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

MOTION FOR STAY OF JUDGMENT PENDING APPEAL AND MEMORANDUM IN SUPPORT

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MOTION FOR STAY PENDING APPEAL

The State Defendants-Appellees respectfully move the Court, pursuant to Appellate Rule 27, to stay its judgment and opinion issued on March 18, 2025. The State will file its notice of appeal in the Ohio Supreme Court within days. As detailed in the accompanying Memorandum in Support, the State believes that its notice of appeal will automatically deprive the trial court of jurisdiction to enter any injunction, but it urges this Court nevertheless to grant a stay to ensure certainty.

As also detailed in the Memorandum, the State asks first for a full stay of the decision, and in alternative, for a stay as to unnamed parties, so that the judgment is for now limited to the named Plaintiffs.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO STAY JUDGMENT PENDING APPEAL

The State Defendants-Appellees move the Court to stay its judgment and opinion pending appeal. The State believes that such a stay is unnecessary, because as soon as the State files its notice of appeal with the Ohio Supreme Court, the trial court will have no jurisdiction to follow this Court's instruction to enter a permanent injunction against enforcement of the challenge law. But to avoid any confusion on a matter of such great importance, the State urges the Court to grant one to give clarity to parties and non-parties alike.

In any case, regardless of whether a stay is needed to maintain the status quo of the law's enforcement, such maintenance is the best way to avoid confusion during further appeal. The State recognizes that the court ruled against the State in holding that the challenged Ohio law, which limits chemical sex-change treatments to adults and bars such treatments for minors, should not be enforced. Nevertheless, the State urges the court to stay its own judgment pending appeal, for several reasons.

First, and most important, a stay preserves the status quo clearly for everyone. Many affected parties—potential patients, parents, doctors, hospitals, and more—have adjusted to the world as it was in the last seven months, before this Court's decision. Changing that status quo now, especially when the change might turn out to be short-lived, benefits no one. This court sensibly declined to impose an injunction pending appeal at the start of this appeal, so it makes sense to stay the course until the case is over.

Second, and relatedly, further review is likely. Although the competing sides disagree on the preferred outcome, we surely all agree that this is an issue of exceptional importance to the people of this State. Indeed, two-thirds of Ohio's General Assembly enacted it into law—twice. Thus, the Ohio Supreme Court is likely to grant review.

Third, the State is likely to prevail on appeal. To be sure, the State does not expect this Court, having just ruled against the State on whether the law comports with the Ohio constitution, to agree with that assessment. So our merits discussion below is short. But the State respectfully

urges the Court to consider the possibility of reversal, and to balance that possibility with the equitable harm of an interim zig-zag in the law.

Finally, the State urges the Court to consider, as an alternative to granting a full stay, a stay as to the judgment's broad scope, to limit relief for now to just the named Plaintiffs. The scope-of-relief issue, independent of the underlying merits, warrants consideration here. The case against universal injunctions stands independent of the other merits arguments, and the Court's decision did not address that separate issue. Because the scope of relief could be narrowed on appeal, even if Plaintiffs win on the merits, that is good reason to limit relief in the interim to the named Plaintiffs.

For all these reasons and more below, the Court should stay its own judgment while the case proceeds on appeal.

ARGUMENT

I. While no stay is necessary, the Court should grant one to provide clarity to all parties and the public.

This Court does not *need* to grant a stay here to maintain the status quo, as the law will remain in effect automatically once the State files its appeal

in the Ohio Supreme Court, which it intends to do promptly. That is so because "the trial court in this case [will have] no jurisdiction to" enter any injunction "once the state [] file[s] its notice of appeal." *State v. Washington*, 2013-Ohio-4982, ¶8. And this Court's judgment is not self-executing, as the Court rightly followed the standard path of instructing the trial court to enter an injunction. *See Moe v. Yost*, 2025-Ohio-914, ¶125 (10th Dist.)("Op."). Thus, the State's appeal will automatically maintain the status quo—because the law has been in effect since last August—simply by filing its appeal.

The State nevertheless urges the Court to enter a confirmatory stay to erase any last doubt on a matter of such importance. Some parties might derive uncertainty from Supreme Court decisions or opinions that might seem to suggest an exception to the normal rule stated in *Washington.* For example, the Court once used a different approach from *Washington*'s to address a similar scenario, and although the Court did not contradict *Washington*, a concurrence noted the concern. *See State v. Bishop,* 2018-Ohio-5132, ¶8; *id.* at ¶24 (DeWine, J., concurring). And in another case,

one dissenting justice argued for an exception to the normal rule when a trial court maintains jurisdiction to act "in aid of the appeal"—something that existed in that case because of a looming deadline and thus a mootness concern, which is not present here. *See State ex rel. Bowling v. DeWine,* 2021-Ohio-3015, ¶2 (Brunner, J., concurring in part and dissenting in part) (emphasis omitted).

In this case, any uncertainty is in no one's best interests, as individuals, doctors, and hospitals should know what the law is so that they can follow it. The State urges that this Court should enter a stay to leave no doubt, since that is the conclusion by operation of law anyway. In the alternative, if the Court disagrees for any reasons, the State explains below why that is the best outcome even if it is a discretionary choice by the Court.

II. This case warrants a stay, whether needed or not

Appellate Rule 27 authorizes a court to stay "the judgment mandate pending appeal." While neither the rule nor caselaw appears to supply a standard specifically for *post*-judgment stays, common sense suggests that the Court may look to the well-established test for preliminary injunctions

to inform its inquiry, just as courts typically do in considering stays *before* hearing an appeal. Courts typically assess injunctions pending appeal using the same four-factor framework that trial courts use for preliminary injunctions. *See OPAWL - Bldg. AAPI Feminist Leadership v. Yost,* 118 F.4th 770, 774 (6th Cir. 2024) (order) (expressly adopting equivalent standard for pre-appeal stays). Preliminary injunctions, in turn, look at both the likelihood of success on the merits of the underlying claim and the equities, with the latter measuring harm to the parties, to others, and to the public interest. *Coleman v. Wilkinson*, 2002-Ohio-2021, ¶2; *see Garb-Ko, Inc. v. Benderson*, 2013-Ohio-1249, ¶32 (10th Dist.).

The relevant adjustments for context are these: The merits prediction should look to whether the Ohio Supreme Court will *grant* review, as well as to what will happen on review. And the equities should consider the timeframe here: This Court should look to what the status quo should be in the immediate weeks between its judgment and the opportunity for the Supreme Court to adequately review any potential preliminary briefing aimed at the status quo. That is, if this Court stays its own judgment,

Plaintiffs can always ask the Supreme Court to lift that stay and allow the law to go into effect while that Court considers next steps. So this Court should assess this request in terms of what makes the most sense for the interim period it takes for the Supreme Court to review any such request.

A. The law has been in effect since last summer, so retaining that status quo is the least disruptive approach for institutions and the public.

The strongest reason to grant a stay here is that it would preserve the status quo in Ohio that has prevailed for over seven months now, with this Court's blessing. Changing direction now, for what might turn out to be a short stretch, does more harm than good.

A recap: While the trial court briefly enjoined the law, this Court allowed it to go into effect while it considered the appeal. The trial court's judgment in the State's favor, on August 6, 2024, lifted its preliminary injunction and allowed the law to go into effect on that date. Plaintiffs immediately asked this court to impose an injunction pending appeal. The State opposed that request, and asked to expedite the appeal instead. While the Court never formally *denied* Plaintiffs' request, it did so

functionally; it never granted that an injunction pending appeal, while it did expedite briefing and argument. *See* Journal Entry (Aug. 14, 2024). Thus, this Court allowed the law to remain in effect after the trial court upheld it.

Ohio's hospitals and doctors immediately began complying with the law, as many announced publicly. For example, Cincinnati Children's Hospital says that it "follows Ohio Law in regard to care of Transgender patients" and is thus "unable to provide" puberty blockers. *See* Cincinnati Children's Transgender Health Clinic, *Frequently Asked Questions*, https://perma.cc/6EM9-JEWR.

Keep in mind that Ohio's law already grandfathered in any patients receiving treatment before the law's enactment, so they may indefinitely continue any course of medication that began by the law's effective date. R.C. 3129.02(B). So the law affects only the start of new medications or new patients under 18.

Regardless of one's view about the final outcome, putting the law on hold (again) for only a short time is not a significant benefit, but causes

harm instead. Having hospitals re-open and re-close such operations for a short window, which is of course possible, is difficult for those institutions, and even for the potential children that might start chemical interventions during that window.

If this Court declines to stay its judgment and allows the law to go into effect, it might be for only a brief time. It will surprise no one that the State will ask the Supreme Court to stay this judgment, if this Court does not. If that Court does so, then the short window will cause more harm than good. Conversely, if this Court stays its judgment, Plaintiffs can always ask the Supreme Court to *lift* the stay and pause compliance with the law again, whether for the medium term while it decides whether to take the case, or for the long term of full review. To be sure, either party can ask the Supreme Court to change the status quo. But the least disruptive option is for this Court to maintain the status quo to give the Supreme Court time to review any preliminary briefing without an emergency.

B. The Ohio Supreme Court is likely to review this decision.

The Ohio Supreme Court is at least *likely* to hear the case. After all, this is an issue of great public interest. Indeed, the United States Supreme Court is currently reviewing near-identical laws from Ohio's neighbor states, Kentucky and Tennessee, albeit under federal rather than State law. *See United States v. Skrmetti*, 144 S. Ct. 2679 (2024) (granting certiorari). Surely, had this Court affirmed the trial court, Plaintiffs would have appealed. Plaintiffs' counsel was correct in recently saying that "this litigation will likely not end here." ACLU, *Press Releases* (March 18, 2025), https://perma.cc/K5VX-JNG3. Such likely further review counsels a stay here.

C. The State will likely prevail on appeal.

The State does not expect the Court to agree that the State should prevail on appeal. But the State has strong arguments on the merits.

First, the State has a good chance of reversing the Court's ruling that Ohio's law violates the Health Care Freedom Amendment. That Amendment of course has resulted in little to no case law applying it,

making it at least an open issue. This Court rejected some of Plaintiffs' broader claims, such as that the Amendment allows the State to limit only "conduct that was already unlawful" when it was enacted. *See* Op. at ¶66 n.31 (quoting Appellants' Br. at 53). The Court did not hold that the Amendment protects whatever one willing doctor and one willing patient will try, but instead relied heavily on what it described as the "prevailing standards of care accepted by the professional medical community." *Id.* It explained that, "this is not to say that the HFCA guarantees Ohioans the right to receive *any* treatment alleged to be 'health care,'" but only what has been approved by the "professional medical community." *Id.* at ¶73. The Court also relied on the idea that Ohio's General Assembly may "appropriately *regulate* the practice of medicine," but may not "categorically ban" what doctors recommend. *Id.*

Both parts of that reasoning are vulnerable on appeal. First, however Ohio's Health Care Freedom Amendment affects State authority over the practice of medicine, it plainly does not delegate state policymaking to private industry groups. Second, the description of Ohio's law as a

"categorical ban" is question of the appropriate level of generality. True, if one defines the law as addressing "chemical gender transition *for minors*," it is a complete prohibition, at least prospectively (as it grandfathers in ongoing treatment). But if one defines the law as addressing when "gender transition" is permitted, then Ohio's law is not a ban, but a regulation: an age-based limitation on chemical treatments intended to transition sex or gender. It simply requires minors to wait until they are 18 years old, while leaving adults generally free to access such medical interventions. The second reading is the better one, and under that reading, the law should pass muster under this Court's understanding of the Health Care Freedom Amendment.

The State is also likely to prevail in reversing the Court's holding as to "due course of law." Recall that Plaintiffs barely mentioned this argument in appellate briefing, using just over two of 79 pages on the topic. Plaintiffs relied more heavily on all of their other three claims, giving this one scant weight. Most of the Court's reasoning related to this Due Course theory was not briefed.

As the Court noted, the Sixth Circuit rejected an identical claim under the federal due-process clause. Op. at ¶90 n.35 (citing *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023), and *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024). And this Court noted that the Ohio Supreme Court has also held that the Ohio "Supreme Court has equated the Ohio's Due Course of Law Clause with the Due Process of Law Clause of the Fourteenth Amendment." Op. at ¶79 (citing *State v. Aalim*, 2017-Ohio-2956, ¶15.). But the Court nevertheless rejected the reasoning of *L.W.* by sidestepping *Aalim*'s default lockstepping rule, relying instead on *State v. Bode,* 2015-Ohio-1519, ¶24, in which the Ohio Supreme Court read the Ohio Due Course clause differently from its federal counterpart. Op. at ¶90 n.35 (citing *Bode*, 2015-Ohio-1519 at ¶¶13–28).

But *Aalim,* not *Bode,* is the better guide for this Court for several reasons. First, *Aalim* came later in time, and explains that deviation under Ohio law requires a basis to do so—something that *Bode* did not provide.

Second, the Court has not relied on *Bode* since *Aalim* to expand Due Course protections beyond the Due Process Clause, while it *has* relied upon *Aalim* to reject such expansion or to reiterate that Ohio clause matches the federal one. *See State v. Ireland*, 2018-Ohio-4494, ¶37 ("we see no reason … to depart from the general rule that" the two clauses "provide the same degree of protection"); *State v. Worley*, 2021-Ohio-2207, ¶77 n.2 (noting general rule). Indeed, *Ireland* described *Bode* as "depart[ing] from the general rule." 2018-Ohio-4494 at ¶37. Third, *Bode* involved a *procedural* right in a criminal case—the right to counsel for juveniles—so it differs categorically from substantive-due-process analysis, which requires a deeply rooted history of a right. Ohio's deeply-rooted history does not differ from America's National history on this topic.

For all these reasons, the State is likely to obtain reversal on appeal of the Court's Due Course holding.

D. In the alternative, the Court should limit the scope of relief for now to the named Plaintiffs.

If the Court does not grant a full stay of its judgment, it should alternatively stay its ruling to the extent that it covers unnamed non-parties, thus limiting relief for now to the named Plaintiffs. The Court has already limited the scope of relief in one significant way (and correctly so, in the State's view) by limiting its ruling to only the medication provisions of Ohio's law and excluding the surgical restrictions as well as the separate sports and custody provisions. Op. at ¶47. That recognizes that these Plaintiffs have not made a showing as to those other items. The Court should take the next step and also limit, at least for now, its medication holding to cover *these Plaintiffs.*

As the Court is well aware, both state and federal courts, together with prominent scholars, have debated the propriety of the so-called "universal injunction." *See, e.g., State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶7 (DeWine, J., concurring); *Labrador v. Poe by & through Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring); Samuel L. Bray, *Multiple*

Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 427 (2017). To be sure, some of that discussion involves preliminary relief, but some also involves the ultimate reach of equity in governing non-parties. *See* Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 471 (describing limit as based on the scope of "the judicial power"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (noting, in a permanent-injunction case, "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"). All that means that even if the State does not prevail on the merits of Plaintiffs' Ohio-Constitution claims, it could still prevail on narrowing the scope of relief.

Consequently, this Court should at least stay its ruling as to unnamed parties.

CONCLUSION

The Court should stay its judgment pending appeal, or in the alternative, stay it partly to limit any immediate any relief to the named Plaintiffs.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 2025, this motion and memorandum in support were 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:

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