No. 23-0697

IN THE SUPREME COURT OF TEXAS

The State of Texas; Office of the Attorney General; Ken Paxton, in his official capacity as Attorney General of Texas; The Texas Medical Board; and the Texas Health and Human Services Commission,

Appellants,

v.

Lazaro Loe, et al.,

Appellees.

On Direct Appeal from the 201st

Judicial District Court, Travis County

Amici Curiae Brief of Texas Values and Family Policy Alliance in Support of Texas

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INTEREST OF AMICI CURIAE[1]

Texas Values is an independent nonprofit organization and is the state family policy council (FPC) in Texas associated with Focus on The Family and Family Policy Alliance (FPA). The mission of Amici Curiae is to preserve and advance a culture where religious liberty flourishes, family values prosper, and every human life is valued and protected. Through policy research, public education, grassroots mobilization, review of legislation and the provision of legal analyses, and testifying at the Texas Legislature and other governmental entities – Texas Values promotes its core values of *faith*, *family*, and *freedom*.

Family Policy Alliance (FPA) is a Christian ministry that defends faith and protects families by organizing, educating, and mobilizing the social conservative movement in America. Originally founded by Focus on the Family in 2004, FPA is emerging as one of the most influential leaders of the social conservative movement in America.

SUMMARY OF ARGUMENT

Plaintiffs' concerns about Senate Bill 14 ("S.B. 14"), and the solutions they seek, are more deeply rooted in nature than they can imagine. The

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

mind and body are two distinct but integrated mechanisms given to humans by nature and nature's God. Minds can be changed easily, frequently, and convincingly; bodies are immutable. When attempts to change the body are made, those attempts frequently appear unnatural and dysfunctional. The spurious argument that a child's body must be brought into conformity with a child's mind in order to be his or her "true self" is a false narrative with no legitimate medical or scientific basis. Male and female are not how we *feel* we are, but what we *actually* are.

The Texas Constitution guarantees protection against discrimination based on sex, thus requiring male and female individuals to be treated equally in the absence of any compelling state interest. SB 14 meets this threshold by equally prohibiting gender transitioning treatments and procedures for both male and female children in line with the historical and legal understanding of the term "sex."

Further, parental rights are well-established in Texas as being fundamental liberty interests requiring a strict scrutiny standard for governmental restrictions placed upon them. *See Reno v. Flores*, 507 U.S. 292, 302 (1993). In protecting children from serious and irreversible harm,

SB 14 easily survives this high strict scrutiny standard with its thoughtful and intentional narrowly tailored approach for sex development disorders and currently transitioning individuals.

ARGUMENT

I. S.B. 14 Upholds Equal Protection in the Texas Constitution's equality-under-the-law provisions

The Texas Constitution is clear that "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."[2] As an initial matter, statutory classifications are ordinarily valid if they are rationally related to and further a legitimate state interest. *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 55 (1973). In the case at hand, and as discussed in depth below, involving fundamental liberty interests such as parental rights protected under the Due Process Clause of the Fourteenth Amendment, strict scrutiny is the correct standard. *Holly v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976) (recognizing that because the case

[2] Texas Constitution Article I § 3a

involved the right of the parent to surround the child with proper influences, the case was "strictly scrutinized").

The State of Texas has authority and a moral responsibility to look after the health and safety of its children. In an area of new and developing debate, Texas could rationally and understandably take a cautious approach to permitting irreversible medical treatments of its children.

The district court's contention that SB 14 discriminates on the basis of "sex, sex stereotypes, and transgender status" is as surprising as it is incorrect. SB 14 bans gender transition services for minors of *both* sexes. The ban applies to all minors, regardless of their birth with male or female sex organs, which is a valid prohibition of a medical procedure not implicating "sex." Indeed, this court held in *Bell v. Low Income Women of Tex.,* 95 S.W. 3d 651 (Tex. 2020) that a ban on a medical operation is not a classification based on sex simply because the operation is performed on individuals of a single sex.

A. *Carolene Products'* Footnote 4 does not help plaintiffs

Plaintiffs try hard to convince the court that transgenderism is a suspect class deserving heightened scrutiny by characterizing transgender people as a "discrete and insular group" – a recognized hallmark of a suspect class from the well-known footnote 4 of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). However, the Texas Constitution expressly lists which classifications are suspect. Texas voters ratified article 1, section 3a of the Texas Constitution in 1971, almost four decades after footnote 4 and the "discrete and insular group" language was written. They did not adopt such language then, and it is not employed in modern jurisprudence applications in relation to transgenderism. Instead, they meticulously specified that government cannot discriminate on the basis of "sex, race, color, creed, or national origin." Tex. Const. art. I, § 3a (1972). Glaringly, transgenderism is not included in the list as a suspect classification.

The *Carolene Products* footnote states that a minority is entitled to judicial protection only when it is a "discrete and insular" minority that is the victim of "prejudice." A reasonable definition, consistent with the general theory of the footnote – that political branches of

government have the primary responsibility for deciding disputed issues that arise in society - is that these are groups that are not able to play their proper role in democratic politics for some reason or another. *Felix Gilman: The Famous Footnote*. South Texas Law Review. Vol. 46:163

The footnote's objective seems to describe groups that are "discrete" in the sense that they are separate in some way, identifiable as distinct from the rest of society. They are "insular" in the sense that other groups will not form coalitions with them--and, critically, not because of a lack of common interests but because of prejudice.

The vast network of business, governmental, media, and nonprofit institutions that coalesce around transgender and LGBTQ issues statewide contradicts any argument of insularity or prejudice. The organizations joining to advocate against SB 14 included Lambda Legal, Move Texas Action Fund, Equality Texas, ACLU of Texas, Texas Association of School Psychologists, Texas Freedom Network, Planned Parenthood Texas, Texas Civil Rights Project, National Association of Social Workers – Texas Chapter, NAMI Texas, Texas

AFL-CIO, Texas Impact, AAUW, Children's Defense Fund – Texas, Texas American Federation of Teachers, Southwestern Texas Synod, Girls Empowerment Network, Every Texan, and hundreds of private individuals and churches. Indeed, when SB 14 was heard in legislative committee in the Texas Senate, over 5 times as many people registered against the bill as for it. Likewise, when Senate Bill 12 from the 88th Regular Session - another measure opposed by the LGBT community because of alleged detrimental effects on drag - was heard in committee at the Texas House, the LGBT community boasted that over 800 individuals registered against the legislation, with only 12 people registering in favor.

This, of course, does not signal overwhelming opposition to SB 14 or other legislation by the Texas population more generally. Majority votes in both chambers by elected representatives and the response to this very suit against an enacted law prove otherwise. However, government belongs to those who show up, and LGBT coalition members engaging in advocacy against SB 14 enjoyed tremendous cooperation and approval from many sectors including the media and liberal state lawmakers. This completely undercuts all claims of

"insularity" and political powerlessness by the Plaintiffs.

What may be even more relevant to the issue at hand is that, in assessing a suspect class, traditional jurisprudence focuses on the immutable characteristics of the class. *Glona v. American Guar. & Liab. Ins. Co.,* 391 U.S. 73, 75 (1968); *Parham v. Hughes, 441 U.S. 347,* 352 (1979). "Sexual orientation," unlike race and sex, and regardless of one's unfounded belief that it is not a social construct (it is), certainly cannot be regarded as an immutable trait by definition. And even if, by some stretch, transgender adults were considered a discrete and insular class, SB 14 only prohibits gender treatments for children. Research has shown that that 80 to 95 percent of children with gender dysphoria will eventually come to embrace the bodily sex with which they were born. *See Paul R. McHugh, Paul Hruz, and Lawrence S. Mayer*, Brief of *Amici Curiae* in Support of Petitioner, *Gloucester County School Board v. G.G.,* U.S., No. 16-273 (January 10, 2017). Thus, it is far from clear that children meet any sort of immutability standard.

B. Policy making is the Texas Legislature's role, not the courts

Neither the U.S. Supreme Court nor this court has recognized transgender status as a suspect class. Gender identity issues pose difficult line-drawing dilemmas for which the Texas Legislature is better suited to weigh through robust and vigorous debate. Age cutoffs for minors. Men in women's sports. Access to restroom facilities. All of these issues involve making policy judgements with public and expert input, often after prodigious discussion in an open forum.

Medical debates and evolving medical science in particular are suited for the legislative forum where medical and scientific experts can testify as invited witnesses or in their public capacity. Under the same reasoning, the legislative model is well-suited for testimonies of personal experience. For example, during SB 14's Senate committee debate, Walt Heyer, an outspoken detransitioner and expert on sex-change regret, described how he was conditioned to identify as female by a close family member.

All these issues are perfectly within the realm of the democratic process. State legislatures play a critical role in regulating health and

welfare and their efforts are usually "entitled to a strong presumption of validity." *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. 215 (2022).

II. SB14's Ban of Gender Transitioning Procedures for Children Requires and Survives Strict Scrutiny

Parental rights are well-established in Texas as being fundamental liberty interests requiring a strict scrutiny standard for governmental restrictions placed upon them. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *see also Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). Under Texas law, these rights include the authority to make a child's medical decisions. Tex. Fam. Code § 151.001(a)(6). There is no doubt that children cannot fully understand the permanent consequences of their decisions, or that parents know their children best and have hold their best interests at heart. Great deference is afforded to parental authority in the law, but it is not unlimited.

SB 14 is the rare example of how a statute correctly *limits* parental authority. "[W]e have recognized that a state is not without constitutional control over parental discretion in dealing with

children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). But even as it does so, SB 14 must undergo the highest level of scrutiny a law can endure – strict scrutiny; reserved for analyzing state intervention into most important and fundamental of rights. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

With this heightened level of scrutiny, it must be shown that a law's alleged infringement on parental rights is "narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (noting the Fourteenth Amendment's role in checking governmental restriction on fundamental liberty interests). Indeed, unwarranted state interference is a violation of the parents' Fourteenth Amendment due process. *Id.*

We agree with the conclusion of the Family Freedom Project (FFP) that SB 14 survives the jurisprudential rigors of strict scrutiny. As a leading organization shepherding SB 14's legislative passage, *amici* worked with Texas House and Senate authors to protect children

while meeting this constitutional standard. We will forgo an exhaustive discussion on compelling state interest. State intervention in parental decision making is usually reserved for circumstances that amount to child abuse or neglect. *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986). SB 14 is no exception to that rule. Briefing by the State and other *Amici Curiae* briefs submitted to this court cover this element extensively and effectively. There can be no doubt that protecting children from abuse is a compelling state interest.

SB 14 validly meets the "narrowly tailored" requirement. First, it has no effect whatsoever on adults seeking to transition their gender. The statute only bans medical procedures and treatments known by medical science to hurt children or implicate such an unreasonably large risk of bodily injury as to qualify as medical experimentation on children. This includes castration, mastectomies, hysterectomies, metoidioplasties, and vaginoplasties – all which pose exceedingly dangerous mental and physical health issues for children. Tex. Health and Safety Code § 161.702

Additionally, appropriate exceptions are included for "medically verifiable" sex development disorders such as Turner and Klinefelter syndromes, those with ambiguous external genitalia, and situations where genetic testing has determined abnormal chromosome structure. Finally, the bill provides a "tapering off" provision for minors already mid-treatment at the time of SB 14's enactment to be safely transitioned off the dangerous drugs. The legislation expressly allows this process to be done in a "safe and medically appropriate" manner that "minimizes the risk of complications…". Tex. Health and Safety Code § 161.703

The means-end analysis of the narrow tailoring requirement though, is grounded in the overarching purpose to minimize governmental intrusion on individual rights, and to protect constitutional norms such as the fundamental rights of parents to direct the care and upbringing of their children. SB 14 manages this crucial balance with sensible, thoughtful legislative crafting. As shown by other *Amici Curiae* briefs that extensively cite modern applications of peer-reviewed medical science and safe practices, the necessity for relief from these harmful interventions is great, and the

efficacy of alternative remedies does not exist. *United States v. Paradise,* 480 U.S. 149 (1987).

CONCLUSION AND PRAYER FOR RELIEF

SB 14 upholds equal protection under Article 1, Section 3 of the Texas Constitution. SB 14 also narrowly regulates parental rights in regards to high risk medical interventions of an experimental nature on children. Texas Values respectfully prays that this Court vacate the temporary injunction and reverse the judgement of the district court, dismissing all claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with TEX. R. APP. P. 9. It contains 2,993 words, as determined by the computer software's word count function, excluding the sections of the brief exempted by TEX. R. APP. P. 9.4(i)(1) and is proportionally spaced using Georgia Pro, 14-point font.

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The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered to each party and/or their respective attorney of record on or before January 18, 2024, via electronic service in accordance with TEX. R. APP. P. 9.5.

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