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THIRD COURT OF APPEALS
AUSTIN, TEXAS
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No. 03-22-00587-CV

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

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

Appellants,

v.

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

Appellees.

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

RESPONSE TO APPELLEES' EMERGENCY MOTION FOR TEMPORARY INJUNCTIVE RELIEF

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To the Honorable Third Court of Appeals:

Despite the increasingly obvious signs that giving pubertal blockers and hormone therapy (PBHTs) to children can cause severe harm, Appellees, again, move this Court under Rule 29.3 to prevent DFPS from investigating child abuse allegations based on children who are given these body-altering chemicals. Appellees want the trial court's injunction to remain in effect pending the State's appeal so that DFPS is left unable to conduct investigations into alleged instances of abuse. But an order permitting those threats to persist is not necessary to preserve the status quo, nor is it necessary to prevent irreparable harm. Indeed, the opposite is true - allowing the trial court's injunction to take effect would cause irreparable, and in some instances irreversible, harm. The law has long recognized that investigation, standing alone, is not a judicially cognizable injury; this Court cannot and should not prohibit DFPS from so much as investigating possible abuse. Because there is no jurisdiction or merit to Appellees' arguments, Appellees' motion should be denied.

Background

The Department of Family and Protective Services (DFPS) is charged with protecting children from abuse, including "physical injury that results in substantial harm to the child." Tex. Fam. Code § 261.001(1)(C). As most people accused of child abuse deny wrongdoing, this requires that DFPS be able to investigate reports of abuse. If there is no abuse, that is the end of the matter. If there is, DFPS may ask a court to intervene.

The Texas Supreme Court was clear just recently in May 2022:

> **DFPS does not need permission from courts to investigate** . . . The normal judicial role in this process is to act as the gatekeeper against unlawful interference in the parent–child relationship, **not to act as overseer of DFPS's initial, executive-branch decision to investigate** whether allegations of abuse may justify the pursuit of court orders.

In re Abbott, 645 S.W.3d 276, 282 (Tex. 2022) (emphasis added). Despite this explicit holding, Appellees continue to seek court intervention to do precisely what the Supreme Court has said not to do: prohibit DFPS from investigating reports of child abuse. Appellees consist of three families with a transgender child as well as one national organization, PFLAG. Again, they raise *ultra vires* and APA claims against the Governor, DFPS, and DFPS's Commissioner.

Timeline of DFPS' Investigations

DFPS is the executive state agency tasked with investigating reports of child abuse. Everyone in Texas is a mandatory reporter and, once a report is made, DFPS has the sole statutory responsibility to "make a prompt and thorough investigation" of that report. Tex. Fam. Code § 261.301(a). Before it can impose consequences on a family beyond an investigation, DFPS generally must seek court orders authorizing it to intervene. *See generally* Tex. Fam. Code § 262.001 *et seq.*

On August 6, 2021, Governor Greg Abbott sent a letter to DFPS Commissioner Jaime Masters inquiring whether genital mutilation (sex reassignment) of a child for purposes of gender transitioning through reassignment surgery constituted child abuse. Resp. App'x 1. On August 11, 2021, the Commissioner responded that surgical sex reassignment of a child "may cause a genuine threat of substantial harm from physical injury to a child" as defined under the Texas Family Code. Resp. App'x 2. The response noted that the surgical procedure might not constitute abuse if it were medically necessary. The letter concluded by acknowledging that all such allegations would be investigated.

On February 21, 2022, the Office of the Attorney General of Texas released Opinion No. KP-0401, which concluded that some sex-change treatments and procedures for minors could constitute child abuse. Op. Tex. Att'y Gen. No. KP-

0401 (2022); Resp. App'x 3. The Opinion includes the important caveat that "[t]his opinion does not address or apply to medically necessary procedures." *Id.* at *1. Instead, it focused solely on elective procedures and treatments that could result in permanent sterilization, and the Attorney General opined that in some cases these procedures could constitute child abuse because of the child's inability to provide informed consent for such treatments and procedures.

A letter from the Governor's office followed on February 22, 2022, in which Governor Abbott stated his agreement with the OAG opinion and stated DFPS had a duty to investigate claims of this nature pursuant to current state statute. Resp. App'x 4 (Letter from Gov. Greg Abbott to Commissioner Jaime Masters (Feb. 22, 2022), https://bit.ly/3PMrtTn).

DFPS' Investigatory Process

DFPS is statutorily tasked with determining what falls under the scope of child abuse and with investigating allegations of abuse. Resp. App'x 5 (Declaration of Stephen Black (Black Dec.)) at ¶24.

Here, following the issuance of KP-0401, DFPS began investigating reports[1] involving allegations of either sex reassignment surgery performed on a child or the use of pubertal blockers and hormone therapy (PBHT) on a child where such

[1] The identity of reporters is confidential pursuant to Texas Family Code § 261.201(a)(1).

medication may not be medically necessary or may be otherwise harmful. *Id.* at ¶24, 26. DFPS prioritizes reports of abuse based on the immediacy of the risk and the severity of the possible harm to the child. *Id.* at ¶14. Reports can be categorized as Priority 1 (P1), Priority 2 (P2), or Priority None (PN). *Id.* In the reports at issue here—a child receiving medication that is potentially harmful, but not emergently so—DFPS determined such a claim would be a P2 assignment and that the other two possible assignments would have been inappropriate. *Id.* at ¶15-17, 21. P1 assignments are for reports that indicate an immediate risk of abuse or neglect to a child that could result in death or serious harm. *Id.* at ¶15. PN assignment occurs where the allegation does not rise to the level of abuse/neglect and, therefore, there is no current safety threat to the child whatsoever. *Id.* at ¶17.

Since February, DFPS has received a total of 11 reports regarding the administration of hormone therapy or puberty suppressants to minors. *Id.* at ¶18. Reports that a child was transitioning genders or socially transitioning, without medical intervention, were screened and closed at intake. *Id.* To date, 7 out of the 11 reported cases have either been closed or are pending closure because the child was either not taking puberty suppressants or hormone therapy, or because their treating medical providers affirmed that they were and DFPS verified that the treatments are medically necessary. *Id.* at ¶26. Two of those cases are Appellees': the Roe and

Briggle families. Resp. App'x 8 (TI Hearing Transcript) at 273:7-10; Resp. App'x 9. The results of these cases demonstrate that DFPS has treated reports of minors receiving PBHTs like all other cases involving abuse with underlying medical issues or concerns. *Id.* at ¶28.

DFPS' Investigations of Appellees

Appellees are PFLAG, Inc. ("PFLAG") as well as three individual families: (1) Mirabel Voe, individually and as parent and next friend of Antonio Voe, a minor; (2) Wanda Roe, individually and as parent and next friend of Tommy Roe; and (3) Adam Briggle and Amber Briggle, individually and as parents and next friends of M.B., a minor (collectively, "Appellees"). In their temporary injunction motion and in their Motion to this Court, Appellees painted a picture of how DFPS conducts its investigations and, specifically, how it conducted its investigations of the individual Appellees. But their assertions are not supported by any evidence in the record.

In their most recent Rule 29.3 Response, Appellants detailed the investigations DFPS conducted into the individual Appellees as well as provided the investigatory files to this Court redacted pursuant to law and under seal pursuant to the trial court's order. Resp. App'x 10. For the sake of brevity and given the consolidation of the appeals, Appellants incorporate the same herein by reference.

Summary of the Argument

This Court should decline to issue Appellees' requested order because Appellees have failed to show an injunction is proper. Appellees' claims are jurisdictionally barred and they have failed to show that they are entitled to relief on the merits. The issuance of such an order would upset, rather than preserve, the status quo. Further, Appellees have failed to demonstrate why allowing DFPS to conduct its statutorily-authorized investigations into child abuse would cause irreparable harm. There is no evidence that any Appellee or member of PFLAG has been placed on the child abuse registry or had their child removed simply because that child is transgender and receiving PBHTs.

Accordingly, this Court should deny Appellees' motion.

Argument

Appellees have failed to prove they are entitled to the injunction they seek. Under Rule 29.3, "[w]hen an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. Rule 29.3 allows the court to "preserv[e] the status quo based on the unique facts and circumstances presented." *In re Geomet Recycling, LLC*, 578 S.W.3d 82, 89 (Tex. 2019). It is also appropriate "to protect [a party] from irreparable harm." *Id.*

The standard set forth in Rule 29.3 mirrors the requirements that a litigant must satisfy for the court to issue a temporary injunction. Specifically, Appellees are required to "plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

The Texas Supreme Court recently weighed in on the scope of this Court's power under Rule 29.3 and the analysis to be conducted in a related matter, *In re Abbott*, 645 S.W.3d at 276. There, the Supreme Court granted the State mandamus relief from this Court's grant of a Rule 29.3 motion insofar as it enjoined DFPS from actions being taken against non-parties. *Id.* at 283. It permitted a portion of that

order, covering an individual plaintiff family, to stand only did so after making two things clear. *Id.* First, it explained that this Court had authority under Rule 29.3 to grant an injunction as to *a party* if the party had demonstrated a need to "preserve the status quo and prevent irreparable harm to [it] during the pendency of an appeal." *Id.* Second, it noted that because "none of the State's argument" in that petition "focuse[d] on the circumstances of th[at particular] child" it was unable to discern whether the Court's ruling as to status quo and irreparable harm was an abuse of discretion. *Id.*

Here, however, the State *does* focus on the circumstances of the identified children—along with whether Appellees have stated a valid cause of action. Because they have not, and because the circumstances demonstrate there is no status quo to be preserved or harm to be prevented, this Court should deny Appellees' motion

I. Appellees Failed to Prove a Valid Cause of Action to Both the Trial Court and this Court.

Appellees failed to adequately plead a cause of action against Appellants that (1) confers jurisdiction on the trial court or this Court to consider; and (2) has a factual basis that demonstrates their claims have merit. For these reasons, Appellees cannot satisfy the first temporary injunction factor.

A. Appellees Lack Standing.

"The Texas standing requirements parallel the federal test for Article III standing, which provides that a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 799 (Tex. 2021).

1. *The individual Appellees lack standing.*

The individual Appellees failed to show an actual or imminent injury by virtue of the mere allegation that they are being investigated by DFPS. The bare existence of an investigation against the remaining Appellees is not a legally cognizable injury. *See Laird v. Tatum*, 408 U.S. 1 (1972). A constitutionally cognizable "injury" may arise later—for example, if DFPS were to seek a subpoena. But the "theoretical possibilit[y]" that such a thing might occur in the future is not enough to establish standing now. *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) (per curiam); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

A litigant cannot "claim[ ] a hypothetical or possible impairment of rights because of a rule or its possible application" because doing so "calls for an advisory opinion," which a court does not have jurisdiction to issue. *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 592 (Tex. 2013) (Johnson, J., concurring). To demonstrate standing

to challenge a rule, "[a] plaintiff['s] pleadings must contain more than conclusory statements that their rights have been or probably will be impaired." *Id.* They must instead allege "facts showing how a particular rule has already interfered with the plaintiff['s] rights or how that rule in reasonable probability will interfere with the plaintiff['s] rights in the future." *Id.* (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993))

Waco ISD v. Gibson, 22 S.W.3d 849 (Tex. 2000), illustrates the distinction. There, parents sued the school district sued over a policy that set testing standards to determine whether and how students would be promoted to the next grade. *Id.* at 850. When the suit was filed, the policy had not been implemented to the point that any student actually *had* been promoted to or retained in a particular grade. Instead, the school district had sent out letters that particular students were at "risk of retention" based on projected test scores. *Id.* at 852.

The Texas Supreme Court reversed the appellate court's determination that the plaintiffs had alleged a concrete injury sufficient to confer standing. *Id.* "When th[e] lawsuit was filed, no student . . . had been retained or given notice of retention;" "the alleged harm to the students caused by retention was still contingent on uncertain future events[.]" *Id.* And that meant the impact of the policy "was only hypothetical when the suit was filed; it may not occur as anticipated or may not occur

at all." *Id.* The possible threat that the policy would cause students to be retained was not a concrete injury. *Id.*

So too here. Both now and when this suit was filed, the harm that Appellees allege—that DFPS will find child abuse based on solely on allegations that a child is transgender and taking PBHTs (C.R.33 ¶103; C.R.75 ¶287)—is nothing more than a hypothetical future risk. None of the Appellees or PFLAG members have actually had a finding of child abuse issued on such a basis. Moreover, given that *none* of the existing investigations based on such claims have resulted in court intervention or placement on the child-abuse registry, the only conclusion is that future placement on the registry "may not occur as anticipated or may not occur at all." *Waco ISD*, 22 S.W.3d at 852.

2. PFLAG lacks associational standing.

Similarly, PFLAG lacks associational standing. An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Texas Ass'n of Bus.*, 852 S.W.2d at 447 (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

a. PFLAG's members lack individual standing.

PFLAG's members do not have standing to sue in their own rights. The purpose of this requirement is "to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n v. City of New York,* 478 U.S. 1, 9 (1988). As discussed above, none of the plaintiffs, including those that are PFLAG members, are suffering a cognizable harm. There are no court orders or requests for court orders pending against them. *See supra*. All that is currently occurring – and, at this point, only to Appellee Voe - is that an investigation into claims of medical abuse are being conducted. If the mere presence or threat of an investigation by DFPS was sufficient for a subject of that investigation to not only have standing but to then use that standing to *halt* the investigation, no investigation of any kind could occur in this State. A police investigation, investigation into judicial misconduct, or the Texas Comptroller's investigation into tax crimes, to name a few, could be halted with the simple submission of a temporary injunction motion on Efile Texas.

Moreover, PFLAG fails the first prong because it does not identify any members actually injured by the specific policy it alleges. PFLAG claims its members are being harmed by virtue of a policy that: "subject[s] [them] . . .to the peril and stigma of being labeled a 'child abuser' and having the child removed from the parent's care."

C.R. 38 ¶108. But the only specific five members that PFLAG mentions—the individual plaintiffs, Samantha Poe, and Lisa Stanton—have not been subject to a "child abuser" label or had their children taken from them. *See* Mot. App'x A. PFLAG does not name any members who *have* had that occur. *See id.* "[T]o establish associational standing, general references to members are usually insufficient." *Abbott v. Mexican Am. Legis. Caucus*, 647 S.W.3d 681, 692 (Tex. 2022). Thus, neither PFLAG's reliance on named members that have not actually had the alleged policy applied to them nor any general reference it makes to "[o]ther current and future PFLAG members with transgender or nonbinary children" satisfy the first associational standing prong.

b. The interests PFLAG seeks to protect are not germane to its purpose.

PFLAG also fails to meet the second requirement of associational standing: that the interests it seeks to protect are germane to its purpose. *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. "[T]o satisfy this element, the interest that is germane to the organization's purpose 'must also relate to the interest by which its members would have standing to sue in their own right.'" *Abbott*, 647 S.W.3d at 694 (quoting *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 886 (Tex. App.—Austin 2010, pet. denied)). Here, members of PFLAG would have standing to sue in their own right if they had been placed on the child-abuse registry or had their child

removed from the home as a result of the alleged policy. But PFLAG is not an organization whose purpose is to assist parents from being wrongfully labelled child abusers. It claims its purpose is "[t]o create a caring, just, and affirming world for LGBTQ+ people and those who love them." *PFLAG*, https://pflag.org/ (last visited Oct. 4, 2022). In other words, PFLAG cannot satisfy the second prong of associational standing based on its members' general concerns about "a caring, just, and affirming world" while satisfying the first prong solely based on certain members' unrelated concerns about being found to have abused their child.

c. Participation by individual members

Finally, the claims asserted and relief sought in this case require individual members to participate in this lawsuit themselves. Associational standing exists only if neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt,* 432 U.S. at 343. PFLA's claims, however, require individuals' participation to demonstrate both an injury and entitlement to the requested relief.

Indeed, all of Appellees' claims require the individual participation of PFLAG's members. Appellees bring two types of claims in this suit. First, Appellees challenge governmental action under the APA and the *ultra vires* doctrine. Second, Appellees bring due process and equal protection challenges under the Texas Constitution.

This Court has already recognized that, "[t]o have standing to challenge a governmental action . . ., a claimant generally must demonstrate that he has suffered a *particularized injury* distinct from that of the general public." *Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914, 919 (Tex. App.—Austin 2010, pet. denied) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555–56 (Tex. 2000)) (emphasis added). As the Supreme Court explained in *Bland*, "[g]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review." 34 S.W.3d at 555 (quoting *Osborne v. Keith,* 142 Tex. 262 (1944)). Here, the "particularized injury" rule requires determining each claimant's individual injury rather than assigning a general harm to all parents in the state—or even all parents who are members of PFLAG—who may, at some point, have a child taking PBHTs.

Similarly, "[c]onstitutional questions must be presented in the context of specific live grievances." *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1288 (5th Cir 1992). This means that due process challenges also require a particularized injury to be pled and proven. *See, e.g., Kohout v. City of Fort Worth*, 292 S.W.3d 703, 711 (Tex. App.—Fort Worth 2009, no pet.) ("Kohout has not demonstrated any particularized injury, or any injury at all, as to her due process claim. Accordingly,

she does not have standing to assert this claim."). As do equal protection claims brought under the Texas Constitution. *See, e.g., Andrade v. NAACP of Austin*, 345 S.W.3d 1, 15 (Tex. 2011) (bar against generalized-grievance standing applies to equal-protection claims.) PFLAG's claims will require its affected members to participate in the litigation going forward if they are to demonstrate the particular injuries they have suffered and the relief they are entitled to. *Warth v. Seldin*, 422 U.S. 490, 515–16 (1975) (association lacked standing to sue because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof").

Any claim to the contrary is belied by the fact that *three* of PFLAG's members are individual parties in this suit making individualized allegations about the investigations they underwent. That the Briggle family, whose investigation is now closed, did not immediately receive temporary injunctive relief while the Voe and Roe families did further indicates that the relief in this case will need to be determined on an individual, not mass, basis. Mot. App'x B, D. Moreover, no report received by DFPS nor investigation conducted is exactly the same. Surely, it cannot be the case that Appellees, or the trial court, intend to deprive DFPS its statutory discretion to determine the proper action to take on reports of child abuse. Determining whether a PFLAG member is being harmed, in what way, and the

appropriate relief will demand an inquiry tailored to each potentially affected member, not an averaging or agglomeration of disparate situations.

B. Appellees' Claims Are Not Ripe.

The court also lacks subject-matter jurisdiction because Appellees' claims are not ripe. The ripeness inquiry "asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). And "[c]laims based on an allegedly improper investigation typically are not ripe because 'after reviewing information submitted by [the plaintiff], the agency might agree" that there has been no wrongdoing. *Winter v. Cal. Med. Rev., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir. 1994). As the Court has recognized, a claim may ripen if the agency finds wrongdoing and takes action against the subject, but until then, there is nothing for a court to adjudicate. *See Rea v. State*, 297 S.W.3d 379, 383–84 (Tex. App.—Austin 2009, no pet.) ("The finality requirement—in the context of ripeness—concerns whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. The administrative decision must be formalized, and its effects felt in a concrete way by the challenging party." (internal citations omitted)); *accord Sw. Ins.*

Managers, Inc. v. Tex. Dep't of Ins., No. 03-10-00073-CV, 2010 WL 4053726, at *4-5 (Tex. App.—Austin Oct. 15, 2010, no pet.).

Beyond this failure to satisfy the constitutional minimum, this case is also not prudentially ripe. This "prudential part of ripeness," which courts must also consider, looks to whether, even assuming the constitutional ripeness threshold is met, the issues are "fit . . . for judicial decision." *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1124 (9th Cir. 2022). Prudential ripeness balances the relative harm to the parties if a case goes forward, which includes the harm to the government of enjoining it from investigating possible wrongdoing. *See id.* The issue in Appellees' claims is whether their actions with regard to their children's medical treatment constitute child abuse or neglect, but that "is the very thing [DFPS] is trying to investigate." *Id.* at 1125. The issues are not fit for judicial decision because DFPS has not made any allegations against Appellees, the facts are not developed—indeed, that is the very purpose of a DFPS investigation—and Appellees will have the opportunity to raise their arguments in defense if DFPS ever does allege wrongdoing and seek court authorization to intervene. *See id.* at 1124-25. DFPS has not yet determined whether any of PFLAG's members abused their children, and DFPS cannot be required to "litigate the merits in a defensive posture . . . without being able to investigate its own claims." *Id.* at 1125.

C. Appellees' Claims Are Barred by Sovereign Immunity.

a. Appellees claim the DFPS Commissioner's "statement" is a "rule" that can be challenged under the APA's waiver of sovereign immunity. *See* Mot. App'x A 50-54. But the purported "rule" is a statement the agency's spokesman gave to a reporter. Mot. App'x A at 8-9 & nn.13-14. Press statements are not rules subject to APA review.

"Not every statement by an administrative agency is a rule for which the APA prescribes procedures for adoption and for judicial review." *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994). The APA defines "rule" as "a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency." Tex. Gov't Code § 2001.003(6)(A). Statements to the press do not "implement[], interpret[], or prescribe[] law or policy." *Id.* § 2001.003(6)(A)(i). Nor do they "describe[] the procedure or practice requirements of a state agency." *Id.* § 2001.003(6)(A)(ii). Agency spokesmen may be authorized to speak to the press, but they are not authorized to formally set agency policy. *See* Tex. Hum. Res. Code § 40.027(c)(3) (authorizing "[t]he commissioner" to "oversee the development of rules"); *cf. Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764, 769 (Tex. App.—Austin 1999, no pet.) (explaining that "[a]gencies would be reduced to impotence

. . . if bound to express their views . . . through contested-case decisions or formal rules exclusively" and noting that an agency must be able to "practically express its views to an informal conference").

And the APA's definition includes an express exception. Even if the press statement could otherwise constitute a rule, it would be excluded from the APA's scope because it is a "statement 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); *see Brinkley*, 986 S.W.2d at 770. "[S]uch statements have no legal effect on private persons absent a statute that so provides or some attempt by the agency to enforce its statement against a private person," neither of which applies here. *Brinkley*, 986 S.W.2d at 770. "Although the distinction between a 'rule' and an agency statement that concerns only 'internal management or organization . . . and not affecting private rights' may sometimes be elusive, the core concept is that the agency statement must in itself have a binding effect on private parties." *Slay v. Tex. Comm'n on Envtl. Quality*, 351 S.W.3d 532, 546 (Tex. App.—Austin 2011, pet. denied) (footnote omitted).

At most, DFPS' statement suggests that it will continue to apply the law when investigating and identifying child abuse. That would not "itself have a binding effect on private parties." *Id.* In the child-abuse context, private rights may be affected

when an abuser is found guilty of a crime or when a child is removed from a home, but the press statement does no such thing. Even if the press statement itself caused investigations, private rights are not affected by the existence of an investigation. Investigations are what the agency does in order to determine the propriety of potentially affecting private rights. So too here. Appellees have not alleged, much less shown, that the press statement binds the future decisionmakers—Texas judges—who could affect private rights. And the fact that an individual would prefer not to be investigated for child abuse does not mean that private rights have been determined. *See Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 905 (Tex. App.—Austin 2009, no pet.) (holding that providing special formatting for drivers licenses issued to non-citizens does not "have any legal effect on private persons" because the licenses "remain valid").

b. Appellees insist the Governor's letter was ultra vires and that the Commissioner acted ultra vires by "implementing" the Attorney General's legal analysis. Mot. App'x A at 58. "An ultra vires action requires a plaintiff to 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). As to their claim of ultra vires action by the Governor, this clearly cannot survive. The Supreme Court has already reviewed the Governor's directive at issue

in this case and found that "[t]he Governor and the Attorney General were certainly well within their rights to state their legal and policy views on this topic." *In re Abbott*, 645 S.W.3d at 281. There is nothing ultra vires about the Governor's decision to send a letter expressing his opinion on the law.

And even if the Governor's letter were ultra vires, it did not cause the injury Appellees claim—DFPS's initiation of investigations. DFPS continued its investigations into the Voe, Roe, and Briggle allegations even after the Supreme Court emphasized that the Governor's authority is persuasive only. To the extent Appellees' theory is that DFPS would not have investigated such allegations otherwise, it is inconsistent with the historical record. There is no chance DFPS investigated only because it mistakenly believed it had to obey an order from the Governor.

As to DFPS, Appellees' theory depends on assuming "that any legal mistake is an ultra vires act," but that is "[n]ot so." *Hall*, 508 S.W.3d at 241. So long as a mistaken conclusion is not made while "exceed[ing] the scope of [an agency's] authority," that mistaken conclusion cannot form the basis of an ultra vires action. *Schroeder v. Escalera Ranch Owners' Ass'n*, 646 S.W.3d 329, 335 (Tex. 2022). 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." *In re Abbott*, 645 S.W.3d at 281 (citing Tex. Fam. Code § 261.301(a)). And "when deciding whether and how to exercise that authority, DFPS . . . naturally must assess whether a report it receives is actually 'a report of child abuse or neglect.'" *Id.* Appellees' belief that DFPS acted ultra vires because it came to a mistaken conclusion *while* exercising that exact authority in their case – whether or not to investigate—does not rise to the level of an ultra vires act.

Nor does any decision by DFPS to find the Attorney General or Governor's opinions helpful in exercising the authority to determine what constitutes a report of child abuse. The Commissioner has the authority to "oversee the development and implementation of policies and guidelines needed for the administration of [DFPS's] functions." Tex. Hum. Res. Code § 40.027(c)(2). Nothing prevents the Commissioner from deciding that the Attorney General's explanation of the Family Code is persuasive; indeed, such a decision is firmly within the Commissioner's statutory authority. Appellees seemingly argue that the Commissioner's decision violated DFPS's general statutory duty to protect children and support families. Mot. App'x at ¶226. But, again, disagreements about discretionary questions or conclusions about the best way to help children cannot be superintended through ultra vires suits. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

c. Finally, the UDJA does not help Appellees avoid sovereign immunity. *Contra* Mot. App'x A at 58. The UDJA does not enlarge the courts' jurisdiction beyond an implied, limited waiver of immunity for constitutional challenges to ordinances or statutes. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011) (per curiam); *see* Tex. Civ. Prac. & Rem. Code § 37.006(b). Appellees do not challenge an ordinance or a statute; they contend Appellants have misinterpreted a statute. Mot. App'x A at 54-56. The UDJA's limited waiver does not extend to a "bare statutory construction claim[]" like that. *McLane Co., Inc. v. Tex. Alcoholic Beverage Comm'n*, 514 S.W.3d 871, 876 (Tex. App.—Austin 2017, pet. denied); *see Sefzik*, 355 S.W.3d at 622.3.[2]

D. Appellees' Claims Lack Merit.

Even if jurisdiction existed to hear Appellees' claims, Appellees nonetheless fail to demonstrate the first injunction factor is met because their factual allegations lack merit sufficient to amount to a cause of action.

1. *Plaintiffs cannot establish the factual premise underlying their claims.*

Appellees' claims require them to prove that PBHTs are *always* safe and reversible. Not even their own expert witness would testify as much. *See* Resp App'x

[2] And to the extent Appellees mean to invoke the UDJA in support of claims against the Governor or Commissioner, *see* Mot. App'x A at 34-35, that theory fails because the UDJA authorizes suit against governmental units, not *ultra vires* claims against officials. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015).

8 (TI Hearing Transcript) at 112:7-13; 119:10-19 (stating PBHTs should not be given to any child until they are diagnosed with gender dysphoria); *see also* C.R. 122-23 (Expert Report of Dr. Brady) at ¶71 ("[P]roceeding from pubertal suppression to gender-affirming **can impair** fertility[.]"). And "[t]here do not yet exist prospective outcomes studies either for social transition or for medical interventions for people whose gender dysphoria began in adolescence." Resp. App'x 10 (Cantor Report) at 35-36. What is more, children with gender dysphoria "outgrow this condition in **61% to 98% of cases** by adulthood" across the large studies of cases.[3] Resp. App'x 9 (Laidlaw Report) at 6. Appellees are not likely to succeed in showing that PBHTs never cause irreversible harm, *especially* considering that children diagnosed with gender dysphoria are **more likely than not** to return to their biological sex and will have been subjected to the risks for **no reason**.

2. *DFPS' investigations are permitted by statute and do not violate the APA.*

Investigations of claims that a child is being given chemicals to alter them physically, mentally and emotionally does not mean DFPS created a new rule or that Commissioner Masters acted *ultra vires* because, put succinctly, they did not need

[3] "Rates of persistence of gender dysphoria from childhood into adolescence or adulthood vary…In natal males, persistence has ranged from 2.2% to 30%. In natal females, persistence has ranged from 12% to 50%" Resp. App'x 9 (Laidlaw Report) at 6 (citing American Psychiatric Association, 2013).

to. There is no dispute that "the Legislature has granted to **DFPS** . . . the statutory responsibility to 'make a prompt and thorough investigation of a report of child abuse or neglect.'" *In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022) (quoting Tex. Fam. Code § 261.301(a))(emphasis added). And the Legislature has defined child abuse for DFPS as:

- "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." Tex. Fam. Code § 261.001(1)(A).
- "causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning" *Id.* § 261.001(1)(B).
- "physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child." *Id.* § 261.001(1)(D).
- "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[,]" particularly by parents, counselors, and physicians. *Id.* § 261.001(1)(D).

As explained above, PBHTs have the potential — and, to a certain extent, the purpose — to impair a child in their growth, development and/or psychological functioning. And it is **DFPS'** statutory authority to make the determination whether such impairment causes a mental, emotional or physical injury to the child.

Thus, the fact that DFPS may investigate reports that a child is taking PBHTs does not support an ultra vires claim; regarless of whether this is a mistaken application of . *See, e.g., Hall*, 508 S.W.3d at 242-43 ("[I]t is not an ultra vires act for

an official or agency to make an erroneous decision while staying within its authority… Only when these improvident actions are *unauthorized* does an official shed the cloak of the sovereign and act *ultra vires*.").

Nor was Commissioner Master's statement to the press that these investigations were statutorily permissible any more than a statement "regarding only the internal management or organization of a state agency[.]" *See Slay v. Tex. Comm'n on Envtl. Quality*, 351 S.W.3d 532, 547 (Tex. App.—Austin 2011, pet. denied) (finding challenged policy lacked the required prescriptive element to constitute a rule under the APA because "[t]he executive director may use enforcement guidelines that are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings); *see also Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 533 (Tex. App.—Austin 2014, pet. granted) ("Although the guidelines considered in *Slay* were intended to achieve a level of consistency when similar circumstances were present, they did not require a specific result in all cases.").

Appellees' claims lack merit in their entirety and, therefore, they have failed to demonstrate they are entitled to Rule 29.3 relief.

II. Appellees' Requested Order Would Upend, Not Preserve, the Status Quo.

The status quo is "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint ISD v. Marquez*, 487 S.W.3d 538, 556 (Tex. 2016). Here, the status quo is that DFPS is permitted—indeed, obligated—to investigate allegations of child abuse and neglect. The trial court's order prevents DFPS from doing so as to the Roe and Voe families. Ordering DFPS to cease an ongoing investigation is far from maintaining the status quo. The Supreme Court has already told this Court as much:

> DFPS bears the responsibility of investigating reports of child abuse or neglect, which necessarily includes "assess[ing] whether a report it receives is actually 'a report of child abuse or neglect.'" **A proper judicial remedy cannot go so far as to curb that discretion beyond legislative and constitutional limits.** That is, the remedy for an allegedly improper limitation on DFPS's investigatory discretion cannot be the placement of a different but equally improper limitation on DFPS's investigatory discretion; either amounts to a change in the status quo that the court is seeking to preserve.

In re Abbott, 645 S.W.3d at 286 (Lehrman, J, concurring) (emphasis added) (citations omitted); *accord id.* at 276 (unanimous op.), 287 (Blacklock, J., concurring in part and dissenting in part). In other words, DFPS, not a court, has the discretion to determine what to do with the reports it receives. *See also id.* at 281 ("when deciding whether and how to exercise that authority, DFPS . . . naturally must assess whether a report it receives is actually 'a report of child abuse or neglect.'"). Preventing it

from doing so when it comes to the Appellees and PFLAG members flies in the face of that precedent.

At bottom, Appellees' claims about status quo are premised on a misunderstanding of what the Governor and the Commissioner have done. Appellees attempt to characterize the Governor's letter as "redefining child abuse," App. Mot. at 5, but it does no such thing. Both the Governor's letter and the DFPS statement to the press refer directly to the Attorney General's opinion. That opinion interprets existing law, including the definition of child abuse in the Family Code. *See* Resp. App'x 3 at 7 ("Section 261.001 defines abuse through a broad and nonexclusive list of acts and omissions."). It does not purport to replace the statutory definition with a new one, as Appellees erroneously assume.

III. Rule 29.3 Relief Does Not Prevent Irreparable Harm, but Rather, Causes it.

Appellees cannot demonstrate irreparable harm sufficient to warrant Rule 29.3 relief because the *perceived* harm to themselves is speculative at best, and an injunction from this Court would cause an unavoidable irreparable harm on the State.

1. ***Appellees' speculative harm.*** Appellees have failed to show any irreparable harm should they not be granted Rule 29.3 relief. At most, Appellees speculate as to what harm could befall them if the investigations do not resolve in a favorable way.

But that very notion is why they cannot demonstrate irreparable harm. Appellees have, thus far, merely spoken, or refused to speak, to an investigator. There is no evidence or basis to claim Appellees are imminently in danger of having their child removed from their home or being placed on the child abuse registry.

The best way to determine such a harm is not imminent is to look at the past eight months. A "statewide injunction" as to these DFPS investigations was in effect for approximately two of those months. Thus, for six of those months, investigations have continued. Yet, Appellees cannot point to a single investigation that went beyond ensuring the wellbeing of the child and confirming the child was either not on PBHTs or receiving PBHTs from a medical provider as part of medically necessary treatment. *See* Resp. App'x 5 (Black Dec.). Indeed, two of the Appellees—Briggle and Roe—whose cases DFPS *did* manage to fully investigate for one of these two outcomes, *had their case closed*. Resp. App'x 8 at 273:7–10; Resp. App'x 9.

Appellees' affidavits even more clearly indicate they are incapable of demonstrating imminent and irreparable harm. Appellees explain their harm solely as "living in constant fear about what will happen to them." Mot. App'x A at ¶¶187, 204, 208. But such assertions are "merely speculative," and, thus, "fear and apprehension of injury are not sufficient" to demonstrate irreparable harm. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 227 (Tex. App.—Fort Worth

2009, pet. denied). And in any event, a temporary injunction cannot alleviate that fear—only a permanent injunction could do that—so issuing a temporary injunction would be improper. *See, e.g.*, *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985); *Ohio v. Yellen*, 539 F. Supp. 3d 802, 821 (S.D. Ohio 2021); *cf. Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012) (court lacks jurisdiction to issue an injunction that would not remedy the plaintiff's alleged harm).

2. *Proven harm to the State.* This Court has previously recognized that a State suffers irreparable harm when it is prevented from being able to enforce its laws. *Tex. Ass'n of Bus. v. City of Austin, Tex.*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied) (quoting *Abbott v. Perez*, 138 S.Ct. 2305, 2324 n.17 (2018)) ("The "inability [of a state] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State."). As explained above, DFPS is enforcing the laws the Legislature requires it to when it intakes reports of child abuse and determines how to prioritize and investigate those reports. *See, supra*, Section I.D.2. The trial court's order, specifically as to PFLAG, prevents DFPS from conducting its statutorily-required duties and the State from ensuring its laws are applied and enforced. Because Rule 29.3 relief harms "Texas's concrete interest, as a sovereign state, in maintaining compliance with its laws," this Court should deny Appellees' Motion. *Texas v.*

EEOC, 933 F.3d 433, 447 (5th Cir. 2019). Indeed, enjoining DFPS from investigating all members of PFLAG would be in contravention of the Supreme Court's holding that Rule 29.3 does not allow relief to benefit non-parties, *In re Abbott*, 645 S.W.3d at 280; in all but name, that is what the trial court's injunction does.

IV. Appellees' Claim of Status Quo and Irreparable Harm is Belied by the Fact that the Trial Court Did Not Grant PFLAG Members or the Briggle Family an Injunction Until 2½ Months After They Asked For One.

The trial court granted an injunction only to the Roe and Voe families and let the remainder of the TRO in the case expire on July 7, 2022. Mot. App'x C. It did not grant PFLAG or the Briggle Family any temporary injunctive relief until September 16th — two and half months after they had asked for one. Mot. App'x A, D. This should be telling. By denying an injunction for PFLAG and the Briggle family for over two months, the trial court necessarily found that there was no threat of immediate, irreparable harm nor was the status quo going to be upended in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Indeed, the trial court's order granting a temporary injunction only came after Appellees filed "advisories" with unsubstantiated claims and provided those advisories, and interviews, to the media. *See* Paúl, María, *Mom says trans eighth-grader was questioned by Texas officials at school*, Washington Post, Sept. 9 2022 (https://wapo.st/3M6tXeD); *see also* Varma, Tanvi, *Court filing shows that*

transgender eighth-grader was pulled out of class by DFPS, KVUE, Sept. 9, 2022 (https://bit.ly/3fKpOAA); *but see* Tex. Fam. Code § 261.302(b)(1) (stating investigation into child abuse – specifically the interview and examination of the child – may "be conducted at any reasonable time and place, including the child's home or the child's school.").

In other words, PFLAG and the Briggle family failed to demonstrate a need for preservation of the status quo. After all, "[w]ith regard to the second element, a probable right to the relief sought, "the applicant is not required to prove, at this stage, that it will prevail on final trial; instead, the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial." *Shor v. Pelican Oil & Gas Mgmt., LLC*, 405 S.W.3d 737, 749 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (emphasis added). The trial court's refusal to rule on PFLAG and Briggle's motion for temporary injunction necessarily indicates that such an order was not necessary to maintain the status quo; and is particularly important given that the temporary injunction against PFLAG would have been the most wide-reaching.

As to the third element, the trial court's refusal to promptly issue a temporary injunction similarly indicates that neither PFLAG nor Briggle proved irreparable harm. *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887,

894 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (explaining that, "in many situations, harm that is imminent in October and December will no longer be imminent the following April—the threat having either been realized or passed."). Had PFLAG or the Briggles been facing imminent harm, the trial court would have found as much at the time they presented evidence and argument.

Moreover, in the time between the first and second temporary injunction orders, Appellees never provided any new information that suggested any of the procedures DFPS is using in the investigation of minors taking PBHTs had changed since the July 6, 2022, temporary injunction hearing. And, most importantly, with now 5 months since any sort of statewide injunction was in place, Appellees still could not point to *one instance* in which, after DFPS initiated an investigation relating to PBHTs, any parent was placed on the child abuse registry or any child was removed from the home. The trial court's complete indifference to this when granting its second temporary injunction order does not support relief under Rule 29.3; it was an abuse of discretion.

PRAYER

The Court should deny Appellees' motion.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

On October 6, 2022, this document was served on Paul Castillo, lead counsel for Appellees, via pcastillo@lambdalegal.org.

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