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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' CLOSING ARGUMENT

Plaintiffs have shown that H.B. 68 violates the Ohio Constitution in four ways. First, as this Court already ascertained at the TRO stage, H.B. 68 violates the Single Subject Rule. Because the defect is fully manifest on the face of the bill, no evidence on this claim (other than proof of standing) needed to be offered at trial. Prior to the trial, Plaintiffs filed a Motion for Summary Judgment on their Single Subject claim; the parties fully briefed that motion; and it is now ripe for decision. *See* Appendix ("Appx") #4 (Renewed Motion for Summary Judgment as to Single Subject Claim). The Court should enter a permanent injunction against H.B. 68. If the state wishes to enact the two Acts, it must pass them in a constitutional manner—i.e., as stand-alone bills.

Plaintiffs' three other challenges are all directed at just one of the component Acts within H.B. 68: the ban on gender affirming health care for adolescents (the "Health Care Ban" or "Ban"). The first of these challenges is based on the Ban's violation of Ohio's Health Care Freedom Amendment ("HCFA"), which provides that "no state... law... shall prohibit the purchase or sale of health care..." or "impose a penalty or fine" for same. Because the Ban expressly prohibits "medical... services" by a "physician," it is in clear violation of the HCFA on its face. Although no

further evidence needed to be adduced at trial (again, other than proof of Plaintiffs' standing), both sides' expert witnesses agreed that the services prohibited by the Ban are indeed health care. The Court should enter a permanent injunction against the Health Care Ban based on this claim.

Other than establishing Plaintiffs' standing, the evidence heard at trial related primarily to Plaintiffs' last two claims: Equal Protection and Due Course of Law. See *infra* for a detailed discussion of the evidence and how it relates to the law.

A finding in Plaintiffs' favor on their HCFA, Equal Protection, or Due Course of Law claims would require enjoining H.B. 68's prohibition against prescribing "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), and aiding and abetting in the same. A finding in Plaintiffs' favor on any of these three claims would *not* require an injunction against the "Save Women's Sports Act," R.C. 3313.5319, 3345.562; against the ban on gender affirming surgery for minors, R.C. 3129.02(A)(1); or against the provisions in the Bill that allocate parental rights, R.C. 3109.054, because Plaintiffs are not asserting those three claims against those provisions.

As the Court has noted since the outset of this case, this case likely will be ultimately resolved in courts of appeal. Plaintiffs respectfully submit that a full record, including detailed findings of fact and conclusions of law, will best equip the appellate courts for that endeavor.

I. PLAINTIFF PARENTS' TESTIMONY

***Testimony of Gina Goe*:** Plaintiff Gina Goe's testimony demonstrates standing for herself, her husband Garrett Goe, and their twelve-year-old daughter Grace Goe. Gina, Garrett, Grace, and Grace's three older brothers live in a suburb of Columbus. Goe (Day 1 - 18:8-24, 19:4-14). Grace, a transgender girl, received a diagnosis of gender dysphoria some six years ago. 45:23-46:2, 34:23-35:2. In the summer before first grade, Grace socially transitioned from masculine to feminine in

her name, pronouns, and choice of clothing, and generally shifted to being "perceived and respected as a girl[.]" 38:2-39:2, 40:13-20. Before Grace's transition, "[s]he was in distress. She was just coming to us in a constant state of desperation" to be recognized as a girl, praying nightly for God to make her one, and even wondering aloud whether death would allow her to return as one. 27:14-21, 45:2-6. Once she was able to live as who she knew herself to be, "[h]er distress ceased and melted away almost instantaneously." 39:13-14. She blossomed into a "thriving, happy, healthy person," and now enjoys strong family relationships, friends, and a wide array of interests and hobbies. 45:1-6, 19:15-22, 25:8-27:21. Grace has lived and presented as a girl ever since. 45:7-22. Only a select few of her friends, family, and acquaintances—largely those who knew her before her transition—know she is transgender, "and that's the way she wants to keep it." 46:3-20.

Puberty for Grace "could begin at any time." 51:23-25. For her to develop masculine physical characteristics "would be devastating" as she already has expressed "discomfort with parts of her body." 48:13-49:2, 55:4-13; *see also* 60:4-61:3 (Grace "laid down and wept" and has been "carrying this looming worry and anxiety" since H.B. 68). "She would not want to leave the house. She would not feel like herself to be free, to exist in this world as who she is." 55:8-13. This impending concern prompted Gina and Garrett to prepare for Grace to receive puberty blockers. 47:6-48:1. Following a referral from her diagnosing psychiatrist, Grace undergoes regular check-ins with an endocrinologist, with whom Grace and her parents have discussed the effects, side effects, and risks of this treatment. 50:11-52:18. As soon as Grace's endocrinologist finds visible signs of puberty, the Goes and their doctors will discuss the matter again, but Gina is certain that Grace will receive puberty blockers. 53:1-55:13 ("I would be shocked if she didn't.").

H.B. 68 would "keep [Grace] from being able to access the necessary care that she needs." 56:2-58:18. Even her longstanding relationship with her psychiatrist is in doubt. 60:4-61:3. Indeed,

if H.B. 68 takes effect, it will leave the Goe family facing a choice among serious harms. Forgoing treatment for Grace would "harm her mentally, emotionally, spiritually, and relationally[.]" 48:23-49:2. The family has discussed options to ensure continued care: Gina taking Grace on periodic multi-day trips to a clinic in Michigan, a substantial "financial burden" that would cause Grace to miss school; moving away from Ohio, at considerable personal and economic burden; or separating their family, with Grace and Gina moving to California while Garrett and Grace's brothers remain behind, where Garrett has a job and the boys have settled lives. 61:4-63:15 (seeking an option that "would cause the least trauma on each individual person.").

***Testimony of Michael Moe*:** Michael Moe gave testimony that establishes standing for himself, his wife Michelle Moe, and their twelve-year-old daughter Madeline Moe. The Moes are longtime residents of Cincinnati, with Madeline and her older sister having lived there for their whole lives. Moe (Day 2 - 234:14-25). Madeline is transgender. 264:4-8. She was diagnosed with gender dysphoria around first grade, and eventually her parents allowed her socially "to transition into a girl." 254:10-255:24. In the year prior to her social transition, Madeline was frequently "saying things like, 'Why did God make me like this? … I wish [I] could die and be reborn as a girl.'" 247:23-248:3. One day, while saying similar things, she "grabbed a knife out of the drawer and tried to cut herself in the wrist[.]" 249:24-251:7. During a vacation to Mexico, when Michael and Michelle allowed Madeline to live as "whoever [she] want[ed] to be," she "just really, really [came] out of her shell[.]" 253:7-254:2. Once she was able to live as a girl, "[i]t was beautiful. It was like we got our kid back. 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." 258:1-10; 253:9-254:2. Soon after, she began to consistently use a feminine name and pronouns. 255:22-257:5, 258:25-259:2. Her parents changed her legal name, as well as the gender markers on her birth certificate, passports,

school records, and medical records. 264:9-15. She has continuously lived and presented herself as a girl for the past five years. 258:17-24.

In February of 2023, Madeline received a puberty blocker implant. 265:17-19. The choice was "logical" to her and her parents. 266:9-24. "[T]o have facial hair, an Adam's apple, chest hair, big arms, big feet, big muscles" would "cause her to have anxiety, depression, suicidal tendencies." 266:4-24. She and her parents were informed of potential side effects, and she has experienced none. 267:2-15. She will need a new implant around February of 2025. 267:19-268:15. They have also considered hormone therapy, for which Madeline would be eligible "around age 13 or 14." 268:16-269:5.

Madeline's family knows that under H.B. 68, she will be unable to obtain a replacement puberty blocker implant or hormone therapy. 269:25-270:13; 271:16-18. Absent hormone therapy, "it would be devastatingly bad. She would now start to develop characteristics as man, which was the exact opposite of what she wants." 270:21-271:2. The Moes have made plans to try to secure health care for Madeline in Chicago—where she is currently on an 18-month wait list. Were H.B. 68 to go into effect, the Moes would be forced to make expensive and difficult overnight trips every few months or move out of Ohio. 271:19-273:2, 273:3-15 ("Everything we have is in Ohio. It always has been. And I always thought it would be.").

II. EXPERT EVIDENCE

Both sides presented the testimony of several expert witnesses, who disagreed on a number of things, but the relevant facts are undisputed:

- **Experts from both sides agree that the decision whether to provide this care to minors should be made by parents after a doctor has fully informed the adolescent and their parents about the potential risks and benefits and the evidence supporting treatment**. Levine

(Day 4 - 74:14-24, 95:1-13); Antommaria (Day 2 - 146:8-149:8, 170:12-16, 177:5-178:3); Corathers (Day 2 - 27:1-30:25); Turban (Day 1 - 121:5-19). Indeed, Defendants' expert Dr. Levine has written letters approving hormone therapy for minors and (absent H.B. 68) will continue to make decisions for such patients on a case-by-case basis. Levine (Day 4 - 110:16-112:19, 114:19-116:21). Dr. Levine has also written articles on best practices for evaluating patients and conducting the informed consent process before beginning such treatment for minors. *Id.*

- **Experts from both sides agree that *all* medical treatments come with risks and that minor patients and their parents, in consultation with doctors, weigh the risks and benefits to determine the best course of action.** Hruz (Day 5 - 29:19-30:1); Antommaria (Day 2 - 146:8-149:8, 170:12-16); Corathers (Day 2 - 14:22-15:8). For example, Dr. Hruz prescribes puberty blockers for central precocious puberty, even though he noted the risk of intracranial pressure. Hruz (Day 5 - 70:25-71:9).

- **Experts from both sides agree that most of the potential risks of puberty blockers and hormone therapy also apply when used for other purposes in minors who are not transgender.** For instance, regardless of the reason for which it is used, estrogen and testosterone pose a risk of blood clots, and puberty blockers pose risks related to intracranial pressure. Corathers (Day 1 - 321:3-25, 328:7-25; Day 2 - 17:2-20:18); Hruz (Day 5 - 47:7-15, 70:25-71:9). It was also undisputed that patients can be treated to reduce or mitigate fertility risks. Corathers (Day 1 - 330:4-332:2; Day 2 - 12:19-13:20). It was also undisputed that there are other medical interventions for minor children that impact fertility. Antommaria (Day 2 - 167:25-170:11). Also undisputed is the fact that for patients treated with puberty blockers who are later treated with hormone therapy, the latter treatment can begin within the normal age range for youth to start puberty, e.g. 13-14 years old. Corathers (Day 1 - 308:9-309:3, 316:4-317:8; Day 2 - 7:14-

8:1, 67:14-18); Hruz (Day 5 - 19:18-20:10). Thus, the social development associated with puberty can occur at or around the same time as peers, along with the rapid accrual of bone density that is important to bone health. Corathers (Day 1 - 322:12-323:15).

- **It is undisputed that the type of risks associated with gender affirming medical care for adolescents are comparable to the type of risks associated with other medical treatments that patients and their parents, in consultation with their doctors, may pursue.** Antommaria (Day 2 - 167:25-170:4).

- **It is undisputed that doctors have to make treatment decisions based on the best available evidence for patients who are currently in need of care**. Antommaria (Day 2 - 140:5-16, 163:14-164:18, 199:17-200:5).

- **It is undisputed that many of the medical treatments adolescent patients and their parents may pursue are based on evidence of comparable quality as the evidence supporting gender affirming medical care for adolescents**. Antommaria (Day 2 - 166:16-23, 190:14-191:3); Corathers (Day 1 - 304:23-305:5). The research supporting gender affirming medical care for adolescents consists of cross-sectional and longitudinal studies, which are referred to as "low quality" evidence in the parlance of systems used to grade the quality of medical evidence. Turban (Day 1 - 127:17-128:25, 131:7-132:8); Antommaria (Day 2 - 154:3-17). In contrast, "high quality" evidence generally refers to randomized controlled clinical trials. Antommaria (Day 2 - 143:11-19). It is also undisputed that many medical treatments in pediatrics are not supported by randomized controlled trials, which are often difficult to obtain for ethical and practical reasons, but rather on "low quality" cross-sectional and longitudinal studies. Antommaria (Day 2 - 157:25-160:24, 161:20-162:20, 171:13-19).

- **Both parties' experts agree it would be beneficial to have more research on the**

use of puberty blockers and hormone therapy to treat adolescents with gender dysphoria, Antommaria (Day 2 - 166:24-167:11); Hruz (Day 5 - 70:10-17); Levine (Day 4 - 116:22-118:12), but H.B. 68 does not contain an exception to allow such research to be conducted. While some European countries with nationalized healthcare services are now requiring that some or all gender-affirming medical care for minors take place in the context of clinical trials where more data can be collected, **none** of these countries has banned care. Antommaria (Day 2 - 187:14-189:11); Turban (Day 1 - 168:6-169:8); Cantor (Day 3 - 88:4-25).

- **Experts from both sides agree that gender dysphoria can cause severe distress that requires attention *and* that it is diagnosed the same way that other psychiatric conditions are: patient clinical interviews and, for minors, information from parents as well.** Turban (Day 1 - 97:18-99:11, 114:23-115:9, 258:5-13); Corathers (Day 1 - 309:14-310:2); Levine (Day 4 -139:1-140:14); Hruz (Day 5 - 8:25-9:5); *see also* Goe (Day 1 – 35:3-22, 45:2-22); Moe (Day 2 - 249:6-17). Defendants' expert Dr. Levine testified as to the validity and reliability of the diagnosis of gender dysphoria, noting that it has inter-relator validity, meaning that if one doctor diagnoses a patient with gender dysphoria, another doctor is likely to reach the same conclusion. Levine (Day 4 - 140:6-14).

- **Experts and other witnesses on both sides agree that some youth can benefit from transitioning.** Levine (Day 4 - 113:22-114:1-18); Reed (Day 4 - 223:7-11); Turban (Day 1 - 129:1-133:23, 199:1-200:5); Corathers (Day 1 - 301:14-302:21; Day 2 - 14:7-21, 43:16-45:11); Moe (Day 2 – 262:2-11, 265:17-24, 269:1-271:2). And the undisputed testimony from Dr. Turban and Dr. Corathers was that among their patients, puberty blockers and hormone therapy greatly relieved their gender dysphoria and enabled them to go from distressed and depressed to thriving. Turban (Day 1 - 129:1-133:23); Corathers (Day 1 - 301:14-302:21; Day 2 - 14:7-21, 43:16-45:11).

- **Experts from both sides also agree that if a patient's gender incongruence persists after onset of puberty, that incongruence is unlikely to naturally desist.** Cantor (Day 3 - 98:13-20); Turban (Day 1 - 169:25-173:4). In other words, youth for whom the banned treatments might be indicated are not likely to "outgrow" gender incongruence.

- **Experts from both sides agree that there is no evidence-based psychotherapeutic methodology to treat gender dysphoria** (though psychotherapy can be effective in treating comorbidities such as depression and anxiety). Levine (Day 4 - 76:15-16); Turban (Day 1 - 126:11-25, 136:18-137:3, 137:24-138:2; 200:7-201:13, 210:7-22). Thus, if puberty blockers and hormone therapy for adolescents with gender dysphoria were prohibited in Ohio, these patients would be left with no evidence-based treatment options. Turban (Day 1 - 36:18-137:3, 137:24-138:2; 200:7-201:13). Corathers (Day 1 - 302:11-21; Day 2 - 52:2-14); Antommaria (Day 2 - 178:4-22).

* * *

Defendants do not appear to dispute that gender affirming medical care can be appropriate and beneficial to minors. Rather, Defendants' case, in large part, focused on **how care is provided**. Much of their evidence presented was aimed at demonstrating that some doctors, somewhere, departed from the WPATH Standards of Care and Endocrine Society Guideline and provide puberty blockers, hormone therapy, or surgery "on demand," without engaging in what those clinical practice guidelines actually recommend: among other things, a comprehensive biopsychosocial evaluation; only providing hormone therapy if gender incongruity has been present "for years"; and a rigorous informed consent process that advises patients and parents of the potential risks and benefits (including fertility risks). Turban (Day 1 - 106:15-107:23, 112:2-115:24, 118:7-124:5, 195:22-196:19); Corathers (Day 1 - 309:4-310:20; Day 2 - 36:23-39:1);

Antommaria (Day 2 - 170:5-11, 180:3-15).

Defendants did not present any direct or competent evidence that such departure from standards is an issue in Ohio. Their witnesses testified about personal experiences only in California and Missouri that departed from established standards of care,[1] and some speculated that similar sub-standard care was happening nationwide.[2] The only evidence about how gender affirming medical care is provided in Ohio was Dr. Corathers' testimony about how care is provided at Cincinnati Children's Hospital, Corathers (Day 1 - 295:3-10, 296:5-20; Day 2 - 23:7-39:1), and the testimony of Michael Moe and Gina Goe about their daughters' treatment. Moe (Day 2 - 25:3-13, 265-267), Goe (Day 1 - 31:10-33:22).

But even if there were evidence of some doctors in Ohio providing substandard treatment in the way described by Defendants' witnesses—and again, there was no such evidence—there are already mechanisms in place to address inappropriate conduct by doctors, such as employer-level discipline, state medical licensing board action, or medical malpractice. Antommaria (Day 2 - 181-183). No other medical treatment is banned because some doctors provide such care inappropriately. Antommaria (Day 2 - 181:20-23). Indeed, to do so would deprive patients of needed care and cause them harm. Turban (Day 1 - 201:10-13); Corathers (Day 1 - 302:11-21; Day 2 - 52:2-14); Antommaria (Day 1 - 178:10-179:14).

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[1] Ms. Reed testified that she personally engaged in inappropriate practices at the clinic where she worked in Missouri, but had no knowledge of Ohio practice. Reed (Day 4 - 159:24-160:4, 214:13-21, 236:11-237:25). Ms. Cole has sued her California doctors for malpractice and medical negligence, but had no knowledge of Ohio practice. Cole (Day 5 - 116:17-117:8, 120:6-17).

[2] See, e.g. Levine (Day 4 - 47:4-48:14). Dr. Levine testified about second-hand perceptions of some parents' and patients' experiences with other doctors in Ohio, but did not know the specific practices of any doctors or clinics in Ohio with respect to the treatment of minors with gender dysphoria apart from his own medical practice. Levine (Day 4 - 141:1-143:13, 147:1-16).

III. EXPERT RELIABILITY

Plaintiffs' expert witnesses are qualified by their "knowledge, skill, experience, training, or education" and provided testimony because their "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue." Evid. R. 702. They have extensive clinical experience in the diagnosis and/or treatment of gender dysphoria in adolescents—that is to say, they have direct experience in the medical field that is the subject of this case. Turban (Day 1 - 88:12-24); Corathers (Day 1 - 296:16-20); Antommaria (Day 2 - 135:8-18). In contrast, Defendants' experts (with the exception of Dr. Levine, who believes this medical decision for minors should be made on a case-by-case basis), do not. *See* Cantor (Day 4 - 28:10-20, 30:15-16); Hruz (Day 5 - 67:17-68:15); Reed (Day 4 - 171:14-173:3). Moreover, the federal courts have discounted testimony from Drs. Cantor and Hruz because of this lack of experience, and in Dr. Hruz's case, also for ideological bias.[3]

There is no requirement in this case that experts testify to a particular level of certainty, as that is only required when opining on the proximate cause of a bodily injury or related matters of probability, e.g. whether exposure to a chemical was the proximate cause of cancer. *See* Appx #5

[3] *L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 698 (M.D. Tenn. 2023) ("the testimony of Dr. Cantor and Dr. Hruz is minimally persuasive given that neither of them state that they have ever diagnosed or treated a minor with gender dysphoria"), *rev'd on other grounds*, 83 F.4th 460 (6th Cir. 2023); *see also Brandt v. Rutledge*, 677 F. Supp. 3d 877, 916 (E.D. Ark. 2023) (finding Hruz's opinions "grounded in ideology rather than science"); *Doe v. Ladapo*, 676 F. Supp. 3d 1205, 1211 & n.8 (N.D. Fla. 2023) (finding Hruz not credible and a "deeply biased advocate"); *Kadel v. Folwell*, 620 F. Supp. 3d 339, 364-65, 368 (M.D.N.C. 2022) (striking several Hruz opinions and noting ideological motivations); *Koe v. Noggle*, 688 F. Supp. 3d 1321, 1336 & n.11, 1352 & n.28 (N.D. Ga. 2023) (Hruz and Cantor); *Dekker v. Weida*, 679 F. Supp. 3d 1271, 1279 & n.8 (N.D. Fla. 2023) (Hruz); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1142-43 (M.D. Ala. 2022) (Cantor), *vacated sub nom.* 80 F.4th 1205 (11th Cir. 2023). Dr. Hruz's ideological bias was evident at trial. *See* Hruz (Day 5 - 71:18-72:11 (publication demonstrating theologically-based concerns regarding transgender identity); *id.* at 76:1-77:4 (joining amicus brief to the U.S. Supreme Court describing social transition as "a form of child abuse").

(Brief regarding Expert Evidentiary Standards).

Nor is Plaintiffs' experts' testimony somehow *less* credible because it is based on their work in the area at issue in the litigation. The opposite is true: the entire purpose of expert testimony is to "help the trier of fact to understand the evidence or determine a fact in issue" based on their "knowledge, skill, experience, training, or education." Ohio R. Evid. 702. Dr. Cantor's assertion that anyone who practices in an area of medicine has a conflict of interest making their testimony unreliable is plainly at odds with Rule 702. Cantor (Day 3 - 147:13-148:4). Such a position would preclude Dr. Cantor—or any expert—from testifying within their own field. Cantor (Day 3 - 59:8-12). To the contrary, expert witnesses for both parties have emphasized the importance of expertise in the subject matter of testimony. *See, e.g.*, Hruz (Day 5 - 15:12-16, 17:15-23); Antommaria (Day 2 - 148:4-7, 148:16-149:9, 156:7-12). To exclude those with the most applicable experience would upend Rule 702.

Plaintiffs' experts do not have any conflicts of interest that preclude them from testifying credibly in this case. Dr. Turban works in California, but even the passage of a law like H.B. 68 in his state would not affect his work or income. Turban (Day 5 - 199:3-200:7). Dr. Corathers and Dr. Antommaria are salaried employees whose livelihood would not be affected by H.B. 68. *See* Corathers (Day 1 - 52:15-18; Day 5 - 163:8-164:4); Antommaria (Day 5 - 158:19-23, 160:6-20). Contrary to defendants' expert's suggestion, the "market" for Dr. Corathers' services would not shrink as a result of H.B. 68; the majority of her patients are not being treated for gender dysphoria, and she has a six-month new-patient wait list. Corathers (Day 5 - 163:8-20). While one of the Minor Plaintiffs receives care from the hospital where Dr. Corathers and Dr. Antommaria practice, neither has treated her. Even if they had, "[n]othing, [] in Fed. R. Evid. 702 disqualifies an individual from serving as an expert by virtue of his or her relationship to the plaintiff." *Reader's*

Dig. Sales & Servs., Inc., 139 F. App'x 707, 708 (6th Cir. 2005); *see also, e.g.*, *Tagatz v. Marquette Univ.,* 861 F.2d 1040 [redacted] (7th Cir. 1988). The same is true for Ohio Rule of Evidence 702.

IV. STANDING

Plaintiffs proved their standing on all four claims at trial through the testimony of the Plaintiff Parents. H.B. 68 threatens Plaintiffs with direct and concrete injury in a manner different from that suffered by the public in general, and only declaratory or injunctive relief from this Court will redress the injury. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469–70 (1999). *See* Appx #6 (Plaintiffs' Brief as to Standing); *see generally supra* Section I. Specifically, Plaintiffs have demonstrated that they are seeking to initiate or continue gender affirming medical care—which the statute terms "gender transition services"—in Ohio. If H.B. 68 were enforced, it would prohibit Plaintiffs from obtaining in Ohio the very medical treatments they are seeking. Plaintiffs and their families will also suffer social, emotional, and economic costs if H.B. 68 takes effect because, they testified, they would either regularly travel out of state or move out of state to obtain medical care for their child. *See supra* Section I.

V. BURDEN ALLOCATION AMONG THE PARTIES

On the merits of their claims, Plaintiffs have the nominal burden of establishing "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State v. Grevious,* 2022-Ohio-4361, ¶ 9 (internal citation omitted).[4] Plaintiffs have met their burden on

[4] The "beyond a reasonable doubt" standard has no measurable impact on this case. Plaintiffs have demonstrated a conflict between H.B. 68 and the Ohio Constitution under any standard. But this purported standard is a burden in name only. As Justice DeWine has explained, it is not actually employed in practice; further, it improperly shoehorns an evidentiary standard into a legal inquiry, and would have disastrous results if it were actually followed—which, again, it is not. *Grevious* ¶ 48 (DeWine, J., concurring) ("Beyond-reasonable-doubt is an evidentiary standard that is poorly suited to the legal question whether a legislative enactment comports with the Constitution. This is probably why the standard is often repeated but not actually applied by this court. And if the standard were to be applied, it would undercut the protections for individual liberties guaranteed

each claim, as discussed below. *See also* Appx #7 (Plaintiffs' Brief as to Burden).

For Claims One and Two, the matter is fully resolved on the face of the statute.

With respect to Claims Three and Four, because H.B. 68 facially classifies based on sex– a suspect classification–and infringes on the rights of parents to direct their children's medical care, it is subject to heightened scrutiny. Under strict scrutiny, Defendants have the burden to show that the law is narrowly tailored to further a compelling government interest. *See* Appx #7 (Plaintiffs' Brief as to Burden). Defendants have failed to carry that burden. In fact, the evidence demonstrates that H.B. 68 fails even to meet lower standards of scrutiny than those that apply here: heightened scrutiny or even rational basis review.

In deciding constitutional claims, this Court acts as a necessary—indeed, *vital*—check on the legislative process by scrutinizing the General Assembly's purported rationales for the Ban and conducting its own inquiry into relevant evidence. *See Grevious* at ¶¶ 53, 65.

VI. THE HEALTH CARE BAN VIOLATES OHIO'S SINGLE SUBJECT RULE (CLAIM 1).

On Claim One, Plaintiffs have met any burden to show that H.B. 68 has more than one subject. The question of violation of the requirement that "[n]o bill shall contain more than one subject" is a purely legal one. *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 2016-Ohio-478, ¶ 21 ("[I]dentification of a bill's subject is a question of law … No fact-finding is necessary.") (internal citation omitted). Nothing at trial disturbs the Court's prior analysis. *See* Appx #3 (TRO Order). Plaintiffs' pending Motion for Partial Summary Judgment, together with their showing

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by the federal and state Constitutions."); *id.* at ¶ 63 ("So the bottom line is that while the beyond-reasonable-doubt standard is something that we have rotely pasted into constitutional opinions, there is no indication that we actually use it."). Justice Brunner agreed, in her concurrence in Defendants' mandamus action against this Court. *State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶ 14 (Brunner, J., concurring) ("Thus, like Justice DeWine, I consider it appropriate to use a standard that reflects the reality of how courts review constitutional questions.").

standing offered at trial, resolves this claim in their favor as a matter of law.

VII. THE HEALTH CARE BAN VIOLATES OHIO'S HEALTH CARE FREEDOM AMENDMENT (CLAIM 2).

Plaintiffs have shown that H.B. 68 unconstitutionally "prohibit[s] the purchase or sale of health care" and "impose[s] a penalty or fine" for the same. Ohio Const. Art. I, Sec. 21(B)-(C). As with Claim One, this violation is patent on the face of the statute, which states: "A physician shall not" provide "gender transition services," which is expressly defined as a category of "medical or surgical service." R.C. 3129.02(A), 3129.01(F). On the construction of the law, Plaintiffs incorporate by reference the points set forth in previous briefing. *See* Appx #1, #2.

To the extent this Court finds that evidence is necessary to demonstrate that puberty blockers and hormone therapy are "health care" protected by the HCFA, the uncontroverted evidence at trial establishes that they are. Indeed, even Defendants' experts agreed that gender-affirming medical care is health care. *See* Hruz (Day 5 - 70:4-14, 90:16-23); Cantor (Day 3 - 123:8-19); Levine (Day 4 - 116:17-117:1, 144:18-146:20); Reed (Day 4 - 182:24-183:16). Puberty blockers and hormone therapy are available in Ohio medical care facilities to patients diagnosed with gender dysphoria. Corathers (Day 1 - 305:6-306:7). Even Defendants' expert Dr. Levine admitted that he has approved patients for hormone therapy. Levine (Day 4 - 110:16-112:19, 114:19-116:21). The Ban prohibits the sale and purchase of these medical treatments for gender dysphoria, which is a serious medical condition. Turban (Day 1 - 99:24-101:19); Corathers (Day 1 - 309:14-310:2); Hruz (Day 5 - 8:25-9:5). And by threatening physicians with government enforcement actions and professional discipline, the Ban also "impose[s] a penalty" for the sale or purchase of health care. Ohio Const. Art. I Sec. 21(C).

As its proponents repeatedly stated, the HCFA was intended to apply broadly to "cutting-edge services [and] procedures" and even "alternative medicine." *See* Appx #1 (Motion for TRO,

Exhibit #1, Decision and Entry Granting Temporary Restraining Order, *Preterm-Cleveland v. Yost*, Hamilton C.P. No. A2203203 (internal citation omitted)). The HCFA's protection thus applies to puberty blockers and hormone therapy.

VIII. THE HEALTH CARE BAN VIOLATES OHIO'S EQUAL PROTECTION CLAUSE (CLAIM 3).

By prohibiting treatment if and only if it facilitates a "gender transition," H.B. 68 classifies on the basis of sex. And because sex is a suspect classification, the Ban is subject to strict scrutiny, requiring the government to show that it is narrowly tailored to advance a compelling governmental interest. The evidence at trial shows that H.B. 68 fails that demanding test.[5]

A. The Health Care Ban Classifies Based on Sex.

The Ban facially classifies based on sex in two distinct ways. First, the Ban classifies based on birth sex, and specifically limits access to care based on an individual adolescent's birth sex. Sex thus "plays an unmistakable" role, as the Ban "penalizes a person identified as male at birth for traits or actions that it tolerates in [a person] identified as female at birth." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 659-663 (2020) (Gorsuch, J.). A person with a female birth sex can obtain any medical intervention to affirm a female gender identity, but a person with a male birth sex cannot. That is precisely what *Bostock* identified as a sex classification.

Second, the Ban classifies based on whether a person seeks to live in accordance with their birth sex. As relevant here, "gender transition services" are defined by virtue of whether they "alter

[5] Compared to its federal counterpart, Ohio's Equal Protection Clause has both "unique language" and an independent "historical background." *Stolz v. J & B Steel Erectors, Inc.*, 2018-Ohio-5088, ¶ 28-29 (Fischer, J., concurring). While the Ban fails the standard set by either the U.S. or Ohio Constitutions, the Ohio Supreme Court "can and will interpret [the Ohio] Constitution to afford greater rights to [Ohio] citizens" since it is "not confined by the federal courts' interpretation of similar provisions in the federal Constitution." *State v. Mole*, 2016-Ohio-5124, ¶ 21; *see also id.* ¶ 23 (holding that "the guarantees of equal protection in the Ohio Constitution independently forbid" certain conduct, regardless of federal constitutional protections).

or remove" features "that are typical for the individual's biological sex," or create characteristics "that resemble a sex different from the individual's birth sex." R.C. 3109.054(F). Removing any doubt, the Ban specifies that its language applies to "*cross-sex* hormones." *Id.* (emphasis added). The Ban thus "unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 590 U.S. at 669.

B. Sex-based classifications are subject to at least heightened, if not strict, scrutiny.

Under the Ohio Constitution, sex is a suspect class. *See, e.g.*, *Adamsky v. Buckeye Loc. Sch. Dist.*, 1995-Ohio-298 ("[A] suspect class … has been traditionally defined as one involving race, national origin, religion, or sex."); *In re A.W.*, 2015-Ohio-3463, ¶ 23 (5th Dist.) ("Suspect classes include race, sex, religion, and national origin[.]"), *aff'd in part, appeal dismissed in part on other grounds*, 2016-Ohio-5455. Sex-based classifications are therefore subject to strict scrutiny under the Ohio Constitution. *See Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 64.

C. The Health Care Ban cannot survive strict or heightened scrutiny because it is not narrowly tailored to advance a compelling state interest.

To survive strict scrutiny, the Ban must be narrowly tailored to serve a compelling state interest, *see Groch v. Gen. Motors Corp.*, 2008-Ohio-546, ¶ 155, which places a "heavy" burden on the state. *Crowe v. Owens Corning Fiberglass*, 1998 WL 767622, at *4 (8th Dist. Oct. 29, 1998), *aff'd*, 1999-Ohio-16. The State cannot satisfy this burden. Indeed, even if heightened or intermediate scrutiny applied, as under federal law for sex classifications, the State has failed to show that the Ban is substantially related to an important governmental objective. *See State v. Thompson*, 2002-Ohio-2124, ¶ 13 (noting application of heightened scrutiny under federal law).

While the State purports to protect children's health and safety, the Ban does the opposite by depriving adolescents of the only evidence-based medical care for gender dysphoria, which provides great benefit to many adolescents. *Supra* Section II. The Ban is not narrowly tailored to

address the legislature's purported concerns about the treatments at issue—namely, the potential risks and purported inadequacy of the evidence of efficacy. It was undisputed that all medical treatments come with risks that must be weighed against the benefits; that the potential risks of puberty blockers and hormone therapy apply when those medications are also prescribed for other purposes; that all of those risks are comparable to the kinds of risks associated with other medical treatments that minors may pursue; and that many medical treatments that adolescents receive are supported by evidence of comparable quality as the evidence supporting gender affirming medical care for adolescents. *Supra* Section II.

Defendants have not met their burden under either strict or heightened scrutiny because they have failed to demonstrate that the Ban is even substantially related to those asserted interests. Indeed, there is such an extreme mismatch that the law cannot withstand even rational basis review. The rationales for banning gender-affirming medical care for minors "ma[k]e no sense in light of how" Ohio treats medical care provided for purposes other than gender transition. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (applying rational basis review). Because there is nothing unique about the risks and evidence base for these treatments, allowing adolescents to receive gender affirming medical care does not "threaten legitimate interests of [the state] in a way that" allowing other types of care "would not." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (applying rational basis review). Moreover, the law allows adolescents who have already begun receiving this care to continue receiving care—an exception that makes no sense given Defendants' purported safety concerns. At minimum, the law's "classification [must] be rationally related to a legitimate government purpose." *Thorp v. Strigari*, 2003-Ohio-5954, ¶ 15. What this law does, however, is "so far removed from [the asserted] justifications that [it is] impossible to credit them." *Romer v. Evans*, 517 U.S. 620, 635 (1996). Rather than protect

children, the Ban harms them.

What Defendants appear to dispute is not whether gender affirming medical care is ever appropriate, but rather *how* particular clinicians may be providing that care—but their only evidence was of past practices in other states. *See generally* Reed (Day 4); Cole (Day 5). Even if there were doctors providing care in Ohio the way Defendants describe—and there was no competent evidence of such practices—the law is not a ban on *inappropriate* care; it is a prohibition on *all* gender-affirming medical care for adolescents with gender dysphoria, including care that is appropriately provided under the relevant guidelines. There is a profound disconnect between Defendants' purported concerns and a blanket prohibition on gender-affirming medical care; Defendants have failed to meet their burden and the law is invalid under any level of scrutiny.

IX. THE HEALTH CARE BAN VIOLATES OHIO'S DUE COURSE OF LAW PROVISION (CLAIM 4).

The Ban also violates Article I, Section 16 of the Ohio Constitution by infringing the Parent Plaintiffs' fundamental right to seek appropriate medical care for their children. Parents have a "fundamental liberty interest … in the custody, care and control of their children." *In re S.H.*, 2013-Ohio-4380, ¶ 13 (9th Dist.). This right encompasses decisions over, "within reason, whether and what type of medical care the child will receive." *In re I.S.*, 2022-Ohio-3923, ¶ 102 n.8, (8th Dist.).

Because any restriction of parents' rights in this area "infringe[s] upon a fundamental right," the restriction faces strict scrutiny. *Stolz*, 2018-Ohio-5088, ¶ 14. The government cannot "infringe certain 'fundamental' liberty interests at *all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). As described above, the Ban fails this standard. *See supra* Section VIII-C.

X. SCOPE OF THE PERMANENT INJUNCTION

Because Plaintiffs have shown that H.B. 68 violates the Single Subject Rule, the statute is facially unconstitutional as enacted and must be enjoined in its entirety: it "may not be enforced under any circumstances." *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 21. *See also State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶ 14 (Brunner, J., concurring).

If instead this court finds that H.B. 68 does not violate the single subject rule, but violates the HCFA, Equal Protection, or Due Course of Law provisions of the Ohio Constitution, the portion of H.B. 68 that prohibits "prescribing 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), or the "aiding and abetting" thereof, must be enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 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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