IN THE SUPREME COURT OF OHIO

STATE ex rel., DAVE YOST, *et al.*, **Relators,** ***v.*** **JUDGE MICHAEL HOLBROOK** **Respondent.**	**Case No. 2024-0551** **IN MANDAMUS AND PROHIBITION**

INTERVENOR-RESPONDENTS' MOTION TO DISMISS, OPPOSITION TO GRANT OF AN ALTERNATIVE WRIT, AND OPPOSITION TO EMERGENCY MOTION FOR WRIT OF PROHIBITION OR MANDAMUS

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 Intervenors-Respondents 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

MOTION TO DISMISS

Come now Proposed Intervenors-Respondents Madeline Moe, Michael Moe, Michelle Moe, Grace Goe, Garrett Goe, and Gina Goe, by and through counsel, pursuant to Ohio S.Ct.Prac.R. 4.01, and hereby move this Court for dismissal of Relators' Complaint for Writs of Mandamus and Prohibition. Relators are not entitled to the relief sought, and this Court should further deny the Emergency Motion for Writ of Prohibition or Mandamus. A memorandum in support is attached.

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 Intervenors-Respondents 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

Relators make three extraordinary claims, all of which endanger the system of checks and balances inherent in our form of government and the judicial process, and none of which justify granting a writ.

First, Relators claim that the Ohio judiciary lacks authority to check the Ohio General Assembly when it exceeds its constitutional authority. That is not the allocation of power among the branches of government. Intervenors sued to enjoin enforcement of H.B. 68 in part because it violates the Single-Subject Rule. That is a constitutional limitation on the General Assembly's authority. The Ohio courts have the duty and obligation to say when the General Assembly exceeds its constitutional bounds and the authority to enjoin conduct accordingly. After notice to Relators and an opportunity to be heard, Respondent Judge Michael J. Holbrook ("the trial court") held as a preliminary matter that H.B. 68 violated the Single-Subject Rule and therefore was unconstitutionally enacted. Because an invalid law cannot be constitutionally enforced against anyone, the trial court temporarily enjoined H.B. 68's enforcement. Nothing about that ordinary litigation process warrants extraordinary relief from this Court.

Second, Relators claim that even after an Ohio court enters preliminary relief to enjoin enforcement of an enacted bill that it finds is likely unconstitutional, the executive branch remains free to enforce that likely unconstitutional statute against anyone in Ohio who is not a party to the dispute. That is not the law. Relators nonetheless ask this Court to micromanage the contours of temporary injunctive relief issued by the trial court, which is given broad equitable authority to fashion orders that provide the appropriate relief. Even after repeated motions by Relators, the trial court determined that the scope of relief in its temporary restraining order was appropriate to redress the alleged constitutional violation and the irreparable, immediate harm that would flow

from allowing H.B. 68's enforcement. Writs of prohibition and mandamus do not issue because a party disagrees with the scope of temporary injunctive relief, even when that party is the government.

Third, Relators claim that there is an emergency because they will be unable to enforce the General Assembly's policy preferences, as enacted in the likely invalid H.B. 68. Far from creating an emergency, the challenged temporary injunction order maintains the status quo that has always existed in our state. As the trial court found, there is no injury to Relators in continuing the status quo until further hearing, and it is in the public interest to maintain the status quo. Relators are not entitled to emergency relief from this Court because they cannot wait three weeks for the next proceeding below, currently scheduled for May 16-17, 2024.

Intervenors respectfully request that this Court dismiss Relators' Complaint and deny the Emergency Motion. Far from lacking an adequate remedy at law, Relators have one: an appeal. Moreover, Relators can make their case again to the trial court in a matter of weeks, when the parties return for the currently-scheduled May 16-17, 2024 hearing. There is no right to relief from this Court, or to upend the status quo in the brief interim between the entry of the temporary restraining order and the upcoming hearing.

No writ should issue and Relators' Complaint should be dismissed.

STATEMENT OF FACTS

As set forth below, the General Assembly logrolled two bills that could not pass into a single statute, which Intervenors sued to enjoin. After notice to the parties, briefing from both sides, and oral argument, the trial court entered a temporary restraining order enjoining the enforcement of H.B. 68 to bridge the 3-week gap between April 24, 2024, when the law was set to go into effect, and a hearing, which is scheduled for May 16-17, 2024.

I. The General Assembly Logrolls Two Failed Acts Into One Bill

On December 13, 2023, the Ohio General Assembly passed H.B. 68, which 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. 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 girls' and women's sports in grade school, college, university, and interscholastic conferences. *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.

On December 29, 2023, Governor Mike DeWine vetoed H.B. 68, stating his justification in no uncertain terms:

> Ultimately, I believe this is about protecting human life. 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. […] Parents are making decisions about the most precious thing in their life, their child, and none of us should underestimate the gravity and the difficulty of those decisions.

The Governor's message continued:

> While there are rare times in the law, in other circumstances, where the State overrules the medical decisions made by the parents, I can think of no example where this is done not only against the decision of the parents, but also against the medical judgement of the treating physician and the treating team of medical experts.

On January 24, 2024, ignoring the concerns of affected families and physicians, the General Assembly overrode Governor DeWine's veto.

II. Respondent Temporarily Enjoins H.B. 68 Pending a Further Hearing

On March 26, 2024, Intervenors filed a Complaint and Motion for Preliminary Injunction Preceded by Temporary Restraining Order If Necessary in the Franklin Court of Common Pleas. Intervenors (Plaintiffs below) are two families: Michael and Michelle Moe, along with their twelve-year-old daughter Madeline, who live in Hamilton County, Ohio; and Gina and Garrett Goe, along with their twelve-year-old daughter Grace, who live in Franklin County, Ohio. Both Madeline Moe and Grace Goe are transgender and have gender dysphoria diagnoses. Intervenors sought emergency relief because H.B. 68 closed off access to critical medical care in Ohio for the minor plaintiffs.

Relators (Defendants below) filed their response to the motion for temporary restraining order on April 9, 2024. Intervenors replied on April 11, 2024. On April 12, 2024, the trial court held a hearing on the motion for temporary restraining order. A few days after the hearing, Relators filed a Notice of Supplemental Authority, to which Intervenors-Respondents responded.

On April 16, 2024, the trial court issued an Order and Entry Granting Plaintiffs' Motion for Temporary Restraining Order. *See* Relators' Complaint at Exhibit A ("TRO"). The trial court made specific findings and holdings. As to the merits, the trial court held:

> Having carefully considered the affidavits, arguments of counsel, and the relevant law, the Court finds plaintiffs have sufficiently demonstrated a substantial likelihood of success on

> the merits on at least one of their claims. Even providing the General Assembly with great latitude in enacting comprehensive legislation, the substance of the Act in combination with the legislative history yields this Court's conclusion that there is a substantial likelihood of success on the merits of plaintiffs' single-subject claim. The very title of the Act references two subjects: Saving Ohio Adolescents from Experimentation and Saving Women's Sports. See Long Title. Beyond the title, the Act includes additions to R.C. Chapter 3109 Domestic Relations - Children, the creation of R.C. Chapter 3129 Gender Transition Services for Minors, as well as additions to R.C. Chapter 3313 Board of Education and R.C. Chapter 3345 State Universities - General Powers. The substance of these additions address occupational licensing and regulation related to health care, the allocation of parental rights, and athletics. Finally, it is not lost upon this Court 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 it was able to pass.

See TRO at 11-12.

As to Intervenors' showing of irreparable harm, the trial court found:

> "[T]here is little doubt as to the irreparable nature of the actual physical injury to plaintiffs upon enforcement of the Act. There is certainly a point where the changes to the body as a result of the progression of puberty cannot be reversed...As argued by plaintiffs, 'puberty does not arrive by appointment.'...This reality combined with the termination of access to their Ohio providers for gender transition services effective April 24, 2024, renders the harm to plaintiffs immediate."

See TRO at 12-13.

As to the public interest, the trial court found:

> As stated by Governor DeWine as his justification for his veto of the Act,"[p]arents 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." Complaint at ¶4. The harm to third parties facing these difficult decisions is best served with a temporary injunction enjoining the enforcement of the Act such that they may continue to have access to their preferred Ohio healthcare provider. And, while the Court acknowledges the public's interest in the enforcement of duly enacted laws, having previously found that there is a substantial likelihood of success on the merits with respect to at least one of plaintiffs' constitutional challenges to the Act, such interest is likewise advanced with a temporary order maintaining the status quo while the Court can more thoroughly review the evidence and argument following a full hearing.

See TRO at 13-14.

On April 17, 2024, Relators filed a Motion to Clarify Temporary Restraining Order, requesting materially the same relief they now seek in this Court: an order limiting the injunction

to the Intervenors. On April 18, 2024, Intervenors filed a memorandum in opposition. On April 19, 2024, the trial court issued a Journal Entry, denying Relators' Motion to Clarify. *See* Relators' Complaint at Exhibit B. On April 22, 2024, the trial court entered an Order Amending Case Schedule, setting a consolidated preliminary injunction hearing and trial on the merits for May 16-17, 2024.

ARGUMENT

Relators' Complaint must be dismissed and their Emergency Motion denied because Relators cannot, with respect to a writ of mandamus, "establish by clear and convincing evidence (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of respondents to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Evans v. Tieman*, 157 Ohio St. 3d 99, 101, 2019-Ohio-2411, 131 N.E.3d 930. Nor can they establish with respect to a writ of prohibition that "(1) The court or officer against whom it is sought must be about to exercise judicial or quasi judicial power[;] (2) The exercise of such power must be unauthorized by law[; and (3)] that the refusal of the writ would result in injury for which there is no other adequate remedy." *State ex rel. Caley v. Tax Comm'n of Ohio*, 129 Ohio St. 83, 87, 193 N.E. 751 (1934).

I. Relators' extraordinary request undermines the balance of power among the coequal branches of government

Relators admit that they are before this Court in this posture because the trial court's order is not immediately appealable. *See* Relators' Brief at 13. That is a reason to deny, not grant, the extraordinary relief sought. This Court should not countenance Relators' attempt to subvert the judicial process because they are dissatisfied with the outcome of the proceedings below. Allowing Relators to fashion an alternative avenue of appeal for the executive branch whenever a court

enjoins an unconstitutionally enacted law subverts the democratic order by displacing the judiciary itself as a check on legislative authority.

Relators cite no law for their proposition that a trial court cannot enjoin a state law that was unconstitutionally enacted, *see* Relators' Brief at 10, because there is none. In fact, the opposite is true: "The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers." *State ex rel. Ohio Acad. of Trial Laws. v. Sheward*, 86 Ohio St. 3d 451, 462, 1999-Ohio-123, 715 N.E.2d 1062. Courts cannot abdicate their duty to declare laws unconstitutionally enacted just because the General Assembly's preferred policy outcomes, *see, e.g.*, Relators' Brief at 11-12, cannot be executed in the meantime. An illegitimately enacted statute is no law at all. *See 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."); *City of Toledo v. State*, 2018-Ohio-4534, 123 N.E.3d 343, ¶ 34 (affirming trial court judgment and injunction against law violating the single-subject rule). It is for the judiciary to make that determination and within its authority to fashion relief accordingly.

Relators also cite no law for their proposition that the time involved in the ordinary course of an appeal warrants emergency relief from this Court, *see* Relators' Brief at 13, because there is none. Far from "'vindicat[ing]' the democratic process," Relators' Brief at 12, the Relators' requested relief undermines one of the essential checks on government overreach: the courts. This Court "jealously guard[s] the judicial power against encroachment from the other two branches of government . . ." *Sheward* at 467. That encroachment includes this attempt by Relators to leapfrog over the existing process of orderly appeals that they and all parties before the courts are bound to

respect. Indeed, some states do specifically permit immediate appeals to the state supreme court where a statute is held to be unconstitutional. *See, e.g.*, Tex. Gov. Code 22.001(c) ("[a]n appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state."). But Ohio is not among them. Ohio law is clear that appellate jurisdiction is limited to the review of "judgments or final orders" of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). This Court should reject Relators' attempt to fashion such a bespoke procedure when there is no constitutional or statutory authority for it.

Relators' two cited cases, *see* Relators' Brief at 14, do not save their arguments. In both cases, the trial court lacked jurisdiction to enter the challenged injunctions because state agencies had exclusive jurisdiction over a particular subject matter. In S*tate ex rel. Dir., Ohio Dep't of Agric. v. Forchione*, 148 Ohio St. 3d 105, 2016-Ohio-3049, 69 N.E.3d 636, ¶ 22, this Court explained that it had "found a patent and unambiguous lack of jurisdiction" when "courts attempted to bypass special statutory proceedings by agencies that have exclusive jurisdiction over a particular subject matter," and thus lacked jurisdiction to order the return of dangerous wild animals where the director of the relevant agency had exclusive authority to order the removal and quarantine of such animals. Similarly, in *State ex rel. Taft-O'Connor '98 v. Franklin Cty. Ct. of Common Pleas*, 83 Ohio St. 3d 487, 488-89, 1998-Ohio-500, 700 N.E.2d 1232, the trial court had no jurisdiction to enjoin the airing of a campaign ad because of the exclusive jurisdiction of the Ohio Elections Commission, and the plaintiff in the underlying action below bypassed a mandatory statutory procedure for filing complaints with that commission. There is no such agency here: the trial court

temporarily enjoined an unconstitutionally enacted statute, which was well within its jurisdiction and authority.[1]

II. Relators do not satisfy the high standard for a writ of prohibition or mandamus because they have an adequate remedy at law

Relators are not entitled to a writ from this Court because they have an adequate remedy at law: an appeal. "Mandamus is not available where appellant has a plain and adequate remedy in the ordinary course of the law by way of appeal." *Lippert v. Engle*, 52 Ohio St. 2d 67, 67, 369 N.E.2d 1044 (1977). Moreover, there is nothing ultra vires about a trial court temporarily enjoining a statute based on a preliminary assessment that it was unconstitutionally enacted. That is the very role of the courts. *See Sheward*, 86 Ohio St. 3d 451, 462, 1999-Ohio-123, 715 N.E.2d 1062.

First, "[m]andamus is no substitute for appeal, and is unavailable where there is a plain and adequate remedy in the course of law." *State ex. rel. Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-03-1159, 2004-Ohio-1968, ¶ 8 (internal citations omitted). Even when an aggrieved party believes that the existing legal process for their appeal "would have encompassed a great deal of delay, inconvenience, and futility," *State ex rel. Bryco Co. v. City Of Milford*, 12th Dist. Clermont

[1] Relators recognize the legitimacy of trial courts' injunctions against unconstitutional enactments when such orders align with their policy objectives. *See, e.g.*, Press Release, "AG Yost's Statement Regarding Stay of Unconstitutional Columbus Gun Ordinances," April 25, 2023, *available at* https://www.ohioattorneygeneral.gov/Media/News-Releases/April-2023/AG-Yost%E2%80%99s-Statement-Regarding-Stay-of-Unconstituti ("The injunction rightfully puts the city's heavy-handed ordinances on hold while the merits of this case continue to be argued. The judge's determination that the ordinances violate state law and likely violate the Ohio Constitution is a welcome decision for all who want to prevent government overreach and protect their constitutional rights."). Relators had no quarrel there with a facial injunction prohibiting enforcement of a city ordinance against everyone, even though the case was brought by six individual plaintiffs. *See* Judgment Entry Granting Motions for Preliminary Injunction, *John Doe 1 v. City of Columbus*, Delaware C.P. No. 23 CV H 02 0089 (Apr. 25, 2023), *available at* https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Buckeye-Inst-v-City-of-Columbus_Order.aspx.

No. CA2000-09-069, 2001 WL 705738, at *7 (June 25, 2001) (Powell, J., concurring separately), it does not create an entitlement to a writ. This Court "has repeatedly held that [a writ of] prohibition is not concerned with the exercise of discretion by an inferior tribunal having jurisdiction of the subject matter and the parties in a cause before it. That issue is for the determination of a reviewing court, even if errors or defects exist in the proceedings." *State ex rel. Berger v. McMonagle*, 6 Ohio St. 3d 28, 30, 451 N.E.2d 225 (1983) (internal quotations and alterations omitted). The scope of temporary injunctive relief issued by the trial court to bridge the gap between the law's effective date and an upcoming hearing is precisely the kind of question that is inappropriate for mandamus. *See State ex rel. Racine v. Dull*, 44 Ohio St. 2d 72, 73, 337 N.E.2d 776 (1975) ("Where an action is pending and undetermined in a lower court of competent jurisdiction, and where there is otherwise an adequate remedy by way of appeal, this court has no authority to determine what judgment should be rendered by the lower court."). Preliminary injunctions themselves cannot be appealed, but "review may be had in the event it becomes permanent." *State ex rel. Tilford v. Crush*, 39 Ohio St. 3d 174, 177, 529 N.E.2d 1245 (1988). But writs "may not be employed as a substitute for error or for the ordinary available remedies." *State ex rel. Caley v. Tax Comm'n of Ohio*, 129 Ohio St. 83, 88, 193 N.E. 751 (1934).

Second, there is nothing ultra vires about the trial court's TRO enjoining the enforcement of H.B. 68. None of Relators' cited cases stand for the proposition that a trial court acts ultra vires when it enjoins the enforcement of a statute. And none of the holdings in Relators' cited cases have any bearing on the contours of this dispute. For example, there is no lack of subject-matter jurisdiction. *Contra* Relators' Brief at 14-15. There is no want of personal jurisdiction. *Contra* Relators' Brief at 15-16. Relators do not point to any statutory authority that the trial court has allegedly exceeded. *Contra* Relators' Brief at 16-17. There is no law to support Relators' position

and no limiting principle to the legal theory they propose. Under Relators' view of the law, any time a trial court entered temporary or preliminary relief that was broader in scope than a party wanted, that party could immediately appeal to this Court for emergency relief. That is not and cannot be the law in Ohio. The most generous reading of Relators' brief is that the trial court lacks authority to enter the relief because, on the merits, that decision was wrongly decided. But this Court has already rejected such arguments. *See Sheward*, 86 Ohio St. 3d 451, 474, 1999-Ohio-123, 715 N.E.2d 1062 ("We are well aware, as respondents point out, that the unconstitutionality of a statute does not deprive a court of the initial jurisdiction to proceed to its terms; and, therefore, a writ of prohibition will not lie to prevent a court of common pleas from determining its own jurisdiction or rendering an anticipated erroneous judgment.").

The Relators' remedy at law is adequate: an appeal. No writ should issue.

III. The trial court did not exceed its power or jurisdiction on the TRO

Relators conflate the question of standing to bring suit with the appropriate scope of relief. Under Relators' view of the democratic order, no judge in Ohio has the authority to issue relief when the General Assembly exceeds the bounds of its constitutional authority. Far from protecting the constitutional allocations of power, *contra* Relators' Brief at 18, Relators seek to eliminate the judiciary's role. That is antithetical to our system of checks and balances.

First, the trial court plainly had authority to issue a temporary restraining order. "[T]he common pleas courts have basic statutory jurisdiction over actions for injunction and declaratory judgment." *State ex rel. CNG Fin. Corp. v. Nadel*, 111 Ohio St. 3d 149, 2006-Ohio-5344, 855 N.E.2d 473, ¶ 15; *see also* R.C. 2727.02 ("A temporary order may be granted restraining an act when it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part of it, consists in restraining the commission or continuance of such act, the commission

or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff..."); R.C. 2727.03 ("At the beginning of an action, or any time before judgment, an injunction may be granted by...the court of common pleas or a judge thereof in his county...in causes pending therein...when it appears to the court or judge...that the plaintiff is entitled to an injunction."). But Relators do not confine their arguments to preliminary relief: they claim that the trial court lacks authority to enjoin an unconstitutional enactment *even* "for final judgment." Relators' Brief at 21. That is not the law. Under such a view, no trial court anywhere in Ohio could protect the people of Ohio from the General Assembly's unconstitutional enactments. That is a fundamental reapportionment of power among the branches of government that this Court must reject. It is also contrary to this Court's prior holdings on the kind of relief available for the particular violation the trial court found below: the Single-Subject Rule. Trial courts do not exceed Rule 65 or their equitable power when they enjoin enforcement of a statute that is likely invalid under the Single-Subject Rule. *See, e.g.*, *City of Toledo v. State*, 2018-Ohio-4534, 123 N.E.3d 343, ¶ 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). The trial court's TRO comports with this Court's direction that where "there is a strong suggestion that the provisions [of a challenged act] were combined for tactical reasons, *i.e.*, logrolling," which "was the very evil the one-subject rule was designed to prevent, an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purpose of the rule." *Id* at 497.

Second, Relators conflate issues of standing with the scope of relief and the incidental effects of entering such relief. As the trial court explained, "standing is a self-imposed judicial rule of restraint, and courts 'are free to dispense with the requirement for injury where the public

interest so demands.'" TRO at 10 (citing *Sheward* at 470). Nonetheless, the trial court held that Intervenors "have a direct interest in the challenged litigation that is adverse to the legal interests of defendants and gives rise to an actual controversy for the court to decide." TRO at 11. Moreover, "to deny plaintiffs standing would insulate legislation from single-subject constitutional scrutiny without class certification or unless a coalition of plaintiffs could be assembled to cover the wide variety of subjects amassed in a single piece of legislation. Accordingly, the Court finds plaintiffs have standing to challenge the constitutionality of the Act in its entirety." TRO at 11. The trial court's explanation of the nature of Intervenors' single-subject challenge distinguishes the underlying case from the federal constitutional challenges raised in *Labrador v. Poe*. *See* Relators' Brief at 19. Whereas the underlying claims in *Poe* challenged the constitutionality of Idaho's law under the federal constitution, the Intervenors here claimed (and the trial court held below) that H.B. 68's enactment offended the Ohio Constitution and injured every citizen of Ohio. The trial court had "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 Sheward*, 86 Ohio St.3d 451, 500, 1999-Ohio-123, 715 N.E.2d 1062; *City of Toledo*, 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."). Nothing about the stay order in *Labrador v. Poe* limited the trial 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). The federalism concerns animating the *Poe* stay order and

its commentary on universal injunctions issued by federal judges are not 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). Indeed, this Court has already rejected attempts to cabin its authority with respect to standing in ways that mirror the federal courts' restraints. *See Sheward*, 86 Ohio St. 3d 451, 470, 1999-Ohio-123, 715 N.E.2d 1062 ("However, the federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands.").

Intervenors carried their burden to demonstrate entitlement to a temporary restraining order to maintain the status quo until a preliminary injunction hearing. The trial court did not err in holding that Intervenors were likely to succeed on the merits, would suffer immediate and irreparable harm absent relief, and that the public interest was served, not harmed, by preventing the enforcement of H.B. 68. As the trial court held, Intervenors and third parties are benefitted, not harmed, by continued access to their health care providers and maintaining the status quo, especially given the likely Single-Subject Rule violation posed by H.B. 68. *See* TRO at 12-14. Relators' proposed relief would inflict on Intervenors and the people of Ohio the very harms that the trial court already, well within its authority and discretion, entered temporary relief to prevent. As Intervenors demonstrated below, the statewide injunction reflected in the TRO is the appropriate scope of relief to prevent immediate and irreparable constitutional and medical harms to Intervenors themselves.

CONCLUSION

There is no legal or factual basis to grant Relators' Emergency Motion, which asks this Court to interfere in the brief interim between a temporary restraining order and an already-scheduled preliminary injunction hearing. Intervenors respectfully request that this Court dismiss the Complaint. No writ should issue.

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 Intervenors-Respondents 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 the foregoing document was served this 24th day of April, 2024 by email upon the following:

Elliot.Gaiser@OhioAttorneyGeneral.gov
Erik.Clark@OhioAttorneyGeneral.gov
Stephen.Carney@OhioAttorneyGeneral.gov
Amanda.Narog@OhioAttorneyGeneral.gov

Counsel for Relators

Darcy_Shafer@fccourts.org
GTyack@franklincountyohio.gov

Counsel for Respondents

/s/ Freda J. Levenson

Counsel of Record for Intervenor-Respondents