Supreme Court of Ohio Clerk of Court - Filed September 12, 2016 - Case No. 2016-1348

In the
Supreme Court of Ohio

CAPITAL CARE NETWORK OF TOLEDO,	:	Case No. _______
	:	
Appellant-Appellee,	:	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
v.	:	
	:	
STATE OF OHIO DEPARTMENT OF HEALTH,	:	Court of Appeals Case No. CL-201501186
	:	
Appellee-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF STATE OF OHIO DEPARTMENT OF HEALTH

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INTRODUCTION

Decades ago, Justice Sandra Day O'Connor recognized that cases involving abortion had been distorting generally applicable legal principles, which were being ignored or transformed so that courts could reach out to resolve constitutional questions on that controversial subject. It is "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court," she noted, "when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). In that case, Justice O'Connor criticized the Court for deciding sensitive constitutional questions that were "not properly before" it, explaining that the Court's desire to address the abortion questions wrongly overrode normal appellate rules. *Id.* at 815. The decision below represents another textbook example of this mistake. The court violated settled (and entirely routine) principles to make grand pronouncements about abortion in a regulatory case involving neutral rules applicable just as much to plastic-surgery clinics as to abortion clinics. *See Capital Care Network of Toledo v. State of Ohio Dep't of Health*, 2016-Ohio-5168 (6th Dist.) ("App. Op."), App'x 1.

Since 1996, Ohio has required outpatient surgical clinics ("ambulatory surgical facilities") to be licensed by the Ohio Department of Health, and a health regulation has required those clinics to have a written transfer agreement with a hospital for transferring patients in emergencies. A federal court upheld those laws a decade ago. *Women's Med. Prof. Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). In 2013, the General Assembly codified the transfer-agreement requirement and clarified that an agreement must be with a "local" hospital. In this case, a Toledo clinic that performs abortions, Capital Care Network of Toledo (the "Clinic"), purported to enter into a transfer agreement with an Ann Arbor hospital, 52 miles from the Clinic. The Department had told the Clinic—before the 2013 statutes were even effective, App.

Op. ¶¶ 5-6—that it would lose its license if it did not obtain an agreement, and the Clinic responded by signing an arrangement with the Ann Arbor hospital. By then the statute was effective, and the Department found that the Clinic's agreement did not satisfy either the statute or the rule, because the hospital was too far away. (The Clinic's director had theorized that the Clinic could call a helicopter from outside the Columbus area, land the helicopter in an unblocked parking lot (the Clinic lacked a helipad), and fly patients to the Ann Arbor hospital. Tr. 49, 160, 169.). The Department denied the Clinic a renewal of its license based on both the regulation and the statute. The common pleas court rejected that denial, and in affirming that rejection, the Sixth District ignored independent grounds to rule for the Department and relied on constitutional grounds that the Clinic expressly disclaimed.

By making new and potentially far-reaching constitutional law in a manner that violated important principles of judicial restraint, the Sixth District's decision compels this Court's intervention. To begin with, it is "well settled" that courts should "not reach constitutional issues unless absolutely necessary." *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888 ¶ 9. Accordingly, "where a case can be resolved upon other grounds the constitutional question will not be determined." *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225 (1990). Here, however, the Sixth District reached out to consider a host of constitutional challenges to the 2013 statute, even though the 1996 regulation (which had already been upheld by a federal appellate court) provided an independent basis for a decision in the Department's favor. While the court initially acknowledged that both the statute and rule were at issue, App. Op. ¶¶ 5, 7, 9, 12, it inexplicably ignored the rule thereafter.

Similarly, courts should not engage in a "*sua sponte* consideration of the constitutionality" of statutes. *State v. 1981 Dodge Ram Van*, 36 Ohio St. 3d 168, 170 (1988);

Smith v. Landfair, 135 Ohio St. 3d 89, 2012-Ohio-5692 ¶ 12 ("Declaring a statute unconstitutional, sua sponte, without notice to the parties would be unprecedented."). Yet the decision below invalidated the 2013 statute primarily because it imposed an "undue burden" on abortion, App. Op. ¶¶ 16-33, even though the Clinic expressly conceded that it had *not* raised any type of undue-burden claim. *See* Sixth District Appellee's Br. 8. Not only that, the Clinic had even expressly conceded that it "presented no evidence" of an undue burden. *Id.* at 8 n.2.

In short, the court below committed a host of errors, culminating in wrongly striking down important laws with no basis, while failing to resolve the administrative issue that the court was presented with. This Court should review and reverse that decision.

STATEMENT OF THE CASE AND FACTS

A. Since 1996, Ohio has required all ambulatory surgical facilities to have transfer agreements with hospitals or to obtain a waiver from the Director of Health.

In 1995, the General Assembly enacted R.C. 3702.30, requiring licensure of "ambulatory surgical facilities" by the Ohio Department of Health. An ambulatory surgical facility is a free-standing facility in which outpatient surgery is routinely performed. *See* R.C. 3702.30(A)(1)(a), (b) and (f). These facilities include abortion clinics and many other types of outpatient centers. About 250 facilities are licensed in Ohio. *See* https://www.odh.ohio.gov/odhprograms/chcf/comhfs/ambctr/asc1.aspx. The Department's regulations do not apply differently based on the type of surgery performed. Fewer than a dozen perform abortions, while hundreds of others perform surgery in areas such as cosmetic and laser surgery; plastic surgery; dermatology; digestive endoscopy; gastroenterology; ear, nose, and throat; and orthopedics.

To obtain or renew a license, a facility must meet certain requirements, or obtain a waiver or variance from the Director. *See* O.A.C. 3701-83-05(A). These administrative rules, in effect since 1996, include building and equipment requirements, such as having particular equipment

available, having separate designated waiting and recovery rooms, and having emergency power in case of a power outage. O.A.C. 3701-83-20. A facility must also meet "service standards," such as ensuring that anesthetics are administered properly by qualified individuals, maintaining anesthesia records, having procedures for blood supplies, and so on. O.A.C. 3701-83-19. And "[t]he [facility] shall respond to medical emergencies including emergency cardiac care that may arise in the provision of services to patients." *Id.*

In particular, an ambulatory surgical facility "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. 3701-83-19(E) (the "Transfer-Agreement Rule"). The Transfer-Agreement Rule is designed to ensure immediate treatment in a hospital setting for patients who experience medical complications, a medical emergency, or other circumstance requiring hospital care during their treatment at an outpatient facility. *Id.* It also provides for the continuity of care and the rapid transmission of medical records. *Id.*

The importance of transfer agreements is well-recognized. Medicare requires outpatient facilities to have such agreements with local hospitals (or that their doctors have admitting privileges with them). 42 C.F.R. § 416.41(b). Accrediting groups recommend that facilities have transfer agreements or protocols with local hospitals. Am. Ass'n for Accreditation of Ambulatory Surgery Facilities, 2016 Checklist at 48, *available at* https://www.aaaasf.org/docs/default-source/accreditation/standards/standards-manual-and-checklist-v14-(obs).pdf?sfvrsn=9.

Ohio's regulations allow the Director to grant variances or waivers from these licensing requirements. O.A.C. 3701-83-14(A). "The director may grant a variance or waiver from any building or safety requirement established by Chapter 3701-83 of the Administrative code, unless the requirement is mandated by statute." *Id.* A variance is allowed if the Director

concludes that "the requirement has been met in an alternative manner," and a waiver is allowed if the Director finds that the requester has provided sufficient documentation that a regulatory requirement is an undue hardship to the facility and that "the waiver will not jeopardize the health and safety of any patient." O.A.C. 3701-83-14(B)-(C). In 2011, the Director adopted protocols to guide the review in granting waivers or variances from the Transfer-Agreement Rule. Hearing Tr. at 36-37.

B. In 2013, Ohio's General Assembly amended the licensure statute.

In 2013, the General Assembly amended the statutes for ambulatory surgical facilities to streamline the administrative process. Those amendments were included in HB 59, the biennial budget bill, which governs revenue, appropriations, and government operations. The amendments statutorily codified the Transfer-Agreement Rule. The new R.C. 3702.303(A) mirrors the Rule, and clarifies that the written transfer agreement must be with a local hospital:

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

R.C. 3702.303(A) (the "Transfer-Agreement Statute"). Other amendments enacted in that bill set standards for the Director's consideration of a waiver or variance from the transfer-agreement requirement. R.C. 3702.304. In addition, a severance provision states that the invalidation of any provision should not lead to the invalidation of others. R.C. 3702.08.

C. Capital Care Network of Toledo sought to renew its license and submitted a transfer agreement with a hospital 52 miles away, but the Director found that this agreement did not comply with the regulation or statute.

Capital Care Network of Toledo had been licensed as an ambulatory surgical facility since at least 2010. App. Op. ¶ 2. In 2012, the Clinic entered into a transfer agreement with the

University of Toledo Hospital. That agreement expired on July 31, 2013, after the university did not renew it. *Id.* ¶ 4. Upon learning of that non-renewal, the Department instructed the Clinic to submit a new one by July 31, 2013, to meet the licensure requirements. Hearing Tr. at 20-21.

For over six months, the Clinic did not submit a new agreement. *Id.* at 21-22, 46. On August 2, 2013, the Department proposed to revoke the Clinic's license for failure to comply with the Rule. App. Op. ¶ 5. The Clinic operated without any transfer agreement from August 1, 2013, to January 15, 2014. *Id.* ¶¶ 5, 7. On January 16, 2014, the Clinic entered into a transfer agreement with the University of Michigan Health System in Ann Arbor, Michigan, effective January 20. *Id.* ¶ 7; *see* Adjudication Order at 2, App'x 3. The hospital is 52 miles from the Clinic. App. Op. ¶ 12. The Clinic never asked the Director for a variance from the requirement.

The Director reviewed the agreement and determined that it did not comply with the Transfer-Agreement Statute, which required an agreement to be with a "local" hospital, or the Transfer-Agreement Rule, which required the agreement to allow for immediate hospital care in case of emergencies. *See* Order at 1. On February 14, 2014, therefore, the Director issued a second notice proposing to revoke the Clinic's license. *Id.* The Clinic requested a hearing. *Id.* At the hearing, Dr. Wymyslo, who by then had stepped down as Director, explained why he had considered 52 miles to be beyond "local." Hearing Tr. 124-25. Regardless of whether it was local, Dr. Wymyslo further testified that, based on his experience as a doctor, that distance would not adequately protect patient safety in case of emergencies. *Id.* at 57-59. He opined that a hospital should be within, at most, 30 minutes' travel time. *Id.* at 57-59, 66. The Clinic's director testified that it could use a helicopter that would come from outside Columbus, but conceded that it had no such arrangement in place. *Id.* at 49, 169. She said that it had no helipad, but that a nearby parking lot would usually have enough free space to land. *Id.* at 160.

The Hearing Officer issued a Report and Recommendation. The Report found that the Ann Arbor Arrangement was not with a "local" hospital as required by R.C. 3702.303(A), and that the Director's determination that it was not a "local" hospital was reasonable and consistent with R.C. 1.42 and 3702.303(A). Order at 2.

The Interim Director adopted the Hearing Examiner's Report in an Adjudication Order. The Order specifies that the Ann Arbor Arrangement fails to satisfy *both* the Statute *and* the Rule. *Id.* ("in accordance with R.C. 3702.32, R.C. 3702.303(A), R.C. Chapter 119, and OAC 3701-83-19(E), I hereby issue this Adjudication Order").

D. A common pleas court overturned the Order and the Sixth District affirmed.

The Clinic appealed the Adjudication Order to the Lucas County Court of Common Pleas. The court granted a stay pending appeal, so the Clinic has remained open. It then reversed the Director's Order. *See* Opinion and Judgment Entry ("Com. Pl. Op."), App'x 2. It agreed that the Order properly interpreted and applied state statutory law, *id.* at 9-14, but held that the Transfer-Agreement Statute violated the federal undue burden standard by improperly delegating regulatory authority to a third party, *id.* at 18-24. It also held that three separate laws—the Transfer-Agreement Statute, the new 2013 variance provisions, and the public-hospital restriction—violated the Ohio Constitution's "one-subject" clause. *Id.* at 24-29.

The Sixth District affirmed. It held that the Transfer-Agreement Statute was an undue burden, independent of the Clinic's delegation theory. App. Op. ¶ 33. It was "necessary to analyze" that issue, the court said, even though the Clinic did not raise it. *Id.* ¶ 25. The court also held that the Statute unconstitutionally delegated state licensing authority to private hospitals. *Id.* ¶ 37. It distinguished *Baird*, which rejected the same challenge, by saying that the Transfer-Agreement Statute differed from the Rule because the Director now had less discretion to grant waivers or variances. *Id.* ¶ 36. The court held that all of the 2013 statutory amendments

regarding ambulatory surgical facilities, including those that the Clinic did not challenge, violated the one-subject clause. The court thus ended its opinion by rejecting the Department's Order, but without addressing the Rule as an independent basis for that Order.

THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS OF PUBLIC AND GREAT GENERAL INTEREST

The Court should grant review. The Sixth District reached issues not raised, but failed to resolve a key issue that was raised. When doing so, it invalidated important Ohio laws not just by getting the specific legal challenges wrong, but also by breaking the rules for resolving cases. The decision below thus typifies Justice O'Connor's caution "that no legal rule or doctrine is safe from ad hoc nullification" by courts "when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). The Court should clarify that the lower courts must apply generally applicable procedural rules in all cases, and should not make special abortion exceptions to those general rules.

A. The Court should review whether the Clinic complied with the Transfer-Agreement Rule, because that issue eliminates the need to consider any constitutional questions regarding the Transfer-Agreement Statute and because the decision below leaves the validity of the Rule uncertain.

The Sixth District's inexplicable failure to resolve the ultimate issue here warrants review. The court repeatedly acknowledged that the Department acted under its 1996 Transfer-Agreement Rule *in addition to* the 2013 Transfer-Agreement Statute. App. Op. ¶¶ 5, 7, 9, 12. But the court ultimately invalidated several *statutes* (including the Transfer-Agreement Statute) without even discussing the Rule. *Id.* ¶ 43. That was legally and practically problematic.

Legally, the court wrongly made expansive new constitutional law. It held that the Transfer-Agreement Statute violated the undue-burden standard explained in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). App. Op. ¶¶ 16-33. It held that the Statute

unconstitutionally delegated state power to private hospitals. *Id.* ¶¶ 34-37. And it held that the Statute (and several others) violated the one-subject clause. *Id.* ¶¶ 38-42.

None of this novel law was at all necessary, let alone "absolutely" so. *Talty*, 2004-Ohio-4888 ¶ 9. The Department's Order rested on *both* the Transfer-Agreement Statute *and* the Transfer-Agreement Rule. And none of the court's constitutional holdings apply to the latter. For example, the court said that the Transfer-Agreement Statute's inclusion in the budget bill violated the one-subject clause, but that does not affect the preexisting Transfer-Agreement Rule. Likewise, the court's undue-burden and delegation holdings did not apply to the Rule, because the Sixth Circuit in *Baird* upheld the Rule against those same challenges, and the decision below accepted *Baird* as a starting point, saying the "trial court properly distinguished how the laws in *Baird* were different from" the current regime. App. Op. ¶ 36. Thus, the court could have avoided *all* of these constitutional questions simply by indicating that the Order was valid on the basis of the Rule (which the federal Sixth Circuit had already blessed). Because it *could* have done so, it *should* have done so. There is no abortion exception to the canon of constitutional avoidance or to this Court's repeated admonition that "'if it is not necessary to decide more, it is necessary not to decide more.'" *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900 ¶ 51 (quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in judgment)).

Practically, the Sixth District's failure even to discuss the Rule has left the Department with uncertainty over it. The Department needs to know whether it can apply its Rule in the future to this Clinic, to other abortion clinics, or to any of the other 200-plus ambulatory surgical facilities that have nothing to do with abortion. The Rule, moreover, addresses important patient health and safety requirements for Ohioans. In any other context, the Rule's requirements would

be uncontroversial. Medicare, for example, generally requires that ambulatory surgical facilities have written transfer agreements with local hospitals (or ensure that all of their physicians have admitting privileges at those hospitals). *See* 42 C.F.R. § 416.41(b). Given the Rule's importance, therefore, its status should not be left in this state of uncertainty.

While the court ignored the Rule, the Clinic argued below that the Department had "waived" reliance on the Rule. That is wrong. At the administrative level, the Department relied on the Rule, as the Sixth District said, and as the Department's Order shows. *See* Order. In the common pleas court, the *Clinic* nowhere addressed the Rule in its Appellant's Brief (despite citing the Rule in its Notice of Appeal); the Department as *Appellee* did not waive anything. But more important, even if the Clinic were right, the issue warrants review, because the Department's power to apply its Rule in the future matters, and a purported one-time waiver would leave the Department free to apply the Rule even on remand in this very case. The Clinic also said it satisfied the Rule, because the Rule does not use the word "local." But the Rule requires a plan adequate for an "emergency," which requires a hospital to be nearby.

B. The Court should review the Sixth District's undue-burden ruling, so that it may vacate bad precedent on an important issue that the Clinic disavowed, and so it may remind lower courts not to reach unraised issues.

The Sixth District's "undue burden" "holding" also illustrates the problems that Justice O'Connor decried in the abortion context. The court conceded that "the parties focused their arguments on other matters and very limited evidence was presented with regards to the undue burden issue." App. Op. ¶ 25. Yet even that frank admission *understates* the reality. After the common pleas court raised the undue-burden standard sua sponte, the Department explained in its opening appellate brief why that ruling was wrong. The Clinic responded by insisting that the court had *not* resolved any undue-burden issues and that the question was *not* in play:

> Although the common pleas court recited the substantive due process undue burden standard from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869 (1992), before analyzing the procedural due process delegation claim, the Court did not apply *Casey* . . . . Appellee has *never argued at any stage of this case* that it has suffered a substantive due process violation and *presented no evidence* to that effect at the administrative hearing.

Appellee's Br. at 14 n.2 (emphases added). The Clinic was right that it presented *no* evidence or argument on the issue, and thus the appellate court wrongly raised the issue on its own. The court compounded that error by basing its view on the U.S. Supreme Court's new decision in *Whole Woman's Health*, which was issued in June 2016 after briefing and argument, so the court did not have the parties' views on the case. (The Department did not believe any supplemental briefing was necessary after the Clinic's *disclaimer* that it had not raised an undue-burden issue.)

That calls for review. The Court should clarify that the general rule barring courts from reaching constitutional issues *sua sponte* applies just as much in the abortion context as in any other. *See 1981 Dodge Ram*, 36 Ohio St. 3d at 170. And the Sixth District overlooked the central teaching from *Hellerstedt*. That case turned on an in-depth *factual* assessment of the Texas laws at issue. *Hellerstedt*, 136 S. Ct. at 2311-313. Here, however, *no* facts were presented, and the Department had no chance to justify Ohio law. Further, the Texas law was largely abortion-specific, while Ohio's regulatory scheme has long applied to *all* surgical clinics. (Only one provision, limiting public hospitals from entering transfer agreements with abortion clinics, is abortion-specific, but that is a proprietary control on Ohio's own hospitals, not a regulation of private entities.) *Baird* also rejected an undue-burden claim, too.

C. The Court should review the Sixth District's delegation ruling, because it conflicts with the federal Sixth Circuit's reasoning, and has far-reaching effects.

The Sixth District next held that the Transfer-Agreement Statute unconstitutionally delegated sovereign power to the hospital. App. Op. ¶¶ 34-37. The Court should review this decision because it conflicts with *Baird* and because it has far-reaching effects.

1. *Baird*. The court below purported to distinguish *Baird* because *Baird* turned on the Director's discretion to grant variances from the transfer-agreement requirement, so that sovereign authority remained with Ohio. App. Op. ¶¶ 36-37. The court viewed the Director's discretion as narrower under the statutes, because they direct him to grant variances only if an ambulatory surgical facility has an alternate plan involving doctors with admitting privileges. *Id.* That did not distinguish *Baird*. In fact, as *Baird* said, the Department's preexisting practice had looked to admitting privileges as a basis for variances, 438 F.3d at 602, so the statutory codification was no change. In addition, even if the Director's discretion is now narrower and even unconstitutional, the right answer is to invalidate *only* the provisions narrowing that discretion, thus preserving the transfer-agreement requirement, not to invalidate the entire scheme. A severance provision here mandates that result. R.C. 3702.308. In that respect, the court's resolution of the delegation issue clashes with its own one-subject resolution. On one hand, the court invalidated *all* of the 2013 statutory provisions as one-subject violations. On the other, it based its *Baird* distinction, and thus its entire delegation theory, on the *presence* of those same statutory amendments. Both cannot be true. If the one-subject ruling is correct, none of the statutory changes are effective, and Ohio's legal scheme remains what *Baird* upheld in 2006.

2. *Effects*. The court's delegation view has far-reaching effects. Its specific ruling invalidates the law for *all* ambulatory surgical facilities, not just abortion clinics. Its general reasoning threatens countless other Ohio laws. The delegation view says that the State cannot make its *own* licensing decisions depend upon an applicant's meeting a condition that requires another party's cooperation. That means that Ohio cannot require *any* ambulatory surgical facility to have a transfer agreement because, in any context, transfer agreements require cooperation with hospitals. Many licensing schemes are similar. This Court, for example, does

not allow prospective lawyers to take the bar exam unless they obtain a degree from a law school. Most professional licenses require similar educational prerequisites. Prospective professionals, therefore, must "cooperate" with third parties to obtain a license to practice.

D. The Court should review the Sixth District's one-subject ruling, because it invalidates provisions that the Clinic did not challenge, and because its resolution conflicts with its own resolution of the delegation issue.

The one-subject issue deserves review. To begin with, the Sixth District once again failed to follow normal appellate rules. It wrongly reached out to invalidate *all* of the ambulatory-surgical-facility statutes, including ones the Clinic did not even challenge. The Clinic challenged *only* the requirement that it have an agreement with a "local" hospital, as it claimed that its agreement with an Ann Arbor hospital satisfied the Transfer-Agreement Rule. It did not challenge the provisions regarding variances (as it did not seek one), or the provisions regarding public hospitals. In addition, on the merits, this Court recently reaffirmed in a one-subject case that a budget bill is not just about spending, but is about state *operations*, and the Court affords the General Assembly "great latitude" in a comprehensive budget/operations bills. *State ex rel. Ohio Civ. Serv. Emps. Assn, et al. v. St. Emp't Relations Bd.,* 104 Ohio St.3d 122, 2004-Ohio-6363, ¶ 27 ("*OCSEA*"). These provisions involve such operations.

ARGUMENT

<u>Appellant Department of Health's Proposition of Law No. 1:</u>

> *Ohio's administrative rule, O.A.C. 3701-83-19(E), validly requires ambulatory surgical clinics to have written transfer agreements with hospitals in cases of "medical complications, emergency situations, and for other needs." The Director acted in accordance with that law when finding that an agreement with a non-local hospital is not adequate for "emergency situations."*

Because the appeals court failed to address the Rule, it was wrong to conclude that the Department's Order here was invalid, as the Order relied on that Rule as well as the Statute. Application of the rule is straightforward. While the Rule did not use the specific word "local,"

the Rule does say the agreement is for use in "emergency situations," which the Director could reasonably interpret to include *some* distance limitation. It cannot be that *any* hospital would do, even one as far away as California, because that would defeat the Rule's purpose. Even an in-state distance from Cleveland to Cincinnati would be too much. Thus, applying the normal R.C. 119.12 standard, the Court should find that the Director acted in accordance with law, and based on reliable, probative, and substantial evidence, when finding that the 52-mile distance from Toledo to Ann Arbor was too far. The Court thus should not consider any constitutional issues involving the statutes because the Order follows from the Rule. *See Talty*, 2004-Ohio-4888 ¶ 9.

<u>Appellant Department of Health's Proposition of Law No. 2:</u>

> *A challenged law can only be found to be an "undue burden" on abortion rights if a plaintiff makes a factual and legal showing of such a burden, and a court cannot sua sponte find such a burden when the issue is not raised. Ohio's transfer-agreement requirement is a valid health-and-safety regulation that applies to all outpatient surgical clinics, and it is not an undue burden.*

The Court should vacate the Sixth District's undue-burden holding for the simple reason that the undue-burden question was not even raised. Courts commit error when they sua sponte raise and resolve constitutional questions. *See 1981 Dodge Ram*, 36 Ohio St. 3d at 170. Regardless, even if this issue somehow could be raised, the factual record does not support such a finding. And Ohio's laws are valid because they are neutral health regulations, unlike the abortion-specific Texas laws invalidated in *Hellerstedt.*

<u>Appellant Department of Health's Proposition of Law No. 3:</u>

> *Ohio law does not unconstitutionally delegate authority in requiring all ambulatory surgical facilities to have written transfer agreements with local hospitals in case of emergencies or other needs, as the ultimate decision remains with the Ohio Department of Health.*

Ohio's law is not an unconstitutional "delegation" of State power to private parties. First, licensing laws routinely require applicants to meet conditions that involve third parties, whether

meeting education requirements by attending schools, or meeting standards set by private organizations. *See, e.g.*, R.C. 4731.091(B)(1) (medical school required for doctors). Second, as *Baird* held, the Director's ability to grant variances or waivers preserves ultimate authority in a State official. That holding is not changed merely because the General Assembly guides that discretion with alternate requirements for such variances or waivers. Finally, even if the limits on discretionary variances are somehow unconstitutional, then those *limits* should be invalidated, not the entire scheme.

Appellant Department of Health's Proposition of Law No. 4:

> *The General Assembly did not violate the one-subject clause by using the budget bill to streamline the rules for a state agency to grant ambulatory-surgical-facility licenses.*

None of the budget bill's provisions concerning ambulatory surgical facilities violate the one-subject clause, and, equally important, the Court should consider only the provision that the Clinic challenged. The Court recently reiterated that its gives the General Assembly "great latitude" in deciding what belongs in a comprehensive budget and operations bill. *OCSEA*, 2004-Ohio-6363, ¶ 27. These laws guide agencies' operations, and connect to spending as well, in multiple ways. The public-hospital provision controls the proprietary operations of public entities. The provisions governing variances direct the operations of the Director, rendering review more efficient by setting out easy-to-apply rules rather than requiring a comprehensive and thus more expensive review of each request. And the transfer-agreement requirement is tied to that variance control, so once one is included in the budget, the other is as well, just as the prison-sale conditions upheld in *OCSEA* made sense once the sale provisions itself was allowed.

CONCLUSION

For the above reasons, the Court should grant review and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. mail this 12th day of September 2016, upon the following counsel:

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