Opponent Testimony Regarding House Bill 68, the "SAFE Act"
Ohio Senate Government Oversight Committee
December 6, 2023
Robert S. Chaloupka

Chair Roegner, Vice Chair Antani, Ranking Member Hicks-Hudson, and members of the committee,

Thank you for the opportunity to testify in opposition to House Bill 68, the so-called "SAFE Act." I come before you as a parent and as an attorney. As a parent, I have strong feelings about this bill and what it would mean for Ohio's children, particularly those suffering from gender dysphoria. Not completely separate from that, as a licensed attorney, I function as an officer of the Supreme Court of Ohio. As such, I have an obligation to do what I can to ensure that the General Assembly, and specifically the Ohio Senate, has a clear picture of the issues before it. The first portion of this testimony will be my personal statement as a parent and a citizen of Ohio. The second portion will provide the legal perspective. I thank you in advance for your indulgence.

Part I

The sponsor and supporters of this bill argue that it would "save" Ohio's children from "experimentation" by means of gender-affirming care. Of course, they don't call it that—they will instead talk about "chemical castration," "sterilization," and "mutilation." They will call it deviant; they will call it disordered; and some have even spoken of it as the work of demons. What they won't tell you is that this care literally saves lives.

I don't know if any of you are parents, grandparents, aunts, uncles, or otherwise have children in your immediate family. But, speaking as a parent, any time I see my daughter suffer, I feel it a million times worse than she does. I think that's probably true of almost all parents—at heart, we want what's best for our kids. We celebrate their accomplishments, and we agonize over their struggles. We're usually our children's strongest advocates, and—even when they disagree—we're always looking out for what's best for them. When you see your child suffering from some illness—be it mental, physical, or both—you want them to get the best care possible. You would move heaven and earth to see their condition improved, if not cured. That's one reason why people come from all over the world to the Cleveland Clinic, to Nationwide, to Cincinnati Children's, and so many of the great health care facilities we have in this state—to get the best care available, based on the best research, and from the best practitioners in their fields. By and large, we trust those professionals—we trust them with our lives, and the lives of our kids. However, there are times where a doctor recommends a life-saving treatment, but the parents don't agree. Sometimes, the parents have done their own research, but in other instances it's an ethical conflict. While the law and ethics are complicated, parents are generally free to make these determinations for themselves, provided they are considering the best interests of the child.

As has been argued repeatedly when it comes to education, we typically care about parents' rights to raise their children as they see fit. If they agree with their children's choices, they can support them; if they disagree, they can choose not to support them, and in many cases prohibit them from acting on those choices. This bill would change all of that, but not for everyone. The first section of the bill explicitly

prohibits a court from considering a parent's refusal to consent to gender-affirming care when determining parental rights and responsibilities. The bill would also overrule a law that has been in place for nearly 35 years that protects the right of patients over the age of 14 to seek mental health treatment without parental consent, but ONLY for transgender kids. So, in a case where one or both parents were not supportive of their child's gender identity, even to the point of creating an abusing environment where the child was not able to thrive, that child could not be removed from the home situation and could not seek counseling without the parent's consent.

Meanwhile, parents who choose to support and affirm their children have no rights. While the sponsor and proponents of this bill would surely point out that there are no punitive measures laid out for parents who choose to affirm their children's gender identity, that's not the point. By effectively banning the type of health care that has been proven effective for so many children and adolescents, the state would be taking that choice out of the parents' hands. But, why? Why would the state of Ohio enact laws to so strongly emphasize and protect parental rights in the education context, but strip those same parents of their fundamental rights to make decisions about their children's medical care?

The sponsor and proponents of this bill have (correctly) said that we've always had limits on what parents can consent to on behalf of their children. In his voluminous written testimony, after comparing lifesaving, gender-affirming care to genital mutilation, the sponsor argues that "while parents' right should be highly valued, they are not without limits when children's safety is at risk." He cites the fact that parents may not deny a life-saving blood transfusion based on religious reasons and then suggests that gender-affirming care as a whole – from puberty blockers to hormone treatments to actual surgery – is even riskier and more dangerous than those procedures. And so, in this instance, the state will assert its authority and insert itself into the relationship between doctors and their patients (and their families).

Just as parents typically look to the major, mainstream medical institutions for guidance, so too does the state when banning medical procedures on safety grounds. To use the sponsor's preferred example of female genital mutilation, the American Medical Association and almost every other mainstream medical group came out strongly against that practice, providing significant support for bans on both the state and federal levels. But, in this case, just about every major medical association SUPPORTS the type of individualized, evidence-based affirming care that would be prohibited by this bill. Certainly, there are some fringe organizations out there that disagree, and the proponents of this bill rely heavily on those organizations' findings, but the consensus of the top medical associations in the world—on whose advice many, if not all of the co-sponsors of this bill rely every single day—is that gender-affirming care is a valid, proper choice for individuals struggling with gender dysphoria, including minors. [PLEASE note that I did NOT say that this is the UNANIMOUS opinion of experts in the field. It's clear that, as always, some medical professionals disagree. Yet, a small number of objectors does not invalidate the decision of the majority of the group's membership. The Ohio Legislature should be more than aware of this basic principle.]

Supporters of HB 68 seek to get around this inconvenient truth by attempting to degrade the credibility of mainstream medicine. As the narrative goes, if the American Medical Association, American Academy of Pediatrics, American Psychiatric Association, and the American Academy of Child & Adolescent Psychiatry all support a gender-affirming care model, they must have been co-opted by "gender ideology activists" who have muted all opposing voices. In his testimony, the sponsor goes further and suggests that "the

medical industry has failed children experiencing gender dysphoria" due to "ideology, financial interest, and intimidation." Leaving aside that it's unclear how "intimidation" can be a cause for an action, rather than an action in and of itself, this approach makes clear that the sponsor of this bill not only disagrees with all mainstream medical organizations, but feels it necessary to make health care professionals out to be nothing more than profit-driven members of a "gender cult" who have thrown aside their commitment to "do no harm" in service of their mission to mutilate and sterilize children. Personally, I find that claim specious at best, but in the end, the determination is left to this committee.

We have addressed what the supporters of this legislation are doing, but the question remains, why? I'm not here to question the personal motivations of any of the individual supporters of this bill. I don't know what's in their hearts and minds any more than they know what's in mine. However, looking at this bill logically and objectively, it seems to come down to the idea that transgender people, particularly transgender youth, are not, in fact, real. I don't mean that in the sense that they, as people, do not exist, but rather in the sense that "you can't change your sex," or that "a boy cannot become a girl." You have heard from trans people, including children, who have described the anguish they suffered due to their gender dysphoria. You have heard, and will hear more, about the suicide rates among teenagers with gender dysphoria, kids who didn't feel like there was a place for them to live as their authentic selves in this world. And, while no one can deny that what these kids are feeling is real, and that their conditions are authentic, the real question is, what to do about it?

According to the sponsor and supporters of this bill, the answer is **never** to affirm that child's gender identity. Why? Because their transgender identity cannot possibly be valid. It must be a mental illness, one that can be cured by forcing the child to accept the sex that they were assigned at birth. Certainly, the appropriate course cannot possibly be to evaluate each child's situation individually based on a number of clinical factors, make an appropriate diagnosis, and talk with the patient and their family about treatment options. While that is the same approach we take to nearly every other medical and/or mental health condition, that can't be the right answer here. And, why not? Because a boy can't become a girl, and vice versa, right? Who's focused on ideology now?

The proponents of this bill have argued that there's nothing here to prohibit therapy that does not involve medical or surgical treatment. But that's not entirely true, as it would create new section 3129.03, which would require a patient presenting for gender dysphoria to be screened for "other comorbidities that may be influencing the minor individual's gender-related condition, including depression, anxiety, attention deficit hyperactivity disorder, autism spectrum disorder, and other mental health conditions." The clear implication here is that gender dysphoria, or even potentially any transgender identity, cannot be a legitimate condition in and of itself – instead, it must be a side effect of some other mental illness. Given the increased prevalence of all of these conditions in recent decades, this bill would seem to render invalid just about ANY diagnosis of gender dysphoria. Effectively, this is the state of Ohio saying that neurodiverse individuals cannot be authentically transgender, flying in the face of the entire mainstream medical establishment.

One damaging portion of this bill that has gone largely unaddressed is not in the effective legislative text at all, but in the three and a half pages worth of "findings." While the sponsor of the bill has repeatedly

insisted that he has no intention to expand the ban on gender-affirming care to adults, this bill would express the sense of the General Assembly that, among other things:

- *"It is an accepted principle of economics and public policy that when a service or product is subsidized or paid for, demand for that service or product increases. Just between 2015 and 2016, gender reassignment surgeries increased by twenty per cent."* – Nothing here about minors, just an increase in the total number of surgeries.
- *"It is of grave concern to the General Assembly that the medical community is allowing individuals who experience distress at identifying with their biological sex to be subjects of irreversible and drastic non-genital gender reassignment surgery and irreversible, permanently sterilizing genital gender reassignment surgery, despite the lack of studies showing that the benefits of such extreme interventions outweigh the risks."* – Again, this is an attack on "gender reassignment surgery" in general, NOT limited to children.
- *"The risks of gender transition services far outweigh any benefit at this stage of clinical study on these services."* – Once again, there is no limitation to this statement regarding the age group being discussed. Instead, it's a blanket statement that it is the opinion of the Ohio Legislature that ALL "gender transition services" are unsafe.

While there is nothing in the actual proposed statutory text that would cover adults seeking gender-affirming care, these statements of intent clearly lay the groundwork. Furthermore, the bill's sponsor and its proponents have pointed to states like Missouri as examples of where Ohio should look for guidance. Coincidentally, both of those states have significantly reduced access to gender-affirming treatments for both children AND adults within the past year.

Members of the committee, I'm going to be honest with you. I have no idea whether my words, or the words of any of the others testifying in opposition, are going to make a difference. While the sponsor and supporters of this bill will argue otherwise, I don't believe for a second that this legislation is before you due to a spontaneous, organic concern for the well-being of children in Ohio. Look no further than the fact that the so-called "Save Women's Sports" bill was hastily slapped onto this legislation before it passed the House. The proponents of that legislation have spent years demonizing transgender female athletes as fearsome, brutish, "biological men" who are coming to "destroy" women's sports and deprive women and girls of the opportunity to compete on a level playing field. Somehow, this bill wants us to accept that trans kids (of all genders) are innocent victims, of a money-hungry, ideologically tainted gender cult among our finest medical institutions . . . and yet are also predators looking to expose themselves in female locker rooms and dominate women's sports? I don't buy it. In fact, this Frankenstein's monster of a bill simply illustrates the fact that trans people – especially kids – are made out to be whatever they're needed to be, so long as the overall agenda passes.

In closing, I'll leave you with this. The General Assembly is a political body. Issues are discussed and debated, positions are considered and discarded, and eventually decisions are made. Sometimes, we disagree on the issues, but we trust the process. This isn't about disagreeing on the issues. If you oppose this bill, no family of a transgender child is coming to try and recruit or convert your kids. This is about individuals being free to make choices about how to live their lives and how to raise their kids. There are real children suffering in Ohio right now – some of them are trans, some are not. Some of these children

may well have started to question their gender identity due to some sort of peer pressure or “social contagion,” but the vast majority have not. No kids or young adults are running the gauntlet of therapies, medical treatments, and all of the social efforts that come with transitioning to a different gender simply for the purpose of playing a sport.

Imagine this was your child. Who would you want to make the decisions on how to proceed with treatment? With all due respect, of all the available options, I would not want it to be the Ohio General Assembly.

Thank you.

Part II

As has been noted by other witnesses in previous hearings, 21 other states have already passed some version of the SAFE Act. In fact, many of those bills are strikingly similar in their language and specific provisions. While there is room to question how nearly two dozen state legislatures could have spontaneously arrived at the same legislative text on this issue, this also provides an opportunity to peer into the future a bit and see how the courts have treated bills like HB 68. Of course, now that the SAFE Act has been combined with the Save Women's Sports Act, some of the legal analysis is inconsistent, or incomplete – to my knowledge, no state has passed a bill like this, regulating both health care for transgender kids and their participation in athletic activities. If the analysis is a bit disjointed, that would be the reason why.

For decades, transgender adolescents have been receiving gender-affirming care under the supervision of trained medical and mental health professionals, based on guidelines and protocols derived from evidence-based studies conducted by national and international governing bodies. However, in the past three years, 21 states have enacted outright bans on gender-affirming treatments for minors. This has forced families around the country to move out of state to ensure that their children get the kind of medical treatment they need. What laws like these – including HB 68 – ignore is that each of these children's cases are assessed individually, with treatment plans developed based on the specific needs of the patient. Instead, these state legislatures (potentially including Ohio) have imposed a one-size-fits-all ban on the only evidence-based treatments available for gender dysphoria in minors. Perhaps most important for purposes of legal analysis, laws like HB 68 impose bans on the use of gender-affirming treatments for minors of one sex but allow their use for minors of another sex. As has been explained by the bill's proponents, this is not a bug, but rather a feature.

As I mentioned above, several of these laws have been thoroughly evaluated by the federal courts. Without getting too deeply into the weeds, there are different standards of review required for constitutional claims like the ones brought by the plaintiffs in these cases. The lowest standard of review only requires that the state show that it had a "rational basis" for enacting the law. In some cases, including discrimination on the basis of sex and/or or gender, a higher standard is required – the state action must advance an important governmental interest, the action must significantly further that interest, and it must be necessary to further that interest. In other words, if there is a less-restrictive means of accomplishing the same goal, the state must choose that one. You have heard from the bill's sponsor that the federal circuit courts are split on the constitutionality of these laws, but that is not entirely accurate. It would be more accurate to say that the courts are split on the standard of review to which these laws should be held.

There has been a lot said in testimony about the level of rigor and analysis that area applied to the scientific research backing some of these treatments. The idea, of course, is that stricter, more rigorous analysis and review of the research will produce better results. The same is true in the law. That's why it's important that **every court that has applied a heightened level of scrutiny** has found that these laws do not meet the standard of advancing an important government interest.

The district court in *L.W., et al., v. Skrmetti, et al.,* No. 3:23-cv-00376 (M.D. Tenn. Apr. 20, 2023) thoroughly reviewed an extensive record and made several detailed findings of fact. Among these were the following:

- the benefits of gender-affirming care are "well-established;"
- it is undisputed that "every major medical association has found [gender-affirming care] to be safe, effective, and medically necessary" for adolescents with gender dysphoria when clinically indicated;
- many of the claims about the harms of [gender-affirming care] "are not reliable;"
- the "alleged harms are not unique to the prohibited care;" and
- prohibitions like this "undermine[] rather than advance[] an interest in protecting the welfare of children."

Based on these findings, the court ruled that the Tennessee statute was "not proportionate to the state's interest of protecting children from allegedly dangerous medical treatments" and was "severely underinclusive in terms of the minors it protects from the alleged medical risks of the banned procedures." In addition, the court ruled that the statute likely infringed on the fundamental right of parents to make decisions regarding the medical care of their minor children.

The Sixth Circuit overturned the decision, but not because the lower court's findings were deemed to be incorrect. Rather, the circuit court merely disagreed with the standard of analysis applied by the trial court. Think about that. Gender-affirming care for adolescents is beneficial, has been found to be safe and effective, and does not pose unique harms to transgender patients, when compared to patients receiving the same treatments for other conditions. Those FACTS were not held to be incorrect – the circuit court merely applied a less rigorous standard and stated that the state could ban such treatments anyway.

The families who brought this lawsuit in Tennessee are currently appealing the ruling to the U.S. Supreme Court, which will hopefully provide the Court an opportunity to provide some clarity on several important points of law regarding discrimination against transgender individuals. Below, I list the relevant cases that have already been decided in the federal courts.

Federal Circuit Court Cases on Gender-Affirming Care

Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (upholding injunction on Arkansas' version of the SAFE Act)

Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023) (overturning injunction on Alabama's version of the statute.

L. W. et al., and U.S. v. Skrmetti, No. 23-5600 (6th Cir. Sept. 28, 2023) (reversing preliminary injunction on Tennessee and Kentucky's statutes)

District Court Cases Rejecting Laws Like the SAFE Act

Eknes-Tucker v. Marshall, 603 F. Supp. 3d (M.D. Ala. 2022)

Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021)

Koe v. Noggle, No: 1:23-CV-2904-SEG (N.D. Ga. Aug. 20, 2023)

K.C. v. Individual Members of Med. Licensing Bd. of Indiana, No. 1:23-cv-00595-JOH-KMB, 2023 WL 4054086 (S.D. Ind. June 16, 2023)

Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848 (N.D. Fla. June 6, 2023)

District Court Cases Upholding Laws Like the SAFE Act
Poe v. Drummond, NO. 23-Cv-177-JFH-SH (N.D. Okla. Oct. 5, 2023)

[NOTE: The *Poe v. Drummond* case from Oklahoma is the ruling misidentified by the bill's sponsor in a supplement to his written testimony. While he repeatedly referred to the opinion as coming from the Tenth Circuit Court of Appeals, it is, in fact, a ruling from the Northern District of Oklahoma. The case has since been appealed to the Tenth Circuit, but the appeals court has not yet ruled on the matter.]