IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

JANE DOE 1, *et al.*, Plaintiffs, v. WILLIAM C. THORNBURY, JR., MD, in his official capacity as the President of the Kentucky Board of Medical Licensure, *et al.*, Defendants.	No. 3:23-cv-00230

PLAINTIFFS' OPPOSITION TO CAMERON'S
EMERGENCY MOTION FOR STAY PENDING APPEAL

For all the reasons expressed by this Court in its Memorandum Opinion and Order granting Plaintiffs' Motion for Preliminary Injunction (the "Order"), (ECF No. 61), Attorney General Cameron has not shown that a stay pending appeal is warranted. Plaintiffs have shown they are entitled to a preliminary injunction, the benefits of which would be negated by a stay pending appeal. Cameron's Emergency Motion for a Stay Pending Appeal (the "Motion") includes no new arguments or evidence that warrant any different result. (ECF No. 66).

Accordingly, and for the same reasons that Judge Richardson of the Middle District of Tennessee recently denied a virtually identical motion for stay pending appeal of an order preliminarily enjoining Tennessee's similar ban on healthcare for transgender minors, the Motion should be denied. *See* Order, *L.W. et al., v. Jonathan Skrmetti et al.*, Case No. 3:23-cv-00376 (June 30, 2023) (Doc. No. 172), attached hereto as Exhibit A.

ARGUMENT

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (cleaned up). "It is instead an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (cleaned up). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. To evaluate whether to grant a stay pending appeal from an order granting a preliminary injunction, the Court considers equitable factors that mirror those governing whether a preliminary injunction should issue:

> (1) whether the defendant has a *strong or substantial* likelihood of success on the merits; (2) whether the *defendant* will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies.

Baker v. Adams Cnty/Ohio Valley Sch. Bd, 310 F.3d 927, 928 (6th Cir. 2002) (emphases added). None of the factors support granting a stay here.

(1) Cameron has no likelihood of success on the merits.

Cameron is not likely to succeed on the merits of his appeal for all the reasons already stated in Plaintiffs' prior briefing, (ECF Nos. 17, 52), and in this Court's Order, (ECF No. 61), which need not be restated here. Cameron asserts the same arguments in support of his Motion that he previously made in opposition to Plaintiffs' Motion for Preliminary Injunction. *Compare* ECF No. 47 *with* ECF No. 66. Because Cameron's "arguments in support" of a stay "are essentially identical to those that [he] posed in opposition to Plaintiffs' motion for a preliminary injunction," he cannot show a likelihood of success on the merits. Exhibit A at 3.

(2) The Commonwealth will not suffer any harm.

Cameron cannot rely on the conclusory assertion that the Commonwealth will suffer irreparable harm if a stay is not granted. Rather, "to substantiate a claim that irreparable injury is

likely to occur, a movant must provide some *evidence* that the harm has occurred in the past and is likely to occur again. . . .[T]he movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (emphasis added). Cameron has not done so.

Contrary to Cameron's argument, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) does not stand for the broad proposition that *all* orders preliminarily enjoining the enforcement of a law cause irreparable harm to the State. In fact, the *Abbott* Court explicitly states that an order preliminarily enjoining a law's enforcement causes irreparable harm "*[u]nless* the [enjoined] statute is unconstitutional." *Id.* at 2324 (emphasis added).[1] This exclusion is consistent with Sixth Circuit precedent, which holds that the Commonwealth has "no interest in the enforcement of laws" that are unconstitutional. *See Martin-Marietta Corp. v. Bendix Corp*., 690 F.2d 558, 568 (6th Cir. 1982). This Court has found that the challenged portions of SB 150 likely are unconstitutional, and they consequently fit within *Abbott*'s clearly defined exclusion.

In addition, even if preliminarily enjoining an unconstitutional law could constitute harm to the Commonwealth, Cameron would still be required to show that any such harm "decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Baker,* 310 F.3d at 928. Cameron cannot do that here. As this Court found, "Plaintiffs have submitted declarations stating that the treatments have significantly improved the minor plaintiffs' condition and that eliminating access to those treatments in Kentucky would cause serious consequences, including severe

[1] Further, *Abbot* is factually distinguishable because it dealt with a state statute that conformed state election proceedings with federal policy (*Id.* at 2324)—SB 150 contradicts federal policy, which favors the protection of individual civil rights, including the civil rights of transgender people. *See* Statement of Interest of the United States (ECF No. 37), at 2-3 (citing Executive Order 13,988).

psychological distress and the need to move out of state." Order at 13. The real and tangible harms that Plaintiffs would suffer from enforcement of SB 150 outweigh the abstract, speculative harms to the Commonwealth's "interests" Cameron invokes. Motion at 12. Even Defendants Thornbury and Denker—the state officials who, unlike Cameron, are charged by the Legislature with the responsibility to enforce SB 150—agree it "would behoove KBML/KBN-licensees and their patients for the Court to maintain the status quo pending final ruling on the merits of the Plaintiffs' suit." Defendants' Response to Intervening Defendants' Motion for a Stay Pending Appeal (ECF No. 69), at 2.

(3) Plaintiffs will be irreparably harmed by a stay.

As this Court has already found, staying the injunction will alter the status quo and irreparably harm Plaintiffs and other similarly situated transgender youth. "When reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). A stay would defeat the purpose of having granted the injunction in the first place and cause the very constitutional violations this Court's Order seeks to prevent. *See Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999) ("[T]he grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm that is imminent as required to sustain the same preliminary injunction.").

In addition, this Court has already found that permitting SB 150 to take effect will cause Plaintiffs and other transgender youth to suffer additional specific concrete harms. As the Court found, "[i]f allowed to take effect, SB 150 would eliminate treatments that have already significantly benefited six of the seven minor plaintiffs and prevent other transgender children

from accessing these beneficial treatments in the future." Order at 13. The harm that would arise from their being denied access to those treatments is both serious and irreparable.

(4) The public interest weighs against a stay.

Staying the Court's preliminary injunction would work against the public interest because "[i]t is in the public interest not to perpetuate the unconstitutional application of a statute." *Martin-Marietta Corp. v. Bendix Corp*., 690 F.2d 558, 568 (6th Cir. 1982). As the Sixth Circuit has made clear: "[w]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 649 (6th Cir. 2015) (cleaned up). Accordingly, and as every court to have considered similar state laws banning healthcare for transgender minors has concluded, the Court's entry of a preliminary injunction here was appropriate and necessary, and so should not be stayed pending appeal. *See Brandt v. Rutledge*, 47 F.4th 661, 667 (8th Cir. 2022); *K.C. v. Medical Licensing Bd.*, No. 1:23-cv-00595, ECF No. 67, slip op. 32–33 (S.D. Ind. June 16, 2023); *Doe v. Ladapo*, 2023 WL 3833848, at *1 (N.D. Fla. 2023); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1146 (M.D. Ala. 2022).

(4) The Scope of the Injunction is Appropriate.

Finally, this Court should reject Cameron's request to "correct the scope" of the preliminary injunction, which is effectively an improper request for reconsideration of the Court's Order smuggled into a motion for stay. Motion at 15. Even if Cameron's reconsideration request could be considered, this Court correctly found that a facial injunction is appropriate here because Plaintiffs have made a facial challenge to SB 150, (*see Mulholland v. Marion Cnty. Elec. Bd*., 746 F.3d 811, 819 (7th Cir. 2014)), and because it would be "virtually impossible" for the Court to fashion a more narrowly tailored injunction. Order at 14. For all the same reasons as before, (*id*.),

this Court should reject Cameron's identical request to limit the injunction's scope to the named Plaintiffs.

CONCLUSION

For all the forgoing reasons, Cameron's Emergency Motion for Stay Pending Appeal should be denied.

Dated: July 6, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed with the Court using the CM/ ECF system on July 6, 2023, which will generate an electronic notice of filing to all counsel registered with that service.

/s/ Randall M. Levine
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Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

L.W. et al., *by and through her parents and next friends, Samantha Williams and Brian Williams* Plaintiffs, v. JONATHAN SKRMETTI et al., Defendants.	)	NO. 3:23-cv-00376 JUDGE RICHARDSON

ORDER

On June 28, 2023, the Court issued a Memorandum Opinion (Doc. No. 167, "Memorandum Opinion") and entered an order (Doc. No. 168, "Order") granting in part and denying in part Plaintiffs' motion for a preliminary injunction. The Order enjoined Defendants from enforcing most of the provisions of Senate Bill 1 (hereinafter "SB1" or "the law"), codified at Tenn. Code Ann. § 68-33-101 *et seq*. Just hours later, Defendants filed a Notice of Appeal (Doc. No. 169) and an "Emergency Motion for a Stay of Preliminary Injunction Pending Appeal" (Doc. No. 170, "Motion"). In the Motion, Defendants request that if the Court is to deny the Motion, that it do so "quickly, without waiting for a response from Plaintiffs, so that Defendants can proceed to the Sixth Circuit." (Doc. No. 170). Cognizant of the time-sensitive nature of certain features of this action, and given that the Court's ruling on the instant Motion does not prejudice Plaintiffs, the Court herein exercises its discretion to rule on the instant Motion before the time period for a response from Plaintiffs has expired. For the reasons stated herein, the Motion will be denied.[1]

[1] Although the filing of a Notice of Appeal generally strips the district court of jurisdiction with respect to matters involved in the appeal, district courts retain jurisdiction to "grant[], continue, modif[y], refuse[],

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). "It is instead an exercise of judicial discretion, and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (internal quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–434. Four factors govern whether a stay is warranted: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits [of the appeal]; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *See id.* at 434. "Because the state is the moving party, its own potential harm and the public's interest merge into a single factor." *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020). "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 433. "There is substantial overlap between these and the factors governing preliminary injunctions, []; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *See id.* (internal citation omitted).

The Court acknowledges that its Memorandum Opinion (Doc. No. 167) does not necessarily dictate the outcome of the instant Motion. Indeed, Defendants could raise (and have raised) in the Motion issues distinct from those resolved by the Court in its Memorandum Opinion.

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dissolve[], or refuse[] to dissolve or modify an injunction. . .." *See* Fed. R. Civ. P. 62(d), (a); *Gutierrez v. CogScreen, LLC*, No. 17-cv-2378, 2018 WL 3006121, at *1 (W.D. Tenn. May 4, 2018) (explaining that district courts retain jurisdiction for injunctions even where a notice of appeal has been filed); *Prater v. Commerce Equities Management Co., Inc.*, Civ. Act. No. H-07-2349, 2009 WL 172826, *1 (S.D. Tex. Jan. 22, 2009) ("[A] district court retains jurisdiction to entertain a motion to stay a judgment or order being appealed."). The Court is therefore satisfied that it has jurisdiction to consider the instant Motion, despite the pending appeal overlapping with issues raised by the instant Motion.

However, as for the four-factor test that generally governs whether a stay is warranted, Defendants assert the same arguments (with one exception discussed below) in *support* of the instant Motion as they previously posed in *opposition* to Plaintiffs' motion for a preliminary injunction. Certainly, the Court does not begrudge Defendants for doing so—the issues raised by the instant Motion are substantially identical to those resolved in the Court's Memorandum Opinion. Because Defendants' arguments in support of the four factors listed above are essentially identical to those that they posed in opposition to Plaintiffs' motion for a preliminary injunction, the Court is satisfied that none of the four factors (substantial likelihood of success on the merits, irreparable harm, injury to the other parties, and the public interest) weigh in favor of a stay.

Defendants argue that even where the above-four factors do not weigh in favor of a stay, a stay is nonetheless warranted where a movant has shown that a court's ruling on an injunction poses "serious questions going to the merits." (Doc. No. 170 at 2). In other words, they argue that if there are serious questions going to the merits of Plaintiffs' motion for a preliminary injunction and this Court's ruling thereon, Defendants need not show either that those questions are likely to be resolved on appeal in their favor (*i.e.*, that they have a likelihood of success on appeal) or any of the other above-referenced three factors. Defendants' argument relies on the Sixth Circuit's fairly recent decision in *Antonio v. Garland*, 38 F.4th 524, 526 (6th Cir. 2022). But *Antonio* neither says nor suggests that a stay is warranted where a court's ruling on an injunction poses serious questions on the merits, even where none of the above-four factors favoring a stay. Instead, *Antonio* states that "*even if a movant can demonstrate irreparable harm*, he is still required to show, at a minimum, serious questions going to the merits." *See id.* (emphasis added). Contrary to Defendants' position, *Antonio* does not indicate that a movant meets his or her burden for a stay by showing only that a court's ruling on an injunction to be stayed poses serious questions on the

merits. Therefore, even if the Court's Memorandum Opinion and Order pose serious questions on the merits, Defendants have not met their burden for a stay because none of the four factors favor such a stay.[2]

For the reasons stated herein, the Court in its discretion DENIES the Motion (Doc. No. 170).

IT IS SO ORDERED.

Eli Richardson

ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

[2] The Court's finding that a stay is unwarranted should come as no surprise because, even though a stay of a preliminary injunction is never automatically out of the question at the outset, "the grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm that is imminent as required to sustain the same preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999).