

No. 03-24-00241-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF TEXAS, *et al.*,

Appellants,

v.

PFLAG, INC.,

Appellee.

On Appeal from the 261st Judicial District of Travis County, Texas
Cause No. D-1-GN-24-001276, Hon. Amy Clark Meachum

**APPELLEE'S EMERGENCY MOTION FOR TEMPORARY INJUNCTIVE
RELIEF PURSUANT TO RULE 29.3**

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To the Honorable Justices of the Third Court of Appeals:

Appellee PFLAG, Inc. (“PFLAG”) hereby moves on an emergency, expedited basis for entry of an order providing temporary injunctive relief, pursuant to the Court’s inherent authority and Texas Rule of Appellate Procedure 29.3 (“Rule 29.3”), to preserve the status quo ante in this litigation and to protect PFLAG’s rights until the disposition of the instant appeal.

PFLAG, a private, non-profit membership organization dedicated to creating a just, caring, and affirming world for lesbian, gay, bisexual, transgender, and queer (“LGBTQ+”) people and those who love them, has represented the interests of its Texas members in two lawsuits in the last two years because of unprecedented attacks on transgender minors, their parents, and their health care providers. *See PFLAG, Inc. v. Abbott*, No. D-1-GN-22-002569 (in the 459th District Court of Travis County, Texas), temporary injunction affirmed *sub nom. Muth v. Voe*, No. 03-22-00420-CV, No. 03-22-00587-CV, 2024 WL 1340855 (Tex. App.—Austin Mar. 29, 2024) (injunction protecting PFLAG families from unlawful child abuse investigations properly issued); *Loe v. Texas*, No. D-1-GN-23-003616 (201st Judicial District of Travis County, Texas, Aug. 25, 2023), (enjoining Senate Bill 14 based on its likely unconstitutionality and the probable, imminent, and irreparable harm it poses), on appeal, *State of Texas v. Loe*, No. 23-0697 (argued Jan. 30, 2024 Tex. Sup. Ct.). As a direct result of this advocacy on its members’ behalf, Appellants

have targeted PFLAG with an unauthorized investigation under the Texas Deceptive Trade Practices Act (“DTPA”). Tex. Bus. & Com. Code, § 17.41 *et seq.*

Within days of the Texas Supreme Court oral argument in *Loe*, the Office of the Attorney General (“OAG”) served PFLAG with a Civil Investigative Demand (“CID”) (attached hereto as App. A) and a Notice of Demand for Sworn Written Statement (“Demand for Sworn Statement”) (attached hereto as App. B) (collectively, the “Demands”). These far-reaching Demands, which instruct PFLAG to provide documents and information that would reveal members’ identities and deeply personal information members shared as participants in PFLAG’s programs, have had a dramatic chilling effect on PFLAG’s core expressive activity. They target PFLAG for its representation of its members’ interests in *Loe v. Texas* and *PFLAG v. Abbott*—attaching an affidavit from PFLAG’s Chief Executive Officer, Brian Bond, from *Loe* as the basis for the majority of the Demands’ requests. The Demands also attempt an end-run around the discovery protections afforded to PFLAG as a civil litigant.

After an evidentiary hearing and argument on March 25, 2024, pending a resolution on the merits, the trial court enjoined Appellants from enforcing the DTPA against PFLAG as set forth in the Demands or otherwise requiring PFLAG to provide the information and documents sought by the Demands. The trial court found (1) that PFLAG is likely to succeed on the merits of its claims; (2) that PFLAG

will suffer imminent and irreparable injury unless Appellants are enjoined; and (3) that the injunction is necessary to maintain the status quo, particularly in the face of Appellants' representations that they will continue seeking the information sought by the Demands. Order Granting Plaintiff's Application for a Temporary Injunction, *PFLAG, Inc. v. Off. of the Attorney Gen. of Texas, et al.*, D-1-GN-24-001276, at 2-3 (201st Judicial District of Travis County, Texas Mar. 25, 2024) (attached hereto as App. C). Specifically, the trial court found that the Demands injure PFLAG by subjecting them to "unlawful and *ultra vires* requests for information and documents that exceed the [Appellants'] authority under the DTPA"; harm the ability of PFLAG and its members to exercise their rights of free speech and association; harm the ability of PFLAG and its members to be secure against unreasonable searches; harm the ability of PFLAG and its members "to avail themselves of the courts when their constitutional rights are threatened;" and "gross invasions of both PFLAG's and its members' privacy" in an attempt to bypass discovery stays in place in PFLAG's other litigation against the State. *Id.*

With the filing of Appellants' notice of appeal, attached hereto as App. K, the injunction protecting PFLAG from those harms and maintaining the status quo was superseded. To preserve the status quo ante during the pendency of this appeal, protect PFLAG's rights, and prevent immediate and irreparable harms to PFLAG and its members, this Court should similarly exercise its equitable powers and

authority under Rule 29.3 to issue a temporary order restraining Appellants just as the trial court's temporary injunction did. The requested emergency order is necessary to prohibit Appellants from obtaining the information sought by the challenged demands before any court has had a chance to rule on their ultimate propriety, effectively gutting the judicial oversight expressly permitted by the DTPA.

DESCRIPTION OF THE PARTIES

Appellee, who was the plaintiff at the trial-court level, is PFLAG, Inc. PFLAG is a non-profit membership organization incorporated in California. It is the first and largest organization for LGBTQ+ people, their parents and families, and allies. PFLAG connects a network of over 350 local chapters through the United States, 18 of which are in Texas. Individuals who identify as LGBTQ+ and their parents, families, and allies become members of PFLAG, the national organization, by joining directly or through one of the local chapters. Of approximately 325,000 members and supporters nationwide, PFLAG has a roster of approximately 1,500 members in Texas, including many families of transgender youth who need to access the medical treatment for gender dysphoria prohibited by SB14. Encouraging and supporting parents and families of transgender and gender expansive people in affirming their children and helping them access the supports and care they need is

central to PFLAG’s mission. PFLAG asserts its claims in this lawsuit on behalf of itself and its members.

Appellants, who were defendants at the trial-court level, are the Office of the Attorney General of the State of Texas (“OAG”) and Warren Kenneth Paxton, Jr. (“Paxton”), in his official capacity as Attorney General of Texas.

FACTUAL AND PROCEDURAL BACKGROUND

A. PFLAG is a private non-profit membership organization that includes thousands of people in Texas.

Founded in 1973, PFLAG has served as a resource for LGBTQ+ people, families, and allies in their pursuit of justice and affirmation for over fifty years. PFLAG envisions an equitable and inclusive world where every LGBTQ+ person is safe, celebrated, empowered, and loved. Because promoting the wellbeing of LGBTQ+ youth through encouraging and supporting love and affirmation by their families is a core part of PFLAG’s mission and because PFLAG’s members in Texas include families with transgender youth who need access to medically necessary gender-affirming medical care, PFLAG has been actively involved in supporting and providing resources to its members and constituents in light of the increasingly hostile climate for transgender youth and their families in the State of Texas over the last few years. This includes PFLAG joining litigation on behalf of its members.

B. PFLAG sues the State of Texas and government officials to protect its members.

1. *PFLAG v. Abbott – PFLAG sues on behalf of its members to enjoin the State’s treatment of gender-affirming medical care as child abuse.*

On February 22, 2022, Governor Abbott sent a letter to DFPS Commissioner Jaime Masters, (the “Governor’s Directive”) directing the agency “to conduct a prompt and thorough investigation of any reported instances” of “sex-change procedures.”¹ That same day, DFPS announced that it would comply with the Governor’s Directive to “investigate[]” any reports of the procedures outlined in the new directives (“DFPS Rule”). DFPS operationalized this announcement immediately.

On March 1, 2022, a family under investigation because of the DFPS Rule and a licensed psychologist filed suit in Travis County District Court. *See Doe v. Abbott*, Cause No. D-1-GN-22-000977 (in the 353rd District Court of Travis County, Texas). That action resulted in a temporary injunction from the District Court and a temporary order on appeal from the Court of Appeals blocking statewide DFPS

¹ Letter from Greg Abbott to Hon. Jaime Masters, Comm’r, Tex. Dep’t of Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>.

investigations based on the DFPS Rule.² On May 13, 2022, the Texas Supreme Court upheld the Court of Appeals' temporary order but narrowed its scope of relief to apply only to the specific plaintiffs in *Doe* based on a technical reading of the relief that may be granted under Rule 29.3. *See In re Abbott*, 645 S.W.3d 276, 284 (Tex. 2022). Following that ruling, DFPS resumed investigations pursuant to the DFPS Rule into medically necessary care for transgender youth.

Seeking to prevent harm to its members in Texas while the statewide injunction remained on appeal, on June 8, 2022, PFLAG filed suit in the 459th District Court of Travis County to temporarily and permanently enjoin enforcement and implementation of the DFPS Rule against PFLAG members. *See PFLAG, Inc. v. Abbott*, Cause No. D-1-GN-22-002569 (in the 459th District Court of Travis County, Texas). On September 16, 2022, the district court issued a temporary injunction enjoining and restraining the DFPS Commissioner and DFPS from implementing or enforcing the DFPS Rule against PFLAG members. *See Order Granting PFLAG, Inc.'s and the Briggie Plaintiffs' Application for Temporary*

² The district court's temporary injunction was recently affirmed by the Third Court of Appeals on March 29, 2024. *Abbott v. Doe*, No. 03-22-00126-CV, 2024 WL 1340692 (Tex. App.—Austin Mar. 29, 2024).

Injunction, *PFLAG, Inc. v. Abbott*, Cause No. D-1-GN-22-002569 (in the 459th District Court of Travis County, Texas, issued Sept. 16, 2022).

The State appealed to the Third Court of Appeals, which reinstated the injunction's protective scope during the appeals' pendency pursuant to its authority under Tex. R. App. P. Rule 29.3. While the appeal was pending, the parties filed with the district court in a Rule 11 agreement among all plaintiffs, including PFLAG, and all defendants and their respective counsel, including the OAG, agreeing to stay all discovery and any other development of the case in the trial court. *See* Rule 11 Agreement and Informal Stay of Trial Court Proceedings in *PFLAG, Inc., v. Abbott, et al.*, D-1-GN-22-0002569, in the 459th District Court, Travis County (filed on May 3, 2023). On March 29, 2024, the Court of Appeals affirmed the trial court's temporary injunction. *Muth v. Voe*, No. 03-22-00420-CV, 2024 WL 1340855 (Tex. App.—Austin Mar. 29, 2024).

2. *Loe v. Texas – PFLAG sues on behalf of its members to enjoin SB14.*

On May 19, 2023, the Texas State Legislature passed SB14, which prohibits physicians and other healthcare providers from providing, prescribing, administering, or dispensing gender-affirming medical care to transgender minors in Texas. SB14 § 2 (Tex. Health & Safety Code §§ 161.702, 161.706). SB14's passage had a profound impact on PFLAG families, who began seeking support and

resources from their PFLAG chapters, were concerned about how they would ensure access to the necessary and potentially lifesaving medical care their adolescents need, and were pursuing community and mental health support for the fear, distress, and anxiety they and their children were experiencing at the prospect of being denied medically necessary care. Although the statute's effective date was months away, some families began feeling the effects of SB14 immediately following its passage, as their appointments for scheduled care were being cancelled or they were losing access to medical providers who were leaving Texas. Ex. B1 to the Demands (Apps. A, B), at 4-5

Once again, seeking to prevent harm to its members in Texas, on July 12, 2023, PFLAG filed suit in the 459th District Court of Travis County against the State of Texas, the OAG, the Attorney General in his official capacity, and other state entities to enjoin SB14 from taking effect and to prevent immediate and irreparable harm to PFLAG's members. On Aug. 25, 2023, the District Court issued a temporary injunction, enjoining and restraining defendants from taking any action to implement or enforce SB14, and denied the defendants' plea to the jurisdiction. *See* Temporary Injunction Order, *Loe v. Texas*, Cause No. D-1-GN-23-003616 (in the 201st District Court of Travis County, Texas, issued Aug. 25, 2023); Order on Defendants' Plea to the Jurisdiction, *Loe v. Texas*, Cause No. D-1-GN-23-003616 (in the 201st District Court of Travis County, Texas, issued Aug. 25, 2023).

That same day, the defendants filed a notice of accelerated interlocutory appeal pursuant to Tex. Civ. Prac. & Rem. Code §§ 51.014(a)(4), (a)(8), seeking direct review from the Texas Supreme Court, and specifically noting that, “[p]ursuant to Tex. Civ. Prac. & Rem. Code § 51.014(b), all further proceedings in this court are stayed pending resolution of Defendants’ appeal,” thereby staying all discovery in the case. *See* Defendant’s Notice of Accelerated Interlocutory Appeal, *Loe v. Texas*, Cause No. D-1-GN-23-003616 (in the 201st District Court of Travis County, Texas, filed Aug. 25, 2023).

The Texas Supreme Court held oral argument in the case on January 30, 2024. *State of Texas v. Loe*, No. 23-0697 (argued Jan. 30, 2024 Tex. Sup. Ct.)

C. The Texas OAG serves the Demands on PFLAG.

On February 9, 2024, PFLAG received the Demands, both dated February 5, 2024, from the OAG. *See* Apps. A, B.³ The Demands instruct PFLAG to provide information or statements in relation to the OAG’s purported “investigation of actual or possible violations of DTPA section 17.46 for issues related to misrepresentations regarding Gender Transitioning and Reassignment Treatments and Procedures and Texas law.” *See* Apps. A, B.

³ The Demands were sent directly to PFLAG without copying or alerting PFLAG’s counsel in either prior case, notwithstanding that the OAG is counsel for defendants in both cases and a defendant in *Loe v. Texas*. *Cf.* Tex. R. Prof. Conduct 4.02(a).

More specifically, the Demands seek information about the assertions in PFLAG CEO Brian Bond's affidavit in *Loe v. Texas*, which was related to his testimony on behalf of PFLAG in *PFLAG v. Abbott*. Five of the eight requests in the CID and seven of the nine requests in the Demand for Sworn Statement relate specifically to Mr. Bond's affidavit in *Loe v. Texas*, submitted in support of the petition for a temporary injunction in that case. The OAG attached Mr. Bond's affidavit to the Demands.

The Demands, which require information and documents from March 8, 2023—the date on which SB14 was introduced in the Texas legislature—through the date of production, seek a broad range of information and documents that would reveal the identities and private communications of PFLAG members in Texas. For example, the Demands seek documents, communications, and statements pertaining to Mr. Bond's basis for all statements in the *Loe v. Texas* affidavit, but particularly the statements that “PFLAG families with transgender and nonbinary adolescents shared their contingency plans” or sought “alternative avenues to maintain care in Texas.” *See* Ex. B to the Demands (Apps. A, B), at 6; Ex. B1 to the Demands (Apps. A,B) at 4-5.

For context, Mr. Bond made those statements in his affidavit when describing how PFLAG members with transgender adolescents have been relentlessly targeted in Texas and how PFLAG decided to represent its members in a lawsuit attempting

to block SB14 from going into effect. After describing the relief PFLAG obtained in an injunction against the DFPS Rule, Mr. Bond continued:

This brief sigh of relief we felt from the DFPS Rule being enjoined ended when SB 14 was signed into law on June 2, 2023. PFLAG members had been actively engaged in fighting against SB14's passage, voicing their opposition regularly at the statehouse. Given the hostility of the climate in Texas towards transgender people in general, and toward youth in particular, its passage was met with both resignation at its predictability and tremendous fear. New families showed up in droves for chapter meetings and support groups, seeking information and support. Chapters planned and participated in events to provide comfort to and celebrate the unbreakable joy of the gender diverse community. PFLAG families with transgender and nonbinary adolescents shared their contingency plans—those with the resources to move or seek care out of state have begun firming up their plans to do so, while the vast majority without those resources have been asking chapters for alternative avenues to maintain care in Texas. Families were not just seeking health care providers who specialize in medical care for gender dysphoria but leads on affirming general practitioners as well so that their adolescents would have access to multiple providers in the event that their primary providers stop providing gender-affirming medical care or leave the state as a result of SB14. Requests for mental health care providers have skyrocketed, as the fear, distress, and anxiety at the prospect of losing access to medically necessary care has exacerbated adolescents' existing mental health issues connected to their gender dysphoria. Parents and families are scrambling as their children's providers have cancelled appointments and begun winding down medical care for gender dysphoria because of SB14's imminent effective date. And chapter leaders have heard concerns about the impacts on transgender and non-binary youth in the foster care system, who receive health care coverage through Medicaid and will lose coverage for their medical care for gender dysphoria if SB14 goes into effect.

Ex. B1 to the Demands (Apps. A, B), at 4-5.

The Demands also seek documents and communications between “any PFLAG representative regarding, relating to, or referencing” a list of medical providers set forth in Exhibit B2 to the Demands, some of whom provide or have provided gender-affirming care to transgender adolescents, including medical providers outside of Texas.

The Demands required PFLAG to provide information, documents, communications, and statements in response on or before Monday, February 26, 2024. Apps. A, B. On February 21, 2024, the OAG granted a one-week extension for PFLAG to provide information, documents, communications, and statements in response to the Demands up to and including Monday, March 4, 2024. *See* email from D. Shatto to A. Pollard (Feb. 21, 2024) (attached hereto as App. D).

D. The Demands are part of a pattern by the OAG to use its powers to target transgender people, their families, and medical providers.

The Demands sent by the OAG to PFLAG were issued within a particular context that encompasses not just the *PFLAG v. Abbott* and *Loe v. Texas* litigation matters but also the issuance of similar Civil Investigative Demands and Requests to Examine to entities that provide gender-affirming medical care, consistent with well-established, evidence-based clinical practice guidelines, including entities outside of Texas. *See, e.g., Seattle Child. ’s Hosp. v. Off. of the Att’y Gen.*, Cause No.

D-1-GN-23-008855 (in the 98th District Court of Travis County, Texas).⁴ From the OAG's multiple demands, it appears that the OAG is seeking to determine which Texas families are seeking to access gender-affirming care for their transgender adolescents, rather than conducting legitimate investigations into deceptive trade practices or consumer fraud.

These requests are also indicative of a pattern by the OAG of seeking identifying information about any person who is transgender in Texas, illustrating that the OAG's demands are motivated not by a desire to protect consumers under the DTPA but rather to target transgender Texans and their families. For example, in 2022 after the Texas Supreme Court's decision in *In re Abbott*, the OAG asked the Texas Department of Public Safety to compile a list of individuals who had changed their gender on their Texas driver's licenses and other department records

⁴ See also Maham Javaid and Molly Hennessy-Fiske, *Texas AG Seeks Transgender Records in Georgia as Part of his Wider Probe*, The Washington Post, Jan. 29, 2024, <https://www.washingtonpost.com/nation/2024/01/29/texas-agtransgender-records-georgia/>; Lil Kalish, *Texas Attorney General Expands Pursuit Of Medical Records For Trans Youth*, HuffPost, Jan. 29, 2024, https://www.huffpost.com/entry/texas-ag-trans-youth-medicalrecords_n_65b81785e4b01c5c3a37c713; Madaleine Rubin, *Texas Attorney General Requests Transgender Youth's Patient Records from Georgia Clinic*, The Texas Tribune, Jan. 26, 2024, <https://www.texastribune.org/2024/01/26/texas-attorney-general-trans-documents-georgia-ken-paxton/>.

during the past two years.⁵ Given both the specifics of the Demands and this broader context, PFLAG brought the instant challenge.

E. PFLAG Files this Action for Injunctive Relief and to Set Aside the Demands.

On February 28, 2024, PFLAG filed an Original Verified Petition to Set Aside Civil Investigative Demands, for Declaratory Judgment, and Application for a Temporary Restraining Order and Temporary and Permanent Injunctive Relief (attached hereto as App. E). On March 1, 2024, District Court Judge Maria Cantú Hexsel entered an Order Granting Plaintiff's Application for a Temporary Restraining Order ("TRO"), finding that it "clearly appear[ed] to the Court that unless the Defendants [were] immediately restrained from abusing the Deceptive Trade Practices Act by enforcing or otherwise requiring PFLAG to respond" to the Demands, PFLAG and its members would face "immediate and irreparable injury, loss, or damage." Order Granting Plaintiff's Application for a TRO (attached hereto as App. F) at 2. The Court's Order set a hearing to show cause for March 25, 2024. Because the TRO originally expired on March 14, 2024, two weeks from the date it

⁵ See Molly Hennessy-Fiske, *Texas Attorney General's Office Sought State Data on Transgender Texans*, The Washington Post, Dec. 14, 2022, https://www.washingtonpost.com/nation/2022/12/14/texas-transgender-datapaxton/?itid=lk_inline_manual_10.

was issued, Plaintiff received an extension of the TRO until March 29, 2024. Order Granting Plaintiff's Motion to Extend TRO (attached hereto as App. G).

Appellants filed a Motion to Modify and Clarify the TRO on March 19, 2024 and a Plea to the Jurisdiction on March 22, 2024. The Motion to Modify and Clarify attached as exhibits modified Demands. *See* Exs. 3, 4 to OAG's Motion to Modify and Clarify the Court's March 1, 2024 TRO (attached hereto as Apps. H, I). Appellants have not properly set either filing for hearing. *See* Transcript of Record ("Tr.") (attached hereto as App. J) at 25:1-26:15, *PFLAG v. Off. of the Att. Gen. Texas et. al.*, D-1-GN-24-001276.

F. The trial court entered a temporary injunction in Appellee's favor.

The trial court held a hearing to show cause on PFLAG's application for a temporary injunction on March 25, 2024. Appellants attempted to have the Court address their Motion to Modify and Clarify the TRO, raising the proposed modified Demands as part of their opening argument. App. J at 23:6-9, 25, 26:6-7, The Court directed Appellants to address the proposed modifications as part of their response to PFLAG's application for a temporary injunction. App. J at 25. ⁶

⁶ Appellants also brought to the trial court's attention that they had filed a plea to the jurisdiction, but acknowledged that it had not been properly set. Appellants raised no objection when the trial court informed them that the plea to the jurisdiction would not be heard as a separate motion during the hearing. App. J at 26.

The trial court then heard testimony from Aaron Ridings, Executive Vice President of PFLAG, addressing the expressive nature of PFLAG's core work and underscoring the impact the Demands have had on PFLAG and its members. Mx. Ridings testified that PFLAG's efforts center on support, education, and advocacy, with the core of those services and programs being "peer-to-peer support groups for parents and families of LGBTQ+ children." App. J at 36:13-16. Mx. Ridings described chapter meetings as safe, confidential spaces where parents and family members share deeply personal information as they endeavor to understand and support their children's LGBTQ+ identities. App. J at 36:19-37:3; 42:25-45:15. They addressed the ways receiving the Demands has already chilled the activities of PFLAG members, with members expressing fear that anything they say will be turned over to the OAG, chapter leaders changing the ways they conduct meetings and what forms of communication they use, reluctance to take on new initiatives or partnerships that might put other vulnerable people on the OAG's radar, and a decrease in participation in meetings. App. J at 49:11-51:6.

Having considered this testimony and the parties' arguments, the trial court entered an Order Granting Plaintiff's Application for a Temporary Injunction ("TI"). Order Granting Plaintiff's Application for a Temporary Injunction (attached hereto as App. C). The Court found that unless Appellants "are immediately restrained from enforcing the DTPA against PFLAG or otherwise requiring PFLAG to provide the

information and documents listed in” the Demands, “immediate and irreparable injury, loss, or damage will result to PFLAG and its members.” *Id.* at 2-3. The Court found that the injuries to PFLAG and its members included “being subjected to unlawful and *ultra vires* requests for information and documents that exceed the Defendants’ authority under the DTPA; harm to the ability of PFLAG and its members to exercise their rights of free speech and association under the First Amendment; harm to the ability of PFLAG and its members to be secure against unreasonable searches under the Fourth Amendment; harm to the ability of PFLAG and its members to avail themselves of the courts when their constitutional rights are threatened; and gross invasions of both PFLAG’s and its members’ privacy in an attempt to bypass discovery stays entered in both *Loe v. Texas* and *PFLAG v. Abbott*.” *Id.*

The Court further found that these injuries could not be remedied by an adequate remedy at law, particularly in light of Defendants’ efforts to “continue seeking much of the same information, even if through modified demands.” *Id.* at 3. Therefore, the TI extended the return dates for the Demands until the conclusion of the litigation and enjoined and restrained Appellants from taking any adverse action in relation to the Demands, including demanding information or documents from PFLAG “that would reveal the identities or private communications of PFLAG.” *Id.* at 4. The Court scheduled a trial on the merits for June 10, 2024.

G. Appellants filed a notice of appeal and counterclaim to enforce the Demands.

On April 12, 2024, Appellants filed a Notice of Accelerated Appeal, notifying the trial court of their accelerated interlocutory appeal to the Third Circuit, seeking reversal of the temporary injunction. Defendants’ Notice of Accelerated Appeal (attached hereto as App. K). Less than two hours later, Appellants filed a Counterclaim for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand. *See* Counterclaim for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand, Apr. 12, 2024 (attached hereto as App. L).⁷

ARGUMENT AND AUTHORITIES

Rule 29.3 authorizes appellate courts to “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal.” Tex. R. App. P. 29.3. Preservation of the status quo is at the heart of Rule 29.3. Appellee asks this Court to exercise its inherent powers and its authority under Rule 29.3 to issue a temporary order reinstating the terms of the temporary injunction issued by the trial

⁷ Though initially filed as a “motion to enforce,” Appellants corrected the styling of this filing to reflect its intended purpose as a counterclaim on Apr. 15, 2024. *See* Counterclaim for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand, Apr. 15, 2024 (attached hereto as App. M).

court, which preserves the status quo in this case, protects Appellee's rights, and prevents irreparable and immediate harms to Appellee and its members.

I. A Temporary Injunction Is Necessary To Preserve The Status Quo.

Rule 29.3 “broadly empower[s this Court] to preserve parties’ rights when necessary,” granting the Court “great flexibility in preserving the status quo based on the unique facts and circumstances presented.” *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019). Based on the facts and circumstances of this case, temporary injunctive relief of the same scope as issued by the trial court is necessary to preserve the status quo.

When a trial court's temporary injunction is superseded when Appellants file an appeal, Rule 29.3 authorizes an appellate court to issue its own temporary order effectively continuing that injunction pending resolution of the appeal in order “to preserve the status quo and prevent irreparable harm.” *In re Tex. Educ. Agency*, 619 S.W.3d 679, 680 (Tex. 2021). And the “status quo” is “the last, actual, peaceable, non-contested status which preceded the pending controversy.” *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (quotation marks and citation omitted). Permitting Appellants to enforce the unconstitutional Demands, or to take other punitive measures against PFLAG related thereto, would alter and disrupt the status quo in a manner detrimental to the lives of PFLAG members in Texas.

The prohibitory temporary injunction issued by the trial court against Appellants preserves the status quo in this case, and this Court should issue an order enjoining Appellants from the actions outlined in the trial court’s temporary injunction to similarly preserve the status quo. The trial court found that the temporary injunction is necessary to maintain the *status quo*. App. C at 3. Before the issuance of the Demands, PFLAG was under no obligation to reveal the identities of any of its members or to turn over their private information or communications to the OAG; members could freely access the benefits of associating with other members and PFLAG leaders, sharing their experiences with others, and seeking education, solidarity, and assistance in supporting their LGBTQ+ family members. If PFLAG is forced to comply with the Demands, this status quo would be suddenly and irrevocably altered. PFLAG and its members would face irreparable violations of their constitutionally protected rights to freely speak, assemble, and associate with each other, as well as of their rights to be free from unreasonable searches and seizures, irrevocably altering their participation in PFLAG. Such a negative impact on participation would effectively “shut [PFLAG] down in Texas.” See App. J. at 51:9-13.

Appellate courts have the authority to effectively reinstate a lower court’s temporary injunction to preserve the status quo and preserve a party’s rights, including PFLAG. See, e.g., *Masters v. Voe*, No. 03-22-00420-CV, 2022 WL

4359561, at *3 (Tex. App. —Austin, Sept. 20, 2022) (“Voe and Roe have shown ‘compelling circumstances’ that require the Court to keep the trial court’s temporary injunction in place to preserve the parties’ rights during the pendency of the appeal.”); *Masters v. PFLAG, Inc.*, No. 03-22-00587-CV, 2022 WL 4473903, at *1 (Tex. App.—Austin, Sept. 26, 2022) (“To preserve the status quo while the Court considers the motion for temporary relief, pending further order of this Court, we temporarily order that the trial court’s September 16, 2022 ‘Order Granting PFLAG, Inc.’s and the Briggie Plaintiffs’ Application for Temporary Injunction’ is reinstated.”).

In *In re Texas Education Agency*, the appellants filed an interlocutory appeal that “automatically suspended enforcement of the trial court’s order,” which included a temporary injunction. 619 S.W.3d at 683. As the Texas Supreme Court noted, “[i]nstead of preserving the status quo, however, suspension of the temporary injunction would . . . have the contradictory effect of permitting the status quo to be altered, because if compliance with the injunction were not required,” the plaintiff’s rights and position “could be changed from ‘the last, actual, peaceable non-contested status [that] preceded the pending controversy.’” *Id.* at 683-84. In such circumstances, temporary relief under Rule 29.3 is appropriate even if that temporary order has the “same practical effect as denying supersedeas of the trial

court's injunction.” *Id.* at 680; *see also In re Abbott*, 645 S.W.3d 276, 282 (Tex. 2022).

Appellate courts have exercised and continue to exercise their authority under Rule 29.3 to preserve the *status quo*. *See Texas Health & Human Servs. Comm’n v. Sacred Oak Med. Ctr. LLC*, No. 03-21-00136-CV, 2021 WL 2371356, at *1, *5 (Tex. App.—Austin June 9, 2021, no pet.) (“The Texas Supreme Court recently confirmed that courts of appeals have the power to provide relief from the State’s automatic right to supersedeas under Rule 29.3”); *see also In re Newton*, 146 S.W.3d at 651 (explaining “that the continuation of illegal conduct cannot be justified as preservation of the status quo”).

Under these same principles, in *In re Abbott*, the Texas Supreme Court denied requested mandamus relief from the Court of Appeals’ reinstatement of a trial court’s temporary injunction under Rule 29.3 to maintain the status quo for the parties. 645 S.W.3d at 283. After the State’s appeal superseded a district court’s injunction barring enforcement of the DFPS Rule, which had changed the status quo, and the Court of Appeals reinstated temporary injunctive relief under Rule 29.3 in order to maintain the status quo that existed prior to the Rule, the Texas Supreme Court held that the court of appeals’ order protecting the plaintiffs was within its Rule 29.3 power. *See In re Abbott*, 645 S.W.3d at 683-84.

Appellants have already demonstrated their intent to alter the status quo absent injunctive relief. Less than two hours after their notice of appeal, Appellants filed a counterclaim seeking enforcement of the Demands in the trial court. *See* App. L.⁸ In essence, Appellants’ counterclaim seeks reconsideration of the temporary injunctive relief that it is simultaneously appealing to this Court. *Compare* App. L at 8, n.3 (acknowledging that the rationale of the TI “serves as a basis to deny this petition to enforce” and arguing that the TI was “entered wrongly and, for the same reason, the petition to enforce *should be granted*”) (emphasis in original), *with id.* at 8, n.4 (acknowledging Appellants’ appeal of the TI). With this filing, Appellants thus attempt to circumvent the TI, while disingenuously seeking to revisit it in the trial court, and simultaneously appeal the same issue to this Court. This Court should not allow such gamesmanship; rather, it should order temporary injunctive relief to preserve the status quo, protect the rights of PFLAG and its members, and allow the proper appellate process to proceed without interference.

Because the Appellants have shown their disregard for the very process set forth by the DTPA to assess the validity of their Demands, the Court should exercise its Rule 29.3 authority and enter injunctive relief on the terms set forth by the trial

⁸ The counterclaim was initially filed as a motion to enforce. It was not filed as a petition as provided for under Tex. R. Civ. P. 502.6(a). Appellants subsequently corrected its styling as a counterclaim.

court. Doing so is the only way to preserve the status quo while the merits of Appellants' appeal of the trial court's temporary injunction are considered.

II. Reinstating The Trial Court's Temporary Injunction Is Necessary To Protect Appellee's Rights And Prevent Irreparable Harm.

Appellate courts also have “the power to preserve a party's right to judicial review of acts that it alleges are unlawful and will cause it irreparable harm.” *Sacred Oak*, 2021 WL 2371356, at *5. Specifically, “Rule 29.3 provides a mechanism by which [this Court] may exercise the scope of [its] authority over parties, including [its] inherent power to prevent irreparable harm to parties properly before [it] pursuant to [its] appellate jurisdiction in an interlocutory appeal.” *Tex. Educ. Agency*, 609 S.W.3d at 578. *See also Geomet*, 578 S.W.3d at 90 (noting “the authority of a court of appeals to prevent irreparable harm to parties that have properly invoked its appellate jurisdiction in an interlocutory appeal”). Here, reinstatement of a temporary injunction is necessary to protect the rights of PFLAG and its members, who would suffer irreparable and immediate harms from enforcement of unlawful Demands in the absence of such a temporary injunction.

Absent relief from this Court, PFLAG will suffer the constitutional injuries that the trial court found would result absent a temporary injunction. Specifically, if Defendants are not “immediately restrained from enforcing the DTPA against PFLAG or otherwise requiring PFLAG to provide the information and documents

listed in the” Demands, “immediate and irreparable injury, loss, or damage will result to PFLAG and its members,” including but not limited to “[1] being subjected to unlawful and *ultra vires* requests for information and documents that exceed the Defendants’ authority under the DTPA; [2] harm to the ability of PFLAG and its members to exercise their rights of free speech and association under the First Amendment; [3] harm to the ability of PFLAG and its members to be secure against unreasonable searches under the Fourth Amendment; [4] harm to the ability of PFLAG and its members to avail themselves of the courts when their constitutional rights are threatened; and [5] gross invasions of both PFLAG’s and its members’ privacy in an attempt to bypass discovery stays entered in both *Loe v. Texas* and *PFLAG v. Abbott*.” App. C at 2-3.

A. Injury from unlawful and ultra vires requests for information

Absent relief from this Court, PFLAG will be subjected to unlawful and ultra vires requests for information. Moments after filing their Notice of Appeal, Defendants filed a counterclaim seeking to enforce the Demands in the trial court. App. L. That filing attaches the same modified investigative demands already contemplated within the scope of the trial court’s TI, which still seek private communications of PFLAG and its members related to Brian Bond’s affidavit in *Loe v. Texas* and PFLAG’s support of families with transgender adolescents in Texas, among other items, and a sworn statement from Brian Bond regarding the same. *Id.*

at Exs. 3, 5. The only check on the Defendants' ability to continue improperly seeking information from PFLAG during the pendency of the underlying proceedings is relief from this Court.

B. Injury to freedoms of speech, association, and assembly

Absent relief from this Court, nothing precludes the Defendants from demanding that PFLAG reveal the identities of its members or their private communications, or from taking affirmative steps to revoke PFLAG or its chapters' ability to operate in Texas based on their refusal to do so. That potential for compelled disclosure has already had and will continue to have a chilling effect on members' continued participation with PFLAG. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 (Tex. 1998) ("Compelled disclosure of the identities of an organization's members or contributors may have a chilling effect on the organization's contributors as well as on the organization's own activity.").

The existence of the Demands alone has already chilled PFLAG members' participation and PFLAG's ability to support its members. For example, there has been a marked decrease in physical participation in PFLAG meetings in Texas. *See App. J at 50:25-51:4*. Additionally, PFLAG members in Texas are not communicating with each other or with the organization as they typically would, for fear of the OAG eventually being able to access their emails or text messages. *App. J at 49:11-20*. Since the Demands were issued, PFLAG members have also been

reluctant to sign into meetings or bring new volunteers, and meeting locations are being changed to private locations rather than public ones, impeding people's ability to access meetings. *See* App. J at 49:21-50:10.

This chilling effect is additionally harmful beyond the inherent constitutional injury because of PFLAG's role in representing members' interests in both *PFLAG v. Abbott* and *Loe v. Texas*. Those families with transgender adolescents who would benefit most critically from the protection afforded by any injunctive relief applicable to PFLAG members in those cases may hesitate to join PFLAG for fear of their private information and communications being shared with the OAG. Those families face an impossible catch-22 absent injunctive relief shielding PFLAG from having to respond to the Demands.

The chill imposed by Defendants' retaliatory actions injures PFLAG's ability to serve its members and further chills its ability to participate in a robust public discussion about the critical importance of supporting LGBTQ+ young people and their families that has been a core part of PFLAG's work. The Demands have already subjected PFLAG to the burden of having to deal with an administrative subpoena issued in bad faith and forced PFLAG to incur "the expense of becoming entangled in the legal system." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). Absent relief from this Court, the OAG's retaliatory campaign against PFLAG will continue to

injure⁹ the organization's and its members' constitutional rights to free speech, assembly, and association, especially when the Demands are "hanging in the air."¹⁰ Because "any significant denigration of First Amendment rights inflicts irreparable injury ... and constitutes irreparable harm," *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981) (quotation omitted), emergency relief is warranted and necessary.

C. Injury to rights to be free from unreasonable searches

Absent relief from this Court, PFLAG and its members will suffer irreparable injury to their rights under Article I, Section 9 of the Texas Constitution and the Fourth Amendment to the United States Constitution. Fishing expeditions by law

¹⁰ Attorney General Paxton's own words resolve any possible doubt about the uniquely injurious effects of the Demands that are already being felt by PFLAG and its members. In 2016, alongside several other state attorneys general, Paxton filed an amicus brief excoriating Massachusetts for using its own deceptive trade practices law to serve a similar civil investigative demand on Exxon Mobil—which, notably and unlike PFLAG, is involved in trade practices—regarding claims it misled consumers about the impact of its energy products on climate change. Brief of Amici Curiae, *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-00469-K (N.D. Tex. Sept. 8, 2016), ECF No. 63-2. Attorney General Paxton wrote: "The[] [First Amendment] protections afforded by the Constitution . . . [are] threatened by the chill of subpoenas, like Massachusetts's CID, hanging in the air. Thus, not only is Massachusetts attempting to silence Exxon through the issuance and threat of compelling a response to the CID, this very action harms everyone[.]" *Id.* at 6. He added that "[t]he authority attorneys general have to investigate fraud does not allow them to encroach on the constitutional freedom of others to engage in an ongoing public . . . debate." *Id.* at 3.

enforcement, especially those predicated on legal activity, violate these rights. *See, e.g., See v. City of Seattle*, 387 U.S. 541, 544 (1967); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-06 (1924); *Major League Baseball v. Crist.*, 331 F.3d 1177, 1187-88 (11th Cir. 2003). These unlawful, unduly broad Demands transgress the constitutional safeguards that shield PFLAG and its members against abusive and unreasonably burdensome governmental inquiries. *See, e.g., United States v. Miller*, 425 U.S. 435, 445 (1976); *See*, 387 U.S. at 544. Those safeguards are particularly strong when they overlap with First Amendment protections. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). Injunctive relief is necessary to prevent further infringement of these constitutional protections in the interim.

The Texas OAG has made plain its intent to investigate PFLAG, not only for its conduct in *Loe v. Texas* and *PFLAG v. Abbott*, but also based on its initiation of this protective litigation: even before the TRO hearing on this matter, the OAG issued a press release accusing PFLAG of an “effort to hide **incriminating** documents” (emphasis added) and promising to “fight to hold this organization [PFLAG] accountable.” Attorney General of Texas, Press Release, “Trans Advocacy Group Sues Attorney General in Effort to Hide Incriminating Documents,” Feb. 29, 2024, available at <https://www.texasattorneygeneral.gov/news/releases/trans-advocacy-group-sues-attorney-general-effort-hide-incriminating-documents>.

Injunctive relief is warranted from this Court to protect PFLAG from the Texas OAG’s stated intent to “hold [PFLAG] accountable” for its refusal to accede to the Demands, as originally issued or modified, even though the Demands themselves are and remain a violation of PFLAG’s rights to be free from unreasonable searches.

D. Injury to right to seek redress in Court

Absent relief from this Court, nothing will prevent the Texas OAG from investigating PFLAG based on its participation in *Loe v. Texas* or *PFLAG v. Abbott*, or taking adverse action against PFLAG or its chapters based on PFLAG’s refusal to provide documents in response to the Demands. But PFLAG’s “right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984). Both the federal and Texas constitutions also prohibit Defendants from using their authority to deter, obstruct, or chill the associational activities or expressive rights of PFLAG and its members, including advocacy to support transgender youth and their families throughout Texas. But if the Texas OAG can take punitive action against PFLAG or its chapters while PFLAG’s three underlying lawsuits, including this one, are still pending—which, again, it has promised to do, *see* Feb. 29, 2024 Press Release—then those constitutional protections are illusory. Indeed, the OAG has recently shown its propensity to sanction CID recipients who contest, otherwise object to,

and do not yield to its demands—particularly when they pertain to gender-affirming medical care. *See, e.g.*, Defendant Off. of the Att’y Gen.’s Mot. for Leave to File Proposed Counterclaim in the Nature of Quo Warranto, Ex. 1 at 7, *Seattle Child.’s Hosp. v. Off. of the Att’y Gen.*, Cause No. D-1-GN-23-008855 (in the 98th District Court of Travis County, Texas, filed Feb. 8, 2024).

That is precisely what Appellants are attempting to do through their Counterclaim, which utterly disregards that PFLAG has been shielded from having to respond to the Demands by the trial court’s TRO and TI and aims to take the very kind of punitive action against PFLAG that the trial court sought to enjoin. The DTPA expressly provides for judicial review of investigatory demands, providing that “[a] person on whom a demand is served under this section shall comply with the terms of the demand **unless otherwise provided by a court order,**” § 17.61(h) (emphasis added), and establishing the venues in which a demand recipient is permitted to file a “petition to extend the return date for, or to modify or set aside the demand.” *Id.* at § 17.61(g). Much as Appellants seek to evade that process, such judicial review is appropriate and necessary in order to protect against government overreach and abuse of power. Appellants’ continued efforts to enforce the Demands would deprive PFLAG of the ability to avail themselves of the very process laid out by the DTPA to protect recipients from unlawful Demands. Emergency relief is

necessary to shield Appellees from the harm of Appellants' attempts to short circuit that process.

E. Invasions of privacy and contravention of existing discovery stays

Absent relief from this Court, nothing will stop the Texas OAG from seeking PFLAG's membership information or private communications with and among its members, which violates not only their constitutional rights but also the privacy of PFLAG and its members and the existing stays on discovery in *Loe v. Texas* and *PFLAG v. Abbott*. This harm will be held at bay by reinstating injunctive relief that enjoins Appellants from further investigating PFLAG or enforcing the Demands. Indeed, the Appellants have renewed their commitment to seeking, at the very least, the private correspondence of PFLAG's members through their Counterclaim. *See* App. M Exs. 1, 2.

CONCLUSION AND PRAYER

Appellee respectfully asks this Court to grant this Emergency Motion and issue an order providing temporary injunctive relief on the terms set forth by the trial court until the disposition of the appeal. Such an order is necessary to preserve the status quo, protect Appellee's rights, and prevent irreparable and immediate harms to Appellee PFLAG and its members. Appellee further requests that this Court grant any and all other relief to which it may be entitled.

Dated: April 16, 2024

Respectfully submitted,

/s/Allissa Pollard

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this Motion contains 7,317 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Allissa Pollard
Allissa Pollard

CERTIFICATE OF CONFERENCE

Pursuant to Texas Rule of Appellate Procedure 10.1(a)(5), I certify that, on April 15, 2024, I conferred with Appellants' counsel via email regarding this Motion and Appellants' counsel stated that Appellants are opposed to this Motion.

/s/ Allissa Pollard

Allissa Pollard

CERTIFICATE OF SERVICE

I hereby certify that, on April 16, 2024, Appellee electronically served a true and correct copy of the foregoing Motion on the following counsel for Appellants, through the electronic-filing manager in the electronic-filing system.

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/s/ Allissa Pollard
Allissa Pollard