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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, ET AL.,	:	CASE NO. **A 2100870**
	:	**JUDGE ALISON HATHEWAY**
Plaintiffs,	:	
	:	**ENTRY GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**
-vs.-	:	
OHIO DEPARTMENT OF HEALTH, ET AL.,	:	
Defendants.	:	

This matter comes before the Court upon Plaintiffs' Motion for Judgment on the Pleadings, filed on August 12, 2024. The Court, having considered the Motion, the responsive briefs, and being fully apprised of the law, finds Plaintiffs' Motion to be well taken. Therefore, Plaintiffs' Motion for Judgment on the Pleadings is hereby **GRANTED.**

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") (collectively "Plaintiffs") are health care providers in the state of Ohio who provide reproductive healthcare, including procedural abortions. Plaintiffs raised due-process and equal-protection claims under the Ohio Constitution and pursuant to the Declaratory Judgment Act, R.C. 2721.03, against 2020 Am.S.B. No. 27 ("S.B. 27"). S.B. 27 requires embryonic and fetal tissue from a procedural abortion to be disposed of by cremation or internment.

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THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

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Under this Court's previous order, Defendants were preliminarily enjoined from enforcing S.B. 27 until 30 days after implementing rules took effect on February 8, 2022. Before the effective date, Plaintiffs filed a second Motion for Preliminary Injunction, which this Court granted on January 31, 2022, to enjoin S.B. 27 until the final judgment in this case. Before the Court now, following the passage of the Reproductive Freedom Amendment, Plaintiffs filed a Motion for Judgment on the Pleadings to declare S.B. 27 violates the Ohio Constitution and to permanently enjoin Defendants Ohio Department of Health ("ODH"), Ohio Director Bruce Vanderhoff, the State Medical Board of Ohio, and county and city prosecutors from enforcing S.B. 27.

A. S.B. 27

S.B. 27, a copy of which is attached as Exhibit A to Plaintiffs' Complaint, requires that "fetal remains" (which R.C. 3726.01(C) defines as "the product of human conception that has been aborted") from a procedural abortion be disposed of only by cremation or interment. A patient may decide whether to dispose by cremation or interment, but if no decision is made, the provider may choose. However, this burden only applies to procedural abortion, not to miscarriage management or in vitro fertilization ("IVF").

Failure to comply with S.B. 27 would subject Plaintiffs and their physicians to significant criminal penalties. Also, they face noncriminal penalties including license suspension or revocation for both abortion facilities and physicians, fines, damages, and court injunctions. *See* Ohio Adm. Code 3701-83-05(C); Ohio Adm. Code 3701-83-05.1(B), (C)(2), (C)(4), and (F); Ohio Adm. 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).

B. Reproductive Freedom Amendment

On November 7, 2023, Ohioans overwhelmingly voted to amend the Ohio Constitution to explicitly enshrine the right to reproductive freedom. The Reproductive Freedom Amendment provides, in relevant part, that:

> (A) Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on...
> (5) abortion.
> (B) The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
> (1) An individual's voluntary exercise of this right or
> (2) A person or entity that assists an individual exercising that right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.

Ohio Const., art. I, § 22.

LAW AND ANALYSIS

A. Civ.R. 12(C) Standard for Dismissal

A Civ.R. 12(C) motion "presents only questions of law, and determination of the motion for judgment on the pleadings is restricted solely to the allegations in the pleadings." *Whaley*, 92 Ohio St.3d at 582, 752 N.E.2d at 275. Motions for judgment on the pleadings may be brought by either party when the pleadings have closed and there exist no material factual disputes such that the court need only resolve questions of law to grant relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1966); *Trinity Health Sys. v. MDX Corp.*, 2009-Ohio-417, ¶ 17 (7th Dist.). A motion for judgment on the pleadings filed by plaintiffs should be granted if, construing the material allegations in the complaint and the answer in favor of the nonmoving party, the court finds beyond doubt that the defendants could prove no set of facts on which they could prevail. *Trinity Health* at ¶ 18.

B. Plaintiffs Have Traditional and Third-Party Standing.

Prior to the Reproductive Freedom Amendment's passage, the State attempted to argue Plaintiffs lacked third-party standing – which this Court addressed in its Entry Granting Plaintiffs' Second Motion for Preliminary Injunction. Specifically, this Court found that Plaintiffs were "likely to prevail against Defendants' third-party standing argument." Third-party standing exists where a claimant "(i) suffers its own injury in fact, (ii) possesses a sufficiently 'close relationship with the person who possesses the right,' and (iii) shows some 'hindrance' that stands in the way of the claimant seeking relief." *City of Liverpool v. Columbiana Cty. Budget Comm.*, 2007-Ohio-3759, ¶ 22, *quoting Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004).

Following the passage of the Reproductive Freedom Amendment, which explicitly grants Plaintiffs standing in this case, the State's lack of standing argument continues. Specifically, the Reproductive Freedom Amendment states, in relevant part, that the State may not "directly or indirectly discriminate against...[a] person or entity that assists individual[s] exercising" their right "to make and carry out [their] own reproductive decisions, including but not limited to decisions on...abortion." Here, Plaintiffs are healthcare providers in the state of Ohio who provide reproductive healthcare, including procedural abortions.

Despite the Amendment's clear text, and despite the State's agreement that S.B. 27 imposes special burdens upon Plaintiffs as abortion providers, the State nonetheless argues Plaintiffs lack standing for themselves and for their patients. S.B. 27 regulates and imposes severe penalties for noncompliance on abortion providers and facilities by requiring providers who perform procedural abortions to take on numerous additional obligations—paying for the cremation or interment of embryonic and fetal tissue from

procedural abortions—upon pain of loss of licensure, civil penalties, civil suits, and criminal penalties for themselves and their staff. The State's lack of standing argument is not well-taken. Rather, Plaintiffs' Complaint adequately pleads facts to demonstrate they have traditional and third-party standing in this case.

C. Plaintiffs are entitled to judgment on the pleadings.

1. S.B. 27 violates Article 1, Section 22 of the Ohio Constitution.

The State argues S.B. 27 deals solely with what happens to fetal tissue after an abortion and does not limit anyone's right to have an abortion. S.B. 27 does regulate what happens to fetal tissue after an abortion, but to say it does not limit anyone's right to have an abortion is not accurate. First, S.B. 27 requires abortion providers to explain the cremation or interment decision to patients seeking abortions *before* the abortion and as part of the abortion decision-making process. Additionally, the State fails to acknowledge that before this decision can be made, abortion providers must have established relationships with willing crematory facilities and funeral homes to ensure the fetal tissue's cremation or burial in accordance with S.B. 27. The decision to cremate or inter, and to establish these relationships must occur *before* the abortion, so S.B. 27 does not solely deal with what happens after the abortion.

Plaintiffs argue that S.B. 27 violates the Ohio Constitution by "indisputably discriminat[ing] *against* procedural abortion patients and providers because [S.B. 27] treats them worse than other patients by restricting abortion patients' ability to dispose of the tissue in the same way as tissue from any other health care service would be handled." Importantly, S.B. 27 only applies to fetal tissue from procedural abortions and has no effect on fetal tissue from comparable health care, such as miscarriage management. The Reproductive Freedom Amendment explicitly states the State shall

not directly or indirectly discriminate against a person or entity that assists an individual exercising that right. Plaintiffs, as abortion providers and facilities, are directly and indirectly impacted by S.B. 27's requirements.

Abortion providers must bear expenses that do not exist for other healthcare providers that routinely dispose of tissue, including identical fetal tissue resulting in miscarriage management or IVF. Abortion providers must explain the decision to patients and if the patient does not indicate the method or location of final disposition, the abortion provider must choose for the patient. R.C. 3726.04. Abortion facilities must facilitate and bear the cost of the cremation or burial of the fetal tissue which requires maintaining contracts with willing crematory facilities and funeral homes. Abortion facilities must also store the fetal tissue until patients make a disposition decision which does not have a set time limit.

2. S.B. 27 does not further individual health.

Discrimination against abortion patients or abortion providers can only occur when the State demonstrates "that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Ohio Const. art. I, § 22(B). S.B. 27's regulations are exclusively for the disposition of embryonic and fetal tissue, not the health care of the patient. The State did not plead nor put forth any arguments regarding how the disposition requirements further patient health. As the Plaintiffs argue, it is clear why the State has been silent on this issue: S.B. 27 simply does nothing to serve patient health. This fact becomes even more clear when considering that S.B. 27's disposition requirements apply only to tissue from procedural abortion and not to *identical tissue* from miscarriage management or to embryos from

IVF. S.B. 27 serves only to target and discriminate against individuals seeking procedural abortions and their healthcare providers.

3. S.B. 27's provisions cannot be severed.

The State argues that this Court cannot enjoin S.B. 27 in its entirety, rather, it "must sever any invalid provision and preserve remaining law." *State Def.'s Memo. in Opp. at 3-4.* However, as Plaintiffs point out, the State fails to analyze its severability argument under the three-part test established by *Geiger v. Geiger*, 117 Ohio St. 451 (1927). In *Geiger*, the Ohio Supreme Court articulated a three-part test to determine whether an unconstitutional statutory provision may be severed from the remaining portions of the law. *Geiger* directs this Court to ask:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Id. at 466. "A portion of a statute can be excised only when the answer to the first question is yes and the answers to the second and third questions are no." *State v. Noling*, 2016-Ohio-8252, ¶ 35.

R.C. 3726.02, the provision at issue here from S.B. 27, states "final disposition of fetal remains from a surgical abortion at an abortion facility shall be by cremation or interment." The State argues the other provisions of S.B. 27 are not tied to the disposition requirement so the rest of the bill can remain. Yet, the remaining provisions rely on the disposition requirement – which is perhaps why the State failed to analyze its severability argument under the proper standard.

The first prong is not satisfied where the sentences depend on the other for any of its meaning. Here, when R.C. 3726.02, S.B. 27's disposition requirement, is struck, the remaining provisions are emptied of meaning and cannot stand on their own, because every provision either constitutes, contemplates, or cross-references the disposition requirement at issue. For instance, R.C. 2317.56 requires patients seeking abortions to certify notification of the right to choose disposal and complete the disposition determination. R.C. 3701.79 requires abortion facilities to keep records of the method of final disposition of the fetal remains. R.C. 3726.03 allows patients seeking abortions to choose cremation or interment and location of final disposition. R.C. 3726.04 requires abortion facilities to make the disposition decision for the patient if the patient declines to do so. R.C. 3726.09 requires abortion facilities to pay for the disposition of the tissue unless the patient identifies another location. R.C. 3726. 10 requires abortion facilities to document the disposition determination in patient's medical records. R.C. 3726.12 requires abortion facilities to have written policies and procedures regarding cremation or interment. R.C. 3726.13 requires abortion facilities to maintain a written list of locations for the final disposition. R.C. 3726.99 imposes a first-degree misdemeanor for failure to dispose of fetal tissue humanely. R.C. 4717.271 imposes requirements for crematory operators for disposing fetal tissue. In other words, the answer to *Geiger* prong one is "no" and the unconstitutional statutory provision may not be severed from the remaining portions of the law. While the analysis could end here, the Court will address Plaintiff's analysis of prong two.

The second prong is not satisfied where the unconstitutional part is so connected to the general scope that severing would defeat the Legislature's intention. Here, it is clear that the disposition requirement is too connected to the remainder of S.B. 27's

provisions to be severed. The disposition requirement was referred to as the "core provision" by both parties. Every provision of S.B. 27 depends on the existence of the disposition requirement. This is even more clear when considering the purpose of the S.B. 27: to require tissue from a procedural abortion to be disposed of by interment or cremation. Further, S.B. 27 lacks a severability clause, which is further evidence of the intent for the bill's separate provisions to work together as a whole.

S.B. 27's failure at *Geiger* prong one suffices to resolve the severability analysis and the failure at prong two provides an additional, independent basis to enjoin S.B. 27 in full. Due to failure at prong one and two, prong three does not need to be analyzed.

3. Plaintiffs are entitled to a permanent injunction.

"'A permanent injunction is [***17] issued after the movant has demonstrated a right to relief under the applicable substantive law.'" *West v. City of Cincinnati*, 2024-Ohio-1951, 245 N.E.3d 304, ¶ 20 (1st Dist.), *quoting Vontz v. Miller*, 2016-Ohio-8477, 111 N.E.3d 452, ¶ 25 (1st Dist.), *citing Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist.2000). "'A party seeking a permanent injunction must show,'" by clear and convincing evidence, "'that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law.'" *Stoneham* at 267-268.

Here, even construing all of the allegations in the pleadings in a light most favorable to that State, it remains clear beyond doubt that the State could prove no set of facts entitling them to recovery. Plaintiffs have demonstrated a right to relief under the law, and have proven by clear and convincing evidence that the injunction is necessary to prevent irreparable harm and that there is no other adequate remedy at law. S.B. 27 is a restriction on abortion that clearly violates the Ohio Constitution. If S.B. 27 were

allowed to go into effect, it would severely impede access to abortion resulting in delayed or denied healthcare. In addition, this restriction is without reason, as the State has not plead nor offered any argument about how S.B 27 is the "least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Further, its unconstitutional provisions cannot be severed. The only adequate remedy is to permanently enjoin S.B. 27.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Judgment on the Pleadings is hereby **GRANTED**. Defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing S.B. 27. This is a final appealable order and there is no just cause for delay.

IT IS SO ORDERED.

Judge Alison Hatheway