IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO

MADELINE MOE, et al. Plaintiffs, v. DAVID YOST, et al. Defendants.	Case No. 24-cv-002481 Judge Holbrook

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

Today, Madeline Moe and Grace Goe have unfettered access to their physicians at Cincinnati Children's and Nationwide Children's Hospital, who have been monitoring and treating them for gender dysphoria for years. Right now, Madeline, Grace, and their parents can evaluate with their longstanding and highly qualified Ohio providers what medical care is necessary based on their age, pubertal status, or gender dysphoria symptoms, and then pursue that care. That ends on April 24, 2024—the date H.B. 68 is set to go into effect. Absent a TRO from this Court, on April 24, the Minor Plaintiffs' physicians will be prohibited from engaging in any conduct that "aids and abets" the Minor Plaintiffs in obtaining further care, even from another provider. R.C. 3129.02(A)(3). H.B. 68 subjects the Minor Plaintiffs' physicians to professional discipline for monitoring, evaluating, and prescribing the puberty blockers and hormone treatments that Minor Plaintiffs had planned to receive as part of their treatment plan. This interference and the removal of these medical options for these plaintiffs is a "concrete" harm (*contra* Opp. 10) that will occur

absent a TRO. Without a TRO, the Minor Plaintiffs will not be able to consult with their physicians about obtaining further medical care until this Court issues a decision on the underlying merits. Defendants' focus on future treatment dates is not grounded in reality: the physician-patient relationship will change immediately once H.B. 68 goes into effect, to the Minor Plaintiffs' instant detriment. This Court should not accept the Defendants' narrow view of the harms to the Minor Plaintiffs and their families, especially given Plaintiffs' likelihood of success on the merits of their constitutional claims and the equitable factors that weigh in favor of a TRO.

Plaintiffs respectfully request that this Court keep the parties in their same position until this matter can be heard more completely. Plaintiffs ask the Court to grant the TRO to prevent the immediate, irreparable harm that the Minor Plaintiffs and their parents will suffer if the Health Care Ban goes into effect on April 24.

ARGUMENT

I. Plaintiffs Have Demonstrated Irreparable Harm

Minor Plaintiffs will suffer immediate, irreparable harm absent a TRO. Defendants' arguments to the contrary are wrong for many reasons.

First, Defendants cite the wrong legal standard. Where (as here) Plaintiffs are not seeking a TRO *ex parte*, the standard for issuing a TRO is the same as the standard for issuing a preliminary injunction. *See, e.g.*, *Total Quality Logistics, LLC v. Love*, Clermont C.P. No. 2015 CVH 01223, 2016 WL 242880, at *3 (Jan. 8, 2016) ("Where both parties had notice of, were present at, and participated in the temporary restraining order hearing, the court may treat the application for a temporary restraining order as an application for a preliminary injunction."); *Rios v. Blackwell*, 345 F. Supp. 2d 833, 835 (N.D. Ohio 2004) ("As long as there is notice to the other side and an opportunity to be heard, the standard for a preliminary injunction is the same as that for a temporary restraining order."); *LNB Bancorp, Inc. v. Osborne*, N.D. Ohio No. 1:09-CV-00643-AA, 2009 WL

805136, at *2 (Mar. 28, 2009) (same). The relevant question is what harm the Plaintiffs will suffer absent relief before a decision on the merits, not just in the next few weeks. *See, e.g.*, *Western Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1008 (D. Or. 2019) ("in considering irreparable harm for a contested TRO, the Court is not limited only to harm that may occur before a preliminary injunction motion can be heard," but rather "may look to whether the plaintiff has shown a likelihood of irreparable harm occurring between the time of the motion and when a final decision on the merits can be entered").

Second, puberty does not arrive by appointment, as Defendants' Response erroneously suggests. The Affidavits submitted with the Motion show that Minor Plaintiffs will suffer immediate harm from the interruption of their medical care. Grace Goe's physicians are continuously monitoring her for signs of puberty, Goe Aff. ¶ 13, which could emerge any day now, and certainly before her next visit to Nationwide Children's or before a ruling on the merits. Indeed, Dr. Corathers has explained that the ongoing care patients like Grace currently need is precisely the kind of care doctors can no longer provide once the Health Care Ban goes into effect: for patients "who are candidates for pubertal suppression" whom she would ordinarily "meet with and monitor … until they met the criteria to initiate treatment, i.e. demonstrate Tanner 2 puberty development," she "cannot provide that care to those patients, who will now have to travel out of state to see a clinician for that monitoring and to initiate that treatment." Corathers Aff. ¶ 75. That monitoring, consultation, and care will all abruptly end for Grace Goe on April 24 absent relief.

Similarly, Madeline Moe's medical care will immediately be in limbo. Although she can continue receiving pubertal suppression, the Ban prohibits her doctors at Cincinnati Children's from aiding or abetting the provision of care that she is not currently receiving. But Madeline must maintain a continuity of care to monitor her hormone levels and evaluate when to begin hormone

therapy, and she needs the ongoing and continued cooperation of her Ohio physicians to make this time-sensitive determination.[1] Moe Aff. ¶ 14, 17. Madeline will thus be unable to "initiate that next step in treatment with [her] established care providers in Ohio" once the Ban goes into effect. Corathers Aff. ¶ 75.

Moreover, Grace, Madeline, and their parents will be immediately harmed if they cannot go to their existing medical providers for referrals, transfer of medical records, or other assistance regarding next steps, all of which may be prohibited by the "aiding and abetting" provision of the Health Care Ban. Indeed, without a TRO, there is no reason to believe that Grace will be able to keep the July appointment that Defendants emphasize: the Ban prohibits conduct that "aids or abets" the prescription of pubertal suppression "for the purpose of assisting the minor individual with gender transition" unless that individual has the benefit of the preexisting care exception in R.C. 3129.02(B). Grace and Madeline's doctors are "pencils down" starting April 24, including with respect to conduct that "aids or abets" obtaining new care elsewhere. That provision ensures that Grace and Madeline's harms are immediate, regardless of whether they need a specific medication prescribed prior to a preliminary injunction hearing or merits trial. Both Grace and Madeline have longstanding relationships with their providers, who they have been seeing since they were five or six years old. They have established clinical teams in Ohio that their parents know and trust, and who have been assisting them in developing individualized, age-appropriate, evidence-based treatment plans for their gender dysphoria. It is an immediate and irreparable harm for them to lose access to that clinical care in Ohio, especially given that their providers may not

[1] And it is not as though care can be so easily obtained elsewhere at a moment's notice. Wait times for new patients can be over a year. *See*, e.g., McMillan & Schoenbaum, *States that protect transgender health care now try to absorb demand*, AP News (Aug. 15, 2023), https://apnews.com/article/transgender-gender-affirming-care-health-texas-630f0a8ff873c33b7258cf0c3f6a2859.

be permitted to assist them with obtaining care from another physician out of state.

Finally, Defendants entirely fail to address the immediate constitutional harm, which is a sufficient injury to warrant a TRO. *See, e.g.*, *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (holding that when "a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."); *Magda v. Ohio Elections Comm.*, 58 N.E.3d 1188, 2016-Ohio-5043, ¶ 38 (10th Dist.) (relying on *Bonnell* to hold that a "finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well"). Given Plaintiffs' strong showing on the merits of their constitutional claims, they also satisfy the harm prong of the test for a TRO.

II. Plaintiffs Have Demonstrated Likelihood of Success on the Merits.

A. Plaintiffs have demonstrated a likelihood of success on their single-subject rule claim.

Defendants misread the standing holding of *Preterm-Cleveland v. Kasich*, which provides only that a plaintiff must have standing "as to each provision the party seeks to have *severed* from the enactment." 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 30 (emphasis added). A single-subject plaintiff need not establish standing on every aspect of a challenged law merely to bring suit. Such a draconian limitation would turn the single-subject rule on its head; the more disunified the bill—and the more offensive to the Ohio Constitution—the harder it would be to bring a challenge. *See Akron Metro. Hous. Auth. Bd. of Trustees v. State*, 10th Dist. Franklin No. 07AP-738, 2008-Ohio-2836, ¶ 14 ("to deny plaintiffs standing would insulate legislation from one-subject constitutional scrutiny unless a coalition of plaintiffs could be assembled to cover the wide variety of subjects amassed in a single piece of legislation").

At most, then, Defendants are merely seeking to limit any injunction to severing the Health Care Ban alone. But that argument also fails, because severance is not the appropriate remedy here.

See Akron Metro. Hous. Auth. Bd. of Trustees ¶¶ 26–27. In a single-subject claim, severance is only feasible—and *Preterm-Cleveland* is only relevant—where the court can discern a "primary" subject of the bill from which the challenged portion may be severed. Where there is no "primary" subject, the entire bill is invalid. *Id.* ¶ 27; *see also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 500, 715 N.E.2d 1062 (1999) (where attempting to carve out a primary subject "would constitute a legislative exercise wholly beyond the province of this court," the appropriate remedy is invalidation *in toto* rather than severance); *City of Toledo v. State*, 2018-Ohio-4534, 123 N.E.3d 343, ¶ 29 (6th Dist.) (similar). It is uncontested that Plaintiffs have standing to challenge the Health Care Ban, but the Health Care Ban is no more "primary" to H.B. 68 than the Sports Prohibition. They are two coequal laws that the General Assembly logrolled into one. As in *City of Toledo*, "the originally-introduced legislation had a discernible primary subject," but the final bill did not, rendering it "not possible to save any provisions of the bill." *Id.* at ¶ 30.

On the merits, Defendants attempt to evade the single-subject rule by articulating a "subject" at an extreme level of abstraction, in order to mask a blatant disunity of topics. Courts reject that maneuver. *See, e.g.*, *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (1991); *Linndale v. State*, 19 N.E.3d 935, 2014-Ohio-4024, ¶ 18 (10th Dist.); *City of Toledo*, 2018-Ohio-4534, ¶ 26. In *Hinkle*, for example, the bill made changes to elected judiciary structure, but also revised a law that regulated local option elections. *Hinkle* at 148. The Supreme Court rejected the government's argument that the bill encompassed "election matters," remarking that it was "akin to saying that securities laws and drug trafficking penalties have sales in common[.]" *Id.* Similarly, the Tenth District found a "blatant disunity" of subject matter where a bill made changes to judiciary structure, but also prohibited texting and driving. It rejected the government's argument that these provisions both modified the "authority, scope, and

jurisdiction" of courts. *Linndale* ¶ 18; *see also, e.g.*, *Akron Metro. Hous. Auth. Bd. of Trustees* ¶ 21 ("modifying local authority" was too broad a concept to connect zoning regulations with school extracurricular activities).

It is simply false that the Health Care Ban and the Sports Prohibition share a purpose, however misguided, of "protecting children." Opp. 19. Even setting aside whether children can be "protected" by being denied health care for a serious condition, the Sports Prohibition is not limited to children at all. It extends to adults in collegiate-level athletics. In fact, the only purportedly common thread that Defendants articulate is the general category of people who are the target of H.B. 68's restrictions: transgender Ohioans. Defendants argue that both Acts respond to what they call an "increasingly pressing social trend" warranting "protect[ion]": Ohioans being transgender.

That is not—and Plaintiffs submit, cannot be—sufficient grounds to constitute a single subject. By Defendants' logic, if the state became concerned by a "growing trend" of people who are Jewish, it could simultaneously ban wearing yarmulkes in public schools and restrict the sale of Kosher food in grocery stores, citing restrictions on Jewish Ohioans as a common "purpose" to satisfy the single-subject rule. Courts do not countenance that approach. It is not a cognizable common "purpose" to impose restrictions on a category of people in multiple, utterly unrelated aspects of their lives. Defendants themselves point to *City of Toledo* as an example of an absurd connection between subject matters, and that case illustrates the general point. The state in *City of Toledo* unsuccessfully argued that pet store licensing, minimum wage standards, and humane society laws shared a common purpose of "standardiz[ing] the manner in which businesses are regulated[.]" 2018-Ohio-4534, ¶ 17. Merely sharing a common object of regulation—local businesses in *City of Toledo*, and transgender Ohioans here—does not suffice to connect disjointed areas of regulation. *Id.* All the more so when the targets are not entities, but people.

B. Plaintiffs have demonstrated a likelihood of success on their claim that H.B. 68 unconstitutionally restricts the sale and purchase of health care under Article I, Section 21 of the Ohio Constitution.

Defendants first attempt to drastically limit the HCFA's scope by rewriting it. They argue that although the Amendment's text forbids the state from prohibiting "the purchase or sale of health care," it in fact protects only the purchase or sale of *whatever health care the state chooses not to ban*. According to Defendants, the government has unlimited authority to declare particular care or practices to be "wrongdoing in the health care industry," Ohio Const. Art. I Sec. 21(D), and thus exempt from the HCFA.

First, that cramped interpretation stands contrary to both the plain text and history of the HCFA. If the state bans a type of health care, then obviously it has prohibited Ohioans from the the "purchase" or "sale" of that health care. *But see* Ohio Const. Art. I Sec. 21(B) ("No ... state ... law or rule shall prohibit the purchase or sale of health care"). If the HCFA's drafters had intended for it to protect only a very limited range of decisions—such as how to pay for health care, or which provider to select—rather than the core decision of whether to purchase that particular health care at all, they would have written it to say so. They did not. They even assured the public that the HCFA *does* prevent the government from restricting any particular type of health care. *See* Mot. at 24–25 (citing proponent statements).

Second, in Defendants' reading, the HCFA's "fraud" or "wrongdoing" exception would subsume the rest of the Amendment by allowing the government to redefine "health care" as "wrongdoing" at will. They articulate no limiting principle to this purported power. Indeed, under their circular reasoning, any matter "in the health care industry" that the legislature prohibits is *ipso facto* "wrongdoing" rather than "health care," and so is always exempt from the HCFA.

A simple hypothetical illustrates the absurdity. Suppose Ohioans passed a constitutional amendment providing that the state may not "prohibit the purchase or sale of fruit," with the caveat

that the state may continue to regulate "fraud" or "wrongdoing in the agricultural industry." In Defendants' view, the General Assembly could lawfully prohibit the purchase of apples, because merely by passing such a prohibition, it had defined the exchange of apples to be "wrongdoing"—or even had determined that apples are not "fruit" at all. No court would credit that argument, and for good reason. "Fruit," like "health care," is a plain language term with a definition. Where it appears in the Constitution, it cannot simply mean whatever the legislature wishes it to mean. The protections of Ohio's bill of rights—which includes the HCFA—are to be given force and effect *against* the General Assembly, not rendered meaningless through legislative wordplay. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379, ¶ 94 ("we should avoid any construction that makes a [constitutional] provision meaningless or inoperative") (internal citation and quotation marks omitted); *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 47 (Kennedy, J., concurring) ("the purpose of a bill of rights is to protect people from the state") (internal citation and quotation marks omitted).

Defendants next argue that a plain-text reading of the HCFA would lead to undesirable results, because "any service labeled 'health care' … would be constitutionally protected." Opp. at 22. They accompany this bald assertion with an assemblage of hyperbolic examples. Defendants' histrionics are unwarranted. Again, "health care" is a term that can be defined; it does not simply mean whatever an individual patient or practitioner declares it to mean. *See* Mot. at 22 (noting statutory and dictionary definitions). For example, Defendants declare that a ruling for Plaintiffs would somehow create constitutional protection for female genital mutilation. That is absurd. Genital mutilation serves no medical purpose and treats no medical condition—and Ohio's statutory ban on it already exempts "a procedure performed for medical purposes" by a licensed

professional. *See* R.C. 2903.32(C). The HCFA does no more. Nor would it protect other actions that serve no medical purpose, such as recreational drug use. Laws or rules that pre-date the HCFA itself, such as Ohio's ban on assisted suicide, would be exempt under the HCFA's grandfather provision. *See* Art. I Sec. 21(D) ("This section does not affect laws or rules in effect as of March 19, 2010"); R.C. 3795.02 (ban on assisted suicide, enacted in 2003); *see also* OAC 4731-11-03 (restrictions on anabolic steroids and cocaine hydrochloride, versions of which rule were in effect in 1986, 1998, 2000, and 2009).

Moreover, nothing in the HCFA immunizes physicians from general liability for negligence, malpractice, failure to obtain a patient's informed consent, practicing medicine without a license, or other "wrongdoing." *See* Art. I Sec. 21(D). It is not incompatible with reasonable regulation of the medical profession. A physician who acts negligently or commits malpractice—as would likely be the case with the "lobotomies-for-payment" or "electroshock therapy for minors" that Defendants warn of—would still be liable for their misconduct. *See, e.g.*, *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St. 3d 300, 2010-Ohio-1041, 927 N.E.2d 1112, ¶ 21 (noting that a medical malpractice plaintiff must demonstrate an injury that "was the direct and proximate result of the physician's failure to use ordinary skill, care, and diligence").

This Court need not resolve every possible scenario, nor must it devise a universal definition of "health care" or "wrongdoing" that would resolve any hypothetical Defendants could concoct. That is because this is not an edge case that tests the boundaries of those terms. *See State ex rel. Parisi v. Dayton Bar Ass'n Certified Grievance Committee*, 159 Ohio St.3d 211, 2019-Ohio-5157, 150 N.E.3d 43, ¶ 48 (noting "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more") (internal citation omitted). Gender-affirming care is the accepted standard of care for gender dysphoria, is recognized by every major

medical organization in the United States, and has been widely practiced by Ohio's leading health care providers, at least until H.B. 68. The operative question under the HCFA is not whether the General Assembly—or for that matter, this Court—endorses gender-affirming care, either generally or in a particular patient's case. The question is whether it is "health care" at all. Notably, even H.B. 68 itself effectively admits that gender-affirming care is health care; the law defines the banned "gender transition services" as "any *medical or surgical service* … provided for the purpose of assisting an individual with gender transition ... including *medical services* that provide puberty blocking drugs, cross-sex hormones, [etc.]" 2024 Sub.H.B. No. 68 (enacting R.C. 3129.01(F)) (emphasis added). Simply put, if gender-affirming care constitutes "wrongdoing" rather than "health care," those terms have no meaning outside of legislative whims.

a. Plaintiffs have demonstrated a likelihood of success on their equal protection and due course of law claims

Defendants do not meaningfully address Plaintiffs' equal protection and due course of law claims. On equal protection, Defendants attempt to sidestep the law's sex-based classification by describing the distinction it draws as "biological granularity." Opp. 23. But "biological granularity" *is* the problem: the law treats adolescents differently based on their sex designated at birth. According to Defendants, this classification is not a constitutional problem because the law bars both those designated male at birth *and* those designated female at birth from receiving gender-affirming care. The Supreme Court rejected this precise argument in *Bostock v. Clayton County*, 590 U.S. 644 (2020), explaining that sex can "play[] an essential but-for role" even "if a member of the opposite sex might face the same outcome from the same policy." *Id.* at 671-72. And that is only one of three ways the Health Care Ban classifies based on sex. Mot. 28-30. Defendants entirely ignore the other two, objecting instead that transgender status is not a "suspect classification." Opp. 24. But Plaintiffs notably never made such an argument in their motion.

Defendants' response to Plaintiffs' due course of law claim is equally misguided. The issue is not whether any particular medical intervention is deeply rooted in the nation's history and tradition, but rather whether parents have the right to make decisions concerning the care of their children—"perhaps the oldest of the fundamental liberty interests recognized by [the] Court." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Defendants object that the Due Course of Law Clause plays no role when parental decisions run counter to the State (Opp. 26), but the whole purpose of that Clause is to protect parental autonomy from state interference.

III. The Equitable Factors Favor Plaintiffs

The equities weigh strongly in favor of granting Plaintiffs' request for temporary relief. Plaintiffs' motion asks the Court to maintain the status quo while the Court assesses the constitutionality of the Health Care Ban. Defendants, by contrast, ask the Court to allow a massive change in pediatric health care—a change the Ohio Children's Hospital Association has described as having a "catastrophic impact" and "devastating to kids and their families"[2]—before the Court has even had an opportunity to assess the merits. Defendants object that the State will be harmed if the Ban is put on hold, but that is correct *only if* the State is also right that the Ban is constitutional. Defendants have identified no reason to upend care for adolescents while that question is resolved. Moreover, the TRO will be in effect only until a ruling on the merits. There is little reason to think that the State's interest outweighs the immediate risk to the health care of Minor Plaintiffs and Ohio's transgender youth. And while Defendants object that Plaintiffs cannot "appeal to the alleged interest[s] of other Ohio families," Opp. 17, the harm to these families is highly relevant to the public interest. Defendants are wrong to the extent they suggest this facial

[2] Ohio Children's Hospital Association, Media Statement (Dec. 15, 2023), *available at* https://ohiochildrenshospitals.org/press-room/media-statement-regarding-ohio-general-assembly-passage-of-sub-hb-68/.

challenge to the Ban can account for—and apply to—the broader public only if brought as a class action. *Gottlieb v. City of South Euclid*, 157 Ohio App. 3d 250, 260, 2004-Ohio-2705810 N.E.2d 970, (8th Dist.) (Rocco, J., concurring).

CONCLUSION

For the foregoing reasons, Plaintiffs ask that this Court enter a temporary restraining order enjoining the implementation and enforcement of H.B. 68 in whole or in part, as specified in Plaintiffs' Motion for Preliminary Injunction Preceded by Temporary Restraining Order if Necessary.

Respectfully submitted,

/s/ Freda J. Levenson

Freda J. Levenson (45916)
Trial Attorney
Amy Gilbert (100887)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
Levenson: (216) 541-1376
Office: (614) 586-1972
flevenson@acluohio.org
agilbert@acluohio.org

David J. Carey (88787)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Ave., Ste. 203
Columbus, Ohio 43206
(614) 586-1972
dcarey@acluohio.org

Chase Strangio*
Harper Seldin*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500

Miranda Hooker*
Kathleen McGuinness*
Jordan Bock*
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
mhooker@goodwinlaw.com
kmcguinness@goodwinlaw.com
jbock@goodwinlaw.com

Allison DeLaurentis*
GOODWIN PROCTER LLP
One Commerce Square
2005 Market Street, 32nd Floor
Philadelphia, PA 19103
(445) 207-7800
adelaurentis@goodwinlaw.com

Lora Krsulich*
GOODWIN PROCTER LLP
601 S Figueroa St., 41st Floor
Los Angeles, CA 90017
(213) 426-2500
lkrsulich@goodwinlaw.com

**PHV motion forthcoming*

cstrangio@aclu.org
hseldin@aclu.org

Counsel for Plaintiffs Madeline Moe, by and through her parents and next friends, Michael Moe and Michelle Moe; Michael Moe; Michelle Moe; Grace Goe, by and through her parents and next friends, Garrett Goe and Gina Goe, et al.; Garrett Goe; and Gina Goe

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2024, the foregoing was electronically filed via the Court's e-filing system. Notice of this filing will be sent to counsel for all parties via the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Freda J. Levenson
Trial Attorney for Plaintiffs