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

MEMORANDUM CONTRA OF PLAINTIFFS TO DEFENDANTS' MOTION TO CLARIFY TEMPORARY RESTRAINING ORDER FILED APRIL 17, 2024

This Court should not be fooled by Defendants' Motion to "Clarify" Temporary Restraining Order. It is a motion for reconsideration based on Defendants' dissatisfaction with this Court's reasoned decision granting temporary relief. Defendants' "Proposed Revised Temporary Restraining Order" does not resolve any ambiguity or create efficiency. Instead, it would create a gap between the TRO and the preliminary injunction hearing, forcing the parties back before the Court for a second TRO hearing. This Court should deny Defendants' Motion, which invents problems that do not exist and in turn creates new ones, mostly by citing inapposite authority that this Court has already seen.

First, this Court has already held that Plaintiffs have a likelihood of success on the merits of their single-subject rule claim that H.B. 68 was improperly enacted. *See* April 16, 2024 Order at 11-12. An illegitimately enacted statute is no law at all. *See, e.g.*, *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 20 ("The one-subject rule therefore is a constitutional limitation on the legislative power of the General Assembly."). A bill

that was never validly enacted cannot be enforced as to anyone. This challenge is distinguishable from the federal constitutional challenges raised in *Labrador v. Poe*. Whereas the underlying claims in *Poe* challenged the constitutionality of Idaho's law under the federal constitution, the TRO here addresses why H.B. 68's very enactment offends the Ohio Constitution and injures every citizen of Ohio.. Indeed, this Court already ruled on the irreparable nature of the constitutional harm. *See* April 16, 2024 Order at 12. This Court has "broad discretion to fashion the terms of an injunction" and equitable authority to prohibit complained-of activities. *Adkins v. Boetcher*, 4th Dist. Ross No. 08CA3060, 2010-Ohio-554, ¶¶ 35-36. Those "complained-of" activities include H.B. 68's very enactment, not just its application. Any lesser remedy than a statewide injunction would not provide relief. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 500, 715 N.E.2d 1062 (1999); *City of Toledo v. State*, 2018-Ohio-4534, 123 N.E.3d 343, ¶ 31 (6th Dist.); *Magda v. Ohio Elec. Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.) ("A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well.").

Second, as set forth in Plaintiffs' Response to Defendants' Notice of Supplemental Authority, nothing about the stay order in *Labrador v. Poe* **limits** this Court's authority to enjoin the enforcement of a facially invalid law in Ohio. *See, e.g.*, *Gottlieb v. City of South Euclid*, 157 Ohio App. 3d 250, 2004-Ohio-2705, 810 N.E.2d 970, ¶¶ 52-53 (8th Dist.) (Rocco, J., concurring). As the concurring opinions in *Poe* make clear, the Supreme Court's order in that case concerned the propriety of universal injunctions issued by federal judges and the various federalism concerns that arise. No such concerns are present here. This case does not "thrust federal courts into the operations of state and local governments," and "federalism concerns ... have no application at all when a state court considers the scope, defenses, or remedies available to vindicate state

constitutional claims." *Baldwin v. City of Estherville*, 929 N.W.2d 691, 705 (Iowa 2019). This Court does not exceed Rule 65 or its equitable power when it enjoins Defendants from enforcing a likely invalid statute. *See, e.g.*, *City of Toledo* ¶ 31 (where a statute violated the single-subject rule and no primary statutory purpose could be discerned, affirming that "[i]t was, therefore, not possible to save any provisions of the bill"); *Sheward* at 500 (similar).

Third, no non-party is enjoined from doing anything during the pendency of this TRO. And, that other people beyond the Minor Plaintiffs may incidentally *benefit* from the relief contained in the TRO does not mean the Court exceeded its authority; this Court already determined that weighs *in favor* of relief, not against it.

Fourth, statewide relief against Defendants' enforcement of H.B. 68 is the only practicable way to afford Plaintiffs the complete relief they are entitled to during the pendency of the TRO. Plaintiffs Grace Goe and Madeline Moe see providers at Nationwide Children's Hospital and Cincinnati Children's, respectively. Moe Aff. ¶ 11, 14; Goe Aff. ¶ 10-11, 13. As with any medical condition involving interdisciplinary treatment, their care teams extend beyond the physicians they meet face-to-face, including radiologists or other physicians who read or review test results. So too does the Health Care Ban's "aiding and abetting" provision sweep widely. R.C. 3129.02(A)(3). Unless the Defendants are enjoined from enforcing the Health Care Ban broadly, there is no guarantee that Plaintiffs will actually be able to access the ongoing care they need. How are they and their parents to prove to physicians that they are the pseudonymous plaintiffs in this case? What of other doctors who are not Minor Plaintiffs' treating physicians, but are "aiding and abetting" by consulting or advising a treating physician? Those doctors providing professional consultations cannot be assured that they are covered by Defendants' proposed limited injunction. It is unworkable, certainly for the next few weeks, for the Minor Plaintiffs' providers to offer them

a bespoke exception to H.B. 68 and hope that the Defendants do not later claim that those providers exceeded the scope of conduct permitted by a narrowed TRO.[1] To provide Minor Plaintiffs and their parents with the immediate relief to which this Court has already determined they are entitled, the Defendants must be enjoined from enforcing H.B. 68 and the Health Care Ban. Questions about a more narrowly crafted preliminary injunction are for the Preliminary Injunction hearing, not re-litigation of the existing TRO.

Finally, although Defendants did not brief this issue in their Motion, Defendants' "Proposed Revised Temporary Restraining Order" changes not just the scope, but also the duration of the TRO. Defendants propose that the TRO retroactively run from *before H.B. 68 goes into effect*, i.e. starting on April 16, and then terminate on April 30, thereby leaving a 17-day gap between the end of the TRO and the potential May 17 hearing. Clearly the TRO was meant to cover the gap between its issuance and when the Court could hear and rule on Plaintiffs' preliminary injunction motion. In any event, this Court should reject Defendants' proposal, which would require the parties to return to court to seek another TRO to bridge the gap between April 30 and May 17, 2024. Defendants' midnight Motion creates the exact distraction and delay that Defendants purportedly wish to avoid and increases the burden on this Court.[2]

For the reasons set forth in this Court's April 16, 2024 Order, Plaintiffs' motion for temporary restraining order and preliminary injunctive relief, arguments made during the hearing

[1] Despite their promises at the April 12, 2024 hearing, and this Court's admonition regarding privacy during the April 4, 2024 status conference, Defendants have not responded to Plaintiffs as to a proposed protective order regarding Plaintiffs' identities.

[2] Defendants provided Plaintiffs with a copy of their Motion at 11:58 PM on Wednesday, April 18, 2024. The Motion itself requests the Court provide a response by 4:00 PM on Friday, April 19, 2024.

on April 12, 2024, Plaintiffs' response to Defendants' Notice of Supplemental Authority, and the reasons stated herein, Plaintiffs respectfully request that this Court deny Defendants' motion.

Respectfully submitted,

/s/ Freda J. Levenson

Freda J. Levenson (45916)
Trial Attorney
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)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Ave., Ste. 203
Columbus, Ohio 43206
(614) 586-1972
dcarey@acluohio.org

Chase Strangio*
Harper Seldin*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500
cstrangio@aclu.org
hseldin@aclu.org

Miranda Hooker*
Kathleen McGuinness*
Jordan Bock*
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
mhooker@goodwinlaw.com
kmcguinness@goodwinlaw.com
jbock@goodwinlaw.com

Allison DeLaurentis*
GOODWIN PROCTER LLP
One Commerce Square
2005 Market Street, 32nd Floor
Philadelphia, PA 19103
(445) 207-7800
adelaurentis@goodwinlaw.com

Lora Krsulich*
GOODWIN PROCTER LLP
601 S Figueroa St., 41st Floor
Los Angeles, CA 90017
(213) 426-2500
lkrsulich@goodwinlaw.com

**PHV motion forthcoming*

Counsel for Plaintiffs Madeline Moe, by and through her parents and next friends, Michael Moe and Michelle Moe; Michael Moe; Michelle Moe; Grace Goe, by and through her parents and next friends, Garrett Goe and Gina Goe; Garrett Goe; and Gina Goe

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2024, 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:

Amanda.Narog@OhioAGO.gov
Erik.Clark@OhioAGO.gov

/s/ Freda J. Levenson
Trial Attorney for Plaintiffs