Nos. 03-22-00420-CV & 03-22-00587-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JAIME MASTERS IN HER OFFICIAL CAPACITY OF COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

Appellants,

v.

PFLAG, INC.; MIRABEL VOE, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF ANTONIO VOE, A MINOR; WANDA ROE, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF TOMMY ROE, A MINOR; ADAM BRIGGLE AND AMBER BRIGGLE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF M.B., A MINOR,

Appellees.

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

APPELLANTS' REPLY BRIEF

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Appellees' Brief ignores four points that are dispositive to the impropriety of the trial court's injunctions: (1) Texas law permits the statement made by DFPS at issue in this case; (2) DFPS is statutorily authorized to assess, prioritize and initiate investigations into child abuse, including medical abuse; (3) pubertal blockers and hormone therapy (PBHT) has the potential to impair a child mentally, emotionally and physically; and (4) the provision of medication that is capable of impairing a child physically, mentally and emotionally can, under Texas law, be investigated as potential child abuse. Courts lack jurisdiction to enjoin the State from investigating reports of potential medical abuse.

Argument

I. Appellees Fail to Identify Factual Allegations or Evidence that Demonstrate they Have Standing.

Appellees attempt to establish standing to sue by making generalized, conclusory assertions about what rights DFPS' investigations *could* impact. That cannot suffice. Appellees were required to demonstrate both individual and associational standing. They did neither. The individual Appellees have failed to dispute that they have no particularized injury, much less one that can be redressed by the trial court's injunction. And PFLAG cannot have associational standing if its members do not. Even if the individual Appellees managed to demonstrate standing, PFLAG still has not proven the other two associational standing factors.

A. Appellees Do Not Identify a Single Particularized Injury.

Appellees' Brief fails to overcome their inability to plead an injury sufficient to confer standing. A plaintiff must show an "'injury in fact,' an invasion of a legally protected interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical." *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied). They continue to argue that being at risk of, or subject to, an "unlawful investigation" is harm enough. App. Br. 47, 60. It is not. First, there is nothing unlawful about DFPS' investigations. As explained further below, DFPS is entitled to take reports, to determine whether that report raises allegations that *could* implicate current child abuse statutes, and then investigate. *See, infra*, Section IV.B.

Second, if an appellees' bare assertion, unsupported by any evidence, that an investigation was unfounded were sufficient, no investigation could ever take place. This is precisely why Appellees' assertion does *not* meet the standard for showing an "injury in fact." *In re Abbott*, 645 S.W.3d 276, 289 n. 1 (Tex. 2022) (Blacklock J. concurring).

Even assuming Appellees' claimed injury of being subject to an unlawful investigation were correct, they fail to assert facts that demonstrate the "unlawful investigation" caused a particularized injury to any of them. They broadly assert

rights to "due process," "equal protection" and "the right to consent to their child's medical care," and a "minor[s] . . .right to equality under the law." App. Br. 19, 23. Those are recitations of constitutional rights, not a description of the *particularized* injuries *Appellees* have suffered as a result of any Appellants' actions. After all, "an injury in law is not an injury in fact." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). The affidavits Appellees provided detailing DFPS's investigations, lack detail of any particular harm suffered. *See* C.R.85-103, 160-192 (Pet. Exs. 1-2, 5-8). This is likely why Appellants do not cite **even once** to their affidavits when discussing these injuries in law. App. Br. 17-25.

Indeed, Appellees effectively admit their alleged injuries are not particularized. Even when arguing they have a particularized injury, Appellees identify **only** the same broad concepts of "interference 'with [Appellees'] fundamental parental rights and other equality and due process guarantees of the Texas Constitution.'" App. Br. 25. They cite to nothing in the record that particularizes those violations to themselves. *Id.* A generalized, uniform harm is not an injury in fact sufficient to confer standing. "[The Supreme Court's] decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large." *Brown v. Todd,* 53 S.W.3d 297, 302 (Tex. 2001). In other words, without pleading facts demonstrating how they were individually harmed by alleged "unlawful

investigations," Appellees have merely brought a "lawsuit challenging the lawfulness of governmental acts," which they "lack[] standing" to do. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2011) (citing *Brown,* 53 S.W.3d at 302).

Appellees attempt to evade the particularized requirement by claiming Justice Blacklock, in the *In re Abbott* opinion, recognized they had an injury because "a mere investigation[ ] *could* chill the exercise of rights enumerated in the U.S. and Texas Constitutions." C.R.23 (quoting *Abbott*, 645 S.W.3d at 289 n. 1 (Blacklock J. concurring) (emphasis added)). But Appellees misapprehend Justice Blacklock's opinion.

First, the example Justice Blacklock gave of when an investigation may be enjoined was an instance where "DFPS opened an investigation into a parent's religious instruction of his children." *Id.* That would implicate parents' First Amendment rights, but that is in no way similar to Appellees' challenging of DFPS' opening an investigation into a potentially harmful medical decision. After all, Justice Blacklock explained that *unlike* the example he gave, this Court's injunction—forbidding DFPS from investigating the provision of PBHTs to a minor as potential child abuse—was an *improper* enjoinder of DFPS' investigatory powers. *Id.* This was because "the courts' normal role in this process is not to tell DFPS what it can and cannot investigate" and the trial court's injunction, in contrast, "amount[ed] to *one*

court ordering DFPS not even to *look into* whether it should seek orders from *another court*" *Id*. at 288-89 (emphasis in the original).

Second, Appellees claim that the investigations have "chilled" their exercise of their rights but never allege specifically how. None of Appellees' pleadings nor affidavits suggest they are withholding any alleged medically necessary treatment or have altered their conduct in any other way because of DFPS' investigations. C.R.4-80, 85-103, 160-192 (Pet. and Exs. 1-2, 5-8). "Allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 418 (2013). In sum, Justice Blacklock's footnote *distinguishing* an instance in which an investigation may chill one's exercise of their rights from the investigations challenged *in this case*, does not give Appellees standing where they have none.

B. Appellees Entirely Fail to Explain Their Basis for Standing to Bring Their APA Claim.

In attempting to claim they have standing, Appellees focus solely on injuries that would go to their *constitutional* claims and never mention why they have standing to bring their APA claim. App. Br. 17-25. "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for **each claim** that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC*, 141 S. Ct. at 2208 (emphasis added). In other words, regardless of

whether this Court finds Appellees' alleged injuries in law are sufficient, it cannot equate that to Appellees having standing to bring their APA claim. Indeed, Appellees' failure to identify a concrete injury-in-fact supporting their APA claim highlights that the only injuries they identify are injuries in law—alleged violations of their constitutional rights. But again, an injury in law is not an injury in fact. *See id.* at 2205.

Even if Appellees had explained their basis for standing to bring an APA claim, it would fail. Appellees are challenging statements made by the Governor and DFPS in this suit and, at most, suggest they have standing to do so under the APA as parents of children that require "medically necessary care" for their gender dysphoria. But the statements made by the Governor and the Commissioner that address the OAG opinion—the very statements Appellees challenge—do not implicate medically necessary care. *See* C.R.284-298; Isaac Windes, *Texas AG says trans healthcare is child abuse. Will Fort Worth schools have to report?*, Fort Worth Star-Telegram (Feb. 23, 2022), https://www.star-telegramcom/news/local/crossroads-lab/article258692l93.html. The OAG opinion, in fact, explicitly states, "This opinion **does not address or apply to medically necessary procedures**." C.R.285.

And, even if the Appellees were to claim there is simply a disagreement between themselves and the OAG as to what is "medically necessary," another problem

arises: Appellees have never actually stated what care—medically necessary or not—their children are currently undergoing.[1] The OAG opinion provides a list of procedures and treatments it is meant to address[2] and under what circumstances. C.R.284.

Neither Appellees' affidavits, their testimony, nor their briefing ever states they are currently giving their children any of those specified treatments or will do so in the future. C.R.4-80, 85-103, 160-192; *see generally* App. Br. In fact, they take pains to remain as vague as possible, stating only that they are "*alleged* to have sought medically necessary care for their children." App. Br. 24 (emphasis added). When asked at the hearing what medications or treatment their children were currently receiving, Appellees asserted the Fifth Amendment and refused to answer. R.R.56:5-58:6; 153:4-154:16. As this Court has held, a negative inference must be drawn when the assertion is made in regards to "probative evidence as to the elements of the [plaintiff's] claims." *State for Prot. of P. B. v. V. T.*, 575 S.W.3d 921, 928 (Tex. App.—

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[1] While they do vaguely indicate that their children have been prescribed some sort of treatment, they do not address whether they are obtained and are currently providing those prescriptions to their children. C.R.85-103, 160-192.

[2] These are (1) sterilization through castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; (2) mastectomies; (3) removing from children otherwise healthy or non-diseased body part or tissue; (4) puberty-suppression or puberty-blocking drugs; (5) supraphysiologic doses of testosterone to females; and (6) supraphysiologic doses of estrogen to males. C.R.284.

Austin 2019, no pet.). Thus, the necessary inference is that Appellees' are either providing or intend to provide some medical procedure that is *not* medically necessary or that they are providing no treatment at all. *See id.* The trial court erred because it *did not* make these necessary inferences and, instead, simply assumed Appellees had standing to bring their APA claim.

Since Appellees did not provide the factual assertions they needed to avail themselves of Article III standing in this case, their claims, including their APA claim, must fail.

C. The Generalized "Interference in Parental Rights" Injury that Appellees Claim Has Not Actually Occurred Nor is it Imminently Likely to Occur; this Suit is Not Ripe.

A claim must be ripe for this Court to have jurisdiction, which requires that a plaintiff show a concrete, particularized injury has occurred or is likely to occur. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000). Although neither requirement can be disregarded simply to allow a general challenge to a State agency's acts, this is exactly what Appellees ask this Court to do. Appellees assert that the ripeness inquiry into their *individual* claims is irrelevant because they "do not challenge any individualized determinations about whether a particular parent has engaged in child abuse; they challenge the Abbott Directive and DFPS Rule's re-definition of child abuse and mandated investigations." App. Br. 34.

But it is clear that a plaintiff must demonstrate that he has or will suffer a particularized injury because, where a plaintiff is simply "challenging the lawfulness of governmental acts," they "lack[ ] standing." *Andrade*, 345 S.W.3d at 7. Appellees effectively admit they are suing "solely as citizens who insist that the government follow the law," which belies a finding that this suit is ripe. *Id.*

Appellees try to sidestep the application of *Gates* to their claims by stating it "involved a challenge to the process and outcome of a *legally authorized* investigation," and their suit does not. App. Br. 37 (citing *Gates v. Tex. Dep't of Family & Protective Services*, No. 03-11-00363-CV, 2013 WL 4487534 (Tex. App.—Austin 2013, pet. denied)). That is no distinction at all.

First, the *Gates* plaintiff did, in fact, argue the investigation was unauthorized. *See Gates*, 2013 WL 4487534, at *4. Second, *Gates* did not turn on the nature of DFPS' investigation and how or when it was "unlawful." *See id.* at *4-5. Instead, the ripeness inquiry turned on what the *plaintiff's* particularized, concrete injury was as a result of the "unlawful" investigation. *Id.* The *Gates* plaintiff alleged, just as Appellees do here, that DFPS' "unlawful investigation" violated the APA, due process, equal protection, the "right to familial integrity" and was ultra vires. *Id.* at *4. But because the plaintiff did not present facts or evidence showing that "[DFPS'] challenged actions had 'legally affected' her relationship with her children or that

she had been precluded" from taking particular actions in her private life, the suit was not ripe. *Id.* at *5 (citing *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1125–26 (3rd Cir. 1997) ("Whatever disruption or disintegration of family life the [parent] may have suffered as a result of [a] child abuse investigation does not, in and of itself, constitute a constitutional deprivation.")). So too here.

Gates makes clear that an "unlawful investigation," whatever that claim is based on, does not affect parental rights until there is a *legal* effect on those rights. Other than making the conclusory assertion that DFPS' "unlawful investigation" (App. Br. 37) interfered with their rights as parents—or "familial integrity" as the *Gates* plaintiff phrased it—Appellees' suit lacks the very same factual allegations that made the *Gates* plaintiff's claim unripe: Appellees cannot allege that they "lost[t] custody or visitation of [their] children or otherwise ha[d] [their] parental rights affected in any way." *Id.* at *4. Thus, Appellees have not been injured and their suit is not ripe until their injury is imminent or has already occurred.

D. The Briggle and Roe Families' Claims are Moot as a Result of their Investigations Being Closed.

Appellees' Brief demonstrates a fundamental misunderstanding of the mootness doctrine. DFPS has closed its investigations into Appellees Briggle and Roe. Since Appellees cannot dispute this fact, they argue that another investigation may occur in the future. App. Br. 40. That does not change the mootness of their challenges to

DFPS's past investigation; and the possibility of a future investigation is too speculative to support standing for a new claim. *Clapper*, 568 U.S. at 401. Roe and Briggle do not allege DFPS has stated or done anything to suggest they face an imminent threat of being reinvestigated for the claims they were already investigated for—giving their children PBHT. App. Br. 39-41. Indeed, DFPS has provided this Court with evidence that they will not be. *See* C.R.274-79 (Black Dec); R.R.221:8-15 (Talbert testimony); *see also Tex. State Bd. of Veterinary Med. Examiners v. Jefferson*, No. 03-14-00774-CV, 2016 WL 768778, at *5 (Tex. App.—Austin 2016, no pet.) (noting, when finding case was moot, the significance that counsel for agency defendant assured the Court that the agency would not institute new disciplinary proceedings against the plaintiff for the same conduct, absent some material change in circumstances).

Given this, it was Appellees' burden to "to offer evidence disputing the [Defendants'] evidence." *Democratic Sch. Research, Inc. v. Rock*, 608 S.W.3d 290, 305 (Tex. App.—Houston 2020, no pet.). Appellees did not (*see* App. Br. 39-41), choosing instead to claim their mere disbelief of that evidence and that there's "no guarantee" they won't be investigated at some unspecified point in the future. App. Br. 41. In essence, Appellees' argument is that, while they have no evidence that another investigation is "*actual* or *imminent*," the fact that future injury is not

"guaranteed" to never occur is what gives them standing. *Spokeo, Inc. v. Robbins*, 136 S.Ct. 1540, 1548 (2016). That is not the standard for demonstrating injury; that is "conjectural," "hypothetical" and "remote." *Id*. None of those types of injuries suffice.

What Roe and Briggle were required to do, but did not, was point to evidence showing there is a *current*, *imminent* threat of an additional investigation against *them*, specifically. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50 (2010). Instead, they ask this Court to engage in pure speculation as to when, and under what circumstances, a future investigation could occur. *See* App. Br. 39-41. Speculation does not resolve a mootness problem because courts lack "power to decide hypothetical or contingent situations." *Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 324 (Tex. App.—Houston 2009, pet. denied). And the fact that investigations occurred in the past does not change that. *See, e.g., Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2000) (past exposure to illegal conduct does not present a controversy conferring jurisdiction if unaccompanied by continuing, present, adverse effects).

E. PFLAG Lacks Associational Standing.

PFLAG's insistence that it can stand in the place of parents who may be investigated for child abuse does not suffice for associational standing.

First, as explained above, Appellees cannot demonstrate their identified members have standing to sue. *See, supra*, Section I.A. Second, PFLAG fails to explain how the interests that it seeks to protect—prohibiting specific types of child abuse investigations—are germane to its purpose of "creat[ing] a caring, just, and affirming world for LGBTQ+ people." *PFLAG*, https://pflag.org/ (last visited Oct. 4, 2022). Instead, they rely on the unsupported proposition that they simply do not need to show a "specific" purpose at all and entirely ignore the Texas Supreme Court's requirement that their purpose "'relate to the interest by which its members would have standing to sue in their own right.'" *Abbott v. Mexican Am. Legis. Caucus*, 647 S.W.3d 681, 694 (Tex. 2022) (quoting *Save Our Springs All., Inc.*, 304 S.W.3d at 886).

Finally, Appellees' arguments as to why individual member participation is not required actually belies such a conclusion. Appellees insist the few PFLAG members they name can demonstrate the "violation of law experienced by other Texas PFLAG members with transgender children." App. Br. 30. But the content of the statements at issue in this case do not reference every parent with a transgender child. Instead, those statements reference certain irreversible medical treatments administered to minor children. Whether those children identify as "transgender" or not would not determine who may be subject to a child abuse investigation. *See*

C.R.284-298; *see also* Windes article, *supra*, pg.8; R.R.231:18-25 (assigning "priority none" to the 12th case where it was not specifically reported that the transgender "child or the youth was actually on any kind of hormones or blockers[.]").

Even for those parents the statements may implicate—those investigated for providing non-medically necessary treatment to their minor children—individual participation is still a necessity. Not every report and investigation will be precisely the same. Thus, the lawfully appropriate *results* of those reports or investigations will differ. Because of this, evidence and facts regarding those individual investigations—and the individuals involved—will necessarily be required. Appellees' Brief does not provide any basis to reach a different conclusion.

F. Appellees Fail to Explain How an Effectively Statewide Injunction Does Not Violate the *In re Abbott* Opinion.

Appellees dispute that an injunction as to PFLAG is overbroad by asserting that "members of PFLAG" are somehow different from "all Texas citizens." App. Br. 65-66. But their own briefing undercuts this assertion. Appellees expressly acknowledge that they read the injunction to "extend[] to members who join after the date on which the order was entered." *Id.* at 67. Presumably, that would mean that *any Texan citizen* can, at any time in the future, claim to be *a member of PFLAG* whenever they come under an investigation. In other words, the injunction at issue applies, at any given moment, to "'any and all' nonparties." *Abbott*, 645 S.W.3d at

283.

That is a statewide injunction. *See id.*

The Supreme Court has already forbidden such relief in this exact context. *Id.* In their Response, Appellees attempt to point to other cases claiming them to be examples of when a "statewide" injunction was upheld (though, none of the cases mention the injunction being "statewide" or challenge it on that basis) but those cases are inapposite. None of those cases involved an injunction against a group of members that was so widely defined that any citizen of Texas could avail themselves of the injunction at any given moment in the lawsuit.[3] *In re Abbott* plainly controls here and the injunction provided to PFLAG is impermissible.

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[3] Appellees first cite to *Tex. Health & Human Services Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 619 (Tex. App.—Austin 2013, no pet.). That injunction was limited only to existing "participants in the state's Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program," a readily determinable number of people. *Id.* Indeed, this Court actually *vacated* the portions of the injunction order in that case that could have been seen as having a statewide effect. *Id.* at 629-30. Appellees' second case, *Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 715 (Tex. App.—Austin 2009, no pet.), is even less relevant. There, the plaintiff, Entertainment, sought a very narrow injunction so that the Comptroller could not "collect and remit tax on the sales of products sold through school fundraising activities" *by Entertainment. Id.* at 714-716. The plaintiff did not seek relief on behalf of third parties and the trial court did not construct its injunction to contemplate such a group. *Id.*

II. Appellees' Brief Fails to Overcome the Commissioner's Sovereign Immunity Because DFPS Has Always Had the Authority to Decide Whether or Not to Investigate a Report of a Child being Given PBHT.

The parties do not dispute the base point: DFPS is authorized to investigate reports of child abuse. Appellees' Brief fails to explain the one issue that their claims against DFPS hinge on: whether Texas law prevents DFPS from receiving a report that a child is taking PBHT and determining that such a report requires investigation.

Appellees attempt to maintain their claims despite this fact by suggesting that DFPS did not investigate a report of a child being given PBHT until February 2022. App. Br. 23. There are two problems. First, that says nothing about DFPS's statutory authority because DFPS *did not receive any reports* of a child being given PBHTs before February 2022. R.R.228:13–17. So the absence of such investigations is immaterial. Appellees do not dispute this point nor offer evidence to contradict it. That leads to the second problem: the fact that DFPS receives a report of child abuse based on a new type of circumstance does not mean DFPS' determination that the report alleges potential child abuse is unlawful.

This, like many of Appellees' arguments, can be illustrated by replacing reference to gender dysphoric children or PBHT with any other form of child abuse. Say that DFPS had never received a report of a parent breaking a child's arm until February

2022. Surely the fact that DFPS thereafter investigated that February 2022 report would not lead this Court to hold that a "new" or "expanded" definition of child abuse had been created. DFPS would obviously have the authority and discretion to determine whether the allegations are true and, if so, whether breaking one's child's arm constitutes abuse.

Neither, for that matter, is jurisdiction conferred through Appellees' contention that giving a child PBHT is sometimes *not* child abuse. To be sure; as the Attorney General's opinion explains, sometimes PBHT treatment is medically necessary. But it is DFPS's job to determine whether that is so in any given case. Appellees cannot unequivocally state PBHT are always, at all times, for every gender dysphoric child, necessary medical treatment.[4] Nor can they claim it is impossible for PBHT to cause physical or mental impairment that harms a child.[5] *See* C.R.316-350, 360-426 (Expert

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[4] Of course, they continue to laconically state PBHTs are "safe and effective." App. Br. 3. It's unclear where this conclusory statement with no support comes from since even the American Academy of Pediatrics and the international Endocrine Society—sources Appellees cite—have described the limited research on the effects of the drugs on trans youth as "low-quality." Twohey, Megan, *They Paused Puberty, but Is There a Cost?* NY Times, https://nyti.ms/3St9uE0.

[5] One need not even rely on any evidence presented by Appellants on this score. All this Court needs to do is take judicial notice of the scores of news articles and personal testimony that detail the horrific, permanent results that come with providing young, nonconsenting minors PBHTs. *See* Reed, Jamie, *I Thought I was Saving Trans Kids. Now I'm Blowing the Whistle*, The Free Press, https://bit.ly/3ZeUN9r (article written by a case manager with The Washington University Transgender Center at St. Louis Children's Hospital explaining why she had to leave the profession and noting "hormone prescriptions. . . can have life-altering consequences—including sterility," and "**how the American medical system is treating these [gender dysphoric minor]**

Reports of Dr. Laidlaw and Dr. Cantor); R.R.157:4-162:19 (Dr. Cantor testimony); *see also* C.R.122 (Dr. Brady Expert Report) at ¶71 ("[P]roceeding from pubertal suppression to gender-affirming **can impair** fertility[.]"). Indeed, reading the claims in their Petition as true, this Court *must* find that it's possible for PBHT to impair a child. *See* C.R.26 (Petition) ¶ 65 (admitting that, at the very least, there are "partly irreversible effects and side effects" to taking PBHT as a child). And, because that is so, it necessarily follows that giving a child PBHT *could*, in some cases, constitute child abuse; DFPS is authorized to investigate such a report. *See* Tex. Fam. Code § 261.001(1)(A) -(B), (D). DFPS has the statutory duty to make that determination.

Finally, Appellees suggest that prioritizing reported use of PBHT on children as P2 is somehow beyond its statutory authority. App. Br. 59-60. They wholly ignore that DFPS *is* statutorily authorized to prioritize reports of abuse, *see* Tex. Fam. Code § 261.301(d), and it does so based on the immediacy of the risk and the severity of the possible harm to the child. C.R.276 (Black Dec.) at ¶14; R.R.231-18-232:19 (Talbert testimony). DFPS determined that the claims in the reports at issue here, a

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patients is the opposite of the promise we make to 'do no harm.' Instead, we are permanently harming the vulnerable patients in our care."); *see also* Twohey article (n. 2) (referencing expert opinions that "it's **increasingly clear** that [PBHTs] are associated with deficits in bone development," and "[s]ex hormones have been shown to affect social and problem-solving skills,"); *see also* Video Testimonials of Detransitioners , Twitter, (https://bit.ly/3XZ6m3w) (9 victims testifying about their experience in being given PBHT as minors to treat their gender dysphoria and the long-term irreversible consequences they suffered).

child receiving medication that is potentially harmful, but not emergently so, would be a P2 assignment because the other two possible assignments—P1 for an immediate risk of abuse or neglect that could result in death or serious harm; PN for no abuse or neglect and therefore no safety threat to the child—would have been inappropriate. C.R.276-77 (Black Dec) at ¶¶ 15–17, 21; R.R.231-18-232:19 (Talbert testimony). Appellees' Brief does not point to a single statute, factual allegation or piece of evidence that demonstrates DFPS acted outside its authority by prioritizing these particular reports of child abuse, as a category, as P2s. And they cannot. The current law places **no** such limitation on DFPS' authority to prioritize its own investigations. *See* Tex. Fam. Code § 261.301(d).[6]

In sum, (1) DFPS has, and always has had, the authority to assess, prioritize and investigate reports of child abuse; (2) Texas law authorizes DFPS to investigate claims that a child has been physically and/or mentally impaired; and (3) it is possible for a child to be physically, mentally or emotionally impaired by taking PBHT. That

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[6] Appellees appear to believe this statute requires DFPS to pass a formal rule each time it designates an incoming report of a unique type of child abuse as a particular priority. C.R.44. This is an obviously flawed and nonsensical reading of this statute. DFPS, by rule, must *assign* priorities, which it has already done by assigning (1) "concern[s] children who appear to face an immediate risk of abuse or neglect that could result in *death or serious harm*" as Priority 1 cases; (2) "all other reports of abuse or neglect that are not assigned a Priority I" as Priority II cases. 40 Tex. Admin. Code § 707.485. The statute in no way mandates that, if it receives a report of a new type of child abuse—which, in itself, is impossible to determine when that happens since every report is unique and circumstance-dependent—DFPS must engage in lengthy APA proceedings before it can prioritize and investigate that report.

is precisely why the DFPS Commissioner is entitled to sovereign immunity from all of Appellees' claims.

APA claim. DFPS is immune from Appellees' APA claim because, as explained above, Appellees' allegations amount to no more than DFPS' use of discretion to determine whether a report alleges potential child abuse under current law. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 123 (2015) ("executive officials necessarily interpret the laws they enforce"). DFPS stating it would "follow the law" was no more than a statement "regarding only the internal management or organization of a state agency and [did] not affect[ ] private rights or procedure." Tex. Gov't Code § 2001.003(6). There is no private right to be free from an investigation of child abuse or to engage in child abuse, even if one rephrases the right as one of familial integrity. *See, e.g., Croft*, 103 F.3d at 1125 ("The right to familial integrity . . . does not include a right to remain free from child abuse investigations."). And procedure did not change because, as explained, DFPS has *always* had the authority to determine which reports to investigate as potential child abuse.

Appellees' attempt to re-brand the right being implicated as the "right to provide medically necessary care" to their children is flawed. App. Br. 20. First, assuming they provide any medically necessary care to their children at all (*but see, supra,* Section I.B), there is no evidence that the possibility of a DFPS investigation

impedes Appellees' ability to continue obtaining medically necessary treatment for their child. *See also, supra* Section I.A (explaining standing requires each individual plaintiff to have suffered a particularized injury). Neither would the challenged "rule," which is based on the Attorney General's opinion, impede medically necessary treatments. C.R.284-298. If Appellees' children's medical treatments are medically necessary, they are outside the definition of "child abuse" that Appellees challenge here.

Second, it defies logic and Texas law to find that the Governor's or DFPS' statements that DFPS investigate claims of children taking PBHT as potential medical abuse "radically expands DFPS' authority to interfere with parents' decision-making[.]" App. Br 63. DFPS was already statutorily permitted to investigate medical abuse (*see, supra*), which means it has *always* had the authority to conduct investigations that could potentially implicate the "private medical decision of families." *Id*. In other words, any impact on a private right to make medical decisions for one's children cannot be traced to the Governor or DFPS statement but, if anything at all, to the current child abuse statutes, which Appellees do not challenge. Therefore, the only right Appellees' plausibly allege DFPS' statement to have "expanded" its authority over is a claimed right to give their children PBHT under any circumstance. No such private right exists.

Third, and finally, if Appellees' theory is correct, that would mean *every time* DFPS receives and investigates a report of a parent giving their child any medication, the parent could halt the investigation by asserting a right to provide medically necessary care to their child. Under that rubric, DFPS also could not investigate a report that medical treatment is *not* being provided to a child. After all, *not* providing a particular medical treatment—for whatever reason—is still a medical decision. But no one in this suit alleges, or could plausibly allege, that DFPS' statutory authority to investigate medical neglect (40 Tex. Admin. Code § 707.469) is unlawful because it impedes a parent's right to make medical decisions for their child. In fact, the medical neglect statute allows DFPS to continue to investigate a claim, and seek a court order, of medical neglect **even** where a parent is claiming a religious exception. 40 Tex. Admin. Code § 707.469 (b)(2)(C). If parents cannot assert violation of a specific First Amendment right to avoid investigation of medical *neglect*, it defies logic to hold that a parent can avoid investigation of medical *abuse* by claiming a general violation of the right to give one's child medical care.

Ultra vires claim. Appellees' ultra vires claim similarly fails as a result of what DFPS is statutorily authorized to do. If the Commissioner is statutorily authorized to exercise discretion when determining whether to investigate a particular type of report as potential child abuse, DFPS did not act outside the law in deciding to do so

in this case. Even if the Commissioner were wrong that the child abuse statutes allow DFPS to investigate a report of providing PBHTs to a child as potential child abuse, that does not abrogate sovereign immunity to pursue an ultra vires claim. So long as a mistaken conclusion is not made while "exceed[ing] the scope of [an agency's] authority," it is not *ultra vires*. *Schroeder v. Escalera Ranch Owners' Ass'n, Inc.*, 646 S.W.3d 329, 335 (Tex. 2022). To be acting *ultra vires*, DFPS would have to be unauthorized to assess reports of child abuse and unauthorized to determine whether or not to investigation was required and, clearly, it is not unauthorized to do either.

Constitutional Claims. Based on what is undisputed about DFPS' authority, Appellees' constitutional claims are not viable. DFPS did not violate the separation of powers by using its statutory discretion to determine what allegations constitute *potential* child abuse under Texas law. Such is within DFPS' authority. *Perez*, 575 U.S. at 123 ("executive officials necessarily interpret the laws they enforce"). DFPS did not violate Appellees' substantive due process rights because DFPS' statutorily-authorized decision to investigate them—even if it caused "disruption or disintegration of family life[,]"—"[did] not, in and of itself, constitute a constitutional deprivation." *Croft,* 103 F.3d at 1125–26. This is because the interest in familial integrity "is not absolute." *Id.* The "liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children . . .

particularly where the children need to be protected from their own parents." *Id.*

After acknowledging that they can point to nothing that suggests the OAG, the Governor, or DFPS explicitly discuss transgender minors in their statements, Appellees attempt to resuscitate their equal protection claim by claiming—without cited authority—that "the viability of an equal protection claim does not turn on whether Appellants referenced a protected class by name." App. Br. 54. This demonstrates a fundamental misunderstanding of Appellants' argument and the law. Equal protection does, in fact, turn on whether the "[l]aw[ ] . . . **explicitly** distinguish[es] between individuals[.]" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Where the law is "ostensibly neutral," strict scrutiny does not apply unless the law has a "'disproportionately adverse effect' that 'can be traced to a discriminatory purpose.'" *Lewis v. Ascension Par. Sch. Bd.,* 662 F.3d 343 (5th Cir. 2011) (per curiam).

Appellees provide no explanation as to what the disproportionate adverse effect is on transgender children versus any other child being given PBHTs that are not medically necessary. Even if they could, it's clear any adverse effect was not the result of a discriminatory purpose. Appellants' statements make a distinction not based on transgender status but between children who may take PBHT for other

medical conditions[7] from children given PBHT as an off-label treatment for the psychological condition of gender dysphoria. DFPS rationally distinguishes between the two circumstances. As any medical professional—Appellees' experts included—would agree, "just because a drug has been approved for one class of patients doesn't mean it's safe for another." *See* Twohey article (n. 2). The Equal Protection Clause, therefore, is not implicated because it "does not require classes of people **different in fact** or opinion to be treated in law as though they were the same." *Cunningham v. Beavers*, 858 F.2d 269, 272 (5th Cir. 1988) (citing *Plyler v. Doe,* 457 U.S. 202, 217 (1982)) (emphasis added).

As to their void for vagueness challenge, Appellees acknowledge their challenge is *facial* only. App. Br. 63 ("Appellees' claims challenge Appellants' authority to institute the DFPS Rule, not any individualized determinations about whether a particular parent has engaged in child abuse."). But they do not prove, or even allege, the challenged statements are "impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Nor can they. The statements would not be vague, at the very least, to parents who are

[7] For example, a child much younger than the normal age to begin puberty that has been diagnosed with the *endocrine* condition—central precocious puberty—which requires delaying puberty until the normal age of onset. *See Precocious Puberty*, Stanford Medicine Children's Health, https://bit.ly/3KK5Cwb.

subjecting their children to "elective [i.e. *not* medically necessary] procedures for gender transitioning" (C.R.258 (Governor's Letter)) such would be "conduct that is clearly proscribed." *Flipside, Hoffman Estates, Inc.*, 455 U.S. at 495. If a child is not diagnosed with gender dysphoria, for example, even Appellees agree that no medical treatment is necessary. R.R.116:25-117:5.

III. Appellants' Evidence is Properly Before this Court.

Appellees urge this Court to ignore relevant written evidence because the trial court (improperly) ruled them inadmissible at the temporary injunction hearing. *See* Appellees' Brief (App. Br.) 15-16. Appellees' argument ignores that Appellants filed a written response to Appellees' motion. C.R.215-49. That response contained the same evidence as exhibits (*id.*) and Appellees never challenged those exhibits nor moved to strike them from the record. *See, e.g., Strother v. City of Rockwall,* 358 S.W.3d 462, 468–69 (Tex. App.—Dallas 2012, no pet.) (holding that objections to evidence contained in written motion are waived by the failure to obtain a ruling).

"[W]ith any ruling" an appellate court's review "generally extends to the evidence that was before the court when it ruled, absent an indication that the court did not consider certain evidence for purposes of that ruling." *Plotkin v. Joekel,* 304 S.W.3d 455, 486 (Tex. App.—Houston 2009, pet. denied). Here, there is no such indication. The trial court's order granting a preliminary injunction makes no

mention of disregarding Appellants' briefing or their exhibits, and the trial court did not state it would disregard the attached exhibits during the hearing. C.R.546-550; 2C.R.3-8.

Even if this Court were to ignore Appellants' written evidence properly before it, there is no reason for it to ignore that same evidence as was provided via testimony at the hearing by Marta Talbert and Dr. James Cantor.[8] Neither witness was prevented from testifying and both provided the evidence needed for this Court to make its determination. The record, with or without the affidavits Appellees challenge, shows (1) that PBHT are not proven to be safe and reversible, but rather, are known to alter a child physically, mentally and emotionally; and (2) that DFPS acted within its statutory authority to investigate claims that may meet the current legal definition of child abuse. R.R.157:5-162:19 (Dr. Cantor testimony); R.R.171:5-14 (trial court stating it was going to "accept [Dr. Cantor] as a qualified witness and allow testimony from him"); R.R.215:21-235:21, 257:7-263:15 (Talbert testimony).

Appellees provided no evidence—written or testimonial—to rebut these two points despite the fact that it was their burden to do so. *See, e.g. Perry v. Kroger Stores Store No. 119*, 741 S.W.2d 533, 535 (Tex. App.—Dallas 1987, no writ) ("We are

[8] Where this brief cites to affidavits by Stephen Black, Dr. Cantor or Dr. Laidlaw, it also cites to the same information provided via admitted testimony at the hearing.

entitled to accept as true statements in appellant's brief not challenged by appellee."). Thus, Appellees' arguments as to Appellants' evidence attempts to place a burden on Appellants that does not exist.

CONCLUSION

For the reasons provided in DFPS' principal brief and this Reply in Support, DFPS respectfully requests that the Court vacate the preliminary injunction, reverse the judgment of the district court, and remand with instructions to dismiss Appellees' claims for lack of jurisdiction.

Respectfully Submitted.

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