

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 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
No. 03-22-00126-CV

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Record References and Abbreviations

MR.[page]	Mandamus Record
“Order”	Order of the Texas Court of Appeals, Third District, at Austin, issued March 21, 2022, reinstating the District Court’s Temporary Injunction
“Petition”	Petition for Writ of Mandamus filed by Relators on March 23, 2022 and cited as Pet.XX.
“Temporary Injunction”	Order Granting Plaintiffs’ Application for Temporary Injunction Issued by District Court on March 11, 2022
“District Court”	District Court of Travis County, Texas, 201st Judicial District, Hon. Amy Clark Meachum presiding
“Appeals Court”	Respondent the Court of Appeals for the Third District of Texas, Austin
“Directive”	Directive issued by Greg Abbott on February 22, 2022 directing DFPS to investigate reports of “gender transitioning procedures” as “child abuse” and ordering all licensed professionals to report such “abuse”
“Rule”	DFPS’s statement adopting the Directive as a new rule and subsequent implementation
“Paxton Opinion”	Attorney General Ken Paxton’s Opinion No. KP-0401 opining that certain procedures could constitute “abuse”
“Doe Family” or “Does”	Real Parties in Interest Jane Doe, John Doe, and Mary Doe

“DFPS”	Relator Texas Department of Family and Protective Services
“Plaintiffs”	The Doe Family and Dr. Megan Mooney
“Governor”	Relator Governor Greg Abbott
“Commissioner”	Relator Commissioner Jaime Masters
“Dr. Mooney”	Real Party in Interest Dr. Megan Mooney
“APA”	Texas Administrative Procedure Act
“Rule 29.3”	Texas Rule of Appellate Procedure 29.3
“Relators”	Relators Abbott, Masters, and DFPS

STATEMENT OF THE CASE

Nature of the case:

Action by Plaintiffs seeking declaratory and injunctive relief against Relators for ultra vires action and violations of the APA and Texas Constitution. Plaintiffs ask this Court to maintain the status quo that preceded Relators' challenged conduct while Relators' interlocutory appeal proceeds.

Course of proceedings:

Plaintiffs sought declaratory and injunctive relief, alleging, among other things, that the Governor's issuance of the Directive on February 22, 2022 and DFPS's subsequent implementation were ultra vires and violated the APA and Article II of the Texas Constitution. On March 11, 2022, the District Court held an evidentiary hearing on Plaintiffs' temporary injunction request, granted Plaintiffs' request, issued the Temporary Injunction, and denied Relators' plea to the jurisdiction.

Relators filed an interlocutory appeal challenging the Temporary Injunction and denial of the plea. Plaintiffs moved the Appeals Court to reinstate the Temporary Injunction under Rule 29.3. On March 21, 2022, the Appeals Court reinstated the Temporary Injunction to preserve the status quo and rights of the parties pending interlocutory appeal.

On March 23, 2022, Relators filed this petition for writ of mandamus challenging the Appeals Court's Order.

Trial court:

201st Judicial District Court of Travis County, Judge Amy Clark Meachum presiding.

Appeals court:

Third Court of Appeals, Austin, Texas (Byrne, C.J., Kelly, J., and Smith, J.).

ISSUE PRESENTED

Issue One

In an interlocutory appeal, Rule 29.3 empowers an appellate court to “make *any* temporary orders necessary to preserve the parties’ rights until disposition of the appeal.” Tex. R. App. P. 29.3 (emphasis added).

On March 21, 2022, after concluding the Temporary Injunction was “necessary to maintain the status quo and preserve the rights of all parties,” the Appeals Court issued its Order reinstating the Temporary Injunction. MR.1209.

Did the Appeals Court abuse its discretion in issuing the Order reinstating the Temporary Injunction where (1) Rule 29.3 permits the issuance of orders reinstating temporary injunctions to preserve the parties’ rights and the status quo; and (2) there are no valid jurisdictional challenges?

Issue Two

Mandamus is an extraordinary remedy, which will not issue against an appellate court where a relator has an adequate appellate remedy. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)).

Is the Appeals Court subject to mandamus where Relators have an adequate remedy by way of the pending interlocutory appeal?

INTRODUCTION

Ultimately, this case concerns whether Texas agencies and officials have the statutory and constitutional authority to categorically change Texas's statutory definitions of child abuse and, in so doing, deprive Texas parents of their ability to provide their adolescent children diagnosed with gender dysphoria with the medical care they and their physicians deem necessary. But that question is not presently before the Court.

The only questions before this Court are whether (1) the Appeals Court abused its discretion under Rule 29.3 by reinstating the District Court's Temporary Injunction and (2) Relators lack an adequate remedy by appeal. The answer to both is no.

Relators' Petition seeks to prematurely litigate the merits of their appeal, upend the status quo, and circumvent judicial review of agency rules and executive actions under Texas law. But it fails to establish either of the required showings for mandamus, much less both, and wholly fails to address the second prong of Relators' burden. Nevertheless, the Appeals Court clearly had authority under Rule 29.3 to issue its narrow Order to preserve the status quo and protect the parties' rights while Relators' interlocutory appeal is decided, and the pending appeal provides Relators an adequate appellate remedy. Accordingly, this Court should deny mandamus.

STATEMENT OF FACTS

This dispute arises from Relators' actions requiring DFPS to investigate the provision of medical care for gender dysphoria as child abuse and the mandatory requirements to report such care. Medical treatment of adolescents with gender dysphoria is well established;¹ based on guidelines that are widely accepted by the medical community, MR.350-51, 384-87;² and done in consultation with adolescents, parents/guardians, and medical providers, MR.287. This care is safe and effective, MR.388-90, and withholding it can lead to "increased anxiety, depression, and suicide" and "an increased risk for death." MR.352, 388, 392.³

During the 87th Regular Session, the Legislature considered and rejected legislation prohibiting this medical treatment. MR.7. On February 22, 2022, the Governor circumvented the Legislature by directing DFPS and the Commissioner to investigate all reports of medically indicated treatment of adolescents with gender dysphoria as "child abuse." MR.6, 44, 436. That

¹ Gender dysphoria, a recognized condition in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), is characterized by clinically significant distress resulting when a person's gender identity differs from the person's sex assigned at birth. MR.349, 522-23.

² Under clinical guidelines, no medical treatment for gender dysphoria is provided until after the onset of puberty. MR.349-50. Consequently, only transgender adolescents and adults access this treatment.

³ Every major U.S. medical association recognizes the medical necessity of this care for improving the physical and mental health of transgender people. MR.12-14, 18, 388.

Directive, which incorporates the Paxton Opinion, MR.423-35, also orders, under threat of criminal prosecution, “all licensed professionals” to report such “abuse.” MR.436.

The Directive impermissibly expanded statutory definitions of “child abuse” and triggered abrupt changes in DFPS’s practices. MR.154, 175. Before February 22, DFPS did not consider reports that an adolescent was receiving medical care for gender dysphoria a reason to investigate potential child abuse. MR.171, 210. The Directive now *requires* investigation where such care is reported, and DFPS has improperly promulgated a new Rule, without notice or public comment, prioritizing these reports for compulsory investigation. MR.160, 166, 173.

After February 22, DFPS launched, for the first time, investigations into families throughout Texas based solely on reports of medically indicated care being provided to transgender adolescents. MR.7, 155. On February 23, DFPS placed Jane Doe on employment leave and opened an investigation into her family solely because she and John Doe are the parents of Mary Doe, a 16-year-old adolescent with gender dysphoria. MR.22, 206-07, 212-13. At the same time, Dr. Mooney was put in the quandary of either doing real harm to her patients and livelihood or facing civil and criminal penalties.

Plaintiffs sued Relators and moved for temporary injunctive relief

because Relators’ actions violate the APA, are ultra vires, and violate constitutional separation of powers. MR. 27-49. On March 11, based on uncontroverted evidence from an evidentiary hearing, the District Court issued the Temporary Injunction, which enjoined Relators from (1) investigating families for “child abuse” based *solely* on reports of medically indicated care provided to adolescents and (2) requiring Texans to report such treatment as “abuse.” MR.101-02.

After Relators appealed, Plaintiffs moved for temporary relief under Rule 29.3. MR.736-1174. Finding it “necessary to maintain the status quo and preserve the rights of all parties,” the Appeals Court reinstated the Temporary Injunction. MR.1209. The following day, DFPS informed its employees of the Order, explaining that it does not prevent DFPS from assessing intakes and opening investigations where “*independent grounds* that warrant an investigation are reported.”⁴

⁴ Lauren McGaughy, *AG Paxton appeals to Texas Supreme Court as state halts inquiries into parents of trans children*, Dallas Morning News (Mar. 23, 2022), <https://www.dallasnews.com/news/politics/2022/03/23/ag-paxton-takes-fight-to-supreme-court-as-texas-halts-investigations-into-parents-of-trans-children/> (emphasis added). This Court “may judicially notice a fact that is not subject to reasonable dispute.” Tex. R. Evid. 201(b).

ARGUMENT AND AUTHORITIES

This Court will only “issue mandamus against a court of appeals 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 Ct. of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997). Relators are not entitled to this “extraordinary remedy” because they fail to show *both* that (1) the Appeals Court clearly abused its discretion and (2) Relators have no adequate appellate remedy. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36, 138 (Tex. 2004) (orig. proceeding).

I. The Court of Appeals did not abuse its discretion.

Relators argue the Appeals Court abused its discretion because (1) the District Court lacked jurisdiction, Pet.4-10, (2) the Appeals Court exceeded its jurisdiction, Pet.10-15, and (3) the injunction itself is improper, Pet.16-17. All three arguments fail.

A. The courts below properly exercised jurisdiction.

1. Plaintiffs have standing.

Plaintiffs have standing because they “allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (citation omitted).

First, Plaintiffs have been subjected to concrete, particularized, and irreparable harm due to Relators' unlawful actions.⁵ Relators did not, and cannot, show as a matter of law or fact that an investigation is not sufficiently imminent harm (*see* Relators' Issue #1). Indeed, harm has already occurred—both from the investigation and from additional consequences of the Directive and Rule.⁶ Relators' adoption and enforcement of the Directive and Rule without legal authority caused Jane to be placed on leave and suffer the “stigma attached to being the subject of a child abuse investigation.” MR.100-01. The Directive and Rule have, likewise, threatened essential medical care for Mary, “which[,] if abruptly discontinued[,] can cause severe physical and emotional harms, including anxiety, depression, and suicidality.” MR.101. After an investigator came to her home, Mary was deeply traumatized by the prospect that she could be separated from her parents. MR.219. Additionally, the unequal treatment and deprivation of individual rights are themselves injuries sufficient to confer standing. *See*,

⁵ When all plaintiffs seek similar injunctive relief, the Court need only find that one plaintiff has standing. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 77-78 (Tex. 2015).

⁶ Relators incorrectly argue that DFPS investigations cannot be harmful unless DFPS takes “official action.” Pet.4. But 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). A DFPS investigation alone can force Jane to “lose the ability to practice her profession, and Jane and John to lose their ability to work with minors and volunteer in the community.” MR.101.

e.g., Ne. Fla. Chapter Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (“The ‘injury in fact’ in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”).

Similarly, the Directive and Rule have already had a “direct impact” on Dr. Mooney’s private practice as a licensed psychologist sufficient to confer standing. *See* MR.293. As a mandatory reporter, Dr. Mooney must report any “reasonable cause to believe that a child has been abused or neglected” within 48 hours. Tex. Fam. Code § 261.101(b). Citing this statutory duty—and corresponding criminal penalties—the Governor sent the Directive to the Texas Behavioral Health Executive Council, which has control and authority over Dr. Mooney’s license. MR.292, 437. Dr. Mooney also testified that Relators’ actions have threatened the bonds of trust with her patients, which subsequently harms her business. MR.936. It is well established that “a business can have standing to challenge the legality of governmental actions [that] . . . damage or destroy markets for its services.” *Tex. Dep’t of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 741 (Tex. App.—Austin 2014, pet. dismiss’d). Not only has Dr. Mooney’s business been injured, but also—regardless of whether she complies with or ignores the Directive—she risks potential criminal prosecution, either for false reporting of child abuse or

failure to comply with the Directive. MR. 291, 293-94. Where a plaintiff has alleged an intent to continue the regulated conduct, as Dr. Mooney has, she need not be arrested and prosecuted before filing suit. *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (explaining that “intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute”, is sufficient to confer standing).

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

Third, Plaintiffs’ injuries are redressable because they flow directly from Relators’ wrongful conduct. Therefore, “there is a substantial likelihood” that enjoining Relators from enforcing the illegal Directive and Rule will remedy Plaintiffs’ injuries. *Id.*

2. Plaintiffs' claims are ripe.

Relators' ripeness challenge, which focuses on whether an investigation is an injury, Pet.ix (Relators' Issue #1), Pet.4-5, misconstrues Plaintiffs' claims. Plaintiffs do not challenge Relators' ability to investigate child abuse, but rather investigations under the Directive and Rule as ultra vires, violative of the APA, and beyond Relators' constitutional authority.

“Under the ripeness doctrine, courts must consider whether, *at the time a lawsuit is filed*, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote.” *Patel*, 469 S.W.3d at 78. Because Relators have taken *concrete* steps to implement the Directive and Rule, Plaintiffs' claims are unquestionably ripe for adjudication. The APA provides a cause of action when a “rule or its *threatened application* interferes with or impairs, or *threatens to interfere with or impair*, a legal right.” Tex. Gov't Code § 2001.038(a) (emphases added). Similarly, a constitutional challenge to a rule is ripe where enforcement is “sufficiently likely” to occur. *Patel*, 469 S.W.3d at 78.

Relators are incorrect that an investigation is not a sufficient injury. For example, in *Patel*, this Court held that the plaintiffs' claims were ripe, even though they had “not yet faced administrative enforcement,” because

one of plaintiffs' businesses had "received two warnings" and "been referred to [the agency's] legal department for enforcement." *Id.* at 78.

When Plaintiffs filed suit, their injuries had already occurred or were likely to occur. They were not contingent or remote. The Directive and Rule require investigations and mandatory reporting, consequently interfering with Plaintiffs' legal rights. By investigating the Doe Family, placing Jane on leave, and threatening Mary's removal, Relators ripened the Does' claims. By placing Dr. Mooney in the catch-22 of either reporting or not reporting—and thereby risking either her livelihood or license (not to mention civil and criminal liability)—Relators ripened Dr. Mooney's claims.

Relators' related contention that Plaintiffs fail to satisfy the "prudential part of ripeness" also fails. Pet.5 (quoting *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1123 (9th Cir. 2022)). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Twitter*, 26 F.4th at 1123 (citation omitted). No further factual development is needed to determine whether Relators had the authority to issue the Directive and Rule. And, "the purpose of [APA] section 2001.038 is to obtain a final declaration of a rule's validity before the rule is applied." *Tex. Mut. Ins. Co. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 214 S.W.3d 613, 619 (Tex. App.—Austin 2006, no pet.). "One is not required to

wait until [a challenged] rule is attempted to be enforced against him before he may resort to declaratory relief.” *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 797 (Tex. App.—Austin 1982, writ ref’d n.r.e.); *see also Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex. Inc.*, 997 S.W.2d 651, 656 (Tex. App.—Austin 1999, pet. dismiss’d w.o.j.) (APA challenge to invalid rules was ripe without proof of individual prosecution).

3. Sovereign immunity does not shield Relators’ actions from judicial review.

a. The APA waives sovereign immunity.

The APA expressly 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.).

By mischaracterizing Plaintiffs’ claims as a challenge to a press statement (Relators’ Issue #2), Relators claim the Rule is not subject to the APA’s immunity waiver. Pet.6-7. But the unrebutted evidence below shows that it is. The record establishes that the Rule is “a state agency statement of general applicability that . . . implements, interprets, or prescribes law or policy” subject to the APA. Tex. Gov’t Code § 2001.003(6)(A)(i); *see* MR.166-75 (testimony describing DFPS’s implementation of Directive and

substantial changes in DFPS enforcement policies after February 22); *Tex. Alcoholic Beverage Comm’n*, 997 S.W.2d at 657-58 (holding that agency memoranda “substantially chang[ing] previous enforcement policy” were rules). The record likewise establishes that the Rule is binding, meaning it is not a mere “press statement.” DFPS policy now requires investigation into gender-affirming medical care—without exception—and such investigation cannot be designated a lower priority. MR.160-75; *cf. Slay v. Tex. Comm’n on Env’l Quality*, 351 S.W.3d 532, 546 (Tex. App.—Austin, 2011, pet. denied) (holding APA did not apply where state presented evidence that rule was not binding).

Relators’ reliance on the APA’s exclusion for statements about internal management and organization that do not affect private rights or procedures, Pet.7, is also belied by the record. The evidence shows that, after implementing the Directive, DFPS changed its previous enforcement policy and initiated investigations that were not pursued before February 22. MR.166-75. Additionally, the Rule is generally applicable and affects the rights of class(es) of persons—parents of transgender children, healthcare providers, and members of the general public—meaning the Rule is not limited to internal management of DFPS. *See El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm’n*, 247 S.W. 3d 709, 714 (Tex. 2008) (agency

statement had “general applicability” because it applied to “all hospitals”); *Combs v. Ent. Publ’ns, Inc.*, 292 S.W.3d 712, 721-22 (Tex. App.—Austin 2009, no pet.) (Comptroller’s statements constituted “rule” because they applied to all “similarly situated” entities).

Finally, *Texas Department of Public Safety v. Salazar*, 304 S.W.3d 896, 905 (Tex. App.—Austin 2009, no pet.) does not help Relators. There, the challenged appearance-of-licenses policy had no effect on litigants because their licenses remained valid. *Id.*

b. Sovereign immunity does not shield ultra vires actions.

Relators cannot invoke sovereign immunity to shield judicial review of their ultra vires conduct. In arguing that misinterpretation of the law is not an ultra vires act (Relators’ Issue #3), Relators misconstrue Plaintiffs’ claims.

An action to determine or protect private rights “against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). 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*, ---S.W.3d---, 2021 WL 5977218, at *4 (Tex. Dec. 17, 2021). Relators agree the Governor’s actions are ultra vires if he “misinterpreted ‘his enabling law’ or ‘his organic authority.’” Pet.9. Plaintiffs

contend just that.

Under the Texas Constitution, the Governor does not make law. *See* Tex. Const. art. I, § 28. Yet that is exactly what the Governor did here. Child abuse is defined by the Texas Family Code, as is DFPS’s investigatory authority. *See* Tex. Fam. Code §§ 261.001 (defining child abuse); 261.301 (outlining DFPS investigatory authority). The Governor cannot change this law—he *administers* the law pursuant to the general grant to “cause the laws to be faithfully executed.” Tex. Const. art. 4, § 10. As Relators admit, these are “explicit constraints” on the Governor’s authority. Pet.9 (quoting *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017)). The Governor exceeded this authority by directing DFPS to make the *new* presumption that “gender-transitioning” procedures necessarily constitute “abusive procedures” and by directing DFPS to conduct “prompt and thorough investigation[s]” based on this presumption. MR.436.

If accepted, Relators’ claim that the Directive does not “redefin[e] child abuse” because it “refers to the Attorney General’s opinion, which interprets existing law,” Pet.8 n.2, would entirely negate legislative power. Relators could simply “interpret[] existing law” to circumvent the Legislature. The Legislature recently considered legislation to prohibit gender-affirming care, but declined to enact it. *See* Tex. S.B. 1646, 87th Leg., R.S. (2021), Texas H.B.

68, 1399 87th Leg., R.S. (2021). Nevertheless, the Directive requires, under threat of criminal prosecution, that “all licensed professionals who have direct contact with children” as well as “members of the general public” report instances of minors who have received gender-affirming care. By expanding the definition of “child abuse” under Family Code § 261.001, the Governor has done what the Legislature did not: establish a new criminal offense. *See* Tex. Const. art. II § 1 (“Our Legislature, which ‘declares the public policy of the state,’ holds the exclusive power to make law.”); *Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010).

Similarly, the Commissioner’s authority over DFPS is circumscribed by those powers granted by the Legislature. These statutorily enumerated powers 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 limited this power by simultaneously requiring DFPS to abide by the APA, *see id.* § 40.006(a). The Commissioner’s other enumerated powers neither exempt her from these procedures, nor permit her to create new agency rules by fiat, nor allow her to refashion laws and policies in response to gubernatorial directive. *See id.* § 40.027(a)-(d). By enacting a new investigatory rule under the Directive and promptly enforcing the Rule without public comment, all in violation of the APA, the

Commissioner exceeded her authority.

Contrary to Relators' contentions, Plaintiffs do not challenge an exercise of discretion or allege that Relators have misinterpreted a statute. Pet.9-10. Plaintiffs seek to require compliance with existing statutory and constitutional law, and such ultra vires claims are not barred by immunity. *See Heinrich*, 284 S.W.3d at 372 (explaining that "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity").

c. Sovereign immunity does not shield Plaintiffs' constitutional claims from judicial review.

Plaintiffs have also asserted constitutional claims, including the separation of powers claim under which they moved for emergency relief. This Court's decisions teach "that sovereign immunity is inapplicable when a suit" raises constitutional claims "and seeks only equitable relief." *Patel*, 469 S.W.3d at 75–76. Relators do not contend otherwise. Because Plaintiffs assert their separation of powers claim against all Relators, this Court should deny mandamus even if it concludes that one or more other claims are barred by immunity, which they are not.

B. Rule 29.3 empowers appellate courts to reinstate temporary injunctions.

Relators wrongly contend that no appellate court can reinstate an injunction under Rule 29.3. *See* Pet.ix (Relators’ Issues #5 & 6); Pet.10-11. But the Appeals Court acted well within its Rule 29.3 authority when it acted to maintain the status quo and preserve the parties’ rights during Relators’ appeal.

First, Rule 29.3 contains no express limitations on a court’s ability to issue temporary orders, whether to preserve jurisdiction or otherwise. Tex. R. App. P. 29.3 (“[T]he appellate court may make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal”).

Relators’ argument that Rule 29.3 orders are permitted only when necessary to maintain a live case or controversy, Pet.11-12, is foreclosed by *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019) (orig. proceeding). Rule 29.3’s purpose is to preserve parties’ rights appeal; it leaves “no reason to doubt that the court[s] of appeals ha[ve] the authority to make orders protecting [movants] against irreparable harm”.⁷ *Id.*

Second, an appeals court may issue a Rule 29.3 order with a counter-supersedeas, or injunctive, effect. This Court has squarely rejected Relators’

⁷ Rule 29.3 authority is unaffected by the automatic supersedeas available to governmental parties. *See In re Tex. Educ. Agency*, 619 S.W.3d 679, 680 (Tex. 2021) (orig. proceeding) (“TEA”).

argument that an appeals court lacks appellate jurisdiction to issue an injunction pursuant to Rule 29.3. *See* Pet.12-15. Like the petitioner in *Geomet*, Relators “improperly conflate[]” an appeals court’s *original* jurisdiction to issue writs of injunction with its broad authority to issue temporary orders in an interlocutory appeal within its *appellate jurisdiction*. *See* 578 S.W.3d at 90 (recognizing 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”).

As this Court has recognized, an appellate court’s “broad authority to preserve the parties’ rights is materially distinct from a trial court’s supersedeas authority . . . [as they] deriv[e] from distinct reservoirs of power that are directed to different concerns, even when they would have the same effect.” *TEA*, 619 S.W.3d at 687. Because the Appeals Court properly “issue[d] its own temporary order continuing the injunction pending disposition [Relators’] appeal,” *id.* at 680, this Court should reject Relators’ challenge to the Appeals Court’s jurisdiction.

C. Allowing Relators to pursue challenged actions would upend the status quo.

Reinstating the Temporary Injunction was necessary to preserve the status quo. The “last, actual, peaceable, non-contested status which preceded

the pending controversy” is the state of affairs *before* the challenged Directive and Rule dramatically changed child abuse investigations across Texas. *See Clint ISD v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016); MR.171, 438 (noting changes to investigations after February 22).

D. The Order is necessary and appropriate.

Relators argue that the Order is improper because (1) it is overbroad and reaches non-parties, and (2) Plaintiffs have not established irreparable harm. Pet.ix (Relators’ Issue #4); Pet.16-18. These arguments fail.

It is well established that a court may temporarily enjoin the enforcement of a law, rule, or policy while it determines whether the challenged directive is lawful and enforceable. *See, e.g., Tex. Health & Hum. Servs. Comm’n v. Advocs. 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 preserving as the status quo the state of affairs before the acts being challenged as unlawful took place). The same is true under Rule 29.3. *See Tex. Dep’t of State Health & Hum. Servs. v. Crown Distributing LLC*, No. 03-20-00463-CV, 2021 WL 3413165, at *1 (Tex. App.—Austin Aug. 5, 2021, no pet.) (temporarily enjoining enforcement of

prohibitions against distribution and sale of hemp under Rule 29.3 until disposition of appeal).

This is *particularly* true where, as here, Plaintiffs challenge the validity of a rule under the APA, as ultra vires, and as a violation of separation of powers. *See, e.g., Tex. Health & Hum. Servs. Comm’n*, 399 S.W.3d at 620 (affirming statewide injunction of regulation that was challenged as ultra vires); *Combs*, 292 S.W.3d at 724 (affirming statewide temporary injunction of rule challenged under APA). Enjoining Relators from enforcing the unlawfully adopted Rule and Directive is necessary to provide relief to Plaintiffs. Plaintiffs’ injuries stem from the unauthorized nature of the Rule’s enactment, not merely from its resulting implementation. The Temporary Injunction is thus narrowly crafted to address Plaintiffs’ specific injuries and the particular actions taken without authority.

The cases Relators cite to support their argument that statewide relief is improper, *see* Pet.16, are inapposite. First, Relators’ cases neither arise under the same provisions of Texas law nor address challenges to an entity’s rulemaking authority or ultra vires actions. Second, dicta in a footnote related to the limitations of *federal* jurisdiction does not apply to Texas’s unitary court system. In Texas, challenges to Relators’ rulemaking authority have only one path in the courts—a Travis County district court and the Third

Court of Appeals. *See* Tex. Gov't Code § 2001.038. It is entirely appropriate for the only appellate court with jurisdiction over these claims to enjoin the Rule and Directive while determining the lawfulness of their promulgation and implementation. *See Crown Distributing*, 2021 WL 3413165, at *1.

Relators' claim that Plaintiffs' harms amount to mere "fear" of injury, Pet. 17, ignores the harms that have already occurred because of the Directive and Rule. *See supra* 6-8. Relators' unsupported assertion that Plaintiffs' injuries will remain in spite of the Temporary Injunction is also wrong. Pet. 17-18. Merely because Plaintiffs fear that they could be subjected to an unlawful rule in the future does not undermine the effectiveness of an injunction while Relators' appeal is resolved.

II. Relators have an adequate appellate remedy.

"Mandamus will not issue where there is 'a clear and adequate remedy at law, such as a normal appeal.'" *Packer*, 827 S.W.2d at 840 (quoting *Walker*, 679 S.W.2d at 485). Relators make no attempt to show that their pending, underlying interlocutory appeal is not an adequate remedy. As such, Relators' Petition should be denied.

PRAYER

Relators fail to establish that the Appeals Court clearly abused its discretion and that there is no adequate remedy by appeal. Therefore, Plaintiffs respectfully ask that this Court deny the Petition.

Respectfully submitted:

Dated: March 30, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this Response to Relator's Mandamus Petition contains 4,474 words, excluding the portions of the Motion exempted by Rule 9.4(i)(1).

/s/ Shelly L. Skeen
Shelly L. Skeen

MANDAMUS CERTIFICATION

Pursuant to Texas Rules of Appellate Procedure 52.3(j) and 52.4, I certify that I have reviewed this response and that every factual statement in the response is supported by competent evidence included in the record.

/s/ Shelly L. Skeen
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, a true and correct copy of this Response to Relators' Mandamus Petition was served on all counsel of record by the Court's electronic filing system, as follows:

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