IN THE
SUPREME COURT OF OHIO

IN THE MATTER OF:	:	
	:	**Case No. 2016-1348**
CAPITAL CARE NETWORK OF TOLEDO	:	
	:	**On Appeal from the Lucas County Court of Appeals, Sixth Appellate District**
Appellee,	:	
	:	
vs.	:	
	:	**Court of Appeals**
STATE OF OHIO DEPARTMENT OF HEALTH	:	**Case No. CL-201501186**
	:	
Appellant.	:	

MERIT BRIEF OF APPELLEE CAPITAL CARE NETWORK OF TOLEDO

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INTRODUCTION

Capital Care Network of Toledo has operated its business in the State of Ohio for decades. When the State required it to apply for an Ambulatory Surgical Facility license, it did. When the State required Capital Care to meet the licensing requirement to have a written transfer agreement with a hospital in case a patient developed an emergency or medical complication, it did. Even though Capital Care did not need to transfer a patient to a hospital in years, it secured a written transfer agreement with the University of Toledo Hospital. When the State prohibited the University of Toledo Hospital to have a written transfer agreement with Capital Care because the medical care it provided to women included abortions, the hospital rescinded the agreement with Capital Care. Capital Care looked for another hospital in Toledo to enter an agreement with, but found none. When the State sent a letter proposing to revoke Capital Care's license unless Capital Care secured a transfer agreement with a hospital, it did. Capital Care entered into a written transfer agreement with the University of Michigan Health System in Ann Arbor, Michigan. When the State sent another letter proposing to revoke Capital Care's license because the agreement with the Michigan hospital was too far away to meet a requirement of the newly enacted state law, R.C. 3702.303, Capital Care requested an administrative hearing to oppose the State revoking its license to do business.

The hearing resulted in the Director of the Department of Health issuing an Adjudication Order revoking and not renewing Capital Care's license. Capital Care appealed and the court of common pleas reversed, finding that the state law the Director relied on to revoke the license violated both the Ohio Constitution's single-subject rule prohibition and the U.S. Constitution's Due Process Clause's prohibition on government delegation of licensing authority to third parties. The Sixth District affirmed on the same grounds and one additional ground: Ohio's

written transfer agreement statues violated the U.S. Constitution's Due Process Clause requirement that State's not place an undue burden on a woman's right to access abortion.

The Sixth District affirmed the reversal of the Director's license revocation Order. Capital Care respectfully requests this Court do the same.

I. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This case arises from an administrative proceeding regarding Appellee Capital Care Network of Toledo's Ambulatory Surgical Facility ("ASF") license. In February 2014, Appellant Ohio Department of Health ("ODH" or "State") issued a letter proposing to revoke and refusing to renew Capital Care's ASF license on the basis that Capital Care's written transfer agreement ("WTA") with the University of Michigan Health System ("UMHS") does not comply with the requirements of R.C. 3702.303 because UMHS is not a "local" hospital. State Ex. H, Supp. at S-104-106. A hearing on the matter was held before a hearing examiner on March 26, 2014. On June 12, 2014, the hearing examiner issued a report and recommendation upholding the director's decision to revoke Capital Care's license. Report and Recommendation ("R&R"), App'x 62. Capital Care filed objections. On July 29, 2014, the Director of the Ohio Department of Health issued a final Adjudication Order approving the hearing examiner's decision to refuse to renew and to revoke Capital Care's license. *See* Adjudication Order, App'x 60 ("Order") at 1.

Appellee Capital Care appealed this order to the Lucas County Court of Common Pleas arguing, in part, that the law the Director based his revocation Order on was unconstitutional under both the Ohio Constitution's single-subject rule and the U.S. Constitution's Due Process Clause which prohibited the State from delegating its licensing authority. Following briefing,

the common pleas court issued an opinion and order on June 19, 2015 reversing the Director of Health's decision to not renew and revoke Capital Care's ASF license on the basis that the Director's decision was not in accordance with law because the statute the Director relied on violated the single-subject rule of the Ohio Constitution, Article II, Section 15(D) and it violated the U.S. Constitution, Due Process Clause because the licensing scheme as applied to Capital Care created an unconstitutional delegation of licensing authority. *See* Opinion and Order, Lucas Cty. Court of Common Please (June 19, 2015) ("Com. Pl. Op."), App'x 30-59. Having found the licensing provisions of H.B. 59 not in accordance with law, the common pleas court reversed the Director's revocation order. *Id*. The State filed a notice of appeal on July 10, 2015.

On appeal, the Sixth District affirmed the lower court, holding that the licensing provisions R.C. 3702.303, 3702.304, and 3727.60 violated the Ohio Constitution's single-subject rule and the Due Process Clause of the U.S. Constitution's prohibition on delegating licensing authority. *Capital Care Network of Toledo v. State of Ohio Dep't of Health*, 2016-Ohio-5168 (6th Dist.) ("App. Op."), App'x 4 ¶¶ 34-42. After the case was brief and argued, the U.S. Supreme Court issued its ruling in *Whole Woman's Health v. Hellerstedt*, __ U.S. __, 136 S. Ct. 2292, 195 L.Ed.2d 665 (2016), which clarified the standard on when a state law creates an undue burden on a woman's access to abortion. The Sixth District analyzed Ohio's transfer agreement licensing provisions in light of *Whole Woman's Health* and held H.B. 59 violated the U.S. Constitution Due Process Clause because H.B. 59 created an undue burden on a woman's access to abortion. App. Op. ¶¶16-20. The Sixth District affirmed the lower court's reversal of the Director's revocation Order.

B. Relevant Facts

Capital Care Network of Toledo ("Capital Care" or "CCNT") is an ambulatory surgical facility located in Toledo, Ohio. Capital Care provides pregnancy termination services to women from Ohio, Indiana, Michigan, and West Virginia. Tr. at 141, Supp. at S-40 Terrie Hubbard became the owner of Capital Care in 2010, and prior to that worked for Capital Care as a registered nurse for eight years. Tr. 140, Supp. at S-40. Ms. Hubbard also manages Founder's Women's Health Center, another abortion provider located in Columbus, Ohio. Tr. 52, Supp. at S-18. Capital Care has held an ASF license as required by R.C. 3702.30(E)(1) since before Ms. Hubbard became the owner. Tr. 143, Supp. at S-41. In the twelve years before the hearing, Capital Care never needed to transfer a patient to a hospital. Tr. 140; 142, Supp. at S-40.

In August 2012, Capital Care entered into a written transfer agreement ("WTA") with University of Toledo Hospital as was required by ODH's administrative rule at the time, O.A.C. 3701-83-19(E). Tr. 146, Supp. at S-41; CCNT Ex. A, Supp at S-109. University of Toledo Hospital notified Capital Care and ODH in April 2013 that it did not intend to renew the written transfer agreement when it expired on July 31, 2013. CCNT Ex. B, S-111; Tr. 147, Supp. at S-42. Ms. Hubbard immediately began searching for another hospital that would agree to a written transfer agreement. Tr. 150-151, Supp. at S-42-43. She contacted more than nine hospitals, some as far as Detroit, Cleveland and Columbus. Tr. 151-152, 154-156, Supp. at S-43-44.

During her search, in June 2013, the Ohio legislature enacted 2013 Am.Sub.H.B. No. 59 ("H.B. 59"). H.B. 59 was Ohio's 2013 omnibus budget bill. It included R.C. 3702.303 codifying the written transfer agreement regulation. State Ex. K. Section 3702.303 added a requirement that the transfer hospital be "local." H.B. 59 also prohibited all public hospitals from entering into written transfer agreements with abortion providers. R.C. 3727.60.

When the University of Toledo WTA expired on July 31, 2013, Ms. Hubbard was in negotiations with OhioHealth to secure a WTA, but had not yet reached an agreement before the expiration date. Tr. 153, Supp. at S-43. Because Capital Care had no WTA, ODH proposed to revoke Capital Care's ASF license on August 2, 2013. Since H.B. 59 was not effective, the Director based his revocation solely on the rule, O.A.C. 3701-83-19(E). State Ex. D, Supp. S-102. Ms. Hubbard's attorney immediately requested a hearing before ODH on the matter. State Ex. E. A hearing was scheduled but immediately continued by motion of the Director of Health. State Ex. F.

On September 29, 2013, H.B. 59 codifying the written transfer agreement regulation went into effect. When Ms. Hubbard learned of the new requirement in H.B. 59 that the transfer hospital be "local," she narrowed her search to hospitals within 50 to 75 miles of the Capital Care facility. Tr. 156, Supp. at S-44. Prior to learning about the new "local" requirement, she had been contacting hospitals in Cleveland and Columbus, which are 120 to 140 miles away, respectively. Tr. 152, 154, Supp. at S-43. She believed that a radius of 50 to 75 miles was local. Tr. 157, Supp. at S-44. She found a hospital she considered local in Ann Arbor, 52 miles away. On January 20, 2014, Capital Care entered into a written transfer agreement with University of Michigan Health System in Ann Arbor, Michigan ("University of Michigan" or "UMHS"). Tr. 46, Supp. at S- 16; CCNT Ex. C, Supp. at S-112.

Ms. Hubbard developed a policy to be followed in the event of a hospital transfer. The policy is posted in the Capital Care facility by the surgery rooms and at the front reception desk. Tr. 161, Supp. at S-45; CCNT Ex. M., Supp. at S-118. Capital Care's policy is to call 911 in the event of a life-threatening emergency where a patient needs immediate treatment. Tr. 159, Supp. at S-45. The responding EMTs will transport the patient to the hospital nearest to Capital Care,

most likely Toledo Hospital. Tr. 172, Supp. at S-48. Patients experiencing less serious medical complications who do not need immediate treatment will be transferred to UMHS by helicopter or vehicle. Tr. 171, 46, Supp. at S-48, 17. The Capital Care policy gives the contact information for a helicopter air transport service. Tr. 159, Supp. at S-45; CCNT Ex. M., Supp. at S-118. Ms. Hubbard coordinated transportation with the private helicopter service. The service will transport her patients from the Capital Care facility to UMHS, at Capital Care's cost. Tr. 160, 168, Supp. at S-45,47. If the helicopter is not available or necessary, the patient will be driven to Ann Arbor, which is approximately 52 miles from Capital Care in Toledo. Tr. 46, Supp. at S-16. The estimated drive (no lights and sirens) is 52 minutes.[1] The estimated helicopter flight time is 15 to 20 minutes. Tr. 160, Supp. at S-45. Since the agreement with UMHS has been in place, Capital Care has not needed to transport a patient to a hospital. Tr. 142, S-40.

From the date H.B. 59 was enacted at the end of June 2013 until February 2014 when ODH Director Dr. Wymyslo proposed revoking Capital Care's license, ODH offered no interpretation of the word "local". Tr. 157 75, Supp. at S-44, 24. On February 18, 2014, the Director of Health issued a second proposed order revoking and refusing to renew Capital Care's ASF license. State's Ex. H., Supp. at S-104. Dr. Wymyslo, ***relying solely on the statute***, determined that Capital Care's WTA with the University of Michigan did not meet the requirements of R.C. 3702.303 because UMHS was not a "local" hospital as was required by H.B. 59. He did not explain why he believed this or offer any explanation for the term "local." State's Ex. H, Supp. at S-104.

A hearing on the matter was held before a hearing examiner on March 26, 2014, wherein Capital Care presented reliable, substantial, and probative evidence that its WTA meets the

[1] According to Google Maps the distance is 52.1 miles and a 52-minute drive via US 23. https://maps.google.com/maps?hl=en&tab=wl

requirements of the statute, and that the statute is unconstitutional as applied to Capital Care. As of the date of the hearing ODH had issued no regulations, rules, guidelines, or protocols to define the meaning of "local." Tr. 75-76, Supp. at S-24. Ms. Hubbard testified that she believed 50- 75 miles from the facility met the definition of "local." She also testified that she consulted with her attorney at the time the law went into effect. He advised her 50-75 miles would meet the "local" requirement. Tr. 157, Supp. at S-44. Tamara Malkoff, ODH's Chief of the Bureau of Information and Operational Support, testified that a hospital 50 miles away would be considered a local hospital in some circumstances. Tr. 30, Supp. at S-12.

On June 12, 2014, the hearing examiner issued a report and recommendation upholding the director's decision to revoke Capital Care's license. Capital Care filed objections. On July 29, 2014, the Director of Health issued a final adjudication order approving the hearing examiner's decision to refuse to renew and to revoke Capital Care's license. (Attached to Appellant's Brief as Ex. 2). Capital Care appealed this order and a stay was granted pending a determination of the appeal. Following briefing, the Common Pleas court issued an order on June 19, 2015 reversing the Director of Health's decision to revoke Capital Care's license. The court found that while Capital Care's WTA with UMHS does not satisfy the "local" component of R.C. 3702.303(A), the Director's decision was nonetheless not supported by law because Ohio's ASF licensing scheme unconstitutionally delegates licensing authority to private hospitals in violation of the U.S. Constitution's Fourteenth Amendment Due Process clause. Order at 24. The Court relied on *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 609 (6th Cir. 2006) to reach this conclusion. The Court also held H.B. 59 violated the Ohio Constitution's single-subject rule. Order at 24-29.

II. ARGUMENT

Try as it might, the State cannot avoid a constitutional review of the laws the Director of the Ohio Department of Health used to revoke Capital Care Network of Toledo's ("Capital Care" or "CCNT") ambulatory surgical facility ("ASF") license. The revocation was based on Capital Care's written transfer agreement with a Michigan hospital not complying with the new state law's mandate that ASFs must have a written transfer agreement with a "local" hospital. R.C. 3702.303. Adjudication Order, App'x 60 ("Order"). Because the Director based his revocation Order on that statute, the reviewing court must determine whether the Director's Order was in accordance with the law. R.C. 119.12. Raised on appeal CHALLENGE SSR and Delegation. Therefore, it was necessary for the Sixth District to review whether H.B. 59 violated the single-subject rule in the Ohio Constitution, Article II, Section 15(D) and whether it violated the U.S. Constitution's Due Process Clause.

The lower court properly found that H.B. 59 violated the single-subject rule because there is no common nexus between the transfer agreement provisions and the budget related items in H.B. 59. Appellee agrees with the State, that if the Court were to declare H.B. 59's written transfer provisions unconstitutional, then the Court may, but need not address, whether the provisions also violated the Due Process Clause.[2] The lower court also correctly held that the transfer agreement provisions of H.B. 59 caused an undue burden on Ohio women's access to abortion in Northwest Ohio. Finally, the lower court rightly determined that the transfer agreement, variance, and public hospital ban provisions collectively created an unconstitutional

[2]A challenge to H.B. 59's written transfer agreement provisions, including whether H.B. 59 creates an undue burden on a woman's access to abortion and delegates licensing authority without due process to hospitals and doctors, is pending in the U.S. District Court in Cincinnati. *See Planned Parenthood of Ohio Southwest Region, et al. v. Hodges*, SDOH Case No. 1:15-cv-568. The *PPSWO v Hodges* litigation is stayed pending the outcome of this case.

delegation of the State's licensing authority without due process. For these reasons, the Sixth District's reversal of the Director's Order to revoke Capital Care's license must be affirmed.

The State suggests, incorrectly, that despite the unconstitutionality of the written transfer statutes, the Director's Order should nonetheless be affirmed because it properly relied on the pre-existing administrative written transfer rule, O.A.C. 3701-83-19(E), App'x 81-82, to revoke Capital Care's license. The State's argument fails because the Director neither proposed to revoke, nor ordered Capital Care's license be revoked, for any reason related to the transfer agreement rule. Nor could he. The hearing officer and Director found that Capital Care's transfer agreement with the Michigan hospital was deemed insufficient because the hospital was not "local." The transfer agreement *rule* does not require that the hospital be local; it was H.B. 59 that added the requirement that the hospital be "local."

For these reasons, this Court should affirm the Sixth District's reversal of the Director's Order revoking and not renewing Capital Care's ambulatory surgical facility license.

Appellee Capital Care Network of Toledo's Proposition of Law No. 1:

> *An Adjudication Order revoking an ASF's license because the ASF did not meet the requirements of an unconstitutional law must be reversed irrespective of whether the ASF also did not meet the requirements of an irrelevant administrative rule that the Adjudication Order did not rely on for the revocation. When an Adjudication Order revoking an ASF license is not based on a rule, the rule cannot be used to justify the Order.*

A. When an Adjudication Order revoking an ASF's license is based on an unconstitutional law, a reviewing Court cannot avoid reviewing whether the Order is accordance with the law.

The State would like this Court to ignore Capital Care's challenge to the Director's Adjudication Order on the grounds it was not in accordance of law. However, when a license

holder appeals the State's revocation[3] of its license, the reviewing court must evaluate whether the revocation is in accordance with the law. R.C. 119.12. The State cites no authority to support its suggestion that this Court ignored this duty.

It is undisputable that the law the Director based his license revocation on was a provision of H.B. 59. The record is clear that the Director proposed to revoke Capital Care's license because its agreement with the University of Michigan Health system "violated the requirements of R.C. 3702.303(A)." State's Ex. H, Supp. at S-104-106. The hearing officer concluded that Capital Care's agreement with the Michigan hospital violated R.C. 3702.303 because the Michigan hospital was not a "local" hospital, as required by R.C. 3702.303. Report and Recommendation, App'x 70-71, ¶¶7, 10 ("R&R").The Director approved the hearing officer's conclusions and ordered the license revocation because the hearing examiner concluded that "because [Capital Care] does not meet the licensing requirements of R.C. Section 3702.30, the Director's decision not to renew or to revoke the license of [Capital Care] is valid." Adjudication Order, App'x 61. Therefore, Capital Care's license was revoked because its transfer agreement with the Michigan hospital was not with a "local" hospital in violation of the transfer agreement provision of H.B. 59. For this reason, it was proper for the Sixth District to decide whether the law the Director based his decision on was unconstitutional.

B. The Adjudication Order revoking Capital Care's license for failing to meet the requirements of the transfer agreement *statute* cannot be affirmed on an alternative ground that Capital Care did not meet the requirements of the transfer agreement *rule* when the *rule* was not the basis for the revocation, nor could have been the basis for rejecting Capital Care's transfer agreement.

The State appears desperate to have this Court allow it to retroactively change the grounds for the revocation. The State did not reject Capital Care's WTA with the Michigan

[3] The Director's Order both revoked and did not renew Capital Care's ASF license, therefore the term "revocation" includes non-renewal.

Hospital because it violated the administrative rule, O.A.C. 3701-83-19(E): it did not propose revocation on that ground (State Ex. H, Supp. at S-104), it did not argue that at the hearing, it did not rely on the rule in the revocation Order, but yet it now seeks affirmance of that Order on grounds the State admittedly did not raise until the court of appeals. Appellant Merit Br. at 25. It is too late for the State to change its reasoning. If this Court declares H.B. 59 unconstitutional, then the State can send a new proposed revocation notice to Capital Care, putting it on notice and giving it an opportunity to be heard on whether its Michigan agreement violates the transfer agreement rule. There is no need for this Court to accept the State's invitation to violate Capital Care's procedural due process rights by affirming the revocation Order on grounds Capital Care had no notice of or opportunity to oppose, nor any lower court addressed.

1. The State is wrong to declare that the transfer agreement *statute* is identical to the transfer agreement *rule*.

The State suggests the statute and the rule are identical based on "common sense." This argument is belied by not only a comparison of the terms, but the need to amend the statute. The rule was promulgated in 1996 and simply states: "Each ASF shall have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise." O.A.C. 3701-83019(E), App'x 81. The statute 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.

R.C. 3702.303(A), App'x 76. The word "local" is unique to the statute, but not defined. It was not clear to Capital Care what "local" meant under the statute.

In the summer of 2013, Ms. Hubbard, the owner and operator of Capital Care, was searching for a new hospital to enter into a transfer agreement. The current hospital, the public University of Toledo Hospital, would no longer be able to sign an agreement because H.B. 59's public hospital ban would become effective in September 2013. When Ms. Hubbard learned H.B. 59 also required that the agreement be with a "local" hospital, she narrowed her search to hospitals within 50-75 miles of the Capital Care facility. Tr. 156, Supp. at S-44. Prior to learning about the new "local" requirement, she had been contacting hospitals in Cleveland and Columbus, which are 120 to 140 miles away, respectively. Tr. 152, 154, Supp. at S-43. With no guidance from the State, she believed that a radius of 50-75 miles was local. Tr. 157, 75, Supp. at S-44, 24. She found a hospital she considered local to Toledo, in Ann Arbor, Michigan, 52 miles away. The UMHS signed a transfer agreement with Capital Care on January 20, 2014. CCNT Ex. C., Supp. at S-112-17. Soon after notifying the Department of Health of the agreement, the Director rejected the UMHS agreement because a hospital in Ann Arbor was not "local" as required by R.C. 3702.303. Proposed Revocation Letter, State's Ex. H., Supp. at S-105. As of the date of the hearing ODH had issued no regulations, rules, guidelines, or protocols to define the meaning of "local." Tr. 75-76, Supp. at S-24. At the hearing, Bureau Chief of the Department of Health, testified that a hospital 50 miles away would be considered a local hospital in a rural part of Ohio. Tr. 30, Supp. at S-12.

In June of 2015, as part of the budget bill, the State finally clarified what local meant. It passed an additional transfer agreement provision requiring that a local hospital "not be further than thirty miles from an ambulatory surgical facility." R.C. 3702.3010. Given these facts it is disingenuous for the State to argue that rule and the statue were identical.

2. The State is wrong to suggest Capital Care's transfer agreement with the Michigan hospital did not meet the rule.

The rule required that Capital Care had a written transfer agreement with a hospital for the transfer of patients for complications, emergencies or other situations. O.A.C. 370-83-19. The agreement with UMHS satisfied the rule by explicitly stating that the hospital agrees to admit patients, including those with emergency medical conditions. CCNT Ex. C, Supp. at S-112. Furthermore, the only reason the Director rejected the UMHS agreement was because of the location of the hospital in Ann Arbor, MI. Order, App'x 61.

In addition to the agreement, Capital Care arranged with Air Evac Lifeteam, a helicopter company, to transport patients experiencing non-life-threatening complications to UMHS in 15 to 20 minutes. Capital Care Ex. M, Supp. at S-118; Tr. 160, 171, Supp. at S-45, 48. In the rare event that a patient experiences a life-threatening emergency requiring immediate medical attention, Capital Care will not need to use the transfer agreement. The Capital Care staff are trained to call 911 who would send an ambulance that would transfer the patient to the nearest hospital. Tr. 159, Supp. at S-45. All emergency patients would be treated at any hospital because federal law requires the hospital to accept and treat every emergency patient until they are stabilized and ready to transport to the receiving hospital. 42 U.S.C. § 1395dd (b); *Moses v. Providence Hospital and Medical Centers, Inc.*, 561 F.3d 573, 583 (6th Cir. 2009). Hospitals must accept every emergency patient regardless of whether the patient arrives with a transfer agreement from an ASF. 42 U.S.C. § 1395dd (b) (commonly referred to as EMTALA). Even though Capital Care did not need to transfer a patient to a hospital in the twelve years proceeding the hearing, it had a written transfer agreement and procedures that provided for the safe and efficient transfer of a patient to a hospital if she required hospitalization, therefore, Capital Care did satisfy the rule.

Moreover, if Capital Care had been on notice that its Michigan agreement needed to, but did not, comply with the rule, it would have applied for a waiver of the rule. However, Capital Care could not avail itself of the waiver option once the enactment of R.C. 3702.303 eliminated the Director's power to grant a waiver. The administrative code allows that Director to grant a waiver of an ASF rule "***unless the requirement is mandated by statute.***" O.A.C. 3701-83-14(A), App'x 83. When H.B. 59 became effective in September 2013, Capital Care was no longer able to request waiver of the rule. If this Court were to strike down H.B. 59 and the State were to propose to revoke Capital Care's license because the Michigan transfer agreement does not comply with the rule, then Capital Care would be on notice and would have an opportunity to request a waiver and establish at a hearing its compliance with the rule.

3. The state is wrong to ask this Court to affirm the Order on alternative grounds for the first time on appeal.

Throughout its arguments the State misstates the record below, claiming that the Director based his revocation decision on the fact that the agreement with the Michigan hospital did not comply with the administrative rule. The State fails to explain to the Court that the Director's first notice of proposed revocation on August 2, 2013 was based on Capital Care having no written transfer agreement as of August 1, 2013. State Ex. D, Supp. at S-102. The Director explained the absence of a transfer agreement violated the administrative rule, O.A.C. 3701-83-19(E). *Id*. At that time, the transfer agreement statute was not effective. Six months later, after Capital Care submitted its new agreement with the Michigan hospital, the Director again proposed to revoke Capital Care's license, this time for having a WTA with a non-local hospital, in violation of the transfer agreement statute. State Ex. H, Supp. at S-104. It is indisputable that the reference to the regulation does not apply to the Michigan agreement. The hearing officer made the same distinction in his report and recommendation. R&R, App'x 70.

More importantly, the State concedes it did not articulate the rule justified the revocation Order in the common pleas court. Appellant Merit Br. at 25. The State acknowledges that in its common pleas court opening brief it made a fleeting reference to the rule in its first introductory sentence but did not develop the argument in either its opening or reply briefs. Department Appellee Br. (Com. Pl) at 1. The State waited until its appellant brief in the court of appeals to "extensively" brief the issue. This delay in clearly advancing this argument is tantamount to a waiver. When a party raises an argument in the appellate court for the first time, it is too late. An argument raised for the first time on appeal is waived. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 277, 611 N.E.2d 830 (1993) (A party who fails to raise an argument in the court below waives its right to raise it on appeal).

4. The State is wrong to request this Court to violate Capital Care's procedural due process rights by affirming the revocation Order on alternative grounds for which the State did not give Capital Care notice and an opportunity to be heard prior to the Order being issued.

If the Director intended to propose to revoke Capital Care's license because its agreement with UMHS did not comply with the administrative rule, he needed to put Capital Care on notice of this ground for the revocation and give Capital Care the opportunity have a hearing. In addition, he needed to inform Capital Care that it could seek a waiver of the rule. The State's attempt to bypass these procedural due process rights, by asking this Court to make such a finding on appeal, would be a flagrant violation of the Due Process Clause of the U.S. Constitution.

In *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 603 (6th Cir. 2006), the State attempted to revoke a Dayton abortion clinic's ASF license for failing to have a written transfer agreement as required by the rule, O.A.C. 3701-83-19(E). The court held that a license holder has a procedural due process right in the continued operation of an existing business. *Id.*

at 611-12. The Court reasoned that the Dayton clinic has been in operation since 1983 and that if it could not obtain a license it would have to permanently close despite having a long history of operation. *Id*. Therefore, it had a property right to pre-deprivation due process. The Director denied the clinic's request for waiver of the WTA rule and it ordered the clinic to close before providing it with an adequate pre-deprivation process. The Court held that the Director's actions violated the clinic's procedural due process rights. *Id*. at 612-614.

Capital Care has been in operation for decades and operating with an ASF license for over one decade. Therefore, it has a vested property interest in its license. The pre-deprivation process for the Dayton clinic included being able to apply for a waiver before the license revocation, but that was not enough. The Director also needed to provide a pre-deprivation hearing. Capital Care has been afforded neither option. The Director has never put Capital Care on notice that its WTA with the Michigan hospital violated the transfer rule or offered it a hearing to object the revocation on those grounds. Nor has Capital Care been able to request a waiver since the enactment of H.B. 59 abolished the Director's power to even grant a waiver. Therefore, it is too late, at the appellate stage, for the State to seek to revoke Capital Care's license on the grounds that the Michigan transfer agreement was not adequate under the rule. To do so now would be a blatant denial of procedural due process and this Court should reject the State's invitation to reverse on this ground.

Appellee Capital Care Network of Toledo's Proposition of Law No. 2:

> *When no common purpose or discernible relationship exists between the provisions in a bill, the enactment violates the single-subject rule of the Ohio Constitution Article II Section 15(D). The inclusion of the ambulatory surgical facility written transfer agreement licensing provisions R.C. 3702.303, 3702.304, and 3727.60 in the 2013 budget bill violates the single-subject rule.*

The Sixth District properly held that H.B. 59, titled "Appropriations – Fiscal Year 2014-2015 State Budget," violated the single-subject rule because there was no common nexus between the licensing provisions and the budget-related items in H.B. 59. App. Op. ¶42. The court was quite aware of its duty to "take a limited role in enforcing the single-subject requirement in order to avoid undue interference with the purpose of legislation." App. Op. ¶39 (quoting *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 28).

Ohio Constitution, Article II, Section 15(D) expressly provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." This provision, known as the single-subject rule, unambiguously requires every piece of legislation to address only a single-subject and serve a single purpose. Its purpose is to promote an "orderly and fair legislative process" by prohibiting "logrolling" — "the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately." *See In re Nowak*, 104 Ohio St.3d 466, 472, 2004-Ohio-6777, 820 N.E.2d 335 at ¶ 31 (citing *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 495-96, 1999-Ohio-123, 715 N.E.2d 1062). "By limiting each bill to one subject, the issues presented can be better grasped and more intelligently discussed." *State ex rel. Dix v. Celeste* 11 Ohio St.3d 141, 145, 464 N.E.2d 153 (1984). Limiting one subject per bill prevents the "unnatural combination of provisions" into an omnibus bill. *Dix* at 142-143. This is prohibition is especially important when the subject matter is "inherently controversial and of significant constitutional importance." *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 16, 711 N.E.2d 203 (1999).

Courts find violations of the single-subject rule where there is "'an absence of common purpose or relationship between specific topics in an act.'" *Nowak* at ¶ 44 (quoting *Dix at* 145). This Court has stated that "when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act, there is a strong suggestion that the provisions were combined for tactical reasons, i.e., logrolling [,] * * * the very evil the one subject rule was designed to prevent." *Dix at* 145.

An act may involve multiple topics, so long as they share a common purpose or relationship. However, where there is a "disunity of subject matter such that there is no discernible practical, rational or legitimate reason for combining the provisions in one Act," *State ex rel. Ohio Civ. Serv. Employees. Assn v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 28 (internal quotation marks omitted), the Court must invalidate the law. *See also Sheward* at 497; *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (1991). Logrolling "occurs when legislators combine disharmonious proposals in a single bill to ensure passage of proposals that might not have won acceptance on their own." *Ohio Civil Serv. Employees Ass'n* ¶ 15, citing *Dix* at 142-143.

A bill which embraces more than one topic "is not fatal as long as a common purpose or relationship exists between the topics." *Hoover v. Bd. of Cnty. Comm'r*, 19 Ohio St.3d 1, 6, 482 N.E.2d 575 (1985) (budget bills encompass many items, all bound by the thread of appropriations). However, "where there is a blatant disunity between topics and no rational reason for their combination can be discerned, it may be inferred that the bill is a result of log-rolling" in violation of the single-subject rule. *Id*.

Ohio Revised Code 3702.303 (written transfer agreement), 3702.304 (variance of WTA), and 3727.60 (public hospital ban) were enacted by the Ohio legislature as part of the 2013 omnibus budget bill, H.B. 59. The stated purpose of the bill is "[t]o amend sections . . .; to enact new sections . . . and to repeal sections of the Revised Code; . . . to make operating appropriations for the biennium beginning July 1, 2013, and ending June 30, 2015; [and] to provide authorization and conditions for the operation of state programs . . ." 2013 H.B. 59.

The three transfer agreement provisions were introduced late in the legislative process as riders to the budget bill with little or no opportunity for public debate. At the end of the state budget process Ohio legislators buried controversial anti-abortion provisions in the several thousand pages of a budget bill that was sure to pass. The written transfer agreement provisions, which are inherently controversial and of significant constitutional import, were not debated and approved during a fair and open legislative process. *Cf. Cleveland v. State* at ¶¶ 44-45 (noting that the lack of testimony and hearings on nutrition- and food-service-related provisions in a budget bill "create[d] a strong suggestion" of impermissible logrolling). H.B. 59 frustrates the single-subject rule's purpose of preventing logrolling and ensuring "a more orderly and fair legislative process." *Dix*, 11 Ohio St. 3d at 142-43; *In re Nowak* at ¶ 31.

There is no discernible common purpose between making operating appropriations and the three WTA licensing provisions. There is not even a tenuous connection between the provisions and the state budget. The licensing provisions do not restrict state spending, or reform the effective operation of the state government. In fact, the provisions do not require any action on the part of the government at all. The licensing provisions in H.B. 59 violate the single-subject rule because there is a "disunity of subject matter such that there is 'no discernible practical, rational or legitimate reason for combining the provisions in one Act.'" *Ohio Civ.*

Serv. Employees Assn. ¶ 28 (quoting *Beagle v. Walden,* 78 Ohio St.3d 59, 62, 676 N.E.2d 506 (1997).

The State advances the argument that the licensing provisions fall within the budget bill's purpose because they "set conditions for the efficient and effective operation of state government." Appellant Merit Br. at 28. First, the State argues, without any evidence, that the public hospital ban "establishes a condition on the use and operation of a state funded resource." *Id*. This is nothing more than an unsubstantiated argument stated without any proof of the resources affected. Ohio public hospitals must accept, treat, and stabilize all emergency patients under EMTALA, 42 U.S.C. § 1395dd (b). The public hospital ban does not extinguish that obligation. Public hospitals must accept a patient with a medical complication from an abortion whether she is transferred from the clinic or walks in on her own. Given this federal mandate, enacting the public hospital ban had no impact on State appropriations.

Furthermore, appropriations bills "present[] a special temptation" to attach unrelated provisions because they are necessary and often popular bills which are certain of passage. *Simmons-Harris*, 86 Ohio St.3d at 16. That is why this Court has made clear that allowing provisions that are bound together solely because they are appropriations that impact the budget "renders the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguable impacts the state budget, even if only tenuously." *Ohio Civ. Serv. Employees Assn.* ¶ 33 (noting that the Court "flatly rejected this proposition" in Simmons-Harris, 86 Ohio St.3d at 16). Similarly, the court of appeals in *Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, ¶52 (8th Dist.) accepted "in theory" the state's premise that provisions eliminating police powers "could *potentially* impact the budgets of municipalities," but rejected "the concept that such a tenuous, tangential link can serve as the unifying thread between

amendments [of police powers] and an appropriations bill. The application of such logic would eviscerate the one-subject rule in the context of appropriations bills."

Second, the State argues that the variance statute is an improvement to the operation of the Department of Health and thus "fairly included in the budget bill." Appellant Merit Br. 29. The State cites *Dix* for this bold assertion. Dix. 11 Ohio St. 3d at 145. In *Dix*, the Court acknowledged "that the combination of provisions on a large number of topics, ***as long as they are germane to a single subject***, may not be for purposes of logrolling but for the purposes of bringing greater order and cohesion to the law or of coordinating an improvement of the law's substance." *Id*. at 145 (emphasis added). The State offers no explanation of how the inclusion of variance statute in the two-thousand-page budget bill is germane to the rest of the budget bill. Taking a partial quote, out of context, does not establish that the variance statute has a common purpose or relationship with the appropriations bill, nor does it establish a discernible practical, rational or legitimate reason for combining the variance provision with the budget provisions. The State cannot overcome the obvious conclusion both lower courts came to: the variance provision is impermissible logrolling.

Third, the only argument the State can muster to justify the inclusion of the written transfer agreement statute, R.C. 3702.303, in the budget bill is that it is linked to the public hospital ban and the variance statute. This argument does not establish common purpose or relationship with the rest of the appropriations bill. These three pieces of legislation must be "bound by the thread of appropriations." *Ohio Civ. Serv. Employees Assn*. ¶ 30. As in *Simmons-Harris*, there is no thread tying any one of the transfer agreement provisions to the rest of the two-thousand-page budget bill.

> [W]e held in *Simmons–Harris* that there was "a 'blatant disunity between' the School Voucher Program and most other items contained in [the Act]" and that there was " 'no

> rational reason for their combination.' " Id. In support of our conclusion, we noted that the program "was created in a general appropriations bill consisting of over one thousand pages, of which it comprised only ten pages." Id. Such legislation, we reasoned, was little more than a "rider"—a provision included in a bill that is "'so certain of adoption that the rider will secure adoption not on its own merits, but on [the merits of] the measure to which it is attached.'" Id.

Ohio Civil Serv. Employees Ass'n ¶ 31. Had the General Assembly passed the three transfer agreement statutes in one bill, then the State's argument would be persuasive. In the context of an appropriations bill, this argument does more to emphasize the disunity of the three provisions from the rest of the budget bill.

Finally, the State seeks reversal on the variance statute and the public hospital ban because Capital Care did not raise these statutes in its appeal and neither statute was used by the Director to revoke Capital Care's license. The State undermines its own argument by stitching the three provisions together to justify their inclusion in the budget bill. The State cannot argue it both ways. If the three are separate than there is no justification for including the written transfer agreement statute in the budget bill.

For these reasons, the Sixth District correctly held that H.B. 59's transfer agreement statutes violated the single-subject rule and thus, the Director's revocation Order should be reversed.

Appellee Capital Care Network of Toledo's Proposition of Law No. 3:

> *It was entirely appropriate for the Sixth District to address the constitutionality of the licensing provisions, upon which the Adjudication Order was based, given that these provisions are contrary to law because they have the effect of creating an undue burden for Northwest Ohio women to access abortion under Whole Woman's Health v. Hellerstedt, __ U.S. __, 136 S. Ct. 2292, 195 L.Ed.2d 665 (2016).*

A. Because the Director of the Department of Health is prohibited from revoking or not renewing Appellee's facility license when his order is not in accordance with the law, the Sixth District appropriately reviewed the order to determine Ohio's transfer agreement law violated the due process clause of the Fourteenth Amendment to the U.S. Constitution.

The Sixth District properly considered whether the licensing provisions, as applied to Capital Care, created an undue burden on a woman's access to abortion, because Ohio courts must determine whether an administrative decision is contrary to law. The Sixth District correctly held that the licensing provisions that the Director relied on to revoke and not renew Capital Care's license created an unconstitutional undue burden. App. Op. ¶¶ 20-33. If licensing provisions have the effect of creating substantial obstacles in the path of a woman seeking an abortion in Northwest Ohio, as the Sixth District held, the Director's decision must be reversed as not in accordance with the law. See. R.C. 119.12 (D). The State does not disagree. For the first time in the court of appeals, the State vigorously argued and asked the Sixth District to hold that the Director's Order did not violate the due process rights of women in Northwest Ohio seeking abortion services. Appellant Br. (6th Dist.) at 1-3, 11-15, 20-21.

As much as the State would like to avoid a constitutional review of its transfer agreement provisions, it cannot. The courts tasked with reviewing an agency decision must determine whether it is contrary to law.

B. The Sixth District properly considered and applied the U.S. Supreme Court decision in *Whole Woman's Health v. Hellerstedt*, __ U.S. __, 136 S. Ct. 2292, 195 L.Ed.2d 665 (2016), based on the record before it.

The appeal in the Sixth District was briefed and argued by the end of November 2015. On June 27, 2016, the United States Supreme Court issued its opinion in *Whole Woman's Health v. Hellerstedt*, __ U.S. __, 136 S. Ct. 2292, 195 L.Ed.2d 665 (2016), striking down Texas laws requiring doctors performing abortions to maintain admitting privileges at a hospital and abortion facilities to meet surgical center requirements as unconstitutional undue burdens. The decision clarified the application of the due process standard articulated in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992). Prior to *Whole*

Woman's Health, Capital Care did not seek a ruling in the common pleas court or the Sixth District as to whether Ohio's WTA statutory requirements violated due process by creating an undue burden on abortion providers and patients.

Considering this new precedent that was issued after briefing and argument, the Sixth District appropriately addressed the issue. Recently, this Court recognized that it is proper for an appellate court to consider new law when a case is pending on appeal. *State v. Moore*, Slip Opinion No. 2016-Ohio 8288. "Ohio appellate courts routinely recognize that extraordinary circumstances exist when this court issues an opinion that is directly on point with the issue raised on appeal." *Id*. *See Ohio v. Crager*, 123 Ohio St.3d 1210, 914 N.E.2d 1055 (2009) (after U.S. Supreme Court ruling was issued, this Court remanded case to the trial court for new trial consistent with the U.S. Supreme Court ruling).

In *Whole Woman's Health*, the United States Supreme Court held that, "there 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Whole Woman's Health* at 2300 (quoting *Casey*, 505 at 878 (emphasis omitted). The Court further clarified that the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," and a law may not be upheld unless the benefits of the justification outweigh the burdens it imposes. *Id.* at 2309. The Court concluded that the Texas laws would have the effect of forcing clinics to close and forcing patients to drive farther distances which meant "fewer doctors, longer waiting times, and increased crowding." *Id*. at 2313, 2317-18. When weighed against the laws' complete lack of medical benefit, the laws created a substantial obstacle for Texas women. *Id*.

Similarly, the Sixth District found that, even based on the limited record before it, Ohio's licensing provisions created a substantial obstacle for women because the burdens it places on women far outweigh any benefit the State can articulate.

The facts that support the decision include:

- Capital Care is the sole abortion facility remaining in Northwest Ohio.
- Capital Care provides services to women in Northwest Ohio, Indiana, Michigan and West Virginia. Tr. 141, Supp. at S-40.
- Abortion is exceedingly safe, as the U.S. Supreme Court recognized in *Whole Woman's Health*, 136 S.Ct. at 2311.
- Transferring patients from an abortion facility to a hospital is exceeding rare. Capital Care has not had a single hospital transfer in the eight years prior to the hearing. Tr. 142, Supp. at S-40; Tr. 133-134, Supp. at S-38, 138, Supp. at S-39 (Founders Clinic in Columbus had six or seven in 40 years).
- Ohio had nine abortion clinics at the time of the hearing. Tr. 130, Supp. at S-37.
- Without access to safe and legal abortions in Ohio, women have to choose between illegal abortion and carrying an unwanted pregnancy to term. Tr. 132, Supp. at S-38.
- The risk of an illegal abortion in Ohio before abortions were legalized included death, infection, bleeding, loss of fertility, and other complications. Tr. 131-133, Supp. at S-38.
- Prior to Ohio requiring a written transfer agreement, doctors had no difficulty transferring patients to local hospitals. Dr. Harley Blank testified at the hearing that before and after the transfer agreement rules were effective, the abortion

facility in Columbus where he worked called 911 to transfer a patient to the local hospital, without any issues. Tr. 135-136, Supp. at S-39.

- With or without a transfer agreement, the local Columbus hospitals always accept and treat the transferred patients from the Columbus abortion facility, Founder's, and private doctors' offices. Tr. 136-137; 143, Supp. at S-39, 41.
- There is no risk that the patient will not receive necessary treatment at the hospital because federal law requires the hospital to accept and treat every emergency patient until they are stabilized before sending the patient to another hospital. 42 U.S.C. § 1395dd (b) (commonly referred to as EMTALA); *Moses v. Providence Hospital and Medical Centers, Inc.*, 561 F.3d 573, 583 (6th Cir. 2009).
- The transfer agreement requirement did not change the ability to transfer patients to a hospital. Tr. 137, Supp. at S-39. The seven patients Dr. Blank transferred in 40 years of practice were all treated at the hospital regardless of a transfer agreement. *Id*.
- The closing of Capital Care would obviously increase the travel times for woman from Northwest Ohio who needs an abortion: she would be forced to travel to a facility in Columbus (300 miles roundtrip) or Cleveland (240 miles roundtrip).[4] Increased travel distances can pose a serious burden, particularly for poor, rural, or disadvantaged women. *Whole Woman's Health v. Hellerstedt*, __ U.S. __, 195 L.Ed.2d 665 (2016). These challenges are exacerbated by Ohio's mandatory delay law for abortion, which forces patients to make the round-trip—and miss work,

[4] The distances are not in the record, but Ohio R. Evid. 201 allows the court to take judicial notice of the distances between Toledo and Columbus and Cleveland because the distances are not disputed and are capable of accurate and ready determination by using Google Maps.

lose wages, and pay for transportation and child care—at least twice. See, R.C. 2317.56 (B)(1) which requires a mandatory 24-hour waiting period.

- Capital Care has a transfer agreement with a hospital 55 miles away in Ann Arbor if a patient had a non-urgent reason to be transferred. In an emergency, Capital Care would call 911. Tr. 159, Supp. at S-45.
- The State chose not to present evidence to justify the transfer agreement provisions and in fact objected when Capital Care submitted evidence to show a constitutional violation. Tr. 130-131, Supp. at S-37.

The Sixth District carefully weighed the burdens on women seeking an abortion against the "virtually non-existent health benefits of the licensing provisions" as applied to Capital Care and held that the licensing provisions created an undue burden on women. App. Op. ¶ 33. Thus, the Sixth District did not err in holding the licensing provisions created an undue burden.

C. The Fourteenth Amendment Due Process Clause applies to the general ASF licensing provisions at issue in this case.

The State also disputes the substance of the Sixth District's ruling, arguing that only a statute directed at abortion can violate the Due Process Clause. Appellant Merit Br. p. 36-39. The State is mistaken and provides absolutely no support for its position. The undue burden test also applies to neutral regulations or laws that adversely ***affect*** abortion facilities. *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 603 (6th Cir. 2006) (rejecting precisely the same argument made by the State here, and holding that undue burden test applies to a challenge to Ohio's facility neutral ambulatory surgery center written transfer agreement regulation as applied only to plaintiff's abortion clinic); *see also, e.g., Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (requiring new abortion facility to comply with state's onerous certificate of need process was an undue burden even though certificates of

need were also required for health centers that did not provide abortion); see also *Comprehensive Health of Planned Parenthood Great Plains v. Missouri Department of Health and Senior Services*, W.D. Mo. No. 2:16-cv-04313, WL1407656 (April 19, 2017) (finding that forcing abortion clinics to be licensed as surgical centers was an undue burden).

The State has not cited a case, nor is there one, that justifies this distinction. The Seventh Circuit rejected such a position in *Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health*, 505 F. 2d. 1141, 1153-1154 (7th Cir. 1974), where the court stated that regulations, "even if applied universally to all similar medical procedures, because of the fundamental right of a woman to procure an abortion during the first trimester, would have to meet a compelling governmental interest requirement." Likewise, in *Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 361-62 (6th Cir. 1984), the court applied the relevant test for violations of the constitutional right to decide to terminate a pregnancy when analyzing Michigan's requirement that abortion clinics be licensed as an outpatient surgical facility, notwithstanding the general applicability of the regulations to all surgery clinics.

In fact, in *Whole Woman's Health*, one of the challenged provisions was a law of neutral application. The surgical center requirement in newly enacted Texas House Bill 2, required abortion facilities to meet Texas' pre-existing minimum standards for all ambulatory surgical centers. 136 S. Ct. at 2300. The surgical center requirements were facially neutral: they applied to all Texas surgery facilities. The Supreme Court analyzed the application of the surgical center requirements to abortion clinics, using the undue burden analysis, and found the provision was an undue burden on access to abortion. *Id*. Here, just as in Texas, Ohio abortion clinics are required to comply with Ohio's general ASF regulations. *See Founder's Women's Health Center v. Ohio State Dept. of Health*, 10th District Franklin No. 01AP-872, 01AP-873, 2002-

Ohio-4295 (requiring Ohio abortion providers be licensed as ASFs). Therefore, just as in Texas, the undue burden tests applies to Appellee's challenge to Ohio's general ASF laws as applied to abortion clinics.

The State further suggests that the undue burden analysis cannot apply based on "common sense," pointing out that if an abortion clinic failed to have fire prevention equipment, it could rely on *Whole Woman's Health* to prevent the government declaring the building unsafe. Appellant Merit Br. at 38. This example completely ignores the balancing test that a court must use to weigh the state's interest in requiring fire prevention equipment against the burden the requirement imposes on a woman's access to an abortion. Presumably, in this hypothetical scenario, the State would submit evidence of the health and safety benefits of fire prevention equipment and the court would find that those benefits outweighed the burden on a woman's access to an abortion. Here, by contrast, the licensing provisions provide no such health and safety benefit—the unrebutted evidence is that local hospitals always accept and treat patients in need of emergency care, as required by federal law—and any hypothetical state interest served by the licensing provisions is far outweighed by the harm these provisions impose on Ohio women.

D. The Sixth District did not *sua sponte* determine that the transfer agreement provisions violated the due process clause of the Fourteenth Amendment to the U.S. Constitution.

As an initial matter, contrary to Appellant's assertion, this Court has never articulated a rule categorically barring courts from considering constitutional issues *sua sponte.* This Court has permitted appellate courts to consider the constitutionality of a statute *sua sponte* where the court determines that it is necessary in rendering its decision. *Mayer v. Bristow*, 91 Ohio St. 3d

3, 9, 740 N.E.2d 656 (2000). Below, the Sixth District explicitly found that it was necessary to analyze whether the licensing provisions violate the undue burden standard. App. Op. ¶ 25.

However, the Sixth District did not raise the issue of undue burden *sua sponte* –the State itself raised this issue before the Sixth District. Because the State invited the Sixth District to rule on whether Ohio's licensing statute created an undue burden, it is disingenuous for the State to reverse course and argue in this Court that the Sixth District ***sua sponte*** decided this issue. Appellant Br. (6th Dist.) at 13, 34-35, 40. In fact, the State, as appellant below, lead its brief with a thorough argument as to why the Sixth District should rule on undue burden. Appellant Br. (6th Dist.) at 11-15. There is no question that both parties had notice of the issue and an opportunity to brief it. Capital Care simply chose not to press the issue given the state of the law in the Sixth Circuit at that time. But in *Whole Woman's Health*, the Supreme Court reaffirmed that the level of scrutiny that applies when reviewing restrictions on abortion providers and their patients is consistent with that applicable to regulation of a constitutionally protected right, not the less strict review applicable to economic legislation. *Id*. at 2309-10. Additionally, as the Sixth District put it, *Whole Woman's Health* "set forth a more exacting undue burden standard, where combined burdens to patients seeking abortions are weighted against the health benefits of a regulation to determine whether an undue burden exists." App. Op. ¶ 18.

Without the need for additional facts or argument, the Sixth District was able to apply this new precedent to determine that Ohio's transfer agreement provisions constituted an undue burden. App. Op. ¶ 33. The court found, based on the record, that application of the law would cause Capital Care to close and would force patients to travel long distances to reach other abortion providers. App. Op. ¶¶ 27-29. The court also found that like the law in Texas, the health benefits of the licensing provisions are "virtually nonexistent." App. Op. ¶ 33. Because the Sixth

District correctly applied the test articulated in *Whole Woman's Health* to evidence in the record, this Court must affirm.

E. Remand to the trial court to hear evidence and argument in the first instance is appropriate in this case.

The State argues that it "deserves a chance to present evidence about these and other important differences and how they affect the undue burden analysis." Although the Sixth District had sufficient facts to conclude that the licensing statute and regulations created an undue burden on a woman's access to abortion, Appellant would not object to a remand to further develop the undue burden evidence if this Court determines that is appropriate. Remand is an appropriate remedy. *Chapman v. Ohio State Dental Bd.*, 33 Ohio App.3d 324, 328, 515 N.E.2d 992 (Ninth Dist. 1986) (since R.C. 119.12 authorizes reversal and vacation of an administrative order, it implicitly gives the court the power to remand for further proceeding consistent with law). *See also Superior Metal Products v. Admr., Bur. of Employment Services*, 41 Ohio St.2d 143, 146, 324 N.E.2d 179 (1975) (faced with the issue of whether a trial court had the authority to remand a decision of the board of review when R.C. 4141.28(O) which only authorized vacation, reversal, or modification, this Court held that "the power to reverse and vacate decisions necessarily includes the power to remand the cause to the decision maker."). The remand should be to the common pleas court to develop the record and issue a ruling on the merits since constitutional issues raised in an administrative appeal are properly heard in the common pleas court. *Grant v. Ohio Dept. of Liquor Control,* 86 Ohio App.3d 76, 83, 619 N.E.2d 1165 (1st Dist.1993) (constitutional issues cannot be determined administratively), citing *Mobil Oil Corp. v. Rocky River,* 38 Ohio St.2d 23, 26, 309 N.E.2d 900 (1974).

Appellee Capital Care Network of Toledo's Proposition of Law No. 4:

> *The combination of R.C. 3702.303, which requires ambulatory surgical facilities to obtain a written transfer agreement from a local hospital, and R.C. 3702.304, which requires a doctor to agree to admit patients, and R.C.3727.60, which bans public hospitals from entering transfer agreements with an abortion facility, create an unconstitutional delegation of the Director of the Department of Health's authority to license ambulatory surgical facilities that provide abortions.*

The Sixth District correctly ruled that Ohio's transfer agreement statutes, R.C. 3702.303 (transfer agreement requirement), R.C. 3702.304 (variance from transfer agreement), and R.C. 3727.60 (public hospital ban of entering transfer agreement) unconstitutionally delegates licensing authority from the Director of the Department of Health to local hospitals and doctors. App. Op. ¶¶ 34-37. The State incorrectly asserts that *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 609 (6th Cir.2006) already has ruled these transfer agreement statutes are constitutional. The State's position is simply wrong. *Baird* was decided seven years before the transfer agreement statute was enacted. More importantly, *Baird* found the old transfer agreement regulations were constitutional for one reason only: Department of Health Director Baird retained the authority to grant a complete waiver of the transfer agreement requirement. The State fails to acknowledge or even address the fact that the enactment of the transfer agreement statute, combined with the variance statute, eliminated the Director's authority to grant a waiver. Thus, the Director no longer has final authority to grant waiver, thereby leaving to third party hospitals and doctors the impermissible delegation of authority to license an abortion surgery center.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires that all licensing decisions be made based upon established standards, rather than upon the whim or caprice of a licensor. *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). States are prohibited from evading due process protections by delegating their licensing

authority to a private, non-state actor. *See e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) (holding Due Process Clause prohibits standardless delegation of legislative authority to private individuals); *Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912) (striking ordinance setting property lines upon the request of two-thirds of adjacent owners because it "confer[red] the power on some property holders to virtually control and dispose of the property rights of others, [and] create[d] no standard by which the power thus given is to be exercised"); *Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) (same); *see also Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir.2004) ("When a State delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process."). In the abortion context, the U.S. Supreme Court has held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976).

Early cases applying the unconstitutional delegation doctrine to state licensing schemes requiring written transfer agreements or requiring doctors performing abortions to have admitting privileges held these schemes violated the Due Process Clause as an unconstitutional delegations of state power. In *Hallmark Clinic v. N.C. Dep't of Human Res.*, 380 F.Supp. 1153, 1158-59 (E.D.N.C.1974), *aff'd*, 519 F.2d 1315 (4th Cir.1975), a federal district court struck down a North Carolina statute that required abortion clinics to either secure a written transfer agreement with a hospital or have the physician operating the clinic be an active member of a licensed hospital medical staff. The court held that both the written transfer agreement

requirement and the admitting privileges requirement were unconstitutional delegations of authority to private hospitals. "By conditioning the license on a transfer agreement, the state has given hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all. The state cannot grant hospitals power it does not have itself." *Id.* at 1158-59. The court also recognized that "[s]taff privileges, like transfer agreements, depend on the whim or good will of a hospital . . . and the Department has not undertaken to superimpose its own criteria or even guidelines to control admission to staff privileges." *Id.* at 1159. The court held that "[i]f the state is determined to utilize hospitals as a control factor for the protection of patients in freestanding abortion clinics then it must establish and enforce standards for admission to hospital staff privileges." Because the "[s]election of standards [wa]s generally left to the hospital," the court struck down the relevant requirement, citing the "potential for arbitrariness." *Id.* at 1159. "[T]he state cannot confer upon a private institution the exercise of arbitrary and capricious power. . . . To do otherwise is government by caprice and cannot withstand fourteenth amendment challenge." *Id*.

In *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp.3d 949, 996-97 (W.D. Wis.2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir.2015) the federal district court invalidated requirements that all abortion providers obtain admitting privileges at a local hospital. The *Van Hollen* district court observed that a law requiring abortion providers to have admitting privileges at a local hospital did not further a legitimate state interest, and "therefore the State cannot impose this requirement through third parties, at least in the admitted absence of a waiver or some other mechanism to ensure due process." 94 F.Supp.3d at 997.

Similarly, in *Birth Control Centers, Inc. v. Reizen*, 508 F.Supp. 1366 (E.D.Mich.1981), aff'd in part on other grounds, 743 F.2d 352 (6th Cir.1984), a federal district court considered a Michigan law requiring abortion clinics to obtain a written transfer agreement with a hospital. The law had been interpreted to allow clinics to use backup doctors with admitting privileges instead of a written transfer agreement. *Id.* The district court threw out the regulation in its entirety, stating that it acted as an "impermissible delegation of state power, since it conferred upon hospitals the ability to arbitrarily veto the operation of abortion clinics by withholding transfer agreements . . ." *Id.* The court explained:

> The defect lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor. Similar delegations of licensing functions have met with judicial disapproval . . . The power to prohibit licensure may not constitutionally be placed in the hands of hospitals. Such an impermissible delegation without standards or safeguards to protect against unfairness, arbitrariness or favoritism is void for lack of due process.

Id. at 1375 (internal citations omitted).

When a state delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121–22, 49 S.Ct. 50, 73 L.Ed. 210 (1928). Where a state has delegated licensing authority for abortion providers to hospitals, the state must ensure that hospital decision-making comports with due process by imposing standards or criteria to guide the private party's discretion. In *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555–56 (9th Cir.2004), the Ninth Circuit held that a law requiring that a doctor with admitting privileges be present while abortions are performed was not an unconstitutional delegation because Arizona state law prohibited hospitals from making arbitrary admitting privileges determinations and required notice, hearing, and judicial review. *See also Women's Health Ctr. of W. Cnty., Inc. v. Webste*r, 681 F.Supp. 1385, 1386 (E.D. Missouri 1988) *aff'd*, 871 F.2d 1377 (8th Cir.1989)

(holding delegation constitutional because doctors could obtain admitting privileges from public hospitals which are required by Missouri law to follow neutral criteria in determining whether to grant surgical privileges). Unlike Arizona and Missouri, Ohio does not have laws prohibiting hospitals from making arbitrary decisions regarding whether to give an ASF a written transfer agreement.

The Ohio Department of Health's WTA administrative rule was challenged as an unconstitutional delegation a decade ago. As a result of that litigation, in 2006, the U.S. Court of Appeals for the Sixth Circuit held that Ohio can avoid an unconstitutional delegation by having the ODH Director retain final decision-making authority over the licensing decision. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 609 (6th Cir.2006). The Sixth Circuit considered whether ODH's original administrative WTA rule that required abortion providers to obtain written transfer agreements with hospitals constituted an unconstitutional delegation. *Id.* The Court concluded that there was no unconstitutional delegation of ODH's licensing authority because the ODH Director had the ability to grant a waiver from the transfer agreement requirement, preventing the hospitals from having an unconstitutional third-party veto. *Id.* at 610. The Ohio regulation was saved because the state retained the ability to make the final licensing decision. "Because the waiver procedure allows the state to make the final decision about whether ASFs obtain a license, there was no impermissible delegation of authority to a third party." *Id*. *See also Greenville Women's Clinic v. Comm'r*, 317 F.3d 357, 361 (4th Cir.2002) (finding no unconstitutional delegation with respect to regulation requiring doctors to maintain admitting privileges with a hospital because state retained the ability to grant a waiver of the requirement).

As in *Reizen*, *Van Hollen*, and *Hallmark*, the State violates the non-delegation doctrine by revoking Capital Care's ASF license based on decisions made by private hospitals in their "unfettered discretion." *Baird*, 438 F.3d at 610. Ohio law provides no standards at all to guide or restrict the exercise of discretion by the hospitals, and thus fails to provide both the necessary procedural and substantive due process protections to ASFs. Because the State may not refuse an ASF license for arbitrary reasons that are unrelated to the ASF's qualifications as a provider, including "political, religious, or ideological opposition to abortion," *id.*, it violates the non-delegation doctrine when it permits private hospitals to do the same. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 23 F.Supp.3d 956, 965 (W.D.Wis.2014) ("Stated another way, a state cannot impose requirements on the practice of a profession through third parties, like hospitals, that it could not impose directly."); *Hallmark Clinic*, 380 F.Supp. at 1158-59 ("The state cannot grant hospitals power it does not have itself.").

Applying the delegation doctrine to the case at hand, the Sixth District correctly found that the current ASF licensing scheme, embodied in R.C. 3702.202, 3702.304, and 3727.60, is unconstitutional as applied to Capital Care because it is an unconstitutional delegation of the state's licensing authority. App. Op. ¶ 37. Just as in *Hallmark Clinic*, *Reizer*, and *Baird*, R.C. 3702.202 and 3702.304 require Ohio ASFs to have either a WTA with a local hospital or a variance agreement signed by a backup doctor with admitting privileges at a local hospital. Unlike *Baird*, Ohio no longer allows the ODH Director to make the final decision whether to grant a license without a WTA. These provisions of H.B. 59 eliminated the Director's ability to grant a waiver of the WTA statutory requirement. H.B. 59 also eliminated the Director's ability to grant a variance absent the agreement of a doctor. *Baird* was decided based on the original administrative rule that did give the Director the ability to grant a waiver or variance for any

reason he saw fit. Since H.B. 59 eliminated the Director's discretion, it creates the exact situation that *Baird* held would be unconstitutional: H.B. 59 gives hospitals the "final veto on whether an abortion clinic is licensed." *Baird*, 438 F.3d at 610.

Capital Care had a transfer agreement with University of Toledo Hospital, which is a public hospital. Tr. 146, 32, Supp. at S-41, 13. The WTA Capital Care had with University of Toledo Hospital expired on July 31, 2103, after the public hospital ban was enacted. Tr. 146, Supp. at S-41. Since then, the only hospital Capital Care has been able to sign an agreement with is University of Michigan Health Centers in Ann Arbor, Michigan.[5] Tr. 46, 150-152, 154-156, Supp. at S-16, 42-43, 43-44.

In addition, Capital Care could not obtain a variance because it could not locate a physician who would serve as a backup physician. Tr. 163, Supp. at S-46. As part of H.B. 59, the Ohio legislature enacted R.C. 3702.304, which allows the Director of Health to grant a variance only if the ASF has a signed agreement with one or more physicians with admitting privileges at a local hospital to provide backup coverage. The statutory variance requirements as set out in R.C. 3702.304 allow third parties, such as the backup physicians and his credentialing hospital, to make the final licensing decision and therefore constitute an unconstitutional delegation. Just as in *Hallmark Clinic* and *Reizer*, ASFs may obtain a license if they have either a transfer agreement or a backup doctor with admitting privileges, but there is no option for obtaining a license that does not require the final approval of a private entity. In this case, all Toledo hospitals refused to enter into a written transfer agreement with Capital Care for various reasons completely unrelated to women's health. Tr. 163, Supp. at S-46. Furthermore, Terrie

[5] H.B. 59 states that the written transfer agreement must be with a "local hospital," but it did not define "local." R.C. 3702.303(A). The 2015 Am.Sub.H.B. No. 64 (the 2015 budget bill) ("H.B. 64") defined local as not more than 30 miles from the ASF. R.C. 3702.3010.

Hubbard contacted many doctors, none of whom have agreed to serve as backup doctors. Tr. 163, Supp. at S-46. Under R.C. 3702.304, the Director has no discretion to renew Capital Care's license without the approval of a private entity, either a local hospital or backup doctors with admitting privileges. Thus, the statutory transfer agreement requirement, as applied to Capital Care, is an unconstitutional delegation of the licensing authority.

Appellants argue that Sixth District erred because the delegation doctrine is all but extinct, particularly in the context of abortion laws. This assertion is mistaken. The Sixth Circuit affirmed the viability of the delegation doctrine and its application to abortion in *Baird*. More recently, the court in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 23 F.Supp.3d 956 (W.D.Wis.2014), considered whether a Wisconsin law requiring physicians who perform abortions to obtain admitting privileges at a hospital violated the nondelegation doctrine. The *Van Hollen* court denied summary judgment for plaintiffs, finding that there were not enough facts in the record to determine whether the requirement amounted to a third-party veto power. *Id.* at 967. Following a trial on the merits, the court found that requirement did violate the physicians' due process rights because the hospitals' business interests in denying admitting privileges did not necessarily further a legitimate state interest. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 94 F.Supp.3d 949, 997 (W.D.Wis.2015).

New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), cited by Appellants as support for their argument that the delegation doctrine is dead, is easily distinguishable from this case. The statutory scheme approved by the U.S. Supreme Court required auto manufactures to delay opening a new competitor auto dealer franchise in the same market where a current franchise dealer protested. *Id.* This scheme is very different from the one at issue in this case, where private hospitals and doctors have the ultimate

power over whether an ASF may receive a license at all. The Supreme Court reasoned that a delay in licensing a competitor franchise dealership while the New Motor Vehicle Board approved the application was not a due process violation:

> [T]the California Legislature had the authority to protect the conflicting rights of the motor vehicle franchisees through customary and reasonable procedural safeguards, *i. e.*, by providing existing dealers with notice and an opportunity to be heard by an impartial tribunal—the New Motor Vehicle Board—before their franchisor is permitted to inflict upon them grievous loss. Such procedural safeguards cannot be said to deprive the franchisor of due process. States may, as California has done here, require businesses to secure regulatory approval *before* engaging in specified practices.

Id. at 107-08. California did not rest the power of licensing new Chevrolet dealerships with the manufacturer or the existing dealer; it provided a process for the existing dealer to protest and be heard before the manufacturer added a competitor in his market. *Id*. This scheme could not be said to be a delegation of government power.

The State argues that the WTA statutes are not an unconstitutional delegation of state power because Ohio may regulate safety requirements for medical facilities. Appellants Merit Br. At 43-47. This recurring point is not relevant to the unconstitutional delegation of the Director's licensing power to third party hospitals and doctors. The final decision whether a hospital will sign an agreement to transfer a patient or a doctor will sign an agreement to admit a patient, rests in the hands of those third parties. When both the hospital refused to sign a transfer agreement and doctor refused to sign an agreement to admit patients, the Director had to deny Capital Care's license. He had no discretion to waive these statutory requirements. The hospital transfer agreement and variance application requirements are both statutory requirements and cannot be waived by the Director.

The State ignores the Director's loss of power and instead asserts that the Director retains authority to grant an ASF license without the cooperation of a hospital or an admitting physician.

As the lower courts found, this is not accurate. The licensing *regulations* at issue in *Baird* would have been struck down as an unconstitutional delegation but for one saving grace: the Director of Health's final discretion to provide a license to an ASF without the approval of a private third party by *using his power to waive the WTA regulatory requirement*. The licensing statutes in place today do not retain this "important feature." Under H.B. 59 transfer agreement statutes *the Director lost his power to waive the WTA regulatory requirement*: the Director cannot waive a statutory requirement. Therefore, H.B. 59 took away the Director's power and gave private hospitals and doctors the final say over whether a particular ASF may be licensed. Ohio could have crafted a statute that gave the Director discretion to waive the transfer agreement requirement, but it did not. By refusing to give the Director final decision making power, Ohio enacted a law that violates the Due Process Clause of the Unites States Constitution.

Alternatively, Ohio could have delegated its power to license ASFs to hospitals, however, the delegated authority must still satisfy the requirements of due process. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121–22, 49 S.Ct. 50, 73 L.Ed. 210 (1928). That is to say that the private entity's decision may not be arbitrary or irrational and must be rationally related to a legitimate state interest. *Van Hollen*, 23 F.Supp.3d at 965. However, as the court in *Van Hollen* noted, while it may be rational for a hospital to consider its business needs in making the decision whether to enter into a written transfer agreement, this does not necessarily further any legitimate state interest, at least with respect to the providing of constitutionally protected abortion services. *Id.* A hospital's action must comport with due process. Private hospitals are not required by law to provide notice and a hearing before terminating a written transfer agreement, revoking admitting privileges, or prohibiting its doctors from being backup doctors. Furthermore, the State has set no standards or guidelines for the granting of written transfer

agreements or admitting privileges that would satisfy the requirements of due process. *See Baird*, 438 F.3d 609 ("Director Baird admitted that Ohio has no power over hospitals to direct them as to how to respond to requests for written transfer agreements and that hospitals could deny such a request for business, religious, personal, or political reasons.").

Capital Care's director, Terrie Hubbard testified that she was told by the University of Toledo that they were not renewing their transfer agreement with Capital Care due to pressure from Right to Life, an anti-abortion organization. Tr., 149, Supp. at S-42. This reason is clearly not related to a legitimate governmental interest. Ms. Hubbard also testified that before entering into the University of Michigan transfer agreement, she requested an agreement from at least 6 hospitals in the Toledo area. Most declined without offering any reason at all. Others simply did not respond to her request. Hubbard Tr., 152-153, Supp. at S-43. Just as in *Hallmark Clinic*, "[b]y conditioning the license on a transfer agreement, the state has given hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all." 380 F.Supp. at 1159.

Appellant cites *Planned Parenthood of Greater Tx. Surgical Health Servs. v. Abbott,* 748 F.3d 583, 600 (5th Cir.2014), in support of its argument that the delegation doctrine does not apply in the abortion context. In *Abbott*, the Fifth Circuit held that a statute requiring doctors who perform abortions to obtain admitting privileges with a hospital was not a delegation, comparing it to licensing decisions made by the medical board. The *Abbott* court reached this decision without considering whether the discretion of the hospitals was constrained by neutral criteria or whether the state had the ability to grant a waiver of a licensing requirement. More importantly, the comparison to licensing physicians illustrates when delegation can satisfy due process: the licensing body must follow criteria in making its decision and thus complies with

due process by not being allowed to in an arbitrary manner. For example, in Ohio the licensing of physicians is determined by a state agency, the Ohio State Medical Board, which is required to follow criteria for licensing doctors contained in R.C. Chapter 4731 et seq. and O.A.C. Chapter 4731 et seq. Similarly, the State's concern that it could not delegate its licensures for accountants, lawyers, and zoos is unjustified since each of those licensing schemes provides criteria for third party participation in the licensing process that avoids arbitrary decision-making and thus satisfies Due Process.

Finally, the State's solution to the unconstitutional delegation problem of H.B. 59 cannot be solved by severance. Appellant Merit Br. at 47-48. If this Court finds that H.B. 59's transfer agreement, variance, and public hospital bans are unconstitutional for any reason: violation of the single-subject rule, creates an undue burden on access to abortions, or is an unconstitutional delegation to unregulated third parties, the fact remains that the Director propose to revoke Capital Care's ASF license and ordered its license be revoked, because Capital Care did not comply with the written transfer agreement provisions of H.B. 59. When the Director's decision is contrary to law, the Court must reverse the Director's decision.

CONCLUSION

The Court should affirm the Sixth District Court of Appeals and hold that the Director's Adjudication Order revoking and not renewing Capital Care's ambulatory surgical facility license is contrary to law and must be reversed. In the alternative, if this Court believes it is necessary to develop the record on the undue burden argument, then remand to the common pleas court is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via this Court's electronic docketing system and regular, U.S. Mail, prepaid, this 29th day of June, 2017, to the following:

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