No. ___

# In the Supreme Court of Texas

IN RE GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JAIME MASTERS IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

*Relators.*

On Petition for Writ of Mandamus
to the Third Court of Appeals, Austin

## PETITION FOR WRIT OF MANDAMUS

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## Identity of Parties and Counsel

**Relators:**
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Jaime Masters, in her official capacity as Commissioner of the Texas Department of Family and Protective Services;
Texas Department of Family and Protective Services

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**Real Parties in Interest:**
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John Doe, individually and as parent and next friend of Mary Doe, a minor;
Dr. Megan Mooney

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**Respondent:**
The Court of Appeals for the Third District of Texas, Austin

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## Record References

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## Statement of the Case

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| *Nature of the Case*: | Plaintiffs sued Relators—the Governor, the Commissioner of the Department of Family and Protective Services, and the Department of Family and Protective Services—to enjoin them from investigating alleged child abuse as discussed in an Attorney General Opinion concluding that certain medical procedures can constitute child abuse under the Texas Family Code. |
| *Trial Court*: | 353d Judicial District, Travis County<br>Hon. Amy Clark Meachum presiding<br>Case No. D-1-GN-22-000977 |
| *Disposition in the Trial Court*: | The trial court issued a temporary injunction, which applies not just to the investigation into the parties' self-reported actions, but also to *any* instance of reported medical abuse of a child involving "gender-affirming medical care." MR.102. |
| *Parties in the Court of Appeals*: | Relators are the appellants in the court of appeals. Real parties in interest, Plaintiffs, are the appellees. |
| *Disposition in the Court of Appeals*: | The court of appeals entered an order pursuant to Texas Rule of Appellate Procedure 29.3 "reinstat[ing] the temporary injunction." MR.1209. The case number in the Third Court is 03-22-00126-CV. |

## Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.002(a).

## Issues Presented

1. Whether a government agency's investigation into possible wrongdoing, without taking official action against the subject, is a judicially cognizable injury giving rise to standing to sue or a ripe claim for relief.
2. Whether the APA's waiver of sovereign immunity for challenges to "rule[s]" encompasses a challenge to an agency spokesman's statement to the press about the agency's internal conduct.
3. Whether a government official acts *ultra vires* by misinterpreting a law other than his office's organic statute.
4. Whether Texas Rule of Appellate Procedure 29.3 empowers a court of appeals to issue temporary orders for the benefit of non-parties.
5. Whether a court of appeals exercising appellate jurisdiction has authority to issue an injunction.
6. Whether an order by a court of appeals "reinstating" a trial court's temporary injunction is itself an injunction.

## To the Honorable Supreme Court of Texas:

The Department of Family and Protective Services is charged with protecting children from abuse, including "physical injury that results in substantial harm to the child." Tex. Fam. Code § 261.001(1)(C). As most people accused of child abuse deny wrongdoing, this requires that DFPS be able to investigate reports of abuse. If there is no abuse, that is the end of the matter. If there is, DFPS asks a court to intervene.

The court of appeals nonetheless "reinstated" a temporary injunction barring all DFPS investigations into certain types of possible child abuse. This is contrary to the well-established limitations on the courts' jurisdiction; an investigation, standing alone, is not a judicially cognizable injury. And, regardless of Plaintiffs' own claims, no court has authority to issue a universal injunction on behalf of unknown, unnamed persons not before it. Mandamus is necessary to restore DFPS's ability to protect Texas children.

## Statement of Facts

Last year, the Attorney General received an official request to analyze "whether the performance of certain medical and chemical procedures on children—several of which have the effect of sterilization—constitute child abuse." MR.423. In response, the Attorney General issued an opinion that expressly did "not address or apply to medically necessary procedures," *id.*, but concluded that medically unnecessary procedures that "result in sterilization" can constitute child abuse under Texas Family Code section 261.001 because they cause physical harm to the child. MR.427-30. The opinion concluded "a court would have to go through the process

of evaluating, on a case-by-case basis" any other procedure to see if it "poses a similar threat or likelihood of substantial physical and emotional harm." MR.430.

The Governor sent the opinion to DFPS, noting it "makes clear[] it is already against the law to subject Texas children to a wide variety of elective procedures for gender transitioning." MR.436. He directed DFPS "to conduct a prompt and thorough investigation" of any reported abuse in Texas. MR.436. In response to a press inquiry, DFPS stated it would follow Texas law as interpreted by the Attorney General. MR.438.

Plaintiffs filed this suit raising *ultra vires* and APA claims. Jane Doe, a DFPS employee, reported that she may be violating state law as interpreted by the Attorney General by providing her child with hormone-altering medication and puberty blockers. MR.73, 398-400. Doe was joined as plaintiff by her husband and child, as well as Dr. Mooney, a psychologist who fears having to report transgender youth clients seeking or engaging in certain therapies. MR.292. Dr. Mooney does not allege DFPS is investigating her. *See* MR.60-68. Plaintiffs sought "statewide" interim relief preventing implementation of the Attorney General's letter. MR.1.

On March 11, 2022, the trial court held a hearing on Plaintiffs' motion for temporary injunction. At its conclusion, the trial court read a pre-written script of its findings on the record and granted Plaintiffs' motion. MR.99-103.

The trial court enjoined Relators from "[t]aking any action against Plaintiffs based on the Governor's directive and DFPS rule." MR.102. The trial court also issued the "statewide relief" Plaintiffs sought, enjoining relators from (among other things): "[i]nvestigating reports in the State of Texas against *any and all persons*

based solely on alleged child abuse by persons, providers, or organizations in facilitating or providing gender-affirming care to transgender minors." MR.102.

The trial court denied relators' plea to the jurisdiction without making any findings. MR.104. Relators immediately appealed, superseding the injunction. MR.105. Plaintiffs sought "reinstatement" of the temporary injunction pursuant to Texas Rule of Appellate Procedure 29.3, MR.736-767, which the court of appeals granted, MR.1207-1209.

## Standard of Review

To obtain mandamus relief, Relators must show that the respondent abused its discretion, and no adequate appellate remedy exists. *In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding). A court abuses its discretion if it acts without subject-matter jurisdiction, *In re Crawford & Co.*, 458 S.W.3d 920, 929 (Tex. 2015) (orig. proceeding) (per curiam), and if it misinterprets or misapplies the law, *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam).

## ARGUMENT

### I. The Court of Appeals Abused its Discretion By "Reinstating" the Jurisdictionally Flawed Temporary Injunction.

Because subject-matter jurisdiction is lacking, the courts below could not enjoin relators "even temporarily." *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (orig. proceeding) (per curiam). Mandamus is necessary to suspend an unlawful injunction preventing DFPS from protecting Texas children during the pendency of Relators' appeal.

#### A. Plaintiffs' claims are unripe.

Subject-matter jurisdiction is absent because Plaintiffs' claims are unripe. The ripeness inquiry asks whether "an injury has occurred or is likely to occur" or is "contingent or remote." *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Courts agree: claims based on an allegedly improper investigation typically are not ripe because "after reviewing information" discovered, DFPS "might agree" that there has been no wrongdoing. *Winter v. Cal. Med. Rev., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989); *see, e.g.*, *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir. 1994).

The Does' claim may ripen if the agency takes official action; until then, it has done nothing for a court to adjudicate. *See Rea v. State*, 297 S.W.3d 379, 383-84 (Tex. App.—Austin 2009, no pet.); *accord Am. Sw. Ins. Managers, Inc. v. Tex. Dep't of Ins.*,

No. 03-10-00073-CV, 2010 WL 4053726, at *4-5 (Tex. App.—Austin Oct. 15, 2010, no pet.).[1]

Even if Plaintiffs' injury met the constitutional minimum of a concrete injury, they would not satisfy the "prudential part of ripeness," which looks to whether the issues are "fit[] . . . for judicial decision." *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 2022 WL 610352, at *3 (9th Cir. 2022). This inquiry balances the relative harm to the parties if the case goes forward, including harm to the government by being unable to investigate possible wrongdoing. *See id.* This case is not prudentially ripe: Plaintiffs' complain that Mary Doe's medical treatment is not child abuse, but that "is the very thing [DFPS] is trying to investigate." *Id.* at *4. DFPS cannot be required to "litigate the merits in a defensive posture . . . without being able to investigate its own potential claims." *Id.* Plaintiffs will have the opportunity to challenge the Attorney General's interpretation if DFPS ever does seek court-ordered intervention. *See id.* at *3-4.

### B. Plaintiffs lack standing.

And even if their claims were ripe, Plaintiffs lack standing necessary obtain temporary injunctive relief. *See Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 917 (Tex. 2020) (per curiam). "The Texas standing requirements parallel the federal test for Article III standing, which provides that a plaintiff must allege personal injury fairly traceable to the defendant's allegedly

[1] Dr. Mooney's claims are likewise unripe because she does not allege that DFPS is contemplating action against her.

unlawful conduct and likely to be redressed by the requested relief." *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 799 (Tex. 2021).

Plaintiffs failed to show an actual or imminent injury. Dr. Mooney does not allege *any* imminent disciplinary action, even assuming Relators had such authority. And the bare existence of an investigation against the remaining Plaintiffs is not a legally cognizable injury. *See Laird v. Tatum*, 408 U.S. 1 (1972). An constitutionally cognizable "injury" may arise later—for example, if DFPS were to seek a subpoena. But the "theoretical possibilit[y]" that such a thing might occur in the future is not enough to establish standing now. *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) (per curiam); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Plaintiffs also don't meet the other elements of standing. Plaintiffs do not identify *anything* the Governor has or is likely to do that would injure them. Because Plaintiffs' supposed injury cannot be "traced to allegedly unlawful conduct of the defendant," standing is lacking. *See Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (distinguishing the defendant's conduct and the "provision of law that is challenged") (quotation marks omitted).

The court of appeals ignored this jurisdictional defect in "reinstating" the temporary injunction.

### C. Sovereign immunity bars Plaintiffs' claims.

The injunction is also barred by Relators' sovereign immunity.

**1.** First, Plaintiffs insist that the DFPS Commissioner's "statement" is a "rule" that can be challenged under the APA's immunity waiver. MR.27-34. But "[n]ot every statement by an administrative agency is a rule" under the APA. *Tex.*

*Educ. Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994). A "rule" is "a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency." Tex. Gov't Code § 2001.003(6)(A).

Here, the purported "rule" is a statement the agency's spokesman gave to a reporter. MR.438. Press statements do not "implement[], interpret[], or prescribe[] law or policy." Tex. Gov't Code § 2001.003(6)(A)(i). Nor do they "describe[] the procedure or practice requirements of a state agency." *Id.* § 2001.003(6)(A)(ii). They are thus not rules. An agency spokesman must be able to "practically express its views to an informal conference," *Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764, 769 (Tex. App.—Austin 1999, no pet.), but only "[t]he commissioner" may "oversee the development of rules," Tex. Hum. Res. Code § 40.027(c)(3).

And even if DFPS's press statement could otherwise constitute a rule, the APA expressly excludes from the definition of "rule" any "statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." Tex. Gov't Code § 2001.003(6)(C). "[S]uch statements have no legal effect on private persons absent a statute that so provides or some attempt by the agency to enforce its statement against a private person," neither of which applies here. *Brinkley*, 986 S.W.2d at 770. "Although th[is] distinction . . . may sometimes be elusive, the core concept is that the agency statement must in itself have a binding effect on private parties." *Slay v. Tex. Comm'n on Envt'l Quality*, 351 S.W.3d 532, 546 (Tex. App.—Austin 2011, pet. denied) (footnote omitted).

At most, DFPS's statement directs employees how to conduct investigations of potential child abuse. An investigation does not itself have a binding effect on private parties—let alone a statement about how to conduct an investigation. *See Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 905 (Tex. App.—Austin 2009, no pet.) (holding that providing special formatting for drivers licenses issued to non-citizens does not "have any legal effect on private persons" because the licenses "remain valid"). DFPS investigates *whether* to seek to affect private rights—*e.g.*, by removing a child from a dangerous situation. Only a judge can affect such rights, and plaintiffs have not alleged that the press statement binds the judge who will ultimately decide whether any particular child is in danger.[2]

**2.** Plaintiffs next insist the Governor acted *ultra vires* in directing DFPS to follow the Attorney General's legal analysis and that the Commissioner acted *ultra vires* by allegedly "implementing" that directive. MR.34-35. "An *ultra vires* action requires a plaintiff to 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). Here, Plaintiffs rely entirely on the "without legal authority" theory, *see* MR.35, but Relators have acted within their authority.

Plaintiffs' theory depends assuming "that any legal mistake is an *ultra vires* act," but that is "[n]ot so." *Hall*, 508 S.W.3d at 241. Even if the Governor's letter were wrong about DFPS's legal obligations (it is not), it would be *ultra vires* only if the

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[2] Plaintiffs are also wrong to characterize the Governor's letter as "redefining child abuse." MR.35. It refers to the Attorney General's opinion, which interprets existing law. MR.436.

Governor (a) misinterpreted "his enabling law" or "his organic authority," or (b) used an improper method of reaching or expressing that conclusion. *Id.* at 241-42. But Plaintiffs contend the Governor misinterpreted "collateral" law, the Family Code. *Id.* at 242. Because there are no "explicit constraints" on the Governor's interpretation of the Family Code, "misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous." *Id.*

Nor has the Commissioner acted *ultra vires* because DFPS stated that if any allegations of child abuse (as interpreted by the Attorney General) were made, "they will be investigated under existing policies of Child Protective Investigations." MR.438. DFPS is obligated to "make a prompt and thorough investigation of a report of child abuse." Tex. Family Code § 261.301(a). To meet that obligation, DFPS of course starts with the definition in the Family Code. *See* Tex. Hum. Res. Code § 40.042(b). But DFPS still needs "standardized policies" for interpreting and applying that general definition. Tex. Hum. Res. Code § 40.042(c). And the Commissioner is charged with "oversee[ing] the development and implementation of policies and guidelines needed for the administration of [DFPS's] functions." *Id.* § 40.027(c)(2). Thus, deciding that DFPS should follow the Attorney General's explanation of the Family Code is within the Commissioner's statutory authority.

Plaintiffs seemingly have two responses, but neither is meritorious. *First*, they allege the Commissioner acted *ultra vires* by issuing a rule without following the APA's procedures. *See* MR.37. But as discussed above (at 6-8), the Commissioner did not issue a rule; an agency spokesman gave a statement to the press.

*Second*, Plaintiffs argue that the Commissioner's decision violated DFPS's general statutory duty to protect children and support families. MR.37-38. But disagreements about discretionary questions about the best way to help children cannot be superintended through *ultra vires* suits. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

**3.** Finally, the UDJA does not help Plaintiffs avoid sovereign immunity. *Contra* MR.34. The UDJA does not enlarge the courts' jurisdiction beyond an implied, limited waiver of immunity for constitutional challenges to ordinances or statutes. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011) (per curiam); *see* Tex. Civ. Prac. & Rem. Code § 37.006(b). Plaintiffs do not challenge an ordinance or a statute; they contend Relators have misinterpreted a statute. MR.36-39. The UDJA's limited waiver does not extend to a "bare statutory construction claim[]" like that. *McLane Co., Inc. v. Tex. Alcoholic Beverage Comm'n*, 514 S.W.3d 871, 876 (Tex. App.—Austin 2017, pet. denied); *see Sefzik*, 355 S.W.3d at 622.[3]

## II. Rule 29.3 Does Not Authorize the Court of Appeals to "Reinstate" the Temporary Injunction.

Even apart from the faults in the trial court's jurisdiction, this order exceeds the appellate court's. Prohibiting DFPS from conducting *any* investigation of a type of potential child abuse—against anyone, not just Plaintiffs—preserves neither the status quo nor the court's jurisdiction. And because the order is itself an injunction, it

[3] The UDJA also does not apply to claims against the Governor or Commissioner because its waiver applies only to suits against governmental entities. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015).

is improper in a case where that court is exercising appellate jurisdiction. Mandamus is necessary to correct these further abuses of discretion.

### A. The Third Court's order upends the status quo.

The status quo is "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint ISD v. Marquez*, 487 S.W.3d 538, 556 (Tex. 2016). Here, the status quo is that DFPS is permitted—indeed, obligated—to investigate allegations of child abuse and neglect. Ordering DFPS to cease an ongoing investigation changes the status quo; universally enjoining DFPS from investigating potential child abuse involving nonparties obliterates it.

### B. Temporary relief is not necessary to preserve the courts' jurisdiction.

Plaintiffs rely on *In re Tex. Education Agency*, 619 S.W.3d 679 (Tex. 2021) (orig. proceeding), for the proposition that appellate courts may issue temporary orders under Rule 29.3. MR.763. *TEA* merely recognized such orders may be issued to preserve the court's jurisdiction. *Id.* at 688-89. There, the Court considered whether a court of appeals had authority to issue temporary orders to prevent the installation of a board of managers to a school district. *Id.* at 681-82. Because the entire dispute was about whether the district could institute a board of managers, absent temporary relief, the courts may have lost jurisdiction to resolve the underlying dispute. *Id.* at 688-89.

By contrast, no temporary order is necessary to maintain a live case or controversy here. In its absence, DFPS can respond to Jane Doe's self-report under its ordinary procedures during the (potentially lengthy) pendency of this appeal. That

may or may not result in DFPS taking any legal action in response. But—unlike in *TEA*, DFPS cannot intervene without a court order. *See* Tex. Fam. Code ch. 262. Because the involvement of a court is baked into the process, *TEA* does not support the imposition of a statewide injunction here.

### C. Rule 29.3 does not authorize courts of appeals to issue injunctions.

Even if the court of appeals' order was somehow necessary to preserve the status quo or its jurisdiction, Rule 29.3 does not and cannot authorize courts of appeals to issue their own injunctions, which exceed the scope of the courts' appellate jurisdiction.

The Texas Constitution confers on courts of appeals two species of jurisdiction, appellate and original. Article V, section 6 of the Texas Constitution gives the courts of appeals general "appellate jurisdiction" over cases like this arising from a district court. Tex. Gov't Code §§ 22.220-.221. This case is under the court of appeals' general appellate jurisdiction. MR.105; Tex. R. App. P. 25.1.

Injunctions are outside the court of appeals' appellate jurisdiction, and neither Rule 29.3 nor the court of appeals' inherent powers authorizes the challenged order.

#### 1. The court of appeals' order is an injunction.

Plaintiffs were forthright about the type of order they seek—the title of their motion expressly asked for "temporary injunctive relief." MR.736. And the court of appeals prohibited Relators from investigating alleged child abuse arising from "gender-affirming medical treatment" on pain of contempt. MR.1209. Under this Court's precedent, that is an injunction—no matter how it is styled. *See Qwest*

*Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) (per curiam); *Del Valle ISD v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992).

That the court of appeals characterized its order as "reinstating the temporary injunction," MR.1209, is meaningless: the trial court's injunction has always been in place. Relators' notice of appeal superseded that injunction, Tex. R. App. P. 24.2(a)(3), but that only meant Relators were "not required to observe it[] . . . , and cannot be punished in contempt for disobedience thereof." *Ex parte Kimbrough*, 146 S.W.2d 371, 372 (Tex. 1941). Under Rule 29.3 it is the "appellate court's temporary orders"—not the trial court's injunction—that the parties are "subject to." *Texas Educ. Agency*, 619 S.W.3d at 689. In other words, the court of appeals' order is an injunction in its own right.

**2. Courts of appeals exercising appellate jurisdiction cannot issue injunctions.**

The court of appeals lacked jurisdiction to issue an injunction when exercising appellate jurisdiction, and Plaintiffs have not invoked that court's original jurisdiction.

Appellate jurisdiction is the power to "correct[] by appellate review . . . errors of inferior courts." *Love v. Wilcox*, 28 S.W.2d 515, 519 (Tex. 1930) (orig. proceeding). For nearly 150 years, since the City of Laredo requested an injunction from a Texas appellate court, it has been clear that appellate jurisdiction does *not* include the power to issue injunctions. *City of Laredo v. Martin*, 52 Tex. 548, 553-54 (1880). This Court rejected the city's request because "[i]ts jurisdiction being appellate only, the court is not invested by the Constitution and laws with such general powers as would

enable it to protect the parties from damage during the pendency of the appeal." *Id.* at 554. "The issuing [of] an injunction for such a purpose," the Court explained, "would be the exercise of original, and not of appellate, jurisdiction." *Id. City of Laredo* bars the court of appeals' order.

*City of Laredo* has been applied repeatedly since. *See Tex. Emp. Ins. Ass'n v. Kirby*, 150 S.W.2d 123, 125 (Tex. App.—Dallas 1941, orig. proceeding), *opinion adopted*, 152 S.W.2d 1073, 1073 (Tex. 1941). Courts as far away as New Hampshire have cited it: "[t]he issuance of an injunction is an exercise of original, not appellate, jurisdiction." *Garand v. Town of Exeter*, 977 A.2d 540, 545 (N.H. 2009).

"Although Rule 29.3 does not say so explicitly," it authorizes only "orders that are consistent with the law." *In re Geomet Recycling LLC*, 578 S.W.3d 82, 88 (Tex. 2019) (orig. proceeding); *see also Order Adopting Rules of Civil Procedure*, 47 Tex. Bar J. 155, Special Pull-Out Section at 32 (1984) ("Advisory Note"). The most fundamental limit is the issuing court's jurisdiction—*i.e.*, its "power to act." *City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009).

Neither of this Court's recent decisions addressing Rule 29.3 supports appellate jurisdiction to issue an injunction or undermines *City of Laredo*'s well-established rule. *First*, *Geomet* concluded the parties' briefing gave it "no reason to doubt that the court of appeals had the authority to make orders protecting [parties] against irreparable harm using Rule 29.3." 578 S.W.3d at 90. Such a statement does not vitiate *City of Laredo*: the referenced briefing did not cite *City of Laredo*, the Court was not asked to consider whether Rule 29.3 authorizes injunctions, and this Court does not overrule precedent *sub silentio*. *See Nazari v. State*, 561 S.W.3d 495, 506 (Tex. 2018).

In fact, *Geomet* recognized the precedent stating that "issu[ing] injunctive relief" is a matter of "original jurisdiction." *Geomet*, 578 S.W.3d at 90.

*Second*, *Texas Education Agency* considered only whether a statute guaranteeing the State's right to supersedeas bars a form of temporary relief designed to prevent the defendant from mooting the case. *See* 619 S.W.3d at 687-90. The Court again never considered whether courts of appeals possess jurisdiction to issue injunctions.

To be sure, once a party has properly invoked a court of appeals' *original* jurisdiction, the relief available via temporary orders, *see* Tex. R. App. P. 52.10, is necessarily more expansive. An appellate court exercising original jurisdiction has broader remedial powers, which include authority to issue an injunction pending consideration of a petition. *See, e.g.*, Order, *In re Texas*, No. 20-0715 (Tex. Sept. 15, 2020); *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 462 (Tex. 2011); *Riggins v. Thompson*, 71 S.W. 14, 15-16 (Tex. 1902). After all, when exercising original jurisdiction, an appellate court is effectively sitting as a court of equity, not a court of review. *See City of Houston v. City of Palestine*, 267 S.W. 663, 666 (Tex. 1924) (discussing prior version); *Dunn v. St. Louis Sw. Ry. of Texas*, 88 S.W. 532, 533 (Tex. App. 1905, orig. proceeding) (same).

But this case is not before the court of appeals under its original jurisdiction. *See* Tex. R. App. P. 52. Because only appellate jurisdiction has been invoked, and appellate jurisdiction does not encompass issuing injunctive relief, the court of appeals abused its discretion in enjoining investigation and enforcement.

## III. The Court of Appeals' Order Is Improper on the Merits.

### A. The order improperly reaches nonparties.

Even if the court of appeals had jurisdiction to issue its order, it was an abuse of discretion because it extends beyond "the parties'[.]" Tex. R. App. P. 29.3. It prohibits DFPS from "investigating reports [of alleged child abuse] to the State of Texas against *any and all persons*," "prosecuting or referring for prosecution such reports," or "imposing reporting requirements on *persons* who are aware of others who" engage in the conduct at issue. MR.102. Rule 29.3 allows relief "to preserve *the parties' rights*"; it does not authorize relief in favor of *non*-parties.

Indeed, this type of universal injunction is beyond the power of any court. Courts lack power to "grant[] a remedy beyond what [i]s necessary to provide relief to [the plaintiffs]," *Lewis v. Casey*, 518 U.S. 343, 360 (1996), or to "enjoin enforcement of [a challenged law] as to anyone other than the named plaintiffs," *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021), or even a plaintiff who has not shown a likely injury, *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 568 (Tex. 1998). Yet the lower courts entered universal injunctions.

That could have grave consequences. At bottom, Plaintiffs disagree with the Attorney General's interpretation of child abuse. But they acknowledge that "[n]o medical treatment is recommended or necessary" for a transgender child prior to puberty, they agree medical treatment is not universally necessary for transgender individuals, and they do not claim the same medical interventions would be appropriate for a child not suffering from gender dysphoria. MR.14, 18. Plaintiffs would

thus seem to concede that a medically unnecessary operation on a prepubescent child *might* constitute "child abuse" under the Family Code. But the lower courts' orders seem to prohibit DFPS from even investigating a report that a parent is seeking such a procedure over the objection of, for example, the child's other parent. That injunction leaves an unknown number of vulnerable children subject to potential abuse.

### B. Plaintiffs have not established irreparable harm.

This overbroad injunction is doubly improper because Plaintiffs failed to show they would probably suffer an imminent injury that could be remedied by temporary injunctive relief. "[F]ear and apprehension of injury" that might arise if an investigation should lead to enforcement action "are not sufficient to support a temporary injunction." *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 227 (Tex. App.—Fort Worth 2009, pet. denied).

And even if the temporary injunction remains enforceable during relators' appeal, plaintiffs' injuries would remain. An injunction prohibiting enforcement ceases to be binding if "it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947). In that event, the temporary injunction would not be a defense to a subsequent enforcement action. *See Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715 (2d Cir. 1985); *cf. Ohio v. Yellen*, 539 F. Supp. 3d 802, 821 (S.D. Ohio 2021). So a temporary injunction could not alleviate Plaintiffs' fears that their actions might be addressed as child abuse in the future. Indeed, Ms. Doe testified she understands that temporarily enjoining DFPS's investigation will not prevent the injury she

claims. MR.751. Plaintiffs' alleged injury arises from the very possibility of future investigation or enforcement, MR.751, and that possibility remains even with a temporary injunction. The court of appeals erred in "reinstating" an order that does nothing "to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3.

## Prayer

The Court should issue a writ of mandamus directing the Third Court of Appeals to withdraw its March 21 order.

Respectfully submitted.


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## Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

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

## Certificate of Service

On March 23, 2022, this document was served on Shelly L. Skeen, lead counsel for Appellees, via sskeen@lambdalegal.org.

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

## Certificate of Compliance

Microsoft Word reports that this document contains 4,474 words, excluding exempted text.

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

No. ___

# In the Supreme Court of Texas

IN RE GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JAIME MASTERS IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

*Relators.*

On Petition for Writ of Mandamus
to the Third Court of Appeals, Austin

## APPENDIX

# TAB A: DISTRICT COURT'S ORDER GRANTING PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION

CAUSE NO. D-1-GN-22-000977

| | | |
|---|---|---|
| JANE DOE, individually and as parent and next friend of MARY DOE, a minor; JOHN DOE, individually and as parent and next friend of MARY DOE, a minor; and DR. MEGAN MOONEY | § | |
| Plaintiffs | § | |
| | § | IN THE DISTRICT COURT OF |
| | § | TRAVIS COUNTY, TEXAS |
| v. | § | 353RD JUDICIAL DISTRICT |
| GREG ABBOTT, sued in his official capacity as Governor of the State of Texas; JAIME MASTERS, sued in her official capacity as Commissioner of the Texas Department of Family and Protective Services; and the TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, | § | |
| Defendants. | § | |

**ORDER GRANTING PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION**

On this day the Court considered the application by Plaintiffs John and Jane Doe, individually and as parents and next friends of Plaintiff Mary Doe, a minor, and Dr. Megan Mooney (collectively, "Plaintiffs") for a Temporary Injunction (the "Application"), as found in Plaintiffs' Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and Request for Declaratory Relief ("Petition") filed against Defendants Greg Abbott, in his official capacity as Governor of the State of Texas, Jaime Masters, in her official capacity as Commissioner of the Texas Department of Family and Protective Services, and the Texas Department of Family and Protective Services ("DFPS") (collectively, "Defendants").

Based on the facts set forth in Plaintiffs' Application, the supporting declarations, the testimony, the evidence, and the arguments of counsel presented during the March 11, 2022, hearing on Plaintiffs' Application, this Court finds sufficient cause to enter a Temporary Injunction. Plaintiffs state a valid cause of action against each Defendant and have a probable right to the declaratory and permanent injunctive relief they seek. For the reasons detailed in Plaintiffs' Application and accompanying evidence, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is *ultra vires*, beyond the scope of his authority, and unconstitutional. The improper rulemaking and implementation by Commissioner Masters and DFPS are similarly void.

The Court further finds that gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022. The series of directives and decisions by the Governor, the Executive Director, and other decision-makers at DFPS, changed the *status quo* for transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas. The Governor's Directive was given the effect of a new law or new agency rule, despite no new legislation, regulation or even stated agency policy. Governor Abbott and Commissioner Masters' actions violate separation of powers by impermissibly encroaching into the legislative domain.

It clearly appears to the Court that unless Defendants are immediately enjoined from enforcing the Governor's directive and the DFPS rule enforcing that directive, both issued February 22, 2022, and which make reference to and incorporate Attorney General Paxton's Opinion No. KP-0401, Plaintiffs will suffer imminent and irreparable injury. For example, Jane Doe has already been placed on administrative leave at work and is at risk of losing her job, her livelihood, and the means of caring for her family. Jane, John and Mary Doe face the imminent

and ongoing deprivation of their constitutional rights and the stigma attached to being the subject of a child abuse investigation. Mary faces the potential loss of medically necessary care, which if abruptly discontinued can cause severe and irreparable physical and emotional harms, including anxiety, depression, and suicidality. If placed on the Child Abuse Registry, Jane Doe would lose the ability to practice her profession, and both Jane and John Doe would lose their ability to work with minors and volunteer in their community. Absent intervention by this court, Dr. Mooney could face civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if Defendants' directives are enforced. If Defendants' directives remain in effect, Dr. Mooney will be required to report her patients who are receiving medically necessary gender-affirming care, in contravention of the code of ethics governing her profession and the medical needs of her patients. If Dr. Mooney does not report her patients, she could face immediate criminal prosecution, as set forth in the Governor's letter. Defendants' wrongful actions cannot be remedied by any award of damages or other adequate remedy at law.

The Temporary Injunction being entered by the Court today maintains the status quo prior to February 22, 2022, and should remain in effect while this Court, and potentially the Court of Appeals, and the Supreme Court of Texas, examine the parties' merits and jurisdictional arguments.

IT IS THEREFORE ORDERED that, until all issues in this lawsuit are finally and fully determined, Defendants are immediately enjoined and restrained from enforcing the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate. This Temporary Injunction ~~restrains~~ Restrains the following actions by the Defendants: (1) taking any actions against Plaintiffs based on

the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate; (2) investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports; and (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

IT IS FURTHER ORDERED that a trial on the merits of this case is July 11, 2022. The Clerk of the Court is hereby directed to issue a show cause notice to Defendants to appear at the trial.

The Clerk of the Court shall forthwith, on filing by Plaintiffs of the Bond hereinafter required, and on proving of the same according to law, issue a temporary injunction in conformity with the laws and terms of this Order.

Plaintiffs have previously executed and filed with the Clerk a bond in conformity with the law in the amount of $100 dollars, and that bond amount will remain adequate and effective for this Temporary Injunction.

It is further ORDERED that this Order shall not expire until judgment in this case is entered or this Case is otherwise dismissed by the Court.

Signed this 11th day of March 2022, at 5:22 P.M o'clock in Travis County, Texas.

JUDGE AMY CLARK MEACHUM

# TAB B: Third Court of Appeals' Order granting Appellees' Emergency Motion for Temporary Injunction

# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-22-00126-CV**

**Greg Abbott in his Official Capacity as Governor of the State of Texas; Jaime Masters in her Official Capacity of Commissioner of the Department of Family and Protective Services; and the Texas Department of Family and Protective Services, Appellants**

**v.**

**Jane Doe, individually and as parent and next friend of Mary Doe, a minor; John Doe, individually and as parent and next friend of Mary Doe, a minor; and Dr. Megan Mooney, Appellees**

**FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY**
**NO. D-1-GN-22-000977, THE HONORABLE AMY CLARK MEACHUM,**
**JUDGE PRESIDING**

## ORDER

**PER CURIAM**

Before the Court is a pre-submission challenge to a district court's order enjoining The Department of Family and Protective Services and its Commissioner from complying with the terms of a letter issued by Governor Greg Abbott on February 22, 2022. That letter requires the Department to "conduct a prompt and thorough investigation of any reported instances" of "gender-transitioning procedures" being performed on minors and classifies the use of those procedures as "child abuse." The letter further requires the Department to coordinate with other agencies in pursuing "criminal penalties" against any parent allowing such procedures and against any professional or member of "the general public" that suspects but fails to report this

purported abuse to appropriate authorities. Following an evidentiary hearing, the district court temporarily enjoined appellants from abiding by the directives within the letter pending the outcome of the litigation. That injunction is currently suspended pending the resolution of this appeal. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Texas R. App. P. 29.1(b). Appellees now seek emergency relief, pursuant to Rule of Appellate Procedure 29.3, asking this Court to reinstate the temporary injunction for the duration of this appeal. Appellants oppose the motion, arguing that Rule 29.3 does not afford this Court with discretion to award the relief requested.

As we recently observed, "Rule 29.3 gives us 'great flexibility in preserving the status quo based on the unique facts and circumstances presented.'" *Texas Educ. Agency v. Houston Indep. Sch. Dist.*, 609 S.W.3d 569, 578 (Tex. App.—Austin 2020, order [mand. denied]) (quoting *In re Geomet Recycling LLC*, 578 S.W.3d 82, 89 (Tex. 2019)). *See also In re Texas Educ. Agency*, 619 S.W.3d 679, 686–87 (Tex. 2021) (holding that statute precluding trial court counter-supersedeas orders in cases against state agencies did not limit appellate court's authority to issue appropriate temporary orders under Rule 29.3 where statute did not reflect an intent to limit appellate rights). 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) (orig. proceeding) (citing *Janus Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589 (Tex. 1962)). In addition, "Rule 29.3 provides a mechanism by which we may . . . prevent irreparable harm to parties properly before us pursuant to our appellate jurisdiction in an interlocutory appeal." *Texas Educ. Agency*, 609 S.W.3d at 578 (citing *Geomet*, 578 S.W.3d at 90). One of the orders we may issue under Rule 29.3 to maintain the status quo and prevent irreparable harm is an order reinstating a suspended injunction. *See Hughs v. Move Tex. Action Fund*, No. 03-20-00497-CV, 2020 WL 6265520, at *1 (Tex. App.—Austin Oct. 23, 2020, order)

(confirming authority to reinstate injunction under Rule 29.3 but denying relief under circumstances); *Texas Ass'n of Bus. v. City of Austin*, No. 03-18-00445-CV, 2018 WL 3967045, at *1 (Tex. App.—Austin Aug. 17, 2018, order) (reinstating injunction under Rule 29.3 after finding injunction "necessary to preserve the parties' rights until disposition of the appeal").

A litigant's request for injunctive relief is predicated upon that party's assertion that irreparable harm will result from the challenged act or action. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) ("To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." (citations omitted)). In this case, the trial court reviewed the evidence and concluded that appellees had established a probable right to recovery on their claims. It further concluded that the appellees had made a sufficient showing that allowing appellants to follow the Governor's directive pending the outcome of this litigation would result in irreparable harm. Having reviewed the record, we conclude that reinstating the temporary injunction is necessary to maintain the status quo and preserve the rights of all parties. Therefore, without regard to the merits of the issues on appeal, which are not yet briefed to this Court, we exercise our discretion under Rule 29.3 to reinstate the injunction as issued by the district court on March 11, 2022.

It is ordered on March 21, 2022.

Before Chief Justice Byrne, Justices Kelly and Smith

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