No. 23-0697

In the Supreme Court of Texas

THE STATE OF TEXAS; OFFICE OF THE ATTORNEY GENERAL; KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; THE TEXAS MEDICAL BOARD; AND THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION,

Appellants,

v.

LAZARO LOE, ET AL.,

Appellees.

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

APPELLANTS' BRIEF

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General
State Bar No. 24076720
Judd.Stone@oag.texas.gov

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

Counsel for Appellants

Identity of Parties and Counsel

Appellants:
The State of Texas
Office of the Attorney General
Ken Paxton, in his official capacity as Attorney General of Texas
Texas Medical Board
Texas Health and Human Services Commission

Appellate and Trial Counsel for Appellants:

Ken Paxton
Brent Webster
Judd E. Stone II (lead counsel)
Lanora C. Pettit
Natalie D. Thompson
Grant Dorfman
James Lloyd
Kimberly Gdula
Ryan Kercher
Johnathan Stone
Heather Dyer
Charles Eldred
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700
Judd.Stone@oag.texas.gov

Angela Colmenero, currently with the
Office of the Governor

Appellees:
Lazaro Loe, individually and as parent and next friend of Luna Loe, a minor
Mary Moe, individually and as parent and next friend of Maeve Moe, a minor
Matthew Moe, individually and as parent and next friend of Maeve Moe, a minor
Nora Noe, individually and as parent and next friend of Nathan Noe, a minor
Sarah Soe, individually and as parent and next friend of Samantha Soe, a minor
Steven Soe, individually and as parent and next friend of Samantha Soe, a minor
Gina Goe, individually and as parent and next friend of Grayson Goe, a minor
PFLAG, Inc.
Richard Ogden Roberts III, M.D.

David L. Paul, M.D.
Patrick W. O'Malley, M.D.
American Association of Physicians for Human Rights, Inc., d/b/a/ GLMA: Health Professional Advancing LGBTQ+ Equality

Appellate and Trial Counsel for Appellees:

Kennon L. Wooten (lead counsel)
Lauren Ditty
Scott Douglass & McConnico LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300
kwooten@scottdoug.com

Allissa Pollard
Arnold & Porter Kaye Scholer, LLP
700 Louisiana Street, Suite 4000
Houston, Texas 77002

Lori B. Leskin
250 West 55th Street
New York, New York 10019

Omar Gonzalez-Pagan
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Floor
New York, New York 10005

Karen L. Loewy
Sasha J. Buchert
1776 K Street, N.W., 8th FloorWashington, DC 20006

Paul D. Castillo
3500 Oak Lawn Ave, Unit 500
Dallas, Texas 75219Harper Seldin

American Civil Liberties Union Foundation
125 Broad Street, Floor 18
New York, New York 10004

Elizabeth Gill
39 Drumm Street
San Francisco, California 94111

Brian Klosterboer
Chloe Kempf
Adriana Pinon
ACLU Foundation of Texas, Inc.
P.O. Box 8306
Houston, Texas 77288

Lynly S. Egyes
Milo Inglehart
Transgender Law Center
594 Dean Street, Suite 11
Brooklyn, New York 11238

Shawn Meerkamper
Dale Melchert
P.O. Box 70976
Oakland, California 94612

Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other Authorities:

Statement of the Case

Nature of the Case: Senate Bill 14 prohibits certain medical procedures and treatments when performed "[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; *see* Act of May 17, 2023, 88th R.S., ch. 335, 2023 Tex. Sess. Law Serv. 733 ("S.B. 14"), App'x Tab E. Plaintiffs-Appellees are parents of children who seek prohibited medical procedures, physicians who have provided such services and wish to continue doing so, and two organizations representing such persons, PFLAG and GLMA. They sued the State of Texas, the Attorney General, the Office of the Attorney General, the Texas Medical Board, and the Texas Health and Human Services Commission to prevent enforcement of the statute. The parent plaintiffs contend the statute violates the Texas Constitution's due-course clause by interfering with their rights to parental autonomy. Tex. Const. art. I, § 19. The physicians and their trade organization, GLMA, say it violates physicians' economic substantive-due-course rights. *Id.* And all plaintiffs claim the statute discriminates based on sex or "transgender status," and thus violates the Texas Constitution's equal-rights guarantees. *Id.* §§ 3, 3a. App'x Tab C, 1.CR.3-75.

Trial Court: 201st Judicial District Court, Travis County
Hon. Maria Cantú Hexsel

Disposition in the Trial Court: The trial court granted Plaintiffs' request for a temporary injunction on the basis of the constitutionality of the statute and denied Defendants' plea to the jurisdiction. App'x Tab A, 7.CR.2148-49; App'x Tab B, 7.CR.2150-56.

Statement of Jurisdiction

The Court has noted probable jurisdiction under Texas Government Code section 22.001(c). The trial court granted a temporary injunction on the basis of the constitutionality of a state statute. *See id.* This Court may exercise its extended jurisdiction to review the denial of defendants' plea to the jurisdiction. *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001); *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001).

Issues Presented

Legislatures around the country have noted a disturbing trend: as smartphones and social media have become an increasingly ubiquitous force in the lives of children and adolescents, reports of gender dysphoria—once exceedingly rare—have grown exponentially. Meanwhile, medical organizations have been captured by activists and appear unconcerned by the lack of scientific research on the long-term effects of medical treatments given to children to address a mental-health condition. Concerned about the effect these outside influences have on young people, Texas's Legislature has chosen to prohibit certain irreversible treatments for gender dysphoria until a potential patient has reached the age of majority. The questions presented here are:

1. Whether plaintiffs have viable claims or have shown entitlement to temporary injunctive relief, including a probability of success on the merits concerning:
    a. Whether the parent plaintiffs have shown that they have a fundamental right to obtain the subject medical procedures for their children or that

S.B. 14 violates the due-course clause in article I, section 19 of the Texas Constitution.

b. Whether the physician plaintiffs have shown that S.B. 14 violates a fundamental right to practice medicine that is protected under article I, section 19 of the Texas Constitution.

c. Whether plaintiffs have shown that S.B. 14 discriminates on the basis of sex or "sex stereotypes" in violation of article I, section 3a of the Texas Constitution.

d. Whether plaintiffs have shown that S.B. 14 discriminates on the basis of "transgender status" in violation of article I, section 3a of the Texas Constitution.

2. Whether the temporary injunction was jurisdictionally and remedially proper.

To the Honorable Supreme Court of Texas:

"This case revolves around an issue that is surely of the utmost importance to all of the parties involved: the safety and well-being of . . . children." *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1231 (11th Cir. 2023). As in similar litigation pending around the country, however, "there is a strong disagreement between the parties over what is best for those children." *Id.* In particular, the parties disagree about how best to address children suffering from "gender dysphoria," a condition arising when children experience distress from an apparent disconnect between their biological sex and their self-perceived gender. "Clinical guidelines" regarding gender dysphoria "suggest that comorbidities, including mental health issues," can often be present in these children. *Id.* at 1217.

Texas is among two dozen States that recognize that as children mature through adolescence and into adulthood, their bodies and minds undergo profound changes that affect both their physical and mental health. These States therefore prevent minors from undergoing irreversible medical treatments for gender dysphoria until they reach adulthood. *See infra* pp.2-5; Tex. Health & Safety Code § 161.702.

Plaintiffs disagree with those legislative judgments, and specifically with how the Legislature has balanced the need to prevent harm to minors who might one day regret irreversible medical interventions against the asserted benefits from such treatments for gender dysphoria. These are precisely the kinds of legislative judgments that the law-making process is designed to settle. But instead, plaintiffs have foisted this essentially legislative question on the courts. The parent plaintiffs claim that because the Texas Constitution guarantees parents' right to control the

upbringing of their children, the Legislature cannot pass regulations regarding what medical procedures may be performed on minors. The physician plaintiffs further insist that the due-course-of-law clause gives doctors a protected right to perform such procedures. And they all claim that S.B. 14 unconstitutionally discriminates on the basis of sex; and even if not, that "transgender status" should be treated as a protected class under the Texas Constitution.

Following an evidentiary hearing, the trial court concluded that S.B. 14 was unconstitutional and issued a temporary injunction preventing state officials from enforcing it. That injunction is superseded during the pendency of this appeal. It should now be dissolved. S.B. 14 plainly comports with our Constitution's various guarantees. The injunction, however, cannot be squared with the text of the Constitution, this Court's precedent, or the evidence of harm that these treatments can cause vulnerable children, this Court should vacate the temporary injunction, reverse the district court's denial of Defendants-Appellants' plea to the jurisdiction, and render judgment dismissing Plaintiffs' claims.

STATEMENT OF FACTS

I. Gender Dysphoria and S.B. 14

Gender dysphoria is understood to "refer[] to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." *Keohane v. Florida Dep't of Corr. Sec'y*, 952 F.3d 1257, 1262 (11th Cir. 2020) (quoting American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013)); *accord* 2.RR.38, 76 (plaintiffs' experts). As

other courts have recognized, "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." *L.W. ex rel. Williams v. Skrmetti*, No. 23-5600, 2023 WL 6321688, at *6 (6th Cir. Sept. 28, 2023). For all the attention it receives (correctly or incorrectly), the condition is relatively rare: "one report shows that the prevalence among the total U.S. population is about 0.6%." Danyon Anderson et al., *Gender Dysphoria and Its Non-Surgical and Surgical Treatments*, Health Psychol. Res. (2022), https://tinyurl.com/NIH-GenderDysphoria. According to recent data, however, "there has been an increase in the prevalence of individuals seeking treatment for gender dysphoria"—particularly among children and adolescents. *Id.*

This growth has led to concern in many States about the quality of the research on how to treat such children; such concerns include the lack of any long-term scientific studies about the impact of medical intervention as a treatment for gender dysphoria on children's overall health. *See, e.g.*, *Skrmetti*, 2023 WL 6321688, at *2-5; *Ecknes-Tucker*, 80 F.4th at 1216-18. More than 20 States have passed legislation limiting such medical procedures on children. *See also, e.g.*, Iowa Code § 147.164; Regulate Experimental Adolescent Procedures Act, H.B. 1125, 2023 Miss. Laws ch. 303; Youth Health Protection Act, S.B. 99, 2023 Mont. Laws ch. 306; N.D. Cent. Code §§ 12.1-36.1-01 through -04; .

Signed into law on June 2, 2023, and effective as of September 1, S.B. 14 responds to those and similar concerns by prohibiting certain medical procedures and treatments when performed "[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." S.B. 14 § 2 (codified as Tex. Health & Safety Code § 161.702). If done for that purpose, it is unlawful to "perform a surgery that sterilizes the child, including," *inter alia*, castration, vasectomy, and hysterectomy; to perform a mastectomy on a child; to "provide, prescribe, administer, or dispense [listed] prescription drugs that induce transient or permanent infertility"; and to "remove any otherwise healthy or non-diseased body part or tissue." *Id.* (codified as Tex. Health & Safety Code § 161.702(1)-(4)).

S.B. 14 contains two express caveats and one express exception. *First*, to avoid any doubt, the prohibition does not apply to "puberty suppression or blocking prescription drugs for the purpose of normalizing puberty for a minor experiencing precocious puberty." *Id.* (codified as Tex. Health & Safety Code § 161.703(a)(1)). *Second*, it does not apply to "appropriate and medically necessary procedures or treatments to a child who: (A) is born with a medically verifiable genetic disorder of sex development" or "(B) does not have the normal sex chromosome structure for male or female as determined by a physician through genetic testing." *Id.* (codified as Tex. Health & Safety Code § 161.703(a)(2)). *Third*, for children who had started receiving such treatment before June 1, 2023, S.B. 14 provides for gradual cessation of the treatment "in a manner that is safe and medically appropriate and that minimizes the risk of complications." *Id.* (codified as Tex. Health & Safety Code § 161.703(b), (c)).

Because S.B. 14 makes performing such procedures a prohibited practice for Texas physicians, *id.* § 4 (codified as Tex. Occ. Code § 164.052(a)(24)), the Texas Medical Board (among other things) "shall revoke the license or other authorization to practice medicine of a physician who" does so, *id.* § 5 (codified as Tex. Occ. Code § 164.0552(a)). S.B. 14 also prohibits the use of public money for prohibited procedures, *id.* §§ 2, 3 (codified as Tex. Health & Safety Code §§ 161.704, .705, Tex. Hum. Res. Code § 32.024(pp)), and permits "the attorney general [to] bring an action . . . to restrain or enjoin [a] person from committing, continuing to commit, or repeating the violation." *Id.* § 2 (codified as Tex. Health & Safety Code § 161.706).

II. Procedural Background

A. Plaintiffs' lawsuit

Plaintiffs brought this pre-enforcement challenge on July 12, 2023. 1.CR.3. They are (1) parents of children who have received and want to continue to receive prohibited procedures, suing on behalf of themselves and their children; (2) three licensed physicians who would like to continue to perform such procedures on children; and (3) two organizations that represent the interests of these groups, PFLAG and GLMA. 1.CR.7-10.

Plaintiffs allege that S.B. 14 violates the Texas Constitution in three ways. *First*, the parent plaintiffs (and PFLAG) argue that S.B. 14 "violat[es]" the "rights of parents to parental autonomy" in violation of the due-course-of-law guarantee in article I, section 19. 1.CR.63-64. *Second*, the physician plaintiffs (along with GLMA) argue that S.B. 14 "deprives" physicians "of their vested property interests in

the[ir] medical licenses" and "infringes upon" their "right to occupational liberty." 1.CR.65-66. *Third*, plaintiffs claim that S.B. 14 "discriminates because of sex" in violation of the Texas Constitution's equality-under-the-law clause, 1.CR.66-68 (citing Tex. Const. art. I, § 3a); and *fourth*, that it "discriminat[es] . . . because of transgender status" in violation of the equal-rights clause, 1.CR.69-71 (citing Tex. Const. art. I, § 3).

Plaintiffs sued the State of Texas, the Office of the Attorney General, the Attorney General, the Texas Medical Board ("TMB"), and the Texas Health and Human Services Commission ("HHSC"). 1.CR.10-12. They sought a temporary injunction prohibiting defendants from enforcing S.B. 14 against anyone at all, not just themselves. 1.CR.72-73; *see* App'x Tab B. Defendants opposed the temporary injunction and filed a plea to the jurisdiction. 3.CR.642-1110; 4.CR.1120-1697.

In support of their claims, plaintiffs relied upon preliminary injunctions against a subset of similar laws passed in other States 1.CR.57-59; *see also* 6.CR.1727, one of which had been affirmed on appeal by the Eighth Circuit, *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022). Three of those preliminary injunctions have now been vacated by the Sixth and Eleventh Circuits, respectively, because no authority supports the challengers' due-process or equal-protection claims under the U.S. Constitution. *See Skrmetti*, 2023 WL 6321688, at *2-5 (Kentucky, Tennessee); *Eknes-Tucker*, 80 F.4th at 1216-18 (Alabama). And earlier this month a federal district court in the Tenth Circuit agreed with the Sixth and Eleventh Circuits when it denied a preliminary injunction based on the same substantive-due-process and equal-protection theories under the U.S. Constitution that plaintiffs raise here under

the Texas Constitution. *Poe v. Drummond*, No. 23-CV-177-JFH-SH, 2023 WL 6516449, at *17 (N.D. Okla. Oct. 5, 2023).[1]

B. The trial court's hearing

Largely without the benefit of this developing case law, the trial court conducted concurrent hearings on the plea to the jurisdiction and the temporary injunction.

1. Plaintiffs put on evidence from expert witnesses and some of their own testimony. Some of the parent plaintiffs testified about their children's history, diagnoses of gender dysphoria, and about medical treatment their children were receiving. *See, e.g.*, 2.RR.26-31, 142-51, 198-208, 211-18. One of their children, who was 16 at the time of the hearing, testified about receiving testosterone injections beginning at age 14 to treat gender dysphoria. 3.RR.9-13, 15-21.

Two of the physician plaintiffs also testified. Dr. Richard Roberts, a pediatric endocrinologist in Houston, 2.RR.161-67, estimated that 10- 20% of his clinical time is spent treating gender dysphoria, 2.RR.164, and described the impact of S.B. 14 on

---

[1] Three of the federal injunctions on which plaintiffs have relied are also destined for reversal in light of the Eleventh Circuit's decision. *See Koe v. Carlson*, No. 1:23-CV-2904-SEG, ECF No. 119 at 1-4 (N.D. Georgia Sept. 5, 2023) (staying preliminary injunction pending reconsideration in light of *Eknes-Tucker*); *Doe v. Ladapo*, No. 4:23-cv-114, ECF 151 at 2 (N.D. Fla. Sept. 11, 2023), *appeal docketed*, No. 23-12159 (11th Cir. June 27, 2023) (denying motion for further preliminary injunction and noting that "[t]he plaintiffs' likelihood of success on the merits is significantly lower now than it was prior to *Eknes-Tucker*"); *cf. Dekker v. Sec., Florida Agency for Health Care Admin.*, No. 23-12155 (11th Cir. June 27, 2023) (concerning Medicaid coverage). The balance of the cited federal injunctions—Arkansas and Indiana—are also on appeal. *K.C. v. Indiv. Members of Med. Licensing Bd. of Indiana*, No. 23-2366 (7th Cir. July 12, 2023); *Brandt v. Griffin*, No. 23-2681 (8th Cir. July 21, 2023).

his practice, 2.RR.169-70. Dr. David Paul—also a pediatric endocrinologist, 2.RR.172-89—spends only six months of the year practicing in a "clinic setting," 2.RR.174, where gender dysphoria treatments makes up "perhaps 5 percent" of his practice. 2.RR.176.

Plaintiffs offered expert testimony from three physicians as well. *First*, they offered Dr. Aron Janssen, a psychiatrist who founded a "gender clinic" in Chicago, who is a co-author of the WPATH standards on which plaintiffs rely. 2.RR.34-38. Discussing those standards, Janssen summarized that "for adolescents with gender dysphoria, we're still recommending therapy for some folks and social supports, and for those for whom it is medically indicated, one would consider puberty blockers or hormones." 2.RR.47.

Second, plaintiffs offered Dr. Daniel Shumer, who serves as medical director for gender-dysphoria clinics in Michigan and has "provided gender-affirming care" to approximately 400 adolescents. 2.RR.75. Plaintiffs offered Dr. Shumer as an expert on gender dysphoria and "the field of pediatric endocrinology." 2.RR.76. He testified that he treats children as young as twelve with GnRH agonists, or "puberty blockers," and that he provides "hormonal intervention such as testosterone or estrogen" to older children. 2.RR.76-79, 2.RR.98-99.

Dr. Shumer described puberty suppression as follows:

> [A]s puberty continues, the child would develop more secondary sex characteristics, those differences that help to identify men versus women; so for men, deeper voice, more body hair, more facial hair, body shape changes; for women, breast shape changes, body shape changes, skin softening. Those secondary sex characteristics are different between males and females due to different hormones.

> GnRH agonists arrest the progression of the production of those hormones. And so in doing that, the child - if puberty is causing distress, that distress would be alleviated. But also, by never developing the secondary sex characteristics associated with the unwanted puberty, in the long term that person would not have to carry those secondary sex characteristics with them for the rest of their life, which would have the potential for long-term harm.

2.RR.81. Dr. Shumer acknowledged that "one must go through some of [one's] endogenous puberty to achieve fertility." 2.RR.86; *compare with* 3.CR.780. He explained that GnRH agonists are used differently as treatment for gender dysphoria than they are for precocious puberty or other conditions. 2.RR.84. When given during a child's natural puberty, the GnRH agonists delay the child's pubertal growth spurt and increase in bone density—consequences that are absent when the same hormones are given to a young child. 2.RR.84; *see also* 3.CR.888-89 (discussing a child's development of bone mass and its indications for future osteoporosis).

Dr. Shumer also described hormone treatments for gender dysphoria in adolescents:

> [W]e're using hormones like testosterone or estrogen to mimic the normal rise of testosterone or estrogen in other people of that gender. So if someone is being prescribed testosterone, we're dosing the testosterone in order to raise the testosterone level up into the normal range for a young person that age. In so doing, very predictably, the development of secondary sex characteristics would follow similar to other young men that age; and similarly with estrogen, using estrogen, dosing estrogen to mimic the normal rise of estrogen in other young women, young women that age, and then predictably expecting the development of secondary sex characteristics similar to other young women, women that age.

2.RR.88. (The hormones must be administered for the rest of the person's life if these secondary sex characteristics are to be maintained. *See* 3.CR.874.) Dr. Shumer

testified that someone taking these hormones is "less likely" to "ovulate or have a normal sperm count." 2.RR.92-93. He also acknowledged, "[t]here is probably a subset of people that if they are taking testosterone or estrogen for a long enough period of time may have reduction in their fertility," but he dismissed this risk because "there's a big—there's variability in fertility in people in the first place." 2.RR.93.

Dr. Shumer testified that testosterone and estrogen hormones are prescribed to pediatric patients for other purposes, too. 2.RR.88-89. Testosterone is prescribed to boys who are unable to produce sufficient testosterone due to, for example, testicular loss, or who have Klinefelter syndrome (a chromosomal abnormality, *see* 2.RR.235). 2.RR.88-89. Estrogen is prescribed to girls whose bodies cannot make enough of the hormone for various reasons. 2.RR.89.

Third, Dr. Johanna Olson-Kennedy testified as an expert on "the study, research, and treatment of gender dysphoria." 2.RR.112. She described the history of these types of medical interventions, 2.RR.112-13, including recounting that GnRH agonists were first used as puberty blockers for children diagnosed with gender dysphoria in the 1990s at a clinic in the Netherlands. 2.RR.113, 118. Dr. Olson-Kennedy also discussed the field of research on such treatments, and reasoned that there are no randomized controlled trials because "it is highly unlikely that anyone would make a decision to participate in a study where they might be randomized to not getting treatment." 2.RR.115-16. Regarding the process of diagnosing gender dysphoria, Dr. Olson-Kennedy acknowledged that the condition has no physical manifestation, and that there is no "physical test to prove or

disprove" a person's "experience of having an incongruent gender identity." 2.RR.135; *accord* 3.RR.66.

2. Defendants also put on evidence, including the testimony of six expert witnesses either live or by declaration, which showed that medical procedures to treat gender dysphoria in children are experimental, come with significant health risks, and can be counterproductive.

First, Dr. Colin Wright, PhD, an evolutionary behavioral ecologist, testified as an expert on biological sex. 2.RR.229-40. He explained that "biological sex refers to the type of reproductive strategy that an individual has," and it cannot be changed. 2.RR.228-29. In anisogamous species—including humans—biological sex is defined by the type of gamete that individual can produce—an individual who produces the larger gamete is called the female, while one "who produce[] the smaller gamete or sperm is called the male." 2.RR.229-30. Because there are "only two gamete types" for a species, there are only two biological sexes. 2.RR.230.

Dr. Wright explained that in human beings, the type of gamete an individual can produce (sperm and ovum, respectively) is determined by his or her chromosomes (typically XY for males and XX for females); one's type of gamete, in turn, results in the production of relatively greater testosterone (males) and estrogen (females), which in turn result in secondary sex-related characteristics such as facial hair (males) or breasts (females). 2.RR.235-40. These secondary characteristics do not "define the sex of an individual," but "are downstream consequences of an individual's sex." 2.RR.235.

Next, Dr. James Cantor, Ph.D., testified as an expert on the scientific research related to treating gender dysphoria in minors. 3.RR.78, 81. Noting that the treatment of gender dysphoria is as-yet a developing field—particularly for minors—he testified that the treatments at issue are experimental and not "medically necessary." 3.RR.116; 4.CR.1205-10. Further, there is no scientific evidence that these treatments reduce the rate of either suicide or suicidality in minors with gender dysphoria. 3.RR.114; 4.CR.1193-96. The eleven cohort studies that have been conducted regarding childhood-onset gender dysphoria show that 61-88% of children desist feeling gender dysphoria over the course of puberty. 4.CR.1182-85; 3.RR.107. Finally, Dr. Cantor testified that the WPATH and Endocrine Society guidelines' conclusions and recommendations relating to the prohibited treatments are not supported by the scientific research. 3.RR.117; 4.CR.1237-39.

Second, Dr. Michael Laidlaw, M.D., an endocrinologist, testified that puberty blockers are not a safe and effective treatment for gender dysphoria. 3.RR.39; 4.CR.1371-72. Dr. Laidlaw explained that there is no medical consensus supporting the use of puberty blockers and cross-sex hormones for the treatment of gender dysphoria in minors, 3.RR.32:; *see* 4.CR.1359, and that puberty blockers are not FDA-approved for the treatment of gender dysphoria in minors, 3.RR.37—a fact that is undisputed. Among their many risks, Dr. Laidlaw explained, puberty blockers can cause infertility, sexual dysfunction, osteoporosis, and psychosocial underdevelopment. 3.RR.35-36; *see* 4.CR.1326-36. They also can be counterproductive because they interfere with natural desistance of gender dysphoria—that is, children no longer identifying their gender identity to be

different than their biological sex. 4.CR.1316, 1336-37. Dr. Laidlaw further testified that some effects of puberty blockers prescribed to minors for the treatment of gender dysphoria are irreversible, 3.RR.36-37; 4.CR.1324, and he opined that the potential benefits do not outweigh the risks, 3.RR.37-39.

Third, Dr. Katrina Taylor, LMFT, testified as an expert in clinical psychotherapy and the diagnosis, treatment, and care of gender dysphoria as well as other psychological conditions. 3.RR.140, 142. Dr. Taylor explained that what most people describe as "gender identity" is a personal or spiritual belief about the self, and that individuals experiencing gender dysphoria are experiencing feelings of hatred or revulsion for their bodies that require therapy. 3.RR.144. For children, these feelings can be distress associated with puberty, especially among girls who may experience unwanted, painful, and embarrassing changes to their bodies. 3.RR.157. As a result, she testified that psychotherapy is a safe and effective treatment for minors with gender dysphoria. 3.RR.144. She has noticed patterns among minors with gender dysphoria: they often come from dysfunctional families with marital discord and divorce, or there is trauma in their parents' histories or mental illness in the extended family. 3.RR.148.

Fourth, Dr. Sven Román, M.D., a Swedish child and adolescent psychiatrist. 4.CR.1617, and an expert on the research, study, and practice of child and adolescent psychiatry, 4.CR.1653-63, explained that he does not refer minors with gender dysphoria for the treatments prohibited by S.B. 14 because of (1) the lack of scientific evidence supporting those treatments' safety and effectiveness, and (2) his observation that such patients have other psychiatric conditions in addition to their

professed gender dysphoria. 4.CR.1618. Gender dysphoria often arises as a secondary condition relative to a different and main psychiatric condition, and treatment of that condition frequently alleviates gender dysphoria. 4.CR.1635. Dr. Román also explained that the treatments covered by S.B. 14 could be counterproductive. A person's sense of gender identity can change over time, 4.CR.1630, yet almost all children who are treated with puberty blockers go on to begin cross-sex-hormone treatments, thus transforming what may well have been a temporary state of gender dysphoria into a permanent state of gender dysphoria. 4.CR.1645.

Dr. Román also testified about European countries' experience with gender dysphoria in recent years. In particular, Dr. Román testified that in March 2021, the leading gender clinic in Sweden prohibited many of these treatments on children under 16, and permits them on older adolescents only within a "research setting." 4.CR.1627-28. The decision was based on a systematic review showing the lack of evidence regarding long-term consequences of the prohibited treatments: for example, "[t]hese treatments are potentially fraught with extensive and irreversible adverse consequences such as cardiovascular disease, osteoporosis, infertility, increased cancer risk, and thrombosis." 4.CR.1627-28. The change also reflects concerns about the reasons for the large influx of patients in recent years—an influx that correlates with the advent of the smartphone and rise in social-media use by children. 4.CR.1622-23. Dr. Román explained that treating such procedures as experimental represents the trend in Europe. 4.CR.1628-29. The Swedish National Board of Health and Welfare concluded that "the risks of puberty blockers and

gender-affirming treatment are likely to outweigh the expected benefits of these treatments." 4.CR.1637; *accord* 4.CR.1538-49 (discussing similar developments in England and the National Health System's recent limitations on providing hormone treatments to minors).

Fifth, Dr. Geeta Nangia, M.D., a child and adolescent psychiatrist, discussed her expertise developed through research, study, and practice of child and adolescent psychiatry. 4.CR.1420-22, 1533-35. Dr. Nangia has treated 550 children who met the criteria for gender dysphoria, approximately 350 of whom had their gender dysphoria resolved with time and puberty, and without the need for psychotherapy. 4.CR.1443-44. She has treated approximately 100 children with psychotherapy presenting with adolescent onset gender dysphoria. 4.CR.1445-47. Dr. Nangia explained that minors lack the necessary neurological, psychosocial, and cognitive development to provide informed consent or assent to such treatments. 4.CR.1452-85.

Instead, Dr. Nangia has treated her patients with exploratory, supportive, and family therapy. 4.CR.1447. She testified that children with gender dysphoria benefit tremendously from therapy—particularly psychodynamic therapy, 4.CR.1448-49, which "focuses on unconscious processes as they are manifested in the client's present behavior." Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Brief Interventions and Brief Therapies for Substance Abuse Ch. 7 – Brief Psychodynamic Therapy (1999), https://tinyurl.com/Psycholdynamic. In such therapy, the goal is to promote "self-awareness and understanding of the influence of the past on present behavior." *Id.*

Defendants put on evidence that the "consensus" to which plaintiffs' point is the result of activist capture and market motivations, not rigorous scientific inquiry. *See* 4.CR.1536-1604. Even the Dutch clinic that first used puberty blockers for gender dysphoria in the 1990s was more conservative than gender clinics and physicians in the United States today. 4.CR.1542-43, 1571, 1587, 1628, 1136. "In the short span of a decade, psychiatrists, psychologists, pediatricians, and their patients have been pressed both to think about and to treat child and adolescent dysphoria in one 'correct' manner." 4.CR.1571; *see also* 4.CR.1574-75. Researchers who question such gender-transitioning procedures are fired or ostracized, 4.CR.1574-80, while clinics performing gender-transitioning procedures for patients who want them have grown their businesses astronomically, 4.CR.1571-73.

Fact witnesses described not only the damage the medical interventions prohibited by S.B. 14 can do to children and adolescents, but also the social pressure that can lead vulnerable youths to believe that such intervention is the solution to feelings of depression or anxiety. For example, Emelie Schmidt is a woman who experienced depression, anxiety, and what was diagnosed as rapid-onset gender dysphoria as a minor. 4.CR.1664; 3.RR.251:16-20. At age 14, she joined an online transgender community, where others encouraged and affirmed her feelings of gender dysphoria. 3.RR.247:17-248:13, 251:16-25; 4.CR.1664-66. Emelie testified that she was never more suicidal and depressed than during this time. 4.CR.1665; 3.RR.251:6-9. She socially transitioned at school, but she did not undergo any medical treatments. 3.RR.249:3-15; 4.CR.1666-67.

When Emelie began to spend less time online, her feelings of gender dysphoria began to subside, and she began to question whether she was truly transgender. 3.RR.250:2-18; 4.CR.1667. When she conveyed these changes to her online community, rather than celebrate that she was no longer experiencing acute mental distress, her so-called friends bombarded Emelie with hatred, accused her of trying to erase the transgender community, and told her that she should die. 4.CR.1667. Emelie eventually left the online transgender community, and her feelings of gender dysphoria desisted. 4.CR.1666-67.

Another witness, Soren Aldaco, is also a woman who was diagnosed with gender dysphoria as a minor. *See* 3.RR.255. Like Emelie, Soren was introduced to the transgender community through the internet. 3.RR.255:. While hospitalized for a psychiatric episode at age 15, she began to "identify as transgender" at the suggestion of a psychiatrist. 3.RR.255-56. She was diagnosed with gender dysphoria, along with autism, major-depressive disorder, social rejection and exclusion, general anxiety, and obsessive-compulsive disorder. 3.RR.256-57. After "attending a transgender youth support group," Soren "was prescribed testosterone by a psychiatrist in that support group who prescribed hormones for many children and adults in that support group." 3.RR.257.

Although testosterone initially made Soren feel "high" and very engaged, over time she began to have complications like joint pain, brain fog, and hot flashes. 3.RR.258:3-24. At one time she was taking 11 different medications to manage these side-effects. *Id.* She stopped engaging in any of her prior interests and became obsessed with her gender identity. *Id.* Shortly after her 19th birthday, Soren had a

double mastectomy, 3.RR.257, which brought further severe medical complications, 3.RR.258-59. Her nipples, which had been surgically grafted back onto her body, were peeling off, and she had extensive bruising. 3.RR.259. Eventually, Soren had to go to the hospital where the incisions were reopened and a drain was inserted. 3.RR.529.

Soren "detransitioned" just six months later. 3.RR.257:25-258:2. She continues to struggle with chest pain, pain in her mastectomy scars, vaginal dysfunction, hypothyroidism, hypoglycemia, idiopathic hypersomnia, and chronic-fatigue. 3.RR.260-61. She testified that she wishes she had never received these treatments and had instead received psychotherapy. 3.RR.263, 267-68. "I realized," she explained, "that I had been sold [a] lie that that was the only way forward when in fact it was not the only way forward, and it caused me a lot of other problems on top of the ones that I was already experiencing." 3.RR.260.

Defendants also offered the accounts of parents whose children—like Emelie and Soren—were diagnosed as minors with gender dysphoria. For example, defendants offered the account of a mother who felt pressured by doctors to consent to medical intervention, rather than first pursuing therapy for her daughter who announced she was a transgender male at age 16. 4.CR.1670-74. Another mother described her prepubescent daughter's temporary symptoms of gender dysphoria, which desisted by the time her daughter started sixth grade. 4.CR.1676-79. Parents also described the negative influence of the online transgender community on their children as they struggled with anxiety and depression during puberty. 4.CR.1682-83, 1692-94.

C. The trial court's order

On August 25, 2023, the trial court denied defendants' plea to the jurisdiction, 7.CR.2148-49, and entered a statewide temporary injunction prohibiting defendants from "enforcing" S.B. 14's prohibitions in any way, including as to persons not parties to the case, 7.CR.2150-56. Defendants appealed directly to this Court because the injunction was granted on the ground of the constitutionality of a state statute. Tex. Gov't Code § 22.001(c). The Court has noted probable jurisdiction and set argument for January 30, 2024. *See* Orders Pronounced Sept. 15, 2023.

Defendants' notice of appeal superseded the trial court's temporary injunction. Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. R. App. P. 29.1(b). Plaintiffs filed a motion for temporary relief, asking this Court to "use its inherent powers and its authority under Rule 29.3 to . . . reinstat[e] the terms of the temporary injunction issued by the trial court." Emergency Mot. for Temp. Relief at 27 (Aug. 28, 2023). The Court denied that motion. *See* Orders Pronounced Aug. 31, 2023.

Standard of Review

The Court reviews an order denying a plea to the jurisdiction de novo. *Presidio ISD v. Scott*, 309 S.W.3d 927, 929 (Tex. 2010). An order granting a temporary injunction is reviewed for an abuse of discretion. *TEA v. Hous. ISD*, 660 S.W.3d 108, 116 (Tex. 2023). Under this standard, the Court "defer[s] to the trial court's factual determinations if they are supported by evidence, but review[s] legal determinations de novo." *Haedge v. Cent. Tex. Cattlemen's Ass'n*, 603 S.W.3d 824, 827 (Tex. 2020) (per curiam) (quotation marks omitted).

Summary of the Argument

I. The temporary injunction and plaintiffs' claims alike rely on a variety of fatal legal errors. Chief among them is that plaintiffs have not alleged any viable claim that S.B. 14 violates the Texas Constitution. As with many other plaintiffs pursuing similar claims across the country, plaintiffs' primary theory here is that by regulating what medical treatments may be performed on minors, the Texas Legislature has impermissibly interfered with the fundamental rights of both parents and physicians. These claims fail because, even if Texas's due-course-of-law provisions provide substantive legal rights, they certainly do not protect a form of medical care that was unfathomable to most when they were ratified as part of the Texas Constitution of 1876. Parental rights do not create an exemption from otherwise-applicable regulation of the medical profession, and physicians do not have due-course protected rights to perform these procedures as part of their medical licenses. Plaintiffs' equal protection claims also fail because as a growing number of courts have recognized, health-care regulations such as S.B. 14 do not discriminate on the basis of sex, and transgenderism is not a protected class.

II. Where "a probable right to relief is lacking," the Court "need not consider . . . whether the plaintiffs have" established the other elements on which they bear the burden of proof. *In re Abbott*, 628 S.W.3d at 288, 294 n.8 (citing *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 917 (Tex. 2020) (per curiam); *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567-68 (5th Cir. 2020) (per curiam)). But plaintiffs have not, in any event; indeed, the district court lacked subject-matter jurisdiction. After all, plaintiffs' only route around the defendants'

sovereign immunity is the limited waiver this Court has found in the text of the Uniform Declaratory Judgment Act. 1.CR.62-63. Reliance on that waiver, however, requires that the claims be facially valid, which they are not because the Texas Constitution does not protect the putative rights plaintiffs seek to vindicate.

Even beyond these several injunction-dispositive reasons, the Court should still vacate the injunction and dismiss at least in part because the case presents additional jurisdictional problems. *First*, certain of the defendants do not fall within the limited waiver of sovereign immunity found in the UDJA. *Second*, plaintiffs lack standing to pursue several of the claims they raise. Standing is a claim-by-claim analysis, and at least one plaintiff must have standing for every claim pursued and every form of relief sought in the complaint. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). Plaintiffs fail to meet this obligation because (1) this Court has never recognized the theory of third-party standing asserted by the physician and organizational plaintiffs, (2) their complaints regarding state funding do not represent a cognizable injury, and (3) no plaintiff has asserted a desire to obtain some of the procedures that S.B. 14 prohibits.

Finally, the statewide temporary injunction was overbroad and procedurally improper. A court can and should issue only temporary injunctive relief sufficient to remedy the demonstrated harm of the plaintiffs. Here, even if the plaintiffs had demonstrated cognizable harm (and they have not), the trial court went too far in prohibiting the State from enforcing S.B. 14 anywhere, against anyone, in any circumstances. Such a sweeping injunction cannot be justified by reference to the physician plaintiffs, who seek to treat patients who have chosen not to sue, because

the temporary injunction will not prevent the putative chill they feel in performing these procedures as physicians due to the threat of disciplinary action. Because the statute of limitations for disciplinary action far exceeds the likely extent of this lawsuit, only a permanent injunction can remove that chill. The temporary injunction does nothing to redress the harm alleged, so principles of equity will not allow its issuance to the prejudice of the State's inherent right to enforce its laws.

ARGUMENT

I. Plaintiffs Failed to Bring a Facially Valid Constitutional Challenge to S.B. 14—Let Alone Demonstrate a Probability of Relief.

Try as they might, plaintiffs have not identified a right to obtain or perform the prohibited medical procedures that is subject to strict scrutiny under article I, section 19's due-course-of-law clause, and S.B. 14 easily passes rational-basis review. Nor can plaintiffs base an equality-under-the-law violation on a statute that distinguishes between types of medical procedures, not the sexes, and is supported by a rational basis. This failure is fatal twice over: it renders the trial court's temporary injunction legally defective, and it deprives the courts of jurisdiction for want of a route around defendants' sovereign immunity. *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives*, 647 S.W.3d 681, 698 (Tex. 2022).

A. Parents do not have a constitutional right to have gender-transitioning procedures performed on their children.

Plaintiffs' primary theory is that by regulating what medical treatments may be performed on minors, the Texas Legislature has impermissibly interfered with the fundamental rights of parents. 1.CR.46-48. Plaintiffs rely on parents' general right

"to make decisions concerning the care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality op.); *see* 1.CR.46 (citing *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)), which has long been recognized as protected by the federal Constitution's due-process clause, U.S. Const. amend. XIV, and Texas law, *see In re A.M.*, 630 S.W.3d 25 (Tex. 2019) (Blacklock, J., concurring in the denial of petition for review). But no authority supports plaintiffs' contention that this general proposition provides a substantive right to obtain these medical procedures. As the Sixth Circuit put it, "becoming a parent does not create a right to reject democratically enacted laws." *Skrmetti*, 2023 WL 6321688, at *9.

1. This Court interprets the Texas Constitution to give effect to the plain meaning of the text as it was understood by those who ratified it. *Sears v. Bayoud*, 786 S.W.2d 248, 251 (Tex. 1990); *accord Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992). Plaintiffs cite article I, section 19's due-course clause, which provides: "No 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." 1.CR.46; *see also* 1.CR.63-64.

The clause has remained unchanged since Texas adopted its current constitution. *LeCroy v. Hanlon*, 713 S.W.2d 335, 340 (Tex. 1986).[2] Because "the constitutional language . . . means to-day what it meant . . . when the Constitution was adopted," the relevant question is what the due-course provisions meant in

[2] *See* Tex. Legislative Council, *Amendments to the Texas Constitution Since 1876* (May 7, 2022), https://tlc.texas.gov/docs/amendments/Constamend1876.pdf.

1876. *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1012 (Tex. 1934); *see also Van Dyke v. Navigator Group*, 668 S.W.3d 353, 359 (Tex. 2023); *Booth v. Strippleman*, 61 Tex. 378, 380 (1884). When answering that question, "[l]egislative construction and contemporaneous exposition of a constitutional provision is of substantial value." *In re Abbott*, 628 S.W.3d at 293.

Plaintiffs do not contend that the original meaning of the due-course clause includes a right to provide one's children with puberty-delaying treatment and hormone therapy for gender-transitioning, or the other prohibited medical interventions. They have identified no judicial decisions, legislative enactments, or other contemporaneous evidence suggesting that the Texans who ratified the Constitution of 1876 understood it to prevent the Legislature from prohibiting such medical procedures on children, even with the consent of their parents. For good reasons: their own witness acknowledged that these medical interventions are late–twentieth-century innovations. *Supra* p.10.

Indeed, article I, section 19's due-course-of-law clause likely does not protect substantive legal rights at all. As four justices of this Court recently observed, "the scope of the due-course clause [remains] an open question." *Tex. DSHS v. Crown Distrib. LLC*, 647 S.W.3d 648, 670 (Tex. 2022) (Young, J., concurring). As defendants-appellants have discussed, text and history suggest that the due-course-of-law provisions in article I, section 13 and 19 provide procedural, rather than substantive, protections. Resp. to Emergency Motion for Temp. Relief at 17-22 (Aug. 30, 2023).

The Court need not resolve that question to decide this case, however. Parents' historic rights "to the custody and care of their children" do *not* extend to "ill treatment or cruelty," or even an absolute right to "act[] in a manner injurious to the morals or interests of [one's] children." 2 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America § 1341 (2d ed. 1839). In S.B. 14, the Legislature has determined that as a matter of Texas public policy, the prohibited gender-transitioning treatments are too risky to be performed on children, who lack the maturity and cognitive development necessary to appreciate their long-term effects. *See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 665 (Tex. 2008) ("The Legislature determines public policy through the statutes it passes.").

2. Nor can plaintiffs show that federal courts have recognized these medical treatments to be among the "'select list of fundamental rights that are not mentioned anywhere in the Constitution.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022). Assuming the federal substantive-due-process framework even applies to the due-course clause, *cf. Crown Distrib.*, 647 S.W.3d at 664 (Young, J., concurring) (explaining that these protections are *not* identical), an unenumerated right is protected as fundamental only where it is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citing, *inter alia*, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The doctrine requires a reviewing court to be "mindful of the reality that substantive due process is 'a treacherous field,' and [to be] appreciative of the risk that comes with it—loss of democratic control over public

policies that the people never delegated to the judiciary." *Skrmetti*, 2023 WL 6321688, at *7 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)).

When applying the federal analysis to a request to recognize an unenumerated fundamental right, it does not suffice to cite parents' general right to direct their children's upbringing. Instead, this analysis requires the plaintiff (and ultimately the Court) to give "a 'careful description' of the asserted fundamental liberty interest," and show that the *particular* interest is "deeply rooted" in "history and tradition." *Glucksberg*, 521 U.S. at 720-21. "Level of generality," after all, "is everything in constitutional law," *Skrmetti*, 2023 WL 6321688, at *9. Carefully described, the interest the parent plaintiffs assert is a right to obtain the medical procedures that S.B. 14 proscribes as treatments for their children's gender dysphoria. *See Glucksberg*, 521 U.S. at 724; *see* 1.CR.4. A growing number of federal courts have rejected the same argument in due-process challenges to materially identical laws.

As the Eleventh Circuit explained, Supreme Court precedent "does not at all suggest that parents have a fundamental right to direct a particular medical treatment for their child that is prohibited by state law." *Eknes-Tucker*, 80 F.4th at 1223 (analyzing, *inter alia*, *Parham v. J.R.*, 442 U.S. 584 (1979)). Rather, "all of the cases dealing with the fundamental parental right reflect the common thread that states properly may limit the authority of parents where 'it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.'" *Id.* at 1224 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972)). As a result, a preliminary injunction prohibiting enforcement of Alabama's analogue to S.B. 14 could not be sustained. *See id.* at 1212-15, 1218-19, 1231.

The Sixth Circuit said the same, agreeing that no fundamental right is infringed by Kentucky and Tennessee's materially identical laws, and that the laws easily satisfy rational-basis review. *Skrmetti*, 2023 WL 6321688, at *3-5, 7. "There is a long tradition of permitting state governments to regulate medical treatments for adults and children." *Id.* at *8. The court explained:

> State and federal governments have long played a critical role in regulating health and welfare, which explains why their efforts receive a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). State governments have an abiding interest "in protecting the integrity and ethics of the medical profession," *Glucksberg*, 521 U.S. at 731, and "preserving and promoting the welfare of the child," *Schall v. Martin*, 467 U.S. 253, 265 (1984). These interests give States broad power, even broad power to "limit[ ] parental freedom," *Prince v. Massachusetts*, 321 U.S. 158 (1944), when it comes to medical treatment, *cf. Watson v. Maryland*, 218 U.S. 173, 176 (1910).

Id. at *7 (some internal citations omitted). The longstanding role of federal regulatory agencies also refutes the claimed right, the Sixth Circuit reasoned: "Neither doctors, adults, nor their children have a constitutional right to use a drug that the FDA deems unsafe or ineffective," and "[t]hat is true even if the FDA bars access to an experimental drug that a doctor believes might save a terminally ill patient's life." *Id.* at *8 (citing *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703, 706 (D.C. Cir. 2007) (en banc)).

The Sixth Circuit rejected the plaintiffs' contention that parents' general right to direct their children's upbringing subjects such regulations to strict scrutiny:

> This country does not have a custom of permitting parents to obtain banned medical treatments for their children and to override contrary legislative policy judgments in the process. Any other approach would not work. If

> parents could veto legislative and regulatory policies about drugs and surgeries permitted for children, every such regulation—there must be thousands—would come with a springing easement: It would be good law until one parent in the country opposed it.

Id. at *9. Put another way, both here and in *Skrmetti*, plaintiffs "overstate the parental right by climbing up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children—that the case law and our traditions simply do not support." *Id.*

Plaintiffs, like the challengers in the Sixth Circuit, "insist that these treatments are not new and do not involve experimental care." *Skrmetti*, 2023 WL 6321688, at *10; *see* 1.CR.6 (relying on what plaintiffs describe as "well-established, evidence-based clinical practice guidelines"). This Court should reject that argument just as the Sixth Circuit did. "Even if that were true," the court explained, "that alone does not give parents a fundamental right to acquire" such treatments. *Id.* "As long as it acts reasonably, a state may ban even longstanding and nonexperimental treatments for children." 2023 WL 6321688, at *10. And in any event, the claim that these treatments are not new is unsupportable on this record, where the witnesses of both sides testified that these treatments are of recent vintage and are still being studied. *Supra* p.8-16.

3. Because no fundamental right is at issue, the rational-basis test applies to this type of substantive-due-course challenge. *See, e.g.*, *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 65 (Tex. 2007) (per curiam); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996). S.B. 14 easily meets that low bar, which requires only that a law be rationally related to a

legitimate state interest. *Barshop*, 925 S.W.2d at 633; *see also Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 792 (Tex. 2016). The long-term risks of gender-transition medical procedures are well documented, while the benefits to children of puberty suppression or hormone treatments, if any, are unknown. *See supra* pp.8-18.

Indeed, the State's authority to regulate is particularly strong "in areas of 'medical and scientific uncertainty.'" *Skrmetti*, 2023 WL 6321688, at *7 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). "In that setting, courts face two risks of error, not just one." *Id. First*, there is the risk inherent in any substantive-due-process claim: "that the[courts] will assume authority over an area of policy that is not theirs to regulate." *Id. Second*, there is the risk "that they will impose a constitutional straightjacket on legislative choices before anyone knows how that 'medical and scientific uncertainty' will play out." *Id.*

Here, respecting the Legislature's role as policymaker "is critical in view of two realities": "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." *Id.* at *6. "Prohibiting citizens and legislatures from offering their perspectives on high-stakes medical policies, in which compassion for the child points in both directions, is not something" the judiciary should hasten to do. *Id.* Given this scientific and legislative reality, the parent plaintiffs' due-course claim is facially invalid and thus barred by defendants' sovereign immunity. *See MALC*, 647 S.W.3d at 698.

Plaintiffs have asserted that S.B. 14 lacks a rational basis because, in their view, it was "motivated and justified by Texas lawmakers' anti-transgender animus."

1.CR.25; *see also* 6.CR.1748-50. Even assuming plaintiffs have accurately characterized the legislators' statements they cite (and they have not), that theory fails on its face. *First*, statements by individual lawmakers do not show the collective intent of the Legislature. *See Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136-37 (Tex. 2018).

Second, plaintiffs cannot satisfy the doctrine they rely upon. To be sure, on a few occasions the U.S. Supreme Court has concluded a state law fails rational-basis review because it "lack[ed] any purpose other than a bare . . . desire to harm a politically unpopular group." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 632 (1996)). The inquiry is not subjective, however. That Court still looks to whether the law has a "discern[able] relationship to legitimate state interests" or, instead, that it is "inexplicable by anything but animus." *Id.* at 2420-21. The Sixth Circuit rejected the same animus-based argument:

> The key problem is that a law premised only on animus toward the transgender community would not be limited to [children]. The legislature plainly had other legitimate concerns in mind. A fair-minded legislature could review the evidence in the area and call for a pause, demanding more proof that these procedures are safe before continuing on the path the plaintiffs propose. Neither risk aversion nor a fair-minded policy dispute about the best way to protect children shows animus.

Skrmetti, 2023 WL 6321688, at *19. The same could be said about S.B. 14.

4. Even if plaintiffs pleaded a facially valid claim, the temporary injunction was in error. To establish a right to a temporary injunction, plaintiffs must demonstrate: "(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). As a result, plaintiffs needed to do more than plead plausible facts; they had to offer evidence "that the claims will probably succeed on the merits." *Anti-Defamation League*, 610 S.W.3d at 917.

Plaintiffs are not likely to show that S.B. 14 lacks a rational basis. Rational-basis review "does not require the Legislature to show that its understanding of the record before it is infallible"—only that it is reasonable. *Tex. Small Tobacco Coal.*, 496 S.W.3d at 792. That standard is satisfied so long as the Legislature "rationally could have believed" the statute would promote its objective. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 640 (Tex. 2008).

S.B. 14 easily withstands that review. The State has a substantial—indeed, a "compelling"—interest in "safeguarding the physical and psychological well-being of [children]." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *accord State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 696 (Tex. 1984) (holding that "the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm"). After all, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince*, 321 U.S. at 168. Accordingly, the United States Supreme Court and this Court have consistently sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Corpus Christi People's Baptist Church*, 683 S.W.2d at 695-97.

The State offered extensive evidence that S.B. 14 is rationally related to that interest, including testimony from numerous experts showing that S.B. 14 serves that interest by preventing vulnerable young people from being pressured into agreeing to unproven, irreversible medical interventions which might actually exacerbate their feelings of emotional distress and prolong their gender dysphoria. *Supra* pp.11-18. Plaintiffs and their contrary experts clearly disagree, but that is a policy dispute for the Legislature—not this Court. *See Bell*, 95 S.W.3d at 264.

Indeed, the State offered evidence establishing that S.B. 14 is sufficiently tailored to achieving that compelling interest to survive strict scrutiny. The prohibited medical procedures subject children to potentially life-altering side effects, including infertility, sexual dysfunction, erythrocytosis, diminishing bone density, and damage to psychosocial development. *See supra* pp.10-15. And they do so at an age where the patient necessarily cannot legally consent because children—even adolescents—lacks the cognitive and emotional maturity to appreciate the long-term significance of these effects. S.B. 14 is narrowly tailored; it is limited to minors and provides a transition period for children who were already receiving a prohibited treatment. *See* Tex. Health & Safety Code § 161.703(b), (c). Because the record shows that parents often feel pressured to consent to the prohibited procedures from a variety of social forces—even when they would prefer more conservative approaches such as psychotherapy or watchful waiting—and physicians have every incentive to provide affirmative treatments instead, there are no less restrictive means to preserve the State's compelling interest. *E.g.* 4.CR.1672-76. As a result,

regardless of the level of constitutional scrutiny, the parent plaintiffs have not shown a probability of success on the merits on their due-course-of-law claim.

B. Doctors do not have a constitutional right to perform gender-transitioning procedures on children.

Nor have the physician plaintiffs shown a facially valid claim that S.B. 14 violates (1) their "property rights in their medical licenses" or (2) their "liberty rights to engage in their occupations." 1.CR.53-56 (capitalization altered); *see also* 1.CR.64-65. They certainly did not establish the probable right to relief necessary for a temporary injunction.

1. S.B. 14 does not infringe on any property right. "The right to practice medicine is a privilege and is not a natural right." *Tex. Med. Bd. v. Wiseman*, No. 03-13-00210-CV, 2015 WL 410330, at *2 (Tex. App.—Austin Jan. 30, 2015, pet. denied) (mem. op.). And, "[a]s 'a general rule,' constitutional due-process protections do not 'extend' to such privileges." *Crown Distrib.*, 647 S.W.3d at 656. Nor do the physicians have a property interest in performing medical procedures that violate public policy. As discussed above, there is a deeply rooted historical tradition of States regulating medical treatments and procedures, including by prohibiting those that are deemed unsafe or where efficacy is in doubt. *See supra* pp.25-28.

S.B. 14 does not deprive the physician plaintiffs of their medical licenses in any event. The physician plaintiffs *can* continue to practice medicine even with S.B. 14 in effect. Dr. Roberts, for example, averred that performing prohibited procedures is "a small portion of [his] medical practices." 1.CR.125. Neither he nor any of the other physician plaintiffs can plausibly claim to be deprived of a lawful occupation as

a physician based on a statute that applies to only "a small portion" of his previous practice.

Plaintiffs have relied on precedent recognizing that a license to practice medicine cannot be taken away arbitrarily. 6.CR.1732-34 (citing, *inter alia*, *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965)). This precedent, however, stands for the proposition that the due-course clause provides *procedural* protection against the arbitrary deprivation of a medical license. *See Crown Distrib.*, 647 S.W.3d at 669 (Young, J., concurring) ("[T]he due-course clause operates independently—to protect any citizen from an unfair trial or governmental proceeding."). These cases do not help the physician plaintiffs because they do not contend the Texas Medical Board's procedures for disciplinary action fail to satisfy due course of law. If the Texas Medical Board should need to take disciplinary action based on a violation of S.B. 14, the physician in question would receive notice and an opportunity to be heard, *see, e.g.*, Tex. Occ. Code § 164.005, along with a right to judicial review and all manner of other procedural protections, *see generally* Tex. Occ. Code ch. 164. Precedent recognizing procedural-due-course rights provides no support for a substantive-due-course claim.

2. The physician plaintiffs' claim that S.B. 14 infringes a liberty interest "to engage in their occupations" also fails. 1.CR.53. This Court has squarely held that "[t]he due-course clause is not so broad as to protect every form and method in which one may choose to work or earn a living, and some work-related interests do not enjoy constitutional protection at all." *Crown Distrib.*, 647 S.W.3d at 654.

Instead, the clause's protections for "work-related interest[s]" do not extend beyond "*common* occupations" and "*lawful* calling[s]." *Id.*

Even leaving aside whether performing medical interventions invented in the 1990s that are not FDA-approved—and that many in other Western countries have deemed experimental—can be considered a "common occupation," plaintiffs have not plausibly alleged or shown that S.B. 14's regulation of the practice of medicine is arbitrary. Texas has a long history of regulating the practice of medicine—going back to the Medical Practice Act of 1837. Act approved Dec. 14, 1837, 2nd Cong. R.S., 1838 Repub. Tex. Laws 39, *reprinted in* 1 H.P.N Gammel, The Laws of Texas 1822-1897 at 1381 (Austin, Gammel Book Co. 1898). S.B. 14 carries on that tradition by prohibiting certain procedures that the Legislature has determined are too risky to justify the uncertain potential benefits, while leaving physicians free to treat gender dysphoria through other means, including mental health care and watchful waiting—treatments that plaintiffs' experts recognize. 2.RR.98. The record contains ample evidence of the many risks of the medical interventions prohibited by S.B. 14, *see supra* pp.10-18, so there is no validity to plaintiffs' contention that S.B. 14 arbitrarily deprives the physician plaintiffs' right to practice their occupations.

And because S.B. 14 implicates only a small fraction of the physician plaintiffs' practices, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), does not help their claim. *Contra* 6.CR.1734. After all, *Patel* involved an as-applied challenge to a regulation that made it prohibitively expensive for eyebrow threaders to practice their trade at all. 469 S.W.3d at 87-90. The physician plaintiffs' facial challenge to S.B. 14 alleges nothing of the sort. The two endocrinologists

complain instead about the delay of medical procedures—the procedures, after all, are lawful once the patient reaches adulthood—that form a small portion of their respective medical practices.[3] The third physician plaintiff is a psychiatrist, and the 20% of his practice that involves treating minors with gender dysphoria consists of "psychotherapy, psychiatric medication management, and family consultation." 1.CR.41. Plaintiffs have not shown that *any* of this practice is prohibited by S.B. 14. *See* 1.CR.41-42.

C. S.B. 14's prohibitions on particular medical procedures do not offend the Texas Constitution's equality-under-the-law clause.

Finally, plaintiffs have not pleaded a viable claim—let alone shown probable relief—that S.B. 14 violates article I, section 3a. To state an equal-rights claim under the Texas Constitution, Plaintiffs must show they have been "treated differently from others similarly situated" based on one of the Constitution's enumerated classifications. *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) (quoting *TxDOT v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004)). Where no fundamental right or suspect classification is involved, plaintiffs must carry the heavy burden of demonstrating that the law is not rationally related to a legitimate governmental purpose. *Id.* S.B. 14 easily withstands rational-basis review, as discussed above. *See supra* pp.28-32.

---

[3] To the extent their concern is losing business because some children will no longer want gender-transitioning procedures once they reach adulthood, that only underscores the reasonableness of the Legislature's choice to delay such intervention. *E.g.* 4.CR.1316, 1336-37.

To invoke heightened scrutiny, plaintiffs contend that S.B. 14 "draws a classification based on sex in three [putatively] distinct ways": (1) it "speaks in explicitly gendered terms and facially discriminates based on sex"; (2) it "discriminates based on sex stereotypes." 1.CR.48; *see* 1.CR.65-68. These claims fail.

1. Sex

Under this Court's precedent, S.B. 14 is not an impermissible sex-based classification. To assess such a claim, the Court considers whether equality under the law has been denied, whether that denial was because of sex, and if so—and only if so—whether the law is narrowly tailored to serve a compelling governmental interest. *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 257 (Tex. 2002).

This Court has long recognized that the Texas Constitution is not offended by prohibitions on medical procedures merely because those procedures are performed on individuals of one sex only. In *Bell*, the Court rejected such a challenge to prohibitions on public funding for certain abortions. 95 S.W.3d at 258. The Court explained that "[t]he classification here is not so much directed at women as a class as it is abortion as a medical treatment." *Id.* As the *Dobbs* Court put it, the regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" 142 S. Ct. at 2245-46 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496, n.20 (1974)).

S.B. 14 is not. Although S.B. 14 refers to sex because the regulated medical treatments depend on biology, S.B. 14 applies to children of both sexes. As the Sixth Circuit explained:

> Testosterone transitions a minor from female to male, never the reverse. That means only females can use testosterone as a transition treatment. Estrogen transitions a minor from male to female, never the reverse. That means that only males can use estrogen as a transition treatment. These treatments, by biological necessity, are "medical procedure[s] that only one sex can undergo."

Skrmetti, 2023 WL 6321688, at *14 (quoting *Dobbs*, 142 S. Ct. at 2245). Plaintiffs' own expert agrees: that is precisely how the hormone treatments work. *See supra* pp.8-10. So S.B. 14's references to a particular hormone for treatment of gender dysphoria in males and females, respectively, do not render it a constitutionally suspect classification based on sex. *See Bell*, 95 S.W.3d at 257; *accord Eknes-Tucker*, 80 F.4th at 1227 (explaining that Alabama's statute "is best understood as a law that targets specific medical interventions for minors, not one that classifies on the basis of any suspect characteristic under the Equal Protection Clause.").

Plaintiffs' equal-treatment challenges to S.B. 14 fail because, like other States' laws, the statute "regulate[s] sex-transition treatments for all minors, regardless of sex." *Skrmetti*, 2023 WL 6321688, at *13. "Under [S.B. 14], no minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another." *Id.* As the Sixth Circuit reasoned:

> Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other. It does not include one sex and exclude the other. It does not bestow benefits or burdens based on sex. And it does not apply one rule for males and another for females.

Id. (internal citations omitted). The Eleventh Circuit reached the same conclusion, reasoning that Alabama's "statute does not establish an unequal regime for males and females" and "refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based." *Eknes-Tucker*, 80 F.4th at 1228.

Just as legal classifications for abortion as a medical procedure were not discrimination based on sex, S.B. 14's classifications are not based on boys or girls as a class, but on the prohibited procedures "as a medical treatment" for gender dysphoria. *Bell*, 95 S.W.3d at 258. "Far from 'command[ing] dissimilar treatment for [boys] and [girls] who are similarly situated,'" S.B. 14 treats "boys and girls exactly the same for constitutional purposes—reasonably limiting potentially irreversible procedures until they become adults." *Skrmetti*, 2023 WL 6321688, at *15.

Plaintiffs' contrary assertion leans heavily on the Supreme Court's interpretation of Title VII's prohibitions on workplace discrimination in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *see* 42 U.S.C. § 2000e-2(a)(1). "If the legislature cannot 'writ[e] out instructions' for determining whether treatment is permitted 'without using the words man, woman, or sex (or some synonym),'" plaintiffs argue, "the law classifies based on sex." 1.CR.48 (quoting *Bostock*, 140 S. Ct. at 1746).

This Court should reject that argument. *Bostock*, of course, is not legally controlling on Texas courts interpreting the Texas Constitution. Under this Court's precedent, if "because of sex" were not self-explanatory (and it is), then the Court's

next step would be to consider the larger context of the amendment to the *Texas Constitution*. *Brown v. City of Houston*, 660 S.W.3d 749, 752 (Tex. 2023). And there is nothing in the larger context indicating that when Texas voters ratified the equality-under-the-law provision in 1972, they understood that term to apply to persons whose "gender identity does not match their gender assigned at birth."

Transplanting *Bostock* onto the Texas Constitution would not make sense. For one thing, "Title VII focuses on but-for discrimination," meaning that evidence of disparate impact can be sufficient to show a violation. *Skrmetti*, 2023 WL 6321688, at *16; *see Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). This Court has never treated the Texas Constitution to prohibit laws based on a mere disparate impact on a protected class. *See Bell*, 95 S.W.3d at 259-60. (And plaintiffs did not even show disparate impact on females over males, or vice versa.) For another, "[i]mporting the Title VII test for liability . . . would require adding Title VII's many defenses to the Constitution: bona fide occupational qualifications and bona fide seniority and merit systems, to name a few." *Skrmetti*, 2023 WL 6321688, at *17. That would make little sense in the context of the Texas Constitution's general provisions requiring equality under the law.

And *Bostock* rests on faulty reasoning anyway. For many decades after Title VII was enacted, no court or government agency understood "because of sex" to mean anything other than biological sex, or "the division of living things into two groups, male and female, based on biology." *Bostock*, 140 S. Ct. at 1765 (Alito, J., dissenting). Nor would the general public have read it to include gender identity or sexual orientation—concepts that were respectively unknown and criminalized. *See id.* at

1756-58, 1766-73 (Alito, J., dissenting). Even today, "the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'" *Id.* at 1755; *see id.* at 1766-73 (Alito, J., dissenting). After all, "[b]oth men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes. And individuals who are born with the genes and organs of either biological sex may identify with a different gender." *Id.* at 1758 (Alito, J., dissenting). This Court should be particularly reluctant to engage in the sort of linguistic updating reflected in *Bostock*'s majority opinion when it comes to Texas's Constitution.

2. "Sex stereotypes"

Plaintiffs' second theory—that S.B. 14 discriminates based on sex stereotypes—is also facially invalid. That theory traces to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality op.), in which four justices reasoned that a Title VII plaintiff may establish unlawful discrimination by showing that her employer acted on the basis of a sex stereotype about, in that case, how a woman should behave. *Id.* at 250-51.

This Court has never recognized such a theory under the Texas Constitution, which unlike the Fourteenth Amendment expressly lists the considerations upon which equal protection "shall not be denied or abridged"—namely, "sex, race, color, creed, or national origin." Tex. Const. art. I, § 3a. To the extent a "sex stereotype" is different than "sex," it is not listed and thus is not included. Unless this Court recognizes such a suspect class, "rational basis review applies." *Skrmetti*,

2023 WL 6321688, at *18; *see Bell*, 95 S.W.3d at 266. And S.B. 14 easily withstands rational basis review. *See supra* pp.28-32.

Even assuming such a theory is viable, S.B. 14 "simply reflects biological differences between males and females, not stereotypes associated with either sex." *Eknes-Tucker*, 80 F.4th at 1229. It is not a stereotype to recognize the biological fact that estrogen promotes female secondary sex characteristics while testosterone promotes male. Plaintiffs' own expert explained as much. *See* 2.RR.81-84. That is why the Eleventh Circuit rejected the sex-stereotype theory, explaining that Alabama's statute "targets certain medical interventions for minors meant to treat the condition of gender dysphoria; it does not further any particular gender stereotype." *Eknes-Tucker*, 80 F.4th at 1229. "Insofar as [it] involves sex, it simply reflects biological differences between males and females, not stereotypes associated with either sex." *Id.*

The Sixth Circuit agreed: "Recognizing and respecting biological sex differences does not amount to stereotyping—unless Justice Ginsburg's observation . . . that biological differences between men and women 'are enduring' amounts to stereotyping." *Skrmetti*, 2023 WL 6321688, at *18 (quoting in *United States v. Virginia*, 518 U.S. 515, 533 (1996)). It did not, and S.B. 14 doesn't either. S.B. 14 "do[es] not deny anyone general healthcare treatment based on . . . stereotypes [about how males and females should behave]; [it] merely den[ies] the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit[s] all of these treatments after they reach the age of

majority." *Id.* "A concern about potentially irreversible medical procedures for a child is not a form of stereotyping." *Id.*

D. "Transgender status" is not a quasi-suspect classification under the Texas Constitution's equal-rights provision.

Finally, plaintiffs contend S.B. 14 discriminates "based on transgender status" and thus violates article I, section 3. 1.CR.69-71. Section 3 provides: "All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Plaintiffs' theory is that "transgender status" should be treated as a "quasi-suspect classification." 6.CR.1728; *see* 1.CR.67. The first fault in that argument is that—like "sex stereotypes"—"transgender status" is not in the Texas Constitution's explicit list of suspect classifications. Tex. Const. art. 1, § 3a. Plaintiffs have not identified any Texas authority suggesting transgender status is nevertheless implicitly subject to special protection under section 3. As a result, S.B. 14 is subject to rational-basis review, which it easily passes. *Supra* pp.28-32.

Treating transgenderism as a suspect class subject to heightened scrutiny under the Constitution would open a host of issues, as "[r]egulation of treatments for gender dysphoria poses fraught line-drawing dilemmas." *Skrmetti*, 2023 WL 6321688, at *18. The Sixth Circuit identified some of these:

> Counseling versus drugs. Puberty blockers versus hormone treatments. Hormone treatments versus surgeries. Adults versus minors. One age cutoff for minors (16) versus another (18). And that's just the line-drawing challenges that accompany treatments for gender dysphoria. What of other areas of regulation that affect transgender individuals? Bathrooms and

> locker rooms. Sports teams and sports competitions. Others are sure to follow.

Id. "Removing these trying policy choices" from the Legislature to this Court "will not solve them and in truth runs the risk of making them harder to solve." *Id.*

And even if transgender status received heightened scrutiny, plaintiffs' claim would fail. Plaintiffs' theory is that S.B. 14 discriminates on the basis of "transgender status" because it prohibits medical interventions when "used to treat transgender adolescents with gender dysphoria," but not "when prescribed to non-transgender patients to treat" medical conditions such as central precocious puberty, primary ovarian insufficiency, or Turner's Syndrome. 1.CR.52-53.

The Constitution does not require the State to treat distinct things as if they are the same, and even plaintiffs' experts agree that these medical conditions are not the same. Gender dysphoria is often accompanied by significant comorbidities such as other mental-health diagnoses. *See supra* pp.12-18. And plaintiffs' own expert acknowledged that puberty blockers are used differently for the treatment of gender dysphoria than for other conditions, and the risks of giving them to a young child to prevent precocious puberty are not the same as the risks of giving them to an older child to prevent natural, or endogenous, puberty. 2.RR.84, 89.

The sex hormones, too, can be used to treat other medical conditions, but "[t]hese distinct uses of testosterone and estrogen stem from different diagnoses and seek different results." *Skrmetti*, 2023 WL 6321688, at *14. "Because the underlying condition and overarching goals differ, it follows that the cost-benefit analysis does too." *Id.* Equal protection "does not require things which are different in fact or

opinion to be treated in law as though they were the same." *Id.* (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *see also id.* at *19 ("A legislature could conclude that treating congenital conditions with puberty blockers and hormones carries less risk than using these drugs to treat gender dysphoria for the purpose of changing an individual's secondary sex characteristics."). Texas can "permit distinct treatments of varying diagnoses," *id.* at *14, without violating its Constitution.

* * *

In sum, S.B. 14 is a regulation of the medical profession designed to protect minor children, which impinges on no fundamental rights. As a result, rational-basis review applies and is easily satisfied. *See supra* pp.28-32. But even if heightened scrutiny applied, S.B. 14 would satisfy that standard too as there is no narrower way to achieve the State's compelling interest in protecting children from irreversible medical conditions when parents—the first line of defense—are themselves subject to substantial pressures to consent. *See, e.g.*, *supra* p.18. Plaintiffs lack a facially viable claim that S.B. 14 violates the Texas Constitution. And at the very least their right to relief is improbable, so the trial court erred in issuing a temporary injunction.

II. The Trial Court Erred in Issuing a Temporary Injunction.

Not only do plaintiffs lack facially valid claims or a probable right to relief on the merits, but numerous jurisdictional defects affect individual claims. As a result, they lack a probable right to relief as to those claims. And even if they could overcome these jurisdictional problems, the trial court's injunction exceeded the scope of its authority to issue equitable relief.

A. Additional jurisdictional defects

1. Sovereign immunity and lack of standing bar claims against the State of Texas and the Attorney General.

If sovereign immunity bars a claim, it is the district court's "duty" to dismiss the suit in order to "ensure that the court itself is functioning in an authorized and properly judicial capacity." *Rattray v. City of Brownsville*, 662 S.W.3d 860, 867 (Tex. 2023). As discussed above, sovereign immunity bars plaintiffs' claims because they are facially invalid. *Supra* Part I. But even if plaintiffs had facially valid claims, their claims against the Attorney General and the State of Texas would be barred.

The UDJA's waiver of immunity for claims challenging the constitutionality of a statute authorizes suit against governmental entities, not *ultra vires* claims against government officials. Under Texas law, an individual government official like the Attorney General does not act *ultra vires* by complying with an unconstitutional law; that is why a challenge to a law's constitutionality is brought against the enforcing agency under the UDJA. *See Patel*, 469 S.W.3d at 77; Tex. Civ. Prac. & Rem. Code § 37.006(b). The claims against the Attorney General must be dismissed.

And plaintiffs do not have standing to sue "the State of Texas": "The State is not automatically a proper defendant in a suit challenging the constitutionality of a statute merely because the Legislature enacted it." *MALC*, 647 S.W.3d at 697. Instead, the UDJA allows a suit against the agency with authority to enforce the law. *Id.* at 698. The claims against the State of Texas must also be dismissed.

2. The physician and organizational plaintiffs are not proper plaintiffs.

a. Physician plaintiffs cannot pursue claims on behalf of their patients.

In addition to suing at least two incorrect defendants, neither physicians nor physician trade groups can invoke federal third-party standing doctrine as a basis to assert constitutional claims on behalf of their patients. *See* 6.SCR.1711-14. Third-party standing doctrine has never been recognized in Texas, and it should not be. Under this Court's precedent, "the standing inquiry begins with determining whether the plaintiff has personally been injured, that is, 'he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.'" *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman*, 369 S.W.3d at 155); *accord Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Thus, to demonstrate standing under Texas law, a plaintiff must be *personally* aggrieved. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008). If a plaintiff lacks an actual or threatened injury, he is not "personally aggrieved," has no personal stake in the litigation, and lacks standing. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-08 (Tex. 2001).

As applied to challenges to the constitutionality of a statute, a plaintiff must (1) "suffer some actual or threatened restriction under that statute," and (2) "contend that the statute unconstitutionally restricts the plaintiff's rights, not somebody else's." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995); *see also Barshop*, 925 S.W.2d at 626. Here, the physician plaintiffs claim that Texas has impermissibly restricted their alleged right to *perform* medical

procedures prohibited by S.B. 14. 1.CR.65-66. But they do not claim that they have suffered the same injuries as their patients or their parents: an inability to *obtain* such treatments. *Compare* 1.CR.53-56, 66, *with* 1.CR.46-50.

Because "[s]tanding is not dispensed in gross," "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Heckman*, 369 S.W.3d at 153 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Because the physician plaintiffs have not been personally aggrieved in the same way their patients allegedly have, they lack the necessary injury to assert their patients' rights.

This Court should decline Plaintiffs' invitation to adopt the federal courts' third-party standing doctrine, under which a litigant may assert the rights of a third party when (1) the litigant has "a close relationship" with the third party and (2) some "hindrance" affects the third party's ability to protect her own interests. *Kowalski*, 543 U.S. at 130 (citations omitted). Doing so would effectively create an exception to the constitutional requirement of a personal injury. *See Garcia*, 893 S.W.2d at 518. And even assuming the physician plaintiffs have the necessary "close relationship" with their established patients, there is no "hindrance" to patients protecting their own interests. As evidenced by this lawsuit, children who seek these medical treatments are more than capable of asserting their rights through their parents (or another next friend), which is the usual means of bringing suit on behalf of a child. In any event, for the reasons discussed above, the physician plaintiffs have not alleged any viable constitutional claim that their patients could assert.

b. The organizations did not establish associational standing.

The organizations lack associational standing because, even to the extent their members have standing, their claims "require[] the participation of individual members in the lawsuit." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993). PFLAG and GLMA contend that participation by individual members is not necessary because all of their members allege the same legal injury—alleged violations of their constitutional rights. 6.CR.1718. But "an injury in law is not an injury in fact." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). And to establish standing to sue in Texas court, a member would have to establish an injury in *fact*, such as by asserting an imminent plan to obtain a prohibited treatment. *See Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692, 696 (Tex. 2021).

As to potential patients for are members of PFLAG, an individual person's injury in fact turns on the medical treatments or procedures that person would obtain if not prohibited by S.B. 14—as plaintiffs' own experts emphasize, diagnosing and treating gender dysphoria is highly individualized. *See* 1.CR.40-41. Under any standard of review, the cost-benefit balancing differs for each procedure—puberty blockers, cross-sex hormones, and surgical interventions, for example, do not pose the same relative risks. As to physicians who are members of GLMA, an occupational liberty claim would require each one to show that S.B. 14 is "so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest" as applied to his or her medical practice. *Patel*, 469 S.W.3d at 87. That is not a showing the GLMA could make on every member's behalf.

Even if the organizations had associational standing, to obtain a preliminary injunction, an organization must submit evidence of injury as to specific members, *see Campaign Legal Center v. Scott*, 49 F.4th 931, 937 (5th Cir. 2022); *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017), and any remedy is limited to the injuries proved, *see, e.g.*, *United Food & Comm. Workers Union Loc. 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996); *Conservation Law Found. of New England, Inc. v. Reilly*, 950 F.2d 38, 43 (1st Cir. 1991). Here, the alleged injuries are specific to individual members, so even if the organizations identified certain members with standing to sue, that could support, at most, an injunction preventing enforcement against those members.

3. Plaintiffs lack a cognizable injury as to certain claims.

Finally, apart from suing two incorrect defendants and listing parties who are not injured, no plaintiff claims to have been injured by two challenged provisions: S.B. 14's prohibitions on public funding and surgical procedures. As injury is the most basic building-block of a justiciable controversy, the court lacks jurisdiction to consider such challenges.

a. Plaintiffs have shown no injury from the prohibition on public funding.

Plaintiffs complain about S.B. 14's prohibitions on public funding for prohibited medical procedures, *see, e.g.*, 1.CR.41-42, 59, and the trial court enjoined HHSC from enforcing these provisions. 7.CR.2155. But plaintiffs nowhere identify a constitutional right to such funding. *Cf.* 1.CR.62-71. Nor have the parent plaintiffs alleged—let alone shown—that they plan to use public programs such as Medicaid or CHIP to pay for medical procedures subject to S.B. 14. It is hard to see how an

injunction can stand where plaintiffs have not even identified—let alone proven—a right to be protected by such an injunction.

At most, plaintiffs point to a declaration from one of the parent plaintiffs stating that she and her husband "have been able to obtain health care coverage for our daughter through our state employee plan and will lose coverage as a result of S.B. 14." 1.CR.106-07, *see also* 1.CR.112. That could, at most, support injunctive relief for that plaintiff—not the statewide injunction that the trial court entered here. But it does not support even that, because HHSC lacks an enforcement role when it comes to state employee health insurance, which is administered by the Employee Retirement System of Texas. *See* Tex. Gov't Code ch. 811. Without some connection to enforcement, this declaration cannot establish standing. *See MALC*, 647 S.W.3d at 697.

It is no response that the physician plaintiffs say some unidentified number of their patients "are on Medicaid" or CHIP. *See* 1.CR.127-28, 179; 2.RR.178. The physician plaintiffs (and their experts) agree that treating gender dysphoria is individualized, *e.g.*, 1.CR.40-41, and acknowledge "gender-affirming care is a small portion of [each of their] medical practice," 1.CR.125; *see also* 2.RR.164, 176. There is no evidence showing an overlap between patients who are "on Medicaid" and patients who would obtain prohibited procedures in the absence of S.B. 14. In the absence of such a link, such generalizations are not enough to support standing to sue, much less show a probable right to injunctive relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("Since [the requirements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each

element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.").

Even if the Court were willing to overlook these defects, this Court has already unequivocally held that a recognized constitutional right to a medical procedure does not carry a concomitant right to have the taxpayers fund the procedure. *See Bell*, 95 S.W.3d at 265 (under the *Roe v. Wade* regime, no constitutional right to public funds for abortion). As a result, even if the Court were to conclude that there is a constitutionally cognizable right to puberty blockers and sex-change operations (and it should not), plaintiffs would have no right to public funds for such treatments. The trial court could not properly enjoin Defendants from enforcing the S.B. 14 public-funding provisions based on a constitutional right that has been held not to exist.

b. None of the plaintiffs established standing to challenge S.B. 14's prohibitions on surgery as a treatment for gender dysphoria.

Plaintiffs also did not establish standing to challenge S.B. 14's prohibitions on surgical procedures such as castration, hysterectomy, vaginoplasty, or mastectomy. *See* S.B. 14 § 2 (codified as Tex. Health & Safety Code § 702(1), (2), (4)). "Absent allegations that plaintiffs will trigger these [provisions] in the near future, they have no standing to challenge them." *In re Gee*, 941 F.3d 153, 1664 (5th Cir. 2019) (per curiam).

The parent plaintiffs do not say their children would obtain a prohibited surgery during the pendency of this lawsuit if S.B. 14 did not prohibit it. One plaintiff parent's declaration states her 16-year-old child "wants to get top surgery, which we

have been discussing as a family," and that "a consultation with a surgeon . . . was canceled after SB 14 passed." 1.CR.100. That is not sufficient to establish standing at the temporary-injunction stage.

The physician plaintiffs also lack standing because they made no showing they plan to perform such procedures on a child. After all, the physician plaintiffs are two endocrinologists and a psychiatrist, 1.CR.39-41, not plastic surgeons. Because their scope of practice would not permit them to perform such surgeries, they are not injured by a legal prohibition against the procedures.

B. The temporary injunction is remedially defective.

Finally, apart from its jurisdictional and merits defects, the temporary injunction is overbroad because it applies beyond the parties before the court. The inclusion of physicians cannot solve this problem because a *temporary* injunction cannot remedy the only alleged injury: the chill putatively caused by the potential for disciplinary action in the future. Moreover, the injunction was entirely unnecessary to do the only thing for which a temporary injunction is proper—maintaining the status quo.

1. A statewide injunction is improper.

Courts generally lack power to "grant[] a remedy beyond what [i]s necessary to provide relief to [the plaintiff]" *Casey*, 518 U.S. at 360; *accord In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated as moot sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (courts lack authority to "enjoin enforcement of [a challenged law] as to anyone other than the named plaintiffs"); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[P]laintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third

parties."); *cf. In re Abbott*, 645 S.W.3d 276, 282 (Tex. 2022) (orig. proceeding) ("Rule 29.3 plainly limits the scope of the available relief to that which is necessary to preserve *the parties'* rights."). Prohibiting state agencies from enforcing the law against non-party physicians is not necessary to protect any *plaintiff's* rights.

Plaintiffs do not contend there are particular non-party physicians against whom enforcement could be enjoined in order to alleviate a plaintiff *parent's* or her *child's* injury, such as by identifying a particular treating physician and showing this physician would perform prohibited procedures on that child if enforcement of S.B. 14 were enjoined. Instead, plaintiffs have argued that injuries to the plaintiff children and parents justify a statewide prohibition on enforcement. But extending an injunction on enforcement to benefit third-party patients or parents, even if they are members of an organizational plaintiff, would be unworkable. Enforcement is with respect to regulated parties—physicians, not parents. An injunction that does not identify which physicians it protects cannot meet the requirement that an injunction "be specific in terms" and describe "the act or acts sought to be restrained." Tex. R. Civ. P. 683. The burden was on the plaintiffs to make the connection to any non-party physicians whose discipline would harm a plaintiff who is actually before the court.

Recognizing that the parents' alleged injuries flow from physicians' unwillingness to violate the law, plaintiffs have attempted to justify a statewide injunction as necessary to "mitigate the fears" of all non-party physicians. Emergency Mot. for Temp. Relief at 36-38. But the "chilling" that causes the injury could not be alleviated by a temporary injunction on enforcement. Only a

permanent injunction could do that. *See Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985) (temporary injunction based on First Amendment "chilling" was improper where "the theoretical chilling . . . stems not from the interim [action], but from the threat of permanent [action], which is not vitiated by an interim injunction"); *accord Ohio v. Yellen*, 539 F. Supp. 3d 802, 821 (S.D. Ohio 2021). The trial court erred in issuing an injunction that could not remedy the injury alleged.

2. Temporary injunctive relief is not necessary to maintain the status quo.

The trial court also erred in issuing a temporary injunction because it was not necessary to maintain the status quo. In this context, the "status quo" is "the last peaceable uncontested status between the[] parties." *Clint ISD v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016). Stripped of plaintiffs' effort to obtain relief beyond the parties before the Court, the status quo is that some minor patients were receiving these treatments; others were not. But S.B. 14 already accounted for that possibility, and it does *not* immediately prohibit preexisting treatments plaintiffs are receiving or performing. It provides for gradual cessation of treatments initiated prior to the date the statute was enacted. *See* Tex. Health & Safety Code § 161.703(b), (c).

To the extent any plaintiff's concern is continuing a treatment or procedure that was initiated between the date the law was enacted (June 1) and the date the law became effective (September 1), that is not the "status quo" recognized by Texas law. Again, this Court begins with a presumption of "compl[iance] with both the United States and Texas Constitutions." *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744,

754 (Tex. 2020). "The party asserting that the statute is unconstitutional bears a high burden to show unconstitutionality.'" *Id.* To prevent unfairness to parties who need time to adjust their behavior, "statutory grace periods are required by our Constitution," absent exception. *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 649 S.W.3d 197, 202 (Tex. 2022). A party cannot use that 90-day grace period, however, to begin a course of conduct that he knows will be forbidden and then insist equity allows him to continue the conduct.

Prayer

The Court should vacate the temporary injunction, reverse the judgment of the district court denying Defendants-Appellants' plea to the jurisdiction, and render judgment dismissing the claims.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Judd E. Stone II
Judd E. Stone II
Solicitor General
State Bar No. 24076720
Judd.Stone@oag.texas.gov

Lanora C. Pettit
Principal Deputy Solicitor General

Natalie D. Thompson
Assistant Solicitor General

Counsel for Appellants

Certificate of Service

On October 16, 2023, this document was served on Kennon L. Wooten, lead counsel for Plaintiffs-Appellees, via kwooten@scottdoug.com.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance

Microsoft Word reports that this document contains 14,937 words, excluding exempted text.

/s/ Judd E. Stone II
Judd E. Stone II