

**IN THE COURT OF COMMON PLEAS
FOR HAMILTON COUNTY, OHIO**

PLANNED PARETHOOD SOUTHWEST	:	
OHIO REGION, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. A21 00870
	:	
v.	:	Judge Alison Hatheway
	:	
OHIO DEPARTMENT OF HEALTH, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**DEFENDANTS OHIO DEPARTMENT OF HEALTH, DIRECTOR
STEPHANIE MCCLOUD, AND STATE MEDICAL BOARD OF
OHIO’S MEMORANDUM IN OPPOSITION TO PLAINTIFFS’
MOTION FOR TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

On March 9, 2021, Plaintiffs Planned Parenthood Southwest Ohio Region (“PPSWO”), Dr. Sharon Liner, Planned Parenthood of Greater Ohio (“PPGOH”), Preterm-Cleveland (“Preterm”), Women’s Med Group Professional Corporation (“WMGPC”), and Northeast Ohio Women’s Center (“NEOWC”) (collectively “Plaintiffs”), moved this court for a temporary restraining order (“TRO”) and preliminary injunction to enjoin Defendants from enforcing Am.S.B. No. 27, 2020, Ohio Laws File 77 (“SB 27”). Plaintiffs assert that there will be irreparable injury and an unquestionable violation of Plaintiffs’ and their patients’ constitutional rights. The Ohio Department of Health, Director Stephanie McCloud, and the State Medical Board of Ohio (collectively “the Defendants”) contend that a TRO is not needed at this juncture, as SB 27 does not go into effect until April 6, 2021.

As this Honorable Court is aware, a TRO is effective for fourteen days. If the Court was to grant Plaintiffs’ request, the TRO would expire on March 25, 2021. This date is pr



to the date SB 27 is even set to go into effect. This Court's time would be better utilized by denying the TRO and allowing the parties to brief and prepare for the Motion for Preliminary Injunction and oral argument, because there is not going to be enforcement of SB 27 in the next 14 days.¹

The most simplistic reason Plaintiffs are not entitled to a TRO in this matter is because it doesn't accomplish anything – there simply is no way to violate a law which is not yet in effect. Accordingly, the Court should deny Plaintiffs' motion for a temporary restraining order.

II. SUMMARY OF RELEVANT FACTS

On December 30, 2020, Governor DeWine signed into law SB 27. SB 27 is a lengthy piece of legislation, but the overarching message in the bill is that any woman who obtains an abortion in Ohio must be informed prior to the procedure that she can choose the final disposition of the fetal remains. In addition, under this bill, abortion facilities may only dispose of embryonic or fetal tissue by cremation or internment. R.C. 3726.02(A). SB 27 sets forth certain rule making steps and timelines for which the Department of Health must comply. For example, R.C. 3726.14 specifically states that not later than ninety days after the effective date of this section (April 6, 2021), the director of health, in accordance with Chapter 119 of the Revised Code, shall adopt rules necessary to carry out the provisions of SB27. This includes rules that prescribe the manner and substance for three informed consent forms which must be provided to patients before a surgical abortion. The language is specific as to what is to be contained in these forms. *See* R.C. 3726.14(C)(1). Because

¹ This Memorandum in Opposition is limited to the TRO, as the parties will later address the motion for a preliminary injunction.

SB27 requires additional rule making pursuant to Chapter 119 of the Revised Code, SB27 cannot be enforced unless or until the Department of Health promulgates those rules.

III. LAW AND ARGUMENT

The moving party in a TRO action has the burden to establish the requisite factors necessary to prevail. In determining whether to grant injunctive relief, the court considers the following factors: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction." *TGR Enters., Inc. v. Kozhev*, 2006-Ohio-2915, ¶ 11, 167 Ohio App. 3d 29, 32, 853 N.E.2d 739, 742. For the trial court to issue the temporary restraining order, there must be clear and convincing evidence to support the four findings listed above, namely the moving party has a substantial likelihood of success in the underlying suit; that the moving party will suffer irreparable harm if the order does not issue; that no third parties will be harmed if the order is issued; that the public interest is served by issuing the order." *City of Cincinnati v. City of Harrison*, 2010-Ohio-3430, ¶ 8 (1st Ct. App.). The purpose of injunctive relief is to 'prevent a future wrong that the law is unable to redress.'" (Id).

A TRO is an extraordinary remedy, to be issued only if the movant carries its burden of persuasion. *Stenberg v. Cheker Oil Co.*, 573 F.3d 921, 925 (6th Cir. 1978) (citation omitted). Before a TRO can be issued, there must be a clear showing that irreparable harm will occur without it. *Garlock, Inc. v. United Seal*, 404 F.2d 256, 257 (6th Cir. 1968); *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982); *Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc.*, 716 F.3d 952, 957 (6th Cir 2013) (citing *Friendship Materials*, 679 F.2d at 103). Although the irreparable-harm factor is generally

weighed with the other three factors in the balancing test often applied to a motion for a TRO, the element of irreparable harm must be present or no TRO can be issued. *Friendship Materials*, 679 F.2d at 104. That is because the whole point of a TRO is to preserve the status quo to prevent harm that could not be corrected by a final judgment if the movant were to ultimately prevail. *Id.* A TRO by law is limited in time and is designed to maintain the status quo until a hearing on the request for an injunction can occur. *M.R. v. Niesen*, 1st Dist. Hamilton No. C-200302, 2020-Ohio-4368, ¶ 1. Finally, a TRO is significantly limited in duration. It can be issued for only fourteen days and can only be extended for one additional fourteen day period. Civ.R. 65(A)

Here, the requested injunctive relief would not prevent a future wrong, because there is no violation that could occur in the next 14 days. The temporary restraining order that Plaintiffs seek to enforce would disrupt the status quo. As of today, SB 27 is not in effect. Specifically, SB 27 does not go into effect until April 6, 2021, and then after that date ODH has 90 days to comply with the terms within the bill. If this Court were to grant a temporary restraining order, the Court would in fact be acting as if SB 27 is now valid, thus pretending that the bill is in effect when it is not. Acting as if a statute is effective when it in fact is not effective for weeks certainly does not maintain the status quo. Plaintiffs cannot pretend that this law is in effect when it is not.

A. The Plaintiffs do not establish a likelihood or probability of success on the merits.

This matter is not ripe for consideration, and thus the plaintiffs cannot succeed on the merits. Plaintiffs have alleged hypothetical concerns of what may or what could happen if this Court denies their TRO, but the fact is that there is nothing that they need to comply with until the bill and statutes are operational as well as the effective date of the rules. It is

akin to arguing that someone can be prosecuted for a crime which does not yet exist – it just cannot happen. If granted, this Court would be agreeing with the idea that one can be held accountable to a law which is not yet in effect – as if someone could be indicted for a crime which was not yet codified into Criminal law. You simply cannot enforce a provision which does not yet exist.

Although SB 27 goes into effect on April 6, 2021, ODH has additional times to promulgate rules and comply with the other requirements. Indeed, “not later than ninety days after the effective date of this section, the director of health, in accordance with Chapter 119 of the Revised Code, shall adopt rules necessary to carry out sections 3726.01 to 3726.13 of the Revised Code including rules that proscribe (A) the notification form, (B) the consent form, and (C) the detachable supplemental form. R.C. 3726.14. Essentially, ODH has an additional three months after April 6 to adopt and promulgate rules, and namely, three months to produce the forms which Plaintiffs are required to provide to women before performing a procedural abortion. This provision also provides that the rules are necessary to implementing the statutory provisions Plaintiffs are concerned about. At bottom, any TRO that this Court would issue now will expire well before the Plaintiffs could even conceivably violate SB27. Issuing a TRO now would serve absolutely no purpose.

B. A temporary restraining order against the Defendants is not necessary to prevent irreparable harm to Plaintiffs.

A TRO is an extraordinary remedy, to be issued only if the movant carries its burden of persuasion. *Stenberg v. Cheker Oil Co.*, 573 F.3d 921, 925 (6th Cir. 1978) (citation omitted). Before a TRO can be issued, there must be a clear showing that irreparable harm will occur without it. *Garlock, Inc. v. United Seal*, 404 F.2d 256, 257 (6th Cir. 1968); *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982); *Nat'l*

Viatical, Inc. v. Universal Settlements Int'l, Inc., 716 F.3d 952, 957 (6th Cir 2013) (citing *Friendship Materials*, 679 F.2d at 103). Although the irreparable-harm factor is generally weighed with the other three factors in the balancing test often applied to a motion for a TRO, the element of irreparable harm must be present or no TRO can be issued. *Friendship Materials*, 679 F.2d at 104. That is because the whole point of a TRO is to preserve the status quo to prevent harm that could not be corrected by a final judgment if the movant were to ultimately prevail. *Id.*

In addition to its inability to demonstrate a substantial likelihood of success on the merits, Plaintiffs cannot demonstrate that they will suffer an irreparable injury without a temporary restraining order against the Defendants. As discussed above, if the Court does not grant the TRO, nothing will happen because SB 27 is not in effect until April 6, 2021. Plaintiffs have asserted a potential alleged harm, but they have not showed that they will suffer an irreparable injury. Plaintiffs assert that “Plaintiffs and their physicians will thus be forced to stop all procedural abortions in Ohio beginning on April 6, absent an injunction from this Court.” (TRO, p. 11). There is no evidence that this will occur, especially given the fact that SB 27 states that “Not later than ninety days after the effective date of this section, the director of health, in accordance with Chapter 119. Of the Revised Code, shall adopt rules necessary to carry out sections 3726.01 to 3726.13 of the Revised Code.”

In fact, it appears that all of the harms that Plaintiffs have alleged are speculative. Some of the speculated harm alleged by Plaintiffs include Plaintiffs and their physicians being subjected to significant penalties. (TRO at 8). They also state that “a physician who provides an abortion without first obtaining the patient’s written certification that they have received the SB 27-required notification form (and consent form, if applicable) could be

subject to disciplinary action, including having their medical license limited, suspended, or revoked. (Id.). This is *purely speculative*. For example, for the medical board to sanction a licensee pursuant to R.C. 4731.22(B)(21) or (23), it would have to prove that there was a violation of an actual law or statute. This simply cannot happen prior to a law even going into effect – it’s simply putting the cart before the horse, and is an exercise in speculation. The Plaintiffs concede that the statute suspends criminal penalties until ODH has adopted rules to implement the statute. (Id.). In fact, R.C. 3726.15 provides that no person will be subject to civil penalties or disciplinary action if, among other things, that person makes a good faith effort to comply with the statute.

C. A temporary restraining order against the Defendants will harm the public and third parties, and would not be in the public’s interest.

If this Court granted the TRO, it would enjoin ODH from developing rules and complying with SB 27 in advance of the statute’s effective date. If the Plaintiffs are seeking clarification and guidance from ODH on the requirements for procedural abortions, enjoining ODH will be contrary to what they seek. In addition, granting the Plaintiffs’ TRO would not be an appropriate use of the court’s time, and would serve no interest to the public. It would be a better use of the court’s time to schedule this matter for a full preliminary injunction hearing, so that the parties can better present the facts and evidentiary issues.

IV. CONCLUSION

As stated numerous times through this Motion in opposition, the Plaintiffs are premature in requesting a TRO in the matter. Granting a TRO that would expire on March 25 does nothing to further Plaintiffs’ goals, and in fact, could possibly restrain ODH from enacting the very rules which need adopted. The Plaintiffs have not met their burden in establishing the requirements for this Court to grant a TRO. As such, the Court should deny

Plaintiffs' Motion and allow ODH and Director to continue to work toward establishing the rules and requirements set forth by SB 27.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing *Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order* has been served upon the following by electronic mail this 11th day of March, 2021.

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