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

MADELINE MOE, *et al.* Plaintiffs-Appellants, v. DAVID YOST, *et al.* Defendants-Appellees.	Case No. 24AP-483 On appeal from the Franklin County Court of Common Pleas, Case No. 24-cv-002481

APPELLANTS' RESPONSE IN OPPOSITION TO MOTION FOR STAY OF JUDGMENT PENDING APPEAL

Freda J. Levenson (45916)
Counsel of Record
Amy Gilbert (100887)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
Levenson: (216) 541-1376
Office: (614) 586-1972
flevenson@acluohio.org
agilbert@acluohio.org

David J. Carey (88787)

Dave Yost (0056290)
OHIO ATTORNEY GENERAL

T. Elliot Gaiser (0096145)
SOLICITOR GENERAL
Counsel of Record
Erik Clark (0078732)
DEPUTY ATTORNEY GENERAL
Stephen P. Carney (0063460)
DEPUTY SOLICITOR GENERAL
Amanda Narog (0093954)
ASSISTANT ATTORNEY GENERAL

Carlen Zhang-D'Souza (93079)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Ave., Ste. 203
Columbus, Ohio 43206
(614) 586-1972
dcarey@acluohio.org
czhangdsouza@acluohio.org

Chase Strangio (PHV 27521-2025)
Harper Seldin (PHV 27516-2025)
Leslie Cooper (PHV 27717-2025)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500
cstrangio@aclu.org
hseldin@aclu.org
lcooper@aclu.org

Miranda Hooker (PHV 27555-2025)
Jordan Bock (PHV 27547-2025)
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
mhooker@goodwinlaw.com
jbock@goodwinlaw.com

Counsel for Appellants

30 East Broad Streer
17th Floor
Columbus, Ohio 43215
(614) 466-8980
thomas.gaiser@ohioago.gov

Counsel for Appellees

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ARGUMENT

I. This Court Should Deny the Government's Motion.

The Government is attempting to game the appellate process. It is trying to take advantage of the trial court's delay in complying with this Court's order to enter a permanent injunction by contriving a race between its own lawyers and the court below. The Court should not reward this maneuver. Nor is there any merit to the Government's other arguments.

First, the Government manufactures an unprecedented "rule" that a losing party can turn defeat into victory by racing to file a notice of appeal with the Ohio Supreme Court before a trial court effectuates a mandate from this Court, obtaining what is tantamount to an automatic stay. But the law is not a game of "gotcha." There is no such rule.

Second, the Government does not satisfy any of the factors that would justify a stay, but instead callously suggests that the people of Ohio must continue to tolerate violations of their civil rights because that has been the state of play for several months due to error from the court below.

Third, the Government is unlikely to prevail on the merits of any appeal because, as this Court explained, the challenged portions of H.B.

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68 violate at least two separate provisions of the Ohio Constitution.

Finally, there is no basis for limiting this Court's ruling—that a permanent injunction should issue based on the facial unconstitutionality of a law—to only the plaintiffs who challenged it. The parties are no longer litigating in the posture of a preliminary injunction. Even setting aside whether such a drastic limitation would be appropriate in the context of preliminary relief, certainly after a full trial on the merits the appropriate remedy for a facially unconstitutional law is to render it a nullity as to all Ohioans.

II. There is No Automatic Stay, Nor a Functional Equivalent of One.

The Government proposes an unprecedented, unsupported rule of appellate procedure: that when this Court issues a ruling and remands for the trial court to enter an order effectuating that ruling, the ruling is subject to the functional equivalent of an automatic stay if a party simply rushes and files its notice of appeal before the trial court acts. In other words, in the Government's view, all a losing party needs to do to stay an order of this Court is to file its notice of appeal—requesting that the Ohio Supreme Court exercise its *discretionary* jurisdiction—before the trial court

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responds to this Court's mandate. This Court should reject the Government's attempt to end-run the appellate process.

To start, the Government entirely ignores the effect of *this* Court's order. "[T]he filing of a notice of appeal to the Ohio Supreme Court does not generally give rise to any type of automatic stay of a judgment from a court of appeals." *DeLost v. Ohio Edison Co.*, 2012-Ohio-4561, ¶ 28 (7th Dist.). Rather, the "non-prevailing party in an appeal must either file a motion for stay in the court of appeals under App.R. 27, or seek a stay in Ohio Supreme Court pursuant to S.Ct.Prac.R. 2.2(A)(3)(a), after filing a further appeal to that Court." *Id.* Regardless of whether the trial court has taken the final step of complying with the mandate from this Court, this Court's ruling is in effect, absent a stay from this Court or the Supreme Court.

In the Government's view, its filing of a notice of appeal would divest the trial court of jurisdiction, preventing that court from following this Court's mandate to enjoin enforcement of H.B. 68. Even were that correct, the filing of a notice of appeal has no effect on this Court's decision, which declared in no uncertain terms that H.B. 68 is

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"unconstitutional on its face." Opinion ("Op.") 56. The Government suggests that this Court's order is "not self-executing," Mot. at 4, but it is a bedrock principle of the American legal system that "[a]n unconstitutional law is void, and is as no law." *Montgomery v. Louisiana*, 577 U.S. 190, 204 (2016) (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1879)). Thus, under this Court's decision, the challenged portions of H.B. 68 are void, and the Government has no basis to continue enforcing an unconstitutional law. But the Government runs roughshod over this Court's decision, suggesting that it will have no operative effect if the trial court is unable to enter the required injunction.

The Government is also wrong about the trial court's jurisdiction. It is generally true that a trial court loses jurisdiction to *itself* take further action once a notice of appeal has been filed. *See, e.g.*, *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97 (1978). Thus, in *State v. Washington*, 2013-Ohio-4982, ¶ 8—the Government's sole support for its theory (Mot. at 4–5)—the Supreme Court explained that a trial court had no jurisdiction to resentence a defendant after the state had already filed its notice of appeal. *Washington*

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provides no support for the Government's argument that filing a notice of appeal (seeking discretionary review) will prevent the trial court from taking the ministerial step of entering an injunction following this Court's order.

The obvious purpose of divesting the trial court of jurisdiction during an appeal is to ensure that there is no interference with—or evasion of—the appellate process. Courts thus repeatedly recognize that "the trial court loses jurisdiction except to take action *in aid of the appeal*." *In re S.J.*, 2005-Ohio-3215, ¶ 9 (emphasis added); *see also id.* at ¶ 9 ("The trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from."); *State ex rel. Special Prosecutors* at 97 (trial courts retain jurisdiction "over issues not inconsistent with that of the appellate court"). But as a member of the Supreme Court has sensibly explained, the trial court *can* "proceed to execute the mandate of the Tenth District." *State ex rel. Bowling v. DeWine*, 2021-Ohio-3015, ¶ 2 (Brunner, J., concurring in part and dissenting in part). All the trial court has been asked to do is enter an order implementing this Court's ruling—an order that will in no way

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interfere with the appeal. An alternative rule would allow the Government to secure what amounts to a stay "by the simple act of filing a notice of appeal and a memorandum in support of jurisdiction." *Id.* at ¶ 3.

The Government's approach would leave the effect of an appellate court order to chance (at best) and gamesmanship (at worst). There is no reason that the effectuation of the intermediate appellate court decision should hinge on the outcome of a race between the trial court's compliance with the mandate and a losing party's filing of a notice of appeal. Had the trial court in this case entered the permanent injunction the day after receiving this Court's mandate, then the Government would have no claim to an automatic "stay." It makes no sense that the availability of the Government's purported stay should turn on whether it can beat the trial court to the punch.

In short, the Government's concocted shortcut to an automatic stay does not exist. The Government must follow the established course and request a stay from this Court—a request this Court should deny.

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III. A Stay is Not Warranted.

The Government's request for what it dubs a "confirmatory stay to erase any last doubt" should be denied. As the movant, it has the burden, but has failed to demonstrate the requisite harm, likelihood of success on the merits, or any of the other factors required to justify a stay.

A. No harm will result to the Government or the public from preventing enforcement of an unconstitutional law.

The Government has no meaningful claim of harm. In its own words, the "strongest reason to grant a stay" is to "preserve the status quo in Ohio." Mot. at 7. But in Ohio, the "'status quo' is that which precedes the enforcement of a challenged law. *Preterm-Cleveland v. Yost*, 2022-Ohio-4540, ¶ 23. H.B. 68 is an unconstitutional law that violates, at a minimum, two separate provisions of the Ohio Constitution, prohibits Plaintiffs from obtaining critically important medical care, and obstructs medical providers from exercising their professional judgment in treating patients. That H.B. 68 was initially enjoined, then temporarily in effect only to be deemed unconstitutional once again, does not alter this determination, as courts look to the "precontroversy status quo." *Id.*

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The Government's request that the Court allow it to continue to enforce an unconstitutional law because it is the "least disruptive option" is precisely backwards. The fact that "potential patients, parents, doctors, hospitals, and more" have "adjusted to the world as it was in the last seven months"—*i.e.*, have been forced to suffer the ongoing violation of their own, their patients', or their children's constitutional rights—in no way excuses continuing those constitutional violations.

Tellingly, the Government does not actually identify any disruption that will result from denial of a stay. It points to a single, speculative "harm"—namely, that "[h]aving hospitals re-open and re-close such operations for a short window … is difficult for those institutions, and even for the potential children that might start [medical care] during that window." Mot. at 9. This argument is simply absurd, and fails at every turn.

To start, the trial court's forthcoming order enjoining H.B. 68 will not *require* hospitals, patients, doctors, or parents to do anything at all, but merely will remove an unconstitutional obstacle. To be sure, many hospitals and medical care providers will likely choose to treat their

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patients in accordance with the standard of care as soon as the state of the law again allows it—and if the Government believed otherwise, it surely would not trouble this Court with a stay request. The Government cannot seriously suggest that hospitals will be harmed by having the option to treat patients.

Nor will an injunction cause hospitals to "re-open and re-close" their operations, voluntarily or otherwise. As the Government recognizes, any patients who were "grandfathered in" by the law "may indefinitely continue any course of medication that began by the law's effective date." Mot. at 8. Because these patients are already receiving care at the hospitals the Government is purportedly protecting, the hospitals will not need to "reopen" or "reclose" operations.

The Government's claim is even more unbelievable with respect to patients. The Government argues that minor patients who want to access gender-affirming medical care will be harmed unless this Court takes that option away from them—notwithstanding this Court's decision that they have a constitutional right to these treatments. Plaintiffs will not be harmed by having access to the very treatments they seek. As with

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hospitals, patient families can decide for themselves whether to start treatment pending a final resolution of this case.

In short, this Court's decision does not require any action from Ohio's citizens, and so can impose no hardship. Hospitals are not required to make any changes to their treatment regimens and minors and their families are not required to seek any treatment. Nor does the Government itself suffer any cognizable harm from being unable to enforce an unconstitutional law. *See, e.g.*, *EMW Women's Surgical Ctr. v. Beshear*, 2017 WL 11920191, at *4 (6th Cir. Dec. 8, 2017) ("There is no irreparable harm to a government, however, when it is enjoined from enforcing an unconstitutional statute."). The Government has failed to meet its burden to show that the equities in the four-factor stay inquiry tilt in its favor.

B. A stay will cause irreparable harm.

By contrast, a stay of this Court's order will cause irreparable harm for reasons that have been well established in this litigation.

First, Plaintiffs will suffer constitutional injury. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v.*

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District of Columbia, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)); *see also Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043, ¶ 38 (10th Dist.) ("A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well.").

Second, Plaintiffs have already suffered very tangible and irreparable harm in the seven months H.B. 68 has been in place, from being unable to secure health care from their chosen providers in their home state. That harm will only be prolonged and exacerbated by allowing H.B. 68 to remain in effect, notwithstanding this Court's ruling that H.B. 68 is unconstitutional.

C. The Government is not likely to prevail on appeal.

The Government's merits discussion fares no better, and offers no reason for this Court to reconsider its ruling on the merits.[1]

First, this Court did no more than apply the plain text of the Health

[1] The Government cites no authority for its assertion that this Court should engage in the tea leaf reading exercise of predicting whether the Supreme Court will accept jurisdiction. That question will, of course, be resolved by the Supreme Court.

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Care Freedom Amendment, consistent with the will of the voters who approved it. It rejected several of the Government's exaggerated slippery-slope arguments—such as the warning that "health care" could somehow lose its plain meaning, such that the HCFA would protect anything at all—and applied the most straightforward interpretation of that text.

Contrary to the Government's warnings now, nothing about the Court's ruling "delegate[s] state policymaking to private industry groups." Mot. at 11. It merely effectuates a constitutional limit on legislative power. By the plain terms of the HCFA, the General Assembly may not prohibit or penalize the sale or purchase of health care. Nor is the Government's hair-splitting over the term "categorical ban" likely to bear fruit on appeal. Simply put, the HCFA forbids the General Assembly from "prohibit[ing]" the sale or purchase of health care. Under H.B. 68, there is nothing a minor can do to qualify for gender affirming medical care; they are categorically forbidden from obtaining it.

Second, the Government has not demonstrated a likelihood of success on Plaintiffs' claim under the fundamental parenting right. Aside from repeating its accusation that Plaintiffs were not verbose enough for

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its tastes, the Government does not attempt to argue the merits of this claim. It instead argues that this Court should consider itself bound by a Sixth Circuit ruling under the federal due process clause. This Court correctly dispensed with that idea—not merely because federal and state due process differ, but because the Sixth Circuit would not bind this Court even if they did not. *See also Greater Dayton Reg'l Transit Auth. v. State Emp. Relations Bd.*, 2015-Ohio-2049, ¶ 33 (citing *P.D.M. Corp. v. Hyland–Helstrom Ents., Inc.*, 63 Ohio App.3d 681, fn. 1 (10th Dist.1990)) ("decisions of the Sixth Circuit Court of Appeals serve as persuasive authority, at best").

IV. The Court Should Not Limit the Relief to the Named Plaintiffs.

Last, the Government asserts that if this Court will not grant a full stay, it should nevertheless stay its ruling as to all parties other than the named plaintiffs. The Government posits that this drastic limitation is the "next step," because the ruling, being limited to the medical ban, already doesn't enjoin all of HB 68. But there is no logic to this. The scope of *which* provisions are covered by an injunction, and the scope of *who* is entitled to relief from them, are two different questions.

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As to who is entitled to relief: Where, as here, a law is facially unconstitutional, it cannot, by definition, be constitutionally applied to anyone. A class action is not required. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 680-81 (2015); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It has *never* been the law that every party injured by an unconstitutional law must go to court to litigate. But the Government, citing no authority—and offering instead ruminations from concurrences and academic "debates"—continues to rail against "universal injunctions." The Government admits, however, that most of these ruminations involve *preliminary* relief. In this case, where there has been a 5-day trial, plus an appeal on the merits, even the Government does not suggest any reason to treat the permanent injunction ordered here as if it were only preliminary.

The sole case cited by the Government that actually addresses permanent relief, *Califano v Yamasaki*, 442 U.S. 682 (1979), does not change the established rule that an injunction against a facially unconstitutional law covers everyone. *Califano* contains dicta regarding whether nationwide relief is appropriate in certifying a class under Federal

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Rules of Civil Procedure, Rule 23 – not the scope of an injunction. In rejecting defendant's argument that "a nationwide class is unwise[,]" the court noted that "a nationwide class [is not] inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id. a*t 702. And in contrast to the situation in *Califano* where the defendant was concerned that granting nationwide relief could be burdensome, the concern of burdensomeness is absent here where, in contrast, the injunction—broad or narrow—will impose no burden whatsoever on the Government. Either way, the injunction requires the Government to do nothing.

Even if there *were* some authority—which there is not—for limiting some permanent injunctions to protect only the named litigants from a facially unconstitutional law, this case would be inappropriate for such treatment. Unless the Government is broadly enjoined, the Plaintiffs themselves, who have appeared pseudonymously, will be unable to benefit from the injunction. How could they prove to any physician that they are the plaintiffs in this case? It would be completely unworkable,

and would provide no relief to the Plaintiffs themselves, if the injunction were limited to just their treatment.

CONCLUSION

For the foregoing reasons, this Court should deny the Government's request for a stay of its judgment pending appeal.

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Respectfully submitted,

/s/ Freda J. Levenson
Freda J. Levenson
(45916)
Counsel of Record
Amy Gilbert (100887)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
(614) 586-1972
flevenson@acluohio.org
agilbert@acluohio.org

David J. Carey (88787)
Carlen Zhang-D'Souza (93079)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Ave., Ste. 203
Columbus, Ohio 43206
(614) 586-1972
dcarey@acluohio.org
czhangdsouza@acluohio.org

Chase Strangio (PHV 27521-2025)
Harper Seldin (PHV 27516-2025)
Leslie Cooper (PHV 27717-2025)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500
cstrangio@aclu.org
hseldin@aclu.org
lcooper@aclu.org

Miranda Hooker (PHV 27555-2025)
Jordan Bock (PHV 27547-2025)
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
mhooker@goodwinlaw.com
jbock@goodwinlaw.com

Counsel for Appellants

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2025, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served by email upon the following:

Thomas.Gaiser@OhioAGO.gov
Erik.Clark@OhioAGO.gov
Amanda.Narog@OhioAGO.gov
Stephen.Carney@OhioAGO.gov

/s/ Freda J. Levenson
Counsel for Appellants

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