IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NATIONAL ASSOCIATION OF SOCIAL WORKERS, et al.,

Plaintiffs,

v.

CITY OF LEBANON, OHIO, et al.,

Defendants.

Case No. 1:22-cv-258

ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, EXPEDITED SUMMARY JUDGMENT

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INTRODUCTION

This case concerns a municipal ordinance that can be interpreted to criminalize virtually all activity even tangentially connected to abortion without providing fair notice of the conduct it forbids. The challenged ordinance (the "Lebanon Ban" or "Ban") criminalizes not only abortion, but also an ill-defined but potentially massive range of efforts to "aid or abet" obtaining an abortion. *See* Lebanon, Ohio, Code of City Ordinances §§ 509.09, 509.10 (uncodified version attached as Exhibit A to the Declaration of B. Jessie Hill ["Hill Decl."]).

The Ban, and the Lebanon City Attorney's unenlightening statements about its scope, have created substantial confusion over whether individuals who provide assistance to those seeking abortions—including members of Plaintiff the National Association of Social Workers ("NASW") and Plaintiff Women Have Options – Ohio ("WHO/O")—might face criminal prosecution. The Ban offends basic constitutional principles, including the right to due process, the First Amendment, and the Home Rule limits imposed by the Ohio Constitution. It must therefore be enjoined.

First, it is bedrock law that the government violates the Fourteenth Amendment's Due Process Clause when it "take[s] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). The Ban does precisely that: it provides virtually no clarification of what it means to aid or abet abortion, except by enumerating several examples that are themselves vague and undefined. The Ban also defines its exceptions to criminal liability by reference to complex, nuanced legal concepts like the First Amendment, "undue burden," and "third-party standing" that only compound the serious confusion created by the Ban's substantive prohibitions.

Second, it is similarly well-established that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). And yet the Ban does that as well, notwithstanding its purported exemption for First Amendment-protected activity. Its prohibition on acts that aid or abet abortion explicitly restricts speech, as do its specific proscriptions on providing information and emotional support to those seeking abortions. Although the ordinance purports to except conduct protected by the First Amendment, the Sixth Circuit has held that such an exception does not prevent a constitutional violation where, as here, a statute, "on its face[,] … reaches a substantial amount of constitutionally protected speech." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (quotation omitted).

Finally, the Ban also runs afoul of the Ohio Constitution. By purporting to enforce existing but enjoined state abortion bans by making them into municipal-level misdemeanor offenses, the Lebanon Ban violates a longstanding, bright-line rule under the Home Rule provision of the Ohio Constitution. *See* Ohio Const. art. XVIII, § 3.

Plaintiffs NASW and WHO/O are organizations that reasonably fear that they or their members, employees, or volunteers will face unconstitutional prosecution under the Lebanon Ban. Because Plaintiffs' "constitutional right[s] [are] being threatened or impaired, *a finding of irreparable injury is mandated*." *Am. C.L. Union of Ky. v. McCreary Cnty.*, 354 F.3d 438, 455 (6th Cir. 2003) (emphasis added). In addition, the risk of prosecution, and its attendant effects—including serious criminal penalties, the loss of licenses for NASW's members, and reputational damage to WHO/O—all constitute forms of irreparable injury in their own right. And neither the City of Lebanon nor the public will suffer any harm from the injunction of an ordinance that is clearly unconstitutional.

Plaintiffs did not file suit lightly. They moved to file suit only after NASW sought, but failed to receive, clarity as to the meaning and application of the Ban. The Lebanon City Attorney, Defendant Mark Yurick, refused to answer even basic questions about the activity encompassed by the Ban. Given that the Ban threatens Plaintiffs, their members, their employees, and/or their volunteers with prosecution without fair notice, for constitutionally protected activity, and in violation of the Ohio Constitution, Plaintiffs have been forced to seek injunctive relief.

For these reasons, Plaintiffs respectfully request that the Court enjoin Lebanon from implementing the Ban pending final judgment. In the alternative, if the Court concludes that Plaintiffs are not entitled to a preliminary injunction, or believes that summary judgment would be a more efficient way of resolving this case, Plaintiffs respectfully request that the Court convert this motion to a motion for summary judgment, expedite briefing and consideration of that motion, and enter judgment for Plaintiffs.

STATEMENT OF FACTS

I. The Availability of Abortion in Lebanon and Ohio

Even before the Ban, Lebanon lacked any clinics that perform abortions within its city limits, and it still does not have any such facilities. Hill Decl., Ex. A at 1. In Ohio, obtaining an abortion requires an initial in-person visit with a physician for state-mandated counseling and informed consent. Ohio Rev. Code §§ 2317.56, 2919.192 *et seq*. People who live in Lebanon must therefore travel to facilities in other cities to access reproductive health care.

Ohio has passed many limitations and restrictions on abortion, some of which are in effect, and some of which have been enjoined. Among those enjoined, for example, is Ohio Revised Code section 2919.195 which prohibits abortions after fetal cardiac activity can be detected (*i.e.*, at or after approximately six weeks of pregnancy). *Preterm-Cleveland v. Yost*, 394

F. Supp. 3d 796, 804 (S.D. Ohio 2019). Also enjoined in large part is Section 2919.15, which prohibits abortions performed using the most common second-trimester abortion method, known as dilation and evacuation (D&E). *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 872 (S.D. Ohio 2019). Because the State is enjoined from enforcing these unconstitutional bans, patients may still access abortions as permitted by those courts.

There are two types of abortion: procedural (or "surgical") and medication. Medication abortion typically involves a safe and effective regimen that was approved by the FDA two decades ago. Hill Decl., Ex. B. That regimen is legal in Ohio through 70 days after a patient's last menstrual period, or "LMP." As part of that regimen, two drugs are taken orally. The first drug, mifepristone, must be taken 24 to 48 hours before the second drug, misoprostol. In Ohio, the mifepristone is dispensed to the patient in the clinic, while the patient receives the misoprostol itself or a prescription for misoprostol and takes it 24 to 48 hours later at a location of their choosing. *See id.*; Ohio Rev. Code § 2919.123. Approximately 2 to 24 hours after taking the second medication, the patient will experience a process similar to an early miscarriage. Hill Decl., Ex. C.

Whether a patient obtains a surgical or a medication abortion, they may require assistance in doing so. That assistance can include help in evaluating their options; locating an appropriate clinic; making travel plans; arranging child care; figuring out how to pay for the abortion; and handling other miscellaneous issues, such as help obtaining necessary state-issued identification documents. *See* Declaration of Margaret Light-Scotece ¶¶ 5, 11-16 ["Light-Scotece Decl."]; Declaration of Danielle Smith ¶¶ 20-24 ["Smith Decl."]. Some of these tasks are similar to the work done by "abortion doulas." Although there is no single or widely accepted definition of what constitutes serving as an "abortion doula," abortion doulas generally give emotional,

physical, and informational support to people obtaining medical and surgical abortions. Light-Scotece Decl. ¶ 17. These services can include things as diverse as referring patients to help lines, holding hands during the procedure, talking with the patient about their choice to have an abortion or something entirely different (like the patient's commute or her favorite tv shows), and sometimes just sitting in supportive silence. *Id.* ¶¶ 17-18.

II. Lebanon's Unconstitutional Ban

The Lebanon Ban constitutes a potentially sweeping prohibition on activities related to abortion. Specifically, the Ban enacts two new criminal provisions into Lebanon's municipal code, Sections 509.09 and 509.10, both of which create first-degree misdemeanors.

Section 509.09(A) provides that "[i]t shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the city of Lebanon, Ohio." It defines abortion to mean "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant." Lebanon Code § 509.09(H). Although the Ban appears to exempt abortions that are provided outside Lebanon, *id.* § 509.09(A)-(B), it is unclear whether a patient who visits a clinic outside of Lebanon for a medication abortion and takes the second drug of the regimen at her Lebanon residence is "using … a drug" with the intent of terminating her pregnancy within Lebanon. It is therefore unclear whether anyone who assists the patient in Lebanon—including by arranging or helping provide transportation or child care—is guilty of aiding or abetting under the Ban.

In contrast, the text of Section 509.10(B) lacks any tether to Lebanon. It instead provides that "[i]t shall be unlawful for any person to perform an abortion in violation of any statute enacted by the Ohio legislature." Thus, it broadly seeks to render enforceable even those laws

that have been found unconstitutional by a federal court. Indeed, the Ban specifically names as one such law Ohio's enjoined six-week abortion ban, found at Ohio Rev. Code § 2919.195.

Both sections also render it unlawful "for any person to knowingly aid or abet" a prohibited abortion. That proscription "includes, but is not limited to, the following acts":

(1) Knowingly providing transportation to or from an abortion provider;

(2) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;

(3) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;

(4) Providing "abortion doula" services; and

(5) Coercing a pregnant mother to have an abortion against her will.

Lebanon Code §§ 509.09(B), 509.10(C). Section 509.10 (but not Section 509.09) additionally proscribes "[e]ngaging in conduct that makes one an accomplice to abortion under section 2923.03 of the Ohio Revised Code." *Id.* § 509.10(C)(6). Beyond this non-exhaustive list full of undefined terms, the Lebanon Ban provides virtually no guidance regarding what conduct will be understood to constitute aiding or abetting an unlawful abortion.

Section 509.09(D) also renders it "unlawful for any person to possess or distribute abortion-inducing drugs in the city of Lebanon, Ohio." The term "abortion-inducing drugs" is defined to include "mifepristone, misoprostol, and any drug or medication that is used to terminate the life of an unborn child." *Id.* § 509.09(H)(3). It is unclear whether someone who drives a patient home from an abortion clinic with misoprostol would be considered to "possess" misoprostol, nor whether or what the driver must know about the patient's possession.

Both sections also contain exceptions. For instance, both sections exempt "any conduct protected by the First Amendment of the U.S. Constitution" and the equivalent provision of the Ohio Constitution, while at the same time explicitly criminalizing some conduct that constitutes

protected speech, such as providing truthful information and emotional support. *Id.* §§ 509.09(F), 509.10(C). Section 509.09 also exempts "any action which occurs outside of the jurisdiction of the city of Lebanon, Ohio," and any actions by the pregnant person. *Id.* §§ 509.09(E), (G). Although Section 509.10 lacks exceptions for extraterritorial conduct—and, unlike Section 509.09, by its terms applies to abortions that occur both within and outside of Lebanon—Section 509.10 both exempts, and provides an affirmative defense to, anyone who *both* "has standing to assert the third-party rights of a woman or group of women seeking an abortion under the tests for third-party standing established by the Supreme Court," *and* "demonstrates that his prosecution or punishment will impose an undue burden on that woman or group of women seeking an abortion," until the U.S. Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (410), or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Id.* § 509.10(D)-(F).

On February 17, 2022, NASW's Executive Director, Danielle Smith, emailed the Lebanon City Attorney, Defendant Mark Yurick, in an attempt to gain clarity on how the law might apply to NASW's members. *See* Smith Decl., Exs. A & B.

- First, Ms. Smith asked: "What services fall within 'abortion doula services' under the law?" Mr. Yurick responded: "In a general sense, an 'abortion doula' is a person who provides emotional, informational and/or logistical support to a person who is seeking or having an abortion."
- Second, Ms. Smith asked: "[W]hat kind of counseling related to abortion (including self-managed abortion) will and will not constitute aiding and abetting or make our members accomplices under this law?" Mr. Yurick responded: "I am not able to answer this hypothetical question. Please consult your own legal counsel for appropriate legal advice. I am not a psychiatrist, therapist or a counselor, and I am not familiar with all of the

activities of those professions. Whether a particular activity falls within the reach of the ordinance would be evaluated on an individual 'case by case' basis."

- Third, Ms. Smith asked: "Does this ordinance apply only to social work services rendered entirely within Lebanon (*e.g.*, both the social worker and pregnant person are present in the city), or does it also apply when the social worker is remotely providing service to a Lebanon resident?" Mr. Yurick responded: "I am not able to answer this hypothetical question. Please consult your own legal counsel for appropriate legal advice. Whether a particular activity or set of activities falls within the jurisdiction of a particular law enforcement agency is a matter of law."

Separately, an individual made a report to the Lebanon police concerning the sale of mifepristone and misoprostol at Walgreens, a national pharmacy chain with a store in Lebanon. *See* Hill Decl., Ex. D. However, the police appear not to have investigated the store or any other Lebanon pharmacies that may sell these drugs, even though they may be in violation of the Ban.

III. Plaintiffs and Procedural History

Plaintiff the National Association of Social Workers is the most prominent professional membership organization for social workers in Ohio. Smith Decl. ¶ 3. Its mission includes strengthening, supporting, and unifying the social work profession, promoting the development of social work standards and practice, and advocating for social policies that advance social justice and diversity. *Id.* To that end, NASW provides continuing education materials, practice resources, and mentorship to its members. *Id.* ¶¶ 3, 15, 37. It has thousands of members, some of whom provide services in Lebanon, and who therefore risk prosecution under the Ban. *Id.* ¶¶ 9-12. In particular, three members of NASW have submitted declarations asserting that they provide services that could fall within the scope of the Ban. *See* Declaration of Alice Doe ["Alice Decl."]; Declaration of Beth Doe ["Beth Decl."].

Plaintiff Women Have Options – Ohio is an organization dedicated to helping Ohioans afford their reproductive choices. Light-Scotece Decl. ¶ 3. Specifically, WHO/O provides practical support in the form of transportation, housing, and other assistance to help patients access contraception, emergency contraception, and abortion services. *Id.* ¶ 5. WHO/O has assisted patients who reside in Lebanon in the past, and there is every reason to believe that patients who live in Lebanon and need to travel to abortion providers outside of Lebanon will seek out WHO/O's services in the future. *Id.* ¶¶ 9, 19. Even if it places them at risk of prosecution, WHO/O's staff and volunteers will continue serving any client needing assistance, including within Lebanon. *Id.* ¶ 24.

Plaintiffs filed this lawsuit on the same date as this motion, asserting that the Lebanon Ban: (1) is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause; (2) violates Plaintiffs' free speech rights under the First and Fourteenth Amendments; and (3) exceeds Lebanon's home rule authority under the Ohio Constitution.

LEGAL STANDARD

"In considering a preliminary injunction, the court considers four elements: '(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.'" *Preterm-Cleveland*, 394 F. Supp. 3d at 800 (quoting *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014)). "These four considerations are factors to be balanced, not prerequisites that must be met." *Id.* (quoting *Kessler v. Hrivnak*, 2011 WL 2144599, at *3 (S.D. Ohio May 31, 2011)).

"Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2).

And "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." *Id.* 56(b); *see also* 28 U.S.C. § 1657(a) ("[T]he court shall expedite the consideration of any action … if good cause therefor is shown."). A movant is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

As a matter of law, Plaintiffs are certain to prevail on at least three of their claims: that the Lebanon Ban is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause; that the Ban restricts constitutionally protected speech in violation of the First and Fourteenth Amendments; and that the Ban violates the limits on home-rule authority imposed by the Ohio Constitution.

A. The Lebanon Ban is unconstitutionally vague in violation of the Due Process Clause.

Section One of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The government violates that guarantee when it enforces a criminal law that is either (1) "so vague that it fails to give ordinary people fair notice of the conduct it punishes," or (2) "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). The long-standing vagueness doctrine vindicates "ordinary notions of fair play and the settled rules of law." *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 242 (1932).

"[T]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir. 1997) (quoting *Vill. of*

Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498 (1982)). "When criminal penalties are at stake, a relatively strict test is warranted." *Id.* That is "especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights," like the rights to engage in constitutionally protected speech or to obtain an abortion. *Colautti v. Franklin*, 439 U.S. 379, 391 (1979).

Courts have frequently relied on the vagueness doctrine in invalidating criminal abortion restrictions. *See, e.g.*, *id.*; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled on other grounds by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Voinovich*, 130 F.3d 187; *Adams & Boyle, P.C. v. Tennessee Dep't of Health*, 4 F. App'x 291 (6th Cir. 2001); *Northland Fam. Plan. Clinic, Inc. v. Cox*, 394 F. Supp. 2d 978, 988 (E.D. Mich. 2005), *aff'd*, 487 F.3d 323 (6th Cir. 2007); *WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 827, 843 (E.D. Mich. 2000).[1]

Although the Ban imposes criminal penalties on conduct implicating multiple constitutional rights, and therefore must pass the most stringent vagueness test, it fails under any level of scrutiny. Specifically, the Ban's prohibition on acts that aid or abet abortion, as well as its abstruse and legalese-laden exceptions and affirmative defense, fail to provide fair notice of the conduct that is prohibited and invite arbitrary enforcement, thereby violating due process.

1. The Ban's prohibition on aiding or abetting abortion is vague.

The Ban includes an unprecedented, ambiguous, and potentially sweeping prohibition on all acts that aid or abet abortion. Although "aiding and abetting" is a familiar concept in some

[1] The Sixth Circuit also recently upheld, on vagueness grounds, a preliminary injunction against Tennessee's prohibition on abortions motivated by race, sex, or a diagnosis of Down syndrome, although that decision has since been vacated pending rehearing en banc. *See Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 415 (6th Cir. 2021).

areas of criminal law, its meaning in the context of the Lebanon Ban is vague. As the Supreme Court has emphasized, broad prohibitions on aid or support often involve "extraordinary ambiguity" that threatens to sweep in many forms of "guiltless knowing behaviour"—including conduct that involves "the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 286 (1961). Here, for example, the language of the Ban not only leaves open what activities are prohibited, but the requisite causal relationship between the assistance and the prohibited abortion; whether the defendant must know that the abortion is prohibited (*e.g.*, because it will occur in Lebanon or after the time threshold specified in Ohio law); whether spouses and other family members are included within the scope of the prohibition; and the extent to which acts that aid or abet abortion must occur within Lebanon to incur punishment.

These are not hypothetical concerns. Plaintiffs, like many people in Ohio, provide counseling and resources that support persons seeking abortions and that could be encompassed by some construction of the statute. Notably, Lebanon's City Attorney could not answer whether such services would violate the ordinance, and explained that "whether a particular activity falls within the reach of the ordinance would be evaluated on an individual 'case by case' basis." Smith Decl. Ex. B. That is practically an admission that the City cannot provide fair notice to the public and lacks standards to guide its enforcement. The fact that liability could extend to "the host of [Ohioans]," including many outside Lebanon, "who, while not directly performing abortions, nonetheless help patients access such care," provides a powerful reason to invalidate the Ban. *Isaacson v. Brnovich*, 2021 WL 4439443, at *10 (D. Ariz. 2021) (noting that the availability of accomplice liability aggravated the vagueness of an abortion prohibition).

To be sure, the Lebanon Ban enumerates specific examples of conduct that may be considered aiding or abetting. But far from clarifying the Ban, those examples generate considerable further confusion about its scope and invite arbitrary enforcement.[2]

Abortion Doula Services. Although the ordinance purports to criminalize "abortion doula services," that term is left entirely undefined. When pressed to define the term, and to explain how it might apply to NASW's activities, Lebanon's own lawyer responded only that, "[i]n a general sense, an 'abortion doula' is a person who provides emotional, informational and/or logistical support to a person who is seeking or having an abortion," Smith Decl. Ex. B.—an answer that provides no clarity about what specific services are prohibited. For example, NASW members frequently assist clients in determining whether and how to obtain an abortion and provide counseling around the abortion. Smith Decl. ¶¶ 20-25; Alice Decl. ¶ 6; Beth Decl. ¶ 6. Similarly, WHO/O's employees and volunteers regularly provide forms of emotional, informational, and logistical support to those seeking abortion. Light-Scotece Decl. ¶¶ 17-18. The Ban therefore reaches a "substantial amount of innocent conduct," including constitutionally protected speech, without providing any guidance to constrain the "vast discretion" of law enforcement. *Chicago v. Morales*, 527 U.S. 41, 60-61 (1999).

At the same time, the Ban's exception for conduct protected by the First Amendment, Lebanon Code §§ 509.09(F), 509.10(C), could be construed to exempt nearly all such activity.

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[2] This vagueness is compounded by the fact that some of the examples likely would *not* constitute aiding or abetting under Ohio law. *See, e.g.*, *State v. Davis*, 61 N.E.3d 650, 661 (Ohio Ct. App. 2016) ("In order to be complicit to a crime by aiding and abetting, 'the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.'") (quoting *State v. Johnson*, 754 N.E.2d 796 (Ohio 2001), syllabus). Section 509.09 (but not Section 509.10) references Ohio's complicity statute, Ohio Rev. Code § 2923.03, which includes aiding or abetting as one form of complicity—as itself an *additional* example of aiding or abetting conduct. Lebanon Code § 509.09(C)(6).

That makes it even more difficult for Plaintiffs to guess what the prohibition on abortion doula services is intended to encompass, and whether their specific services might nonetheless be constitutionally protected. *See* Light-Scotece Decl. ¶ 12; Smith Decl. ¶ 30; Alice Decl. ¶ 8. Beth Decl. ¶ 8. The Due Process Clause does not permit Lebanon to force Plaintiffs to "guess" on such questions, and risk criminal prosecution if they guess incorrectly. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

Giving Instructions Regarding Self-Administered Abortion. As with the "abortion doula" provisions, it is unclear how prohibiting the dissemination of truthful, constitutionally protected information can be reconciled with the Ban's First Amendment exceptions. Moreover, "self-administered abortion" is also not defined in the Ban, and both that term and the more common term "self-managed abortion" are used with significant variation, even in the medical community.[3] *Cf. Northland Fam. Plan. Clinic*, *Inc.*, 394 F. Supp. 2d at 988 (holding that unused term "perinate" was vague). In particular, it is unclear whether "self-administered abortion" encompasses all medication abortions, especially given that patients typically take the second pill of the two-dose regime at home, Light-Scotece Decl. ¶ 7, nor whether unlawfully "[g]iving instructions" encompasses generally providing information about this form of abortion, as both NASW members and WHO/O do, *id.* ¶ 14; Smith Decl. ¶ 25; Alice Decl. ¶ 6; Beth Decl. ¶ 6.

Knowingly Providing Transportation. Although the Ban makes it unlawful to provide transportation for an abortion, it does not clarify whether someone who provides *funds* to procure transport or arranges transport to be provided by a third party has broken the law. For example,

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[3] *See, e.g.*, Annik Sorhaindo & Gilda Sedgh, *Scoping Review of Research on Self-Managed Medication Abortion in Low-Income and Middle-Income Countries*, 6 BMJ Global Health 1, 8 (2021), https://gh.bmj.com/content/6/5/e004763; Katherine Gambir et al., *Self-Administered Versus Provider-Administered Medical Abortion*, Cochrane Database of Systematic Reviews 1, 8 (Mar. 9, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7062143/.

NASW members sometimes connect clients with services that can provide transportation, Smith Decl. ¶¶ 24-25; Beth Decl. ¶ 6, and WHO/O employees and volunteers often arrange and/or pay for clients' transportation, Light-Scotece Decl. ¶¶ 13, 15-16. The Ban therefore "conditions potential criminal liability on confusing and ambiguous criteria." *Colautti*, 439 U.S. at 394.

Providing Money. Similarly, the Ban does not specify whether the prohibition on providing money to defray costs "associated with procuring an abortion," Lebanon Code §§ 509.09(B)(3), 509.10(C)(3), includes more than the cost of the abortion itself, and encompasses such things as housing, childcare, and food that are not connected to the medical procedure itself. *See* Light-Scotece Decl. ¶¶ 13, 15. In fact, even donors to WHO/O may be at risk of prosecution if helping to pay for such expenses would be encompassed within the Ban's prohibitions. *Id.* ¶ 14. Nor does it specify whether one who directs an abortion seeker to available resources and sources of financial support, knowing that those resources may be used to procure an abortion, has unlawfully provided money for an abortion. *See id.* ¶ 15; Smith Decl. ¶¶ 24-25; Beth Decl. ¶ 6. These ambiguities violate the maxim that "[t]he crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Connally*, 269 U.S. at 393.

These are just some examples of the real, concrete ways that the Ban's vagueness leaves Plaintiffs, their members, their employees, and/or their volunteers unable to determine whether their conduct conforms to the law. If a city wishes to create an entirely new form of aiding and abetting liability, criminalizing conduct that has been consistently treated as lawful for over fifty years, it must do so with far greater precision. Moreover, the Ban's potential breadth pits NASW members' ethical obligations to assist their clients against their fear of prosecution. In many cases, NASW members may feel obligated to provide counseling or other services that the Ban

potentially forbids. Smith Decl. ¶¶ 21, 34; Alice Decl. ¶¶ 11; Beth Decl. ¶ 11. Similarly, WHO/O feels morally compelled to assist pregnant persons in understanding and exercising their reproductive rights. Light-Scotece Decl. ¶ 24. "[W]here conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject [a person] to possible criminal sanctions." *Colautti*, 439 U.S. at 400-01.

The Ban is vague for still another reason: it does not specify how much of a nexus any of these acts must possess to the City itself. For example, NASW members located outside Lebanon might provide counseling and other services over the internet or phone to Lebanon residents. Smith Decl. ¶ 14; Alice Decl. ¶ 5. WHO/O employees located outside Lebanon might arrange for transportation to pick up a client at a Lebanon address. Light-Scotece Decl. ¶¶ 15-16. Either might direct a Lebanon client to a website hosted by an organization outside of Lebanon to obtain information. *See* Light-Scotece Decl. ¶¶ 11, 17; Smith Decl. ¶¶ 23-24; Alice Decl. ¶ 6; Beth Decl. ¶ 6. And any Lebanon resident who obtains a medication abortion would likely take the first pill outside the city but take the second at home. *See* Light-Scotece Decl. ¶¶ 7, 14. Once again, when pressed to clarify how the Ban would apply to "telehealth services," Defendant Yurick refused to "answer this hypothetical question" and directed NASW to "legal counsel." Smith Decl. Ex. B. These potential extraterritorial ramifications only further illustrate how the Ban leaves many individuals with a tangential connection to Lebanon or prohibited abortions facing unanticipated criminal liability.

The ambiguity surrounding the Ban's definitions of aiding and abetting render that prohibition vague at its core. It therefore cannot constitutionally be enforced.

2. The Ban's exceptions and affirmative defense are vague.

By carving out exceptions in legalese unfamiliar to ordinary persons, the Lebanon Ban exacerbates, rather than mitigates, its constitutional problems. Both sections of the Ban exempt "any conduct protected by the First Amendment" without further specificity, while at the same time, by their terms, criminalizing speech. Lebanon Code §§ 509.09(F), 509.10 (C). Section 509.10 also exempts from enforcement, and provides an affirmative defense to, anyone who has "third-party" standing "under the tests for third-party standing established by the Supreme Court" to assert a valid "undue burden" claim on behalf of a person seeking an abortion. *Id.* § 509.10(C), (D).[4] Moreover, the exception and affirmative defense are only available unless and until the Supreme Court "overrules" *Roe* or *Casey*. *Id.* §§ 509.10(D)-(F).

All of these terms are not just legal concepts, but highly nuanced, complex, and continuously evolving ones. The First Amendment encompasses a "vast and diverse body of law," *Nat'l People's Action v. City of Blue Island, Ill.*, 594 F. Supp. 72, 79 (N.D. Ill. 1984)—one that has been described as a "vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections." Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 278 (1991). Similarly, the undue burden standard has frequently been criticized as difficult even for experienced jurists to apply. *See, e.g.*, *Memphis Ctr. for Reprod. Health*, 14 F.4th at 451 (Thapar, J., dissenting) ("By asking lower courts to figure out when a burden becomes undue, *Casey* poses a set of subjective questions that do not lend themselves to objective answers."), *reh'g en banc granted, opinion vacated*, 18 F.4th 550 (6th Cir. 2021); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 16 (Tenn. 2000)

[4] It is unclear whether only the affirmative defense applies to those parties or both the exemption and the affirmative defense apply to them—and therefore whether the prosecution or defense would bear the burden of proof on these elements.

(criticizing the undue burden standard as subjective and as providing "essentially no standard at all"). It would be unreasonable to expect even constitutional lawyers—not to mention Plaintiffs—to be able to state with certainty whether they meet these requirements.

Moreover, the precise meaning of these concepts is in flux. What might amount to constitutionally protected speech, third-party standing, or an undue burden has changed and will continue to change over time. That would mean that individuals could face different legal obligations tomorrow or a year from now, making it even more difficult to conform their conduct to the law. Indeed, the Lebanon Ban explicitly invites this sort of uncertainty by tying its undue burden exception to whether *Roe* and *Casey* have been "overrule[d]," Lebanon Code §§ 509.10(D), (E)—forcing laypersons to determine the status of those decisions, including whether they have been distinguished, narrowed, or limited to their facts rather than overruled.

The framing of these exceptions therefore fails the most basic requirement of the vagueness doctrine: that a statute must inform "ordinary people" of the conduct it prohibits and permits. *Johnson*, 576 U.S. at 595; *see, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("people of ordinary intelligence"); *Connally*, 269 U.S. at 391 ("men of common intelligence"); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the State commands or forbids."). It is unreasonable to expect all laypersons even tangentially connected to abortion to determine whether or not their conduct is exempt under these standards. *Cf. United States v. Caseer*, 399 F.3d 828, 839 (6th Cir. 2005) ("[W]e caution against the drafting of criminal statutes, targeted at the general populace, that rely on obscure technical or scientific terms foreign to ordinary persons."). By the same token, the Ban fails to provide sufficiently definite standards to guide enforcement decisions by police officers and prosecutors.

In this respect, the Lebanon Ban is similar to the statute in *Screws v. United States*, which criminalized violations of constitutional rights. 325 U.S. 91, 93 (1945) (plurality opinion). The defendants argued that the statute incorporated the "broad and fluid definitions of due process" expressed in "a large body of changing and uncertain law"—law that "is not always reducible to specific rules, is expressible only in general terms, and turns many times on the facts of a particular case." *Id.* at 95-96. Three justices found "inescapable vagueness due to the doubts and fluctuating character of decisions interpreting the Constitution." *Id.* at 151 (Roberts, J., dissenting). Four more characterized that challenge as "serious," and agreed that such a statute would cast individuals "loose at their own risk on a vast uncharted sea," but construed the statute narrowly to apply only to circumstances where the defendant knew that their conduct violated an established constitutional right. *Id.* at 97-98 (plurality opinion). As written, the Lebanon Ban similarly incorporates complicated and changing legal tests to determine the scope of liability, without any sort of safe harbor.

These ambiguities again have dire consequences for NASW, its members, and WHO/O. Both NASW members and WHO/O are forced to guess whether their counseling, abortion doula, and other services are protected by the First Amendment. By "referring to [the] vast and diverse body of law" that is First Amendment doctrine, the "general exemption does not sufficiently inform [the public] of the activity" that is protected. *Nat'l People's Action*, 594 F. Supp. at 79. Thus, an ordinary person—who is "not [a] scholar[] of First Amendment law"—is unlikely to "feel that she can engage in conduct that violates those proscriptions … in the hope that the powers-that-be will agree, after the fact, that the course of action she chose was protected by the First Amendment[.]" *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *cf. Battle v. Seattle*, 89 F. Supp. 3d 1092, 1106 (W.D. Wash. 2015) ("A

hypothetical ordinance declaring that a city 'has discretion to issue business licenses, but shall grant licenses when the First Amendment requires it' does not describe limits on the City's discretion; it begs the question of what those limits are.").

As to the undue burden exception, Plaintiffs cannot be expected to guess as to whether their members', employees', and volunteers' relationships with their clients suffice to establish third-party standing, nor whether preventing them from providing their services would constitute an undue burden on those clients' reproductive rights. *See* Lebanon Code §§ 509.10(D), (E). Indeed, an individual must show that *their prosecution*, rather than the Ban itself, would constitute an undue burden. Because that standard differs from that explicated in the Supreme Court's precedents, which focuses on whether the challenged "provision" creates an undue burden, they cannot even rely on extant case law. *See Whole Woman's Health v. Hellerstedt*, 529 U.S. 582, 585-86 (2016). In addition, to assert the affirmative defense, an individual cannot rely on the fact that their prosecution would "prevent women from obtaining support or assistance," and have to make some unspecified additional showing. Lebanon Code § 509.10(E)(2). Finally, an individual must guess correctly as to *both* third-party standing *and* undue burden—if they get either complicated legal requirement wrong, they lose, and face criminal sanctions.

Given that Plaintiffs cannot even tell whether the Ban applies to them, much less whether their conduct falls within the Ban's specific prohibitions, it must be found vague in its entirety.[5]

[5] A court may not sever an act's exceptions where it would "extend the law to additional persons or territory," thereby "invading the province of the General Assembly." *State Bd. of Health v. City of Greenville*, 98 N.E. 1019, 1026 (Ohio 1912). That principle makes good sense here: eliminating the exceptions alone would plainly cause the Ban to run afoul of other constitutional provisions. *See Voinovich*, 130 F.3d at 203 (invaliding prohibition with vague medical emergency exception).

B. The Lebanon Ban prohibits speech based on its content in violation of the First Amendment.

Although the Lebanon Ban is riddled with ambiguities, its text appears to encompass services like counseling, the dissemination of truthful information about abortion, and other fundamentally speech-based activities. It therefore violates the First Amendment, both facially and as applied to Plaintiffs. The First Amendment prohibits the government from restricting speech based on "its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012). "In light of the substantial and expansive threats to free expression posed by content-based restrictions," the "Constitution demands that [such] restrictions be presumed invalid … and that the government bear the burden of showing their constitutionality." *Id.* (quotation omitted).

Defendants cannot meet that heavy burden. The Lebanon Ban facially imposes potentially sweeping content-based restrictions, prohibiting not just abortion-related speech—which is unquestionably protected by the First Amendment—but also potentially any speech that conveys information or emotional support to an individual seeking an abortion prohibited by the Ban. To be sure, the Ban then purports to exempt "any conduct protected by the First Amendment." Lebanon Code §§ 509.09(F), 509.10(C). But the Sixth Circuit has consistently held that such exemptions do not save statutes that facially prohibit protected speech. *Dambrot*, 55 F.3d at 1183. Because the Ban imposes such restrictions—and because those restrictions are not narrowly tailored to meet a compelling government interest—it cannot survive strict scrutiny.

1. The Ban restricts protected speech.

The Lebanon Ban's criminalization of any action that "aid[s] or abet[s]" a prohibited abortion, Lebanon Code §§ 509.09(B), 509.10(C), restricts protected speech in several ways. As explained above, this vague term potentially extends to a broad range of conduct, including

protected speech such as the counseling services offered by both NASW members and WHO/O. *See* Light-Scotece Decl. ¶ 11; Smith Decl. ¶¶ 22-23; Alice Decl. ¶ 6; Beth Decl. ¶ 6; *cf. Cramp*, 368 U.S. at 287 (finding that a provision prohibiting "aid, support, advice, counsel, or influence" had a "potentially inhibiting effect on speech").

Although the full extent of the ban is unclear, the specific examples of aiding and abetting provided by the ordinance confirm that the restriction extends to protected speech. For example, the Ban prohibits "abortion doula services" when provided to anyone seeking an abortion that occurs in Lebanon or violates Ohio law. Lebanon Code §§ 509.09(B)(3), 509.10(C)(3). Although the term is undefined by the ban itself and vague in some significant respects, Lebanon's own lawyer broadly defined it to include the provision of all "emotional, informational and/or logistical support to a person who is seeking or having an abortion." Smith Decl. Ex. B. The concepts of "emotional" and "informational support" appear to encompass a wide variety of pure speech, including the counseling services identified above as well as providing factual information about where to obtain an abortion, referring patients to help lines, lending a kind ear, talking with a patient about their choice to have an abortion, and correcting misinformation about abortion. *See* Light-Scotece Decl. ¶¶ 17-18; Smith Decl. ¶ 25.

Similarly, the Ban prohibits "giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions." Lebanon Code §§ 509.09(B)(2), 509.10(C)(2). Although, again, the term is left undefined by the Ban, one standard definition of "instruction" is "an imparted or acquired item of knowledge." *Instruction*, American Heritage Dictionary (5th ed. 2022). The ordinance therefore potentially proscribes the provision of any knowledge about self-administered abortions—including that such abortions are

legal in other jurisdictions, where such abortions can be obtained, and what those abortions involve. *See* Light-Scotece Decl. ¶¶ 14, 17-18; Smith Decl. ¶¶ 23-25.

Such speech is clearly protected. Indeed, courts have routinely held that the First Amendment protects the speaker's right to provide, and the individual's right to hear, abortion-related speech. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (advertisements for abortion services); *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1259-60 (10th Cir. 2016) (holding that there is a First Amendment right to "advocate[] for abortion rights"); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 944 (9th Cir. 1983) ("[T]he state … may not unreasonably interfere with the right of Planned Parenthood to engage in … abortion-related speech activities."); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 319-20 (M.D.N.C. 2012) (describing "the right to advocate for and provide abortion-related services" as "protected") (quotation omitted)); *Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282, 1288 (D. Kan. 1990) ("women have a First Amendment right to receive information about abortion"); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1477 (D. Colo. 1988) (same); *Meadowbrook Women's Clinic, P.A. v. State of Minn.*, 557 F. Supp. 1172 (D. Minn. 1983) (advertisements for abortion services were protected speech); *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 741 (Mo. 2007) ("provid[ing] information and counseling to minors about … abortion" is "core protected speech").

The potential breadth of the Ban simply underscores its constitutional deficiencies. Lebanon cannot seriously argue that a conversation between private individuals about their feelings falls into a category of unprotected speech simply because it relates in some way to abortion. Despite what the city might think, such speech remains constitutionally protected.

2. The Ban's restrictions are content-based.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* "[F]acial distinctions based on a message are obvious" where they "defin[e] regulated speech by particular subject matter." *Id.*

The Lebanon Ban facially prohibits speech based on its content. By the Ban's terms, speech is impermissible if it can be interpreted in some way to facilitate an abortion, including if it consists of emotional support or information about abortion writ large. Lebanon Code §§ 509.09(B)(2), (3); *id.* § 509.10(C)(2), (3). That is a content-based distinction. For example, WHO/O's staff members—both of whom are trained abortion doulas—are clearly permitted to speak to clients seeking abortions about topics wholly unrelated to the abortion (so long as those conversations do not veer into emotional support), but may run afoul of the ordinance if they address a wide range of subjects that constitute emotional or informational support, such as any of the emotions the client might be feeling about having an abortion or basic information regarding medication abortions. Likewise, a social worker can be confident in the legality of speaking to a client about housing issues, but could be guilty of a misdemeanor if she counsels a client deciding whether to terminate a pregnancy. The Ban's proscriptions on speech therefore "draw[] distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163.

Other federal courts have reached the same conclusion when faced with restrictions on abortion-related speech. For example, the Southern District of Indiana held that a statute prohibiting dissemination of "factual information concerning consent requirements and abortion options" was a "content-based restriction on pure speech" that was "subject to strict scrutiny."

Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health ("PPINK"), 258 F. Supp. 3d 929, 953 (S.D. Ind. 2017). Likewise, the District of Colorado found that regulations prohibiting counseling and referral for abortion services "represent content-based censorship." *Planned Parenthood Fed'n of Am.*, 680 F. Supp. at 1477.

3. The Ban's content-based restrictions fail strict scrutiny.

Because the Ban is a content-based restriction, it is "presumed invalid" and "the [g]overnment bears the burden of showing [its] constitutionality." *Alvarez*, 567 U.S. at 716; *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."). To do so, Lebanon must demonstrate that the Ban is both "necessary to serve a compelling state interest [and] narrowly [tailored] to achieve that end." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983). Defendants cannot.

As an initial matter, the City cannot show that any interest supporting a total ban on all abortions in Lebanon, with no exceptions, is legitimate, much less compelling. Even if that were possible, however, Defendants cannot show that the Ban's speech restrictions—including on abortion counseling, providing information about abortion, instructions regarding self-administered abortions, and emotional support—are necessary and narrowly tailored to serve any such interest. As the Supreme Court has made clear, content-based restrictions are not necessary to advance a state interest—even when they "promote" that interest—if the state has "adequate content-neutral alternatives." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992). Similarly, speech restrictions are only narrowly tailored if they are the "least-restrictive means available to serve [the] compelling government interest." *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015). "[W]holesale bans on types of expression"—like the speech

restrictions at issue here—"are usually invalidated on the ground that they clearly fail a 'least-restrictive means' analysis." *Denton v. City of El Paso, Tex.*, 861 Fed. App'x 836, 840 (5th Cir. 2021) (collecting cases).

Here, Lebanon's speech restrictions are neither necessary nor the "[least] restrictive means of furthering" any purported interest in banning abortion itself, because "[n]othing prohibits the government from regulating directly the conduct the government identifies as problematic." *Speet v. Schuette*, 889 F. Supp. 2d 969, 977 (W.D. Mich. 2012), *aff'd*, 726 F.3d 867 (6th Cir. 2013). Namely, the City can directly regulate abortion itself to the extent permitted by the Constitution. "But what the [City] cannot do without violating the First Amendment is categorically prohibit the speech … that may sometimes be associated with the … conduct." *Id.* Because the Ban's censorship provisions fail to "focus narrowly and directly on the conduct it seeks to prohibit"—not to mention on any conduct that it is constitutionally permitted to prohibit—it cannot survive strict scrutiny. *Id.; see also, e.g.*, *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (invalidating ban on handbill distribution that was intended to prevent littering because the city could pass laws directly penalizing littering).

Moreover, many of the speech restrictions imposed by the Ban fail even to advance—much less are *necessary* to advance—any purported interest in outlawing abortion. For example, Lebanon cannot "prove that the restriction" on emotional support to pregnant individuals "furthers" any interest in preventing abortions, as required by strict scrutiny. *Reed*, 576 U.S. at 171. Nor can Defendants show that they will avert abortions by banning information (like instructions regarding "self-administered abortions") that exists on the internet.[6] *PPINK*, 258 F.

[6] *See, e.g.*, Planned Parenthood, *How Do I Get the Abortion Pill*, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-do-i-get-the-abortion-pill (last visited May 11, 2022) (describing how to obtain a medication abortion).

Supp. 3d at 954 (state failed to show how "prohibiting … information" about abortion advanced its interests "particularly given that such information is widely available to the public").

4. The Ban's First Amendment exception does not save its unconstitutional prohibition on abortion-related speech.

Nor is the Ban salvaged by language stating that the ordinance should not be "construed to prohibit any conduct protected by the First Amendment[.]" Lebanon Code § 509.09(B); *see also id.* § 509.10(C). Courts, including the Sixth Circuit, have routinely rejected arguments that provisions of this ilk are sufficient on their own to "abate[]" "any concerns [that a] policy will reach constitutionally protected speech." *Dambrot*, 55 F.3d at 1183 (citing *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995)); *Coll. Republicans*, 523 F. Supp. 2d at 1021 (explaining that a First Amendment exception did not "'save' from First Amendment condemnation" an otherwise unconstitutional proscription of speech); *UWM Post, Inc. v. Bd. Of Regents of Univ. of Wisconsin Sys.*, 774 F. Supp. 1163, 1177-78 (E.D. Wisc. 1991) (policy held overly broad notwithstanding its guidance pledging conformity with First Amendment values and offer of narrowing construction); *Nat'l People's Action*, 594 F. Supp. at 76-80 (N.D. Ill. 1984) (speech restrictions were not "cure[d]" of First Amendment violations by exemption for any activity "upon which such restrictions would be invalid, under federal or state law or constitution"). A general exception provides little comfort that the government will not enforce a specific, explicit ban on protected speech.

Adopting this common-sense approach in *Dambrot v. Central Michigan University*, the Sixth Circuit found that a university policy was unconstitutional despite including a clause stating the policy would not be applied "so far as to interfere impermissibly with individuals['] rights to free speech." 55 F.3d at 1183. As the court explained, such language did "nothing to ensure the University will not violate First Amendment rights" because it was "clear from the

text of the policy that [protected speech] can be prohibited upon the initiative of the university." *Id.*[7] Because the policy "[o]n its face … [swept] within its ambit … constitutionally protected activity," it "present[ed] a realistic danger the University could compromise the protection afforded by the First Amendment." *Id.* (quotation omitted).

So too here. The Lebanon Ban proscribes "on its face" a substantial amount of protected speech, including *any* information and emotional support provided to individuals seeking prohibited abortions. A boilerplate exception cannot save what is otherwise an unconstitutional edict. Even if Lebanon could be trusted not to enforce its ordinance against protected speech, the exemption itself is so vague that it has the "additional problem of chilling constitutional speech." *Nat'l People's Action*, 594 F. Supp. at 76. As explained above, *see supra* pages 19-20, ordinary people are likely unable "to determine (when judges have so much difficulty doing so) whether any particular speech or expressive conduct will be deemed (after the fact) to fall within the protections of the First Amendment." *Coll. Republicans*, 523 F. Supp. 2d at 1021. NASW's members and WHO/O's employees—along with anyone else potentially subject to the ordinance—are thus more likely to "heed the relatively specific proscriptions of the [Ban]" than they are to rely on the exemption. *Id.*; *see also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (holding that vague statute "inhibite[d] … sensitive areas of basic First Amendment freedoms"

[7] The policy prohibited "racial [or] ethnic harassment," defined as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment," including "demeaning or slurring individuals … because of their racial or ethnic affiliation," as well as "using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation." *Dambrot*, 55 F.3d at 1182. The court concluded that this language—which was "sweeping and seemingly drafted to include as much and as many types of conduct as possible"—"reache[d] a substantial amount of constitutionally protected speech." *Id.*

because its "uncertain meaning" required "teachers and public servants [] to steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked").

Because the Lebanon Ban imposes unconstitutional burdens on speech and threatens to further chill the exercise of First Amendment rights, it is invalid.

C. Section 509.10 of the Lebanon Ban exceeds the City of Lebanon's Home Rule Authority under the Ohio Constitution.

Section 509.10 of the Ban is unconstitutional for the additional reason that it "contravene[s] the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor," exceeding Lebanon's power under the Ohio Constitution. *City of Cleveland v. Betts*, 154 N.E.2d 917, 919 (Ohio 1958); *see also id.* at syllabus. Article XVIII, Section 3 of the Ohio Constitution—often referred to as the "Home Rule Amendment"—grants municipalities "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Under the Amendment, a municipal ordinance exceeds Home Rule Authority if "(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *City of Dayton v. State,* 87 N.E.3d 176, 182 (Ohio 2017) (quoting *Mendenhall v. Akron*, 881 N.E.2d 255 (Ohio 2008)). Section 509.10 meets each condition.

The first two requirements are straightforward. First, the Lebanon Ban plainly does not constitute a mere exercise of "local self-government": rather than "relat[ing] 'solely to the government and administration of the internal affairs of the municipality,'" it imposes a "penalty … aimed at curbing … regulated behavior," purportedly "for the general welfare of [Lebanon's] citizens." *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967, 973 (Ohio 2008) (quoting *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906 (Ohio 2008)). Second, Ohio's laws

concerning abortion constitute general laws, in that they constitute "statewide and comprehensive legislative enactment[s]" establishing generally applicable regulations across the state. *Canton v. State*, at syllabus, 766 N.E.2d 963, 964-65 (Ohio 2002). Indeed, Ohio's abortion regulations are nothing if not comprehensive—they regulate everything from the method of abortion to the reasons one might have for seeking an abortion.[8]

As to the third requirement, the Ban conflicts with Ohio's numerous abortion statutes. The Ohio Supreme Court has explained that "a municipal ordinance is in conflict with state law when," as here, "there is a significant discrepancy between the punishments imposed for that behavior," such as when a city imposes misdemeanor penalties for offenses that constitute felonies under state law. *Mendenhall*, 881 N.E.2d at 264. In *Cleveland v. Betts*, the Ohio Supreme Court held that a conflict existed between a municipal ordinance and a state law that punished the crime of carrying concealed weapons as a misdemeanor and a felony, respectively. 154 N.E.2d at 919. The court explained that the ordinance "contravene[d] the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor, and this creates the kind of conflict contemplated by the [Ohio] Constitution." *Id.* The court pointed to the difference in penalties between misdemeanor offenses and felony offenses, and rejected the idea that municipalities should be able to pass ordinances that make felonious acts under state law into misdemeanors "and finally dispose of such offenses in the Municipal Court." *Id.* The court therefore invalidated the ordinance, holding that by creating a discrepancy in penalties, Cleveland's ordinance exceeded its authority.

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[8] *See, e.g.*, Ohio Rev. Code §§ 2919.10 (performing or attempting to perform an abortion that was being sought because of Down syndrome); 2919.123 (unlawful distribution of an abortion-inducing drug); 2919.124 (ban on telemedicine abortion); 2919.15(C) banning a common second-trimester method of abortion); 2919.151 ("partial birth feticide"); 2919.17 (terminating or attempting to terminate a human pregnancy after viability).

Because it makes aiding or abetting the violation of any Ohio abortion restriction, even those that carry felony penalties, a first-degree misdemeanor, Section 509.10 is unconstitutional under *Betts*. Section 509.10 prohibits a person from performing or aiding or abetting "an abortion in violation of any statute enacted by the Ohio legislature, including section 2919.195 of the Ohio Revised Statutes" and specifies that any such violation constitutes a first-degree misdemeanor. Lebanon Code § 509.10(B), (J). In contrast, Section 2919.195 of the Ohio Revised Code, which is explicitly referenced in the ordinance, makes "performing or inducing an abortion after the detection of a fetal heartbeat" a fifth-degree felony, so aiding or abetting an abortion in violation of Section 2919.195 is also a fifth-degree felony. Ohio Rev. Code § 2923.03(F). Likewise, the other Ohio laws that regulate or restrict the performance of abortion are felonies.[9] Because Section 509.10 penalizes the same conduct as these state laws, but as a misdemeanor, it is invalid under Article XVIII, Section 3 of the Ohio Constitution.

II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

Unless Lebanon is enjoined from enforcing the Ban, Plaintiffs face multiple injuries that cannot be remedied later. Specifically, the Ban violates Plaintiffs', their members', their employees', and/or their volunteers' constitutional rights to fair notice and free speech; places Plaintiffs, their members, their employees, and/or their volunteers at risk of prosecution; and harms their missions and/or reputations. These effects constitute immediate, irreparable harm.

[9] *See, e.g.*, Ohio Rev. Code §§ 2919.10(C) (performing or attempting to perform an abortion that was being sought because of Down syndrome, fourth-degree felony), 2919.123(E) (unlawful distribution of an abortion-inducing drug, fourth-degree felony or third-degree felony depending on previous convictions), 2919.124(E) (ban on telemedicine abortion, fourth-degree felony or third-degree felony depending on previous convictions), 2919.15(C) (ban on a particular method of abortion, fourth-degree felony); 2919.151(D) (ban on a particular method of abortion, second-degree felony), 2919.17 (F) (post-viability abortion, fourth-degree felony).

The Sixth Circuit has long made clear: "[I]f it is found that a constitutional right is being threatened or impaired, *a finding of irreparable injury is mandated*." *ACLU of Ky.*, 354 F.3d at 445 (emphasis added); *see also Mich. State A. Phillip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("[W]hen constitutional rights are threatened or impaired, irreparable injury is presumed.") (citations omitted); *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("[A] plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights.").

Specifically, Plaintiffs have shown that the Ban threatens their right to due process under the Fourteenth Amendment and their right to freedom of speech under the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "Thus, to the extent that [Plaintiffs] can establish a substantial likelihood of success on the merits of [their] First Amendment claim, [they] also [have] established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). As for due process, the Sixth Circuit has held that plaintiffs who showed "a substantial likelihood of success on [a] vagueness argument" established "potential irreparable injury in the form of a violation of constitutional rights." *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400-01 (6th Cir. 1987).

Indeed, Plaintiffs' constitutional rights have already been infringed. The Ban's vagueness and potentially sweeping breadth have had a chilling effect on Plaintiff NASW's members, who are avoiding providing services related to or counseling clients about abortion because it may constitute "aiding or abetting" an abortion or providing prohibited "abortion doula services." Smith Decl. ¶ 36. To avoid potential prosecution, some members have stated that they may not

accept future clients from Lebanon, may decline to provide pregnancy-related counseling, or might halt an ongoing session if pregnancy or abortion is brought up. *Id.* Similarly, WHO/O has had to assess which of its services might involve legal risks, obtain legal advice, and even change the manner in which it provides its services, by declining to establish a volunteer-staffed support hotline. *See* Light-Scotece Decl. ¶¶ 21-23. Thus, the threat to Plaintiffs' rights is real.

Moreover, the threat of criminal prosecution itself constitutes irreparable harm. Depending on how the Lebanon Ban is interpreted by police and prosecutors in Lebanon, both NASW's members and WHO/O's employees could be at risk. The Ban may outlaw a wide variety of emotional, mental, or physical support or information sharing for pregnant people prescribed by the NASW *Code of Ethics*. *See* Smith Decl. ¶¶ 19-28. While many NASW members have noted they will decline to provide pregnancy or abortion-related counseling services to clients in Lebanon, other NASW members have indicated that they will continue assisting any client needing assistance, including within the limits of the City of Lebanon, even if it puts them at risk of prosecution. *Id.* ¶ 36. In addition to risking criminal penalties, NASW members who are convicted may also face the loss of their licenses or other professional sanctions. *Id.* ¶ 17. Similarly, WHO/O has continued to provide financial aid and practical support in the form of transportation, housing, and other assistance to help patients access contraception, emergency contraception, and abortion services, all of which could expose WHO/O's employees to prosecution. *See* Light-Scotece Decl. ¶ 24.

Finally, the Ban and the resulting risk of prosecution further harm the activities of NASW's members and WHO/O. By labeling their standard professional services and longstanding activities as unlawful, both "face[] irreparable injury to [their] reputation[s] if injunctive relief is denied." *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 676

F. Supp. 2d 649, 654 (N.D. Ohio 2009). "Charities … depend on their reputation and 'customer'—*i.e.*, donor—goodwill to continue to operate." *Id.* It is also not clear whether donations to WHO/O would constitute unlawful aiding or abetting. Light-Scotece Decl. ¶ 14. Conversely, if WHO/O and NASW members are forced to turn away potential clients in Lebanon, they will suffer distinct harm to their missions and reputations, which will not be easy to overcome if they are able to resume services there. *See id.* ¶¶ 23-24; Smith Decl. ¶ 21; Alice Decl. ¶¶ 10-11; Beth Decl. ¶¶ 10-11. For these reasons, both NASW and WHO/O face severe irreparable injuries.

III. The Remaining Preliminary Injunctive Factors Weigh in Favor of an Injunction.

For many of the same reasons, a preliminary injunction would do no substantial harm to Defendants and would serve the public interest by vindicating Plaintiffs' and others' constitutional rights. "[B]ecause the questions of harm to the parties and the public interest generally cannot be addressed properly … without first determining if there is a constitutional violation, the crucial inquiry often is … whether the statute at issue is likely to be found constitutional." *Connection Distrib. Co.*, 154 F.3d at 288.

Indeed, because Plaintiffs are certain to prevail in showing that the Ban is unconstitutional, "it is … questionable whether the City has any 'valid' interest in enforcing the Ordinance." *Planned Parenthood Ass'n of Cincinnati*, 822 F.2d at 1400; *see also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir.2001) ("[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment."). In contrast, Plaintiffs "face[] the prospect of subjecting" themselves to "criminal liability" for several more months or years if the Ban is not enjoined, *Women's Med. Pro. Corp. v. Taft*, 114 F. Supp. 2d 664, 704 (S.D. Ohio 2000)—a harm that outweighs any suffered by Lebanon.

Similarly, "the public interest is promoted by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 896 (6th Cir. 2012). And "the public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional," including those dealing with abortion. *Planned Parenthood Ass'n of Cincinnati*, 822 F.2d at 1400; *see also Preterm-Cleveland v. Att'y Gen. of Ohio*, 456 F. Supp. 3d 917, 938 (S.D. Ohio 2020) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). Moreover, enjoining the Ban would ensure that the public can continue to receive services from Plaintiffs while litigation proceeds. Thus, "[t]he public interest in preserving the status quo and in ensuring access to the[se] constitutionally protected health care services while this case proceeds is strong." *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 961 (S.D. Ohio 2015).

CONCLUSION

The Court should preliminarily enjoin Defendants from enforcing the Lebanon Ban pending final judgment in this case.[10] Alternatively, the Court should convert this motion to a motion for summary judgment, expedite briefing and consideration of that motion, and enter judgment for Plaintiffs.

[10] The injunction should also make clear that Lebanon cannot later prosecute actions that took place while the preliminary injunction was pending. While the Ban is enjoined, it is not lawfully in effect, and therefore prosecutions may not be instigated under it for actions during that period. Moreover, allowing Lebanon to prosecute those who relied on the injunction would again violate "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties," which "is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191 (1977).

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