IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO

MADELINE MOE, et al. Plaintiffs, v. DAVID YOST, et al. Defendants.	Case No. 24 CV 002481 Judge Holbrook

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT ONE OF THE COMPLAINT, AND MEMORANDUM CONTRA OF PLAINTIFFS TO DEFENDANTS' PARTIAL MOTION TO DISMISS

Plaintiffs Madeline, Michael, and Michelle Moe and Grace, Garrett, and Gina Goe (collectively "Plaintiffs") submit the attached Memorandum Contra to Defendants' Partial Motion to Dismiss, which was filed on April 26, 2024. In addition, Pursuant to Ohio Rule of Civil Procedure 56(A) and Local Rule 53.01, Plaintiffs file this Motion for Summary Judgment as to Count One of the Complaint (Violation of the Single-Subject Rule).

In light of the substantial overlap in subject matter and to avoid burdening the Court with redundant briefing, Plaintiffs submit their Motion for Partial Summary Judgment in combination with their Memorandum Contra to Defendants' Partial Motion to Dismiss.

Respectfully submitted,

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**PHV motion forthcoming*
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MADELINE MOE, et al.	Case No. 24 CV 002481
Plaintiffs,	Judge Holbrook
v.	
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Defendants.	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT ONE OF THE COMPLAINT, AND MEMORANDUM CONTRA OF PLAINTIFFS TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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INTRODUCTION

Plaintiffs agree with Defendants that Plaintiffs' single-subject rule claim is ripe for resolution now—except it is Plaintiffs, not Defendants, who are entitled to judgment as a matter of law. Accordingly, and in the interests of judicial economy, Plaintiffs submit this Memorandum Contra to Defendants' Partial Motion to Dismiss in combination with a Motion for Partial Summary Judgment as to Count One of the Complaint.

Single-subject rule challenges center on a pure question of law: whether the challenged bill unnaturally combines disunified subjects. The Court has already answered this question based on the bill's text: "[t]he very title of the Act references two subjects: 'Saving Ohio Adolescents from Experimentation and Saving Women's Sports.'" April 16 TRO Order at 12. The bill's substance is an amalgamation of "occupational licensing and regulation related to health care, the allocation of parental rights, and athletics." *Id.* And although Defendants ask this Court to turn a blind eye to H.B. 68's legislative history, it reinforces a finding of a single-subject violation. Simply put, there is no fact-finding to be done. Defendants' motion to dismiss should be denied as to Count One of the Complaint, and judgment should be entered for Plaintiffs as a matter of law.

Plaintiffs have also stated a valid claim under the Health Care Freedom Amendment, which provides that the state may not "prohibit the purchase or sale of health care[.]" Ohio Const. Art. I, Sec. 21(B). On a Rule 12(B)(6) posture, Defendants cannot and do not dispute that gender-affirming care is "health care," and also cannot and do not dispute that it is the widely accepted standard of care for gender dysphoria. They nonetheless argue that the state may in fact "prohibit the purchase or sale" of gender-affirming care—namely, by banning it altogether. Their motion relies on an unsupportable premise: that the HCFA does not mean what its plain language says. Defendants' motion to dismiss Count Two of the Complaint is without merit and should be denied.

STATEMENT OF RELEVANT FACTS

I. H.B. 68's Healthcare Ban Was Passed Only After Being Logrolled With A Restriction On Interscholastic Sports Participation.

A. H.B. 68's Text.

H.B. 68 comprises two distinct Acts regulating two distinct subject matters (respectively, the "Health Care Ban" or "Ban," and the "Sports Prohibition"). Its title expressly states as much:

> 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. [1] As noted at oral argument on April 12, 2024, Plaintiffs' counsel reviewed bills going back through the 131st General Assembly (2015-16), and did not find any that expressly combined two Acts as H.B. 68 does. Levenson Aff. ¶ 19.

In relevant part, the Health Care 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 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 current Ohio residents' preexisting care, *id.* (enacting R.C. 3129.02(B)), and includes penalties and enforcement mechanisms. Defendant Yost is authorized to "bring an action to enforce compliance" with the Health Care Ban, and the Defendant State Medical Board is instructed that any violation of the Health Care Ban "shall be considered unprofessional conduct

[1] This action challenges the enactment of H.B. 68 as a whole because it is a logrolled combination of the "Health Care Ban" and the "Sports Prohibition", and also specifically challenges the substance of the Health Care Ban.

and subject to discipline[.]" *Id.* (enacting R.C. 3129.02(A)(2)–(3), 3129.05(A)).

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." 2024 Sub.H.B. No. 68 (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 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)).

B. H.B. 68's Legislative History.

The Health Care Ban and the Sports Prohibition began as two separate bills—H.B. 68 and H.B. 6, respectively—introduced on different dates with different representatives, each with a distinct title. *See* Compl. ¶ 74; Affidavit of Freda Levenson ("Levenson Aff.") ¶¶ 9, 11. They had no overlap. The original H.B. 68 consisted primarily of the Health Care Ban, with no mention of interscholastic sports. *See generally* Levenson Aff. ¶ 11; H.B. No. 68, As Introduced version, 135th General Assembly (February 27, 2023). H.B. 6 contained a series of restrictions on interscholastic girls' and women's sports at the grade school and collegiate levels. *See* Levenson Aff. ¶ 9; H.B. No. 6, As Introduced version, 135th General Assembly (February 15, 2023). Notably, two bills substantively similar to the Health Care Ban and the Sports Prohibition were introduced in a prior legislative session, but failed to pass. Compl. ¶ 75; Levenson Aff. ¶¶ 4, 7.

H.B. 68 and H.B. 6 did not clear committee review for several months. Compl. ¶ 78; Levenson Aff. ¶¶ 10, 12. Then, on June 14, 2023, H.B. 6 was rolled into H.B. 68 as a second "Act" within H.B. 68. *See* Levenson Aff. ¶ 13. *Saving Ohio Adolescents from Experimentation Act:*

hearing on H.B. 68 before the H. Comm. on Public Health Policy, 2023 Leg., 135th Sess. The combined bill passed the House within a week. Compl. ¶ 78; Levenson Aff. ¶ 14.

II. H.B. 68 Will Deny Plaintiffs Medical Care

Madeline Moe is a twelve-year-old transgender girl. Michael Moe Aff. ¶ 4, 7. Madeline has been living as a girl in all aspects of her life since she was seven years old. Moe Aff. ¶ 17. She has been on pubertal suppression medication for a year to treat her diagnosed gender dysphoria, and she is thriving. Moe Aff. ¶ 14. Puberty-delaying medication has given her significant relief from her gender dysphoria: she no longer has to endure the distress of developing secondary sex characteristics that do not match her gender identity. Moe Aff. ¶ 15-16. Michelle and Michael Moe do not want their daughter to return to the self-harm and mental anguish she felt at six years old, when she said, "I want to die and come back as a girl. Can't God just make me come back as a girl?" Moe Aff. ¶ 9. The Moe family wants to remain in their supportive and loving community in Ohio and to be able to access their daughter's need for hormone therapy so that she can grow into a healthy young woman. Moe Aff. ¶ 17-18.

Grace Goe is also a twelve-year-old transgender girl. Gina Goe Aff. ¶ 4, 7. Grace first told her parents, Gina and Garrett, that she was a girl at five years old, and was diagnosed with gender dysphoria at six years old. Goe Aff. ¶ 10-11. Since her parents allowed her to live as a girl—as her true self—in all aspects of her life, she has been the happiest and healthiest version of herself. Goe Aff. ¶ 12. That has been her life for the past six years. Goe Aff. ¶ 13. Now that she is twelve, her parents and doctor are monitoring her for the first signs of puberty to identify the right time to begin medication that will pause puberty temporarily. Goe Aff. ¶ 13. When puberty begins, Gina and Garrett want to be able to discuss these options with Grace and her doctor in Ohio and, if medically indicated, begin treatment so that she does not develop physical characteristics that do not match her gender identity. Goe Aff. ¶ 14. Grace's parents worry about her mental health and

safety in the community if she is unable to start pubertal suppression and is thus outed as being transgender against her will. Goe Aff. ¶ 14-15. Although the Goe family has deep roots in Ohio and does not want to leave, they are considering moving, or even temporarily separating their family, so Grace can receive the medical care she needs . Goe Aff. ¶16-17.

ARGUMENT

I. Legal Standards.

Defendants' partial motion to dismiss is governed by Civ.R. 12(B)(6). This Court is to "presume the truth of all material factual allegations in the complaint," and draw "all reasonable inferences" in favor of the nonmoving party. *State ex rel. Yost v. Rover Pipeline, L.L.C.*, 167 Ohio St.3d 223, 2022-Ohio-766, 191 N.E.3d 421, ¶ 6. A complaint "should not be dismissed unless it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.'" *Lunsford v. Sterilite of Ohio, L.L.C.*, 162 Ohio St.3d 231, 2020-Ohio-4153, 165 N.E.3d 245, ¶ 22 (internal citation and quotation marks omitted).

Plaintiffs' motion for partial summary judgment is controlled by Civ.R. 56. Summary judgment is appropriate where "(1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Estate of Coumbassa v. Hickle*, 230 N.E.3d 61, 2023-Ohio-4292, ¶ 29 (10th Dist.) (internal citation omitted). Under Civ.R. 56(C), the movant bears "the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact." *Id.* (internal citations omitted). Once that initial burden is met, the burden shifts to the nonmoving party to respond "with specific facts demonstrating a genuine issue exists for trial." *Id.* (internal citations omitted).

A summary judgment motion brought by the party seeking relief—here, Plaintiffs—may be brought "at any time after the expiration of the time permitted … for a responsive motion or pleading by the adverse party[.]" Civ.R. 56(A). The Complaint was filed on March 26, 2024, and Defendants' counsel accepted service on March 29, setting a responsive pleading deadline of April 26. *See* Civ.R. 12(A)(1). Defendants filed their partial motion to dismiss on that date.

II. Plaintiffs Have Stated a Valid Claim Under the Single-Subject Rule, and Summary Judgment in Their Favor is Appropriate

A. No Fact-Finding Is Necessary to Resolve Plaintiffs' Single-Subject Rule Claim.

Summary judgment exists to resolve questions of law. *See* Civ.R. 56(C) ("Summary judgment shall be rendered forthwith if … the moving party is entitled to judgment as a matter of law."); *see also Gibson v. Am. Inst. of Alternative Medicine*, 62 N.E. 3d 754, 2016-Ohio-1324, ¶ 47 (10th Dist.) (where a trial court erroneously denies summary judgment on a pure question of law, that error is not rendered harmless by a subsequent trial). Single-subject rule claims are particularly well-suited to summary judgment: "identification of a bill's subject is a question of law, which depends upon the particular language and subject matter of the proposal. No fact-finding is necessary." *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 21 (internal citation and quotation marks omitted). This Court already concluded in its TRO order that, upon review of H.B. 68's text, Plaintiffs have demonstrated a substantial likelihood of success on this claim. No amount of extrinsic evidence or post-hoc rationalization from Defendants will warrant changing that conclusion in later proceedings.

Moreover, although logrolling is apparent from H.B. 68's text alone, the legislative record supports that conclusion as well. For purposes of Defendants' motion to dismiss, Plaintiffs have alleged H.B. 68's legislative history in the Complaint, and those allegations must be taken as true. For Plaintiffs' motion for summary judgment, this Court may take judicial notice of the legislative

record, as summarized in the attached affidavit of counsel. *See* Levenson Aff.; *Rivers v. Kairis*, 442 N.E.2d 494, 495 (Franklin C.P. 1982) (taking judicial notice of legislative history of a statute); *cf. Spitaleri v. Metro Reg'l Transit Auth.*, 67 Ohio App. 2d 57, 62 (9th Dist. 1980) (taking judicial notice of general legislative practices, such as relying on opinions of the Ohio Attorney General).

Finally, H.B. 68's ban on gender affirming care directly impacts both Madeline Moe and Grace Goe, neither of whom will be able to obtain the treatment that they need in Ohio. *See generally* Michael Moe Aff. ¶¶ 14, 17–18; Gina Goe Aff. ¶¶ 13, 17. Defendants have not disputed that essential point giving rise to Madeline's and Grace's standing.

B. The Single-Subject Rule Exists to Prohibit Logrolling.

The single-subject rule imposes "a constitutional limitation on the legislative power of the General Assembly." *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 20. 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[.]" *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 71 (quoting *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 143, 464 N.E. 2d 153 (1984)). 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." *Dix* at 143. A constitutional challenge under this rule contests "the authority of the General Assembly to enact the bill," *Rumpke* ¶ 20, not the bill's substance.

Courts do not define "subjects" at an extreme level of abstraction. *See, e.g.*, *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (1991); *Linndale v. State*, 19 N.E.3d 935, 2014-Ohio-4024, ¶ 18 (10th Dist.); *City of Toledo v. State*, 2018-Ohio-4534, 123 N.E.3d 343, ¶ 26 (6th Dist.). In *Hinkle*, for example, the bill made changes to 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, the Tenth District 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* ¶ 18; *see also, e.g.*, *Akron Metro. Hous. Auth. Bd. of Trustees v. State*, 10th Dist. Franklin No. 07AP-738, 2008-Ohio-2836, ¶ 21 ("modifying local authority" was too broad a concept to connect zoning regulations with school extracurricular activities).

C. H.B. 68 Expressly Pertains to At Least Two Disunified Subjects

H.B. 68's title announces its violation of the single-subject rule by "clearly express[ing]" two separate subjects: the "Saving Ohio Adolescents from Experimentation (SAFE) Act regarding gender 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). This dual title is no accident: H.B. 68 jams two separate bills into one, not even united by their title.

Adolescent health care and interscholastic sports are distinct subjects pertaining to two wholly independent spheres of life. 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. And indeed, as the Court has noted, the disunity does not stop there. Other provisions pertain to parental rights and court-ordered parenting time. *See* TRO Order at 10–11.

Defendants argue that H.B. 68's various components relate to "protecting children and families," Motion at 3, but that argument fails. Even setting aside that children are not "protected" by being denied health care, the Sports Prohibition is not limited to children at all; it extends to adults in collegiate athletics. The only purportedly common thread that Defendants can articulate is the category of people who are the target of H.B. 68's restrictions: transgender Ohioans.

It is not a cognizable common "purpose" to impose restrictions on a category of people in multiple, utterly unrelated aspects of their lives. *City of Toledo*—which Defendants themselves cite—illustrates an absurd connection between subject matters. The state in *City of Toledo* unsuccessfully argued that pet store licensing, minimum wage standards, and humane society laws shared a common purpose of "standardiz[ing] the manner in which businesses are regulated[.]" 2018-Ohio-4534, ¶ 17. Merely sharing a common object of regulation—local businesses in *City of Toledo*, and transgender Ohioans here—does not suffice to connect disjointed areas of regulation. *Id.* All the more so when the targets are not entities, but people.

D. The Structure and History of H.B. 68 Confirm the General Assembly's Logrolling.

The individual provisions of H.B. 68 underscore the distance between its two major component Acts. To start, the Health Care Ban and the Sports Prohibition each have their own set of statutory definitions; neither Act 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. 3345.532, containing separate definitions for the sports restrictions). In other words, each Act can accomplish its objective with no mention of the subject matter of the other Act.

Each Act also has its own enforcement mechanism, with no overlap in degree or type of penalty. 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). Again, this disconnect reveals that the Acts target entirely different conduct through entirely separate means. 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.

Though "[t]he one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves," *Nowak* ¶ 71, the history of H.B. 68 does reveal unambiguous logrolling. Each of H.B. 68's component bills—the Health Care Ban and the Sports Prohibition—had previously failed to pass as a standalone bill in previous legislative sessions. 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 3-4.

Given this damning sequence of events, it is perhaps unsurprising that Defendants ask this Court to ignore H.B. 68's legislative history. That would be a misguided approach here. Logrolling is "the very evil the one-subject rule was designed to prevent[.]" *Dix* at 145; *Akron Metro. Hous. Auth. Bd. of Trustees* ¶ 17 (quoting *Dix*). It would be bizarre indeed if the Court were required to ignore plain indications of logrolling on the face of the legislative record. While the parties agree that "the one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves," *Nowak* ¶ 71, the timeline of a bill's passage may be relevant: "Assessment of an enactment's constitutionality will be primarily a matter of a 'case-by-case, semantic ***and contextual*** analysis.'" *Cuyahoga Cty. Veterans Serv. Comm. v. State*, 159 Ohio App. 3d 278, 2004-Ohio-6124, 823 N.E.2d 888, ¶ 10 (10th Dist.) (quoting *Dix* at 145) (emphasis added). This Court need not ignore the public record on matters so basic as timing.

Further, the bill's text need not be ambiguous for the Court to consider H.B. 68's legislative

history. *See* Motion at 11 (citing *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8). Defendants' argument that "legislative history is a poor guide for legal meaning," *id.*, is inapposite. Legislative history is not being used here to ascertain meaning, but as *an indication of logrolling in the legislative process itself*. The parties are not disputing an ambiguous term within H.B. 68 and resorting to legislative history to shed light on it; they are disputing whether the bill is the product of logrolling. *Dix* at 145. Legislative history is not necessary to find H.B. 68 unconstitutional—the text alone is enough—but it provides relevant, corroborating context.

E. The Appropriate Remedy Is Invalidation *In Toto*

As this Court has also already ruled, H.B. 68 is not susceptible to severing any one offending portion because there is no "primary" subject of the bill. The Health Care Ban and the Sports Prohibition are coequal. April 16 TRO Order at 11. A party need not have standing as to every portion of a disunified bill in order to challenge that bill under the single-subject rule. *See Akron Metro. Hous. Auth. Bd. of Trustees* ¶ 14. Further, where there is no "primary" subject, the entire bill is invalid even if the plaintiff has only demonstrated injury as to a portion of the bill. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 500, 715 N.E.2d 1062 (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* ¶ 29 (similar). It is uncontested that Plaintiffs have standing to challenge the Health Care Ban, but the Health Care Ban is no more "primary" to H.B. 68 than the Sports Prohibition. They are two coequal laws that the General Assembly logrolled into one. As in *City of Toledo*, "the originally-introduced legislation had a discernible primary subject," but the final bill did not, rendering it "not possible to save any provisions of the bill." *Id.* at ¶ 30.

III. Plaintiffs Have Stated a Valid Claim Under the Health Care Freedom Amendment

Defendants' extratextual limitation on the HCFA would eviscerate the amendment itself.

The HFCA forbids the government from prohibiting "the purchase or sale of health care." That constitutional protection is nonexistent if, as Defendants argue, it extends only to the purchase or sale of *whatever health care the state chooses not to ban*. The HCFA is meaningless if the government has unlimited authority to outlaw particular care by classifying it as "wrongdoing in the health care industry," Ohio Const. Art. I Sec. 21(D), and thus exempt from the HCFA.

First, Defendants' cramped interpretation stands contrary to the plain text of the HCFA. *See City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22 (text is to be given its "normal and ordinary" meaning). If the state bans a type of health care, then it has necessarily prohibited Ohioans from the "purchase" or "sale" of that health care. *But see* Ohio Const. Art. I Sec. 21(B) ("No ... state ... law or rule shall prohibit the purchase or sale of health care"). If the HCFA's drafters had intended for it to protect only the *choice of means to pay* for health care, rather than protecting the purchase or sale of health care, then they could have written it to say so. They did not. As the Hamilton County Court of Common Pleas—the only court to apply the HCFA—has explained, "[t]he plain language of subsections B and C of the HCFA is simple and clear[.] ...[A]s a result of the HCFA, the Ohio Constitution contains a direct recognition of the fundamental nature of the right to freedom in health care decisions." *See* Exhibit 1 to Plaintiffs' Motion for Preliminary Injunction at 12–13.

Second, Defendants offer sweeping assertions about Ohio voters' purported understanding of the HCFA's purpose and function. *E.g.* Motion at 13 (characterizing "concerns among many Ohioans," what the Amendment "sought to protect," and what "Ohioans in 2011 would have understood the plain meaning" of the HCFA to provide in that context). They offer no supporting evidence or citations. Even if they did, it would be improper. "[C]ourts cannot rely on evidence or allegations outside the complaint to determine a Civ.R. 12(B)(6) motion." *State ex rel. Fuqua v.*

Alexander, 79 Ohio St.3d 206, 207, 1997-Ohio-169, 680 N.E.2d 985. And even if it were not improper, the actual public record of the HCFA's passage only confirms that its purpose is to protect a right to the sale and purchase of health care. *See* Plaintiffs' Motion for Preliminary Injunction at 23–25 (collecting public statements).

Third, in Defendants' reading, the HCFA's "wrongdoing" exception would subsume the rest of the Amendment by allowing the government to redefine any "health care" as "wrongdoing," evidently at will. Under their circular reasoning, any matter "in the health care industry" that the legislature prohibits is *ipso facto* "wrongdoing" rather than "health care," and so is always exempt from the HCFA. That argument fails because "health care" is a plain language term that was well understood by the voters who enacted the HCFA. *See* Plaintiffs' Motion for Preliminary Injunction at 22 n.4 (dictionary definitions); R.C. 2315.01(G). Where it appears in the Constitution, it cannot simply mean whatever the legislature wishes it to mean. *See Knab* ¶ 22. Ohio's bill of rights—which includes the HCFA's protection for "health care"—is to be given force and effect *against* the General Assembly, not rendered meaningless through legislative wordplay. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379, ¶ 94 ("we should avoid any construction that makes a [constitutional] provision meaningless or inoperative") (internal citation and quotation marks omitted).

Fourth, Defendants complain that applying the HCFA "would freeze the law as it was on March 19, 2010" and prohibit the General Assembly from regulating medical care further. *See* Motion at 13. That is inaccurate. Nothing in the HCFA immunizes physicians from general liability for negligence, malpractice, failure to obtain a patient's informed consent, practicing medicine without a license, or other "wrongdoing." *See* Art. I Sec. 21(D). The HCFA merely prevents the legislature from "prohibit[ing]" or "impos[ing] a penalty or fine for" the purchase or sale of health

care. It is meaningless to complain, as Defendants do, that the HCFA limits the General Assembly's power to prohibit medical care. The entire purpose of a constitutional amendment is to limit government power. The fact that the HCFA does so is not an argument for disregarding it. *Knab* ¶ 47 (Kennedy, J., concurring) ("the purpose of a bill of rights is to protect people from the state") (internal citation and quotation marks omitted).

Fifth, Defendants argue that a plain-text reading of the HCFA would lead to undesirable results. That exaggerates the Amendment's scope. The term "health care" in the HCFA defines the scope of protected activities. It is not limitless. To address one of Defendants' examples: female genital mutilation serves no medical purpose and treats no health condition. Ohio's statutory ban on it already exempts "a procedure performed for medical purposes" by a licensed professional. *See* R.C. 2903.32(C). The HCFA does no more. Similarly, Ohio's restrictions on illegal use of anabolic steroids would be unaffected; they pre-date the HCFA. *See* R.C. 2925.06. The HCFA also does not protect actions that serve no medical purpose, such as recreational steroid or drug use.

There may well be difficult cases in the future that test the boundaries of the term "health care." But this case is easy. Taking the Complaint's allegations as true, as must be done at this stage, gender-affirming care is the accepted standard of care for gender dysphoria. *E.g.*, Compl. ¶¶ 3, 37, 45. It is recognized by every major medical organization in the United States, *id.* ¶ 30, and has been widely practiced at Ohio's leading health care institutions. *Id.* ¶ 35. Even H.B. 68 acknowledges that it is applies to "*medical services* that provide puberty blocking drugs, cross-sex hormones, [etc.]" 2024 Sub.H.B. No. 68 (enacting R.C. 3129.01(F)) (emphasis added). The operative question under the HCFA is not whether the General Assembly endorses gender-affirming care, either generally or in a particular patient's case. The question is whether gender-affirming care is "health care" at all. On a motion to dismiss, that cannot be disputed.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' partial motion to dismiss in its entirety, and should enter summary judgment in Plaintiffs' favor on Count One of the Complaint.

Respectfully submitted,

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**PHV motion forthcoming*
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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024, the foregoing was electronically filed via the Court's e-filing system. Notice of this filing will be sent to counsel for all parties via the Court's electronic filing system. Parties may access this filing through the Court's system.

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