No. 03-22-00126-CV

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

GREG ABBOTT, in his official capacity as Governor of the State of Texas; 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.

JANE DOE, individually and as parent and next friend of MARY DOE, a minor; JOHN DOE, individually and as parent and next friend of MARY DOE, a minor; and DR. MEGAN MOONEY,

Appellees.

On Appeal from the 353rd Judicial District of Travis County, Texas
Cause No. D-1-GN-22-000977, Hon. Amy Clark Meachum

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ORAL ARGUMENT REQUESTED

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CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

RECORD REFERENCES & ABBREVIATIONS

CR	Clerk's Record
RR	Reporter's Record
PX	Plaintiffs' Exhibit
"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"
"APA"	Texas Administrative Procedure Act
"Appellants"	Appellants Abbott, Masters, and DFPS
"Appellees"	The Doe Family and Dr. Megan Mooney
"Commissioner"	Appellant Commissioner Jaime Masters
"DFPS Rule"	The instant challenged rule announced in DFPS's statement adopting Abbott's Directive and DFPS's subsequent implementation thereof
"DFPS"	Appellant Texas Department of Family and Protective Services
"District Court"	District Court of Travis County, Texas, 201st Judicial District, Hon. Amy Clark Meachum presiding
"Doe Family" or "Does"	Appellees Jane Doe, John Doe, and Mary Doe
"Dr. Mooney"	Appellee Dr. Megan Mooney
"Governor"	Appellant Governor Greg Abbott

"Mandamus Petition"	Petition for Writ of Mandamus filed by Relators on March 23, 2022 and cited as Pet.XX.
"Paxton Opinion"	Attorney General Ken Paxton's Opinion No. KP-0401 opining that certain procedures could constitute "abuse"
"Petition"	Plaintiffs' Original Petition filed on March 1, 2022, in the District Court of Travis County, Texas
"Rule 29.3 Order"	Order of the Texas Court of Appeals, Third District, at Austin, issued on March 21, 2022, reinstating the District Court's Temporary Injunction
"Rule 29.3"	Texas Rule of Appellate Procedure 29.3
"Temporary Injunction"	Order granting Plaintiffs' application for temporary injunction, issued by District Court on March 11, 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, including 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 March 11, 2022, the District Court held an evidentiary hearing on Appellees' application for temporary injunction. 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. Appellants presented no evidence. At the conclusion of the hearing, the District Court granted Appellees' request, issued the Temporary Injunction, and denied Appellants' plea to the jurisdiction.

Appellants filed an interlocutory appeal challenging the Temporary Injunction and denial of the plea. Appellees moved this Court to reinstate the Temporary Injunction under Rule 29.3. On March 21, 2022, this Court issued the Rule 29.3 Order, which reinstated the Temporary Injunction to preserve the status quo and rights of the parties pending interlocutory appeal.

On March 23, 2022, Appellants petitioned the Texas Supreme Court for a writ of mandamus challenging the Rule 29.3 Order and an emergency motion for temporary relief to stay

	the Rule 29.3 Order's reinstatement of the Temporary Injunction. On May 13, 2022, the Supreme Court delivered an opinion partially denying and partially granting Appellants' mandamus petition and dismissing the emergency motion for temporary relief. In issuing the Mandamus Opinion, the Supreme Court "express[ed] no opinion on the pending interlocutory appeal of the District Court's temporary injunction. . . ." *In re Abbott*, No. 22-0229, -- S.W.3d --, 2022 WL 1510326, at *4 n.8 (Tex. May 13, 2022). Following issuance of the Mandamus Opinion, the Temporary Injunction remains in place, as modified, to protect Appellees against actions by DFPS and Commissioner Masters.
Trial Court:	201st Judicial District Court of Travis County, Judge Amy Clark Meachum presiding.
Trial Court's Disposition:	Following an evidentiary hearing on March 11, 2022, the District Court signed an Order Granting Appellees' Application for Temporary Injunction, enjoining Appellants from (1) investigating families for "child abuse" based solely on reports of medically indicated care provided to adolescents and (2) requiring Texans to report such treatment as "abuse." 1CR235-36. The District Court denied Appellants' plea to the jurisdiction. 1CR232-37. This appeal followed.

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 believe that oral argument would be helpful to assist the Court in navigating these complex issues.

ISSUES PRESENTED

Issue One

A plea to the jurisdiction may be granted *only* where the Appellees' pleadings—construed in their favor—and the jurisdictional evidence affirmatively negate the existence of jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

Was the plea to the jurisdiction correctly denied by the District Court where (i) Appellees presented extensive evidence that Appellants' actions had caused and would cause Appellees imminent and irreparable harm; and (ii) Appellees' claims are not barred by sovereign immunity?

Issue Two

"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 Injunction where Appellees provided extensive evidence at the March 11, 2022 hearing that (i) Appellants' actions in issuing and implementing Abbott's Directive and the DFPS Rule, did not follow Texas's process for rulemaking or lawmaking; and (ii) Appellees had suffered and would continue to suffer irreparable harm due to Appellants' actions?

INTRODUCTION

Based on an uncontroverted record following a day-long evidentiary hearing, the District Court properly found that temporary injunctive relief was warranted to prevent imminent and irreparable harm resulting from Appellants' efforts to categorically change Texas's statutory definitions of child abuse in violation of the law and rulemaking procedures established by the APA and Texas Constitution. The uncontested record conclusively establishes not only that Appellees have standing, but also that they are entitled to the temporary relief sought.

Appellants offer no meaningful challenge to the harm Appellees will suffer absent temporary relief pending a trial on the merits. Nor do Appellants deny that, immediately after issuance of Abbott's Directive, DFPS abruptly changed its policy and announced that "[i]n accordance with Governor Abbott's directive today to Commissioner Masters, we will follow Texas law as explained in Attorney General opinion KP-0401." Based on novel and erroneous interpretations of law in Paxton's Opinion and Abbott's Directive, the DFPS Rule, for the first time, set forth a new agency rule mandating investigation of families of transgender adolescents for child abuse based solely on the allegation that adolescents were receiving medically necessary gender-affirming care. Appellees do not—and cannot—

seriously contest that Abbott's Directive, the DFPS Rule, and their subsequent implementation followed neither the law nor procedures required by the APA and Constitution.

Faced with these indisputable allegations, Appellants raise two principal arguments: (1) the District Court lacked subject-matter jurisdiction because (i) Appellees lack standing as they have not suffered a cognizable injury traceable to Appellants; (ii) Appellees' claims are unripe; and (iii) Appellees' claims are barred by sovereign immunity; and (2) the District Court erred in issuing the Temporary Injunction because (i) Appellees do not have a probable right to the relief they seek and (ii) Appellees have not suffered irreparable harm.

Appellants ignore the extensive evidence Appellees presented at the temporary injunction hearing establishing that Appellees not only have suffered—and will continue to suffer—imminent and irreparable harm, but also that this harm is traceable to Appellants' ultra vires, unconstitutional, and APA-violative actions. Thus, the District Court properly exercised jurisdiction and did not err in granting Appellees' temporary injunction request. Appellants' appeal is meritless and should be denied.

STATEMENT OF FACTS

This dispute arises from Appellants' actions requiring DFPS to investigate parents for child abuse based solely on allegations that they were providing medically necessary care for their adolescent's gender dysphoria,[1] and requiring mandatory reporters statewide to report parents suspected of providing that care. Medical treatment of adolescents[2] with gender dysphoria is well established; based on guidelines that are widely accepted by the medical community, 3RR84-85, 118-21; and provided in consultation with adolescents, their parents or guardians, and their medical providers, 3RR21. This care is safe and effective, 3RR85-87, and withholding it can lead to "increased anxiety, depression, and suicide" and "an increased risk for death," 3RR86, 122, 126.[3]

During the 87th Regular Session in 2021, the Legislature considered and rejected legislation that would categorize the provision of medical care

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[1] Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. 3RR83; 4RR PX-08, pp.7-8. Gender dysphoria is recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). 4RR PX-08, p.8.

[2] Under clinical guidelines, no medical treatment for gender dysphoria is provided until after the onset of puberty. 3RR83-84. Consequently, only transgender adolescents and adults are provided this treatment.

[3] Every major U.S. medical association recognizes the medical necessity of gender-affirming care for improving the physical and mental health of transgender people. 1CR14-16, 20; 3RR122. *See also* Brief of *Amici Curiae* American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations, 2022 WL 2270222 (Tex. App.—Austin, Mar. 18, 2022).

for a minor with gender dysphoria as "child abuse." 1CR9. After the legislation did not pass, Governor Abbott explained that he had a "solution" to what he called the "problem" of medical treatment for minors with gender dysphoria. 1CR10.

On February 21, 2022, Attorney General Ken Paxton released the Paxton Opinion, opining that medical treatment for a minor with gender dysphoria, including pubertal suppression and hormone therapy, could constitute child abuse, but stated that the opinion did "not address or apply to medically necessary procedures." 4RR PX-01, p.2.

The next day, the Governor circumvented the Legislature by directing DFPS and its Commissioner to investigate all reports of medical treatment for adolescents with gender dysphoria as "child abuse," without regard to medical necessity. *See* 4RR PX-02, p.1. Abbott's Directive incorporated the Paxton 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.* Abbott's Directive to Commissioner Masters is clear and unequivocal: "I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures

in the State of Texas." *Id.* It also orders, under threat of criminal prosecution, "all licensed professionals" to report such "abuse." *Id.*

Abbott's Directive triggered abrupt changes in DFPS's policies and practices. 2RR32-33, 51-53. 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. 2RR44-46, 49, 88-89; 1CR8. DFPS confirmed that, before Abbott's Directive, it had "no pending investigations of child abuse involving the procedures described" in the Paxton Opinion. 1CR8. But the day Abbott issued his directive, DFPS announced that it would comply with Abbott's Directive and "investigate[]" any reports of such care, without regard to medical necessity. 4RR PX-03; 1CR8. And after Abbott's Directive, DFPS promptly launched investigations into families throughout Texas, including the Doe Appellees, based solely on reports of providing medical care to transgender adolescents. 1CR9; 2RR33. DFPS also instructed investigators to neither document anything about these "specific cases" in writing, nor designate them "priority none" or "alternative response." 4RR PX-17; *see also* 2RR37:24-25, 38:24-39:5. 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.

Appellees Jane and John Doe are the loving parents of Mary Doe, a 16-year-old adolescent diagnosed with gender dysphoria. 1CR22-23; 2RR84:23-25, 90:22-23, 115:2-4. The day after Abbott's Directive and DFPS's announcement of the DFPS Rule, Jane Doe, a DFPS employee, sought clarification from her supervisor regarding the impact of Abbott's Directive on DFPS policy. 1CR24; 2RR87:4-19. Within hours, Jane was placed on administrative leave. 1CR57. Two days later, a DFPS investigator visited the Doe home as part of a newly opened investigation based only on the allegation that the Does have a transgender daughter prescribed treatment for gender dysphoria. 1CR24-25; 2RR89:15-90:21.

Appellee Dr. Megan Mooney is a clinical psychologist and mandatory reporter under Texas law. 1CR26; 3RR17:24-25, 22:14-16. She has a private practice that provides psychotherapy to, among others, adolescent patients diagnosed with gender dysphoria. 1CR26-27; 3RR19:8-22, 21:9-12.

Appellees sued Appellants on March 1, 2022, challenging Abbott's Directive and the DFPS Rule. Appellees contend that DFPS's February 22 statement of compliance with and subsequent implementation of Abbott's Directive improperly establishes a new rule without following mandatory APA procedures and conflicts with both DFPS's enabling statute and Appellees' constitutional rights. *See* Tex. Gov't Code §§ 2001.023, .029, .033;

1CR29-36. Appellees also assert that the Governor lacked authority to direct DFPS's discretionary investigation decisions and usurped the power of the Legislature in redefining statutory terms. 1CR36-47.

Appellees assert six causes of action, including (1) a declaratory judgment claim that the DFPS Rule is an invalid rule under the APA, 1CR29-36; (2) a declaratory judgment claim that the Governor's and Commissioner's actions are ultra vires, 1CR36-40; and constitutional claims that (3) constitutional claims the Governor and Commissioner violated separation of powers, 1CR40-44; (4) Abbott's Directive and the DFPS Rule are unconstitutionally vague, 1CR44-45; (5) the Governor and Commissioner deprived Appellees Jane and John Doe of their fundamental parental rights, 1CR45-46; and (6) the Governor and Commissioner violated Mary Doe's guarantee of equal rights and equality under the law, 1CR46-47. Appellees sought temporary and permanent injunctive relief for their APA, ultra vires, and separation of powers claims. 1CR48-51.

In response, Appellants filed a plea to the jurisdiction challenging Appellees' standing and invoking sovereign immunity. 1CR71-82.

After a full evidentiary hearing that only included testimony of Appellees' three fact witnesses and two experts, the District Court issued the Temporary Injunction and denied Appellants' jurisdictional plea. 1CR232-

37. Based on the uncontroverted 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 Governor's directive is ultra vires, beyond the scope of his authority, and unconstitutional" and "the improper rulemaking and implementation by Commissioner Masters and DFPS are similarly void." 1CR234. The District Court found that "gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022." 1CR234. Thus, Appellants "changed that *status quo* for transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas." 1CR234. Therefore, the District Court concluded "[t]he Governor's Directive was given the effect of a new law or new agency rule, despite no new legislation, regulation or even stated agency policy" and that "Governor Abbott and Commissioner Masters' actions violate separation of powers by impermissibly encroaching into the legislative domain." 1CR234.

The District Court also held that, absent injunctive relief, Appellees would be irreparably harmed: "Jane, John and Mary Doe face the imminent and ongoing deprivation of their constitutional rights and the stigma attached to being the subject of a child abuse investigation." 1CR234-35. Additionally, "Mary faces the potential loss of medically necessary care,

which if abruptly discontinued can cause severe and irreparable physical and emotional harms, including anxiety, depression, and suicidality." 1CR235. Without an injunction, Dr. Mooney "could face civil suits by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if Appellants' directives are enforced." 1CR235. And she "could face immediate criminal prosecution" if she did not report her patients under state mandatory reporter requirements. 1CR235.

The Temporary Injunction enjoined Appellants from "enforcing the Governor's directive and DFPS rule." 1CR235. Appellants are specifically restrained from:

> (1) taking any actions against [Appellees] based on the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate; (2) investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports; and (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-

> affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

1CR235-36. The District Court found Appellants' plea "not founded and without merit." 1CR232.

Appellants appealed. 1CR226. The appeal superseded the Temporary Injunction. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. R. App. P. 29.1(b). Appellees requested emergency relief from this Court reinstating the Temporary Injunction during the appeal, which this Court granted over Appellants' jurisdictional objections. *See 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*, No. 22-0229, 2022 WL 1510326 (Tex. May 13, 2022). The following day, DFPS explained to its employees that the Rule 29.3 Order does not prevent DFPS from assessing intakes and opening investigations where "*independent grounds* that warrant an investigation are reported."[4]

[4] Lauren McGaughy, *AG Paxton appeals to Texas Supreme Court as state halts inquiries into parents of trans children*, Dallas Morning News (Mar. 23, 2022), https://www.dallasnews.com/news/politics/2022/03/23/ag-paxton-takes-fight-tosupreme-court-as-texas-halts-investigations-into-parents-of-trans-children/ (emphasis added). This Court "may judicially notice a fact that is not subject to reasonable dispute," Tex. R. Evid. 201(b), and printed material in newspapers or periodicals is self-authenticating, Tex. R. Evid. 902(6).

Appellants sought mandamus from the Supreme Court. *See In re Abbott*, No. 22-0229, -- S.W.3d --, 2022 WL 1510326, at *4 (Tex. May 13, 2022). In addition to arguing that this Court's order was improper under Rule 29.3, Appellants raised the same jurisdictional objections in their plea to the jurisdiction. *See* Pet., *Abbott*, 2022 WL 945519, at *4-10 (Tex. filed Mar. 23, 2022).

The Supreme Court denied mandamus relief "insofar as it governs conduct among these parties while the appeal proceeds." *Abbott*, 2022 WL 1510326, at *4. The Supreme Court emphasized that "DFPS's preliminary authority to *investigate* allegations does not entail the ultimate authority to *interfere* with parents' decisions about their children, decisions which enjoy some measure of constitutional protection whether the government agrees with them or not." *Id.* at *3 (emphases added). The Supreme Court confirmed that "neither the Governor nor the Attorney General has statutory authority to directly control DFPS's investigatory decisions." *Id.* As a result, the Supreme Court concluded that the Governor could not be enjoined from engaging in conduct for which he had no authority to undertake. *Id.* at *2.

The Supreme Court did not address the merits. *Id.* at *4 n.8. Implicitly rejecting Appellants' jurisdictional and lack of irreparable harm arguments, the Supreme Court allowed this Court's 29.3 Order to remain in effect *as to*

the parties on this appeal, except the Governor. *Id.* at *4-5. The Supreme Court did not address "the scope of a district court's power to enjoin an administrative rule." *Id.* at *4. The Supreme Court also noted that "DFPS's press statement . . . suggests that DFPS may have considered itself bound by either the Governor's letter, the Attorney General's Opinion, or both." *Id.* at *3.

After agreeing with the majority that the Supreme Court did not address the merits of the underlying case, Justice Lehrmann observed: "The reinstated injunction prohibits DFPS from investigating reports 'based *solely* on . . . facilitating or providing gender-affirming care . . . where the *only grounds* for the purposed abuse' are 'facilitation or provision of gender-affirming medical treatment.'" *Id.* at *6 (Lehrmann, J., concurring) (emphasis in original). Thus, "the order temporarily reinstates DFPS's policies as they were prior to the February 22 directive, leaving DFPS free to screen and investigate reports based on its preexisting policies regarding medical abuse and neglect," *id.*, and "DFPS's own statements support this reading of the reach of the order," *id.* at *7. Justice Lehrmann continued: "By essentially equating treatments that are medically accepted and those that are not, the OAG Opinion raises the specter of abuse every time a bare allegation is made that a minor is receiving treatment of any kind for gender

dysphoria." *Id.* at *7 n.3. Justice Lehrmann thus concluded that "a parent's reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse." *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the denial of Appellants' plea to the jurisdiction and the grant of Appellees' request for a temporary injunction.

First, Appellants' jurisdictional plea distorts the controlling law, the uncontested facts, and Appellees' Petition. Appellees alleged cognizable harms resulting not only from DFPS's unlawful investigation, but more broadly from Abbott's Directive and the invalid DFPS Rule. Appellants' unlawful acts interfere with the Doe Parents' fundamental right to consent to medically necessary care for their child, deprive Mary of her right to equality under the law, and harm Dr. Mooney's business interests and due process rights. Injunctive relief preventing DFPS and the Commissioner from enforcing the DFPS Rule and declaratory relief that Abbott's Directive and the DFPS Rule were ultra vires and violated both the separation of powers and Appellees' constitutional rights are tailored to remedy these harms. And Appellees' injuries establish that their claims are constitutionally and prudentially ripe.

Additionally, sovereign immunity does not shield Appellees' claims from judicial review. The APA expressly waives sovereign immunity for Appellees' challenge to the validity of the DFPS Rule. Even were this not the case, sovereign immunity does not bar Appellees' ultra vires and constitutional claims.

Finally, the District Court did not abuse its discretion by granting temporary injunctive relief. The uncontroverted evidence demonstrates that Appellees (1) have a probable right to a declaration that Abbott's Directive and the DFPS Rule violate the APA, unconstitutionally upend the separation of powers, and are ultra vires; and (2) would suffer irreparable harm absent injunctive relief. Accordingly, this Court should affirm the order denying Appellants' jurisdictional plea and the order granting Appellees' temporary injunction request.

STANDARD OF REVIEW

A denial of a plea to the jurisdiction is reviewed *de novo*. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "When a plea to the jurisdiction challenges the pleadings, [courts] determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Id.* The court "construe[s] the pleadings liberally in favor of the plaintiffs and look[s] to the pleaders' intent." *Id.*

"Only if the pleadings affirmatively negate jurisdiction should the plea to the jurisdiction be granted without affording the plaintiffs an opportunity to replead." *Hous. Belt & Terminal Rwy. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016).

"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*."[5] *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 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 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

[5] Appellees cite no supporting authority for their erroneous assertion that a temporary injunction is reviewed *de novo*. *See* Appellants' Br.8.

reviewing court must affirm even if it would have reached a contrary conclusion. *Butnaru*, 84 S.W.3d at 211.

ARGUMENT

I. The District Court properly exercised jurisdiction.

In response to Abbott's Directive, DFPS adopted a new agency rule and launched unwarranted, intrusive investigations into the Doe Family and other families across the state. By its own admission, DFPS explicitly followed Abbott's Directive, radically departing from longstanding agency rules and procedures. These actions violated the APA, upended separation of powers, and were ultra vires. Appellants' actions and unlawful rulemaking directly interfered with Appellees' rights—causing them immediate and irreparable harm and future imminent harm—which is sufficient to confer standing, establish ripeness, and render sovereign immunity inapplicable.[6]

Appellants argue that "[w]hether a particular child's medical care is appropriate and medically necessary, on the one hand, or unnecessary and abusive, on the other, is precisely what a DFPS investigation is meant to find out." Appellants' Br.11. But Appellants do not cite *any* examples where DFPS assumed that role before Abbott's Directive and the DFPS Rule—whether

[6] Appellants have presented the same jurisdictional objection to multiple courts, including the Supreme Court, which denied Appellants' mandamus petition as to Appellees. *See, e.g.*, *Abbott*, 2022 WL 1510326, at *2. Appellants offer no new arguments here.

evaluating treatment for gender dysphoria or any other medical diagnosis. And it simply has never been the case that DFPS had the authority to investigate families based solely on an allegation that a minor is being provided with medical care, without more. Appellants' argument would represent a radical and unprecedented new role for the government, whereby every medical decision Texas parents make for their children could be subject to DFPS investigation to determine if DFPS agrees with the medical treatment, regardless of whether an allegation of *actual* abuse has been made.

Appellants manufacture a strawman argument to claim that upholding injunctive relief could allow anyone to bring a lawsuit challenging any "allegedly improper investigation." Appellants' Br.9. Appellees do not challenge DFPS's general investigative authority, but rather a novel DFPS Rule that unlawfully and dramatically expanded DFPS's authority to interfere with the private medical decisions of families. Of course, the Family Code and DFPS's regulations authorize investigations of *actual* allegations of abuse under duly enacted statutory definitions. But Appellants cannot bypass the Legislature, disregard substantive and procedural APA requirements, or intrude upon the constitutionally protected role of parents to make medical decisions for their children. Abbott's Directive and the

DFPS Rule *assume* there is abuse warranting an investigation when the only allegation is that a family is providing well-established medical care to their transgender adolescent child. Neither the Texas Constitution, nor the laws and regulations applicable to DFPS, authorize such far-reaching and unprecedented governmental intrusion.

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

Appellants incorrectly argue that an investigation cannot establish a judicially cognizable injury, but they also mischaracterize Appellees' injury as limited to "investigations." *See* Appellants' Br.6-7. In doing so, Appellants ignore the myriad harms caused by their actions. Appellees' allegations must be read as pleaded. *See Davis v. Burnam*, 137 S.W.3d 325, 331 (Tex. App.—Austin 2004, no pet.). 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 investigations constitute legally cognizable harm. Second, Appellants' unlawful rulemaking and subsequent enforcement have caused, and absent

injunctive relief will continue to cause, Appellees significant, ongoing, and irreparable harm far beyond any "investigation."[7]

1. The Doe Appellees.

Appellants are wrong that "[a] bare investigation is not a judicially cognizable injury, so the Doe Appellees lack standing." Appellants' Br.6.[8] Appellants also ignore the range of harms alleged in Appellees' Petition.

Unequal treatment and deprivation of individual rights are judicially cognizable injuries. *See, e.g.*, *Ne. Fla. Chapter 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 medical treatment for gender dysphoria to adolescents, Appellants violated the Doe Appellees' right to due process, 1CR42-45, deprived the Doe Parents of their

[7] 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) ("Because the voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required.").

[8] Appellants do not include any supporting argument or authority for this assertion. *See* Tex. R. App. P. 38.1(i) (briefs must contain "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284-85 (Tex. 1994) (recognizing long-standing rule that error may be waived by inadequate briefing); *Liberty Mut. Ins. Co. v. Griesing*, 150 S.W.3d 640, 648 (Tex. App.—Austin 2004, pet. dism'd w.o.j.) ("Bare assertions of error, without citations to argument or authority, waive error.").

fundamental rights as parents to consent to medical care for their child, 1CR45-46, and violated Mary Doe's right to equality under the law, 1CR22, 25, 46-47, 58.

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." *T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 43 (Tex. App.—Fort Worth 2020, pet. denied). "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); *see also Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). Texas law recognizes that "parents 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). Parents have not only a natural right, but a "'high duty' to recognize symptoms of illness and to seek and follow medical advice" for their child. *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979); *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").

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," Tex. Const. art. 1, § 3a. The United States Supreme Court has explained that "discrimination based on . . . transgender status necessarily entails discrimination based on sex." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1747 (2020); *cf. Tarrant Cnty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 329 (Tex. App.—Dallas 2021, no pet.) ("[W]e must follow *Bostock* and read 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 the Doe Parents from consenting to medically necessary care, abridging their fundamental rights and duties as parents and preventing Mary Doe from accessing medically necessary care based solely on her identity as a transgender adolescent. *See* 1CR33-34, 37-38, 43-44. Appellants do not dispute that Mary Doe was diagnosed with gender dysphoria. *See* 1CR21, 56. Mary's doctors recommended medical care to treat her gender dysphoria. *See* 1CR21, 56. Medical treatment for adolescents with gender dysphoria is well-established and medically

necessary. *See* 2RR91:18-21; 3RR84-85, 118-21; *see also* 1CR12-19 (describing medical standards). And withholding treatment can lead to "increased anxiety, depression, and suicide," as well as "an increased risk for death." 3RR126; *see also* 3RR86, 122. Appellants' actions thus violate the Doe Parents' fundamental rights as parents to care for their child, a fundamental liberty interest protected by Texas's Constitution and Legislature. *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 Mary Doe's constitutional right to equality.

Moreover, the DFPS Rule subjects the Doe Appellees to a DFPS investigation whether or not they consent to specific medical care for their adolescent child. *See* 1CR42-43; *see also Abbott*, 2022 WL 1510326, at *7 n.3 ("By essentially equating treatments that are medically accepted and those that are not, the OAG Opinion raises 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 Mary Doe's gender dysphoria, the Doe Appellees are subject to DFPS investigation for child abuse under Abbott's Directive and the DFPS Rule. Paradoxically, should the Doe Parents refuse to provide medically necessary care for Mary

Doe's gender dysphoria, they not only cause their child 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").

Nevertheless, Appellants argue that it is DFPS's role to investigate every allegation of medical treatment for gender dysphoria. *See* Appellants' Br.11 ("Whether a particular child's medical care is appropriate and medically necessary, on the one hand, or unnecessary and abusive, on the other, is precisely what a DFPS investigation is meant to find out."). Under this new regime, Appellants elevate *themselves* as arbiters of *all* parental medical decisions involving a child's diagnosis and treatment, even when done in consultation with medical professionals. *See* Appellants' Br.10-11 (citing Dr. Mooney's testimony that treatment is highly individualized).[9] Under Appellants' proposed regime, the mere allegation of *any* medical care provided to minors, without more, is sufficient for DFPS to open intrusive

[9] DFPS policy recognizes that its caseworkers are not qualified to decide whether medical issues qualify as child abuse or neglect. *See* CPS Handbook 2232.1 (CPS Oct. 2021), https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp.

and stigmatizing investigations, along with their collateral consequences, to determine if "medical care is appropriate and medically necessary." *Id.*

Appellants' effort to portray DFPS investigations into gender-affirming care as the routine agency business of searching out abuse cannot conceal the extraordinary nature of categorically equating medically recognized care for gender dysphoria with child abuse. Appellants have not pointed to any other instance where DFPS assumed unbridled authority to ignore established standards of medical care and automatically investigate treatments prescribed by medical professionals as child abuse. The District Court found that "gender-affirming care was not investigated as child abuse by DFPS until after February 22." 1CR234. As Appellees allege in their Petition: "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." 1CR35-36. 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." 1CR47. Thus, Appellants infringe the Doe Parents' fundamental parental rights and Mary's equal rights under the law, causing cognizable constitutional injuries.

Moreover, Appellants' assertion 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*, 2022 WL 1510326, at *9 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." 4RR PX-16, p.1. The invasion of privacy, potential 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 Appellants allege, DFPS investigations can be highly stigmatizing, traumatic, and give rise to a whole host of collateral consequences. *See*, *e.g.*, 1CR28 ("Being subject to an investigation would dramatically worsen the mental health outcomes of [transgender youth], and could worsen the already tragic rate of suicide among transgender youth."); *cf.* 1CR47 (noting Defendants' actions "place a stigma and scarlet letter upon transgender youth"). A DFPS investigation

alone can prevent Jane Doe from practicing her profession and prevent the Doe Parents from working with minors and volunteering in the community. 1CR49. Indeed, Jane Doe has already been placed on administrative leave and risks losing her job. 1CR24-25, 57. And, after an investigator came to her home, Mary was deeply traumatized by the prospect that she could be separated from her parents. 2RR97:8-98:4. These harms are more than sufficient to establish Appellees' standing.

Finally, Appellants entirely ignore Appellees' APA claims. 1CR29-36. The APA provides a cause of action for declaratory judgment 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). The legal rights impaired include interference "with Appellees' fundamental parental rights and other equality and due process guarantees of the Texas Constitution." 1CR34; *see supra* pp. 19-25.

Appellants fail to address the significant, ongoing harms suffered by the Doe Appellees. Appellants' unlawful acts interfere with the Doe Parents' right—indeed duty—to provide well-established, medically necessary care for their child. And they deprive Mary of her right to equality under the law. The Doe Appellees thus have alleged a judicially cognizable injury.

2. Dr. Mooney.

Appellants similarly seek to diminish and distort Dr. Mooney's injuries, ignoring caselaw authorizing professionals to challenge unlawful agency rules. *See* Appellants' Br.12.

First, it is well established that "a business can have standing to challenge the legality of governmental actions [that] . . . damage or destroy markets for its services." *Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 741 (Tex. App.—Austin, pet. dism'd). Dr. Mooney is a clinical psychologist and mandatory reporter under Texas law. 1CR27, 66. Part of her practice includes providing mental health care for youth with gender dysphoria. 1CR27, 63. Dr. Mooney testified that Appellants' actions have threatened the bonds of trust with her patients and have harmed her business. 3RR27; 1CR63.

Second, Dr. Mooney is left without fair notice of reporting standards for child abuse and how her actions will be assessed. 1CR45. The conflict between the DFPS Rule's equation of gender-affirming care with abuse, on the one hand, and the statutory definition of neglect implicated by a parent's failure to provide medically necessary care, on the other, *see supra* pp. 22-23, makes it unclear when Dr. Mooney is required to report her clients. *See also Abbott*, 2022 WL 1510326, at *7 n.3 (Lehrmann, J., concurring). This

places Dr. Mooney in the immediate quandry of being asked to violate her professional code of ethics, which mandates that she do her clients no harm. 1CR26, 64.

Consistent with her ethical obligations, Dr. Mooney said publicly before filing suit that she would not follow Abbott's Directive and the DFPS Rule. 3RR 24:19-24. Since then, she has been called a "child abuser," and had her license threatened. 3RR 26:17-20. Absent injunctive relief, Dr. Mooney will face more threats to her business and professional reputation, plus the possible loss of her license or criminal prosecution. 1CR69; 3RR24-25, 26:2-16, 29:7-10. Dr. Mooney is thus directly harmed by Appellants' actions. 1CR27; 3RR23-29, 91-92.

Appellants describe Dr. Mooney's risk of civil or criminal penalties as a mere "theoretical possibility." Appellants' Br.12 (citing *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). But, where a plaintiff alleges an intent to continue the regulated conduct, she need not be prosecuted before filing suit. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) (explaining that "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" is sufficient to confer standing); *Lake Medina Conservation Soc., Inc./Bexar-Medina Atascosa*

Cntys. WCID No. 1 v. Tex. Natural Res. Conservation Comm'n, 980 S.W.2d 511, 516 (Tex. App.—Austin 1998, pet. denied) (property owners had standing to challenge government regulations that could harm their property in the future). The particularized injuries that Dr. Mooney faces from Appellants' challenged actions make Appellants' cases readily distinguishable.[10] Indeed, Dr. Mooney's bonds with her clients, professional reputation, and business have already been negatively affected by Appellants' actions, and Dr. Mooney will face irreparable harm absent injunctive relief.

Appellants' assertion that Dr. Mooney can only seek relief from the Behavioral Health Executive Council or District Attorneys is a red herring. Appellants' Br.12. The entity responsible for enforcing a directive is not a necessary defendant where a plaintiff challenges the validity of the directive itself. In *Abbott v. La Joya Independent School District*, the Governor similarly argued that plaintiffs lacked standing to challenge the validity of his order because local district attorneys, not the Governor, had the power to enforce the order and seek penalties for noncompliance. No. 03-21-00428-

[10] *See* Appellants' Br.12; *Gee*, 941 F.3d at 163-64 (noting that plaintiffs failed to challenge provisions that imposed requirements on them); *Clapper*, 568 U.S. at 409 (concluding that it was speculative whether the Government would intercept respondents' communications and what harm would result).

CV, 2022 WL 802751, at *8 (Tex. App.—Austin Mar. 17, 2022, no pet. h.). This Court rejected that argument, explaining that plaintiffs' declaratory relief claim that the Governor's actions are ultra vires "complain[s] about the validity of the executive order itself, as opposed to the threat of enforcement for non-compliance." *Id.* at *9. Thus, plaintiffs demonstrated standing: "If successful on their ultra vires claim, the declaratory and injunctive relief sought would allow the school districts to exercise their authority" and "prevent the State from interfering with that authority." *Id.*; *accord Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 5217636 (Tex. App.—San Antonio Nov. 10, 2021, pet. filed).

Here too, Dr. Mooney does not merely seek to prevent civil or criminal actions. Dr. Mooney seeks declaratory and injunctive relief that DFPS's Rule violates the APA and that Abbott's Directive and DFPS's actions were ultra vires and unconstitutional. 1CR34, 36-44. This relief is necessary to redress Dr. Mooney's harm by ensuring that she remains in compliance with her mandatory duty to report without violating the law or her ethical obligations to her clients.

B. Appellees' injuries—as pleaded in the Petition—are traceable to Appellants.

Appellants' argument that Appellees have not sought relief from the proper parties is similarly unavailing. *See* Appellants' Br.13. Appellees'

injuries are traceable to "the challenged actions of the defendant[s]." *Lindig v. Pleasant Hill Rocky Cmty. Club*, No. 03-17-00388-CV, 2018 WL 3447719, at *2 (Tex. App.—Austin July 8, 2018, no pet.) (mem. op). Before Abbott's Directive and the DFPS Rule, Mary did not face losing medically necessary care; the Does did not face family separation, losing their livelihoods, or the consequences of a child abuse investigation based solely on an *invalid* directive and rule; and Dr. Mooney treated her patients without fearing loss of business and license or criminal prosecution.

Abbott's Directive triggered a sea-change in DFPS policy. As Justice Lehrmann noted, "[t]he plaintiffs allege that the Governor's February 22, 2022 letter and DFPS's summary implementation of the directive in that letter resulted in an immediate, dramatic change in DFPS's interpretation of its legal obligations with respect to investigating child abuse in the context of adolescent minors receiving medical treatment for gender dysphoria." *Abbott*, 2022 WL 1510326, at *5 (Lehrmann, J., concurring); *see* 2RR32:16-22, 53:2-8. Before Abbott's Directive, DFPS had never investigated medically necessary treatment of adolescents with gender dysphoria, standing alone, as suspected child abuse. 2RR49:5-12, 88:17-23. The Commissioner confirmed that, before Abbott's Directive, DFPS had "no pending investigations of child abuse involving the procedures described in that

opinion." 1CR8. But immediately after the Directive, DFPS launched new investigations based solely on reports of medically necessary treatment to transgender adolescents. 1CR9; 2RR33:13-17, 86:7-12. DFPS policy now *always* requires an investigation into such care, without exception, and it cannot be designated a lower level of priority. 2RR44:17-25, 53:2-8; 2RR38:9-25, 51:2-19. In other words, DFPS treats Abbott's Directive as binding.

Appellees thus identify specific unlawful acts by the Governor that caused them injury beyond DFPS's investigation. The Governor exceeded his authority by unilaterally redefining child abuse and ordering the "prompt and thorough investigation" based on that new definition. 1CR37; 4RR PX-02, p.1. Appellees further assert that Abbott's Directive violated their constitutional rights to due process, deprived the Doe Appellees of their parental rights, and violated the guarantee of equal rights and equality under the law. 1CR44-47. Appellees thus seek relief tailored to the Governor's unlawful act and resulting harms—a declaration that Abbott's Directive is ultra vires and unconstitutional. 1CR51.

Nevertheless, ignoring the harms flowing from the Governor's ultra vires actions and constitutional violations, Appellants mischaracterize Appellees' injury as merely "DFPS's investigation" and argue that "neither

the Governor nor the Attorney General has statutory authority to directly control DFPS's investigatory decisions." Appellants' Br.13 (quoting *Abbott*, 2022 WL 1510326, at *3). But Appellees have sufficiently alleged that the Governor's unlawful actions themselves—without which there would be no investigation—have caused their injury. They need not do more. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 157 (Tex. 2012) ("We note that Heckman has not shown exactly what responsibility Williamson County bears for his alleged injuries. But he is not required to do so at this stage in the litigation.").

Appellants insist that the Supreme Court's conclusion that injunctive relief was inappropriate as to the Governor means that Appellees lack standing. Appellants' Br.13 (quoting *Abbott*, 2022 WL 1510326, at *3). The Mandamus Opinion, however, did not address the availability of declaratory relief against the Governor, so Appellants' argument is unavailing.[11] *See Abbott*, 2022 WL 1510326, at *6 (Lehrmann, J., concurring) (explaining "the merits of [Appellees' declaratory relief] claims are not before us and are not affected by our narrow decision today, which addresses only the propriety of the court of appeals' temporary order").

[11] Appellees do not intend to further pursue injunctive relief against the Governor. *See infra* n.20.

Indeed, the Mandamus Opinion confirmed that the Governor lacks the authority he sought to wield by directing DFPS to conduct certain investigations. The Supreme Court explained: "[T]he executive power is spread across several distinct elected offices, and the Legislature has over the years created a wide variety of state agencies—including DFPS—whose animating statutes do not subject their decisions to the Governor's direct control." *Abbott*, 2022 WL 1510326, at *2. And "the Legislature has granted to DFPS, not to the Governor or the Attorney General, the statutory responsibility to 'make a prompt and thorough investigation of a report of child abuse or neglect.'" *Id.* at *3 (quoting Tex. Fam. Code § 261.301(a)). Thus, the Supreme Court emphasized that "neither the Governor nor the Attorney General has statutory authority to directly control DFPS's investigatory decisions." *Id.* The Mandamus Opinion thus confirms that the Governor has *no authority* to direct DFPS to investigate what the Governor considers to be "child abuse."

This ultra vires exercise of purported authority is precisely what Appellees complain of in their Petition. *See supra* p.7; 1CR154. The Texas Constitution makes clear that the Governor only administers the law pursuant to the general grant to "cause the laws to be faithfully executed." Tex. Const. art. 4, § 10. The Governor neither makes the law nor possesses

the authority to suspend laws under the Texas Constitution. *See* Tex. Const. art. 1, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature"); 1CR36. After the Legislature's failure to pass legislation criminalizing well-established and necessary treatment for adolescents diagnosed with gender dysphoria, the Governor attempted to "legislate by press release." 1CR4. As a result, "[t]he Governor has circumvented the will of the legislature." 1CR4.

Although the Court noted the Governor could use "informal mechanisms" to influence DFPS behavior, the Governor here went beyond merely stating "legal and policy views" regarding treatment for gender dysphoria and child abuse. *Abbott*, 2022 WL 1510326, at *2 & n.3. Governor Abbott explicitly stated: "*I hereby direct* [DFPS] to conduct a prompt and thorough investigation of any reported instances" of minors being provided gender-affirming care. 4RR PX-02, p.1 (emphasis added); 1CR8. By the plain meaning of the language he used, Governor Abbott sought to directly control DFPS despite having no authority to do so. And DFPS heeded that instruction. The Mandamus Opinion observes that the DFPS Rule "suggests that DFPS may have considered itself bound by either the Governor's letter, the Attorney General's Opinion, or both." *Abbott*, 2022 WL 1510326 at *3.

Indeed, the DFPS Rule referred to Abbott's letter as a "directive," implying that DFPS *was* constrained by the letter. *See* 4RR PX-03.

Appellants recognize that "the [Supreme] Court explained that the Governor does not have statutory authority to direct DFPS as to how to exercise its investigatory discretion." Appellants' Br.5 (citing *Abbott*, 2022 WL 1510326, at *2-3). That ends the matter. The declaratory relief Appellees seek against the Governor—a declaratory judgment that the Governor's letter directing DFPS to investigate "child abuse" under the new definition—is fairly traceable to his ultra vires and unconstitutional directive to investigate.

In the same vein, Appellees' injuries are redressable because they flow directly from Appellants' wrongful conduct. Thus, "there is a substantial likelihood" that declaring Abbott's Directive and the DFPS Rule invalid, ultra vires, and unconstitutional, and enjoining DFPS from enforcing them, will remedy Appellees' injuries. *Lindig*, 2018 WL 3447719, at *2.

C. Appellees' claims are ripe.

1. Appellees' claims are constitutionally ripe.

Because Appellees have suffered significant concrete injuries arising from Appellants' actions, and will likely suffer more, Appellees' claims are ripe. "Ripeness . . . , like standing, emphasizes the need for a concrete injury" to determine "when [an] action may be brought," *Patterson v. Planned Parenthood of Hous. & 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 & Regulation,* 469 S.W.3d 69, 78 (Tex. 2015) (citation omitted). "A claimant is not required to show that the injury has already occurred." *City of Waco v. Tex. 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 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.). Claims are ripe when an agency "has arrived at a definitive position on the issue." *Id.* Where challenged 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).

This lawsuit is ripe because Appellants arrived at a definitive position that imposed established and imminent injuries on Appellees. The Does' injuries include the violation of the Doe Parents' fundamental rights to care for their child, the threat to essential medical care and violation of the equality rights of Mary Doe, Jane Doe's suspension and placement on

administrative leave, Jane Doe's potential loss of employment by being barred from working with minors, and more. *See supra* Section I.A.1. Dr. Mooney has already faced harm to her business, professional reputation, and the bonds of trust she has built with her clients. Absent injunctive relief, she also risks the loss of her professional license and criminal penalties because she publicly stated that she will not report the families of her transgender patients. *See supra* Section I.A.2.[12] 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 misrepresent the Does' claims as alleging only improper DFPS investigations, and they incorrectly argue that implementing a new rule to initiate investigations into the provision of well-established and medically necessary care for gender dysphoria cannot establish a ripe claim.[13] Appellants' Br.9. But, when the plaintiff faces a "real threat of likely civil [or] criminal *proceedings*," a claim is ripe. *Patel*, 469 S.W.3d at 78 (emphasis added).

[12] This is especially true given that the Governor sent his Directive to the executive director of the Texas Board of Examiners of Psychologists, which has control and authority over Dr. Mooney's license. 3RR26:2-16, 29:7-10; 4RR PX-02, p.2.

[13] Appellants cited cases do not support the proposition that "claims based on an improper investigation typically are not ripe." Appellants' Br.19. None challenges an investigation initiated pursuant to an improper and unlawful agency rule, as Appellees do here.

For example, in *Patel*, two plaintiffs, owners of an eyebrow threading salon, employed unlicensed technicians to provide "eyebrow threading" services and sought a declaration that the onerous licensing requirements to perform the services constituted an unconstitutional burden on their business. *Id.* at 74. When suit was filed, the salon had not yet faced any enforcement action for unlicensed threading. The Texas Department of Licensing and Regulation ("TDLR") had only investigated the business, issued warnings, and referred the matter to TDLR's legal department. *Id.* Nevertheless, the Supreme Court held that plaintiffs' claims were ripe. *Id.* at 78. The Court concluded that, "although [plaintiffs] have not yet faced administrative enforcement, the threat of harm is more than conjectural, hypothetical or remote" because the record of TDLR actions established plaintiffs were "subject to a real threat of likely civil and criminal proceedings." *Id.*; *see also Mitz v. Tex. State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 25 (Tex. App.—Austin 2008, pet. dism'd) (claims challenging ad hoc agency reinterpretation of a statute were ripe based on cease-and-desist letters and informal conferences with agency because "an enforcement action [was] imminent or sufficiently likely").

Similarly, in *Texas Alcoholic Beverage Commission v. Amusement & Music Operators of Texas, Inc.,* an associational plaintiff had standing to

challenge two memoranda that altered an agency's enforcement policies based on a non-binding Texas Attorney General opinion. 997 S.W.2d 651, 656 (Tex. App.—Austin 1999, pet. dism'd w.o.j.). Like in this case, the plaintiff alleged the memoranda were issued without notice and comment and expanded the statutory definition of "gambling device" to allow the agency to seize members' coin-operated prize machines. *Id.* at 654. Although the agency had not yet enforced these memoranda against the plaintiff or seized members' machines, this Court found that the claims ripe. *Id.* at 656 ("The contention is simply that the Commission adopted what is effectively a rule without complying with the rulemaking procedures mandated by the APA. If [plaintiff] has standing to contest the validity of this rule, which we have determined that it does, then the claim is ripe.").

Here too, Appellees' claims are constitutionally ripe. Like the Patel plaintiffs, Appellants have taken concrete actions against Appellees that directly caused them harm and threatened more imminent and irreparable harm absent injunctive relief. Like the plaintiff in *Texas Alcoholic Beverage Commission*, Appellees challenge DFPS's definitive position on an issue directly affecting them and exposing them to civil and criminal liability. Appellees need not wait for DFPS to fully implement its unlawful rule by

seeking to separate families or bring criminal charges before challenging the rule's validity.

2. Appellees' claims are prudentially ripe.

Appellants also incorrectly contend that this case is not "prudentially ripe." Appellants' Br.10. "[R]ipeness is both a question of timing, that is, when one may sue" and "a question of discretion, whether the court *should* hear the suit and not whether it *can* hear the suit." *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 858 (Tex. App.—Austin 2004, no pet.) (internal citations omitted) (emphasis in original). Prudential ripeness considerations include: "(1) the fitness of the issues for judicial decision; and (2) the hardship occasioned to a party by the court's denying judicial review." *Id.* Here, both weigh in favor of ripeness.

First, the issues in this case are fit for determination because no further factual development is required. Appellees' claims seeking declaratory relief are purely legal in nature and thus are prudentially ripe. *See City of Waco*, 83 S.W.3d at 177 (reversing dismissal of UDJA claims for ripeness where claims involved purely legal questions). The record is sufficient for a court to determine whether Abbott's Directive and the DFPS Rule violate the law.

In arguing this case is not prudentially ripe because DFPS must first conclude that the Doe Parents have committed child abuse, Appellants

misinterpret their primary cited case. Appellants Br.10. (citing *Twitter, Inc. v. Paxton*, 26 F.4th 1119 (9th Cir. 2022)). In *Twitter*, the Ninth Circuit dismissed Twitter's suit against the Texas Attorney General (which sought to enjoin an AG investigation into Twitter) on prudential ripeness grounds because resolving Twitter's suit involved a judicial determination of whether Twitter's conduct was protected speech, *i.e.*, the issue the AG sought to investigate. *Twitter*, 26 F.4th at 1124.

That case, however, did not involve an allegedly unlawful adoption of a rule or directive. Rather, Twitter sought to enjoin a state investigation in federal court by arguing the merits of the object of that investigation. By contrast, here, Appellees do not seek a determination of "the very thing [DFPS] is trying to investigate." Appellants Br.10 (citing *Twitter*, 26 F.4th at 1125). This case presents a challenge to an underlying rule unlawfully adopted by DFPS and Abbott's Directive. Resolving this case does not turn on the specifics of the resulting, improperly-initiated investigation into the Does. Rather, it involves predicate, threshold issues about whether Appellants' actions are lawful.[14] The investigation into the Does and its

[14] To be clear, by affirming and supporting their transgender daughter, the Doe Parents have not committed abuse, but proved to be loving and caring parents. But the Court need not decide the particulars of the investigation into the Doe family to resolve this case.

collateral consequences are simply illustrative of the harms suffered by Appellees as a result of Appellants' actions.

Second, the hardship prong is easily satisfied. Indeed, Appellees' claims are prudentially ripe for the same reasons they are constitutionally ripe: Appellees allege numerous actual and imminent harms flowing from Appellants' conduct, and Appellees would therefore be forced to bear hardships flowing from such conduct if review were denied on ripeness grounds.

The Does' hardships are self-evident and have already been established. *See supra* Section I.A.1. To dismiss this case on ripeness grounds because DFPS has not yet concluded its investigation would allow for the complained-of harms to continue, inflicting substantial hardship. Likewise, Dr. Mooney faces continuing hardship because she is placed in the untenable position of either risking criminal liability or violating her duty to treat her patients and thereby damaging her business. *See Atmos Energy Corp.*, 127 S.W.3d at 858 (explaining that plaintiffs' suit challenging advertising statute [in *KVUE, Inc. v. Moore*, 709 F.2d 922 (5th Cir. 1983)] was prudentially ripe because "plaintiffs were under sufficient uncertainty and threat of prosecution because any [advertiser] could make a complaint" leading to enforcement and, in the meantime, plaintiff "was confronted with a

dilemma: abide by the statute and suffer financial loss or consciously disregard it and face prosecution."); *id.* (noting that "the concepts set out in *KVUE* comport with" ripeness principles in Texas caselaw). Such hardships are unwarranted. This Court should not enable them by declining to consider Appellees' claims.

Appellants' unsupported prudential ripeness argument thus fails. The time for judicial determination is now. There are no contingent events to anticipate before deciding the matters now before the Court. The issue is whether Abbott's Directive and the DFPS Rule are unlawful and burden transgender youth, their families, and mandatory reporters, including medical practitioners. There is no utility in waiting for the results of DFPS's investigation against the Does or for penalties against Dr. Mooney, as those scenarios provide no necessary factual development for Appellees' declaratory and injunctive relief claims about whether, as a matter of law, the Governor may order and DFPS may issue a new Rule requiring investigation of all parents seeking gender-affirming care for their transgender children, in every instance. Appellees' harms are present, concrete, and ripe for adjudication.

D. Sovereign immunity does not bar Appellees' claims.

Appellants are not entitled to immunity for any of Appellees' claims:

The APA expressly waives sovereign immunity, and ultra vires and constitutional claims are well-established exceptions to the doctrine of sovereign immunity.

1. The APA expressly waives sovereign immunity.

As Appellants acknowledge, the APA grants original jurisdiction that 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.). Nevertheless, Appellants say that the APA does not permit injunctive relief, Appellants' Br.27, and contend there is no agency "rule" subject to APA review, *id.* at 14-16. Appellants are wrong on both counts.

First, Texas law is clear that "courts possess jurisdiction to award injunctive relief 'in connection with a declaratory judgment invalidating a rule under APA section 2001.038.'" *John Gannon, Inc. v. Tex. Dep't of Transp.*, No. 03-18-00696-CV, 2020 WL 6018646, at *10 (Tex. App.—Austin Oct. 9, 2020, pet. denied) (mem. op.) (citation omitted); *see also Balquinta*, 429 S.W.3d at 749 & n.108 (explaining that courts may award temporary injunctive relief in connection with pending APA rule challenges and

collecting cases); *El Paso Cnty. Hosp. Dist. v. Tex. Health & Hum. Servs. Comm'n*, 247 S.W.3d 709, 715 (Tex. 2008) (declaring rule subject to APA invalid and enjoining its enforcement). Appellants' sole authority does not provide otherwise; it merely delineates the scope of declaratory relief under the APA without discussing the availability of injunctive relief. *See* Appellants' Br.27 (citing *State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 362 (Tex. App.—Austin 2009, pet. denied)). The District Court thus properly allowed Appellees' claims for injunctive relief under the APA to proceed.

Second, Appellees directly challenge Appellants' implementation of a new rule, which was announced and established outside mandatory APA requirements: Governor Abbott's direction that DFPS investigate reports of procedures referenced in the Paxton Opinion; the Commissioner's statement operationalizing the Paxton Opinion and Abbott Directive's; and DFPS's actual enforcement and "threatened application" of that rule, "interfere[] with or impair[], or threaten[] to interfere with or impair, a legal right or privilege of the plaintiff." Tex. Gov't Code § 2001.038(a).

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." *Id.* § 2001.003(6). It is well settled that pronouncements by an agency "that advise third parties regarding applicable legal requirements" may constitute rules under the APA. *See, e.g.*, *Amusement & Music Operators of Tex,*, 997 S.W.2d at 657-58 (holding memoranda constituted "rule" because they "set out binding practice requirements" that "substantially changed previous enforcement policy" for gaming machines); *El Paso Hosp. Dist.*, 247 S.W. 3d at 714 (holding agency rate-calculation procedure, ostensibly an "interpretation" of agency's formally promulgated rules, was itself a "rule" subject to APA).

Appellants assert that the DFPS Rule is just a "press statement," that did not "implement[], interpret[], or prescribe[] law or policy." Appellants' Br.14. But 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 [the Paxton] opinion" before Abbott's Directive; yet, going forward, DPFS *will* investigate 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.14 (citing Tex. Gov't Code § 2001.003(6)(A)(ii)), lacks support. DFPS's announcement that it would comply with Abbott's Directive and "investigate[]" any reports of the procedures outlined in the directives without regard to medical necessity, 4RR PX-03; 1CR8, plainly describes new DFPS procedures concerning the investigation of gender-affirming care.

Appellants' argument boils down to an erroneous claim that an agency can avoid mandatory APA requirements by using press statements to announce new standards, procedures, or policies. That is not the law. The Family Code mandates DFPS to follow rulemaking procedures when adopting standards regarding the investigation of suspected child abuse. *See, e.g.*, Tex. Fam. Code § 261.301(d) ("The executive commissioner shall *by rule* assign priorities and prescribe investigative procedures for investigations….") (emphasis added); *id.* at § 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). Those procedures were not followed before the Commissioner announced that DFPS would—and did—investigate reports of gender-affirming care as "child abuse."

Furthermore, the record establishes that the DFPS Rule is (1) generally applicable to all investigations involving medical care for adolescent gender dysphoria and (2) binding. After DFPS announced it would follow Abbott's Directive, DFPS instructed investigators to treat reports of gender-affirming care differently from other abuse allegations. *See supra* p.5. 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.*, 247 S.W.3d at 714 (holding statement of Health and Human Services Commission was generally applicable because it applied to "all hospitals"); *Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 718, 721-22 (Tex. App.—Austin 2009, no pet.) (holding Comptroller's statements constituted "rule" under APA because it applied to all persons and entities similarly situated); *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 those "made in determining individual rights." (citation omitted)). Appellees also established that the new rule is binding—DFPS now *requires* investigation into gender-affirming care, without exception, and it cannot be designated a lower level of priority. *See supra* p.5.

Merely because a spokesperson communicated DFPS's official policy change to the press does not change these basic, uncontroverted facts or DFPS's actions.[15] *See Combs*, 292 S.W.3d at 721-22 (holding that letter signed by Assistant Director of Tax Administration conveying Comptroller's construction of tax laws was "rule" under APA and noting that "Comptroller does not contend that the signer of the letter was acting with anything less than her full authority").

Appellants' alternative argument that the DFPS Rule falls within the APA's "internal management exception" because it "governs how DPFS will interpret the Family Code's definition of abuse for purposes of its discretionary investigatory decisions" is specious. This exception 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) (emphasis added). The DFPS Rule unquestionably affects private rights and procedures. The Rule provides that DFPS *will* implement Abbott's Directive and investigate allegations of gender-affirming care as "child abuse" according to the new definition formulated by the Paxton Opinion, without regard to medical necessity, based *solely* on an allegation

[15] Similarly, DFPS cannot circumvent APA requirements by intentionally not reducing its rulemaking into writing. *See* 4RR PX-17; Tex. Gov't Code § 2001.003(6) (no requirement in definition of "rule" of a *written* statements).

that medical treatment is provided. Moreover, 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.*

Appellants incorrectly contend that "investigations do not themselves alter private rights." Appellants' Br.16. 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. Furthermore, Appellants ignore that the new DFPS Rule impedes parents' ability to seek medically necessary care for their transgender adolescents (abridging their fundamental rights and duties as parents) and prevents transgender adolescents from accessing medically necessary care (abridging their fundamental right to equal protection under the law). *See supra* Section I.A.1. This case thus stands in sharp contrast to Appellants' cases where the challenged agency rules were not binding and 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") (emphasis in original); *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).

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 Appellees' APA claim against DFPS and the Commissioner.

2. Sovereign immunity does not shield ultra vires actions from judicial review.

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." *City of El Paso v. 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).

a. Governor Abbott.

In issuing Abbott's Directive, the Governor acted without statutory or legal authority. As the Texas Supreme Court already explained, the Governor lacks "statutory authority to directly control DFPS's investigatory decisions."[16] *Abbott*, 2022 WL 1510326, at *3. To try to escape this conclusion, Appellants argue that Abbott's Directive "does not purport, as [Appellees] allege, to 'order the Commissioner to adopt a particular rule.'" Appellants' Br.18 (citing CR38). Yet this is exactly what the Governor did. *See supra* pp. 35-36. By directing DFPS to initiate such investigations, the Governor did not merely "express [his] views on DFPS's decisions and . . . seek, within the law, to influence those decisions." *Abbott*, 2022 WL 1510326, at *3. Instead, in plain violation of his statutory authority, he sought to directly control DFPS's investigatory decisions.

The Governor also acted without legal authority; he did not simply misunderstand the law, as Appellants contend. Appellants' Br.18. In accordance with his promise to achieve what the Texas Legislature did not,

[16] Under the Texas Constitution, the Governor neither makes the law nor possesses the authority to suspend the law. *See* Tex. Const. art. I, § 28. Child abuse is defined by statute in the Texas Family Code, as is DFPS's investigatory authority. *See* Tex. Fam. Code §§ 261.001 (defining child abuse), 261.301 (outlining DFPS's investigatory authority). The Governor cannot change this law—the Governor only administers the law pursuant to the general grant to "cause the laws to be faithfully executed." Tex. Const. art. 4, § 10. Appellants wholly ignore these "explicit constraints" on the Governor's authority. *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017).

the Governor—by directing DFPS to make a *new* presumption that gender-affirming care for minors, without regard for medical necessity, is "abusive" and to conduct "prompt and thorough investigation[s]" thereof—exceeded his legal authority. Furthermore, Appellants' contention that the Governor did not redefine the law because he relied on the Paxton Opinion would render the legislative process a nullity. *See* Appellants' Br.20. The Governor could simply "interpret[] existing law" to enact legislative policy previously rejected by the Legislature. The Texas Constitution does not vest the Governor with such authority.

The Governor also exceeded his legal authority by directing, under threat of legal prosecution, "all licensed professionals who have direct contact with children" as well as "members of the general public" to report instances of minors receiving gender-affirming care. 4RR PX-02, p.1. The Legislature alone can establish new criminal offenses and associated penalties. *See* Tex. Const. art. 2, § 1; *Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010) ("Our Legislature, which 'declares the public policy of the state,' holds the exclusive power to make law."); *Diaz v. State*, 68 S.W.3d 680, 685 (Tex. App.—El Paso 2000, pet. denied) (explaining that the "power to make, alter, and repeal laws" lies with the state legislature and is "plenary"). Here, the Legislature considered several bills to broaden the

definition of child abuse but declined to do so. *See* Senate Bill 1646, House Bills 68 and 1399. By establishing a new definition of "child abuse" under Texas Family Code Section 261.001, the Governor did what the Legislature did not—establish a new criminal offense. Thus, more fundamentally, the Governor's actions violated the separation of powers guaranteed by the Texas Constitution.[17] Tex. Const. art. 2, § 1.

Lastly, Appellants contend that, even if the Governor acted ultra vires, those actions did not cause Appellants' injuries. But even a cursory review of the record reveals that Appellees' injuries are fairly traceable to the Governor's ultra vires and unconstitutional directives. *See supra* Section I.B. Thus, Appellees' declaratory judgment claims that the Governor acted ultra vires and violated separation of powers[18] are not barred by immunity.

b. Commissioner Masters.

Like the Governor, 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

[17] Unlike the U.S. Constitution, the Texas Constitution contains an express Separation of Powers provision. Texas courts have "given weight to this distinction," noting that the textual difference "suggests that Texas would more aggressively enforce separation of powers between its governmental branches than would the federal government." *Ex parte Perry*, 483 S.W.3d 884, 894 (Tex. Crim. App. 2016) (quotations and citations omitted).

[18] Appellees' separation of powers claim based on this illegal conduct is a constitutional claim and, therefore, not barred by immunity. *See infra* Section I.D.3.

"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.* at § 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.* at § 40.027(a)-(d). By enacting a new investigatory rule pursuant to Abbott's Directive and promptly enforcing that rule without following procedural and substantive APA requirements, *see supra* Section I.D.1., the Commissioner acted without legal or statutory authority.

Appellants' contrary argument that the Commissioner's actions were statutorily authorized lacks merit. Appellants' Br.19. The Family Code requires DFPS to investigate reports of child abuse and neglect. Tex. Family 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*, 2022 WL 1510326, at *7 n.3 (Lehrmann, J., concurring). Rather, DFPS policy acknowledges that caseworkers are not qualified to decide whether medical issues qualify as child abuse or neglect. *See supra* n.9. Thus, it is unsurprising that Appellants

have identified no 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.

Lastly, Appellees do not challenge a mere exercise of discretion. *See Heinrich*, 284 S.W.3d at 372. The new 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. *See supra* p.5; *see also Abbott*, 2022 WL 1510326, at *7 n.3 (Lehrmann, J., concurring). While DFPS investigations may involve discretionary determinations, the law *requires* DFPS to adopt rules governing those investigations under the APA, Tex. Hum. Res. Code § 40.006(a). When expounding on statutory definitions of abuse under Texas Family Code § 261.001(1) for child protective investigations, DFPS has properly adopted new rules under the APA. *See, e.g.*, 40 Tex. Admin. Code §§ 707.453 ("What is emotional abuse?") (effective July 15, 2020), 707.455 ("What is physical abuse?") (effective July 15, 2020), 707.457 ("What is sexual abuse?") (effective July 15, 2020). Here, however, the Commissioner and DFPS deviated from required practice, improperly circumvented the APA, and, as a result, exceeded their rulemaking authority.

3. Appellants' UDJA argument is unavailing.

Appellees do not rely on the UDJA's limited immunity waiver to establish jurisdiction for their claims. Rather, jurisdiction is established because the APA expressly waives immunity for Appellees' APA claims, *see supra* Section I.D.1; Appellees' ultra vires claims fall within a well-established exception to sovereign immunity, *see supra* Section I.D.2; and Appellants' do not even contend immunity bars Appellees' remaining claims, which are constitutional. 1CR40-44 (separation of powers claims); 1CR44-45 (due process vagueness claims); 1CR45-46 (deprivation of parental rights due process claims); 1CR46-47 (equal protection claims); *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) ("Sovereign immunity does not bar a suit to vindicate constitutional rights."). Because Appellees' claims fall either within a statutory immunity waiver or an exception to the doctrine of sovereign immunity, the fact that the UDJA does not also waive immunity is irrelevant.

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

Appellants fail to demonstrate that the District Court abused its discretion by entering the Temporary Injunction. Appellees are entitled to a temporary injunction if they plead and prove: (1) a cause of action against the 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.

Appellants challenge only the latter two elements.[19] But those challenges are lacking. Appellees demonstrated at the injunction hearing that (1) they have a probable right to a judgment declaring that Abbott's Directive and the DFPS Rule violate the APA and are ultra vires and unconstitutional; and (2) they would immediately suffer irreparable harm absent injunctive relief.

A. Appellees have a probable right to relief.

Appellees presented sufficient evidence to show a probable right to the relief sought in their APA, *ultra vires*, and separation of powers claims against Appellants at this preliminary stage.[20] *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."); 1CR233-36. Each of the four provisions of the Temporary Injunction were properly issued; and they properly targeted Appellants' execution of Abbott's Directive and the DFPS Rule as the unlawful motivation behind investigations of gender-affirming care as

[19] Appellants make no challenge to the first element. Although Appellants broadly assert that a Court cannot issue temporary injunctive relief when it lacks subject-matter jurisdiction, this proposition is unremarkable where the District Court properly exercised jurisdiction. *See supra* Section I.

[20] Because Appellees no longer seek injunctive relief against Governor Abbott, Appellees only defend the Temporary Injunction as it applies to DFPS and Commissioner Masters.

child abuse.

1. Appellees demonstrated their right to relief preventing Appellants from opening investigations based on Abbott's Directive and Paxton's Opinion.

Appellants challenge the first provision of the Temporary Injunction enjoining Appellants from taking actions against Appellees based on Abbott's Directive and the DFPS Rule. Appellants' Br.23. Appellants say this provision is void because DFPS has authority to investigate child abuse independent from the Abbott Directive, but Appellants ignore the substance of Appellees' pleadings and the uncontroverted evidence presented at the temporary injunction hearing.

The record shows that Abbott's Directive prompted DFPS to summarily adopt a new rule categorically deeming the provision of gender-affirming care to be child abuse and requiring investigations against families of transgender adolescents, including the Does, based solely on the allegation that medical care is being provided to an adolescent. *See supra* p.5. As the District Court explained, Abbott's Directive changed the *status quo* for transgender children and their families, as well as professionals who offer treatment to them, throughout the State of Texas. 1CR234. DFPS's actions post-Directive and Rule marked a dramatic change, deeming gender-

affirming care *presumptively* abusive when no investigations of such care were pending before Appellants' actions. *See supra* p.5.

In short, the District Court determined that DFPS's enforcement actions following Abbott's Directive were driven not by DFPS's independent judgment and exercise of authority, pursuant to Texas's statutory rulemaking process, but by the DFPS Rule's operationalizing of Abbott's Directive and Paxton's Opinion. The Temporary Injunction properly enjoins DFPS from taking actions against Appellees on this basis. Appellants have no basis to perpetuate the fiction that DFPS initiated investigations of transgender adolescents and their families of its own volition, in light of the evidence Appellees presented demonstrating that the agency *did* consider Abbott's Directive binding.[21]

Moreover, even if DFPS adopted the DFPS Rule independently, that would be irrelevant: the DFPS Rule is contrary to law and did not follow the requisite rulemaking procedures under the APA. DFPS's adoption of a new

[21] Appellants claim that "Plaintiffs seem to agree that DFPS can investigate and even take action against 'facilitating and providing gender-affirming care to transgender minors,' if DFPS independently believes the "care" at issue constitutes 'child abuse' under section 261.001(a)." Appellants' Br.25 (citing 1CR236). Appellees *do not* agree that the Texas Family Code and Constitution authorize DFPS to independently adopt a rule that it can investigate the provision of gender-affirming medical treatment as presumptively unlawful. To the contrary, Appellees challenge not only the invalid adoption of the DFPS Rule, but also the *substance* the rule itself. Regardless, DFPS *admitted* that it opened investigations into gender-affirming care *in response to* Abbott's Directive. *See* 4RR PX-03.

rule requiring investigations of gender-affirming care based *solely* on allegations that such care is being provided and without more represents a marked departure from DFPS's admitted own past practice, and one that would radically expand DFPS's authority to interfere with parents' medical decision-making protected by the Texas Constitution in circumvention of the Texas Legislature and the rulemaking process. The Temporary Injunction properly enjoins DFPS from taking actions against Appellees on this basis.

Appellants' related complaint—that the first provision is invalid because it is "insufficiently specific to put Defendants on notice of what exactly is prohibited"—also falls flat. Appellants' Br.23. The Temporary Injunction specifically restrains DFPS from taking actions against Appellees based on Abbott's Directive, DFPS's Rule, and Paxton's Opinion. 1CR235-36. As Justice Lehrmann explained: The injunction "prohibits DFPS from investigating reports 'based *solely* on . . . facilitating or providing gender-affirming care . . . where the *only grounds* for the purported abuse' are 'facilitation or provision of gender-affirming medical treatment.' The order further makes clear that the injunction is intended to restrain enforcement of "the Governor's directive and DFPS rule." *Abbott*, 2022 WL 1510326, at *6 (Lehrmann, J., concurring) (emphasis in original). DFPS apparently understood the scope of the Temporary Injunction when it instructed its

employees that this Court's Rule 29.3 Order did not prohibit them from performing intakes and opening investigations where "*independent grounds* that warrant an investigation are reported."[22] This Court should reject Appellants' belated attempt to manufacture a "fatal ambiguity" in the Temporary Injunction's terms where no such ambiguity exists.

2. Appellees demonstrated their right to relief preventing Appellants from investigating child abuse solely based on reports of gender-affirming care.

Appellants also challenge the second provision of the Temporary Injunction preventing DFPS from investigating reports of child abuse "where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment." 1CR236. Appellants cannot rely on DFPS's obligation to interpret the statutory definition of child abuse and investigate cases of child abuse to show an abuse of discretion here. Appellants' Br.25.

DFPS's authority to interpret the law and investigate child abuse is limited by the APA's procedural and substantive requirements, DFPS's own enabling statute, and the Texas Constitution. Appellees do not seek—and the Temporary Injunction did not impose—"a flat prohibition" on DFPS's investigatory authority, as Appellants argue. Appellants' Br.25. Instead,

[22] *See* McGaughy, *supra* n.4.

Appellees' claims (and the Temporary Injunction) target DFPS's summary implementation of a new rule that improperly creates a presumption that gender-affirming care constitutes child abuse. Appellants' arguments are, therefore, unavailing.

First, the DFPS Rule implemented new agency policy (*i.e.*, treating the provision of gender-affirming care alone as presumptively grounds for a child abuse investigation) without adhering to APA procedures. *See supra* Section I.D.2. In prescribing a new enforcement policy, the DFPS Rule was not a mere informal agency statement that restated a formally promulgated agency rule. *See supra* Section I.D.2. The failure to comply with notice-and-comment rulemaking was enough to demonstrate a probable right to relief and enjoining investigations under the new policy.

Second, the DFPS Rule violates the substantive requirements of the APA because it conflicts with the general objectives of DFPS's enabling statute and infringes Appellees' constitutional rights. *See Gulf Coast Coal. of Cities v. Pub. Util. Comm'n,* 161 S.W.3d 706, 711-12 (Tex. App.—Austin 2005, no pet. h.); *Williams v. Tex. State Bd. Of Orthotics & Prosthetics*, 150 S.W.3d 563, 568 (Tex. App.—Austin 2004, no pet.). Appellants improperly suggest that the agency may investigate gender-affirming care for transgender adolescents "if DFPS independently believes the 'care' at issue constitutes

'child abuse' under section 261.001(a)."[23] Appellants' Br.25. But DFPS does *not* have the authority to position itself as the final arbiter of medically necessary treatment decisions by parents on behalf of their minor children. *See supra* pp.23-24. The Legislature never granted such sweeping and unprecedented power to DFPS. The DFPS Rule thus contravenes the specific duty that DFPS "shall . . . provide family support and family preservation services that respect the fundamental right of parents to control to control the . . . upbringing of their children." Tex. Hum. Res. Code § 40.002(b)(2). As such, DFPS's new agency policy cannot be harmonized with DFPS's foundational objectives. *See R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992) ("The determining factor . . . whether . . . a particular administrative agency has exceeded its rule-making powers is that the rule's provisions must be in harmony with the general objectives of the [statute] involved") (quotations and citation omitted). Furthermore, the DFPS Rule interferes with Appellees' fundamental parental rights and other equality and due process guarantees of the Texas Constitution. *See supra* Section I.A.1; *Williams*, 150 S.W.3d at 568. The DFPS Rule causes immediate—and irreparable—harm to adolescents diagnosed with gender

[23] Taken to its logical conclusion, Appellants' argument would allow DFPS unfettered power to investigate *anything* it subjectively believes constitutes child abuse. The law does not permit such unwarranted and unchecked government intrusion.

dysphoria who seek medically necessary treatment that the Rule now deems "child abuse."

Moreover, Appellants do not even address the substance of Appellees' allegations that DFPS violated the APA and its statutory authority when it treated gender-affirming care for adolescents as *presumptively* abusive and investigated families based *solely* on parents' decisions to seek gender-affirming care for their transgender adolescent child. This is the very conduct addressed by the Temporary Injunction.

In sum, the Temporary Injunction does not, as Appellants contend, operate as a "flat prohibition" on DFPS's authority to investigate child abuse—but rather, it returns DFPS to the status quo, before Abbott's Directive, where DFPS did *not* investigate medical care as child abuse. Appellants' Br.25. The Temporary Injunction is tailored to address specific DFPS actions that violate the APA and are ultra vires.

3. Appellees demonstrated their right to statewide relief.

Appellants challenge the statewide scope of the Temporary Injunction's second through fourth provisions, questioning the District Court's power to grant statewide relief and arguing that the APA permits only declaratory relief. Appellants' Br.26. Both challenges are mistaken.

First, courts routinely issue statewide injunctive relief.[24] *See*, *e.g.*, *Tex. Health & Hum. Servs. Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 620 (Tex. App.—Austin 2013, no pet.) (affirming statewide injunction of regulation challenged as ultra vires); *Combs*, 292 S.W.3d at 724-25 (affirming statewide temporary injunction of rule challenged under APA). A court's authority to enjoin a state agency's unlawful rule statewide is critical to ensuring uniformity and the preservation of judicial economy, just as it is to providing relief to the parties before it. Enjoining DFPS and Commissioner Masters from enforcing the unlawfully adopted DPFS Rule is necessary to provide relief to Appellees whose injuries stem from the unauthorized nature of the DFPS Rule's *enactment* in addition to its implementation. Thus, the Temporary Injunction is narrowly crafted to address Appellants' illegal conduct and the resulting injury to Appellees.

Additionally, Texas courts regularly issue injunctive relief under their equitable power in APA validity challenges. *See supra* Section I.D.1.

The cases Appellants cite to support their argument that statewide relief is improper are inapposite. *See* Appellants' Br.26. First, Appellants' cases do not address challenges to an agency's rulemaking authority or ultra

[24] As the Texas Supreme Court recognized, the fact that Rule 29.3 does not permit a *court of appeals* to afford injunctive relief to nonparties says nothing about the authority of district courts to issue statewide injunctive relief. *Cf. Abbott*, 2022 WL 151326, at *4.

vires actions. Second, dicta in a footnote related to the limitations of *federal* jurisdiction does not apply to Texas's unitary court system. In Texas, challenges to agency rulemaking authority have only one path in the courts—a Travis County district court and the Third Court of Appeals. *See* Tex. Gov't Code § 2001.038(b). It is entirely appropriate (indeed, necessary) for the only district court with jurisdiction over Appellees' claims to enjoin the DFPS Rule while Appellees challenge its validity.

4. Appellees seek relief from the proper parties.

Finally, Appellants incorrectly argue that the Temporary Injunction's third and fourth provisions—enjoining Appellants from prosecuting or referring for prosecution reports of gender-affirming care and from imposing mandatory reporting requirements—do not seek relief from the proper parties. *See* Appellants' Br.27; 1CR236. Appellants contend that they lack responsibility to take these enforcement actions. Appellants' Br.27. But Appellants do not dispute that Abbott's Directive required DFPS to investigate as abuse all reported instances of gender-affirming care and imposed reporting requirements on licensed professionals under threat of criminal penalty. These provisions prevent DFPS from executing that direction and taking action that would impose criminal liability related to the provision of medically necessary care to transgender adolescents. And they

are necessary because Appellees' injuries are fairly traceable to Appellants' unlawful conduct. *See supra* Section I.B.

As to Appellants' contention that Appellees must sue district attorneys responsible for prosecuting child abuse, that argument has been considered and rejected by multiple courts of appeals, including this Court. *See supra* pp. 29-30. And Appellants' related contention that it is within the purview of the Legislature to impose reporting requirements simply underscores that Appellants acted ultra vires and violated separation of powers when they unilaterally changed those requirements.

B. Appellees will suffer irreparable harm absent injunctive relief.

The District Court explicitly found that Appellants caused Appellees cognizable injury by unlawfully and unilaterally categorizing medically necessary gender-affirming care to adolescents as child abuse. The record establishes that Appellees suffered concrete harms from DFPS's pursuit of investigations in accordance with the DFPS Rule. *See supra* Section I.A. Appellees thus made a "clear showing" of irreparable harm. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

The Temporary Injunction remedies Appellees' injuries and is necessary to prevent further imminent and irreparable harm. Appellants' only response to this irrefutable conclusion is to misdirect the Court by

narrowly characterizing Appellees' injury as only the DFPS investigation itself. *See supra* Section I.A. They contend the Temporary Injunction will do nothing to immunize the Does from DFPS scrutiny or subsequent enforcement action because child abuse "remains child abuse even if a court temporarily prevent[s] the State from acting to prevent it." Appellants' Br.29.

Appellants' argument is absurd. According to Appellants, the Temporary Injunction cannot remedy Appellees' harms because *if* the Temporary Injunction is vacated on appeal, DFPS's investigation into the Does could then resume. Appellants' Br.28-29. That argument ignores Appellees' significant harms, *see supra* Section I, and improperly assumes that Appellants will ultimately prevail, despite the District Court's determination that Appellees have already established a probable right to relief on their claims that DFPS's unilateral redefinition of child abuse is unlawful, 1CR234. Appellants' speculation about the final outcome of this case says nothing about the real harms that the Temporary Injunction has already prevented, including that the Doe family currently does not face immediate family separation and Dr. Mooney is able to continue providing therapy to her clients without being required to report their families for abuse.

Appellants also ignore that Appellees are seeking a *permanent*

injunction. Should Appellees ultimately prevail on their claims following this appeal, there would be no "subsequent enforcement action" of the DFPS Rule. The Temporary Injunction does, in fact, remedy Appellees' harms pending the District Court's final resolution of Appellees' application for a permanent injunction and declaratory relief.

PRAYER

This Court should affirm.

Dated: July 5, 2022

Respectfully submitted,

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Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 14,859 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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