

No. 22-0229

IN THE SUPREME COURT OF TEXAS

In re GREG ABBOTT, in his Official Capacity as Governor of the State of Texas; JAIME MASTERS, in her Official Capacity as Commissioner of the Texas Department of Family and Protective Services; and the TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

Relators.

On Petition for Writ of Mandamus to
the Court of Appeals for the Third Judicial District, Austin, Texas
Cause No. 03-22-00126-CV

**RESPONSE TO RELATORS' EMERGENCY MOTION FOR
TEMPORARY RELIEF**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Based on their misapprehension of both the ultimate relief sought by Real Parties in Interest (Plaintiffs Jane Doe, John Doe, Mary Doe, and Dr. Megan Mooney) and the temporary relief granted by the courts below, Relators (Defendants Governor Greg Abbott, Commissioner Jaime Masters, and the Texas Department of Family and Protective Services (“DFPS”)) seek emergency intervention by this Court and a stay of the appeals court’s temporary order which preserves the status quo ante in this case and thereby protects the parties’ rights. But this case is not, as Relators misrepresent, about whether the State of Texas can and should investigate child abuse and neglect. This case is about Relators’ *ultra vires* actions in establishing—without authority and in violation of the Texas Administrative Procedure Act (“APA”) and the separation of powers—a new rule that recasts the provision of medically indicated treatment to transgender adolescents suffering from gender dysphoria as “child abuse.”

The record and evidence in this case are clear. Before February 22, 2022, DFPS never treated the provision of medically indicated treatment to adolescents with gender dysphoria as a sole basis to open an investigation into a family for suspected child abuse or neglect. On February 22, however, Relators created a new rule *requiring* that DFPS investigate families who

seek such medical treatment for their adolescent children under the guidance and recommendations of physicians based on well-established medical guidelines. Relators issued their new rule without authority and in contravention of the law. After Plaintiffs sued to enjoin Relators' implementation of their unlawful new rule, both the trial court and appeals court—supported by an undisputed factual record—issued temporary orders to preserve the status quo and prevent the irreparable harm that would be imposed upon Plaintiffs should the new rule remain effective, while the merits of this case are decided.

Relators now claim that the appeals court's temporary order that preserves the parties' rights and enjoins Relators from automatically opening DFPS investigations based *solely* on reports of the provision of medically indicated gender-affirming care, has created an "emergency" that compels this Court to issue extraordinary relief staying the appeals court's order. But there is no basis for Relators' hyperbolic claims that this narrow order "prevents the State from fulfilling its duty to protect Texas children" or "DFPS from so much as investigating possible child abuse." Mot. at 4. The temporary relief granted by the appeals court only preserves the status quo while that court considers the merits of Relators' interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014; Tex. R. App. P. 38.6. And, as DFPS

acknowledged just three days ago, the appeals court's temporary order *does not* prevent DFPS from assessing intakes and beginning investigations when "independent grounds that warrant an investigation are reported." *See infra* n.3.

For these reasons and others described herein, Real Parties in Interest respectfully request that this Court deny Relators' emergency motion for temporary relief.

BACKGROUND

The provision of medical treatment to adolescents with gender dysphoria is well established.¹ Such care is provided when medically indicated based on medical and clinical guidelines that are widely accepted by the medical community, MR.350-51, 384-87 (3 RR 84:9-86:17, 118:16-121:14),² and after consultation between the adolescent, the adolescent's parents, and the adolescent's medical providers. MR.287 (3 RR 21:16-19). As the uncontested evidence in this case demonstrates, the provision of such

¹ Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. MR.349, 522-23 (3 RR 83:15-19; 4 RR Pls.' Ex. 08, 3875-76). Gender dysphoria is recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). MR.523 (4 RR Pls.' Ex. 08, 3876).

² Under the well-established and widely accepted evidence-based clinical guidelines, no medical care is provided to transgender youth with gender dysphoria until after the onset of puberty. MR.349-50 (3 RR 83:20-84:5). Thus, when speaking of "gender-affirming" medical care, the population at issue is transgender adolescents and adults.

care is safe and effective, MR.388-90 (3 RR 122:17-124:22), while the withholding of such care can lead to “increased anxiety, depression, and suicide,” as well as “an increased risk for death.” MR.392 (3 RR 126:13-22); MR.352 (3 RR 86:18-23); MR.388 (3 RR 122:11-16).

Before Governor Abbott’s directive unilaterally changing the definition of child abuse on February 22, medical professionals in Texas were able to provide transgender adolescents with evidence-based treatment deemed safe, effective, lifesaving, and widely accepted in the medical community without unwarranted government interference. MR.350-51, 384-90 (3 RR 84:9-86:17, 118:16-121:14, 122:17-124:22). During that time, DFPS never investigated the provision of medically necessary care to adolescents with gender dysphoria, on its own, as child abuse. MR.171 (2 RR 49:5-12); MR.210 (2 RR 88:17-23). Indeed, DFPS has acknowledged that it previously had “no pending investigations of child abuse involving the procedures described in that opinion.” MR.6 (Pet. p. 6, ¶¶ 18-19); MR.438 (4 RR Pls.’ Ex. 03). In fact, before Governor Abbott issued his February 22 directive, DFPS treated reports of transgender youth receiving medical care for gender dysphoria as “clearly not reportable,” which means “it does not go out for investigation.” MR.210-11 (2 RR 88:17-89:6).

During the 87th Regular Session, the State Legislature rejected

multiple bills seeking to prohibit medical treatment of adolescents suffering from gender dysphoria. MR.7 (Pet. p. 7, ¶ 22). Despite the Legislature’s clear message, Governor Abbott, acting by executive fiat, directed DFPS Commissioner Jaime Masters to begin investigating all reports of “gender-transitioning procedures” as “child abuse” (hereinafter, “Abbott Directive”). MR.6, 44 (Pet. p. 6, ¶ 17, p. 44, ¶ 171); MR.436 (4 RR Pls.’ Ex. 02, p. 1, ¶¶ 1, 3). The Abbott Directive, which incorporated Attorney General Ken Paxton’s Opinion No. KP-0401, MR.423-35 (4 RR Pls.’ Ex. 01), also ordered, under threat of criminal prosecution, “all licensed professionals” and “members of the general public” to report such “abuse.” MR.436. In response, DFPS stated it would “investigate[]” any reports of the procedures outlined in the new directives. MR.6 (Pet. p. 6, ¶¶ 18-19); MR.438 (4 RR Pls.’ Ex. 03). Immediately thereafter, DFPS launched new investigations of families throughout Texas, including the Does. MR.7 (Pet. p. 7, ¶ 21); MR.155, 208 (2 RR 33:13-17, 86:7-12).

The Abbott Directive and DFPS’s new rule resulted in a sudden change in DFPS’s practices when it received reports of transgender youth receiving medical care. MR.154, 175 (2 RR 32:16-22, 53:2-8). As Randa Mulanax, an investigations supervisor with DFPS, testified, following the Abbott Directive, DFPS required all such reports be investigated without exception

by prohibiting the designation of these cases as “Priority None,” which applies to cases where it is “not likely that a child is being abused or neglected,” MR.166, 175 (2 RR 44:17-25, 53:2-8); MR.160 (2 RR 38:9-25), and prohibiting these cases from going to “Alternative Response.” MR.173 (2 RR 51:2-19).

In addition, on February 23, DFPS placed Jane Doe, who along with John Doe is the parent of Mary Doe, a 16-year-old adolescent with gender dysphoria, on leave from her employment at DFPS and opened an investigation into her family, even though it had never done so before. MR.209-10, 212-13 (2 RR 87:23-88:1, 90:11-91:5, 91:12-25); MR.22. (Pet. p. 22, ¶ 81); MR.207 (2 RR 85:3-4); MR.20-21 (Pet. pp. 20-21, ¶¶ 66, 71, 73); MR.206, 212, 237 (2 RR 84:23-25, 90:22-23, 115:2-4). Within two days, an investigator interviewed Jane, John, and Mary at their home. MR.22-23 (Pet. pp. 22-23, ¶¶ 83-84); MR.211-12 (2 RR 89:15-90:21).

Accordingly, on March 1, Real Parties in Interest Jane, John, and Mary, along with Dr. Megan Mooney, a practicing clinical psychologist based in Houston, and a mandatory reporter under Texas law, MR.24 (Pet. p. 24, ¶¶ 90-91); MR.283, 288 (3 RR 17:24-25, 22:14-16), filed suit against Relators asserting six causes of action, and moved for temporary injunctive relief on three claims, contending that Relators’ actions violated the APA, were *ultra*

vires, and violated the constitutionally protected separation of powers. MR.27-49 (Pet. pp. 27-49, ¶¶ 109-182).

On March 2, the trial court issued a temporary restraining order pending a temporary injunction hearing on March 11. MR.79-82. Based on the arguments and the uncontroverted evidence presented, the trial court entered a temporary injunction and denied Relators' plea to the jurisdiction. MR.99-103; MR.104. The trial court found that: (1) "there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits"; (2) "gender-affirming care was not investigated as child abuse by DFPS until *after February 22, 2022*"; (3) "[t]he series of directives and decisions . . . changed the *status quo* for transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas." MR.100 (first emphasis added). The trial court also held that, absent injunctive relief, the Does and Dr. Mooney would be irreparably harmed. MR.100-01.

The trial court thus enjoined Relators from:

(1) taking any actions against Plaintiffs based on the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate; (2) investigating reports in the State of Texas against any and all persons based ***solely*** on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the ***only*** grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender

transitioning, or receiving or being prescribed gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports; and (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors **solely** based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

MR.101-02 (emphases added).

Following Relators' interlocutory appeal and Real Parties in Interest's emergency motion for a temporary order pursuant to Texas Rule of Appellate Procedure 29.3 ("Rule 29.3"), the appeals court reinstated the temporary injunctive relief granted by the trial court in order to preserve the status quo before the directives and to prevent irreparable harm during pendency of the interlocutory appeal. MR.1207-09.

The following day, DFPS informed its employees of the appeals court's temporary order and explained to them that the order *does not* prevent them from assessing intakes and beginning investigations when "independent grounds that warrant an investigation are reported."³ Thus, under the order, DFPS can—and still does—screen reports of child abuse and neglect under the criteria DFPS has long applied to evaluate whether case specific

³ Lauren McGaughy, *AG Paxton appeals to Texas Supreme Court as state halts inquiries into parents of trans children*, Dallas Morning News (Mar. 23, 2022), <https://www.dallasnews.com/news/politics/2022/03/23/ag-paxton-takes-fight-to-supreme-court-as-texas-halts-investigations-into-parents-of-trans-children/>. This Court "may judicially notice a fact that is not subject to reasonable dispute." Tex. R. Evid. 201(b).

circumstances warrant investigation. And DFPS still conducts investigations and takes appropriate steps to protect children in accordance with the Texas Family Code and properly promulgated DFPS rules.

ARGUMENT AND AUTHORITIES

Relators have not shown that they are entitled to a stay of the injunction reinstated by the appeals court below. Where this Court has yet to consider the merits of a mandamus challenge, its role in issuing temporary relief is limited to “preserving the status quo” pending consideration of the mandamus petition. *In re State*, No. 21-0873, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021) (orig. proceeding) (per curiam).⁴ But Relators do not seek to preserve the status quo that existed prior to February 22. Instead, they seek to disrupt the status quo by upending the appeals court’s temporary order that merely places the parties in the same position they were in before the contested Abbott Directive and DFPS rule.

Moreover, a stay is warranted *only* where “the facts show that relator will be prejudiced in the absence of such relief.” *Republican Party of Tex. v.*

⁴ Relators attempt to prematurely argue the merits of the underlying appeal regarding the temporary injunction, but the merits are not before this Court at this stage. *See In re State*, 2021 WL 4785741, at *1 (in considering relief under Tex. R. App. P. 52.10, the Court “express[es] no view on the merits of the State’s claims”). The sole issue in this motion—and in Relators’ pending mandamus petition—is whether a Rule 29.3 temporary order is appropriate to protect the status quo that existed before the directives. *In re Tex. Educ. Agency*, 619 S.W.3d 679, 688 (Tex. 2021) (orig. proceeding).

Dietz, 924 S.W.2d 932, 932 (Tex. 1996) (per curiam).⁵ Here, Relators face no prejudice in the absence of a stay—and their complaint that the temporary order prevents them from “investigating” child abuse is belied by DFPS’s own statements and the undisputed factual record below. In contrast, Real Parties in Interest would suffer immediate and irreparable harm if the Court grants Relators’ request for temporary relief, which would make such relief not “just” under Texas Rule of Appellate Procedure 52.10(b).

I. Relators are not entitled to the emergency relief they seek.

A. Relators cannot establish that they will suffer prejudice without a stay of the temporary order.

Relators cannot demonstrate that the appeals court’s temporary order gives rise to an emergency requiring relief because the order merely restores the longstanding policies of Relators that were in place *before* their challenged actions.

Relators’ chief claimed source of prejudice—that the appeals court’s temporary order overbroadly prevents DFPS investigations of child abuse—is unfounded. *See* Mot. at 2-4. The appeals court’s order merely reinstates the trial court’s injunction, which “temporarily enjoined appellants from

⁵ Relators cite *Dietz* for the proposition that a temporary stay is warranted where the Court reaches a “tentative opinion that relator is entitled to the relief sought.” Mot. at 2. The “tentative opinion” language in *Dietz* is not instructive, much less controlling, because it derives from *former* Texas Rule of Appellate Procedure 121. *See Dietz*, 924 S.W.2d at 932 (quoting former Tex. R. App. P. 121).

abiding by the directives within the letter pending the outcome of the litigation.” MR.1208. DFPS can and does continue to screen and investigate allegations of child abuse and neglect based on the agency’s longstanding policies and Texas laws predating the Abbott Directive. DFPS’s own statements confirm that Relators’ claims of “emergency” have been exaggerated to secure the relief they seek—indeed, DFPS recently explained to its employees that the order does not prevent them from assessing intakes and beginning investigations into suspected child abuse when “*independent grounds* that warrant an investigation are reported.” *See supra* n.3.⁶

The appeals court’s order merely prevents Relators from bypassing long-established, properly promulgated rules and criteria, anchored upon the statutory definitions of abuse and neglect in the Texas Family Code, by launching investigations based *solely* on allegations involving the provision of medically necessary care to treat adolescents with gender dysphoria, or to penalize mandatory reporters who do not report the provision of such clinically recommended medical care. That is far from circumstances

⁶ Courts routinely provide temporary injunctive relief to enjoin enforcement of a new *rule*, and not the underlying *ordinary* investigations or enforcement by an agency. *Cf. Combs v. Entm’t Publications, Inc.*, 292 S.W.3d 712, 724 (Tex. App.—Austin 2009, no pet.) (injunction stopped implementation of rule governing the tax treatment of fundraising sales, not assessment or collection of taxes); *Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 656-66 (Tex. App.—Austin 1999, pet. dismissed w.o.j.) (injunction applied to process regarding suspension of permits, not assessment or collection of related taxes). That is the case here.

justifying an emergency.

Relators rely on two cases to say that the state suffers an irreparable injury “[a]ny time a state is enjoined . . . from effectuating statutes enacted by representatives of its people.” Mot. at 4 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) and citing *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam)). But these cases are inapposite.⁷ Neither the petition nor the temporary order entered below seeks to enjoin a state official from effectuating a duly enacted statute. Rather, they seek to prevent government officials from engaging in *ultra vires* conduct.

Indeed, the disputed rule here *was not enacted* by the Legislature and, in fact, was *rejected* by the 87th Legislature, which refused to pass legislation prohibiting the provision of gender-affirming care. MR.7 (Pet. p. 7, ¶ 22). In light of this rejection, Relators circumvented the APA and acted *ultra vires* when they implemented their new rule. But Relators lack the authority to redefine what constitutes child abuse in contravention of the Texas Family Code—only the Legislature can do that. Relators also cannot unilaterally warp DFPS’s longstanding investigatory policies based solely on *ultra vires*

⁷ The Relators’ cases actually *support* the necessity of the temporary order entered by the court of appeals. Indeed, *Hollins* concerned an *ultra vires* claim *brought by the state* against a local official to prevent local officials from defying or misapplying the law. 620 S.W.3d at 410.

acts.

Relators have articulated no cognizable harm here. Nothing has changed what DFPS can do *now* versus what DFPS was doing or could do before February 22—at least by way of the appeals court’s order. To the contrary, to the extent any prejudice is likely to occur in this case, it would be the Real Parties in Interest who would suffer irreparable harm should a stay of the injunction be granted. *See, e.g.*, MR. 762-66. In short, Relators present no emergency, let alone one sufficient to compel this Court to disturb the status quo and interrupt a pending interlocutory appeal that is already accelerated by statute.

B. The scope of the appeals court’s temporary order is proper and narrow.

Relators’ argument that they are harmed by the statewide scope of the appeals court’s temporary order has no merit either. It is well established that a court may temporarily enjoin the enforcement of a law, rule, or policy while the court determines whether the challenged directive is lawful and enforceable. *See, e.g., Tex. Health & Human Servs. Comm’n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 631 (Tex. App.—Austin 2013, no pet.) (affirming trial court’s temporary injunction in challenge to rule’s validity); *City of San Antonio v. Vakey*, 123 S.W.3d 497, 502 (Tex. App.—San Antonio 2003, no pet.) (affirming trial court’s temporary injunction which preserved

as the status quo the state of affairs before the acts being challenged as violations of the law took place).

This is particularly true where, as here, the Real Parties in Interest have challenged the validity of a rule under the APA, as *ultra vires*, and in violation of separation of powers. *See, e.g., Tex. Health & Human Servs. Comm'n*, 399 S.W.3d 615 at 620 (affirming statewide injunction of regulation limiting eligibility for Medicaid services for patients under 18 that was challenged as *ultra vires*); *Combs*, 292 S.W.3d at 724 (affirming statewide temporary injunction barring agency head's implementation and enforcement of rule enacted in violation of APA); *Tex. Alcoholic Beverage Comm'n*, 997 S.W.2d at 651 (affirming statewide temporary injunction of rule challenged under the APA). Enjoining Relators from taking actions pursuant to an unlawfully adopted rule is necessary to provide relief to the Real Parties in Interest. The injury to the Real Parties in Interest stems from the unauthorized nature of the rule's enactment, not merely from its resulting implementation. The temporary relief is thus narrowly crafted to address the specific injury at issue and the particular actions taken without authority.

The cases cited by Relators in support of their argument that statewide

relief is improper, *see* Mot. at 3, are inapposite for at least two reasons. First, none of the cited cases arises under the provisions of Texas law at issue here or addresses a challenge to the authority of the entity that issues a challenged rule or acts *ultra vires*. Second, *dicta* in a footnote related to the limitations of *federal* jurisdiction does not apply to Texas’s unitary court system. Unlike in the federal system, challenges to Relators’ authority to enact rules have only one path under the Texas APA—a Travis County district court and the Third Court of Appeals. *See* Tex. Gov’t Code § 2001.038. It is therefore entirely appropriate for the only court of appeals with jurisdiction over these claims to put a stop to a rule statewide while the lawfulness of its promulgation is determined.

C. Relators seek to alter the status quo, not preserve it.

Relators’ Motion invites this Court to ignore the status quo before February 22, which is the “last, actual, peaceable, non-contested status which preceded the pending controversy,” so that Relators can engage in challenged (and currently enjoined) actions before the courts have a chance to consider the merits of their mandamus petition or their interlocutory appeal. *Clint ISD v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016) (quoting *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding)). This Court’s precedent forecloses the relief Relators seek.

This Court may only issue relief to protect the last “*non-contested status*” before litigation. *In re State*, 2021 WL 4785741, at *1 (recognizing Court’s authority to issue temporary relief pending consideration of the mandamus petition is limited to “*preserving the status quo*”) (emphasis added). In this case, that means the state of affairs as it existed before the challenged Abbott Directive and DFPS’s new rule. *See* MR.100 (trial court finding that “gender-affirming care was not investigated as child abuse by DFPS *until after February 22, 2022*” and “[t]he series of directives and decisions by the Governor, the [Commissioner], and other decision-makers at DFPS, changed the *status quo* for transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas.” (first emphasis added)). Relators cannot credibly argue that the state of DFPS investigations *after* the issuance of the Abbott Directive on February 22 is either “non-contested” or “precede[s] the pending controversy.” *Clint ISD*, 487 S.W.3d at 555.

What is more, Relators’ characterization of the status quo is backwards. Were it to be accepted, it would mean that Relators could issue any rule, regardless of its compliance with the law, and simply designate the illegal rule as the status quo, no matter how quickly it is challenged, thereby preventing litigants from ever preserving the state of affairs prior to the

issuance of the rule. This cannot be the case. After all, the status quo “cannot be a violation of the law.” *Clint ISD*, 487 S.W.3d at 555; *see also In re Newton*, 146 S.W.3d at 651 (agreeing “that the continuation of illegal conduct cannot be justified as preservation of the status quo”).

D. A stay of the appeals court’s order is also inappropriate because Relators are not entitled to mandamus relief.

The emergency relief sought by Relators is inappropriate and unwarranted not only because Relators face no prejudice from the temporary order and because the requested stay would alter rather than preserve the status quo, but also because Relators have no likelihood of prevailing on their petition for a writ of mandamus.

Mandamus is an “extraordinary” remedy, which does “not issue[] as a matter of right, but at the Court’s discretion.” *In re Allstate Indem. Co.*, 622 S.W.3d 870, 883 (Tex. 2021) (orig. proceeding) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding)). Mandamus is only appropriate where the relator satisfies the “heavy” burden of establishing that (1) the lower court *clearly* abused its discretion, and (2) that there is no adequate remedy by way of appeal. *See In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding); *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding).

Relators fall far short of meeting this heavy burden. A lower court abuses its discretion only when “it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law’ or if it clearly fails to correctly analyze or apply the law,” *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 839 (Tex. 1992)), and mandamus will “issue ... against a court of appeals” only “for procedural irregularities or for actions taken by a court of appeals so devoid of any basis in law as to be beyond its power.” *Deloitte & Touche, LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997) (emphasis added). Here, however, the appeals court’s temporary order was well within the broad discretion afforded by Rule 29.3 to preserve the status quo.

Rule 29.3 “broadly empower[s] the court of appeals to preserve the parties’ rights when necessary,” and grants “great flexibility in preserving the status quo based on the unique facts and circumstances presented.” *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019) (orig. proceeding). This includes the power to order that a temporary injunction remain in effect pending disposition of an interlocutory appeal, notwithstanding any automatic supersedeas that may be available to governmental parties. *See In re Tex. Educ. Agency*, 619 S.W.3d at 687 (recognizing that Rule 29.3

“effectively allow[ed] the trial court’s temporary injunction to be enforced pending disposition of the Relators’ appeal,” thereby preserving the status quo).

Here, the appeals court was clearly authorized under Rule 29.3 to issue the relief it granted, and Relators raise no compelling arguments to the contrary. Indeed, Relators “improperly conflate[]” the appeals court’s *original* jurisdiction to issue writs of injunction with the appeals court’s broad authority to issue temporary orders in an interlocutory appeal properly within its *appellate jurisdiction*.⁸ *In re Geomet*, 578 S.W.3d at 90 (recognizing that “limitations on a court of appeals’ *original* jurisdiction *have little to do with* the scope of a court of appeals’ power over parties properly before it pursuant to its *appellate* jurisdiction” and that “no authority cast[s] any doubt on the validity of Rule 29.3 or the authority of a court of appeals to prevent irreparable harm to parties that have properly invoked its appellate jurisdiction in an interlocutory appeal”) (emphasis added). The order Relators seek to stay is not an *independent* injunction but rather a temporary order giving effect to the trial court’s temporary

⁸ The courts of appeals have general “appellate jurisdiction” over all cases “*as may be prescribed by law*,” Tex. Const. art. V, § 6 (emphasis added), and Rule 29.3 is such a law that prescribes the authority of courts of appeals to “make *any* temporary orders necessary to preserve the parties’ rights until disposition of the appeal.” Tex. R. App. P. 29.3 (emphasis added).

injunction during the pendency of the interlocutory appeal and thereby, as contemplated by Rule 29.3, securing the status quo. *See In re Tex. Educ. Agency*, 619 S.W.3d at 687; *In re Geomet*, 578 S.W.3d at 89.

Relators also cannot avail themselves of mandamus because the existing appeal provides an adequate remedy. *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding). This Court has long recognized that “[m]andamus should not issue to correct grievances that may be addressed by other remedies,” *In re Columbia Med. Ctr.*, 290 S.W.3d at 207, nor “where there is ‘a clear and adequate remedy at law, such as a normal appeal.’” *Walker*, 827 S.W.2d at 840 (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)).

Relators cannot show that the appeals court’s temporary order was “so arbitrary and unreasonable as to amount to a clear and prejudicial error of law,” *In re Ford Motor Co.*, 165 S.W.3d at 317, or “so devoid of any basis in law as to be beyond its power,” *Deloitte & Touche, LLP*, 951 S.W.2d at 398, as to amount to an abuse of discretion, and they also have clear remedy at law through the accelerated interlocutory appeal pending below that precludes such relief. As such, Relators are not entitled to mandamus relief and their emergency motion should be denied.

II. The trial court and court of appeals have jurisdiction over this matter.

A. Plaintiffs' claims are ripe; they challenge a final agency action, not enforcement.

Relators attempt to reframe this case as challenging DFPS investigations in general rather than Relators' specific directives to assert a lack of ripeness. Mot. at 3. But this case challenges specific executive actions that are already final under the APA, as well as the *ultra vires* and separation of powers doctrines.

“The finality requirement—in the context of ripeness—concerns whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Rea v. State*, 297 S.W.3d 379, 383 (Tex. App.—Austin 2009, no pet.). “The administrative decision must be formalized, and its effects felt in a concrete way by the challenging party.” *Id.* at 384. A constitutional claim is a matter for the court to resolve, and such a claim is ripe where there is a continuing threat of civil or criminal liability. *See Mitz v. Tex. State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 24 (Tex. App.—Austin 2008, pet. dismiss’d).

Such is the case here. Plaintiffs have alleged a final agency action: the Abbott Directive and DFPS's immediate implementation of that directive. MR.436 (4 RR Pls.' Ex. 02); MR.438 (4 RR Pls.' Ex. 03). These final actions exceeded Relators' constitutional and statutory authority. The Governor and

DFPS acted *ultra vires* and violated separation of powers by creating a new definition for abuse that was rejected by the Legislature last session and ordering a new subset of investigations that were never previously conducted under Texas law. MR.171 (2 RR 49:5-12); MR.210 (2 RR 88:17-23). DFPS also violated the APA by prescribing a new rule that is unconstitutional, exceeds the scope of DFPS’s authority, and does not comply with any of the procedural requirements for agency rulemaking. MR.27-34 (Pet. p. 27-34, ¶¶ 109-30). These decisions had an immediate and harmful effect on the Does and Dr. Mooney, which provides them with the necessary standing to bring this case.

B. The Does and Dr. Mooney have standing.

Standing requires that (1) the plaintiff must have personally suffered a “concrete and particularized . . . and actual or imminent” injury, (2) that is “fairly trace[able] to the challenged action of the defendant,” and (3) there is a substantial likelihood the requested relief will remedy the alleged injury.⁹ See *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018)

⁹ When multiple plaintiffs seek similar injunctive relief, the Court need only find one plaintiff to have standing to issue prospective relief. *Patel v. Texas Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 77–78 (Tex. 2015) (“[I]f one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs.”); see *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011) (“Because the voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required.”).

(citations and quotations omitted).

Relators claim that “the bare existence of an investigation against the [Doe] Plaintiffs is not a legally cognizable injury,” and that “Plaintiffs do not identify *anything* the Governor has or is likely to do that would injure them.” Mandamus Pet. at 6. To the contrary, Relators’ unlawful actions have already threatened the Doe Plaintiffs’ ability as parents to care for their child and resulted in tangible and concrete harms. Jane Doe has “already been placed on administrative leave at work and is at risk of losing her job, her livelihood, and the means of caring for her family.” MR.47 (Pet. p. 47, ¶ 177); MR.100. Mary Doe faces the inability to access the gender-affirming care she needs, “which if abruptly discontinued can cause severe physical and emotional harms, including anxiety, depression, and suicidality.” MR.101. She has also “been traumatized by the prospect that she could be separated from her parents.” MR.219 (2 RR 97:16-25). As such, the Does have standing.¹⁰

Dr. Mooney also has standing because the Governor and DFPS’s

¹⁰ Relators also incorrectly argue that DFPS investigations cannot be harmful unless they end up in court. Mandamus Pet. at 4. But DFPS is required to conduct investigations in accordance with the state law and constitution, as well as pre-existing DFPS policies. These policies provide that DFPS “accepts reports for investigation only when . . . DFPS appears to be the responsible department under the law, and . . . the child’s apparent need for protection warrants an investigation.” MR.580 (4 RR Pls.’ Ex. 16, p. 1). Even without any court involvement, DFPS investigations can result in a “reason to believe” disposition that causes someone to be placed on the child abuse registry. MR.195 (2 RR 73:21-24). The trial court found that a DFPS investigation alone can force Jane Doe to “lose the ability to practice her profession, and both Jane and John Doe would lose their ability to work with minors and volunteer in the community.” MR.101.

directives have had a “direct impact” on her private practice as a licensed psychologist. *See* MR.293 (3 RR 27:11-20). If Dr. Mooney abides by these directives, she would be forced to violate her ethical obligations, risk the loss of her license, break the bonds of trust she has built with clients, and harm her business. MR. 293 (3 RR 27:11-24). Before filing suit, Dr. Mooney stated publicly that she would not comply with these directives. MR.290 (3 RR 24:19-24). This has placed her at immediate risk of criminal penalties and the possible loss of her license, MR.291 (3 RR 25:4-6), especially considering that Governor Abbott sent his directive to the executive director of the Texas Board of Examiners of Psychologists, which has control and authority over Dr. Mooney’s license. MR.292 (3 RR 26:2-16); MR.437 (4 RR Pls.’ Ex. 02, p. 2); MR.295 (3 RR 29:7-10).

Real Parties in Interest have thus shown concrete, particularized, actual, and imminent injuries that are fairly traceable to Relators’ unlawful acts. These injuries are redressable by enjoining the directives and rule at issue here.

C. Relators are not entitled to sovereign immunity.

1. The APA waives sovereign immunity.

Relators fail to recognize that immunity is waived under the APA. The APA expressly provides a grant of original jurisdiction and waives sovereign immunity in suits alleging that a rule or its threatened application interferes

with or impairs a plaintiff's legal right or privilege. *See* Tex. Gov't Code § 2001.038(a); *Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, 598 S.W.3d 417, 421 (Tex. App.—Austin 2020, no pet.). A rule “means a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency.” Tex. Gov't Code § 2001.003(6). Here, the Governor's directive and DFPS's implementation of the directive established a new rule. *See Tex. Alcoholic Beverage Comm'n*, 997 S.W.2d at 657-58 (holding that agency memoranda were rules because they “set out binding practice requirements” that “substantially changed previous enforcement policy”).

Relators' claim that DFPS Statement is nothing more than a “press statement,” Mandamus Pet. at 7, 9, “regarding *only* the internal management or organization of a state agency and *not* affecting private rights or procedures” is an improper merits argument that is clearly rebutted by the record below. *Id.* at 7 (quoting Tex. Gov't Code § 2001.003(6)(C)) (emphases added). DFPS's implementation of the Abbott Directive was a generally applicable policy that applies to and affects the rights of a class of persons—parents of transgender children—as well as healthcare providers and members of the general public, and it is not a determination of individual

rights. *See El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 247 S.W. 3d 709, 714 (Tex. 2008) (Health and Human Services Commission statement had “general applicability” because it applied to “all hospitals”); *Combs*, 292 S.W.3d at 721-22 (Comptroller’s statements constituted “rule” because they applied to all persons and entities similarly situated”).

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

Relators also cannot invoke sovereign immunity to shield judicial review of claims that they acted *ultra vires*. “[T]his Court has long recognized that governmental immunity does not bar claims alleging that a government officer acted *ultra vires*, or without legal authority, in carrying out his duties.” *Hous. Belt & Terminal Rwy. Co. v. City of Hous.*, 487 S.W.3d 154, 157-58 (Tex. 2016). State action is without legal authority if it exceeds the bounds of authority granted to the actor or conflicts with the law itself. *Matzen v. McLane*, No. 20-0523, 2021 WL 5977218, at *4 (Tex. Dec. 17, 2021).

While the Court need not address the merits at this juncture, the Governor’s and DFPS’s directives exceeded their legal authority. Under the Texas Constitution, the Governor neither makes the law nor possesses the authority to suspend the law. *See Tex. Const. art. I, § 28*. Governor Abbott thus exceeded his authority by directing DFPS to conduct “prompt and

thorough investigation[s]” based on a redefinition of child abuse to include the provision of medically indicated treatment to adolescents with gender dysphoria.

Like the Governor, Commissioner Masters’ authority over DFPS is circumscribed and limited to those powers granted to her office by the Legislature. The statutorily enumerated powers of the DFPS Commissioner include the ability to “adopt rules and policies for the operation of and the provision of services by the department,” Tex. Hum. Res. Code § 40.027(e), but the Legislature tempered this power by simultaneously requiring DFPS to abide by the APA. *See id.* at § 40.006(a). No other enumerated power of the Commissioner exempts her from having to follow these procedures and permits her to create new agency rules by fiat or to immediately refashion laws and policies in response to a gubernatorial directive. *See id.* at § 40.027(a)-(d). By enacting a new investigatory rule under the Abbott Directive and promptly enforcing that rule without public comment, the Commissioner deviated from required practice and exceeded her rulemaking authority.

CONCLUSION AND PRAYER

Real Parties in Interest respectfully ask that this Court deny Relators’ Emergency Motion for Temporary Relief.

Dated: March 25, 2022

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I certify that this Response to Relators' Emergency Motion for Temporary Relief was prepared with Microsoft Word using Georgia 14-point font. It contains 6,353 words, excluding the portions of the Motion exempted by Rule 9.4(i)(1).

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CERTIFICATE OF SERVICE

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