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IN THE COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

**A2200704**

**WOMEN'S MEDICAL GROUP  
PROFESSIONAL CORPORATION**  
d/b/a **WOMEN'S MED DAYTON**  
c/o B. Jessie Hill  
ACLU of Ohio  
4506 Chester Ave.  
Cleveland, OH 44103

**PLANNED PARENTHOOD  
SOUTHWEST OHIO REGION**  
c/o Fanon A. Rucker  
The Cochran Firm  
119 E. Court St., Suite 102  
Cincinnati, OH 45202

**Plaintiffs,**

**vs.**

**BRUCE VANDERHOFF**  
Director, ODH  
246 N. High Street  
Columbus, OH 43215

**OHIO DEPARTMENT OF HEALTH**  
246 N. High Street  
Columbus, OH 43215

**Defendants.**

Case No. \_\_\_\_\_

Judge \_\_\_\_\_

**COMPLAINT**  
**FOR DECLARATORY AND**  
**INJUNCTIVE RELIEF**

COPY FILED  
CLERK OF COURTS  
HAMILTON COUNTY

FEB 25 2022

COMMON PLEAS COURTS

## INTRODUCTION

1. This is a constitutional challenge to the 134th Ohio General Assembly's Substitute Senate Bill No. 157 ("SB 157"), seeking declaratory and injunctive relief. Ambulatory surgical centers ("ASFs"), including procedural abortion providers, without written transfer agreements ("WTAs") must contract with backup doctors in order to maintain their ASF licenses. SB 157 amends Ohio's already unnecessarily onerous licensing scheme for procedural abortion providers by drastically limiting the pool of potential backup doctors. It requires backup doctors to certify that they "do[] not teach or provide instruction, directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college" and that they "[are] not employed by or compensated pursuant to a contract with, and do[] not provide instruction or consultation to, a medical school or osteopathic medical school affiliated with a state university or college[.]" Doctors who engage in these activities are prohibited from serving as backup doctors. If clinics are unable to find backup doctors, their ASF licenses will be revoked and they will no longer be able to provide procedural abortion care, resulting in significant harm to Plaintiffs and their patients seeking procedural abortions in Ohio. Although SB 157 does not take effect until March 23, 2022 and, by its terms, gives clinics an additional 90 days after the effective date—until June 21, 2022—to comply, Defendants are already enforcing the law against Plaintiff Women's Med Dayton ("WMD"), and have taken steps indicating that they may soon enforce the law against Plaintiff Planned Parenthood Southwest Ohio Region ("PPSWO"). A copy of SB 157 is attached hereto as Exhibit A.

2. Plaintiffs' ASFs have provided safe procedural abortion care in Ohio for decades. Abortion is very safe and far safer than giving birth. Complications requiring hospital treatment

occur in only a fraction of a percent of all abortions.<sup>1</sup> In the rare event that a complication requiring hospital-based care does occur, federal law<sup>2</sup> and Plaintiffs' policies and procedures ensure that the patient will receive the best available care as quickly as possible.

3. Despite this, Ohio has adopted an onerous and unwarranted licensing scheme that provides no health or safety benefits to patients and that the Ohio Department of Health ("ODH") exploits at every turn to deny ASF licenses to Plaintiffs through arbitrary and unjustifiable enforcement actions.

4. Clinics that provide procedural abortion must maintain an ASF license. To maintain an ASF license, a clinic must either have a written transfer agreement ("WTA") with a local hospital or be granted a variance from that requirement by ODH. R.C. 3702.303. Pursuant to statute, to obtain a variance from the WTA requirement, a clinic must have a written agreement with at least one backup doctor who, among other things, maintains admitting privileges at a local hospital. R.C. 3702.304. ODH has unilaterally expanded the scope of these statutes by requiring that abortion clinics—and only abortion clinics—seeking a variance have agreements with at least four backup doctors who are obstetrician-gynecologists ("OBGYNs") and who maintain staff voting privileges as well as admitting privileges at a local hospital.

5. SB 157 now makes it even more difficult, if not impossible, for abortion clinics to obtain a variance—and therefore an ASF license—by further limiting the pool of potential backup physicians. Under SB 157, backup physicians may not teach or provide instruction,

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<sup>1</sup> Natl. Academies of Sciences, Eng. & Medicine, *The Safety & Quality of Abortion Care in the United States*, at 77–78, 162–63 (2018), available at <http://nap.edu/24950> (accessed Feb. 24, 2022).

<sup>2</sup> The Emergency Medical Treatment & Active Labor Act, commonly referred to as EMTALA, requires hospitals to stabilize all emergency patients, and treat them unless transfer to another facility is indicated. 42 U.S.C. § 1395dd(b).

directly or indirectly, at a medical school or osteopathic medical school affiliated with a state university or college. The law further states 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.

6. Despite Plaintiffs' best efforts, Plaintiffs have not been able to obtain WTAs with local hospitals. Thus, Plaintiffs must obtain variances to maintain their ASF licenses and continue providing procedural abortion care.

7. Each of Plaintiffs' most recently granted variance requests relied on backup doctors who would be disqualified solely because of SB 157. As a result, Plaintiffs are in danger of ODH revoking their ASF licenses under SB 157.

8. Although SB 157 is not set to take effect until March 23, 2022, ODH has already begun to enforce it. In January 2022, ODH denied the variance application of WMD solely because it relied on backup doctors who would be disqualified under SB 157. The denial letter is attached hereto as Exhibit B.

9. Similarly, ODH sent a letter to PPSWO on February 23, 2022 asking PPSWO to submit by Sunday, February 27, 2022, attestations that its backup doctors meet SB 157's requirements. The letter is attached hereto as Exhibit D.

10. ODH's denial of WMD's variance based on SB 157 months prior to SB 157's effective date of March 23, 2022, and request for attestations from PPSWO regarding SB 157 months ahead of time, constitute unlawful premature enforcement of SB 157.

11. By its terms, SB 157 gives ASFs that have variances 90 days after its effective date—until June 21, 2022—to come into compliance with the new requirements and to submit attestations to ODH documenting that compliance. In the absence of Defendants' premature

enforcement of SB 157, Plaintiffs would have had until June 21, 2022 to come into compliance with its requirements. Instead, because of ODH's arbitrary decision, WMD faces imminent risk of losing its ASF license, and PPSWO is at risk of ODH taking steps to rescind its current variance and subsequently revoke its ASF license.

12. The penalties for operating an ASF without a license include civil penalties between one thousand and two hundred and fifty thousand dollars and/or daily civil penalties between one thousand and ten thousand dollars for each day that the ASF operates. Ohio Adm. Code 3701-83-05.1(A); R.C. 3702.32(A).

13. Without ASF licenses, Plaintiffs will be unable to provide procedural abortion care, resulting in tremendous burdens to Plaintiffs and their patients.

14. Procedural abortion is the most common method of abortion in Ohio, accounting for more than half of all abortions, and it is the only abortion method available for patients who are over ten weeks pregnant. It is also the only method available at any point in pregnancy for patients for whom medication abortion is contraindicated.

15. Plaintiffs' clinics are the only procedural abortion providers in Southwest Ohio and two of only six procedural abortion providers in the entire state. Three of the other procedural abortion providers are in the Cleveland area and the fourth is in Columbus.

16. If Plaintiffs' ASF licenses are revoked, people needing procedural abortions would be forced to travel hundreds of miles round-trip to the next closest procedural abortion providers, and, due to a statutory waiting period, make that trip twice, or stay overnight, in order to access procedural abortion. Moreover, the Planned Parenthood in Columbus, the only procedural abortion provider that would be left outside of the Cleveland area, already has an approximate two-week wait for appointments.

17. Although abortion is very safe, and in fact much safer than childbirth, unnecessarily delaying abortion care increases the risks associated with the procedure. Because of SB 157, many patients seeking procedural abortions will be significantly delayed in accessing this vital, time-sensitive and constitutionally-protected health care until later in pregnancy, when the procedure not only carries greater health risks, but is also more expensive. Other people will be prevented from obtaining abortion care from a trusted medical provider altogether. Some patients will seek to terminate their pregnancies outside the medical system, or have to travel out of state to obtain care, if they can afford to do so. Others will be forced to carry a pregnancy to term against their wishes. These harms will be disproportionately suffered by Black women and other people of color in Ohio who both access abortion at higher rates than white people and who face more barriers to accessing healthcare in general, and abortion specifically, than white people.<sup>3</sup>

18. Relief from this Court is necessary to prevent grievous harm to Plaintiffs and their patients, and to ensure patients are able to exercise their constitutionally protected right to obtain essential health care and thereby determine the course of their own lives.

## **PARTIES**

### **A. Plaintiffs**

19. Plaintiff Women's Medical Group Professional Corporation d/b/a Women's Med Dayton ("WMD") has owned and operated a clinic that provides abortion care in Kettering, Ohio since 1983. WMD and its predecessors have been providing abortions in the Dayton area since

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<sup>3</sup> See, e.g., Center for Reproductive Rights, National Latina Institute for Reproductive Health & SisterSong Women of Color Reproductive Justice Collective, *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care* (2014), available at [https://reproductiverights.org/wp-content/uploads/2020/12/CERD\\_Shadow\\_US\\_6.30.14\\_Web.pdf](https://reproductiverights.org/wp-content/uploads/2020/12/CERD_Shadow_US_6.30.14_Web.pdf).

1973. WMD cannot obtain a WTA with a local hospital and must obtain a variance from ODH to maintain its ASF license. Because WMD's current backup doctors would be disqualified under SB 157, WMD is in danger of ODH revoking its ASF license if SB 157 is enforced. Moreover, SB 157 will require WMD staff to spend many hours that would otherwise be spent on patient care attempting to identify, recruit, contract with, and maintain new backup doctors who comply with SB 157's medically unnecessary requirements. And they must do so on an annual basis, or more frequently, as part of the annual variance process and any time a backup doctor resigns or succumbs to anti-abortion harassment. If WMD loses its ASF license, it will no longer be able to provide abortion care after ten weeks of pregnancy as measured from the first day of a patient's last menstrual period ("LMP") and will be forced to deny care to anyone for whom medication abortion is contraindicated. Patients who are unable to obtain procedural abortions at WMD will face physical, financial, and emotional obstacles to obtaining abortion care. This will result in patients being delayed or prevented entirely from obtaining abortions, in violation of their constitutional rights. WMD sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

20. Plaintiff Planned Parenthood Southwest Ohio Region ("PPSWO") is a nonprofit corporation organized under the laws of the State of Ohio. PPSWO and its predecessor organizations have provided a broad range of high-quality reproductive health care to patients in Southwest Ohio since 1929. PPSWO's ASF, located in Cincinnati, provides procedural abortions. PPSWO cannot obtain a WTA with a local hospital and must obtain a variance from ODH to maintain its ASF license. Because PPSWO's current variance relies on backup doctors who would be disqualified under SB 157, PPSWO is in danger of ODH denying its variance and revoking its ASF license if SB 157 is enforced. Moreover, SB 157 will require PPSWO staff to

spend many hours that would otherwise be spent on patient care attempting to identify, recruit, contract with, and maintain new backup doctors who comply with SB 157's medically unnecessary requirements. And they must do so on an annual basis, or more frequently, as part of the annual variance process and any time a backup doctor resigns or succumbs to anti-abortion harassment. If PPSWO loses its ASF license, it will no longer be able to provide abortion care after ten weeks LMP and will be forced to deny care to anyone for whom medication abortion is contraindicated. Patients who are unable to obtain procedural abortions at PPSWO will face physical, financial, and emotional obstacles to obtaining abortion care. This will result in patients being delayed or prevented entirely from obtaining abortions, in violation of their constitutional rights. PPSWO sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

**B. Defendants**

21. Defendant Bruce Vanderhoff is the Director of ODH. He can deny Plaintiffs' variance requests; suspend, refuse to renew, or revoke Plaintiffs' ASF licenses; order Plaintiffs' ASFs to cease operations; and/or impose civil penalties on Plaintiffs' ASFs for violations of SB 157. He is sued in his official capacity.

22. Defendant ODH is the agency with the power to deny Plaintiffs' variance requests; suspend, refuse to renew, or revoke Plaintiffs' ASF licenses; order Plaintiffs' ASFs to cease operations; and/or impose civil penalties on Plaintiffs' ASFs for violations of SB 157.

**JURISDICTION & VENUE**

23. The Court has jurisdiction over this complaint pursuant to R.C. sections 2721.02, 2727.02, and 2727.03.



24. Venue is proper in this Court pursuant to Civ.R. 3(C)(6), because Plaintiff PPSWO provides procedural abortions in Hamilton County, and thus the claims for relief arise in part in Hamilton County.

### FACTUAL ALLEGATIONS

#### A. Abortion in Ohio

25. Legal abortion in the United States is very safe.<sup>4</sup>

26. There are two main methods of abortion: medication abortion and procedural abortion. Both medication abortion and procedural abortion are effective in terminating a pregnancy.

27. Medication abortion involves a combination of two pills, mifepristone and misoprostol, which expel the contents of the uterus in a manner similar to a miscarriage after the patient has left the clinic and in a location of the patient's choosing, typically at home.

28. Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery," as it involves no incisions. In a procedural abortion, the clinician uses suction from a thin, flexible tube, alone or in conjunction with instruments, to empty the contents of the patient's uterus.

29. Plaintiffs provide procedural abortion for patients up to 21 weeks and 6 days LMP, which is the legal limit for abortion in Ohio.<sup>5</sup>

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<sup>4</sup> Natl. Academies of Sciences, Eng. & Medicine, *The Safety & Quality of Abortion Care in the United States*, at 77–78, 162–63 (2018), available at <http://nap.edu/24950> (accessed Feb. 24, 2022).

<sup>5</sup> A full-term pregnancy is approximately 40 weeks LMP. R.C. 2919.201 prohibits abortions at or after 22 weeks LMP.

30. According to data from ODH, in 2019, more than 61 percent of abortions in the state were procedural abortions.<sup>6</sup> In 2020, this number declined for reasons related to the COVID-19 pandemic, but still more than half of abortions in the state were procedural abortions.<sup>7</sup>

31. Because Ohio law restricts medication abortion to the first ten weeks of pregnancy,<sup>8</sup> procedural abortion is the only method of abortion available after ten weeks LMP, and for some, it is the only method available at any point in pregnancy. For example, a patient may be allergic to one of the medications used in medication abortion or may have medical conditions that make procedural abortion relatively safer. Some patients strongly prefer procedural abortion, including because they perceive it to be less painful or because it can be done quickly at the health center and may allow them to return to work, childcare, or other responsibilities shortly afterward. Additionally, other patients may need procedural abortion for personal reasons, including reasons related to abuse, where it could be dangerous for a partner or person in their home to know that the patient is having an abortion, or reasons related to lack of safe housing, where the patient may have no safe place to expel the pregnancy.

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<sup>6</sup> Ohio Dept. of Health, *Induced Abortions in Ohio, 2019*, 23 (2020), available at <https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/vital-statistics/resources/vs-abortionreport2019> (accessed Feb. 24, 2022) (“ODH 2019 Report”).

<sup>7</sup> Ohio Dept. of Health, *Induced Abortions in Ohio, 2020*, 23 (2021), available at <https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/vital-statistics/resources/vs-abortionreport2020> (accessed Feb. 24, 2022) (“ODH 2020 Report”).

<sup>8</sup> R.C. 2919.123 restricts Ohio abortion providers to prescribing the first drug in the medication abortion regimen according to the federally approved label, which allows use of mifepristone only up to ten weeks LMP. See U.S. Food & Drug Administration, *Mifeprex (mifepristone) Information* (last updated Feb. 24, 2022), available at <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>. Accordingly, Plaintiffs provide medication abortion up to ten weeks (70 days) LMP.

**B. Abortion Safety**

32. Because legal abortion is so safe, the vast majority of abortions can be and are safely provided in an outpatient setting.<sup>9</sup>

33. Abortion rarely results in complications. Most of the rare complications related to abortion are safely and appropriately handled in the outpatient setting.

34. Plaintiffs provide high-quality care in the rare event that a complication occurs.

35. In the exceedingly rare case that a patient requires hospital-based care, Plaintiffs' policies and procedures ensure that the patient receives that care as quickly as possible.

36. Regardless of whether an ASF has a WTA with a local hospital, appropriate care is also ensured because hospitals provide necessary care to patients who need it. Hospitals must comply with the federal Emergency Medical Treatment & Active Labor Act, which requires hospitals to stabilize all emergency patients, and treat them unless transfer to another facility is indicated. 42 U.S.C. § 1395dd(b) (commonly referred to as "EMTALA"). In fact, Miami Valley Hospital in Dayton has confirmed that it will treat WMD's patients in an emergency.

37. As a result, WTAs do nothing to increase patient safety or health and are not medically necessary.

38. Lack of access to abortion services, by contrast, clearly decreases patient safety and threatens patients' health. Continuing a pregnancy against one's will can pose a risk to one's physical, mental, and emotional health, as well as to the stability and well-being of one's family, including existing children.

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<sup>9</sup> In 2020, over 90 percent of abortions were performed in an ASF, including Plaintiffs' ASFs, and another 8.8 percent were provided in another type of outpatient facility. ODH 2020 Report at 22.

### **C. Pre-Existing ASF Licensing Framework**

39. For almost two decades, the state of Ohio has used the ASF licensing scheme to target abortion providers for harassment and close their ASF businesses. The Ohio legislature openly discusses how new legislation in this area can be used to target abortion providers in general and Plaintiffs in particular. When legislation alone has failed to close providers, ODH steps in and invents and simultaneously enforces its own arbitrary rules specifically targeted to close Plaintiffs' ASFs. When Plaintiffs are able to adjust to comply with these unnecessary, arbitrary and improper rules, ODH invents new ones to ensure ASF licenses remain out of reach.

40. Ohio's pre-existing licensing framework is the subject of ongoing federal litigation. *Planned Parenthood of Southwest Ohio v. Vanderhoff*, No. 1:15-cv-568 (S.D. Ohio 2015). Plaintiffs continue to seek relief for constitutional violations caused by this framework in federal court. *Id.* SB 157 is not the subject of federal litigation, however, as it was just enacted in December 2021.

#### **1. Written Transfer Agreement Statute**

41. Ohio law requires that abortion clinics that provide procedural abortions have a WTA. The current law, R.C. 3702.303(A), states:

Except as provided in division (C) of this section, an ambulatory surgical facility shall have a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise. A copy of the agreement shall be filed with the director of health.

42. A "local" hospital cannot be further than 30 miles from an ambulatory surgical facility with which the local hospital has a WTA under section 3702.303 of the Revised Code. R.C. 3702.3010.

43. Ohio law also prohibits any “public hospital” from “enter[ing] into a written transfer agreement with an ambulatory surgical facility in which nontherapeutic abortions are performed or induced.” R.C. 3727.60(B)(1). The ban applies only to clinics that provide abortions and does not apply to any other ASF in the state.

44. In addition, hospitals’ religious and political opposition to abortion, and/or hospitals’ fear of the harassment and intimidation they and their doctors would face if they were to enter into a WTA with an abortion clinic, deter hospitals from entering into WTAs with abortion clinics.

45. As a result, the WTA requirement has been difficult, and impossible in some cases, for abortion clinics to meet. Over the years, WMD and PPSWO have been unable to obtain or maintain a WTA and have been required to apply for variances from the requirement in order to maintain their ASF licenses.

46. Upon information and belief, as of 2018, abortion clinics were the only ASFs that have ever needed or sought variances from Ohio’s WTA requirement.

## **2. Variance Statute**

47. Ohio law also sets forth the procedure for ASFs that cannot obtain a WTA with a local hospital to obtain a variance from that requirement. Specifically, R.C. 3702.304 states:

(A)(1) The director of health may grant a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code if the ambulatory surgical facility submits to the director a complete variance application, prescribed by the director, and the director determines after reviewing the application that the facility is capable of achieving the purpose of a written transfer agreement in the absence of one. The director’s determination is final.

...

(B) A variance application is complete for purposes of division (A)(1) of this section if it contains or includes as attachments all of the following:

(1) A statement explaining why application of the requirement would cause the facility undue hardship and why the variance will not jeopardize the health and safety of any patient;

(2) 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;

(3) For each consulting physician described in division (B)(2) of this section:

(a) A signed statement in which the physician attests to all of the following:

(i) The physician actively practices clinical medicine within [the mandatory] 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.

(5) Any other information the director considers necessary.

(C) The director's decision to grant, refuse, or rescind a variance is final.

(D) The director shall consider each application for a variance independently without regard to any decision the director may have made on a prior occasion to grant or deny a variance to that ambulatory surgical facility or any other facility.

48. Ohio law prohibits 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. R.C. 3727.60(B)(2).

49. Even though a variance denial can be and has served as the sole basis for revocation and/or non-renewal of an ASF license for any clinic that lacks a WTA, providers have no right to administratively appeal a variance denial. Ohio law explicitly states that "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 Adm.Code 3701-83-14(F); R.C. 3702.304(A) and (C).<sup>10</sup>

### **3. ODH's Arbitrary, Unnecessary and Improper Requirements for Abortion Clinics.**

50. ODH's unlawful premature enforcement of SB 157 is just the latest in a long string of actions demonstrating that ODH will not stop until Plaintiffs' licenses have been

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<sup>10</sup> Additionally, under Ohio law, a variance is automatically denied after 60 days if not ruled on and an ASF's license automatically suspended if ODH fails to rule on a variance request within 60 days or if ODH denies a variance request. R.C. 3702.309(A). These provisions are part of the Plaintiffs' federal case, and the automatic suspension provision is currently preliminarily enjoined. *Planned Parenthood of Southwest Ohio v. Vanderhoff*, No. 1:15-cv-568 (S.D. Ohio 2015), ECF Nos. 25 & 28.

revoked. Whether it is arbitrary, unnecessary, and improper requirements which are specially crafted to deny their variance requests and are enforced with no notice, or enforcement of an unnecessary and likely unconstitutional statute that is not even in effect yet, ODH will invent any basis to deny Plaintiffs' variance requests and revoke their licenses.

51. In 2015, ODH began—without notice—to require abortion clinics to have at least four backup physicians in order to obtain a variance (the “Four Backup Doctor Requirement”). This new requirement was communicated through the denial of a PPSWO variance request that listed three backup physicians.

52. The Four Backup Doctor Requirement is found nowhere in the relevant statutes or regulations.

53. The hostile climate in Southwest Ohio makes it extremely difficult to find even one backup doctor to support a variance. There has been a national campaign to harass and shame the Dayton doctors who provide backup services to patients of WMD. An anti-abortion group plastered the doctors' faces on trucks next to a photograph purporting to depict an aborted fetus, drove the truck through each doctor's neighborhood, and parked the trucks at the hospital and outside of their respective homes and work sites. This and other harassment takes place solely to intimidate and discourage the doctors from serving as backup physicians for WMD.

54. Finding four backup physicians to support a variance has been even more difficult, and at times, impossible.

55. After a years-long battle to secure a license, Plaintiffs both had ASF licenses by the start of 2020. From March 25, 2020 through July 1, 2021, ODH suspended all licensing action, including renewals and revocations of ASF licenses, due to the COVID-19 health emergency.



56. When licensing action resumed, so too did ODH's practice of inventing arbitrary, unnecessary and improper requirements to deny variances, and therefore licenses, to abortion clinics.

57. ODH began, informally and without notice to Plaintiffs, adding new requirements for acquiring a variance that were medically unnecessary and lacking in any statutory basis. In addition to the Four Backup Doctor Requirement, ODH arbitrarily decided that all four backup doctors must be OBGYNs and have staff voting privileges at the hospital at which they have admitting privileges.

58. Plaintiffs had no notice of these requirements prior to August 2021. These requirements are found nowhere in the relevant statutes or regulations.

59. While ODH granted PPSWO's variance request on August 30, 2021, ODH communicated these new requirements in an August 23, 2021 letter denying WMD's September 14, 2020 variance request, which rejected two of the four backup doctors WMD listed in support of its request. One of the rejected physicians—a general surgeon—had been part of the 2019 variance request that ODH granted, but in September 2020, the Director rejected that doctor on the basis that she was not an OBGYN. The Director rejected the other physician on the ground that, although he had admitting privileges at a local hospital, he did not have staff *voting* privileges.<sup>11</sup> The denial did not explain how these two new requirements would enhance patient care or safety.

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<sup>11</sup> The denial letter stated that the doctor was rejected because he had “affiliate status,” rather than “active status” admitting privileges. The only difference between the two is that a physician with active status privileges can vote on matters affecting the medical staff and physicians with affiliate status admitting privileges cannot.

60. In November of 2021, ODH proposed to revoke and not to renew WMD's ASF license because of the denial of its variance that was based solely on noncompliance with these two new arbitrary requirements.

**D. SB 157**

61. SB 157 adds yet another layer to this arbitrary, unnecessary, and complicated enforcement scheme.

62. 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 medical school affiliated with a state university or college from serving as a backup doctor in support of a variance. Under SB 157, in addition to meeting all of the statutory requirements for a backup physician under R.C. 3702.304, a physician must also sign a statement attesting that they do not engage in any activities that would prohibit them from serving as backup doctors for clinics.

63. If a physician enters into a backup physician agreement with an abortion clinic while associated with a hospital or practice affiliated with a state university or college, the Director shall rescind the abortion clinic's variance.

64. SB 157 was signed into law on December 22, 2021 and is scheduled to go into effect 90 days later on March 23, 2022.

65. By SB 157's terms, clinics that have been granted a variance from the WTA requirement have 90 days from the effective date, until June 21, 2022, to submit the required physician attestations. If the Director determines that a clinic has failed to demonstrate compliance by June 21, the Director shall rescind that clinic's variance.

**E. ODH's Premature Enforcement of SB 157**

66. Despite acknowledging in its letter to WMD that SB 157 is not yet in effect,<sup>12</sup> ODH has already begun enforcing SB 157.

67. In support of its November 2021 license application, WMD submitted a variance request to ODH on November 30, 2021. This request met all of ODH's requirements, including the arbitrary, unnecessary and improper new requirements that clinics have four backup physicians who are all OBGYNs with voting privileges at the hospitals where they have admitting privileges.

68. On January 28, 2022, ODH informed WMD that its November 30, 2021 variance request was denied. The sole reason listed for the denial was "the four backup physicians' clear relationship with Wright State Physicians and the clear public policy directives contained within Sub. S.B. 157[.]" Ex. B. ODH followed up with a letter on January 31, 2022, proposing to revoke and not renew WMD's license. The letter is attached hereto as Exhibit C.

69. The Ohio legislature had not even passed SB 157 when WMD submitted its variance request on November 30, 2021.

70. SB 157 was not in effect on January 28, 2022, when the Defendants applied the law to deny WMD's variance request or on January 31, 2022, when Defendants proposed to revoke and not to renew WMD's license.

71. SB 157 will not be in effect on March 3, 2022, when ODH intends to revoke WMD's license for noncompliance with SB 157.

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<sup>12</sup> ODH's letter states that SB 157 goes into effect March, 22, 2022, but it appears to be one day off. According to the Ohio State Legislature's website, SB 157 goes into effect March 23, 2022. See Ohio Legislature GA 134, Senate Bill 157, available at <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-SB-157> (accessed Feb. 24, 2022).

72. ODH's enforcement of SB 157 before its effective date is clearly unlawful.

Because noncompliance with SB 157 is the sole reason for denying WMD's November 30, 2021 variance request, WMD should rightly have a variance now. Thus, consistent with the terms of SB 157, WMD should have until June 21, 2022, 90 days after SB 157's effective date, to comply with SB 157, and it is working to comply with it.

73. Similarly, ODH has taken steps indicating it may soon enforce SB 157 against PPSWO as well. Because PPSWO currently holds a variance that remains in effect, pursuant to the language of SB 157 itself, PPSWO has until June 21, 2022 to comply with the substantive provisions of SB 157 and to submit the required documentation to ODH. Nonetheless, ODH sent a letter to PPSWO on February 23, 2022 stating that, while ODH recognized that SB 157 does not even go into effect until late March, PPSWO would be required to submit by Sunday, February 27, 2022 attestations that its back-up physicians meet SB 157's requirements. ODH appears to be unilaterally and without basis moving the compliance deadline up approximately four months.

74. PPSWO intends to respond to ODH to convey its understanding that, because PPSWO currently holds a variance from the WTA requirement, it has until June 21, 2022, to comply with SB 157 and to submit documentation of that compliance with ODH. In the meantime, PPSWO is already working to attempt to comply with SB 157.

**F. SB 157 Irreparably Harms Plaintiffs and Their Patients**

75. Unless this Court blocks enforcement of SB 157 altogether, Defendants will deny any variance request that includes backup doctors who do not meet the arbitrary requirements of SB 157, and will revoke Plaintiffs' ASF licenses. Without ASF licenses, Plaintiffs will be unable to provide procedural abortions.

76. In the absence of Defendants' premature enforcement of SB 157, WMD would have had until June 21, 2022—90 days after SB 157's effective date—to come into compliance with its requirements. Instead, because of ODH's arbitrary decision, WMD faces imminent risk of losing its ASF license. While PPSWO has been granted a variance and therefore should have until June 21, 2022 to comply with SB 157, PPSWO is at risk of ODH taking steps to prematurely enforce SB 157, rescind its current variance and subsequently revoke its ASF license.

77. As a result of ODH's enforcement of SB 157, including its enforcement prior to the law's effective date and without notice, Plaintiffs will be deprived of their substantive due process and procedural due process rights. Many Ohioans, including Plaintiffs' patients, will be deprived of their constitutional right to abortion.

78. Being forced to stop providing procedural abortions will irreparably harm Plaintiffs, their physicians, and other staff. Although Plaintiffs could continue to provide medication abortion, because the majority of the care that Plaintiffs provide is procedural abortion, Plaintiffs would need to terminate, furlough, or otherwise reduce staff, who as a result would likely seek employment elsewhere. PPSWO would need to shut down its ASF, and WMD may permanently close its clinic. Dr. Haskell, WMD's owner, would find that he is forced to close a business that he spent nearly his entire career building and running. Even if Plaintiffs were eventually able to resume providing procedural abortion, such a reduction in their workforce would make it difficult to return to normal operations, and there would be ongoing patient confusion about the availability of services.

79. Even if Plaintiffs are not forced to close as a result of being unable to provide procedural abortion, they cannot repair the damage to their reputation in the community as

trusted providers of reproductive health care, including procedural abortions. Having to abruptly stop providing this care will be extremely damaging to Plaintiffs.

80. ODH's enforcement of SB 157 against Plaintiffs will also have a devastating impact on Dayton- and Cincinnati-area patients who will be left without any access to procedural abortion services.

81. Medication abortion is available in Ohio but must be accessed in the first ten weeks of pregnancy. If Plaintiffs could no longer provide procedural abortion, abortion after ten weeks of pregnancy would be wholly unavailable in Southwest Ohio.

82. If Plaintiffs are forced to stop providing procedural abortion, any person who would have sought a procedural abortion at these clinics, including Plaintiffs' patients with scheduled procedures, will be forced to seek procedural abortion elsewhere, and to travel hundreds of miles in order to access that care.

83. Because of Ohio's law requiring that patients make two trips to an abortion clinic prior to receiving an abortion, any person who would have sought a procedural abortion at Plaintiffs' clinics will be required to travel to another city twice, or secure lodging for an extended stay there, in order to receive abortion care. This additional travel and/or additional expenses will dramatically increase the costs of seeking abortion care, delaying and even preventing many people from accessing abortion.

84. If WMD loses its ASF license and is unable to provide procedural abortions while PPSWO continues to hold a license, PPSWO will not be able to absorb all of the patients who would otherwise have obtained care at WMD without patients facing significant delays in obtaining the care they need.

85. Reducing or eliminating access to procedural abortion in Southwest Ohio will have a disproportionate impact on the lives of Black women, other people of color, and people who are poor or have low incomes. In 2021, Black people made up only 13.1 percent of Ohio's population but more than 48 percent of people who obtained abortions in Ohio.<sup>13</sup> Recent ODH statistics show that Black women are 2.5 times more likely than white women to die from pregnancy-related causes.<sup>14</sup>

86. Black women are more likely to face structural barriers to obtaining quality health care throughout their lives. These barriers, including racial discrimination, economic inequality, lack of access to comprehensive health education, and other social determinants of health, severely limit Black women's access to health care in general and exacerbate difficulties in accessing reproductive health care, including abortion.<sup>15</sup>

## CLAIMS FOR RELIEF

### COUNT I—Substantive Due Process—Plaintiffs' Patients

87. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

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<sup>13</sup> ODH 2020 Report at 3; U.S. Census Bureau, *Quick Facts: Ohio*, available at <https://www.census.gov/quickfacts/fact/table/OH/>.

<sup>14</sup> Ohio Dept. of Health, *A Report on Pregnancy-Associated Deaths in Ohio 2008–2016*, 19 (2019), available at <https://odh.ohio.gov/know-our-programs/pregnancy-associated-mortality-review/Reports/Pregnancy-Associated-Deaths-Ohio-2008-2016>.

<sup>15</sup> See, e.g., Center for Reproductive Rights, National Latina Institute for Reproductive Health & SisterSong Women of Color Reproductive Justice Collective, *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care* (2014), available at [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_NGO\\_USA\\_17560\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17560_E.pdf).

88. By significantly burdening, delaying, or preventing entirely, patients from accessing procedural abortions, SB 157 infringes on Plaintiffs' patients' right to previability abortion, privacy, and bodily autonomy guaranteed by the Ohio Constitution, without adequate justification, in violation of Ohioans' rights under Article I, Sections 1, 16, and 20 of the Ohio Constitution.

89. If SB 157 is enforced, Plaintiffs' patients will be subject to irreparable harm for which no adequate remedy at law exists because they will be prevented entirely from obtaining an abortion in Ohio or be greatly delayed or otherwise burdened in doing so, resulting in significant constitutional, medical, emotional, financial, and other harm.

**COUNT II—Substantive Due Process—Plaintiffs**

90. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

91. By depriving Plaintiffs of their licenses, the continued operation of the businesses, and their ability to provide constitutionally protected care to patients, without sufficient justification, SB 157 violates the substantive due process rights of Plaintiffs to continue to operate their businesses, under Article I, Sections 1, 16, and 20 of the Ohio Constitution.

92. If SB 157 is enforced, Plaintiffs will be subject to the irreparable harm for which no adequate remedy at law exists because they will be forced to cease operation of their ASF businesses resulting in patients being significantly burdened, delayed, or prevented entirely from accessing procedural abortions and resulting in constitutional, business and other harms to Plaintiffs.

**COUNT III—Substantive Due Process—Premature Enforcement—Plaintiffs**



93. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

94. Defendants' arbitrary enforcement of SB 157 prior its effective date violates Plaintiffs' substantive due process rights to continue to operate their businesses, under Article I, Sections 1, 16, and 20 of the Ohio Constitution.

95. If Defendants are not enjoined from enforcing SB 157 before it has become effective, Plaintiffs will be subject to irreparable harm for which no adequate remedy at law exists by being deprived of their liberty and property interests without due process, thereby causing them to suffer significant constitutional and other harm, and Plaintiffs' patients will be denied constitutionally protected care.

#### **COUNT IV—Procedural Due Process—Plaintiffs**

96. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

97. By serving as the sole basis for the variance denial which cannot be appealed and which can serve as the sole basis for depriving Plaintiffs of their ASF licenses and the continued operation of their businesses—thereby preventing Plaintiffs from providing procedural abortion and pursuing their professions—SB 157 violates Plaintiffs' right to procedural due process under Article I, Sections 1 and 16 of the Ohio Constitution.

98. If Defendants are not enjoined from enforcing SB 157, Plaintiffs will be subject to irreparable harm for which no adequate remedy at law exists by being deprived of their liberty and property interests without due process, thereby causing them to suffer significant constitutional and other harm.

#### **COUNT V—Procedural Due Process—Premature Enforcement—Plaintiffs**

99. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

100. Defendants' enforcement of SB 157 prior to its effective date violates Plaintiffs' right to procedural due process under Article I, Sections 1 and 16 of the Ohio Constitution.

101. If Defendants are not enjoined from enforcing SB 157 before it has become effective, Plaintiffs will be subject to irreparable harm for which no adequate remedy at law exists by being deprived of their liberty and property interests without due process, thereby causing it to suffer significant constitutional and other harm.

#### **COUNT VI—Equal Protection—Plaintiffs**

102. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

103. By arbitrarily and irrationally singling out Plaintiffs because they are abortion providers, and treating them differently from other ASFs without adequate justification, SB 157 violates Plaintiffs' right to equal protection under Article I, Section 2 of the Ohio Constitution.

104. If Defendants are not enjoined from enforcing SB 157, Plaintiffs will be subject to irreparable harm for which no adequate remedy at law exists by being deprived of their liberty and property interests, causing them to suffer significant constitutional and other harm.

#### **COUNT VII—Declaratory Judgment**

105. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 86.

106. A real controversy exists between the parties, the controversy is justiciable, and speedy relief is necessary to preserve the rights of the parties. SB 157 will impose significant

harm on Plaintiffs and their patients, as set forth herein. In addition, Plaintiffs and their patients will be unconstitutionally deprived of their rights to due process and/or equal protection.

107. The rights, status, and other legal relations of Plaintiffs are uncertain and insecure, and the entry of a declaratory judgment by this Court will terminate the uncertainty and controversy that has given rise to the action.

108. Pursuant to R.C. 2721.01, *et seq.*, Plaintiffs request that the Court find and issue a declaration that:

a. SB 157 violates Article I, Sections 1, 16 and 20 of the Ohio Constitution because it will deprive Plaintiffs of their ability to continue to operate their businesses and pursue their professions without due process of law.

b. SB 157 violates Article I, Sections 1, 16, and 20 of the Ohio Constitution because it will have a devastating effect on Plaintiffs' patients' ability to access procedural abortions in Ohio in violation of their due process rights.

c. SB 157 violates Article I, Section 2 of the Ohio Constitution because it arbitrarily and irrationally singles out procedural abortion providers and treats them differently from other ASFs in violation of their rights to equal protection.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs ask this Court:

A. To immediately issue a temporary restraining order and preliminary injunction, restraining Defendants, their employees, agents, and successors in office from enforcing SB 157 until 90 days after the effective date, as the statute requires, and further injunctive relief including, but not limited to, a permanent injunction restraining Defendants, their employees, agents, and successors in office from enforcing SB 157.

B. To enter a judgment declaring that SB 157 violates the Ohio Constitution and other Ohio law.

C. To award Plaintiffs their fees and costs.

D. To grant such other and further relief as the Court deems just and proper.

Dated: February 25, 2022

Respectfully submitted,

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