IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, et al.,	:	**Case No. 1:15-cv-568**
	:	**Judge Michael R. Barrett**
***Plaintiffs*,**	:	
vs.	:	
BRUCE T. VANDERHOFF, M.D.,	:	**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
Defendant.	:	

MOTION

Pursuant to this Court's Calendar Order (May 20, 2022), Plaintiffs hereby move for summary judgment against Defendant under Federal Rule of Civil Procedure 56 on the grounds that there is no genuine issue of material fact as to Plaintiffs' claims, and Plaintiffs are entitled to judgment as a matter of law that the Written Transfer Agreement ("WTA") Requirement, Ohio Rev. Code Ann. §§ 3702.303-04(A); Ohio Admin. Code § 3701-83-14(C); Public Hospital Ban, Ohio Rev. Code Ann. § 3727.60; and Automatic Suspension Provision, *id.* § 3702.309(A), are unconstitutional. Plaintiffs have a constitutionally protected property interest in both the continued operation of their facilities and the continued possession of their facilities' Ambulatory Surgical Facility licenses. *See Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). The undisputed evidence proves that 1) the WTA Requirement and Public Hospital Ban unconstitutionally delegate authority to determine Plaintiffs' property interest to private parties (Pls.' Third Am. Compl. ¶¶ 138-39, ECF No. 177 ("Am. Compl.")); 2) the Automatic Suspension Provision unconstitutionally deprives Plaintiffs of their protected property interests without affording them any procedural protections (Am. Compl. ¶¶ 140-41); and 3) the WTA Requirement and the Ohio Department of Health's enforcement thereof unconstitutionally threaten to deprive

Plaintiffs of their protected property interests without affording them fair notice of what the law requires and adequate procedural protections (Am. Compl. ¶¶ 142-43).

Dated: July 29, 2022

Respectfully submitted,

/s/ B. Jessie Hill

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail and email upon all parties for whom counsel has not entered an appearance electronically.

/s/ B. Jessie Hill
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, *et al.*,	:	**Case No. 1:15-cv-568**
Plaintiffs,	:	**Judge Michael R. Barrett**
vs.	:	
BRUCE T. VANDERHOFF, M.D. In his official capacity as the Director of the Ohio Department of Health	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The State of Ohio has undertaken a deliberate campaign to eliminate access to abortion care in Ohio, including through repeated assaults on the last two ambulatory surgical facilities that perform abortions in Southwest Ohio and their ability to operate. This campaign has taken many forms but has notably included imposing an onerous, medically unnecessary requirement that Ambulatory Surgical Facilities ("ASFs"), including those providing procedural abortions, maintain a written transfer agreement ("WTA") with a local hospital, or otherwise obtain a variance from that requirement, which involves meeting Defendant Ohio Department of Health's ("ODH") arbitrary, constantly changing, and surprise demands ("WTA Requirement").

Plaintiffs have a protected property interest in both the continued operation of their facilities and the continued possession of their ASF licenses. In violation of Plaintiffs' constitutional right to procedural due process, the Automatic Suspension Provision challenged in this case empowers ODH to suspend Plaintiffs' licenses automatically upon the denial of their variance applications or if ODH simply fails to act upon Plaintiffs' applications within 60 days. Ohio Rev. Code Ann. §§ 3702.309(A), 3702.304(A)(2) ("Automatic Suspension Provision"). These suspensions require immediate closure of Plaintiffs' clinics with no pre-deprivation or post-deprivation review.[1] These shifting requirements deprive Plaintiffs of their due process rights, ensuring that they have no meaningful opportunity to comply with new and arbitrary requirements.

[1] The administrative process does not provide any meaningful post-deprivation review, as it does not allow for substantive review of the variance denial, "which shall be final." Ohio Admin. Code 3701-83-14(F); Ohio Rev. Code Ann. §3702.304(A) and (C); *Women's Med Ctr. of Dayton v. Dep't of Health*, 2019-Ohio-1146, ¶¶ 54-55 (holding that variance denials are not judicially reviewable under Ohio law).

Lastly, Ohio law forbids public hospitals enter into WTAs with abortion clinics (but not other ASFs). Ohio Rev. Code Ann. § 3727.60 ("Public Hospital Ban"). The WTA Requirement and the Public Hospital Ban function together to unconstitutionally delegate unreviewable authority to private parties to grant or deny Plaintiffs' ASF licenses. Private hospitals and physicians may decide not to enter into a WTA agreement with Plaintiffs for any reason, or no reason whatsoever. With no statutory standards to provide procedural safeguards, this delegation of power over Plaintiffs' ASF licenses gives private actors veto power to determine who may or may not provide abortions.

The undisputed evidence proves that the Automatic Suspension Provision, WTA Requirement, and Public Hospital Ban violate Plaintiffs' due process rights under the Fourteenth Amendment to the United States Constitution as a matter of law. Defendants have presented no evidence to the contrary, nor can they. There is no genuine issue of material fact, and Plaintiffs are entitled to summary judgment on their claims: Count I: Due Process Nondelegation – WTA Requirement; Count II: Procedural Due Process – Automatic Suspension Provision; Count III: Procedural Due Process – Fair Notice. Pls.' Third Am. Compl. for Decl. and Inj, Relief at ¶¶ 138-43. (Apr. 28, 2022), ECF No. 177 ("Compl.").

STATUTORY FRAMEWORK

ODH requires clinics that provide procedural abortion to maintain an ASF license. Ohio Rev. Code Ann. § 3702.30(E)(1). To maintain an ASF license, a clinic must either have a WTA with a local hospital "for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise" or be granted a variance from that requirement by the Director of ODH. Ohio Rev. Code Ann. § 3702.303; Ohio Admin. Code 3701-83-19(E). Not a single ASF in Ohio has needed to apply for a WTA variance, except for abortion providers.

Compl. at ¶ 37; Def. Bruce Vanderhoff's Answer to Pls.' Third Am. Compl. at ¶ 37, (May 12, 2022), ECF No. 181 ("Answer"); *see also* Dep. of Shannon Richey, 268:3-6, ECF No. 1309 ("Richey Dep.").

For many years, this requirement was imposed by administrative rule, and ODH could grant either a "waiver" or a "variance" from the WTA rule to ASFs that provided procedural abortions—just as it could for any of the other regulatory rules for ASFs. On various occasions, the agency did just that, granting variances from the rule to those clinics that could demonstrate that they met the requirement "in an alternative manner." Ohio Admin. Code 3701-83-14(C); Richey Dep., 186:2-190:7. In 2006, the Sixth Circuit upheld the administrative rule requiring a WTA as applied to Plaintiff WMGPC because at that time ODH could grant a waiver *or* variance of the requirement. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006).

In 2013, as a part of the biennial budget bill, Substitute Amended House Bill 59 of the 130th General Assembly ("HB 59"), the Ohio legislature enacted three new provisions that made it difficult or impossible for abortion clinics—the only ASFs already struggling to comply with the WTA rule—to maintain their licenses. First, HB 59 codified the requirement to have a WTA and eliminated the Director's discretion to grant a "waiver" of the administrative rule, but retained the Director's discretion with respect to variances. Ohio Rev. Code Ann. § 3702.303. Second, HB 59 established a new, onerous application process that applies only to ASFs seeking WTA variances (which, in practice, is only abortion clinics), distinct from the ordinary regulatory process that applies to all other types of variance applications. Ohio Rev. Code Ann. § 3702.304(A)-(B) ("Statutory Variance Requirements"). Finally, HB 59 banned abortion clinics from obtaining the necessary WTA from any "public hospital," Ohio Rev. Code Ann. § 3727.60(A)(4) ("Public Hospital Ban"). At the same time, the Public Hospital Ban also

prohibited physicians with staff membership or professional privileges at a public hospital "to use that membership or those privileges as a substitution for, or alternative to, a written transfer agreement for purposes of a variance application" for an ASF that performs abortions. Ohio Rev. Code Ann. § 3727.60(B)(2). The ban applies only to clinics that provide abortions and does not apply to any other ASFs in the state.

Because of HB 59, a WTA "waiver" is no longer available, and the ODH Director may grant a "variance" only if an applicant submits a "complete variance application" that contains agreements with consulting physicians possessing admitting privileges at a minimum of one local hospital (but not a public hospital), and verification that this hospital has been informed of the physician's agreement with the abortion clinic, and that the physician has committed to providing backup coverage for the abortion clinic when necessary.[2]

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[2] Ohio Rev. Code Ann. § 3702.304 contains several additional requirements for a variance application, including:
(a) A signed statement in which the physician attests to all of the following:
(i) The physician actively practices clinical medicine within a twenty-five mile radius of the facility.
(ii) The physician is familiar with the facility and its operations.
(iii) The physician agrees to provide notice to the facility of any changes in the physician's ability to provide back-up coverage.
(b) The estimated travel time from the physician's main residence or office to each local hospital where the physician has admitting privileges;
(c) Written verification that the facility has a record of the name, telephone numbers, and practice specialties of the physician;
(d) Written verification from the state medical board that the physician possesses a valid license to practice medicine and surgery or osteopathic medicine and surgery issued under Chapter 4731. of the Revised Code;
(e) Documented verification that each hospital at which the physician has admitting privileges has been informed in writing by the physician that the physician is a consulting physician for the ambulatory surgical facility and has agreed to provide back-up coverage for the facility when medical care beyond the care the facility can provide is necessary.
(4) A copy of the facility's operating procedures or protocols that, at a minimum, do all of the following:
(a) Address how back-up coverage by consulting physicians is to occur, including how back-up coverage is to occur when consulting physicians are temporarily unavailable;
(b) Specify that each consulting physician is required to notify the facility, without delay, when the physician is unable to expeditiously admit patients to a local hospital and provide for continuity of patient care;
(c) Specify that a patient's medical record maintained by the facility must be transferred contemporaneously with the patient when the patient is transferred from the facility to a hospital.

In addition, 3702.304 allows ODH to require the variance application to provide "[a]ny other information the director considers necessary." 3704.304(B)(5).

In 2015, as part of the biennial omnibus budget measure, the Ohio Legislature enacted House Bill 64 of the 131st General Assembly ("HB 64"). HB 64 immediately and automatically suspends an ASF's license (1) if ODH fails to act on a WTA variance application within 60 days, or (2) if ODH denies the ASF's request for a variance pursuant to Ohio Rev. Code Ann. § 3702.304(A). Ohio Rev. Code Ann. § 3702.309(A) ("Automatic Suspension Provision"). Again, because abortion clinics are the only ASFs seeking WTA variances, HB 64 functionally singles out abortion clinics.

If an ASF were to provide procedural abortion services without a license, ODH could take action against it, including imposing civil penalties between one thousand and two hundred and fifty thousand dollars and/or imposing daily civil penalties between one thousand and ten thousand dollars for each day that the ASF operates without a license. Ohio Admin. Code 3701-83-05.1(A); Ohio Rev. Code Ann. § 3702.32(A). Thus, abortion providers whose licenses are suspended as a result of the Automatic Suspension Provision will be forced to cease providing procedural abortion services immediately, without any notice to providers, staff, or patients, and without even affording them an opportunity for a pre-deprivation hearing.

Providers are not only denied a pre-deprivation hearing—they are also denied any post-deprivation hearing rights. While HB 64 indicates that a provider's license could be reinstated pursuant to an order issued in accordance with Chapter 119 of the Revised Code, Ohio Rev. Code Ann. § 3702.309(A)(3), an abortion provider will in fact have no right to appeal the basis for this deprivation under Chapter 119. Because the variance itself is unappealable, the underlying reason leading to the variance denial, and therefore the license suspension, evades review. Ohio Admin. Code 3701-83-14(F) ("the refusal of the director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a

hearing under Chapter 119 of the Revised Code"); Ohio Rev. Code Ann. § 3702.304(A) and (C); *see also Women's Med Center of Dayton v. Dep't of Health*, 133 N.E.3d 1047, ¶ 55 (Ohio Ct. App. 2019) ("Since WMCD did not have a WTA or a variance from the requirement to have one, ODH was entitled to '[r]evoke, suspend, or refuse to renew the license' pursuant to Ohio [law]."). Moreover, the automatic suspension of a license does not trigger any right to appeal under Chapter 119 because the automatic suspension does not qualify as an agency "adjudication" under Ohio Rev. Code Ann. § 119.06. An "adjudication" does not include "acts of a ministerial nature," Ohio Rev. Code Ann. §119.01(D), such as the automatic suspension of an abortion provider's license following a variance denial. Consequently, an abortion provider has no opportunity to appeal the suspension of its ASF license either pre- or post- deprivation.

This Court preliminarily enjoined the Automatic Suspension Provision on October 13, 2015, holding that Plaintiff PPSWO had established a likelihood of success on the merits of its claim that the Provision constituted an unconstitutional deprivation of its Fourteenth Amendment right to due process. Op. & Order at 17, (Oct. 13, 2015), ECF No. 28 ("ASP PI Op.").

STATEMENT OF UNDISPUTED FACTS

I. PLAINTIFFS AND THEIR PRACTICES

Plaintiff Planned Parenthood Southwest Ohio ("PPSWO") is a non-profit corporation organized under the laws of the State of Ohio. Decl. Jerry H. Lawson Supp. Pls' Mot. Prelim. Inj. ¶ 3, ECF No. 3-1 ("Lawson Decl."). PPSWO provides a broad range of medical services at seven health centers in Southwest Ohio. *Id.* ¶¶ 3-4. PPSWO operates an ASF in Cincinnati, Ohio, where it provides procedural and medication abortion up to the current legal limit, which is approximately six weeks in pregnancy. *See Preterm-Cleveland v. Yost*, No: 1:19-cv-00360 (S.D. Ohio July 7, 2022) (order granting motion to dismiss). In the past, PPSWO provided abortions

through 21 weeks and 6 days of pregnancy as dated from the first day of the patient's last menstrual period ("LMP") and provided approximately 3,000 abortions a year. Lawson Decl. ¶ 5.

Plaintiff Women's Medical Group Professional Corporation ("WMGPC") owns and operates the ASF currently known as Women's Med Dayton in Kettering, Ohio. Second Decl. W.M. Martin Haskell, M.D., Supp. Pls.' Mot. TRO & Prelim. Inj. ¶ 1, ECF No. 137-3 ("Second Haskell Decl."). It formerly operated under the name Women's Med Center of Dayton ("WMCD"). Decl. W.M. Martin Haskell, M.D., Supp. Pls.' Mot. Prelim. Inj. ¶ 7, ECF No. 3-2 ("Haskell Decl."). WMGPC and its predecessors have been providing abortions in the Dayton area since 1973. *Id.* ¶ 3. WMGPC provides a range of reproductive health care, including abortion up to the current legal limit, which is approximately six weeks in pregnancy. *See Preterm-Cleveland v. Yost*, No: 1:19-cv-00360 (S.D. Ohio July 7, 2022) (order granting motion to dismiss). In the past, WMGPC provided approximately 2,800 abortions per year through 21 weeks 6 days of pregnancy LMP. Second Haskell Decl. ¶ 6. Until 2017, WMGPC also operated a clinic in Sharonville, Ohio, called Lebanon Road Surgery Center ("LRSC"). *Id.* ¶ 7. Because it had no WTA and could not obtain a variance, that clinic ceased providing procedural abortions in 2014 and closed completely three years later. Haskell Decl. ¶ 31; Second Haskell Decl. ¶¶ 7, 31-33.

A. Plaintiffs' Variance Applications and ODH's Responses

According to the Ohio Revised Code, to obtain a variance from the WTA requirement, a clinic must have, among other things, a written agreement with at least one backup doctor who has admitting privileges at a local hospital and who can provide "[d]ocumented verification that each hospital at which the physician has admitting privileges has been informed in writing by the

physician that the physician is a consulting physician for the [ASF] and has agreed to provide back-up coverage." Ohio Rev. Code Ann. § 3702.304. ODH has expanded the scope of the current statutes and regulations governing licensing by adding requirements that abortion clinics seeking a variance have at least four backup doctors, all of whom must be obstetrician/gynecologists ("OBGYNs") and have voting privileges at their hospital—requirements that ODH announced only upon denying variance applications and without prior notice to the ASFs. Compl. ¶ 109; Answer ¶ 109.

B. Plaintiff PPSWO's Licensing History

Since being informed by ODH that its provision of abortion services qualified it as an ASF, PPSWO has operated with an ASF license and has sought to comply with the WTA Requirement. Lawson Decl. ¶ 7. Initially, PPSWO maintained a WTA with University of Cincinnati Medical Center ("UCMC"). *Id.* ¶ 8. In 2013, UCMC terminated its WTA with PPSWO as required by the Public Hospital Ban. *Id.* ¶¶ 9-10. Prior to the expiration of the WTA with UCMC and pursuant to HB 59, PPSWO applied for a WTA variance. *Id.* at 12. The application included contracts with several backup physicians with admitting privileges at a local hospital who agreed to provide care to PPSWO's patients, as well as a patient hospital transfer policy to assure ODH that PPSWO provides continuous care to any patient who requires transfer to a hospital. *Id.* ¶¶ 12-13. Though PPSWO's variance application had been pending with ODH, on October 14, 2014, ODH informed PPSWO that it did not comply with the ASF licensing requirements because it lacked a WTA in a letter that threatened to revoke PPSWO's license. *Id.* ¶¶ 16-17. Because of ODH's threatened revocation of PPSWO's ASF license and PPSWO's exposure to substantial civil penalties, PPSWO filed litigation in this Court seeking to enjoin ODH from taking actions to revoke its ASF license. Compl. for Decl. & Inj. Relief, *Planned*

Parenthood Southwest Ohio Region v. Hodges, No. 1:14-cv-867 (S.D. Ohio Nov. 10, 2014) ("*Hodges I*"), ECF No. 1. ODH subsequently granted PPSWO's variance request on November 20, 2014, through May 31, 2015, and the litigation was dismissed without prejudice. Compl. ¶ 74; Answer ¶ 74; Notice of Voluntary Dismissal Without Prejudice, *Hodges I*, ECF No. 13.

On September 25, 2015, after this litigation was filed and a mere four days before the Automatic Suspension Provision was set to go into effect, Defendant Hodges denied PPSWO's 2015 variance request and proposed to revoke and not renew PPSWO's ASF license. Second Decl. Jerry H. Lawson Supp. Pls.' Mot. Prelim. Inj. ¶ 3, ECF No. 24-1 ("Second Lawson Decl."). The variance denial states that "PPSWO's provision of only three named backup physicians does not meet [the ODH Director's] expectation that a variance provide the same level of patient health and safety that a written transfer agreement with a local hospital assures for 24/7 backup coverage." Second Lawson Decl. Ex. B. The denial further notes that the prior variance that ODH granted to PPSWO was based on "backup agreements with four named physicians." *Id.* As a result, Defendant Hodges' denial of the variance appeared to require PPSWO to add a fourth backup doctor to its variance request. ODH had never before informed PPSWO that four backup doctors were required, Second Lawson Decl. ¶ 5, and this requirement is found nowhere in the relevant statutes or regulations.

Indeed, PPSWO had previously been granted a WTA variance from ODH with only three backup doctors. After the Public Hospital Ban in HB 59 caused UCMC to terminate its WTA with PPSWO, PPSWO requested a variance for 2013 and named three backup doctors in its application. Second Lawson Decl. ¶ 5. ODH granted it. In 2014, PPSWO added a fourth backup doctor to its variance request, but when one of the four doctors resigned, PPSWO immediately notified ODH of the resignation, and ODH never objected to that change. *Id.*

On September 28, 2015, PPSWO submitted a new variance request to ODH adding a fourth backup doctor. *Id.* ¶¶ 6-7. On September 29, 2015, HB 64 became effective, *Id.* ¶ 8, but because of this Court's Temporary Restraining Order and subsequent Preliminary Injunction, the Automatic Suspension Provision is currently enjoined. ECF Nos. 25, 28. ODH granted PPSWO's variance request listing four backup physicians on November 27, 2015. Compl. ¶ 85; Answer ¶ 85. PPSWO continued to submit timely variance requests in compliance with Ohio law. Compl. ¶ 86; Answer ¶ 86. From March 25, 2020, through July 1, 2021, ODH suspended all licensing action, including removals and revocations of ASF licenses, due to the COVID-19 health emergency. Compl. ¶ 89; Answer ¶ 89. On August 30, 2021, ODH granted PPSWO's variance request. Letter from Def. Vanderhoff to Pl. PPSWO (Aug. 30, 2021), attached as exhibit No. 1.

On December 22, 2021, the Ohio legislature passed SB 157, which was set to take effect on March 23, 2022. Ohio Rev. Code Ann. § 3702.305. SB 157 prohibits physicians who are employed by or compensated pursuant to a contract with, and provide instruction or consultation to, a medical school associated with a state university or college and those who teach or provide instruction, directly or indirectly, at a medical school affiliated with a state university or college from serving as backup physicians in support of a variance. On February 23, 2022, ODH sent a letter to PPSWO requesting that it demonstrate compliance with SB 157, even though the statute's effective date was March 23, 2022, and the statute granted ASFs an additional 90 days—until June 21, 2022—to demonstrate compliance to ODH. Letter from James Hodge to Pl. PPSWO (Feb. 23, 2022), attached as exhibit No. 2. The premature enforcement and the additional arbitrary and irrational requirements of SB 157 are the subject of ongoing litigation in Ohio state court and are not the subject of this federal litigation. The state court enjoined enforcement of SB 157, allowing Plaintiffs to continue providing procedural abortion. *Women's*

Med. Group Prof'l Corp v. Vanderhoff, No. A 2200704 (Hamilton Ct. Com. Pl. June 17, 2022) (entry granting preliminary injunction), attached as exhibit No. 3.

C. Plaintiff WMGPC's Licensing History

In 2008, ODH determined that WMGPC's relationship with two backup physicians who had admitting privileges at a local hospital satisfied the WTA Requirement "in an alternative manner," and granted a WTA variance to WMGPC. Second Haskell Decl. ¶ 24. Since ODH started requiring the filing of variance applications on an annual basis, in 2011, WMGPC has diligently applied for variances each year. WMGPC continued to operate while its annual applications remained pending. *Id.* ¶¶ 24, 28. On June 24, 2015, ODH denied WMGPC's 2012, 2013, and 2014 variance applications. Letter from Richard Hodges to Pl. WMGPC (June 25, 2015), attached as exhibit No. 4.

On September 25, 2015, after this litigation was filed—a mere four days before the Automatic Suspension Provision was scheduled to go into effect—ODH denied WMGPC's 2015 variance application submitted on July 24, 2015, on the basis that although WMGPC listed three backup doctors on its application, ODH now required four. *Id.* ¶ 37. From September 2015 to October of 2019, WMGPC was able to stay open and continue providing services while it sought administrative review of ODH's denial of its 2015 variance application. *Id.* ¶ 40. WMGPC was not able to successfully reapply for a variance until 2019 because, until then, it had been unable to find a fourth backup doctor to list on the variance application. *Id.* ¶¶ 41-42.

On September 23, 2019, sixty days after WMGPC filed a variance request listing four backup doctors as part of its license renewal application, ODH rejected the renewal application and declined to rule on the variance request. Fourth Decl. W.M. Martin Haskell, M.D., Supp. Pls.' Mot. TRO & Prelim. Inj. ¶ 7, ECF No. 140-3 ("Fourth Haskell Decl."). ODH

deemed the application "no longer relevant" because the original license revocation had been upheld by the Ohio Supreme Court. *Id.* ¶ 8. In the same letter, ODH informed WMGPC it would "promptly" rule on WMGPC's new license application and variance request that had been filed on August 27, 2019. *Id.* On October 25, 2019, exactly sixty days after it was filed, ODH approved the variance request that was part of the new license application but did not issue a new license to WMGPC. *Id.* ¶ 12. On October 29, 2019, the Ohio Supreme Court denied WMGPC's motion for reconsideration, thus finalizing the revocation of WMGPC's license. Fifth Decl. W.M. Martin Haskell, M.D., Supp. Pls.' Mot. TRO & Prelim. Inj. ¶ 2, ECF No. 143 ("Fifth Haskell Decl.").

Having lost the license under which it had been providing safe abortion care, and unable to obtain a new license despite meeting every requirement (including ODH's four-backup-physician rule), WMGPC was forced to abruptly stop providing procedural abortion services on October 29, 2019. *Id.* ¶ 3. ODH did not issue a new license until November 12, 2019, Compl. ¶ 106, Answer ¶ 106, though ODH was aware the license WMGPC had been operating under had been revoked and that WMGPC's application, including a variance that had been granted days earlier, was pending. Fifth Haskell Decl. ¶¶ 2-8. As a result, WMGPC was unable to provide any patients with procedural abortion care for two weeks. Compl. ¶¶ 104-106.

From March 25, 2020, through July 1, 2021, ODH suspended all licensing action, including renewals and revocations, due to the COVID-19 health emergency. WMGPC is currently operating under the license issued in 2019. Compl. ¶ 107; Answer ¶ 107.

On September 14, 2020, WMGPC submitted its annual license renewal application for 2021 that included four backup doctors listed on the variance request. Compl. ¶ 108; Answer ¶ 108. Even though the variance request included four backup doctors who each had admitting

privileges at a local hospital and met all of the Statutory Variance Requirements, ODH denied WMGPC's variance request on August 30, 2021. Compl. ¶ 109; Answer ¶ 109. In the letter explaining the denial, ODH claimed that two of the four listed backup doctors were not qualified. Letter from Def. to Pl. WMGPC (Aug. 30, 2021), attached as exhibit No. 5. According to ODH, one was disqualified (even though she had previously been accepted as a backup doctor), because she was a general surgeon rather than an OBGYN. *Id.* The other physician was disqualified because he lacked hospital staff voting rights. *Id.*

On September 13, 2021, WMGPC submitted a new variance request and a simultaneous request that ODH reconsider the August 30 variance denial, Compl. ¶ 113; Answer ¶ 113, explaining (1) that the non-OBGYN was a general surgeon who is well-qualified to treat WMGPC's patients, and OBGYN specialization was neither medically necessary nor legally required; and (2) staff voting rights have nothing to do with a doctor's qualifications or ability to admit or treat patients at the hospital where they have admitting privileges. Pl. WMGPC Request for Variance to the Hosp. Transfer Agreement Requirement (Sep. 13, 2021), attached as exhibit No. 6. WMGPC further informed ODH that the doctor who lacked voting rights had acquired them in August 2021. *Id.* ODH notified WMGPC that it would not reconsider its decision on the variance and denied the renewed variance request WMGPC submitted on September 13, 2021. Compl. ¶ 114; Answer ¶ 114. While the Director agreed that his objection based on one backup doctor's lack of voting rights was no longer an issue, ODH continued to maintain that the previously accepted general surgeon was not an acceptable backup doctor. *Id.*

WMGPC requested a hearing on the proposed license revocation decision on September 20, 2021. Compl. ¶ 117; Answer ¶ 117. On November 30, 2021, WMGPC submitted a new variance request to ODH. Compl. ¶ 116; Answer ¶ 116. The latest variance request lists four

backup doctors, all of whom are OBGYNs with voting rights at the hospitals at which they have admitting privileges. Pl. WMGPC Request for Variance to the Hosp. Transfer Agreement Requirement (Nov. 30, 2021), attached as exhibit No. 7.

In support of its November 2021 license application, WMGPC submitted a variance request to ODH on November 30, 2021, that met all of ODH's requirements. *Id.* On January 28, 2022, WMGPC received a letter from ODH denying the November 30, 2021, variance application, citing noncompliance with SB 157. Letter from D. Vanderhoff to Pl. WMGPC (Jan. 28, 2022), attached as exhibit No. 8. WMGPC continues to provide procedural abortions because SB 157 was preliminarily enjoined by the Hamilton County Court of Common Pleas. *Women's Med. Group Prof'l Corp v. Vanderhoff*, exhibit No. 2.

D. Abortion Safety

Abortion is very safe and is much safer than giving birth. Second Haskell Decl. ¶ 12; Lawson Decl. ¶ 6; Decl. Paula J. Hillard, M.D. ¶¶ 10, 15, ECF No. 137-5 ("Hillard Decl."). Because abortion is so safe, the vast majority of abortions, including the abortions provided by Plaintiffs, are provided in an outpatient setting. Hillard Decl. ¶ 17; Second Haskell Decl. ¶ 12; Lawson Decl. ¶ 6. Complications rarely occur, and complications requiring hospital-based care are even more unlikely to occur. Hillard Dec. ¶¶ 13-14, 18-19; Second Haskell Decl. ¶¶ 12-13. Plaintiffs' policies and procedures ensure that a patient will receive the best available care as quickly as possible. Haskell Decl. ¶ 13; Second Haskell Decl. ¶ 16; Hillard Decl. ¶¶ 24-28. Furthermore, in the event a complication requiring hospital care does occur, the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(b), requires hospitals to stabilize all emergency patients, establishing a pre-existing legal duty for the hospital to treat

patients suffering from an abortion-related complication unless transfer to another facility is indicated.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *France v. Lucas*, 836 F.3d 612, 624 (6th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). While the court must view the relevant facts and inferences in the light most favorable to the nonmoving party, *see Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 346 (6th Cir. 2012), "the mere existence of *some* alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

II. THE CHALLENGED LICENSING REQUIREMENTS ARE UNCONSTITUTIONAL AS A MATTER OF LAW UNDER THE RIGHT TO DUE PROCESS

The undisputed evidence shows that the WTA Requirement, the Public Hospital Ban, and the Automatic Suspension Provision violate Plaintiffs' due process rights under the Fourteenth Amendment of the United States Constitution as a matter of law. Plaintiffs have constitutionally protected property and liberty interests in the continued operation of their facilities and the continued possession of their licenses. The Automatic Suspension Provision, by allowing ODH to immediately suspend an ASF's business operations upon the denial of, or ODH's inaction on, a variance application deprives Plaintiffs of their protected interests without pre-deprivation or post-deprivation review. Plaintiffs' due process rights have been further infringed upon by

ODH's practice of announcing new and arbitrary WTA variance requirements after Plaintiffs have submitted their applications. With no opportunity to comply, Plaintiffs are deprived of their liberty and property rights without fair notice and without constitutionally sufficient process. Additionally, in conjunction with the Public Hospital Ban, the WTA Requirement impermissibly delegates unreviewable and standardless authority to private parties over Plaintiffs' licenses and continued operation.

A. The Automatic Suspension Provision Violates Procedural Due Process.

To establish a procedural due process claim, a plaintiff must show "(1) that it had a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment; (2) that it was deprived of that protected interest within the meaning of the due process clause; and (3) that the state did not afford it adequate procedural rights before depriving it of its protected interest." *Wedgewood Ltd. P'ship I v. Twp. of Liberty*, 610 F.3d 340, 349 (6th Cir. 2010); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). The undisputed facts show that Plaintiffs meet all three of these of these elements and that the Automatic Suspension Provision clearly violates Plaintiffs' procedural due process rights.

First, as this Court recognized when granting Plaintiff PPSWO's motion for a preliminary injunction, the procedural due process analysis in this case is nearly identical to that in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). There, the Sixth Circuit held that ODH violated Plaintiff WMGPC's right to procedural due process by abruptly denying its ASF license, forcing the clinic to shut down immediately without an opportunity for pre-deprivation review. *Baird*, 438 F.3d at 613. The Supreme Court has made clear that "the root requirement" of the Due Process Clause is that generally "an individual [must] be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland*

Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (internal quotation marks omitted). Following this clear precedent, the Sixth Circuit held that "[t]he case law contemplates at a minimum some chance to react to proposed governmental action before deprivation occurs." *Baird*, 438 F.3d at 614 (citing *Loudermill*, 470 U.S. at 547). ODH provided no such opportunity, and its actions were held unconstitutional. *Id.* at 613.

As this Court has already held, the same is true here. ASP PI Op. 9-12. This is a purely legal matter—the Automatic Suspension Provision permits ODH to suspend Plaintiffs' licenses automatically and shut down their ASFs immediately without providing the opportunity for any pre-deprivation, or even post-deprivation, hearing. *Id.* at 5-6, 9. Under Sixth Circuit and Supreme Court precedent, the Automatic Suspension Provision cannot withstand constitutional scrutiny.

Indeed, as both this Court and the Sixth Circuit have agreed, the precedents of the United States Supreme Court, Sixth Circuit, and Ohio Supreme Court all recognize that Plaintiffs maintain a protected property interest in both the continued operation of their ASFs and the continued possession of their licenses. *See Baird*, 438 F.3d at 611-612 ("Due process protects an interest in the continued operation of an existing business," and Dr. Haskell and WMGPC "have a protected property interest in the continued operation of the Dayton clinic."); ASP PI Op. 7-8 (PPSWO's "property interest plainly exists in the continued operation of its ASF" and "PPSWO also has a protected property interest in its ASF license because PPSWO previously has obtained and currently has a valid license for operation pursuant to Ohio Rev. Code Ann. § 3702.304 and will be unable to operate its business without it under the new Ohio statutory scheme." (citing, *inter alia*, *Bell v. Burson*, 402 U.S. 535, 539 (1971)). *See also Johnson v. Morales*, 946 F.3d 911, 921, 937 (6th Cir. 2020) (relying on Supreme Court precedent that "has long recognized that an individual may have a significant interest in maintaining a license," and the "Court has

repeatedly recognized the severity of depriving someone of his or her livelihood.") (internal quotation marks omitted); *Brookpark Entm't, Inc. v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991); *Hillside Prods., Inc. v. Duchane*, 249 F. Supp. 2d 880, 897 (E.D. Mich. 2003) (collecting cases); *State v. Hochhausler*, 668 N.E.2d 457, 463 (Ohio 1996).

It is well established, even outside of the abortion and ASF contexts, that the suspension of a license infringes on the license-holder's protected property interests. *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 10 n.7 (1979) ("the Due Process Clause applies to a state's suspension or revocation of a driver's license"); *Burson*, 402 U.S. at 539 ("Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees."); *Morales*, 946 F.3d at 923 ("In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."); *O'Daniel v. Ohio State Racing Comm'n*, 307 N.E.2d 529, 533 (Ohio 1974) (finding that suspension of a horse trainer's license deprives the licensee of a protected property interest).

Applying the second prong of the due process analysis, the automatic suspension of Plaintiffs' ASF licenses and the forced closure of their ASFs serve to deprive Plaintiffs of these protected interests under the Due Process Clause. *See* ASP PI Op. 8. Again, *Baird* is instructive here. In that case, ODH issued a cease-and-desist order requiring WMGPC to shut down immediately after denying WMGPC's license. The Sixth Circuit held that this order deprived Dr. Haskell of his protected interests in operating his business. *Baird*, 438 F.3d at 612. Like ODH's activity in *Baird*, the Automatic Suspension Provision will also force Plaintiffs to immediately close their ASFs upon the denial of their variance applications. This immediate action is required whether ODH denies these applications explicitly or by inaction in the form of failing to act upon these applications within 60 days. Once an ASF's license is suspended, an

ASF must cease operations immediately. Ohio Rev. Code Ann. § 3702.30(E)(1); Ohio Admin. Code 3701-83-03(A). The Automatic Suspension Provision thus empowers ODH to immediately deprive Plaintiffs of their protected interests based on an arbitrary variance denial or even simply a failure to act. Finally, as this Court recognized, the automatic suspension of Plaintiffs' ASF licenses and subsequent forced closures of Plaintiffs' ASFs do not afford Plaintiffs adequate pre-deprivation process. ASP PI Op. 9-11.[3]

Third and finally, the Due Process Clause requires an opportunity for a hearing "before the individual is deprived of any significant property interest." *Loudermill*, 470 U.S. at 542. These pre-deprivation hearings require more than the opportunity to be heard; they must provide an opportunity to *respond* to the specific basis for the proposed action that will result in the deprivation of the protected interests. *Id.* at 542-46. *See also Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 789, 800 (6th Cir. 2018) (clarifying that notice of the factual basis for deprivation and opportunity to rebut those assertions constitute the minimum level of process required for any property interest).

Baird also noted this requirement and the lack of a pre-deprivation hearing here. Plaintiffs' opportunity to present variance applications to the ODH Director cannot "be appropriately characterized as an opportunity to be heard and respond" because "the case law contemplates as a minimum some chance to react to the proposed governmental action before deprivation occurs." *Baird*, 438 F.3d at 614; *see* ASP PI Op. 9; *Johnson v. City of Saginaw*, 980

[3] If Plaintiffs were to continue operating and providing procedural abortion services at their ASFs without a license, ODH could take action against them, including imposing civil penalties between $1,000 and $250,000 and/or imposing daily civil penalties between $1,000 and $10,000 for each day that the ASF operates. Ohio Admin. Code 3701-83-05.1(A); Ohio Rev. Code Ann. § 3702.32 (A); *see Baird*, 438 F.3d at 613 (noting that ODH threatened to "impose a civil penalty for operating without a license as well as additional penalties for each day that the clinic continued operating" if the clinic did not immediately shut down). Plaintiffs would have no choice but to cease operations immediately.

F.3d 497, 510-11 (6th Cir. 2020) (finding a violation of procedural due process where the City ceased providing water service prior to a deprivation hearing).

The variance process provides no opportunity to respond to Defendants' decision, which automatically triggers the suspension of Plaintiffs' licenses based on the ODH Director's unreviewable decision on the variance application, which—as noted below—is often based on standards for which Plaintiffs have no prior notice. The Automatic Suspension Provision, and the challenged scheme as a whole, provide Plaintiffs with no opportunity to respond prior to the deprivation of the interests.[4] For these reasons, as this Court has previously held, the Automatic Suspension Provision violates Plaintiffs' procedural due process rights as a matter of law. No facts have been developed to change this Court's prior finding.

B. ODH's Arbitrary Enforcement Actions Violate Procedural Due Process by Depriving Plaintiffs of Their Property Interests Without Fair Notice.

As discussed at *supra* Section II.A, to establish a procedural due process claim, a plaintiff must show that it has a protected interest, has been deprived of that interest, and the State's procedures in depriving it of its interest do not comport with due process. *Wedgewood Ltd.*

[4] Any argument that Defendants can meet constitutional requirements with a post-deprivation hearing is foreclosed as a matter of law. Notice and a pre-deprivation hearing are required except for those "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 53 (1993) (internal quotation marks omitted); *see also Morales*, 946 F.3d at 921 ("the failure to provide a pre-deprivation hearing does not violate due process in situations where a government official reasonably believed that immediate action was necessary to eliminate an emergency situation and the government provided adequate post-deprivation process." (quoting *United Pet Supply, Inc. v. City of Chattanooga*, 768 F.3d 464, 486 (6th Cir. 2014))); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988) (denial of pre-deprivation hearing warranted in only "limited cases demanding prompt action" where the government offers "substantial assurance that the deprivation is not baseless or unwarranted" and where a post-deprivation hearing is available). Here, just as in *Baird*, Plaintiffs' "interest in continuing to operate [their] business[es] is strong," and ODH can fully anticipate the property deprivation and need for pre-deprivation hearing. *Baird*, 438 F.3d at 614. In requiring pre-deprivation process under the same requirement challenged here, *Baird* forecloses an argument that the Automatic Suspension Provision is justified in denying pre-deprivation hearing because of any health and safety justification. *See also* PI ASP Op. 15 (in evaluating the justification for the Automatic Suspension Provision, "the connection to health and safety is tenuous."). And in any event, as explained above, *supra* Section II.A, no substantive post-deprivation review is afforded to Plaintiffs after the denial of their variance applications, either.

P'ship I, 610 F.3d at 349; *Sullivan*, 526 U.S. at 59. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Providing no opportunity to comply with new requirements deprives Plaintiffs of fair notice and constitutes a procedural due process violation. *See 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."). ODH has repeatedly denied Plaintiffs' variance applications for Plaintiffs' failure to meet arbitrary requirements invented by ODH only *after* the submission of their respective applications, providing Plaintiffs no meaningful opportunity to comply. By continually moving the goal posts, repeatedly denying variances based on newly minted requirements not contained in any statute or regulation, ODH deprives Plaintiffs of fair notice of what is required to obtain a variance. The undisputed facts show that Plaintiffs meet all three elements of a procedural due process claim and that the ODH's ongoing practice of arbitrary enforcement of the WTA Requirement, and specifically of the variance application process, violates Plaintiffs' procedural due process rights.

As previously established, there is no question that Plaintiffs have protected property interests in both the continued operation of their ASFs and the continued possession of a license. *See supra* Section II.A. By repeatedly imposing new, arbitrary requirements for variance applications only after Plaintiffs have submitted their applications, ODH strips Plaintiffs of any meaningful ability to comply with the WTA Requirement under the threat of automatic license suspension. The inability of Plaintiffs to continue operating their ASFs and providing procedural

abortion care clearly constitutes a deprivation of Plaintiff's protected property and liberty interests. *Id.*

Finally, by continually inventing new deficiencies in Plaintiffs' applications, including by rejecting back-up physicians previously deemed acceptable, changing the number of required back-up physicians, and basing denials on the requirements of a law not yet in effect, Defendant seeks to eviscerate Plaintiffs' protected interests without any pre-deprivation procedural protections. Defendant can point to no justification for such severe and unreasonable actions. Although "due process is flexible and calls for such procedural protections as the particular situation demands," *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), providing *no* opportunity for a party to learn of and ensure compliance with new requirements before depriving that party of its protected interests is a constitutional violation. *See Campbell*, 212 F. Supp. 2d at 1343; *Van Hollen*, 738 F.3d at 789; *United States v. Dumas*, 94 F.3d 286, 291 & n.3 (7th Cir. 1996). ODH's erratic and arbitrary process imposes new requirements on Plaintiffs with no corresponding opportunity to comply, depriving Plaintiffs of protected interests not simply with inadequate process but with *no* process, and no notice, whatsoever. *Hallmark Clinic*, *v. N.C. Dep't of Hum. Res.*, 380 F. Supp. 1153, 1158 (E.D.N.C. 1974) ("due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim").

Courts have not hesitated to find a due process violation under these circumstances. *See* Tr. of TRO Hr'g at 40:16-19, *Hodes & Nauser, MD's, P.A. v. Moser*, No. 11-2365-CM (D. Kan. July 1, 2011), attached hereto as exhibit No. 9 (granting preliminary injunction against enforcement of facility licensing requirements and stating that "[t]he right to pursue a lawful business has long been recognized as a property right within the protection of the Fourteenth Amendment."); *Baird*, 438 F.3d at 611-13 (holding that immediate shut-down of abortion

provider's practice violated procedural due process, notwithstanding the availability of post-deprivation remedies); *cf. Planned Parenthood of Kan. & Mid-Mo. Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 WL 2669089 (W.D. Mo. Sept. 6, 2007) (issuing temporary restraining order to ensure adequate time for plaintiffs to work out compliance issues with defendants). ODH's systematic and arbitrary changes to the WTA Requirements violate Plaintiffs' procedural due process rights and cannot stand.

C. The WTA Requirement and Public Hospital Ban Unconstitutionally Delegate Licensing Authority to Private Parties.

Plaintiffs' due process rights are further violated by the State's delegation of authority over the clinics' professional licenses to private actors through the WTA Statute and Public Hospital Ban. A long line of precedent holds that delegating arbitrary and unreviewable authority and discretion to determine protected liberty and property interests—discretion that the State itself cannot exercise—to private parties violates due process. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121-22 (1928); *Eubank v. Richmond*, 226 U.S. 137, 143-45 (1912); *Rice v. Vill. of Johnstown*, 30 F.4th 584, 590-91 (6th Cir. 2022) (explaining that the private nondelegation doctrine remains vital and applies when there is a deprivation of "life, liberty, or property," a delegation of governmental authority to third parties, "little or no guidance" given to the delegee, and where there is reason for "particular concern about the delegee's self-interest."); *id.* (collecting cases).

Plaintiffs' property rights in their respective licenses are being determined by private hospitals and physicians who have unreviewable institutional and individual discretion to either enter into agreements with the clinic (thus making Plaintiffs eligible for a license) or not (thus making it impossible for Plaintiffs to secure a license). Richey Dep. 204:24-205:7. Because of the Public Hospital Ban, Plaintiffs are categorically prevented from entering into agreements

with public hospitals in Ohio. Therefore, to remain in compliance with the Public Hospital Ban and satisfy the WTA requirement, Plaintiffs may only obtain or retain their licenses by entering agreements with private physicians and/or a private hospital. Defendant has previously conceded that "there is no . . . evidence" of any conditions or standards that Ohio hospitals have adopted to determine whether they will enter into a WTA. Def.'s Resp. Opp'n to Pl.'s Mot. for TRO &/or Prelim. Inj. 24-25, ECF No. 139. Indeed, this court has characterized hospitals as having "unfettered power to decide whether or not to enter into an agreement." Op. & Order 8, ECF No. 57; *see also id.* ("Ohio has no power over hospitals to direct them as to how to respond to requests for written transfer agreements . . . ." (quoting *Baird*, 438 F.3d at 609)). Moreover, the only way to get a variance from the WTA Statute is to defer to a different private actor, a backup physician, whose decision is also constrained by no standards under Ohio law, except for statutes that limit the pool of doctors who can serve in that role. *See* Ohio Rev. Code Ann. § 3727.60(B)(2) (limiting doctors with admitting privileges at a public hospital from serving as a backup physician for an abortion clinic); Ohio Rev. Code Ann. § 3702.305 (limiting physicians who provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college).

In effect, these laws work in tandem to ensure that Plaintiffs' eligibility for licenses is exclusively dependent upon private actors. At the same time, Ohio law provides no standards to guide or restrict the exercise of discretion by the hospitals or physicians considering whether to enter into agreements with clinics providing procedural abortion. Thus, the WTA Requirement and Public Hospital Ban delegate unreviewable authority and discretion over Plaintiffs' protected liberty and property interests—discretion that the State itself cannot exercise. In light of the

undisputed facts, this is plainly an unconstitutional delegation of government power, and this scheme violates nondelegation doctrine as a matter of law.

Federal circuit courts have affirmed lower courts' proper application of the nondelegation precedent to invalidate similar state laws that effectively gave private hospitals a veto over who may provide abortions. *Birth Control Ctrs., Inc. v. Reizen*, 508 F. Supp. 1366, 1375 (E.D. Mich. 1981) (holding that "[t]he power to prohibit licensure may not constitutionally be placed in the hands of hospitals"), *aff'd in part, vacated in part on other grounds*, 743 F.2d 352 (6th Cir. 1984); *Hallmark Clinic*, 380 F. Supp. at 1158-59 (holding that North Carolina could not confer on hospitals "the arbitrary power to veto the performance of abortions" by withholding transfer agreements or denying staff privileges), *aff'd,* 519 F.2d 1315 (4th Cir. 1975); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 996-97 (2015) (holding that the state cannot impose an admitting privileges requirement "through third parties, at least in the admitted absence of a waiver or some other mechanism to ensure due process"). Consistent with nondelegation principles, courts have held that delegating a veto function to a private party without any legitimate standards to guide their decisions, or a waiver, or other due process mechanism, constituted an unlawful delegation to a private party. *See Reizen*, 508 F. Supp. at 1374-75; *Van Hollen*, 94 F. Supp. 3d at 996-97; *Hallmark Clinic*, 380 F. Supp. at 1158-59. The fact that this standardless delegation "applies to all [ASFs], rather than only to abortion clinics does not change the result." *Reizen*, 508 F. Supp. at 1374-75.

By eliminating the possibility of a waiver, leaving only the variance provision in place, HB 59 rendered *Baird*'s analysis inapt here. Under current law, the discretion over Plaintiffs' licenses lies with private hospitals or private physicians, not ODH. The *Baird* decision hinged on the fact that ODH "make[s] the final decision about whether ASFs obtain a license." 438 F.3d at

610. This is no longer the case. HB 59 sets out a number of specific requirements for obtaining a variance. This includes a requirement—which did not appear in the regulation that existed at the time of *Baird*—that a clinic have a relationship with "one or more consulting physicians who have admitting privileges at a minimum of one local hospital[.]" *See* Ohio Rev. Code Ann. § 3702.304. Thus, while the Director retains arbitrary discretion to *deny* a variance (even if the variance application meets all the statutory requirements), the Director's discretion can only apply to a variance where there is at least one backup physician agreement.

Furthermore, hospitals retain a large amount of power in determining whether a clinic will be able to obtain an agreement with a backup physician. Under the statute, an application for a variance must include, among other things, "[a] letter, contract, or memorandum of understanding signed by the facility and one or more consulting physicians who have admitting privileges at a minimum of one local hospital, memorializing the physician or physicians' agreement to provide back-up coverage when medical care beyond the level the facility can provide is necessary[.]" *Id.* § 3702.304(B)(2). Each backup agreement must include "[d]ocumented verification that each hospital at which the physician has admitting privileges has been informed in writing by the physician that the physician is a consulting physician for the [ASF] and has agreed to provide back-up coverage for the facility when medical care beyond the care the facility can provide is necessary." *Id.* § 3702.304(B)(3)(e). This verification requirement, in effect, enables hospitals to exercise their authority over physicians and prevent them from serving as backup doctors. Additionally, Ohio law prohibits physicians with admitting privileges at public hospitals from entering into backup agreements with abortion clinics. *See id.* § 3727.60. In effect, the law requires hospital approval for an individual to serve as a backup

doctor; without such approval, the ODH Director lacks authority to approve a variance application.

Thus, not only does the hospital hold veto power over whether a clinic can meet the WTA Requirement, it also holds veto power over whether a clinic will be able to obtain a variance. Through the WTA Requirement and Public Hospital Ban, the State has thus delegated final, unreviewable, and unfettered authority to private parties to determine whether an abortion provider is entitled to an ASF license. Such an unlawful delegation violates the Plaintiffs' due process rights, and summary judgment is warranted.

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment as to: Count I (Due Process Nondelegation – WTA Requirement); Count II (Procedural Due Process – Automatic Suspension Provision); and Count III (Procedural Due Process – Fair Notice).

Respectfully submitted,

/s/ B. Jessie Hill

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail and email upon all parties for whom counsel has not entered an appearance electronically.

/s/ B. Jessie Hill

Attorney for Plaintiffs

Exhibit 1

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

August 30, 2021

Via e-mail and Regular U.S. Mail
Lisa Pierce Reisz
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216-1008

Re: Planned Parenthood of Southwest Ohio
Variance Request Submitted on July 1, 2021

Dear Ms. Reisz:

Pursuant to RC. 3702.304 and O.A.C. 3701-83-14, and after careful review and consideration I am granting the variance request of Planned Parenthood of Southwest Ohio (PPSWO) submitted on July 1, 2021 for the 2021 license period. This variance is an alternative to the requirement for a written transfer agreement as set forth in R.C. 3702.303 and O.A.C. 3701-83-19. The variance is being granted based on the information submitted, including PPSWO's Hospital Transfer Policy, and on the identified back-up physicians. The physicians listed in the variance application are: Amanda Jackson, MD, Marcia Bowling, MD, Caroline Billingsley, MD, and Israel Washington, MD.

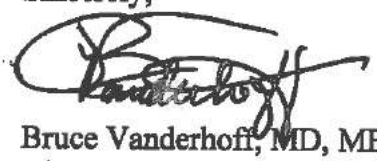
It is my expectation that PPSWO will comply with the requirements of R.C. 3702.307 and will notify the department within 48 hours of any proposed modification to the variance protocol or the information contained in the variance application described in RC. 3702.304(B). This information includes, but is not limited to, changes to the back-up physician(s) listed. PPSWO must also notify me within one week after becoming aware of any event that may affect a back-up physician's ability to practice medicine, including discipline by the state medical board, ability to admit patients to the hospital identified in PPSWO's variance application, or any court judgments that affect a back-up physician's ability to practice medicine or provide back-up services. Further, as a condition of this variance, if PPSWO proposes any modifications to the approved variance during the licensure period, PPSWO must obtain written approval from the department prior to making any unilateral changes. In addition, PPSWO shall comply with its Hospital Transfer Policy.

This variance shall expire at the end of the facility's next renewal period. However, you should be aware of the changes to the variance requirements included in HB 110 that could affect the

expiration date.

If you have any questions regarding this variance, please contact Lisa Eschbacher, General Counsel, at 614-466-4882 or by email Lisa.Eschbacher@odh.ohio.gov.

Sincerely,



Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations
Lisa Eschbacher, General Counsel

Exhibit 2

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

February 23, 2022

Via email only:
Lisa Pierce Riez
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
lpreisz@vorys.com

Re: Planned Parenthood of Southwest Ohio - December 29, 2021, Application for Existing Variance to the Hospital Transfer Agreement Requirement and application of S.B. 157, effective March 22, 2022.

Dear Attorney Pierce Riesz,

The Department is requesting additional information related to Planned Parenthood of Southwest Ohio's pending Application for Variance to the hospital transfer agreement received December 29, 2021. Please provide the Department with the following by February 27, 2022.

- Attestation by the physicians and the facility that the backup physicians identified in the application (p.4/138) comply with Sub. S.B. 157 (134th General Assembly).

Sub. S.B. 157 (134th General Assembly) was signed by Governor DeWine on December 22, 2021. The bill, among other provisions, provides that backup physicians may not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a sate university or college. The bill further provides that backup physicians may not be employed by or compensated pursuant to a contract with, and many not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college. The bill specifically provides that if, at any time, the director of health determines that a consulting physician for an ambulatory surgical facility that has been granted a variance from the written transfer agreement requirement of section of 3702.303 or the Revised Code has violated the prohibition in division (B) of the this section [teaching, providing instruction, being employed by, under contract or affiliated with a state university or college], the director shall rescind the variance. Sub. S.B. 157 becomes effective March 22, 2022. Given the clear public policy directives contained with Sub.S.B. 157, the Department requests information that details the physicians' status vis a vis state universities and colleges.

Please submit this information to me in writing at the following email address: James.Hodge@odh.ohio.gov

Please feel free to contact me if you have any questions.

Sincerely,

James Hodge

James Hodge, Chief
Bureau of Regulatory Operations

Exhibit 3

D135257484

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORPORATION, *ET AL.*, *Plaintiffs*, -vs.- **BRUCE VANDERHOFF, *ET AL.*,** *Defendants.*	Case No. A 2200704 Judge Alison Hatheway **ENTRY GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This matter comes before the Court on Plaintiffs', Women's Medical Professional Group Corporation d/b/a Women's Med Dayton ("WMD"), and Planned Parenthood Southwest Ohio Region ("PPSWO"), Second Motion for Preliminary Injunction. This case involves a challenge to 2021 Am. S.B. No. 157 ("SB 157"), which prohibits ambulatory surgical facilities ("ASF"), such as Plaintiffs, from contracting with backup doctors who teach or provide instruction, directly or indirectly, at a medical school affiliated with a state university or college, or with backup doctors who are employed by and compensated pursuant to a contract with, and provide consultation to, a medical school affiliated with a state university or college, for the purposes of supporting the ASF's request for a variance from Ohio's written transfer agreement ("WTA") requirement.[1]

[1] More precisely, SB 157 provides that any physician who serves as a backup or "consulting physician" as required to support a variance application must attest that:

> (1) The physician does not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college as defined in section 3345.12 of the Revised Code, any state hospital, or other public institution.
>
> [and]
>
> (2) The physician is not employed by or compensated pursuant to a contract with, and does not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college as defined in section 3345.12 of the Revised Code, any state hospital, or other public institution.

R.C. § 3702.305(A).

FACTUAL BACKGROUND

On February 25, 2022, Plaintiffs filed their Seven-Count Complaint alleging, inter alia, that SB 157 violates: (1) Plaintiffs' substantive due process rights under Article I, Sections 1, 16, and 20 of the Ohio Constitution; (2) their patients' substantive due process rights under Article I, Sections 1, 16, and 20 of the Ohio Constitution; (3) Plaintiffs' right to procedural due process under Article I, Sections 1 and 16 of the Ohio Constitution; and (4) Plaintiffs' right to equal protection under Article I, Section 2 of the Ohio Constitution. Plaintiff WMD filed its Motion for Temporary Restraining Order Followed by Preliminary Injunction. On March 2, 2022, the Court granted Plaintiff's Motion for Temporary Restraining Order and a Hearing on Plaintiff's Motion for Preliminary Injunction was held on April 15, 2022.

On April 15, 2022, Defendants and their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them were Temporarily Enjoined from revoking or refusing to renew WMD's ambulatory surgical facility license or otherwise preventing WMD from providing procedural abortion services for reasons related to noncompliance with SB 157 until June 21, 2022. Plaintiff WMD's first Motion for Preliminary Injunction was granted because Defendants, Ohio Department of Health ("ODH"), and its Director, Bruce Vanderhoff, denied WMD's November 30, 2021 request for a variance due to its failure to comply with SB 157 prior to the effective date.[2] By its terms, SB 157 granted clinics 90 days from the effective date of March 23, 2022—that is, until June 21, 2022—to demonstrate compliance with SB 157.

[2] WMD was informed that its request for a variance was being denied because all four of its back-up doctors were "credentialed as obstetrician/gynecologists with full active status admitting privileges at Miami Valley Hospital," and all four were professors or instructors at Wright State University Boonshoft School of Medicine.

On May 26, 2022, Plaintiffs filed this Motion for Preliminary Injunction presently before the Court. On June 13, 2022, following a briefing period, counsel for all parties appeared via Zoom for a Hearing on the Motion.

LAW AND ANALYSIS

A. Standard of Review

Generally, a party seeking a preliminary injunction must demonstrate "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; [and] that the public interest is served by issuing the order." *City of Cincinnati v. City of Harrison*, 1st Dist. Hamilton No. C-090702, 2010-Ohio-3430, ¶ 8, citing *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-68, 747 N.E.2d 268 (1st Dist. 2000). The purpose of a preliminary injunction is to preserve the status quo. *Martin v. Flick*, 150 N.E.2d 314, 316 (1st Dist. 1958).

B. Analysis

1. *Likelihood of Success on the Merits*

Plaintiffs argue that unless this Court enjoins Defendants from revoking or refusing to renew Plaintiffs' due to their non-compliance with SB 157, Plaintiffs' patients' fundamental right to privacy will be violated.[3] When legislation infringes on fundamental rights, the Ohio Constitution requires it to survive strict scrutiny to be upheld. *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000). "Under the strict-scrutiny standard, a statute unconstitutionally infringes

[3] As this Court has previously determined in the case of *Planned Parenthood Sw. Ohio Region v. Ohio Dep't. of Health*, "third-party standing [for abortion providers on behalf of their patients] is available in circumstances like these," Hamilton C.P. No. A 2100870, Entry Granting Pls.' Second Mot. For Prelim. Inj. at 3-4.

upon a fundamental right unless the statute is necessary to promote a compelling governmental interest and is narrowly tailored to achieve that interest." *Oliver v. Feldner*, 7th Dist. Noble No. CA-290, 149 Ohio App.3d 114, 121, ¶ 40, 776 N.E.2d 499 (2002). The burden rests on the State to show that its interest is compelling and that the law is narrowly tailored. *In re Jud. Campaign Complaint Against O'Toole*, 2014-Ohio-4046, 141 Ohio St.3d 355, 361, ¶ 20, 24 N.E.3d 1114.

Plaintiffs argue that SB 157 fails under strict scrutiny because the State cannot show that SB 157's prohibition on physicians serving as backup doctors based on direct or indirect affiliation with a state university furthers any compelling government interest. Defendants argue that strict scrutiny does not apply under the Ohio Constitution and that the statute need only survive rational basis review. Defendants' argument is not well taken. This Court has previously determined that a fundamental right to privacy exists under the Ohio Constitution and continues to do so. Therefore, to survive strict scrutiny, Defendants must demonstrate that the statute is necessary to promote a compelling governmental interest and that it is narrowly tailored to achieve that interest.

Defendants argue that no compelling interest is necessary because Plaintiffs lack third-party standing to sue on their patients' behalf. Further, they argue that no fundamental right to abortion exists under the Ohio Constitution. While the Court finds Defendants' argument to be not well taken, the Court finds that SB 157 fails even under rational basis review. Defendants argue that SB 157 survives rational basis review because it is rationally related to the legitimate purpose of preventing public funds for abortion. Defendants also assert that it is rationally related to the interest in "the health, safety, and welfare of citizens." Defendants summarily argue that SB 157 is rationally related to these purposes but fail to articulate how so. The intended purpose of back-up doctors is to provide life saving care in the rare emergency circumstances resulting from a procedural abortion, not provide or assist in providing procedural abortion. To prohibit otherwise

qualified physicians from being able to provide such care, as this statute appears to do, is contrary to the State's interest in "the health, safety, and welfare of citizens." Therefore, the Court finds that Plaintiffs have demonstrated a substantial likelihood of success on their patients' substantive due process claim.

2. ***Plaintiffs Patients will Suffer Irreparable Harm Without Relief***

The Court finds that Plaintiffs' patients will suffer irreparable harm if Defendants are permitted to enforce SB 157. Because Plaintiffs will be unable to provide procedural abortions, there will be no procedural abortion centers in the Southwest Ohio region and patients will be forced to travel to Columbus, Ohio or further for that type of care. It is clear that this would cause undue and severe, if not insurmountable, burdens for those who are low-income.

3. ***No Third Parties will be Harmed***

Because Plaintiffs have been providing safe abortion care in accordance with applicable laws, including laws that require back-up doctors for the purpose of providing lifesaving care in the rare event of an emergency, for decades, the Court finds that no third parties will be harmed if Defendants are enjoined. In fact, the public interest will be served by allowing abortion providers to continue providing this essential and constitutionally protected health care.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a 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 revoking or refusing to renew Plaintiffs' ambulatory surgical facility license or otherwise preventing WMD from providing procedural abortion services for reasons related to non-compliance with SB 157 until final judgment is entered in this case. Because the relief granted to

Plaintiff will not result in monetary loss to Defendant, the Court hereby sets Plaintiff's Civ.R.65(C) bond requirement at $0.00.

IT IS SO ORDERED.

Dated: JUN 17 2022

Judge Alison Hatheway

Exhibit 4

OHIO DEPARTMENT OF HEALTH
246 North High Street
Columbus, Ohio 43215
614/466-3543
www.odh.ohio.gov
John R. Kasich/Governor
Richard Hodges/Director of Health

JUN 2 5 2015

Jennifer L. Branch
Gerhardstein & Branch
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202

Re: Women's Med Center of Dayton: Denial of Variance Request

Dear Ms. Branch:

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14 and after careful review and consultation with the department's medical director, I am denying the variance requests of Women's Med Center of Dayton (WMC) for the 2012, 2013, and 2014 license periods.

As you know, the written-transfer-agreement (WTA) requirement in R.C. 3702.303 and O.A.C. 3701-83-19 is designed to protect patient health and safety. Variances from that requirement are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the rule. R.C. 3702.304. I have concluded that the information submitted with WMC's the July 25, 2014 request for variance does not meet the standard of the same protection that a WTA would provide, as it does not meet the department's expectation for 24/7 back-up coverage and uninterrupted continuity of care, as a WTA with a hospital would provide.

In particular, I am concerned that patient safety is not covered to the same degree as a WTA would provide in light of WMC's provision of just two named back-up physicians. The previous 2012 variance request had listed three back-up physicians: Janice Duke, M.D., Sheela Barhan, M.D. and Lawrence Amesse, M.D. On April 26, 2013, Dr. Haskell notified the Ohio Department of Health that Dr. Amesse would no longer serve as a back-up physician for Women's Med Center. But WMC did not provide any substitute third doctor. Thus, the 2013 and 2014 variance requests named just two back-up physicians, Drs. Duke and Barhan. In my view, two back-up physicians cannot meet the department's expectation for 24/7 back-up coverage and uninterrupted continuity of care, as a WTA with a hospital would provide. All it would take is for one doctor to be out of town, and another to be busy, for WMC's back-up options to be unavailable when needed.

WMC's request also suggests that Wright State Physicians Women's Health Care will also provide back-up coverage, but that suggestion identifies no specific, individual physicians. As

you know, R.C. 3702.304(B)(3) requires specific information to be provided as to each named physician, so of course, such required information cannot be supplied when no individual doctor is listed. Listing this entity falls between the WTA requirement, which requires a true agreement with a hospital, and the variance option, which requires individual physicians with the requisite information required. This approach meets neither option.

Additionally, I am very concerned by the September 5, 2014 letter of objection from Mark S. Shaker, President and CEO of Premier Health Miami Valley Hospital. In his letter, Mr. Shaker objects to Miami Valley Hospital being named in a Back-up Physician Services Agreement with Women's Med Center of Dayton and indicates that the hospital has not agreed to serve in any capacity as a supporting agency or affiliate of Women's Med Center.

In sum, the listing of two doctors does not meet the standard of ensuring patient safety to the same degree as a WTA, and the naming of the Wright State group does not make up for that inadequacy. If Women's Med Center of Dayton wishes to submit a new variance request for the department's consideration, it must do so within thirty (30) days of the date of this letter. If Women's Med Center of Dayton does not submit a new proposal for consideration or otherwise obtain a written transfer agreement within thirty (30) days of the date of this letter, the department may propose revocation of the facility's ambulatory surgical facility license.

If you have any questions regarding this decision, please contact Lance Himes, General Counsel, at 614-466-4882.

Sincerely,

Richard Hodges, MPA
Director of Health

Exhibit 5

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

August 30, 2021

Via e-mail and regular U.S. mail
Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106

Re: Women's Med Dayton
2020 Variance Request and April 21, 2020 Variance Modification

Dear Ms. Hill:

Pursuant to RC. 3702.304, O.A.C. 3701-83-14, and 3701-83-19 and after careful review and consideration, I am denying the variance request of Women's Med Dayton submitted on September 14, 2020, for its 2020 license renewal. I am also denying the 2020 variance modification submitted on April 21, 2020, substituting Dr. David Dhanraj for Dr. Jerome Yaklic, whose admitting privileges at Miami Valley Hospital ended on April 30, 2020.

As you know, the written transfer agreement (WTA) requirements in R.C. 3702.303 and O.A.C. 3701-83-19 are designed to protect patient health and safety. Variances from these requirements are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the statute and rule. R.C. 3702.304. Women's Med Dayton's use of Dr. Dhanraj as a backup physician is not sufficient as Dr. Dhanraj currently has affiliate status privileges at Miami Valley Hospital and not active status privileges.

As an additional reason for the denial, Dr. Dunn is not credentialed as an obstetrician/gynecologist with full active privileges at Miami Valley Hospital.

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14, the denial of Women's Med Dayton's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

If you have any questions regarding this variance, please contact Lisa Eschbacher, General Counsel, at 614-466-4882.

Sincerely,

Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations
Lisa Eschbacher, General Counsel

Exhibit 6

SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

B. Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law

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September 13, 2021

Mr. James Hodge
Chief, Bureau of Regulatory Operations
Ohio Department of Health
246 North High Street
Columbus, OH 43215

Re: Women's Med Dayton
Request for Variance to the Hospital Transfer Agreement Requirement

Dear Mr. Hodge:

I represent Women's Med Group Professional Corporation (WMGPC) and Women's Med Dayton (WMD).

Jennifer Branch, who previously represented WMGPC and WMD, wrote on September 14, 2020 to request a variance to O.R.C. § 3702.303, which requires ASFs have a written transfer agreement (WTA) with a local hospital. A variance is necessary because WMD, a facility that provides surgical abortions, has requested a written transfer agreement with all of the local hospitals, but none has agreed to provide a WTA. By letter dated August 30, 2021, Director Bruce Vanderhoff denied this variance request.[1]

It is my understanding that WMD does not have a right to request a hearing from ODH regarding the variance denial. O.R.C. § 3702.304(C); O.A.C. 3701-83-14; *Women's Med Ctr. of Dayton v. Dep't of Health*, 133 N.E.3d 1047, 1049 (Ohio Ct. App.), *appeal not allowed*, 156 Ohio St. 3d 1492 (2019). However, because the August 30 variance denial was based on incorrect understandings of the factual premises underlying WMD's request, and because ODH's consideration of this variance request may benefit from addition information provided herein, I

[1] It is my understanding that Ohio HB 197 (133rd Gen. Assem.) and Ohio HB 404 (133rd Gen. Assem.) had extended ODH's time for responding to this request to August 30, 2021 (sixty days after July 1, 2021).

am now writing to re-apply for a variance on behalf of WMD, or in the alternative, to request reconsideration of the August 30 variance denial.

For the following reasons, WMD meets the requirements for a variance from the WTA requirement set forth in O.R.C. § 3702.304(B):

1. Application of the WTA requirement to WMD would cause it undue hardship, because as noted above, WMD has been unable to obtain a WTA from any local hospital. If the WTA requirement were applied to WMD, it would therefore be unable to continue operating, resulting in closure of the business and loss of its and its owner's constitutionally protected property rights. As explained in more detail below, WMD's alternative to a written transfer agreement provides patients with the same or higher level of safety and protection as a written transfer agreement would provide.

WMD has contracted with Drs. Barhan, Duke, Dunn, and Dhanraj to provide backup physician services (Attachment 1). WMD also has a contract with Wright State Physicians Women's Health Care (WSPWHC) to provide backup coverage. (Attachment 2). The four backup physicians have full, unrestricted, and active admitting privileges at Miami Valley Hospital (MVH) and have agreed to exercise those privileges to provide for the continuity of care and the timely, unimpeded acceptance and admission of WMD's emergency patients.

Drs. Barhan, Duke, and Dhanraj are credentialed with admitting privileges in Obstetrics and Gynecology without restrictions at Miami Valley Hospital and will arrange patient admission and care for each patient needing medical services according to each patient's need. (Attachment 3). Dr. Dunn is credentialed with admitting privileges in General Surgery without restrictions at Miami Valley Hospital and will arrange patient admission and care for each patient needing medical services according to each patient's need. (Attachment 3).

The Director's August 30 letter explains that a variance was denied in part because Dr. Dhanraj, one of WMD's four backup physicians, "currently has affiliate status privileges at Miami Valley Hospital and not active status privileges." WMD respectfully submits that this statement does not accurately reflect Dr. Dhanraj's ability to admit patients and is not a proper basis for denying the variance. At the time of application, Dr. Dhanraj possessed full, unrestricted privileges in obstetrics and gynecology at MVH.[2] Although Dr. Dhanraj was listed

[2] By email dated August 23, 2021, at 4:00 p.m., you requested the following information, to be provided by the close of business on August 25, 2021:

- Documentation that explains what each backup physician is permitted to do under their respective admitting privileges at Miami Valley Hospital, including any restrictions on procedures that can be performed or areas of the hospital that are restricted.
- The number of miles between each backup physician's clinical practice and Women's Med Dayton.

as "Affiliate (non-vote)" on the admitting privileges list submitted to Mr. Hodge on August 25, 2021, his inability to vote on matters affecting the medical staff was entirely due to the fact that he first joined the MVH staff in April 2020 and, according to the MVH Bylaws, physicians must be on staff for at least one year in order to acquire voting rights. (Attachment 4). Dr. Dhanraj's non-voting status had no impact whatsoever on the scope of his clinical privileges at MVH or his ability to admit and care for patients. In fact, Dr. Dhanraj was hired to chair the Obstetrics and Gynecology Department at Wright State School of Medicine with responsibility for overseeing the training of resident physicians at Miami Valley Hospital. (Attachment 11). Therefore, Dr. Dhanraj's non-voting status was not a proper basis for denial of the variance.

In addition, since Dr. Dhanraj was re-credentialed by MVH in August 2021, he has now acquired voting rights and his current status is therefore "Active (voting)." (Attachment 3).

The Director denied WMD's variance for the additional reason that Dr. Dunn "is not credentialed as an obstetrician/gynecologist with full active privileges at Miami Valley Hospital." As indicated by the attached Privileges List for Dr. Dunn (Attachment 3), and as confirmed in my email to you dated August 25, 2021, she has full, active privileges in general surgery at MVH. She is also board certified in general surgery. (Attachment 5). The fact that Dr. Dunn's privileges and credentials are in general surgery rather than obstetrics/gynecology does not undermine patient health and safety. There would be no greater benefit to patient safety if WMD had a WTA. A WTA would entail that a patient facing a complication would be sent to the emergency room to be evaluated by an emergency room physician and the appropriate specialist consulted by the emergency room physician. Dr. Dunn, who is the former Dean of the Wright State Boonshoft School of Medicine, is able to admit patients to MVH and consult the relevant specialist in the case of a complication that would be beyond her expertise, just as an emergency room physician would do.[3] (Attachment 12). Indeed, ODH accepted Dr. Dunn as a backup physician for WMD in support of its 2019 variance application, which was granted.

WMD also has a written policy ensuring coverage by the backup physicians who can admit patients to a hospital in the event that a patient experiences a surgical complication, an

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- The number of miles between Miami Valley Hospital and Women's Med Dayton.
- Board certification(s) held by each backup physician

On August 24, 2021, you also asked me "to confirm the privilege status for both Dr. Barhan and Dr. Duke[.] Are their statuses, 'active,' or 'affiliated? It is not clear from the letter provided." By email dated August 25, 2021, I responded to all of these requests and confirmed that "all 4 doctors have active privileges at MVH," because I understood the question to refer to the physicians' ability to admit patients and treat them at the hospital, not their medical staff voting status.

[3] In fact, some complications that could arise—such as bowel perforation—would be managed by a general surgeon rather than an OB/GYN.

emergency, or other medical need and needs to be transferred from WMD to the hospital. (Attachment 6).

2. The contracts between WMD and its four backup physicians who have admitting privileges at MVH, memorializing their agreement to provide backup coverage when medical care beyond the level the facility can provide is necessary, are attached. (Attachment 1).

3a. Drs. Barhan, Dhanraj, Duke, and Dunn are familiar with WMD and its operations and its policy. Each backup physician contract verifies this. (Attachment 1).

3b. All four physicians' primary practice location is Five Rivers Center for Women's Health, which is on the Miami Valley Hospital campus. It is about a 5-minute walk to the hospital. They have a secondary practice location in the Sugar Camp Medical Building, 400 Sugar Camp Circle, which is 1.6 miles or about a 5-minute drive to MVH. The distance from WMD to MVH is 5.8 miles, or approximately a 14-minute drive. (Attachment 7).

3c. WMD has a record of the name, telephone numbers, and practice specialties of each backup physician. (Attachment 6).

3d. Drs. Barhan, Dhanraj, Duke, and Dunn currently have active status with the Ohio State Medical Board and possess current medical licenses. None of the four backup physicians has had any action taken against them by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. Nor does any physician have a pending action or a complaint under review by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. (Attachment 8).

3e. All backup physicians are credentialed with admitting privileges in Gynecology or General Surgery without restrictions at Miami Valley Hospital. All backup physicians have notified MVH that they are consulting for WMD and that they have agreed to provide backup services. (Attachment 9).

4a. WMD's patient hospital transfer protocol (Attachment 6) and backup physician credentialing protocol (Attachment 10), which ensure continuity of care for any patient who may need to be transferred to a hospital, are attached. The facility's written policy explains how the attending physician will use the backup physicians to admit patients to a local hospital in an emergency, complication, or other medical need. The policy includes a plan which ensures that a substitute doctor is available to admit patients to

local hospitals in the event the four named backup physicians are temporarily unavailable and unable to admit patients to local hospitals. Drs. Barhan, Dhanraj, Duke, and Dunn affirm that they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

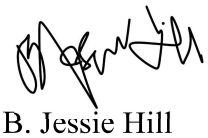
4b. Drs. Barhan, Dhanraj, Duke, and Dunn agreed in their contracts to immediately inform WMD of any circumstances that may impact their ability to provide for continuity of care and the timely, unimpeded acceptance and admission of the WMD's emergency patients. (Attachment 1). Drs. Barhan, Duke, Dhanraj, and Dunn agree they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

4c. WMD's written protocol ensures that a copy of the patient's medical record is transmitted contemporaneously with the patient to hospital. (Attachment 6)

This variance request is a good faith attempt to comply with Ohio law. WMD has not been informed by ODH of any additional rules or regulations that apply to a variance request. If ODH implements any additional rules, WMD requests ODH to notify WMD.

If you need any additional information or have any questions, please contact me at the address and phone number above, or by email to bjh11@case.edu

Sincerely,



B. Jessie Hill

C: Heather Coglianese

Encls. Attachment 1 Backup physician agreements
Attachment 2 WSPWHC agreement
Attachment 3 Privilege lists
Attachment 4 MVH Medical Staff Bylaws
Attachment 5 Board certifications
Attachment 6 WMD Backup Physician and Hospital Transfer protocol dated 4/2020
Attachment 7 Maps
Attachment 8 Verifications of license status with the Ohio Medical Board

Attachment 9 Notifications
Attachment 10 WMD Backup Physician credentialing protocol dated 8/26/19
Attachment 11 Dhanraj CV
Attachment 12 Dunn CV

Exhibit 7

SCHOOL OF LAW
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November 30, 2021

Mr. James Hodge
Chief, Bureau of Regulatory Operations
Ohio Department of Health
246 North High Street
Columbus, OH 43215

VIA EMAIL

Re: Women's Med Dayton
Request for Variance to the Hospital Transfer Agreement Requirement

Dear Mr. Hodge:

I represent Women's Med Group Professional Corporation (WMGPC) and Women's Med Dayton (WMD).

I write to request a variance to O.R.C. § 3702.303, which requires ASFs have a written transfer agreement (WTA) with a local hospital. A variance is necessary because WMD, a facility that provides surgical abortions, has requested a written transfer agreement with all of the local hospitals, but none has agreed to provide a WTA. Please consider this variance application in support of WMD's pending license renewal application.

For the following reasons, WMD meets the requirements for a variance from the WTA requirement set forth in O.R.C. § 3702.304(B):

1. Application of the WTA requirement to WMD would cause it undue hardship, because as noted above, WMD has been unable to obtain a WTA from any local hospital. If the WTA requirement were applied to WMD, it would therefore be unable to continue operating, resulting in closure of the business and loss of its and its owner's constitutionally protected property rights. As explained in more detail below, WMD's alternative to a written transfer agreement provides patients with the same or higher level of safety and protection as a written transfer agreement would provide.

WMD has contracted with Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle to provide backup physician services (Attachment 1). WMD also has a contract with Wright State Physicians Women's Health Care (WSPWHC) to provide backup coverage. (Attachment 2). The four backup physicians have full, unrestricted, and active admitting privileges at Miami Valley Hospital (MVH) and have agreed to exercise those privileges to provide for the continuity of care and the timely, unimpeded acceptance and admission of WMD's emergency patients.

Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle are credentialed with active admitting privileges in Obstetrics and Gynecology without restrictions at Miami Valley Hospital and will arrange patient admission and care for each patient needing medical services according to each patient's need. (Attachment 3).

WMD also has a written policy ensuring coverage by the backup physicians who can admit patients to a hospital in the event that a patient experiences a surgical complication, an emergency, or other medical need and needs to be transferred from WMD to the hospital. (Attachment 4).

2. The contracts between WMD and its four backup physicians who have admitting privileges at MVH, memorializing their agreement to provide backup coverage when medical care beyond the level the facility can provide is necessary, are attached. (Attachment 1).

3a. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle are familiar with WMD and its operations and its policy. Each backup physician contract verifies this. (Attachment 1).

3b. All four physicians' primary practice location is Five Rivers Center for Women's Health, which is on the Miami Valley Hospital campus. It is about a 5-minute walk to the hospital. They have a secondary practice location in the Sugar Camp Medical Building, 400 Sugar Camp Circle, which is 1.6 miles or about a 5-minute drive to MVH. The distance from WMD to MVH is 5.8 miles, or approximately a 14-minute drive. (Attachment 5).

3c. WMD has a record of the name, telephone numbers, and practice specialties of each backup physician. (Attachment 4).

3d. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle currently have active status with the Ohio State Medical Board and possess current medical licenses. None of the four backup physicians has had any action taken against them by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. Nor does any physician have a pending action or a complaint under review by the Ohio State Medical Board for violations of R.C. § 4731.22, according to their agreement with the facility. (Attachment 6).

3e. All backup physicians are credentialed with admitting privileges in Gynecology or General Surgery without restrictions at Miami Valley Hospital. All backup physicians have

notified MVH that they are consulting for WMD and that they have agreed to provide backup services. (Attachment 7).

4a. WMD's patient hospital transfer protocol (Attachment 4) and backup physician credentialing protocol (Attachment 8), which ensure continuity of care for any patient who may need to be transferred to a hospital, are attached. The facility's written policy explains how the attending physician will use the backup physicians to admit patients to a local hospital in an emergency, complication, or other medical need. The policy includes a plan which ensures that a substitute doctor is available to admit patients to local hospitals in the event the four named backup physicians are temporarily unavailable and unable to admit patients to local hospitals. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle affirm that they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

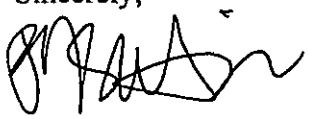
4b. Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle agreed in their contracts to immediately inform WMD of any circumstances that may impact their ability to provide for continuity of care and the timely, unimpeded acceptance and admission of the WMD's emergency patients. (Attachment 1). Drs. Barhan, Dhanraj, Duke, and Reisinger-Kindle agree they have access to and will use MVH's on-call consulting/referral physicians outside WSPWHC's area of specialty/expertise, if necessary. (Attachment 1).

4c. WMD's written protocol ensures that a copy of the patient's medical record is transmitted contemporaneously with the patient to hospital. (Attachment 4)

This variance request is a good faith attempt to comply with Ohio law. WMD has not been informed by ODH of any additional rules or regulations that apply to a variance request. If ODH implements any additional rules, WMD requests ODH to notify WMD.

If you need any additional information or have any questions, please contact me at the address and phone number above, or by email to bjh11@case.edu.

Sincerely,



B. Jessie Hill

cc: Heather Coglianese

Encls. Attachment 1 Backup physician agreements
Attachment 2 WSPWHC agreement

Attachment 3 Privilege lists
Attachment 4 WMD Backup Physician and Hospital Transfer protocol dated 4/2020
Attachment 5 Maps
Attachment 6 Verifications of license status with the Ohio Medical Board
Attachment 7 Notifications
Attachment 8 WMD Backup Physician credentialing protocol dated 8/26/19

Exhibit 8

Ohio | Department of Health

Mike DeWine, Governor
Jon Husted, Lt.Governor

Bruce Vanderhoff, MD, MBA, Director

January 28, 2022

Via e-mail and regular U.S. mail
Jessie Hill
Associate Dean for Research and Faculty Development
Judge Ben C. Green Professor of Law
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106

Re: Women's Med Dayton
2021 License Renewal Variance Request

Dear Ms. Hill:

Pursuant to R.C. 3702.304, O.A.C. 3701-83-14, and 3701-83-19, Sub. S.B. 157 (134th General Assembly), and after careful review and consideration, I am denying Women's Med Dayton's November 30, 2021 request for a variance for its 2021 license renewal.

As you know, the written transfer agreement (WTA) requirements in R.C. 3702.303 and O.A.C. 3701-83-19 are designed to protect patient health and safety. Variances from these requirements are for limited circumstances in which the facility can still achieve the purposes of a WTA, where compliance with the WTA requirement would impose an undue hardship, and where the proposed alternative method of compliance meets or exceeds the protections afforded by the statute and rule. R.C. 3702.304. Four of the backup physicians submitted, Dr. Sheela Barhan, Dr. Janice Duke, Dr. David Dhanraj, and Dr. Reisinger-Kindle are credentialed as obstetrician/gynecologists with full active status admitting privileges at Miami Valley Hospital.

In addition, based on information contained in the November 30th application and publicly available information, all four proposed back-up physicians are employed by or compensated pursuant to a contract with, or provide instruction and consultation to Wright State University Boonshoft School of Medicine via their employment by and/or affiliation with Wright State Physicians. Wright State Physicians is composed of more than 100 physicians affiliated with the Wright State University Boonshoft School of Medicine. (https://wrightstatephysicians.org/find-a-doctor/) The Wright State University Boonshoft School of Medicine and Wright State Physicians are partners in providing training to medical students and delivering health care to the region. (https://wrightstatephysicians.org/about/)

According to the Wright State Physicians website (https://wrightstatephysicians.org/ob-gyn/physicians/):

- Sheela M. Barhan, M.D. is Associate Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- Janice M. Duke, M.D. is Associate Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- David N. Dhanraj, M.D. is Chair and Assistant Professor, WSU Boonshoft School of Medicine Department of Obstetrics & Gynecology

- Keith Reisinger-Kindle, D.O. is Instructor/Faculty, WSU Boonshoft School of Medicine

Sub. S.B. 157 (134th General Assembly) was signed by Governor DeWine on December 22, 2021. The bill, among other provisions, provides that backup physicians may not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college. The bill further provides that backup physicians may not be employed by or compensated pursuant to a contract with, and may not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college. The bill specifically provides that if, at any time, the director of health determines that a consulting physician for an ambulatory surgical facility that has been granted a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code has violated the prohibition in division (B) of this section [teaching, providing instruction, being employed by, under contact or affiliated with a state university or college], the director shall rescind the variance. Sub. S.B. 157 becomes effective March 22, 2022.

Given the four backup physicians' clear relationship with Wright State Physicians and the clear public policy directives contained within Sub. S.B. 157, I am denying Women's Med Dayton's November 30, 2021 variance request.

Pursuant to R.C. 3702.304 and O.A.C. 3701-83-14, the denial of Women's Med Dayton's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

If you have any questions regarding this variance, please contact James Hodge, Bureau Chief, Bureau of Regulatory Operations, at 614-644-6220.

Sincerely,

Bruce Vanderhoff, MD, MBA
Director of Health

cc: James Hodge, Bureau Chief, Bureau of Regulatory Operations
Lance Himes, Interim General Counsel

Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS,

HODES & NAUSER, MD's, PA,
et al.,

Plaintiff,

v.

ROBERT MOSER, et al,

Defendants.

.....

Docket No. 11-2365-CM

Kansas City, Kansas
Date: 7/1/11

TRANSCRIPT OF
TEMPORARY RESTRAINING ORDER HEARING
BEFORE THE HONORABLE CARLOS MURGUIA,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: Teresa A Woody
Woody Law Firm, PC
1621 Baltimore Avenue
Kansas City, MO 64108

Bonnie Scott Jones
Center for Reproductive Rights - NY
120 Wall Street - 14th Floor
New York, NY 10005

For the Defendants: Jeffrey A Chanay & Steve R Fabert
Office of Attorney General - Topeka
120 SW 10th Avenue - 2nd Floor
Topeka, KS 66612-1597

Movant: Cheryl A Pilate
Morgan Pilate LLC
142 N Cherry
Olathe, KS 66061

Court Reporter: Nancy Moroney Wiss, CSR, RMR, FCRR
Official Court Reporter
558 US Courthouse
500 State Avenue
Kansas City, KS 66101

15:03:16 THE COURT: Give me a moment please just to
15:03:18 set up here. Let the record show we're here regarding
15:03:44 Case Number 11-2365. It's a case entitled -- may have
15:03:53 to help me with the pronunciation of the plaintiffs'
15:03:55 names.
15:03:55 MS. WOODY: Doctors Hodes and Nauser.
15:03:59 THE COURT: Hodes and Nauser versus Moser,
15:04:04 et al. Would the parties please enter their appearance?
15:04:06 MS. WOODY: Your Honor, Teresa Woody on
15:04:08 behalf of the plaintiffs, and here are Doctor Hodes and
15:04:11 Doctor Nauser, and with me is Bonnie Scott Jones who's
15:04:14 been admitted pro hac vice this morning.
15:04:17 THE COURT: Thank you.
15:04:19 MR. CHANAY: Your Honor, on behalf of the
15:04:21 defendant, it's Jeffrey Chanay, Deputy Attorney General
15:04:24 of Kansas, and with me is Steve Fabert, Assistant
15:04:27 Attorney General.
15:04:28 THE COURT: Thank you. Appreciate the
15:04:29 parties accommodating the court with the scheduling of
15:04:32 this hearing on very short notice. There is something
15:04:36 before and pending at this time, which would be
15:04:40 plaintiffs' motion for temporary restraining order
15:04:44 and/or preliminary injunction, which is Document Number
15:04:48 Four. This morning, the court granted Aid For Women's
15:04:53 motion to intervene as well as Aid for Women has filed a

15:04:58 motion to join plaintiff's motion for temporary
15:05:01 restraining order and/or preliminary injunction, which
15:05:04 is Document 27. Upon review of the motion, the court
15:05:09 grants Aid for Women's motion. As a result, for our
15:05:14 record, Miss Pilate, if you could enter your appearance
15:05:19 as well here at this hearing.
15:05:20 MS. PILATE: Thank you, Your Honor. Good
15:05:22 afternoon. Cheryl Pilate for intervenors Central Family
15:05:27 Medical, LLC, doing business as Aid for Women, and also
15:05:31 representing Doctor Ronald Yeomans who is present with
15:05:34 me at counsel table. Thank you.
15:05:38 THE COURT: In regards to our court
15:05:39 appearance this afternoon, the court has scheduled this
15:05:43 to be heard, but with that, there's some time
15:05:47 limitations the court has informed the parties about
15:05:51 regarding their arguments or however you want to use
15:05:55 your time. Hopefully, you both were -- all of you were
15:05:58 informed, and you have 30 minutes per party, and we
15:06:04 actually have set up a timer that will be placed in
15:06:09 front of the podium that I would trust and ask that you
15:06:14 monitor and keep track of, and what I'll do is let you
15:06:19 know if you want a warning when you're about to have
15:06:22 your time expire. I would request please that when that
15:06:26 timer shows that you have zero time remaining, that you
15:06:29 stop. If not, I will have to interrupt you with

15:06:33 whatever is being presented or being argued. Yes?

15:06:37 MS. WOODY: Your Honor, we would like to
15:06:39 divide the argument and provide at least a short period
15:06:42 of time for intervenors to make a comment to the court
15:06:46 with respect to the argument.

15:06:48 THE COURT: That's fine. If there's nothing
15:06:50 else, we'll start at this time. Miss Woody.

15:06:54 MS. WOODY: Good afternoon, Your Honor. May
15:07:03 it please the court. We are here on behalf of Doctors
15:07:07 Hodes and Nauser requesting injunctive relief of the
15:07:10 licensing process and temporary regulations promulgated
15:07:14 under Senate Bill 36. Doctor Hodes and Doctor Nauser
15:07:17 are very well respected physicians with a clinic located
15:07:21 in Overland Park, Kansas where they operate an
15:07:24 obstetrics and gynecology practice. Doctor Hodes has
15:07:28 been practicing in this field for over 30 years. Doctor
15:07:32 Nauser has been practicing with Doctor Hodes for
15:07:35 13 years, and he is her father. Doctor Nauser and
15:07:39 Doctor Hodes have a full OB/GYN practice which includes
15:07:43 a full range of services including gynecological
15:07:47 surgeries. They also perform abortions in their
15:07:49 practice, and especially are referred to by other
15:07:52 physicians in instances where there are complications,
15:07:54 medical complications for the woman, or where there is a
15:08:00 fetal anomaly that would require an abortion. They have

15:08:06 1 been providing these services at their same clinic in
15:08:09 2 Overland Park for over 24 years without incident. Since
15:08:13 3 2002, their practice like all other practices in the
15:08:16 4 state of Kansas where office surgeries are performed in
15:08:21 5 a physician's office have been regulated by the Kansas
15:08:25 6 Board of Healing Arts, which in 2002 had a panel of some
15:08:28 7 35 doctors who promulgated standards for offices in
15:08:32 8 Kansas where office surgeries were performed. With
15:08:37 9 respect to these regulations which apply to all surgical
15:08:40 10 procedures and offices, whether -- not just abortions,
15:08:43 11 but other procedures for dental procedures,
15:08:49 12 gastroenterology, all those sorts of surgeries that can
15:08:51 13 be performed in an outpatient basis at a doctor's
15:08:54 14 office, many of which are far more risky and invasive
15:08:59 15 than abortion procedures performed at Doctor Hodes and
15:09:02 16 Doctor Nauser's office, they've been regulated under
15:09:04 17 these -- these standards promulgated by the board of
15:09:07 18 healing arts for some eight years, and they are
15:09:10 19 inspected routinely with respect to these procedures by
15:09:13 20 representatives of the Kansas Board of Healing Arts.
15:09:19 21 On May 16th of this year, however, the
15:09:22 22 Kansas legislature enacted Senate Bill 36, and under
15:09:25 23 that bill, said that it would become effective July 1st,
15:09:30 24 and that anyone who was not licensed, any provider who
15:09:33 25 was not licensed as of that date would not be allowed to

15:09:36 perform abortions, and that any abortions performed
15:09:39 after that date without a license would be considered a
15:09:41 crime. KDHE was charged with implementing regulations
15:09:45 under that act, and it is those temporary regulations
15:09:49 and the licensing procedure that we are asking the court
15:09:52 to enjoin today.
15:09:55 That occurred on May 16th, the act was
15:09:59 enacted. Doctor Hodes and Doctor Nauser immediately
15:10:01 reached out to the KDHE to say it's going to be
15:10:04 impossible for you to both promulgate regulations and
15:10:08 give the providers an opportunity to comply in a very
15:10:11 limited time before July 1st. They basically heard
15:10:15 nothing until May 26th when they were told that
15:10:18 temporary regulations would be forthcoming. On July
15:10:22 9th, they did receive a copy of draft regulations from
15:10:26 the KDHE.
15:10:26 THE COURT: June 9th? June 9th?
15:10:29 MS. WOODY: June 9th. I'm sorry, on
15:10:31 June 9th, they received -- they received the draft of
15:10:33 the temporary regulations from the KDHE, and these
15:10:37 imposed stricter regulations, more stringent regulations
15:10:41 on their facility than had previously been -- that they
15:10:44 had previously been subject to under the standards of
15:10:48 the board of healing arts. They were also told that
15:10:52 they would have a licensing application, that the

15:10:55 licenses would -- application would be available on
15:10:57 June 13th, and that they were to have their -- their
15:11:00 license application submitted no later than June 17th.
15:11:04 On June 13th, in the intervening time-frame, they -- in
15:11:09 addition to getting the license application, they also
15:11:11 received notice that the regulations, the draft
15:11:14 regulations they had initially been provided on June 9th
15:11:17 were being revised, and that they would get revised
15:11:20 copies of those regulations at some point in the future,
15:11:23 those temporary regulations.
15:11:26 That occurred after they had actually
15:11:29 submitted their application on June 17th, as was
15:11:32 required procedurally. They then received on the
15:11:35 morning of June 20th new regulations that -- new
15:11:39 temporary regulations and were told that these temporary
15:11:42 regulations would be the ones that would be applied to
15:11:44 determine whether they were able to get a license on
15:11:47 July 1st. These new regulations were far more stringent
15:11:51 even than the draft regulations that had been provided
15:11:55 to them on June 9th. They had extremely strict
15:11:58 standards, provided, for instance, for two hours of
15:12:01 recovery for any patient of an abortion procedure, an
15:12:05 amount of recovery time far in excess of anything
15:12:08 required either at the Kansas hospitals or Kansas
15:12:12 ambulatory surgical centers for much more invasive and

15:12:16 risky surgical procedures. They also imposed extremely
15:12:19 strict physical plan regulations mandating the size of
15:12:24 the rooms in which procedures could be performed,
15:12:26 mandating that each room have its own washing -- hand
15:12:30 washing and facilities, sink and a lavatory by itself
15:12:34 attached to each procedure room, and standards such as
15:12:37 requiring 50 square feet of janitorial storage for each
15:12:41 procedure room which for the Hodes practice and Nauser
15:12:45 practice would have meant 350 square feet of janitorial
15:12:48 storage alone.
15:12:51 Upon reviewing these regulations, Doctor
15:12:55 Hodes and Doctor Nauser reached out to the KDHE, and
15:12:58 asked if there would be waivers available, because it
15:13:01 was impossible for them to comply by July 1st. It would
15:13:06 have required them essentially to tear down their
15:13:08 building and re-build it, totally reconfigure it and --
15:13:12 and make it larger. They were told there would be no
15:13:16 waivers, and that they -- if they were -- failed to be
15:13:19 in compliance by July 1st, their license would be
15:13:22 denied. This is inconsistent with the way other Kansas
15:13:25 state regulations have been applied, particularly ones
15:13:27 for hospitals where when there's a change in the
15:13:29 physical plan for a hospital facility, they've been
15:13:32 given up to two years to make those changes. But for
15:13:35 these providers, and there are only three providers of

15:13:38 abortions in the state of Kansas that were affected by
15:13:40 these, for these three providers, there was a -- they
15:13:43 were to comply with these regulations within nine days
15:13:46 of having received these regulations or their license
15:13:49 would be denied.
15:13:52 Obviously, there was an inspection scheduled
15:13:55 for even sooner than that. The original inspection was
15:13:57 scheduled for June 27th, and they asked to have that
15:14:02 moved until June 29th, but even so, recognized that it
15:14:06 would be totally impossible for them to comply with
15:14:08 these regulations, come the physical plan status alone,
15:14:14 and so, they have moved this court for temporary
15:14:17 injunction. They knew there's -- the state has raised
15:14:20 an argument that there's some potential waiver because
15:14:23 they didn't go through and exhaust their administrative
15:14:27 remedies, but there was absolutely no purpose for them
15:14:30 going in that manner. They'd all ready been told that
15:14:32 they would not get a waiver, and they knew that they
15:14:35 would not be able to comply with those regulations by
15:14:37 July 1st.
15:14:38 And indeed, this morning, even though this
15:14:42 motion for temporary restraining order and preliminary
15:14:44 injunction was pending before this court, they received
15:14:46 from the KDHE notice of intent to deny their license
15:14:50 which came in at about 10:15 or 10:30 this morning.

15:15:00 It's clear that these regulations -- these temporary
15:15:03 regulations and this licensing process infringe on the
15:15:08 plaintiff's due process. There is absolutely no way
15:15:13 that they could have complied with this -- with these
15:15:16 requirements in the very limited, very quick time-frame
15:15:20 provided to them, and there was absolutely no way that
15:15:24 they were going to be able to continue providing
15:15:28 services to women who needed those services without --
15:15:33 without -- they simply would have to close, and indeed
15:15:36 they were denied a license, and now are unable to
15:15:38 provide those -- those abortions at their facility under
15:15:43 the licensing today.
15:15:45 So, it's clear that there's irreparable harm
15:15:48 to them, there's irreparable harm to the women that they
15:15:52 serve. For instance, just in the last couple of days --
15:15:55 and we've submitted this in our supplemental declaration
15:15:57 of Doctor Hodes -- just in the last couple of days, he
15:16:00 has been referred patients by referring physicians
15:16:04 because of his expertise in this area where there were
15:16:07 serious medical conditions for the woman or a medical
15:16:12 anomaly for the fetus, in both of those instances, he
15:16:16 has been unable to perform the abortions that the
15:16:20 referring physician requested because these regulations
15:16:24 are now in place. This has put these women in a
15:16:28 position where they are unable to get the medical

15:16:31 treatment they need in the state of Kansas, and so,
15:16:34 despite the -- despite the state's argument that this
15:16:38 will heighten medical processes and medical procedures
15:16:45 for women in Kansas, it in fact is denying women who
15:16:49 very much need these services, the ability to access an
15:16:53 abortion in Kansas, because they can't get them at
15:16:56 Planned Parenthood, and Doctor Hodes and the referring
15:16:59 physicians are unaware of any other abortion provider
15:17:02 who can provide those services in the state of Kansas
15:17:05 for women who have these kind of complications or these
15:17:08 kind of fetal anomalies.
15:17:11 So, there is -- there -- you can quickly see
15:17:15 that there is an undue burden both on the doctors and on
15:17:18 the patients who are unable to access these procedures,
15:17:22 even though they need them. In addition, it is clear
15:17:27 that these regulations really were designed to make
15:17:32 access to abortion more difficult in the state of
15:17:34 Kansas.
15:17:35 Now, the state tries to argue that because
15:17:37 they have granted Planned Parenthood a last minute
15:17:42 license, that -- that there is adequate access, and
15:17:46 there isn't a problem with the regulations, and they
15:17:48 cite to the court the Greenville case, and say that
15:17:51 regulations on facilities are okay, and basically imply
15:17:56 that anything that the state wants to do, any kind of

15:17:58 regulations that the state wants to impose should not be
15:18:04 unconstitutional.
15:18:07 We've cited to the case -- a case very
15:18:09 similar to this in 2007 where Judge Smith in the Western
15:18:13 District of Missouri, in examining some regulations
15:18:15 very, very similar to those here, only those here are
15:18:18 actually even more onerous and more burdensome than the
15:18:22 ones that were being addressed by the court with the
15:18:27 Missouri regulations, he did find that there was both a
15:18:30 likelihood that it violated plaintiff's due process, and
15:18:34 that it imposed an undue burden on both the doctors and
15:18:37 the women with respect to the constitutionality of those
15:18:41 regulations, and granted a preliminary injunction on
15:18:44 that matter.
15:18:46 If you look at the regulations in the chart
15:18:49 that we've provided, you can see that the regulations
15:18:51 far exceed anything that is required for Kansas
15:18:56 ambulatory surgical centers, for Kansas hospitals, and
15:19:00 certainly, even the case that they cite, the Greenville
15:19:03 versus South Carolina case, the regulations in those
15:19:07 cases -- in that case, the physical regulations were far
15:19:10 less stringent, far less onerous, far less specific and
15:19:15 particular than we have here in the -- in the case of
15:19:17 these temporary regulations with respect to Kansas.
15:19:20 So, there clearly is, we believe, a showing

15:19:24 of irreparable harm on behalf of the plaintiffs and the
15:19:28 doctors and their patients, and that's balanced against
15:19:31 any harm to the state in continuing things the way they
15:19:35 are, continuing the status quo.
15:19:37 And we submit that there really is no -- no
15:19:41 injury to the state whatsoever in continuing things the
15:19:44 way they were. The facilities are all ready regulated.
15:19:48 They're regulated like any other facility that provides
15:19:51 surgical procedures at a doctor's office under the
15:19:56 standards developed by the Kansas Board of Healing Arts.
15:19:59 They have been in compliance with those standards,
15:20:01 they've been performing procedures like this at their
15:20:04 office for over 24 years. If the injunction is put in
15:20:07 place, they will still be subject to those regulations
15:20:10 by the board of healing arts, and still be subject to
15:20:13 those inspections and still be subject to the high
15:20:16 standards of medical care for women that those standards
15:20:19 impose on all providers of surgical procedures in a
15:20:23 doctor's office. This is -- this has been going on for
15:20:27 eight years. They've had no issues with that. And they
15:20:31 will continue to have that oversight by the Kansas Board
15:20:36 of Healing Arts if this injunction is granted. So,
15:20:41 there is really no detriment to the state.
15:20:44 On the other hand, the detriment to the
15:20:45 doctors both in having to shut down that part of their

15:20:49 practice, to lose the revenue from that part of their
15:20:52 practice, to lose patients, and in the patients
15:20:56 themselves from their inability to access these
15:20:58 services, is -- is very much impacted. And the fact
15:21:02 that there's one abortion provider that's licensed in
15:21:09 the state of Kansas is not sufficient to meet the needs
15:21:11 of those women, and to in effect spirit away the undue
15:21:15 burden, Doctors -- Doctor Hodes and Nauser perform some
15:21:20 25 percent of the abortions in the state of Kansas.
15:21:23 It's -- it is really -- it's imaginary -- it's -- it's
15:21:29 imaginary to presume that the women who otherwise were
15:21:32 treated by them can simply go to Planned Parenthood just
15:21:36 as it would be if -- as we said in our briefs, if there
15:21:39 was only -- if you had three hospitals, and went down to
15:21:41 one hospital, and said, well, that's fine, because
15:21:43 everybody who went to the other two hospitals can just
15:21:45 go to the first one. There simply isn't enough --
15:21:49 enough, there aren't enough providers, and there simply
15:21:53 isn't the expertise at the Planned Parenthood facility
15:21:57 for some of the more serious complications that Doctors
15:22:00 Hodes and Nauser treat.
15:22:01 So, the fact that there's one -- one
15:22:04 facility left in the state that's licensed does not take
15:22:07 away either the -- does not take away the undue burden
15:22:10 for -- for women who are seeking these procedures. So,

15:22:16 it's clear that there's irreparable harm to the doctors
15:22:19 and to their patients. It's clear that there is not any
15:22:25 sort of irreparable harm to the state. Status quo will
15:22:28 be maintained. They'll be able to regulate these
15:22:32 providers just as they have been doing, and in the --
15:22:35 they'll have -- they can go through the regular
15:22:37 licensing process and -- and develop what happens there.
15:22:42 There's no medical emergency, no health
15:22:46 emergency that mandates that these regulations have to
15:22:49 go into effect on July 1st as they're currently drafted.
15:22:52 There's no reason to believe that they should go into
15:22:55 effect without waivers.
15:22:57 And there's -- then there's the public
15:23:00 interests, and as we've just cited to the court, there's
15:23:02 ample interest in the public in having these -- this
15:23:06 facility open to the public so that they can obtain
15:23:10 abortion procedures there. Abortion is a lawful
15:23:14 procedure. And -- and these doctors are highly
15:23:18 experienced doctors that provide sophisticated services
15:23:21 to some women with the most serious complications that
15:23:26 require abortions.
15:23:29 Finally, likelihood of success. Clearly, I
15:23:33 don't see how there can be any question that there is --
15:23:36 that they're likely to prevail on their due process
15:23:42 claim. And again, we would draw the court's attention

15:23:45 to Judge Smith's opinion in the Planned Parenthood case
15:23:49 in the Western District of Missouri where he clearly
15:23:52 found that there -- the same kind of thing, where there
15:23:54 were no waivers implemented, very strict -- very strict
15:23:58 physical plan requirements implemented with no
15:24:01 opportunity for waivers and no ample time-frame to meet
15:24:05 those, that that was an infringement on the plaintiff's
15:24:10 due process, and that he believed it likely that -- that
15:24:14 those statute -- those regulations would be
15:24:16 unconstitutional under the due process clause.
15:24:20 Finally, there is the likelihood of success,
15:24:25 the merits of undue burden, and it was -- as we've just
15:24:28 outlined, there is an undue burden both to the plaintiff
15:24:30 doctors and to plaintiffs seeking abortion in the state
15:24:33 of Kansas if these regulations are not enjoined.
15:24:37 I'm going to turn my time over now to
15:24:39 intervenors to -- to take a -- to explain to the court
15:24:46 their position and how it might differ from ours, but we
15:24:49 are respectfully asking this court to enter -- to enter
15:24:52 injunctive relief, enjoining the licensing process and
15:24:56 the temporary regulations currently promulgated under
15:25:00 Senate Bill 36. Thank you.
15:25:07 MS. PILATE: Thank you, Your Honor. I will
15:25:10 be fairly brief. I'd like to say at the outset that we
15:25:13 would like to adopt and incorporate into our argument

15:25:18 all of the arguments so ably made by Miss Woody and her
15:25:23 co-counsel both in their pleadings and in the oral
15:25:26 argument. Your Honor, I'd like to say at the outset
15:25:33 that my clients are concerned about the health and
15:25:38 safety of women, but that's not what these regulations
15:25:42 are about. If these regulations were about the health
15:25:46 and safety of women, they might contain something to
15:25:51 address the one part of the process where this very
15:25:56 vulnerable population that my clinic serves might suffer
15:26:01 some harm, which is between the parking lot and the
15:26:04 front door. And it is during that passage when they
15:26:08 suffer the screamers, the shouters, the hecklers who are
15:26:13 saying things that I won't repeat. But when they make
15:26:16 it to the clinic, that is their safe place. It is the
15:26:21 parking lot to the front door that poses the risk, not
15:26:25 the clinic. Your Honor, my client is the only provider
15:26:33 in Wyandotte County. They serve a vulnerable
15:26:36 under-served population that needs access to affordable
15:26:42 services. These regulations, like so many decisions by
15:26:48 governments, business, and other entities fall most
15:26:54 heavily and burden the most poor women. The vast
15:26:59 majority, between 90 and 95 percent of the people that
15:27:04 my clinic serves are poor women. A good half, maybe a
15:27:08 little bit more are African American and Latino. The
15:27:13 Latino part is very important, because my clinic has

15:27:16 three bilingual staff members, and as far as I know, it
15:27:21 is the only place where many members of the Latino
15:27:27 population feel like they can communicate and feel
15:27:32 comfortable. Our clinic does only first trimester
15:27:36 abortions. It is set up to do a very simple, frankly,
15:27:42 medical procedure that does not take much time. Many of
15:27:45 the regulations are simply inapplicable to our clinic.
15:27:49 And so, we would ask the court to take that into account
15:27:53 as well. Your Honor, abortions have been safely
15:27:56 performed in the building at 7th and Central for
15:27:59 21 years. The time line that has been set up in this
15:28:02 case is absurd. The final regulations were received on
15:28:09 June 20th, and compliance in full was expected by
15:28:13 July 1st. Frankly, Your Honor, that would require the
15:28:16 skills of a magician, and what my clinic has is a
15:28:20 dedicated staff, a registered nurse, and a very
15:28:24 dedicated physician. There are no magicians there. So,
15:28:29 Your Honor, we respectfully request that you enter the
15:28:34 emergency relief requested, and that these clinics and
15:28:41 other providers are able to continue providing this very
15:28:45 necessary service to the women of Kansas. Again, we
15:28:50 don't believe this has anything to do with the health
15:28:53 and safety. There has been no time to comply. My
15:28:57 client desires to comply, frankly, and was denied even
15:29:01 an inspection.

15:29:02 Your Honor, I will draw your attention to one fact that we are addressing rapidly. The statute requires the physician to have clinical privileges at a hospital within 30 miles. We anticipate that that issue is going to be resolved within days, perhaps within, you know, the next week or so. We've been working very hard on that. There has been no more need for our physician to have clinical privileges at a hospital than a dermatologist who treats teen-age acne, but we are complying with that, don't seek to litigate that, and do seek Your Honor's order as requested. Thank you.

THE COURT: At this time, Mr. Chanay, on behalf of -- Mr. Fabert?

MR. CHANAY: Mr. Fabert will be arguing.

THE COURT: Mr. Fabert.

MR. FABERT: Thank you, Your Honor. I want to distinguish here today the statute and the regulations. As I understand their motion and the argument, the challenge is to the regulations, but there is no challenge being made to the statute. I don't read the statute the same way the plaintiffs do. And I'm not sure I read the primary case that they rely on the same way either. We have a statute here whose most important provision is the Statute Seven that relates to the limitation on lawfully performed abortions. It starts

15:30:52 with an exemption for all true medical emergencies. If
15:30:58 we have any women who are suffering from true medical
15:31:02 emergency, those abortions can go forward unregulated
15:31:06 without the requirement of the license for the facility.
15:31:12 The statute creates a regimen of facilities licensing.
15:31:18 That is different from the board of healing arts which
15:31:22 has regulatory authority over physicians, and which
15:31:26 regulates the conduct of the doctors. The facilities
15:31:30 are going to have separate licensing, and separate
15:31:35 oversight by the department of health and environment.
15:31:38 And that's why it misses the point to talk about the
15:31:43 extent to which the doctors are all ready subject to
15:31:46 regulations by the board of healing arts. They always
15:31:50 have been subject to regulation by the board of healing
15:31:52 arts. They're going to continue to be subject to that
15:31:54 regulation. Those regulations and that agency have
15:31:58 nothing to do with overseeing the facilities. It just
15:32:03 so happens, coincidentally, the plaintiffs in this case
15:32:07 are both the physicians who perform the abortions and
15:32:10 the owners of the facilities. That could be otherwise.
15:32:14 We could have a circumstance where a new applicant for
15:32:19 licensing does not have the coincidence where the
15:32:24 physicians performing the abortion are also the owners
15:32:26 and operators of the facility. The regulations that
15:32:31 have to be adopted by the department of health and

15:32:34 environment have to address not just the specialized
15:32:39 concerns of these plaintiffs, they have to also address
15:32:44 the issue of any and all future applicant for licensing
15:32:48 under the statute. We need sufficiently explicit,
15:32:53 clear, understandable regulations that can be complied
15:32:57 with not just by these individuals but also by all
15:33:01 future applicants. We are, of course, caught coming and
15:33:06 going between a potential objection that the regulations
15:33:10 are too vague and objection that the regulations are too
15:33:15 specific. If the regulations did not include
15:33:20 definitions of what the facilities ought to look like,
15:33:22 they would be challenged as unreasonably vague. Because
15:33:28 the temporary regulations do specify what the facilities
15:33:31 ought to look like, they're now challenged as being too
15:33:34 specific. I think the fact that these plaintiffs are
15:33:39 not pursuing their administrative remedies in front of
15:33:44 the KDHE is proof that the real grievance here is
15:33:49 against the statute, not against the regulations. There
15:33:53 is no grievance that arises from the lack of sufficient
15:34:00 time to comply with this statute. They do not want to
15:34:04 comply with the statute ever. They do not want
15:34:08 additional time to comply with the statute. They want
15:34:12 to be permanently relieved of the obligation ever to
15:34:16 comply with the statute. That is something the
15:34:20 department of health and environment cannot do for them

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15:34:23 under any circumstances.

15:34:28 There is no fair reading of this statute
15:34:31 that would authorize the department of health and
15:34:34 environment to create out of thin air a process for
15:34:37 granting case by case exceptions and waivers. No such
15:34:42 waiver provision has been included in the statute. And
15:34:46 for that reason, you can't criticize KDHE for failing to
15:34:50 grant waivers and exception. The ultimate question,
15:34:55 because we are in US District Court and the state of
15:34:59 Kansas is the defendant, is whether there is a
15:35:02 constitutional violation, not merely is there an
15:35:08 arguable harm that could be addressed in a court case.
15:35:12 Court does not have jurisdiction to award tort damages
15:35:14 under the Eleventh Amendment. We're here solely for
15:35:19 injunctive relief consistent with the Eleventh
15:35:23 Amendment, and the question is whether the state is
15:35:26 acting unconstitutionally, enacting and enforcing this
15:35:32 statute.

15:35:33 Now, as I read the Planned Parenthood versus
15:35:38 Drummond case, the Missouri case that's been relied on,
15:35:43 Judge Smith specifically held that he believed those
15:35:46 plaintiffs would fail in their facial challenge to the
15:35:51 statute. That statute required all abortion providers
15:35:56 in the state of Missouri to comply with the standard for
15:36:00 ambulatory surgical centers. I'm looking at the

15:36:09 1 September 24, 2007 decision in that case, 2007 Westlaw
15:36:15 2 2811407. The fourth page of that opinion states, the
15:36:22 3 court holds that PPK does not have a probability of
15:36:28 4 success of establishing these facial claims. It goes on
15:36:34 5 further to say, for plaintiffs to succeed, the court
15:36:36 6 would have to determine the statute, and intended
15:36:40 7 regulations cannot be justified as a legitimate health
15:36:43 8 or safety measure. The court does not believe
15:36:46 9 plaintiffs will carry their heavy burden. Further into
15:36:50 10 that opinion, the judge pointed out that it is
15:36:54 11 reasonable to have regulations that require all
15:36:59 12 facilities where surgery is performed to abide by the
15:37:03 13 same regulations. What we're really here today about is
15:37:09 14 an argument that these plaintiffs are entitled to a
15:37:13 15 grandfather provision that is not in the statute, that
15:37:17 16 they are constitutionally entitled to a grandfather
15:37:19 17 provision that tells them that they are never, ever
15:37:23 18 going to be required to comply with current law, that
15:37:27 19 the law cannot be updated in any way that would restrict
15:37:32 20 their ability to keep performing their day to day
15:37:35 21 activities in the way they've been accustomed to.
15:37:39 22 Kansas law has never recognized a right protected by law
15:37:45 23 to perform medicine the way these plaintiffs have been
15:37:48 24 performing it. To the extent they've been lawfully
15:37:52 25 performing it, that's been primarily as a result of

15:37:54 judicial decisions that restrict past statutes that made
15:37:59 abortion illegal. We don't have a protected property
15:38:04 interest here in the business that these plaintiffs are
15:38:08 engaging in. They do not have existing licenses that
15:38:11 tell them that they have a -- a state guaranteed right
15:38:15 to engage in the business of providing abortions. The
15:38:24 state of Kansas does have the right to regulate
15:38:26 abortions. Judge Smith noted that in his decision.
15:38:30 The only question is whether they're going
15:38:33 to regulate abortions under a uniform rule applicable
15:38:37 both to these plaintiffs and to ambulatory surgical
15:38:41 centers, or whether instead, this court is going to
15:38:44 compel the state to create exceptions that apply only to
15:38:51 these plaintiffs and to no one else, to let them operate
15:38:53 the way they want to, free of all oversight and
15:38:58 regulation of the way their facilities are structured,
15:39:01 maintained and operated.
15:39:06 The standard for a temporary injunction, the
15:39:10 standard for temporary restraining order require there
15:39:15 to be a finding of irreparable harm, not just some harm,
15:39:18 but irreparable harm. The statute says that all medical
15:39:23 emergencies can go forward unlicensed. Statute also
15:39:27 says that unlicensed facilities can perform five first
15:39:33 trimester abortions every month without transgressing
15:39:36 the regulations or the statute. I think I have a

15:39:40 1 different idea of what irreparable harm is than the
15:39:43 2 plaintiffs have put forward. It is not enough to show
15:39:48 3 that there is some harm. The harm must be a harm that
15:39:53 4 cannot be remedied in any other way other than the
15:39:57 5 issuance of the temporary restraining order, and that
15:40:01 6 simply is not true in this case.
15:40:04 7 We cited the court to the case of State, ex
15:40:08 8 rel, Schneider versus Liggett. One of the key holdings
15:40:11 9 of that case from 1976 was the Kansas administrative
15:40:15 10 agencies have no jurisdiction to decide constitutional
15:40:18 11 challenges. The constitutional challenges must be
15:40:21 12 brought for the first time when an administrative case
15:40:25 13 has first been transferred to the district court on
15:40:27 14 appeal. That's what ought to be done in this case.
15:40:31 15 These plaintiffs should proceed to exhaust their
15:40:35 16 administrative remedies, and then if they don't get a
15:40:38 17 license, they should appeal to the district court. The
15:40:44 18 district court can then entertain their constitutional
15:40:46 19 challenges and decide whether this statute needs to have
15:40:52 20 a grandfather clause read into it in order to comply
15:40:55 21 with due process. KDHE cannot do that for them. It
15:41:00 22 lacks the authority to do it.
15:41:07 23 I have never heard of a regulated industry
15:41:13 24 being granted a due process right to craft the
15:41:17 25 regulations that apply to them, which is what I see in

15:41:21 the motion, that due process would require that these
15:41:25 regulations actually result from a meet and confer of
15:41:31 some kind with the regulated businesses. That is not my
15:41:35 understanding of due process. Due process comes when
15:41:44 the protected interest, whether it's the liberty
15:41:47 interest or property interest, is threatened, or the
15:41:50 government takes action, the government affords due
15:41:54 process at that time.
15:41:56 The government does not afford due process
15:41:58 to everyone by inviting their lobbyists into the
15:42:03 legislative process. That is not where due process
15:42:06 applies. Likewise, due process does not mandate that
15:42:11 there be a -- a prior comment period before a regulation
15:42:16 is made effective. I see no evidence whatever to
15:42:28 support the contention that either the statute or the
15:42:32 regulation was designed to make access more difficult.
15:42:37 In fact, the reply brief that was filed today agrees
15:42:42 with my own reading of the statute that the real purpose
15:42:46 is to try to bring all abortion clinics under a single
15:42:50 standard of professionalism, that being the standard of
15:42:55 professionalism historically present in ambulatory
15:42:59 surgical centers. If there is no medical emergency in
15:43:09 this case, there is no irreparable harm. If there were
15:43:18 a true medical emergency, the statute would not even
15:43:21 apply.

15:43:29 This statute, these regulations, have
15:43:33 nothing whatever to do with abortion protesters at all.
15:43:38 The fact that this statute does not address that
15:43:42 completely distinct and separate subject has nothing to
15:43:45 do with the lawfulness of these regulations. I think if
15:44:00 the purpose here is to avoid any potential risk of
15:44:04 prosecution for violation of the statute, we're probably
15:44:09 missing at least one party. That would, I assume, be
15:44:13 the prosecutor in Wyandotte County. But again, I don't
15:44:19 really think that that's why we're here today. What
15:44:22 we're here today is to address whether the department of
15:44:25 health and environment ought to be restrained and
15:44:28 prevented from going forward with the administrative
15:44:30 process of hearing the administrative appeal from denial
15:44:35 of the application for permits. I think that would be a
15:44:39 mistake. I think it would be an unnecessary
15:44:42 complication in the procedural posture of this case. I
15:44:46 think the right thing to do is not to restrain the
15:44:51 department of health and environment, to go ahead and
15:44:55 have the appeals prosecuted in the normal course so that
15:44:59 we can see what the outcome of those administrative
15:45:02 appeals are. Then whichever party feels aggrieved by
15:45:08 the outcome of the administrative appeal can pursue
15:45:12 additional relief in the district court, presumably the
15:45:17 District Court of Shawnee County, and at that time,

15:45:21 constitutional challenges to the interpretation and
15:45:23 application of the statute can properly be raised, and
15:45:27 the court can hear what a Kansas judge thinks this
15:45:32 statute really means.
15:45:37 If I read the -- the factual materials
15:45:42 correctly, I think the witnesses that are being offered
15:45:46 in support of this motion are in agreement with me. If
15:45:49 I read the contractor's affidavit, it's the first
15:45:53 attachment, the contractor says he's looked at the
15:45:56 regulations, and they -- he says these regulations
15:45:59 appear to him to be perfectly ordinary and normal
15:46:03 requirements for an ambulatory surgical center. He
15:46:09 said, that's right. That's -- that means they've done
15:46:12 their job correctly. The purpose of the regulations is
15:46:16 essentially to bring into alignment the practice in
15:46:22 individual doctor's offices with the practice in
15:46:25 ambulatory surgical centers, that that's the level of
15:46:31 health care that the legislature of the state wants to
15:46:35 see afforded in every abortion facility operating in
15:46:40 this state. To the extent that is inconsistent with
15:46:48 operating a comparatively small doctor's office, that
15:46:54 grievance would have to be taken up with the Kansas
15:46:56 legislature, not with the department of health and
15:46:59 environment.
15:47:01 There is no way for the KDHE to draft and

15:47:05 adopt regulations that carry out the orders of the
15:47:10 Kansas legislature without having substantially what
15:47:17 these regulations say. If there is any wiggle room
15:47:21 there, I'm sure that all the proceedings in this case
15:47:24 will be taken into account in drafting any changes of
15:47:31 the permanent regulations that will take the place of
15:47:33 the temporary regulation. But the notion that this is
15:47:37 somehow a facially obvious due process violation, I
15:47:45 think is clearly erroneous. There is not a single case
15:47:50 that has been offered up here that holds that this kind
15:47:55 of statute and these regulations, regulations similar to
15:47:59 this, are due process violations. I might point out
15:48:04 that what the Planned Parenthood case really held was
15:48:08 that to the extent non-surgical abortions were being
15:48:11 performed in one of those plaintiffs' facilities, those
15:48:15 would not appropriately be subject to the same rules and
15:48:17 regulations as the -- the rules applicable to surgical
15:48:21 facilities. But in the course of that holding, Judge
15:48:25 Smith specifically included that everyone who performs
15:48:29 surgical abortions deserves to be subjected to the same
15:48:33 rules and regulations as every other surgical facility
15:48:37 in the state of Missouri.
15:48:39 I don't know how that case can be cited for
15:48:42 the proposition that there is some sort of property
15:48:46 right in continuing to operate a private medical office

15:48:55 that falls far short of the requirements of an
15:48:59 ambulatory surgical center as an abortion facility. We
15:49:09 have a lot of speculation about patients who might or
15:49:13 might not be allowed to go to the place they would
15:49:20 prefer to go for their abortion.
15:49:23 I am not aware of any irreparable harm that
15:49:26 is suffered by being required to go to an ambulatory
15:49:31 surgical center rather than going to a doctor's office
15:49:35 for an abortion. I do not know that one facility is any
15:49:42 more subject to the potential for screaming protesters
15:49:46 as opposed to the other.
15:49:52 The standard in the Tenth Circuit for the
15:49:56 issuance of temporary restraining order is plain, and it
15:50:02 is what we've cited the court to, the Aid for Women case
15:50:06 from 1996. It is not enough to just say that some
15:50:14 privacy interest is implicated in the enforcement of the
15:50:18 statute. Considerably more detailed showing is required
15:50:25 before the TRO can be issued by a US District Court here
15:50:28 in the state of Kansas, unlike apparently, the standard
15:50:32 they're applying in Missouri.
15:50:36 We think it would be a mistake to bring to a
15:50:40 halt the administrative process at the state level. We
15:50:44 think it's extremely important that this administrative
15:50:46 process be allowed to play itself out. I am aware of no
15:50:50 threat of prosecution of any of these plaintiffs. We

15:50:55 have nothing from any of the interested prosecutorial
15:51:00 agencies suggesting that they're waiting to swoop down
15:51:03 on someone, close their building, arrest them and throw
15:51:06 them in jail. Kansas courts are perfectly competent to
15:51:14 address due process concerns. If there really are
15:51:19 grandfather clause concerns under the statute, they can
15:51:25 be addressed by the Shawnee County District Court. They
15:51:28 don't have to be addressed first and foremost here in
15:51:32 this court.
15:51:34 Without a fully developed administrative
15:51:38 record, we will never know whether either of the
15:51:42 facilities operated by these plaintiffs has any hope
15:51:45 ever of being licensed consistent with the statute and
15:51:49 the regulations. They have outlined what they consider
15:51:54 the reasons that they think would probably impose a
15:52:01 burden on them in seeking to be licensed, but we will
15:52:05 never know until we've seen the entire administrative
15:52:08 record filled out whether the real reason they don't
15:52:13 have a license issued, assuming there is no license
15:52:18 issued, is because they didn't have enough time, or
15:52:21 whether instead, their grievance is that no matter how
15:52:24 much time they're allowed, they have no intention of
15:52:27 complying with the statute.
15:52:34 I'd like to see this case resolved in as
15:52:39 expeditious and final a way as possible, I think it

15:52:42 would be a mistake to shut down the administrative
15:52:45 process prematurely, and that's why I think that because
15:52:50 there is no threat of eminent enforcement, no one is
15:52:55 being threatened with going to jail, medical emergencies
15:52:59 are all ready addressed in the statute, we do not have
15:53:05 any reason to believe that irreparable harm will follow
15:53:09 if we let the administrative process play out, that
15:53:12 that's the right course. And if expedited hearings are
15:53:16 needed, all plaintiffs need do is ask for them. We have
15:53:20 a highly cooperative office of administrative hearings,
15:53:23 and we can do what it takes to get the issues resolved
15:53:29 as quickly as possible, and then come back to this
15:53:32 court, if necessary, with a fully developed
15:53:35 administrative record. Thank you.
15:53:39 THE COURT: Court had given 30 minutes per
15:53:42 side. In light of the time that we've used, I am going
15:53:46 to ask the parties if they wish, they can respond to
15:53:49 each other's arguments at this time. Give you some
15:53:52 additional time. Five minutes.
15:53:56 MS. WOODY: Sure. Your Honor, I just want
15:54:27 to address a couple of things that Mr. Fabert mentioned.
15:54:30 First of all, the defendants cannot prevail in this case
15:54:33 by mischaracterizing the plaintiff's claims. This is
15:54:35 not a facial challenge to the statute. This is an as
15:54:38 applied statute to the -- the particular way the KDHE

15:54:42 has implemented the licensing provisions of the act and
15:54:45 the temporary regulations as adopted. Secondly,
15:54:50 Mr. Fabert argues that there's no irreparable harm to
15:54:53 patients because they can simply choose another abortion
15:54:56 facility or they can get a medical emergency exception,
15:54:59 and implies somehow that the two women that we discussed
15:55:02 in the first part of the argument could somehow get some
15:55:04 kind of a waiver in that respect. But if you look at
15:55:07 the statute, it says only where there's -- the woman is
15:55:10 in danger of eminent death or impairment of a major
15:55:14 bodily function could she get a waiver for an emergency
15:55:19 abortion.
15:55:20 In this instance, these abortions are
15:55:22 medically indicated, but would not fall within the
15:55:25 definition of the regulations, and therefore, would not
15:55:30 be able to -- she would not able to get an abortion --
15:55:38 would not be able to get an abortion on a medical
15:55:40 emergency basis.
15:55:43 I want to take issue with the idea that the
15:55:45 board of healing arts does not regulate the facilities.
15:55:48 As the court looks at the chart that we've given the
15:55:51 court, clearly it does. That's the reason for the
15:55:53 inspections coming out. If you look at the -- for
15:55:56 instance, at the issue of procedure room size, you can
15:55:58 see that the procedure room size is spoken to in the

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15:56:03 Kansas regulations for office space surgery. It is, of
15:56:06 course, not nearly as stringent as the 150 square feet
15:56:09 requirement that's in the -- the temporary regulations,
15:56:12 but nor is that as stringent as -- nor is the one for
15:56:18 hospitals as stringent. There's nothing about that
15:56:21 regulation that is appropriate in this case, and there's
15:56:24 nothing that would mandate such a regulation in light of
15:56:28 the other regulations specifically for office space
15:56:31 surgeries.

15:56:32 With respect to the argument that there's no
15:56:38 due process argument here, and that we should go through
15:56:41 the administrative route, it is the court's obligation
15:56:44 to address the constitutional issues under due process.
15:56:48 The idea that the plaintiffs here are seeking some
15:56:51 special treatment is not -- is not true. Here you have
15:56:54 regulations that were adopted that gave the providers
15:56:59 nine days to come in compliance with regulations that
15:57:02 would have totally meant total remodeling of their
15:57:06 facilities. There is no due process in that. The
15:57:09 regular -- the regular procedure for adopting
15:57:12 regulations, with public comment going forward with
15:57:17 that, and then having permanent regulations entered at
15:57:21 some time in the future, that's the regulations that we
15:57:24 are asking the court to have the Kansas -- the state of
15:57:27 Kansas follow, not that they adopt some temporary

15:57:30 regulations that in effect shut these folks down.
15:57:34 There is irreparable harm to the doctors.
15:57:36 If you look at Judge Smith's opinion, he clearly says
15:57:39 that because of the Eleventh Amendment, as it's stated
15:57:41 -- as stated, they don't have an opportunity to come in
15:57:44 here for tort damages. So, for instance, any lost
15:57:47 revenues to the -- to the doctors are irreparable harm
15:57:50 because they can never recoup those while they go
15:57:53 through the administrative procedures that the state is
15:57:55 talking about. So, clearly there is irreparable harm
15:57:58 there. There clearly is irreparable harm to women
15:58:02 seeking abortions and access to abortions in this state
15:58:05 by way of the temporary regulations. And as we've said,
15:58:08 there is absolutely no reason for the court to let
15:58:14 them -- to not give injunction in this case and let the
15:58:17 case go forward, if there is any other information the
15:58:20 court needs, that it will be developed throughout --
15:58:23 throughout this procedure, it's clear, and plaintiff
15:58:27 stated in their brief, this court has discretion to
15:58:31 enter injunctive relief when it's appropriate. If ever
15:58:35 there was a case where injunctive relief is appropriate,
15:58:37 where the state should be restrained from enforcing
15:58:41 these temporary regulations in nine days when it's
15:58:46 impossible for the plaintiffs to comply, this is such a
15:58:49 case. If you look at Judge Smith's opinion, it doesn't

15:58:52 say what the state said. There, he found that the same
15:58:55 kinds of regulations, the same kinds of restrictions,
15:58:59 because they didn't provide for ample time for the
15:59:01 plaintiffs to comply and because they didn't provide for
15:59:06 an opportunity for them to seek waivers, likely would be
15:59:10 unconstitutional.
15:59:10 There's no difference between the
15:59:12 regulations at issue here and those that were at issue
15:59:16 in front of the Western District of Missouri with
15:59:18 respect to the -- the constitutionality of those --
15:59:23 those issues.
15:59:23 Clearly, we believe that there is likelihood
15:59:27 of success on both the due process and the undue burden
15:59:30 issues, and we respectfully request that the court grant
15:59:33 injunctive relief.
15:59:35 THE COURT: Mr. Fabert?
15:59:38 MR. FABERT: Well, I just want to address
15:59:51 this notion that we are mischaracterizing the relief
15:59:54 that was being requested here. Umm, the relief that's
15:59:59 being requested here is permanent, permanent,
16:00:05 non-enforcement of the statute. Plaintiffs are not
16:00:09 asking for a schedule, for a reasonable length of time
16:00:14 for the KDHE to tell them exactly what they need to do
16:00:18 to come into compliance and to get licenses. They have
16:00:22 made it very plain that the reason they consider their

16:00:24 harm to be irreparable is the fact that they cannot
16:00:28 under any reasonable circumstances comply with any
16:00:32 anticipated version of the regulations. This nine day
16:00:37 argument is, therefore, a red herring. We could have
16:00:40 given them nine months, and their objection would be
16:00:43 identical.
16:00:44 They do not care how much time they're
16:00:47 allowed. They do not want to come into compliance ever.
16:00:52 They want this court to tell them they don't ever have
16:00:54 to remodel their facilities to make them look more like
16:00:59 an ambulatory surgical center.
16:01:07 The only reason -- the only reason damages
16:01:11 are not available is because these plaintiffs have
16:01:14 chosen the forum of US District Court. If they thought
16:01:18 they needed a money damages remedy, all they needed to
16:01:22 do was to start the proceedings in state court, because
16:01:25 there is no Eleventh Amendment immunity in state court.
16:01:29 It is their decision to choose this forum of limited
16:01:33 jurisdiction that limits the extent of their remedy, not
16:01:38 anything the state has done.
16:01:42 Once more, if the issue is the regulations
16:01:46 and the behavior of the Kansas Department of Health and
16:01:49 Environment, there can be no criticism of their conduct.
16:01:55 It is not due process for them to overstep the authority
16:01:59 entrusted them by the legislature of the state of

16:02:02 Kansas. They have no power to grant waivers. They have
16:02:04 no power to grant grandfather clauses. They have no
16:02:10 power to entertain constitutional challenges to this
16:02:13 statute. Only the District Court of Shawnee County can
16:02:18 entertain the constitutional challenges in the first
16:02:22 instance. That is what needs to occur here to give
16:02:25 these plaintiffs all the remedy that they're entitled
16:02:29 to, and the sooner we reach that point, then they will
16:02:33 get all the remedy the law will ever allow them. Thank
16:02:38 you.
16:02:41 THE COURT: What the court would like to do
16:02:43 at this time is then -- appreciate the parties
16:02:46 accommodating the court's schedule -- if I could take a
16:02:49 recess to consider the arguments that have been made
16:02:51 this afternoon, and then return and give you the court's
16:02:55 ruling. Thank you.
16:02:56 (Whereupon court took a recess. Proceedings
16:38:36 then continued as follows:)
16:38:36 THE COURT: We're back on the record. I
16:38:59 want to thank the parties, counsel, for again
16:39:02 accommodating the court in regards to our schedule for
16:39:07 this afternoon, and also in regards to the expedited
16:39:13 briefing that the court made a request of the parties.
16:39:16 So, thank you for that. As I begin with the court's
16:39:20 ruling, I will mention this for the record. We're at a

16:39:27 very early stage of these proceedings. The record has
16:39:31 not been fully developed, and what is before the court
16:39:37 is a request for preliminary relief. The court has
16:39:44 reviewed the briefs, the evidence, and the relevant law.
16:39:49 Court has heard the parties' arguments, and again, is
16:39:52 now prepared to rule. I'd ask the parties to follow
16:39:57 along. This will take me a little while here to get
16:40:01 through.

16:40:02 To begin with, because defendants had notice
16:40:05 of this hearing, filed written arguments and authorities
16:40:10 regarding their position and are present, the court will
16:40:16 consider plaintiff's motion which was entitled motion
16:40:19 for a temporary restraining order and/or preliminary
16:40:24 injunction, the court will consider it as one for a
16:40:28 preliminary injunction.

16:40:30 The purpose of a preliminary injunction is
16:40:32 to maintain the status quo pending the outcome of the
16:40:37 case. Plaintiffs as the parties seeking the preliminary
16:40:42 injunction bear the burden to establish, number one, a
16:40:45 substantial likelihood of prevailing on the merits.
16:40:49 Number two, irreparable harm unless the injunction is
16:40:53 issued. Number three, the threatened injury outweighs
16:40:57 the harm that the injunction may cause the opposing
16:41:03 party. And number four, an injunction, if issued, will
16:41:07 not adversely affect the public interest.

16:41:11 First, the court looks at the likelihood
16:41:13 that plaintiffs will succeed on the merits of their
16:41:15 claims. Plaintiffs base their injunction request on
16:41:21 their claims that defendants violated plaintiffs'
16:41:24 procedural and substantive due process rights and their
16:41:30 patient's right to privacy. To succeed on the
16:41:34 procedural due process claim under the Fourteenth
16:41:38 Amendment, plaintiffs must establish that they possessed
16:41:43 a protected interest such that the due process
16:41:46 protections were applicable. If they make such showing,
16:41:50 then they must show that they were not afforded an
16:41:53 appropriate level of process. It's a case of Farthing
16:41:58 versus City of Shawnee at 39 Fed 3rd 1131, an 1135, a
16:42:04 Tenth Circuit case from 1994. Plaintiffs argue they
16:42:09 have a property and liberty interest in the continued
16:42:12 operation of their medical practice. The right to
16:42:16 pursue a lawful business has long been recognized as a
16:42:20 property right within the protection of the Fourteenth
16:42:22 Amendment. Plaintiffs have provided evidence that their
16:42:26 medical practice has been in operation, that they have
16:42:29 been providing abortion services for approximately
16:42:32 24 years. Based on the record presented, it appears
16:42:38 plaintiffs have a protected interest in maintaining
16:42:41 their business. Procedural due process requires notice
16:42:45 and a pre-deprivation hearing before property interests

16:42:51 are negatively affected by governmental actors. At this
16:42:55 stage of the litigation, plaintiffs have also provided
16:43:00 the court with evidence to suggest that defendants did
16:43:02 not afford them an appropriate level of process
16:43:06 implementing the temporary regulations and licensing
16:43:11 process. On the record presented, it appears defendants
16:43:17 failed to provide plaintiffs with, arguably, any
16:43:21 process, let alone adequate process. According to the
16:43:25 record presented, plaintiffs wrote to KDHE regarding the
16:43:31 act on May 17th, 2011, the day after the act was
16:43:37 enacted. KDHE responded on May 26th, informing
16:43:43 plaintiffs that the new regulations and licenses would
16:43:47 become effective July 1st, which is today's date.
16:43:52 Plaintiffs did not receive regulations until June 9th
16:43:56 when they were given until Friday, June 17th to become
16:44:00 familiar with the regulations, confirm compliance, and
16:44:06 apply for a license. After the close of business on
16:44:10 June 17th, KDHE sent plaintiffs a copy of the final
16:44:14 temporary regulations and licensing process. These
16:44:20 regulations imposed more, arguably, onerous requirements
16:44:27 than the June 9th draft regulations. Plaintiffs asked
16:44:34 for waivers, but were told no waivers would be given.
16:44:40 There's no evidence in the record that plaintiffs were
16:44:42 provided a meaningful notice or opportunity to be heard
16:44:47 or give comment on the regulations. In addition to

16:44:51 guaranteeing fair procedures, the due process clause of
16:44:54 the Fourteenth Amendment, quote, covers a substantive
16:44:58 sphere as well, barring certain government actions,
16:45:01 regardless of the fairness of the procedures used to
16:45:04 implement them, end quote, case of Diaz versus City and
16:45:09 County of Denver at 567 Fed 3rd 1169, at 1181, a Tenth
16:45:16 Circuit case from 2009 which is quoting County of
16:45:21 Sacramento versus Lewis at 523 U S 833 at 845, 1998
16:45:26 Supreme Court case. In this case, the legislative
16:45:31 enactment is required to bear a rational relation to the
16:45:34 legitimate government interest. Plaintiffs argue the
16:45:38 temporary regulations and licensing process requirements
16:45:42 are medically unnecessary, unattainable and harmful to
16:45:47 public health. Plaintiffs further argue that defendants
16:45:50 have violated their substantive due process rights by
16:45:53 implementing the requirements in a manner that prohibits
16:45:57 plaintiffs from continuing to provide abortion services
16:46:00 unless they meet onerous standards on a short amount of
16:46:04 time. Plaintiffs contend number one, there's no medical
16:46:08 need for the physical facility requirements; number two,
16:46:13 it's impossible for them to comply with the physical
16:46:16 facility requirements in time to obtain a license before
16:46:21 the effective date of the act; number three, the
16:46:24 physical facility requirements directly undermine public
16:46:28 health by substantially impeding access to a lawful and

16:46:33 necessary medical procedure. Through affidavits,
16:46:38 plaintiffs have presented evidence that the temporary
16:46:41 regulations and licensing process requirements regarding
16:46:45 the physical facilities where abortion services are
16:46:49 performed are unique to those facilities, that the
16:46:52 regulations for facilities to handle more complex and
16:46:56 riskier procedures like hospitals do not contain
16:46:59 physical facility requirements as strict and/or onerous
16:47:04 as the temporary regulations and licensing process, and
16:47:09 that the temporary regulations and licensing process
16:47:13 physical facility requirements are not medically
16:47:15 necessary. Defendants have not presented evidence that
16:47:20 the additional requirements for the facilities where
16:47:23 abortion services are provided are rationally related to
16:47:27 a legitimate governmental interest. The evidence
16:47:34 presented to the court is sufficient at this early stage
16:47:39 of the proceedings to show a likelihood that plaintiffs
16:47:43 will succeed on the merits of their due process claims.
16:47:47 Because the court has found that plaintiffs have shown a
16:47:51 likelihood that they will succeed on the merits of their
16:47:53 due process claims, the court need not address
16:47:57 plaintiff's right to privacy claim.
16:47:59 The court next considers whether plaintiffs
16:48:01 will suffer irreparable harm if the court denies a
16:48:04 preliminary injunction. The irreparable harm

16:48:06 requirement is satisfied if plaintiff shows a
16:48:09 significant risk that it will experience harm that
16:48:14 cannot be compensated after the fact by monetary
16:48:17 damages. Irreparable harm can occur through loss of
16:48:21 customer or good will as well as threats to a business's
16:48:26 viability. Here, plaintiffs argue that absent an
16:48:29 injunction, defendants will enforce the temporary
16:48:32 regulations and licensing process immediately, harming
16:48:36 plaintiffs by number one, forcing them to shut down
16:48:38 their ongoing abortion services; number two, subjecting
16:48:43 them to loss of revenues; number three, subjecting them
16:48:46 to loss of future patients; and number four, damaging
16:48:50 the professional standing. Plaintiffs also allege, in
16:48:54 the absence of the requested injunction, their patients
16:48:57 will be exposed to unnecessary health risks. The Kansas
16:49:02 women will be unable to obtain abortion services in the
16:49:05 state and/or in a private medical office setting, and
16:49:09 public health will be threatened. Yesterday, KDHE
16:49:16 issued a one year license to Comprehensive Health of
16:49:19 Planned Parenthood of Kansas and Mid-Missouri, one of
16:49:23 only two other facilities in Kansas that provides
16:49:26 abortion services. Defendants argue that because
16:49:30 Planned Parenthood was licensed, women will still be
16:49:33 able to obtain abortion services in Kansas. They also
16:49:37 argue that plaintiffs can seek to get a license to

16:49:40 perform abortion services at another facility. Thus,
16:49:46 the defendants argue, the only remaining harm of
16:49:49 plaintiffs is the speculative harm that plaintiffs will
16:49:52 lose revenue and future clients, receive damage to the
16:49:58 professional standing, and that there will be a threat
16:50:00 to public health. Plaintiffs presented evidence that
16:50:03 without an injunction, they would have to cease
16:50:08 providing medical services today. KDHE informed
16:50:12 plaintiffs this morning that they would be denied a
16:50:15 license. They have patients scheduled to receive these
16:50:19 services within the next week. According to the
16:50:23 affidavit submitted, these services are often medically
16:50:26 necessary, and a delay in the services creates a health
16:50:30 risk for patients. There is evidence in the record of
16:50:34 at least two women with fetal anomalies and serious
16:50:38 medical complications that will suffer irreparable harm
16:50:42 if an injunction is not issued. At least one of the
16:50:47 plaintiffs performs 25 percent of these services in the
16:50:51 state of Kansas. One plaintiff has been licensed, but
16:50:55 the record indicates that that clinic does not have the
16:50:59 specific expertise of plaintiffs Hodes and Nauser in
16:51:06 performing certain complicated procedures, and is
16:51:10 unlikely to be able to absorb the patients of both
16:51:13 plaintiffs in the manner that will address the health
16:51:15 concerns involved with dealing with delaying the

16:51:18 services to patients. There's also evidence that
16:51:24 plaintiffs will lose revenue through future clients, and
16:51:28 good will, and suffer harm to their professional
16:51:31 reputation if they are forced to stop providing legal
16:51:35 medical services. Based on the record presented, the
16:51:38 court finds that plaintiffs have sufficiently shown that
16:51:41 they will suffer irreparable harm unless a temporary
16:51:45 restraining order is issued.
16:51:47 Next, the court looks at whether the
16:51:49 threatened injury outweighs the harm that the temporary
16:51:54 restraining order may cause defendants. If the court
16:51:56 were to issue the requested orders, defendants would be
16:51:58 prohibited, at least temporarily, from enforcing the
16:52:01 temporary regulations and licensing process. There's no
16:52:05 evidence that an injunction will impose any affirmative
16:52:10 obligations, administrative burden or cost to
16:52:13 defendants. The delay in enforcing the state's laws
16:52:17 that might result from an injunction is not as great as
16:52:20 the threatened harm to plaintiffs and their patients.
16:52:23 An injunction would not prevent the regulation of
16:52:26 plaintiff's medical services entirely. Plaintiffs would
16:52:30 remain subject to existing regulatory requirements and
16:52:34 government oversight. Any delay or interruption from
16:52:38 the issuance of an injunction will be temporary pending
16:52:42 the resolution of this action. The court finds that the

16:52:47 significance, certainty and reparability of the
16:52:52 threatened harm outweigh any potential harm to
16:52:56 defendants.
16:52:57 Finally, court will consider whether the
16:52:59 injunction, if issued, would adversely affect the public
16:53:02 interest. This action involves access to and regulation
16:53:06 of medical services that directly affect the public
16:53:09 interest. Although regulation of medical services is a
16:53:13 recognizable public interest that would be affected by
16:53:17 issuing the requested injunction, the court believes
16:53:20 that the public's interest lies in preserving the status
16:53:24 quo pending resolution of this case. As the court
16:53:30 mentioned, if an injunction is issued, plaintiffs would
16:53:33 remain subject to the existing regulatory requirements
16:53:36 and government oversight. The court finds that
16:53:40 restraining action on the temporary regulations and
16:53:43 licensing process until the merits of this action can be
16:53:48 resolved would not adversely affect the public interest.
16:53:52 As a result of considering these factors, the court
16:53:56 finds plaintiffs have established entitlement to the
16:54:00 requested preliminary injunction. Plaintiff's motion is
16:54:04 granted. Defendants and their agents and successors and
16:54:09 office are temporarily restrained from enforcing the
16:54:13 licensing requirements of Senate Bill Number 36, 2011
16:54:18 bill, at Sections 2, 8 -- 2 and 8, and also enforcing

HODES & NAUSER, MDS, PA v. NAUSER, et al.

16:54:26 the temporary regulations and licensing procedures until
16:54:30 a resolution of this action.
16:54:34 I would direct the parties to, in light of
16:54:37 the court's ruling, contact the magistrate judge
16:54:41 assigned to this case to request that a scheduling order
16:54:46 regarding this case be set as soon as possible. Based
16:54:53 on the court's ruling, at this time, is there any
16:54:59 request or argument for a bond to be issued?
16:55:09 MR. FABERT: If it please the court, I think
16:55:11 Federal Rule 65 C makes a posting of some bond
16:55:19 mandatory, and there is no discretion to completely
16:55:21 waive and dispense with the posting of a security bond.
16:55:27 THE COURT: Is there a request for a bond
16:55:29 amount?
16:55:38 MR. FABERT: Umm, we think a nominal figure
16:55:44 of $25,000 would be sufficient.
16:55:46 THE COURT: In regards to your statement
16:55:49 that the bond is mandatory, is that based on your
16:55:55 reading of the rule or some other source?
16:56:01 MR. FABERT: I think the language of the
16:56:03 rule states the court may issue a preliminary injunction
16:56:06 or a temporary restraining order only if the movant --
16:56:10 if the movant gives surety in an amount that the court
16:56:15 considers proper. And so, the black letter language of
16:56:17 the rule, I think, makes it obligatory to impose some

16:56:21 requirement on the security bond.
16:56:27 THE COURT: Thank you. Plaintiffs want to
16:56:30 be heard in regards to a request that a bond be set at
16:56:33 this time?
16:56:33 MS. WOODY: Yes, Your Honor. It's
16:56:34 plaintiff's position that Rule 65 provides the court
16:56:36 with discretion as to whether or not to enter a bond.
16:56:39 Based on the court's finding that there is no
16:56:41 affirmative action required by the state in this matter,
16:56:44 and no damages -- that there would be no damages to the
16:56:48 state from proceeding under the injunction, and as I
16:56:51 believe that injunctions of this nature have been
16:56:53 granted without bond as evidenced by the case that we
16:57:00 have cited to you, which is Judge Smith in the Western
16:57:02 District granted an injunction without a bond, and we
16:57:07 would draw the court's attention to the Tenth Circuit
16:57:10 case of Coquina Oil Corp versus Transwestern Pipeline
16:57:14 Company, there's no bond necessary absent the proof of
16:57:17 showing of likelihood of harm to the state.
16:57:21 THE COURT: Anything else?
16:57:23 MS. WOODY: No.
16:57:25 MR. FABERT: I don't believe so.
16:57:27 THE COURT: In regards to the rule, the rule
16:57:29 has the language that you've put on the record,
16:57:33 Mr. Fabert. I would tell you that courts have actually

16:57:37 1 weighed in, in regards to that language. I refer the
16:57:41 2 record to a case of RoDa Drilling Company versus Siegal
16:57:45 3 at 552 Fed 3rd 1203, at 1215, a Tenth Circuit case from
16:57:51 4 2009, noting wide latitude of trial courts in
16:57:56 5 determining whether to require a bond, despite what
16:58:00 6 appears to be the plain reading of the rule. It appears
16:58:07 7 to be something which this court has discretion based on
16:58:12 8 the court's interpretation of the rule. Again, the
16:58:15 9 court made its ruling. I believe in good faith the
16:58:23 10 state has asked for a bond to be imposed. At this time,
16:58:29 11 again, it's an early stage of these proceedings. The
16:58:32 12 record's not fully developed. The court under these
16:58:36 13 circumstances does not believe that a bond should be
16:58:40 14 required. I don't believe that there's been a
16:58:45 15 sufficient showing of likelihood of harm by the court
16:58:49 16 not issuing the bond. Bond request has been considered
16:58:52 17 by the court. At this time, at this hearing, that
16:58:56 18 request is denied. If there's nothing else from the
16:58:59 19 parties, this hearing's adjourned. Thank you.
16:59:08 20 MR. CHANAY: I'm sorry, Your Honor, I just
16:59:10 21 had one question. Is the state free to continue under
16:59:13 22 process of developing its permanent regulations by
16:59:16 23 taking evidence from the public and comment on the
16:59:18 24 regulations as they have intended for the -- for the
16:59:22 25 permanent application? I would certainly understand

16:59:25 your ruling to keep them from implementing them, but may
16:59:28 they at least continue on in the development process and
16:59:32 taking public comment and information for those
16:59:34 regulations?
16:59:38 THE COURT: I don't know if I need to hear
16:59:39 from plaintiffs in regards to that, because I would find
16:59:42 the plaintiffs have specifically addressed what relief
16:59:46 they were requesting. I don't think the relief the
16:59:48 court has granted in any way would interrupt or
16:59:52 interfere with that part of the process from continuing.
16:59:56 MR. CHANAY: All right. Very good.
16:59:57 THE COURT: Anything else?
16:59:57 MR. CHANAY: No, Your Honor.
16:59:58 THE COURT: If there's nothing else, this
17:00:00 hearing's adjourned. Thank you.
(Whereupon court recessed proceedings.)

C E R T I F I C A T E

I, Nancy Moroney Wiss, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 52 typewritten pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED July 12, 2011.

S/_____

Nancy Moroney Wiss, CSR, CM, FCRR