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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THE STATE OF OHIO'S
RESPONSE TO PLAINTIFFS' WRITTEN CLOSING ARGUMENT

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INTRODUCTION

If the evidence set forth from both sides at trial is of any relevance to this Court's ruling, the parties seem to agree that the evidence presented is relevant only to two of Plaintiffs' four claims: those raising challenges under the Ohio Constitution's equal-protection and due-course-of-law guarantees. (Plaintiffs also claim that evidence could be relevant to the issue of whether Plaintiffs' have established standing to raise any of their claims, but the problem with that assertion is that there ***was*** no evidence of Plaintiffs' standing to assert any of their claims.)

As for the evidence that was introduced, as explained below and in earlier briefing, Plaintiffs had the burden, from the very beginning through the very end of trial, of proving beyond a reasonable doubt that the SAFE Act lacks any legitimate purpose and/or that any unequal treatment or restriction in the Act bears no rational relation to any such purpose. Plaintiffs failed to carry this high burden. Even if the burden were nothing more than preponderance, or even if there were no relevant burden to speak of relevant to their constitutional challenges, Plaintiffs still have not shown, by any measure, what is necessary for this Court to invalidate the law.

At best, Plaintiffs have shown only that their own view of the relevant scientific literature may, in time, turn out to be correct in some part. This is far from any showing that the relevant science is in their favor as it currently stands. It is even farther from any showing that the answers to the relevant scientific questions have already been answered, that the debate is already over, and that their view has already prevailed. To the contrary, the evidence showed that medical intervention on children in this setting is a novel and experimental phenomenon, that real risks (including a high likelihood of permanent infertility) exist, and that there is potential for additional harm beyond that which is already known.

The most important point to keep in mind at this juncture, after the parties have presented their evidence and had the opportunity to summarize it following trial, is that this Court need not resolve questions that, at best for Plaintiffs, science has yet to resolve. The relevant law does not require—or even allow—the Court to choose between (1) upholding the law if it finds that the risks of this medical intervention outweigh any benefits, or (2) striking down the law if it finds the opposite. Instead, the relevant law is very clear. For at least as long as the legitimate scientific debate is ongoing, the decision on whether the SAFE Act should or should not be enacted lies wholly with the General Assembly, not this Court. Indeed, even if the scientific debate were concluded (which it is not), there may be legitimate purposes for the law that go beyond science and that bear a rational relationship to the restrictions the law sets forth.

In the end, Plaintiffs failed to establish standing to raise any of their constitutional challenges. They failed to even get out of the starting blocks. Without such standing, all that remains of this case is an invalid attempt to rehash the general debate that already took place in the legislature and an invalid presumption that this Court can and should strike down the law if it disagrees with the General Assembly's policy decisions. As this Court is already well aware, that would be beyond this Court's authority and would strike a blow to the rule of law and to representative self-government by the People of Ohio.

Even if Plaintiffs had established standing, their claims still fail on the merits. Little more needs to be said on these merits beyond what the parties have argued already. Ultimately, the Single-Subject-Clause and Health-Care-Freedom-Amendment claims fail as a matter of law, regardless of any weighing of evidence. And the Equal-Protection and Due-Course-of-Law claims fail because only rational-basis review applies, and as the Sixth Circuit has already decided under federal law that is indistinguishable from the Ohio law relevant here, the restrictions in the SAFE Act easily survive that constitutional analysis. Even if a stricter scrutiny

were applicable (which it is not) the SAFE Act likewise is narrowly tailored to achieve a compelling government interest.

As the Sixth Circuit concluded in its analysis of similar Tennessee and Kentucky law, "The unsettled, developing, in truth still experimental, nature of treatments in this area surely permits more than one policy approach, and the Constitution does not favor one over the other." *L.W.* at 36. "This ongoing debate provides 'persuasive evidence' that Kentucky and Tennessee could choose fair-minded caution and their own approach to child welfare, just as other jurisdictions could rationally adopt another path." *Id.*

In short, the SAFE Act is constitutional, and this Court should allow it to stand.

RESPONSE TO PLAINTIFFS' SUMMARY OF EVDIENCE

Plaintiffs' summary of the evidence does not convincingly refute any of the following facts:

Medical practitioners in Europe and North America have seen an emerging explosive growth in pre-pubescent minors seeking medical intervention as part of a transition from one gender identity to another. *See, e.g.*, Tr. 07/17 at 66:4-66:15, 108:22-110:15, 117:22-118:20; Tr. 07/18 at 85:14-86:18. In this new phenomenon, 70% of the patients are female, and their gender dysphoria often starts in early adolescence, not long before they naturally begin puberty. *See, e.g.*, Tr. 07/17 at 110:1-112:10; Tr. 07/18 at 87:12-88:1.

This sea change in the population of gender-dysphoric youth correlates in time with skyrocketing rates of several mental-health concerns, including depression, anxiety, and suicidality (i.e., contemplation of suicide, which itself is concerning, but which is not a strong predictor of actual suicide attempts). *See, e.g.*, Tr. 07/17 at 91:20-93:9, 110:1-15. This dramatic increase in mental health concerns among youth also coincides in time with the prevalence of social media, which now bombards youth, especially females, with algorithmically conjured

images of, and pressure to conform to, "perfect" female body types. *See, e.g.*, Tr. 07/17 at 109:2-25.

Experts throughout Europe have conducted systematic reviews of what scientific studies do exist on puberty blockers, hormone treatment, and medical intervention for gender-dysphoric youth. These studies endeavor to eliminate selection bias and compile and synthesize all available scientific of sufficient quality, as judged by neutral standards. *See, e.g.*, Tr. 07/17 at 77:22-83:7. All of these systematic reviews have concluded that the risks (known and unknown) of treating youth with gender dysphoria through medical intervention, including but not limited to puberty blockers and hormone treatment (regardless of additional risks of surgery), outweigh any potential benefits. *See, e.g.*, Tr. 07/17 at 81:7-81:23, 84:3-88:25. Plaintiffs' experts' attacks on the margins of the specific methodologies of these systematic reviews are irrelevant to outcome, as shown in part by the systematic studies' independent and consistent conclusions. *See, e.g.*, Tr. 07/17 at 77:22-83:7.

Gender dysphoria (that is, the diagnosable mental illness associated with significant distress caused by incongruence between gender identity and natal sex) can and often does resolve without medical intervention. *See, e.g.*, Tr. 07/17 at 97:19-99:12; Tr. 07/18 at 85:5-19. Gender identity (that is, a person's own concept of their gender, as distinguished from their natal sex) is not innate or immutable; in fact, a person's gender identity frequently changes throughout a person's life. This does not mean that transgenderism is not real, nor does it mean that a transgender identity is less genuine or valid than a non-transgender identity. *See, e.g.*, Tr. 07/18 at 88:16-89:16.

A child or adolescent with a transgender identity before puberty can and often does desist from this transgender identity after puberty is allowed to take its natural course. *See, e.g.*, Tr.

07/17 at 97:19-99:12; Tr. 07/18 at 85:5-19. Puberty that takes place at a typical age is important for the physical and mental development of a person. *See, e.g.*, Tr. 07/18 at 101:25-102:23.

Medical intervention through puberty blockers and hormone treatment carries a high risk of permanent infertility. *See, e.g.*, Tr. 07/15 at 249:2-250:1; Tr. 07/19 at 46:1-47:13. Other risks, such as low bone density and higher risk of blood clots, also exist.

While puberty blockers and hormone treatment have been used for a long time to treat other physical conditions (such as early or late onset of puberty and polycystic ovarian syndrome (PCOS)), and the physical risks of this treatment are fairly well known, it is not known if the risks, especially psychological risks, are different when these treatments are used to treat the mental condition of gender dysphoria. *See, e.g.*, Tr. 07/19 at 60:21-62:7, 71:12-25.

Instead of refuting these facts, Plaintiffs seem to try to steer attention away from them. They largely ignore all of this evidence and instead construct a straw-man argument: "Defendants' case in large part, focused on ***how care is provided***," they claim. Plaintiffs' Br. at 9. "Much of their evidence presented was aimed at demonstrating that some doctors, somewhere, departed from the WPATH Standards of Care and Endocrine Society Guideline and provide puberty blockers, hormone therapy, or surgery 'on demand,' without engaging in what those clinical practice guidelines actually recommend." *Id.* Having reduced the evidence to this one issue, they respond that the State "did not present any direct or competent evidence that such departure from standards is an issue in Ohio." *Id.* at 10.

To be sure, one concern that supports the General Assembly's policy choice is the concern that medical professionals are not following relevant guidelines. But even if this concern were eliminated entirely, the principal concern—as is clear from any fair review of the expert testimony in this case—is that even if these guidelines were followed without fail, the science shows that the risks, both known and unknown, outweigh the potential benefit of the treatment

when the patient is a child. That is why several European countries are now shutting down such treatment for minors, often with only limited exceptions, such as for the purpose of additional research. This is the crux of the concern behind the SAFE Act. The General Assembly's factual findings in H.B. 68 make that clear, as does the vast majority of the expert testimony. On that, Plaintiffs have little to say worthy of response beyond what has previously been explained through briefing and/or testimony.

RESPONSE TO PLAINTIFFS' ARGUMENT

A. Plaintiffs Failed To Prove Standing For Any Claim.

At trial, Plaintiffs failed to establish that the minor Plaintiffs have the underlying medical condition that their own experts say is a predicate to allow any medical professional under the to prescribe or render the prohibited treatments. This is fatal to their case. The law is clear and has been explained already. Plaintiffs offer no convincing response. This threshold failure strikes at the core of the critical issue of when Courts can and should entertain constitutional challenges to statutes, and when Courts cannot and should not.

B. Plaintiffs Failed To Prove A Violation Of The Single-Subject Clause.

Likewise, Plaintiffs' Single-Subject-Clause claim fails, because there can be no question, under binding precedent already discussed, that the law is limited to a single subject—transgender youth—that is easily specific enough to pass constitutional muster. Again, Plaintiffs have no meaningful response. The real objection Plaintiffs seem to raise is that two bills were combined into one during the process of passing this law. But that is wholly irrelevant to the analysis. The Supreme Court, in rejecting a claim under the analogous "separate vote" clause that applies to constitutional amendments, found varying topics "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.

C. PLAINTIFFS FAILED TO PROVE A VIOLATION OF THE HEALTH CARE FREEDOM AMENDMENT.

Third, Plaintiffs' Health-Care-Freedom-Amendment claim also fails, and again no more needs to be said, beyond what has been briefed earlier in this litigation, to respond to Plaintiffs' closing argument. Put simply, it would be an absurd reading of the Amendment to conclude that it deprives the General Assembly of any power to determine what is or is not legitimate health care. Plaintiffs' reading of the Amendment would create that very result. Not only is that contrary to common sense, it is also contrary to the plain language and historical context of the Amendment.

D. Plaintiffs Are Unlikely To Succeed On Their Equal Protection Claim.

Plaintiffs' equal-protection claim fails for reasons already explained. Again, their closing argument does not overcome this result.

Further, even if strict scrutiny somehow applies here, Ohio's limits on medical treatment of minors survive that standard as well. "A statute survives strict scrutiny if it is narrowly tailored to serve a compelling state interest." *State v. Lowe*, 2007-Ohio-606, ¶18, 112 Ohio St. 3d 507, 510; *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶64, 116 Ohio St. 3d 468, 481. Here, the State's "interest—safeguarding the physical and psychological well-being of a minor—is a compelling one." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982). The trial evidence, especially the testimony of Chloe Cole summarized in the State's closing brief, established that the treatments regulated by Ohio can cause extreme, immeasurable harm to at least some minors, who will bear physical and emotional scars for their entire lives. Ohio has a compelling interest in ensuring that our children do not go through the trauma that Cole did.

Given that compelling interest, prohibiting this medical intervention on minors (while allowing it for adults) is narrowly tailored. It is the only way to prevent unproven, experimental medical intervention that would permanently harm those children who might someday wish to detransition. Plaintiffs' expert Dr. Turban acknowledged that detransitioners such as Cole exist. Tr 07/15 at 178:16-20. And he acknowledgde that, as is often true "for most psychiatric conditions," there is no biological test for gender dysphoria or gender incongruence that might predict which children's transgender identity would persist into adulthood and which children's transgender identity would not. Thus, only a prohibition applicable to all children will prevent the harm the State seeks to address. Such a prohibition does nothing more than allow every child the opportunity to make their decision after they turn 18, if they still want, at which point the law's restrictions have no application whatsoever.

To be sure, Plaintiffs will likely counter that this unfairly eliminates this medical intervention option for all children, including those who never end up changing their minds. But this ignores the acknowledged inability to distinguish between these two situations. Further, even the strict scrutiny test does not invite a court to weigh relative harms and gains. That is the General Assembly's job. As long as the interest is compelling and the State's method of meeting that interest is narrowly tailored, both of which are true here, the test does not ask whether other interests, however sincere or heartfelt, are affected to a greater or lesser degree. Consequently, Ohio's law survives even strict scrutiny.

E. Plaintiffs Failed To Prove A Violation Of The Due Course Of Law Clause.

Finally, based on the same rational-basis or strict-scrutiny analysis, Plaintiffs' due-course claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court issue final judgment upholding the SAFE Act, denying all Plaintiffs' requested permanent relief, and immediately dissolving the temporary, preliminary injunction previously issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically and served by e-mail on July 24, 2024 upon all counsel of record.

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