CAUSE NO. D-1-GN-24-001276

PFLAG, Inc.,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
v.	§	**TRAVIS COUNTY, TEXAS**
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF Texas; and WARREN KENNETH PAXTON, JR., in his official capacity as Attorney General of Texas,	§	**261st JUDICIAL DISTRICT**
Defendant.	§	
	§	

PLAINTIFF PFLAG, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS AND MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM

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Pursuant to Texas Rule of Civil Procedure 166a, Plaintiff PFLAG, Inc. ("PFLAG") files this Motion for Partial Summary Judgment on its claims under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") and this No Evidence and Traditional Motion for Summary Judgment on Defendants' Counterclaim. The Court should grant PFLAG's motion because the Civil Investigative Demands ("CID") and Demand for Sworn Written Statement ("DSWS") (together, the "Demands") propounded by the Office of the Attorney General of the State of Texas ("OAG") and Warren Kenneth Paxton, Jr., in his official capacity as Attorney General of Texas ("Attorney General"), exceed Defendants' authority under the DTPA as a matter of law, including because the Demands infringe the constitutional rights of PFLAG and its members. The Court should further grant PFLAG's motion with regard to Defendants' Counterclaim because a petition to enforce is appropriate only against a party that has "fail[ed] to comply with a directive of the consumer protection division." PFLAG has not failed to comply, it has been shielded from complying with the Demands during the pendency of this litigation by orders of the Court. PFLAG respectfully requests that the Court modify the Demands to comply with the DTPA's statutory requirements, limit their scope, and avoid constitutional infringements, and deny Defendants' Counterclaim to Enforce the Demands. PFLAG would respectfully show this Court as follows:

INTRODUCTION

This action arises out of the OAG's improper Demands instructing PFLAG, a private membership organization dedicated to supporting, educating, and advocating for LGBTQ+ people and those who love them, to provide information purportedly related to the OAG's "investigation of actual or possible violations" of Section 17.46 of the Texas Business and Commerce Code for issues related to alleged "misrepresentations regarding Gender Transitioning and Reassignment Treatments and Procedures and Texas law." Ex. 1, OAG CID (Feb. 9, 2024); Ex. 2, OAG DSWS

(Feb. 9, 2024). PFLAG brought this action pursuant to both section § 17.61(g) of the DTPA and the Uniform Declaratory Judgment Act, Texas Civil Practice and Remedies Code § 37.001, *et seq.* ("UDJA"), seeking a declaration that the Demands are beyond the scope of authority under the DTPA and violative of the rights of PFLAG and its members under the Texas and United States Constitutions, and asking the Court to set aside or modify the Demands accordingly.[1] *See* Pl.'s Original Verified Pet. to Set Aside Civil Investigative Demands, for Declaratory J., and Appl. for a TRO and Temporary and Permanent Injunctive Relief (hereinafter, "Petition") at 1-4, 47-49. Defendants subsequently filed a counterclaim for enforcement of the Demands pursuant to section 17.62(b) of the DTPA. *See* Defs.' Countercl. for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand (hereinafter, "Counterclaim").

There is no genuine issue of material fact in dispute. The Demands exceed Defendants' authority under the DTPA and unlawfully seek information and documents well outside the scope of the investigation Defendants claim to have undertaken—an investigation they failed to sufficiently describe in the Demands themselves. Defendants' only purported justification for the Demands is based on statements by PFLAG's CEO in an affidavit supporting other litigation that bears no connection to the alleged fraud and deception Defendants are purportedly authorized to investigate. The Demands are overly broad, unduly burdensome, and seek information not related to the subject matter of the investigation and which is unlikely to lead to the discovery of admissible evidence. Requiring PFLAG to respond to the Demands without modification would infringe PFLAG's and its members' constitutional rights. PFLAG is thus entitled to judgment as a matter of law. Accordingly, PFLAG respectfully requests that the Court grant PFLAG's motion.

[1] PFLAG does not seek summary judgment on its claims under the UDJA at this time.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. PFLAG

PFLAG is a national, nonprofit membership organization, with over 1,600 members in Texas. Ex. 3, Tr. of Hr'g on Temporary Injunction ("TI Transcript") at 33:2-5, 40:3-4, 41:24-42:1, Ex. 4, PFLAG Articles of Incorporation. PFLAG provides support, education, and advocacy to LGBTQ+ people and their families in furtherance of its mission to create a more caring, just, and affirming world for LGBTQ+ people and those who love them. Ex. 3 at 36:8-16. PFLAG's members in Texas include families with transgender youth who need access to medically necessary gender-affirming medical care. *Id.* at 42:17-22. The core of the support PFLAG provides to PFLAG members is peer-to-peer support groups, run by volunteers, in which members are supported in sharing deeply personal information about themselves and their families. *Id. at* 42:23-45:15. PFLAG has also advocated for these members by joining litigation on their behalf in *PFLAG, Inc. v. Abbott*, Cause No. D-1-GN-22-002569 (in the 459th District Court of Travis County, Texas), challenging the State's treatment of gender-affirming medical care as child abuse, and *Loe v. Texas*, Cause No. D-1-GN-23-003616 (in the 201st District Court of Travis County, Texas), challenging the constitutionality of Senate Bill 14 ("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); Ex. 3 at 45:18-46:1; 46:13-25.

PFLAG does not provide medical care; it does not offer any goods or services related to medical care; it does not provide any specific resources to medical providers, including as to how to bill for medical care; and it has never billed an insurance provider for medical care. Ex. 3 at 39:2-17. The only goods PFLAG sells in Texas are branded merchandise on its website—T-shirts and mugs, for example. *Id*. at 39:20-40:1.

B. The Demands

On February 9, 2024, PFLAG received the Demands, both dated February 5, 2024, from the OAG. *Id.* at 47:8-48:4; Ex. 1. With respect to their basis, the CID states only that "[t]he [Consumer Protection] Division believes you are in possession, custody, or control of documentary material relevant to the subject matter of an 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." Ex. 1 at 1. Similarly, the DSWS states only, "[t]his demand for sworn written statement is relevant to the subject matter of an investigation regarding possible violations of DTPA section 17.46 for issues related to misrepresentations regarding Gender Transitioning and Reassignment Treatments and Procedures." Ex. 2 at 1. Neither Demand provides any information about what the alleged misrepresentation was, who is suspected to have made the purported misrepresentation or to whom it was made. Nor does either Demand mention insurance or billing practices.

The Demands each attach an affidavit from PFLAG CEO Brian Bond, dated July 11, 2023, and submitted in *Loe v. Texas* in support of Plaintiffs' petition for a temporary injunction seeking to enjoin SB14 from going into effect, filed prior to the effective date of SB14. Five of the eight requests in the CID and seven of the nine requests in the DSWS relate specifically to this affidavit. Ex. 1 at 6; Ex. 2 at 5. In particular, the Demands focus on the following statement in Mr. Bond's affidavit:

> 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.

See Ex. B1 to Exs. 1, 2 at 4-5. And specifically, the Demands seek information and documents related to the "contingency plans" and "alternative avenues to maintain care" described in Mr. Bond's affidavit. Ex. 1 at 6; Ex. 2 at 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. Ex. 1 at 6; Ex. 2 at 5.

In the definitions and instructions, the Demands require the furnishing of information and documents from March 8, 2023—the date on which SB14 was *introduced* in the Texas legislature—through the date of production and a broad range of information and documents that would reveal the identities and private communications of PFLAG members in Texas. Ex. 1 at 2; Ex. 2 at 3. For example, the Demands require PFLAG to "[i]dentify from whom PFLAG learned about such 'contingency plans' or 'alternative avenues,'" and then the Demands define "identify" to require a person's "complete name, any alias(es), social security number, date of birth, occupation, title(s), job responsibilities, street and mailing address for both home and business at the time in question at the time of responding (if different), home, cellular, and business telephone numbers, and personal and business email addresses." Ex. 1 at 5; Ex. 2 at 2. The Demands seek privileged information and documents and do not provide for any form of redaction. Ex. 1 at 3, 5-6; Ex. 2 at 2-3.

The Demands required PFLAG to provide information, documents, communications, and statements in response on or before Monday, February 26, 2024. Ex. 1 at 1; Ex. 2 at 1. On February

20, 2024, the OAG granted a one-week extension for PFLAG up to and including Monday, March 4, 2024. Ex. 5 at 5 (Email from D. Shatto to A. Pollard, Feb. 20, 2024).

C. PFLAG's Petition for Injunctive Relief and To Set Aside or Modify the Demands

On February 28, 2024, PFLAG filed its Petition. The Petition requests that the Demands be set aside on the grounds that: (1) the Demands are beyond the OAG's scope of authority and are otherwise improper under the DTPA; (2) the Demands violate PFLAG's freedom of association and assembly under both the federal and Texas constitutions; (3) the Demands were issued as impermissible retaliation against PFLAG and its members for the exercise of their constitutionally protected activity in violation of the federal constitution; and (4) the Demands violate the freedom from unlawful search and seizure under both the federal and Texas constitutions. Petition at 47-49. In the alternative, the Petition requests a reasonable extension of time to further respond to the Demands and modification of their scope. *Id*. at 49.

At the Court's request, Defendants filed The Office of the Attorney General's Response to Plaintiff's Application for Temporary Restraining Order ("TRO Response") on February 29, 2024. On March 1, 2024, following a hearing, 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 Pl.'s Appl. for a TRO at 2. On March 15, Judge Cantú Hexsel entered an order extending the TRO until March 29, 2024. *See* Order Granting Pl.'s Mot. to Extend TRO.

On March 19, Defendants filed The Office of the Attorney General's Motion to Modify and Clarify the Court's March 1, 2024, Temporary Restraining Order ("Motion to Modify TRO").

Through this filing, Defendants attempted to offer modifications to the Demands. *See* Exs. 1, 2 to Motion to Modify TRO.

The Court held a hearing to show cause on PFLAG's application for a temporary injunction before District Court Judge Amy Clark Meachum on March 25, 2024. Although Defendants had issued a Notice of Hearing on their Motion to Modify TRO for the same time, it was not properly set. Judge Meachum instructed Defendants to address their proposed modifications to the Demands in the context of their response to Plaintiff's application for a temporary injunction. Ex. 3 at 25:1-19. The Court 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." *Id.* 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. *Id.* 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. *Id.* 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"). 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." Order Granting Pl.'s Appl. for a TI 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.* at 3.

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.* Therefore, the TI extended the return dates for the Demands until the conclusion of the litigation and enjoined and restrained Defendants 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.

On April 12, 2024, OAG filed a Notice of Accelerated Appeal, notifying the trial court of their accelerated interlocutory appeal to the Third Court of Appeals, seeking reversal of the temporary injunction. *See* Defs.' Notice of Accelerated Appeal at 1. Plaintiff filed an application for emergency relief pursuant to Texas Rule of Appellate Procedure 29.3 on April 16. The Court of Appeals granted temporary relief on April 17, reinstating the relief ordered by this Court in its

March 25 Temporary Injunction. *See* Ex. 6, PFLAG Emergency Mot. for Temp. Injunctive Relief Pursuant to Rule 29.3; Ex. 7, Order Granting PFLAG Temp. Relief and Reinstating TI.

D. OAG's Counterclaim and Proposed Modifications to the Demands

Also on April 12, 2024, Defendants filed their Counterclaim. The Counterclaim seeks to enforce a modified version of the Demands, styled as "proposed New Demands" against PFLAG, seeking "information" that is purportedly "in all material ways narrower than the information requested by the original Demands" and "reflect[s] the information that the Attorney General currently seeks." Counterclaim ¶ 24. The Counterclaim attaches as exhibits proposed modifications to the Demands. *See* Exs. 3, 4 to Counterclaim. The proposed modifications allow for the redaction of individual member information, but 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. *See id.*

In addition to proposing modifications to the Demands, the Counterclaim clarified the basis for the underlying investigation.[2] As set forth in the TRO Response and the Counterclaim, internet research led an investigator at the OAG to conclude that "providers may be fraudulently prescribing hormones under the guise of treating an 'endocrine disorder,' when in fact the hormones are intended to treat 'gender dysphoria' or another medical condition." Counterclaim ¶ 6; *see* TRO Response at 14-15, (Sam Weeks Aff.). Defendants identify online statements from two providers, neither of which are in Texas. The statements do not relate to providing medical care in states where that care is banned or to providing medical care to minors.

[2] Defendants' TRO Response first set forth the nature of the investigation to which the Demands purportedly relate, pointing to allegations of medical providers allegedly evading SB14 by misrepresenting patients' conditions to continue providing prohibited care, thus "committing various forms of fraud, including insurance fraud." Defs.' Resp. to Pl.'s Appl. For TRO ¶¶ 7-8.

According to the Counterclaim: "On or around January 30, 2024, the Attorney General's office became aware that PFLAG likely possessed information relevant to providers misrepresenting the purpose of and condition treated by their written prescription for hormone treatments. In other words, PFLAG likely possess information related to insurance fraud." Counterclaim ¶ 7. The Counterclaim describes Brian Bond's *Loe v. Texas* affidavit and then states: "In context, this language strongly suggests of action to obtain or offer gender-transition care using deception, *i.e.*, 'contingency plans.'" *Id*.

E. PFLAG Does Not Have Information or Documents Relevant to Defendants' Investigation Into Insurance Fraud.

On its face, Brian Bond's affidavit in *Loe v. Texas* does not indicate any involvement in or knowledge of insurance fraud. Mr. Bond's affidavit was filed to support PFLAG's standing to participate in the lawsuit on behalf of its members, including PFLAG's decision to become a plaintiff in that lawsuit. As Mr. Bond explained in his affidavit, after SB14 was passed, and before it went into effect, Texas families with transgender adolescents were making "contingency plans" and seeking "alternative avenues to care" in Texas because providers were ceasing to provide the care *even prior* to the law going into effect:

> 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 . . . 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.

Ex. B1 to Exs. 1, 2 (¶ 13). Mr. Bond described in subsequent paragraphs how PFLAG members were already being harmed even before SB14 became operative because of those cancelled

appointments, as well as because of "losing access to healthcare providers who are moving their practice out of state or ending their provisions of gender-affirming care" or having had "imminent plans" to obtain care for their children "disrupted or foreclosed." *Id.* ¶ 14. He further discussed how SB14 had already caused families to leave Texas or to seek access to care in other states. *Id.* ¶ 16. Everything in this affidavit related to attempts by families to obtain care for their children lawfully, whether in state or out of state, before SB14's prohibition on that care became effective.

In the attached Exhibit 8, Mr. Bond further clarifies the statements Defendants have pointed to as motivating the Demands. He attests that: "The 'contingency plans' that I was referring to in the *Loe* affidavit for Texas families with transgender or nonbinary adolescents were either (1) moving out of state entirely or partially (such as some family members moving out of state) or (2) accessing medically necessary care in another state while continuing to live in Texas. The 'alternative avenues to care' I was referring to in the *Loe* affidavit, regarding Texas families with transgender or nonbinary adolescents, was about doctors continuing to provide gender-affirming medical care for adolescents in Texas, including pediatricians or adolescent medicine doctors who do not specialize in gender-affirming medical care—'affirming general practitioners'—following the enactment of SB14 in June 2023 but prior to its effective date in September 2023." Ex. 8, Bond. Aff. (May 20, 2024), at ¶ 9. He also attests that: "I have never had any conversation or other communication about PFLAG members in Texas: seeking to access hormones as treatment for an 'endocrine disorder' as opposed to treatment for gender dysphoria; billing their insurance providers for any type of medical care in any particular way; or in any way accessing or seeking to access gender-affirming medical care in Texas following the effective date of SB14." *Id.* ¶ 11.

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issue exists as to any material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a; *BPX Operating Co v.*

Strickhousen, 629 S.W.3d 189, 196 (Tex. 2021). In deciding whether there is a disputed material fact issue precluding summary judgment, the Court must "take as true all evidence favorable to the nonmovant and [ ] indulge every reasonable inference and resolve any doubts in its favor." *BPX*, 629 S.W. 3d at 196.

Whether the Demands exceed the authority granted by the DTPA and infringe the constitutional rights of PFLAG and its members are questions of law. *See Int'l Ins. Agency, Inc. v. R.R. Comm'n of Texas*, 893 S.W.2d 204, 211 (Tex. App.—Austin 1995, writ denied) (whether agency action exceeds statutory authority is a question of law); *Armbrister v. Morales*, 943 S.W.2d 202, 205 (Tex. App.—Austin 1997, no writ) (constitutional question is "pure question of law"). As such, they "are appropriate matters for summary judgment." *Salahat v. Kincaid*, 195 S.W.3d 342, 343 (Tex. App.—Fort Worth 2006, no pet.) (citing *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex.1999)).

ARGUMENT

I. The Demands Are Not Authorized By The DTPA.

Summary judgment is proper because the Demands exceed the OAG's authority under the DTPA. The Demands fail to meet the statutory requirements that they clearly identify both the statutory basis for and general topic of any investigation, that they only be sent to parties actually engaged in trade or commerce or to those for whom there is a reasonable basis to believe they have information or documents regarding a deceptive trade practice, that they are relevant to the investigation to which they allegedly relate, and that they seek materials appropriately discoverable under the Texas Rules of Civil Procedure. PFLAG's activity at issue in Texas does not constitute trade or commerce under the DTPA's definitions and the OAG has stretched the DTPA far beyond what the Texas legislature intended and what the letter of the law allows. As the courts must

enforce a statute as written and the OAG has clearly overreached its authority under the text of the law, PFLAG is entitled to judgment as a matter of law.

A. The Demands Fail to Describe the Investigation with Sufficient Specificity.

The Demands should be set aside or modified because they fail to provide sufficient clarity regarding either the statutory basis for or the general subject matter of the investigation to which they allegedly relate. CIDs must identify "the statute and section of the DTPA under which the alleged violation is being investigated," along with "the general subject matter of the investigation." Tex. Bus. & Com. Code § 17.61(b)(1). Here, the Demands simply assert they are seeking information "relevant to the subject matter of an investigation regarding possible violations of DTPA § 17.46 for issues related to misrepresentation regarding Gender Transitioning and Reassignment Treatments and Procedures" or "relevant to the subject matter of an 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* Ex. 1 at 1, Ex. 2 at 1. This general reference to DTPA § 17.46, which sets forth a non-exclusive laundry list of 34 categories of "false, misleading, or deceptive acts or practices," and the vague description of "issues related to misrepresentation regarding Gender Transitioning and Reassignment Treatments and Procedures" do not suffice to apprise PFLAG of the nature of the investigations or enable PFLAG to assess the relevance of the Demands to those investigations.

A CID recipient must be able to assess or challenge Defendants' authority to have issued the Demands in the first instance and to determine whether the information and documents they seek can meet a relevance standard. *See Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, 903 F.3d 456, 459 (5th Cir. 2018). Because the Demands' validity is measured by the

purposes stated therein, the sufficiency of the statement of their purpose "is an important statutory requirement." *Id.* at 459-60 (quotation omitted). Here, the Demands fail to meet that requirement.

That Defendants have elaborated on the subject matter of the investigations they are conducting through subsequent filings and representations to the Court does not change that the Demands themselves fail to comply with the requirements of the DTPA.[3] Defendants' authority to issue the Demands "is a creature of statute," *id*. at 458, and Defendants are obligated to comply with those statutes "as written" and "refrain from rewriting text that lawmakers chose," *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (quotation omitted).

B. The DTPA Does Not Authorize Issuing These Demands to PFLAG.

The Demands further exceed Defendants' authority under the DTPA because PFLAG does not engage in trade or commerce or sell or lease goods or services that relate in any way to the Demands. The DTPA is a consumer protection law that applies exclusively to "[f]alse, misleading, or deceptive acts or practices *in the conduct of any trade or commerce*." Tex. Bus. & Com. Code § 17.46(a) (emphasis added). The statute defines "trade" and "commerce" to include "the advertising, offering for sale, sale, lease, or distribution of any good or service," § 17.45(6), "goods" as "tangible chattels or real property purchased or leased for use," § 17.45(1), and "services" as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods," § 17.45(2).

The resources and support that PFLAG provides to its members are not, by any reasonable standard, goods or services or engagement in trade or commerce. PFLAG is a nonprofit membership organization that seeks to support, educate, and advocate for LGBTQ+ people and

[3] Although Defendants claim their proposed modifications cure deficiencies in the Demands, they failed to alter in any way the Demands' descriptions of the subject matter of the investigations or their statutory basis. *Compare* Ex. 1, 2, *with* Counterclaim Exs. 3, 4.

their families, including families with transgender adolescents. Ex. 3 at 33:2-5, 36:8-14, 40:3-6, 42:17-22. Its mission is "to build a more caring, just, and affirming world for LGBTQ+ people and those who love them." *Id.* at 33:14-16. In regard to its work with the families of transgender young people in Texas, the "core of the support that [PFLAG has] provided is . . . peer-to-peer support groups." *Id.* at 42:25-43:14. PFLAG's Texas members do not purchase or lease any goods or services from PFLAG. The OAG is therefore using the DTPA in a manner that goes far beyond what the Legislature intended and cannot be squared with the plain and ordinary meaning of its terms.

The DTPA is a consumer protection law, and both its articulated purpose and the scope of its explicit prohibitions make clear that it is not intended to regulate organizations like PFLAG that engage in advocacy and support for their members. *See* Tex. Bus. & Com. Code § 17.44 (purpose); § 17.46 (prohibitions); *see also Riverside Nat. Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980) ("the scope of 'trade' and 'commerce' defines the acts that are illegal" under the DTPA); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 407 (Tex. App.—Houston 1997, writ dism'd by agr.) ("The DTPA is designed to protect consumers from any deceptive trade practice made in connection with the purchase or lease of any goods or services … To this end, the supreme court has stated the DTPA must be given its most comprehensive application without doing any violence to its terms.") (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540-41 (Tex. 1981)).

More specifically, PFLAG does not engage in any trade or commerce related to the subject of the Demands, either as described therein or by the Defendants' subsequent representations. PFLAG is not a medical provider and does not provide goods or services related to medical care. Ex. 3 at 39:2-11. PFLAG has never billed an insurance company and does not offer resources to medical providers regarding how to bill for medical care. *Id*. at 39:12-17. Absent any connection

with PFLAG's transaction in goods or services, the DTPA does not permit Defendants to take action against them regarding deceptive practices. *See Amstadt v. U.S. Brass Corp*., 919 S.W.2d 644, 649-50 (Tex. 1996).[4]

Defendants' assertions that PFLAG is not the target of the investigations do not cure the impropriety of the Demands.[5] First, while the DTPA allows Defendants to send a CID to any person they believe may be in possession of documents relevant to their investigation, Tex. Bus. & Com. Code § 17.61(a), that belief must be reasonable. *See Major League Baseball v. Crist*, 331 F.3d 1177, 1187 (11th Cir. 2003) (to issue a CID, "the Attorney General must have more than a mere intuition that illegal activity is afoot"). Defendants have made clear that the affidavit submitted by PFLAG CEO Brian Bond in *Loe v. Texas* is the reason they sent the Demands to PFLAG. (TRO Response at 4; Ex. 3 at 18:9-13; Counterclaim ¶ 7). In particular, they have focused on this affidavit's mentions of PFLAG members making "contingency plans" and seeking "alternative avenues to maintain care" or "affirming general practitioners" after the passage of SB14, asserting that these words mean that PFLAG "almost certainly has knowledge" about fraud

[4] While Defendants have now stated that the Demands relate to their investigation of insurance fraud relating to gender-affirming medical care, on their face, the Demands are broadly worded to pertain to "issues related to misrepresentation regarding Gender Transitioning and Reassignment Treatments and Procedures." But as the Texas Supreme Court clarified over 30 years ago, the DTPA does not authorize claims based "on a breach of the accepted standard of medical care." *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994). Multiple state courts have similarly interpreted their consumer protection laws like the DTPA. *See*, *e.g.*, *Brookins v. Mote*, 292 P.3d 347, 360 (Mont. 2012); *Henderson v. Gandy*, 623 S.E.2d 465, 468 (Ga. 2005); *Darviris v. Petros*, 812 N.E.2d 1188, 1193 (Mass. 2004); *Haynes v. Yale- New Haven Hosp.*, 699 A.2d 964, 973 (Conn. 1997); *Nelson v. Ho*, 564 N.W.2d 482, 486 (Mich. 1997). As such, the operative Demands, as written, exceed the scope of the DTPA.

[5] Although Defendants have represented that PFLAG is not currently the target of the investigation, *see* TRO Response at 5; Ex. 3 at 18:16-19, Defendants' public statements have suggested the opposite. *See* Paxton press release, Feb. 29, 2024, https://www.texasattorneygeneral.gov/news/releases/trans-advocacy-group-sues-attorney-general-effort-hide-incriminating-documents ("The Attorney General will fight to hold this organization accountable.").

allegedly being perpetrated by medical providers (Ex. 3 at 18:9-13) or that they constitute an admission that PFLAG "has knowledge about this insurance fraud business [Defendants are] looking into." *Id.* 23:11-14. They allege that the use of these words "strongly suggests of actions to obtain or offer gender-transition care using deception." Counterclaim ¶ 7. But there is nothing about any of these phrases, either in isolation or in the context of the affidavit, that bears any relationship to deception or fraud of any kind, let alone insurance fraud. The entire basis for the Demands ignores the text of the very paragraph of the affidavit in which those terms appear, which explicitly references families' plans to "move or seek care out of state," the desire for "affirming general practitioners" in the event their primary specialists wind down care or leave the state, and the realities of providers "cancell[ing] appointments" and "winding down medical care for gender dysphoria" in advance of SB14's effective date (Ex. B1 to Ex. 1 at ¶ 13); its timing, having been executed in July, well before the September 1, 2023 effective date of SB14; its context in establishing the standing of PFLAG members to challenge SB14's constitutionality in light of the harms they were already experiencing even before the law took effect; and the numerous declarations filed by other plaintiffs in the SB14 lawsuit, along with that of Mr. Bond, that recounted their own experiences of having medical appointments canceled prior to the effective date of SB14, the decision of some SB14 plaintiffs to move out of Texas in order to continue care, and the collective efforts of the SB14 plaintiffs to obtain an injunction preventing SB14 from taking effect. None of this provides any basis for issuing Demands to PFLAG—a nonprofit membership organization not in the health care business—with regards to purported concerns about deception or fraud regarding medical procedures by medical providers. Defendants' characterization of Mr. Bond's affidavit as support for the Demands to PFLAG is simply unreasonable on its face.

Second, the Demands must meet a relevance requirement. The documents and information sought by the Demands go well beyond the scope of what Defendants claim to be investigating. Even assuming, *arguendo*, that the phrases Defendants have seized upon had any connection to medical providers potentially engaging in fraud, the Demands broadly seek documents and information wholly irrelevant to a fraud investigation, such as documents and communications that form the basis of or relate to the entirety of Mr. Bond's affidavit, including its preparation; contractual and charter agreements between PFLAG and its chapters; and PFLAG's governing documents. *See* Ex. 1. Defendants' proposed modifications would not remedy this overbreadth, as they continue to seek documents and communications regarding PFLAG's Texas chapters, contractual and charter agreements between PFLAG and its chapters, and PFLAG's governing documents. *See* Counterclaim Ex. 3. Though "[w]hat is relevant to the subject matter is to be broadly construed," "[t]hese liberal bounds, however, have limits." *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223–24 (Tex. 2016) (quotation omitted). Here, Defendants have exceeded those limits. This is particularly so given that PFLAG is not the target of Defendants' investigation. *See In re McVane*, 44 F.3d 1127, 1138 (2d Cir. 1995) (where documents are sought from third parties, "the agency must make some showing of need for the material sought beyond its mere relevance to a proper investigation").

C. The Request for Sworn Written Statements Is Not Authorized for Use on Third Parties.

The DTPA does not authorize Defendants to issue a DSWS to a person who is not the target of an investigation. Tex. Bus. & Com. Code § 17.60 states plainly that when the Consumer Protection Division either has reason to believe a person is engaging in a deceptive trade practice or reasonably believes it is in the public interest to ascertain whether a person is doing so, "the division may: (1) require *the person* to file on the prescribed forms a statement or report in writing,

under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and such other data and information as the consumer protection division deems necessary." *Id*. (emphasis added). Unlike § 17.61(a), which allows CIDs to be sent to "any person" believed to have relevant information, § 17.60(1) makes clear that demands for sworn written statements may only be sent to "the person" suspected of violating the DTPA. As Defendants have repeatedly indicated that PFLAG is not the target of their investigation, TRO Response at 5; Ex. 3 at 18:16-19, the DTPA does not authorize their sending a DSWS to PFLAG.

D. The Demands Seek Materials Not Appropriately Discoverable Under the Texas Rules of Civil Procedure.

Beyond the other constraints of the DTPA, the statute further limits the information that can be sought by CIDs to "documentary material which would be discoverable under the Texas Rules of Civil Procedure." Tex. Bus. & Com. Code § 17.61(c). The Texas Rules of Civil Procedure place many limits on the discoverability of information, chief among them, that information must be relevant to be discoverable. Tex. R. Civ. P. 192.3(a).

As previously noted, the Demands are overbroad, seeking information and documents that bear no connection to an investigation of "misrepresentations regarding Gender Transitioning and Reassignment Treatments and Procedures," as set forth in the text of the Demands, or even regarding medical providers allegedly engaging in insurance fraud, as Defendants eventually clarified. For example, the Demands' requests for documents and communications regarding the contents of Mr. Bond's entire affidavit, contractual agreements between PFLAG and its Texas chapters, and PFLAG's governing documents and bylaws go well beyond either topic. *See* Ex. 1 (Demands 1, 4, 7, 8). These requests are not reasonably calculated to lead to admissible evidence and constitute an impermissible "fishing expedition." *See* Tex. R. Civ. P. 192.3(a); *In re Am.*

Optical Corp., 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (denying the enforceability of overbroad discovery requests and emphasizing that discovery must be particularized).

The overbreadth and burdensome nature of the requests in the Demands is particularly egregious in light of the fact that PFLAG is not even the subject of Defendants' investigation but a third party. Under the Texas Rules of Civil Procedure, the discovery from third parties is more limited than that available from the parties themselves. *See, e.g.,* Tex. R. Civ. P. 197.1 (interrogatories can be propounded only on parties, not on third parties); Tex. R. Civ. P. 205.1 (discovery from a nonparty requires court order or service of a subpoena and a party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production); Tex. R. Civ. P. 176.7 ("A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship."). Any information about the potential fraud being investigated by the OAG would be obtainable from a more convenient, less burdensome source. *See* Tex. R. Civ. P. 192.4.

The Texas Rules of Civil Procedure also provide protections, including the ability to challenge requests for privileged information, specific times to respond, the ability to seek protective orders, and the framework necessary to facilitate the assertion of and ruling on these protections and other objections. *See* Tex. R. Civ. P. 190-215. The Demands include no such restraints, seeking privileged and confidential materials with no ability to make redactions or objections. This includes seeking information and documents that would reveal the identities of

PFLAG members, as well as communications regarding the preparation of Mr. Bond's affidavit, which would reveal attorney-client communications. The Demands exceed both the Rules of Civil Procedure and the DTPA itself.

Even the proposed modifications offered by Defendants do not go far enough to remedy these issues. While Defendants have narrowed the paragraphs of the affidavit about which they are seeking related documents and communications, one of those relates only to general information about PFLAG's Texas chapters. *See* Counterclaim Ex. 3. And they still seek contractual agreements between PFLAG and its Texas chapters and PFLAG's governing documents and bylaws. *Id*. None of this has any relevance to what the OAG alleges they are investigating.

II. The DTPA Must Be Read Consistent with Constitutional Constraints.

The canon of constitutional avoidance requires that, if a question can be resolved "on nonconstitutional grounds," it must be. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). "This rule is not optional." *Phillips v. McNeill*, 635 S.W.3d 620, 630 (Tex. 2021). "[T]his canon of construction applies only when the statutory language is ambiguous." *Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022) (citing *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019)).

The DTPA allows for a recipient of a CID to file "a petition to extend the return date for, or to modify or set aside the demand, stating good cause[.]" Tex. Bus. & Com. Code § 17.61(g). The DTPA does not define the term "good cause." To avoid constitutional infirmities, "good cause" must be interpreted to include the need to set aside or modify Demands that are outside Defendants' authority and threaten recipients' constitutional rights. Art. I, § 29 of the Texas Constitution carves out of Defendants' broad authority to conduct investigations any action that would violate the Texas Bill of Rights. To the extent the Demands would infringe PFLAG and its members' constitutional rights as written, they should be modified to conform to constitutional constraints.

A. Violations of PFLAG and Its Members' Free Speech, Association, Assembly, and Petition Rights Constitute Good Cause for Setting Aside or Modifying the Demands.

In seeking information, documents, and communications regarding PFLAG members' transgender children and their healthcare, the Demands would require PFLAG to disclose member identities, in clear violation of longstanding First Amendment protections. And while Defendants have subsequently disclaimed seeking information that would reveal the identities of PFLAG members, Counterclaim ¶ 24, and have agreed to permit redactions or anonymizations to the extent documents or information requested include information identifying members, Counterclaim Exs. 3, 4, their proposed modifications do not allow for withholding or redacting deeply personal communications or other information shared as part of PFLAG's core expressive activities.

Constitutional freedoms of speech, association, and assembly include "immunity from state scrutiny of membership lists" because of their close relation to the "rights of the members to pursue their lawful private interests privately and to associate freely with others." *NAACP v. Alabama*, 357 U.S. 449, 466 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters[.]" *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375-76 (Tex. 1998) ("*BACALA*") (quoting *NAACP*, 357 U.S. at 460-61); *see also In re Maurer*, 15 S.W.3d 256, 260 (Tex. App. — Houston [14th Dist.] 2000, no pet.). The protection against disclosure of member information precludes even production requests that seek information about a particularized subset of members. *See Tilton v. Moye*, 869 S.W.2d 955, 956 (Tex. 1994) (reversing trial court order that church produce information about the subset of its congregation who "claimed to have been healed of medical illnesses"). Compelled disclosure of a person's affiliation with groups engaged in advocacy or in speech the government disfavors is a restraint on that person's speech, association, and assembly rights.

Similarly, by seeking to expose the contents of communications shared among PFLAG members and participants in PFLAG programs, the Demands target the expressive purposes of PFLAG as an association. PFLAG chapters provide parents of transgender adolescents a safe space to share their experiences, ask questions, seek support, vent their frustrations, and figure out how to help their children navigate an increasingly hostile environment. Ex. 3 at 36:13-37:3, 42:25-45:15. Compelling disclosure of the deeply personal, sensitive topics shared in a space that is supposed to be safe and confidential has had and would continue to have a dramatic chilling effect on PFLAG and its members' ability to engage in expression freely and to assemble for their common good.

The Demands would give any ordinary parent pause before discussing anything relating to gender-affirming medical care for their child and would discourage them from coming together and associating with other parents in the same situation. But this is by no means hypothetical. PFLAG has offered evidence that its members are already quite literally speaking and associating less freely since learning of the Demands. There has been a marked decrease in physical participation in PFLAG meetings in Texas. *Id.* at 50:25-51:4. Additionally, members in Texas are not communicating with each other or with PFLAG as they typically would, for fear of Defendants eventually being able to access their emails or text messages. *Id.* 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. *Id.* at 49:21-50:10. This is precisely the type of chilling effect the Texas Supreme Court recognized as cognizable harm in *BACALA*, 982 S.W.2d at 377.

To avoid these infringements, the Demands must be either set aside or modified to prevent disclosure of PFLAG members' identities and deeply personal communications.

B. Violations of PFLAG's Freedom from Unreasonable Search and Seizure Constitute Good Cause for Setting Aside or Modifying the Demands.

The Demands and Defendants' proposed modifications run afoul of Article I, Section 9 of the Texas Constitution and the Fourth Amendment to the U.S. Constitution because they are an unreasonably broad fishing expedition and are outside Defendants' authority.

Article I, Section 9 and the Fourth Amendment protect against unreasonable searches and seizures. These parallel clauses "protect the same right to the same degree[.]" *Holder v. State*, 595 S.W.3d 691, 698 (Tex. Crim. App. 2020); *see also Schade v. Tex. Workers' Comp. Comm'n*, 150 S.W.3d 542, 550 (Tex. App.—Austin 2004, pet. denied) ("A plain reading and comparison of the language of the Fourth Amendment of the United States Constitution and our constitutional provision reveals no substantive difference between the two."). Article I, Section 9 and the Fourth Amendment protect PFLAG and its members from law enforcement fishing expeditions, especially those predicated on legal activity. *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).

The OAG "may not exercise its investigative and inquisitorial power without limit—the examination is 'unreasonable' and impermissible if it is overbroad, 'out of proportion to the end sought,' or if it is 'so unrelated to the matter properly under inquiry as to exceed the investigatory power." *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1968) (citations omitted) (cleaned up). Indeed, "judicial protection against the sweeping or irrelevant order is particularly appropriate

in matters where the demand for records is directed not to the [target] but to a third party who may have had some dealing with the person under investigation." *Id*.

The Demands run afoul of these constraints by exceeding Defendants' statutory authority under the DTPA, including by failing to describe the investigation with sufficient specificity, *see supra*, Section I.A; by investigating PFLAG despite its not providing goods and services, *see supra*, Section I.B; and by requesting materials that are not appropriately discoverable under the rules of civil procedure. *See supra*, Section I.C. Moreover, the Demands are unduly broad, exceeding the bounds of relevance. *See supra,* Section I.B. They are not limited, for example, to information related to knowledge of medical billing practices—as one might expect in an insurance fraud investigation—or knowledge of specific providers planning to evade SB14. Nor are they limited to information about the particular providers Defendants claim to be investigating. TRO Response, ¶¶ 7-8. Rather, the Demands seek the identities and private communications of Texas families discussing their children's healthcare and other legal activities *months before SB14's effective date*. Finally, they seek documents the State already has, including PFLAG's governing documents and bylaws, which have been introduced in both this litigation, *see* Ex. 3 at Pl's ex. 3, 4, and in prior litigation in which Defendants have served as counsel. *See PFLAG v. Abbott*, D-1-GN-22-002569, TI Exs. P22, P23 (Jul. 6, 2022). Each of these aspects of the Demands raises constitutional concerns. *See Schade*, 150 S.W.3d at 551 (citing *Sinclair v. Sav. & Loan Comm'r*, 696 S.W.2d 142 (Tex. App.—Dallas 1985, writ ref'd n.r.e)). This is particularly the case given the overlap of these constitutional safeguards against unreasonable searches and seizures with free speech protections. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978).

To avoid these infringements, the Demands must be either set aside or modified to shield PFLAG from unduly broad inquiries in excess of Defendants' authority.

III. Significant Modifications to the Demands Would Be Required to Bring Them Within the Requirements of the DTPA.

The parties are in agreement that modifications to the Demands would be appropriate. Those proposed by Defendants are a start, but they do not go far enough to address the full range of deficiencies the Demands present. The following proposed modifications would bring the Demands within the requirements of the DTPA.[6]

First, the Demands must specifically identify the statutory basis for and subject matter of the investigation to which the Demands purportedly relate. More specifically, the Demands must specify which subsection(s) of Tex. Bus. & Com. Code § 17.46(b) Defendants claim are being violated, rather than the general reference to the statute's laundry list of "false, misleading, or deceptive acts or practices." They must also provide more specificity on the nature of their investigation in order for PFLAG to properly assess the Demands.

Second, the Demands must be further narrowed to remedy their current overbreadth, particularly as regards the internal structure, relationships, agreements, governing documents, and bylaws of PFLAG and its chapters. Nothing about those requested documents has any relationship to what Defendants claim they are investigating, particularly given their statements that PFLAG is not the target of their investigation.

Third, the Demands are particularly overbroad in light of the fact that they are directed at a third party, not the target of an investigation. As well, because PFLAG is not the target of the investigation, the DSWS should be withdrawn. To the extent the Court allows Defendants to

[6] Though it is Defendants' burden to ensure their own compliance with the DTPA when they issue Demands, and they alone can provide the information and context related to their own investigation, PFLAG would be glad to provide the Court with proposed modifications to the text of the Demands should the Court so request.

persist with it, however, the Court should order that the Affidavit of Brian Bond, attached hereto as Ex. 8, should suffice as a response to the DSWS.

Further, the Demands must be modified to ensure they are consistent with constitutional constraints. Modifying the Demands to permit PFLAG to withhold or redact documents and information that would reveal members' identities *or* deeply personal communications would avoid infringing PFLAG's and its members' rights to free speech, association, assembly, and petition under the First Amendment to the U.S. Constitution and Art. I, §§ 8, 27 of the Texas Constitution and decrease the chilling effect on PFLAG's core expressive activities. It is not enough to allow PFLAG to shield members' identities, as Defendants' proposed modifications allow. Requiring PFLAG to turn over documents or communications sharing deeply personal, sensitive information—particularly about specific minors' health care—shared by participants in PFLAG's support groups would also raise constitutional concerns, and thus the Demands should be further modified to shield such disclosures to avoid targeting and having a chilling effect on PFLAG's core expressive conduct and its members' association rights. Similarly, narrowing the Demands to seek only relevant, appropriately discoverable materials that are not already in Defendants' possession and that are truly premised on unlawful trade practices would bring them into compliance with the Fourth Amendment to the U.S. Constitution and Article I, Section 9 of the Texas Constitution.

There are no modifications that can cure either the impropriety of subjecting PFLAG—a private membership organization that in no way engages in trade or commerce—to a DTPA investigation or Defendants' unreasonable reading of the *Loe v. Texas* affidavit as the basis for the Demands. Nonetheless, Defendants represented during the TI hearing their position that, based solely on that affidavit, PFLAG has "indicated that they likely have information that's highly

relevant for our investigations into insurance fraud. If they've got it, I don't think they've got any privilege to withhold it, and if they don't have it, they can just swear that they don't have it." Ex. 3 at 69:18-70:10. As set forth in the Affidavit of Brian Bond at Ex. 8, nothing about the statements Defendants have relied upon as the basis for the Demands had anything whatsoever to do with insurance fraud or any other kind of misrepresentation about gender-affirming medical care. Those statements reflected PFLAG families' plans to move out of Texas or travel to obtain care; families whose doctors were cancelling appointments, ceasing to provide care, or leaving the state in advance of SB14 going into effect asking about doctors who were continuing to provide gender-affirming medical care in Texas in the meantime; and families looking for general practitioners, like pediatricians and adolescent medicine doctors, who might be providing that care when facilities with specialists in gender-affirming medical care had already shut it down. Ex. 8 ¶¶ 9-10. Mr. Bond stated plainly that at no point in time did he hear about or discuss anything related to insurance fraud or billing codes. *Id.* ¶ 11.

Furthermore, Mr. Bond attests that PFLAG does not have any communications relating to its members in Texas with any of the healthcare entities identified in the document attached as Exhibit B2 to the Demands, which the OAG has identified as the primary targets of its investigation. *Id.* ¶ 13; *see also* Ex. 3 at 17:9-17 ("the Attorney General's office is investigating various forms of insurance fraud, namely a number of medical providers . . . ."). Mr. Bond's attestation should more than suffice to demonstrate that PFLAG does not have "highly relevant" information regarding Defendants' investigations into insurance fraud. Based on Defendants' prior representation, that should be enough to resolve this matter.

NO EVIDENCE AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

Plaintiff also hereby moves for traditional and no evidence summary judgment on Defendants' Counterclaims. Traditional summary judgment is appropriate when no genuine issue exists as to any material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a; *BPX Operating Co v. Strickhousen*, 629 S.W.3d 189, 196 (Tex. 2021). Defendants have already conceded that their Counterclaim "does not present any triable issues of fact." Defs.' Protective Motion for Summary Judgment, ¶ 1.

Plaintiff is also entitled to summary judgement under Rule 166a(i) of the Texas Rules of Civil Procedure, which provides:

> (i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Enforcing the Demands—whether as served on PFLAG or with Defendants' proposed modifications—would be wholly inappropriate at this time because Defendants cannot meet the statutory requirements for bringing the petition to enforce. Tex. Bus. & Com. Code § 17.62(b) permits Defendants to file a petition for an order for enforcement of the sections governing CIDs and DSWS, but only if the recipient "fails to comply" with the Demands. *Id*. PFLAG has in no way "failed to respond to the State's Demands." Counterclaim at 1. Here, there is nothing to enforce because there is no evidence of PFLAG's noncompliance with the Demands.

A party moving for summary judgment pursuant to Rule 166a(i) is not required to provide supporting summary judgment evidence. *See, e.g., Gen. Mills Rests., Inc. v. Texas Wings, Inc*., 12 S.W3d 827, 832 (Tex. App.—Dallas 2000, no pet.); *Moore v. K Mart Corp*., 981 S.W.2d 266, 268

(Tex. App.—San Antonio 1998, writ denied). Rather, the "no-evidence summary judgment shifts the burden to the nonmovant to present enough evidence to be entitled to a trial[;] . . . [i]f the nonmovant is unable to provide some evidence, then the trial court must grant the motion." *Merch. Ctr., Inc. v. WNS, Inc*., 85 S.W.3d 389, 395 (Tex. App.—Texarkana 2002, no pet.) (internal citations omitted).

To defeat such a motion, the non-movant must bring forth admissible evidence supporting each element of his claim that creates more than a mere surmise or suspicion of fact. *See Miller v. Mullen*, 531 S.W.3d 771, 778 (Tex. App.—Texarkana 2016, no pet.). "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983). If the non-movant fails to produce summary judgment evidence raising a genuine issue of material fact, the court must grant the motion. *See* Tex. R. Civ. P. 166a(i); *see also Texas Wings*, 12 S.W.3d at 832.

Rule 166a(i) does not require discovery to be completed but only that there be adequate time for discovery. *Lattrell v. Chrysler Corp*., 79 S.W.3d 141, 146 (Tex. App.—Texarkana 2002, pet denied). "An adequate time for discovery is determined by the nature of the cause of action, the nature of the evidence necessary to controvert the no-evidence motion, and the length of time the case had been active in the trial court." *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Here, an adequate time for discovery has passed—this Motion is being set for hearing on the day trial is currently scheduled to commence. Plaintiff has filed a motion for continuance of the trial date. Defendants have indicated they oppose that motion despite having filed their own

Motion for Summary Judgment on their Counterclaim and having set it for the trial date. *See* Protective Motion for Summary Judgment; Notice of Hearing.

Plaintiff filed its Petition in this matter in accordance with the statutory framework established by Tex. Bus. & Com. Code § 17.61(g), which permitted PFLAG to seek an order of the Court "to extend the return date for, or to modify or set aside the demand, stating good cause." In order to protect PFLAG's interests during the course of the Court's consideration of the petition, PFLAG sought and obtained temporary relief from having to respond to the Demands in the interim. *See* TRO; TI; Ex. 7, Order Granting PFLAG Temp. Relief and Reinstating TI. Whether Defendants agree with the temporary orders issued by both this Court and the Court of Appeals, those orders have explicitly shielded PFLAG from having to respond to the Demands and extended the return date for them until the end of this litigation. *See id*.[7] PFLAG cannot "fail" to comply with an obligation that has been suspended. Because the undisputed facts are that PFLAG has not "fail[ed] to comply" with the Demands, Tex. Bus. & Com. Code § 17.62(b), the condition precedent for a petition to enforce has not been met.

As addressed in the prior section, all parties agree that modifications to the Demands are necessary. PFLAG will not be in a position to comply with the Demands until they are modified to address their legal flaws. A petition to enforce would only become appropriate in the event that PFLAG failed to comply *after* the Demands are modified accordingly.

CONCLUSION

For the foregoing reasons, PFLAG respectfully requests that this Court

[7] Though the Counterclaim suggests that the TI did not address the proposed modifications it attempted to introduce through its Motion to Modify TRO, Counterclaim ¶ 25, the Court was clear during the hearing that those proposed modifications would be considered as part of Defendants' argument against the TI. Ex. 3 at 25:1-19. And the Court's Order was clear that injunctive relief was necessary to protect PFLAG from Defendants' efforts "to continue seeking much of the same information, even if through modified demands." TI at 3.

- grant Plaintiff's Partial Motion for Summary Judgment on its claims under the DTPA, declaring that the Demands exceed Defendants' authority under the DTPA, including because they infringe Plaintiff's constitutional rights;
- order that the Demands be modified to conform to the statutory and constitutional constraints set forth herein;
- grant Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim;
- order that, to the extent a third party can be required to respond to a DSWS, the Affidavit of Brian Bond attached hereto suffices as a response to the DSWS;
- order that PFLAG be given until 30 days from the Court's ruling on this Motion to provide any documents responsive to the CID as modified; and
- grant such other relief as the Court deems just and proper.

Dated: May 20, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, I electronically filed the foregoing Motion For Summary Judgment with the Clerk of Court using the File & Serve Texas system which will send notices to the following:

/s/Allissa Pollard