IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO

MADELINE MOE, *et al.*, Plaintiffs, v. DAVE YOST, *et al.*, Defendants.	:	Case No. 24 CV 002481 Judge Michael J. Holbrook

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MEMORANDUM CONTRA PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

People of good will may differ on how society should address the growing trend of children who identify as transgender. The People of Ohio, through their elected representatives, have recently 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 scholastic sports from the threats to safety, fairness, and privacy 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. Others have an entirely different view of how to address the same subject. Thus, it is not surprising that Ohio's ACLU has sued to challenge Ohio's new law, representing two families who say that they and their children will be harmed by it.

What is surprising, though—and what makes *this* TRO motion easy to deny at this stage, regardless of the outcome of this litigation down the road—is that the Plaintiffs seek *immediate* relief without alleging that will be harmed in the immediate future. A TRO protects the status quo for two to four weeks. But the Plaintiffs' alleged harm is months or years away, if ever. That is enough to deny TRO relief now, proceed with the case normally, and revisit temporary relief if and when an immediate concern arises.

First, the Plaintiffs' pleadings leave no doubt that no harm is imminent. The Goe Plaintiffs—two parents and their minor child—say that their child will be assessed at a July 2024 medical appointment to *possibly* begin puberty blockers. The Moe Plaintiffs say that their child is already on puberty blockers—which the new law allows to continue—but might at some unknown future date wish to start new drugs. None of that is any basis for restraining

enforcement of any part of Ohio's law *now,* or any time before fuller review is complete. Further, Plaintiffs' motion does not even ask for relief regarding provisions of the law addressing scholastic sports or custody disputes for parents.

Second, Plaintiffs cannot pivot to alleging harm to unnamed and unknown Ohioans beyond this case. Their motion alleges nothing in that regard, and properly so. Preliminary relief is not available without a showing of imminent and irreparable harm *to Plaintiffs themselves.*

Third, while the Plaintiffs have not alleged (let alone established) that they face any immediate harm, a TRO here will immediately harm Ohio and the public interest by undermining democracy and the will of the people, as reflected in the laws adopted by the General Assembly.

Finally, while the above is more than enough to deny relief, Plaintiffs are unlikely to succeed on the legal merits of their claims, *even if* the factual allegations in the Complaint and the facts and opinions set forth in the affidavits attached to Plaintiffs' TRO motion are accepted as true. To be sure, the State disputes many of these allegations and assertions. Much to the contrary, in enacting the law challenged here, the General Assembly made specific findings, including the following, among others:

- "Studies consistently demonstrate that the vast majority of children who are gender nonconforming or experience distress at identifying with their biological sex come to identify with their biological sex in adolescence or adulthood, thereby rendering most medical health care interventions unnecessary." (H.B. 68, Section 2(C)).

- "Scientific studies show that individuals struggling with distress at identifying with their biological sex often have already experienced psychopathology, which indicates these individuals should be encouraged to seek mental health care services before undertaking any hormonal or surgical intervention." (*Id.*, Section 2(D)).

- "Suicide rates, psychiatric morbidities, and mortality rates remain markedly elevated above the background population after inpatient gender reassignment surgery has been performed." (*Id*, Section 2(E)).

- "Some health care providers are prescribing puberty-blocking drugs . . . despite the lack of any long-term longitudinal studies evaluating the risks and benefits of using these drugs for the treatment of such distress or gender transition." (*Id.*, Section 2(F)).

- Health care providers are also prescribing cross-sex hormones for children who experience distress at identifying with their biological sex," even though "no randomized clinical trials have been conducted on the efficacy or safety of the use of cross-sex hormones in adults or children for the purpose of treating such distress or gender transition." (*Id.*, Section 2(G)).

- "The use of cross-sex hormones comes with . . . serious known risks," including "erythrocytosis, severe liver dysfunction, coronary artery disease, cerebrovascular disease, hypertension, increased risk of breast and uterine cancers, and irreversible infertility," for biological females, and "thromboembolic disease, cholelithiasis, coronary artery disease, macroprolactinoma, cerebrovascular disease, hypertriglyceridemia, breast cancer, and irreversible infertility," for biological males. (*Id.*, Section 2(H)).

But at this early and expedited first stage, it is neither possible nor necessary to engage in an evidentiary contest between the parties' different versions of the relevant facts and science. Even without contesting Plaintiffs' allegations and their witnesses' untested assertions, their claims still fail.

First, Plaintiffs' single-subject challenge fails as a matter of law because the entire law serves a unified purpose: protecting all children and families amidst a growing trend of children who identify as transgender and/or are diagnosed with gender disphoria. 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.

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 override the State's power to define allowable medical care.

Third, the equal-protection claim fails because Ohio limits medical "transition" for all children equally, and it further does so for the rational and compelling purpose of delaying life-altering decisions until adulthood.

Fourth, the due-course-of-law claim fails because the Ohio Constitution has no textual or historical support for a deeply rooted right to change sex or gender, and again, the law has a rational and compelling purpose in protecting children from medical experimentation that risks permanent effects.

To be sure, Plaintiffs will dispute this, and in coming months, to the extent their claims can survive a motion to dismiss as a matter of law, they will have enough time to make their case. But for today, Plaintiffs have not alleged, let alone established that *any* harm will befall them this month or next, nor that they are likely to succeed on any of their claims. Accordingly, the TRO motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

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

A. 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 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 becomes effective April 24, 2024.

B. Plaintiffs sued to challenge the law and seek immediate relief.

1. 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" families. (The State does not oppose their motion to proceed under pseudonyms and is working with Plaintiffs on an agreed protective order regarding health information or other details to ensure privacy.) 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.

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, Sec. 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. (Their Motion defines what they call the "Health Care Ban" to include the custody-adjudication provision, but their legal discussion in the Memorandum never mentions that custody provision, only the medical ones.). Count Two alleges a violation of Ohio's Health Care Freedom Amendment, Art, I, Sec.

21. Count Three is based on the Equal Protection Clause, Art. I, Sec. 2, and Count Four rests on the Due Course of Law Clause, Art. I, Sec. 16.

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.

2. Both Plaintiff families allege that the medical provisions could harm them, if and when their doctors recommend new or different medication, and the Moes allege an upcoming medical checkup in July.

Plaintiffs filed, along with their Complaint, a "Motion for Preliminary Injunction Preceded By Temporary Restraining Order If Necessary" ("TRO Motion," or "Motion"). While the Motion sought a TRO "if necessary" before a preliminary injunction, the Court instructed the State to immediately respond only to the TRO request. The State has proposed proceeding to trial by June for final resolution, without any preliminary injunction hearing along the way. Future scheduling is to be discussed on Friday, April 12, 2024, along with oral argument on the TRO Motion.

Both Plaintiff families allege that the medical provisions could harm the Minor Plaintiffs by interfering with future medical treatment. (By "medical provisions," the State here refers only to the actual medical provisions, and not the custody provision. As noted, Plaintiffs define what they call a "Health Care Ban" to include the custody provision, but they never identify harm caused by it.) The Goes allege that their child is not yet on any medication, but they might wish to begin "puberty blockers," depending on the outcome of a July 2024 medical appointment or later, future appointments. Specifically, they allege:

> Grace is now 12, and her doctors are monitoring her for the first signs of puberty to identify the right time to begin medication that will temporarily pause puberty. She is being seen every six months; her next appointment is in July 2024.

Compl. ¶110. The Moes allege 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. Specifically, they allege:

> Madeline is now 12, and her doctors have said that she is a good candidate for hormone therapy in the form of estrogen, if that is what she wants and her parents agree. Madeline and her parents would like Madeline to be able to start hormones at the right time so that she can go through female puberty alongside her peers. Madeline's physicians are monitoring her physical and mental health, and have told her that they will prescribe an appropriate hormone therapy if H.B. 68 does not go into effect.

Id. ¶103.

Both families allege various long-term harms if their respective children are not able to pursue future medication in Ohio, including "debilitating stress and anxiety," *id.* ¶105 (Moe), a "serious negative effect on Grace's mental health," *id.* ¶112 (Goe), and pressure on both families to consider leaving Ohio to obtain treatment, *id.* ¶¶106, 113.

Neither family alleges that either child is involved in school or college sports or will be affected in any way by the custody provision.

LEGAL STANDARD

Ohio Civil Rule 65 governs both temporary restraining orders ("TROs") and preliminary injunctions. While both forms of judicial relief involve a temporary order to preserve a movant's rights pending further review, a TRO is a shorter version—granted for just fourteen days, sometimes before notice to the opposing party, based on "specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage" will occur without relief. Civ. R. 65. "In determining whether to grant a temporary restraining order, a trial court must 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).

ARGUMENT

While TROs and preliminary injunctions both turn on the same four factors, TROs operate on a much shorter timeframe of *immediacy*. A preliminary injunction is aimed at protecting rights or preventing harm until permanent resolution, while a TRO is aimed at preserving the status quo immediately for just fourteen days—and maybe fourteen more—until a preliminary injunction can be considered. That shorter timeframe means that the Court asks about "immediate and irreparable injury" in terms of those few days. Here, that alone is enough to defeat Plaintiffs' Motion, as they do not even allege, let alone establish, *any* immediate harm in the next fourteen or twenty-eight days.

To be sure, Plaintiffs' Motion seeks both a TRO and a preliminary injunction, styling the TRO request as conditional, depending on how soon a preliminary-injunction request will be assessed. The Court directed the State to address only the TRO request for now. Nonetheless, Plaintiffs, by asking for a TRO, have a duty to justify it in *immediate* terms. They have failed to do so. Even for a preliminary injunction, they have not shown any immediate harm that prevents this case from proceeding in the normal course over the next several months.

While the lack of immediacy is enough to deny the motion, the State nevertheless reviews below all four factors out of an abundance of caution. Those confirm that no relief is justified, as Plaintiffs' Motion likewise fails on all other factors, including the merits.

A. Plaintiffs do not show any *immediate,* irreparable harm to warrant immediate relief.

1. Any alleged harm must be imminent.

To receive a TRO, both Rule 65 and binding precedent require that any alleged harm 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?—the immediacy aspect is just as important. After all, if nothing concrete will happen for months, a TRO for the next fourteen days is irrelevant.

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 plaintiff that she "may renew her 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.

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

All of Plaintiffs' alleged harms are at least months away. As quoted fully in the fact statement above (at 7), the Goes' child has an appointment in July 2024—about three months away—and even that appointment is only to determine *whether* the doctors recommend starting puberty blockers. Compl. ¶110. Indeed, the Goes' child has not "started puberty," but even then, the Plaintiffs aver only that they "hope to discuss which medications are a good fit." Goe Aff. ¶13.

Likewise, the Moes do not give a date for a next appointment, but say only 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; TRO Mot. at 36 (discussing "therapy in the form of estrogen" to begin "at the appropriate time."). Thus, even assuming for the sake of

argument that all the alleged harms are irreparable, they are irrelevant because none of them are even allegedly happening to the Plaintiffs *now*.

Put another way, a TRO is a judicial tool to preserve the "status quo," but the status quo for both Minor Plaintiffs is waiting to see what comes next. That "status quo" is not affected by any provisions of Ohio law. At most, the challenged medical provisions might affect them down the road if they want to *change* their medical status quo. But those challenged provisions will not affect them in the next fourteen or twenty-eight days, and that defeats any current request for a TRO.

Indeed, on these allegations, the Plaintiffs cannot even show entitlement to a preliminary injunction before a permanent-injunction trial (especially if the Court agrees with the State to hold a trial by May, or even June). Thus, because Plaintiffs are not "facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit.'" *Sorey*, 2023 WL 4189656 at *1 (quoting *D.T.*, 942 F.3d at 327 (emphasis in original)). And if that changes, and either Minor Plaintiff has some new medical need before trial, they may "renew their request" when that moment "looms." *Fischer*, 78 F.4th at 868.

Plaintiffs may strongly believe that Ohio's law is bad policy that should be stopped at once, regardless of whether it will directly affect them. But entitlement to a TRO does not turn on Plaintiffs' beliefs. Because Plaintiffs have not showed immediate harm, a TRO cannot issue.

3. Plaintiffs do not seem to seek immediate relief from provisions related to sports or custody, but even if they do, they allege nothing to justify relief now.

Plaintiffs do not seem to even ask for a TRO (or for a preliminary injunction) as to provisions of the law governing student sports or parental custody. But to the extent Plaintiffs are unclear, the State notes that any such request is not supported by a single allegation.

The Motion itself—the two-page cover document, not the accompanying Memorandum in Support—is expressly limited to specific provisions regulating the medical profession and parental rights in custody disputes in court. The Plaintiffs ask the "Court for a preliminary injunction to enjoin enforcement of Ohio's recently enacted ban against gender-affirming health care for minors (the "Health Care Ban,") consisting of Sections 3109.054, 3129.01-3129.06, 3313.5319, and 3335.562 of the Ohio Revised Code, contained in H.B. 68." Mot. at 1. The rest of that Motion repeatedly cites what Plaintiffs mislabel the "Health Care Ban," with no reference to sports by description or by code section. Likewise, Plaintiffs' Proposed Order would enjoin only provisions related to medical treatment—and apparently the custody-adjudication provision, which they somehow define in their Motion as part of a "Health Care Ban"—leaving sports-related provisions untouched until permanent resolution is reached. And even in the Memorandum in Support, the sections regarding irreparable harm, the public interest, and effect on Defendants are all limited to Ohio's laws on medical treatment. (Curiously, even though the Plaintiffs seek to enjoin the parental rights provision, R.C. 3109.054, none of the families allege that this provision will affect them in the Complaint, Memorandum in Support, or affidavits.) Nevertheless, Plaintiffs' Memorandum in Support adds a one-line perfunctory shot at the Sports Provisions in the Conclusion. There, the Plaintiffs ask the Court to "[e]njoin[] implementation and enforcement of H.B. 68 in its entirety, on the basis that it violates Article II, Section 15(D) of the Ohio Constitution," that is, the Single-Subject Clause. *See* Mem. at 45.

In the State's view, the formal request in the Motion and the Proposed Order should govern what relief this Court even entertains. Indeed, if the Court simply signed Plaintiffs' own order, provisions related to student sports would be entirely untouched. But even if the Memorandum were read to seek relief about sports or parental custody rights, no such relief is warranted. That is so because Plaintiffs make *zero* allegations about the provisions related to

student sports or custody adjudication at all, let alone any allegations about imminent harm in the next fourteen days.

Notably, that lack of a custody-and sports-specific showing is fatal at either the TRO or preliminary injunction stage *even if* Plaintiffs could somehow achieve a final judgment encompassing the whole bill. First, Plaintiffs have no standing to challenge provisions of law related to sports or custody-adjudications (as noted below at 18). Second, as a matter of remedy, Ohio law requires severing only the offending provisions, if any, not an entire bill. 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). "Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy." *Aluminum Workers Int'l Union, AFL-CIO, Loc. Union No. 215 v. Consol. Aluminum Corp.*, 696 F.2d 437, 446 (6th Cir. 1982). With zero allegations of harm from the sports or custody-adjudication provisions, Plaintiffs cannot earn relief against those laws.

4. Plaintiffs may not rely on speculative harm to non-plaintiffs.

Because Plaintiffs did not, and cannot, allege any imminent harm to themselves, they might pivot to relying instead on alleged harm to other Ohioans. But preliminary relief may only protect *plaintiffs* or *movants* in a case, not the world at large. By its plain terms, Rule 65 allows for TROs to prevent "injury, loss or damage . . . to the *applicant*." Civ. R. 65 (emphasis added); *see Coleman*, 2002-Ohio-2021, ¶2 (a TRO is "intended to prevent the applicant from suffering immediate and irreparable harm"). In cases with multiple plaintiffs, courts generally will tailor preliminary relief such that the plaintiffs showing harm receive relief, while plaintiffs that do not show individualized harm are denied relief. *See, e.g.*, *Ohio v. Becerra*, 87 F.4th 759, 784 (6th

Cir. 2023) (granting preliminary injunction to State of Ohio, but denying preliminary relief for other plaintiff States, "[b]ecause only Ohio made the requisite showing of irreparable harm"); *CSL Plasma, Inc. v. U.S. Customs and Border Protection*, 628 F. Supp. 3d 243, 249 (D.D.C. 2022) (granting preliminary injunction for only some plaintiffs, because "[o]nly [certain named] Plaintiffs have made the clear showing necessary to merit injunctive relief," while other named "Plaintiffs have not made a clear showing of irreparable harm"). If such selective relief is mandated for actual plaintiffs, then surely non-plaintiff parties cannot be the basis for relief. Thus, Plaintiffs here cannot point to unknown others at the TRO or preliminary-injunction stage to show their entitlement to relief.

Notably, Plaintiffs have not sought class-actions status. *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."). And if they had, as the Tenth District recently reaffirmed, "'plaintiffs at the class-certification stage … must adduce common evidence that shows all class members suffered some injury.'" *Waitt v. Kent State Univ.*, 2022-Ohio-4781, ¶25 (10th Dist.) (quoting Schwartz & Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 50 (2005)).

Thus, even at the merits stage and in a class action, relief must be tied to the parties before the court. To be sure, sometimes a party's victory might benefit others, too, depending on its nature, but it must be rooted in relief *for* plaintiffs. The "judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). That is, even when there might be debate over the scope of relief to cover others *beyond* a given party—such as the notions of whether a challenge to a law is "facial" or "as applied," or debates over so-called

"universal injunctions"—those debates are always about *extending* to non-parties, not relying on non-parties as a substitute for a lack of harm to the named parties.

Finally, as a practical matter, this is not a case in which unknown citizens might run afoul of some law unwittingly if enforcement of the law is not universally enjoined. Nor is it an area involving spontaneity or emergencies. Those seeking medication will have to go through doctors, who are directly regulated in many ways under this and other laws. If any doctor has a patient with an urgent need that might warrant relief, that doctor can contact the ACLU and direct the patient to this case, where they may proceed under a pseudonym. Unless and until that happens, *these* Plaintiffs, who have shown no urgent need for relief, cannot rely on allegations about unknown other parties to gain relief for themselves or others.

* * *

In sum, Plaintiffs have shown no imminent harm to themselves from the provisions they identify, have said nothing about the sports and parental rights provisions, and cannot rely on unknown harm to unknown others as a substitute. Thus, no TRO is warranted, and the Court can stop there.

B. The public interest does not support a TRO, while enjoining State laws is inherently harmful to democracy.

As demonstrated above, the Plaintiffs have not alleged, let alone established, that they face any immediate harm. But a TRO here will immediately harm Ohio and democracy.

Before entering a TRO or preliminary injunction, a court must assess two other 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.

Courts have often noted that 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).

The law Ohio enacted to address the challenges posed by the growing trend of children who identify as transgender was not only passed by a majority in the General Assembly in December 2023, but by a supermajority in January 2024 to override a gubernatorial veto. Plaintiffs not only mistakenly ignore the harm to the State's interest—which is really the interest of a democratic majority to enact its favored policies within the bounds of the Constitution—but Plaintiffs also try to appeal to the alleged interest of other Ohio families with children on such medications. *See* Mot. at 44. However, the interests of ongoing patients are already covered by the medical provisions' grandfather provision, allowing ongoing treatment to continue. R.C. 3129.02(B). And again, provisions addressing girls' sports are not even at issue now. Even if they were, any injunction would risk great harm to third parties and the public interest. Girls who are forced to compete with boys risk suffering serious bodily injury, losing unfairly, and encountering invasions of their privacy in showers and locker rooms. Parents who do not consent to experimental medical treatments on their minor children risk losing their parental rights and responsibilities in court. And the will of the People to establish regulatory guardrails for this controversial subject through the democratic process will be thwarted.

Thus, a TRO will harm Ohio and the public interest and should be denied.

C. Plaintiffs have no likelihood of success on the merits on any counts.

The Court need not look long, if at all, at the merits, given the plain lack of immediate irreparable harm to Plaintiffs, especially in the next fourteen days. Nonetheless, the State briefly summarizes why Plaintiffs' claims also fail on the merits.

Importantly, resolution of the merits does not require the Court to decide hotly debated policy matters over whether medicating children to transition their sex or gender is a good or bad policy. The legal test on each count shows that the *Constitution* does not mandate that Plaintiffs' policy preferences become law.

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

Ohio's "Single-Subject Clause," Art. II, sec. 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.

First, Plaintiffs do not even have standing to challenge provisions related to sports or custody decisions. The Ohio Supreme Court has explained that, in a single-subject challenge, a party "must prove standing as to each provision" challenged. *Preterm-Cleveland, Inc. v. Kasich*, 2018-Ohio-441, ¶30. "[I]deological opposition to a program or legislative enactment is not enough." *ProgressOhio.org, Inc. v. JobsOhio*, 2014-Ohio-2382, ¶1. That makes sense, because standing for any case requires that that a party show injury in fact, causation (*i.e.*, that the challenged law caused the injury), and "redressability"—that is, that the requested relief will fix that injury. *Moore v. Middletown*, 2012-Ohio-3897, ¶22. Even if Plaintiffs could manage to have provisions related to girls' sports or custody decisions permanently enjoined, that would redress nothing for *them* and *their injuries*, which are based solely on provisions related to medicine.

Further, the standard remedy for a single-subject violation is to sever offending "rider" provisions (when those provisions affect a plaintiff), and to leave the core of a law intact. *State ex rel. Hinkle v. Franklin Cty. Bd. of Elecs.*, 62 Ohio St. 3d 145, 149 (1991).

Second, the claim fails on the merits, because all parts of the law are tied to one common purpose: addressing gender transition in children and youth—and more specifically, protecting children—even if it advances that purpose in different aspects, such as medicine, sports, and judicial proceedings. Ohio courts 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, 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. Only "a manifestly gross and fraudulent violation" is illegal. *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141, 145 (1984). Here, even if the medical, sports, 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.

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.

2. Plaintiffs are unlikely to succeed 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, Sec. 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 define what is allowed as "health care."

Plaintiffs' view would have shocking implications. 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 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.

Perhaps Plaintiffs will argue that their claim is different, based on their view of certain experts' opinions, or what they claim as a consensus in some quarters. The problem is that the Amendment's text leaves no room for counting doctors' heads or assessing "good" or "bad" limits on allowable health care. Either the State is right that the State preserves its power to

define allowable medical care, or Plaintiffs are right, and the Ohio Constitution forbids the State from limiting *anything* that can be called health care. Plaintiffs' view is wrong.

3. Plaintiffs are unlikely to succeed on their Equal Protection claim.

Plaintiffs are also mistaken in claiming that they will likely succeed in showing that the Health Care Provisions violate Ohio's Equal Protection Clause, which says that government is instituted for the people's "equal protection and benefit." Art. 1, Sec. 2. Plaintiffs propose up to five theories under this Clause, but none provide a basis for relief.

First, as an overarching matter, the Ohio Supreme Court has held that the equal-protection provisions in the state and federal constitutions are co-extensive. *Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60 (1999). While some justices' opinions have addressed the potential room for different Ohio protections, no Ohio Supreme Court majority opinion has ever found a state equal-protection violation where no federal one existed. That makes it notable that the U.S Court of Appeals for the Sixth Circuit has concluded that equal protection claims similar to Plaintiffs' are unlikely to succeed, reversing preliminary injunctions against Kentucky's and Tennessee's similar laws barring minors' gender transitions. *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir.), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023).

Second, all of Plaintiffs' theories fail, for reasons in the Sixth Circuit's opinion and more. Plaintiffs allege that the provisions restricting the medical profession's treatment of minors discriminate on the basis of sex. The argument goes like this: the law's ban on cross-sex hormones applies differently for those born male but who identify as female, who are barred from taking estrogen, from those born female but who identify as male, who are barred from taking testosterone. *See* Compl. ¶¶89–90. But that biological granularity does not change the fact that categorically, each is barred from taking the hormone opposite to their birth sex. *L. W.*, 83

F.4th at 483. Thus, the intent and effect of the law is equal by applying to the type of treatment. Further, even if Plaintiffs' view were correct as to cross-sex hormones, it does not apply at all to puberty blockers, because the identical medicine is given to males and females alike. *Id.* And it also fails as against the gender reassignment surgery restriction, as the law prohibits any surgeries removing or "creating" versions of genitals on minors, even if the relevant genitals differ for boys and girls.

Plaintiffs likewise fail in their attempt to charge unlawful discrimination based on transgender status. First, they are wrong that transgender status is a "suspect classification," triggering strict scrutiny. *Id.* at 486–88. As the Sixth Circuit noted, among other things, transgender persons are not insular and politically powerless. Although some might feel that they lost this particular political fight in Ohio, transgender persons have the support of the federal executive branch and many other State and local governments, as well as the support of much of corporate America, the public schools, and more. "These are not the hallmarks of a skewed or unfair political process." 83 F.4th at 487. Second, the challenged provisions satisfy the rational-basis test and provide even a compelling interest. The State has a compelling and rational interest in protecting children from experimental medication regimens that have lifetime effects. Multiple European countries have pulled back from their prior support of medicating minors, and studies are coming in questioning the approach. *See, e.g.*, Frieda Klotz, "A Teen Gender-Care Debate Is Spreading Across Europe," The Atlantic (Apr. 28, 2023), https://perma.cc/9Q5H-SAFV ("governments and medical authorities in at least five countries that once led the way on gender-affirming treatments for children and adolescents are now reversing course"). When there is such uncertainty, the State is free to choose among competing views. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

The State's compelling and rational basis for the medical provisions also answers Plaintiffs' other theories of equal protection. In sum, Plaintiffs are not likely to succeed on any such claim.

4. Plaintiffs are unlikely to succeed under the Due Course of Law Clause.

Plaintiffs finally claim that the medical provisions violate Ohio's "Due Course of Law" clause, which provides that everyone "shall have remedy by due course of law." Art. I, Sec. 16. Plaintiffs allege that clause, the equivalent of the federal Due Process Clause, covers a "substantive due process" right. Plaintiffs claim that the parents here have a right to direct their children's medical gender transitions as part of a substantive constitutional right to control their children's healthcare. Here, too, they are mistaken.

As originally understood, this provision conferred no substantive rights—it simply entitled injured parties to seek redress. *See State v. Aalim*, 2017-Ohio-2956, ¶¶40, 45–48 (DeWine, J., concurring). But the Supreme Court of Ohio long ago departed from the Clause's plain meaning. Today, the Due Course of Law Clause is treated as "the equivalent of the 'due process of law' protections in the United States Constitution." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶48. Because the federal due-process-of-law provisions have been interpreted to confer substantive rights, the Due Course of Law Clause has been interpreted to do the same.

The Clause thus protects a selective group of substantive rights. Under the substantive-due-process doctrine, "[g]overnment actions that infringe upon a fundamental right are subject to strict scrutiny, while those that do not need only be rationally related to a legitimate government interest." *Stolz v. J & B Steel Erectors, Inc.*, 2018-Ohio-5088, ¶14. But "fundamental rights" include only those rights that are "objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Aalim*, 2017-Ohio-2956, ¶16 (quotation omitted).

The Plaintiffs argue that the substantive-due-process doctrine creates a right to direct their children's healthcare, including medical gender transition. But they can obtain "strict scrutiny" review if they can show that there is a fundamental right to direct a child's gender transition, or, at a minimum, a broader right to direct a child's healthcare *even where* the State has barred the particular practice the parents seek. Only then does strict scrutiny apply. Otherwise, rational-basis review applies.

There is no evidence that either the State of Ohio or the United States has viewed gender transition for minors as a right "objectively, deeply rooted in this Nation's history and tradition." *Aalim*, 2017-Ohio-2956, ¶16. Nor is this surprising, given that young children transitioning from one to another gender is a recent phenomenon. Even viewed as a broader parental right over children's healthcare, no such right has ever been viewed as operating to override the State's right to define allowable medical care—that is, parents have had the right to choose options among those on a menu, but the State has always set the menu. Otherwise, this parental right would override all sorts of regulations, allowing parents to direct any treatments barred by State law, or even to use drugs not approved by the Federal Drug Administration. *See Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703, 706 (D.C. Cir. 2007) (en banc) (concluding that neither parents nor their children have a constitutional right to use a drug that the FDA deems unsafe or ineffective). That is not so, so no such "fundamental right" exists.

Further, as noted above regarding equal protection, the State has a rational reason—indeed, it would be compelling if that were required—to protect children from experimental medical treatment of uncertain efficacy. While Plaintiffs strongly assert medical support for their view—and many doctors and groups agree with them—there is also much medical evidence, with more arriving almost daily, on the other side, urging caution about the harmful and

devastating effects of "transitioning" children. *L.W.*, 83 F.4th at 477. Many European countries are backing away from such treatments and limiting them, and 23 States have enacted laws similar to Ohio's. *See* Klotz, above, at 24; IWF Policy Focus: Current State of Laws Governing Gender Transitions (Mar. 2024), https://perma.cc/GSK5-PY7J, at 3 (listing 23 States). At best for Plaintiffs, there is uncertainty about the right medical treatment for gender dysphoria. And in the face of uncertainty, the State legislature is free to choose among competing views, adopting even a minority one if it wishes. *J.W.*, 83 F.4th at 477.

In sum, Plaintiffs will not succeed in establishing a constitutional right for parents to transition their children's gender under the Due Course of Law Clause.

* * *

As the State said at the outset, this might seem to be a hard case because people of good will have strong but different opinions on the best way to address the trend of children who identify as transgender. But as a matter of constitutional law, the case is straightforward: This is a legislative choice, allowing the People of Ohio to act democratically through our representatives, and on the basis of sound and compelling reasons. Even more important, for this TRO Motion, nothing will happen in the next few weeks to harm *these* Plaintiffs, so the Court should deny the Motion and let the case proceed normally.

CONCLUSION

The Court should deny the motion for a temporary restraining order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Response in Opposition to Temporary Restraining Order was filed electronically and served by e-mail and U.S. mail on this 9th day of April, 2024, upon the following:

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