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In the
Supreme Court of Ohio

MADELINE MOE, *et al.*, Appellees, v. DAVE YOST, *et al.,* Appellants.	Case No. 2025-0472 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Case No. 24AP-483

RESPONSE OF APPELLEES TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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TABLE OF CONTENTS

INTRODUCTION AND BACKGROUND 1
I. The Nature of the Ban 1
II. The Harm of a Stay 2
ARGUMENT 4
I. The Government Is Not Entitled to an Automatic Stay 4
II. A Stay Is Not Warranted 7
A. The Government Will Suffer No Irreparable Harm 7
B. A Stay Will Cause Irreparable Harm to Plaintiffs and the Public 9
C. The State Is Unlikely to Prevail on Appeal 10
CONCLUSION 15

INTRODUCTION AND BACKGROUND

I. The Nature of the Ban

This case challenges the provisions of H.B. 68 that forbid medical providers in Ohio from prescribing certain medications—puberty blockers and hormone therapy—to treat adolescents diagnosed with gender dysphoria.[1] H.B. 68 permits these very same medical interventions to treat minors for any other medical purpose (as well as for adults for any purpose.)

Gender dysphoria is a medical condition characterized by clinically significant distress resulting from incongruence between a person's gender identity and their sex assigned at birth that has persisted for at least six months. It is a formal diagnosis under the American Psychiatric Association's Diagnostic and Statistical Manual.[2] Untreated, it can lead to debilitating distress, depression, impairment of function, substance use, self-injurious behaviors, and even suicidality.

Gender-affirming medical care (consisting of puberty-delaying medication at the onset of puberty and, for older adolescents, gender-affirming hormone therapy), when prescribed for carefully evaluated patients who meet diagnostic criteria, is the accepted standard of care for treating gender dysphoria in adolescents.[3] The protocols are not experimental; they are based on decades of research and clinical experience, and are set forth in medical society guidelines.[4]

The nation's leading medical and mental health organizations—including the American

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[1] The law also bans other matters – including surgical intervention for minors – but only the medical care ban is at issue here.

[2] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 452 (5th Ed.2013).

[3] At trial, the state's experts testified about some European countries that have modified their approach to providing puberty blockers and hormone therapy to adolescents, but none of these countries have categorically banned the use of puberty blockers and hormones, as H.B. 68 does.

[4] Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLIN. ENDOCRINOL. & METAB. 3869 (2017), https://academic.oup.com/jcem/article/102/11/3869/4157558 (accessed Apr. 7, 2025).

Medical Association, the American Psychiatric Association, the American Psychological Association, The American Family Practice Association, the National Association of Social Workers, the American College of Surgeons, and many others, recognize these guidelines as reflecting the consensus of the medical and mental health communities as to the accepted standard of care for treating gender dysphoria. They support this care and oppose banning it. Accordingly, for decades, until H.B. 68, every one of the world-class children's hospitals that treat adolescent gender dysphoria in our state provided this care.

Gender-affirming medical care is safe and effective. If this treatment is banned until they turn 18, adolescents for whom this care is clinically indicated will suffer immensely. There exists no alternative evidence-based option to treat the debilitating distress of gender dysphoria. Governor DeWine recognized this when, in vetoing H.B. 68, he stated, "Many parents have told me that their child would be dead today if they had not received the treatment they received from an Ohio children's hospital. I have also been told, by those that are now grown adults, that but for this care, they would have taken their lives when they were teenagers . . ." He added, "Parents are making decisions about the most precious thing in their life, their child, and none of us should underestimate the gravity and difficulty of those decisions. Were I to sign [H.B. 68] . . . Ohio would be saying that the State, that the government, knows what is best medically for a child rather than the two people who love that child the most, the parents."[5]

II. The Harm of a Stay

Families in Ohio have spent the last several months unjustly deprived of both their constitutional rights and health care for their minor children. But for the many decades prior to

[5] Gov. Mike DeWine, *Statement of the Reasons for the Veto of Substitute House Bill 68*, available at https://content.govdelivery.com/attachments/OHIOGOVERNOR/2023/12/29/file attachments/2731770/Signed%20Veto%20Message%20HB%2068.pdf (Dec. 29, 2023).

H.B. 68's enactment, parents in Ohio had been entrusted with the ability to make decisions concerning their children's medical care for any condition, including for gender dysphoria. And in 2011, the people of Ohio made clear that all Ohioans had the right to be free from government control over what health care is or is not available. Now that the Tenth District Court of Appeals has directed the trial court to enter a permanent injunction to enjoin limited portions of H.B. 68, the Government claims that the relevant status quo is the harmful deprivation of liberty and medically necessary care from the past several months, not the decades of freedom from state overreach into parental medical decision-making and health care purchase that existed before H.B. 68 was enacted. That is wrong.

First, far from providing clarity, a stay would undermine the rule of law. Right now, the Tenth District Court of Appeals has unequivocally held that H.B. 68's prohibition on puberty blockers and hormone therapy is unconstitutional and directed the trial court to enter a permanent injunction. It would be confusing to the public to learn that an intermediate appellate court—the last court of appeal as of right—does not have the power to hold Ohio's legislature accountable when it violates Ohioans' constitutional rights, or that trial courts are free to wait to hear from this Court before obeying intermediate appellate courts. It would be even more alarming for this Court to find that the Government has a special dispensation to continue violating Ohioans' constitutional rights if that outrage has continued for long enough that it can be considered the new status quo.

Second, every day that parents in Ohio cannot freely make medical decisions for their children is an affront to the Ohio Constitution. The voters spoke on this issue in 2011, when they amended the Ohio Constitution to include the Health Care Freedom Amendment, mandating that the government not prohibit them from purchasing health care or health insurance. And the parental medical decision-making right is a fundamental one, far pre-dating this century. The Ohio

legislature's decision to violate the People's will by enacting H.B. 68 is a constitutional affront twice over, and it does not serve the public interest to continue that violation while this Court decides whether to accept jurisdiction over any or all of the Government's appeal.

Third, the harm to Plaintiffs and families like theirs in the event of the stay is that children who are in need of health care from doctors they know and trust in their home state will not be able to receive that care. As even the trial court recognized, and the Government did not challenge, gender affirming medical care in the form of puberty blockers and hormone therapy is health care. *Moe v. Yost*, 2025-Ohio-914, ¶ 59 (10th Dist.). And it is health care that parents like the Moes and Goes only choose for their children after enormous reflection, prayer, research, and consultation with experienced and knowledgeable medical experts leads them to decide that the best way to relieve their children's immense suffering is using safe and well-studied medicine to treat their gender dysphoria. Aug. 22, 2024 Appellants' Br. at 24-30. Far from inflicting harm or creating medical issues, gender affirming medical care gives Madeline Moe and Grace Goe the ability to thrive as young people. *Id* at 24-30. It does not harm the Government to allow families like the Moes and Goes to continue making those individualized decisions for themselves and their families while this Court decides whether to take the Government's appeal.

ARGUMENT

I. The Government Is Not Entitled to an Automatic Stay

The Government proposes an unprecedented, unsupported rule of appellate procedure: that when an intermediate appellate 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 an intermediate appellate

court is to file its notice of appeal—requesting that the Ohio Supreme Court exercise its *discretionary* jurisdiction—before the trial court responds to the court of appeals' mandate. This Court should reject both the Government's attempt to end-run the appellate process and its request that this Court now enshrine that approach for all appeals moving forward.

"[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 the intermediate appellate court, that court's ruling remains in effect absent a stay. Here, the Government first sought a stay in the appellate court, which that court denied. Apr. 3, 2025 Journal Entry. The Government now moves for a stay in this Court. Paradoxically, it argues both that this Court should enter a stay, and that such a stay is not "necessary" because it believes the lower court's ruling is automatically stayed upon its filing of the notice of appeal.

In the Government's view, its filing of a notice of appeal would divest the trial court of jurisdiction, preventing that court from following the Tenth District's mandate to enjoin enforcement of H.B. 68. Even were that correct, the filing of a notice of appeal has no effect on the efficacy of the prevailing decision, which declared that H.B. 68 is "unconstitutional on its face." Opinion ("Op.") ¶ 56. The Government suggests that the appellate court's order in this case 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 the governing order, 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 the appellate court's decision, suggesting that it will have no effect if the trial court is unable to enter the required injunction.

The Government is also wrong about the trial court's jurisdiction and the supposed "uncertain[ty]" in this area. Mot. at 5. 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). But lower courts unquestionably retain jurisdiction over matters "in aid of the appeal." *State v. Washington*, 2013-Ohio-4982, ¶ 8; *see also In re S.J.*, 2005-Ohio-3215, ¶ 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."). This is wholly consistent with the obvious purpose of ensuring that there is no interference with—or evasion of—the appellate process.

Thus, in *State v. Washington*, a trial court was found to lack jurisdiction to resentence a defendant after the state had already filed its notice of appeal when resentencing the defendant would have rendered any subsequent appeal moot. 2013-Ohio-4982, ¶ 8. *Washington* 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 an intermediate appellate court's order. As a member of this 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). Doing so is plainly "not inconsistent with" an appeal in which no stay has been entered. All the trial court has been asked to do is enter an order implementing the ruling of the intermediate appellate court—an order that will in no way interfere with the appeal.

The Government's alternative rule would allow it 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. That 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 the 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. Such a practice would also render meaningless the appellate and Ohio Supreme Court rules governing the filing of a motion for stay, which can be denied. *See* App.R. 27; S.Ct.Prac.R. 7.01(A)(3)(a).

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

II. A Stay Is Not Warranted

The Government's request for what it dubs a "confirmatory stay" should be denied. As the movant, it must bear 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. The Government Will Suffer No Irreparable Harm

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 (1st Dist.). H.B. 68 violates, at a minimum, two separate provisions of the Ohio Constitution, prohibits Plaintiffs from obtaining critically important medical care, interferes with parents' ability to make informed medical decisions on behalf of their children, 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.*

The Government's request that the Court allow it to continue to enforce an unconstitutional law because it is the "least disruptive approach" Mot. at 7, is precisely backwards. The fact that "potential child patients, parents, doctors, hospitals, and more" have "adjusted to the world as it was in the last seven months" Mot. at 3—*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 to new patients 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, an order enjoining H.B. 68 will not *require* hospitals, patients, doctors, or parents to do anything at all. To be sure, many hospitals and medical care providers will likely choose to treat their patients in accordance with the standard of care as soon as the state of the law again allows it. 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 references, they 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 the appellate 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 hospitals, patient families can decide for themselves whether to start treatment pending a final resolution of this case. As a last-ditch attempt to manufacture harm, the Government cites to the testimony of Chloe Cole, a woman who has sued her California doctors for malpractice and medical negligence as a result of the care she received there but admittedly has no knowledge of or experience with Ohio practice. Tr. 7/19 116:17-117:8; 120:6-17. In short, the appellate 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 to Plaintiffs and the Public

The state is attempting to characterize the health care in this case as irreparably harmful, when in fact it is the denial of care that is causing Plaintiffs irreparable harm.

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. 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 eight months H.B. 68 has been in place, including being unable to secure health care from their chosen providers in their home state. For many families, not being able to access treatment in accordance with the standard of care can have dire impacts on their children's wellbeing. That harm will only be prolonged and exacerbated by allowing H.B. 68 to remain in effect, notwithstanding the lower court's ruling that H.B. 68 is unconstitutional.

C. The State Is Unlikely to Prevail on Appeal

i. The Tenth District Applied the Unambiguous Text of the Health Care Freedom Amendment, Consistent with the Will of the Voters

The Government insists that it is likely to successfully persuade this Court to ignore the plain text of the Health Care Freedom Amendment to the Ohio Constitution. It is not. The Tenth District did no more than apply that plain text, in a manner that is fully consistent with the voters' understanding when they enacted the Amendment.

The Health Care Freedom Amendment ("HCFA") was enacted through a citizen-led ballot initiative in 2011. In relevant part, it provides: "(B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance." Ohio Const, art. I, § 21. It contains only limited exceptions; most relevant here, the HCFA does not apply to "laws calculated to deter fraud or punish wrongdoing in the health care industry." Ohio Const., art. I, § 21(D).

The primary command of the HCFA is unambiguous: the General Assembly may not "prohibit" the purchase or sale of "health care," a term that is distinct from "health insurance." *Id.* Tellingly, although the Government disputes the merits of gender affirming care—and although its

briefing makes liberal rhetorical use of the word "chemicals" to describe the physician-prescribed medications involved—it has never disputed that it is "health care" within any reasonable meaning of that term.[6] Both the trial court and the Tenth District agreed; gender affirming medical care is "health care." Edge cases undoubtedly exist that would raise bona fide disputes over whether a particular procedure is or is not "health care," and courts will need to resolve those as they arise, much as they resolve what constitutes "speech" or a "search" within the Constitution's meaning. But even the Government does not pretend that this is such an edge case.

Instead, the Government asserts that the Tenth District should have nullified Section (B) of the HCFA. In the Government's view, the General Assembly can prohibit the purchase or sale of health care at will because by doing so, it has inherently deemed that health care to be "wrongdoing," and thus met the HCFA's exception for laws aimed at "fraud" or "wrongdoing." That argument is circular. If any health care prohibition automatically qualifies for the exception, then the exception would cancel out the core protections of Section (B) of the HCFA. The legislature cannot circumvent its own constitutional guardrails by engaging in such wordplay. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, ¶ 94 ("we should avoid any construction that makes a [constitutional] provision meaningless or inoperative") (internal citation and quotation marks omitted).

The Tenth District correctly accepted Plaintiffs' construction of the "wrongdoing" exception: especially read in conjunction with "fraud" and "in the health care industry," "the term 'wrongdoing' most naturally refers to specific instances of misconduct within the medical profession." Op. ¶ 68 (quoting Aug. 22, 2024 Appellants' Br.). That might include, for example,

[6] As the Tenth District noted repeatedly and correctly, Plaintiffs are not directing a challenge to H.B. 68's prohibition on surgery. The Government's repeated references to surgery are therefore irrelevant, as even it admits in passing. *See* Mot. at 1.

negligence, malpractice, failure to obtain a patient's informed consent, false billing, practicing medicine without a license, or other actions committed *in the course of providing* health care. But "wrongdoing" cannot include *health care itself* without nullifying the HCFA's core protection.

The Tenth District was also correct that H.B. 68 "prohibit[s]" the sale or purchase of gender affirming care. Simply put, the fact that a prohibition does not apply to every single Ohioan does not make it something other than a prohibition. For the individuals within the scope of H.B. 68's ban, there is nothing they can do—no diagnosis they can receive, showing they can make, or administrative box they can check—to access gender affirming care. To argue that minors can wait until they are eighteen years old, as the Government does, is no answer. They are subject to a categorical ban until they are no longer minors; the term "prohibit" is routinely used in statutes and case law to describe such a circumstance, and the HCFA is no different. One would not say, for example, that a minor is not "prohibited" from buying alcohol merely because they will eventually be old enough. *See, e.g.*, R.C. 4301.69(E)(1) (referring to bans on alcohol for minors as "prohibitions"); *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 529 (1999) (referring to an ordinance "prohibiting minors from remaining in 'billiard rooms'"); *State ex rel. Quality Stamping Prods. v. Ohio Bur. of Workers' Comp.*, 84 Ohio St.3d 259, 263 (1998) (referring to rules "prohibiting the employment of minors" in hazardous occupations).

Importantly, the Tenth District did not hold—and Plaintiffs have never argued—that the General Assembly cannot regulate the medical profession, so long as its regulations fall short of a prohibition on health care. Op. ¶ 73. The Government's insistence that the Tenth District's decision would "delegate state policymaking to private industry groups," or that the HCFA would "convert the medical profession into a self-regulating profession" is meaningless hyperbole. Mot. at 12. As with any other constitutional provision, it is the province of courts to determine whether a

particular treatment is "health care"; if it is, as with gender affirming care, it cannot be "prohibit[ed]." H.B. 68 does so, and so it is void.

The HCFA's plain text settles this matter. "In construing constitutional text that was ratified by direct vote," courts are to apply "the plain language of the text" as the voters would have understood it. *City of Centerville v. Knab*, 2020-Ohio-5219, ¶ 22. Even so, it is worth noting that this case is not some unintended consequence. The voters knew precisely what they were voting for when they enacted the HCFA, because even beyond its plain text, they were told repeatedly what it would do. Proponents announced that the HCFA was "about freedom – the freedom of Ohioans and others to make some of the most important personal decisions they can make about their choice of health care and how to pay for it."[7] The HCFA's author promised that once it was in place, the state could not "punish the purchase or sale of cutting-edge services, procedures, and coverage."[8] Each voter who signed a petition to put the HCFA on the ballot was shown the initiative's title: "To preserve the freedom of Ohioans to *choose their health care* and health care coverage" (emphasis added).[9] The official ballot proponent argument promised in bolded text that Ohioans would not be "imprisoned, fined, or prosecuted for choosing health insurance *or treatment* different from government requirements[.]" (emphasis added).[10] Thus, to the extent this Court sees

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[7] Ed Meese & Jack Painter, *Ohio's battle for health care freedom*, Politico (Nov. 7, 2011), available at https://www.politico.com/story/2011/11/ohios-battle-for-health-care-freedom-067727 (accessed Apr. 7, 2025).

[8] Maurice Thompson, 1851 Center, *Passage of Issue 3 will protect liberty, restrain health care costs, and preserve health care choice and privacy*, available at https://www.healthpolicyohio.org/wp-content/uploads/2014/01/1851_issue3essay.pdf (Sept. 29, 2011)).

[9] 2010 Issue 3 Initiative Petition, *available at* https://www.ohiosos.gov/globalassets/ballotboard/2011/2010-05-03initpetition.pdf (accessed April 7, 2025).

[10] 2010 Issue 3 Official Argument For, *available at* https://www.ohiosos.gov/globalassets/ballotboard/2011/3-argument-for.pdf (accessed April 7, 2025).

fit to consider the "history of the amendment and the circumstances surrounding its adoption," *City of Centerville* ¶ 22, it will find that the Tenth District's conclusion was even more clearly consistent with the HCFA.

ii. The State Does Not Raise Any Meaningful Objection to the Tenth District's Thorough Analysis of the Scope of the Due Course of Law Clause.

The appellate court correctly held that Ohio's Due Course of Law Clause guarantees parents' fundamental right to direct the medical care of their children. Op. ¶ 83. As the court explained, the "United States Supreme Court has specifically recognized as protected by the Due Process Clause … the fundamental right of parents to 'make decisions concerning the care, custody, and control of their children.'" *Id.* ¶ 84 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion)). Following a highly detailed analysis of the governing caselaw and the interests at play, the court explained that the parents in this case "assert a long-recognized and well-established fundamental liberty interest," *id.* ¶ 93, and that the fundamental parenting right to medical decision making must be viewed "at a level of generality sufficient to ensure the 'basic principles' that define our rights 'do not vary' in the face of 'ever-changing technology.'" *Id.* ¶ 97 (citing *Moody v. NetChoice, LLC*, 603 U.S. 707, 733 (2024)). The trial court, however, "failed entirely to engage in any analysis regarding the extent of that right." *Id.* ¶ 95. The Tenth District concluded that the deeply rooted historical tradition surrounding parental authority over their children's medical care extends to decisions regarding gender affirming care, noting that "we decline to hold that parents' fundamental right to direct their children's medical care is limited to those treatments existing as of 1851, 1868, or 1912." *Id.* ¶ 98.

The Government's approach to the Due Course of Law Clause claim is to simply ignore any substantive analysis. It raises a single objection to this analysis in its request for a stay—namely, that the Tenth District erred by failing to follow the Sixth Circuit's analysis in *L.W. v.*

Skrmetti, 83 F.4th 460 (6th Cir. 2023). Mot. at 14. Other than baldly asserting that the appellate court should have followed *Skrmetti* (which is, of course, not binding on either this Court or the Tenth District), the State provides no explanation of why *Skrmetti* has the better of the constitutional analysis or how the court of appeal erred in its painstaking analysis of the rights at issue. The State cannot meet its burden to demonstrate that it is likely to prevail on the merits while entirely failing to engage with the legal issues at play.

Moreover, the State's argument is premised on its assumption that the Tenth District's decision is based on an interpretation of the state Due Course of Law Clause that expands the scope of its protections beyond the federal Due Process Clause. That is not correct. While the appellate court recognized, Op. ¶ 90, that it was not required to take a "lock-step approach when interpreting a state constitutional counterpart," its analysis stands on the federal Constitution. Indeed, it recognized that "Ohio courts generally look to decisions of the United States Supreme Court to give meaning to Ohio's Due Course of Law Clause." *Id.* ¶ 79. The Tenth District's extensive analysis thus consists almost entirely of caselaw from the United States Supreme Court interpreting the scope of parental rights under the federal Constitution. *See, e.g.*, *Id.* ¶¶ 84-93.

CONCLUSION

For the foregoing reasons, this court should deny the Government's Emergency Motion for Stay Pending Appeal.

Dated: April 9, 2025

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served this 9th day of April, 2025 by email upon the following:

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