No. 23-0697

In the Supreme Court of Texas

THE STATE OF TEXAS; OFFICE OF THE ATTORNEY GENERAL; KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; THE TEXAS MEDICAL BOARD; AND THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION,

Appellants,

v.

LAZARO LOE, ET AL.,

Appellees.

On Direct Appeal from the
201st Judicial District Court, Travis County

APPELLANTS' REPLY BRIEF

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To the Honorable Supreme Court of Texas:

Plaintiffs ask this Court to ignore a fundamental principle: Like the U.S. Constitution, the Texas Constitution "does not require things which are different in fact or opinion to be treated in law as though they were the same." *L. W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 481-82 (6th Cir. 2023) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *see Klumb v. Hous. Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015). From a constitutional perspective, an eight-year-old girl experiencing precocious puberty—something her body has not matured enough to undergo—is not similarly situated to a physically healthy thirteen-year-old boy diagnosed with gender dysphoria. The long-term effects of delaying puberty in the one are not the same as blocking it in the other. As a result, the Legislature may constitutionally regulate their medical care differently.

Because the right of parents to raise their children does not extend to exempting children from reasonable medical regulations—whether in the context of transgender healthcare or abortion—that principle defeats each of plaintiffs' claims. Regulations on the provision of healthcare do not become sex-based discrimination in violation of article I, section 3a of the Texas Constitution just because they can be provided to members of only one sex. S.B. 14 regulates procedures that are specific to transgender youth, but transgenderism is not a suspect classification under the Texas Constitution as currently ratified by the People of Texas. And although a medical license is a property interest that cannot be revoked without constitutionally adequate *procedures*, there is no substantive right to be a licensed physician. Even if

there were, the physician plaintiffs' testimony is that S.B. 14 affects only a small fraction of their medical practices.

In short, plaintiffs did not plead viable constitutional claims that would support jurisdiction—let alone warrant enjoining enforcement of S.B. 14. And even if their pleadings had sufficed to state a claim, the temporary injunction was improper because it suffered additional evidentiary and jurisdictional defects.

Reply Regarding Standard of Review

Plaintiffs suggest (at 4-5) that defendants are improperly mixing standards of review between the questions of whether the trial court had jurisdiction to enter a temporary injunction and whether the temporary injunction was proper. Defendants do not dispute that their plea to the jurisdiction challenged the plaintiffs' pleadings. *See* 3.CR.651-52. Had the trial court ruled on the plea before proceeding to the temporary injunction, as it should have done, this Court's review would be limited to the sufficiency of the pleadings. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 655 (Tex. 2020). But because the trial court permitted factual development before ruling on the plea, this Court may also "consider relevant evidence offered by the parties.'" *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020) (collecting cases). Indeed, it must do so because the elements of jurisdiction "are not mere pleading requirements" but instead "indispensable part[s] of the plaintiff's case" that "must be supported in the same way as any other on which the plaintiff bears the burden of proof." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993) (adopting *Lujan*). Here, plaintiffs sought

temporary injunctive relief, so they must meet the evidentiary standard for a temporary injunction. *In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (orig. proceeding).

ARGUMENT

I. Plaintiffs' Challenges to S.B. 14 Are Not Facially Valid, Let Alone Likely to Succeed.

The trial court improperly issued a statewide temporary injunction on claims that lack facial viability, much less the evidentiary support needed to justify enjoining enforcement of a duly enacted law.

A. S.B. 14 does not offend the Texas Constitution's due-course guarantees.

Defendants do not dispute that the due-course clause in article I, section 19 of the Texas Constitution protects against (1) state intrusion into a sphere of parental autonomy and (2) revocation of a license to practice medicine without due process. But there is no historical or precedential support for the notion that either of those protections overrides the government's regulation of medicine and the medical profession. To the contrary, regulation in these areas has a long history, as the Sixth and Eleventh Circuits have recently explained in rejecting identical legal theories. Plaintiffs offer no response to these persuasive decisions.

1. Parents do not have a constitutional right to have gender-transitioning procedures performed on their children.

Plaintiffs admit (at 30) that the State may properly intervene in a parent's medical decisions when necessary to "protect a child from ill health or death." That

disproves the fundamental premise of their argument: that parents have the fundamental right to control all healthcare choices for their children. Stripped of that premise, the question is only whether the State can place limits on *these* healthcare decisions. It can. Rational-basis review applies, and S.B. 14 easily satisfies that standard.

a. Plaintiffs rely on parents' general right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.). Appellees' BOM 22-25. The existence of that fundamental right is not in question, as defendants have discussed (at 22-23). The question is its scope. Although not binding as to the Texas Constitution, *Washington v. Glucksberg*, 521 U.S. 702 (1997), warned that to avoid overstepping their own constitutional roles, courts should "carefully formulat[e] the interest at stake in substantive-due-process cases." *Id.* at 722. In that case, the Supreme Court defined the right at issue as a claimed "right to commit suicide with another's assistance," not the more general right to personal autonomy. *Id.* at 724. The Court further explained that "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy," but that "does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." *Id.* at 727.

Just so here. There is a long tradition of the government regulating the practice of medicine and prohibiting medical treatments determined to be unduly risky. *See Skrmetti*, 83 F.4th at 473-74 (discussing, *inter alia*, *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703, 706 (D.C. Cir. 2007) (en banc)). And "[t]his country does not have a custom of permitting parents to obtain

banned medical treatments for their children and to override contrary legislative policy judgments in the process." *Id.* at 475. This makes sense: "A parent's right to make decisions for a child does not sweep more broadly than an adult's right to make decisions for herself," *Skrmetti*, 83 F.4th at 475, and plaintiffs do not suggest there is a fundamental right to the prohibited medical procedures.

Unable to find support for the specific right they seek, plaintiffs insist (at 25) that the Court should depart from the *Glucksberg* framework and hold that "the parental autonomy right includes the right to determine the course of a child's medical care." Like the unsuccessful plaintiffs in the Sixth and Eleventh Circuits, however, plaintiffs "overstate the parental right by climbing up the ladder of generality to a perch . . . that the case law and our traditions simply do not support." *Id.*; *accord Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1224, 1228 (11th Cir. 2023). If there is a choice between one or more lawful courses of action, the choice belongs to the parents absent some extraordinary circumstances. *Cf. Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003). But courts have long recognized distinctions between different *types* of medical decisions in this context, including "a material distinction between the State effectively sticking a needle in someone over their objection and the State prohibiting the individual from filling a syringe with prohibited drugs." *Skrmetti*, 83 F.4th at 476 (collecting cases).[1]

[1] Contrary to plaintiffs' suggestion (at 27 & n.8), defendants' view of *Glucksberg* does not limit parents to medical treatments in existence in the 1870s, though the vintage of the treatments can inform the scope of permissible legislation. Where

To support their view that fundamental rights need not be identified with the same specificity under the Texas Constitution as under the U.S. Constitution, plaintiffs cite (at 27) to the *Skrmetti* dissent and this Court's decisions in *Miller* and *In re Derzapf*, 219 S.W.3d 327 (Tex. 2007) (per curiam) (orig. proceeding). The *Skrmetti* dissent's argument did not carry the day in the Sixth Circuit, and it should not do so here for much the same reasons. As to *Miller* and *Derzapf*, plaintiffs' reliance is misplaced for two reasons.

First, *Miller* was not even a due-course case. 118 S.W.3d at 761. And the Court recognized that "parents' rights to *make decisions* for their children," Appellees' BOM 27, do *not* give them an absolute right to prevent lifesaving medical treatment: a physician may act to save a child's life over the parents' objections, *Miller*, 118 S.W.3d at 768. If anything, the Court's conclusion that physicians were not liable for resuscitating a premature baby after her parents affirmatively refused consent forecloses plaintiffs' assertion that parents control all medical treatment for their children. *See id.* at 767-68; *see also* Appellees' BOM 30 (acknowledging that the State may intervene to "protect a child from ill health").

Second, although *Derzapf* mentioned *Troxel*, a due-process decision, *see* 219 S.W.3d at 333, the Court did not suggest that a parent could act outside of the law when making medical decisions for his child. Instead *Derzapf* concluded that a grandmother seeking court-ordered visitation over the objection of the children's

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plaintiffs falter is the inability to show a history or tradition that parents have been entitled to displace the Legislature's regulation of the medical profession.

father had not met the statutory requirement to show that denial of access "would 'significantly impair' the children's physical health or emotional well-being." *Id.* at 334. *Derzapf* thus fits within a line of cases recognizing that courts cannot typically interfere with parents' control over where and with whom their children live[2] or how they are educated.[3] But none of these cases extends that realm of parental autonomy to prevent the State's long-established power to regulate the practice of medicine and the use of drugs and medical technology, for children and adults alike. *See Skrmetti*, 83 F.4th at 473. S.B. 14 fits comfortably within that tradition. Plaintiffs' claimed fundamental right, defined with particularity, does not.

b. Strict scrutiny does not apply because no fundamental right is at issue, and S.B. 14 easily survives rational-basis review. *See* Appellants' BOM 8-18, 28-32. The record includes ample evidence that S.B. 14 is a reasonable regulation of treatments with significant side effects. *See id.* at 8-10, 12-15. And the public record is full of evidence that the medical associations promoting such treatments are driven by ideology when it comes to gender dysphoria and that gender clinics often do not follow the associations' guidelines anyway.[4] Both are cognizable under rational-basis

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[2] *See Troxel*, 530 U.S. at 66; *In re C.J.C.*, 603 S.W.3d 804, 812 (Tex. 2020) (orig. proceeding); *Derzapf*, 219 S.W.3d at 334.

[3] *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925); *cf. Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 433-35 (Tex. 1994).

[4] *See, e.g.*, Jamie Reed, *I Thought I was Saving Trans Kids. Now I'm Blowing the Whistle*, The Free Press (Feb. 9, 2023), https://www.thefp.com/p/i-thought-i-was-saving-trans-kids; Emily Yoffe, *"I Felt Bullied": Mother of Child Treated at Transgender Center Speaks Out*, The Free Press (April 3, 2023), https://www.thefp.com/p/i-felt-bullied-mother-of-child-treated; Christopher F. Rufo, *"They're*

review. *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (explaining that the "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"); *accord Klumb*, 458 S.W.3d at 13 (adopting *Beach Communications*).

Plaintiffs attempt to undermine the Legislature's reasonable concern by pointing (at 47) to S.B. 773, which allows patients suffering from a "severe chronic disease" to access certain "investigational drug[s], biological product[s], or device[s]" that "ha[ve] completed phase one of a clinical trial but the [FDA] has not yet approved for general use and that remain[] under investigation." Tex. Health & Safety Code § 490.001(3); *see* Act of May 27, 2023, 88th R.S., ch. 1082, 2023 Tex. Sess. Law Serv. 3397. Assuming this new theory is even properly before the Court, the same Legislature passed both bills, indicating that *it* saw no conflict. For good reason: S.B. 773 does not apply to the medical procedures at issue in S.B. 14, which are FDA approved to treat medical conditions (like prostate cancer) but used off-label for gender dysphoria. *E.g.* 3.CR.880-81, 896. Moreover, adolescent gender dysphoria would not meet the S.B. 773 definition of a "severe chronic disease." *See* Tex. Health & Safety Code §§ 490.001(4), .002. The statute speaks in terms of "condition, injury, or illness" and "functional impairment," *id.*, which are similar

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Wanting to Play God": A new whistleblower describes the horrors of 'gender-affirming care' at Texas Children's Hospital, City Journal (May 23, 2023), https://www.city-journal.org/article/texas-childrens-hospital-whistleblower-speaks-out; Leor Sapir, *The Deposition of Jack Turban: One of America's leading gender clinicians proves that he doesn't understand evidence-based medicine*, City Journal (Nov. 13, 2023), https://city-journal.org/article/the-deposition-of-jack-turban.

to those that this Court has recognized typically address *physical* conditions, *see In re State*, 602 S.W.3d 549, 559 (Tex. 2020).

Plaintiffs insist (at 45-48) that hormone interventions and surgery are "neither experimental nor new" and are "safe and effective" for children. But they cite no case supporting the notion that either the Legislature or this Court must take the word of any professional organization, including the World Professional Organization for Transgender Health. Federal courts certainly have not. *See, e.g.*, *Gibson v. Collier*, 920 F.3d 212, 223-24 (5th Cir. 2019) (discussing *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) (en banc), and noting that WPATH does not "have universal consensus" and its conclusions are "hotly contested"). Because S.B. 14 is subject to rational-basis review and plaintiffs have not carried their burden "to negative every conceivable basis which might support it," plaintiffs' claims are facially invalid. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

c. Even if S.B. 14 were subject to strict scrutiny, it would still survive. Plaintiffs cannot dispute that the State has a compelling interest in safeguarding the long-term health of children. Its authority to do so is particularly strong "in areas of 'medical and scientific uncertainty.'" *Skrmetti*, 83 F.4th at 473 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). As the record shows, that is the case here: The prohibited treatments can have irreversible physical effects on a child's growth and development—effects that go beyond the intended purpose of changing the child's secondary sex characteristics—and the evidentiary support for the treatments' benefits is of extremely low quality. *See* Appellants' BOM 12-15. As defendants have explained (at 32-33), the known risks of harm, coupled with the uncertainty of any

benefits, warrant delaying such procedures until adulthood. Plaintiffs make two general responses, neither of which has merit.

First, plaintiffs again insist (at 45) the procedures are "not experimental" and "not new." But the treatments have existed for less than 30 years, and they previously were used on different, more rigorously screened, patient populations. *See* 4.CR.1136, 1542-43, 1571, 1587, 1628. Moreover, plaintiffs can point to no evidence that these medical interventions improve children's mental health in a way that psychotherapy and other mental health treatments cannot. *See, e.g.*, 3.RR.114; 4.CR.1196-98, 1618, 1627-28. Indeed, plaintiffs do not dispute that these treatments have never been the subject of a controlled trial. *See* 2.RR.115-16.

Second, plaintiffs try (at 49) to undercut the State's interest by noting that the State has not prohibited physicians from using such methods to treat other conditions or "no condition at all." This ignores, however, that—as even plaintiffs' experts agree—these treatments are used differently for other diagnoses, which carry different cost-benefit ratios. *See* Appellants' BOM 9-10. Plaintiffs insist that the law pretend a mastectomy as treatment for breast cancer is the same thing as a mastectomy for gender dysphoria, or that using GnRH agonists to treat cancer is the same thing as preventing a child from undergoing natural puberty. *See* Appellants' BOM 8-9. Plaintiffs cannot establish a viable claim under strict scrutiny *because* the State tailored its solution by restricting certain medical interventions to the perceived problem of alleged misuse of interventions to treat conditions for which they are not appropriate.

d. Even if the Court disagreed with all of these arguments, plaintiffs would still not be entitled to public funding for the prohibited procedures. That renders any challenge to Texas Health and Safety Code sections 161.704-.705 facially invalid. This Court has long held that public funding is not constitutionally required even if there *were* a constitutional right to obtain such medical procedures, *see Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 265 (Tex. 2002), and "[a] party seeking a temporary injunction must have at least one valid legal theory to support a probable right to recover," *Tex. Health Huguley, Inc. v. Jones*, 637 S.W.3d 202, 216 (Tex. App.—Fort Worth 2021, no pet.). Plaintiffs did not even allege S.B. 14's public-funding provisions violate the Constitution, yet the trial court enjoined HHSC from applying them. 7.CR.2155. Plaintiffs offer no justification for that part of the injunction. That alone requires this Court to vacate the temporary injunction on HHSC's compliance with the public-funding provisions.

2. Doctors do not have a constitutional right to perform gender-transitioning procedures on children.

The plaintiff physicians' substantive-due-course claim also fails because they lack a facially valid claim and therefore could not establish a probable right to relief on the merits.

a. The physician plaintiffs' first theory is that S.B. 14 deprives them of a property interest in their medical licenses. But plaintiffs cite precedent (at 42) establishing only that a medical license is a protected property interest for which the government must provide *procedural* safeguards. Defendants have admitted as much (at 33-34). And the plaintiff physicians do not dispute that any disciplinary measures

based on S.B. 14 would be accompanied by notice and an opportunity to be heard, including through judicial review. As a result, cases like *Texas Southern University v. Villarreal*, 620 S.W.3d 899 (Tex. 2021), which address the government's obligation to provide constitutionally adequate procedures in depriving a person of a constitutionally protected interest, do not move the needle in establishing a viable claim for relief. *See id.* at 905-07 (discussing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972)).

b. Also unavailing is the physician plaintiffs' claim that S.B. 14 infringes a right "to engage in their occupations." 1.CR.53. Even accepting that "engaging in a lawful occupation" receives substantive protection under the due-course clause, *see Patel v. TDLR,* 469 S.W.3d 69 (Tex. 2015), the clause's protections for "work-related interest[s]" do not extend beyond "*common* occupations" and "*lawful* calling[s]," *DSHS v. Crown Distrib. LLC*, 647 S.W.3d 648, 654 (Tex. 2022). Practicing medicine generally is a lawful calling, but performing medical procedures outside of one's medical license is not. Appellants' BOM 35-36.[5] To the contrary, as the Sixth Circuit has explained, history and tradition provide no support for the idea that physicians may act without regard to regulation, including prohibitions on certain medical procedures or regulations on how a substance may properly be used. *See Skrmetti*, 83 F.4th at 472-75. And in any event, S.B. 14 does not prevent these physician plaintiffs

[5] Because defendants have never disputed that the practice of medicine is a lawful calling, plaintiffs' appeal (at 42-43) to the long history of the practice of medicine is irrelevant.

from practicing medicine; it affects just "a small portion" of each plaintiff physician's practice. 1.CR.125; *see* Appellants' BOM 35-36.

Plaintiffs do not respond to many of defendants' arguments or defend the injunction on the grounds they asserted below. And rather than cite precedent for the proposition that an incremental limitation on the scope of their medical practice violates the due-course clause (defendants are aware of none), plaintiffs rely (at 43) on inapposite cases. *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190 (Tex. App.—Austin 2008, no pet.), has nothing to do with the due-course provision. It instead addressed whether a statute violated article I, section 16's retroactivity clause. *Id.* at 214. In *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996), the Court observed that the due-course clause "contains both a procedural component and a substantive component." *Id.* at 632. But that says nothing about whether a substantive-due-course right is implicated here. The case involved water rights, and the Court *rejected* the challengers' due-course claims. *Id.* at 632-33.

Plaintiffs next shift their focus (at 44) from their overall medical practice to particular patients, arguing that S.B. 14 violates the due-course clause because it "interferes with the professional relationship among healthcare providers, adolescent patients, and the patients' parents, and prevents providers from carrying out their professional and ethical obligations." The first problem with that theory appears on its face: Physicians do not have a "professional [or] ethical obligation[]" to perform unlawful medical procedures. *See generally* Tex. Occ. Code § 164.052 (listing prohibited practices by a physician). To the contrary, following the law is part

of those obligations. The second problem is that this Court's economic substantive-due-course precedent does not speak in terms of commercial relationships between a claimant and his individual customers (or would-be customers), but rather in terms of a claimant's ability to earn a living practicing a lawful profession. *See Crown Distrib.*, 647 S.W.3d at 656-57; *cf. Patel*, 469 S.W.3d at 93 (Willett, J., concurring) (referring to "Texans' constitutional right to earn an honest living for themselves and their families"). Because S.B. 14 does not cause the physician plaintiffs to lose the ability to earn a living practicing medicine, their economic due-course claim lacks facial viability.

Moreover, the unstated premise of plaintiffs' theory is that there is a fundamental right to hormone administration and surgery as treatment for gender dysphoria. Only then would these procedures be outside the reach of the State's authority to regulate under the rational-basis standard. But plaintiffs have not advanced such a theory; they do not claim that a patient has a fundamental right to the medical treatments that S.B. 14 prohibits until the age of majority. Nor could they succeed in making that showing. *See Skrmetti*, 83 F.4th at 475 (stating that "[t]he government has the power to reasonably limit the use of drugs" and that, "[i]f that's true for adults, it's assuredly true for their children").

Even if the physician plaintiffs' substantive-due-course rights were implicated, S.B. 14's limitations on the practice of medicine easily pass rational-basis review, *supra* at 7-9, or strict scrutiny for the reasons already discussed, *supra* at 9-10.

B. S.B. 14 does not offend the Texas Constitution's equality-under-the-law clauses.

Plaintiffs' equal-protection theory fares no better. This Court held more than 20 years ago that a prohibition on a medical procedure does not become a sex-based classification for the purposes of article I, section 3a just because it is performed on individuals of one sex only. *Bell*, 95 S.W.3d at 257. Moreover, children with different medical diagnoses are *not* similarly situated for constitutional purpose. And plaintiffs cannot transform transgenderism into a suspect classification by invoking (at 40) perhaps the most famous of all footnotes, footnote 4 from *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Plaintiffs chose to bring their challenge under the *Texas* Constitution, which expressly lists which classifications are suspect. Tex. Const. art. I, § 3a. Transgenderism is not among them. *Id.*[6]

1. Plaintiffs' claim of sex-discrimination fails at the outset because, like the similar laws upheld in other States, S.B. 14 "is best understood as a law that targets specific medical interventions for minors, not one that classifies on the basis of [sex]." *Eknes-Tucker*, 80 F.4th at 1227; *accord Skrmetti*, 83 F.4th at 480-81. The statute "regulate[s] sex-transition treatments for all minors, regardless of sex." *Skrmetti*, 83 F.4th at 480. "Such an across-the-board regulation lacks any of the hallmarks of sex discrimination." *Id.*; *accord Eknes-Tucker*, 80 F.4th at 1228. That

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[6] In the trial court, plaintiffs also argued that S.B. 14 discriminates based on "sex stereotypes." As defendants have shown (at 41-43), that theory is not viable under the Texas Constitution. Plaintiffs' footnote 11 (at 35) mentions "discriminatory sex stereotypes," but does not explain how this could be actionable apart from plaintiffs' other theories. Any sex-stereotyping theory is forfeited for inadequate briefing.

analysis aligns with this Court's precedent applying article I, section 3a: "[t]he classification [prohibiting funding for abortions] here is not so much directed at women as a class as it is abortion as a medical treatment." *Bell*, 95 S.W.3d at 258.

Indeed, even plaintiffs agree (at 34-35) that "[t]he nature of the medical care and underlying diagnosis" are relevant to whether the law withstands scrutiny. Here, if the Legislature drew a classification based on sex when it specified that the prohibition applies to "supraphysiologic doses of testosterone to females"; or "supraphysiologic doses of estrogen to males," Tex. Health & Safety Code § 161.702(3)(B), (C), it did so because that is the only possible way to vindicate the State's interest in protecting children from the risks of medical procedures that are given for a sex-dependent mental-health diagnosis. "Testosterone transitions a minor from female to male, never the reverse," and "[e]strogen transitions a minor from male to female, never the reverse." *Skrmetti*, 83 F.4th at 481. Recognizing as much is not invidious discrimination. It is the only way to describe the hormone treatments at issue. 2.RR.88; *see Skrmetti*, 83 F.4th at 481-82; Appellants' BOM 38.

Plaintiffs make two counterarguments. Neither has merit.

First, plaintiffs contend (at 32-33) that a child who needs treatment for hypogonadism or polycystic ovarian syndrome is similarly situated to a child diagnosed with gender dysphoria. Indeed, they insist (at 1) that these diagnoses call for "*the exact same medical care.*" That is folly. Plaintiffs' expert acknowledged that different uses of hormones carry different risks and benefits. *See* Appellants' BOM 8-10. It is not invidious discrimination to distinguish between gender dysphoria and physical conditions that can be treated with these drugs or surgical procedures—

precocious puberty or cancer, for example. Any argument that "assumes that any administration of these hormones is one treatment" fails. *Skrmetti*, 83 F.4th at 481. S.B. 14 treats "boys and girls exactly the same for constitutional purposes—reasonably limiting potentially irreversible procedures until they become adults." *Id.* at 482.

Second, plaintiffs contend (at 34) that the Sixth and Eleventh Circuits erroneously "conflated the threshold question of whether a sex-based classification exists with the inquiry into the alleged justification for that classification." That contention fails to contend with this Court's assessment in *Bell* that a law's reference to a medical treatment that is relevant to one sex only does not turn the law into a sex-based classification. *Bell*, 95 S.W.3d at 258. When plaintiffs do address *Bell*, they assert that S.B. 14 "condition[s the] legality of certain medical treatments on the government's view of the person's 'biological sex.'" But again, S.B. 14 treats "boys and girls exactly the same for constitutional purposes." *Skrmetti*, 83 F.4th at 482.

2. Finally, relying on footnote 4 of *Carolene Products*, plaintiffs argue that transgenderism should be recognized as a suspect class under article I, section 3, which states that "all free men, when they form a social compact, have equal rights." Plaintiffs contend (at 40) that transgender people are a "discrete and insular group" not subject to the usual consequences of majority rule. Tellingly, however, Texans ratified article I, section 3a, which lists the classifications to which it applies, more than 40 years after *Carolene Products.* Tex. S.J. Res. 16, 62nd Leg., R.S., 1971 Tex. Gen. Laws 4129. Rather than adopt *Carolene Products*—either expressly or by reference to "discrete and insular minorit[ies]," 304 U.S. at 152 n.4, the People of

Texas spelled out that discrimination would not be permitted on the basis of "sex, race, color, creed or national origin." Tex. Const. art. I, § 3a (1972). And, to the State's knowledge, this Court has never applied the footnote 4 principle to expand article I, section 3 or section 3a to find an unmentioned suspect class.

The only precedent from this Court that plaintiffs cite, *Spring Branch ISD v. Stamos*, 695 S.W.2d 556 (Tex. 1985), does not support the proposition that *Carolene Products* footnote 4 applies to the Texas Constitution. To the contrary, it concluded that "students who fail to maintain a minimum level of proficiency in all of their courses do *not* constitute the type of discrete, insular minority necessary to constitute a 'suspect' class." *Id.* at 559.

Moreover, even if the footnote 4 theory applies, plaintiffs do not meet it. Contrary to plaintiffs' contention (at 41), defendants certainly do dispute the suggestion that transgenderism "meets the hallmarks of a suspect class" under *Carolene Products*. Indeed, defendants offered testimony that symptoms of gender dysphoria that manifest in adolescents frequently resolve themselves as the child matures. Appellants' BOM 12-13. As a result, even if transgenderism could be considered sufficiently discrete and insular, it is far from clear that *children* can be considered members of that class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring) (discussing how immutability is relevant to the *Carolene Products* inquiry). What *is* clear is that plaintiffs bore the burden to make that evidentiary showing in support of a temporary injunction and failed to do so. And because S.B. 14 would satisfy strict scrutiny, *see supra* at 9-10,

plaintiffs' claims are facially invalid—and would not support a preliminary injunction—in any event.

II. At Minimum, the Court Should Narrow the Injunction.

Apart from the facial invalidity of plaintiffs' overall theory, the trial court's temporary injunction is flawed in other respects. To start, this Court's precedent forecloses plaintiffs' claims against the State of Texas and the Attorney General because they are the wrong defendants for sovereign-immunity purposes. Precedent also rejects plaintiffs' theory of standing for many aspects of the injunction, as plaintiffs have not established that they are affected by many of the challenged laws. These errors are compounded by the fact that the temporary injunction is both overbroad (it applies to parties not before the Court) and ineffective (it does not actually protect the present plaintiffs, should a permanent injunction not issue). Although each of those defects may not be independently dispositive, each one would, at a minimum, require that the temporary injunction be significantly narrowed.

A. Additional jurisdictional defects doom individual claims.

1. Sovereign immunity and lack of standing bar claims against the State.

Precedent forecloses plaintiffs' suits against the State twice over: Because the State is not the entity that enforces S.B. 14, it is not the proper defendant for purposes of either sovereign immunity or standing. Appellants' BOM 46. Plaintiffs contend (at 54) that sovereign immunity does not bar claims against the State of Texas under *Patel*. As the Court explained last term, when "the State itself has no

enforcement authority with respect to" a challenged law, claims against the State must be dismissed—even if there are state agencies that could alternatively be sued. *Abbott v. Mexican Am. Legislative Caucus*, 647 S.W.3d 681, 698 (Tex. 2022) ("*MALC*"). The State has no more "enforcement authority" over S.B. 14 than it had over the "election laws" challenged in *MALC*. Administrative agencies, including HHSC and the Comptroller, pay out public funds. Indeed, Texas's executive branch is split between multiple agencies with independent authority. *See In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022) (orig. proceeding). Allowing suits like this one to proceed against "the State of Texas" would ignore those distinctions and be unworkable.

Because the State does not enforce S.B. 14, precedent similarly precludes plaintiffs' efforts to establish standing to sue the State. *MALC*, 647 S.W.3d at 698. In arguing to the contrary, plaintiffs theorize (at 55) that the State "enforces" S.B. 14's prohibitions on use of public funds to pay for the prohibited procedures.

That theory fails for at least two reasons. *First*, plaintiffs' argument is just another way of saying that the State enforces the law because it is the State's law—an argument that this Court has soundly rejected. *Id.* at 698-99; *accord In re Turner*, 627 S.W.3d 6, 658 (Tex. 2021) (noting that it is typically "the Comptroller [who] is in charge of disbursing appropriated funds"). *Second*, as defendants have explained, and plaintiffs do not rebut, plaintiffs have not offered any evidence that they are injured by S.B. 14's funding prohibitions. *See* Appellants' BOM 50-52; *infra* at 23. The injunction must be vacated as to the State.

2. Sovereign immunity bars claims against the Attorney General.

This Court's sovereign-immunity precedent also precludes plaintiffs from suing the Attorney General in his official capacity. Plaintiffs do not contend that the Attorney General has acted *ultra vires*. That theory would fail for the reasons defendants have discussed (at 46). The Court has held that an individual government official like the Attorney General does not act *ultra vires* by complying with an allegedly unconstitutional law. *See Patel*, 469 S.W.3d at 77. It has never said that the waiver of sovereign immunity found in the Uniform Declaratory Judgments Act ("UDJA"), which the Court found to exist because the Act "requires that the relevant *governmental entities* be made parties," *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 & n.6 (Tex. 2009) (emphasis added), extends to claims against individual state officials. In arguing to the contrary, plaintiffs suggest (at 54) that their claims against the Attorney General are purely duplicative of their UDJA claims against the agency. If so, then the trial court erred in issuing a broader-than-necessary injunction, which should be narrowed.

3. The physician and organizational plaintiffs have failed to show standing to sue on behalf of their patients or members.

In addition to suing the wrong defendants, plaintiffs' response demonstrates why the physician and organizational plaintiffs are also not the right plaintiffs for many of the claims they assert. Although defendants have not disputed that the physician plaintiffs have standing to pursue their own due-course claims, they cannot also pursue claims on behalf of their patients. Appellants' BOM 47-48. To support third-party standing for physicians, plaintiffs rely (at 57) on *Kowalski v. Tesmer*, 543

U.S. 125 (2004). But they point to no case rebutting defendants' assertion that this Court has never adopted the third-party standing doctrine from federal law.

The organizations also failed to establish associational standing. As defendants have pointed out (at 49), "an injury in law is not an injury in fact," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021), so a "shared legal injury" cannot "create[] standing." *Contra* Appellees' BOM 58. PFLAG and GLMA are thus wrong (at 58) that participation by individual members is not necessary because all their members would allege the same legal injury: alleged violations of their constitutional rights. 6.CR.1718; *contra* Appellees' BOM 58. Moreover, as to PFLAG, the participation of individual members is necessary to fashion the relief from enforcement that, by its nature, must run through physicians; members of PFLAG would need to identify the relevant treating physicians to obtain an injunction covering enforcement against them. *See infra* at 25-26. As to physicians who are members of GLMA, an occupational liberty claim would require each one to show that S.B. 14 is "so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest" as applied to his or her medical practice. *Patel*, 469 S.W.3d at 87. That is not a showing the GLMA could make on every member's behalf.

Even if the organizations had associational standing, an injunction based on associational standing properly remedies the injuries shown—and only the injuries shown. *See* Appellants' BOM 50. Because plaintiffs do not contend that every member shares an identical injury, the trial court was wrong to apply the injunction statewide, rather than limiting it to those members whose injuries were proven.

4. No plaintiff has offered evidence of injury by the prohibition on public funding.

Plaintiffs also did not establish standing to challenge the public-funding provisions (Tex. Health & Safety Code §§ 161.704-.705). As defendants have explained (at 50-52), none of the parent plaintiffs say that they have been using Medicaid or CHIP coverage to pay for now-prohibited medical procedures for their children's diagnosis of gender dysphoria. One plaintiff parent identified a potential injury based on loss of coverage through state-employee health insurance, 1.CR.106-07, but traceability and redressability are lacking because the state agency that administers that insurance is not a defendant here. *See* Appellants' BOM 51. Plaintiffs offer no response to that disconnect.

Though physicians could theoretically establish a pocketbook injury by identifying patients who would use public funds to pay for prohibited procedures but will not because of S.B. 14, thus depriving the physicians of revenue from those procedures, the physician plaintiffs made no such showing. As defendants explained (at 51-52), the evidentiary record does not establish overlap between the patients who some physicians stated are "on Medicaid," 1.CR.127-28, 179; 2.RR.178, and patients who would obtain prohibited procedures from those physicians in the absence of S.B. 14. Plaintiffs offer no contrary reading of the record.

Plaintiffs *do* counter (at 60) that "adolescent patients on Medicaid or CHIP are deprived of insurance coverage" for the prohibited procedures. But an injury that might be suffered by hypothetical patients does not give *plaintiffs* standing.

5. No plaintiff established standing to challenge S.B. 14's ban on surgical procedures.

The trial court similarly erred in enjoining enforcement of S.B. 14's prohibitions on performing gender-transitioning surgery on minors, Tex. Health & Safety Code § 702(1), (2), (4), because plaintiffs did not establish standing to challenge these provisions. Indeed, with one exception, the parent plaintiffs do not so much as allege that they *want* to obtain such surgery on their child. "Absent allegations that plaintiffs will trigger these [provisions] in the near future, they have no standing to challenge them." *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) (per curiam).

The one exception is the Noe plaintiffs, who refer to a consultation for their child who "wants to get top surgery," 1.CR.100, *i.e.* a mastectomy, but their showing also does not suffice to support the injunction entered. To start, the Noe parents pointedly will not say that they would consent to such surgery while their child is a minor. What the parents will say is that they have been "discussing [it] as a family." 1.CR.100. That is even less concrete than the "'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—[that themselves] do not support a finding of the 'actual or imminent' injury" required. *Lujan*, 504 U.S. at 564. Even if the Noes had standing to challenge S.B. 14's prohibition on mastectomies, that would not justify a statewide injunction on enforcement of S.B. 14's prohibitions on castration and other surgeries as to every other child in the State.

The physician plaintiffs cannot fill this gap. They are two endocrinologists and a psychiatrist, 1.CR.39-41, not plastic surgeons. They cannot show they are personally injured by S.B. 14's prohibition on surgeries.

B. The temporary injunction improperly extends statewide and does not maintain the status quo.

Finally, even if the Court were to conclude that it had jurisdiction and that plaintiffs established an entitlement to *some* injunction, the temporary injunction could not be properly affirmed as written. Traditional rules of equity require that a court issuing an injunction carefully tailor the relief so that it is "no more burdensome to the defendant than necessary" to remedy the plaintiff's injury. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *accord AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 530-31 (Tex. 2006); *Holubec v. Brandenberger*, 214 S.W.3d 650, 658 (Tex. App.—Austin 2006, no pet.) (an injunction is "overly broad" when it "prohibits more . . . than the evidence supports"). Here, the trial court entered an order that was neither: it applies beyond the parties before the court, and it is unnecessary to do the only thing a temporary injunction may properly do—maintain the status quo.

1. As defendants have explained (at 53-55), prohibiting state agencies from enforcing the law against non-party physicians, including the unidentified physicians the parent plaintiffs wish to use, was improper. An injunction that does not identify which physicians it protects cannot meet the requirement that an injunction "be specific in terms" and describe "the act or acts sought to be restrained." Tex. R. Civ. P. 683. And even if the organizational plaintiffs could obtain an injunction

protecting every unidentified member, *but see supra* at 22, GLMA does not claim that every physician in Texas is a member of its organization. The burden was on the plaintiffs to make the connection to any non-party physicians whose discipline would harm a plaintiff.

The parent plaintiffs' counter (at 61) that "[t]he only way" to remedy their injuries was "to enjoin the enforcement mechanisms in their entirety." If that is true, it is because *plaintiffs* failed to submit evidence of the relevant treating physicians; their temporary-injunction record includes, after all, detailed declarations and live testimony about their children's diagnoses, medical treatments, and physicians. *E.g.* 1.CR.88, 98-99, 109, 116-17; 2.RR.30-31, 148. GLMA, too, could have identified the members affected by the statute so that the trial court could issue a tailored injunction limited to those properly before the court. Plaintiffs' concerns about confidentiality (at 61) are unfounded, given the availability of sealing procedures to protect any sensitive personal information. If that were really plaintiffs' reason for not identifying the relevant physicians, plaintiffs could have sought a protective order. They never did so, proving that this confidentiality concern is a post-hoc rationalization that should not be credited.

2. In addition to being overbroad, the statewide temporary injunction is (ironically) also unnecessary for at least two reasons.

First, it was unnecessary—or at least ineffective—to alleviate the alleged injury by allowing physicians to perform prohibited procedures on the plaintiffs' children before trial. To be sure, a permanent injunction could cause physicians to disregard S.B. 14's prohibitions; at that point, disciplinary action would be permanently off the

table. But a temporary injunction still may be vacated or reversed on appeal, or not be replaced by a permanent injunction after trial, so it cannot give that same assurance. *See Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985). Even if the physician plaintiffs are willing to take the risk, plaintiffs made no showing that their non-party physicians would do the same.

Second, the temporary injunction did nothing to maintain the status quo—that is, "the last peaceable uncontested status between the[] parties." *Clint ISD v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016). Here, the status quo is that some minor patients were receiving the now-prohibited treatments; others were not. And S.B. 14 contains its own delay provision for preexisting courses of treatment. *See* Tex. Health & Safety Code § 161.703(b), (c). To the extent plaintiffs believe that accommodation is inadequate for a particular child, they could have sought relief specific to that child's treatment through an injunction on enforcement against his or her physician. But the trial court's statewide injunction is not so tailored, and as discussed above, plaintiffs put on no evidence identifying the relevant treating physicians that would allow it to be narrowed.

Plaintiffs contend (at 62) that the status quo is instead "the legal landscape *before* S.B. 14 took effect." That definition confuses the legal regime with the factual status quo, and it is the latter that is relevant here: "A temporary injunction's purpose is to preserve the status quo of *the litigation's subject matter* pending a trial on the merits." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (emphasis added). The

subject matter of this litigation is medical procedures; specifically, those performed on the parent plaintiffs' children or by the physician plaintiffs.

In re Newton, 146 S.W.3d 648 (Tex. 2004) (orig. proceeding), is in accord. There, the Court explained that the status quo was the parties' pre-litigation conduct. *Id.* at 651 (explaining that the defendant had been engaged in the challenged course of conduct "for four years"). Allowing physician plaintiffs to begin new medical procedures on additional children, which is what the trial court's statewide injunction does, itself alters the status quo. And physicians may continue preexisting courses of treatment under S.B. 14's own terms, so a temporary injunction was not warranted.

Prayer

The Court should vacate the trial court's temporary injunction, reverse the order denying Defendants-Appellants' plea to the jurisdiction, and render judgment dismissing plaintiffs' claims.

Respectfully submitted.

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