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03-22-00420-cv
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THIRD COURT OF APPEALS
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No. 03-22-00420-CV & No. 03-22-00587-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

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3rd COURT OF APPEALS
AUSTIN, TEXAS
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JEFFREY D. KYLE
Clerk

JAIME MASTERS, in her official capacity as Commissioner of the Texas 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, individual 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 of Travis County, Texas
Cause No. D-1-GN-22-002569, Hon. Amy Clark Meachum

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.1,[1] the following is a complete list of all parties to the trial court's order, and the names and addresses of all trial and appellate counsel:

Appellants:	Jaime Masters,[2] in her official capacity as Commissioner of the Texas Department of Family and Protective Services; Texas Department of Family and Protective Services
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Appellees:	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;

[1] Appellants' Brief does not include the identities of parties and counsel, as required by Tex. R. App. P. 38.1.

[2] Commissioner Masters' tenure as DFPS Commissioner ended on November 28, 2022. Effective January 2, 2023, Stephanie Muth assumed the role of DFPS Commissioner.

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RECORD REFERENCES & ABBREVIATIONS

CR	Clerk's Record[3]
RR	Reporter's Record
1SCR	Supplemental Clerk's Record filed October 3, 2022[4]
2SCR	Supplemental Clerk's Record filed October 4, 2022[5]
3SCR	Supplemental Clerk's Record filed November 8, 2022
SRR	Supplemental Reporter's Record
"APA"	Texas Administrative Procedure Act
"Abbott's Directive"	Directive issued by Greg Abbott on February 22, 2022 directing DFPS to investigate reports of "gender transitioning procedures" as "child abuse" and ordering all licensed professionals to report such "abuse"
"Appellants"	Commissioner Masters and DFPS
"Appellee Families"	Appellees Mirabel Voe, Antonio Voe, Wanda Roe, Tommy Roe, Adam Briggle,

[3] Citations to the Clerk's Record herein appear in the form [Volume] CR [Page(s)] and reflect the pagination that appears in the footer of the Clerk's Record. Beginning with page 493, the pagination in the Clerk's Record is not consecutive and does not match the pagination identified in the index thereto.

[4] Citations to the Supplemental Clerk's Records herein appear in the form [Volume] SCR [Page(s)] and reflect the pagination that appears in the footer of the Supplemental Clerk's Records. Each of the three Supplemental Clerk's Records is labeled as Volume 1 on its cover page. For citation purposes, Appellees have assigned volume numbers, as indicated here. Additionally, the pagination in Volume 1 of the Supplemental Clerk's Record is not consecutive and does not match the pagination identified in the index thereto.

[5] Volume 2 of the Supplemental Clerk's record has no pagination in the footer. Therefore, citations to 2SCR herein refer to the pdf page numbers.

	Amber Briggle, and M.B. (also referred to herein as "Individual Appellees")
"Appellee Parents"	Appellees Mirabel Voe, Wanda Roe, Adam Briggle, and Amber Briggle
"Appellees"	Individual Appellees and PFLAG, Inc.
"Commissioner"	Appellant Commissioner Jaime Masters
"DFPS"	Appellant Texas Department of Family and Protective Services
"DFPS Rule"	The instant challenged rule announced in DFPS's statement implementing Abbott's Directive and DFPS's subsequent implementation thereof
"District Court"	District Court of Travis County, Texas, 201st Judicial District, Hon. Amy Clark Meachum presiding
"Doe **Case"**	Cause No. D-1-GN-22-000977 in the District Court of Travis County, Texas, 353rd Judicial District
"Governor"	Governor Greg Abbott
"Individual Appellees"	Appellees Mirabel Voe, Antonio Voe, Wanda Roe, Tommy Roe, Adam Briggle, Amber Briggle, and M.B. (also referred to herein as "Appellee Families")
"Minor Appellees"	Antonio Voe, Tommy Roe, and M.B.
"Paxton's Opinion"	Attorney General Ken Paxton's Opinion No. KP-0401 opining that certain procedures could constitute "abuse"
"Petition"	Plaintiffs' Original Petition filed on June 8, 2022, in the District Court of Travis County, Texas

"PFLAG Injunction"	Order Granting Plaintiffs PFLAG's and Briggle's Application for Temporary Injunction issued by the District Court on September 16, 2022
"Rule 29.3"	Texas Rule of Appellate Procedure 29.3
"Temporary Injunctions"	Voe Injunction and PFLAG Injunction
"Voe Injunction"	Order Granting Plaintiffs Voes' and Roes' Application for Temporary Injunction issued by the District Court on July 8, 2022

STATEMENT OF THE CASE

Nature of the Case:	Action by Appellees seeking declaratory and injunctive relief against Appellants for violations of the APA and Texas Constitution and for engaging in ultra vires actions.
Course of Proceedings:	Appellees seek declaratory and injunctive relief, alleging, among other things, that Governor Abbott's Directive to DFPS issued on February 22, 2022 and DFPS's subsequent implementation thereof violated the APA and the Texas Constitution and were ultra vires. On July 6, 2022, the District Court held an evidentiary hearing on Appellees' Application for Temporary Injunction against Commissioner Masters and DFPS on Appellees' claims arising under the APA. 2RR. At that hearing, Appellees presented the District Court with evidence of their probable right to relief sought and of irreparable harm Appellees would suffer were the injunction not entered. On July 8, 2022, the District Court granted the Voe and Roe Appellees' Application for Temporary Injunction. 1CR546-50. The District Court subsequently granted the Briggle and PFLAG Appellees' Application for Temporary Injunction on September 16, 2022. 2SCR3-8. Appellants filed interlocutory appeals challenging both Temporary Injunctions, 1CR535-37; 2SCR9-11, which this Court consolidated. Appellees separately moved this Court to reinstate each of the Temporary Injunctions under Rule 29.3. On September 20, 2022, this Court issued a Rule 29.3 Order reinstating the Voe Injunction. On September 26, 2022, this Court issued an order temporarily reinstating the PFLAG Injunction to preserve the status quo while the Court considers PFLAG's

	and the Briggles' Rule 29.3 Motion.
Trial Court:	201st Judicial District Court of Travis County, Judge Amy Clark Meachum presiding. Case No.: D-1-GN-22-002569.
Trial Court's Disposition:	Following an evidentiary hearing on July 6, 2022, the District Court signed orders granting Appellees' Application for Temporary Injunction, enjoining Appellants from investigating Appellee Families and PFLAG members for "child abuse" based solely on reports that an adolescent is "gender transitioning" or alleged to be receiving medical treatment for gender dysphoria. 1CR546-50, 2SCR3-8.

STATEMENT REGARDING ORAL ARGUMENT

This accelerated interlocutory appeal involves complex questions of constitutional and administrative law and presents vitally important issues, including the provision of medically necessary care for transgender adolescents. Pursuant to Texas Rule of Appellate Procedure 38.1(e), Appellees submit that oral argument would assist the Court in navigating these complex issues.

ISSUES PRESENTED

"The decision to grant or deny a temporary writ of injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal *only for a clear abuse of that discretion*." *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993) (citing *State v. Walker*, 679 S.W.2d 484 (Tex. 1984)) (emphasis added).

Did the District Court properly exercise its discretion in issuing the Temporary Injunctions where (i) Appellees' claims fall properly within the District Court's jurisdiction and are not barred by sovereign immunity; and (ii) Appellees provided extensive evidence that Appellants' unlawful actions in operationalizing Abbott's Directive through the DFPS Rule had caused and would cause imminent and irreparable harm to Appellees?

INTRODUCTION

This is an appeal of properly issued Temporary Injunctions based on Appellees' APA claims against the Commissioner and DFPS. Despite not having a filed a plea to the jurisdiction until after appealing the Temporary Injunction orders, Appellants have consistently intertwined jurisdictional challenges to *all* of Appellees' claims against all defendants (including the Governor who is not a party to this appeal) into their responses to Appellees' more limited request for temporary injunctive relief—in their opposition to Appellees' Application, in their oppositions to Appellees' motions for relief under Rule 29.3, and now in their opening brief. Appellants' efforts to bootstrap jurisdictional challenges concerning claims and parties not before the Court into this appeal must fail.

The District Court has jurisdiction over Appellees' claims against all defendants, but the only jurisdictional question this Court need resolve is whether the District Court has jurisdiction over Appellees' APA claims against the Commissioner and DFPS. The record before the District Court establishes that the District Court properly exercised its jurisdiction and discretion in issuing the Temporary Injunctions. The record establishes that: (1) DFPS implemented a new rule operationalizing Abbott's Directive to investigate any and all allegations of gender affirming medical care as child

abuse; (2) the DPFS Rule constitutes a dramatic departure from DFPS policy and practice, was implemented without following mandatory APA procedures, is contrary to DFPS's enabling statute, is beyond the legal and statutory authority of the Commissioner and DFPS, and is otherwise contrary to law; and (3) injunctive relief is necessary to restore the status quo given the probable, imminent, and irreparable harm the DFPS Rule has caused and will continue to cause Appellees—harms this Court has already recognized in granting temporary relief to Appellees under Rule 29.3.

Appellants offer no meaningful challenge to the harms Appellees will suffer absent temporary relief pending a trial on the merits. Instead, Appellants ignore the extensive evidence Appellees presented at the Temporary Injunction hearing and rely primarily on fact and expert declarations that the District Court explicitly excluded. Rather than challenge the District Court's evidentiary rulings as a matter of law, Appellees improperly ask this Court to be a trier of fact. Based on the actual record, the District Court did not abuse its discretion in granting Appellees' request for temporary injunctive relief. Appellants' appeal is meritless, and the Temporary Injunctions should be affirmed.

STATEMENT OF FACTS

This dispute arises from Appellants' actions requiring DFPS to investigate parents for child abuse based solely on allegations that they provided medically necessary care for their adolescent's gender dysphoria.[6] Medical treatment of adolescents with gender dysphoria is well established;[7] based on guidelines that are widely accepted by the medical community, *see* 2RR95:21-96:12, 101:1-106:13, and provided in consultation with adolescents, their parents or guardians, and their medical providers, *see* 2RR36:8-18. This care is safe and effective, 2RR107:15-110:4, and withholding it can lead to "increase[d] comorbidities and the risk of suicide," 2RR94:9-16; *see* 2RR110:18-111:1; 1CR128-29.[8]

[6] Gender dysphoria, as recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. 1CR22-23; 2RR92:7-19.

[7] Under clinical guidelines, no medical treatment for gender dysphoria is provided until after the onset of puberty. 1CR24; 2RR106:7-16. Consequently, only transgender adolescents and adults are provided this treatment.

[8] Every major U.S. medical association recognizes the medical necessity of gender-affirming care for improving the physical and mental health of transgender people. 1CR17-19, 114; *see also* Brief of *Amici Curiae* American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations, No. 03-22-00126-CV (Tex. App.—Austin, Mar. 18, 2022), 2022 WL 2270222.

I. The Governor and the Commissioner issue directives redefining child abuse and instruct DFPS to investigate all reported instances of gender-affirming care.

On February 22, 2022, Governor Abbott sent a letter to Commissioner Masters, directing DFPS "to conduct a prompt and thorough investigation of any reported instances" of "gender-transitioning procedures" as "child abuse," without regard to medical necessity. *See* 3RR PX-02 at 1. Abbott's Directive incorporated Paxton's Opinion and claimed that "a number of so-called 'sex change' procedures constitute child abuse under existing Texas law," including "administration of puberty-blocking drugs or supraphysiologic doses of testosterone or estrogen." *Id.* While Paxton's Opinion decreed that medical treatment, including use of pubertal suppression, hormone therapy, and surgery, for a minor with gender dysphoria could constitute child abuse, the Opinion did "not address or apply to medically necessary procedures." 1CR10. Abbott's Directive to Commissioner Masters is clear and unequivocal, mandating that the agency take immediate investigatory action of all gender affirming medical care, while also ordering, under threat of criminal prosecution, "all licensed professionals who have direct contact with children" and "members of the general public" to report instances of minors receiving such treatment. 3RR PX-02 at 1.

DFPS operationalized Abbott's Directive that same day, marking abrupt changes in DFPS's policies and practices. 2RR135:18-138:8. Before February 22, DFPS did not consider reports that an adolescent was receiving medical care for gender dysphoria as justification to investigate potential child abuse. 2RR134:17-135:10, 135:23-136:1; 1CR12-13. In fact, DFPS confirmed that before Abbott's Directive, it had "no pending investigations of child abuse involving the procedures described" in Paxton's Opinion. 3RR PX-03; 1CR12; *see* 2RR228:13-17, 266:4-8. But after the Directive, DFPS announced that it would comply and investigate all reports of such care. 3RR PX-03; 1CR11. DFPS also instructed investigators that they could not document anything about these "specific cases" in writing, nor could they "priority none" these cases or send them to "alternative response." 2RR136:2-16, 137:21-138:2; 1CR12-13; *see* 3RR PX-15 ¶ 2(B). In so doing, DFPS departed dramatically from established rules and statutes and created a presumption that these cases *will* be investigated and cannot be screened out. After February 22, DFPS launched investigations into families throughout Texas, including Appellee Families and other PFLAG members, based solely on reports of providing medically indicated care to transgender adolescents. 2RR40:16-22, 147:15-148:5, 148:24-149:19; 1CR13, 187-88.

II. The District Court issues a statewide injunction in the *Doe* Case, and the Texas Supreme Court upholds the injunction as to the Doe Plaintiffs.

On March 1, 2022, Jane and John Doe, the parents of transgender adolescent Mary Doe, and Dr. Megan Mooney, a psychologist who treats transgender adolescents (collectively, the "Doe Plaintiffs"), filed a challenge to Abbott's Directive and the DFPS Rule. *See Doe v. Abbott*, Cause No. D-1-GN-22-000977 (353rd Dist. Ct., Travis Cnty., Tex.). On March 11, 2022, the District Court entered a temporary injunction against DFPS, the Commissioner, and the Governor blocking statewide DFPS investigations based on the DFPS Rule. *Doe v. Abbott*, No. D-1-GN-22-000977, 2022 WL 831383, at *1-2 (353rd Dist. Ct., Travis Cty., Tex. Mar. 11, 2022). Those Defendants appealed the temporary injunction and denial of their plea to the jurisdiction, thereby superseding those orders. *Abbott v. Doe*, No. 03-22-00126-CV, 2022 WL 837956, at *1 (Tex. App.—Austin, Mar. 21, 2022), *mandamus conditionally granted sub nom. In re Abbott*, 645 S.W.3d 276 (Tex. 2022). Pursuant to Rule 29.3, this Court reinstated the statewide injunction on March 21, 2022. *Id.* at *2. On May 13, 2022, the Texas Supreme Court left in place the Rule 29.3 temporary relief as to the Doe Plaintiffs, denying Appellants' request to overturn the order. *In re Abbott*, 645 S.W.3d 276 (Tex. 2022) (orig. proceeding). Shortly thereafter, DFPS resumed

investigating families of transgender youth. *See* 2RR52:17-25, 149:20-150:5.

III. Appellees sue to enjoin DFPS and the Commissioner from continuing to enforce Abbott's Directive and are granted temporary injunctive relief.

Appellee Mirabel Voe is the loving parent of Appellee Antonio Voe, a 16-year-old transgender adolescent. DFPS opened an unlawful investigation into the Voe family based solely on allegations that Antonio has been prescribed medical care for his diagnosed gender dysphoria. 2RR32:18-22, 33:6-10, 33:14-17, 36:15-18. Appellants' actions have affected the Voes "in every aspect that [they] can[:] medically, physically, emotionally, and . . . to a certain extent financially." 2RR53:1-54:2; *see also* 2RR38:19-40:10, 48:19-49:1.

Appellee Wanda Roe is the loving parent of Appellee Tommy Roe, a 16-year-old transgender adolescent. DFPS opened an unlawful investigation into the Roe family based solely on allegations that Tommy has been prescribed medical care for his diagnosed gender dysphoria. 2RR145:5-9, 146:17-20. The investigation and the threat of future investigations have had an "awful" impact on the Roe family. 2RR150:18-20; *see also* 2RR150:6-17.

Appellees Adam and Amber Briggle are the loving parents of Appellee M.B., a 14-year-old transgender adolescent. DFPS opened an unlawful investigation into the Briggle family based solely on allegations that M.B. has

been prescribed medical care for his diagnosed gender dysphoria. 1CR185-86. Appellants' actions have caused the Briggle family "overwhelming fear, stress and anxiety." 1CR190.

Appellee PFLAG is the "largest and first organization for LGBTQ+ [lesbian, gay, bisexual, transgender, and queer] individuals and their families." 2RR60:24-61:4. A 501(c)(3) non-profit organization, PFLAG has approximately 250,000 members, including approximately 700 members (including Appellee Families) in Texas. *Id.*; 2RR62:1-6, 68:1-5. PFLAG focuses on support, education, and advocacy in line with its mission to help create "an equitable world where LGBTQ+ plus individuals are safe, celebrated, empowered, and loved." 2RR60:24-61:4, 68:14-69:6, 72:23-73:5. Appellants' actions have resulted in or threatened to result in unlawful child abuse investigations of many PFLAG members who have transgender children, including the Voe, Roe, and Briggle families, causing those families to become "extremely terrified," not only about the potential of having their child removed from their care or potential disruption to their child's medically necessary care, but about the trauma, stigma, invasion of privacy, and threat to their parental rights inherent in being investigated for child abuse. *See* 2RR68:6-13, 69:2-6, 69:17-19, 70:13-20, 71:22-72:22.

Appellees sued Appellants, along with the Governor, on June 8, 2022, challenging Abbott's Directive and the DFPS Rule, 1CR4-192, asserting six causes of action, including (1) a declaratory judgment claim that the DFPS Rule is an invalid rule under the APA, 1CR53-61; (2) a declaratory judgment claim that the Governor's and Commissioner's actions are *ultra vires*; 1CR61-66; and constitutional claims that (3) the Governor and Commissioner violated the Separation of Powers, 1CR67-70, (4) Abbott's Directive and the DFPS Statement are unconstitutionally vague, 1CR70-71, (5) the Governor and Commissioner deprived Appellee Families and PFLAG members of their fundamental parental rights, 1CR71-72, and (6) the Governor and Commissioner violated the guarantee of equal rights and equality under the law of Minor Appellees and the children of PFLAG members, 1CR72-74. Appellees sought (1) temporary injunctive relief against Commissioner Masters and DFPS *only* on the grounds that the DFPS Rule violates the APA, both procedurally and substantively, and (2) permanent injunctive relief against DFPS and Commissioner Masters on all grounds asserted in the Petition. 1CR74-78.

In response, Appellants filed an opposition to Appellees' request for a temporary injunction, challenging the District Court's jurisdiction and the merits of Plaintiffs' claims. 1CR215-36.

After a full evidentiary hearing that included testimony from the parties' fact witnesses and experts, the District Court granted Appellees' request for a temporary injunction. 1CR546-50 (granting relief to Voes and Roes); 2SCR3-8 (granting relief to PFLAG and Briggles). Based on the evidence, the District Court determined that Appellees met their burden of showing a probable right of relief, specifically that "there is a substantial likelihood that [Appellees] will prevail after a trial on the merits" because the "DFPS Rule was adopted without following the necessary procedures under the APA, is contrary to DFPS's enabling statute, is beyond the authority provided to the Commissioner and DFPS, and is otherwise contrary to law." 1CR547-48; 2SCR4-5. The District Court found that "gender-affirming medical care . . . was not investigated as child abuse by DFPS until after February 22, 2022." 1CR548; 2SCR5. Thus, Appellants had "changed the *status quo* for transgender children and their families." 1CR548; 2SCR5. Therefore, the District Court concluded "[t]he DFPS Rule was given the effect of a new law or new agency rule, despite no new legislation, regulation or even valid agency policy." 1CR548; 2SCR5.

In concluding that Appellees had stated valid causes of action, the District Court determined that, based on the evidence presented, it had subject matter jurisdiction over their claims, 1CR547-48; 2SCR4-5, a finding

the Court made explicit in the PFLAG Injunction's conclusions that PFLAG has standing and the Briggles' claims are ripe. 2SCR4.

The District Court also held that, absent injunctive relief, Appellees would "suffer probable, imminent, and irreparable injury." 1CR548; 2SCR5. Such harms include, among others, "being subject to an unlawful and unwarranted child abuse investigation; intrusion and interference with parental decision-making; the deprivation or disruption of medically necessary care for the parents' adolescent children . . . [and] increased incidence of depression and risk of self-harm. 1CR548-49; 2SCR5-6.

The Temporary Injunctions enjoined Appellants from "implementing or enforcing" the DFPS Rule against Appellee Families, including PFLAG members. 1CR549; 2SCR6. Appellants are specifically restrained from (1) investigating Appellees "for possible child abuse or neglect *solely* based on allegations that they have a minor child or are a minor child who is gender transitioning or alleged to be receiving or being prescribed medical treatment for gender dysphoria;" and (2) from taking any investigatory or adverse actions against Appellees with investigations that have already been opened on this basis other than to administratively close them. 1CR549; *see* 2SCR6-7.

Appellants separately appealed the Voe Injunction and PFLAG Injunction. 1CR535-37; 2SCR9-11. Appellees requested emergency relief from this Court reinstating the Voe Injunction during the appeal, which this Court granted. *Masters v. Voe*, No. 03-22-00420-CV, 2022 WL 4359561, at *3 (Tex. App.—Austin, Sept. 20, 2022) (per curiam). Appellees similarly requested emergency relief reinstating the PFLAG Injunction, which this Court provisionally granted while considering Appellees' emergency motion. *Masters v. PFLAG, Inc.*, No. 03-22-00587-CV, 2022 WL 4473903, at *1 (Tex. App.—Austin Sept. 26, 2022, no pet.) (per curiam).

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's orders granting Appellees' request for a temporary injunction.

Appellants' jurisdictional arguments distort the controlling law, the uncontested facts, and Appellees' Petition. Appellees allege cognizable harms resulting from the unlawful DFPS Rule purporting to authorize and require investigations into gender affirming care, and not just from those investigations themselves. Appellants' unlawful acts interfere with Appellee Parents' fundamental right to care for their children and direct their medical care, and deprive Minor Appellees of their right to equality under the law. Injunctive relief preventing DFPS and the Commissioner from enforcing the

DFPS Rule and declaratory relief that the DFPS Rule violates the APA and is ultra vires and unconstitutional are tailored to remedy these harms. Appellees, therefore, have standing. Appellees' injuries and the ongoing threat of imminent and irreparable harm Appellants' actions pose also establish that Appellees' claims are both ripe and not moot.

Additionally, sovereign immunity does not bar Appellees' claims. The APA expressly waives sovereign immunity for Appellees' challenge to the validity of the DFPS Rule. Although Appellees' non-APA claims fall outside the scope of this appeal, ultra vires and constitutional claims are well-established exceptions to sovereign immunity.

Finally, the District Court did not abuse its discretion by granting temporary injunctive relief. The record demonstrates that Appellees (1) have a probable right to a declaration that the DFPS Rule implementing Abbott's Directive violates the APA; and (2) would suffer irreparable harm absent injunctive relief. Accordingly, this Court should affirm the Temporary Injunctions.

STANDARD OF REVIEW

"The decision to grant or deny a temporary writ of injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal *only for a clear abuse of that discretion*." *Walling v. Metcalfe*,

863 S.W.2d 56, 57-58 (Tex. 1993) (citing *State v. Walker*, 679 S.W.2d 484 (Tex. 1984)) (emphasis added). "The reviewing court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Accordingly, the reviewing court "must review the evidence in the light most favorable to the order and must indulge all reasonable inferences in favor of the decision," and the order cannot be reversed "if the trial court was presented with conflicting evidence and the record includes evidence that reasonably supports the trial court's decision." *Cold Spring Granite Co. v. Karrasch*, 96 S.W.3d 514, 517 (Tex. App.—Austin 2002, no pet.). The reviewing court must affirm even if it would have reached a contrary conclusion. *Butnaru*, 84 S.W.3d at 211.

ARGUMENT

In adopting the DFPS Rule, the agency launched unwarranted and intrusive investigations into Appellee and other PFLAG families across the state. In so doing, DFPS radically departed from longstanding agency rules and procedures, violating both the procedural and substantive requirements of the APA. Specifically, not only was the DFPS Rule enacted without notice and comment, but it is contrary to the agency's enabling statute and violates Appellees' constitutional rights. The DFPS Rule directly interfered with

Appellees' rights—causing them immediate and irreparable harm and imminent future harm—which is sufficient to confer standing, establish ripeness, and render sovereign immunity inapplicable.[9]

Appellants attempt to shift focus from their unlawful, unilateral redefinition of child abuse to DFPS's ordinary investigatory authority, claiming that (1) they are simply carrying out their statutory obligations in the ordinary course, (2) they are conducting these investigations like every other child abuse investigation, and (3) the Temporary Injunctions would block them from fulfilling their statutory duty to investigate child abuse and allow anyone to bring a lawsuit challenging any DFPS investigation. *See, e.g.*, Appellants' Br. 3, 8-13, 21-22, 56-62, 66-67. In so doing, Appellants heavily, and improperly, rely on declarations and DFPS investigation files, *see, e.g.*, Appellants' Br. 8-13, 52-54, 59-61, that were *not* admitted into evidence at the Temporary Injunction hearing because they are hearsay. *See* 2RR203:12-204:5 (excluding declaration of Associate DFPS Commissioner Stephen Black); 2RR201:24-203:4 (excluding declaration of Dr. Michael Laidlaw); 2RR255:22-257:5 (excluding Individual Appellees' DFPS case files).

[9] In the *Doe* Case, Appellants unsuccessfully presented near-identical jurisdictional arguments to multiple courts, including the Texas Supreme Court, which denied Appellants' mandamus petition as to Appellees in that case. *In re Abbott*, 645 S.W.3d at 280.

Appellants do not challenge the District Court's evidentiary rulings, and the District Court cannot be said to have abused its discretion in rendering a decision based on evidence not properly before it. The actual record plainly establishes that DFPS dramatically departed from established rules in adopting the DFPS Rule, creating a *presumption* that cases involving medically indicated care to transgender adolescents *will* be investigated and cannot be screened out. 2RR136:2-16, 137:21-138:2; 3RR PX-15 ¶2(B); 1CR12-13. On that basis, the District Court properly enjoined the DFPS Rule itself—and not DFPS's general investigative authority—as a disruption of the status quo causing imminent and irreparable harm to Appellees.

I. The District Court properly exercised jurisdiction.

In granting the Temporary Injunctions, the District Court properly concluded that Appellees' APA claims are wholly within its jurisdiction. Both Individual Appellees and PFLAG have sufficiently alleged imminent and redressable injuries to themselves or to their members to support the District Court's findings that they have standing and their claims are ripe and not moot. Furthermore, Appellees' APA claims are not barred by sovereign immunity because the APA contains an express immunity waiver.

As they did at the District Court, Appellants wrongly attempt to bootstrap questions regarding the District Court's jurisdiction over

Appellees' non-APA claims and claims against the Governor into this appeal. *See* 1CR225-26; Appellants' Br. 40-41, 43-47. Appellees sought temporary injunctive relief *only on their APA claims against DFPS and the Commissioner*. 1CR74-79. The Temporary Injunctions impose restraints only on DFPS and the Commissioner. 1CR546-50; 2SCR3-8. For that very reason, *the Governor is not a party to this appeal*. Because Appellees' APA claims encompass allegations regarding Appellants' ultra vires actions and violations of Appellees' constitutional rights, Appellees respond here to Appellants' jurisdictional arguments regarding those claims against DFPS and the Commissioner. Though similarly unavailing, Appellees do not respond here to Appellants' jurisdictional arguments specific to Appellees' claims against the Governor because they are not properly before the Court and should not be decided in this appeal.[10]

A. Appellees allege a redressable injury in fact to confer standing.

Appellees have standing because they "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (citation omitted). First, *unlawful*

[10] Should the Court conclude otherwise, Appellees respectfully request an opportunity to submit supplemental briefing, but at a bare minimum, argue.

investigations constitute legally cognizable harm—regardless of the outcome of such investigations. Second, Appellants' unlawful promulgation and implementation of the DFPS Rule have caused and, absent injunctive relief, will continue to cause Appellees significant, ongoing, and irreparable harm far beyond an "investigation."[11] Appellants' efforts to diminish and mischaracterize Appellees' injuries, *see* Appellants' Br.17, 19-20, ignore the myriad harms caused by Appellants' actions and fail to read Appellees' allegations as pleaded. *See Davis v. Burnam*, 137 S.W.3d 325, 331 (Tex. App.—Austin 2004, no pet.).

1. Individual Appellees have standing.

Unequal treatment and deprivation of individual rights are injuries sufficient to confer standing. *See, e.g.*, *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). By categorically redefining child abuse to include providing medical treatment for gender dysphoria to adolescents, Appellants violated Appellees' right to due process, 1CR60-61, 70-71,

[11] When multiple plaintiffs seek similar relief, the Court need only find one plaintiff to have standing. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011).

deprived Appellee Parents of their fundamental rights as parents to direct their children's medical care, 1CR71-72, and violated Tommy, Antonio, and M.B.'s right to equality under the law, 1CR72-74.

Under Texas law, "[i]t is axiomatic that parents enjoy a fundamental right to the care, custody, and control of their children. . . . This right includes the right of parents to give, withhold, and withdraw consent to medical treatment for their children." *TL v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 43 (Tex. App.—Fort Worth 2020, pet. denied). "[P]arents are presumed to be appropriate decision-makers, giving parents the right to consent to their [child's] medical care." *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003); *see also* Tex. Fam. Code § 151.001(a)(3) (parent has the right and duty "to support the child, including providing the child with . . . medical and dental care"). "This natural parental right has been characterized as 'essential,' 'a basic civil right of man,' and 'far more precious than property rights.'" *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (citation omitted).

Additionally, under the Texas Constitution, all persons "have equal rights," Tex. Const. art. 1, § 3, and "[e]quality under the law shall not be denied or abridged because of sex," *id.* art. 1, § 3a; *see Tarrant Cnty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 329 (Tex. App.—Dallas 2021, no pet.) (reading the Texas Commission on Human Rights Act's "prohibition on

discrimination 'because of . . . sex' as prohibiting discrimination based on an individual's status as a . . . transgender person").

Appellants' actions prevent Appellee Parents from consenting to medically necessary care, thereby abridging their fundamental rights and duties as parents and preventing their children from accessing medically necessary care based solely on their identity as transgender adolescents. *See*, *e.g.*, 1CR60-61, 71-74. Appellants do not dispute that Tommy, Antonio, and M.B. were diagnosed with gender dysphoria. *See* 1CR7-8, 186; 2RR36:15-37:3, 146:13-20. Each of their respective doctors recommended medical care to treat their gender dysphoria. *See* 1CR7-8; 2RR36:19-22, 146:21-25. Medical treatment for adolescents with gender dysphoria is well-established and medically necessary. *See* 2RR95:21-96:12, 101:1-106:13; *see also* 1CR21-28 (describing medical standards). And withholding treatment can lead to increased distress, "suicide risk," and "death." 2RR93:2-7, 94:9-16. Appellants' actions thus violate Appellee Parents' fundamental rights to care for their adolescent children, a fundamental liberty interest protected by the Texas Constitution and statutes. *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) ("The natural right which exists between parents and their children is one of constitutional dimensions."). And they infringe on Tommy,

Antonio, and M.B.'s constitutional rights to equality by singling out the medical care required only by transgender youth as child abuse.[12]

Moreover, the DFPS Rule subjects Appellee Families to a DFPS investigation whether or not they consent to gender-affirming care for their adolescent children. *See* 1CR70-71; *see also In re Abbott*, 645 S.W.3d at 287 n.3 (Appellant's actions "raise[] the specter of abuse every time a bare allegation is made that a minor is receiving treatment of any kind for gender dysphoria.") (Lehrmann, J., concurring). By seeking treatment for their children's gender dysphoria, Appellee Parents are automatically subject to DFPS investigation for child abuse under the DFPS Rule. On the other hand, should Appellee Parents refuse to provide medically necessary care for their children's gender dysphoria, they not only cause their children actual harm, but also risk a DFPS investigation for neglect. *See* Tex. Fam. Code § 261.001(4)(A)(ii)(b) (defining "neglect" to include "failing to seek, obtain, or follow through with medical care for a child, . . . with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child").

[12] Appellants' claim that neither Abbott's Directive nor the DFPS Rule suggests that transgender youth "should be treated differently than non-transgender youth" is specious. *See* Appellants' Br. 45. The "sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not." *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022); *see infra* p. 54.

Nevertheless, Appellants argue that it is DFPS's role to investigate every allegation of medical treatment for gender dysphoria and that there can be no concrete injury to Appellees unless there is a finding of child abuse. *See* Appellants' Br. 17-20. Under this new regime, Appellants elevate *themselves* as the arbiters of *all* parental medical decisions involving a child's diagnosis and medical treatment, even when done in consultation with medical professionals.[13] And the mere allegation of *any* medical care provided, without more, is sufficient for DFPS to open an intrusive and stigmatizing investigation, along with its collateral consequences, to second-guess the medically prescribed care and make its own assessment of its safety or necessity.

Appellants' strained efforts to portray DFPS investigations into gender affirming care as within the ordinary agency business of searching out abuse cannot conceal the extraordinary nature of categorically deeming the provision of the medically recognized course of care for gender dysphoria to be child abuse. Appellants have not pointed to any other instance of DFPS assuming unbridled authority to ignore established standards of medical care and automatically investigate professionally prescribed treatments as

[13] DFPS policy recognizes that its caseworkers are not qualified to decide whether medical issues qualify as child abuse or neglect. *See* 3RR PX-20 § 2232.1.

child abuse. The District Court found that "the provision of gender-affirming medical care, such as puberty blockers and hormone therapy, without more, was not investigated as child abuse by DFPS until after February 22." 1CR548; 2SCR5. As Appellees' Petition alleges: "The agency's new rule substitutes parents' judgment as to what medical care is in the best interests of their children for the judgment of the government." 1CR61. And Appellants' actions "unlawfully discriminate against transgender youth by deeming the medically necessary care for the treatment of their gender dysphoria as presumptively abuse because they are transgender when the same treatment is permitted for non-transgender youth." 1CR74. In so doing, Appellants infringe Appellees' fundamental rights to due process and equal protection, causing cognizable constitutional injuries.

Appellants' argument that investigations alone can never be a cognizable harm also falls flat. As Justice Blacklock noted, a "mere investigation could chill the exercise of rights enumerated in the U.S. and Texas Constitutions." *Abbott*, 645 S.W.3d at 289 n.1 (Blacklock, J., concurring in part and dissenting in part). DFPS's investigatory authority is not boundless but instead limited by Texas laws and agency rules. Under its own policies, DFPS only accepts reports for investigation when "DFPS appears to be the responsible department under the law, and . . . the child's

apparent need for protection warrants an investigation." 3RR PX-18 at 1. The invasion of privacy, trauma, and interference with family life inherent in an investigation can only be justified by a *lawful* basis for suspecting abuse.

The DFPS Rule provides no such lawful basis, thereby permitting unwarranted, unchecked government intrusion. As Appellees allege, DFPS investigations can be highly stigmatizing, traumatic, and they can give rise to a host of collateral consequences. *See*, *e.g.*, 1CR36-38 (describing trauma and fear experienced by PFLAG member families following issuance of Abbott's Directive and DFPS Rule); 1CR74 (noting Appellants' actions "place a stigma and scarlet letter upon transgender youth"); *see also* 1CR47, 76-77, 89-90. These harms are more than sufficient to establish Appellees' standing.

Appellants' cited authorities are inapposite. The APA provides a cause of action if a "rule *or its threatened application* interferes with or impairs, or threatens to interfere with or impair, a legal right." Tex. Gov't Code § 2001.038(a) (emphasis added). Appellees do not challenge DFPS's general "governmental investigative and data-gathering activity." *Laird v. Tatum*, 408 U.S. 1, 10 (1972). Appellees are not average members of the public generally complaining that Appellants merely "abused [their] discretion." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). And this

case is readily distinguishable from *Waco Independent School District v. Gibson*, 22 S.W.3d 849 (Tex. 2000). Not only was that case not decided on standing grounds, but those plaintiffs challenged the substance of a policy, not the school district's authority to adopt the policy in the first instance. *See Waco ISD*, 22 S.W.3d at 850-51.

Here, Appellees challenge Appellants' unlawful adoption and implementation of the DFPS Rule, which subjects all Appellees to mandatory investigations for child abuse solely because they are alleged to have sought medically necessary care for their children. Appellees established that the DFPS Rule "has already interfered with [Appellees'] rights or . . . in reasonable probability will interfere with [Appellees'] rights in the future." *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 592 (Tex. 2013) (Johnson, J., concurring in part). Among the particularized injuries Appellees have suffered and will continue to suffer are interference "with [Appellees'] fundamental parental rights and other equality and due process guarantees of the Texas Constitution." 1CR60. Individual Appellees thus have alleged a judicially cognizable injury to bring their claims.

2. PFLAG has associational standing

As the District Court held, PFLAG plainly meets the test for associational standing: (1) PFLAG's members, including Individual

Appellees, have standing to sue in their own right; (2) the interests PFLAG seeks to protect are germane to its organizational purpose; and (3) neither the claims PFLAG asserts nor the relief it seeks requires the participation of its individual members in the lawsuit. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

First, the evidence before the District Court demonstrated that PFLAG members have standing to sue in their own right because they face imminent and irreparable harm or threat of harm due to the DFPS Rule. *See supra* pp. 18-25. The Rule's redefinition of child abuse and mandatory investigations of parents alleged to have facilitated gender affirming care target transgender youth and their parents and subject Texas PFLAG members, including but not limited to the Individual Appellees, to legally cognizable harm. Because the Rule constitutes "unlawful government action" that results in "actual present or immediately threatened injury," *Laird*, 408 U.S. at 15, PFLAG members with transgender children have standing to challenge Appellants' actions.

Appellants wrongly claim there is no cognizable harm because "[t]here are no court orders or requests for court orders pending against" Appellees. Appellants' Br. 21. The District Court, however, found that the harm to

Appellees includes:

> being subjected to an unlawful and unwarranted child abuse investigation; intrusion and interference with parental decision-making; the deprivation or disruption of medically necessary care for the parents' adolescent children; the chilling of the exercise of the right of Texas parents to make medical decisions for their children relying upon the advice and recommendation of their health care providers acting consistent with prevailing medical guidelines; . . . and criminal prosecution and the threat thereof.

1CR548-49; 2SCR5-6. In finding these harms, among others, the District Court had before it evidence of the DFPS Rule's impact on not only Individual Appellees who are also PFLAG members, but also non-Appellee PFLAG members. *See* 1CR85-91, 93-103; 3SCR30-40 (declarations of PFLAG members Samantha Poe, Lisa Stanton, and Carol Koe). Thus, PFLAG members have standing to sue in their own right.

Appellants' related claim that PFLAG has failed to "identify members actually injured or facing imminent injury" similarly fails. *See* Appellants' Br. 22. Appellees' Petition does not merely make "general references to [PFLAG] members." *See id.* (quoting *Abbott v. Mex. Am. Legis. Caucus*, 647 S.W.3d 681, 692 (Tex. 2022)). As Appellants themselves acknowledge, Appellees have specifically identified *at least* five PFLAG members who have suffered, and are at risk to further suffer, the myriad harms enumerated in the Temporary Injunctions. Those harms are sufficient to confer standing on

PFLAG members, including but not limited to Individual Appellees. *See supra* pp. 18-25.

Second, PFLAG's representation of its members' interests in challenging the unlawfulness of Appellants' actions is entirely germane to its organizational purpose. *See Hays Cnty. v. Hays Cnty. Water Planning P'ship,* 106 S.W.3d 349, 357 (Tex. App.—Austin 2003, no pet.). While Appellants correctly note that PFLAG's mission statement references creating "a caring, just and affirming world for LGBTQ+ people and those who love them," Appellants' Br. 24 (citation omitted), that does not end the inquiry into PFLAG's organizational purpose. "[N]owhere [is it] suggested that mention of a given purpose in an organization's organic papers is talismanic or, indeed, anything more than strong evidence of purpose." *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 59 (D.C. Cir. 1988). Supporting LGBTQ+ young people by supporting their families in affirming their sexual orientation and/or gender identity has been central to PFLAG's work since its founding in 1973 as the first support group for parents of LGBTQ+ people. 1CR35-36, 152-53; 2RR61:22-62:6. Helping, supporting, and advocating for parents of transgender youth in affirming their transgender identities and accessing the social, psychological, and medical supports that they need is part of PFLAG's mission. 1CR36, 153-54, 157-58;

2RR72:23-73:5. Because Appellants' actions and the DFPS Rule target those parents, deeming their facilitation of that very medical care to be child abuse, representing their interests in challenging Appellants' actions is germane to PFLAG's purpose.

Appellants suggest that only an organization whose mission is to "assist parents from being wrongfully labelled child abusers" could meet the germaneness requirement. Appellants' Br. 24. But this prong of the associational standing test does not demand that an organization's purpose be so narrow or specific. *See, e.g.*, *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 673–74 (E.D. La. 2010) (collecting authorities); *Tex. Soc'y. of Prof'l Eng'rs v. Tex. Bd. of Architectural Exam'rs*, No. 03-08-00288-CV, 2008 WL 4682446, at *4 (Tex. App.—Austin Oct. 24, 2008, no pet.) (mem. op.). Rather, "the germaneness requirement is undemanding and requires mere pertinence between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 & n.2 (5th Cir. 2010) (citation and quotations omitted). PFLAG plainly meets this test.

Finally, neither the claims asserted nor the relief sought by PFLAG requires the participation of its individual members. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 448. The basis of Appellees' claims is not, as Appellants

contend, "individualized allegations about the investigations [Appellee Families] underwent." Appellants' Br. 25. Rather, the specifics of each investigation, though plainly traumatic for each family and emblematic, are collateral to the general harm posed by Appellants' actions that is shared by all PFLAG members with transgender adolescents: the threat or actuality of "being subjected to an unlawful and unwarranted child abuse investigation" that "intrudes upon and interferes with the[] right [of] parents to make medical decisions for their children, relying upon the advice and recommendation of their health-care providers." *Masters*, 2022 WL 4359561, at *2-3.

Stated differently, while PFLAG members' specific articulations of harm may differ, their legal claims are identical—that Appellants' actions are unlawful and unconstitutional, constituting ultra vires actions that violate the procedural and substantive requirements of the APA, constitutional separation of powers requirements, and the rights of PFLAG members and their children to privacy, equality, and parental autonomy. The participation of Individual Appellees who are PFLAG members is all that is required to demonstrate the same violation of law experienced by other Texas PFLAG members with transgender children. *See Big Rock Invs. Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845, 851 (Tex. App.—Fort Worth 2013, pet.

denied) (explaining that "when resolution of the claims can be proven by evidence from representative injured members without a fact-intensive-individual inquiry, the need for participation of those individual members will not defeat associational standing"); *Ass'n of Am. Physicians & Surgeons, Inc.*, 627 F.3d at 552 (associational standing was appropriate where "[p]roving the illegality of the [challenged action] required some evidence from members, but once proved as to some, the violations would be proved as to all").

As to the nature of the relief sought, the declaratory and injunctive relief PFLAG seeks is particularly appropriate for organizations seeking to represent the interests of their members, as such relief can provide benefit to all members who are being harmed or face the imminent threat of being harmed by Appellants' actions. *See, e.g.*, *Tex. Ass'n of Bus.*, 852 S.W.2d at 448. PFLAG seeks no damages or other relief "peculiar to the individual member concerned," but rather "a declaration, injunction, or some other form of prospective relief, . . . that . . ., if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975).[14]

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[14] Appellants' reliance on *Warth* to suggest individual member participation is required here again underscores their misperception of Appellees' claims. *See* Appellants' Br. 25. Appellees seek unified relief on behalf of all Appellees—a declaration that Appellants'

"Because [PFLAG] seeks only prospective declaratory and injunctive relief, raises only questions of law, and need not prove the individual circumstances of its members to obtain relief," the relief PFLAG seeks does not require participation of individual members. *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 931-32 (Tex. App.—Austin 2010, no pet.). Such relief would apply equally to all affected PFLAG members, regardless of their individual circumstances and without need of their individual participation. The third prong of the associational standing test is therefore met.

B. Appellees' claims are ripe.

Appellees' claims are ripe for much the same reason Appellees have standing: Appellees have already suffered concrete injuries, and imminent and irreparable injuries will continue to occur absent injunctive relief. By misconstruing Appellees' pleadings and claiming that Appellees' injury is a mere "investigation" that does not give rise to ripe claims, Appellants misrepresent the pleadings, ignore the harms that flow from an investigation, and fail to correctly present the law. An accurate examination of the facts demonstrates that Appellees' claims are ripe.

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actions are unlawful and an injunction barring those actions going forward.

“Ripeness . . . , like standing, emphasizes the need for a concrete injury” to determine “when [an] action may be brought,” *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998), and it considers “whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury *has* occurred or *is likely to* occur, rather than being contingent or remote.” *Patel v. Tex. Dep’t of Licensing & Regul.,* 469 S.W.3d 69, 78 (Tex. 2015) (emphases added). “A claimant is not required to show that the injury has already occurred . . . .” *City of Waco v. Texas Nat. Res. Conservation Comm'n,* 83 S.W.3d 169, 175 (Tex. App.—Austin 2002, pet. denied), *as modified on denial of reh'g* (June 21, 2002). Instead, plaintiffs may challenge government action before it inflicts injury, if the threatened harm is “imminent, direct, and immediate, and not merely remote, conjectural, or hypothetical.” *Rea v. State*, 297 S.W.3d 379, 383 (Tex. App.—Austin 2009, no pet.). Cases are ripe when an agency “has arrived at a definitive position on the issue.” *Id.* And where challenged agency action involves a “pure question of law” rather than “factual contingencies that have not yet come to pass,” plaintiffs’ claims are ripe. *Trinity Settlement Servs., LLC v. Tex. State Sec. Bd.*, 417 S.W.3d 494, 506 (Tex. App.—Austin 2013, pet. denied).

Here, Appellees' claims are ripe because Appellants have arrived at a definitive position—as described in the DFPS Rule and Abbott's Directive—that has imposed numerous established and imminent injuries on Appellees. *See supra* pp. 18-25. Such injuries include, among others, violations of Appellee Parents' fundamental rights to care for their children, the threat to essential medical care, and violations of Minor Appellees' equality rights. Nothing about these facts is "contingent or remote." *Patel*, 469 S.W.3d at 78. This dispute is ripe based on the actual and imminent injuries pleaded by Appellees.

Appellants incorrectly argue that Appellees' claims are not yet ripe "because DFPS has not made even an *initial* determination that they engaged in child abuse" and, therefore, Appellants have "not yet arrived at a definitive position." Appellants' Br. 34-35. This argument mischaracterizes Appellees' claims, as Appellees 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 pursuant thereto as violative of the APA, ultra vires, beyond Appellants' constitutional authority, and as infringing on Appellees' constitutional rights. Abbott's Directive and the DFPS Rule themselves are

the "definitive position" at issue and their lawfulness is a pure question of law.

As in *Patel*, Appellants have taken concrete actions to operationalize Abbott's Directive and implement the DFPS Rule, directly causing Appellees harm and threatening more imminent and irreparable harm absent injunctive relief. And, like the plaintiff in *Texas Alcoholic Beverage Commission v. Amusement & Music Operators of Texas, Inc.*, 997 S.W.2d 651, 656 (Tex. App.—Austin 1999, pet. dism'd w.o.j.), Appellees challenge DFPS's definitive position on an issue directly affecting them and exposing them to civil and criminal liability. As court after court has held, Appellees need not wait for DFPS to make initial or even ultimate determinations that Appellees engaged in child abuse or seek court intervention before challenging the lawfulness of Appellants' actions. *See, e.g.*, *Tex. Mut. Ins. Co. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 214 S.W.3d 613, 622 (Tex. App.—Austin 2006, no pet.) ("[T]he purpose of [APA] section 2001.038 is to obtain a final declaration of a rule's validity before the rule is applied."); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 797 (Tex. App—Austin 1982, writ ref'd n.r.e.) ("One is not required to wait until [a challenged] rule is attempted to be enforced against him before he may resort to declaratory relief."); *Mitz v. Tex. State Bd. of Veterinary Med. Exam'rs*, 278 S.W.3d 17,

26 (Tex. App.—Austin 2008, pet. dism'd). Because Appellants have taken concrete steps to implement Abbott's Directive and the DFPS Rule, Appellees' claims are ripe for adjudication.[15]

Appellants' alternate argument fares no better. The contentions that Appellees' claims are unripe because (1) "other proceedings that will affect the parties' respective rights remain pending," Appellants' Br. 32, and (2) DFPS has not obtained "a final court order affecting [Appellees'] parent-child relationship, *id.* at 34, *yet again* misconstrue the nature of Appellees' claims. Resolving this case does not turn on the specifics of the resulting, improperly initiated investigations into Appellee and other PFLAG families. Rather, it involves predicate, threshold issues about whether Appellants' actions are lawful. Such claims are ripe when "a real and substantial controversy exists involving a genuine conflict of tangible interest and not merely a theoretical dispute." *S.O. v. Univ. of Tex.*, No. 03-16-00726-CV, 2017 WL 2628072, at *3 (Tex. App.—Austin June 15, 2017) (mem. op.).

Appellants rely on ripeness cases challenging the way a governmental process was conducted or the ultimate outcome of an investigation.

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[15] Appellees' claims are also prudentially ripe because (1) Appellees' claims for declaratory relief are fit for judicial decision, and (2) Appellees, who have alleged numerous actual and imminent harms flowing from Appellants' conduct, would be forced to bear hardships if their claims were dismissed on ripeness grounds. *See Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 858 (Tex. App.—Austin 2004, no pet.) (identifying prudential ripeness considerations).

Appellants' Br. 32-34. But none of those cases challenged the authority to conduct the underlying process itself. For example, *Rea* addressed the process followed in the course of a *lawful* investigation, not the underlying authority of the Board to conduct the investigation or administrative proceedings. 297 S.W.3d at 381-82. Similarly, *Gates v. Texas Department of Family & Protective Services* involved a challenge to the process and outcome of a *legally authorized* investigation. No. 03-11-00363-CV, 2013 WL 4487534, at *1 (Tex. App.—Austin Aug. 15, 2013, pet. denied) (mem. op.) (challenging the thoroughness of DFPS's investigation and findings, not DFPS's authority to conduct the investigation). Appellants also cite language in *Gates*, quoting *Croft v. Westmoreland County Children & Youth Services*, 103 F.3d 1123, 1125-26 (3d Cir. 1997), suggesting that a child abuse investigation itself does not infringe constitutional rights. Appellants' Br. 33-34. But Appellants ignore that such principle only applies when there is a *lawful* basis for the investigation in the first place. *See Croft*, 103 F.3d at 1126 (state has no interest in interfering in parent-child relationship without a "reasonable and articulable" basis for conducting the investigation (citing *Lehr v. Robertson*, 463 U.S. 248, 254–56 (1983) (liberty interests in preserving family unit "are sufficiently vital to merit constitutional protection in appropriate cases")); *Myers v. Morris*, 810 F.2d 1437, 1462–63

(8th Cir. 1987) (parental liberty interest in maintaining family integrity may be infringed only where there is a "reasonable suspicion" abuse may have occurred). Abuse investigations pursued under the DFPS Rule have no such reasonable or lawful basis.

Appellees' claims are ripe for the same reasons as those held to be ripe in *S.O. See* 2017 WL 2628072, at *3. S.O. sought a declaration that University officials were engaging in ultra vires actions and violating her due process and equal protection rights. In reversing the trial court's dismissal, this Court noted that S.O.'s claims challenged the University's authority to conduct the inquiry at all, not the end result of the inquiry:

> S.O. complains not simply of the actual revocation of her degree, should that occur, but the fact that the University has put the status of her degree in question and is requiring her to defend it in a proceeding that she alleges the University officials are not authorized to conduct. Thus, S.O.'s pleadings seek a declaration that the University officials' conduct is *ultra vires*, not a declaration that under the facts and circumstances presented revocation is not warranted. The nature of the controversy, therefore, is whether the University officials' act of conducting a disciplinary proceeding to consider revoking S.O.'s degree is *ultra vires*, regardless of its outcome. *This controversy is neither hypothetical, contingent, nor remote.*

2017 WL 2628072, at *3 (footnote omitted) (second emphasis added). This is the essence of Appellees' claims as well. Regardless of the outcome or

conclusion of any unwarranted DFPS investigation, Appellees' claims are ripe.

C. The Roe and Briggle claims are not moot

The District Court properly concluded that the Briggles' claims are ripe, and therefore not moot, despite the closure of the original DFPS investigation into allegations that the Briggles provide M.B. with medical care for his gender dysphoria—an investigation that never should have happened in the first place. *See* 2SCR4. The same is true of the Roes' claims.

On June 10, 2022, the Briggles learned that DFPS had ruled out the allegations of abuse against them and was closing their investigation. 2RR240:7-8. On August 8, 2022, DFPS similarly informed Wanda Roe that it had ruled out the allegations of abuse against her and closed out the Roe investigation. *See* 1SCR10-16. Absent injunctive and permanent relief, however, the Briggle and Roe families continue to face imminent harm from the DFPS Rule, including the disruption of and inability to follow the medical care recommended by M.B.'s and Tommy Roe's medical providers, as well as other harms identified by the District Court. *See* 1CR546-50; 2SCR3-8. As Appellant witness Marta Talbert testified, allegations involving gender-affirming care have been "categorically treated as Priority 2 by DFPS," which prevents them from being closed upon receipt and requires an investigation.

2RR265:6-10; *see* 2RR232:1-233:5. Thus, so long as the DFPS Rule remains in effect, anyone who supports M.B.'s and Tommy Roe's medical care in the future could be accused of abuse and subject to automatic investigation, including their doctors and Wanda Roe or the Briggles themselves in the event there are allegations that their course of gender affirming care has changed. *See* 3RR PX-20 § 2244.1 (requiring interviews of an alleged victim of a Priority 2 report within 72 hours).[16] The fact that investigations were initiated against the Briggles and Wanda Roe also make them ineligible for an "Abbreviated Ruled-Out" of other allegations in the future. *See* 3RR PX-20 § 2291.1.

Appellants' assertion "that an investigation [on the same allegations] *cannot* occur in the future" has no support in the record. *See* Appellants' Br. 30. Appellants cite (1) the declaration of Stephen Black, *see id.* (citing 1CR278), which was excluded as hearsay, 2RR203:12-204, and (2) testimony that DFPS will not work "the exact same complaint" after it is closed out, Appellants' Br. 30 (citing 2RR221:8-15). But the DFPS Policy manual and "rule-out" letters stating that Appellees *can* be investigated again contradict

[16] The DFPS "rule-out" letter sent to Wanda Roe specifically provides: "The fact that your role as an alleged perpetrator in this particular investigation has been ruled out or that you request removal of this role information does not preclude further involvement with your family by DFPS, including the provision of services, court involvement, or even termination of parental rights." 1SCR16 (emphases omitted).

Appellants' position. As long as the DFPS Rule remains in effect, there is no guarantee that DFPS will not investigate these families again, such as in the event of an alleged change in their children's course of care, or investigate other "alleged perpetrators," such as doctors, therapists, or teachers who may play a role in or be aware of their children accessing any needed medical care.[17] This ongoing, actual threat of investigation is anything but speculative. Therefore, the Roes' and Briggles' claims are not moot.

D. Sovereign immunity does not bar Appellees' claims.

Appellants are not entitled to immunity for any of Appellees' claims.[18] The APA expressly waives sovereign immunity for suits alleging that a "rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff[.]" Tex. Gov't Code § 2001.038(a); *see also Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, 598 S.W.3d 417, 421 (Tex. App.—Austin 2020, no pet.). And both ultra vires

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[17] This situation is distinct from *Texas State Board of Veterinary Medical Examiners v. Jefferson*, No. 03-14-00774-CV, 2016 WL 768778 (Tex. App.—Austin Feb. 26, 2016, no pet.) (mem. op.). There, an administrative law judge dismissed with prejudice a complaint that had a binding and preclusive effect on the agency. *Id.* at *6. That decision strictly prohibited the agency from instituting new disciplinary proceedings against the plaintiff involving the dispute at issue before the court. *Id.* DFPS's "rule out" letters do not have a preclusive or binding effect, nor do they address or resolve all of the harms to the Roe and Briggle families that stem from the DFPS Rule and Abbott's Directive.

[18] Appellants' suggestion that Appellees abandoned their ultra vires and constitutional claims by seeking temporary injunctive relief only for their APA claims is meritless. Appellants have not amended their Petition to remove those claims. Moreover, Appellees' APA claims are predicated on the Commissioner's ultra vires conduct, 1CR54-60, and expressly incorporate their substantive constitutional claims, 1CR60-61.

and constitutional claims are well-established exceptions to the doctrine of sovereign immunity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009); *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015).

1. The Commissioner and DFPS are not immune from Appellees' APA claims.

Appellants do not dispute that the APA contains an express waiver of sovereign immunity. Nor do they argue that DPFS is immune as to Appellees' APA claims. Instead, Appellants contend only that the Commissioner enjoys immunity from Appellees' APA claims because there is no agency "rule" subject to APA review. Appellants' Br. 36-40. But Appellees directly challenge the establishment and implementation of a new agency rule outside the well-established procedural and substantive requirements of the APA: Commissioner Masters announced in the DFPS statement that the agency was operationalizing Abbott's Directive and thereafter implemented the announced policy, thereby establishing a new agency rule; and DFPS, through its actual enforcement and "threatened application" of that rule, "interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." Tex. Gov't Code § 2001.038(a).

The policy announced in the DFPS statement and its subsequent implementation plainly qualify as a "rule" under the APA. A rule "means a

state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency." Tex. Gov't Code § 2001.003(6)(A). It is well settled that pronouncements by an agency "that advise third parties regarding applicable legal requirements" may constitute rules under the APA. *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex. App.—Austin 2011, no pet.); *see also Tex. Alcoholic Beverage Comm'n*, 997 S.W.2d at 657-58 (holding that memoranda constituted "rule" because they "set out binding practice requirements" that "substantially changed previous enforcement policy" with respect to gaming machines).

Appellants assert that the DFPS Rule is nothing more than a "press statement," that did not "implement[], interpret[], or prescribe[] law or policy." Appellants' Br. 36. This skewed characterization of the challenged agency action is clearly rebutted by the record below. Appellees do not merely challenge an agency spokesperson's informal views or the restatement of existing law. Rather, Appellees challenge the announcement and implementation of a *new* DFPS enforcement policy. According to DFPS itself, there were "no pending investigations of child abuse involving the procedures described" in Paxton's Opinion" before Abbott's Directive; yet, going forward, DPFS *will* investigate any reports of procedures outlined in

Abbott's Directive as child abuse. *See supra* p. 5. Similarly, Appellants' conclusory assertion that the DFPS Rule does not "describe[] the procedures or practice requirements of a state agency," Appellants' Br. 36 (citing Tex. Gov't Code § 2001.003(6)(A)), lacks any support. DFPS's announcement that it would comply with Abbott's Directive and "investigate[]" any reports of the procedures outlined therein, *see* 3RR PX-03, plainly describes new DFPS procedures and practice requirements as it concerns the treatment of gender affirming care as child abuse.

Appellants also insist that the DFPS Rule does not reflect new policy because it was implemented in reliance on Attorney General Paxton's interpretation of existing law. *See* Appellants' Br. 36-38. But the APA does not exempt state agencies from the formal rulemaking process or the substantive limits of statutory or constitutional law as long as they invoke an attorney general opinion. The Family Code mandates DFPS to follow rulemaking procedures when adopting standards regarding investigating suspected child abuse. *See, e.g.*, Tex. Fam. Code § 261.310(a) ("The executive commissioner shall *by rule* develop and adopt standards for persons who investigate suspected child abuse or neglect at the state or local level.") (emphasis added); *id.* § 261.301(d) ("The executive commissioner shall *by rule* assign priorities and prescribe investigative procedures for

investigations . . . .") (emphasis added). Appellants do not dispute that Commissioner Masters failed to follow those procedures before announcing that DFPS would—and did—begin investigating reports of gender-affirming care as "child abuse." Moreover, Paxton's Opinion is non-binding, *Tex. Ass'n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam'rs*, 524 S.W.3d 734, 745 n.6 (Tex. App.—Austin 2017, no pet.), and not even persuasive because it is "clearly wrong." *Broom v. Tyler Cnty. Com'rs Court*, 560 S.W.2d 435, 436 (Tex. Civ. App.—Beaumont 1977, no writ). Appellees are entitled to challenge the DFPS Rule's adoption of Abbott's Directive—which actually exceeded the bounds of Paxton's Opinion—as violating both DFPS's enabling statute and Appellees' constitutional rights. Regardless of whether the Commissioner instituted the DFPS Rule in response to Paxton's Opinion and Abbott's Directive, she was required to comply with the procedural and substantive requirements of the APA.

Furthermore, the DFPS Rule is (1) generally applicable to all investigations involving medical care for adolescent gender dysphoria and (2) binding. After February 22, 2022, DFPS instructed investigators to treat reports of gender-affirming care differently from other abuse allegations. *See* 3RR PX-15 ¶ 2(B); 2RR136:2-16, 137:21-138:2. This dramatic shift in agency standards applies to and affects the rights of a class of persons—parents of

transgender children—as well as healthcare providers and members of the general public. *See, e.g.*, *El Paso Cnty. Hosp. Dist. v. Tex. Health & Hum. Servs. Comm'n*, 247 S.W.3d 709, 714 (Tex. 2008) (agency statement was generally applicable because it applied to "all hospitals"); *Combs v. Ent. Publ'ns, Inc.*, 292 S.W.3d 712, 718, 721-22 (Tex. App.—Austin 2009, no pet.) (Comptroller's statement constituted "rule" under APA because it applied to all persons and entities similarly situated); *see also Teladoc, Inc. v. Tex. Med. Bd.,* 453 S.W.3d 606, 615 (Tex. App.—Austin 2014, pet. denied) (distinguishing agency statements of "general applicability" "that affect the interest of the public at large" from statements "made in determining individual rights"). The new rule is also binding—DFPS now *requires* investigation into gender-affirming care, without exception, and it cannot be designated a lower level of priority. *See* 2RR137:21-138:2.

Appellants contend, in the alternative, that the DFPS Rule falls within the APA's "internal management" exception. Appellants' Br. 39. However, this exception narrowly applies to "statement[s] regarding only the internal management or organization of a state agency and not affecting private rights or procedures." Tex. Gov't Code § 2001.003(6)(C). The DFPS Rule—which provides that DFPS *will* implement Abbott's Directive and investigate all allegations of the provision of gender-affirming care as child abuse—bears

no resemblance to mere organizational management provisions and unquestionably affects private rights and procedures. All parents in Texas have the right to be free from DFPS investigation outside the mandate the Legislature extended to DFPS to investigate child abuse, in recognition that unlawful investigations are themselves harmful. In arguing that "an investigation does not affect private rights," Appellants' Br. 39-40, Appellants again focus on individual investigations rather than the scope and substance of the DFPS Rule itself and ignore that the DFPS Rule both impedes parents' fundamental right to care for their children and targets transgender adolescents for unconstitutional unequal treatment by deeming only their ability to access medically necessary care to be child abuse. *See supra* pp. 18-25.

This case thus stands in sharp contrast to Appellants' cases involving *nonbinding* agency rules that did *not* affect private rights. *See Slay v. Tex. Comm'n on Env'l Quality*, 351 S.W.3d 532, 546 (Tex. App.—Austin 2011, pet. denied) (citing evidence that "TCEQ commissioners were not *bound* to follow [new policy] when exercising their legislatively conferred discretion to impose penalties"); *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 905 (Tex. App.—Austin 2009, no pet.) (policy regarding appearance of licenses had no effect on litigants because vertical licenses remained valid).

Indeed, Appellants' own cited authority acknowledges that the APA's "internal management" exception does *not* apply where there is "some attempt by the agency to enforce its statement against a private person." *Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764, 770 (Tex. App.—Austin 1999, no pet.). Once, as here, an agency attempts or threatens to enforce the statement against a private party, "an affected person may challenge . . . the validity or applicability of the agency statement on whatever grounds may be applicable." *Id.*

Because the DPFS Rule satisfies all elements of a "rule" under the APA and the internal management exception does not apply, sovereign immunity is waived as to Appellants' APA claims against the Commissioner and DFPS.

2. Appellees have pleaded viable ultra vires claims, which are not barred by sovereign immunity.

Appellants also cannot invoke sovereign immunity to shield judicial review of claims that they acted ultra vires. "[A]n action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars." *Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009) (quoting *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997)). State action is without legal authority if it exceeds the bounds of authority granted to the actor or conflicts with the law itself. *Matzen v. McLane*, No. 20-0523, 2021

WL 5977218, at *4 (Tex. Dec. 17, 2021). Because Appellants have pleaded viable ultra vires claims, 1CR61-63, those claims are not barred by sovereign immunity.

a. Commissioner Masters

The Commissioner exceeded her legal and statutory authority, which is circumscribed and limited to those powers granted by the Legislature. The Commissioner's statutory powers include the ability to "adopt rules and policies for the operation of and the provision of services by the department," Tex. Hum. Res. Code § 40.027(e), but the Legislature tempered this power by requiring DFPS to abide by the APA, *see id.* § 40.006(a). No other enumerated power exempts the Commissioner from following APA procedures, permits her to create new agency rules by fiat, or enables her to immediately refashion laws and policies in response to gubernatorial directive. *See id.* § 40.027(a)-(d). By instituting a new investigatory rule pursuant to Abbott's Directive and promptly enforcing that rule without following procedural and substantive APA requirements, the Commissioner acted without legal or statutory authority.

Appellants' argument that the Commissioner's actions were statutorily authorized is meritless. *See* Appellants' Br. 41-42. The Family Code requires DFPS to investigate reports of child abuse and neglect. Tex. Fam. Code

§ 261.301(a). But it does not permit, much less require, DFPS to investigate "a parent's reliance on a professional medical doctor for medically accepted treatment" as child abuse. *Abbott*, 645 S.W.3d at 287 n.3. Rather, DFPS policy acknowledges that caseworkers are not qualified to decide whether medical issues qualify as child abuse or neglect. *See* PX-20 at § 2232.1. Thus, it is unsurprising that Appellants have not identified—and cannot identify—any other circumstances under which DPFS automatically investigates an entire category of prescribed medical treatments to determine whether a child's course of treatment constitutes abuse.

Nor does the Commissioner have the discretion to implement new agency rules without complying with the APA's procedural requirements. The DFPS Rule improperly *narrows* DFPS's exercise of discretion and creates a presumption of abuse for conduct that previously was not investigated as child abuse. While DFPS investigations may involve discretionary determinations about whether a particular report of potential abuse warrants investigation, the law *requires* DFPS to adopt rules governing those investigations under the APA. Tex. Hum. Res. Code § 40.006(a). Here, the Commissioner deviated from this required practice, improperly circumvented the APA, and, as a result, exceeded her rulemaking authority.

Lastly, regardless of whether the Commissioner made a "legal mistake" when she "agreed with the Governor's and Attorney General's interpretation of the law," Appellants' Br. 41, she exceeded her authority—i.e., acted ultra vires—by implementing a new agency rule without complying with the APA.[19] When an official acts without legal authority and in conflict with the law, as did the Commissioner here, the suit is not barred by sovereign immunity. *Heinrich*, 284 S.W.3d at 370.

b. Governor Abbott

In issuing the Abbott Directive, the Governor also acted without legal or statutory authority by (1) unilaterally redefining child abuse and establishing a new criminal penalty, and (2) seeking to directly control DFPS's investigatory decisions. 3RR PX-02 at 1; *see also* Tex. Const. art. 1, § 28; *id.* art. 4, § 10; *Abbott*, 645 S.W.3d at 281 (explaining the Governor lacks "statutory authority to directly control DFPS's investigatory decisions"). Appellees' harms are fairly traceable to the Governor's ultra vires and unconstitutional directives that triggered a sea-change in DFPS policy. Therefore, Appellees' declaratory judgment claim that the Governor acted ultra vires, 1CR80, is not barred by immunity.

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[19] For this reason, neither *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017), nor *Schroeder v. Escalera Ranch Owners' Ass'n, Inc.*, 646 S.W.3d 329, 335 (Tex. 2022), supports Appellants' position.

However, this Court should decline to reach jurisdictional questions regarding Appellees' claims against the Governor. Those questions are not before the Court in this interlocutory appeal from the Temporary Injunctions entered against the Commissioner and DFPS only.

3. Appellees' constitutional claims are not barred by sovereign immunity.

This Court should also not consider Appellants' jurisdictional challenges concerning Appellees' constitutional claims in the context of this appeal from the Temporary Injunctions based only on Appellees' APA claims against the Commissioner and DFPS. Nonetheless, Appellants' arguments fail.[20] "Sovereign immunity does not bar a suit to vindicate constitutional rights." *Klumb*, 458 S.W.3d at 13. Here, Appellees' constitutional claims are facially valid and, therefore, not barred by immunity.

First, Appellees have pleaded viable separation of powers claims against both the Commissioner and Governor. Appellees allege that the Commissioner and Governor, in seeking to adopt and enforce an overbroad definition of "child abuse" under the Family Code—in contravention of the plain meaning of the statutory definition and despite the Legislature's

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[20] Appellees address their constitutional claims and harms because the APA, in addition to mandating procedures for agency rulemaking, provides that agency rules cannot "impair[], or threaten to interfere[] with or impair, a legal right or privilege." Tex. Govt. Code § 2001.038(a).

decision not to adopt such a definition—invaded the legislative function in violation of constitutional separation of powers. 1CR67-70.

Appellants say the Commissioner and Governor (who is not a party to this appeal) did not redefine the law when they purportedly interpreted and enforced the "definition of abuse already codified in the Family Code." Appellants' Br. 44. But accepting this contention would render the legislative process a nullity. If such conduct were permissible, the Commissioner and Governor could simply "interpret" existing law to enact executive policy previously rejected by the Legislature. The Texas Constitution does not vest either of them with such authority.

Second, Appellees' equal protection claim is cognizable. Appellees allege that the DFPS Rule and Abbott Directive: (1) classify based on both transgender status and sex; (2) unlawfully discriminate against transgender youth by deeming the medically necessary care for the treatment of their gender dysphoria presumptively abusive because they are transgender when the same treatment is permitted for non-transgender youth; (3) single out for prohibition only medical treatment for gender dysphoria; and (4) subject transgender youth and their families alone to immense harms. 1CR72-74.

Appellants do not—and cannot—dispute that sex and transgender status are protected classes that support an equal protection challenge.

Instead, they claim that there can be no equal protection violation because the DFPS Rule and Abbott Directive do not expressly use the word "transgender," and any distinction they have drawn is based on age and medical status rather than "transgender status." Appellants' Br. 45-46. But the viability of an equal protection claim does not turn on whether Appellants referenced a protected class by name. Furthermore, courts have regularly recognized that discrimination against people with gender dysphoria is a proxy for discrimination based on sex and transgender status. *See Brandt*, 47 F.4th at 670 (the "sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not"); *Kadel v. Folwell*, No. 1:19CV272, 2022 WL 3226731, at *20 (M.D.N.C. Aug. 10, 2022) ("Discrimination against individuals suffering from gender dysphoria is also discrimination based on sex and transgender status"); *Toomey v. Arizona*, No. CV1900035TUCRMLAB, 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019). The DFPS Rule and Abbott Directive treat the provision of gender-affirming care *to transgender adolescents alone* as presumptively grounds for a child abuse investigation. Because Minor Appellees and PFLAG members' children have sufficiently alleged that they have been denied equality under

the law on the basis of their membership in protected classes, their equal protection claims are not barred by immunity.

Third, Appellees have pleaded viable due process vagueness claims. Appellees allege that Abbott's Directive and the DFPS Rule fail to provide parents of transgender youth with fair notice of how their efforts to provide for the medical needs of their children will be assessed, what standards apply, and how to avoid criminal penalty. 1CR70-71. Appellants assert in a footnote their "interpretation" is not overbroad, Appellants' Br. 46 n.8, but they do not meaningfully challenge, much less undermine, the merits of Appellees' due process vagueness claims.

Fourth, Appellees have pleaded viable substantive due process claims. Appellees and other PLFAG parents allege that (1) the right to care for their children is a fundamental liberty interest, (2) Appellants have violated that right by deeming the provision of medically necessary care to their children to be child abuse, and (3) this infringement is not justified by any legitimate state interest, let alone a compelling one. 1CR71-72. Appellants are wrong that *unlawful* DFPS investigations do not interfere with parental rights. *See supra* pp.18-25. And neither this Court nor the Texas Supreme Court has held otherwise, as Appellants suggest. *See* Appellants' Br.46-47; *Abbott*, 645 S.W.3d at 283 (deciding mandamus petition "[w]ithout commenting on the

merits of any party's claims or defenses"); *see also id.* at 284-85 (reiterating that the Court's "narrow decision" did not affect the merits of plaintiffs' underlying claims) (Lehrmann, J., concurring); *supra* p.37 (discussing *Gates*).

4. Appellants' UDJA argument is unavailing.

Appellees do not rely on the UDJA's limited immunity waiver to establish jurisdiction for any of their claims, as Appellants suggest. *See* Appellants' Br. 47. Rather, the APA expressly waives immunity, Appellees' ultra vires claims fall within a well-established exception to sovereign immunity, and sovereign immunity does not bar constitutional claims. *See supra* pp. 41-51. Because Appellees' claims fall either within a statutory immunity waiver or an exception to the doctrine of sovereign immunity, the fact that the UDJA itself does not *also* waive immunity is irrelevant.

III. The District Court properly granted Appellees' request for a temporary injunction.

The District Court in no way abused its discretion by granting the Temporary Injunctions. Appellees established: (1) a cause of action against Appellants; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *See Butnaru*, 84 S.W.3d at 204.

A. Appellees demonstrated a probable right to relief.

Appellees presented sufficient evidence to show a probable right to the relief sought in their APA claims. *See Butnaru*, 84 S.W.3d at 211 ("The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision."). Rather than undercutting the evidence supporting the Temporary Injunctions, Appellants mischaracterize the nature of Appellees' claims and misrepresent the record.

Appellants contend that the factual premise of Appellees' claims requires them to "prove that PBHT are *always* safe and reversible." Appellants' Br. 48-49. But whether PBHT is "free from risk" has no bearing on the unlawfulness of Appellants' actions. Appellees have challenged Appellants' actions in unilaterally and unlawfully changing the *definition* of child abuse, declaring the provision of medically necessary gender affirming care to be abuse, and subjecting all parents alleged to have secured such care for their transgender adolescents to invasions of privacy and infringements of parental autonomy. The factual premise of those claims is that Appellants singled out the established course of medical care for transgender youth with gender dysphoria and deemed it presumptively abusive, not only treating it differently than all other medical care, but treating it differently than the same care for non-transgender youth.

Appellants' trumped-up litany of alleged risks of gender affirming care is not only legally irrelevant, but factually incorrect and misleading. Appellants do not rely on the evidence actually before the District Court, but inadmissible, unreliable, extra-record hearsay. For example, Appellants repeatedly quote the declarations of Michael Laidlaw and James Cantor, Appellants' Br. 50-52, 54, which the District Court properly excluded on hearsay grounds, 2RR171:25-172:7, 173:9-16, 201:24-203:4. Appellants cite several controverted articles, Appellants' Br. 51-54, all of which are inadmissible hearsay that they did not even attempt to offer at the temporary injunction hearing. And they misrepresent the testimony of Appellees' expert, Dr. Cassandra Brady, lifting out of context a partial phrase from her report and ignoring her testimony that well-established medical standards of care "recommend pubertal-blocking treatment and gender-affirming hormone therapy to adolescents with gender dysphoria." 2RR104:9-23; *see also* 2RR104:24-110:10. If anything, Appellants' inflammatory briefing only underscores that they have unlawfully targeted the established course of medical care for transgender youth with gender dysphoria as presumptively abusive.

Appellants further argue that Appellees' claims must fail because DFPS investigates reports involving gender-affirming care for transgender

adolescents no differently than it does other investigations. *See* Appellants' Br. 56-62. This argument, too, is unresponsive to Appellees' actual claims and ignores the factual record before the District Court. To start, neither DFPS's general authority to conduct child abuse investigations nor the ultimate outcome of any individual investigation is at issue in this case. Even if DFPS conducted investigations of parents alleged to have provided gender affirming care identically to other investigations, that has no bearing on the unlawfulness of Appellants' having redefined "child abuse" to require those investigations in the first place. But the evidence actually shows the opposite—that DFPS investigations involving reports of gender-affirming medical care are anything but business-as-usual. After Abbott's Directive, DFPS instructed investigators to treat reports of gender-affirming care *differently* from other abuse allegations. *See* 3RR PX-15, ¶ 2(B); 2RR136:2-16, 137:21-138:2.[21] DFPS policy now *always* requires an investigation into such care, without exception, and it cannot be designated a lower level of priority. *See* 2RR137:21-138:2; 2RR265:6-10. By contrast, the record is devoid of any evidence supporting Appellants' disputed claim that

[21] Ms. Mulanax's alleged "admissions" that she stopped working for DFPS in March 2022 and therefore lacks knowledge of agency practice and policy after that time, *see* Appellants' Br. 59, do not undermine her testimony regarding the conduct of investigations prior to her departure.

"investigations into allegations that PBHT are being used to harm children fell within the statutes under which DFPS operates before the Attorney General or the Governor opined that it is so." Appellants' Br.58-59. Appellants point to no other category of prescribed medical treatments where DFPS has assumed unchecked authority to ignore established standards of medical care and automatically investigate prescribed treatments by medical professionals as child abuse. That is because such unlawful investigations are *not* within the scope DFPS's statutory authority. *See supra* pp. 49-50.

To bolster this argument, Appellants rely principally on inadmissible hearsay, again citing the unadmitted declaration of Stephen Black. Appellants' Br. 59-62. They also cite select testimony from DFPS Investigations Director Marta Talbert, *id.* at 60-61, but her contested testimony does not support Appellants' position. Ms. Talbert admitted that (1) allegations involving gender-affirming care have been "categorically treated as Priority 2 by DFPS," which prevents them from being closed upon receipt and requires an investigation, 2RR265:6-10, *see* 2RR232:1-233:5, and (2) she did not know whether DFPS employed this practice prior to February 22, 2022, 2RR265:6-17. Appellee witness Randa Mullanax, on the other hand, testified that cases involving gender-affirming healthcare were,

in fact, treated differently than other cases. 2RR137:21-138:8 (explaining that the only other cases not eligible for priority-none status or administrative closure are child death investigations and conservatorships). At best, Appellants' contention that DFPS "conducts . . . PBHT investigations just like any other investigation," Appellants' Br. 61, is a controverted fact. As long as "some evidence reasonably supports the trial court's decision," however, as it does here, the District Court did not abuse its discretion. *Butnaru*, 84 S.W.3d at 211.

B. The Temporary Injunctions preserve the status quo.

As this Court has already recognized, the Temporary Injunctions preserve the status quo because they "temporarily reinstate[] the Department's policies as they were prior to the February 22 directive, leaving the Department free to screen and investigate reports based on its preexisting policies regarding medical abuse and neglect."[22] *Masters*, 2022 WL 4359561, at *3 (cleaned up). As the District Court found, "an allegation about the provision of gender-affirming medical care, such as puberty blockers and hormone therapy, without more, was not investigated as child abuse by DFPS until after February 22, 2022." 1CR548; 2SCR5. The District

[22] Contrary to Appellants' assertions, *see* Appellants' Br. 62, the "last, actual, peaceable, non-contested status which preceded the pending controversy" is not determined as of the date of the *injunction*, but the period prior to the issuance of Abbott Directive's and the DFPS Rule (i.e. before February 22, 2022).

Court further found that "[t]he DFPS Rule changed the *status quo* for transgender children and their families" and "was given the effect of a new law or new agency rule, despite no new legislation, regulation, or even valid agency policy." 1CR548; 2SCR5.

The Texas Supreme Court has not held otherwise. In *In re Abbott*, the Supreme Court *denied* Appellants' requested mandamus relief as to this Court's determination that relief was appropriate under Rule 29.3 in order to maintain the status quo for the parties in that case. *In re Abbott*, 645 S.W.3d at 283. It did so because the temporary injunction in *Doe*, like those in this case, is tailored to address specific DFPS actions that violate the APA and are ultra vires and unconstitutional. Appellees do not challenge—and the Temporary Injunctions do not operate to interfere with—DFPS's general authority to investigate allegations of child abuse. Rather, the Temporary Injunctions narrowly enjoin Appellants from investigating and taking actions against Appellees, "solely based on allegations that they have a minor child or are a minor child who is gender transitioning or alleged to be receiving or being prescribed medical treatment for gender dysphoria." 1CR549; *see* 2SCR6. This narrow prohibition returns DFPS to the status quo—before Abbott's Directive and promulgation and enforcement of the new DFPS Rule—when DFPS did *not* investigate medical care as child abuse.

C. The Temporary Injunctions prevent irreparable harm to Appellees and pose no harm to the State.

The DFPS Rule represents a marked departure from DFPS's admitted own past practice, one that radically expands DFPS's authority to interfere with parents' decision-making and transgender adolescents' equality rights. The Temporary Injunctions properly enjoin Appellants from taking actions against Appellees on this basis.

Appellees harms are anything but speculative and go well beyond merely "living in constant fear about what will happen to them" or an ultimate finding of abuse. *See* Appellants' Br. 64-65. Appellees' claims challenge Appellants' authority to institute the DFPS Rule, not any individualized determinations about whether a particular parent has engaged in child abuse. *See supra* pp. 34-35. As the District Court correctly determined, the irreparable harm faced by Appellee Families includes actual and imminent violations of Appellees' fundamental rights to care for their children, the threat to essential medical care, and equal protection violations. 1CR548-49; 2SCR5-6; *see also Masters*, 2022 WL 4359561, at *3 (Appellees Voe and Roe have shown a risk of "irreparable harm to themselves and to their children from a potentially unlawful investigation that intrudes upon and interferes with their right as parents to make medical decisions for their children, relying upon the advice and recommendation of their health-care

providers”). Without the protection of the Temporary Injunctions, Appellees will continue to experience these irreparable harms.

Next, Appellants argue that the Temporary Injunctions are improper because only a permanent injunction could remedy Appellees’ harms. Appellants’ Br. 65-66. This incomprehensible argument ignores that Appellees are, in fact, ultimately seeking a *permanent* injunction, 1CR79-80, but the Temporary Injunctions are precisely the remedy needed to protect Appellees from irreparable harm during the pendency of the litigation.

Appellants’ claims of harm to the State, on the other hand, border on facetious. *See* Appellants’ Br. 66-67. The Temporary Injunctions do not “block DFPS from fulfilling its statutorily mandated duty to investigate alleged violations” of child abuse. *Id.* at 66. They only prohibit DFPS from *unlawfully* investigating and taking adverse action against Appellee and other PFLAG families based *solely* on providing gender affirming care to their adolescent children. 1CR549; 2SCR6. The State has “no public interest in the perpetuation of unlawful agency action,” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016), and the State is not harmed when the challenged governmental actions are either ultra vires or unconstitutional, *see Heinrich*, 284 S.W.3d at 372 (“*[U]ltra vires* suits ... do not seek to alter government policy but rather to enforce existing policy.”);

Austin Div. Dep't of Tex. v. Tex. Lottery Comm'n, No. A-10-CA-465-SS, 2010 WL 11512170, at *8 (W.D. Tex. Oct. 29, 2010), *aff'd sub nom. Dep't of Texas, Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427 (5th Cir. 2014) ("[T]he state suffers little or no harm when it is prevented from enforcing an unconstitutional law; certainly the harm it suffers does not outweigh the injury to the person whose constitutional rights are violated."). Appellants simply cannot overcome that Appellees—not the State—are experiencing imminent and irreparable harm.

D. The PFLAG Injunction is neither overbroad nor ambiguous.

In addition to attacking PFLAG's standing, Appellants argue that the PFLAG Injunction is improper because (1) it applies to all PFLAG members in Texas, including those that join after the PFLAG Injunction was entered, and (2) its terms are ambiguous. Appellants' Br.26-28. Both arguments fail. The PFLAG Injunction ordered the Commissioner and DFPS to cease any intake, investigation, or assessment involving gender-affirming care upon receipt of notice that the person reported is a member of PFLAG. 2SCR4. Such injunctive relief is both appropriate and practicable.

The PFLAG Injunction does not "create[] the exact same statewide injunction that Jane Doe . . . was already denied," as Appellants contend. *See* Appellants' Br. 27. On its face, the PFLAG Injunction applies only to

"members of PFLAG," 3SCR6, not "all Texas citizens." Appellants' Br. 27. And even if it did apply statewide, Appellants cite no authority for the proposition that district courts lack the authority to grant statewide injunctive relief. Appellants misconstrue the Supreme Court's mandamus decision in the *Doe* Case. Although the Supreme Court limited the Rule 29.3 injunction to plaintiffs in that case, the Court did not address the underlying merits, including "the scope of a district court's power to enjoin an administrative rule." *In re Abbott*, 645 S.W.3d at 283-84 & n.8. Appellants' challenge to the statewide injunction in the *Doe* Case remains pending before this Court. And other courts of appeals have *affirmed* orders enjoining an invalid rule's application on a statewide basis. *See, e.g.*, *Tex. Health & Hum. Servs. Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 620-21 (Tex. App.—Austin 2013, no pet.) (affirming statewide injunction of regulation that was challenged as ultra vires); *Ent. Publ'ns, Inc.*, 292 S.W.3d at 724-25 (affirming statewide temporary injunction of rule challenged under APA). Indeed, where a district court finds that an agency rule with statewide effects is invalid, statewide relief is not only appropriate, but necessary to provide complete relief.

The PFLAG Injunction is also clear and unambiguous. It identifies the specific actions Appellants are prohibited from undertaking and against

whom: Appellants are "enjoined and restrained from" investigating or taking adverse action against PFLAG member families based *solely* on allegations of providing gender affirming care to their adolescent children. 2SCR6. Furthermore, the injunction applies only where DFPS receives "actual notice" that any person being investigated based on such allegations is a PFLAG member. 2SCR7 Thus, there is no risk that DFPS will "unknowingly violate[] the court's order as a result of its vagueness." *See* Appellants' Br. 27-28.

Appellants fail to identify any practical or legal "problem[s]" arising from the fact that the PFLAG Injunction extends to members who join after the date on which the order was entered. *See* Appellants' Br. 28. Such an injunction is not novel. *See, e.g.*, *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 973 (D. Md. 2020) (enjoining enforcement of certain agency rule changes against members of two plaintiff organizations, including members who joined after preliminary injunction was entered); *cf. Morrow v. Washington*, 277 F.R.D. 172, 189 (E.D. Tex. 2011) (inclusion of future members in class definition is not a bar to certification). Nor does the PFLAG Injunction lead to "an absurd result." *See* Appellants Br. 28. The mechanics of the injunction are quite simple. An individual is entitled to the relief afforded by the PFLAG Injunction if they are a member at the time they seek

protection from an unlawful DFPS investigation regarding the provision of gender-affirming care. In the unlikely event an individual waits to join PFLAG to "avoid being bound by unfavorable court rulings," as Appellants hypothesize, *see id.*, the result is straightforward—that individual is not entitled to the relief afforded by the PFLAG Injunction unless and until they become a PFLAG member.

Lastly, the application of the PFLAG Injunction to future members does not undermine PFLAG's standing. Unlike the organizational plaintiff in the sole, non-controlling case cited by Appellants, *see id.* (citing *Nat. Arch & Bridge Soc. v. Alston*, 209 F. Supp. 2d 1207, 1219 (D. Utah 2002)), PFLAG does not seek to impute to itself for the purposes of standing the injuries of individuals who were not members at the time the PFLAG Injunction was entered.

E. The District Court's delay in granting the PFLAG Injunction is irrelevant.

Appellants' argument concerning the timing of the PFLAG Injunction ignores both the content and context of the injunction itself. *See* Appellants' Br. 67-69. A gap in time between a hearing and issuance of an injunction does not undercut the imminence of the harm. Where continual harms like those faced by Appellees are at issue, courts have upheld injunctions even when the finding of imminent harm was based on evidence from an earlier

temporary injunction hearing. *See, e.g.*, *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 893-94 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (no abuse its discretion in finding irreparable harm *five months* after evidence was presented to trial court). Moreover, Appellants cite "no authority for [their] contention that a finding of imminent harm cannot be based on evidence from an earlier temporary injunction hearing." *Id.* at 894. Indeed, the only case Appellants cite *undercuts* their position. As in *Intercontinental Terminals*, the harms and threatened harms to Appellees are "of a continuing nature" and have not yet passed. *Id.* The District Court, therefore, correctly concluded that the harms to Appellees PFLAG and the Briggles remain imminent.

Appellants wrongly contend that the District Court's delay in issuing the PFLAG Injunction shows that (1) the injunction "was not necessary to maintain the status quo, and (2) PFLAG and the Briggles failed "to prove irreparable harm." *See* Appellants' Br. 68. Both contentions disregard the District Court's clear explanation for the delay. After the temporary injunction hearing, having granted injunctive relief for the Voe and Roe Appellees, the District Court issued a letter to the parties on July 8, 2022. 1CR541-42. The letter indicated that (1) the Briggle and PFLAG Appellees' application for relief remained under advisement while the District Court

took time to consider the relevant case law and factual record, and (2) in light of testimony from a DFPS representative, the court was allowing the TRO protecting Appellees to expire to give DFPS "the opportunity to move forward with their intended plan to close these cases with a 'Ruled Out' finding." 1CR542. The letter also invited Appellees to alert the District Court to any additional allegations of immediate and irreparable harm. *Id.* The District Court subsequently advised the parties on August 3, 2022 that the court's consideration was delayed due to the judge's having tested positive for COVID-19. 1SRR15:9-17.

In the interim, in keeping with the court's letter, on September 7, 2022, Appellees alerted the court to additional instances of PFLAG members being harmed by Appellants as a result of the DFPS Rule. 3SCR26-40. Having been apprised of DFPS's continued pursuit of and instigation of new investigations, the District Court issued the PFLAG Injunction on September 16, 2022, explaining its process and conclusions:

> During the last two months, the Court has considered the associational standing of PFLAG, as well as the ripeness of the Briggles' claims. Having now considered the applicable law, as well as the testimony, the evidence, and the arguments and briefing of counsel, this Court finds that PFLAG has standing, and the Briggle Plaintiffs['] claims[] are ripe, in order to pursue this matter to final trial.

2SCR4. This Court should reject Appellants' attempt to misrepresent the

District Court's circumstances and reasoning, which show that the delay in issuing the PFLAG Injunction undermines neither its necessity nor the imminence of Appellees' harms.

PRAYER

This Court should affirm.

Dated: January 19, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 14,930 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Maddy R. Dwertman
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2023, a true and correct copy of the foregoing brief was served electronically via the court's electronic filing system on all parties through the following counsel of record:

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<u>/s/ Maddy R. Dwertman</u>
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