IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

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

THE STATE'S PARTIAL MOTION TO DISMISS

Pursuant to Civ.R. 12(B)(6), Defendants Attorney General Dave Yost, State Medical Board of Ohio, and the State of Ohio (collectively "the State") respectfully move this Court to dismiss Counts One and Two of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. For the reasons set forth in the accompanying memorandum, the State asks this Court to grant the instant motion.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF THE STATE'S PARTIAL MOTION TO DISMISS

Plaintiffs' Complaint contains four counts, all arising under the Ohio Constitution. They contend that the law violates: Ohio's Single-Subject Clause, Ohio's Health Care Freedom Amendment, the Equal Protection Clause, and the Due Course of Law Clause. At this time, Plaintiffs have failed to state a claim on Counts One and Two. Plaintiffs lack standing to raise the single-subject challenge and even if they could demonstrate standing, fail to state a claim because the law covers one subject—addressing gender transition in children and youth. Plaintiffs have also failed to state a claim upon which relief can be granted for their claim that the law violates the Health Care Freedom Amendment. The State is free to enact laws that deter or punish wrongdoing in the health care industry. As a necessary corollary, the State must be free to identify and define wrongdoing in the health care industry, lest the health care industry become a wholly self-regulating industry. The "Health Care Freedom Amendment" allows freedom to purchase *what the law defines as legitimate health care*; it places no limitation on the State's power to define allowable medical care.

For these reasons, the State moves to dismiss Counts One and Two of the Complaint.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' challenge stems from a January 2024 law in which Ohio established basic guardrails for several aspects of a relatively new social subject: how medical professionals, courts, and educational institutions have and should address the growing number of children and youth who seek to transition from one gender identity to another. Overcoming the Governor's veto, a supermajority of the General Assembly enacted H.B. 68 to codify several statutory provisions related to these three primary contexts and where this issue intersects with the State's interest in protecting children and families.

First, the law has a custody-adjudication provision that aims at ensuring that courts adjudicating disputes over parental rights and responsibilities for children who identify as transgender do not penalize a parent who refers to a child consistent with the child's biological sex, declines to consent to the child undergoing a medical transition to the oppose gender, or declines to consent to certain mental health services intended to affirm the child's perception of gender that is inconsistent with the child's biological sex. R.C. 3109.054.

Second, the law has several provisions concerning the medical and mental-health professions that aim at protecting Ohio children. The provisions prohibit the medical profession from performing various forms of medical "gender transition services" upon minors. R.C. 3129.01(F) (defining such services). The prohibited services include "gender reassignment surgery" R.C. 3129.02(A)(1) and "[p]rescrib[ing] a cross-sex hormone or puberty-blocking drug for a minor individual for the purpose of assisting the minor individual with gender transition." R.C. 3129.02(A)(2). Other provisions govern mental-health professionals' treatment of minors who may be experiencing gender dysphoria or seeking to transition, R.C. 3129.03, and bar Ohio's

Medicaid program from paying for minors to transition, R.C. 3129.06. Notably, those currently taking medication are "grandfathered in," and may indefinitely continue any medication that began by the law's effective date. R.C. 3129.02(B).

Third, several more provisions aim at protecting women in sports by regulating the institutions that hold student sporting events, including schools and colleges. Those provisions require schools and colleges to preserve girls' and women's sports teams for those born female. Among other things, those provisions require schools and colleges that participate in interscholastic sports, and any interscholastic associations that organize sports, to designate separate male and female teams (while still allowing for co-ed sports). R.C. 3313.5320(A).

The law was scheduled to take effect April 24, 2024.

On March 26, 2024, Plaintiffs filed suit challenging the law. *See* Compl. Plaintiffs are two families, using the pseudonyms "Goe" and "Moe". Plaintiffs present four counts alleging the legislation violates several provisions of the Ohio Constitution: the Single-Subject Clause, the Health Care Freedom Amendment, the Equal Protection Clause, and the Due Course of Law Clause. Compl. ¶¶ 114-159. Plaintiffs allege various long-term harms if their respective children are not able to pursue future treatment with puberty blockers and cross-sex hormones for gender transition in Ohio. *Id.* ¶¶ 103, 105, 106 112, 113. Neither family has alleged that their child is involved in school or college sports or will be affected by the custody provision.

Plaintiffs have filed suit against the State of Ohio, Ohio Attorney General Dave Yost, and the State Medical Board, together "the State."

Plaintiffs moved for a Preliminary Injunction and Temporary Restraining Order the same day that they filed their Complaint. After briefing and oral argument, on April 16, 2024, the Court

enjoined the law for 14 days. The State now moves for a partial dismissal as to Counts One and Two.

LEGAL STANDARD

"The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward." *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002-Ohio-2480, ¶5. "In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Id.*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 71 Ohio Op. 2d 223, 327 N.E.2d 753 (1975), syllabus. When "construing a complaint upon a motion to dismiss for failure to state a claim, [the court] must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

"It is well established that prior to an Ohio court's considering the merits of a legal claim, 'the person or entity seeking relief must establish standing to sue.'" *Ohioans for Concealed Carry, Inc v. City of Columbus*, 2020-Ohio-6724, ¶¶12-13, quoting *Ohio Pyro, Inc. v. Ohio Dep't of Commerce,* 2007-Ohio-5024, ¶ 27. "At a minimum, common-law standing requires the litigant to demonstrate that he or she has suffered (1) an injury (2) that is fairly traceable to the defendant's allegedly unlawful conduct and (3) is likely to be redressed by the requested relief." *Id.,* citing *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). These three factors—injury, causation, and redressability—constitute "the irreducible constitutional minimum of standing." *Lujan* at 560. In addition, a plaintiff must establish standing "as to each claim presented." *Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St. 3d 157, 165, 2018-

Ohio-441, 102 N.E.3d 461, 468, 2018 Ohio LEXIS 310. "Standing is not dispensed in gross, it must be demonstrated for each claim and each form of relief." *Ohioans for Concealed Carry* at 294 (internal quotations omitted), quoting *Preterm-Cleveland, Inc. v. Kasich* at 166, quoting *Davis v. FEC*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.E.2d 737 (2008), quoting *Lewis v. Casey*, 518 U.S. 343, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), fn. 6.

ARGUMENT

I. Plaintiffs Lack Standing to Bring a Single-Subject Challenge.

Plaintiffs have failed to state a claim upon which relief can be granted under their theory that H.B. 68 violates Ohio's single-subject requirement. The Ohio Constitution requires that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." Art. II, Sec. 15(D). Plaintiffs claim that Ohio's duly enacted legislation violates this rule because it addresses both medical treatment and sports, which they claim are not the same subject. Compl. at ¶119. But Plaintiffs ignore the overriding purpose that unifies every provision in the bill—protecting all Ohioans by addressing: parents' rights over children who identify as transgender; medical and mental gender transition procedures for minors; and the participation of minors who identify as transgender, as well as those who do not, in academic sports—so their claim fails as a matter of law and should be dismissed.

A. Plaintiffs do not have standing to challenge the sports and parental custody portions of the bill under the Single Subject Clause.

Plaintiff's lack standing to raise a single-subject challenge against the parental custody and sports provisions of the Law. "Standing is a threshold question for [a] court to decide in order for it to adjudicate the action," *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998), because "standing relates to a party's right to make a legal claim or seek judicial

enforcement of a legal duty or right." *Albanese v. Batman*, 148 Ohio St.3d 85, 2016-Ohio-5814, 68 N.E.3d 800, ¶ 24, citing *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, Further, "[t]he Ohio Constitution expressly requires standing for cases filed in common pleas courts. Article IV, Section 4(B) provides that the courts of common pleas 'shall have such original jurisdiction over all justiciable matters.'" *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 52, 2014-Ohio-2382, ¶ 11.

When a party challenges multiple provisions in a law as violative of the Single Subject Clause, he or she "must prove standing as to each provision the party seeks to have severed from the enactment by demonstrating it suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the general public because of each provision." *Preterm-Cleveland, Inc. v. Kasich*, 152 Ohio St.3d 157, 2018-Ohio-441, ¶ 30. "Otherwise the relief requested would not redress an injury of the party." *Id.* This follows because standing requires a party to show injury in fact, causation, and redressability. *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶ 22. Here, Plaintiffs have not demonstrated any of the standing requirements. Noticeably absent from the Complaint are claims concerning any of the elements of standing for the sports or parental custody provisions. Their claims solely relate to the medical provisions of the Law. Because Plaintiffs have failed to plead, much less to claim any injury of any kind sufficient to establish standing beyond those alleged to be caused by the medical provisions of the Law, their single-subject claim should be dismissed.

B. Plaintiffs Fail to State a Claim on Their Single-Subject Challenge.

The State is entitled to judgment as a matter of law as to Plaintiffs' single-subject challenge because Plaintiffs have failed to demonstrate a legal entitlement to relief. As a primary matter, the usual rule that applies to all constitutional challenges to statutes also applies to challenges under

the Single Subject Clause: all "[s]tatutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision." *Beagle v. Walden*, 78 Ohio St.3d 59, 61 (1997) (citation omitted). That standard puts a heavy burden on Plaintiffs, one they simply cannot meet.

Every statutory provision contained in H.B 68 encompasses a single, unifying purpose: the protection of Ohio's children and youth amidst the growing trend of transgender identification. A review of the language of the various statutes shows that every single provision relates directly to young Ohioans that identify as transgender, even if the bill creates laws in different areas of the code, such as for medical treatment, school sports participation, and parental custody. The General Assembly was perfectly within its legislative authority to pass these laws on a variety of subtopics that encompass the challenges presented by the larger social issue of children and youth who seek to transition or have been diagnosed with gender dysphoria. Bills may have "more than one topic … as long as a common purpose or relationship exists between the topics." *State ex re. Ohio Civ. Serv. Emps. Ass'n v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, ¶ 17. "The connection or relationship of several matters, such as will render them germane to one subject and to each other, can be over various kinds …. [i]t is enough that the matters are connected with and related to a single subject, in popular signification." *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, ¶ 37.

The purpose of the Single Subject Clause is to provide for an orderly and fair legislative process and to promote unity of purpose within a particular law. *See State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 143 (1984). But the single-subject requirement does not prohibit "a plurality of topics, only a disunity of subjects." *State ex rel. Ohio Civ. Serv. Emples. Ass'n* at ¶ 17, citing *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767

(1991). "The mere fact that a bill embraces more than one topic is not fatal as long as a common purpose or relationship exists between the topics." *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St.3d 1, 6, 482 N.E.2d 575 (1985). "Where legislation contains multiple topics, 'the pivotal question is whether [the] topics share a common purpose or relationship so that they unite to form a single subject for purposes of the [one-subject rule].'" *Village of Linndale v. State*, 2014-Ohio-4024, 19 N.E.d3d 935, ¶ 12 (10th Dist.), quoting *Akron Metro. Housing Auth. Bd. of Trustees v. State*, 10th Dist. Franklin No. 07AP-738, 2008-Ohio-3826, ¶ 20. "Only when there is no practical, rational or legitimate reason for combining provisions in one act will we find a one-subject-rule violation." *State ex re. Ohio Civ. Serv. Emps. Ass'n*, ¶ 17.

This Law has provisions that address custody regarding minors that identify as transgender or are diagnosed with gender dysphoria, medical services for minors that identify as transgender or are diagnosed with gender dysphoria, and sports participation for minors and college athletes that identify as transgender or are diagnosed with gender dysphoria. These provisions all have a "common purpose or relationship." All three subtopics concern children and youth in Ohio who identify as transgender or experience gender dysphoria. The custody provisions govern how courts must handle disputes over parental rights when a child identifies as transgender or experiences gender dysphoria. R.C. 3109.054. The medical services provisions cover what services are available to children and youth in Ohio and when. *See* R.C. 3129.02(A)(1); R.C. 3129.02(A)(2); R.C. 3129.03. The provisions governing sports concern preserving the teams that children and youth play on. R.C. 3313.5320(A).

The common relationship that unifies this law —transgender identifying minors or minors diagnosed with gender dysphoria—is far more concrete than other laws courts have upheld against single-subject challenges. *See, e.g., State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 45

(a bill with provisions governing both post-release control and the sealing of juvenile records was held to have the same topic—"the rehabilitation and reintegration of offenders into society."); *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶ 38 (there was a single general purpose of job creation or economic development in a bill that included both the issuance of state bonds for public works and business-facilities projects); *Riverside v. State*, 2010-Ohio-5868, 944 N.E.2d 281, ¶ 51 (10th Dist.) (holding that a provision precluding a city from taxing the income of non-resident civilian employees and contractors working at an Air Force base was connected to the budget bill because the State funds local governments); *In re Avon Skilled Nursing & Rehab.*, 2019-Ohio-3790, 133N.E.3d 561, ¶ 50 (10th Dist.) (provision concerning the relocation of long-term beds falls under the common purpose of the bill, which was legislative changes to facilities that provide institutional care).

In addition, in those cases that have invalidated legislation as violative of the single-subject clause, courts have only done so where there was clear disunity between subjects. *See, e.g.*, *State ex rel. Hinkle v. Franklin County Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (a liquor control law provision did not have a common purpose with a bill addressing matters pertaining to the state judicial system); *Akron Metro. Hous. Auth. Bd. of Trs. v. State*, 10th Dist. Franklin No. 07AP-738, 2008-Ohio-2836, ¶¶ 22-23 (finding a "blatant disunity of subject matter" between provisions addressing the membership of boards of trustees of metropolitan housing authorities, charter school extracurricular activities, and the stated purpose of the bill: the regulation of local housing); *In re Nowark*, 104 Ohio St.3d 466, 2004-Ohio-6777, ¶ 59 (a bill including provisions about mortgage recording; aviation construction, regulations for the Department of Transportation, liquor control, and food stamp trafficking.); *Vill. of Linndale*, 2014-Ohio-4024, 19 N.E.3d 935, ¶ 17 (provisions including the elimination of a municipal judge;

changes in mayor's courts, and clarification to the texting and driving law where not found to have a common purpose). Put another way, those courts could find no unifying subject or relationship among the statutes amended or enacted, which invalidated the legislation because each was a "manifestly gross and fraudulent violation" of the single-subject clause. *State ex rel. Dix v. Celeste*, 11 Ohio St. 3d 141, 145 (1984).

Finally, the only test to be applied in a single-subject challenges is the relatedness test. There is no precedent that supports any consideration of the legislative process at all, let alone as a substitute for review for a common purpose or relationship under that test. Indeed, as a general matter, "[w]ithout an initial finding of ambiguity, inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8 (quotation and citation omitted). And legislative history is a poor guide for legal meaning in any event. *See* Scalia & Garner, Reading Law: The Interpretation of Legal Texts 436 (2012) ("if the text of a statute is unambiguous, it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text.").

Of course, it would be equally imprudent for courts to attempt to determine what legislative proposals would or would not have passed on their own after the proposal is ultimately combined with others during the legislative process. That fact could only be established through the testimonies of all 99 Representatives and 33 Senators as to what they would have done had the proposal stood alone. Without that information, it is improper to speculate about a hypothetical outcome that did not actually occur based only upon a purported lack of popular support for a provision at an earlier point in the legislative process. After all, courts only have authority to review

laws after the legislative process is complete. *See Sheward*, 86 Ohio St.3d at 462 ("[T]he judicial function does not begin until after the legislative process is completed.").

Absent ambiguity, judicial review cannot and should not be extended to determinations of the propriety of the General Assembly's decision to combine separate provisions into a single enactment, nor can this Court use such determination as evidence of logrolling to invalidate the entire bill. Combining the SAFE and Saving Women's Sports proposals "-- although seemingly the product of a tactical decision -- is not so incongruous that it could not, by any reasonable interpretation, be considered germane to the purposes" of addressing gender transition in children and youth and protecting children." *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶ 38 (rejecting a claim brought under the analogous "separate-vote" requirement for constitutional amendments). The only question before this Court is whether the provisions enacted or amended in H.B. 68 have a common subject, purpose, or relationship as a matter of law—not the facts of legislative history. As explained above, they do. Therefore, the Court should dismiss Plaintiffs' single-subject challenge.

II. Plaintiffs failed to state a claim in their Health Care Freedom Amendment challenge.

The State is free to define the scope of "health care" permissible within its borders. This power is expressly reserved by Art. I, Sec. 21(D) of the Ohio Constitution. Part (D) preserves the State's power to enact laws or rules "calculated to deter fraud or punish wrongdoing in the health care industry." A necessary corollary to deterring or punishing bad acts is to identify and define bad conduct. This provision thus requires the State to have the authority to identify and define prohibited conduct, even if some citizens or health care providers disagree.

Further, the preservation of these powers underscores the limited nature of the Amendment. Constraints placed on federal, state, or local governments to enact laws or rules related to the purchase of health care services only apply to health care services *allowed by the State*. This is supported by the text of Parts (A) and (C) and confirmed by the historical context in which the Amendment was adopted. In 2011, the federal government enacted the Affordable Care Act ("ACA"). The ACA required Ohioans to purchase health insurance coverage; failure to do so resulted in a financial penalty. These requirements raised concerns among many Ohioans that they would be forced to purchase certain health-care plans, prohibit fee-for-service care, and more. The Amendment sought to protect Ohioans from such coercion, as shown by the repeated references to federal law. Part (A) says no "person, employer, or health care provider" shall be compelled to participate in a health care system; Part (C) bars any "penalty or fine for the sale or purchase of health care." Ohioans in 2011 would have understood the plain meaning of this Amendment to protect their freedom to purchase (or not purchase) whatever health care and insurance was allowed by the State in a free market. It would not have been obvious to any voter that it would limit the State's ability to identify and define wrongdoing in the medical care industry. In other words, the State retained the ability to regulate the medical industry in Ohio and to determine what types of medical care are safe and appropriate for physicians to provide to patients. The Court should reject any other interpretation.

Any diverging interpretation of the Amendment, including Plaintiffs', would lead to an absurd result. Without the ability to identify and define wrongdoing the State could place *no further legislative limits* on health care than what existed prior to enactment. State regulators such as the Medical Board could enact no new rules restricting the services of its licensees. Indulging Plaintiffs' interpretation would freeze the law as it was on March 19, 2010. The gamut of

consequences would affect conduct spanning the egregious to the mundane. Medical Marijuana would remain legal, but without the standard of care requirements in O.A.C. 4731-32-03. Physicians would be free to mutilate female genitalia without the criminal consequences of R.C. 2903.32. State laws and regulations meant to address the opioid crisis would be invalidated. *See*, *e.g.*, O.A.C. 4731-11-11; O.A.C. 4731-11-13; R.C. 4731.055. Indeed, under Plaintiffs' theory, any fringe or untested "medical treatment" could be offered by any physician or demanded by a patient from a physician—even an unethical procedure—and the General Assembly would have no ability to prevent it. Such an interpretation is unsupportable, but even more so in this case, where the patients are minors.

Plaintiffs may argue that their claim is different based on their preferred experts' opinion or what they claim to be a consensus in some quarters. But experts and industry groups do not decide the law, the elected representatives of Ohioans do. The health care industry was not transformed into an entirely deregulated industry free to set its own standard forever. And there is no middle ground. Either the State is right that it preserves its power to define allowable medical care, or Plaintiffs are right, and the Ohio Constitution forbids the State from limiting *anything* that can be called health care. Plaintiffs' view is wrong.

C. CONCLUSION

For the foregoing reasons, the State requests that Plaintiffs' Single Subject Clause and Health Care Freedom Amendment challenges be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Partial Motion to Dismiss was filed electronically and served by e-mail on this 26th day of April, 2024, upon the following:

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