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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-483 On appeal from the Franklin County Court of Common Pleas, Case No. 24-cv-002481

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dangerous for Ohio. Here's why. The Columbus Dispatch, Oct. 4, 2023, available at https://www.dispatch.com/story/opinion/columns/guest/2023/10/04/why-do-anti-abortion-groups-say-issue-1-is-bad-for-ohio-wrong-dangerous-november-7-election/71031177007/ (accessed August 31, 2024) 6

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ARGUMENT

I. Assignment of Error No. 1: Single-Subject Rule

A. Imposing Classifications on Transgender People Is Not a Cognizable "Subject"

The Government misses the mark—albeit only in part—when it complains that Appellants are "smuggl[ing] their other objections into" their single-subject claim and declaring H.B. 68's policy "'good' or 'bad'[.]" Govt. Br. 37–38. Furthering a governmental preference that people conform their gender identity to birth sex is indeed "bad" because it is a denial of equal protection. *See infra* Section IV. That the Government—and for that matter, the trial court—cannot identify a single "subject" for H.B. 68 without conceding that the subject is to discriminate on the basis of sex confirms appellants' equal protection claim.

The Government does not deny the tension between H.B. 68's two acts: while the Health Care Ban's stated purpose is to "protect" transgender adolescents, the Sports Prohibition claims to "protect" others *from* transgender women and girls. Unlike the omnibus civil rights laws the Government cites, those are opposite rather than "common" purposes,

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and they are expressed through regulations of unconnected subject areas.[1]

Ohio is not the only state to enact a wide variety of unrelated laws affecting transgender people; it is no great revelation for the Government to point out that the ACLU tracks such legislation.[2] But again, the fact that the two Acts within H.B. 68 both impose restrictions on a particular demographic group does not make them a unified "subject."

Planned Parenthood v. Hilgers, 317 Neb. 217 (2024) is inapposite. The law in *Hilgers* restricted two medical procedures: abortion and

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[1] The Government declares it "[a]lone fatal" for Appellants to point to the Supreme Court of Ohio's "disunity of subjects" language, rather than the Government's preferred "common purpose or relationship" language. Govt. Br. 36. In fact, both phrases are used in single-subject cases, often within the same paragraph. *E.g.*, *State ex rel Ohio Civ. Serv. Emps. Ass'n v. State*, 2016-Ohio-478, ¶ 17; *State v. Bloomer*, 2009-Ohio-2462, ¶ 49. Appellants have discussed both. *See* Opening Br. 35–38, 39–40. The Government points to no meaningful difference in these two phrases, much less demonstrates that "common purpose or relationship" alone is the standard.

[2] The ACLU's website also has a page tracking First Amendment speech matters, ranging from suppression of student protests on Florida college campuses, to local officials in California blocking critics on social media. *See* ACLU, *Free Speech*, https://www.aclu.org/court-cases?issue=free-speech (accessed August 30, 2024). That hardly suggests that the General Assembly could ban college student demonstrations and comments on local officials' social media posts as a single "subject."

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gender-affirming care, which the Nebraska court compared to regulating both beet sugar and chicory. Though separate products, both are foods. Unlike H.B. 68, the law's title also stated a unified purpose: protecting "public health and welfare." *Id.* at 219.

Finally, in asserting that invalidating H.B. 68 in its entirety is not permissible, the Government fails to address the controlling case law, which requires just that. *See infra* Section V (regarding scope of relief).

II. Assignment of Error No. 2: Health Care Freedom Amendment

A. The Text of the HCFA Cannot Be Reconciled with the Government's Proposed Limitation

Courts apply the same rules for constitutional interpretation as for statutes, beginning "with the plain language of the text" and construing words "in their normal and ordinary usage." *City of Centerville v. Knab*, 2020-Ohio-5219, ¶ 22. The HCFA's words are plain: the government may not prohibit the purchase or sale of health care. The Government asks that the words be rewritten to protect only the *means of obtaining and paying for* health care, not the freedom to purchase health care. Govt. Br. 45.

The first problem with the Government's position is that the

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HCFA's text simply does not say that. Further, the Amendment is titled "Preservation of the freedom *to choose health care* and health care coverage." Art. I § 21 (emphasis added). Nothing in the Amendment limits it to the choice of *how to obtain and pay for* health care, or *which provider will dispense health care*. It expressly protects the freedom to "choose health care."

B. The Government's Slanted and Speculative Account of the HCFA's Enactment Cannot Override Clear Text

Where constitutional or statutory text is clear, that is the end of the discussion. "After all, only the words on the page constitute the law[.]" *Bostock v. Clayton Cnty.,* 590 U.S. 644, 654–55 (2020); *State v. Pariag*, 2013-Ohio-4010, ¶ 10 ("When a statute's language is clear and unambiguous, a court must apply it as written."). This Court need not proceed past the text.

Moreover, the Government's reinterpreted version of the HCFA is not what was presented to Ohioans in 2011. Each voter who signed a petition to put the HCFA on the ballot was shown its title: "To preserve the freedom of Ohioans to *choose their health care* and health care

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coverage" (emphasis added).[3] Additionally, the Government is incorrect that "the official ballot arguments … said nothing about limiting the State's power to regulate medicine." Govt. Br. 47–48. In fact, the official proponent argument promised in bolded text that Ohioans would not be "imprisoned, fined, or prosecuted for *choosing* health insurance or *treatment* different from government requirements" (emphasis added).[4]

The Government speculates that if the HCFA truly protected a choice of health care, abortion would have been "a major point of debate." That is hardly a given. Ohio Right to Life and other opponents of abortion rights generally appear to deny that abortion is health care.[5] As for

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[3] 2010 Issue 3 Initiative Petition, *available at* https://www.ohiosos.gov/globalassets/ballotboard/2011/2010-05-03initpetition.pdf (accessed August 31, 2024).

[4] 2010 Issue 3 Official Argument For, *available at* https://www.ohiosos.gov/globalassets/ballotboard/2011/3-argument-for.pdf (accessed August 31, 2024).

[5] For example, a 2023 column by the executive director of Ohio Right to Life and two coauthors juxtaposes mention of "abortionists" with "anti-abortion doctors," apparently implying that abortion providers are not engaged in medical practice. Jeanne Mancini, et al., *Activists: Abortion amendment is wrong and dangerous for Ohio. Here's why*. The Columbus Dispatch, Oct. 4, 2023, available at https://www.dispatch.com/story/opinion/columns/guest/2023/10/04/why

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abortion rights advocates, the HCFA's protection was redundant in 2011. Abortion rights had been secured for decades by federal constitutional precedent that would stand for more than another decade. *But see Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Fewer than three months after *Dobbs*—once the HCFA was *not* redundant—it was already being invoked in an order striking an abortion prohibition. *See* Opening Br. 49. The Government makes much of the fact that abortion-rights advocates did not bring an HCFA claim until 2022. Simply put, they did not need to. Moreover, the fact that a constitutional right is not immediately invoked does not mean that it cannot or will not be.

The Government also points to post-election backpedaling by the HCFA's author, who had previously announced that the HCFA would protect "the purchase or sale of cutting-edge services, procedures, and coverage." Opening Br. 49. Post-hoc reinterpretations are of little value. Even so, it is worth noting that in the same article the Government cites, the HCFA's author also suggests that the HCFA would halt vaccination

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-do-anti-abortion-groups-say-issue-1-is-bad-for-ohio-wrong-dangerous-november-7-election/71031177007/ (accessed August 31, 2024).

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mandates, and an Ohio law professor agrees, and opines that the HCFA would affect "new ways the state medical board might want to regulate the doctor-patient relationship[.]"[6] All understood the HCFA to govern access to health care treatments, not merely to insurance or payment.

Courts do not allow "ambiguous legislative history to muddy clear statutory language." *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) (Gorsuch, J.) (internal citation omitted). Further, "history contrary to clear text is not to be followed." *United States v. Rahimi*, 144 S. Ct. 1889, 1912 n.2 (2024) (Kavanaugh, J., concurring). Even if the HCFA has specific applications that its proponents did not personally anticipate, and might even oppose, that is simply the consequence of the text they wrote and the voters passed. The Government is asking this Court to ignore the HCFA's title, text, official proponent argument to voters, and numerous pre-election proponent statements, and instead, ground its analysis in a "consensus" manufactured from a few cherry-picked sources and

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[6] Aaron Marshall, *State Issue 3 won't have a big impact on health care in the short term, experts say*, Cleveland Plain Dealer (Nov. 10, 2011), http://perma.cc/7XH4-6YXM

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suppositions. It should not do so.

C. The HCFA Forbids Prohibitions, Not Regulations

Appellants have already addressed the Government's unfounded catastrophizing about the HCFA's effects. One point is worth reiterating: the mere fact that a "service [is] labeled 'health care' by a willing buyer and a willing seller" (Govt. Br. 50) does *not* mean that it is protected by the HCFA. Courts must determine whether a practice is "health care," just as they ascertain what is "speech" or a "search."

The Government suggests that if the Court applies the HCFA as written, the practice of medicine could be subject to no regulation at all. The HCFA says nothing of the sort. It provides that the state may not "prohibit" health care. It does not limit reasonable "regulation."

The Government's hand-wringing continues, with the claim that "the Medical Board can no longer address new problems and new debatable practices at all[.]" Again, that is wrong. Regulation of "new problems"—novel forms of malpractice, unlicensed practice, etc.—will often pertain to "wrongdoing" under Section 21(D). "[D]ebatable practices" is an imprecise term, but again, the HCFA does not preclude

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regulation that falls short of prohibition, nor does it protect "debatable practices" that are not "health care."

For example, the Government spends substantial space recounting Chloe Cole's testimony. Ms. Cole's account, though deeply unfortunate, claims only malpractice. She has a lawsuit pending against her doctors in California for medical negligence and failure to follow standards of care in administering hormone therapy to her. *See* 7.19 Tr.120:6-17. Her prescribing endocrinologist was not the first she had approached; the first had declined to prescribe hormone therapy. *Id.* 120:18-121:9. If her doctor committed negligence—wrongdoing—in Ohio, the HCFA would present no bar to relief.

The HCFA does, however, bar the General Assembly from prohibiting an entire category of health care merely because it finds it "debatable[.]" That is what the HCFA's text provides, and "policy arguments cannot supersede the clear statutory text[.]" *Snodgrass v. Harris*, 2024-Ohio-3130, ¶ 69 (Fischer, J., concurring) (quoting *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016)).

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III. Assignment of Error No. 3: Equal Protection

A. H.B. 68 Is Textbook Sex Discrimination.

The Government's equal protection argument flies in the face of binding precedent. To start, the Government asserts that H.B. 68 does not discriminate based on sex because it instead discriminates based on transgender identity. Govt. Br. 61 (accusing Plaintiffs of creating a "workaround" for the requirements of sex discrimination). This reasoning cannot be squared with *Bostock v. Clayton County*, 590 U.S. at 662 (2020), which recognized that discriminating against someone "for being…transgender…must intentionally discriminate against individual men and women in part because of sex."[7] The Government's argument merely reinforces that its motivation is regulating people whose gender identity does not match their birth sex, *see supra* Section I.A,

[7] The Government attempts to sweep away *Bostock* on the basis that it involved "the specific text of that specific statute" (*i.e.*, Title VII). Govt. Br. 62. But the Government says nothing specific about the text of the statute, nor does it explain why the proper understanding of sex discrimination should vary from Title VII to the equal protection clause. *See L.W.*, 83 F.4th at 503 (White, J., dissenting) (identifying the same error in the Sixth Circuit's analysis).

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The Government next argues that the Ban does not discriminate based on sex because it "appl[ies] equally to boys and girls." Govt. Br. 61. The United States Supreme Court has "emphatically and repeatedly" "rejected that principle." *L.W. v. Skrmetti*, 83 F.4th 460, 500 (6th Cir. 2023) (White, J., dissenting) (detailing extensive caselaw showing "that laws that classify on suspect lines do not escape heightened scrutiny despite 'evenhandedly' classifying all persons").[8] The Act's discrimination "against both transgender boys *and* transgender girls based on sex does not change the fact that the Act discriminates based on sex" with respect to any individual adolescent. *Eknes-Tucker v. Governor of Alabama*, No. 22-11707, 2024 WL 3964753, at *61 (Aug. 28, 2014) (Rosenbaum, J., dissenting from the denial of rehearing en banc).

Finally, the Government suggests that H.B. 68 does not stereotype based on sex because the statute does not ban *all* conduct that a transgender adolescent might engage in (*e.g.*, changing their name)–just

[8] The Government relies heavily on *L.W. v. Skrmetti*, but "decisions of the Sixth Circuit Court of Appeals serve as persuasive authority, at best." *Greater Dayton Reg'l Transit Auth. v. State Emp. Relations Bd.*, 2015-Ohio-2049, ¶ 33.

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some of it (*i.e.*, lifesaving medical care). Govt. Br. 64-65. The Government's approach "conflates the classifications drawn by the law with the state's justification for it." *Brandt by and through Brandt v. Rutledge*, 47 F.4th 661, 670 (2022).

Because H.B. 68 classifies based on sex, it is subject to strict scrutiny under Ohio law—and undisputedly so. *See* Opening Br. 65-66. While the Government states in passing (Govt. Br. 59) that Ohio's equal protection clause is "co-extensive" with its federal counterpart, it does not contest that Ohio's equal protection clause requires a higher tier of scrutiny than the Fourteenth Amendment.

B. The Health Care Ban Cannot Survive Strict Scrutiny

The Government makes no serious effort to defend the Ban under strict scrutiny. It relies primarily on Dr. Cantor, who trumpeted his *lack* of experience in the field of adolescent gender dysphoria. 7.18 Tr.26:24-27:17. Dr. Cantor is a pedophilia researcher—that's what he has studied for "roughly 30 years now"—who believes that pedophiles should be included in the LGBTQ cause and has never treated a person under 16. 7.17 Tr.58:9-59:5; 7.18 Tr.26:24-25:4, 32:11-15, 33:16-37:4. Other courts

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have given Dr. Cantor's testimony "very little weight" and found it "minimally persuasive" given his lack of experience. 7.18 Tr.52:3-55:13. The Government builds the rest of its case on alleged instances of out-of-state malpractice (Govt. Br. 6, 14-17, 70) with no relevance to the provision of care following clinical guidelines in Ohio; through Dr. Hruz, who other courts have found unqualified based on his ideological opposition to gender-affirming medical care, and who testified that such care conflicts with Catholic teachings, 7.19 Tr.70:25-72:11, 73:14-75:21; and through Dr. Levine, who would continue to make treatment recommendations for hormone therapy for transgender adolescent patients on a case by case basis. 7.18 Tr.110:16-112:19, 114:19-116:21. That is, the Government's expert with the *most* experience treating adolescents with gender dysphoria *agrees* with treatment in some cases.

Instead of demonstrating a means-end fit between a complete prohibition on pubertal suppression and hormone therapy for transgender minors with gender dysphoria and its purported concerns, the Government tries to rely on the "strength" of the state interest, an unsupported claim that the risk of "hasty" transitions outweighs the fact that youth benefit

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from transitioning, and a disavowal of what the Government's own experts said about further research. Govt. Br. 69-70.[9] None of that satisfies strict scrutiny.

And the lack of narrow tailoring is constitutionally fatal: the Ban is both over- and under-inclusive. For example, the Ban does not restrict the availability of treatments based on fertility: pubertal suppression in transgender adolescents has no impact on fertility (but is banned), while gonadectomy in infants with intersex conditions is sterilizing (but still permitted). 7.15 Tr.324:22-325:3; 7.16 Tr.167:25-170:11. Nor does the Ban restrict treatments based on the risk to bone density or blood clots: those risks attend to the use of pubertal suppression, testosterone, and estrogen *regardless* of the reason they are prescribed. 7.15 Tr.321:3-322:1, 328:7-25; 7.16 Tr.17:2-20:18; 7.19 Tr.47:7-20, 70:25-71:9. "The continued availability of [these medications] to cisgender minors undercuts the State's purported safety rationale and renders the Act over- and under-inclusive." *Eknes-Tucker,* 2024 WL 3964753, at *67

[9] And this Court should ignore the Government's attempt to supplement the record on appeal with extra-record information. *See* Govt. Br. 68.

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Nor is the Ban narrowly tailored to the Government's purported concerns about desistance, informed consent, or aspects of the international landscape: all that could be addressed through gatekeeping requirements, waiting periods, or other guardrails that still permit gender-affirming care in appropriate cases. What the Ban is perfectly tailored to is enforcing sex stereotypes: "forc[ing] boys and girls to *look* and *live* like boys and girls." *L.W. v. Skrmetti*, 83 F.4th at 505 (6th Cir. 2023). But laws that rely on how men and women "should appear and behave…cannot survive scrutiny." *Id.* (citing *United States v. Virginia (VMI,)* 518 U.S. 515, 533 (1996)).

IV. Assignment of Error No. 4: Due Course of Law

"It is cardinal … that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). According to the Government, however, the strength of parents' fundamental right to direct their children's healthcare is merely "featherweight." Govt. Br. 72. That fundamentally misunderstands the due course of law Clause.

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First, the Government goes awry by categorizing the right at issue as parents' 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" that care. Govt. Br. 74. The first articulation unduly narrows the asserted right, in direct conflict with the U.S. Supreme Court's description of the general "right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.). And the second articulation renders fundamental rights "meaningless." *Eknes-Tucker*, 2024 WL 3964753, at *51. Under the Government's approach, "any 'fundamental right' would evaporate instantly upon a state's banning of a particular treatment." *Id.* ("And what's a fundamental right if the state can abrogate it at will?").

Second, the Government retreats to its general role in regulating medical care—as it says, its ability to "set the menu." Govt. Br. 74-75. But Ohio did not ban treatment for both adults and minors, or even for all minors.[10] Rather, the Government bans these treatments solely for a subset

[10] *Abigail All. for Better Access to Developmental Drugs v. von*

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of minors—those seeking treatment for gender-affirming care. As a result, "the issue is not the *what* of medical decision-making—that is, any right to a *particular* treatment." *L.W.*, 83 F.4th at 510. "Rather, the issue is the *who*—who gets to decide whether a treatment otherwise available to an adult is right or wrong for a child?" *Id.* On that question, the Government could "take the decision-making reins from parents only" by satisfying strict scrutiny. *Id.* It comes nowhere close. *See supra* Section III.B.

V. Scope of Relief

Class actions are not required to invalidate facially unconstitutional statutes. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 680-81 (2015); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Now that this case has proceeded through a merits trial and final judgment, the propriety of universal *preliminary* injunctions is irrelevant. *See, e.g.*, *State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶ 1 (DeWine, J., concurring) (expressing

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Eschenbach, 495 F.3d 695 (D.D.C. 2007), is inapposite. "[U]nlike the new and experimental drugs at issue in *Abigail Alliance*, which were not FDA-approved for *any* purpose," the treatments covered by H.B. 68 are approved for a variety of conditions—everything other than gender dysphoria. *Eknes-Tucker*, 2024 WL 3964753, at *52 .

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concern with the "propriety of... **interim** relief in the form of a statewide injunction that enjoins the application of a state legislative enactment, not only as necessary to provide **interim** relief to the parties...") (emphasis supplied). The Government's cases are not on point: *Sharpe v. Cureton* did not address an unconstitutional statute, but rather vacated a post-trial injunction in part because it prohibited an individual fire chief from retaliating against *any* firefighter, as opposed to merely the plaintiff firefighters. 319 F.3d 259 (6th Cir. 2003). And *Aluminum Workers Int'l Union v. Consol. Aluminum Corp.* pertained to interim relief pending arbitration. 696 F2.d 437 (6th Cir. 1982).

In this procedural posture, there is no impediment to enjoining H.B. 68 once this Court determines that it violates the single-subject rule: an unconstitutional law is no law at all, as to anyone in Ohio, and there is nothing further for the trial court to address. Where a law violates the single-subject rule and lacks a "primary" subject, the entire law is invalid even if the plaintiff demonstrated injury as to only a portion of the bill. *See State ex rel. Ohio Acad. of Trial Laws. v. Sheward*, 86 Ohio St.3d 451, 500 (1999); *City of Toledo v. State*, 2018-Ohio-4534, ¶ 29 (6th Dist.).

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's judgment. Appellants are entitled to judgment in their favor on all claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 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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