IN THE SUPREME COURT OF OHIO

State ex rel., Dave Yost, et. al.,	:	
	:	
Relators,	:	Case No. 2024-0551
	:	
vs.	:	
	:	ORIGINAL ACTION IN MANDAMUS
Judge Michael J. Holbrook	:	AND/OR PROHIBITION
	:	
Respondent.	:	

RESPONDENT THE HONORABLE MICHAEL J. HOLBROOK'S RESPONSE TO RELATORS' EMERGENCY MOTION FOR WRIT OF PROHIBITION OR MANDAMUS

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In order to lay hands on the precise issue which this emergency motion involves, it is useful first to canvas various matters which this record does not present. Relators do not challenge the trial court's opinion that House Bill 68 ("H.B. 68") likely violates the Ohio Constitution. Relators do not contest that the trial court had both jurisdiction and authority to grant a temporary restraining order ("TRO"). Relators contest only the scope of the trial court's TRO. The trial court exercised its power to temporarily enjoin Relators from enforcing an unconstitutional law. Whether this Court agrees with the scope of the trial court's TRO is not the issue. Relators' motion is not about whether the trial court *should* have enjoined enforcement of H.B. 68. Rather, the motion is about whether the trial court *can* enjoin enforcement of H.B. 68. Recall that writs of mandamus and prohibition are extraordinary writs requiring a patent and unambiguous lack of authority or jurisdiction. *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 98, 1996-Ohio-340, 671 N.E.2d 236. Accordingly, the question is whether the trial court's temporary enjoinment to prohibit the enforcement of an unconstitutional statute is unauthorized by law. *State ex rel. Elder v. Camplese*, 144 Ohio St. 3d 89, 2015-Ohio-3628, 40 N.E.3d 1138, ¶ 13. As discussed *infra*, the answer is no—the trial court's action was not unauthorized.

Relators are unhappy with the scope of the trial court's TRO, but that does not mean that the trial court acted without authorization. As best that Respondent can tell, neither the U.S. Supreme Court nor the Ohio Supreme Court has ever held that a trial court has no authority to issue a nationwide or statewide injunction enjoining an alleged unconstitutional statute. On the contrary, there are many cases in which state and federal courts have enjoined the enforcement of laws, particularly when the law is likely unconstitutional. To be sure, there are disputes on the discretion to exercise that authority. See e.g. *Labrador v. Poe*, 601 U.S. ---, 2024 WL 1625724 (S.

Ct. April 15, 2024). But disputes over discretion are not proper subjects for writs of mandamus or prohibition.

Although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Furthermore, mandamus and prohibition are not a substitutes for appeal. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 295 N.E.2d 659 (1973); *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Thus, mandamus and prohibition do not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerninghan v. Gaughan*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). Moreover, mandamus or prohibition are extraordinary remedies that are to be exercised with caution and only when the right is clear. They should not issue in doubtful cases, and they should not issue here. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

I. RELEVANT FACTS AND PROCEDURAL HISTORY

A. SEPARATE ACTS COVERING DIFFERENT SUBJECTS BECOME ONE

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

> To enact [multiple sections] of the Revised Code to enact the Saving Ohio Adolescents from Experimentation (SAFE) Act regarding gender transition services for minors, and to enact the Save Women's Sports Act to require schools, state institutions of higher education, and private colleges to designate separate single-sex sports teams and sports for each sex.

2024 Sub.H.B. No. 68. 1.

In relevant part, the Health Care Ban prohibits physicians from providing gender-affirming health care-which it dubs "gender transition services"-to patients under the age of eighteen. That

prohibition specifically forbids physicians from prescribing "a cross-sex hormone or puberty-blocking drug for a minor individual for the purpose of assisting the minor individual with gender transition." *Id* (enacting R.C. 3129.02(A)(2)). It further forbids physicians from knowingly engaging in "conduct that aids or abets in" such treatment. *Id* (enacting R.C. 3129.02(A)(3)).

The Health Care Ban includes penalties and enforcement mechanisms. Relator Yost is authorized to "bring an action to enforce compliance" with the Health Care Ban, and the Relator State Medical Board is instructed that any violation of the Health Care Ban "shall be considered unprofessional conduct and subject to discipline[.]" *Id* (enacting R.C. 3129.02(A)(2)-(3), 3129.05(A)).

When it was first introduced, H.B. 68 consisted solely of the Health Care Ban, with no mention of interscholastic sports. *See generally* H.B. No. 68, As Introduced version, 135th General Assembly (February 27, 2023). A separate bill introduced earlier that month, House Bill 6, contained what would become the "Sports Prohibition"—a series of restrictions on interscholastic girls' and women's sports at the grade school and collegiate levels. *See* H.B. No. 6, As Introduced version, 135th General Assembly (February 15, 2023). Four months later, on June 14, 2023, the contents of H.B. 6 were rolled into H.B. 68 as a second "Act" within that bill. *See Saving Ohio Adolescents from Experimentation Act: hearing on H.B. 68 before the H. Comm. on Public Health Policy,* 2023 Leg., 135th Sess. The combined H.B. 68 thus contains both the Health Care Ban *and* the Sports Prohibition.

The Sports Prohibition has nothing to do with health care, physicians or medication. The Sports Prohibition specifically requires that schools designate sex-segregated sports teams, and mandates that no school or interscholastic conference "shall knowingly permit individuals of the male sex to participate on athletic teams or in athletic competitions designated only for participants

of the female sex." 2024 Sub.H.B. No. 68 (enacting R.C. 3313.5319). Moreover, unlike the Health Care Ban, this portion of the bill is not subject to enforcement by the Attorney General or the State Medical Board. Instead, H.B. 68 creates private rights of action for damages and injunctive relief for "[a]ny participant who is deprived of an athletic opportunity," "[a]ny participant who is subject to retaliation or other adverse action," or "[a]ny school or school district that suffers any direct or indirect harm" as a result of a violation. *Id* (enacting R.C. 3313.5139(E)(l)-(3)).

B. TWO FAMILIES CHALLENGE THE CONSTITUTIONALITY OF H.B. 68 AND SEEK INJUNCTIVE RELIEF

On March 26, 2024, two families sued to challenge the law. See Complaint in Franklin County Common Pleas Case No. 24 CV 002481 (March 26, 2024). Importantly, pursuant to Civ. R. 10(A), the families and their minor children are proceeding under pseudonyms.[1] Plaintiffs allege the H.B. 68 violates both the United States Constitution and the Ohio Constitution. Relevant to these proceedings, Plaintiffs allege that the bill's enactment violates Ohio's "Single-Subject Clause." Ohio Const. art. II, §15(D).

On March 26, 2024, Plaintiffs also filed a "Motion for Preliminary Injunction Preceded By Temporary Restraining Order If Necessary And Memorandum in Support." ("TRO Motion"). On April 9, 2024, the Defendants (Relators in this case) filed their Memorandum Contra. Plaintiffs filed their Reply in Support on April 11, 2024.

C. THE TRIAL COURT GRANTS PLAINTIFFS TRO MOTION

As an initial matter, the trial court held that Plaintiffs had standing to challenge both the healthcare provisions of H.B. 68 and the separate sports provisions of H.B. 68. (Order and Entry Granting Plaintiffs' Motion for Temporary Restraining Order, pp. 10-11). This finding matters

[1] As discussed *infra*, this fact weighs in favor of extending the enjoinment of the statute to non-parties.

because Relators collaterally attack standing regarding the Sports part of H.B. 68 in their Emergency Motion: “Neither family alleges that either child is involved in school or college sports or will be affected in any way by the custody provision.” (Relators’ Mot., p. 8). Standing is not an issue before this Court or an appropriate issue for mandamus or prohibition. The issue of standing does "not attack the court's jurisdiction and can be adequately raised by post-judgment appeal." *State ex rel. Smith v. Smith*, 75 Ohio St.3d 418, 420, 1996 Ohio 215, 662 N.E.2d 366 (1996).

The trial court found that H.B. 68 is likely unconstitutional because it violates Article II, §15(D) of the Ohio Constitution better known as the single-subject clause. Ohio Const. art. II, § 15(D) provides: “No bill shall contain more than one subject, which shall be clearly expressed in its title.” This rule “attacks logrolling by disallowing unnatural combinations of provision in acts, i.e., those dealing with more than one subject[.]” *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 71 (quoting *State ex rel., Dix. v. Celeste*, 11 Ohio St.3d 141, 143, 464 N.E.2d 153 (1984)). By limiting each bill to one subject, the issues presented can be better grasped and more intelligently discussed. *Dix*, supra. Constitutional challenges to statutes under this rule are challenges “to the authority of the General Assembly to enact the bill,” not the underlying provisions of the bill. *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 20.

The trial court found that H.B. 68 clearly covers more than one subject. The title of the bill contains two unrelated subjects: Saving Ohio Adolescents from Experimentation and Saving Women’s Sports. (Order and Entry, p. 12). The substance of the bill covers different subjects including domestic relations, gender transition services, occupational licensing, healthcare, the allocation of domestic rights and school athletics. *Id*. Further, the Court noted that the General

Assembly was unable to pass the SAFE portion of the Act separately, and it was only upon logrolling in the Saving Women's Sports provisions that it was able to pass. *Id*.

In sum, the trial court found that Plaintiffs had a substantial likelihood of success on the merits because of the violation of Ohio's Single Subject Clause. The Court found that there was immediate and irreparable injury because enforcement of the act could terminate access to Plaintiffs' medical providers. The Court also held that non-parties would be harmed without an injunction because enforcement of the Act could prevent them from having access to their preferred Ohio healthcare provider. *Id.* at p. 13. Finally, it is in the public's interest to only be subject to duly enacted laws. *Id*.

Relevant here, the trial court enjoined Defendants (Relators) from enforcing the Act for fourteen days or until the hearing of Plaintiffs' Motion for Preliminary Injunction, whichever is sooner. The trial court has set the case for a consolidated preliminary injunction hearing and trial on the merits on May 16, 2024. Accordingly, the TRO at issue in this emergency motion will currently expire in six days—on April 30, 2024.

II. LAW AND ARGUMENT

A. THE TRIAL COURT HAS AUTHORITY TO DETERMINE THE CONSTITUTIONALITY OF A STATUTE

Since this motion is about authority, we start with the basics: Section 1, Article IV of the Ohio Constitution provides that judicial power resides in the judicial branch. In addition, the judicial branch is endowed with the inherent power of judicial review. *See Derolph v. State*, 78 Ohio St.3d 193, 198, 1997- Ohio-84, 677 N.E.2d 733 (1997), citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803) (holding that "[u]nder the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation

that is constitutional."). So, the trial court in this case has the authority to determine if legislation is constitutional.

B. THE TRIAL COURT HAS AUTHORITY TO ORDER INJUNCTIVE RELIEF

Pursuant to Civ. R. 65(A), the trial court has authority to grant a temporary restraining order. Not so fast, say Relators. Relators point out that Civ. R. 65(A) references loss or damage that "will result to the applicant" not to non-parties. That's true. It is also true that "injunctive relief should be no more burdensome to the defendant than necessary to provide *complete relief* to the plaintiffs." *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) (emphasis added). What Relators misunderstand is that, in this case, "complete relief" requires a statewide injunction.

Under the circumstances of this case, it is not possible to provide complete relief to the Plaintiffs with an injunction limited in scope to the named parties. Plaintiffs' complete relief without a facial injunction would be, at best, very burdensome for Plaintiffs and the courts. At worst, it might be practically unworkable. See e.g. *Koe v. Noggle*, --- F. Supp.3d ---, 2023 U.S. Dist. LEXIS 147770, *80-81 (N.D. Ga. 2023) (Granting statewide injunction to transgender Plaintiffs seeking to prevent Defendants from enforcing state law prohibiting hormone replacement therapy).

"In crafting an injunction, a [ ] court may appropriately consider the 'feasibility of equitable relief' and is empowered 'to weigh the costs and benefits of injunctive relief and, in particular, to assess the practical difficulties of enforcement of an injunction—difficulties that will fall in the first instance on the district court itself.'" *Am. Coll. of Obstetricians and Gynecologists v. U.S. Food and Drug Administration*, 472 F. Supp. 3d 183, 231 (D. Md. 2020) (quoting *Lord & Taylor, LLC v. White Flint, L.P.*, 780 F.3d 211, 217 (4th Cir. 2015)). Here, practical difficulties abound.

The reasoning of *Koe*, supra, is persuasive. First, under a plaintiffs-only injunction, the practical hurdles involved in securing treatment could render the TRO effectively moot. Physicians

and mental health professionals face possible sanctions for non-compliance with H.B. 68's prohibitions. A serious chilling effect on access to care is likely to follow, for what doctor or medical institution will continue to offer such care to minors, with the threat of serious sanctions on the horizon? Given that H.B. 68 subjects medical providers to sanction, "complete relief will only obtain upon an injunction with a broader sweep"—one that "will mitigate the fears" of providers "and in turn alleviate the [Plaintiffs'] consequent harms." *Koe* at pp. 81-82 citing *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Heatlth & Hum. Servs.*, 485 F. Supp. 3d 1, 63 (D.D.C. 2020).

Second, both the child and parent plaintiffs are proceeding pseudonymously, and it would be administratively burdensome, if possible at all, to fashion an injunction that would allow them to secure relief without compromising their anonymity. *Id*. at p. 82. Indeed, the Relators do not even oppose Plaintiffs from proceeding pseudonymously because children have a strong privacy interest. If this Court proceeds as Relators suggest and limits injunctive relief to these particular Plaintiffs, then the identities of the children and their parents would have to be in the court's order. Without known identities, how would a physician know that these minor plaintiffs are not currently subject to H.B. 68?

It is estimated that 8,500 people ages 13-17 identify as transgender in the Ohio. Herman, Jody, L., Flores, Andrew R., O'Neill, Kathryn K., "How Many Adults and Youth Identify as Transgender In the United States?" UCLA School of Law, Williams Institute, June 2022, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf. If a plaintiffs-only injunction issued, follow-on suits by similarly situated non-plaintiffs based on the trial court's order could create needless and repetitious litigation. *Id*. at *83 citing *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409, 330 U.S. App. D.C. 329 (D.C. Cir. 1998).

Lastly, even if this Court disagrees with the reasoning of *Koe*, the case is an example of a trial level court exercising its authority to craft a statewide injunction.

C. WHEN A STATUTE IS UNCONSTITUTIONAL A BROADER INJUNCTION IS WARRANTED

Relators argue that the State's inability to enforce its statutes will cause it irreparable harm. Relators' argument is misguided. The Supreme Court notes that such irreparable harm does not occur to the state if "that statute is unconstitutional…" *Abbot v. Perez*, 138 S. Ct. 2305, 2324 n.17, 201 L. Ed. 2d 714 (2018). In fact, the opposite is true: "When constitutional rights are threatened or impaired, irreparable injury [to the person whose rights are threatened] is presumed." *Obama for Am. V. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). This Court has recognized that a statute can be enjoined if it is unconstitutional. *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 17.

Courts from around the country have issued statewide injunctions against the enforcement of a wide variety of unconstitutional laws. Indeed, where a district court had found a Michigan law unconstitutional and enjoined its enforcement, the Sixth Circuit denied a motion by the defendants for a stay pending appeal. *See U.S. Student Assoc. Found. v. Land*, 546 F.3d 373 (6th Cir. 2008); See e.g. *ABCDE Operating, LLC v. Snyder*, Case No. 11-11426, 2011 U.S. Dist. LEXIS 81487 (E.D. Mich. Jul. 26, 2011) (enjoining the State of Michigan from enforcing a statute regulating signs that advertise sexually oriented business because the statute was unconstitutional); *Yukutake v. Conners*, 554 F. Supp.3d 1074 (D. Haw. 2021) (Permanently enjoining the State of Hawaii from enforcing a gun regulation found unconstitutional); *Animal Legal Def. Fund v. Kelly*, Case No. 18-2657-KHV, 2020 U.S. Dist. LEXIS 58909 (D. Kan. Apr. 3, 2020) (enjoining the governor and attorney general of Kansas from enforcing statutes found to violate the First Amendment. The Court also rejected Kansas' argument to limit the injunction to only the named plaintiffs). The

point is this: courts have the *authority* to enjoin enforcement of state laws that are unconstitutional. Trial courts are given broad authority to determine the appropriate scope of an injunction. *See, United States v. Capitol Serv., Inc.*, 756 F.2d 502, 507 (7th Cir. 1985) ("Geographical limitations regarding the issues at trial do not alter the court's broad remedial powers."); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201-02 (7th Cir. 1971) (affirming the "district court's power to consider extending relief beyond the named plaintiff" "where justice requires such action"). This does not mean that the trial court in this case had to issue a statewide injunction or even that the trial court correctly issued a statewide injunction (Respondent believes it acted correctly) only that the trial court had the authority to issue a statewide injunction. Because the trial court had the authority to issue a statewide injunction, mandamus or prohibition will not lie.

D. RELATORS' RELIANCE ON *LABRADOR V. POE* IS MISPLACED

Relators rely heavily on the Supreme Court's recent opinion in *Labrador v. Poe*, --- S. Ct. ---, 2024 U.S. LEXIS 1814 (Apr. 15, 2024). Relators' reliance is misplaced. First, the actual opinion in *Labrador* says very little. Relators mainly rely on concurring opinions which do not have precedential value. In a concurring opinion, Justice Gorsuch wrote approvingly of the Supreme Court's decision to stay a district court's injunction to the extent it applied to nonparties. *Id*. at *2. Justice Gorsuch continued that "[t[here is always a public interest in prompt execution" of the law, absent a showing of its unconstitutionality. *Id*. at *7. However, nowhere in the concurring opinion did Justice Gorsuch state that a district court absolutely lacks authority to issue a nationwide injunction. In fact, if a statute is unconstitutional, a nationwide injunction might not be unreasonable. In this case, the trial court has ruled that Plaintiffs have shown a likelihood that H.B. 68 is unconstitutional. Respondent acknowledges that there are significant concerns related to the use of nationwide or statewide injunctions at the trial court level, but they are not prohibited. *See City of Chicago v. Sessions*, Case No. 17 C 5720, 2017 U.S. Dist. LEXIS 169518, *14-15

(N.D. Ill. Oct. 13, 2017) (acknowledging concerns of nationwide injunctions but upholding an injunction anyway: "These concerns are not insignificant but fail to overcome the benefits of a nationwide injunction in this specific instance.").

The trial court did not act ultra vires or without legal authority. As argued above, there is a long history of courts enjoining the enforcement of unconstitutional state laws. The Relators disagreement with the scope of the trial court's decision is insufficient to warrant mandamus or prohibition relief. For the foregoing reasons, Relators' emergency motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2024, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. A copy was also sent via electronic mail to:

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