IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY

MADELINE MOE, et al., *Plaintiff-Appellant*, v. DAVE YOST, et al., *Defendants-Appellees*.	:	Case No. 24AP-483 REGULAR CALENDAR On appeal from the Court of Common Pleas Franklin County Case No. 24-CV-002481

RESPONSE IN OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

FREDA J. LEVENSON (0045916)
AMY GILBERT (100887)
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
flevenson@acluohio.org
agilbert@acluohio.org

DAVID J. CAREY (0088787)
CARLEN ZHANG-D'SOUZA (93079)
ACLU of Ohio Foundation, Inc.
1108 City Park Ave., Ste. 203
Columbus, Ohio 43206
dcarey@acluohio.org
czhangdsouza@acluohio.org

DAVE YOST (0056290)
Ohio Attorney General

T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
ERIK CLARK (0078732)
Deputy Attorney General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
AMANDA NAROG (0093954)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
614.466.5087 fax
thomas.gaiser@ohioago.gov

CHASE STRANGIO
HARPER SELDIN
LESLIE COOPER
ACLU Foundation
125 Broad Street, Floor 18
New York, NY 10004
cstrangio@aclu.org
hseldin@aclu.org
lcooper@aclu.org

MIRANDA HOOKER
JORDAN BOCK
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
mhooker@goodwinlaw.com
jbock@goodwinlaw.com

Counsel for Appellants
Madeline Moe, et al.

Counsel for Appellees
Dave Yost, et al.

TABLE OF CONTENTS

Page

INTRODUCTION

This case involves a sensitive and controversial topic on which people of good will may differ—how society should address the growing trend of children and youth who identify as transgender. The People of Ohio, through their elected representatives, months ago enacted a law designed to establish basic regulatory guardrails that protect those most affected by this controversial subject: children, parents, doctors, and schools. The law protects children who identify as transgender from the risks of experimental medical treatments, doing so by regulating doctors. It protects young people who play scholastic sports from the threats to safety and fairness that arise when students born as biological males seek to play in girls' sports, doing so by regulating schools and colleges. It protects parents who do not want to lose custody of their children, even if they disagree with how to treat or discuss gender dysphoria. And after months of delay, these protections have finally gone into effect.

Plaintiffs have had their day in court, and they lost. The trial court heard five days of evidence, including ten witnesses, and it heard

arguments from sophisticated counsel from around the country. Then, the trial court ruled that Plaintiffs failed in their attempt to have the judiciary set aside the democratic will of the People of Ohio. Now, while they appeal that loss—which they have every right to do—they ask this Court to take the extraordinary step of treating their loss as a win while the appeal is resolved. They ask the Court to block enforcement of Ohio's law, and moreover, they do not limit that request to temporarily relieving the alleged harms to the named Plaintiffs. Instead, they ask to reset the clock to ninety days after the legislature overrode a gubernatorial veto and block the law as to *all* Ohioans—even parts of the law that do not affect them in any way.

The Court should say no to this extraordinary request, as Plaintiffs come nowhere close to meeting the test for such relief. They have no likelihood of success on the merits, and no showing of *imminent* harm to even these Plaintiffs. Meanwhile, setting aside these protections would threaten harm to countless Ohioans as well as to the democratic process and the separation of powers. And in any case, even if some modest,

limited relief were justified for the two named Plaintiff children, no "universal injunction" is justified here. *See State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶7 (2024) (DeWine, J., concurring). In the end, this is about protecting children, and doing so through democratic deliberation. Plaintiffs have had their day in court, and will have more days in this Court and beyond. But while the case moves forward, the law's protections, and the democratic will, should continue.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of Plaintiffs' Motion, the State Defendants summarize only the necessary facts regarding Ohio's law and the parts of Plaintiffs' claims relevant to immediate relief.

I. Ohio enacted a law to advance its interest in protecting all children, whether or not they identify as transgender, through regulations of medicine, school sports, and courts.

In January 2024, Ohio adopted a law establishing basic regulatory guardrails for several aspects of a relatively new social issue: a growing number of children and youth who seek to transition from one gender identity to another. Overcoming the Governor's veto, the Ohio General

Assembly enacted H.B. 68 to codify several statutory provisions related to the three primary places this issue intersects with the State's interest in protecting children and families.

First, several provisions aim, in the Assembly's words, at "Saving Ohio Adolescents from Experimentation," by regulating different aspects of the medical and mental-health professions. Specifically, these provisions prohibit the medical profession from performing various forms of medical "gender transition services" upon minors. R.C. 3129.01(F) (defining such services); *see* R.C. 3129.02(A) (barring action). The prohibited services include "gender reassignment surgery," R.C. 3129.02(A)(1), "prescrib[ing] a cross-sex hormone," R.C. 3129.02(A)(2), or prescribing "puberty-blocking drug[s]," *id.* Other provisions govern mental-health professionals in counseling regarding gender dysphoria or transition, R.C. 3129.03, and bar Ohio's Medicaid program from paying for minors to transition, R.C. 3129.06. Notably, those currently taking medication are "grandfathered in," and may indefinitely continue any

course of medication that began by the law's effective date. R.C. 3129.02(B).

Second, several more provisions are designed to, in the Assembly's words, "Save Women's Sports," by regulating the institutions that hold student sporting events—schools and colleges. Those provisions require schools and colleges to preserve girls' and women's sports teams for those born female. Among other things, those provisions require schools and colleges that participate in interscholastic sports, and any interscholastic associations that organize sports, to designate separate male and female teams (allowing for co-ed teams, too). R.C. 3313.5320(A). With those designations in place, biological males may not play in female sports: "No school, interscholastic conference, or organization that regulates interscholastic athletics shall knowingly permit individuals of the male sex to participate on athletic teams or in athletic competitions designated only for participants of the female sex." R.C. 3313.5320(B).

Third, another provision addresses the rights of parents in the judicial system. R.C. 3109.054. That custody-adjudication provision ensures that courts adjudicating disputes over parental rights and responsibilities for children who identify as transgender do not penalize a parent who refers to a child consistent with the child's biological sex, declines to consent to their child undergoing a medical transition to the opposite gender, or declines to consent to certain mental health services intended to affirm the child's perception of gender that is inconsistent with the child's biological sex. *Id*.

The law was to become effective April 24, 2024, but was initially restrained and enjoined by the trial court. It went into effect on August 6, 2024.

II. Plaintiffs sued to challenge the law and obtained immediate relief, but lost after a comprehensive five-day trial.

A. Plaintiffs raise several legal claims, aimed mostly at the medical provisions.

Plaintiffs sued to challenge the law on March 26, 2024. *See* Complaint. Plaintiffs are two families, using the pseudonyms "Goe" and "Moe." The

Goes use the pseudonyms "Gina" and "Garrett" as the "Parent Plaintiffs," and "Grace" for their 12-year-old child. The Moes use the names "Michael" and "Michelle" as the "Parent Plaintiffs," and "Madeline" for their 12-year-old child. The Parent Plaintiffs identify both Minor Plaintiffs as "transgender," with each a "girl with a female gender identity" who was "designated as male" at birth. Compl. ¶¶96, 108 (attached to Mot. as Ex. A).

Plaintiffs present four counts, all under the Ohio Constitution. Count One alleges that the bill's enactment violated Ohio's "Single-Subject Clause," which says that each bill shall have one subject. art. II, §15(D). That claim, they say, aims at the bill in its entirety. Compl. ¶125. Counts Two, Three, and Four are aimed only at the medical provisions. Count Two alleges a violation of Ohio's Health Care Freedom Amendment, art, I, §21. Count Three is based on the Equal Protection Clause, art. I, §2, and Count Four rests on the Due Course of Law Clause, art. I, §16. However, this Motion relies exclusively on the first two counts.

The named defendants (together, "State Defendants" or the "State") are the "State of Ohio" and State officials with roles regarding the law: Ohio Attorney General Dave Yost and the State Medical Board.

B. Both Plaintiff families say that the medical provisions could harm them, if and when their doctors recommend new or different medication, and the Goes testified about an upcoming medical checkup in November.

Both Plaintiff families alleged in their Complaint that the medical provisions could harm the Minor Plaintiffs by interfering with future medical treatment. Plaintiffs sought and obtained a Temporary Restraining Order that turned into a Preliminary Injunction, keeping the law on hold through trial.

At trial, and now in this Motion, the Parent Plaintiffs build on those allegations, but in a limited fashion. Plaintiffs chose *not* to introduce *any* medical evidence about either Plaintiff's health or treatment. They did not have any treating physicians or other caregivers testify; they did not introduce any medical records. Instead, their medical witnesses were all experts talking about the subject of transgenderism at large, with no

testimony specific to these Plaintiffs. The only testimony about these Minor Plaintiffs was lay testimony from the Parent Plaintiffs.

The Goes alleged that their child is not yet on any medication, but they might wish to begin "puberty blockers," if and when providers recommend it when their child shows signs of puberty. Compl. ¶110. At trial, Gina Goe, mother of Grace, testified that their next checkup for that purpose is in Ohio in November. Tr. 7-15 at 66 (attached to Mot. as Ex. F). She said they also had an earlier "backup" appointment in Michigan, but preferred to go to the Ohio one. *Id.* at 61.

The Moes alleged, and father Michael Moe testified, that their child is currently taking "puberty blockers," and that doctors are monitoring for a potential change in medication to a cross-sex hormone, estrogen, at some unidentified point. Compl. ¶103; Tr. 7-16 at 265, 267–68 (attached to Mot. as Ex. G). Mr. Moe testified that the puberty blocker is an implant, and that it was inserted in February 2023 and lasts for two years—that is, until February 2025. *Id.* at 267–68. He also testified that the "plan for when it no longer works is to get a new one inserted into

her." *Id.* at 268. Mr. Moe did not testify about any upcoming appointments or plans to consider cross-sex hormones, but spoke of that only as a possibility at some unspecified point. *Id.* at 270–71.

Neither family alleged in the Complaint, or testified at trial, or specifies in their current Motion, that either child is involved in school or college sports or will be affected in any way by the custody provision.

C. The trial court ruled against Plaintiffs on all claims

The five-day trial ran from July 15-19, 2024, and was followed by post-trial briefing. On August 6, the trial court issued its decision, rejecting all four of Plaintiffs' claims. Trial Court Op. at 12 (attached to Mot. as Ex. E).

LEGAL STANDARD

An appeals court's power to grant an injunction pending appeal arises from R.C. 2727.02 and R.C. 2727.03 and Ohio Appellate Rule 7. R.C. 2727.02 authorizes courts to issue temporary injunctions to prevent "great or irreparable injury to the plaintiff." R.C. 2727.03 specifies that "[a]t the beginning of an action, or any time before judgment, an

injunction may be granted by the supreme court or a judge thereof, the court of appeals," or specified trial courts. Appellate Rule 7 provides for "granting an injunction during the pendency of an appeal."

Courts typically assess injunctions pending appeal using the same four-factor framework that trial courts use for preliminary injunctions. *See Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020) (expressly adopting equivalent standard). Preliminary injunctions or temporary restraining orders require a court to "consider whether the movant has a strong or substantial likelihood of success on the merits of his underlying claim, whether the movant will be irreparably harmed if the order is not granted, what injury to others will be caused by the granting of the motion, and whether the public interest will be served by the granting of the motion." *Coleman v. Wilkinson*, 2002-Ohio-2021, ¶2; *see Garb-Ko, Inc. v. Benderson*, 2013-Ohio-1249, ¶32 (10th Dist.) (restating four factors for preliminary injunction).

While injunctions pending appeal largely track preliminary injunctions, relying on the same four factors, those factors often apply differently in the appellate context in at least three respects.

First, when assessing the likelihood of success, a trial court starts with a blank slate and relies on a plaintiff's allegations, often erring on the side of safety in preserving rights. A trial court allows for the possibility that a plaintiff might be *likely* to succeed at trial, once the evidence is developed. But on appeal, the likelihood of success factor is about whether the plaintiff will succeed in overturning the outcome of a case it has lost after full consideration, which is of course a higher burden.

Second, in many cases, such as this one, the status quo might differ at each stage. In the State's view, the status quo when challenging state laws should always be that democratically enacted laws go into effect, and judicial intervention alters the status quo. But accepting for argument's sake that the status quo *was* the trial court's injunction against the law's enforcement, that is no longer so. The law is now fully in effect, and *that* current status quo is what Plaintiffs seek to disturb.

Third, the timeframe for assessing imminent harm changes from a trial focus to an appellate focus. That is, a trial-level preliminary injunction prevents harms until a trial can be completed, which can be months or even years. On appeal, the relevant timeframe is whatever is needed for resolution of an appeal, and that can be accelerated. Indeed, here, the State asks the Court to expedite the case to decide it by October 31. That makes the question for whether anything will happen to Plaintiffs by *that* time, not years down the road.

ARGUMENT

Plaintiffs fail on all prongs of the test for an injunction pending appeal, starting with a lack of likelihood of success on appeal. For now, Plaintiffs advance only two of their four claims, and neither is an appellate winner. *First*, Plaintiffs' single-subject challenge will not succeed on appeal because the entire law serves a unified purpose: protecting all young Ohioans and their families amidst a growing trend of children who identify as transgender and young people diagnosed with gender dysphoria. Even if medicine, school sports, and parental conscience

rights are different *subtopics* within the challenges presented by the broader social issue of transgender youth and gender dysphoria among youth, bills may have "more than one topic ... as long as a common purpose or relationship exists between the topics." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 2016-Ohio-478, ¶17. While the trial court initially gave relief on this ground, giving Plaintiffs time and a trial to prove any of their claims, the trial court rightly concluded in the end that this claim failed.

Second, the "Health Care Freedom Amendment" claim fails because that amendment allows freedom to purchase only *what the law defines as legitimate health care*, and it does not imply a repeal the State's power to define allowable medical care. The trial court rightly concluded that this claim failed, and Plaintiffs are unlikely to reverse that loss.

Beyond the lack of a merits showing, Plaintiffs have not shown a need for *immediate* relief during the short time needed for appeal. The State urges the Court to expedite the case regardless of whether any temporary relief is granted, unlike Plaintiffs selective request to speed

up if they lose, but slow down if they win. The case can be resolved in a few months.

While Plaintiffs allege harms that might seem strong—moving out of State, losing treatment options—they gloss over that they face nothing *imminent.* One plaintiff child is not on any medication, and is simply being monitored for *potential* interest in puberty blockers. That child has a November appointment to assess a *potential* start of blockers. The other is already on blockers, and the law grandfathers in continuation. R.C. 3129.02(B). None of that is reason to set aside the law *now.*

Further, these plaintiffs have never even alleged to be affected by the parts of the law addressing scholastic sports or custody disputes for parents, yet ask those to be set aside. Even if those laws *could* be reached on the merits eventually—though they cannot in this case—any temporary relief should be about protecting *parties* from proven harm, not speculation about people not in court.

On the other side of the scale, setting this law aside, after it has finally gone into effect, would leave vulnerable countless Ohioans, especially in

the sports arena. Schools are starting soon. Girls in sports should not face the harms to their safety and to fairness from competing against biological boys. And they *especially* should not see those protections set aside now, after Plaintiffs lost at trial, based solely on claims about two children's non-sports medical issues.

I. Plaintiffs have no likelihood of success on the merits on either of the two counts they rely on for immediate relief.

While Plaintiffs raised four claims below, they rely on just two for now. Notably, they do not rely on their due process and equal protection claims that most involve the factual substance of their claims about an alleged constitutional right to medically transition children.

For now, Plaintiffs rely only on a single-subject claim and Ohio's Health Care Freedom Amendment, and they are unlikely to overcome the trial court's rulings against them on either one.

A. Plaintiffs are unlikely to succeed on appeal on their Single-Subject-Clause claim.

Ohio's "Single-Subject Clause," art. II, §15(D), provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in

its title." Plaintiffs claim that Ohio's law concerning minors and gender transitions violates this rule, because, they say, the provisions addressing medical treatment and sports are not within the same "subject." They are wrong.

All parts of the law are tied to one subject of significant public debate and united by one common purpose: protecting children and youth affected by the rise of gender transition medical interventions and a greater share of young Ohioans who wish to live their lives aligned with their transgender identity. The law advances that common purpose in different policy contexts where gender transition has broadly affected children, students, and families—medicine, sports, and judicial proceedings. Not only the General Assembly, but the trial court concluded what common sense and the public debate itself shows: these topics each connect back to one subject.

Begin the with legal standard. Courts reviewing single-subject challenges must review the law liberally in favor of the democratic process. They must not construe "the one-subject provision so as to

unnecessarily restrict the scope and operation of laws … to prevent legislation from embracing in one act all matters properly connected with one general subject.'" *In re Avon Skilled Nursing & Rehab*., 2019-Ohio-3790, ¶48 (quoting *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State Emp. Relations Bd.*, 2004-Ohio-6363, ¶27). To that end, only "a manifestly gross and fraudulent violation" is illegal. *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141, 145 (1984). Moreover, the Ohio Supreme Court has held that the Clause does not bar a "plurality" of topics, only a "disunity in subject matter," and "embrac[ing] more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 2016-Ohio-478, ¶28.

Applying that deferential standard, the Ohio Supreme Court and appeals courts have repeatedly upheld laws against single-subject challenges with relationships that are not nearly as tight as the one here. *See, e.g.*, *State v. Bloomer*, 2009-Ohio-2462, ¶53, ("Here, while H.B. 137 addresses two distinct topics—postrelease control and the sealing of

juvenile delinquency records, those topics share a common relationship because they concern the rehabilitation and reintegration of offenders into society."); *Riverside v. State*, 2010-Ohio-5868, ¶45 (10th Dist.) (restrictions on cities' taxing power was connected to State budget, because State also funds cities); *Avon*, 2019-Ohio-3790, ¶50 (institutional care was single subject); *Cuyahoga Cty. Veterans Serv. Comm. v. State*, 2004-Ohio-6124, ¶14 (10th Dist.) (giving country commissioners power over veterans services and budget bill were single subject); *Newburgh Heights v. State*, 2021-Ohio-61, ¶67 (8th Dist.), *rev'd on other grounds,* 2022-Ohio-1642 (provision granting exclusive jurisdiction over photo-based traffic violations was connected to transportation budget).

By contrast, courts have found single-subject violations only when the disunity of topics was egregious. For example, the Ohio Supreme Court found a violation when a provision about mortgage recording "appear[ed in a bill] cryptically between provisions covering aviation and construction certificates for major utility facilities on one side and

regulations for the Department of Transportation on the other, which are themselves surrounded by a host of provisions that involve topics ranging in diversity from liquor control to food-stamp trafficking and compensation for county auditors, none of which bears any relation to a mortgage-recording law." *In re Nowak*, 2004-Ohio-6777, ¶59. Another court found a violation when a bill included criminal penalties for bestiality (sex with animals) and regulation of small wireless communications towers. *City of Toledo v. State*, 2018-Ohio-4534, ¶20 (6th Dist.). Another case involved a provision governing price transparency in health care for all patients, but it was tacked onto the workers' compensation budget. *Cmty. Hosps. & Wellness Ctrs. v. State*, 2020-Ohio-401, ¶¶62–63 (6th Dist.). The provisions at issue in this case are nothing like these gross violations.

Notably, the sole issue in such cases is whether the resulting bill has a common relationship among the topics it addresses. It does not matter whether legislative history shows that provisions were added later or started out in another introduced bill. The Supreme Court, in rejecting a

claim under the analogous "separate-vote" clause that applies to constitutional amendments, found varying topic "not so incongruous" as to be combined, "although seemingly the product of a tactical decision" to combine them. *State ex rel. Willke v. Taft*, 2005-Ohio-5303, ¶38.

Applying this law, the trial court correctly held that the law properly contained only one subject. Trial Court Op. at 7. Even if the medical, sports, and custody provisions are considered different "topics," they easily have a "common purpose or relationship"—protecting children and families from the challenges of an increasingly pressing social trend.

Plaintiffs' contrary arguments all fail to overcome the above. First, they insist that the contexts of school sports and medicine are different (they seem to omit custody), and they attack the common thread of addressing transgender youth as somehow improper, hurling wild comparisons to invidious religious discrimination. Mot. at 26–28. That attack simply reflects their strong policy objections to Ohio's law.

Consider a more relevant set of examples. No one would question, on single-subject grounds, laws aimed at *protecting* groups of people in

different sub-areas. For example, state and federal anti-discrimination laws have sometimes been enacted to cover one context, such as employment, and several characteristics, such as race, sex, religion, and more. Other times, laws such as the Americans With Disabilities Act concerned people with one characteristic—disability—across contexts of employment, housing, transportation, and more.

Here, too, the General Assembly rightly aimed at a common theme of *protection* across contexts, however much Plaintiffs disagree with that singular aim. Not only is addressing the transgender issue a common subject, but so is the protection approach. Ohio seeks to protect children from disputed and experimental medical treatments that will change their bodies forever. Ohio also seeks to protect girls in sports from unfair competition and threats to their safety. And Ohio seeks to protect parents from losing custody of their children based on their opinions on the best approach to a child's issues. And that is all that the Single-Subject Clause requires. Plaintiffs cannot smuggle in, under the guise of

a single-subject claim, the idea that Ohio's law violates the Equal Protection Clause.

Plaintiffs also argue that the law's codification in separate sections and chapters and origins as different bills show evidence of impermissible "logrolling." Those features are common to many bills, and if that were the test, much of the Revised Code is in danger. Logrolling is about smuggling in provisions that perhaps some of a voting majority are not aware of or do not support. Here, the General Assembly knew exactly what it was doing—indeed, they enacted the law twice, with the second time a supermajority voting to override a veto. The sole test is the Supreme Court's common-subject test, and Ohio's law here passes.

Finally, Plaintiffs' main goal in using the Single-Subject Clause seems to be the only way for them to smuggle in an attack on the sports and custody provisions without actually making a claim about them, or finding parties affected by them. While the State returns to that below in Part III, regarding the scope of relief, we note here the irony of this

approach. On the one hand, they claim that they are vindicating an interest in preventing legislative logrolling, or using more-popular laws to carry along riders that could not pass on their own. Yet what they seek is a form of "injunctive logrolling," or obtaining an injunction about sports and custody that cannot obtain on any merits theory, so they try to add it to a case brought by those solely affected by the medication provisions. That is wrong.

B. Plaintiffs are unlikely to succeed on appeal on their Health Care Freedom Amendment claim.

Ohio's Healthcare Freedom Amendment provides, "[n]o federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance." art. I, §21(B). Plaintiffs argue that this entitles them to purchase gender-transition services as a form of "health care." They are mistaken, as the Amendment concerns only the purchase or sale of services that the State chooses to recognize as valid health care. It does not limit the State's underlying, fundamental power to define what is

allowed as "health care" to begin with, and expressly disclaims such a sweeping result.

The State's power to define allowed or disallowed medical practices is expressly preserved in Part (D) of the Amendment, which says that the Amendment does not "affect any laws calculated to deter fraud or punish wrongdoing in the health care industry." That preserves the General Assembly's pre-existing power to define wrongdoing in the healthcare industry, since the General Assembly cannot bar wrongdoing without first defining what constitutes wrongdoing. This provision thus reserves to the General Assembly the power to identify and prohibit medical procedures that it considers wrongdoing or bad medical practice, even if some citizens or doctors disagree.

Further, the limited nature of the right to purchase health care in Part (B) is shown by the text of Parts (A) and (C), and confirmed by the historical context in which it was adopted. When the Amendment was adopted in 2011, citizens were concerned that the then-new federal Affordable Care Act might force citizens into certain health-care plans,

might forbid fee-for-service care, and more. The Amendment sought to protect Ohioans from such coercion, as shown by the repeated references to federal law. Part (A) says no "person, employer, or health care provider" shall be compelled to participate in a health care system, and Part (C) bars any "penalty or fine for the sale or purchase of health care." Those confirm that the provisions are meant to preserve freedom in the market for buying (or refusing to buy) licensed health care or insurance, not to repeal the General Assembly's power to define what is allowed as "health care."

The trial court rightly reached that conclusion in holding that the State's right to regulate here was preserved under its power to define "wrongdoing," or what is proper or improper medicine. Trial Ct. Op at 7–8.

Plaintiffs' view would have shocking implications, and they do not deal with that in their Motion. It would lead to the absurd result that *no legislative limits* on care could be allowed, such that any service labeled "health care" by a willing buyer and a willing seller would be

constitutionally protected, such as amputation of a healthy body part or experimental surgery outside the accepted standard of care. Restricting the purchase of controlled substances that a willing buyer and seller deem health care would be forbidden, while lobotomies-for-payment might be fair game. No evidence suggests that the People of Ohio, in adopting the Amendment, meant to knock down *all limits* on defining allowable health care. After all, even after the Amendment's passage, Ohio still bars the unlicensed practice of medicine; the Amendment gives citizens no right to purchase medical care from someone with no license to practice. *See, e.g.*, R.C. 4731.41. Similarly, Ohio still forbids physicians from using steroids to enhance athletic performance, or from using cocaine hydrochloride except in narrowly defined circumstances. O.A.C. 4731-11-03. It also bans electroshock therapy for minors, female genital mutilation for minors, and assisted suicide. *See, e.g.*, O.A.C. 5122-3-03(D)(2); R.C. 2903.32; R.C. 3795.02.

True, Plaintiffs may believe that their claim is different from those other disputed treatments, based on their view of certain experts'

opinions, or what they claim is a consensus in some quarters. But such a reading would mean Ohioans stripped authority regarding health care from their elected representatives and left the health care industry wholly self-regulating. But quotations plucked from the Amendment's proponents in the press issued in the context of the debate over the Affordable Care Act, Mot. at 31–33, cannot be read as supporting that result. Nor does Plaintiff's alternative reading that the Amendment took whatever was offered as "health care" when it was ratified and declared it lawful forevermore fare any better. *See* Mot. at 36–37. That would result in effectively freezing the health care industry in the early aughts, leaving no room for the legislature to update standards of care and other regulations to account for new scientific discoveries—or new forms of wrongdoing in the health care industry.

In the end, the Amendment's text leaves no room for counting doctors' heads or assessing permissible or impermissible legislative limits on allowable health care. Either the State is right that the State preserves its power to define allowable medical care (and then citizens

are free to purchase or decline to purchase such allowable care), or Plaintiffs are right, and the Ohio Constitution forbids the State from limiting *anything* that anyone calls health care. Plaintiffs' view is wrong. They are unlikely to succeed on appeal in getting this Court to eliminate the entire "wrongdoing" notion and to wipe out all State power to regulate medical treatment.

II. Plaintiffs do not show any *immediate,* irreparable harm to warrant immediate relief while the appeal proceeds.

A. Any alleged harm must be imminent.

As noted above, the timeframe here asks whether Plaintiffs will be harmed in the time it takes the Court to resolve the case. The State asks the Court to do so quickly, by the end of October, and will soon file a Motion to Expedite with further detail. Further, because the standards for injunctions pending appeal track those for trial-level TROs and preliminary injunctions, the Court should look to that precedent for the meaning of imminence.

At the trial level, any harm alleged for temporary relief must be "immediate" or "imminent," as well as irreparable. Rule 65 refers to "*immediate* and irreparable injury, loss or damage." Civ.R.65(A) (emphasis added). Precedent likewise confirms that a TRO is "intended to prevent the applicant from suffering *immediate* and irreparable harm." *Coleman*, 2002-Ohio-2021, ¶2 (emphasis added); *see also Garb-Ko*, 2013-Ohio-1249, ¶32. While many cases focus on whether an alleged harm is irreparable—can it be undone or remedied later?—immediacy is just as important. After all, if nothing concrete will happen for months, a TRO for the next fourteen days is irrelevant. And if nothing will happen before an upcoming trial, a preliminary injunction is irrelevant. Likewise injunctions pending appeal: if nothing will happen before the appeal can be resolved, no injunction can issue.

Courts routinely reject TRO requests, or even preliminary-injunction requests, when the alleged harm is still months away. For example, in one recent case, a court declined to enjoin a state disciplinary proceeding that allegedly chilled free speech regarding an election,

because at the time of the request, there was "no ongoing election," and the plaintiffs had not "indicated that there will be before the case reaches final judgment." *Fischer v. Thomas*, 78 F.4th 864, 868 (6th Cir. 2023). While that court said that "the risk of chill isn't immediate," it told the plaintiffs that they "can renew their request for preliminary relief" if "an election looms before this suit is resolved." *Id.*; *see also Dutton v. Shaffer*, No. 3:23-cv-00039-GFVT, 2023 WL 5994584, at *3 (E.D.K.Y. Sept. 15, 2023) (same).

In another example, a court found no imminent harm regarding a plaintiff's participation in certain government meetings, because the relevant body did "not have any meetings scheduled nor are any anticipated to be scheduled in the near future." *Sorey v. Wilson Cty. Book Rev. Comm.*, No. 23-cv-00181, 2023 WL 4189656 at *1 (M.D. Tenn. June 26, 2023). The court explained that the "irreparable harm facing Plaintiff absent an injunction 'must be both certain and immediate,'" so if "'the plaintiff isn't facing imminent and irreparable injury, there's no need to

grant relief now as opposed to at the end of the lawsuit.'" *Id.* (quoting *D.T. v. Sumner Cty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019)).

The court in the above-quoted *D.T.* case rejected relief both because the alleged harm was far off, not imminent, and because the asserted harm was speculative. "D.T.'s parents say they are injured because: *if* D.T. regresses at his new private school, and *if* they choose to disenroll him, and *if* they choose not to enroll him in another state-approved school, the state *may* choose to prosecute them for truancy again. The district court said it well: 'there's a lot of ifs in there.' And all those 'ifs' rule out the 'certain and immediate' harm needed for a preliminary injunction." *D.T.*, 942 F.3d at 327 (emphasis in original).

Thus, as these cases make clear, Plaintiffs must show harm that is imminent, concrete, and irreparable to prevail.

B. Plaintiffs' alleged harms are neither imminent nor concrete, but are months away and speculative.

The Plaintiffs do not even argue that most of the provisions of the law even apply to them—let alone concretely harm them right away. They

do not allege any harm from the sports provisions or the custody provisions. Even as to the medical provisions, they do not challenge the limit on surgery for minors. Trial Court Op. at 2. Notably, Plaintiffs' claims to reach those provisions are rooted in their theory that their single-subject claim entitles them to attack the "whole bill," and to invalidate everything. The State will show in full briefing that this "whole bill" view is wrong. But for now, *even if* that view were correct as establishing whole-bill invalidation as a final remedy, it should not be the remedy in this posture of an injunction pending appeal, where preserving the *Plaintiffs'* immediate interests is the entire purpose. Thus, whatever might happen in the end, only the medical provisions—and only some of them—are at issue now.

Moreover, Plaintiffs' alleged harms are at least months away, and this Court can and should resolve the appeal before then. As noted in the fact statement above (at 9), Mrs. Goe testified that their child has an appointment in November on an unspecified date—about three months away—and even that appointment is only to determine *whether* the

doctors recommend starting puberty blockers. Gina Goe, Tr. 7-15 at 66. She said they also had an earlier "backup" appointment in Michigan, but preferred to go to the one in Ohio. *Id.* at 61.

Likewise, the Moes' timeline does not show an imminent harm before this Court could decide an appeal. Mr. Moe said that Madeline's current puberty-blocker implant is good through February 2025. Tr. 7-16 at 265, 267–68. So even if the Court rejects the State's October goal, that is still months further away, with plenty of time. As to beginning cross-sex hormones, Mr. Moe gave no indication of accelerating that to intervention before the current blocker expires. As noted above, Plaintiffs chose not to offer *any* treating physicians or medical records to show any upcoming issues. As to cross-sex hormones, he testified that those "[t]ypically would be around age 13 or 14," *id.* at 269, and Madeline is still only 12. The Moes had earlier alleged in the Complaint that doctors are monitoring their child to consider whether to change medications from puberty blockers to estrogen "at the right time."

Compl. ¶103; Moe Aff. ¶17. But again, no evidence of anything sooner than February 2025 is on the record.

Given Plaintiffs' own testimony, Plaintiffs' claims to irreparable harm all fail because none of them are imminent.

For similar reasons, Plaintiffs' incantation of the "status quo" fails in several ways. For starters, the *factual* status quo, for *these* Plaintiffs, is not threatened. Moe can keep the puberty-blocker implant in, under the grandfathering provisions of the law, R.C. 3129.02(B), and Goe can be "monitored" for possible future medication.

Plaintiffs' focus on their alleged *legal* status quo—that enforcement of the law was enjoined until the trial court's decision—fails for multiple reasons. First, the literal truth: Ohio's law *is in effect now.* It does not matter that enforcement of the law *was* enjoined from enforcement for months, or that the effective period has only been a few days so far—the law is factually the *current* status quo. While this status quo has existed just a few days, courts have routinely treated new laws in effect for a short duration of one month or a few months' tenure as the current

status quo. *See, e.g.*, *Goldstein v. Hochul*, No. 22-cv-8300, 2022 U.S. Dist. LEXIS 243665, at *7 (S.D.N.Y. Sept. 30, 2022) (finding that plaintiffs TRO was not a request "for emergency relief to preserve the status quo . . . [but rather an] action to alter the status quo and enjoin a law that has already been in effect for a month"); *Al Otro Lado v. Wolf*, 945 F.3d 1223, 1224 (9th Cir. 2019) (granting appellate stay of trial-court injunction to restore status quo of rule in effect for five months); *Adventist Health System/SunBelt, Inc. v. United States HHS*, 17 F.4th 793, 806 (8th Cir. 2021) (preserving eight-month-old policy as status quo).

Second, Plaintiffs' notion of "status quo" includes two sleights-of-hand that transform invocation of the "status quo" into a license to seek judicial *change* to the actual status quo. Preserving a status quo makes sense with particular parties, but Plaintiffs shift focus from these Plaintiffs' facts to the status of the law on its face, thus also shifting to other people not before the Court. That means that their "status quo" would allow countless Ohio children, currently not on any medication, to newly *begin* medication every day while the appeal proceeds. That is akin

to a "status quo" of leaving a traffic light permanently on green, while untold cars stream through, regardless of concerns for safety. That is ongoing change, not a status quo.

Third, and perhaps most important, under our separation of powers, the democratic enactment of a law, and its enforcement, ought always to be the status quo. It is judicial intervention, which should be reserved and not used lightly, that should always be considered the change to the status quo that must be justified. The ordinary status quo is that the legislature makes the laws that govern; equitable judicial intervention is extraordinary, and should be regarded as such.

Finally, denying the Plaintiffs' party-specific relief now does not close the door forever. If something arises while the case proceeds, they may "renew their request" whenever that moment "looms." *Fischer*, 78 F.4th at 868.

III. The public interest does not support an injunction, while enjoining State laws is inherently harmful to democracy and harms those protected by the law.

Not only do Plaintiffs fail on the first two factors of merits and immediate, irreparable harm, but also, granting their request would cut against the remaining two factors: "what injury to others will be caused by the granting of the motion, and whether the public interest will be served by the granting of the motion." *Coleman*, 2002-Ohio-2021, ¶2. For private parties, those two factors can vary. But when it comes to enjoining the enforcement of State laws, however, those two factors overlap and even merge: harm to the State *is* harm to the public interest, because the General Assembly is democratically elected to represent the public interest of the State as a whole.

Injunctions against duly enacted laws are a harm to the government and thus to the public interest. *Abbott v. Perez*, 585 U.S. 579, 602 & n.17 (2018); *see Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Thompson v.*

DeWine, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam). Whenever a state is "enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers).

Further, the broad injunction that Plaintiffs seek against the entire law would harm the many Ohioans protected by the law's provisions. For example, the sports provisions protect female athletes in both K-12 and college, who face threats to their physical safety and their right to fair competition against other girls and young women. School is starting soon, and those thousands of Ohioans deserve the laws protections. Indeed, the Ohio High School Athletic Association has already amended its policies to conform to Ohio law. *OHSAA modifies student policy as Ohio's trans athlete ban takes effect,* NBC4, at www.nbc4i.com/news/local-news/central-ohio-news/ohsaa-modifies-student-policy-as-ohios-trans-athlete-ban-takes-effect.

Likewise for any parents whose custodial rights are threatened by their views on potential transitions. And the medical provisions, too,

protect children from the lifetime consequences of experimental medical treatment. At trial, Chloe Cole, who "detransitioned" after years of being experimented on, testified movingly about the harm done to her. Tr. 7-19 at 79–106. Ohioans are entitled to stop more children from going down that path.

IV. Although no relief is warranted, any relief should be narrowly limited to these Plaintiffs and to the medical provisions

While Plaintiffs are not entitled to any injunction pending appeal, if the Court disagrees, it should limit any such injunction to the Plaintiffs before the Court, and to only the medical provisions that might affect the Minor Plaintiffs.

First, under no theory are Plaintiffs entitled to relief for parties not before the Court, even at the end of the case, but *especially* not in this pending-appeal posture. It is fundamental that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *see also Aluminum Workers Int'l Union, AFL-CIO, Loc.*

Union No. 215 v. Consol. Aluminum Corp., 696 F.2d 437, 446 (6th Cir. 1982). Indeed, R.C. 2727.02 authorizes injunctions only to prevent "great or irreparable injury to the *plaintiff*" (emphasis added). Plaintiffs have not filed a class action—which would require them to meet the class-action standards—and are not entitled to class relief while bypassing that process. *See Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-3430, ¶25 (noting that "class-action suits are the exception to the usual rule that litigation is conducted by and on behalf of only the individually named parties."); *Waitt v. Kent State Univ.*, 2022-Ohio-4781, ¶25 (10th Dist.) (noting that class-action plaintiffs must show that "all class members suffered some injury").

Indeed, four justices of the Ohio Supreme Court, in a writ case arising from this very case, noted concerns about such "universal injunctions." *Holbrook*, 2024-Ohio-1936 (2024). Justice DeWine's opinion, for himself and two other Justices, extensively noted questions about the "propriety" of such injunctions, and called for further review when appropriate. *Id.* at ¶1. Chief Justice Kennedy, meanwhile, would have

granted the requested writ, which was based solely on the overbroad scope of enjoining enforcement of this very law statewide. This Court should not issue overbroad relief, especially now, when the narrow question is solely preserving alleged rights before the case is heard.

Second, the Court can and should tailor any potential relief not only to Plaintiffs, but also to only those *particular* medical provisions that could affect them. Plaintiffs acknowledge that they do not challenge the ban on sex-change surgery for minors. *See* Mot. at 9–14. And as to medications, to the extent that they argue that they are concerned that their Ohio doctors might fear "aiding and abetting" liability for monitoring and providing grandfathered-in interventions, the Court could enjoin enforcement of *only* that aiding provision, leaving the primary provisions against medical intervention on minors in place throughout the rest of Ohio.

In sum, the Court ought to deny all interim relief and instead resolve the legal issues quickly. If it nevertheless considers any, it should tailor it to redress the Plaintiffs' claims, rather than transform their suit into a

appellate court veto of the laws enacted by the People's representatives and upheld after a trial on the merits.

CONCLUSION

The Court should deny the motion for an injunction pending appeal, or limit any relief to the minimum necessary.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ T. Elliot Gaiser
T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
ERIK CLARK (0078732)
Deputy Attorney General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
AMANDA NAROG (0093954)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
6143466.5087 fax
thomas.gaiser@ohioago.gov
Counsel for Appellant
Ohio Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, this opposition was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

I further certify that a copy of the foregoing was served by email upon the following:

flevenson@acluohio.org
agilbert@acluohio.org
dcarey@acluohio.org
czhangdsouza@acluohio.org
cstrangio@aclu.org
hseldin@aclu.org
lcooper@aclu.org
mhooker@goodwinlaw.com
jbock@goodwinlaw.com

/s/ T. Elliot Gaiser
T. ELLIOT GAISER