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

MADELINE MOE, et al. Plaintiffs-Appellants, v. DAVID YOST, et al. Defendants-Appellees.	Case No. 24AP-000483 On appeal from the Franklin County Court of Common Pleas, Case No. 24-cv-002481

MOTION OF APPELLANTS TO RESTORE AND/OR GRANT INJUNCTION PENDING APPEAL

Pursuant to Ohio Rule of Appellate Procedure 7 and applicable case law, Appellants Madeline Moe, by and through her parents and next friends, Michael Moe and Michelle Moe; Michael Moe; Michelle Moe; Grace Goe, by and through her parents and next friends, Garrett Goe and Gina Goe; Garrett Goe; and Gina Goe move this Court for an order

restoring and/or granting an order enjoining H.B. 68 during the pendency of this appeal, as is necessary to maintain the status quo.

A memorandum in support is attached.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION OF APPELLANTS TO RESTORE AND/OR GRANT INJUNCTION PENDING APPEAL

INTRODUCTION

Absent relief from this Court, Plaintiff-Appellants Grace Goe and Madeline Moe—twelve-year-old girls who have lived in Ohio their entire lives—will be forced to leave their homes to obtain vitally important health care. Plaintiff-Appellants Gina Goe, Garrett Goe, Michael Moe,

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and Michelle Moe—their loving parents—may have to uproot their whole families because of the burden of seeking care out of state. The Goe family may even separate, sending Gina and Grace away while Grace's father and three brothers stay behind.

Less than four months ago, the Franklin County Court of Common Pleas held that such irreparable harm—combined with Appellants' likelihood of success on the merits—warranted a temporary injunction. The trial court held that H.B. 68, the law that would deprive Grace and Madeline of health care in their home state, likely violated the Ohio Constitution's Single-Subject Rule because it contains two separate bills, about separate topics—one on health care and the other on interscholastic sports —which the General Assembly could only pass after logrolling together.

But yesterday, with no change in the pertinent facts regarding Appellants' Single-Subject Rule claim, the trial court reversed course and held that H.B. 68 did not violate the Single-Subject Rule. Why? Because H.B 68's two separate acts are collectively a "regulation of transgender individuals," which is a "legitimate subject" under that portion of the Ohio

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Constitution. That is, because Grace and Madeline are transgender girls, the trial court decided it was a valid exercise of the General Assembly's power to, in a double-barreled enactment, ban them from receiving health care in Ohio and also prohibit them from playing sports with other girls. The trial court further held that, even though the medical care Grace and Madeline need is "health care" under the Ohio Constitution's Health Care Freedom Amendment ("HCFA")—which expressly prohibits laws that would ban or penalize the purchase or sale of health care—and even though H.B. 68 would indeed penalize the purchase or sale of that health care, the General Assembly nonetheless has the power to ban it anyway, simply by declaring it to be "wrongdoing."

As a result of the trial court's erroneous change of course on Appellants' Single-Subject Claim and flawed reasoning on Appellants' HCFA claim, the challenged law, H.B. 68—which had not yet gone into effect by virtue of the temporary restraining order—became enforceable for the first time on August 6, 2024. Appellants will be appealing the trial court's final judgment on all of their claims, but Grace and Madeline cannot wait until the resolution of this appeal for the status quo to be

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restored. Appellants respectfully request that this Court restore the April 16, 2024 Temporary Restraining Order and/or grant an injunction that enjoins H.B. 68's enforcement pending this appeal.

PROCEDURAL BACKGROUND

On March 26, 2024, Appellants Michael, Michelle, and Madeline Moe, and Gina, Garrett, and Grace Goe[1] filed a Complaint and Motion for Preliminary Injunction Preceded by Temporary Restraining Order If Necessary in the Franklin County Court of Common Pleas. *See* Exhibit A. On April 16, the trial court issued a temporary restraining order, holding that H.B. 68 likely violated the Ohio Constitution's Single-Subject Rule and that Appellants would be irreparably harmed if the Government were permitted to enforce the law during the pendency of the proceedings. *See* Exhibit B (TRO Entry at 11-13). By order issued on April 30, 2024, the trial court extended the TRO through May 20, 2024. *See* Exhibit C. It extended the TRO again on May 3, 2024, through the

[1] The trial court granted leave to Appellants to proceed via pseudonyms.

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conclusion of the scheduled preliminary injunction hearing and trial. *See* Exhibit D.

On July 15-19, 2024, the trial court held a combined hearing on Appellants' preliminary injunction motion and full trial on the merits. On August 6, 2024, the trial court issued an opinion and final judgment on the merits, denying all of Appellants' claims.[2] Appellants filed their Notice of Appeal that same day.

[2] Appellants also moved for preliminary relief based on their claims under the Health Care Freedom Amendment, and the Ohio Constitution's Equal Protection and Due Course of Law Clauses. Appellants challenged the entirety of H.B. 68 (both the Health Care Ban and the Sports Prohibition) under the Single-Subject Rule; however, their remaining three claims challenged only the substance of the Health Care Ban. The trial court did not rule on those three claims when issuing the temporary restraining order, but found for the Government and against Appellants in its final judgment. Appellants seek relief in this Motion only on the basis of their Single-Subject Rule and HCFA claims; however, Appellants will appeal the trial court's decision on all four claims. In the event that no injunction pending appeal issues, Appellants respectfully request that the appeal be heard on an expedited basis.

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FACTUAL BACKGROUND

I. The General Assembly Logrolled Two Disunified Acts Into A Single Bill, H.B. 68, When Neither Act Could Pass On Its Own

As the trial court noted, H.B. 68's title "references two subjects: Saving Ohio Adolescents from Experimentation and Saving Women's Sports," *see* Ex. B at 11-12:

> To enact [multiple sections] of the Revised Code to enact the Saving Ohio Adolescents from Experimentation (SAFE) Act regarding gender transition services for minors, and to enact the Save Women's Sports Act to require schools, state institutions of higher education, and private colleges to designate separate single-sex sports teams and sports for each sex.

2024 Sub.H.B. No. 68. The two bills have no overlap. Not in their titles, substance, definitions, or enforcement mechanisms.

In relevant part, the first bill contained in H.B. 68, called the SAFE Act (the "Health Care Ban" or "Ban") prohibits physicians from providing gender-affirming health care—which it dubs "gender transition services"—to patients under the age of eighteen. That prohibition forbids physicians from prescribing "a cross-sex hormone or puberty-blocking drug for a minor individual for the purpose of assisting the minor

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individual with gender transition," *id.* (enacting R.C. 3129.02(A)(2)), or from knowingly engaging in "conduct that aids or abets in" such treatment. *Id.* (enacting R.C. 3129.02(A)(3)). The Ban contains a limited exemption for continuation of current Ohio residents' preexisting care. *Id.* (enacting R.C. 3129.02(B)). The Attorney General is authorized to "bring an action to enforce compliance" with the Health Care Ban, and the State Medical Board is instructed that any violation of the Health Care Ban "shall be considered unprofessional conduct and subject to discipline[.]" *Id.* (enacting R.C. 3129.05(A), 3129.05(C)).

The second bill in H.B. 68, called the Save Women's Sports Act (the "Sports Prohibition") requires that schools designate sex-segregated sports teams and mandates that no school, college, university, or interscholastic conference "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." *Id.* (enacting R.C. 3313.5319). This portion of the bill is not subject to enforcement by the Attorney General or the State Medical Board. Instead, H.B. 68 creates private rights of action for damages and injunctive relief for "[a]ny

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participant who is deprived of an athletic opportunity," "[a]ny participant who is subject to retaliation or other adverse action," or "[a]ny school or school district that suffers any direct or indirect harm" as a result of a violation. *Id.* (enacting R.C. 3313.5139(E)(1)-(3)).

Previous efforts to enact similar, but free-standing, versions of the two individual bills had failed in previous legislative sessions. *See* S.B. No. 132, As Introduced version, 134th General Assembly (March 16, 2021); H.B. No. 454, As Introduced version, 134th General Assembly (October 19, 2021). When H.B. 68 was first introduced, it consisted solely of the Health Care Ban, with no mention of interscholastic sports. *See generally* H.B. No. 68, As Introduced version, 135th General Assembly (February 27, 2023). A separate bill introduced earlier that month, House Bill 6, contained what would become the Sports Prohibition. *See* H.B. No. 6, As Introduced version, 135th General Assembly (February 15, 2023). Four months later, on June 14, 2023, the contents of H.B. 6 were rolled into H.B. 68 as a second "Act" within that bill. *See* Saving Ohio Adolescents from Experimentation Act: hearing on H.B. 68 before the H. Comm. on Public Health Policy, 2023 Leg., 135th Sess. Once the Acts

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were combined, the bill cleared the Ohio House within a week. *See* Ohio Legislative Service Commission, Final Analysis of Sub.H.B. No. 68, as passed by the General Assembly (2024), at 9.

II. The Ban Will Deprive Minor Appellants Of Necessary Health Care

Appellants, who are "transgender adolescents and their parents…will have to leave the State of Ohio to seek gender affirming care if [the Ban] is enforced, and therefore will be adversely affected by its enforcement." Exhibit E (Judgment Entry) ¶ 4-5. Appellants have standing to challenge H.B. 68. *See* Ex. E ¶ 7.

Appellants Gina, Garrett, and Grace Goe

Appellant Grace Goe is a twelve-year-old girl living in a suburb of Columbus, Ohio with her parents, Appellants Gina and Garrett Goe, and her three older siblings. *See* Exhibit F (7.15.24 Trial Tr.) 18:8-20, 19:9-14. Grace is a "delightful, wonderful person. She is warm. She's friendly. She's kind." *Id.* at 19:16-22. Grace is transgender: her sex assigned at birth was male, but she has long expressed that she is a girl. *Id.* at 21:23-22:18, 25:21-27:1. Before she was allowed to live as a girl, Grace would

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ask God to make her a girl; eventually, Grace started asking whether God would make her a girl if she died. *Id.* at 27:11-23. She was "desperate" and "in distress." *Id.* at 45:2-6. After prayer, spiritual counsel, their own research, consultation with their pediatrician, and a referral to a psychiatrist at Nationwide Children's Hospital, Gina and Garrett allowed Grace to live as a girl, beginning in first grade. *Id.* at 29:1-32:2, 31:22-33:17, 37:4-18. Once she started living as a girl "[h]er distress ceased and melted away almost instantaneously." *Id.* at 37:1-39:2, 39:10-14, 45:7-22. Right now, Grace is a "thriving, happy, healthy person." *Id.* at 44:23-45:1. Grace is now going into seventh grade. *Id.* at 19:25-20:3. Most of Grace's friends do not know she is transgender, nor do the majority of people at school or who meet her, and "that's the way she wants to keep it." *Id.* at 45:23-46:20.

Grace has been diagnosed with gender dysphoria and regularly sees an endocrinologist at Nationwide Children's to check for signs of puberty, which "could begin at any time." *Id.* at 34:23-35:8, 45:2-6, 50:11-51:25. When puberty begins, Grace will start puberty blockers to temporarily pause puberty. *Id.* at 52:1-18. Being forced to undergo male puberty

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"would be devastating…would harm her life in every way…would harm her mentally, emotionally, spiritually, and relationally..." *Id.* at 48:20-49:2; *see also id.* 55:4-13. Grace "would be crushed. She would not feel able to live in this world authentically and freely to be herself. She would not want to leave the house, ever." *Id.* at 47:6-48:12. When Grace's parents told her about H.B. 68, "she wept." *Id.* at 58:19-59:5.

Gina and Garrett are seeking medical care for Grace in Ann Arbor, Michigan if H.B. 68 goes into effect. *Id.* at 61:4-11. But they want to receive care in Ohio: "This is where we live. This is our community. These are the doctors that we know and trust…" *Id.* at 61:12-20. Being forced to travel out of state would be a financial and logistical burden, so much so that they have discussed moving out of state, but Garrett's job is not transferable. *Id.* at 61:21-63:1. Instead, Gina and Grace may move to California to live with Gina's sister, leaving Garrett and Grace's three brothers behind in Ohio. *Id.* at 63:2-15.

Appellants Michael, Michelle, and Madeline Moe

The Moes are longtime residents of Cincinnati, with Madeline and her older sister having lived there for their whole lives. Exhibit G (7.16.24

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Trial Tr.) 234:21-235:13. Madeline is transgender, *id.* at 238:7-9, 240:4-5. As early as age 3-4, though her parents would dress her as a boy for pre-school, "she would take those boy clothes off when she got home and she would put on girl clothes." *Id.* at 241:20-24, 241:15-19. By first grade, she was refusing to get out of the car for school several times a week, "because she was not comfortable with how she was being presented to school." *Id.* at 247:24-248:8. In the year prior to her social transition, Madeline was frequently "saying things like, 'Why did God make me like this? Why can't I just die and come back into a girl's body or come back in another body? I wish I could die and be reborn.'" *Id.* at 248:11-16. One day, she "grabbed a knife out of the drawer and tried to cut herself in the wrist," until her parents managed to get the knife away from her. *Id.* at 250:20-251:14. She was diagnosed with gender dysphoria around first grade, and ultimately her parents allowed her "to transition into a girl." *Id.* at 254:23-256:12. Once Madeline was able to live as a girl, "[i]t was beautiful. … She had gone from a child that had been very distressed and very upset to now being able to express herself as she wanted to be." *Id.* at 258:14-23, 253:22-254:15. She began to consistently use her feminine

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name and feminine pronouns, and ultimately changed her legal name, as well as the gender markers on her birth certificate, passports, school records, and medical records. *Id.* at 256:10-257:18, 264:22-265:3.

In February of 2023, Madeline received a puberty blocker implant. *Id.* at 266:5-7. "She does not want to have facial hair, an Adam's apple, chest hair, big arms, big feet, big muscles. She wants to develop into a woman." *Id.* at 266:17-21. The choice was "logical" to her and her parents, as to do otherwise "would cause her to have anxiety, depression, suicidal tendencies." *Id.* at 267:5-12. She was informed of potential side effects but has experienced none. *Id.* at 267:15-268:3. She will need a new implant around February of 2025. *Id.* at 268:7-269:3. Madeline and her parents have also considered hormone therapy, for which she would be eligible "around age 13 or 14." *Id.* at 269:4-18.

Under H.B. 68, Madeline will be unable to obtain hormone therapy. *Id.* at 270:13-270:1; 272:4-6 ("her reaction was same as ours, anger, frustration, being upset that the government was not allowing to live her life."). Absent hormone therapy, "it would be devastatingly bad. … To pause or interrupt her development would be devastating to her." *Id.* at

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271:9-15. The Moes have made plans to secure Madeline's health care outside of Ohio—in Chicago —and she is currently on an 18-month waiting list. Were H.B. 68 to go into effect, after 18 months the Moes could get this care, but they would be forced to make expensive and difficult trips back and forth. Alternatively, they "don't want to move out of Ohio, but we will if we have to." *Id.* at 273:11-15, 273:16-274:3 ("[I]f we have to do this trip to Chicago or wherever, every two to three months, if the burden becomes too much, then we will have to. We'll be forced to.").

ARGUMENT

Ohio Rule of Appellate Procedure 7(A) permits a party to apply for "an order … restoring or granting an injunction during the pendency of an appeal." *Oxford Oil Co. v. West*, 2016-Ohio-5684, ¶ 32 (7th Dist.); *see also, e.g.*, *State ex rel. Dewey v. McCullion*, 61 Ohio St.3d 79, 80 (1991) ("App.R. 7(A) permits relator to apply for a stay or injunction pending appeal."). Unlike a request for a stay, a motion for an injunction pending appeal need not be brought in the trial court first. *Oxford Oil Co.* at ¶ 32;

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see also App.R. 7(A) (requiring an initial request to the trial court "except in cases of injunction pending appeal").

As with any preliminary injunction, the purpose of a Rule 7(A) injunction is "to preserve the status quo between the parties pending the decision on the merits." *Watson v. Caldwell Hotel, LLC*, 2017-Ohio-4007, ¶ 35 (7th Dist.); *see also, e.g., Dayton City Sch. Dist. Bd. of Educ. v. Dayton Educ. Ass'n*, 80 Ohio App. 3d 758, 761–62 (2d Dist. 1992) (granting "essentially an affirmative injunction"). The movant must demonstrate: (1) a substantial likelihood of success on the merits; (2) that the party will suffer irreparable harm absent relief; (3) that no third parties will be unjustifiably harmed by an injunction; and (4) that the public interest will be served by the injunction. *Watson* at ¶ 34. "No one factor is dispositive as the court is to balance the factors and weigh the equities." *Id.* The required showing "as to the degree of irreparable harm varies inversely with what [the movant] demonstrates as to its likelihood of success on the merits." *AIDS Taskforce of Greater Cleveland v. Ohio Dep't of Health*, 2018-Ohio-2727, ¶ 23 (8th Dist.).

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I. An Injunction Is Warranted to Restore the Status Quo

"The purpose of a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits." *Dunkelman v. Cincinnati Bengals, Inc.*, 2004-Ohio-6425, ¶ 45 (1st Dist.). The "status quo" refers to the "last, uncontested status that preceded the litigation." *State ex rel. Kilgore v. Cincinnati*, 2012-Ohio-4406, ¶ 21 (1st Dist.). In cases challenging statutes, Ohio courts have recognized that the status quo is "that which precedes the enforcement of a challenged law." *Preterm-Cleveland v. Yost*, 2022-Ohio-4540, ¶ 23 (1st Dist.).

Applying these principles here, an injunction should issue. Prior to H.B. 68, families in Ohio have been free—in consultation with their child's doctor—to determine and pursue the appropriate course of treatment for children with gender dysphoria. *See id.* (status quo for lawsuit challenging abortion restriction was the landscape of "legal and safe abortion access that ha[d] been in place in Ohio for nearly five decades"). H.B. 68 is thus an abrupt break with the standard medical practice for treating youth with gender dysphoria, both in Ohio and across the country.

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Not only has gender affirming care for youth *always* been lawful in Ohio, but it has been widely available. Every major medical organization across the country, and the Ohio Association of Children's Hospitals, have issued explicit statements opposing any ban on this care. Banning this care would be an abrupt break with the standard medical practice for treating youth with gender dysphoria for decades in Ohio.

The trial court preserved that status quo with its temporary restraining order in this action, enjoining enforcement of H.B. 68, but then upended it on August 6, 2024, when it vacated that TRO and entered judgment for the Government. An injunction is therefore necessary to restore the status quo, allowing this Court to consider the merits of this highly important issue *before* there is a change in the governing law in Ohio. *See e.g. Watson*, 2017-Ohio-4007 at ¶ 35.

II. Appellants Will Suffer Irreparable Harm Absent Injunctive Relief

Without an injunction, Appellants will be irreparably harmed in three independent ways. *First*, "[a] finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as

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well." *Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043, ¶ 38 (10th Dist.) (citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)). Because H.B. 68 violates Appellants' constitutional rights, *see infra*, p. 20-38, Appellants will be irreparably harmed if it remains in effect during the pendency of the appeal.

Second, Appellants will be deeply and irreparably harmed if they are unable to continue with their current care. For both Grace Goe and Madeline Moe, the interruption of their ongoing care would be crushing. *See supra* p. 11, p. 13. Grace Goe's physicians are continuously monitoring her for signs of puberty, which could "begin at any time." *See supra* p. 10. Once it does, Grace plans to start puberty blockers to temporarily pause puberty. *See supra* p. 10. But if H.B. 68 is allowed to remain in effect, Grace will be unable to continue with this monitoring, entirely disrupting her course of treatment. And if Grace enters puberty while the appeal is pending—a highly likely occurrence—then she will be forced to undergo male puberty and develop male characteristics, resulting in irreparable and "devastating" harm to every aspect of her life. *See supra* p. 10; *see Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d

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260, 278 (1st Dist. 2000) ("A threat of harm is a sufficient basis on which to grant injunctive relief.").

The same is true for Madeline Moe, whose care will likewise immediately be in limbo. While Madeline can continue receiving pubertal suppression, she will be unable to take any further steps in her treatment with her established care providers in Ohio, and specifically will be unable to obtain hormone therapy. *See supra* p. 13. As with Grace, this development would be "devastatingly bad," causing immense pain and suffering. *See supra* p. 13.

Third, allowing H.B. 68's "aiding and abetting provision" to remain in effect will significantly interfere with Appellants' ability to access gender-affirming care outside of the state. H.B. 68 prohibits conduct that "aids or abets" the prescription of pubertal suppression "for the purpose of assisting the minor individual with gender transition," unless that individual has the benefit of the preexisting care exception in R.C. 3129.02(B). H.B. 68 thus prevents Grace and Madeline's doctors from providing *any* assistance with gender-affirming care, including, for example, making referrals to or speaking with doctors outside the state

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about the status of their care or providing necessary records to facilitate their access to care in other states. If Grace and her mother decide to move to California to access gender-affirming care (itself an act of incredible personal hardship), *see supra* p. 11, they may need to start entirely from scratch, leading to lengthy delays and a significant discontinuity in care. Likewise, while the Moes are on an 18-month waiting list to meet with a physician in Chicago, *see supra* p. 14, H.B. 68 will interfere with their ability to actually transition care to that state.

III. Appellants Are Likely to Succeed on the Merits of Their Claims

A. Appellants are likely to succeed on their Single Subject Rule claim

i. The Single Subject Rule Prohibits Unnatural Combinations of Subjects

Article II, Section 15(D) of the Ohio Constitution provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title." This rule "attacks logrolling by disallowing unnatural combinations of provisions in acts, *i.e.*, those dealing with more than one subject[.]" *In re Nowak*, 2004-Ohio-6777, ¶ 71 (quoting *State ex rel. Dix*

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v. Celeste, 11 Ohio St.3d 141, 143 (1984)).[3] The result "is a more orderly and fair legislative process. By limiting each bill to one subject, the issues presented can be better grasped and more intelligently discussed." *State ex rel. Dix* at 143. Constitutional challenges under this rule contest "the authority of the General Assembly to enact the bill," rather than the substantive validity of each component provision. *Rumpke Sanitary Landfill, Inc. v. State*, 2010-Ohio-6037, ¶ 20.

Courts do not allow the government to define a "subject" at an extreme level of abstraction; indeed, that would defeat the purpose of the rule. *See, e.g.*, *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148 (1991); *Linndale v. State*, 2014-Ohio-4024, ¶ 18 (10th Dist.); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 1999-Ohio-123, 86 Ohio St.3d 451, 498 (1999) ("we are not obliged to accept that any ingenious comprehensive form of expression constitutes a legitimate subject"). In *Hinkle*, for example, the bill made changes to

[3] "Logrolling" is "the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately." *Nowak* at ¶ 31.

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elected judiciary structure, but also revised a law that regulated local option elections. *Hinkle* at 148. The Supreme Court rejected the government's argument that the bill encompassed "election matters," remarking that it was "akin to saying that securities laws and drug trafficking penalties have sales in common[.]" *Id.* Similarly, this Court in *Linndale* found a "blatant disunity" of subject matter where a bill made changes to judiciary structure, but also prohibited texting and driving. It rejected the government's argument that these provisions both modified the "authority, scope, and jurisdiction" of courts. *Linndale* at ¶ 18; *see also, e.g.*, *Akron Metro. Hous. Auth. Bd. of Trustees v. State*, 2008-Ohio-2836, ¶ 21 (10th Dist.) ("modifying local authority" was too broad a concept to connect zoning regulations with school extracurricular activities).

ii. H.B. 68 Expressly Combines Two Disunified Subjects

Far from "clearly express[ing]" a single subject, H.B. 68's title confesses the exact opposite. It openly describes H.B. 68 as comprising two distinct Acts, governing two unrelated subject matters: the "Saving Ohio Adolescents from Experimentation (SAFE) Act regarding gender

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transition services for minors, *and* … the Save Women's Sports Act to require schools, state institutions of higher education, and private colleges to designate separate single-sex teams and sports for each sex." 2024 Sub.H.B. No. 68 (emphasis added).

Adolescent health care and interscholastic sports are distinct subjects pertaining to two wholly separate spheres of life. Nowhere did the General Assembly identify any common thread connecting them. The Health Care Ban restricts physicians' ability to provide certain treatments to adolescent patients—an issue that has no relation either to schools or to athletics. The Sports Prohibition dictates the operation of schools' and universities' athletic programs, which, likewise, has nothing to do with adolescent health care. Merging the two is an "unnatural combination[]" of distinct subjects into a single bill, and a brazen display of the "disunity of subject matter" that is the "polestar in assessing a violation of the one-subject rule." *Nowak* ¶ 71, ¶ 59.

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iii. H.B. 68's Structure and History Confirm It Is the Product of Logrolling

"[T]he one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves." *Nowak* at ¶ 71. Nonetheless, such evidence may be relevant, and H.B. 68's history displays it in spades. As noted above, each of H.B. 68's component Acts had previously failed to pass as a standalone bill. When reintroduced in 2023, each of them languished in committee for months. But when they were combined, they cleared the Ohio House within a week. *See supra* at 8-9; Ex. B (TRO Entry) at 12.

H.B. 68's structure also bears hallmarks of logrolling. Its two components—the Health Care Ban and the Sports Prohibition—operate fully independently of each other, just as would be expected of two distinct statutes on different subjects. Each Act has its own set of statutory definitions, and neither uses any terms defined in the other Act. *See* 2024 Sub.H.B. No. 68 (enacting R.C. 3129.01, containing definitions for the Health Care Ban, and R.C. 3345.562, containing separate definitions for the Sports Prohibition). Each Act also has its own enforcement

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mechanism. The Health Care Ban authorizes the Attorney General to bring an "action to enforce compliance," and some violations "shall be … subject to discipline by the applicable professional licensing board." *See id.* (enacting R.C. 3129.05). The Sports Prohibition, meanwhile, is enforced solely by private actions for damages or injunctive relief. *See id.* (enacting R.C. 3345.562). Finally, the General Assembly's findings in Section 2 pertain only to gender-affirming health care, with no mention of sports. *See id.* at Section 2. In sum, H.B. 68's disjointed structure reveals that the Acts target entirely different conduct through entirely separate means.

iv. The Government and the Trial Court Have Identified No Cognizable "Subject"

At no stage of this litigation has the Government—or for that matter, the trial court—identified any common subject matter that is "clearly expressed in [H.B. 68's] title." Ohio Const. art. II, § 15(D); *see generally, e.g.*, *Byrd v. State*, 679 S.W. 3d 492, 494 (Mo. 2023) (under an identical single subject rule, noting that "the bill's title serves as the touchstone for the constitutional analysis"). Instead, the Government has relied purely on

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post hoc characterizations, attempting to retrofit H.B. 68's two Acts with a common purpose. None exists.

At the outset, the Government claimed that the Health Care Ban and Sports Prohibition share a purpose of protecting children. Even setting aside whether H.B. 68 could ever be said to "protect" children by denying health care for a serious condition, that argument fails on the face of the law. The Sports Prohibition regulates adults in collegiate athletics, not merely children.

Failing that, the Government next argued that both Acts responded to what they termed an "increasingly pressing social trend" that warranted "protect[ion]": Ohioans being transgender. The trial court correctly rejected that reasoning. *See* Ex. B (TRO Entry) at 11–12 (finding substantial likelihood of success "[h]aving carefully considered the affidavits, arguments of counsel, and the relevant law"). The trial court later reversed itself, with no explanation of what warranted its reversal. *See* Ex. E (Judgment Entry) at 7 (identifying a "common purpose" of "regulation of transgender individuals," "[n]o matter how abhorrent that may be to some").

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The trial court was right the first time. It is undisputed that H.B. 68's two Acts impose two distinct sets of restrictions on two unrelated aspects of people's lives: health care and athletics. Ohio courts have never recognized multiple disparate areas of regulation as a single "subject" based not on a common activity, position, status, occupation, possession, interest, or geographic locale—but rather, solely based on the fact that the law will impact a particular minority group in two unrelated aspects of their lives. Indeed, even targeting "businesses" is not a sufficiently coherent subject matter to connect unrelated spheres of regulation. *City of Toledo v. State*, 2018-Ohio-4534, ¶ 17 (6th Dist.) (rejecting the argument that pet store licensing, minimum wage standards, and humane society laws were connected by "standardiz[ing] the manner in which businesses are regulated"). The outcome can hardly be any different when the purported target—which, again, is identified nowhere in the bill's title—is not a category of entity, but a minority category of people.

To find otherwise would invite absurdly tenuous connections in legislation. Indeed, in the Government's telling, if the state became concerned by a "growing trend" of Jewish Ohioans, the legislature could

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simultaneously enact school dress codes banning the wearing of yarmulkes, food safety laws restricting the sale of Kosher products in grocery stores, and statewide fire codes prohibiting lighting of menorahs in public libraries, all unified under the purported purpose of "regulation of [Jewish] individuals." That is not—and cannot be—how courts apply the single-subject rule.

v. The Appropriate Remedy Is Invalidation *In Toto*

H.B. 68 is not susceptible to severing any one offending portion, as no "primary" subject of the bill is discernible; the Health Care Ban and the Sports Prohibition are coequal. Where there is no "primary" subject, the entire bill is invalid. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 500 (1999) (where attempting to carve out a primary subject "would constitute a legislative exercise wholly beyond the province of this court," the appropriate remedy is invalidation *in toto* rather than severance); *City of Toledo* at ¶ 30 (similar). Certainly, Appellants need not establish standing on every single portion of the bill. *See Preterm-Cleveland v. Kasich*, 2018-Ohio-441, ¶ 30. They have demonstrated standing to challenge the Health Care Ban. *See generally*

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supra pp. 5–14, Ex. E at 2–3. But, as the Health Care Ban is no more "primary" to H.B. 68 than the Sports Prohibition, it "not possible to save any provisions of the bill." *City of Toledo* at ¶ 31.

B. Appellants are likely to succeed on their Health Care Freedom Amendment claim

Article I, Section 21 of the Ohio Constitution, the Health Care Freedom Amendment ("HCFA"), was enacted through a citizen-led ballot initiative in 2011. In relevant part, it provides:

> (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.
>
> (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.

The HCFA contains only a handful of limited exemptions: laws that were already "in effect as of March 19, 2010," laws affecting which services a health care provider is "required to" provide, the "terms and conditions of government employment," or "any laws calculated to deter fraud or punish wrongdoing in the health care industry." Ohio Const., art. I, § 21(D).

By banning Ohioans from purchasing a specific category of medical

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treatment, H.B. 68 violates both Section 21(B) and 21(C). None of the exemptions in Section 21(D) apply.

i. The Health Care Freedom Amendment protects Ohioans' right to make their own individual health care decisions

"In construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters who adopted the amendment." *City of Centerville v. Knab*, 2020-Ohio-5219, ¶ 22. Courts are to "begin[] with the plain language of the text," and consider "how the words and phrases would be understood by the voters in their normal and ordinary usage." *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 576–577 (2008)).

The primary command of the HCFA is simple, direct, and unambiguous. It forbids the General Assembly from prohibiting or penalizing "the purchase or sale of health care[.]" Ohio Const., art. I, § 21(B)–(C). "Health care" is distinct from health insurance or insurance coverage, as evidenced by the HCFA's repeated use of the disjunctive phrase "health care or health insurance." *See Cowher v. Million*, 380 F.3d 909, 913 (6th Cir. 2004) ("[I]t is a basic principle of statutory construction

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that terms joined by the disjunctive 'or' must have different meanings because otherwise the statute or provision would be redundant."); *see also State ex rel. Liberty Council v. Brunner*, 2010-Ohio-1845, ¶ 57 (noting the then-prospective amendment's "general object or purpose of preserving freedom of choice in health care *and* health-care coverage") (emphasis added). Thus, by its plain text, the HCFA not only protects an individual's ability to select health insurance coverage, but also to ensure constitutional protection for an individual's right to select—and a provider's right to provide—particular health care services, procedures, and treatments.

The background and circumstances of the HCFA's adoption only bolster this conclusion. *See City of Centerville at* ¶ 22 (a court may "review the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis"). The HCFA was enacted against the backdrop of a nationwide debate over the federal Affordable Care Act ("ACA"). The HCFA was itself an effort to reject or undercut portions of the ACA,

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based on perceived governmental interference in the relationship between physician and patient.[4] Its proponents announced that they were "attempting to draw a line in the sand and say that the federal government shouldn't get any further in between doctors and patients."[5] A board member of the HCFA's proponent committee wrote in a national publication that the HCFA was "about freedom – the freedom of Ohioans and others to make some of the most important personal decisions they can make about their choice of health care and how to pay for it."[6] Likewise, the committee's campaign manager declared that "[h]ealth care

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[4] *See generally, e.g.*, *Opponents of health care law continue petition drive*, WFMJ21 (June 25, 2010) https://www.wfmj.com/story/12709736/opponents-of-health-care-law-continue-petition-drive (accessed Aug. 7, 2024); *Obama health care foes score big court win*, CBS News (Aug. 12, 2011), available at https://www.cbsnews.com/news/obama-health-care-foes-score-big-court-win/ (accessed Aug. 7, 2024).

[5] Aaron Marshall, *Opponents of Issue 3 say amendment would interfere with many Ohio laws*, The Plain Dealer (Sept. 1, 2011), available at https://www.cleveland.com/open/2011/09/opponents_of_issue_3_say_amend.html (accessed Aug. 7, 2024).

[6] Ed Meese & Jack Painter, *Ohio's battle for health care freedom*, Politico (Nov. 7, 2011), available at https://www.politico.com/story/2011/11/ohios-battle-for-health-care-freedom-067727 (accessed Aug. 7, 2024).

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decisions should be made between patients and doctors. Not politicians and bureaucrats."[7] He added that the amendment would "allow voters to have a choice this fall if health care decisions should be made by patients and doctors or politicians in Washington D.C."[8]

Even further, HCFA proponents specifically intended the amendment to protect against efforts to penalize or punish disfavored forms of health care. As the Hamilton County Court of Common Pleas noted, in the only case applying the HCFA before this one:

> Proponents of the HCFA argued that its passage would not 'further overcrowd our prisons with those who pursue alternative medicine' and that under its provisions the state could not '*punish the purchase or sale of cutting-edge services, procedures, and coverage*.'

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[7] Robert Wang, *Issue 3 low-key, but has long reach*, The Repository (Oct. 30, 2011), available at https://www.cantonrep.com/story/news/politics/elections/issues/2011/10/30/issue-3-low-key-but/42071877007 (accessed Aug. 7, 2024).

[8] Jo Ingles, *Ohio court says anti-Obamacare amendment can be on November ballot*, Reuters (Aug. 12, 2011), available at https://www.reuters.com/article/us-ohio-obamacare/ohio-court-says-anti-obamacare-amendment-can-be-on-november-ballot-idUSTRE77B50V20110812/ (accessed Aug. 7, 2024).

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See Exhibit H (*Preterm-Cleveland v. Yost* TRO Entry) at 14 n.11 (emphasis added) (citing Maurice Thompson, 1851 Center, *Passage of Issue 3 will protect liberty, restrain health care costs, and preserve health care choice and privacy*, available at https://www.healthpolicyohio.org/wp-content/uploads/2014/01/1851_issue3essay.pdf (Sept. 29, 2011)).

ii. H.B. 68 cannot be reconciled with the HCFA's core prohibition

It cannot be disputed that the Health Care Ban violates the HCFA's primary directive. Gender-affirming health care is "health care" within any reasonable understanding of that term; the Government and its experts have never disputed this point, and the trial court agreed. *See* Ex. E at 7. Similarly, the Government cannot dispute—and again, the trial court agreed—that H.B. 68 "imposes a penalty upon medical providers" who provide gender-affirming health care. *Id.* It is thus beyond question that H.B. 68 violates the core prohibitions of Article I, Section 21(B) and (C). The trial court, however, went on to apply a tortured reading of the HCFA's "wrongdoing" exception, stating:

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> Notwithstanding the forgoing [sic], the Health Care Freedom Amendment unequivocally provides that its provisions do not affect laws calculated to punish wrongdoing in the health care industry. Art. 1, §21(D).
>
> The State of Ohio has legislated that a medical provider's provision of gender affirming care constitutes 'wrongdoing.' Again, the remedy for those who object to the State of Ohio's determination of wrongdoing cannot be found within the judicial system but is instead with their vote.

Ex. E at 7–8. That reading is both wrong and unsustainable.

First, the trial court's reasoning would allow the HCFA's exception to fully swallow the rule. Under its logic, in any instance where the General Assembly passed a law prohibiting or penalizing a category of health care—thus facially violating the Amendment's core prohibition in Sections 21(B) and (C)—then the Amendment's "wrongdoing" exception would *automatically* be met, merely *because* the legislature passed a law. In short, subsection (D) would cancel out subsections (B) and (C) in all cases, reducing the entire Amendment to a nullity. Courts obviously may not void whole provisions of the Constitution in this manner. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, ¶ 94 ("we should avoid any construction that makes a [constitutional]

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provision meaningless or inoperative") (internal citation and quotation marks omitted).

To be sure, the HCFA does not expressly define Section 21(D)'s term "wrongdoing," but that term must be reconciled with the rest of the Amendment in a coherent manner. *Id.*; *see also, e.g.*, *City of Cincinnati v. Correll*, 141 Ohio St. 535, 538 (1943) ("The Constitution must be read and construed in its entirety so as to harmonize and give force and effect to all its provisions."). Section 21(D) provides that the HCFA does not "affect any laws calculated to deter fraud or punish wrongdoing in the health care industry." Read in context—in conjunction with "fraud" and "in the health care industry"—the term "wrongdoing" likely refers to specific instances of misconduct within the medical profession: for example, negligence, malpractice, failure to obtain a patient's informed consent, false billing, practicing medicine without a license, or other actions committed in the course of providing care. "Wrongdoing" cannot be taken out of context to encompass banning an entire category of health care without disregarding the rest of the HCFA .

Alternatively, "wrongdoing" could refer to conduct that was already

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unlawful at the time the HCFA was enacted—which is how the Hamilton County Court of Common Pleas construed that term. *See* Ex. H. H.B. 68 is not in that category.

Second, the trial court's reading grants an absurd degree of power to the Ohio General Assembly: the power to redefine words in the Ohio Constitution by statute. Indeed, in the trial court's reading, the HCFA protects nothing other than whatever the legislature decides it protects, because anything the legislature deemed "wrongdoing" would not be protected by the HCFA.

That is backwards. The legislature is subject to the plain meaning of the Constitution's text, not the other way around. *City of Cleveland v. State*, 2019-Ohio-3820, ¶ 17 ("[w]e give undefined words in the Constitution their usual, normal, or customary meaning"). Moreover, "the purpose of a bill of rights is to 'protect people from the state.'" *City of Centerville* at ¶ 47 (Kennedy, J., concurring); *see also City of Cleveland* at ¶ 16 ("The purpose of our written Constitution is to define and limit the powers of government and secure the rights of the people."). That purpose would be defeated if the legislature could remove or modify its own

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limitations at will.

Consider how that approach, if applied elsewhere, would undercut even the most basic constitutional protections. The First Amendment to the U.S. Constitution provides that "Congress shall make no law … prohibiting the free exercise" of "religion." Applying the trial court's approach—giving the legislature, rather than courts, the authority to determine the meaning of constitutional text—the Free Exercise Clause might protect only the free exercise of whatever Congress chose to recognize as a "religion." In that view, Congress could prohibit a particular religion altogether, and yet not violate the First Amendment. By the same token, the "wrongdoing" exception cannot mean that the state may pick and choose what health care is protected under the HCFA.

Absent the trial court's erroneous application of Section 21(D) "wrongdoing" exception, the plain language of the HCFA determines the outcome of this claim. Appellants have easily demonstrated substantial likelihood of success under the HCFA.

IV. No Harm Will Result to Third Parties

Injunctive relief will not result in any harm—let alone unjustifiable

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harm—to third parties. In stark contrast to the deeply personal and irreparable harms Appellants face, an injunction would merely preserve the status quo while this Court addresses the parties' claims on appeal. *See supra* pp. 17–18. Entering an injunction will restore the state of affairs that existed prior to passage of H.B. 68. *See supra* pp. 17–18. Restoring parents to their proper role as decision-makers for their adolescent children's health care, and ensuring that health care remains available to transgender adolescents, will not cause any unjustifiable harm to third parties.[9] The highly private, personal decision a family makes about whether to pursue gender-affirming care will have no impact on anyone outside of that family. And transgender adolescents will not be harmed by having access to standard-of-care medical treatment that they can affirmatively choose to pursue in consultation with their families and their doctors.

Nor will the Government be unjustifiably harmed if H.B. 68 is

[9] To the extent there are concerns about the care provided in any particular case, patients in Ohio can rely on the full range of professional and legal safeguards to protect against negligence and malpractice.

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enjoined pending resolution of this appeal. H.B. 68 is unconstitutional. *See supra* pp. 20-38. The Government cannot claim any harm from the injunction of an unconstitutional statute.

V. The Public Interest Favors Injunctive Relief

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Here, that violation—discrimination against transgender adolescents—is particularly pernicious. *See, e.g.*, *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (public interest weighed "strongly" against allowing continuing discrimination against a student based on gender identify). Nor is it limited to the Appellants in this case. As Governor DeWine explained when vetoing H.B. 68, "[m]any parents" have expressed "that their child would be dead today if they had not received the treatment they received from an Ohio children's hospital." Gov. Mike DeWine, *Statement of the Reasons for the Veto of Substitute House Bill 68* (Dec. 29, 2023), available at https://bit.ly/3WV2B23 (accessed Aug. 7, 2024). Governor DeWine continued: "Were I to sign [H.B. 68] or were [it] to become law, Ohio

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would be saying that the State, that the government, knows what is best medically for a child rather than the two people who love that child the most, the parents." *Id.* It is strongly in the public interest for parents to have the authority to make health care decisions on behalf of their children, rather than to deny parents that autonomy and privacy. It is likewise strongly in the public interest to provide access to a highly beneficial and potentially life-saving medical treatment, rather than imposing a near-categorical ban before this Court has had an opportunity to address the merits of these issues.

VI. The Injunction Should Issue Without Bond

This Court has discretion to issue an injunction that is not conditioned upon the payment of a bond. *See* App.R. 7(B) (a stay "may" be conditioned on bond); *e.g.*, *U.S. Bank N.A. v. Perdeau*, 2014-Ohio-155, ¶ 4–5 (6th Dist.); *Lomas & Nettleton Co. v. Warren*, 1990 WL 93138, at *1 (11th Dist. June 29, 1990). The Court should exercise that discretion here, where the relief sought will result in no monetary loss to Defendants. *E.g.*, *U.S. Bank N.A.* ¶ 6; *Lomas & Nettleton Co.* at *1.

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CONCLUSION

Appellants will suffer immense and irreparable harm absent an injunction pending appeal. Preserving the status quo will keep Grace and Madeline in their homes and communities, where they and their parents are loved and supported, and enable them to continue accessing vitally important health care from doctors they know and trust. Appellants respectfully request that this Court restore the April 16, 2024 Temporary Restraining Order and/or grant an injunction pending appeal against H.B. 68's enforcement.

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Respectfully submitted,

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**Motion for permission to appear pro hac vice forthcoming*

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2024, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served by email upon the following:

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