clinics' Complaint and Motion. *See, e.g.*, *Casey*, 505 U.S. at 852 ("Abortion is a unique act."); *Harris v. McRae*, 448 U.S. 297, 325, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) ("Abortion is inherently different from other medical procedures[.]"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 66-67, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976) (upholding written-consent requirement that applied only to abortion).

Even if the Clinics' own equal-protection claim was cognizable (which it is not), rational-basis review would apply because "abortion providers are not a suspect class." *Tucson Woman's Clinic*, 379 F.3d at 547; *see also Thompson*, 95 Ohio St. 3d 264, at ¶ 13. This is at least in part

[11] *See also Whole Woman's Health All.*, 493 F. Supp. 3d at 760 ("From our extensive review, the few federal courts addressing this specific issue have foregone a traditional Equal Protection analysis in favor of applying *Casey*'s undue burden analysis."); *see, e.g.*, *Tucson Woman's Clinic*, 379 F.3d at 549 ("[E]ven if laws singling out abortion can be judicially recognized as not gender-neutral . . . *Casey* replaces the intermediate scrutiny such a law would normally receive under the equal protection clause with the undue burden standard."); *ACLU of Kansas & W. Missouri v. Praeger*, 863 F. Supp. 2d 1125, 1135 (D. Kan. 2012) ("The Court concludes it is neither rational basis nor intermediate scrutiny that applies; the *Casey* undue burden standard must be applied to determine Plaintiff's [gender discrimination] equal protection claim.").

because there are "many legitimate reasons that the state might single out the class [of abortion providers] for regulation." *Tucson Woman's Clinic*, 379 F.3d at 545, citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-45, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985).

S.B. 27 easily clears rational-basis review's minimal threshold. "Legislative enactments that do not involve a suspect classification are presumptively rationally related to legitimate social and economic goals . . . ." *Pickaway Cty. Skilled Gaming, L.L.C.*, 127 Ohio St.3d 104, at ¶¶ 31-32 (quotations omitted). "The party challenging the constitutionality of a statute bears the burden to negate every conceivable basis that might support the legislation." *Id.* at ¶ 20 (quotations omitted). As discussed above, S.B. 27 is rationally related—and indeed precisely tailored—to the State's "legitimate interest in proper disposal of fetal remains." *Box*, 139 S. Ct. at 1782; *see supra* Section II.B. The General Assembly does not offend constitutional principles when it recognizes the difference between fetal remains and non-fetal tissue and regulates on that basis. The Clinics' own equal-protection claim fails as a matter of law.

D. The Clinics have no substantial likelihood of success on their vagueness claim.

As discussed above, the Clinics cannot bring a due-process vagueness claim because they lack an appropriate state cause of action. *See supra* Section II.A.1. Even setting aside that fatal defect for the sake of argument, the Clinics' vagueness contention has no likelihood of success.

It is a fundamental principle of constitutional law that statutes or rules be construed to uphold their constitutionality. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147, 128 N.E.2d 59 (1955); *see also, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (noting the "well-established principle that statutes will be interpreted to avoid

constitutional difficulties"); *United States v. Vuitch*, 402 U.S. 62, 70 (1971) ("[S]tatutes should be construed whenever possible so as to uphold their constitutionality").

The Clinics cannot show that S.B. 27 is unconstitutionally vague. To establish that a statute is unconstitutionally vague, "the challenging party must show that the statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *State v. Anderson*, 57 Ohio St. 3d 168, 171, 566 N.E.2d 1224 (1991), quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *see also see Gonzales*, 550 U.S. at 153 (reaffirming that in abortion cases, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality" (citation omitted)).

The Clinics list a handful of critiques of S.B. 27, which they allege will render application of the statute difficult. *See* Mot. at 33-35. But the Clinics cannot show unconstitutional vagueness merely by contending that S.B. 27 does not address every potential complexity that may arise (the same could be said of every law). Rather, the Clinics "must prove, beyond a reasonable doubt," that S.B. 27 establishes "no standard of conduct . . . at all."[12] *Anderson*, 57 Ohio St. 3d at 171. They cannot.

1. S.B. 27 clearly requires individual cremation.

The Clinics assert that S.B. 27 "does not address whether embryonic and fetal tissue can be simultaneously cremated." *Id.* at 35. But S.B. 27 clearly requires individual cremation, and the Clinics' own affidavits undermine their claim to the contrary. In his affidavit, Poul Lemasters states that "SB27 does not alter the general restrictions on simultaneous cremation." Lemasters

[12] S.B. 27 does not "threaten[] to inhibit the exercise of constitutionally protected rights," because S.B. 27 is not an "abortion restriction," and there is no state-law constitutional right in Ohio to abort a pre-viability fetus. Mot. at 32-33; *see supra* Section II.B. Thus, a "more stringent vagueness test" does not apply. Mot. at 32.

Aff. ¶ 20. Moreover, Lemasters concludes that "as the bill is currently written and without further guidance, simultaneous cremation is not permitted." *Id.* ¶ 21.

S.B. 27's text alone establishes that individual cremation is required. S.B. 27 defines "fetal remains" as "the product of human conception that has been aborted," and then states that "*each* zygote, blastocyte, embryo, or fetus or any of its parts that is aborted *is a separate product of human conception that has been aborted*." R.C. 3726.01(C) (emphases added). Thus, S.B. 27 defines the term "fetal remains" in the singular—defining it as the remains of a *single* "product of human conception that has been aborted." *Id.* Accordingly, when S.B. 27 requires that "[f]inal disposition of fetal remains . . . shall be by cremation or interment," it necessarily means that "*each* zygote, blastocyte, embryo, or fetus or any of its parts" that is cremated must be cremated individually. R.C. 3726.02(A); R.C. 3726.01(C) (emphasis added).

S.B. 27's remaining sections confirm that individual cremation is required. For example, if a patient desires to exercise her rights regarding the disposition of fetal remains, she "shall make the determination in writing using a form prescribed by the director of health," indicating (among other things) "[w]hether the final disposition will be by cremation or interment." R.C. 3726.04. But this form cannot cover the cremation or interment of multiple fetuses. Rather, S.B. 27 requires that "[a] form shall be completed for *each* zygote, blastocyte, embryo, or fetus to be aborted." R.C. 2317.56(B)(3)(d) (emphasis added); *see also* R.C. 3726.041(A). Moreover, S.B. 27 provides that "[a] form . . . that covers more than one zygote, blastocyte, embryo, or fetus that will be aborted is invalid." R.C. 3726.042. By requiring separate disposition forms for each aborted fetus to be cremated, S.B. 27's remaining sections confirm that cremation must be individual, not simultaneous.

S.B. 27's purpose further underscores that cremation must be individual. As discussed above, S.B. 27 ensures proper treatment of fetal remains and promotes respect for unborn life by requiring that fetal remains are disposed of in a "dignified manner." R.C. 4717.271(A)(2). And S.B. 27's legislative history demonstrates that S.B.'s key purposes are to "honor the unborn" and "protect[] the dignity of human life." Testimony of Senator Uecker, Feb. 26, 2019, at p. 1. The Clinics acknowledge that "[u]nder Ohio law, simultaneous cremation is permitted in only certain limited circumstances." Mot. at 8, citing R.C. 4717.20(C), 4717.24(A)(7), and 4717.26(D). To allow simultaneous cremation of fetal remains while generally prohibiting simultaneous cremation of adult remains would undermine S.B. 27's fundamental legislative purposes of "honor[ing] the unborn" and "protect[ing] the dignity of human life." Testimony of Senator Uecker, Feb. 26, 2019, at p. 1. Thus, S.B. 27's legislative purposes further underscore that the statute requires individual cremation.

2. S.B. 27 clearly distinguishes between fetal tissue and non-fetal tissue.

The Clinics also assert that S.B. 27 "leaves providers unsure of whether they can send embryonic and fetal tissue from procedural abortion to third parties, such as pathologists and crime labs." Mot. at 34. But S.B. 27 is clear: fetal remains must be cremated or interred, R.C. 3726.02(A), and abortion clinics "shall pay for and provide for the cremation or interment of the fetal remains from a surgical abortion performed at that facility," unless the patient "identifies a location for final disposition other than one provided by the abortion facility." R.C. 3726.9. That language is quite clear. The Clinics contend that "sending tissue" to third parties may be in the patients' best interest. Mot. at 34; *see also* Liner Aff. ¶ 31. But they fail to specify what they mean by "tissue." If they mean "the product of human conception that has been aborted," S.B. 27 requires cremation or interment of those fetal remains. R.C. 3726.01(C). But S.B. 27 does not

create a blanket prohibition on "sending tissue" to third parties. It prohibits a clinic from refusing to make a "final disposition" of *fetal remains* by cremation or interment.

Furthermore, the Clinics fail to even specify how often tissue sent to a crime lab or pathologist includes fetal tissue, and—as a subset of the former—how often fetal tissue that is sent to a third party cannot be distinguished from other tissue. *See* Liner Aff. ¶ 31 (merely stating that "[i]t is *sometimes* necessary to send tissue to a pathologist" (emphasis added)); *see also id.* ¶ 32. Here and throughout, what the Clinics have identified is not ambiguity or vagueness but rather policy disagreement with the General Assembly.

3. S.B. 27 makes clear that aborted fetuses are no longer to be treated as "infectious waste."

The Clinics also complain that the term "fetal remains" is vague because "it does not specify whether it includes pregnancy tissue such as the placenta, gestational sac, and umbilical cord," and thus whether this other tissue should be cremated or interred versus treated as "infectious waste." Mot. at 33. S.B. 27's definition is quite clear. Fetal remains are "the product of human conception that has been aborted." R.C. 3726.01(C). "Product" means "something that is the result of a process," or "someone or something that is produced or influenced by a particular environment or experience."[13] The placenta, gestational sac, and umbilical cord are "product[s] of human conception"—they are not part of the patient's normal tissue but are instead the result of fetal life—and thus, these come within the definition of "fetal remains." Underscoring this point, one of the Clinics' affidavits acknowledges that "tissue from procedural abortions would not be considered a 'limb[] or other portion[] of the anatomy,' or body parts 'of such a dead human body

[13] *Product*, MERRIAM-WEBSTER, https: //www.merriam-webster.com/dictionary/product#:~:text=noun,care%20products%20See%20More%20Examples (last accessed Jan. 19, 2022).

that were removed for [the purposes of medical education or research].'" Lemasters Aff. ¶ 20, quoting R.C. 4717.20(C).

It is the Clinics' burden to "prove, beyond a reasonable doubt," that S.B. 27 establishes "no standard of conduct . . . at all."[14] *Anderson*, 57 Ohio St. 3d at 171. Even assuming for the sake of argument that the definition of "fetal remains" is somewhat "imprecise," that is far from sufficient grounds for declaring the statute unconstitutionally vague. *Id.*[15]

III. A Preliminary Injunction Is Not Warranted Because the Clinics Have Not Produced Clear and Convincing Evidence of Irreparable Harm.

In addition to their inability to demonstrate a substantial likelihood of success on the merits, the Clinics cannot demonstrate that they will suffer an irreparable injury without injunctive relief. The Clinics must demonstrate—by clear and convincing evidence—that they will suffer irreparable injury if the requested injunctive relief is denied. *Paige*, 2013-Ohio-4713, at ¶ 65. If the Clinics cannot establish irreparable harm by clear and convincing evidence, the court "need not consider the remainder of the elements." *Intralot*, 2018-Ohio-3873, at ¶ 47; *see Aero Fulfillment Servs.*, 2007-Ohio-174, at ¶¶ 23, 41 (affirming trial court's denial of injunctive relief where plaintiff failed to establish irreparable harm).

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[14] S.B. 27 does not "threaten[] to inhibit the exercise of constitutionally protected rights," because S.B. 27 is not an "abortion restriction," and there is no state-law constitutional right to abort a pre-viability fetus. Mot. at 32-33; *see supra* Section II.B. Thus, a "more stringent vagueness test" does not apply. Mot. at 32.

[15] The Clinics' final quibble (with R.C. 3726.02(B)) perhaps stems from a failure to read it in its entirety. Mot. at 35. R.C. 3726.02(B) states that "[t]he cremation of fetal remains under division (A) of this section shall be in a crematory facility, in compliance with Chapter 4717[] of the Revised Code." Chapter 4717 in turn sets out detailed requirements for crematory facilities, cremation, and license qualifications—to name just a few. *See also* R.C. 3726.02(C) ("As used in this section, 'crematory facility' has the same meaning as in section 4717.01."). The law is clear; it is the Clinics who wish to make it ambiguous.

First, the Clinics have not shown that their patients will face irreparable harm. The Clinics offer little evidence of—or even argument regarding—alleged irreparable harm. *See* Mot. at 35-36. As discussed at length above, there is no threatened constitutional injury here. *See supra* Section II.B. As the U.S. Supreme Court has held, "a State has a legitimate interest in proper disposal of fetal remains." *Box*, 139 S. Ct. at 1782. S.B. 27 is not an abortion restriction and, in any event, there is no state-law constitutional right in Ohio to abort a pre-viability fetus. Even assuming for the sake of argument that S.B. 27 counts as an abortion regulation (which it does not), the Clinics are complaining about at most a three-week delay in performing surgical abortions (between 10 and 13 weeks LMP), due to the Clinics' asserted concern that they will not be able to distinguish fetal tissue from other tissue until 13 weeks LMP. *See, e.g.*, Mot. at 1-2, 34. This three-week delay in performing surgical abortions is not a constitutional injury. *See supra* Section II.B.

Nor does S.B. 27 otherwise threaten irreparable harm. Several key facts are worth highlighting. First, even the Clinics acknowledge they can comply with S.B. 27. The Clinics were able to find several vendors to work with: three providing cremation services and another providing interment services. *See* Mot. at 11; Bertuleit Aff. ¶ 15; Conrow Aff. ¶ 11. These vendors provided quotes for *individual* cremation of fetal remains, indicating that individual cremation is possible. Bertuleit Aff. ¶ 15; Conrow Aff. ¶ 11. And taken together, the vendors have capacity to meet the Clinics' needs for both cremation and interment. *See* Bertuleit Aff. ¶ 15 (one vendor indicated it "could individually cremate the embryonic and fetal tissue from the other providers in the state"); Conrow Aff. ¶ 11 (vendor could "likely cremate all of the tissue from Preterm"); Bertuleit Aff. ¶ 15 (another vendor "indicated it had capacity to inter tissue from procedural abortion").

As to cost, the Clinics provide no evidence of how much additional cost, if any, would be passed on to patients, given that S.B. 27 generally requires *clinics* to cover the costs of cremation or interment. R.C. 3726.09. Instead, the Clinics' Motion vaguely repeats that increased costs to patients will be "substantial" and "significant." *See, e.g.*, Mot. at 13, 18. However, based on the Clinics' affidavits, the cost to the Clinics of individual interment could be as low as $75, and the cost of individual cremation as low as $95. Bertuleit Aff. ¶ 15. The Clinics provide no breakdown of how much of these asserted costs, if any, would be passed on to patients, or whether the Clinics would make any effort to keep costs constant for those patients with fewer financial resources. Moreover, none of the Clinics' affidavits states that the increased costs to the Clinics will result in clinic closures. What the Clinics' Motion and attached affidavits show is that the Clinics are able to comply with S.B. 27 and that, at least at this time, they lack any evidence that S.B. 27 will unduly burden *patients*.

Second, the Clinics have not shown that they will face irreparable harm. Any economic cost retrospectively determined to be improper is compensable and therefore not irreparable harm. *See Aero Fulfillment Servs.*, 2007-Ohio-174, at ¶ 27 ("[T]he movant must make some showing as to why the harm cannot be remedied through compensatory damages."); *Kyrkos v. Superior Bev. Group, Ltd.*, 8th Dist. Cuyahoga No. 99444, 2013-Ohio-4597, ¶ 16 ("[H]arm or a threat of harm is not irreparable if monetary damages can serve as an adequate remedy."). The Clinics have substantiated no injuries that could count as irreparable harm.

IV. A Preliminary Injunction Against the State Defendants Will Harm Third Parties and Would Not Serve the Public's Interest.

"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 of S.B.

27 will harm the public by preventing the implementation of a state statute intended to provide for the humane treatment of fetal remains and promote the dignity of unborn life. As the U.S. Supreme Court has already made clear in upholding a state fetal-remains law similar to Ohio's, "a State has a legitimate interest in proper disposal of fetal remains." *Box*, 139 S. Ct. at 1782. If the State is enjoined here, it in turn would harm the public's interest in promoting the dignity of unborn fetal life through the legislation of its elected representatives.

CONCLUSION

For the foregoing reasons, the Clinics' Second Motion for a Preliminary Injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing ***Response in Opposition to Plaintiffs' Motion for Preliminary Injunction*** has been served upon the following by electronic mail this 19th day of January, 2022:

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