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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 23-0697

IN THE SUPREME COURT OF TEXAS

THE STATE OF TEXAS, *et al.*,

Appellants,

v.

LAZARO LOE, *et al.*

Appellees.

On Direct Appeal from the
201st Judicial District of Travis County, Texas
No. D-1-GN-23-003616

BRIEF OF APPELLEES

KENNON L. WOOTEN
Texas State Bar No. 24046624
kwooten@scottdoug.com
LAUREN DITTY
Texas State Bar No. 24116290
lditty@scottdoug.com
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 – Phone
(512) 495-6399 – Fax

PAUL D. CASTILLO
Texas State Bar No. 24049461
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Ave, Unit 500
Dallas, Texas 75219
(214) 219-8585 – Phone
pcastillo@lambdalegal.org

ALLISSA POLLARD
Texas State Bar No. 24065915
ARNOLD & PORTER KAYE SCHOLER,
LLP
700 Louisiana Street, Suite 4000
Houston, TX 77002-2755
(713) 576-2451 – Phone
(713) 576-2499 – Fax
Allissa.Pollard@arnoldporter.com

LORI B. LESKIN*
New York State Bar No. 254088
ARNOLD & PORTER KAYE SCHOLER,
LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-8541 – Phone
(212) 836-6441 – Fax
Lori.Leskin@arnoldporter.com

OMAR GONZALEZ-PAGAN*
New York State Bar No. 5294616
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3919
(212) 809-8585 – Phone
ogonzalez-pagan@lambdalegal.org

KAREN L. LOEWY*
D.C. State Bar No. 1722185
kloewy@lambdalegal.org
SASHA J. BUCHERT*
Oregon State Bar No. 70686
sbuchert@lambdalegal.org
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245 – Phone

LYNLY S. EGYES*
New York State Bar No. 4838025
lynly@transgenderlawcenter.org
MILO INGLEHART*
New York State Bar No. 5817937
milo@transgenderlawcenter.org
TRANSGENDER LAW CENTER
594 Dean Street, Suite 11
Brooklyn, NY 11238
(510) 587-9696 – Phone

HARPER SELDIN*
Pennsylvania State Bar No. 318455
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500 – Phone
hseldin@aclu.org

ELIZABETH GILL*
California State Bar No. 218311
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-1237 – Phone
egill@aclunc.org

BRIAN KLOSTERBOER
Texas State Bar No. 24107833
bklosterboer@aclutx.org
CHLOE KEMPF
Texas State Bar No. 24127325
ckempf@aclutx.org
ADRIANA PINON
Texas State Bar No. 24089768
apinon@aclutx.org
ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
(713) 942-8146 – Phone
(713) 942-8966 – Fax

SHAWN THOMAS MEERKAMPER*
California State Bar No. 296964
shawn@transgenderlawcenter.org
DALE MELCHERT*
New York State Bar No. 5366554
dale@transgenderlawcenter.org
TRANSGENDER LAW CENTER
P.O. Box 70976
Oakland, CA 94612
(510) 587-9696 – Phone

Counsel for Appellees
**pro hac vice* admission

IDENTITY OF PARTIES AND COUNSEL

Defendants-Appellants
The State of Texas; The Office of the Attorney General of Texas; Ken Paxton, in his Official Capacity as Attorney General of Texas; The Texas Medical Board; The Texas Health and Human Services Commission (collectively, "Defendants")

Counsel for Defendants-Appellants: Appearing in the Supreme Court
Angela Colmenero
Deputy Chief of Staff
Office of the Governor
(Former Provisional Attorney General)

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700 – Phone

Brent Webster
First Assistant Attorney General

Lanora C. Pettit (lead counsel)
Principal Deputy Solicitor General
Lanora.Pettit@oag.texas.gov

Natalie D. Thompson
Assistant Solicitor General
Natalie.Thompson@oag.texas.gov

Counsel for Defendants-Appellants: Appearing in the Trial Court
Angela Colmenero
Deputy Chief of Staff
Office of the Governor
(Former Provisional Attorney General)

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700 – Phone

Brent Webster
First Assistant Attorney General

Grant Dorfman
Deputy First Assistant Attorney General

James Lloyd
Acting Deputy Attorney General for Civil Litigation

Kimberly Gdula
Deputy Chief, General Litigation Division

Ryan Kercher
Deputy Chief, General Litigation Division

Johnathan Stone
Assistant Attorney General
Johnathan.Stone@oag.texas.gov

Heather L. Dyer
Assistant Attorney General
heather.dyer@oag.texas.gov

Charles K. Eldred
Assistant Attorney General
charles.eldred@oag.texas.gov

Plaintiffs-Appellees
Lazaro Loe, Mary Moe, Matthew Moe, Nora Noe, Sarah Soe, Steven Soe, and Gina Goe (collectively, "Parent Plaintiffs"), asserting claims individually and on behalf of their children; the respective transgender minor children of these parents—Luna Loe, Maeve Moe, Nathan Noe, Samantha Soe, and Grayson Goe (collectively, "Minor Plaintiffs" and, together with Parent Plaintiffs and PFLAG members, "Family Plaintiffs"); three Texas-licensed physicians providing or facilitating medical treatment for gender dysphoria to adolescents in Texas (Dr. Richard Ogden Roberts III, Dr. David L. Paul, and Dr. Patrick W. O'Malley (collectively, "Physician Plaintiffs"), asserting claims as individuals and on behalf of their patients; GLMA, asserting claims on behalf of its members, which include all of the Physician Plaintiffs (collectively, "Provider Plaintiffs"); and PFLAG, asserting

claims on behalf of its members, which include all Family Plaintiffs (together with GLMA, "Organizational Plaintiffs," and collectively with GLMA, Family Plaintiffs, and Physician Plaintiffs, "Plaintiffs")

Counsel for Plaintiffs-Appellees: Appearing in the Trial Court and Supreme Court

KENNON L. WOOTEN
kwooten@scottdoug.com
LAUREN DITTY
lditty@scottdoug.com
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 – Phone

PAUL D. CASTILLO
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Ave, Unit 500
Dallas, Texas 75219
(214) 219-8585 – Phone
pcastillo@lambdalegal.org

OMAR GONZALEZ-PAGAN
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3919
(212) 809-8585 – Phone
ogonzalez-pagan@lambdalegal.org

KAREN L. LOEWY
kloewy@lambdalegal.org
SASHA J. BUCHERT
sbuchert@lambdalegal.org
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245 – Phone

ALLISSA POLLARD
ARNOLD & PORTER KAYE SCHOLER, LLP
700 Louisiana Street, Suite 4000
Houston, TX 77002-2755
(713) 576-2451 – Phone
Allissa.Pollard@arnoldporter.com

LORI B. LESKIN
ARNOLD & PORTER KAYE SCHOLER, LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-8541 – Phone
Lori.Leskin@arnoldporter.com

HARPER SELDIN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500 – Phone
hseldin@aclu.org

ELIZABETH GILL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-1237 – Phone
egill@aclunc.org

LYNLY S. EGYES
lynly@transgenderlawcenter.org
MILO INGLEHART
milo@transgenderlawcenter.org
TRANSGENDER LAW CENTER
594 Dean Street, Suite 11
Brooklyn, NY 11238
(510) 587-9696 – Phone

BRIAN KLOSTERBOER
bklosterboer@aclutx.org
CHLOE KEMPF
ckempf@aclutx.org
ADRIANA PINON
apinon@aclutx.org
ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
(713) 942-8146 – Phone

SHAWN THOMAS MEERKAMPER
shawn@transgenderlawcenter.org
DALE MELCHERT
dale@transgenderlawcenter.org
TRANSGENDER LAW CENTER
P.O. Box 70976
Oakland, CA 94612
(510) 587-9696 – Phone

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STATEMENT OF THE CASE

Nature of the Case	Senate Bill 14 bans physicians and healthcare providers from providing specific medical treatments to certain adolescents for a particular purpose—"transitioning a child's biological sex as determined by the sex organs, chromosomes, and endogenous profiles of the child or affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex"—but not for other purposes. Tex. Health & Safety Code §§ 161.701 (definitions), 161.702 (prohibition), 161.703 (exceptions); Act of May 17, 2023, 88th R.S., ch. 335, 2023 Tex. Sess. Law Serv. 733 ("SB14"). Prohibited treatments include puberty-delaying prescription drugs, hormone therapy, and specified surgeries. Tex. Health & Safety Code § 161.702. SB14 subjects physicians to sanctions, including license revocation, for providing prohibited treatments. Tex. Occ. Code § 164.0552(a)-(b). SB14 also bans coverage and reimbursement with public money for prohibited treatments. Tex. Health & Safety Code §§ 62.151(g), 161.705; Tex. Hum. Res. Code § 32.024(pp). Plaintiffs—transgender adolescents diagnosed with gender dysphoria who either received or anticipated receiving prohibited treatments, their parents, physicians treating transgender adolescents, PFLAG, and GLMA—filed suit, seeking declarations that SB14 violates article I, sections 3, 3a, and 19 of the Texas Constitution, as well as temporary and permanent injunctions to stop SB14's implementation and enforcement in Texas. 1.CR.7-10; 62-73.
Trial Court	201st Judicial District Court, Travis County, Honorable Maria Cantú Hexsel
Disposition in the Trial Court	The trial court entered a temporary injunction based on SB14's likely unconstitutionality and the probable, imminent, and irreparable harm Plaintiffs will suffer from its enforcement. It also denied Defendants' plea to the jurisdiction. 7.CR.2148-56.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Defendants' direct appeal of the trial court's temporary injunction under article V, section 3-b of the Texas Constitution and Section 22.001(c) of the Texas Government Code. Defendants ask this Court to exercise extended jurisdiction to also review the trial court's denial of their plea to the jurisdiction ("PTJ"), but they have not identified a single case in which this Court has invoked extended jurisdiction in that manner. Even if the Court invokes extended jurisdiction in this direct appeal, its jurisdiction will nonetheless remain "constitutionally limited to questions of law." *Perry v. Del Rio*, 67 S.W.3d 85, 95 (Tex. 2001); *accord O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988); *R.R. Comm'n v. Shell Oil Co.*, 206 S.W.2d 235, 238 (Tex. 1947).[1]

ISSUES PRESENTED

Plaintiffs dispute Defendants' statement of issues for two main reasons. First, it goes beyond stating the legal issues before the Court to include unsubstantiated, conclusory, and derogatory assertions regarding the nature of gender dysphoria and the medical establishment that has determined the clinical guidelines for its treatment. Second, it misstates the constitutional questions at issue in this appeal.

[1] With recent amendments, Texas Rule of Appellate Procedure 57 no longer contains an express statement that, on direct appeal, this Court "may not take jurisdiction . . . over any question of fact." *Final Approval of Amends. to Tex. R. App. P. 57*, Misc. Docket No. 21-9155, at 2 (Dec. 20, 2021). This rule change, however, does not change the constitutional confines of jurisdiction.

The actual questions are:

1. Whether the trial court abused its discretion in concluding that Plaintiffs stated valid causes of action against Defendants, and that a substantial likelihood exists that Plaintiffs will prevail on the merits on their claims that:
    a. SB14 violates article I, section 19 of the Texas Constitution by infringing upon the fundamental rights of parents to make decisions concerning the care of their children;
    b. SB14 violates article I, sections 3 and 3a of the Texas Constitution by discriminating against transgender adolescents and their parents because of sex and transgender status; and
    c. SB14 violates article I, section 19 of the Texas Constitution by depriving Texas physicians of a vested property interest in their medical licenses and infringing upon the occupational freedom of Texas healthcare providers.
2. Whether the trial court's injunction was jurisdictionally and remedially proper in temporarily restraining Defendants from enforcing SB14 to preserve the status quo and prevent probable, imminent, and irreparable harm to Plaintiffs.

To the Honorable Supreme Court of Texas:

In trying to undo the trial court's temporary injunction and have this case effectively decided on the merits before the record has been developed fully or a trial on the merits has occurred, Defendants have misstated Plaintiffs' constitutional challenges to SB14, disregarded evidence supporting the trial court's decisions, borrowed fact-finding from other cases involving different laws and records, and read into SB14 policy determinations that appear nowhere in SB14's text.

SB14 does not proscribe particular medical care for *all* adolescents in Texas; it proscribes that care for only "certain" adolescents—transgender adolescents. SB14 at 1-2, 9. Contrary to Defendants' characterization on appeal, the Legislature has not made a policy call that the medical care itself is "too risky[.]" Appellants' Br. 25, 35. In fact, the Legislature carved out exceptions to allow *the exact same medical care* for adolescents in other contexts. *See* Tex. Health & Safety Code § 161.703. Thus, SB14 targets and discriminates against a specific group of adolescents and denies them *alone* the benefits of certain medical care.

SB14 categorically bans particular medical care for transgender adolescents, disregarding that this care has long been recognized as necessary to treat a condition—"gender dysphoria"—experienced by some transgender people. Gender dysphoria is a marked incongruence between one's gender identity and sex assigned at birth, of at least six months' duration, that is associated with clinically significant

distress or impairment in social, occupational, or other important areas of functioning. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* 164.0 (5th ed. 2022). SB14 bans medical treatment for transgender adolescents with gender dysphoria notwithstanding that doctors have provided this care for decades, using evidence-based, widely accepted clinical guidelines. As the trial court found, SB14 "threatens the health and wellbeing of adolescents with gender dysphoria" by "den[ying] their parents, including Parent Plaintiffs and PFLAG parent members, the ability to obtain necessary and in some circumstances, lifesaving medical treatment for these children." 7.CR.2152.

Plaintiffs challenge SB14's constitutionality and seek to enjoin its enforcement because it violates: (1) article I, section 19 by infringing upon the fundamental rights of parents to make decisions concerning the care of their children; (2) article I, sections 3 and 3a by discriminating against transgender adolescents and their parents because of sex and transgender status; and (3) article I, section 19 by depriving Texas physicians of a vested property interest in their medical licenses and infringing upon the occupational freedom of Texas healthcare providers. 1.CR.63-73.

To support its temporary injunction in this case, the trial court—"[h]aving considered the testimony and evidence admitted at the hearing [on August 15-16, 2023], the arguments of counsel, and the applicable authorities"—found in pertinent

part that Plaintiffs have a substantial likelihood of success on their constitutional claims; that, unless Defendants are immediately enjoined from enforcing SB14, Plaintiffs will suffer probable, imminent, and irreparable injury in the interim; and that the temporary injunction entered is necessary to maintain the status quo. 7.CR.2151-54. In attempting to reverse that injunction, Defendants resist the requisite deference to the trial court's factual determinations, which are supported by evidence. Instead, they rely on evidence that *conflicts* with the trial court's factual determinations or evidence that is not even part of the record in this appeal. Applying the proper standard of review, the Court should affirm the trial court's temporary injunction and allow this case to proceed on the merits.

While the trial court properly determined that it had subject matter jurisdiction in response to Defendants' PTJ, this Court may assess subject matter jurisdiction without reviewing that PTJ. If this Court exercises extended jurisdiction to consider Defendants' PTJ, however, it should consider that PTJ based solely on the pleadings, precisely as Defendants presented their challenge. And if this Court decides that Defendants' sovereign-immunity arguments challenging the facial validity of Plaintiffs' constitutional claims require any consideration of the merits, ultimate determinations on the merits must not be made. "[S]overeign immunity does not bar a suit to vindicate constitutional rights." *Klumb v. Houston Mun. Emps. Pension Sys*., 458 S.W.3d 1, 13 (Tex. 2015). Thus, Defendants' attempt to insulate SB14 from

judicial review by merging a threshold jurisdictional inquiry into an ultimate determination on the merits is improper. This Court should affirm the trial court's jurisdictionally sound temporary injunction, which was properly tailored to maintain the status quo and protect Plaintiffs from probable, imminent, and irreparable harm.

STANDARD OF REVIEW

This Court's jurisdiction on direct appeal is "constitutionally limited to questions of law." *Perry*, 67 S.W.3d at 91. Thus, if any determination of a question of law in this direct appeal "rests on factual matters that are in dispute, [this Court] must, of course, rely entirely on the [trial] court's findings." *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 785 (Tex. 2005); *accord Morath v. The Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 846 (Tex. 2016).

Moreover, any "[a]ppellate review of an order granting or denying a temporary injunction is strictly limited to determination of whether there has been a clear abuse of discretion by the trial court in granting or denying the interlocutory order." *Davis v. Huey*, 571 S.W.2d 859, 861-62 (Tex. 1978). "[T]he merits of the underlying case are not presented for appellate review." *Id.* at 861. While this Court "review[s] legal determinations de novo," it "defer[s] 'to the trial court's factual determinations if they are supported by evidence[.]'" *Haedge v. Cent. Tex. Cattlemen's Ass'n*, 603 S.W.3d 824, 827 (Tex. 2020) (per curiam) (quoting *Stockton v. Offenbach*, 336 S.W.3d 610, 615 (Tex. 2011)). A trial court does not abuse

discretion by basing factual determinations on conflicting evidence; this Court may not substitute its judgment for that of the trial court. *Davis*, 571 S.W.2d at 862.

Finally, if the Court decides to exercise extended jurisdiction to review the trial court's denial of Defendants' PTJ, such jurisdiction entails questions of law reviewed de novo. *See State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). Any review here of the denial of Defendants' PTJ should focus on whether Plaintiffs pled facts affirmatively demonstrating subject matter jurisdiction. *See, e.g.*, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) ("When a [PTJ] challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause."); *Abbott v. Mexican Am. Legis. Caucus [MALC]*, 647 S.W.3d 681, 689 (Tex. 2022) (determinations regarding such a challenge are "based solely on the pleadings").[2]

[2] Defendants' PTJ challenges the pleadings. 3.CR.651 (Defendants stating the applicable standard of review for their PTJ). In their reply supporting the PTJ, filed *after* the hearing and *after* the close of evidence, Defendants tried a new approach, instead claiming they are challenging the existence of jurisdictional facts and, therefore, the decision on the PTJ should involve examination of their evidence. 7.CR.2040-41. On appeal, they have not specified whether they are challenging any jurisdictional facts and, if so, which ones. Regardless, even when the existence of jurisdictional facts is challenged via a PTJ, this Court restricts its analysis to evidence that is "necessary to resolve the jurisdictional issues" raised. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). Moreover, "the standard of review mirrors that of a traditional summary judgment[.]" *Id.* at 771. Thus, in evaluating a challenge to jurisdictional facts, this Court would "take as true all evidence favorable to the nonmovants, and . . . indulge every reasonable inference and resolve any doubts in their favor." *Jones v. Turner*, 646 S.W.3d 319, 325 (Tex. 2022) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009))).

STATEMENT OF FACTS[3]

I. Established medical guidelines exist for treating transgender adolescents diagnosed with gender dysphoria.

The trial court properly determined that SB14 "significantly and severely compromis[es] the health and wellbeing of transgender adolescents experiencing gender dysphoria" by depriving them of "access to safe, effective, and medically necessary treatment." 7.CR.2153. These factual determinations regarding the treatment are supported by evidence in the record.

Gender identity refers to a person's core sense of belonging to a particular gender. 2.RR.38:19-23. Gender identity has biological roots and cannot be changed voluntarily, by external forces, or through medical or mental-health intervention. 2.RR.41:23-42:1; 42:23-43:2; 103:15-16. A person's gender identity does not always match the sex the person was assigned at birth. 2.RR.38:9-18. People whose gender identity aligns with their sex assigned at birth are cisgender, while those whose gender identity differs from their sex assigned at birth are transgender.

Being transgender is not a condition to be cured. It is a core, defining trait of identity that a person should not be forced to change or abandon (even if one could), like religion, and that has no effect on one's ability to contribute to society, like

[3] These facts are taken from the sources relevant to this Court's review—the trial court's findings, made following an evidentiary hearing, and the hearing evidence supporting those findings, supplemented by the pleadings.

alienage. But many transgender people suffer from gender dysphoria, a serious medical condition characterized by clinically significant distress arising from the incongruence between a transgender person's gender identity and sex assigned at birth. 2.RR.76:16-21. If left untreated, gender dysphoria can result in severe anxiety, depression, self-harm, and suicide. 2.RR.62:10-63:1; 128:18-129:7.

Treatment for gender dysphoria is well-established and has been provided for decades using evidence-based clinical guidelines ("Guidelines") published by the World Professional Association for Transgender Health ("WPATH") and the Endocrine Society. 2.RR.44:21-46:7; 78:7-19; 112:20-113:13; 185:11-17; *see* 7.CR.2151-52. Under the Guidelines, gender-affirming medical care is provided to an adolescent only when the adolescent has: (i) gender incongruence that is both marked and sustained over time; (ii) a gender dysphoria diagnosis; (iii) sufficient emotional and cognitive maturity to provide informed consent; (iv) provided informed consent with their parents after being informed of the potential risks of treatment, including potential reproductive side effects; and (v) no mental health concerns that would interfere with diagnosis or treatment. *See* 2.RR.47:19-49:4.

There is no medical treatment for gender dysphoria for any person before the onset of puberty. 2.RR.76:25-77:6. For some adolescents with gender dysphoria, pubertal suppression may be medically indicated *after the onset of puberty*. 2.RR.79:11-16. Pubertal suppression is only indicated when, among other diagnostic

criteria, the adolescent "has started puberty and, as puberty has started, gender dysphoria has persisted or intensified." 2.RR.80:22-81:3. Pubertal suppression prevents gender dysphoria from worsening by pausing the development of secondary sex characteristics that are inconsistent with the patient's gender identity. 2.RR.81:1-20. It is reversible and does not affect fertility: once treatment stops, endogenous puberty resumes. 2.RR.82:20-23; 86:2-7.

For some older adolescents, gender-affirming hormone therapy (i.e., testosterone for transgender boys and a combination of testosterone suppression and estrogen for transgender girls) may be medically indicated. 2.RR.87:10-22. It alleviates gender dysphoria by facilitating physiological changes consistent with an adolescent's gender identity. 2.RR.87:23-88:15. Under the Guidelines, treatment is provided only after rigorous assessments of the adolescent's gender dysphoria and capacity to understand the treatment's risks and benefits and with the informed consent of parents or guardians. 2.RR.47:12-49:4; 50:25-51:18; 59:6-11.

For a very small percentage of older adolescents, surgery may be medically indicated to treat gender dysphoria. These surgeries are "highly rare" and mostly limited to chest-masculinization surgery. 2.RR.57:15-21. For example, Dr. Daniel Schumer testified that of the approximately 400 adolescents he has treated for gender dysphoria, "approximately 5 percent" had "top surgery" as minors, while "zero" had "bottom surgery" as minors. 2.RR.99:8-15.

These medical interventions are provided to allow transgender adolescents to undergo puberty within the typical age range. 2.RR.87:23-88:15. These interventions greatly improve the health and wellbeing of transgender adolescents, as demonstrated by a substantial body of evidence, including cross-sectional and longitudinal studies and decades of clinical experience. 2.RR.63:12-19; 82:24-83:15; 89:16-90:4; 97:9-19; 115:13-20; 117:8-122:11; 129:8-130:7. Delaying treatment can result in significant distress, including anxiety and escalating suicidality, and physical changes that can be difficult or impossible to reverse. 2.RR.52:17-53:12; 62:10-63:11, 118:18-119:9. Interventions in adolescence, however, can dramatically minimize gender dysphoria later in life and eliminate the need for surgery. 2.RR.55:10-57:5; 100:17-23. By contrast, the risks and side effects of these interventions are rare or easily managed. 2.RR.84:3-86:15; 90:5-94:10. The evidence supporting gender-affirming medical care is comparable to the evidence supporting other pediatric care, which is often provided without randomized controlled trials. 2.RR.78:20-79:3.

II. SB14 categorically bans medical treatment for transgender adolescents.

On May 19, 2023, the Legislature passed SB14, categorically banning the provision of necessary and often lifesaving medical treatment to transgender adolescents in Texas. Governor Greg Abbott signed SB14 into law on June 2, 2023. The law went into effect on September 1, 2023. The trial court properly determined

that SB14 "enact[s] a discriminatory and categorical prohibition on evidence-based medical treatments for transgender youth which remains available to cisgender youth." 7.CR.2153.

SB14 categorically bans medical treatment of gender dysphoria for adolescents in Texas by prohibiting physicians and healthcare providers from providing, prescribing, administering, or dispensing medical procedures and treatments "[f]or the purpose of transitioning a child's biological sex as determined by the sex organs, chromosomes, and endogenous profiles of the child or affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." Tex. Health & Safety Code § 161.702. Specifically, SB14 prohibits "a physician or health care provider" from "knowingly" providing a range of medical treatments used to treat gender dysphoria, including "puberty suppression or blocking prescription drugs to stop or delay normal puberty," "supraphysiologic doses of testosterone to females," "supraphysiologic doses of estrogen to males," and various surgeries, including "mastectom[ies]" (the "Prohibited Care"). *Id.*

SB14 prohibits such medical treatments only when provided "[f]or the purpose of transitioning a child's biological sex" or for "affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." *Id.* The exact same medical treatments are permitted for *any* other

purpose, including precocious puberty or "a medically verifiable genetic disorder of sex development," which are identified as exceptions under SB14. *Id.*

SB14 includes a so-called "wean off" provision, under which an adolescent who began Prohibited Care before June 1, 2023, and "attended 12 or more sessions of mental health counseling" for "at least six months before the" course of treatment began, "shall wean off the prescription drug over a period of time and in a manner that is safe and medically appropriate." *Id.* § 161.703. SB14 provides no other exceptions for the health and wellbeing of adolescents. Nor does it provide any room to consider the determinations of parents or the judgment of licensed healthcare professionals about the administration of medical care to transgender adolescents. SB14 is "clearly arbitrary," and it "interferes with and overrides the clinical and evidence-based judgment of medical providers and the decision-making of parents, who provide informed consent." 7.CR.2152-53.

SB14 penalizes medical providers who provide or offer to provide Prohibited Care, including requiring the Texas Medical Board to "revoke the license or other authorization to practice medicine" of any physician who violates SB14. Tex. Occ. Code § 164.0552; *see also id.* § 164.0552(a).

SB14 further bars coverage for and reimbursement of Prohibited Care under a patient's state-funded insurance plan, including Medicaid or the Children's Health Insurance Program ("CHIP"), and strips state funding of any kind from any medical

provider, medical institution, "entity, organization, or individual that provides or facilitates" such care to transgender adolescents. Tex. Health & Safety Code §§ 161.704, 161.705; Tex. Hum. Res. Code § 32.024. It also grants the Attorney General enforcement authority to bring an action for injunctive relief against "a[ny] person" if the Attorney General has "reason to believe that [the] person is committing, has committed, or is about to commit" a violation of Section 161.702 of the Health and Safety Code, which addresses Prohibited Care. *Id.* § 161.706.

III. SB14 threatens irreparable harm to Plaintiffs.

The trial court determined that SB14 threatens irreparable harm to the Plaintiffs. 7.CR.2153-54. Specifically, it found an injunction was necessary to protect Plaintiffs from injuries resulting from SB14 including "the loss of access to safe, effective, and medically-necessary treatment for transgender adolescents experiencing gender dysphoria;" "significantly and severely compromising the health and wellbeing" of those adolescents, including "forcing such patients to experience unwanted and unbearable changes to their body;" "the loss of a parent's ability to direct their child's medical treatment;" "destabilizing the family unit, including forcing families to leave Texas, travel regularly out of state, and/or choose indefinite family separation;" "depriving Texas physicians [of] the right of occupational freedom and their vested property interests in their medical licenses;" "forcing Texas physicians to either violate their oath by disregarding the patient's

medical needs and inflicting needless suffering, or putting their medical license and livelihood at risk;" and "exacerbating health disparities for transgender adolescent patients who receive Medicaid and [CHIP] coverage who will lose that coverage." *Id.* These determinations are supported by evidence in the record.

A. Parent and Minor Plaintiffs

Samantha Soe is a fifteen-year-old transgender girl who grew up in Texas with her parents, **Sarah and Steven Soe**. Samantha faced severe mental health struggles before she received medical treatment for gender dysphoria, which led her to cry herself to sleep every night and to search "how to kill yourself" on her school computer. 2.RR.199:11-24; 206:10-14; 201:16-202:2; 202:3-18. Samantha's parents took her to a psychiatrist who prescribed her antidepressants, and she began regular therapy. 2.RR.203:4-15. Samantha continued to struggle and eventually saw a specialist who diagnosed her with gender dysphoria and recommended puberty blockers. 2.RR.203:15-205:21. After starting puberty blockers, Samantha's mental health was "stabilizing," she was not "crying at night anymore," and she was improving at school. 2.RR.205:13-21. A year later, Samantha began hormone therapy. 2.RR.206:15-18. After starting hormone therapy, she was "smiling more and seeming more open and outgoing," started to make new friends, and "just seemed a lot happier." 2.RR.206:19-207:7. Her mother is "very afraid" that without treatment, Samantha will once again be at risk of suicide. 2.RR.208:1-2, 208:6-17.

Grayson Goe is a fifteen-year-old transgender boy who lives in Texas with his mother, **Gina Goe**. Before receiving medical treatment for gender dysphoria, Grayson experienced mental health issues, including suicidal ideation. 2.RR.31:17-22. Since Grayson started hormone therapy, he leaves his room and has become more confident and social; "things have changed for the better." 2.RR.31:10-15. Gina fears that if her son cannot continue taking testosterone, things "will just be completely reversed." 2.RR.31:16. Gina testified that SB14 "completely hinders my ability [and right] as a parent to make medical decisions on a whole for my kid" and that Grayson now has "fractured medical care." 2.RR.31:23-32:13.

Luna Loe is a twelve-year-old transgender girl who lives in Texas with her father, **Lazaro Loe**. Luna first told her father she was a girl around age five. 2.RR.143:3-6. Lazaro had initial fears about the challenges Luna would face as a transgender person. 2.RR.145:8-13. But he saw how much "more joyful" Luna was when her parents accepted her: "it was like she was half a person before, but as we started to accept her more, she just changed. She did better in school and was just happier." 2.RR.145:15-22. Luna was diagnosed with gender dysphoria at age six by a child psychologist and started puberty blockers at age eleven under the care of a pediatric endocrinologist. 2.RR.145:23-146:23; 148:6-149:6. Lazaro described puberty blockers as an "obviously lifesaving kind of care" for Luna. 2.RR.150:2-4.

He worries about her mental health and the physical changes she would experience without puberty blockers. 2.RR.151:12-152:3.

Maeve Moe is a nine-year-old transgender girl who now, because of SB14, lives out of state with her mother, **Mary Moe**, while her father, **Matthew Moe**, remains in their home in Texas. Maeve was diagnosed with gender dysphoria and has been living as a girl for most of her life. 2.RR.214:23-215:19. Because Maeve has not started puberty, she is not yet receiving any medical care for her gender dysphoria. 2.RR.217:19-22; 215:20-216:1. Doctors in Texas told Mary they would not treat Maeve and her gender dysphoria because of SB14. 2.RR.218:4-8. As a result, Mary and her children relocated out of state, leaving Matthew in their family home in Texas, to allow Maeve to "go to the doctor and talk about whatever she feels the need to have a conversation with her doctor about." 2.RR.218:9-18. The Moe family is unwillingly separated due to SB14's restrictions. 2.RR.218:19-219:16.

Nathan Noe is a sixteen-year-old transgender boy who lives in Texas with his family including his mother, **Nora Noe**, and has been taking testosterone for almost two years. 3.RR.11:1-17; 19:19-21. When Nathan started puberty, he would isolate himself and would not participate in events with his family: it felt like "something wrong was happening" to him. 3.RR.11:18-12:15. Once Nathan recognized he was a transgender boy, he could finally make sense of his feelings and he experienced

relief and joy when his family and people around him started treating him as a boy. 3.RR.12:16-13:19; 15:21-17:9. After many conversations with his parents and his doctors, Nathan began hormone therapy when he was about fourteen. 3.RR.17:10-18:7. Nathan testified that his entire life has improved now that people see him as a boy, and he is "able to just go about my life as a teenage boy." 3.RR.18:9-19:18. Hormone therapy has given Nathan "freedom . . . to live my life without having gender dysphoria as a heavy weight on me." 3.RR.21:12-22. Being unable to take testosterone would deprive him of "this medicine" that, in his words, "just really saved my life." 3.RR.19:22-20:18.

B. Physician Plaintiffs

The Physician Plaintiffs—**Dr. Richard Roberts, Dr. David Paul, and Dr. Patrick O'Malley—**are all Texas-licensed and board-certified physicians practicing in Texas, Dr. Roberts and Dr. Paul in endocrinology and Dr. O'Malley in psychiatry. 2.RR.161:11-17; 162:11-13 (Roberts); 173:25-174:5 (Paul); 1.CR.141-142 (O'Malley). They all treat youth with gender dysphoria, some of whom are Medicaid and CHIP recipients. 2.RR.164:7-13 (Roberts); 178:1-6 (Paul); 1.CR.144 (O'Malley).

Drs. Roberts and Paul testified that SB14 would prevent them from treating patients with evidence-based care, violating their ethical obligations to those patients, or else risk their licenses, and that losing such care would have significant

detrimental consequences for their patients. 2.RR.169:12-170:15 (Roberts); 2.RR.185:18-187:18 (Paul). Dr. Paul first started treating adolescents with gender dysphoria while working as an Air Force Pediatric Endocrinologist on a base in San Antonio, 2.RR.175:11-176:3, and he testified: "I recognize that if these youth do not receive standard of care science-based help as they undergo gender transition, that it can be life threatening. It can be threatening to their entire life existence, affecting every single aspect of their life." 2.RR.176:20-25.

C. Organizational Plaintiffs

PFLAG National is the first and largest organization for LGBTQ+ individuals and their families with over 1,500 members in Texas. PFLAG's mission is "to create a caring, just, and affirming world for LGBTQ+ individuals and those who love them." 2.RR.154:23-155:12. PFLAG members include Texas families with transgender children currently receiving and/or anticipating beginning gender-affirming medical treatment, including Plaintiff Parents and Minors. 2.RR.158:22-159:9. PFLAG CEO Brian Bond testified as to the impact of SB14 on PFLAG members facing the loss of access to gender-affirming medical treatments for their adolescents. 2.RR.158:16-159:3; 159:21-160:10.

GLMA is the oldest and largest association for LGBTQ+ and allied health professionals in the country. GLMA's mission is to both advocate for and advance LGBTQ+ health equity, and to promote equality for LGBTQ+ and allied health

professionals in their work. 2.RR.191:20-24. GLMA members include the Physician Plaintiffs along with other Texas healthcare providers that provide gender-affirming medical care for minors. 2.RR.195:6-13. GLMA Executive Director Alex Sheldon testified to the impact of SB14 on GLMA members and their ability to provide care to their patients, 2.RR.191:6-7; 191:17-19, noting that such members "would be putting their medical licenses on the line in order to save the lives of their patients." 2.RR. 195:24-196:12.

PROCEDURAL HISTORY

On July 12, 2023, Plaintiffs filed suit, seeking declaratory relief and temporary and permanent injunctions to prevent the irreparable harms SB14 inflicts on Plaintiffs and hundreds of similarly situated Texas families and their medical providers. The Petition asserted five causes of action, which arise under the Uniform Declaratory Judgments Act ("UDJA"), as well as the Due Course of Law Clause and both the Equal Rights Provision and the Equal Rights Amendment ("ERA") of the Texas Constitution. 1.CR.62-71. In their Petition, Plaintiffs requested a temporary injunction blocking Defendants from enforcing or implementing SB14, a declaratory judgment that SB14 is unconstitutional, and a permanent injunction restraining SB14's enforcement. *Id.* at 71-73.

On August 15-16, 2023, the trial court heard Plaintiffs' Application for a Temporary Injunction, during which Plaintiffs presented extensive evidence—

including expert testimony from Dr. Aron Janssen, a Child and Adolescent Psychiatrist; Dr. Daniel Shumer, a Pediatric Endocrinologist; and Dr. Johanna Olson-Kennedy, a medical doctor double-board certified in Pediatrics and Adolescent Medicine—showing that the medical care prohibited by SB14 is medically necessary and part of the standard course of care for gender dysphoria in adolescents, 2.RR.51:21-24; 53:20-54:3; 62:18-23; 82:24-83:15; 89:11-90:4; 94:11-14; 95:6-11; 129:8-130:7, and that withholding, interrupting, or delaying medically-necessary treatment for gender dysphoria will cause "intensification of [] gender dysphoria," "worsening depression and anxiety," and "increased thoughts of suicidality or self-harm," in addition to causing "a devastating setback in their gender dysphoria care and their overall health" and "significantly deteriorating mental health." 2.RR.62:22-63:1; 95:6-97:3; 128:18-129:7. Plaintiffs also presented fact witness testimony from Parent Plaintiffs Lazaro Loe, Mary Moe, Sarah Soe, and Gina Goe as to the irreparable harms their transgender children and families would face without an injunction; from Minor Plaintiff Nathan Noe as to SB14's harm to him and his family; from Physician Plaintiffs Drs. Paul and Roberts as to SB14's impact on their ability to practice medicine and their patients; and from

Organizational Plaintiffs as to SB14's impact on their members across Texas. *See supra* Part III (Statement of Facts).[4]

On August 25, 2023, the trial court granted Plaintiffs' Application for Temporary Injunction. 7.CR.2150-56. Based on that application, evidence presented at the hearing, arguments of counsel, and applicable authorities, the trial court found "sufficient cause to enter a Temporary Injunction against Defendants" and entered a detailed temporary-injunction order ("TI Order"). 7.CR.2151.

The trial court concluded there was a substantial likelihood Plaintiffs would succeed on the merits of each of their claims that SB14 violates the Texas Constitution and found the following: (1) SB14 likely violates Parent Plaintiffs' fundamental rights under article I, section 19 of the Texas Constitution; (2) SB14 likely violates Provider Plaintiffs' constitutional rights under article I, section 19 of

[4] At the hearing, Defendants presented testimony from only Dr. James Cantor, Dr. Michael Laidlaw, Katrina Taylor, Dr. C. Alan Hopewell, Colin Wright, Dr. John Perrotti, Emelie Schmidt, and Soren Aldaco. On appeal, Defendants characterize as "testimony" declarations and affidavits from *other* individuals in their amended appendix filed the night before the hearing. *See* Appellants' Br. 11, 13-15, 18, 32. Defendants now ask this Court to consider facts inconsistent with the trial court's findings and outside the temporary-injunction record. *See* 5.CR.1702 (describing the record). Further complicating matters, Defendants rely on fact-finding from unrelated cases. Appellants' Br. 2-3, 29, 39, 43-45; *see Iraan-Sheffield Indep. Sch. Dist. v. Kinder Morgan Prod. Co. LLC*, 657 S.W.3d 525, 529 (Tex. App.—El Paso 2022, pet. denied) ("An appellate court may only consider the record as it appeared before the trial court at the time the court made the decision in question."). None of that is properly considered when deciding whether to affirm the temporary injunction. *See, e.g.*, *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W. 683, 686 (Tex. 1968); *see also Shor v. Pelican Oil & Gas Mgmt., LLC*, 405 S.W.3d 737, 751 n.3 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

the Texas Constitution; and (3) SB14 likely discriminates against Minor Plaintiffs because of their sex, sex stereotypes, and transgender status in violation of article I, sections 3 and 3a of the Texas Constitution. 7.CR.2151-53.

Defendants filed a notice of accelerated interlocutory appeal directly to this Court under Section 51.014(a)(4) of the Texas Civil Practice and Remedies Code and Section 22.001(c) of the Texas Government Code, which superseded the TI Order. Plaintiffs filed an Emergency Motion for Temporary Relief under Rule 29.3 of the Texas Rules of Appellate Procedure, seeking temporary injunctive relief on the terms set forth by the trial court until the disposition of this appeal.

On August 31, 2023, this Court denied Plaintiffs' emergency motion. Thus, SB14 went into effect on September 1, 2023.

ARGUMENT

I. The trial court properly concluded that Plaintiffs are substantially likely to succeed on their claims that SB14 is unconstitutional.

"To obtain a temporary injunction, the applicant must 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 trial court determined that Plaintiffs met each element of this test, including that "there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits" on each of their constitutional claims. 7.CR.21511. The record before

the trial court supports these determinations. In arguing Plaintiffs failed to state a claim and demonstrate a probable right to relief, Defendants set up a strawman, recasting the rights at issue and then asserting that the Texas Constitution protects none of *those* rights, such that rational-basis review applies. As a fallback, they argue that even if heightened scrutiny applies, SB14 meets that standard. As explained below, Defendants are wrong on both counts.

To overturn the injunction, Defendants must show that the trial court erred with respect to each one of Plaintiffs' claims. *Cameron Intern. Corp. v. Guillory*, 445 S.W.3d 840, 846 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In this case, the temporary injunction should stand because the trial court was correct on all.

A. SB14 infringes parents' fundamental autonomy right to make decisions about their children's care, including directing their medical care, in violation of article I, section 19.

The paramount duty and privilege of parenthood is to protect and care for one's child. From school consent forms to life-saving medical decisions, our society relies first and foremost on the judgment of parents to decide what is best for their children. In passing SB14, the Legislature impermissibly intruded upon Texas parents' fulfillment of that duty, encroaching on private decision-making about their children's medical care.

The trial court properly concluded that Plaintiffs are likely to succeed on their claim that SB14 infringes the fundamental right of parents to care for their children

in violation of article I, section 19. 7.CR.2151-52. The record illustrates how Parent Plaintiffs, after learning that their children suffered from gender dysphoria, took enormous care in deciding whether, when, and how to treat this serious medical condition. Contrary to Defendants' unsupported assertions about how and when gender-affirming medical care is provided, Parent Plaintiffs witnessed their children struggling, and then, like any parent facing their child's serious health condition, educated themselves, consulted with experts, monitored their child's health and wellbeing, considered all the treatment options, and weighed the risks relative to the benefits. 2.RR 27:2-9; 27:24-28:7; 30:21-31:22; 145:23-146:2; 146:17-148:17; 151:18-151:4; 200:10-202:2; 204:6-205:12; 214:22-215:2; 216:19-217:18; 2.RR 13:10-19; 17:10-18:7. Then, Parent Plaintiffs made what they thought was the best decision, and chose to treat their children using the standard of care recognized by the medical community as safe and effective for their adolescents' gender dysphoria. 2.RR 30:21-31:8; 31:17-22; 148:6-17; 207:8-21; 215:20-216:1; 2.RR 17:10-18:7.

SB14 directly intrudes on parents' autonomy right to make these types of medical decisions, which are historically and fundamentally made by parents for their own children, and not by the government.

1. Parental autonomy is a fundamental and well-established right.

"Parental control and autonomy is a 'fundamental liberty interest'" protected by article I, section 19, *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010) (per curiam)

(quoting *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (per curiam)), reflecting a "fundamental [] aspect of individual liberty." *In re J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994) (Hecht, J., concurring). Fit parents are presumed to act in their children's best interests. *In re C.J.C.*, 603 S.W.3d 804, 808 (Tex. 2020). This presumption is derivative of and bound up in "[t]he natural right which exists between parents and their children," which "is one of constitutional dimensions." *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976); *see also, e.g.*, *In re D.T.*, 625 S.W.3d 62, 69 (Tex. 2021) ("We have . . . recognized the fundamental nature of the parental right to make child-rearing decisions.").

The State cannot claim credibly that this right falls outside "the original meaning of the due-course clause." Appellants' Br. 24.[5] The bond between parent and child has been described as an inalienable right, recognized and respected throughout our legal traditions, vesting parents with broad authority over their children. *See In re A.M.*, 630 S.W.3d 25, 26 (Tex. 2019) (Blacklock, J., concurring in the denial of petition for review). It is squarely among the "vital rights … that courts must protect from fleeting majoritarian whim." *Tex. Dep't of State Health*

[5] Indeed, the State recently argued that parents' rights to direct their children's care are a matter of natural law, predating the Bill of Rights, and grounded in constitutional conceptions of liberty. *See* Brief of Amicus Curiae State of Montana and 22 Other States Supporting Plaintiff-Appellant and Reversal, at 5-11, *Regino v. Staley*, No. 23-16031 (9th Cir. filed Nov. 3, 2023), https://tinyurl.com/mptz5f72.

Servs. v. Crown Distrib. LLC, 647 S.W.3d 648, 666 (Tex. 2022) (Young, J., concurring).[6] A consistent line of cases from ratification to the present recognizes "the parent as the natural guardian of, and entitled to the custody of, his minor child," *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894), and that the conclusive presumption that a fit parent has care and custody of their child ties into the "paramount right" of a parent to a child. *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955); *see also Byrne v. Love*, 14 Tex. 81, 91 (1855) (the parent, as natural guardian, "has very ample authority in the control, management, rearing, and education of his children"). This fundamental right—well understood as paramount and inalienable at the time article I, section 19 was ratified—is what SB14 infringes.

2. The parental autonomy right includes medical decision-making.

The parental autonomy right includes the right to determine the course of a child's medical care: "[i]t is the right and duty of parents … to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary." *Mitchell v. Davis*, 205 S.W.2d 812, 814 (Tex. Civ. App.—Dallas 1947,

[6] Though Defendants point to this concurrence to invite the Court to answer its question about the scope of substantive protection afforded by article I, section 19, Appellants' Br. 24, their direct appeal of a temporary injunction is not the proper vehicle for such an inquiry. Justice Young's recognition of the novelty of such an analysis underscores that the trial court did not abuse its discretion by relying on existing parental-rights jurisprudence. Moreover, Justice Young recognized that matters involving parental rights are not good vehicles for "deriv[ing] general principles" regarding the relationship between article I, section 19 and the Fourteenth Amendment. 647 S.W.3d at 674.

writ ref'd) (quotation omitted). Encompassed within the parent's right to "the custody, care, and nurture of an infant" is the "'high duty' to recognize symptoms of illness and to seek and follow medical advice." *Miller ex. rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003) (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)); *see also T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 43 (Tex. App.—Fort Worth 2020, pet. denied) ("This right includes the right of parents to give, withhold, and withdraw consent to medical treatment for their children.").

SB14 strips parents, including Parent Plaintiffs, of the right to decide their children's course of medical treatment, and, with their children's assent, to follow medical advice from healthcare providers about the standard of care for their children's condition. These are exactly the types of medical decisions over which parents have "plenary authority," and "[n]either state officials nor . . . courts are equipped to review such parental decisions." *Parham*, 442 U.S. at 602, 604.

3. Defendants misframe the scope of the parental right at issue.

Defendants improperly cabin the constitutional right at issue, framing it as a parent's right to direct particular medical treatments. Appellants' Br. 23. That hyperspecific approach defies how this Court has defined the parental autonomy right and the applicable federal framework.[7] While rights must be "carefully

[7] Defendants disclaim the federal framework's relevance even as they misapply that framework. But while the Texas Constitution may provide greater protection for individual rights than its federal counterpart, it cannot provide less. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986).

described" in determining whether they are fundamental under federal Due Process, *id*. at 26 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)), that does not require limiting the scope of existing rights to the specific facts of the case. Indeed, *Glucksberg* itself defines the parental autonomy right broadly as the right "to direct the education and upbringing of one's children." *Glucksberg*, 521 U.S. 702, 720 (1997); *see also Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (assessing an established fundamental right requires examining it "in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right"). This Court did not address a "right to refuse resuscitation" in *Miller*, 118 S.W.3d at 766-67, or a "right to deny grandparent visitation" in *Derzapf*, 219 S.W.3d at 333. In both cases, this Court properly addressed parents' rights to *make decisions* for their children. *Id*.[8]

Moreover, Defendants' focus on specific treatments asks the wrong question:

> [T]he issue is not the *what* of medical decision-making—that is, any right to a *particular* treatment or a *particular* provider. Rather, the issue is the *who*—who gets to decide whether a treatment otherwise available to an adult is right or wrong for a child? Do parents have the right to make that call, or does the government get to decide for itself, notwithstanding the parents' determinations of what is in their children's best interests?

[8] A history-and-tradition approach that defines the right as tied to specific treatments would permit absurd results, protecting only medical care available at the time of constitutional ratification. Parents could claim a fundamental right to vaccinate for smallpox, but not polio; to amputate infected limbs but not provide antibiotics; and to treat cholera and typhus, but not diabetes, asthma, or ADHD.

L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 510 (6th Cir. 2023) (White, J., dissenting).

Defendants cast SB14 as a mere public policy choice, *see* Appellants' Br. 25, but this inverts the relevant inquiry. "The term 'fundamental right' refers to a limitation upon the exercise of governmental power." *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 863 (Tex. App.—Austin 1988), *rev'd on other grounds,* 777 S.W.2d 391 (Tex. 1989). Those constitutional limits constrain the State's public policy choices when they infringe fundamental parental rights to make decisions regarding the care and custody of their children. The State's power to regulate does not alter the nature of the fundamental right, but instead must be closely scrutinized when those regulations usurp a parent's medical decisions for a child.

4. SB14's infringement of parental rights is subject to strict scrutiny.

The State "bear[s] a serious burden of justification before intervention" in a parent's wishes for their child. *Wiley*, 543 S.W.2d at 352 (quotation omitted). More specifically, "'[s]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family.'" *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (quoting *Troxel v. Granville*, 530 U.S. 57, 68 (2000)). The State cannot "'infringe on the fundamental right of parents to make child rearing decisions simply because

[it] believes a better decision could be made.'" *In re Scheller*, 325 S.W.3d at 642 (quoting *Troxel*, 530 U.S. at 72-73).

The State must clear a very high bar to override parental decisions. "Actions which break the ties between a parent and child 'can never be justified without the most solid and substantial reasons.'" *Wiley*, 543 S.W.2d at 352 (quoting *State v. Deaton*, 54 S.W. 901, 903 (Tex. 1900)). The bar is so high to protect against "the risk of an erroneous deprivation and unjust outcome" where "the state is the actor seeking to curtail the parent's liberty interest." *In re D.T.*, 625 S.W.3d at 72. "Under federal and state guarantees of due process, the government may not infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Zaatari v. City of Austin*, 615 S.W.3d 172, 192 (Tex. App.—Austin 2019, pet. denied).

While Defendants allude to the State's role as *parens patriae* as motivating SB14's "public policy" determinations, state intervention in parents' decision-making should be "exceptional," limited to circumstances that have or will amount to abuse or neglect. *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 628 n.13 (1986). And "the responsibility to protect children from abusive parents does not authorize the State to oversee the internal affairs of every family." *In re A.M.*, 630 S.W.3d at 26. To the contrary, the State has no role to play when "the parents, . . . having sought accredited medical assistance and having been made aware of the seriousness of their

child's affliction . . . have provided for their child a treatment which is recommended by their physician and which . . . [is accepted] by all responsible medical authority." *Matter of Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979).

SB14 thus constitutes an unauthorized intrusion into the internal affairs of Texas families whose children have been diagnosed with gender dysphoria. Defendants' bald claim that the care is "too risky," Appellants' Br. 25, is not only baseless, *see infra* Part I(D), but wholly insufficient to overcome parents' rights to "seek and follow medical advice" regarding the necessary treatment for their children's condition. *Miller*, 118 S.W.3d at 766 (quotation omitted). "Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *T.L.*, 607 S.W.3d at 43 (quotation omitted). To the contrary, "'[a]s long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened.'" *Miller*, 118 S.W.3d at 767 (quoting *Bowen*, 476 U.S. at 627 n.13).

State intervention in parents' medical decisions for their children is permitted only to protect a child from "ill health or death." *O.G. v. Baum*, 790 S.W.2d 839, 841 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (quotation omitted); *see also Mitchell*, 205 S.W.2d at 814. In those particular cases, the State intervened to save children's lives because the parents *failed* to treat their medical conditions.

See Baum, 790 S.W.2d at 840-41; *Mitchell*, 205 S.W.2d at 815. SB14 does the opposite—the State has intruded to *prevent* parents from treating their children's medical condition in accordance with the standard of care recommended by their children's physicians, exposing Minor Plaintiffs to "ill health or death." In overriding the aligned judgment of parents, adolescents, and their doctors, SB14 injects the State into the private realm of the family and undermines parents' ability to make decisions about their children's care in violation of article I, section 19. As discussed *infra* at Part I(D), SB14 cannot survive the strict scrutiny applied when the State invades parental autonomy.

B. SB14 discriminates against Family Plaintiffs in violation of article I, sections 3 and 3a.

1. SB14 discriminates based on sex in violation of article I, section 3a.

The trial court properly concluded that Plaintiffs are likely to succeed on their claim that SB14 unconstitutionally discriminates because of sex. The ERA provides that "[e]quality under the law shall not be denied or abridged because of sex . . . ." Art. I, § 3a. When the law treats a person unequally "*because of* [that] person's membership in a protected class of sex"—meaning, "because he is male" or female—strict scrutiny applies. *In re McLean*, 725 S.W.2d 696, 697-98 (Tex. 1987).

SB14 discriminates because of sex in at least two ways. First, it facially discriminates because of sex by denying certain medical treatments "to males" and

others "to females." Second, SB14 discriminates against transgender people, which is necessarily sex discrimination.

a. SB14 facially discriminates based on sex.

SB14's text is facially discriminatory. Not only does it generally prohibit treatments when provided in a manner the State considers "inconsistent with the child's biological sex," but it also explicitly prohibits medical professionals from providing, prescribing, administering, or dispensing "supraphysiologic doses of testosterone *to females*," or "supraphysiologic doses of estrogen *to males*." Tex. Health & Safety Code § 161.702 (emphasis added). SB14 subjects each person to whom it applies to a sex-based classification; their sex assigned at birth determines whether they can receive the medical care.

To illustrate, imagine a mother with two boys, one cisgender and one transgender. Her cisgender son has hypogonadism: he does not naturally make enough testosterone to go through puberty, so his doctor writes a prescription. Her transgender son has gender dysphoria and meets the clinical criteria for hormone therapy: testosterone is medically indicated to relieve the clinically significant distress arising from the incongruence between his gender identity (male) and his sex assigned at birth (female). Under SB14, their mother can fill the testosterone prescription for her son assigned male at birth, but not for her son assigned female at birth. Or imagine a father with two daughters, one cisgender with polycystic

ovarian syndrome (PCOS) and one transgender with gender dysphoria. In both cases, their pediatric endocrinologist prescribes a medically-necessary testosterone suppressant, but only the cisgender daughter is permitted to receive that treatment. The transgender daughter must go without because her sex assigned at birth was male. SB14 treats these sets of similarly situated adolescents differently because of sex. Each needs to access the same medically-necessary treatment, and the legality of doing so is determined by their sex. In this way, SB14 denies equality under the law because of sex, and is subject to strict scrutiny.

Defendants attempt to recast SB14 as a bar on "procedures performed on individuals of one sex only" to fit within their oversimplified reading of *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002). Appellants' Br. 37. In *Bell*, this Court examined a restriction on funding for abortion services, rejecting that it was sex-based largely because all other pregnancy-related services were covered, even conceding that, "[i]f the State were to deny funding of all medically necessary pregnancy-related services, the classification might be comparable to . . . overt gender-based distinction[s]" that violate § 3a. *Bell*, 95 S.W.3d at 258. The Court expressly distinguished this funding provision from a statute that, "by its terms, treated men differently from women based solely on gender," which *would* deny equal treatment. *Id*. at 259 (citing *McLean*, 725 S.W.2d at 697). That is precisely

what SB14 does, by explicitly conditioning the legality of certain medical treatments on the government's view of that person's "biological sex."

Defendants further seek to characterize SB14 as applying equally to minors of both sexes, suggesting that its references to sex simply describe the care it prohibits. Appellants' Br. 38.[9] That is circular reasoning: a classification is no less sex-based merely because the Legislature could not figure out another way to word it. Defendants lean heavily on *Skrmetti* and *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1228 (11th Cir. 2023), for this argument, but completely ignore contrary decisions from the Eighth Circuit and the majority of trial courts.[10] They also fail to recognize that the courts in *Skrmetti* and *Eknes-Tucker* conflated the threshold question of whether a sex-based classification exists with the inquiry into the alleged justification for that classification. The very purpose of strict scrutiny under the ERA is to ensure the validity of a sex classification through reasoned and careful analysis. The nature of the medical care and underlying diagnosis may be

[9] This argument relies on non-binding federal cases, notwithstanding Defendants' denunciation of federal precedent's applicability. Such reliance is particularly inapt here, as the ERA provides more stringent protections. *See McLean*, 725 S.W.2d at 697.

[10] *See Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022); *Koe v. Noggle,* No. 1:23-CV-2904-SEG, 2023 WL 5339281 (N.D. Ga. Aug. 20, 2023); *Doe v. Thornbury,* No. 3:23-CV-230-DJH, 2023 WL 4230481 (W.D. Ky. June 28, 2023); *L.W. ex rel. Williams v. Skrmetti*, No. 3:230CV-00376, 2023 WL 4232308 (M.D. Tenn. June 28, 2023); *Brandt v. Rutledge*, No. 4:32-CV-00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023); *K.C. v. Individual Members of Med. Licensing Bd.,* No. 23-595, 2023 WL 4054086 (S.D. Ind. June 16, 2023); *Doe v. Ladapo,* No. 4:23-CV-114-RH-MAF, 2023 WL 3833848 (N.D. Fla. June 6, 2023).

reasons why SB14 survives strict scrutiny (though it does not, *see infra* Part I(D)), but they cannot be a basis for refusing to apply strict scrutiny in the first place. *See Mercer v. Bd. of Trustees, N. Forest Indep. Sch. Dist.*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) ("any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strictest judicial scrutiny [and] … must fall unless the party defending it can show that it is *required by*" consideration of physical characteristics) (emphasis added);[11] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) ("While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.").

That SB14 facially discriminates based on sex is not just a matter of the use of "gendered terms"—*it is central to how it operates*. Even setting aside the explicit prohibition of certain treatments being provided "to females" or "to males," because

[11] Defendants' claim that "biological differences between males and females" negate the sex discrimination SB14 perpetrates, Appellants' Br. 42, would create an exception that swallows the rule and render the ERA's "because of sex" clause meaningless. Those alleged differences neither erase SB14's facial sex discrimination nor conceal discriminatory sex stereotypes it perpetuates. Defendants misconstrue the relevant stereotypes involved, which themselves violate section 3a. SB14 permits treatment for those who conform to their sex assigned at birth, while prohibiting treatment for those who do not. *See* Tex. Health & Safety Code § 161.702 (barring treatment to affirm a child's perception of their sex only "if that perception is inconsistent with the child's biological sex,"). Discriminating based on gender non-conformity is discrimination "because of sex," including under the ERA. *See Whitaker*, *v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011); Reagan W. Simpson, *A New Look at the Texas Equal Rights Amendment*, 55 Tex. L. Rev. 323, 332 (1977) (stating that, if a statute "does contain a classification that stereotypes, then the TERA prohibition applies").

SB14 more generally prohibits coverage for treatments "[f]or the purpose of transitioning a child's biological sex[,]" Tex. Health & Safety Code § 161.702, one must first determine a patient's "biological sex" for it to function. This determination then controls whether treatment can be provided. Thus, "sex plays an unmistakable" role in how SB14 operates, as it "penalizes a person identified as male at birth for traits . . . that it tolerates in [a person] identified as female at birth." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). The sex of the person seeking care determines the legality of the procedure. That is a sex classification.

b. SB14 discriminates based on transgender status, which is necessarily sex discrimination.

SB14 also constitutes sex discrimination because its prohibition turns on a minor's transgender status—that is, the incongruence between a person's sex assigned at birth and their gender identity. A transgender person, by definition, is someone whose sex assigned at birth is different from their gender identity. 2.RR39:10-13. That is why "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741; *cf. Tarrant Cnty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 329 (Tex. App.—Dallas 2021, no pet.) ("[W]e must follow *Bostock* and read the [Texas Commission on Human Rights Act's] prohibition on discrimination 'because of . . . sex' as prohibiting discrimination based on an individual's status as a . . . transgender person."). Much as Defendants would like to obscure the issue, *Bostock*

remains persuasive precedent from our nation's highest court, and its textual interpretation of "because of . . . sex" is equally incisive whether those words appear in a federal statute or state constitution. Distinctions in causation and liability standards between Title VII and the ERA do not change the definition of sex-based classifications.

Defendants attempt to minimize SB14's facial discrimination because of sex, including transgender status, with the unavailing theory that SB14 is facially neutral and Plaintiff's challenge is a question of "disparate impact." Appellants' Br. 40. That is incorrect. This is not a disparate-impact case. SB14 specifically targets transgender youth; its title is "An Act relating to prohibitions on . . . treatments for gender transitioning[.]" SB14 necessarily discriminates against transgender people, i.e. the only people who have gender dysphoria and undergo "gender transitioning" treatments. *See, e.g., Fain v. Crouch*, 618 F. Supp. 3d 313, 327 (S.D.W. Va. 2022). By barring medically-necessary treatment that only transgender people seek, SB14 makes the kind of "overt gender-based distinction[s]" that violate section 3a. *Bell*, 95 S.W.3d at 258.

Therefore, Defendants' reliance on *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), and *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2235 (2022), is unavailing. *Dobbs* merely restated *Geduldig*'s holding that facially neutral regulations of medical procedures do not always receive heightened scrutiny simply

because they disparately impact members of one sex. And equal protection jurisprudence has long drawn a fundamental distinction between sex-neutral classifications and facial sex classifications. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273-74 (1979). Here, SB14 *facially* classifies based on sex, requiring that in each instance a person's sex be known and used to determine whether treatment is allowed.

Furthermore, *Geduldig* is distinguishable because the centrality of gender transition to transgender identity is at SB14's core. Unlike *Geduldig*'s pregnancy exclusion, SB14 is purposefully drawn to reach transgender people. While pregnancy is not the defining characteristic of a woman, living in accord with one's gender identity rather than sex assigned at birth *is* the defining characteristic of a transgender person and the very thing SB14 targets.

Lastly, *Geduldig* itself recognized that where, as here, distinctions are "mere pretexts designed to effect an invidious discrimination against the members of one [protected class] or the other," such distinctions are unconstitutional. *Geduldig*, 417 U.S. at 496 n.20. The intent to treat transgender persons differently pervades SB14's history and showcases its discriminatory purpose. *See infra* Part I(D). Moreover, "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed."

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993). Defendants' reliance on *Geduldig* and *Dobbs* should be rejected.

Because SB14 discriminates against Minor Plaintiffs and Parent Plaintiffs in their exercise of their fundamental rights because of sex, SB14 is subject to strict scrutiny, which it cannot survive. *See infra* Part I(D).

2. SB14 violates article I, section 3.

SB14 also violates article 1, section 3 of the Texas Constitution, which guarantees equal rights to every person in the State. This provision "was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating or hostile legislation." *Burroughs v. Lyles*, 181 S.W.2d 570, 574 (Tex. 1944). SB14 violates this guarantee by singling out transgender youth and depriving them of medically-necessary care, while allowing the same care for all other minors.

In addition to constituting sex discrimination, this discrimination based on transgender status independently warrants heightened scrutiny under article 1, section 3 because it "categorizes on the basis of an inherently suspect characteristic." *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 639 (Tex. 2008) (quotation omitted). That transgender status is not specifically mentioned in the ERA in no way bars recognition of such classifications as inherently suspect. No Texas court has held that the ERA is an exclusive list; rather, Texas courts have regularly assessed

claims that other classifications warrant heightened scrutiny under section 3 since the ERA's ratification, applying the federal criteria for suspect classifications. *See, e.g.*, *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985) (citing *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (students who fail to meet academic proficiency standards); *In re H.Y.*, 512 S.W.3d 467, 475-76 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam), in stating that "a 'suspect class' [i]s one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'") (minors); *Lilly v. State*, 337 S.W.3d 373, 380 (Tex. App.—Eastland 2011), *rev'd on other grounds*, 365 S.W.3d 321 (Tex. Crim. App. 2012) (incarcerated people); *King v. Bd. of Trustees, Monahans-Wickett-Pyote Indep. Sch. Dist.*, 555 S.W.2d 925, 928-29 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (age).

Classifications based on transgender status are suspect and warrant heightened scrutiny because (1) transgender people have suffered a history of discrimination; (2) they are a discrete and insular group lacking power to protect their rights through the political process; (3) a person's transgender status bears no relation to their ability to contribute to society; and (4) gender identity is a core, defining trait so fundamental to one's identity and conscience that a person cannot be required to

abandon it as a condition of equal treatment. *E.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *cf. Brandt*, 47 F.4th at 670 n.4.

Defendants do not dispute that transgender people bear the hallmarks of a suspect class. Accordingly, the Court should affirm the trial court's decision that SB14's discrimination based on transgender status likely violates article I, section 3.

C. SB14 deprives physicians of their vested property interests in their medical licenses and infringes healthcare providers' occupational freedom in violation of article I, section 19.

The Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const., art. I, § 19. This Court conducts a "two-step inquiry" under article I, section 19: "First, does the plaintiff have a liberty, property, or other enumerated interest that is entitled to protection? Second, if a protected interest is implicated, did the government defendant follow due course of law in depriving the plaintiff of that interest?" *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 905 (Tex. 2021) (citations omitted).

Physician Plaintiffs have a vested property interest in their medical licenses. "To cancel a professional license is to take the entire capital stock of its possessor and . . . takes from him his professional standing and in a manner whatever good name he has, which leaves him 'poor indeed.'" *Francisco v. Bd. of Dental Exam's*, 149 S.W.2d 619, 622 (Tex. App.—Austin 1941, writ ref'd). Physician Plaintiffs made a substantial investment to obtain a medical license, including financial expenditures and years of preparation and examinations. *E.g.*, 2.RR.161:23-162:10; 173:5-16. Not only does SB14's mandated license revocation infringe this property right, but it and other disciplinary actions impair their professional standing, good name, and employability. *E.g.*, 2.RR.195:24-196:12. The "privilege to so practice once acquired [becomes] a right protected by the due process clause[] of the State … Constitution[]" even where "the State could provide reasonable regulations." *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965).

Independently, the practice of medicine is a "lawful calling" historically regarded as implicating a liberty interest that the due course of law protects. *See Dent v. West Virginia*, 129 U.S. 114, 121-122 (1889). It spans all of Texas history. *See* Chester R. Burns, Tex. State Hist. Ass'n, Health & Medicine, Tex. State Hist. Ass'n, https://tinyurl.com/7spnsvb2 (last updated Nov. 5, 2020) (describing physicians' role in Texas's settlement, in the Texas Revolution, and throughout Texas's statehood); *see also* Tex. Const. art. XVI, § 31 ("Practitioners of Medicine"). The

practice of medicine has never been considered "inherently vicious and harmful." *Tex. Dep't of State Health Servs. v. Crown Distrib.*, 647 S.W.3d 648, 655 (Tex. 2022) (quotation omitted).

Defendants short circuit this Court's two-step inquiry. First, they suggest the due-course guarantee *only* provides "procedural protection against arbitrary deprivation of a medical license." Appellants' Br. 34-5. But the guarantee "contains both a procedural component and a substantive component." *Barshop v. Medina Cnty. Underground Water Conservation Dist.,* 925 S.W.2d 618, 632 (Tex. 1996). Next, Defendants erroneously describe the providers' protectible interests in terms of the State's police power to regulate the practice of medicine. *See* Appellants' Br. 33, 27. The mere fact that that Legislature can regulate in an area does not insulate that regulation from review under the Texas Constitution: "[a] statute enacted under the guise of police power that does not fall within the scope of that power and is not reasonably related to safeguarding the public's health, safety or welfare is an invalid exercise of that power." *Satterfield v. Crown Cork & Seal Co., Inc*., 268 S.W.3d 190, 214 (Tex. App.—Austin 2008, no pet.). Police power "remains subject to the rule that the Legislature cannot exercise *any* power that is expressly or impliedly forbidden by the state constitution, and the Legislature, through its exercise of police power, may not render the constitution meaningless." *Id.* at 215. Even as the "[g]overnment's conception of its own power as limitless is hard-wired . . . [it] may

only pursue constitutionally permissible ends." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 122 (Tex. 2015) (Willett, J., concurring).

Defendants' emphasis on Provider Plaintiffs' ability to treat other patients misses the mark. SB14 requires Provider Plaintiffs to either disregard evidence-based clinical practice guidelines, their training, and their oaths, thereby significantly and severely compromising the health of their patients with gender dysphoria or, alternatively, to risk their livelihoods. *E.g.,* 2.RR.169:23-170:15; 183:8-14; 185:11-21. It does so by mandating revocation of licenses, along with a panoply of other disciplinary actions (including through existing enforcement provisions of the Texas Medical Practice Act), as well as the loss of all state funding for them and their institutions, if providers treat transgender adolescent patients with medically-necessary care. These consequences for "treat[ing] a patient according to the generally accepted standard of care," 22 Tex. Admin. Code § 190.8(1)(A), harm providers' reputation and deprive them of their chosen healthcare profession because of what the government *is doing to them*. *See Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929-930 (Tex. 1995). SB14 interferes with the professional relationship among healthcare providers, adolescent patients, and the patients' parents, and prevents providers from carrying out their professional and ethical obligations to treat in accordance with the recognized standard of care in a manner that is clearly arbitrary and so unreasonably burdensome that it is oppressive.

D. SB14 cannot survive any level of scrutiny.

SB14 fails any level of constitutional scrutiny because the State's purported justifications lack any legitimate basis. Plaintiffs agree that the State has an interest in safeguarding minors' physical and psychological wellbeing, but the trial court determined that SB14 does the opposite: it endangers adolescents with gender dysphoria, like Minor Plaintiffs, by prohibiting the only evidence-based medical care for their serious medical condition. *See* 7.CR.2152-54.

The trial court's findings are consistent with Plaintiffs' allegations and supported by the evidentiary record before the court. First, the Prohibited Care is the standard of care for gender dysphoria in adolescents: it is safe, effective, evidence-based, and not experimental. 2.RR.46:2-16; 63:12-20; 129:8-16. Defendants claim that "medical procedures to treat gender dysphoria in children are experimental, come with significant health risks, and can be counterproductive," Appellants' Br. 11, but record evidence demonstrates the opposite. There are decades of cross-sectional and longitudinal studies, along with extensive clinical experience.[12] 2.RR.55:10-58:10; 115:13-20; 119:10-123:22. Where medically indicated, puberty blockers, hormone therapy, and surgery all effectively treat gender dysphoria and

[12] That body of research looks at "mental health aspects, improvement of these mental health symptoms over time, specifically around depression, anxiety, quality of life, psychological well-being, functioning, body esteem, [and] body image," and it demonstrates that the banned treatment improves psychological functioning across all these domains. 2.RR116:22-117:22.

improve physical, psychological, and social outcomes for transgender adolescents. 2.RR.116:22-117:22; 130:14-131:5; 97:9-19; 51:25-52:16. No evidence supports Defendants' proposed alternatives—"psychotherapy and watchful waiting,"—when medical interventions are clinically indicated. 2.RR.128:13-17. Indeed, delaying medically indicated treatment intensifies gender dysphoria and worsens depression and anxiety. 2.RR. 52:17-54:11; 62:10-63:1; 128:18-129:7.

The Prohibited Care is neither experimental nor new: it is considered the standard of care by all major U.S. medical associations and has been used to treat minors with gender dysphoria for decades. Puberty-delaying medications have existed for almost 50 years and have been used to treat gender dysphoria in minors since the 1990s.[13] 2.RR.112:8-113:13. This care is safe and effective: medical interventions reduce (or even eliminate) the clinical distress that defines gender dysphoria. 2.RR.129:8-130:7; 89:11-90:4. The Prohibited Care's efficacy in treating adolescents with gender dysphoria has been robustly studied. Side effects are rare or easily managed. 2.RR.84:3-87:5; 90:5-92:8. Puberty blockers are reversible and have no effect on fertility. 2.RR.82:20-23; 86:2-7. Hormone therapy does not preclude fertility, and many transgender people go on to have families of their own.

[13] Tellingly, Defendants rely on out-of-state case law rather than cite any evidence for their assertion that "the concept of gender dysphoria as a medical condition is relatively new and the use of drug treatments that change or modify a child's sex characteristics is even more recent." Appellants' Br. 29.

2.RR.92:10-94:10. Far from being counterproductive, this care saves lives; withholding or withdrawing this care when medically indicated endangers the health and wellbeing of transgender adolescents. 2.RR.62:10-63:11; 128:20-129:7; 95:12-97:8.

Moreover, Defendants' assertion that SB14 was intended to advance an interest in protecting Texas's children from purported "experimental" medical treatments is undermined by the "Medical Freedom Act," which explicitly protects the right to access medical treatments not approved by the Food and Drug Administration. *See* Act of May 27, 2023, 88th R.S., ch. 1082, 2023 Tex. Sess. Law Serv. 3397 ("SB773") (codified at Tex. Health & Safety Code § 490.055). Signed into law just sixteen days after SB14, the Legislature found that "[t]he use of available investigational drugs, biological products, and devices is a decision that a patient with a severe chronic disease should make in consultation with the patient's physician and *is not a decision the government should make* . . . ." SB773, §1(b)(6) (emphasis added). "Read together," and assuming *arguendo* that the treatments proscribed by SB14 are experimental, SB14 and SB773 "authorize parents to give consent for their minor children to engage in experimental medical treatments, regardless of efficacy or risk, that cannot be blocked by the State *unless* the minor is transgender and seeking medical treatment for gender dysphoria in line with the recognized standard of care." Order Granting Pls.' Mot. Prelim. Inj., at 33, *van*

Garderen v. Montana, No. DV-23-541 (Missoula Cnty. Dist. Ct., Mont. Sept. 27, 2023). This purported purpose for SB14 "is disingenuous." *Id.*

Second, parents and adolescents are capable of consenting and assenting, respectively, to this care, and this care is only provided after extensive reflection and rigorous informed consent processes. 2.RR.50:13-51:18; 54:12-55:9; 61:12-62:9; 79:25-80:21. No evidence supports Defendants' fearmongering that "vulnerable young people [are] being pressured into agreeing to unproven, irreversible medical interventions which might actually exacerbate their feelings of emotional distress and prolong their gender dysphoria." Appellants' Br. 32. To the contrary: clinicians who provide this care consistently communicate with adolescents and their parents to ensure the treatments are effectively treating gender dysphoria. 2.RR.51:3-18; 79:25-80:21. Nor does any evidence exist to suggest that social media causes or even contributes to the incidence of gender dysphoria. 2.RR.67:7-11. And no evidence supports that providing the care to adolescents for whom it is medically indicated creates or causes the persistence of transgender identity. 2.RR.53:13-19; 58:20-59:11. The diagnostic criteria for gender dysphoria are rigorous, so it is unsurprising that those adolescents who receive care continue to benefit from it later in life. 2.RR.58:20-60:1.

Third, SB14's justifications are rooted in anti-transgender animus and therefore cannot survive even rational basis review. Enforcing gender conformity is

not a legitimate, let alone compelling, state interest, but that is exactly what SB14 does: its prohibition hinges on "the purpose of transitioning a child's biological sex" or "affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." Tex. Health & Safety Code § 161.702. SB14 does not prohibit any medications or surgical procedures generally, or even for all minors: clinicians can continue prescribing puberty blockers or hormone therapy for any other purpose, to anyone of any age, except for transgender adolescents with gender dysphoria. The same is true for surgery: indeed, SB14 specifically carves out disorders of sex development, meaning that the law does nothing to stop parents from sterilizing infants with intersex traits, so long as the surgeries conform their bodies to their sex assigned at birth.

SB14's prohibitions do not hinge on risk, side effects, reversibility, or the quality of consent/assent; they rely entirely on whether the patient is transgender and operate to preclude transgender adolescents from undergoing physical changes consistent with their gender identity. The only reason to single out transgender adolescents in this way, while allowing similar treatments for any other condition (or no condition at all) in all other minors, is State disapproval of transgender people generally. That is not a legitimate legislative purpose. *See Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare

. . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). That bare desire to harm transgender adolescents "was a motivating factor" in the Legislature's decision-making, *Bell*, 95 S.W.3d at 260, is not only apparent on SB14's face, but is evident in its legislative history, its adoption in the aftermath of Texas courts' enjoining attempts to administratively define gender-affirming medical care as child abuse, and its clear, foreseeable impact on transgender youth.[14] As the trial court found, SB14 was enacted "because of," not "in spite of," its effects on transgender people, *Feeney*, 442 U.S. at 279, and its impact falls solely on one population: transgender people. 7.CR.2153.

Finally, even if a law does have some "legitimate state interest," it still fails rational basis review if it employs "harsh means" that are "over-inclusive[]" or underinclusive. *Sullivan v. Univ. Interscholastic League*, 616 S.W.2d 170, 172-73 (Tex. 1981). SB14's means are unconstitutionally harsh because they deprive Minor Plaintiffs of medical care they rely on to live and thrive. It is over-inclusive beyond

[14] *See, e.g.,* Tex. Senate, *Debate on Tex. S.B. 14 in the Senate Comm. on State Affs.*, 88th Leg. (Mar. 16, 2023), at https://tlcsenate.granicus.com/MediaPlayer.php?view_id=53&clip_id=17404 (at 05:20); Texas Values (@txvalues), Twitter (May 12, 2023, 2:45 PM), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=53&clip_id=17404 (Sen. Campbell demeaning legitimacy of gender dysphoria, referring to it as a "delusion"); *In re Abbott*, 645 S.W.3d 276, 284 (Tex. 2022); *Masters v. PFLAG, Inc.*, 2022 WL 4473903 (Tex. App.—Austin Sept. 26, 2022); *Masters v. Voe*, 2022 WL 4359561, *3 (Tex. App.—Austin Sept. 20, 2022) (finding families of transgender youth had shown a greater risk of irreparable harm "from a potentially unlawful investigation that intrudes upon and interferes with their right as parents to make medical decisions for their children, relying upon the advice and recommendation of their health-care providers").

any hypothesized governmental interest because it bans medical care that is reversible and applies even to minors experiencing the most severe symptoms of gender dysphoria. SB14 is also under-inclusive because its numerous exceptions allow puberty blockers, hormones, and surgeries to continue being provided to adolescents for any reason other than "gender transitioning." If the State had a legitimate interest in regulating these particular medical treatments, SB14 would not solely single out transgender youth while allowing any other minor to access the same treatments for other diagnoses or none at all. Such a "harsh" and "arbitrary" targeting of transgender youth violates article I, section 3 of the Texas Constitution. SB14 simply cannot withstand any level of scrutiny.

II. The trial court properly enjoined Defendants from enforcing SB14 to maintain the status quo and protect Plaintiffs from probable, imminent, and irreparable harm.

A. The trial court had subject matter jurisdiction over Plaintiffs' facially valid claims against all Defendants.

While this Court must assess subject matter jurisdiction, it need not, and should not, do so through direct review of Defendants' PTJ. If it does review the PTJ, however, it should affirm the trial court's denial thereof. Because Defendants' PTJ challenged the pleadings, any review of its denial should focus on whether Plaintiffs pled facts affirmatively demonstrating subject matter jurisdiction. *See Miranda*, 133 S.W.3d at 226 ("When a [PTJ] challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction

to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent") (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *MALC*, 647 S.W.3d at 689 (such determinations are "based solely on the pleadings"). Plaintiffs' Petition contains straightforward claims against all Defendants to which sovereign immunity simply does not apply.

1. Sovereign immunity is waived for these claims.

When plaintiffs challenge the constitutionality of a statute and seek only equitable relief, sovereign immunity is waived. *Patel*, 469 S.W.3d at 76-77 ("[T]he [UDJA] requires that the relevant governmental entities be made parties, and thereby waives immunity." (quoting *Heinrich*, 284 S.W.3d at 373 n.6)). Defendants seek to sidestep the axiomatic rule that "[s]overeign immunity does not bar a suit to vindicate constitutional rights," *Klumb*, 458 S.W.3d at 13, arguing the UDJA's sovereign immunity waiver does not apply because Plaintiffs have not pled facially valid claims. Appellants' Br. 22-43. To assess the facial validity of Plaintiffs' claims, Defendants urge this Court not only to determine whether the Texas Constitution protects the rights Plaintiffs invoke and what level of scrutiny applies, but to review the entire factual record de novo to determine whether the law survives that scrutiny. Defendants make no attempt to square this approach with clear case law limiting this Court's review to Plaintiffs' pleadings. Requiring suits alleging constitutional violations to be properly pled to be viable advances the "unremarkable principle that

claims against state officials—like all claims—must be properly pleaded in order to be maintained, *not that such claims must be viable on their merits to negate immunity*." *Patel*, 469 S.W.3d at 77 (citing *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 13-14 (Tex. 2011)) (emphasis added).

Properly assessed, the above analysis of the constitutional rights at issue and applicable scrutiny, undertaken in the context of Plaintiffs' probable likelihood of success, *supra* Part I, likewise defeats Defendants' facial-validity challenges. While this Court's facial-validity assessment of whether the Texas Constitution protects Plaintiffs' asserted rights "touches the merits[,]" it does not entail ultimate-merits determinations. *MALC*, 647 S.W.3d at 699 ("We go no further than necessary to determine jurisdiction."). The law simply does not support Defendants' attempt to merge a threshold jurisdictional inquiry as to whether Plaintiffs have alleged facially valid claims into an ultimate determination on the merits of those claims.

Defendants' position—that Plaintiffs must mount their entire case at the outset to avoid sovereign immunity—would severely limit judicial review of potentially unconstitutional laws and, in that way, is inconsistent with basic principles of our legal system. The Court need not decide the ultimate merits to decide whether claims are facially valid; it may look to the pleadings to make this determination. *See MALC*, 647 S.W.3d at 700 n.9 (noting that the merits of a sovereign-immunity

assertion based on facial invalidity is evaluated "only to the extent necessary to grant the opportunity to replead"). As explained, Plaintiffs have pled facially valid claims.

2. Sovereign immunity is waived for all Defendants.

Because all Defendants have a role in enforcing SB14, sovereign immunity is waived against them under the UDJA. *See Patel*, 469 S.W.3d at 76-77. "[I]t is well-recognized that a suit seeking a declaratory judgment that a state agent is acting pursuant to an unconstitutional law is not barred by sovereign immunity." *Scott v. Alphonso Crutch Life Support Ctr.*, 392 S.W.3d 132, 137 (Tex. App.—Austin 2009, pet. denied). UDJA suits can be brought against any appropriate entity with enforcement authority, whether the State, its subdivisions, or relevant government actors in their official capacity. *MALC*, 647 S.W.3d at 698 (noting that "case law is replete" with constitutional challenges to statutes against government actors in their official capacities, including the Governor and Secretary of State, where they are charged with enforcement); *Patel*, 469 S.W.3d at 75-77 (sovereign immunity did not bar UDJA constitutional challenge against agencies and their officials).

SB14 explicitly authorizes the Attorney General to enforce it. *See* Tex. Health and Safety Code § 161.706. Plaintiffs have sued the Attorney General in his official capacity. It follows that he is a proper defendant and his attempt to assert sovereign immunity should be rejected.

Further, the State has a specific enforcement role under SB14 regarding its prohibitions of public money being paid to individuals or entities who provide or facilitate the medical care it prohibits, including via state-funded health plans. Public funds means "funds of the state or of a governmental subdivision of the state," *CareFlite v. Rural Hill Emergency Medical Services, Inc.*, 418 S.W.3d 132, 136 (Tex. App.—Eastland 2012, no pet.), and funds raised and "appropriated by the government to the discharge of its obligation, or for some public or governmental purpose." *San Antonio Bldg. & Constr. Trades Council v. City of San Antonio*, 224 S.W.3d 738, 746 (Tex. App.—San Antonio 2007, pet. denied) (quoting Op. Tex. Att'y Gen. No. DM-489 at 2 (1998)). The State of Texas, as ultimate arbiter of state-funding allocations, enforces the public money denials SB14 mandates. The State is therefore an appropriate government entity to which the waiver of sovereign immunity extends. *See MALC*, 647 S.W.3d at 698.

3. Even if the Court construes Defendants' PTJ as challenging the existence of jurisdictional facts, it should affirm the trial court's denial of the PTJ.

Though Defendants belatedly characterized their PTJ below as challenging the existence of jurisdictional facts, *see supra* n.2, they have never specified a single "jurisdictional fact" that they claim Plaintiffs have failed to establish. Nor have they explained why consideration of the entire voluminous amended appendix they filed separate and apart from their PTJ, *see* 4.CR.1118-697, is "necessary to resolve the

jurisdictional issues" raised. *Alamo Heights*, 544 S.W.3d at 770-71. Even if they had, construing Defendants' PTJ as a challenge to the existence of jurisdictional facts would not change the results of the jurisdictional inquiry. When the existence of jurisdictional facts are challenged, the Court "take[s] as true all evidence favorable to the nonmovants"—here, Plaintiffs—"indulg[ing] every reasonable inference and resolv[ing] any doubts in their favor" under a traditional summary judgment standard. *Jones*, 646 S.W.3d at 325 (citing *Heinrich*, 284 S.W.3d at 378). The PTJ is granted "only if there is no question of fact as to the jurisdictional issue." *Id.*

Even with consideration of Defendants' gratuitously expanded PTJ record (which should not be considered), the trial court's denial of Defendants' PTJ should stand. Taken as a whole, with a summary judgment standard applied, the record demonstrates that Plaintiffs allege facially valid constitutional claims. Perhaps this is why, on appeal, Defendants have not attempted to grapple with extensive evidence favorable to Plaintiffs—in Plaintiffs' Verified Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief, 1.CR.3-337, in Plaintiffs' Response to Defendants' PTJ, 6.CR.1706-1989, and in the Reporter's Record—or really to apply the summary judgment standard at all.

B. Plaintiffs have standing to raise each of their claims.

Plaintiffs have standing to raise their claims. First, the Physician Plaintiffs have standing to represent their own interests and those of their patients. The

Physician Plaintiffs are directly injured by SB14, which threatens the loss of their licenses to practice medicine and infringes their occupational freedom by imposing arbitrary and unduly harsh burdens on their ability to exercise good faith judgment to care for their patients in violation of the Texas Constitution. *See supra* Part I.C.

Further, the harm that SB14 causes the Physician Plaintiffs is inextricably intertwined with the harm to their patients. The direct prohibition and imposition of penalties on medical providers is the mechanism for denying those patients equal care and infringing their rights. Because these harms are intertwined, and having established standing in their own right, the Physician Plaintiffs also pass the prudential test for third-party standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004); *see also Myers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) ("Texas's standing test parallels the federal test for Article III standing" and "[g]iven the parallels between the federal test and our own, we may look to federal standing requirements for guidance."). Unlike the cases cited by Defendants, here the Physician Plaintiffs are "personally aggrieved" by SB14—an aggrievance inseparable from that of their transgender minor patients. *Cf. DaimlerChrsyler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-08 (Tex. 2001).

Second, the Organizational Plaintiffs plainly meet the test for associational standing, including the requirement that asserting their claims and seeking relief do

not require participation of individual members in this lawsuit. *See MALC*, 647 S.W.3d at 690-91. That gender dysphoria treatments are individualized to the patient by their treating providers, Appellants' Br. 49, does not require that individual PFLAG or GLMA members participate. Their shared legal injury creates standing. SB14 bars *every* PFLAG member family with a transgender adolescent from accessing any medically-necessary treatments for that adolescent's gender dysphoria—regardless of which treatment is needed—in violation of their parental and equality rights. SB14 unconstitutionally burdens the occupational liberty of *every* GLMA member that provides or facilitates medically-necessary treatments, regardless of which specific treatment they prescribe.

Organizational Plaintiffs seek no damages or other relief "peculiar to the individual member concerned," but rather "a declaration, injunction, or some other form of prospective relief" that "if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). Such relief does not require the "Court to consider the individual circumstances of any aggrieved [] member." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986); *see also United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555-57 (1996) ("[T]he third prong of the associational standing test is best seen as focusing on . . . matters

of administrative convenience and efficiency, not on elements of a case or controversy [such as injury in fact].").

Thus, Organizational Plaintiffs "need not prove the individual circumstances of its members to obtain relief," *Stop the Ordinances Please v. City of Braunfels*, 306 S.W.3d 919, 931-32 (Tex. App.—Austin 2010, no pet.), and the participation of individual plaintiffs who are PFLAG or GLMA members—and whose standing is uncontested by Defendants—is all that is required to demonstrate the same violation of law experienced by other Texas PFLAG and GLMA members. *See Big Rock Invs. Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845, 851 (Tex. App.—Fort Worth 2013, pet. denied); *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 552 (5th Cir. 2010).

Third, SB14's provision stripping state funding for even facilitating gender-affirming medical care causes cognizable harm to Plaintiffs. *See, e.g.*, *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234, 250-51 (Tex. 2023). Provider Plaintiffs face the loss of public funding for prescribing, providing, or facilitating medically-necessary treatment to adolescents with gender dysphoria. 1.CR.41-42; 129; 144.

SB14 also deprives the Soe Plaintiffs, Provider Plaintiffs' patients, and other PFLAG members, of insurance coverage for the medical treatment of gender dysphoria. 1.CR.37-38; 106-07; 112 ("We have been able to rely upon our state

employee health care coverage to help pay for our daughter's treatment for gender dysphoria and will lose coverage as a result of SB14."). Adolescent patients on Medicaid and CHIP are deprived of insurance coverage for medically-necessary treatment for gender dysphoria. 1.CR.39-40; 42; 127-29; 144; 179. Plaintiffs have standing to challenge SB14's funding provisions.

Finally, Minor Plaintiffs collectively seek each form of medical treatment barred by SB14 to treat their gender dysphoria: puberty blocking medication, hormone therapy, *and* surgery. 1.CR.32-34 (puberty blockers); 1.CR.35-38 (hormone therapy); 1.CR.36 (surgery). Indeed, sixteen-year-old Appellee Nathan Noe had a "consultation scheduled with a surgeon" for chest surgery canceled due to SB14. 1.CR.100. Accordingly, Plaintiffs have established standing for each of their claims.

C. The trial court's statewide injunction was necessary to remedy Plaintiffs' harms.

Having found that SB14 would impose irreparable harms, both tangible and constitutional, the trial court properly determined that a statewide injunction was needed to maintain the status quo and protect Plaintiffs from harm. A facial injunction is necessary to ensure Plaintiffs' rights are meaningfully protected during the pendency of the litigation. *See In re Abbott*, 645 S.W.3d 276, 282 (Tex. 2022) (orig. proceeding).

While SB14 irreparably harms all Plaintiffs, its enforcement mechanisms impose significant penalties and funding restrictions on physicians, healthcare providers, and institutions. The only way to ensure that Minor Plaintiffs and PFLAG members across Texas are not deprived of access to their medically-necessary treatments is to enjoin the enforcement mechanisms in their entirety, thereby permitting all healthcare providers and entities to continue to treat their patients without the specter of SB14's penalties and restrictions. A party-specific injunction would provide only theoretical relief to PFLAG and GLMA members and undermine the privacy interests of pseudonymous Plaintiffs. Pls.' Emergency Mot. for Injunctive Relief at 38-40; *see also Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *29-30 (N.D. Ga. Aug. 20, 2023). Defendants' focus on the absence of specifically-named providers to whom an injunction would apply misses the point. Appellants' Br. 54. So long as SB14's sanctions remain in effect, *no* healthcare provider or facility can provide or facilitate the needed treatment to Minor Plaintiffs, whether individually or as members of PFLAG. There is simply not a "more narrowly tailored injunction that would remedy Plaintiffs' injuries." *Brandt*, 47 F.4th at 672.

The trial court also properly recognized that in a facial constitutional challenge, the only way to provide Plaintiffs meaningful relief is to enjoin the unconstitutional law in its entirety. So long as a law that violates Plaintiffs' liberty

and equality rights remains in effect, they face irreparable harm. *See Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981).

Defendants' argument that only a permanent injunction can remedy Plaintiffs' harm turns the temporary injunction standard on its head. Appellants' Br. 54-55. They rely on one case finding that no party's constitutional rights were presently being impaired, *see Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985), and another in which a preliminary injunction could provide no remedy because the official could not engage in the complained-of behavior. *See Ohio v. Yellen*, 539 F. Supp. 3d 802, 821 (S.D. Ohio 2021). But Plaintiffs' constitutional interests "were either threatened or in fact being impaired at the time relief was sought[,]" *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and Defendants have the full ability to enforce SB14. Thus, statewide injunctive relief is necessary to prevent infringement of Plaintiffs' rights.

Defendants misidentified the status quo the temporary injunction maintains, which is the legal landscape *before* SB14 took effect. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). Facts about adolescents' current stage of treatment are irrelevant. Appellants' Br. 55. The relevant status quo is the lawfulness of medical treatment consistent with the standard of care for adolescents with gender dysphoria.

This misrepresentation also underlies Defendants' argument that SB14's wean-off provision maintains the status quo. *Id.* That provision does not mitigate the

harm of intensifying gender dysphoria from denying treatment and exacerbates the harm by subjecting patients to a medically unsupported and experimental shift in treatment. 2.RR.95:12-97:8 (testimony of expert Dr. Daniel Schumer); 187:19-188:10) (testimony of Plaintiff Dr. Paul). It is the trial court's injunction that maintains the status quo and protects Plaintiffs from irreparable harm.

PRAYER

Plaintiffs ask this Court to affirm the trial court's temporary injunction and allow this case to be decided on the merits.

Respectfully Submitted,

SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 – Phone
(512) 495-6399 – Fax

By: */s/ Kennon L. Wooten*
Kennon L. Wooten (lead counsel)
Texas State Bar No. 24046624
kwooten@scottdoug.com
Lauren Ditty
Texas State Bar No. 24116290
lditty@scottdoug.com

ARNOLD & PORTER KAYE SCHOLER, LLP

Allissa Pollard
Texas State Bar No. 24065915
Allissa.Pollard@arnoldporter.com
700 Louisiana Street, Suite 4000
Houston, TX 77002-2755
(713) 576-2451 – Phone
(713) 576-2499 – Fax

Lori B. Leskin (*pro hac vice*)
New York State Bar No. 254088
Lori.Leskin@arnoldporter.com
250 West 55th Street
New York, NY 10019-9710
(212) 836-8541 – Phone
(212) 836-6441 – Fax

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

Paul D. Castillo
Texas State Bar No. 24049461
pcastillo@lambdalegal.org
3500 Oak Lawn Ave, Unit 500
Dallas, Texas 75219
Phone: (214) 219-8585

Omar Gonzalez-Pagan (*pro hac vice*)
New York State Bar No. 5294616
ogonzalez-pagan@lambdalegal.org
120 Wall Street, 19th Floor
New York, New York 10005-3919
Phone: (212) 809-8585

Karen L. Loewy (*pro hac vice*)
District of Columbia Bar No. 1722185
kloewy@lambdalegal.org
Sasha J. Buchert (*pro hac vice*)
Oregon State Bar No. 70686
sbuchert@lambdalegal.org
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Harper Seldin (*pro hac vice*)
Pennsylvania State Bar No. 318455
hseldin@aclu.org
125 Broad Street, Floor 18
New York, NY 10004
Phone: (212) 549-2500

Elizabeth Gill (*pro hac vice*)
California State Bar No. 218311
egill@aclunc.org
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 343-1237

ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
(713) 942-8146 – Phone
(713) 942-8966 – Fax

Brian Klosterboer
Texas State Bar No. 24107833
bklosterboer@aclutx.org
Chloe Kempf
Texas State Bar No. 24127325
ckempf@aclutx.org
Adriana Pinon
Texas State Bar No. 24089768
apinon@aclutx.org

TRANSGENDER LAW CENTER

Dale Melchert (*pro hac vice*)
New York State Bar No. 5366554
dale@transgenderlawcenter.org
Shawn Meerkamper (*pro hac vice*)
California State Bar No. 296964
shawn@transgenderlawcenter.org
P.O. Box 70976
Oakland, CA 94612
Phone: (510) 587-9696

Lynly S. Egyes (*pro hac vice*)
New York State Bar No. 4838025
lynly@transgenderlawcenter.org
Milo Inglehart (*pro hac vice*)
milo@transgenderlawcenter.org
New York State Bar No. 5817937
594 Dean Street, Suite 11
Brooklyn, NY 11238
Phone: (510) 587-9696 Ext. 353

COUNSEL FOR APPELLEES

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/s/ Kennon L. Wooten
Kennon L. Wooten

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Bar No. 24046624
jkadjar@scottdoug.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kennon L.Wooten		kwooten@scottdoug.com	11/30/2023 8:32:08 PM	SENT
Angela Goldberg		agoldberg@scottdoug.com	11/30/2023 8:32:08 PM	SENT
Charles Kenneth Eldred	793681	Charles.Eldred@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Paul Castillo	24049461	pcastillo@lambdalegal.org	11/30/2023 8:32:08 PM	SENT
Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Allissa Aileen Pollard	24065915	allissa.pollard@arnoldporter.com	11/30/2023 8:32:08 PM	SENT
Adriana Pinon	24089768	apinon@aclutx.org	11/30/2023 8:32:08 PM	SENT
Brian Klosterboer	24107833	bklosterboer@aclutx.org	11/30/2023 8:32:08 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Grace Ojionuka		grace.ojionuka@arnoldporter.com	11/30/2023 8:32:08 PM	SENT
Valeria Alcocer		valeria.alcocer@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Susie Smith		ssmith@scottdoug.com	11/30/2023 8:32:08 PM	SENT
Jordan Kadjar		jkadjar@scottdoug.com	11/30/2023 8:32:08 PM	SENT
Karen L.Loewy		kloewy@lambdalegal.org	11/30/2023 8:32:08 PM	SENT
Sasha J.Buchert		sbuchert@lambdalegal.org	11/30/2023 8:32:08 PM	SENT
Harper Seldin		hseldin@aclu.org	11/30/2023 8:32:08 PM	SENT
Lynly S. Egyes		lynly@transgenderlawcenter.org	11/30/2023 8:32:08 PM	SENT
Milo Inglehart		milo@transgenderlawcenter.org	11/30/2023 8:32:08 PM	SENT
Shawn Meerkamper		shawn@transgenderlawcenter.org	11/30/2023 8:32:08 PM	SENT
Dale Melchert		dale@transgenderlawcenter.org	11/30/2023 8:32:08 PM	SENT
Elizabeth Gill		egill@aclunc.org	11/30/2023 8:32:08 PM	SENT
Lori B.Leskin		lori.leskin@arnoldporter.com	11/30/2023 8:32:08 PM	SENT
Natalie Thompson		natalie.thompson@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Lauren Ditty		lditty@scottdoug.com	11/30/2023 8:32:08 PM	SENT

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Case Contacts

Lauren Ditty		lditty@scottdoug.com	11/30/2023 8:32:08 PM	SENT
Heather Dyer	24123044	heather.dyer@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Omar Gonzalez-Pagan		ogonzalez-pagan@lambdalegal.ord	11/30/2023 8:32:08 PM	SENT
Chloe Kempf		ckempf@aclutx.org	11/30/2023 8:32:08 PM	SENT

Associated Case Party: Office of the Attorney General

Name	BarNumber	Email	TimestampSubmitted	Status
Judd E.Stone		judd.stone@oag.texas.gov	11/30/2023 8:32:08 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	11/30/2023 8:32:08 PM	SENT

Associated Case Party: Spero Law LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Christopher Mills		cmills@spero.law	11/30/2023 8:32:08 PM	SENT

Associated Case Party: Burke Law Group

Name	BarNumber	Email	TimestampSubmitted	Status
Stephanie Gottsch		stephanie@burkegroup.law	11/30/2023 8:32:08 PM	SENT
Jeff Hall		jeff@burkegroup.law	11/30/2023 8:32:08 PM	SENT
Jill Carvalho		jill@burkegroup.law	11/30/2023 8:32:08 PM	SENT