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

JANE DOE, *et al.*, *Plaintiffs,*	§	IN THE DISTRICT COURT
v.	§	201st JUDICIAL DISTRICT
GOVERNOR ABBOTT, *et al.*,	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

DEFENDANTS' PLEA TO THE JURISDICTION

Defendants Greg Abbott in his official capacity as Governor of the State of Texas ("Governor Abbott"), Jaime Masters in her official capacity of Commissioner of the Department of Family and Protective Services ("Commissioner Masters"), and the Texas Department of Family and Protective Services ("DFPS") (collectively, "Defendants") respectfully submit this Plea to the Jurisdiction and would show the Court as follows:

I. INTRODUCTION

With little notice and no opportunity to fully assess the petition and prepare a defense, Plaintiffs request that the Court abrogate Defendants' immunities and enter injunctive relief on unsupported claims. But even a cursory review of Plaintiffs' petition reveals insurmountable jurisdictional hurdles that deprive the Court of any authority to enter the relief that Plaintiffs seek. The Court lacks jurisdiction to enjoin executive agencies from following the law or impose obligations on them to disregard child abuse. Plaintiffs have not demonstrated that they have standing to pursue their claims or that their claims are ripe; they must proceed as every other litigant and are not entitled to pre-enforcement exceptions to Texas law. Moreover, Plaintiffs' claims lack substantive merit. Defendants do not consent to the jurisdiction of this Court and reserve the right to supplement and amend this plea to the jurisdiction, and to raise any and all jurisdictional arguments at any stage of the proceedings.

The Court lacks jurisdiction over Plaintiffs' claims, which should be dismissed.

II. BACKGROUND

The Petition alleges causes of action based upon the following sequence of events: (1) the Office of the Attorney General opined that in certain circumstances, it is possible that several gender-affirming treatments or therapies might be used as implements of child abuse; (2) Governor Abbott wrote a letter to Commissioner Masters instructing DFPS to duly investigate allegations of the use of such treatments as abuse; and (3) Commissioner Masters acknowledged that DFPS would follow the law.

None of these three incidents conclusively determined that each and every incident of treatment using these gender-affirming therapies for young people constitutes child abuse, and none of these three incidents constituted, or purported to be, a change in existing law.

Despite the clear wording of both the Attorney General Opinion and of Governor Abbott's letter, media coverage widely—and incorrectly—proclaimed that State officials sought to outlaw transgender youth. Plaintiff Jane Doe is the mother of a transgender daughter, and a DFPS employee. Following the breathless media coverage of these events, Ms. Doe reported concerns to her supervisor that her daughter's gender-affirming treatment may run afoul of some new State investigatory policy. Reporting such a concern constitutes a "self-report" under DFPS procedures, and the reporting employee is temporarily placed on paid administrative leave while the report is investigated. Mrs. Doe and her husband, Plaintiff John Doe, have filed suit to stop the DFPS investigation, and to prevent any investigations of allegations of child abuse involving gender-affirming treatments.

Plaintiff Mooney is a licensed psychologist who treats transgender youths. She has filed suit out of concern she would have to report all of her transgender youth clients seeking or engaging in gender-affirming therapies. She cites concerns that such a report would injure her clients, sever her professional relationship with her clients, and result in legal and administrative catch-22s inasmuch as

she believes she would be required to report abuse when she believed none had occurred.

III. ARGUMENT AND AUTHORITY

A. Standard of Review

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy.[1] Subject-matter jurisdiction is "never presumed and cannot be waived."[2] "Subject-matter jurisdiction is a multiple choice question with only two answers: yes or no."[3] A defendant may challenge the jurisdiction of the court by challenging the sufficiency of the plaintiff's pleadings, the existence of jurisdictional facts, or both.[4] "When a plea to the jurisdiction challenges the pleadings, [the court] determine[s] if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause."[5] "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend."[6]

B. Sovereign Immunity Bars Plaintiffs' Claims.

"Sovereign immunity implicates a court's subject matter jurisdiction."[7] It is Plaintiffs' burden to establish a viable waiver of Defendants' sovereign immunity.[8] They have not met that burden here. The *ultra vires* exception applies to claims that a government official acted without lawful authority or failed to perform a purely ministerial act.[9] But to establish the Court's subject-matter jurisdiction, the plaintiff must do more than invoke the exception. "[M]erely asserting legal conclusions or labeling a

[1] *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000).
[2] *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993).
[3] *City of Anson v. Harper*, 216 S.W.3d 384, 390 (Tex. App.—Eastland 2006, no pet.).
[4] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–28 (Tex. 2004).
[5] *Id.* at 226.
[6] *Id.* at 227.
[7] *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020).
[8] *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).
[9] *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016).

defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an ultra vires claim—what matters is whether the *facts* alleged constitute actions beyond the governmental actor's statutory authority, properly construed."[10] "[I]f the plaintiff alleges only facts demonstrating acts within the officer's legal authority and discretion, the claim seeks to control state action, and is barred by sovereign immunity."[11]

Defendants seek only to follow the law. The Court has no jurisdiction to enjoin DFPS from undertaking child abuse investigations and ignoring entirely the information from mandatory reporters who bring allegations of child abuse to investigators' attention. If any action is initiated against Plaintiffs, they will be able to defend those allegations or findings in that suit—none of their rights have been stripped or impugned simply by the opening of an investigation of child abuse in accordance with the law. Likewise, Dr. Mooney would have the same protections in any investigation regarding her conduct, including any actions regarding her medical licensure. But if parents could sue and obtain a temporary restraining order simply based on the initiation of a DFPS investigation, DFPS would be seriously hampered in identifying and preventing *all* child abuse—not just the alleged child abuse at issue in this case. All of Defendants' actions and any future proceedings are squarely within the bounds of their legal authority.

Furthermore, even if the merits of Plaintiffs' arguments regarding the proper construction of the child abuse provisions of the Texas Family Code were appropriate for the Court to consider on

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[10] *Texas Dept. of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.) (emphasis in original); *see also Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d 505, 515–16 (Tex. App.—Austin 2010, no pet.) (noting that "if the claimant is attempting to restrain a state officer's conduct on the grounds that it is unconstitutional, it must allege facts that actually constitute a constitutional violation" to fall within the *ultra vires* exception); *see also Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015).

[11] *Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 415–16; *see also Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019) ("[T]he jurisdictional inquiry may unavoidably implicate the underlying substantive merits of the case when, as often happens in *ultra vires* claims, the jurisdictional inquiry and the merits inquiry are intertwined.").

these claims—and the Court need not and should not opine on those arguments—Plaintiffs' position is simply unsupportable. Attorney General Opinion No. KP-0401, though nonbinding, thoroughly explains why it is possible under Texas law that particular "'sex change' procedures and treatments . . . when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code." To the extent that Plaintiffs claim some constitutional defect with this interpretation, none of the Plaintiffs fall within any protected category, and this interpretation of the Texas Family Code readily satisfies rational basis review.[12] Accordingly, even on the merits of this question—which the Court need not reach—Plaintiffs have failed to establish any unlawful acts or legal interpretations, and they have failed to establish a waiver of Defendants' sovereign immunity.

Plaintiffs' APA claims do not alter this conclusion. There has been no agency action subject to APA review by either Defendant—Plaintiffs simply gesture to two letters, one of which they do not even provide to the Court, and they have no colorable claim that this is reviewable under the APA. More importantly, the APA does *not* waive sovereign immunity from claims for injunctive relief.[13]

Simply put, Plaintiffs seek to take away Defendants' lawful authority to protect the children of Texas. The Court has no authority to grant Plaintiffs an exception to these laws simply because Plaintiffs have a particular view on what constitutes child abuse. To hold otherwise would put all children in Texas at grave risk.

C. Plaintiffs lack standing.

"Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable."[14] "A court has no

[12] *See, e.g.*, *Richards v. Tex. A&M Univ. Sys.*, 131 S.W.3d 550, 557 (Tex. App.—Waco Feb. 11, 2004) ("'[L]egislation survives an equal-protection challenge so long as the legislation is 'rationally related to a legitimate state interest.'").
[13] *See* Tex. Gov't Code § 2001.038(a).
[14] *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

jurisdiction over a claim made by a plaintiff who lacks standing to assert it."[15] And claims "to correct an alleged violation of the separation of powers" must receive an "especially rigorous" standing inquiry.[16] This limit preserves the proper role of courts in our judicial system, which is "[to protect] the rights and liberties of individual citizens and minority groups," as opposed to being "some amorphous general supervis[or] of the operations of government."[17]

The Does have not been injured merely by the existence and operation of Texas law prohibiting child abuse. Plaintiffs simply allege that an investigator spoke to the Does. Pet. ¶ 83. However, Plaintiffs do not allege they were required to submit to interviews, subpoenaed, or otherwise coerced. Indeed, Plaintiffs allege that they refused to sign a release for Mary Doe's medical records. *Id.* Dr. Mooney's alleged injury is that the challenged letters create a duty to report. But the letters do no such thing—Dr. Mooney's duties flow from the Texas Family Code and Texas law, and Defendants have not altered those obligations in any way.

The bare possibility of investigation is not actionable under the APA.[18] Likewise, noncoercive investigation is not an injury in fact.[19] Child abuse should be investigated in Texas, and whether child abuse has occurred under Texas law is a fact-intensive determination that should be assessed after investigation pursuant to normal processes and, if necessary, adjudication by a court in a child abuse prosecution. Plaintiffs are not injured merely because they, like every other Texan, are potentially subject to child abuse investigation.

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[15] *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012).
[16] *In re Abbott*, 601 S.W.3d 802, 809 (Tex. 2020) (cleaned up).
[17] *Id.* at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J. concurring)); *see also Raines v. Byrd*, 521 U.S. 811, 819 (1997); *In re Abbott*, 601 S.W.3d at 809.
[18] *See Rea v. State*, 297 S.W.3d 379, 383-84 (Tex. App.—Austin 2009); *cf. LHR Enterprises, Inc. v. Geeslin*, No. 03-05-00176-CV, 2007 WL 3306492, at *5 (Tex. App.—Austin Nov. 7, 2007, pet. denied).
[19] *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1 (1972) (finding no First Amendment injury from "the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose").

D. Plaintiffs' claims are not ripe

Each of Plaintiffs' complaints are wholly premature and unripe for adjudication. "Claims based on an allegedly improper investigation typically are not ripe because 'after reviewing information submitted by appellant, the agency might agree with [its] assertion[s].'"[20] Even issuance of an administrative complaint finding reason to believe there has been a violation is not final agency action subject to judicial review.[21] Dr. Mooney does not allege DFPS is investigating her or has taken any action against her, and the mere existence of investigative power is not an actionable injury. *See Laird*, *supra*. Even if the government could take some action against her, an administrative action is not ripe for judicial review until it is final. *See Rea v. State*, *supra*. And the Does do not allege that any investigative findings have been made or that any actions have been taken against them. When any investigations are concluded, and if any subsequent actions are taken, Plaintiffs will have every opportunity to defend against any prosecution or raise any other challenge. But Plaintiffs' claims are simply premature at this juncture.

E. This Court Cannot Enjoin the Governor

Only the Texas Supreme Court, not a district court, has jurisdiction to enjoin executive officers, including the Governor.

> Section 22.002(c) of the Tex. Gov't Code provides:
> (c) Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Various courts have held that, under this statute, a district court does not have jurisdiction to enjoin an executive officer.[22]

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[20] *Winter v. Cal. Med. Rev., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir. 1994).
[21] *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1980).
[22] *See, e.g.*, *In re B.N.A.*, 278 S.W.3d 530, 533 (Tex. App.—Dallas 2009, no pet.); *In re Office of Attorney General of Texas*, No. 05-18-00086-CV, 2018 WL 1725069, at *6 (Tex. App.—Dallas Apr. 10, 2018,

For example, in *In re B.N.A.*, the trial court issued an order that required the Office of the Attorney General ("OAG") to remit child-support payments to a private entity and enjoined the Attorney General from taking any additional action in the case.[23] The Fifth Court of Appeals concluded that the order was void under section 22.002(c) because "[t]he trial court lacked jurisdiction [to] compel the OAG to remit child support payments to [the private entity] and to enjoin the Attorney General from taking action in the case."[24] The Court therefore vacated those portions of the trial court's order.[25] The Fifth Court of Appeals reached the same conclusion in *In re Office of Attorney General of Texas*, holding that the trial court's injunction prohibiting OAG from distributing child-support payments was void under section 22.002(c).[26]

As the Texas Supreme Court explained: "[D]istrict courts generally have no jurisdiction over executive officer respondents."[27] And Governor Abbott is an "officer[] of the executive departments of the government of this state."[28] As such, this court lacks jurisdiction to enjoin him.

IV. CONCLUSION

For the foregoing reasons, Defendants request the Court dismiss the instant cause for lack of jurisdiction.

Respectfully submitted,

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orig. proceeding) (mem. Op.); *In re C.H.*, No. 13-17-00544-CV, 2019 WL 5251145, at *3–4 (Tex. App.—Corpus Christi Oct. 17, 2019, no pet.) (mem. op.); *In re C.D.E.*, 533 S.W.3d 367, 372 (Tex. App.—Houston [14th Dist.] 2015, no pet.)

[23] 278 S.W.3d at 533.

[24] *Id.*

[25] *Id.*

[26] No. 05-18-00086-CV, 2018 WL 1725069, at *6 (Tex. App.—Dallas Apr. 10, 2018, orig. proceeding) (mem. op.).

[27] *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995).

[28] Tex. Gov't Code § 22.002(c); Tex. Const. art. IV, § 1.

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