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THIRD COURT OF APPEALS
AUSTIN, TEXAS
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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 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 201st Judicial District of Travis County, Texas
Cause No. D-1-GN-22-000977, Hon. Amy Clark Meachum

APPELLEES' EMERGENCY MOTION FOR TEMPORARY INJUNCTIVE RELIEF PURSUANT TO RULE 29.3

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To the Honorable Justices of the Third Court of Appeals:

Appellees hereby move on an emergency, expedited basis for entry of an order reinstating a temporary injunction, pursuant to the Court's inherent authority and Texas Rule of Appellate Procedure 29.3, to preserve the *status quo ante* in this litigation and to protect the parties' rights, until the disposition of the instant appeal.

Emergency relief is needed to preserve the *status quo ante* and prevent imminent and irreparable harm to Appellees and transgender adolescents, families, and providers across Texas. After a full evidentiary hearing, the trial court found that "gender-affirming care was not investigated as child abuse by DFPS [Department of Family and Protective Services] until after February 22, 2022" and that the "series of directives and decisions by the Governor, the [Commissioner], and other decision-makers at DFPS, changed the *status quo*." App. E (Order Granting Pls.' Appl. for Temporary Injunction) at 2. Appellees thus face "imminent and irreparable injury" without an injunction prohibiting Appellants "from enforcing the Governor's directive and the DFPS rule enforcing that directive." App. E at 2.

In issuing its temporary injunction, the trial court concluded that there was a substantial likelihood that Appellees would succeed on the merits of their claims that the Governor's directive was *ultra vires*, beyond the scope of his authority, and unconstitutional, and that the Texas Department of Family and Protective Services ("DFPS") and Commissioner Masters promulgated and implemented a new rule that

was improper and therefore void. Accordingly, the district court temporarily enjoined Appellants from (1) taking any action against Appellees based on the Governor's directive and DFPS rule; (2) investigating reports of child abuse based solely on an individual's prescription of or facilitation of gender-affirming care, or the fact that a minor is transgender, gender transitioning or being prescribed gender-affirming medical care; (3) prosecuting or referring for prosecution any such reports; and (4) imposing reporting requirements based solely on a person's receipt of gender-affirming medical care or status as transgender or gender transitioning. App. E at 3-4. In doing so, the trial court explained that the temporary injunction was necessary to "maintain[] the status quo prior to February 22, 2022" and that it "should remain in effect while [the trial court], and potentially the Court of Appeals, and the Supreme Court of Texas, examine the parties' merits and jurisdictional arguments." App. E at 3.

To preserve the *status quo ante* during the pendency of this appeal, protect Appellees' rights, and prevent immediate and irreparable harms to Appellees, this Court should exercise its equitable powers and authority under Rule 29.3 to issue a temporary order restraining Appellants on the same terms set forth in the trial court's temporary injunction.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2022, the trial court heard Appellees' Application for a Temporary Injunction, App. E, as well as the Appellants' Plea to the Jurisdiction, App. F (Order Denying Defs.' Plea to the Jurisdiction). The same day, after a full evidentiary hearing that included uncontested testimony from Appellees' three fact witnesses and two expert witnesses, the court issued orders granting Appellees' Application for Temporary Injunction, App. E, and denying Appellants' Plea to the Jurisdiction, App. F, (collectively, the "Orders"), which are the subject of the State's current appeal. Appellants did not present any testimony.

I. Governor Abbott and DFPS Commissioner Masters Issue Directives Redefining Child Abuse and Instruct DFPS to Investigate All Reported Instances of Gender-Affirming Care.

On February 22, 2022, Governor Greg Abbott sent a letter to DFPS Commissioner Jaime Masters directing the agency "to conduct a prompt and thorough investigation of any reported instances" of "gender-transitioning procedures," without any regard to medical necessity (hereinafter, "Abbott Directive"). App. A (Pls.' Original Pet. and Appl. for TRO, Temporary Injunction, Permanent Injunction, and Request for Declaratory Relief), p. 6, ¶ 17, p. 44, ¶ 171. App. H (R.R.-Vol. 3, Pls.' Ex. 02, p. 1, ¶¶ 1, 3).[1] The Abbott Directive incorporated

[1] Appendix H (App. H) contains the reporter's record from the March 11, 2022 temporary injunction hearing that was sent to Appellees by the court reporters prior to the court reporters' actual filing of the reporter's record with this Court. On March 16, 2022, both Appellees and Appellants requested that the reporter's record be filed.

Attorney General Ken Paxton's Opinion No. KP-0401 ("Paxton Opinion") and claimed that "a number of so-called 'sex change' procedures constitute child abuse under existing Texas law." App. A, p. 2, ¶ n.2, p. 6, ¶ 17. App. H (R.R.-Vol. 3, Pls.' Ex. 02, p. 1, ¶ 1). While the Paxton Opinion decreed that medical treatment, including use of pubertal suppression, hormone therapy, and surgery, for a minor with gender dysphoria could constitute child abuse, the Opinion did "not address or apply to medically necessary procedures." App. A, p. 6, ¶ 16. App. H (R.R.-Vol. 3, Pls.' Ex. 01, p. 2, ¶ 1). The Abbott Directive, however, ordered the "investigation of any reported instances" of "gender-transitioning procedures," without any regard to medical necessity. App. A, p. 6, ¶ 17, p. 44, ¶ 171. App. H (R.R.-Vol. 3, Pls.' Ex. 02, p. 1, ¶¶ 1, 3). In addition to directing DFPS to investigate reports of medical treatment referenced in the Paxton Opinion, the Abbott Directive orders, under threat of criminal prosecution, "all licensed professionals who have direct contact with children" and "members of the general public" to report instances of minors receiving such treatment. App. A, p. 6, ¶ 17. App. H (R.R.-Vol. 3, Pls.' Ex. 02, p. 1, ¶ 2).

The same day, DFPS announced that it would comply with the Abbott Directive and "investigate[]" any reports of the procedures outlined in the new directives ("DFPS Statement"), again, without any regard to medical necessity. DFPS also claimed that prior to the Paxton Opinion and Abbott Directive, it had "no

pending investigations of child abuse involving the procedures described in that opinion." App. A, p. 6, ¶¶ 18-19. App. H (R.R.-Vol. 3, Pls.' Ex. 03). DFPS immediately launched investigations into families around Texas, including the Doe family, based on their implementation of the Abbott Directive. App. A, p. 7, ¶ 21. App. H (R.R.-Vol. 1, 33:13-17, 86:7-12).

Appellees Jane Doe and John Doe are the loving parents of Appellee Mary Doe, a 16-year-old adolescent who is transgender and has been diagnosed with gender dysphoria. App. A, pp. 20-21, ¶¶ 66, 68, 71. App. H (R.R.-Vol. 1, 84:23-25, 90:22-23, 115:2-4). On February 23, 2022, Jane sought clarification from her supervisor at DFPS, where she works, of how the Abbott Directive would affect DFPS policy. App. A, p. 22, ¶ 80. App. H (R.R.-Vol. 1, 87:4-19). Jane was also deeply concerned about the Abbott Directive's impact on her own family. App. A, p. 22, ¶ 80. App. H (R.R.-Vol. 1, 87:4-9). Hours later, Jane was placed on administrative leave from her employment and under investigation solely because she has a transgender daughter whose doctors may have prescribed medical treatment for her gender dysphoria.[2] App. A, p. 22, ¶ 81. App. H (R.R.-Vol. 1, 87:23-88:1, 90:11-21). Two days later, a DFPS Child Protective Services investigator

[2] 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. App. H (R.R.-Vol. 2, 83:17-19; Vol. 3, Pls.' Ex. 08, 3875-3876). Treatment for gender dysphoria is governed by evidence-based clinical guidelines supported by every major medical association in the United States. App. H (R.R.-Vol. 2, 118:16-119:14). If left untreated, gender dysphoria may result in serious consequences including depression, self-harm, and even suicide. App. H (R.R.-Vol. 2, 86:21-23, 126:18-22).

visited the Doe family home as part of a newly opened DFPS investigation based only on the allegation that Jane and John Doe have a transgender daughter who may be receiving gender-affirming medical care. App. A, pp. 22-23, ¶¶ 83-84. App. H (R.R.-Vol. 1, 89:15, 90:21). The Does are "living in a constant state of fear" and are terrified of "th[e] stress and th[e] pain" and other severe harms they will suffer as a result. App. A, pp. 23-24, ¶¶ 85-89. App. H (R.R.-Vol. 1, 92:4-12, 93:12-24, 94:2-11, 94:15-22, 95:17-96:1, 97:23-24). Indeed, notwithstanding Jane and John's best efforts to reassure her, Mary has expressed fear "that she was going to be taken away." App. H (R.R.-Vol. 1, 93:16-18).

Appellee Dr. Megan Mooney is a clinical psychologist and mandatory reporter under Texas law. App. A, p. 24, ¶¶ 90-91. App. H (R.R.-Vol. 2, 17:24-25, 22:14-16). She has a practice based in Houston, Texas that includes transgender adolescent patients, many of whom have been diagnosed with gender dysphoria and are receiving medically necessary care for this condition. App. A, pp. 24-25, ¶¶ 92, 94-95. App. H (R.R.-Vol. 2, 19:8-22, 21:9-12). The Abbott Directive and DFPS's implementation of it have placed Dr. Mooney in an untenable situation. App. A, p. 25, ¶ 100. *See generally* App. H (R.R.-Vol. 2, 23-29, 91:21-92:1). If Dr. Mooney fails to report her adolescent clients who receive gender-affirming care, she faces the loss of her license and the prospect of civil and criminal penalties for failing to report "child abuse." App. A, p. 25, ¶ 101. App. H (R.R.-Vol. 2, 24:25-25:16).

However, if she follows the Abbott Directive and DFPS's adoption of it, Dr. Mooney would violate her professional standards of ethics and inflict serious harm and trauma on her clients. App. A, p. 26, ¶¶ 102-105. App. H (R.R.-Vol. 2, 27:5-24). In addition, she would irreparably damage the bonds of trust that she has built with her clients and, as a consequence, could face the possible closure of her practice if clients know that she cannot maintain their trust. App. A, p. 26, ¶ 106. App. H (R.R.-Vol. 2, 27:5-20). She could also face potential loss of her professional license. App. A, p. 26, ¶ 106. App. H (R.R.-Vol. 2, 27:21-28:2).

II. Appellees Sue to Enjoin Appellants from Enforcing the Directives and Are Granted a Temporary Restraining Order.

Appellees brought suit on March 1, 2022, challenging the above-described actions of Governor Abbott, Commissioner Masters, and DFPS, asserting six causes of action, including that Appellants' actions violated the Texas Administrative Procedure Act ("APA"), were *ultra vires*, and violated the constitutionally protected separation of powers. App. A, pp. 27-45, ¶¶ 109-173. In their petition, Appellees requested a temporary restraining order, temporary injunction, declaratory judgment, and permanent injunction. App. A, pp. 46-49, ¶¶ 174-182. The trial court set a hearing on the temporary restraining order request for March 2, 2022. App. C (Order Granting Pls.' Appl. for TRO) at 1. Minutes before the hearing, Petitioners filed a plea to the jurisdiction but did not request it for submission or hearing. App. B (Defs.' Plea to the Jurisdiction). At the TRO hearing, neither the trial court nor the

parties addressed the merits of the plea to the jurisdiction. *Abbott v. Doe*, No. 03-22-00107-CV, 2022 WL 710093, at *2 (Tex. App.—Austin Mar. 9, 2022) (mem. op.) (no pet. h.). That day, the trial court issued a temporary restraining order ("TRO") and set a temporary injunction hearing to consider granting state-wide injunctive relief for March 11, 2022. App. C at 2-3.

Later that very same day, Appellants filed an interlocutory appeal arguing that the TRO "implicitly denied" their plea to the jurisdiction. App. D (Defs.' Notice of Accelerated Interlocutory Appeal from TRO) at 1. Appellees filed a motion to dismiss the appeal for want of jurisdiction. *Abbott*, 2022 WL 710093, at *1. On March 9, 2022, this Court dismissed the appeal for lack of jurisdiction, concluding that the TRO did not implicitly deny Appellants' Plea to the Jurisdiction. *Id.* at *2-3.

III. The Trial Court Orders a Temporary Injunction.

A. Evidence Before the Trial Court

On March 11, 2022, the trial court held a temporary injunction hearing to consider Appellees' request for statewide relief. Appellees presented declarations, documentary evidence, and live testimony, including from expert witnesses that the above-described actions of Governor Abbott, Commissioner Masters, and DFPS were unauthorized expansions of executive authority under both the APA and the Texas Constitution. The factual presentation before the trial court showed that the

authorized actions by Appellants have caused severe and ongoing harms to transgender youth and those who care for them by triggering unwarranted investigations into families, threatening providers and mandatory reporters with criminal prosecution, cutting off medically necessary health care to adolescents who rely on it, and infringing upon the fundamental rights of parents to direct the custody and care of their minor children.

Randa Mulanax, an investigations supervisor with DFPS, testified that the Abbott Directive and Commissioner Masters' implementation thereof led to immediate changes to DFPS policy and practice. App. H (R.R.-Vol. 1, 32:16-22, 53:2-8). Almost immediately after the issuance of the Abbott Directive and DFPS Statement, DFPS required all reports of parents with transgender children receiving gender-affirming care to be investigated without exception, thereby treating these matters differently from all other reports of child abuse and neglect. App. H (R.R.-Vol. 1, 44:17-25, 53:2-8). Ms. Mulanax testified that DFPS employees are now prohibited from designating these cases as "Priority None" cases, which are applied to cases where it is "not likely that a child is being abused or neglected." App. H (R.R.-Vol. 1, 36:4-15, 38:9-17). Under DFPS's new policy, DFPS also forbids employees from utilizing "less invasive" Alternative Response procedures. App. H (R.R.-Vol. 1, 38:20-39:5). Furthermore, DFPS instructed employees not to put anything regarding these cases in writing, a highly unusual instruction that Ms.

Mulanax considered "unethical" and that differs from the way that DFPS treats any other cases. App. H (R.R.-Vol. 1, 44:1-16; Vol. 3, Pls.' Ex. 17). In her six years with DFPS, she had never before been told to avoid putting anything in writing. App. H (R.R.-Vol. 1, 44:5-13). DFPS employees were also instructed to involve the agency's general counsel in these investigations, another requirement unique to these cases. App. H (R.R.-Vol. 1, 50:1-12). Before February 22, 2022, Ms. Mulanax was not aware of any open investigations involving medical care for transgender minors but is now aware of at least seven such cases across the state, including three within her region. App. H (R.R.-Vol. 1, 49:5-12). After these changes in policy, Ms. Mulanax resigned because she "no longer" feels DFPS acts in the best interest of children or families. App. H (R.R.-Vol. 1, 53:22-25, 54:1-4). Ms. Mulanax testified that she sees "no really [sic] end goal for these cases," as DFPS investigations are ordinarily opened "to ensure a child is being cared for, loved, and safe in their home." App. H (R.R.-Vol. 1, 54:14-19). She testified that if "pediatricians, professionals who are experienced with these fields . . . have recommended these treatments, it is not our position to step in and say that they are incorrect." App. H (R.R-Vol. 1, 54:22-55:1).

The trial court also heard testimony from Appellees Jane Doe and Dr. Megan Mooney outlining the irreparable harm they will face without an injunction. Jane testified that she was "completely shocked" upon learning she was placed on

administrative leave and her family would be placed under investigation after she contacted her supervisor on February 23, 2022 seeking clarification on DFPS policy in light of the directives. App. H (R.R.-Vol. 1, 89:15-19). The only allegations that prompted the investigation were that Jane and John Doe "have a daughter who was born male and is, 'transitioning to female,' and that she may be receiving gender-affirming care." App. A, p. 23, ¶ 84. App. H (R.R.-Vol. 1, 90:14-20). However, before February 23, a few DFPS employees, including her supervisor, knew that Jane's daughter is transgender and had been prescribed medical care for gender dysphoria, yet she had not been reported or investigated for child abuse, even though DFPS employees are mandatory reporters. App. H (R.R.-Vol. 1, 90:24-91:4, 91:12-17, 91:24-25). Jane also testified that even on February 22, prior to the issuance of the Abbott Directive but after the Paxton Opinion, a report had been received of a transgender youth receiving gender-affirming medical care and the report had been deemed "clearly not reportable." App. H (R.R.-Vol. 1, 88:17-23).

Jane testified that she has since been "terrified" for her family and has found the situation "unbelievably awful" due to the loss of security and privacy. App. A, p. 22, ¶ 79. App. H (R.R.-Vol. 1, 92:1-12). Jane testified that her daughter Mary has been "very scared," begun avoiding school, and blames herself for the stress and pain of the family. App. A, p. 23-24, ¶ 88. App. H (R.R.-Vol. 1, 92:24-94:6). On the day the investigator visited the family, Mary "thought that she was going to be taken

away" from her family "that night." App. H (R.R.-Vol. 1, 97:14-15, 23-24). Without an injunction, Jane testified that her family "will be living in fear" because, as she understands, even the closure of this investigation will not "stop more and more and more and more reports from coming in," which will cause "a continuous disruption" of her family's life. App. A, p. 23-24, ¶ 88. App. H (R.R.-Vol. 1, 95:21-25).

Dr. Mooney testified that she was "very upset" and "very concerned for both myself as a mandatory reporter, and for the children and families across the state of Texas that this would impact" upon learning of Governor Abbott's letter and DFPS's statement. App. H (R.R.-Vol. 2, 23:6-11). As a mandatory reporter, Dr. Mooney understood that there are "legal ramifications" both "civilly and criminally" and "threat[s]" to her license and "professional well-being" for failing to comply with the directives if the courts do not enjoin their effect. App. A, p. 25, ¶ 101. App. H (R.R.-Vol. 2, 25:2-6). She testified that, among other penalties, she "would expect" to lose her license. App. H (R.R.-Vol. 2, 25:11-14). Dr. Mooney also testified about the harms she would suffer if she were required to report "clients and their families for abuse or neglect for receiving medical care for gender dysphoria." App. A, p. 26, ¶¶ 102-107. App. H (R.R.-Vol. 2, 27:8-10). She testified that the "foundation of the therapeutic relationship is our confidentiality and privacy" and being forced to report clients for receiving necessary medical care would be "devastating" to her clients, "ruin" her ability to maintain bonds of trust with them, and "have a direct impact on

my business." App. A, p. 26, ¶¶ 103, 106. App. H (R.R.-Vol. 2, 27:11-20). Being required to report her clients and their families for this type of medical care would also violate Dr. Mooney's ethical obligations and could lead to her being reported of false reporting of child abuse and neglect. App. H (R.R.-Vol. 2, 27:25-28:2, 28:10-12).

As a result of these directives, Dr. Mooney has seen "outright panic" from her community. App. H (R.R.-Vol. 2, 29:3-5). She testified that "[p]arents are terrified that CPS is going to come and question their children or take them away." App. H (R.R.-Vol. 2, 29:6-7). Dr. Mooney testified that "[m]ental health professionals are scared that we are either violating our standards of the professional codes of conduct or in violation of the law" and that the directives put "medical professionals that I work with all the time in a horrible position of not being able to provide care to children and families." App. H (R.R.-Vol. 2, 29:7-13). In addition to "widespread confusion" about these directives, Dr. Mooney testified that she has already witnessed adverse "impacts on the mental health and well-being of young people," including "increased risk of suicidality, increased depression, [and] increased anxiety" as a result of the Governor's letter and DFPS's statement. App. H (R.R.-Vol. 2, 28:19-29:22).

In addition, the trial court heard expert testimony that gender dysphoria treatments are safe, effective, and widely accepted in the medical community. Dr.

Armand H. Matheny Antommaria, a professor in the Departments of Pediatrics and Surgery at the University of Cincinnati College of Medicine and an ethicist and pediatric hospitalist at Cincinnati Children's Hospital Medical Center who regularly consults on treatment for adolescent patients with gender dysphoria and works on the multidisciplinary reviews and policies pertaining to Cincinnati Children's Transgender Clinic, was qualified as an expert by the court. App. H (R.R.-Vol. 2, 77:1-17, 82:4-6; Vol. 3, Pls.' Ex. 05). He testified that both the Endocrine Society and the World Professional Association for Transgender Health ("WPATH") have developed data-driven clinical guidelines for treating gender dysphoria. App. A, p. 14, ¶ 46. App. H (R.R.-Vol. 2, 84:9-85:17; Vol. 3, Pls.' Ex. 08, Defs.' Ex. 01). Dr. Antommaria testified that both guidelines were established only after "robust," "iterative" internal procedures and have been accepted by the medical community. App. H (R.R.-Vol. 2, 84:16-23; 85:9-14). He likewise explained that justifications offered in defense of the new child abuse directives, such as the fact that the targeted treatments are prescribed "off-label," would apply to much of pediatric medicine. App. A, p. 19, ¶ 61. App. H (R.R.-Vol. 2, 90:13-91:9).

Dr. Cassandra C. Brady, an Assistant Professor of Clinical Pediatrics at Vanderbilt University Medical Center and the Clinical Director of the Differences of Sex Development Clinic and the Pediatric and Adolescent Gender Clinic at Monroe-Carell Jr. Children's Hospital at Vanderbilt, was also qualified as an expert

by the court. App. H (R.R.-Vol. 2, 114:8-20, 120:1-3; Vol. 3, Pls.' Ex. 07). She likewise testified that the treatment recommendations outlined in the Endocrine Society and WPATH guidelines are "evidence-based," "mean[ing] that they utilize data and research that's available to . . . support the recommendations," and are "widely accepted by a large number of medical organizations across the country." App. A, p. 9, ¶ 28, p. 18, ¶ 58. App. H (R.R.-Vol. 2, 118:16-119:17). She also testified that she relies on these guidelines "every day" in her current practice of providing these "medically necessary treatments for gender dysphoria [sic] youth." App. H (R.R.-Vol. 2, 119:15-17; 122:5-10).

Dr. Antommaria testified that gender dysphoria treatment is "safe" and "effective" based on "prospective observational studies that show that pubertal suppression decreases depression among individuals with gender dysphoria and improves general functioning in those individuals." App. H (R.R.-Vol. 2, 85:18-86:3). He testified that hormone therapy is "safe" and "effective" because of "similar prospective observational studies that show improvements in mental health outcomes through the use of gender-affirming hormone therapy." App. H (R.R.-Vol. 2, 86:4-12).

Dr. Brady also testified that puberty blockers are reversible, "safe and effective" and are not only used to treat gender dysphoria but have been used for many years to treat central precocious puberty. App. H (R.R.-Vol. 2, 122:24-

123:15). Dr. Brady further noted that any risks associated with the use of puberty blockers are the same, whether these are used to treat gender dysphoria or central precocious puberty. App. H (R.R.-Vol. 2, 124:2-5). Likewise, Dr. Brady testified that provision of hormones is safe and effective, used regularly in her practice to treat other conditions, and that any risks associated with these treatments are not "distinct or unique" to the treatment of gender dysphoria, but rather "very similar across the board for any condition" for which she uses them. App. A, p. 18, ¶ 60. App. H (R.R.-Vol. 2, 124:6-18).

The trial court further heard expert testimony that the cessation of gender dysphoria treatment would cause imminent and potentially deadly harms. Dr. Antommaria testified that the harms of not providing medical treatment for gender dysphoria include "high risk for depression, anxiety, self-harm, suicidality, and eating disorders." App. A, pp. 14-15, ¶¶ 45, 50. App. H (R.R.-Vol. 2, 86:21-23). He testified that "gender-affirming hormone therapy and puberty blockers are medically necessary for the treatment of gender dysphoria" and "are not sterilizing procedures." App. A, pp. 16-17, ¶¶ 52-53. App. H (R.R.-Vol. 2, 91:18-21). As a result, he testified that "they do not constitute child abuse, and that characterizing them as such puts healthcare providers in an untenable position of either violating their professional obligations or the law and causes serious harm to patients and their families." App. A, p. 11, ¶ 34. App. H (R.R.-Vol. 2, 91:21-92:1). Similarly, Dr.

Brady testified that "[t]he harms that can be associated with withholding or pausing [gender-affirming] care are significant mental health distress associated with increased anxiety, depression, and suicide, so that equates to the increased risk for death." App. A, pp. 14-15, ¶¶ 45, 50. App. H (R.R.-Vol. 2, 126:18-22). Dr. Brady testified that her "concern with the directives from the Attorney General and the Governor is that these medically necessary treatments that are safe and effective, if they are withheld, would lead to significant harm and mental health comorbidities and potentially death in these gender dysphoric adolescents." App. H (R.R.-Vol. 2, 122:11-16).

B. Trial Court Findings

Based on the evidence presented as part of Appellees' Application for Temporary Injunction, the trial court entered a temporary injunction and denied the Appellants' plea to the jurisdiction. The trial court found Appellees had met their burden of showing a probable right of relief. The trial court specifically found that "there is substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is *ultra vires*, beyond the scope of his authority, and unconstitutional." App. E at 2. The trial court found that "gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022." App. E at 2. As a result, "[t]he series of directives and decisions by the Governor, the [Commissioner], and other decision-makers at DFPS, changed the *status quo* for

transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas." App. E at 2. Therefore, the trial court found "[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." App. E at 2.

The trial court also held that, absent injunctive relief, Appellees would be irreparably harmed because "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." App. E at 2-3. In addition, "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." App. E at 3. Furthermore, without an injunction, Dr. Mooney "could face civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if Defendants' directives are enforced." App. E at 3. Dr. Mooney also "could face immediate criminal prosecution" if she did not report her patients. App. E at 3.

The temporary injunction enjoined Commissioner Masters and DFPS from "enforcing the Governor's directive and DFPS rule." App. E at 3. More specifically, under the temporary injunction, Appellants are restrained from:

> (1) taking any actions against Plaintiffs 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.

App. E at 3-4.

C. Appeal of the Orders Granting a Temporary Injunction and Denying Defendants' Plea to the Jurisdiction

Immediately following the entry of the Orders granting the temporary injunction and denying the Appellants' Plea to the Jurisdiction, the Appellants filed a notice of accelerated interlocutory appeal, wherein they assert that by perfecting the appeal, the temporary injunction had been superseded pursuant to Texas Civil Practice and Remedies Code § 6.001(b) and Texas Rule of Appellate Procedure 29.1(b). App. G (Defs.' Notice of Appeal from Order Granting Temporary Injunction and Order Denying Defs.' Plea to the Jurisdiction) at 1-2.

ARGUMENT AND AUTHORITIES

I. This Court Should Use Its Inherent Powers and Equitable Authority Under Rule 29.3 to Reinstate a Temporary Injunction on the Terms Set Forth by the Trial Court.

Texas Rule of Appellate Procedure 29.3 authorizes courts of appeals to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. Preservation of the status quo is at the heart of Rule 29.3. This Court should exercise its inherent powers as well as its authority under Rule 29.3 to issue a temporary order reinstating the terms of the temporary injunction issued by the trial court, which preserves the *status quo ante* in this case, protects Appellees' rights, and prevents irreparable and immediate harms to Appellees, as well as transgender youth, their families, and their medical providers across Texas, among others.

A. A temporary injunction is necessary to preserve the status quo ante in this case.

This Court has "great flexibility in preserving the status quo based on the unique facts and circumstances presented." *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019) (orig. proceeding). Based on the facts and circumstances of this case, reinstatement of a temporary injunction is necessary to preserve the *status quo ante* in this case.

"The purpose of supersedeas is 'to preserve the status quo . . . pending the appeal.'" *In re Tex. Educ. Agency*, 619 S.W.3d 679, 683 (Tex. 2021) (orig.

proceeding) (quoting *Shell Petroleum Corp. v. Grays*, 62 S.W.2d 113, 118 (Tex. 1933)). And "[i]n the context of injunctions, . . . status quo means the last, actual, peaceable, non-contested status *which preceded the pending controversy*." *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 609 S.W.3d 569, 572 (Tex. App.—Austin 2020, no pet.) (quotations and citation omitted) (emphasis added). As such, permitting Appellants to supersede the trial court's temporary injunction in this case would do the opposite of what a supersedeas is meant to do; it would alter and disrupt the *status quo ante* in this case, rather than preserve it.

The prohibitory temporary injunction issued by the trial court below preserves the *status quo ante* in this case, and this Court should issue an order enjoining Appellants from the actions outlined in the trial court's temporary injunction to similarly preserve the *status quo*. As the trial court found, "gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022" and "[t]he series of directives and decisions by the Governor, the [Commissioner], and other decision-makers at DFPS, changed the *status quo* for transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas." App. E at 2.

The Supreme Court has expressly approved this Court's authority to reinstate a temporary injunction to preserve the *status quo*. In *In re Texas Education Agency*, the appellants filed an interlocutory appeal that "automatically suspended

enforcement of the trial court's order," which included a temporary injunction. 619 S.W.3d at 683. As the Supreme Court noted, "[i]nstead of preserving the status quo, however, suspension of the temporary injunction would . . . have the contradictory effect of permitting the status quo to be altered, because if compliance with the injunction were not required," the plaintiff's rights and position "could be changed from 'the last, actual, peaceable non-contested status [that] preceded the pending controversy.'" *Id.* at 683-84.

After *In re Texas Education Agency*, this Court has continued to exercise its authority under Rule 29.3 to preserve the *status quo*. In *Texas Health & Human Services Commission v. Sacred Oak Medical Center LLC*, No. 03-21-00136-CV, the appellees—like Appellees here—asked this Court to reinstate the temporary injunction under Rule 29.3 following the State Agency's interlocutory appeal of the trial court's denial of its plea to the jurisdiction. 2021 WL 2371356, at *1 (Tex. App.—Austin June 9, 2021, no pet.). Addressing *In re Texas Education Agency*, this Court explained that "[t]he Texas Supreme Court recently confirmed that courts of appeals have the power to provide relief from the State's automatic right to supersedeas under Rule 29.3," even if procedural rules would prevent the trial court from issuing a counter-supersedeas order. *Id.* at *5.

In deciding whether to reinstate the temporary injunction in *Sacred Oak*, this Court considered the purpose of the relief requested. Specifically, the Court noted

that, "as in *In re TEA*, instead of preserving the status quo, the Commission's suspension of the temporary injunction would, in this case, have the contradictory effect of permitting the status quo to be altered." *Sacred Oak Med. Ctr. LLC*, 2021 WL 2371356, at *5 (quotations and citation omitted); *see also In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding) (explaining "that the continuation of illegal conduct cannot be justified as preservation of the status quo"). The same holds true here.

The Court should enter injunctive relief on the terms set forth by the trial court because it is the only way to preserve the *status quo* while this appeal is considered.

B. Reinstatement of the terms of the temporary injunction issued by the trial court is necessary to protect Appellees' rights and to prevent irreparable and immediate harms.

The Court also has "the power to preserve a party's right to judicial review of acts that it alleges are unlawful and will cause it irreparable harm." *Sacred Oak Med. Ctr. LLC*, 2021 WL 2371356, at *5. "Rule 29.3 provides a mechanism by which [this Court] may exercise the scope of [its] authority over parties, including [its] inherent power to prevent irreparable harm to parties properly before [it] pursuant to [its] appellate jurisdiction in an interlocutory appeal." *Tex. Educ. Agency*, 609 S.W.3d at 578. Here, reinstatement of a temporary injunction is necessary to protect Appellees' rights, who would suffer irreparable and immediate harms in the absence of such a temporary injunction.

In this way, this case is similar to *Texas Education Agency* and *Sacred Oak*—"both cases involving a trial court's grant of a temporary injunction enjoining a State agency from taking or enforcing final administrative action." *Sacred Oak Med. Ctr. LLC*, 2021 WL 2371356, at *5. In *Texas Education Agency*, the plaintiff-appellee was concerned that failure to issue an order under Rule 29.3 to preserve the *status quo* "could delay remedial measures designed to protect students and improve academic achievement." *In re Tex. Educ. Agency*, 619 S.W.3d at 690. And in *Sacred Oak*, the plaintiff-appellee faced irreparable harm from the suspension of its license and continued closure. *Sacred Oak Med. Ctr. LLC*, 2021 WL 2371356, at *8. In both instances, this Court entered a temporary injunction, pursuant to its inherent powers and authority under Rule 29.3, in order to protect the plaintiffs-appellees' rights and prevent irreparable harm as the appeals were considered.

Like *Texas Education Agency* and *Sacred Oak*, this case presents "compelling circumstances that require the Court to reinstate the trial court's temporary injunction to preserve the parties' rights." *Sacred Oak Med. Ctr. LLC*, 2021 WL 2371356, at *7 (quotations omitted). As the trial court found, "unless Defendants are immediately enjoined from enforcing the Governor's directive and the DFPS rule enforcing that directive, both issued February 22, 2022, and which make reference to and incorporate Attorney General Paxton's Opinion No. KP-0401, [Appellees] will suffer imminent and irreparable injury." App. E at 2. Reinstatement of a

temporary injunction is therefore necessary to prevent immediate, ongoing, and irreparable harm to Appellees. Indeed, Appellants have already caused the Does and Dr. Mooney significant stress and fear under the threats of family separation and employment.

The unlawful Abbott Directive and DFPS rule at issue here, which create a presumption of abuse whenever medically necessary treatment for gender dysphoria is provided to transgender youth, presents the Doe Appellees and families of transgender youth with an impossible choice. Either the parents of transgender youth are subjected to an abuse investigation, finding of reason to believe they have committed abuse, and family separation, among other consequences, or they do not provide medically necessary treatment to transgender adolescents who necessitate it for their gender dysphoria. App. E at 2-3.

This catch-22 threatens immeasurable harm to the health and wellbeing of Appellee Mary Doe and other transgender youth. As Dr. Brady testified, the harms from withholding or pausing medically necessary gender-affirming care include "significant mental health distress associated with increased anxiety, depression, and suicide, so that equates to the increased risk for death." App. A, pp. 14-15, ¶¶ 45, 50. App. H (R.R.-Vol. 2, 126:18-22).

It also threatens immediate and irreparable harms to Appellees Jane and John Doe, and countless loving and affirming parents like them, who, aside from suffering

the unwarranted stigma associated with being investigated for child abuse, would have their parental rights be trampled and could suffer numerous consequences simply for being investigated. App. E at 2-3.

Likewise, Dr. Mooney and mandatory reporters like her face either "civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if Defendants' directives are enforced," or "immediate criminal prosecution," if she "does not report her patients." App. E at 3.

This case thus presents the circumstance where, "[a]bsent an appellate court's inherent power to make temporary orders to preserve the parties' rights until disposition of the appeal, the application of Rule 24.2(a)(3) would prevent a party from ever meaningfully challenging acts by the executive branch that the party alleges to be both unlawful and reviewable by courts and that it further alleges will cause it irreparable harm." *Tex. Educ. Agency*, 609 S.W.3d at 578. This Court has already "conclude[d] that under the particular circumstances presented here, where the appellee alleges irreparable harm from ultra vires action that it seeks to preclude from becoming final, to effectively perform [its] judicial function and to preserve the separation of powers, [this Court] must exercise [its] inherent authority and use Rule 29.3 to make orders 'to prevent irreparable harm to parties that have properly invoked [its] jurisdiction in an interlocutory appeal.'" *Id.* (quoting *In re Geomet*, 578

S.W.3d at 90).

Absent immediate relief from this Court, that same imminent and irreparable harm that led the trial court to issue its injunction in the first instance will persist while this appeal is pending. An order from this Court reinstating a temporary injunction on the terms set forth by the trial court would do Appellants "no harm whatsoever," as any interest they may claim "in enforcing an unlawful (and likely unconstitutional)" directive and rule "is illegitimate." *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 618 (5th Cir. 2021).

The Court should enter an order reinstating a temporary injunction on the terms set forth by the trial court in this case, pursuant to Rule 29.3 and its inherent powers, to protect Appellees' rights and prevent irreparable and immediate harms.

II. The Court Should Consider This Emergency Motion for Temporary Injunctive Relief on an Expedited Basis and Should Set an Expedited Briefing Schedule.

Finally, the Court should consider this motion for temporary injunctive relief pursuant to Rule 29.3 on an emergency, expedited basis and set an expedited briefing schedule for its consideration. At stake in this case are, *inter alia*, the health, wellbeing, and very lives of vulnerable transgender youth; the ability of parents to support, love, and affirm their children; and the integrity of countless families across Texas. The trial court already found that a temporary injunction is necessary to

preserve the *status quo ante*, protect Appellees' rights, and prevent irreparable harm. Expedited consideration of this motion is therefore necessary not only to preserve the *status quo*, protect Appellees' rights, and prevent irreparable harm, but also for this Court "to effectively perform [its] judicial function and to preserve the separation of powers." *Tex. Educ. Agency*, 609 S.W.3d at 578.

Accordingly, Appellees respectfully request that the Court request a response from Appellants to the instant motion by Friday, March 18, 2022 at 12:00 p.m. Appellees further respectfully request that Court act on this emergency motion expeditiously.

CONCLUSION AND PRAYER

Appellees respectfully ask this Court to grant this Emergency Motion for Temporary Injunctive Relief and issue an order providing temporary injunctive relief on the terms set forth by the trial court until the disposition of the appeal. Such an order is necessary to preserve the *status quo* and the Appellees' rights. Appellees further request that this Court consider this motion on an expedited basis and that it request a response from Appellants by Friday, March 18, 2022 at 12:00 p.m. Finally, Appellees further request that this Court grant any and all other relief to which they may be entitled.

Dated: March 16, 2022

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this Emergency Motion contains 6,822 words, excluding the portions of the Motion exempted by Rule 9.4(i)(1).

/s/ Shelly L. Skeen
Shelly L. Skeen

CERTIFICATE OF CONFERENCE

Under Texas Rule of Appellate Procedure 10.1(a)(5), I certify that, on March 16, 2022, I conferred with Appellants' counsel, Ms. Courtney Corbello and Mr. Ryan Kercher, via email regarding Appellees' Emergency Motion for Temporary Injunctive Relief pursuant to Texas Rule of Appellate Procedure Rule 29.3. Counsel for Appellants indicated that Appellants are opposed to this Motion and the relief requested therein.

/s/ Shelly L. Skeen
Shelly L. Skeen

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, Appellees electronically served a true and correct copy of the foregoing Emergency Motion for Temporary Injunctive Relief pursuant to Texas Rule of Appellate Procedure Rule 29.3 on all known counsel of record by the Court's electronic filing system, as follows:

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