IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

WOMEN'S MEDICAL GROUP PROFESSIONAL CORPORATION, d.b.a. WOMEN'S MED DAYTON,	:	APPEAL NO. C-250549 TRIAL NO. A-2200704
and	:	*JUDGMENT ENTRY*
PLANNED PARENTHOOD SOUTHWEST OHIO REGION,	:	
Plaintiffs-Appellees,	:	
vs.	:	
BRUCE VANDERHOFF, Director, ODH,	:	
and	:	
OHIO DEPARTMENT OF HEALTH,	:	
Defendants-Appellants.	:	

This cause was heard upon the appeal, the record, and the briefs.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is affirmed as modified.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs be taxed under App.R. 24.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:

Enter upon the journal of the court on 8/21/2026.

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By: Jennifer A. Hensley
Administrative Judge

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BRUCE VANDERHOFF, Director, ODH,	:	
and	:	
OHIO DEPARTMENT OF HEALTH,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed as Modified

Date of Judgment Entry on Appeal: August 21, 2026

ACLU of Ohio, *B. Jessie Hill*, *Freda J. Levenson*, *Rebecca Kendis*, *Maggie Scotece*, and *Amy Gilbert*; *American Civil Liberties Union Foundation* and *Rachel Reeves*; and *The Cochran Firm* and *Fanon A. Rucker*, for Plaintiff-Appellee Women's Medical Group Professional Corporation,

Planned Parenthood Federation of America, *Kyla Eastling, Emily Nestler* and *Melissa Shube*, and *The Cochran Firm* and *Fanon A. Rucker*, for Plaintiff-Appellee Planned Parenthood Southwest Ohio Region,

Dave Yost, Attorney General of Ohio, and *Amanda L. Narog*, Assistant Attorney General, for Defendants-Appellants.

CROUSE, Presiding Judge.

{¶1} Ohio statutes vest Ohio's director of health ("the director") with broad discretion to enforce or dispense with licensure requirements for "ambulatory surgical facilities." Plaintiffs sued to enjoin the Ohio Department of Health ("ODH") and the director (collectively, "the State") from using that discretion to unconstitutionally discriminate against ambulatory surgical facilities that, like plaintiffs, provide abortions. During discovery, ODH representatives testified in depositions that the director had sole discretion to grant or deny variances, and that only the director could say why any particular variance request was approved. So plaintiffs sought to depose the director, and the trial court agreed.

{¶2} The State now appeals the order compelling the director's deposition. For the reasons set forth below, we conclude that contrary to plaintiffs' contentions, we have jurisdiction to hear the State's appeal, and contrary to the State's assertions, the trial court had subject-matter jurisdiction to hear the plaintiffs' claims for prospective, injunctive relief. We further hold that this is the exceptional case in which deposing a high-ranking State official is warranted. We therefore affirm the trial court's order compelling the deposition, with certain limits.

I. BACKGROUND

A. Statutory Backdrop

{¶3} To explain the backdrop of this case, we must begin by explaining the statutory scheme at issue.

{¶4} Ohio law regulates "ambulatory surgical facilities," which are those facilities "in which surgical services are provided to patients who do not require hospitalization for inpatient care." R.C. 3702.30(A)(1). Included in this definition are facilities that provide procedural abortions on an outpatient basis, like the facilities

operated by plaintiffs-appellees Women's Medical Group Professional Corporation ("Women's Med") and Planned Parenthood Southwest Ohio Region ("Planned Parenthood") (collectively, "plaintiffs").

{¶5} Ambulatory surgical facilities must obtain a license from ODH. R.C. 3702.30(E)(1). To do so, they must generally have a "written transfer agreement" with a hospital within 30 miles. R.C. 3702.303(A) and 3702.3010. If they cannot obtain a written transfer agreement, the facility can apply to the director for a variance. R.C. 3702.303(C)(2). The director's variance decisions are discretionary and "final." R.C. 3702.304(A)(1) and (C). To qualify for a variance, the statute states that a facility must show, inter alia, that it has agreements with at least one "consulting physician" who holds admitting privileges at a local hospital. R.C. 3702.304(B)(2) and (3). If a facility applies for a variance and the director denies it, the facility's license "is automatically suspended." R.C. 3702.309(A).

{¶6} Public hospitals (including hospitals at state universities and medical colleges) are prohibited from entering into written transfer agreements with any ambulatory surgical facilities that perform "nontherapeutic abortions." R.C. 3727.60(B)(1). Public hospitals are further prohibited from authorizing those on their staff to serve as "consulting physicians" for any ambulatory surgical facilities that provide "nontherapeutic abortions." R.C. 3727.60(B)(2). The General Assembly further tightened these restrictions in 2022 by prohibiting any "consulting physician" named in a variance application from teaching at or receiving compensation from a state medical school, state hospital, or any "other public institution." *See* 2021 Sub.S.B. No. 157, at 5-6 ("S.B. 157"), enacting R.C. 3702.305.

B. Plaintiffs' Factual Allegations

{¶7} According to the allegations in the complaint, Planned Parenthood was

denied a variance in 2015, when ODH began to require applicants to list four consulting physicians in their application, and Planned Parenthood had listed only three. Planned Parenthood submitted a new variance application listing four doctors, and was approved.

{¶8} Around the same time, Women's Med was denied a variance for similar reasons and sought judicial review. Ultimately, Women's Med lost because the trial court and the Second District concluded (1) that the director's variance decision was not judicially reviewable and (2) that the lack of a variance was a sufficient ground on which to deny an ambulatory-surgical-facility license. *Women's Med Ctr. of Dayton v. Dept. of Health*, 2019-Ohio-1146 (2d Dist.) ("*Women's Med I*").

{¶9} Women's Med then submitted a new variance application with four backup doctors, as well as a new license application. Sixty days after filing the variance application, Women's Med was approved for a new license (although that license would not be issued for another week, and Women's Med would not be notified about it for another two).

{¶10} Planned Parenthood was granted another variance in August 2021, which came with a letter stating that, moving forward, all four consulting physicians would need to be credentialed as obstetricians/gynecologists ("OB-GYNs"), and would need both *admitting* privileges at a nearby hospital *and* full, active-staff *voting* privileges at that hospital. At around this same time, Women's Med was *denied* a variance, on the ground that one of its consulting physicians was not an OB-GYN and that another lacked "staff voting privileges." At least one of these physicians had been listed on Women's Med's approved 2019 variance request. The State then proposed to revoke Women's Med's license.

{¶11} In November 2021, Women's Med submitted a new application that

listed four consulting OB-GYNs with staff voting privileges.

{¶12} In December, the General Assembly passed S.B. 157. The new statute, which included R.C. 3702.305, would not take effect until March 2022 and even then included a 90-day grace period for providers to come into compliance. *See* S.B. 157, Section 3, at 19.

{¶13} On January 28, 2022, the State denied Women's Med's November 2021 application, explaining that Women's Med's consulting physicians had ties to a state medical school, in violation of the "clear public policy directives" of the not-yet-effective S.B. 157. Three days later, the director proposed to deny and revoke Women's Med's license.

C. Proceedings Below

{¶14} In February 2022, Women's Med and Planned Parenthood instituted this action, naming as defendants ODH and Bruce Vanderhoff, M.D., in his official capacity as director of health. The operative complaint at the time of this appeal requested (1) a permanent injunction prohibiting the State from enforcing certain challenged provisions[1] of Ohio law as facially unconstitutional under Ohio's Reproductive Freedom Amendment and Due Course of Law Clause, Ohio Const., art. I, § 22 and 16; (2) a permanent injunction against the "arbitrary enforcement" of the challenged provisions, on the ground that such enforcement violated the same constitutional guarantees; (3) a permanent injunction prohibiting enforcement of the automatic-suspension provisions in R.C. 3702.309, on the ground that they deprived plaintiffs of property interests without providing due process of law; and (4) a declaration that the challenged provisions were unconstitutional. Women's Med also

[1] The "challenged provisions" included R.C. 3702.303, 3702.304, 3727.60, 3702.309, and 3702.305, as well as Adm.Code 3701-83-19(E).

sought and received a preliminary injunction.

{¶15} In January 2025, plaintiffs noticed a Civ.R. 30(B)(5) deposition of ODH. The notice indicated that plaintiffs intended to ask about variance applications filed by ambulatory surgical facilities since 2017, ODH's decisions regarding those applications, and the reason for any denials.[2] Plaintiffs further indicated their intent to ask about the rationales behind any changes in the requirements regarding consulting physicians, including their qualifications and the number needed.[3]

{¶16} ODH designated its medical director, Mary DiOrio, M.D., as its corporate representative. Dr. DiOrio testified that, prior to her deposition, she had spoken with several individuals at ODH, including the director. She proved unable to give many details about the ambulatory-surgical-facility licensing process, however, as she had never seen or reviewed a written-transfer-agreement application before. She testified that variance determinations were "entirely within [the director's] discretion," and that she was "not aware of a policy" governing or guiding the exercise of that discretion. She testified that James Hodge would know more.

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[2] The relevant portion of the notice read as follows:

> 4. All ASF variance applications and decisions since 2017, including variances from the WTA requirement, as well as variances from any other ASF requirement:
>
> . . .
>
> d. Your decisions whether to grant any variances of an ASF requirement, including but not limited to, the WTA requirement, since 2017.
>
> e. The reasons for denying any variance applications from any ASF requirement since 2017.

[3] This portion of the notice listed the following topics:

> 1. The minimum number of Backup Physicians with admitting privileges that are necessary in order for an ASF to obtain a variance of the WTA Requirement, and knowledge of whether and how such requirement advances patient health in accordance with widely accepted and evidence-based standards of care, since 2015.
>
> a. All changes in the minimum number of Backup Physicians required, and reason(s) for each minimum number and change.
>
> b. All changes in the minimum credentials or qualifications for eligible backup physicians required, and reason(s) for each required credential or qualification.

{¶17} Because Dr. DiOrio proved unable to address a number of topics listed in plaintiffs' notice, the State agreed to make James Hodge, ODH's chief of healthcare deployments, available for deposition under the same Civ.R. 30(B)(5) notice and to permit his deposition after the close of discovery.

{¶18} Plaintiffs then served new notices of deposition for both Hodge and the director as Civ.R. 30(B)(5) designees, and for Hodge in his individual capacity. The State responded that it was willing to hold the deposition open and schedule a deposition of Hodge as designee, but protested the remainder of the notices.

{¶19} During Hodge's deposition, which took place the next month, Hodge testified that he could not speak to the rationales behind the director's variance determinations, because such decisions were vested within the director's discretion. As a result, plaintiffs informed the State of their intent to compel the director's deposition as a fact witness or, in the alternative, as a Civ.R. 30(B)(5) designee. Plaintiffs served a new notice of deposition for the director and moved to compel his testimony. Because the discovery deadlines had long since passed and the dispositive-motions deadline was fast approaching, plaintiffs also filed a motion to extend the timeline in the scheduling order.

{¶20} On September 17, 2025, the trial court entered an order granting plaintiffs' motion to compel and ordering the director "to fully cooperate and participate in his deposition as a party and fact witness." In its order, the trial court noted that the State had "not object[ed] to Plaintiffs' examination topics," that the director was "a party to this case" and thus subject to Civ.R. 30(A), and that the State's prior representatives had been "unable to answer some of Plaintiffs' questions during their depositions and stated that Defendant Vanderhoff would be the proper person to answer those questions." The trial court also granted plaintiffs' motion to extend the

case timeline and rejected the State's argument that plaintiffs' notice was untimely.

{¶21} The State now appeals the trial court's September 17 order.

II. APPELLATE JURISDICTION

{¶22} Before turning to the merits of the State's appeal, we address plaintiffs' arguments that we lack jurisdiction.[4]

{¶23} Ohio's courts of appeals have jurisdiction "to review, affirm, modify, set aside, or reverse judgments or final orders" of lower courts. R.C. 2501.02(C); *see also* Ohio Const., art. IV, § 3(B)(2). Generally, discovery orders are not "final orders," and a party must wait to challenge them until they merge into a subsequent judgment. *See Klein v. Bendix-Westinghouse Automotive Air Brake Co.*, 13 Ohio St.2d 85, 86 (1968).

{¶24} But some discovery orders concern "provisional remedies," and therefore can be final. By statute, a "provisional remedy" is "a proceeding ancillary to an action, including, *but not limited to*, a proceeding for a preliminary injunction, attachment, *discovery of privileged matter*, [or] suppression of evidence." (Emphasis added.) R.C. 2505.02(A)(3). An order that grants or denies such a "provisional remedy" becomes a "final order" subject to appeal when (a) the order "in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy," and (b) the "appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4).

{¶25} The heart of this jurisdictional dispute turns on whether the trial court's

[4] Shortly after the State filed its appeal, this court ordered the parties to show cause why it should not be dismissed for lack of jurisdiction. Ultimately, we issued an entry provisionally finding that we had jurisdiction, but making clear that the parties remained "free to raise the issue of jurisdiction in their briefs." Plaintiffs took us up on this invitation.

order compelling the director's deposition denied a provisional remedy. The director claimed that he was shielded from testifying, and that this protection was akin to an evidentiary privilege.

{¶26} The Ohio Supreme Court has held that "only under extraordinary circumstances, when certain factors have been satisfied, may a high-ranking government official be deposed." (Cleaned up.) *State ex rel. Ctr. for Media & Democracy v. Yost*, 2024-Ohio-2786, ¶ 26 ("*CMD I*"). This rule arises neither from statute nor from the common law, but from public-policy concerns and separation-of-powers principles. *Id.* at ¶ 27 and fn. 1. While the protection is "not a statutory or common-law privilege," the Ohio Supreme Court has said it "'is akin to a privilege.'" *Id.*, quoting *State ex rel. Thomas v. McGinty*, 2020-Ohio-5452, ¶ 45. Thus, an order compelling a high-ranking official to testify over objection effectively "denies a provisional remedy" within the meaning of R.C. 2505.02(B)(4). *See id.* at ¶ 21.

{¶27} But the director cannot simply *allege* a protection and gain an automatic appeal. Rather, he must demonstrate he has "a *colorable claim* that the order directs him to disclose information that might be protected." (Emphasis added.) *See id.* at ¶ 24, citing *State v. Glenn*, 2021-Ohio-3369, ¶ 13; *see also Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, ¶ 12 (1st Dist.).

{¶28} An executive official's quasi-privilege claim is governed by the four-factor test set forth in *State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner*, 2008-Ohio-1035. Plaintiffs thus argue that, to appeal, the State must make a colorable showing as to each of the four *Brunner* factors. The Ohio Supreme Court's opinion in *CMD I*, however, implicitly rejects this argument. In *CMD I*, the Attorney General appealed a lower court's rejection of a protection-akin-to-privilege argument. To determine whether it had jurisdiction to hear his appeal under R.C. 2505.02(B)(4),

the Ohio Supreme Court asked simply whether the Attorney General qualified as a high-ranking government official, and whether the deposition would "'unjustly interfere'" with his duties. *See CMD I* at ¶ 25. The Court did not go through all four factors at the jurisdictional stage—it saved that for its subsequent merits ruling. *Compare id.* at ¶ 25-27, *with State ex rel. Ctr. for Media & Democracy v. Yost*, Slip Opinion No. 2026-Ohio-1899, ¶ 53-57 ("*CMD II*").

{¶29} Consistent with *CMD I*, we hold that an individual has raised a "colorable claim" of protection akin to privilege if the record shows that (1) the individual asserting the privilege qualified as a "high-ranking government official," (2) the discovery ordered pertained to their official role, and (3) compliance with the order would plausibly impose a burden on their ability to discharge the duties of their office.

{¶30} We conclude that the director's protection-akin-to-privilege claim satisfies all three criteria. *First*, the parties appear to agree that the director is a "high-ranking government official," by virtue of his statutory role as "chief executive officer of the department of health," tasked with "administer[ing] the laws relating to health and sanitation and the rules of the department of health." *See* R.C. 3701.03(A). We accept their agreement for purposes of this case.[5]

{¶31} *Second*, the trial court ordered the director to testify in a deposition regarding issues pertaining to official licensure and variance decisions.

{¶32} *Third*, compelling the director to sit for a deposition would impose a

[5] We note that the Ohio Supreme Court has only ever applied *Brunner* to two officers, both of whom were elected by the Ohio voters to fixed terms in offices created by the Ohio Constitution. *See* Ohio Const., art. III, § 1 and 2; *Brunner*, 2008-Ohio-1035, at ¶ 3 (secretary of state); *CMD I*, 2024-Ohio-2786, at ¶ 4-5 (attorney general); *CMD II*, 2026-Ohio-1899, at ¶ 50-51 (same). Because such officers are *political* and *constitutional* in character, rather than merely *administrative*, deposing them arguably posed unique separation-of-powers concerns. But no party to this case argues that *Brunner* should not be extended to unelected heads of administrative departments, who occupy positions created by statute and are removable at the governor's "pleasure." *See* R.C. 121.03. We therefore leave that determination for another day.

burden on his ability to discharge his office, as an oral deposition will occupy the director personally for a period of time. And while the burden imposed by this deposition may or may not justify shielding him from testifying, it suffices to state a "colorable claim" of protection akin to privilege for the purpose of determining our jurisdiction.

{¶33} The trial court's order was thus an order denying a provisional remedy within the meaning of R.C. 2505.02(A)(3) and (B)(4). Further, it easily satisfies R.C. 2505.02(B)(4)'s remaining two prongs. "Any order compelling the production of privileged or protected materials certainly determines the action under R.C. 2505.02(B)(4)(a) because it would be impossible to later obtain a judgment denying the motion to compel disclosure if the party has already disclosed the materials." (Cleaned up.) *CMD I*, 2024-Ohio-2786, at ¶ 28. And this order satisfies R.C. 2505.02(B)(4)(b) because the putative interference with the director's discharge of his statutory responsibilities cannot "be repaired after the discovery has taken place." *See id.* at ¶ 29.

{¶34} We therefore hold that the trial court's order was a "final order" under R.C. 2505.02(B)(4), from which the State could appeal.

III. MOTION TO COMPEL

{¶35} We next turn to the merits of plaintiffs' motion to compel and the director's claim of quasi-privilege. This inquiry proceeds in two steps. *First*, the court must consider what legitimate need the litigant has for the official's testimony. *CMD II*, 2026-Ohio-1899, at ¶ 52. *Second*, it must weigh the litigant's need for the official's testimony against the four factors set forth in *Brunner*. *See id.* at ¶ 51, 53-57; *Brunner*, 2008-Ohio-1035, at ¶ 4. Deposition should be compelled only if the second step reveals "'extraordinary circumstances'" that render such discovery proportional to the

litigant's needs. *CMD II* at ¶ 51, quoting *Brunner* at ¶ 3; *see also* Civ.R. 26(B)(1).

{¶36} In general, we review discovery rulings for an abuse of discretion. *See Queen City Cleaning, L.L.C. v. I74 Wired, L.L.C.*, 2024-Ohio-1761, ¶ 14 (1st Dist.); *State ex rel. The V Cos. v. Marshall*, 1998-Ohio-329, ¶ 11. But whether a particular privilege (or quasi-privilege) applies "is a question of law." *Med. Mut. of Ohio v. Schlotterer*, 2009-Ohio-2496, ¶ 13. A trial court enjoys no discretion to commit errors of law, *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 38-39, so we review privilege (and quasi-privilege) determinations de novo. *See Schlotterer* at ¶ 13.

{¶37} Plaintiffs' operative complaint includes both facial challenges to various statutory provisions and challenges to the manner in which those statutes are applied. Because the parties' arguments (and our analysis) differ with respect to the two types of challenges, we address them separately.

A. Plaintiffs' Facial Challenges

{¶38} The State contends that the director's testimony is irrelevant to plaintiffs' claims that the challenged statutes are unconstitutional on their face. Plaintiffs disagree, arguing that the director is "the one individual who can speak to the health and safety justification, if any, of the challenged provisions." These justifications, plaintiffs contend, will be central to determining whether the challenged provisions survive scrutiny under the Reproductive Freedom Amendment.

{¶39} Under the Reproductive Freedom Amendment, Ohioans have "a right to make and carry out [their] own reproductive decisions, including . . . decisions on . . . abortion." Ohio Const., art. I, § 22(A). Regulations that "burden, penalize, . . . or discriminate against" those who assist "individual[s] exercising this right" are constitutional under the amendment only if they represent "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-

based standards of care." *Id.*, § 22(B).

{¶40} While the State's interests in passing the challenged provisions are therefore relevant to plaintiffs' facial challenge, the director has no special knowledge on that question. The director had no power to enact or sign into law the statutes concerning ambulatory surgical facilities, written transfer agreements, or variances. The General Assembly passed these laws, including the limitations imposed under S.B. 157. The director therefore had no "first-hand knowledge" of the State's interest in enacting these statutes. *Compare Brunner*, 2008-Ohio-1035, at ¶ 4, 6. And to the extent plaintiffs challenge the director's application of criteria *beyond* those in the statutes, they raise an *as-applied* challenge to the manner in which the director has and continues to *enforce* the law, not a facial challenge to the law itself.

{¶41} We therefore hold that plaintiffs failed to show that the director's testimony is necessary to their facial challenges.

B. Plaintiffs' As-Applied Challenges

{¶42} The remainder of the State's arguments concern whether the trial court properly ordered the director to testify in support of plaintiffs' as-applied challenges. The State's frontline position is that the trial court lacked subject-matter jurisdiction over these claims, so that those claims cannot provide a basis for compelling the director's deposition. We begin by discussing (1) the trial court's jurisdiction to hear plaintiffs' as-applied challenges, before turning to (2) plaintiffs' need for that testimony and (3) the proportionality of the burden it would impose under the *Brunner* factors.

1. Trial Court's Subject-Matter Jurisdiction

{¶43} Primarily, the State contends that the trial court lacked subject-matter jurisdiction over plaintiffs' as-applied claims. "Because subject-matter jurisdiction is

a condition precedent to a court's power to adjudicate and render judgment in a case, if a court acts without jurisdiction, then any proclamation by that court is void." (Cleaned up.) *Ostanek v. Ostanek*, 2021-Ohio-2319, ¶ 22. Specifically, the State argues that the trial court lacked jurisdiction because (a) plaintiffs' as-applied challenges were impermissible, de-facto appeals from administrative proceedings, (b) plaintiffs' only remedy was in mandamus, and (c) the decisions of ODH and the director were supported by sufficient evidence.

a. De-Facto Appeal/Collateral Attack

{¶44} We begin with the State's argument that the trial court lacked jurisdiction to hear plaintiffs' claims because they constituted de-facto appeals of the director's denials of plaintiffs' variance applications.

{¶45} The State's argument starts from the premise that, under R.C. 3702.304, "the Director's decision to grant or deny a variance is discretionary and not subject to administrative or judicial review." At least one court has agreed with this proposition. In *Women's Med I*, 2019-Ohio-1146, at ¶ 54-55 (2d Dist.), the Second District held that, while a court of common pleas has jurisdiction to hear an appeal from a denial of licensure under R.C. 119.12, a denial of a variance is "not a judicially reviewable determination." Thus, because the director's denial of Women's Med's variance application was not an "adjudication" under R.C. 119.01(D) and 119.12, the court of common pleas lacked jurisdiction to review it. *Id.* at ¶ 55.

{¶46} The State argues that *Women's Med I* dooms plaintiffs' claims in this case. As the State sees things, plaintiffs' as-applied challenges are nothing more than collateral attacks on, or de-facto appeals of, the director's decision denying Women's Med's variance applications and revoking their licenses. In support of its contention, the State points to the host of allegations in plaintiffs' complaint describing their

attempts to obtain prior variances and the director's corresponding denials. The State argues that, because the trial court lacked authority to invalidate those variance denials, it lacked jurisdiction over plaintiffs' as-applied claims.

{¶47} But even if we accept the reasoning in *Women's Med I*, it would not foreclose plaintiffs' claims here. Unlike the complaint in *Women's Med I*, plaintiffs' suit was not an administrative appeal and did not ask the trial court to "reverse, vacate, or modify" any prior administrative decision. *See* R.C. 119.12(N) and 2506.04.

{¶48} Instead, plaintiffs' as-applied challenges sought *prospective* relief to restrain the director and ODH from enforcing the challenged provisions in an allegedly arbitrary manner. Ohio courts have long recognized that, "where a party is threatened by some official enforcement of an unconstitutional statute, the party may ask a court of equity to protect their rights by ordering particular 'public officers . . . be restrained from all action under' the unconstitutional provision." (Alteration in original.) *Preterm-Cleveland v. Yost*, 2026-Ohio-23, ¶ 20 (1st Dist.), quoting *Peck v. Weddell*, 17 Ohio St. 271, 285 (1867). The same is true for an individual threatened with allegedly unconstitutional enforcement of a statute that is constitutional on its face. *Compare Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 35. The courts of common pleas are generally open to hear such claims.

{¶49} Plaintiffs' reliance on the director's prior enforcement decisions does not transform their equitable claims into de-facto appeals. Again, the key is in the relief. If plaintiffs sought an order barring the enforcement of the director's prior adverse decisions, then their new action would constitute a collateral attack on the director's administrative determinations. But the injunction plaintiffs seek in their complaint would leave in place the director's prior revocation orders and would not mandate that plaintiffs be given licenses to operate an ambulatory surgical facility. The

order they seek would simply require that any *future* applications plaintiffs may submit be considered in a manner consistent with the Constitution.

{¶50} The Ohio Supreme Court has drawn this same line between collateral attacks and prospective injunctions. In *Wymsylo*, the plaintiffs sought both (1) a declaration that their ten prior adjudications for violating the Smoke Free Act were unconstitutional, and (2) a declaration and injunction to prevent future unconstitutional enforcement of the act. *Wymsylo* at ¶ 3. The Ohio Supreme Court held that the plaintiffs' "attempt to invalidate the ten violations through a declaratory judgment action" was prohibited as "an improper collateral attack." *Id.* at ¶ 34. But it held that the same bar did not extend to their "declaratory judgment/injunction action . . . to prevent future enforcement of the Smoke Free Act." *Id.* at ¶ 35. There, as here, prospective relief for the plaintiffs would have implied that the prior adjudications had been erroneous. Nevertheless, to the extent that relief applied only to *future* enforcement, and left the prior rulings in place, the Court held the plaintiffs' claims were not barred. *See also*, *e.g.*, *Olivier v. Brandon*, 607 U.S. 552 (2026) (plaintiff could seek to enjoin future enforcement of an allegedly unconstitutional ordinance, even though his prior conviction for violating said ordinance was never set aside).

{¶51} Plaintiffs' as-applied claims are therefore not de-facto appeals of, or collateral attacks on, the director's prior variance denials. So, even assuming the court of common pleas lacked subject-matter-jurisdiction to invalidate the director's prior variance denials, that court would still have jurisdiction to hear plaintiffs' claim for prospective injunctive relief to prevent future, allegedly unconstitutional enforcement.

b. Mandamus as Exclusive Remedy

{¶52} The State's argument that plaintiffs' sole remedy is in mandamus fails for similar reasons. It is well settled that "when an agency's decision is discretionary

and, by statute, not subject to direct appeal, a writ of mandamus is the sole vehicle *to challenge the decision*, by attempting to show that the agency abused its discretion." (Emphasis added.) *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 2007-Ohio-2620, ¶ 23. But the availability of mandamus to challenge the director's *prior* decisions has no bearing on the trial court's ability to enjoin the director from taking unconstitutional actions *in the future*. As we have explained, plaintiffs' claims in this case are prospective and do not seek to challenge the validity or enforceability of the director's prior decisions.

c. Sufficiency of Evidence/Constitutional Avoidance

{¶53} Finally, the State argues that because plaintiffs' licensure applications failed to satisfy R.C. 3702.30 and 3702.303, the trial court lacked jurisdiction to hear their constitutional claims. It bases this argument on *Capital Care Network of Toledo v. Ohio Dept. of Health*, 2018-Ohio-440, ¶ 30-31, and *Women's Med I*, 2019-Ohio-1146, at ¶ 56 (2d Dist.), which held that, where a denial of licensure accorded with law and was supported by reliable, probative, and substantial evidence, the court need not address constitutional arguments.

{¶54} This argument misses the mark for at least two reasons. *First*, it concerns not *jurisdiction* but *the merits* of how the trial court should resolve plaintiffs' claims. Constitutional avoidance would kick in only once the trial court determined there was a nonconstitutional basis for denying plaintiffs' claims on their merits. The merits of plaintiffs' claims are not before us on this appeal—only the trial court's discovery ruling is. Indeed, the trial court previously denied the State's motion to dismiss for failure to state a claim. That order was not (and could not be) appealed.

{¶55} *Second*, the reasoning in both *Capital Care* and *Women's Med I* concerned administrative appeals, not actions that seek prospective injunctive and

declaratory relief. Here, plaintiffs did not seek to invalidate their prior licensure revocations, so the legal sufficiency of the evidence supporting those revocations was not properly before the trial court.

d. Trial Court's Jurisdiction

{¶56} In sum, we hold that the court of common pleas had subject-matter jurisdiction to hear and rule upon plaintiffs' prospective challenge to the manner in which the State enforces the disputed statutes. Just as in *Wymsylo*, plaintiffs' as-applied, prospective challenge was within the traditional, equitable jurisdiction of the court of common pleas, and the State has cited no statute removing such jurisdiction. *See Ohio High School Athletic Assn. v. Ruehlman*, 2019-Ohio-2845, ¶ 9 (courts of common pleas have presumptive subject-matter jurisdiction "unless some statute takes that jurisdiction away").

2. Need for the Director's Testimony

{¶57} Having concluded that the trial court had jurisdiction to enter the motion to compel the director to testify, we next turn to the merits of that motion. We begin by asking what legitimate need plaintiffs had for the director's deposition testimony. *See CMD II*, 2026-Ohio-1899, at ¶ 52.

{¶58} Plaintiffs have shown that their need to depose the director is great. Plaintiffs' as-applied challenges allege that the director has previously applied arbitrary and unconstitutional standards in determining whether to grant or deny variances. Because the merits of those claims are not before us, we assume they would, if proved, entitle plaintiffs to the relief they seek. To prove their as-applied constitutional claims, however, plaintiffs will need to know how variance applications were resolved, what standards were applied, and why those standards were chosen.

{¶59} The deposition witnesses offered by the State made clear that no one but

the director can give plaintiffs these answers. Plaintiffs asked both ODH's medical director (Dr. DiOrio) and its chief of healthcare deployments (James Hodge) about how variance determinations were made. Both said that only the director could answer such questions. Further, those deponents made clear that the director employed an all-encompassing discretion in evaluating such claims and did not bind himself to any preestablished standards. Indeed, the State has argued in this court that the statutes themselves vest the director *personally*, and not ODH, with the sole discretion to decide whether applicants will receive a variance. *See* R.C. 3702.304(A)(1) ("The *director of health may grant* a variance . . . if the ambulatory surgical facility submits *to the director* a complete variance application, *prescribed by the director*, and *the director determines* after reviewing the application that the facility is capable of achieving the purpose of a written transfer agreement . . . ." (Emphasis added.)).

{¶60} Put simply, plaintiffs' as-applied claims turn on information that, according to the State's own Civ.R. 30(B)(5) designees, existed only in the mind of the director. We can think of no more clear-cut need for deposition testimony.

*3. Proportionality/*Brunner *Factors*

{¶61} But need alone is not enough to justify deposing a high-ranking government official. That need must be weighed against the four *Brunner* factors: "(1) the substantiality of the case in which the deposition is requested, (2) the degree to which the witness has first-hand knowledge or direct involvement, (3) the probable length of the deposition and the effect on government business if the official must attend the deposition, and (4) whether less onerous discovery procedures can provide the information sought." *CMD II*, 2026-Ohio-1899, at ¶ 51, citing *Brunner*, 2008-Ohio-1035, at ¶ 4.

{¶62} *First*, this case is substantial. Plaintiffs allege that the director hides

behind his statutory discretion to apply arbitrary or unnecessarily restrictive criteria to deny variances, in violation of the Ohio Constitution. It thus represents a far weightier and more substantial public issue than the public-records question at issue in *CMD II*. *See CMD II* at ¶ 53. The first factor cuts in favor of plaintiffs.

{¶63} *Second*, the State also does not dispute that the director has firsthand knowledge of and had direct involvement in the matter at hand. Indeed, we need not assume the director's knowledge. *Compare CMD II* at ¶ 54. The sworn testimony of the State's two Civ.R. 30(B)(5) designees and the State's appellate brief confirm it.[6] All agree that the director is the *sole* individual possessed of firsthand knowledge of the standards for denying variance applications. The second factor, too, suggests that the director's deposition is appropriate.

{¶64} *Third*, the burden the deposition would impose would be limited, so that the third *Brunner* factor does not cut against plaintiffs. Here, as in *Brunner*, "there is no reason to believe that a deposition need take an inordinate amount of time." *See Brunner*, 2008-Ohio-1035, at ¶ 7. The "issues are limited" to the questions plaintiffs have already identified, which concern a small set of prior decisions and the standards used to evaluate these and future applications. Further, plaintiffs' notice indicated an intent to depose the director remotely, eliminating the inconvenience of travel. And the State has never suggested, either here or below, that some more limited deposition procedure would be acceptable. Its argument was all or nothing.

{¶65} The State also argues that "any order compelling the Director's deposition" would be unduly burdensome because it would "risk establishing a

[6] In its brief, for example, the State explained, "As both designated deponents' testimony confirms, ODH does not have any knowledge regarding variance requirements or decisions. The Director alone can evaluate and decide whether to grant a variance from the written transfer agreement requirement."

precedent that would make such depositions routine in litigation involving ODH." But this mischaracterizes the situation. This is not a case like *CMD II*, which concerned a relatively run-of-the-mill dispute about whether particular public records exist. *See CMD II*, 2026-Ohio-1899, at ¶ 56. This case involves a highly unusual constellation of circumstances, in which (1) the State asserts that the director has sole enforcement/decision-making authority by statute, (2) multiple Civ.R. 30(B)(5) designees testified that no one except the director knows why or how the director exercises that authority, (3) plaintiffs allege that the director is exercising that authority unconstitutionally, and (4) the director has not provided substantive responses to relevant interrogatories or requests for admissions. Deposition is necessary here only because all four of these facts are true; variation with respect to any one would justify distinguishing a future request. Our narrow ruling thus does not "open the door to more such depositions in [many similar] cases," because few, if any, future cases will fit this mold. *See CMD II* at ¶ 56. And, to the extent the State fears that trial courts will overread and extend our decision, it can take solace in its right to take an interlocutory appeal to correct such rogue deposition orders. Thus, the third factor does not cut in favor of denying plaintiffs' request to depose the director.

{¶66} *Fourth*, the State has abandoned any argument that "'less onerous discovery procedures [could] provide the information sought.'" *See Brunner*, 2008-Ohio-1035, at ¶ 4, quoting *Monti v. State*, 151 Vt. 609, 613 (1989). Nor does the record suggest any reason to believe less-onerous procedures were feasible. The State's Civ.R. 30(B)(5) designees testified that only the director had the information plaintiffs sought. And plaintiffs received no substantive responses to their interrogatories asking about "the facts supporting" the alleged extra-statutory requirements for obtaining a variance. Thus, the fourth *Brunner* factor cuts in favor of deposition.

{¶67} We therefore hold that none of the four *Brunner* factors suggest that the State's interest in restricting access to high-ranking officials outweighed plaintiffs' need for the director's testimony.

IV. CONCLUSION

{¶68} Simply put: because of the discretionary character of the statutory variance scheme and the opaque manner in which the director has elected to exercise that discretion, plaintiffs need to depose the director to proceed with their constitutional claims. The trial court had subject-matter jurisdiction over plaintiffs' claims, and an application of the *Brunner* factors suggests that plaintiffs' need for the testimony wins out here. However, plaintiffs have no reason to depose the director with respect to their facial challenges. We therefore sustain the State's assignment of error to the extent the trial court's order permitted plaintiffs to depose the director regarding their facial challenges, and we overrule it in all other respects.

{¶69} Accordingly, we modify the last paragraph of the trial court's September 17, 2025 "Entry Ordering Defendant Bruce Vanderhoff to Appear for a Deposition" to read as follows (with our additions in italics):

> The Court, having considered Plaintiffs' motion and arguments from both Plaintiffs' and Defendant's attorneys, finds Plaintiffs' motion to be well taken. *To the extent* Plaintiffs' Motion to Compel *seeks to depose Defendant Bruce Vanderhoff, M.D., on issues related to Plaintiffs' as-applied constitutional challenges, the motion* is hereby **GRANTED**. *That same motion is* ***DENIED,*** *however, to the extent Plaintiffs' motion seeks to depose Defendant regarding any issues related solely to Plaintiffs' facial challenges, including but not limited to issues regarding the State of Ohio's interest in enacting the*

challenged statutory provisions. Defendant Bruce Vanderhoff, M.D. is hereby **ORDERED** to fully cooperate and participate in his deposition as a party and fact witness.

So modified, we affirm.

Judgment affirmed as modified.

BOCK and **NESTOR, JJ.,** concur.