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

AMICUS CURIAE BRIEF OF TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF TEXAS

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INTEREST OF AMICUS[1]

The Texas Public Policy Foundation (the Foundation) is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, the Foundation has worked to advance these goals through research, policy advocacy, and impact litigation.

In pursuit of its broad mission, the Foundation has long had an interest in protecting individuals from government overreach. The Foundation believes that this Court's traditional reading of Article 1, Section 19 of the Texas Constitution is essential to the success of that work.

At the same time, the Foundation also believes that the Texas Constitution means what it would have been understood to mean when it was written. The Foundation therefore files this brief to provide additional historical context that will allow the Court to place its traditional approach to Article 1, Section 19 on a more solid originalist footing.

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[1] No fee was paid or will be paid for preparing this brief. *See* Tex. R. App. P. 11(c).

INTRODUCTION

The Foundation agrees with Texas that there is no right under Article 1, Section 19 of the Texas Constitution to impose experimental, often irreversible, sex-trait modification procedures on children. SB 14 is therefore Constitutional.

The Foundation writes separately to disagree with the State's argument that Article 1, Section 19 provides no substantive protection for any rights – full stop. This is an error that is both unnecessary for this case and extremely dangerous to parental rights in Texas.

The text and history of Article 1, Section 19 indicate that it was originally understood to provide substantive protections for at least some rights held at common law. Indeed, fundamental rights like the right to raise one's children or pursue a common occupation receive their *only* protection from legislative overreach through the substantive application of Article 1, Section 19. There is no need for this Court to set aside more than a century of uniform case law protecting parental rights and numerous other liberties for the State to prevail in this case.

Therefore, the Foundation supports reversal of the district court's judgment enjoining SB 14, but urges this Court to refuse to adopt the narrow, anti-historical reading of Article 1, Section 19 suggested by Appellants.

SUMMARY OF ARGUMENT

Because child sex-trait modification is not a right protected by Article 1, Section 19, this should be a straightforward case. But Appellants encourage this Court to go further by declaring that the Texas Constitution's "due-course-of-law provisions likely do not provide substantive legal protections at all." Tex. Resp. to Mot. for Emerg. Relief, at 17. According to the State, those provisions "provide procedural, rather than substantive, protections." *Id.*

This Court should not adopt (or even suggest in *dicta* that it may adopt) this radical approach. First, the State's procedure-only approach to Article 1, Section 19 contradicts over a century of precedent. While precedent should not override the plain text of the Constitution or be allowed to stand when it is plainly erroneous, neither of those things is at issue here.

Second, the State's procedure-only approach ignores the plain text of Article 1, section 19, particularly the "law of the land" clause. By 1876, a majority of other state courts had read their "law of the land" clauses to place substantive limitations on the legislative power. The State does not address these cases at all.

Finally, the ratifiers of the Texas Constitution would have disagreed with the State's procedure-only interpretation of Article 1, Section 19. By 1876, it was well established that legislative power was limited, and that state courts had an obligation to review legislative acts

to ensure that they fell within the police power. There is nothing in the historical record that suggests the Texas Constitution mandates a different approach.

ARGUMENT

I. THE STATE'S PROCEDURE-ONLY APPROACH TO ARTICLE 1, SECTION 19 CONFLICTS WITH MORE THAN A CENTURY OF PRECEDENT.

At the outset, it is important to remember that we are not writing on a blank slate. Just five years after Article 1, Section 19's enactment, this Court cited that provision to strike down a local ordinance restricting property rights. See *Milliken v. Weatherford*, 54 Tex. 388 (1881). By the end of the Nineteenth Century, Article 1, Section 19 was regularly invoked to strike down legislative acts as exceeding the police power. See *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 83-84 (Tex. 2015) (collecting history). Indeed, the State does not cite a single Texas case questioning this substantive approach to Article 1, Section 19 until a lone concurring opinion in 2022. Tex. Resp. to Mot. for Emerg. Relief, at 21 (citing *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648 (Tex. 2022) (Young concurring).

While this consistent post-ratification precedent is not dispositive, it cannot be brushed aside by mere *ipse dixit* from the State. Originalists often disagree about the importance of precedent. Justice Scalia thought it had some use. Antonin Scalia, *A Matter of Interpretation: Federal*

Courts and the Law 138–39 (Amy Gutmann ed., 1997) ("Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."). Justice Thomas has long taken a more skeptical approach. See, e.g., Josh Blackman, *Justice Thomas on SCOTUS Leak*, REASON: VOLOKH CONSPIRACY (May 14, 2022) ("I always say when someone uses stare decisis, that means they're out of arguments.")

But even Justice Thomas does not think that precedent is irrelevant. *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring). In particular, Justice Thomas has noted that early post ratification decisions can shed some light on original meaning and, in close cases, should be permitted to stand even if those cases could be decided differently by originalists today with more resources. *Id.* "If, for example, the meaning of a statute has been 'liquidated' in a way that is not demonstrably erroneous (i.e., not an impermissible interpretation of the text), the judicial policy of stare decisis permits courts to constitutionally adhere to that interpretation, even if a later court might have ruled another way as a matter of first impression." *Id.*

Here, the early post-ratification cases interpreting the Texas Constitution, while sparse, almost uniformly support the current reading of Article 1, Section 19 as providing substantive, as well as procedural protections for certain rights. See *Patel*, 469 S.W.3d at 83-84. As such, this precedent should not be disturbed unless the State can show that it

is "demonstrably erroneous" as an original matter. *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring).

With that burden in mind, we turn to the text and history of Article 1, Section 19.

II. BY 1876, "LAW OF THE LAND" CLAUSES WERE OFTEN READ TO PLACE SUBSTANTIVE LIMITATIONS ON LEGISLATIVE POWER

As with any question of Constitutional interpretation, "we begin with the text." *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992). In doing so, the role of the court is to determine what the words within a given constitutional provision would have "meant to the Texans who agreed in 1876 to incorporate that provision within our current Constitution." *Tex. Dep't of State Health Servs.*, 647 S.W.3d at 678 (Young, J. concurring).

Article 1, Section 19 of the Texas Constitution provides that: "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."

Appellants focus on the first part of this text—*i.e.*, "due course." According to the State, the inclusion of "due course" language indicates that the provision may be limited to the protection of procedural, rather than substantive rights. Under this interpretation, Article 1, Section 19 acts as a check on the executive branch by ensuring that liberty or

property not be taken unless authorized by some legislative enactment, but provides no limitation on the legislative power over liberty or property.

But this focus on "due course" alone ignores the full text of the provision. Article 1, section 19 does not merely guarantee that rights will not be infringed except by the due course of "some legislative enactment." It insists that certain rights, privileges, or immunities, may not be infringed except by the due course of the "*law of the land*."

Not everything "which passes under the form of enactment" is "considered the law of the land." *Huntsman v. State*, 12 Tex. Ct. App. 619, 640-41 (1882); see also, *Hoke v. Henderson*, 15 N.C. 1, 15 (1833) ("Those terms 'law of the land' do not mean merely an act of the General Assembly.") Rather, in the decades preceding the ratification of the Texas Constitution, "law of the land" had become a legal term of art which carried implied limitations on the legislative as well as executive power. See, e.g., *Wynehamer v. People*, 13 N.Y. 378, 392-95 (1856) (collecting cases).

In 1873—just two years before the Texas Constitutional Convention—the Illinois Supreme Court struck down a local regulation on the use of property as violating the "law of the land" clause in its state constitution because, based on the facts on the ground, the regulation exceeded the police power. *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 198-99 (1873). As that court explained, "it can not be said that every

legislative enactment that affects the interest of the citizen, is necessarily the 'law of the land.'" *Id.* Rather, to fall within the police power, a restriction on a use of property must be based on evidence that the use will "injuriously affect or endanger others." *Id.* To hold otherwise "would render nugatory every constitutional provision intended for the protection of private property." *Id.*

That same year, the Missouri Supreme Court articulated a similar test:

> A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservative of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land.

State v. Fisher, 52 Mo. 174, 177 (1873).

These courts were not innovators. As early as 1819, the United States Supreme Court held that it had authority to declare that legislation faithfully adopted by the legislature was, nevertheless, "not the law of the land." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). As Justice Marshall explained, if the legislature "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the *law of the land*." *Id.* (emphasis added).

While Justice Marshall was referring to the Federal Government, state court decisions were in accord. See, e.g., *Den ex dem. Trs. of Univ. v. Foy*, 5 N.C. 58 (1805) (noting that the North Carolina Constitution's "law of the land" clause was designed *primarily* to place limits on the legislative power.); *Norman v. Heist*, 5 Watts & Serg. 171, 173-74 (Pa. 1843) (holding that the "law of the land" clause, separate from the takings clause, restricted the legislature's ability to change rules of property); see also, *State v. Glen*, 52 N.C. 321, 331 (1859) (invoking law of the land clause to strike down legislative takings); *Young v. McKenzie*, 3 Ga. 31, 43, 45 (1847) (same).

Indeed by 1831, Judge Green of the Tennessee Supreme Court held that the presumption that the "law of the land" simply means whatever laws the state legislature might pass was "too absurd to find a single advocate." *Bank of State v. Cooper*, 10 Tenn. 599, 606-07 (1831).

By the time the Texas delegates assembled in Austin to draft our Constitution, courts in at least twenty of the thirty-seven then-existing states had embraced a substantive view of their state's law-of-the-land, due-process, or due-course clause. Arif Panju, et. al., *'Every Safeguard Known to Constitutional Law': The History and Tradition of Economic Liberty in Texas*, Tex. Rev. L. & Pol. at *67 (2024 Forthcoming) https://ssrn.com/abstract=4592692.

Given this history, this Court's 140-year-old practice applying the law-of-the-land clause to place restrictions on the legislative power is not demonstrably erroneous.

III. THE STATE'S PROCEDURE-ONLY APPROACH CONFLICTS WITH COMMONLY HELD VIEWS OF THE LEGISLATIVE AND JUDICIAL POWERS IN 1876.

Appellants' procedure-only view of the "law of the land" clause should also be rejected because it is based on a view of the legislative and judicial powers that was well outside of the mainstream by 1876. Under the State's view, state legislative power is unlimited unless explicitly restrained by an enumerated right. Therefore, any act passed by the legislature is the "law of the land" and courts may not look to the record to determine whether the act falls within the police power.

But by 1876, this parliamentary view of the legislative power was, at best, a minority position. See, e.g., *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 308-09, 316 (1795) (explaining that states had not inherited Parliament's unlimited legislative power); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-89 (1798) (recognizing implied, judicially enforceable, limitations on state legislative power); see also, *Lehman v. McBride*, 15 Ohio St. 573, 615-19 (1863) (collecting cases rejecting the position that state legislative power is unlimited unless explicitly restrained).

As early as 1833, Joseph Story declared it to be "general opinion, fortified by a strong current of judicial opinion" that there were implied,

judicially enforceable limits on the legislative power, and that "no court of justice, in this country, would be warranted in assuming, that any state legislature possessed a power to violate and disregard them; or that such a power… lurked under any general grant of legislative authority." Joseph Story, *Commentaries on the Constitution of the United States*. Vol. 3 §1393 (Boston, 1833).

By the time the Texas delegates met in Austin forty-three years later, state courts around the country had been applying something like this Court's evidence-based *Patel* test for decades to determine whether restrictions fell within the police power. See, e.g., *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 40-41 (1873) (applying the burden and proportionality test to strike down a local restriction on railroads); *Barling v. West*, 29 Wis. 307, 315-16 (1871) (local restriction on selling lemonade was invalid because the city could not produce evidence that the sale of lemonade was harmful to the public); *Hayes v. Appleton*, 24 Wis. 542, 543-45 (1869) (restriction on auctions was arbitrary and therefore not within a general grant of the police power); *Mayor v. Winfield*, 27 Tenn. 707, 709 (1848) (striking down a curfew for black men as unduly oppressive); *Waters v. Leech*, 3 Ark. 110, 115-16 (1840) (restriction on playhouses exceeded grant of general power to City); *Austin v. Murray*, 33 Mass. 121, 125-26 (1834) (local restriction on property uses exceeded grant of general police power).

If, as the State suggests, the Texans who ratified our Constitution intended to create a government that provided *less* protection for rights than the norm at the time, we would expect to see *something* in the text or history of our Constitution discussing that departure. Instead, the men who wrote the Texas Constitution claimed that it would protect the "liberty of the citizen, as inherited from our ancestors…by every safeguard known to constitutional law." Panju, *supra*, at * 7. And this Court began applying a substantive interpretation of Article 1, Section 19 without controversy within a decade of ratification.

Indeed, it is worth pausing to consider what the State's alternative "procedure only" approach to Article 1, Section 19 would have looked like. Unlike the federal Constitution, there is no separate privileges or immunities clause in the Texas Constitution where substantive rights may be lodged. The drafters of the Texas Constitution combined the privileges or immunities language of the Fourteenth Amendment into Art 1, section 19. As such, if Article 1, Section 19 provides no substantive protections for fundamental but unenumerated rights, then those protections simply *do not exist* under the Texas Constitution. Fundamental rights like the right to use property, raise one's children, or follow an honest occupation would be wholly subject to the unchecked passions of the majority. *See, e.g.*, *In the Interest of N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (parental rights); *Dobard v. State*, 149 Tex. 332, 339 (Tex. 1950) (right to earn a living).

Such a majoritarian approach to governance flies in the face of what the founding generations thought about law. Writing in 1795, Justice Patterson declared "Omnipotence in Legislation is despotism." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 316 (1795). Without the Court to act as a check on the legislative branch, "we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature." *Id.* Indeed, the great distinction between American governments and those of Britain, according to Justice Patterson, was the existence of judicially enforceable limits on the legislative power. An "act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence." *Id.* at 308. "In America the case is widely different." *Id.* The "Judiciary in this country is not a subordinate, but co-ordinate, branch of the government." *Id.* at 309.

Seven years before Texans died defending the Alamo, the United States Supreme Court repeated the point: a "government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint." *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829).

Two years before the current Texas Constitution was ratified, the Supreme Court of the United States reiterated the point yet again:

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism….

Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1874).

In accord with this tradition, this Court has provided a backstop to government overreach by enforcing baseline limitations on the legislative power for generations. It has done so under Article 1, Section 19 of our Constitution. The people of Texas "ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." *Wilkinson*, 27 U.S. at 657.

CONCLUSION

For generations, Article 1, Section 19 has acted as a bulwark against legislative encroachment of Texans' most fundamental rights. Among other things, those rights include the rights to raise one's children and to pursue a common occupation without arbitrary government interference.

As the State rightly notes, those rights do not include an unfettered right to perform experimental, often irreversible, sex-trait modification procedures on children. But that is not—as the State suggests—because

no unenumerated rights exist. It is because, at the time of ratification, it was well understood that the government can have a role to play when an individual directly attacks the bodily integrity of another. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258 (2022) (distinguishing abortion from traditional liberties protected by the Fourteenth Amendment because it involves the body of another); *Morton v. State*, 3 Tex. Ct. App. 510, 517-18 (1878) (defining the line between rights and the police power as the maxim "*sic utere tuo ut non alienum loedas,*" which means "exercise your own freedom as not to infringe the rights of others or the public peace and safety."); *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876) (same); John Locke, *Two Treatises of Government* 271 (5th ed. Peter Laslett ed., Cambridge Univ. Press 1965) (1690) (same).

This Court therefore need not destroy baseline protections for longstanding fundamental rights to uphold the law at issue in this case. It should not do so.

Respectfully submitted,

/s/ Chance Weldon

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B) because it contains 3,418 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in fourteen (14) point Century Schoolbook style font.

/s/Chance Weldon
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I certify that on January 5, 2024, the foregoing document was electronically filed and served on counsel of record through the electronic filing manager in accordance with Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure.

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