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

MADELINE MOE, et al., *Plaintiff-Appellant*, v. DAVE YOST, et al., *Defendants-Appellees*.	:	Case No. 24AP-483 REGULAR CALENDAR On appeal from the Court of Common Pleas Franklin County Case No. 24-CV-002481

REPLY IN SUPPORT OF MOTION FOR STAY OF JUDGMENT PENDING APPEAL

FREDA J. LEVENSON (0045916)
AMY GILBERT (100887)
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
flevenson@acluohio.org
agilbert@acluohio.org

DAVID J. CAREY (0088787)
CARLEN ZHANG-D'SOUZA (93079)
ACLU of Ohio Foundation, Inc.
1108 City Park Ave., Ste. 203
Columbus, Ohio 43206
dcarey@acluohio.org
czhangdsouza@acluohio.org

DAVE YOST (0056290)
Ohio Attorney General

T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
ERIK CLARK (0078732)
Deputy Attorney General
STEPHEN P. CARNEY (063460)
Deputy Solicitor General
AMANDA NAROG (0093954)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980; 614.466.5087 fax
thomas.gaiser@ohioago.gov

Counsel for Appellees
Dave Yost, et al.

CHASE STRANGIO
HARPER SELDIN
LESLIE COOPER
ACLU Foundation
125 Broad Street, Floor 18
New York, NY 10004
cstrangio@aclu.org
hseldin@aclu.org
lcooper@aclu.org

MIRANDA HOOKER
JORDAN BOCK
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
mhooker@goodwinlaw.com
jbock@goodwinlaw.com

Counsel for Appellants
Madeline Moe, et al.

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REPLY

Plaintiffs oppose the State's request for a stay, but their arguments fail. First, the Supreme Court of Ohio has already explained that the trial court cannot take any action in a case that is properly appealed, whether to a district court of appeals or to the Supreme Court of Ohio. Second, even if Plaintiffs are correct that the trial court could act to enjoin the State from enforcing Ohio's law to protect minors—even after the State appeals to the Supreme Court—that is yet another reason to grant a stay pending appeal. The purpose of such a stay is to balance the practical consequences of the Court's judgment taking effect against the probability that judgment will survive further review. That balance tips in favor of a stay here.

I. A notice of appeal divests trial courts of jurisdiction except to take action in aid of appeal.

As the State explained, the Supreme Court of Ohio held in 2013 that a "trial court" has "no jurisdiction" to do anything "except to take action in aid of the appeal" once "the state filed its notice of appeal to *this court*,"

meaning, the Supreme Court. *State v. Washington*, 2013-Ohio-4982, ¶8 (emphasis added) (quotation omitted). This holding was well-grounded in the cases the Supreme Court cited as authority for that proposition, even though those cases mostly related to notices of appeal in intermediate courts of appeals. *See id.* (citing *In re S.J.*, 2005-Ohio-3215, ¶9; *State ex rel. Special Prosecutors v. Judges, Ct. of Common Pleas*, 55 Ohio St. 2d 94, 97 (1978)). The *Washington* decision thus clarified the Ohio rule that a notice of appeal in the Supreme Court has the same effect as a notice of appeal in the courts of appeals. At least since 2013, then, it has been clear that notices of appeal in the Ohio Supreme Court likewise prevent the trial court from acting, except in aid of the appeal. *See, e.g.*, *Midgett v. Sheldon*, 2021-Ohio-3096, ¶16 (5th Dist.) ("we lost jurisdiction to enforce our judgment when the state filed its Notice of Appeal"); *State v. Thomas*, 2016-Ohio-8326, ¶13 (8th Dist.).

To the extent the one case that Plaintiffs rely on suggests otherwise, *DeLost v. Ohio Edison Co.*, 2012-Ohio-4561 (7th Dist.), it came before *Washington* provided clarity. *DeLost* also cited no authority for its

statement that "[e]ven the 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." *Id.* at ¶28. In any event, the Seventh District's statement that arguably conflicts with *Washington* was dictum. There, the prevailing party acted on the court of appeals' judgment to cut down some disputed trees. *Id.* That action was lawful, the court of appeals held, because the land owners "had not filed a direct appeal or notice of certified conflict with the Ohio Supreme Court" nor "attempted to obtain an immediate stay from this Court under App .R. 27," at the time the prevailing party cut down the trees—which was more than the usual ten days available to seek reconsideration after the court of appeals' judgment. *Id.* at ¶26; *see* App. R. 26(A). The Seventh District, in other words, went out of its way to explain that there was no notice of appeal or stay motion on file with the Supreme Court of Ohio, so no stay could have been in effect. That is only relevant to the extent the notice of appeal to Ohio's highest court is legally significant.

Finally, if any legal uncertainty remains about the effect of the State's forthcoming notice of appeal from this Court's judgment, that is all the more reason to enter a stay now, to ensure orderly consideration in the Supreme Court of Ohio.

II. A stay is warranted.

While the State has already explained why it believes a stay is warranted, it offers three responses to Plaintiffs' opposition.

First, a stay remains warranted to preserve stability and certainty. This Court must decide whether a probable game of judicial redlight-greenlight would be better for the public, the rule of law, and regulated parties than leaving the law in place until the Supreme Court of Ohio has a chance to consider the case. And after all, even if the Supreme Court agrees to review the case, Plaintiffs can urge that Court to change the status quo *while* that review proceeds, if it can persuade that Court that is the better course. While the State will of course oppose any such motion, it urges that the Supreme Court should decide from a place of continuity.

Plaintiffs, for their part, do not dispute that Ohio's hospitals and doctors have been complying with the law since August 6, 2024. *See* Stay Mot. at 8. Nor do they address that this Court allowed enforcement of the law to begin last year. While this Court's judgment will not force hospitals to accept new children as patients, a stay from the Ohio Supreme Court or ultimate reversal will require them to stop. A stay pending appeal would prevent the whiplash from an abrupt start and stop.

Moreover, and most important, from the perspective of Ohio law, allowing children to receive chemical injections with possibly irreversible effects—interventions that may render children patients for life—are the very type of harms that cannot later be undone. Scheduling appointments to administer puberty blockers or cross-sex hormones to new children in a window of uncertain duration that might later close only serves to sow confusion.

Finally, the relevant status quo for purposes of the stay is no longer the world before the General Assembly adopted the challenged law, but the seven-and-a-half months that the law has been in effect. A permanent

injunction now, more than a year after the General Assembly passed the law, would "contravene[] the status quo" rather than preserve it. *Columbus v. State*, 2023-Ohio-2858, ¶53 (10th Dist.).

Second, the State would be irreparably harmed without a stay. The State always "suffers a form of irreparable injury" when it is enjoined from giving effect to its law. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotations omitted); *accord Abbott v. Perez*, 585 U.S. 579, 602–03 (2018). Plaintiffs' only answer to this argument turns on their view of the merits—their argument that Ohio's law is unconstitutional and that there is thus no legitimate interest in enforcing it. That response reduces the irreparable harm inquiry to a truncated merits analysis. Rather, this Court should also consider irreparable harms independent of the merits. From that perspective, Plaintiffs' arguments at most support an injunction for the named Plaintiffs, allowing for the State's alternative request that this Court stay the effect of its judgment except as to them. That would minimize the scope of irreparable harms

to Ohio and to the sovereign lawmaking power of those who represent its 11 million citizens.

Third, the State has a strong likelihood of success on both of the bases for this Court's ruling. For purposes of the stay, this Court's analysis should be predictive and probabilistic—hence the question of "likelihood." Here, a prediction of reversal would be well-grounded on three dimensions.

Number one: on the prospect that the Supreme Court of Ohio will grant review, the State argued that there is a strong chance that at least four justices will look at a challenge to the constitutionality of a law that was adopted by two-thirds of the General Assembly twice as raising issues of public or great general interest. *See* Stay Mot. at 10. Tellingly, Plaintiffs do not appear to dispute that likelihood. Stay Opp. at 11 n.1.

Number two: on the Health Care Freedom Amendment, all this Court needs to observe is that its decision broke new ground. That 14-year-old amendment has never been applied to curtail the authority of the General Assembly by any court before last week. Because this ruling is the first of

its kind, and the State has strong arguments that the Amendment does not strip the State of authority to define the provision of certain health care interventions to minors as "wrongdoing," Ohio Const. Article I, Section 21(D), there is a "a fair prospect" that the Court will reverse. *Conkright v. Frommert*, 556 U. S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quotation omitted).

Number three: on the Due Course of Law Clause, everyone agrees this Court's decision splits from the preliminary injunction ruling interpreting the federal due-process analogue by the U.S. Court of Appeals for the Sixth Circuit in *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir.). The U.S. Supreme Court did not even grant review of the substantive due process question in the parallel petition for certiorari arising from that case. *See id.*, *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023), and *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024); *see also Skrmetti*, No. 23-477, Oral Argument Tr. 64:10-13 (U.S. Dec. 4, 2024) ("we are not making a substantive due process parental rights claim here, and this Court obviously

didn't grant review of that issue"). Plaintiffs thus cannot and do not dispute that intelligent jurists have seen this issue differently, so there is also a "fair prospect" of reversal here, too. *Conkright*, 556 U. S. at 1402.

Finally, and alternatively, the Court should at least stay the part of its judgment that provides relief to non-parties. Plaintiffs are correct that the Court's decision creates a precedent in the Tenth District that the law is facially unconstitutional. It does not follow, however, that as a remedial matter the Court has equitable power to provide relief to non-parties. *State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶7 (DeWine, J., concurring).

CONCLUSION

The Court should stay its judgment pending appeal or, in the alternative, stay it partly to limit any immediate relief to the named Plaintiffs.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ T. Elliot Gaiser
T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
ERIK CLARK (0078732)
Deputy Attorney General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
AMANDA NAROG (0093954)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
6143466.5087 fax
thomas.gaiser@ohioago.gov

Counsel for Appellees
Dave Yost, et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 2025, this reply was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

I further certify that a copy of the foregoing was served by email upon the following:

flevenson@acluohio.org
agilbert@acluohio.org
dcarey@acluohio.org
czhangdsouza@acluohio.org
cstrangio@aclu.org
hseldin@aclu.org
lcooper@aclu.org
mhooker@goodwinlaw.com
jbock@goodwinlaw.com

/s/ T. Elliot Gaiser
T. ELLIOT GAISER