692 S.W.3d 215
Supreme Court of Texas.

STATE of Texas; Office of the Attorney General of the State of Texas; Texas Medical Board; Texas Health and Human Services Commission; and Ken Paxton, in his official capacity as Attorney General of the State of Texas, Appellants,
v.
Lazaro LOE, individually and as next friend of Luna Loe, a minor; Mary Moe and Matthew Moe, individually and as next friends of Maeve Moe, a minor; Nora Noe, individually and as next friend of Nathan Noe, a minor; Sarah Soe and Steven Soe, individually and as next friends of Samantha Soe, a minor; Gina Goe, individually and as next friend of Grayson Goe, a minor; PFLAG, Inc.; Richard Ogden Roberts III, M.D.; David L. Paul, M.D.; Patrick W. O'Malley, M.D.; and American Association of Physicians for Human Rights, Inc. d/b/a GLMA: Health Professionals Advancing LGBTQ Equality, Appellees

No. 23-0697
|
Argued January 30, 2024
|
OPINION DELIVERED: June 28, 2024

Synopsis
Background: Parents of minor children diagnosed with gender dysphoria, individually and on behalf of children, physicians, and other medical care providers filed suit against State, Texas Attorney General, and others, seeking declaratory and temporary and permanent injunctive relief, based on constitutional challenges to statutes prohibiting medical treatment for purpose of transitioning minor child's biological sex and gender affirming care that was inconsistent with child's biological sex and which subjected physicians to mandatory revocation of licenses to practice medicine in event of violation. The 201st District Court, Travis County, Maria Cantu Hexsel, J., issued temporary injunction against enforcement of statutes, 2023 WL 5519799, and defendants appealed.

Holdings: The Supreme Court, Huddle, J., held that:

parents, individually and on behalf of children, had standing to challenge constitutionality of statute prohibiting such medical treatment for minors;

physicians had standing to challenge constitutionality of statutes;

whether statute violated parents' fundamental rights to make decisions about medical care for children under Due Course of Law Clause required determination whether those rights and liberties were objectively, deeply rooted in nation's history and tradition, and implicit in concept of ordered liberty;

parents were not entitled to temporary injunction against enforcement of statute;

statute did not violate fundamental rights of parents to make medical treatment decisions on behalf of their children, under Due Course of Law Clause;

physicians were not entitled to temporary injunction against enforcement of statutes;

statutes were not subject to strict scrutiny, under Due Course of Law Clause;

statutes did not infringe on physicians' and medical care providers' liberty interests in engaging in their occupations, under Due Course of Law Clause;

statute did not infringe on childrens' rights under Equal Rights and Equal Protection Clauses; and

statute prohibiting medical treatment for purpose of transitioning minor child's biological sex and gender affirming care that was inconsistent with child's biological sex was not subject to strict scrutiny.

Reversed and vacated.

Blacklock, J., filed concurring opinion in which Devine, J., joined.

Busby, J., filed concurring opinion.

Young, J., filed concurring opinion.

Lehrmann, J., filed dissenting opinion.

Procedural Posture(s): Interlocutory Appeal; Motion for Preliminary Injunction.

West Codenotes

Negative Treatment Reconsidered
Tex. Health & Safety Code Ann. §§ 62.151, 161.701, 161.702, 161.703, 161.704, 161.705, 161.706; Tex. Hum. Res. Code Ann. § 32.024; Tex. Occ. Code Ann. §§ 164.052, 164.0552

***221** On Direct Appeal from the 201st District Court, Travis County, Texas

Attorneys and Law Firms

Jill Carvalho, Austin, Christopher Mills, for Amicus Curiae Family Research Council.

Joseph Mazzara, for Appellants Texas Health and Human Services Commission, Texas Medical Board, Office of the Attorney General of the State of Texas.

Marcella Burke, Houston, for Amicus Curiae Do No Harm.

Kennon L. Wooten, Austin, Allissa Aileen Pollard, Houston, Chloe Kempf, Dale Melchert, Lynly Egyes, Lauren Ditty, Omar Gonzalez-Pagan, Lori B. Leskin, Elizabeth Gill, Paul Castillo, Shawn Thomas Meerkamper, Sasha J. Buchert, Adriana Pinon, Brian Klosterboer, Karen L. Loewy, Harper Seldin, Milo Inglehart, for Appellee Loe, Lazaro.

Brent Webster, James Lloyd, Houston, Charles K. Eldred, Angela V. Colmenero, Austin, S. Grant Dorfman, Bellaire, Ryan Kercher, Lanora C. Pettit, Johnathan D. Stone, Kimberly Gdula, Heather Dyer, Joseph Mazzara, for Appellant State of Texas.

Jacob P. Warner, Ryan L. Bangert, John J. Bursch, for Amicus Curiae Alliance Defending Freedom.

Andrew Brown, Austin, Robert E. Henneke, Kerrville, Christian Townsend, Chance D. Weldon, for Amicus Curiae Texas Public Policy Foundation.

Chris L. Branson, Houston, for Amicus Curiae Family Freedom Project.

Colleen McKnight, Marcella Burke, Houston, for Amicus Curiae Ethics and Public Policy Center.

Bethany Rothwell, Nicholas J. Bronni, A. Barrett Bowdre, Dylan L. Jacobs, for Amicus Curiae Alabama, Arkansas, and 20 Other States (Multistate Amicus).

Charles (Chad) E. Baruch, Robert L. Tobey, Dallas, for Amicus Curiae Conservative Legislators, Former Legislators, and Activists.

David S. Coale, Dallas, Kyle Gardner, D. Jean Veta, William R. Isasi, Cortlin H. Lannin, Noah S. Goldberg, for Amicus Curiae American Academy of Pediatrics, et al.

Jonathan M. Saenz, for Amicus Curiae Texas Values and Family Policy Alliance.

Michael S. Truesdale, Austin, Katelyn Kang, Kathleen Hartnett, Elizabeth Reinhardt, Zoe Helstrom, for Amicus Curiae Biomedical Ethics and Public Health Scholars.

Jerad W. Najvar, Houston, for Amicus Curiae Kirkpatrick, Katherin.

Emily K. Cook, for Amicus Curiae Pacific Justice Institute.

Opinion

Justice Huddle delivered the opinion of the Court, in which Chief Justice Hecht, Justice Boyd, Justice Devine, Justice Blacklock, Justice Busby, Justice Bland, and Justice Young joined.

***222** A new law prohibits certain medical treatments for children if administered "[f]or the purpose of transitioning a child's biological sex" or "affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." TEX. HEALTH & SAFETY CODE § 161.702. Before it took effect on September 1, 2023, several parents of children with gender dysphoria,[1] together with physicians and groups that would be affected by the law, sued to enjoin its enforcement, alleging that it is facially unconstitutional. The trial court concluded that the law likely violates the Texas Constitution, and it temporarily enjoined the law's enforcement.

On direct appeal of the temporary injunction, we do not attempt to identify the most appropriate treatment for a child suffering from gender dysphoria. That is a complicated question hotly debated by medical experts and policy makers throughout this country and the world.[2] And, to be sure, neither this Court nor any party to this proceeding suggests that children suffering from gender dysphoria are undeserving of treatment and support. The reverse is obviously true: they, like all children, deserve the most appropriate treatment together with support, love, and empathy. We emphasize, though, that the only question we are called upon to answer is a distinctly legal one: whether plaintiffs in this case have established a probable ***223** right to relief on their claims that the Legislature's prohibition of certain treatments for children suffering from gender dysphoria violates the Texas

Constitution.

We conclude that plaintiffs failed to meet that burden. We have said—and we reaffirm today—that fit parents have a fundamental interest in directing the care, custody, and control of their children free from government interference. But we have never defined the source or precise scope of this interest, and our precedents make clear that this interest is not absolute. Indeed, we have never held that a fit parent's interest in caring for her child free from government interference, though weighty, triggers heightened scrutiny of every statute that restricts any asserted right connected to that interest. When developments in our society raise new and previously unconsidered questions about the appropriate line between parental autonomy on the one hand and the Legislature's authority to regulate the practice of medicine on the other, our Constitution does not render the Legislature powerless to provide answers.

For the reasons explained below, we conclude the Legislature made a permissible, rational policy choice to limit the types of available medical procedures for children, particularly in light of the relative nascency of both gender dysphoria and its various modes of treatment and the Legislature's express constitutional authority to regulate the practice of medicine. We therefore conclude the statute does not unconstitutionally deprive parents of their rights or physicians or health care providers of an alleged property right in their medical licenses or claimed right to occupational freedom. We also conclude the law does not unconstitutionally deny or abridge equality under the law because of sex or any other characteristic asserted by plaintiffs. We therefore reverse and vacate the trial court's order.

I. Background

In 2023, the Legislature enacted Senate Bill 14, captioned a statute "relating to prohibitions on the provision to certain children of procedures and treatments for gender transitioning, gender reassignment, or gender dysphoria." Act of May 17, 2023, 88th Leg., R.S., ch. 335.[3] S.B. 14 primarily modifies Chapter 161 of the Health and Safety Code by adding a new Subchapter X addressing "Gender Transitioning and Gender Reassignment Procedures and Treatments for Certain Children." *Id.* § 2. The statute prohibits a physician[4] or health care provider[5] from performing certain actions on a child[6] when those actions are performed for one of two purposes: (1) "transitioning a child's biological sex as determined by the sex organs, chromosomes, and endogenous profiles of the child"; or (2) "affirming the child's perception of the child's sex if that perception is ***224** inconsistent with the child's biological sex." TEX. HEALTH & SAFETY CODE § 161.702. The statute identifies three forms of prohibited surgical intervention: (1) "a surgery that sterilizes the child"; (2) "a mastectomy"; and (3) removal of "any otherwise healthy or non-diseased body part or tissue." *Id.* § 161.702(1), (2), (4). The statute also prohibits providing, prescribing, administering, or dispensing the following prescription drugs: (1) "puberty suppression or blocking prescription drugs to stop or delay normal puberty"; (2) "supraphysiologic doses of testosterone to females"; and (3) "supraphysiologic doses of estrogen to males." *Id.* § 161.702(3).[7]

There are two exceptions. First, "with the consent of the child's parent or legal guardian," the prohibitions in Section 161.702 do not apply to (1) prescription drugs that suppress or block puberty "for the purpose of normalizing puberty for a minor experiencing precocious puberty" or (2) "appropriate and medically necessary procedures or treatments" for a child that either "is born with a medically verifiable genetic disorder of sex development" or "does not have the normal sex chromosome structure for male or female as determined by a physician through genetic testing." *Id.* § 161.703(a). Second, the statute's prohibition against certain prescription drugs does not apply if that drug is "part of a continuing course of treatment that the child began before June 1, 2023," and "the child attended 12 or more sessions of mental health counseling or psychotherapy during a period of at least six months" before treatment began. *Id.* § 161.703(b). However, the statute limits this second exception: the child "shall wean off the prescription drug over a period of time and in a manner that is safe and medically appropriate and that minimizes the risk of complications," and the child may not switch to another prohibited prescription drug or treatment. *Id.* § 161.703(c).

S.B. 14 also amends Section 164.052(a) of the Occupations Code to add violations of Health and Safety Code Section 161.702 to a list of over twenty "prohibited practice[s]" by a physician. *See* TEX. OCC. CODE § 164.052(a)(24). And it adds Occupations Code Section 164.0552, which requires the Texas Medical Board to revoke a physician's "license or other authorization to practice medicine" for violating Section 161.702. *Id.* § 164.0552(a). The statute expressly makes both changes to the Occupations Code applicable only to conduct that occurs on or after S.B. 14's effective date. *See* Act of May 17, 2023, § 6. Finally, the statute provides that a state-provided child health plan for low-income, uninsured children under Chapter 62 of the Health and Safety Code may not provide coverage for the services

prohibited by Section 161.702. *See* TEX. HEALTH & SAFETY CODE § 62.151(g).

A few weeks before S.B. 14 took effect, several plaintiffs sued in Travis County District Court, seeking a declaration that the statute is "unconstitutional, void, and unenforceable in its entirety." They also sought temporary and permanent injunctions prohibiting the statute's implementation or enforcement.

Among the plaintiffs are the parents of five children between the ages of nine and sixteen. Each alleges that his or her child has been diagnosed with gender dysphoria and, in consultation with a physician, either started or planned to start a course of ***225** treatment prohibited by the statute, as follows:

> • Luna Loe,[8] age twelve, and Samantha Soe, age fifteen, had been taking puberty blockers before S.B. 14 took effect.
> • Nathan Noe, age sixteen, and Grayson Goe, age fifteen, had been taking testosterone, and Samantha had been taking estradiol.[9]
>
> • Maeve Moe, age nine, intends to take puberty blockers when she reaches puberty.

Three licensed Texas physicians—Dr. Richard Ogdon Roberts III, Dr. David L. Paul, and Dr. Patrick W. O'Malley—are also plaintiffs. They allege that, but for S.B. 14, they would continue to treat their underage gender dysphoria patients by performing the procedures and treatments the statute prohibits if called for by the generally accepted standard of care. The remaining plaintiffs are two organizations that advocate for LGBTQ+ rights: PFLAG, Inc.; and the American Association of Physicians for Human Rights, Inc. d/b/a GLMA.

The defendants in this suit are the State of Texas; the Office of the Attorney General; Ken Paxton, in his official capacity as Attorney General[10]; the Texas Medical Board; and the Texas Health and Human Services Commission. They jointly filed a plea to the jurisdiction and a response to plaintiffs' application for a temporary injunction, arguing, among other things, that plaintiffs' constitutional claims were facially invalid.

The trial court conducted a two-day evidentiary hearing. Following the hearing, it entered a temporary injunction immediately enjoining all defendants from enforcing S.B. 14, based on the following findings:

> (1) the statute "likely violates Article I, Section 19 of the Texas Constitution by infringing upon the fundamental right of parents to make decisions concerning the care, custody, and control of their children";
>
> (2) the statute "likely violates Article I, Section 19 of the Texas Constitution by infringing upon Texas physicians' right of occupational freedom"; and
>
> (3) the statute "likely violates Article I, Sections 3 and 3a [of] the Texas Constitution by discriminating against transgender adolescents with gender dysphoria because of their sex, sex stereotypes, and transgender status."

Because the trial court granted a temporary injunction based on its conclusion that S.B. 14 likely violates the Texas Constitution, defendants appealed the order directly to this Court. *See* TEX. GOV'T CODE § 22.001(c) ("An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a ***226** statute of this state."). We noted probable jurisdiction and set the appeal for oral argument.

II. Standing

We begin by evaluating our jurisdiction. *See Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 797 (Tex. 2021) ("[S]ubject-matter jurisdiction must exist before we can consider the merits, ... and 'we have an obligation to examine our jurisdiction any time it is in doubt.' " (quoting *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 774 (Tex. 2020))). If plaintiffs lack standing to assert their claim, a "court has no jurisdiction over [the] claim." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008). But we need not undertake a plaintiff-by-plaintiff analysis on the question because the existence of one plaintiff with standing is sufficient to confer jurisdiction in suits seeking to enjoin enforcement of a law. *See State v. Zurawski*, 690 S.W.3d 644, 658–59 (Tex. May 31, 2024).

The first set of plaintiffs are parents suing individually and on behalf of their children. They allege S.B. 14 infringes on their right to make medical decisions for their children and unconstitutionally discriminates against their children for being transgender. At least some of these parents allege that their children were previously receiving treatments that the statute now prohibits and that they would resume those treatments if this suit were successful. Defendants do not argue that these parents have not alleged an injury in fact or that the relief they

seek would not provide redress. Whatever their claims' ultimate merits, the parents have concretely alleged that S.B. 14 prevents them and their children from engaging in constitutionally protected conduct they would continue to engage in but for the statute. Those allegations are sufficient to establish those parents' standing. *See Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 567 (Tex. 2021) ("Constitutional standing requires a concrete injury that is both traceable to the defendant's conduct and redressable by court order.").

The plaintiffs also include physicians who allege they have previously prescribed or administered treatments that S.B. 14 now prohibits and would continue to do so but for the statute. Defendants assert these physicians lack standing to assert their patients' claims. We need not address that issue because we conclude these physicians have standing to press their own claims—that S.B. 14 infringes on their claimed right to occupational freedom. And because the plaintiff parents and physicians, together, have standing to assert each of the three alleged constitutional violations, we can proceed to the merits with our jurisdiction secure and without addressing whether the plaintiff organizations also have standing.

III. Are plaintiffs entitled to a temporary injunction?

To obtain a temporary injunction, the applicant must plead and prove (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. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The Court reviews an order granting a temporary injunction for an abuse of discretion. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 660 S.W.3d 108, 116 (Tex. 2023). Under this standard, we defer to the trial court's factual findings if they are supported by the evidence, but we review legal determinations de novo. *Haedge v. Cent. Tex. Cattlemen's Ass'n*, 603 S.W.3d 824, 827 (Tex. 2020).

***227** Here, plaintiffs make a facial challenge to the constitutionality of S.B. 14, seeking a declaration that it is unconstitutional "in its entirety." The ultimate question of whether a statute violates the Constitution is a question of law. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998).[11]

When a party challenges the constitutionality of a statute, we begin with a strong presumption that the statute is valid. *See Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 785 (Tex. 2016) ("[A] challenged statute is entitled to a 'strong presumption' of constitutional validity." (quoting *Vinson v. Burgess*, 773 S.W.2d 263, 266 (Tex. 1989))); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015) ("[S]tatutes are presumed to be constitutional."); *Tex. State Bd. of Barber Exam'rs v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex. 1970) ("Legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold."); *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968) ("It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. The wisdom or expediency of the law is the Legislature's prerogative, not ours.").

As in the trial court, plaintiffs here assert that S.B. 14 is facially unconstitutional for three reasons: (1) it infringes on the fundamental rights of parents to make decisions concerning the care of their children in violation of Article I, Section 19 (the Due Course of Law Clause); (2) it deprives Texas physicians of a vested property interest in their medical licenses and infringes on the occupational freedoms of Texas healthcare providers in violation of the Due Course of Law Clause; and (3) it discriminates against transgender children and their parents because of sex and transgender status in violation of Article I, Section 3 (the Equal Protection Clause) and Article I, Section 3a (the Equal Rights Amendment). The trial court concluded that plaintiffs established a probable right to relief on all three constitutional challenges. We address each of these theories in turn.

A. Does the statute unconstitutionally infringe on parents' ability to make medical decisions for their children?

First, the trial court concluded the statute likely violates the Due Course of Law Clause "by infringing upon the fundamental right of parents to make decisions concerning the care, custody, and control of their children." According to the trial court, this right includes the right of parents "to give, withhold, and withdraw consent to medical treatment for their children" as well as "to seek and to follow medical advice to protect the health and wellbeing of their minor children."

1. Applicable law

The Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. We have adopted a two-step inquiry to determine whether a government action violates our Constitution's guarantee of "due course of the law." *See* ***228** *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 905 (Tex. 2021) (citing *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)). First, we consider whether the plaintiff has a liberty, property, or other enumerated interest that is entitled to protection. *Id.* Second, if a protected interest is implicated, we consider whether the defendant followed due course of law in depriving the plaintiff of that interest. *Id.* This inquiry requires a careful analysis of the interest of which the plaintiff is allegedly being deprived. *See id.* (noting that a constitutional challenge to a student's dismissal for poor academic performance requires courts to focus on whether the dismissal "interferes with the student's liberty interest in his or her reputation and employability, not on whether education is a protected liberty interest"); *see also Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997) (stating that the U.S. Supreme Court requires a "careful description" of the asserted fundamental liberty interest (quoting *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993))).

If there is no deprivation of a constitutionally protected interest, then a statute satisfies the Due Course of Law Clause as long as it is rationally related to a legitimate state purpose. *See Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996).

This Court has repeatedly recognized that parents have a fundamental interest in making decisions regarding the care, custody, and control of their children. A half century ago, we recognized that this "natural right" between parents and children is "one of constitutional dimensions." *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). We thus held that when the State seeks a parental termination order or other action that "permanently sunders those ties," those proceedings should be "strictly scrutinized." *Id.*; *see also Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) ("[T]ermination proceedings should be strictly scrutinized, and involuntary termination statutes are strictly construed in favor of the parent.").

Similarly, we have recognized that nonparents may not be afforded rights of possession or other rights concerning a child's care without first overcoming the presumption that a fit parent acts in the child's best interests. Quoting the U.S. Supreme Court's plurality opinion in *Troxel v. Granville*, we stated, "[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family ...." *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (alteration in original) (quoting *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality op.)). Plaintiffs point to these cases to support their assertion that the statute unconstitutionally infringes on what should be an unfettered right of parents to exercise absolute control over decisions regarding a child's medical treatment.

Plaintiffs' argument has some force, but only up to a point. Parents' right to exercise control over decision-making for their children has limits: "the rights of natural parents are not absolute." *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994); *see also De Witt v. Brooks*, 143 Tex. 122, 182 S.W.2d 687, 690 (1944) ("While ordinarily the natural parents are entitled to the custody and care of their child, this is not an absolute unconditional right.").

Of significance here, we have never questioned the Legislature's constitutional authority to regulate medical treatments—including by prohibiting certain treatments outright—for both adults and ***229** children. *See* TEX. CONST. art. XVI, § 31 ("The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State ...."); *Martinez v. Tex. State Bd. of Med. Exam'rs*, 476 S.W.2d 400, 405 (Tex. App.—San Antonio 1972, writ ref'd n.r.e.) ("[T]he Legislature was expressly granted the constitutional authority to regulate the practice of medicine."); *Kelley v. Tex. State Bd. of Med. Exam'rs*, 467 S.W.2d 539, 546 (Tex. App.—Fort Worth 1971, writ ref'd n.r.e.) ("It is the right and duty of the State to regulate and control medical practice, so that the public safety and welfare will be served and promoted."). Indeed, state legislatures have long played a critical and recognized role in regulating health and welfare, which is why those efforts receive "a strong presumption of validity." *L.W. v. Skrmetti*, 83 F.4th 460, 473 (6th Cir. 2023) (quoting *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)), *cert. granted*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2024 WL 3089532 (No. 23-477 (U.S. June 24 2024)); *see also Gonzales v. Carhart*, 550 U.S. 124, 157, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession."); *Garcia v. Tex. State Bd. of Med. Exam'rs*, 384 F. Supp. 434, 437 (W.D. Tex. 1974) (three-judge panel) ("This right of a State to regulate under its police powers all aspects of the practice of medicine and thereby help provide for the general health and welfare of its citizens is of such vast importance as to

approach the status of a duty."), *aff'd*, 421 U.S. 995, 95 S.Ct. 2391, 44 L.Ed.2d 663 (1975). In short, our precedents acknowledge that parental rights, though weighty, at times give way to other competing interests such as the interest in protecting children from harm. This is underscored by our Constitution's express authorization of legislative regulation of the practice of medicine. Thus, to the extent parents possess a fundamental interest in obtaining medical care for their children, it has extended only to those medical treatments that are legally available.

2. Analysis

We conclude that the parent plaintiffs failed to establish a probable right to relief on their claim that the statute unconstitutionally deprives them of a protected interest. When analyzing a challenge under the Due Course of Law Clause, we first determine whether the plaintiff has identified a "liberty, property, or other enumerated interest" that is entitled to protection. *Villarreal*, 620 S.W.3d at 905. We then examine whether the State "depriv[ed]" the plaintiff of that interest and, if so, whether it failed to follow due course of law in doing so. *Id.*

Glucksberg provides a useful guide. In that case, the plaintiffs sued for a declaration that a Washington statute prohibiting assisted suicide was unconstitutional under the Due Process Clause of the Fourteenth Amendment. 521 U.S. at 707–08, 117 S.Ct. 2302. In concluding that the statute was constitutional, the Supreme Court's analysis focused on whether "the asserted 'right' to assistance in committing suicide" is a fundamental liberty interest protected by the U.S. Constitution. *Id.* at 728, 117 S.Ct. 2302. The Court rejected an approach that would have defined the asserted right more broadly as a natural extension of "abstract concepts of personal autonomy." *Id.* at 725, 117 S.Ct. 2302. Plaintiffs here (and the dissent) likewise seek to define the asserted right as nothing more than an extension of "parental autonomy." The *Glucksberg* Court explained the Constitution requires a carefully circumscribed description of the asserted right or liberty interest at issue:

> ***230** By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Id. at 720, 117 S.Ct. 2302 (citations and internal quotation marks omitted).

The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21, 117 S.Ct. 2302 (citations and internal quotation marks omitted). We apply a similar analysis in reviewing plaintiffs' claim that S.B. 14 deprives them of a constitutionally protected right. *See Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 656 (Tex. 2022) ("[W]e should define the interest as specifically as necessary to accurately reflect the constitution's language ('liberty' and 'property'), our precedential construction of that language, and the realities of the deprivation the [plaintiffs] are claiming.").

Plaintiffs assert that S.B. 14 violates the Due Course of Law Clause by infringing on parents' "fundamental autonomy right to make decisions about their children's care, including directing their medical care." We have previously described "[p]arental control and autonomy" as a "fundamental liberty interest." *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010) (quoting *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (quoting *Troxel*, 530 U.S. at 65, 120 S.Ct. 2054)). Indeed, we have described the "natural right" between parents and their children as one "of constitutional dimensions." *Wiley*, 543 S.W.2d at 352. Certainly, then, when the State seeks to sever the parent–child relationship, those proceedings must be "strictly scrutinized." *Id.*

But neither our society's history and legal traditions nor this Court's precedents support a view of the scope of parents' constitutionally protected interest in directing their children's care, custody, and control that would place *any* action a parent may undertake outside the government's authority to regulate. *See J.W.T.*, 872 S.W.2d at 195; *De Witt*, 182 S.W.2d at 690. This plays out in various contexts, many of which are deeply embedded in our legal history. Some longstanding restrictions on children's activities, like prohibiting child

labor and access to tattoos and tobacco, limit parental authority. *See* TEX. LAB. CODE § 51.011 (prohibiting the employment of a child younger than fourteen except under limited circumstances); TEX. HEALTH & SAFETY CODE § 146.012(a)(1), (a-1) (prohibiting a child younger than eighteen from obtaining a tattoo, even with parental consent, except to cover certain other tattoos or markings); *id.* § 161.082(a) (prohibiting the giving or selling of cigarettes or tobacco products to someone younger than twenty-one). Tattoos provide a particularly apt example, as they involve what is in most cases a permanent adjustment to the human body that is not intended to restore the body's physical condition but instead applied for psychological reasons. The Legislature prohibits children from being tattooed, even with their parents' consent, both because children may not fully appreciate the consequences of their actions and because of the risk that parents may be imposing their own desires, however well-meaning, on the child.

***231** Whatever the context in which they arise, these examples demonstrate that, while parents have a large degree of control and authority to decide what is best for their children, parental control and authority have never been understood as constitutionally mandated absolutes. Said differently, a fit parent's fundamental interest in caring for her child free from government interference extends to choosing from among legally available medical treatments, but it never has been understood to permit a parent to demand medical treatment that is not legally available. The U.S. Supreme Court cases on which our Court relied in recognizing the "constitutional dimensions" of parental rights likewise acknowledged that the scope of parental authority has always had limits. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare ....").

Carefully described, the purported right for which plaintiffs seek constitutional protection is the right of parents to allow their children access to relatively new medical procedures and treatments for a relatively newly defined medical condition. Plaintiffs claim this asserted right is merely a part of their constitutionally recognized interest in "parental autonomy." But just as the U.S. Supreme Court did in *Glucksberg*, and the Sixth Circuit recently did in a case nearly identical to this one, we decline the invitation to extend constitutional protection to a claimed right—thus placing it "outside the arena of public debate and legislative action"—merely because the conduct, were it allowed, would entail the exercise of parental judgment or decision-making. 521 U.S. at 720, 117 S.Ct. 2302; *see Skrmetti*, 83 F.4th at 475 ("[C]laimants overstate the parental right by climbing up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children—that the case law and our traditions simply do not support.").

Plaintiffs' argument is particularly weak in the context of medical care, as the Legislature has express constitutional authority to regulate the practice of medicine. TEX. CONST. art. XVI, § 31. If it may exercise that authority to regulate the practice of medicine and available treatments for adults, it surely must be true that it may do the same for treatments for children. Nor is there support for the idea that regulation of children's medical treatments would be more closely scrutinized than regulation of medical treatments for adults because children's medical treatments usually require parental consent on the child's behalf.

Our dissenting colleague places much weight on *Parham v. J. R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), which involved a procedural due process claim and does not support a conclusion that parents' fundamental interest in their children's care includes a right to obtain any medical treatment for them, such as those at issue here. The issue in *Parham* was whether a state statute that allowed parents to commit their children to a psychiatric hospital unconstitutionally deprived the children of procedural due process because there was no formal hearing before they were committed. *See id.* at 596–97, 99 S.Ct. 2493. In concluding the statute passed constitutional muster, the Court considered the children's liberty interest in freedom from confinement together with the interests of the parents and the State. *Id.* at 600–06, 99 S.Ct. 2493. The Court noted that parents generally have "broad parental authority" over their children as well as ***232** a "high duty" to seek and follow medical advice. *Id.* at 602, 99 S.Ct. 2493. And it acknowledged the presumption that parents act in their children's best interests, though it noted that presumption can be rebutted. *Id.* But nothing in the Court's opinion suggests that it was recognizing a substantive constitutional right for parents to obtain novel medical care for their children. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 286, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) ("[P]etitioners would seek to turn a decision [*Parham*] which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way."). As the Sixth Circuit concluded, "[t]his traditional due process ruling does not support today's untraditional request for relief under substantive due process."*Skrmetti*, 83 F.4th at 476–77.[12]

We need not and do not hold that the Legislature could withdraw from parents the authority to choose any legal, available medical treatment. Rather, we hold only that novel treatments for a novel condition are generally within the Legislature's power to regulate without facing heightened scrutiny. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) ("[W]hen a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.' " (quoting *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983))). Plaintiffs' expert testified that the first use of puberty blockers for children with gender dysphoria was in Europe in the 1990s, and the earliest identified study regarding the effectiveness and risks of the treatments at issue here was published in 2009. Whatever the precise contours of the fundamental liberty interest held by parents, the notion that it includes a right to pursue the treatments at issue here is not "deeply rooted in our history and traditions." *Glucksberg*, 521 U.S. at 727, 117 S.Ct. 2302; *see also Skrmetti*, 83 F.4th at 475 ("This country does not have a custom of permitting parents to obtain banned medical treatments for their children and to override contrary legislative policy judgments in the process."); *Eknes-Tucker v. Governor*, 80 F.4th 1205, 1224 (11th Cir. 2023) ("[N]one of the binding decisions regarding substantive due process establishes that there is a fundamental right to treat one's children with transitioning medications subject to medically accepted standards." (alteration and internal quotation marks omitted)); *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 & n.18 (D.C. Cir. 2007) (en banc) (identifying multiple courts that have "rejected arguments that the Constitution provides an affirmative right of access to particular medical treatments reasonably prohibited by the Government"). Moreover, the contours of a constitutional right do not turn on plaintiffs' assertion that a particular treatment is currently "recognized by the medical community." *See Jones*, 463 U.S. at 364 n.13, 103 S.Ct. 3043 ("We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric ***233** community."); *Eknes-Tucker*, 80 F.4th at 1224 ("[T]hose decisions applying the fundamental parental right in the context of medical decision-making do not establish that parents have a derivative fundamental right to obtain a particular medical treatment for their children as long as a critical mass of medical professionals approve.").[13]

While S.B. 14 limits the availability of novel medical treatments for children diagnosed with a novel medical condition, it does not deprive those children's parents of any constitutionally protected right or undermine a custom embedded in our history or traditions. The statute does not sever parents' control or autonomy to make medical decisions for their children, nor does it displace a child's parent as the ultimate decision maker. The law merely restricts the availability of new treatments with which medical providers may treat children diagnosed with a newly defined medical condition, gender dysphoria. It therefore will satisfy the Due Course of Law Clause if it is rationally related to a legitimate state purpose. *See Barshop*, 925 S.W.2d at 633.[14]

Plaintiffs contend that the statute falls short of even this bar because it is "rooted in anti-transgender animus." ***234** In support, they first argue that the evidence establishes that each of the prohibited procedures is safe, effective, and accepted in the medical community.[15] But a court's determination regarding the ultimate correctness of the Legislature's findings is not a proper basis for rejecting a statute. *Owens Corning v. Carter*, 997 S.W.2d 560, 582 (Tex. 1999); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995). Plaintiffs do not (and cannot) dispute that the Legislature has legitimate interests in both regulating medical procedures and in protecting the health and wellbeing of children. Accordingly, we uphold the law if it is rationally related to a legitimate government interest. *See Owens Corning*, 997 S.W.2d at 580; *Barshop*, 925 S.W.2d at 633.

Notwithstanding this Court's or the trial court's views, the Legislature had a rational basis for concluding that the risk of providing these treatments to children solely for the purpose of physically transitioning from their sex at birth was not outweighed by the benefits. Plaintiffs respond that the prohibition based on the Legislature's perceived risk of harm to children is pretextual because the exceptions permit these same treatments for other medical conditions. But the decision to prohibit particular medical procedures for a certain condition is based on a balance between both risks and benefits of the treatment in contrast to other treatments for the same underlying condition. The Legislature could rationally reach different conclusions on the balance of risks and benefits when physical treatments are used to treat a purely physical condition (such as precocious puberty) as opposed to a condition like gender dysphoria, for which other treatment options exist. Indeed, policymakers in many other states, as well as other nations, have made similar judgments.

Plaintiffs also cite the statute's legislative history, focusing on statements by lawmakers that, they contend, demonstrate that the statute's enactment was motivated by a "desire to harm transgender adolescents."[16] The State rejects this characterization of the statements, but we need not decide which interpretation is correct. Even if we assume the legislative history demonstrates someone

voting for this bill may have been improperly motivated, that constitutes no evidence that all, most, or even a significant percentage of the over 100 legislators who voted for the statute were similarly motivated. *See Tex. Health Presbyterian Hosp. v. D.A.*, 569 S.W.3d 126, 136–37 (Tex. 2018) ("An individual ***235** legislator's statements—even those of the bill's author or sponsor—do not and cannot describe the understandings, intentions, or motives of the many other legislators who vote in favor of a bill.").

B. Does the statute unconstitutionally infringe on physicians' property rights or medical providers' occupational freedom?

The trial court also concluded that S.B. 14 likely violates the Due Course of Law Clause "by infringing upon Texas physicians' right of occupational freedom." The court went on to say that the statute "deprives Texas physicians of a vested property interest in their medical licenses"; that it "interferes with the professional relationship among medical providers, adolescent patients, and the patients' parents"; and that the statute is "clearly arbitrary and its effect as a whole is so unreasonably burdensome that it is oppressive."

1. Applicable law

Again, the first step in our inquiry under the Due Course of Law Clause is to carefully define the interest of which these plaintiffs are allegedly being deprived. *Villarreal*, 620 S.W.3d at 905. If the plaintiffs are not deprived of a constitutionally protected interest, the statute is constitutional so long as it is rationally related to a legitimate state purpose. *Barshop*, 925 S.W.2d at 633.

In *Patel v. Texas Department of Licensing & Regulation*, this Court held that an as-applied challenge to an economic regulation statute based on the Due Course of Law Clause "must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." 469 S.W.3d at 87. But, as with parental rights, a person's protected work-related interests "are not without limits." *Crown Distrib.*, 647 S.W.3d at 654. We underscored the point in *Crown Distributing*: "[n]either 'property rights nor contract rights are absolute.' " *Id.* (quoting *Nebbia v. New York*, 291 U.S. 502, 523, 54 S.Ct. 505, 78 L.Ed. 940 (1934)).

2. Analysis

We conclude the physicians and healthcare providers failed to establish a probable right to relief on their claims under the Due Course of Law Clause. As with plaintiffs' arguments regarding parental rights, the arguments on behalf of these plaintiffs incorrectly characterize the scope of the constitutionally protected interest of which the statute allegedly deprives them.

Plaintiffs argue that Texas physicians have a vested property interest in their medical licenses and that, under S.B. 14, those licenses "shall" be revoked if they provide prohibited medical care to children. *See* TEX. OCC. CODE § 164.0552(a). Plaintiffs therefore urge that the statute must be subject to strict scrutiny. We disagree. To the extent that a license to practice medicine can be construed as a property interest, that interest is subject to regulation and not absolute. Our Constitution expressly authorizes the Legislature to "pass laws prescribing the qualifications of practitioners of medicine." TEX. CONST. art. XVI, § 31. In accordance with that constitutional mandate, the Legislature enacted the Medical Practice Act, expressly finding that "the practice of medicine is a privilege and not a natural right of individuals" and that legislative regulation of that privilege and its subsequent use and control "is necessary to protect the public interest." TEX. OCC. CODE § 151.003(1). That ***236** authorization necessarily includes the ability to prohibit certain practices altogether.

In short, a medical license does not confer on physicians a right to practice medicine in any way they see fit. To the extent that the State's granting a medical license creates a protected property interest, that interest does not extend to practices that the State has determined to be unlawful. In other words, Texas physicians have no constitutionally protected interest to perform medical practices that the Legislature has rationally determined to be illegal.

Plaintiffs rely on *House of Tobacco, Inc. v. Calvert*, in which we described a permit authorizing the sale of tobacco products as a "privilege which does not have to be granted; however, once it is granted, it cannot be taken away except for good cause." 394 S.W.2d 654, 657 (Tex. 1965). We therefore held that the State Comptroller's order revoking the permit was void because the permit holder was first entitled to notice and a hearing under the

Due Course of Law Clause. *Id.* at 658. But we have never held that the granting of a medical license, or any license, gives the holder a substantive property right to engage in conduct without limitation by the Legislature.

Plaintiffs cannot show that the statute unconstitutionally infringes on a protected property interest. And plaintiffs have not alleged that the procedural protections required to revoke a medical license, including notice and an opportunity to be heard, *see* TEX. OCC. CODE § 164.004, the physician's right to administrative review, *see id.* § 164.007, and the physician's right to judicial review, *see id.* § 164.009, are constitutionally inadequate. We therefore reject plaintiffs' Due Course of Law Clause claim with respect to physicians' medical licenses.

Plaintiffs next argue that S.B. 14 unconstitutionally infringes on medical providers' liberty interest "to engage in their occupations." They contend that the threat of license revocation and discipline for engaging in practices prohibited by the Legislature is "clearly arbitrary and so unreasonably burdensome that it is oppressive." *See Patel*, 469 S.W.3d at 87 (holding that an economic-regulation statute violates the Due Course of Law Clause as applied to the challenging party if its effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest). We need not decide whether the standard we announced in *Patel* applies here because plaintiffs cannot show that this statute, or any statute that limits particular medical treatments for children, imposes an unreasonable burden on physicians' ability to practice medicine. The statute does not prevent medical providers from treating children with gender dysphoria with treatments other than those that are prohibited, nor does it prohibit them from providing those medical procedures to adults.

C. Does the statute unconstitutionally deny or abridge equality under the law?

Finally, the trial court concluded that S.B. 14 likely violates Article I, Sections 3 and 3a "by discriminating against transgender adolescents with gender dysphoria because of their sex, sex stereotypes, and transgender status."

1. Applicable law

Article I, Section 3 of the Texas Constitution provides the following guarantee of equal rights: "All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." ***237** TEX. CONST. art. I, § 3. We have typically referred to Section 3 as our Constitution's "equal protection" clause. *See Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 257 n.4 (Tex. 2002). In 1972, Texans adopted the Equal Rights Amendment, which states, "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a. For convenience, we will refer to these two provisions jointly as the Equal Rights Clauses.

We evaluate alleged violations of the Equal Rights Clauses in three steps. *Bell*, 95 S.W.3d at 257 (citing *In re McLean*, 725 S.W.2d 696, 697 (Tex. 1987) (plurality op.)). First, we examine whether "equality under the law" has been denied. *Id.* If it has, then we determine whether equality was denied because of a person's membership in a protected class of sex, race, color, creed, or national origin. *Id.* (citing *McLean*, 725 S.W.2d at 697). If we conclude that equality was denied because of a person's membership in a protected class, the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest. *Id.* (citing *McLean*, 725 S.W.2d at 698).

We have applied this framework in an analogous case, *Bell.* There, we concluded that the State's restrictions on abortion funding did not deny equality "because of" sex, even though only women could become pregnant. *Id.* at 263–64. We distinguished the "overt gender-based distinction" of a statute we held unconstitutional in *McLean*, which imposed different burdens on fathers and mothers seeking the same relief. *Bell*, 95 S.W.3d at 258; *see McLean*, 725 S.W.2d at 697. We reasoned that the restriction in *Bell* was directed at abortion as a medical treatment, and we held that the funding scheme was not "merely a pretext designed to prefer males over females in the provision of health care." 95 S.W.3d at 258.

2. Analysis

We conclude that S.B. 14 does not deny or abridge "[e]quality under the law" because of plaintiffs' membership in any protected class. *See* TEX. CONST. art. I, § 3a; *Bell*, 95 S.W.3d at 257. Plaintiffs argue that the statute discriminates against them because of sex, a protected class under the Equal Rights Clauses. They contend the statute does so in two ways: (1) it facially discriminates by denying certain medical treatments based

on whether the intended recipient is male or female; and (2) it discriminates against transgender people, which plaintiffs contend "is necessarily sex discrimination."

With respect to plaintiffs' first argument, under the statute, no person is "treated differently from others similarly situated" based on their sex. *See Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) (quoting *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004)). The statute treats both males and females receiving treatment for gender dysphoria the same by prohibiting medical providers from prescribing or supplying cross-sex hormone therapy or other treatments that conflict with the child's sex at birth. Recent decisions from the Sixth and Eleventh Circuits are in accord. *See Skrmetti*, 83 F.4th at 480 ("Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other."); *Eknes-Tucker*, 80 F.4th at 1228 (concluding that Alabama's statute "refers to sex only because the medical procedures that it regulates ... are themselves sex-based" and therefore it "does not establish an unequal regime for males and females"). The mere fact that the statute identifies hormones that are ***238** prohibited for males and others that are prohibited for females does not deny or abridge equal treatment because of sex. We rejected a similar argument in *Bell*, concluding that a statutory restriction on funding for abortion as a medical treatment did not prefer males over females in the provision of health care, even though only females can get pregnant. 95 S.W.3d at 258.

Plaintiffs also argue that the statute discriminates against "transgender people" because it prohibits certain medical treatments only if those treatments are intended to transition a patient from one sex to another. Although they acknowledge that "transgender status" is not one of the protected classes enumerated in the Constitution, they argue that it "is necessarily sex discrimination." Plaintiffs primarily rely on *Bostock v. Clayton County*, in which the U.S. Supreme Court held that firing an employee for being transgender violates Title VII's statutory prohibition against "discriminat[ing] ... because of such individual's ... sex." 590 U.S. 644, 655, 662, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). But the Supreme Court's interpretation of Title VII, which focuses on but-for discriminatory acts by individual employers, does not apply to the Texas Constitution's textually distinct guarantee that "[e]quality under the law shall not be denied or abridged because of sex." TEX. CONST. art. I, § 3a. As noted above, the prohibitions in S.B. 14 do not treat any person differently from those in a similar situation because of that person's sex. *See Klumb*, 458 S.W.3d at 13; *Bell*, 95 S.W.3d at 258.

Finally, plaintiffs argue that S.B. 14 "categorizes on the basis of an inherently suspect characteristic" and therefore should be subject to strict scrutiny under Article I, Section 3. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 639 (Tex. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). But this Court has previously concluded that Section 3a "is more extensive and provides more specific protection than" Section 3. *McLean*, 725 S.W.2d at 698. Since the Equal Rights Amendment's adoption in 1972, this Court has never expanded the Equal Rights Clauses' protection to classifications that fall outside those enumerated in Section 3a. We decline plaintiffs' invitation to create a new protected class beyond those Texas voters have adopted. *See In re J.C.*, 594 S.W.3d 466, 477 (Tex. App.—Fort Worth 2019, no pet.) ("[R]espect for the separation of powers should make courts reluctant to establish new suspect classes." (internal quotation marks omitted) (quoting *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996))).[17]

***239 IV. Conclusion**

Plaintiffs failed to establish a probable right to relief on any of their three asserted constitutional violations. We therefore reverse and vacate the trial court's Temporary Injunction Order.

Justice Blacklock filed a concurring opinion, in which Justice Devine joined.

Justice Busby filed a concurring opinion.

Justice Young filed a concurring opinion.

Justice Lehrmann filed a dissenting opinion.

Justice Blacklock, joined by Justice Devine, concurring.

"I will do no harm or injustice." The Hippocratic Oath, ca. 400 B.C.[1]

This case arises from irreconcilably conflicting visions of what it means for doctors to do "harm or injustice" to children experiencing confusion and distress about the normal biological development of their bodies. The first vision—call it the Traditional Vision—holds that a boy is

a boy, a girl is a girl, and neither feelings and desires nor drugs and surgery can change this immutable genetic truth, which binds us all. Within the Traditional Vision, human males and females do not "identify" as men and women. We *are* men and women, irreducibly and inescapably, no matter how we feel. Proceeding from these moral and philosophical premises, the Traditional Vision naturally holds that medicinal or surgical interference with a child's developing capacity for normal, healthy sexual reproduction is manifestly harmful to the child, an obvious injustice unworthy of the high label "medicine." The Traditional Vision further holds that adolescent children who feel out of place in their physically healthy, normally developing bodies should receive mental health care that seeks to accommodate their feelings to the biological reality of their bodies, which are unavoidable and irreplaceable components of who they truly are.

The second vision—call it the Transgender Vision—holds that we all have a "sex assigned at birth," which usually corresponds to our physical traits but which may or may not correspond to our inwardly felt or outwardly expressed "gender identity." It holds that a person's gender identity is a constitutive part of his or her humanity and that when a person's biological sex and gender identity diverge, often gender identity should be given priority. Based on these moral and philosophical premises, the Transgender Vision holds that an adolescent child who feels out of place in a biologically normal body should in many cases take puberty-blocking drugs designed to retard or prevent the emergence of sexual characteristics out of line with the child's gender identity. Ultimately, the Transgender Vision holds that a person's body can be, and in many cases should be, conformed to the person's gender identity—using hormone therapy and even the surgical removal of healthy sexual organs—in pursuit of the person's mental health.

These competing visions of the human person diverge at the most basic level. The divergence is unbridgeable. We can talk about it in terms of empirical debates over the efficacy or side-effects of the disputed treatments, but the core of the matter is a deep conflict over human nature. In the end, the disagreement is one of philosophy, morality, even religion. The medical debates at issue in this litigation are merely the surface-level consequences of deep disagreement ***240** over the deepest of questions about who we are. In some ways, the answers to the medical questions are derivative of the answers to the deeper questions. Thus, under the Traditional Vision, the disputed treatments are self-evidently harmful to children, cannot rightly be called medical care, and should quite obviously be discouraged, by force of law if necessary. From within the Transgender Vision, however, these treatments are necessary medical care, the failure to provide them is a cruelty, and outlawing them is a grave injustice.[2]

The heart of the dispute is moral and political, not scientific and medical. Doctors have no special expertise in answering moral and political questions. As the plaintiffs' expert testimony demonstrates, doctors often adopt moral and political judgments of their own before they begin to answer the downstream scientific and medical questions. Doctors are surely useful sources of information to aid those tasked with answering moral and political questions about the human body, but doctors are not oracles in possession of special moral insight. Nor are judges the ideal place to look for answers to political questions.

Our Constitution tells us where to look. In the State of Texas, "[a]ll political power is inherent in the people." TEX. CONST. art. I, § 2. This litigation asks whether the sovereign People of Texas have the power, through their representatives in the Legislature, to answer moral and political questions about childhood transgender therapy in accordance with the Traditional Vision of what it means to be human, male and female. The answer is yes.[3]

* * *

Until very recently in human history, the Traditional Vision was the only vision. The questions this case raises did not exist.[4] They were hardly conceivable. Had they been asked, essentially everyone ever ***241** to live would have answered based on the Traditional Vision of human nature. Yet remarkably, despite its recent provenance, the Transgender Vision quickly captured the heights of the medical establishment,[5] as well as many other places of power in our society—including universities, large corporations, and the media.[6]

Consider the American Psychiatric Association's definition of "gender dysphoria" as "the psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity."[7] We have become accustomed in recent years to seeing such morally loaded verbiage presented as uncontroversial fact ***242** in what were once trusted sources of authority, like medical journals and newspapers. But from outside the Transgender Vision, neologisms like "sex assigned at birth" and "gender identity"—while intelligible as theoretical concepts—simply do not correspond to reality.[8] Our ability to conceive of them, and even to believe in them, does not make these concepts real. From within the Traditional Vision, these concepts appear as myths believed by those who hold the Transgender Vision. The fervent belief (or social status) of the myth's

adherents does not make the myth true. Nor does the fervent belief or social status of the myth's adherents require those who do not subscribe to the myth to exercise their political power in accordance with the myth's premises.

Outside the Transgender Vision, our identity as men and women is a brute fact of our existence. Outside the Transgender Vision, our "gender identity," to the extent such a thing exists, arises ineluctably from genetics and biology—not from feelings, choices, or psychiatric diagnoses. Outside the Transgender Vision, we are genetically male or female from the moment of conception, and our parents and doctors have no choice in the matter—so there is no such thing as "sex assigned at birth." Outside the Transgender Vision, the notion that a physically healthy but psychologically troubled boy might *actually* be a girl in some *real* sense is nothing but a fantasy—except that this fantasy can be dangerous in real life because some doctors may act on it in ways that can permanently alter the boy's healthy bodily functioning. Outside the Transgender Vision, just as men and women are "endowed by their Creator with certain unalienable Rights," we are also endowed by our Creator with certain unalienable genetic traits, "male and female."[9] Outside the Transgender Vision, a law prohibiting doctors from altering a child's healthy body in service of a misguided fantasy is perfectly reasonable, perhaps even so obviously right and just as to be unremarkable.

The plaintiffs accuse the Legislature of acting out of "anti-transgender animus"—which I take to mean irrational hostility or hatred of people who claim a transgender identity. Likely there are some holders of the Traditional Vision who bear ill-will against such people. This is regrettable. But just as likely there are holders of the Transgender Vision who bear ill-will against those who hold the Traditional Vision. This is equally regrettable. Sincere disagreement on a disputed philosophical question about human nature does not entail hostility or hatred toward those who disagree. By and large, those who hold the Traditional Vision proceed from a sincere conviction that the Transgender Vision is, in the end, make-believe. They do not proceed from hatred or hostility toward anybody, and they need not abandon or conceal their sincere convictions to avoid nasty labels like "animus." From their perspective, the Transgender Vision is much like other forms of make-believe. Perhaps it can be indulged to a degree, but a line must be drawn when it threatens physical harm to a child.

* * *

The legal question before the Court is whether the Texas Constitution—whose relevant language was last ratified in 1876—enshrines a right to administer ***243** transgender treatments to children. "Our goal when interpreting the Texas Constitution is to give effect to the plain meaning of the text as it was understood by those who ratified it." *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021). From a constitutional perspective—a perspective focused on the original meaning of a nineteenth-century legal document—we should begin by noting that the Transgender Vision would have been utterly inconceivable to those who wrote and ratified our Constitution. Would Texans in 1876 have understood the Constitution they ratified to enshrine the right asserted by the plaintiffs? To ask this question is to answer it.[10]

As the plaintiffs rightly point out, however, Texans in 1876 would have taken a very strong view of the traditional right of parents to direct the upbringing of their children, including with respect to medical care. For this reason, we have long recognized the "fundamental nature of the parental right to make child-rearing decisions," *In re D.T.*, 625 S.W.3d 62, 69 (Tex. 2021), and we have adopted a strong presumption that a parent "acts in the best interest of his or her child." *In re C.J.C.*, 603 S.W.3d 804, 808 (Tex. 2020). But the plaintiffs point to no time in Texas history—and to no aspect of Texas's legal traditions—in which the Legislature was thought to be powerless to outlaw a practice it considers to be severe child endangerment masquerading as medical care.

The plaintiffs and their doctors hold a robust version of the Transgender Vision.[11] They take it for granted that judges will assume the legitimacy of that vision when analyzing their claims—as have the lower court and the dissenting Justice. But in order for their claims to succeed, the plaintiffs must show that the Texas Constitution requires the *Legislature* to assume the legitimacy of the Transgender Vision when it approaches these questions. If it does not—if the Constitution permits the Legislature to proceed from the Traditional Vision—then this case is very simple. Viewed from inside the Traditional Vision, what the Legislature has done is unquestionably within its constitutional power to regulate medicine. *See* TEX. CONST. art. XVI, § 31. Viewed from inside the Traditional Vision, the Legislature has prohibited doctors from disrupting and destroying children's healthy bodies on the basis of a dangerous and thoroughly misguided ideological fad with no roots in our society's history or traditions. From within the Traditional Vision, this law passes the constitutional test by any measure—no matter which "tier of scrutiny" the courts apply. Only from outside the Traditional Vision—from deeply within the Transgender Vision—do the plaintiffs' contentions about the law's irrationality or the State's lack of a compelling interest have any force at all.

All involved agree that our society must draw a line somewhere between parental autonomy and child endangerment. The question before the Legislature was this: Does using the disputed treatments on children in service of the Transgender Vision fall on the parental autonomy side of ***244** the line or the child endangerment side of the line? The Texas Legislature in 2023 answered this question the same way the Texas Legislature in the 1870s (or the 1970s) would have answered it, had it arisen. Yet the plaintiffs' argument is that the 1876 Texas Constitution implicitly prohibits the Texas Legislature from answering as it did—despite the historical reality that the asserted right would have been both inconceivable and, frankly, horrifying to nearly everyone at the time of ratification. Only by commandeering the Constitution in service of the Transgender Vision, a moral vision that has never once—from 1836 to 2024—obtained the consent of the People of Texas, could any court give the plaintiffs what they seek.[12] This Court is ***245** not in the business of "interpreting" the Constitution that way.

Like the legislative branch, the judicial branch is not obligated to adopt the Transgender Vision when it approaches these questions. In fact, if our constitutional heritage reflects one moral vision or the other, it is most certainly the Traditional Vision, the vision held by all those from whom we inherited the Texas Constitution.

* * *

Like the Court, I do not understand our decision today to authorize the government to interfere with parental authority in areas the law traditionally leaves to parents. *Ante* at 233. Whether to use drugs or surgery to *disrupt* or *destroy* the normal biological functioning of a child is not one of those areas. On the other hand, whether to use drugs or surgery to *preserve* or *restore* the normal biological functioning of a child *is* an area in which our legal traditions have long recognized a wide degree of parental autonomy.

This distinction—between treatments that seek to disrupt or destroy a person's normal biological functions, and treatments that seek to preserve or restore a person's normal biological functions—goes to the heart of an important question lurking in the background of this case: What is medicine? Is it just anything a doctor does for a patient? Or does genuine medicine have a *telos*—a goal, a purpose? By calling the disputed treatments "medical care" without asking what "medical care" is and is not, we may be adopting a premise of the Transgender Vision without meaning to do so.

The Legislature's constitutional power to regulate "practitioners of medicine," *see* TEX. CONST. art. XVI, § 31, must include a power to distinguish between treatments that are genuinely "medicine" and those that are not. In this realm, the Legislature may reasonably take the traditional view that medicine, rightly understood, is ordered toward the preservation or restoration of the normal, healthy bodily functioning of the human being.[13] If that is what ***246** medicine *is*, then the disputed treatments are not medicine at all. They may be services offered to patients by doctors, but because their purpose is to disrupt or destroy the patient's normal, healthy bodily functioning, they are different in kind from genuine medical care.

The text of the challenged legislation indicates that the Legislature had this distinction in view. The statute's ban on puberty-blocking drugs and other hormone therapy for children is not absolute. Instead, the ban targets the *purpose* for which the drugs are used. They may not be used "[f]or the purpose of transitioning a child's biological sex" or for the purpose of "affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex." TEX. HEALTH & SAFETY CODE § 161.702. Using the drugs for these prohibited purposes disrupts or destroys normal, healthy, biological functioning, rather than promoting or restoring it. On the other hand, the law permits the drugs to be used "for the purpose of normalizing puberty for a minor experiencing precocious puberty." *Id.* § 161.703(a)(1). They may also be used on a child "born with a medically verifiable genetic disorder of sex development" or a child who "does not have the normal sex chromosome structure for male or female." *Id.* § 161.703(a)(2)(A), (B).

Thus, when the purpose of the drugs is to bring the bodies of children with biological abnormalities more into line with normal human sexual development, the drugs are legal. But when the purpose of the drugs is to disrupt or destroy normal human sexual development, the drugs are illegal. In the Legislature's judgment, one of these is legitimate medical care, and the other is not. This is a moral and political judgment. It is informed by science and medicine, but it is not controlled by scientists and doctors. The fact that expert witnesses or influential interest groups like the American Psychiatric Association disagree with the Legislature's judgment is entirely irrelevant to the constitutional question. The Texas Constitution authorizes the Legislature to regulate "practitioners of medicine." TEX. CONST. art. XVI, § 31. It does not authorize practitioners of medicine to regulate the Legislature—no matter how many expert witnesses they bring to bear. A legitimate distinction exists between treatments that seek to promote normal biological functioning in the patient and those that seek to destroy it. The Legislature was entitled to notice this

distinction and to act upon it, as it has done.

We therefore need not hold that the Legislature could prevent a parent from seeking conventional medical care for a child in order to hold that the disputed ***247** treatments, which serve a purpose at odds with conventional medicine, are different in kind from genuine medical care and may therefore be removed from the realm of parental autonomy without threatening parents' traditional authority to make medical decisions for their children. I join the Court's opinion because nothing in it is inconsistent with this analysis.

* * *

Another way to approach this case would be to ask whether the Texas Constitution grants parents the right to choose for themselves whether to raise their children in accordance with the Traditional Vision or the Transgender Vision. If the question were simply whether the Constitution protects the right of parents to teach their children to follow one viewpoint or another on questions of morality and human nature, the answer would be simple. Of course it does. *See, e.g.*, TEX. CONST. art. I, § 8 ("[N]o law shall ever be passed curtailing the liberty of speech ...."); *id.* art. I, § 6 ("No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion ....").

The matter at hand, however, is not the liberty to hold viewpoints or beliefs, but the liberty to act upon a child's body on the basis of those viewpoints or beliefs. The plaintiffs and their doctors do not invoke their freedom of religion. They claim that the Transgender Vision is an established matter of science, not a matter of belief. Of course, from the perspective of the Traditional Vision, any such assertion is an incoherent conflation of speculative philosophy and empirical science. Neither a philosophical proposition ("gender identity is real") nor a moral rule ("gender identity should be affirmed") can be proven with the scientific method or the tools of medicine. Indeed, from within the Traditional Vision, the Transgender Vision has many characteristics not of a science, but of a religion.[14]

Had the plaintiffs asserted a *religious* right to the disputed treatments, their claim that the Texas Constitution protects their desired course of action would have been at its strongest. The freedom of religion often entails the freedom not just to *believe*, but to *act* upon one's beliefs—even, sometimes, in ways that could harm others. *See, e.g.*, TEX. CONST. art. I, § 6-a (protecting an absolute right to gather in person for worship, no matter what government epidemiologists think). But even if couched as a matter of religion, I do not think the right claimed in this case finds protection in our Constitution. Across history, many religious traditions have demanded that their adherents inflict permanent, physical harm on children. Our constitutional guarantee of religious freedom, robust as it is, has never been understood to protect treatment of children that would have been thought barbaric at the time of the founding.

In recent history, for example, immigrants from parts of Africa and the Middle East claimed a religious obligation to surgically remove portions of a young girl's sexual organs.[15] The practice, known as ***248** "female genital mutilation," was banned by federal law in 1996, and again in 2021. 18 U.S.C. § 116. States, including Texas, have similar bans. *E.g.*, TEX. HEALTH & SAFETY CODE § 167.001. To my knowledge, none of these bans has been invalidated on religious liberty grounds. Yet adherents to this practice genuinely believe they are doing the right thing for the children they love. The same can surely be said of parents seeking transgender treatments for their child, who unquestionably act out of love and conviction. Viewed from the Traditional Vision, however, the two practices are not altogether dissimilar. Both disrupt the normal sexual development of a child's body in service of a vision of human nature that is altogether foreign to our society's moral traditions.

Thus far, the consensus has been that childhood female genital mutilation can be outlawed, despite the heartfelt religious objections of its politically powerless adherents. If we judges were to say that childhood transgender treatments *cannot* be outlawed because of ideological objections from politically powerful places like the American Psychiatric Association, then what would really be doing the work? It would certainly not be the text or history of the Constitution. It would instead be yet another example of willful judges elevating fashionable elite opinion on a disputed moral question to the status of constitutional law, while imperiously consigning unfashionable opinion to the so-called dustbin of history. *See Obergefell v. Hodges*, 576 U.S. 644, 718, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (Scalia, J., dissenting) (bemoaning judicially orchestrated "social transformation without representation").

* * *

The plaintiffs rely primarily on the Due Course of Law Clause of the Texas Constitution.[16] In describing the federal constitution's somewhat analogous Due Process Clause, the U.S. Supreme Court has remarked that the Clause "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice

would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2302, 192 L.Ed.2d 609 (1997) (citations and internal quotation marks omitted). Under *Glucksberg*, those who claim a substantive right under the Due Process Clause must first establish, among other things, that the right is "objectively, deeply rooted in this Nation's history and tradition." *Id.* I agree with the Court that, to the extent our Due Course of Law Clause provides any protection for substantive rights, it would only do so for "careful[ly] descri[bed]" rights that satisfy *Glucksberg*'s requirements. *Id.* at 721, 117 S.Ct. 2302; *ante* at 231.

As the Court correctly concludes, the rights claimed in this case fail *Glucksberg*'s test because, among other reasons, the right to administer the disputed treatments to children is not "objectively, deeply rooted in this Nation's history and tradition." As the Court acknowledges, however, other assertions of parental authority ***249** might very well satisfy the *Glucksberg* standard.[17] Circumcision of baby boys, for instance, is a common practice with roots in our history and traditions. Thus, under *Glucksberg*'s approach, the Constitution might very well treat legislative efforts to ban circumcision quite differently from legislative attempts to ban novel practices that our society has not historically considered to be within the broad realm of parental authority.[18] For the same reason, the Constitution would likely treat the government's attempt to impose childhood transgender treatments on unwilling families much differently from the government's efforts to prohibit those treatments.

A parental right to use drugs or surgery to disrupt or destroy a child's normal biological functions is not "objectively, deeply rooted in this Nation's history and tradition." By contrast, whether and how to use drugs or surgery to preserve or restore a child's normal biological functions is a question long committed to a significant degree of parental autonomy in our society. By denying constitutional protection to the former, the Court does not hold that the Constitution has nothing to say about the latter.

* * *

The Texas Legislature has the power, under our Constitution, to uphold the Traditional Vision of human nature, to express our society's collective moral judgment about the disputed treatments, and to protect children as it has done. I therefore respectfully concur and join the Court's opinion.

Justice Busby, concurring.

The principal question that the parties in this case have brought to the Court is whether the fundamental natural right of parents to make decisions concerning the care, custody, and control of their children is infringed by the Texas Legislature's choice to limit the availability of certain medical therapies for children diagnosed with gender dysphoria. To answer this question, we examine whether parental control over the sort of medical decision at issue is, "objectively, deeply rooted in [our] history and tradition" and therefore a protected liberty under the Texas Constitution. *Ante* at 229–30 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997)).

As the Court and Justice Blacklock explain, gender dysphoria is a relatively new diagnosis and there is substantial debate in the medical community regarding the benefits and harms of the therapies limited by this law, which do not promote normal biological functioning. *Ante* at 222 & n.2, 232–33 & n.13; *ante* at 245–46 (Blacklock, J., concurring). A parental right to demand ***250** such therapies for a recently identified diagnosis is not deeply rooted in our history and tradition. Under our precedent, then, the statute faces only rational-basis scrutiny, which it satisfies. *Ante* at 234.

Like Justices Blacklock and Young, I do not understand the Court's opinion to (1) change the nature or focus of the *Glucksberg* inquiry into whether parents are asserting a fundamental right deeply rooted in our history and tradition, (2) modify the scope of parents' traditional authority to make medical decisions for their children, or (3) alter our precedent that the government may not intrude into this zone of traditional parental authority absent extraordinary justification or, in some circumstances, not at all. *Ante* at 245–46, 248–49 (Blacklock, J., concurring); *post* at 256–59 (Young, J., concurring). Instead, the Court simply applies the established *Glucksberg* inquiry to the facts of this case, holding "only that novel treatments for a novel condition are generally within the Legislature's power to regulate without facing heightened scrutiny." *Ante* at 232. Because I agree with that holding, I join the Court's opinion.

I write separately to make clear that the scope of traditional parental rights remains broad and well supported by our precedent. And when conducting the *Glucksberg* inquiry, courts focus on whether the parents' claimed interest falls *within* the scope of this liberty from government control over traditional child-rearing decisions, not whether the interest falls *outside* the scope of the government's power to legislate. An individual right that extends only to conduct the government chooses

to permit is no right at all. Rather, under our federal constitutional structure, fundamental individual rights retained by the people are "exceptions to the legislative authority."[1] Our Texas Constitution has unequivocally adopted this understanding of individual rights, providing expressly that such rights are "excepted out of the general powers of government." TEX. CONST. art. I, § 29.

To begin, we must understand the asserted right and its source. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of ... parents ... is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). "This natural parental right has been characterized as 'essential,' 'a basic civil right of man,' and 'far more precious than property rights.' " *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (paraphrasing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). Less than a decade after Texas joined the United States, we expressed "no doubt [that] a [parent] has very ample authority in the control, management, rearing, and education of his children." *Byrne v. Love*, 14 Tex. 81, 91 (1855).

Not only do these natural parental rights find protection in various provisions of the United States and Texas Constitutions, they also shape what measures are within the powers that the people have delegated to their representatives in government. As Justice Lehrmann correctly observes,[2] our Court has been steadfast in acknowledging "[t]he natural right which exists between parents and their children [as] one of constitutional dimensions." *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). For example, we have characterized ***251** this right as a "fundamental liberty interest" under the Due Process and Due Course Clauses, *In re N.G.*, 577 S.W.3d 230, 234-35 (Tex. 2019), which "protects the ... right of parents to make decisions concerning the care, custody, and control of their children." *In re C.J.C.*, 603 S.W.3d 804, 811 (Tex. 2020) (quoting *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). Other judges have explained that traditional parental rights may also—or alternatively—find protection as "unalienable Rights"[3] that are "retained by the people" under the Ninth Amendment,[4] or as privileges or immunities of citizenship.[5] Under whatever theory, this State—and this Court—have long "recognize[d] ... that the interest of the child and of society is best promoted by leaving [traditional parenting decisions] untrammeled by the surveillance of government." *Legate v. Legate*, 87 Tex. 248, 28 S.W. 281, 282 (1894).

I agree with the Court that this right is not absolute. Few rights are. Even the unalienable right to life,[6] which also finds robust protection in the Due Process and Due Course Clauses, may be taken from those who commit capital murder.[7] But the fundamental rights of parents offer very substantial protection against government interference with decisions that fall within their scope. For example, we have applied strict scrutiny to laws concerning the termination of parental rights, *Wiley*, 543 S.W.2d at 352, and explained that temporary court orders affecting children "cannot act to infringe" on "[p]arental control and autonomy" when the "parent adequately cares for his children." *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010). Outside this scope, however, the government retains the same power of legislation that it has always had. *Ante* at 233–36 (concluding that "plaintiffs incorrectly characterize the scope of the constitutionally protected interest" and applying rational-basis scrutiny in resolving due-course challenge to statute).

Thus, the pertinent question in deciding what protection parental decisions receive in a given case is not whether the right is absolute, it is how to define the right's limits. As discussed above, the *Glucksberg* inquiry determines whether the type of parental decision in question—when carefully described—is an exercise of deeply rooted rights. If so, it receives "heightened protection against government interference." *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2302.

For this reason, it would be wrong to conclude from the opinions in today's case that parents' fundamental rights generally take their limits from the nature of the state power being exercised rather than from "this Nation's history and tradition." *Id.* at 721, 117 S.Ct. 2302. An individual constitutional right checks a broad grant of state power to legislate, not the other ***252** way around.[8]

"[R]estrictions on government power ... such as contained in the Bill of Rights ... come into play ... only where the Government possesses authority to act in the first place." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). Determining the government's power to legislate is a necessary first step, therefore, as the scope of an individual right need not be considered if the law itself is unauthorized. Yet if there is government power to act, individual constitutional rights provide "restrictions on [that] power," *id.*, protecting conduct that falls within their scope.[9]

As the Supreme Court explained in *Wisconsin v. Yoder*, "[t]here is no doubt as to the *power* of a State ... to impose reasonable regulations for the control and duration of basic education .... Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility ... yield[s] to the *right of parents*

to provide an equivalent education ....” 406 U.S. at 213, 92 S.Ct. 1526 (emphases added). Other examples abound. To name just two, state power to pass laws prohibiting discrimination in public accommodations must yield to First Amendment rights, and Congress’s plenary authority over immigration must be exercised consistent with the Equal Protection Clause.[10]

James Madison made this very point when introducing the initial draft of the Bill of Rights on the floor of the House of Representatives, observing that “a bill of rights” would provide “particular exceptions to the grant of power.”[11] Similarly, Alexander Hamilton wrote in the Federalist Papers that our “limited constitution” contains “certain specified exceptions to ***253** the legislative authority.”[12] And the Texas Constitution addresses the relationship between government power and retained individual rights directly, making explicit what is implicit in our federal constitutional scheme:

> To guard against transgressions of the high powers herein delegated, we declare that every thing in this “Bill of Rights” is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto ... shall be void.

TEX. CONST. art. I, § 29. Because we have held that fundamental parental rights are protected under the Due Course Clause of our Bill of Rights, this declaration applies here.

If government power instead trumped individual rights whenever an authorized law has a rational basis, troubling questions would follow. Could the Legislature use its express constitutional authority over the practice of medicine to require the resuscitation of a critically ill child despite a fit parent’s do-not-resuscitate order, or to forbid the resuscitation of children with severe mental disabilities so that limited resources could be used to help other children? Could it make heroic medical measures legally unavailable to elderly Texans to save money on social service programs, or prevent parents from obtaining prenatal care for pregnant girls to discourage teen pregnancy? Or could the Legislature invoke its fundamental interest in protecting child welfare to forbid any corporal discipline by parents?

Fortunately, our constitutional structure does not leave the answers to such challenging and consequential questions to a rationality test that can depend on the eye of the beholder. Instead, government power is only the beginning of the analysis. If the asserted fundamental liberty interest is deeply rooted in our Nation’s history and tradition, it receives heighted constitutional protection against otherwise-authorized government interference. *See Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. 2302. Because I agree with the Court that the interest asserted here does not receive such protection under the *Glucksberg* inquiry, I concur.

Justice Young, concurring.

The primary way to determine state policy is through the process of self-government. That is even true—perhaps *especially* true—for settling profound disputes that affect individuals’ deeply felt values and our shared identity as a State. As Justice Blacklock observes, Senate Bill 14 and the litigation that followed its enactment implicate political, philosophical, and moral issues of immense importance to citizens who are in intractable disagreement. Politics, philosophy, and morality have always been engines for the law and have given rise to our most sweeping and treasured constitutional guarantees, as well as many landmark statutes. Making those choices lies at the core of self-government, which belongs to the People and their representatives in the first two branches.

The third branch—the judiciary—participates in self-government in a different way. Our authority extends only to saying what the law *is* and then to applying that law to disputes. If we do our job properly, we facilitate self-government by clarifying the law so that, if the People want it to be different, they may adjust it as they see fit. Our task is essentially the same even when we address a constitutional challenge to a statute. The ultimate question for us then is whether the People have *already* ***254** exercised their power to govern themselves by withdrawing a topic from the ordinary political processes. Sometimes, therefore, the judicial duty is to determine which of two competing exercises of self-government has a higher claim to the status of being the law.

Legal difficulty often has no correlation with legal importance, let alone with political, philosophical, or moral significance. Identifying the correct legal rule can be very hard when the stakes are low; it can be very easy when the stakes are high. Today’s case, I conclude, is weighty primarily because of its consequences in real life, not because of its legal difficulty. The Court correctly

concludes that the Constitution has not withdrawn from the legislature's authority the subject matter that Senate Bill 14 regulates. That is the entirety of today's decision and it is enough to discharge the judiciary's obligation. It means that the Court now returns the issue to the other branches and the People in their continuing exercise of self-government. I therefore join the Court's opinion and its judgment.

At the same time, however, self-government sometimes literally means *self*-government—the autonomy of an individual or a family to conduct their affairs without needing permission from the majoritarian political process. The fundamental right of parents over the upbringing of their children—the right invoked today—is one such example. The parents before us forcefully argue that Senate Bill 14 trespasses into a constitutionally protected zone of parental autonomy, and that the courts must protect that zone from intrusion by the State. Our dissenting colleague likewise powerfully defends the concept of parental autonomy, particularly in the medical context.

The parents' claims and our colleague's arguments warrant respect. I accordingly write separately to note my agreement with a basic premise of those arguments: that there *is* a zone of parental authority that is inviolate from incursions by ordinary political means. Delineating the extent of that zone is a matter of great importance, so I describe my understanding of how the judiciary makes that determination for any given claimed exercise of parental authority. There is peril in erring in either direction, either by mistakenly expanding or contracting an unenumerated fundamental right. Casting the right too broadly amounts to the judicial usurpation of the right of self-government by the People; casting the right too stingily amounts to the judicial usurpation of the right of self-government by a person. It is *this* analysis that can seem difficult, so I explain why today's decision correctly, and in the end simply, resolves the specific claim before us.

I

As the Court acknowledges, the parents here seek to provide their children with what the parents believe to be medical care that their children genuinely need. This acknowledgment does not divide the Court. *See, e.g.*, *ante* at 222–23 (opinion of the Court); *post* at 259–60 (Lehrmann, J., dissenting). It is easy to see that the "parents seeking transgender therapy" for their children here, and many other parents, unquestionably "act out of genuine love and conviction." *Ante* at 248 (Blacklock, J., concurring). The parents frame their claim by invoking the fundamental right of all fit parents, which this Court has long recognized and which strikes me as among the most powerful claims they could make based on an unenumerated right. "[O]ur law recognizes the parent-child relationship as sacred: 'This natural parental right [is] a basic civil right of man[ ] and far more precious than property ***255** rights.' " *In re J.W.*, 645 S.W.3d 726, 752 (Tex. 2022) (Young, J., concurring) (second and third alterations in original) (quoting *In re A.M.*, 630 S.W.3d 25, 25 (Blacklock, J., concurring in denial of review) (in turn quoting *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985))).

At the same time, it is challenging to define the exact contours of this right. Courts ordinarily look to the original public meaning of legal *texts* to determine the scope of a right or duty. The fundamental right of parents, however, is unenumerated. This textual silence is problematic because it is dangerous (and often self-aggrandizing) for courts to attempt to define a constitutional concept that is unexpressed in the Constitution's text. Enforcing a judicial conception of an unwritten constitutional right displaces the function of self-government. If a court is wrong, it has forced our citizens to collectively obey commands that their Constitution has not (and thus that the People themselves have not) actually made. One can simultaneously agree that unenumerated rights exist *and* worry about the judiciary abusing any authority it may have to say what they are. For that reason, among others, *how* to protect unenumerated rights is typically left to the political process of self-government.

The U.S. Supreme Court and this Court, however, acknowledge a narrow exception. Sometimes the reason that a right is unenumerated is that it is *so* fundamental to our legal tradition and culture that reducing it to writing may never even have occurred to the drafters. When—as an objective matter—there could be almost no dispute about its existence, the right is reasonably recognized as part of the background assumptions of the law.

Parental authority is part of that background, which is why it is never particularly controversial to acknowledge its status as a fundamental right, at least as a general matter. To see why, compare it to some of our most treasured *enumerated* rights, such as the freedom of speech or the free exercise of religion. I claim those rights for myself and would do so whether they were written down *or not.* The Framers of the United States and Texas Constitutions would too. But those rights had to be

enumerated precisely *because* they have been repeatedly violated and transgressed throughout Anglo-American legal history. So too with most of the rest of the Bill of Rights. Many protections for criminal defendants, for example, reflect a history of general (and often quite specific) patterns of governmental abuse. The Sixth Amendment right of a defendant "to be confronted with the witnesses against him" has a deep and dark history of violation, warranting specific textual protection. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The core functions of parenthood are different. There has never been any real doubt or dissent about the obligations and authority of parenthood in our legal tradition and culture (and I imagine that this is true globally). Importantly, there is no history of governmental interference with the essential autonomy of parenthood that is analogous to the historical interference with textually expressed rights. Our People's traditions and laws have always regarded that autonomy as self-evident. This pattern is essential for the judiciary to recognize any unenumerated fundamental right: an objective, widespread, unbroken, and respected *practice* of the right is what allows courts to recognize it without fearing that they themselves are becoming lawmakers.

Nonetheless, courts should warily approach any claim of a fundamental but unenumerated right. The U.S. Supreme Court has treated the due-process clause ***256** as protecting such rights, but emphasized that judges must " 'exercise the utmost care whenever we are asked to break new ground in this field,' ... lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [judiciary]." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). Such a "transform[ation]" does not necessarily entail bad faith on the part of judges—rather, it reflects an acknowledgment by the Court with the fewest restraints on its power that it can be easy to mistake one's own values or beliefs for the commands of the law. As *Glucksberg* explained, therefore, unenumerated rights must be specific and granular, not general or vague. The risk of the judiciary invading the ordinary processes of self-government is too great to accept anything short of precision. *See id.* at 721, 117 S.Ct. 2302.

Glucksberg continues to provide the best analytical framework for assessing claims of unenumerated rights because it properly strikes the balance. It accepts that some rights are indeed so deeply engrained that committing them to writing would hardly have occurred to the Founding generation. At the same time, *Glucksberg*'s test tempers judicial authority to recognize such rights with proper humility by insisting on specificity, both as to what the right is *exactly* and as to how our history and traditions prove the unbroken and unchallenged existence of that specific right. The Court today follows *Glucksberg*'s guidance in this way, *see ante* at 227–28, 229–32, which is part of why I join its opinion.

Whether unenumerated parental rights are properly grounded in the federal due-process clause (or the Texas due-course clause) or elsewhere is a wholly distinct question. There has been ample criticism of the federal choice. Rather than a manifestation of substantive due process, Justice Scalia described the "right of parents to direct the upbringing of their children" as "among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.' " *Troxel v. Granville*, 530 U.S. 57, 91, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (Scalia, J., dissenting) (alterations in original). Justice Blacklock has likewise expressed skepticism about the due-process clause being the proper constitutional framework. *In re H.S.*, 550 S.W.3d 151, 177–78 (Tex. 2018) (Blacklock, J., dissenting). And without doubting the right, I have expressed doubt about whether the due-course clause of the Texas Constitution is the correct lens through which to view the fundamental right of parenthood in Texas law. *See Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 674 (Tex. 2022) (Young, J., concurring).

But none of that matters much for present purposes; what does matter is that parents' rights *exist* and are properly defined, at least by courts, through the specificity and granularity that *Glucksberg* describes. The other branches, of course, are free to expand even *enumerated* rights far beyond the text, and they certainly may by statute protect the rights of parents and children even more substantially than the courts do. But absent a constitutional amendment, the first two branches may not restrict those rights—a further reason for judicial caution and precision, as always in constitutional adjudication.

II

The foregoing principles yield two results. The first is that there *is* a considerable zone of parental authority or autonomy into which the State may not intrude with ***257** a mere rational basis—and perhaps in some instances into

which the State may not intrude at all. When viewed at a proper level of specificity, in other words, there *are* some parental rights that likely are even "absolute." The second result is that the claim of parental authority in *this* case is outside the zone of authority or autonomy, and so the ordinary process of self-government remains intact.

A

My first point is, I hope, not terribly novel: like the Texas Constitution, the federal Constitution "has been held to bestow upon parents unique and near-absolute powers of control over other persons, namely their children." Anne C. Dailey, *In Loco Reipublicae*, 133 Yale L.J. 419, 423 (2023). True enough—it is a sensible default rule and has manifested in specific contexts over the past century. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (recognizing a "liberty" interest in the right of parents to "establish a home and bring up children" and "to control the education of their own"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (holding that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"). *Pierce* recognized that "the right" is "coupled with the high duty" of "prepar[ing] [children] for additional obligations." 268 U.S. at 535, 45 S.Ct. 571. The Court again acknowledged parents' right to direct the education of their children in *Wisconsin v. Yoder*: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children" makes the role that parents play "established beyond debate as an enduring American tradition." 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The Court put it succinctly in *Troxel*:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be *no reason* for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

530 U.S. at 68–69, 120 S.Ct. 2054 (emphasis added). In fact, parents' right to the care, custody, and control of their children is so valued and deeply entrenched that the Supreme Court recognized a *presumption* that fit parents act in the best interests of their child. *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

This Court has repeatedly embraced similar views as lying within our constitutional jurisprudence. As the Court notes, we have quoted the passage from *Troxel* that is indented above. *Ante* at 228 (quoting *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006)).

It is clear that there *is* a constitutional zone of parental autonomy, as all these cases confirm. At the same time, "parental autonomy" is a category, not a single rule or right—specificity is required to identify what falls within the zone. The law is still somewhat opaque on that point. "[T]he Supreme Court has not described the contours of the [fundamental] right [of parenthood] with clarity." *In re H.S.*, 550 S.W.3d at 175 (Blacklock, J., dissenting).

The answer is to view claims of parental authority through the lens that *Glucksberg* provides for *any* assertion of an unenumerated right. The foregoing analysis shows that, probably more than in any other context, parents start with a presumption favoring their authority because our legal tradition generally excludes all ***258** others from exercising authority over a child's upbringing. Fit parents have a monopoly, or something close to it, in making decisions for their children. Particular actions and decisions can be analyzed to ensure that a parent's claimed right is indeed one that is deeply rooted in our society's legal traditions and history. It is hard to imagine, for example, a serious contention that anyone *other* than a fit parent could direct a child's religious upbringing. Who else would have that authority? A stranger? Some more distant relative? The government? The same analysis would apply to many other aspects of child rearing—the choice of clothing, diet, reading material, entertainment options, companions, and the like. Within the broad range of lawful options for such topics, neither the government nor anyone else may countermand the authority of fit parents to determine what is best for their children. The government may not intrude into the scope of parental authority as to such matters absent extraordinary justifications, or in some cases, perhaps not at all.

To determine whether an action does *not* fall within the historic concept of caring for and raising children—thus enabling State regulation—we must analyze each claim at a specific level. This is why, for example, the legislature may penalize anyone, whether parent or stranger, for subjecting children to sexual abuse or exposing children

to high risks of physical danger or deprivation. Such unlawful conduct has never been protected. The legislature has the authority to pass generally applicable laws for the protection of children that do not violate parents' rights but instead reflect parents' obligations to their children.

Conduct that constitutes abuse and neglect, after all, is not the kind of conduct that our history, tradition, or law has ever characterized as within the zone of options for a parent, even though parents have extraordinarily broad discretion regarding how to care for children. Take the diet example from my list above. Parents can essentially choose what they deem proper for their children's nourishment—but wholly denying sustenance to their children is not a choice that constitutes care, custody, or control. If it were otherwise, the State would be helpless to protect the children who need it the most: the small minority of children whose parents are not fit and who, instead of defending their children, either leave them defenseless or affirmatively subject them to harm.

When a particular course of conduct is not deeply rooted in our State's history and traditions as part of the zone of lawful choices for parents, courts may not declare, in the name of the Texas Constitution, that the State is powerless to legislate. Our precedents suggest that parental authority is absolute *within* the realm of lawful choice—but there are areas altogether outside that realm.

B

This brings me to my second point: that the claim in this case ultimately founders because, at the appropriate level of specificity, there is no history or tradition that allows parents the sort of sweeping authority over all newly developed medical procedures that is demanded here. I agree with the view implicit in Justice Blacklock's concurrence that, even had the parents relied on a powerful *enumerated* right like the free exercise of religion, they likely would not have prevailed. *Ante* at 246 (Blacklock, J., concurring). Courts have sometimes recognized that the state's interest in preventing serious medical harm to children may override parents' interest in making medical decisions for those children. *See* ***259** *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968) (per curiam), *aff'g* 278 F. Supp. 488 (W.D. Wash. 1967).

The corollary to the limitations on government power as to parental choices that are deeply embedded in our history and traditions is this: the State retains considerable authority over new developments that raise novel and previously unconsidered questions arising in areas that never were regarded as lying within parents' authority. For actions or decisions that lack such objective roots, judges will rarely be able to affirmatively conclude that "the people of this [State] ever agreed to remove debates of this sort—over the use of innovative, and potentially irreversible, medical treatments for children—from the conventional place for dealing with new norms, new drugs, and new public health concerns: the democratic process." *L.W. v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023). That democratic process—self-government—is never completely played out, but for now, the elected representatives of the People of Texas have acted in a way that they believe upholds their duty to regulate the practice of medicine, *see ante* at 228–29, 231–32 (opinion of the Court), and to protect children from new and controversial treatments that the legislature is entitled to regard as harmful.

Parents and citizens may passionately disagree with the legislature's conclusion or its depiction of these treatments as "harmful." They have every right to try to overturn the legislature's ban on those treatments—but they cannot achieve that result in the courts of Texas. The use of drugs or surgery to counteract a child's normal biological development and function is not a course of conduct that our legal traditions have committed to the realm of parental discretion. It *is* within the zone of lawful regulation, including regulation of the medical profession. For that reason, the Constitution leaves the matter to the process of self-government.

Justice Lehrmann, dissenting.

At its core, this case presents a foundational issue: whether the State can usurp parental authority to follow a physician's advice regarding their own children's medical needs. The parents at issue are thoughtful, conscientious caretakers who are doing the best they can to deal with serious health conditions with which their children have been diagnosed. They certainly are not mistreating their children. To the contrary, they are facing this challenge with extraordinary courage, fortitude, and perseverance. The State's categorical statutory prohibition prevents these parents, and many others, from developing individualized treatment plans for their children in consultation with their physicians, even the children for whom treatment could be lifesaving. The law is not only

cruel—it is unconstitutional.

The Court claims that its decision today does not deprive children diagnosed with gender dysphoria of appropriate treatment; it is simply answering the legal question before it. Yet, answering the question does just what the Court denies—it effectively forecloses all medical treatment options that are currently available to these children. And it does so under the guise that depriving parents of access to these treatments is no different than prohibiting parents from allowing their children to get tattoos. Of course, there is nothing remotely medically necessary about tattooing. Confusingly, the Court relies on cases unrelated to medical care to support its holding that the Legislature's authority to regulate the practice of medicine preempts the fundamental rights of parents. And though it admits that parental autonomy is a fundamental liberty interest ***260** encompassing the right to make medical decisions for one's children, the Court nevertheless refuses to apply the constitutional scrutiny mandated for fundamental liberty interests.

While I agree that the Legislature has the general authority to regulate the practice of medicine, that authority is necessarily limited by the promises and protections of our Constitution; in fact, limiting the State's intrusion into private action is the very reason for the Bill of Rights. Thus, even when the Legislature exercises its delegated powers, it does so subject to the constitutional rights of citizens—not the other way around. If the Legislature's enactments infringe upon a fundamental liberty interest, those enactments must be subjected to the appropriate constitutional scrutiny.

Although this Court has enshrined a robust conceptualization of parental autonomy for many years, in the blink of an eye, the Court tosses that precedent aside today. Contrary to the Court's holding, the Due Course Clause protects parents' rights to make medical decisions for their children and, because S.B. 14 directly infringes upon that decision-making authority, it must withstand strict scrutiny. Such fundamental rights are not, as the Court erroneously concludes, subject to piecemeal dissection into subcategories that are treated differently for the purpose of constitutional review. Even if they were, this particular parental right—to make potentially life-saving medical decisions for one's children—certainly does not fall within the same category as tattooing, tobacco use, or even child labor.[1] Moreover, the novelty of gender-affirming care makes it no less medically therapeutic when indicated than other cutting-edge medical interventions. Serious medical conditions often call for innovative and novel treatment plans that present risks—but not without good reason. When life is at stake, risky treatment may be the only real option.

The Court's one-sided concerns about potentially permanent effects associated with the prohibited treatments are particularly disconcerting given that the consequences of categorically denying children medical treatment for their gender dysphoria can be equally irreversible. Conservative estimates place suicidal ideation among transgender individuals at around 50%.[2] Further, a study of over 6,000 transgender individuals in the U.S. indicates that minors are among those who have the highest risk of suicide.[3] That gender dysphoria was not a diagnosis recognized by the American Psychiatric Association until 1980 does not mean that the condition did not previously exist. The idea that it is "inconceivable" that anyone ever questioned his or her gender identity until recently, as one of the concurrences argues,[4] is both naïve and callous.[5] And regardless ***261** of when individuals became comfortable expressing these realities publicly, the condition is certainly no "fantasy"[6] for many very real children and their very real parents. Moreover, whether one's gender identity is a product of biology or influenced by modern-day environmental factors, or both, is beside the point. Regardless of the cause, real people express real concerns regarding gender dysphoria in today's world. The medical establishment has recognized this reality, and so should the judiciary.

To survive strict scrutiny, the law must be narrowly tailored to serve a compelling state interest. The State of course has a compelling interest in protecting children from harm as a general matter—though, notably, the interest is undercut when the alleged harm is medical treatment that has been approved by the vast majority of the medical community. In any event, one thing is crystal clear: S.B. 14 is far from narrowly tailored. It does not even provide for an exception to the ban when the prohibited treatment is needed to save the life of the child or to prevent substantial injury to the child. Surely the right of parents to make medical decisions, in consultation with their physicians, regarding the welfare of their children is worthy of more constitutional protection than the Court recognizes today. Concerningly, the Court's opinion puts all parental decisions at risk of being overruled by the government. The Court's attempt to cabin its opinion to only this case makes its outcome-driven decision-making all the more transparent. Because the Court refuses to properly recognize this core right, I am compelled to respectfully express my dissent.

I. Background

A. S.B. 14 Is a Hatchet, Not a Scalpel.

In passing S.B. 14, the Legislature articulated concerns regarding medical treatments aimed at addressing diagnoses of gender dysphoria in children—concerns that I take very seriously. Indeed, the leading medical associations in this field do not recommend surgical intervention before adulthood. Without a doubt, the removal of a young child's genitalia is something that neither the conventional medical community nor conscientious parents would condone. Moreover, medical experts do not recommend that *any* medical intervention, including the prescription of puberty blockers and hormones, be undertaken before the onset of puberty. Legislation that would narrowly prohibit such widely disfavored treatment is something that I believe could survive constitutional challenge. But that is not what S.B. 14 does. It does not simply take measures off the table that medical science has shown are, on balance, so risky and permanent that they should not be utilized. Rather, it prohibits all medical intervention for gender dysphoria, across the board, no matter the age or emotional condition of the child.

***262** The duty of a governing body to protect children's health and wellness does not supplant the duty of a fit parent to fulfill this responsibility.[7] In the first instance, parents have the responsibility to ensure that their children are safe and cared for. Parents have both a right and a duty to provide their children with sound, medically informed treatment. *See* TEX. FAM. CODE § 151.001(a)(3) (enumerating a parent's duty to "provid[e] the child with clothing, food, shelter, medical and dental care, and education"). However, S.B. 14 effectively bars parents from fulfilling that duty when, in consultation with their physicians, they decide that gender-affirming care is the best, perhaps even lifesaving, treatment to address their child's needs.

Indeed, S.B. 14 is a broad-sweeping law that prohibits doctors from treating patients according to their individual needs. It does not distinguish between appropriate and inappropriate medical intervention. Because of S.B. 14, doctors are bound to treat the medical needs of a nine-year-old expressing confused feelings about gender identity as identical to those of a seventeen-year-old struggling with suicidal ideation resulting from untreated gender dysphoria. Where it ought to have utilized the proverbial scalpel, the Legislature instead employed a hatchet, forgoing measured policy predicated on a well-documented medical consensus in favor of a crude and politically expedient categorical prohibition. In so doing, the Legislature supersedes the autonomy of parents whose children have been diagnosed with gender dysphoria under its authority to regulate medicine—no longer can parents rely on their physicians to help them develop sound, medical treatment plans to address their children's specific needs.

Concerningly, the Court acquiesces today. Despite the Court's so-called recognition of fundamental parental rights, it fails to articulate precisely why or how it distinguishes between the parental decisions that are constitutionally protected and those that are not. The Court's "parental rights for me but not for thee" approach has no objective criteria and renders parents entirely without guidance on whether their parental liberty will be meaningfully protected. The Court's opinion thus puts all parental rights in jeopardy.

B. The Experiences of Each Plaintiff Are Essential to this Case.

While all the minor plaintiffs have been diagnosed with gender dysphoria, they are different ages, they are in different stages of their pubertal development, and their medical treatments at the time they filed suit ranged from psychotherapy alone to hormonal therapy. The varying circumstances and challenges faced by each plaintiff, glossed over by the Court, directly undercut the State's purported justifications for a mandate that their medical needs be treated identically.

Plaintiffs Sarah and Steven Soe are the parents of fifteen-year-old Samantha Soe. When Samantha was thirteen, Sarah and ***263** Steven took Samantha to a pediatric endocrinologist who diagnosed gender dysphoria. After their doctor informed them of the risks and benefits of available treatment, Sarah and Steven decided to do additional research. They read medical literature and spoke with several other doctors. Eventually, after receiving multiple opinions offering similar advice, Sarah and Steven determined to proceed with puberty blockers. With medication, Samantha's mental health improved significantly. Being forced to stop this medication after the enactment of S.B. 14 has left these parents with unsatisfactory options: to move out of Texas permanently, to live apart from their child until Samantha turns eighteen, or to default on their obligation

to provide Samantha with treatment that has improved her well-being.

Plaintiff Nora Noe is the mother of sixteen-year-old Nathan Noe. Before starting the medical care recommended by his physician, Nathan suffered from severe anxiety and had symptoms of obsessive–compulsive disorder. Though Nathan was a happy child, Nora noticed a dramatic shift around the age of eleven. Nathan became withdrawn and suffered in school to the point that Nora decided to homeschool. The onset of puberty was so distressing that Nathan became withdrawn and depressed. A few months later, Nathan was diagnosed with gender dysphoria and began seeing a therapist specializing in that condition. Nathan began taking testosterone in November 2021. Even though Nathan's condition improved with this treatment, the news of S.B. 14 led to a cancellation of the treatment and has presented Nora and her husband with a difficult decision: whether to leave Texas entirely or to fail to continue to provide Nathan with medical treatment that has demonstrably helped him.

Plaintiff Gina Goe is the mother of fifteen-year-old Grayson Goe. Grayson experienced severe emotional distress for many years, leading to several incidents of self-harm that required emergency medical care. In 2020, Gina took Grayson to see an adolescent-medicine doctor who ultimately diagnosed him with gender dysphoria. At the age of fifteen, Grayson was evaluated for hormone therapy and, after the family's comprehensive review of the possible side effects and extensive discussions with their doctor, Gina determined it was in Grayson's best interest to begin the recommended treatment plan. Since the start of treatment, Gina has noticed a significant, positive change in Grayson's demeanor and mental health. Unfortunately, this treatment is no longer available to this family because of S.B. 14.

Plaintiff Lazaro Loe is the father of twelve-year-old Luna Loe. Luna expressed a female gender identity to Lazaro at a very early age. Luna has seen a child psychologist since the age of six and has been diagnosed with gender dysphoria. When Luna began to experience puberty, the psychologist recommended seeing an endocrinologist, who determined puberty blockers were a medically appropriate treatment. After consultation with the doctor about benefits and side effects, the Loes determined collectively that treatment was the proper decision. The Loes state that these medications have had a positive impact on Luna's life. They allege that S.B. 14's prohibition of the medication Luna has been receiving for over a year will eliminate the treatment that has allowed Luna to thrive and may require the family to leave the only state Luna has ever called home.

Plaintiffs Matthew and Mary Moe are the parents of nine-year-old Maeve Moe. Maeve expressed an understanding of a female gender identity very early. When ***264** Maeve was six, the Moes saw a doctor who diagnosed Maeve with gender dysphoria and recommended follow-up visits every year before puberty. At the time suit was filed, the Moes' doctor had informed them that Maeve may begin puberty within the next several months. Following extensive discussions with their doctors, and amongst themselves, Matthew and Mary have decided that when puberty starts, puberty blockers may be necessary for Maeve to remain a healthy child. However, the threat of Maeve's recommended medical treatment being prohibited by S.B. 14, which is now a reality, led Mary to temporarily move her children out of state.

C. S.B. 14 Contradicts Accepted Medical Community Standards.

The requirements of S.B. 14 directly contradict well-established industry standards of practice. Gender dysphoria is understood to refer to the distress caused by the incongruence between one's experienced or expressed gender and one's assigned biological sex. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2022).[8] This diagnosis has been the subject of much research, and the results of that research have provided organizations like the American Medical Association and the American Pediatric Association with a clinical basis to issue guidance to doctors.

Clinical studies indicate that gender-affirming care, provided to carefully evaluated patients who meet diagnostic criteria, can alleviate clinically significant distress and lead to significant improvements in mental health.[9] The American Medical Association has endorsed guidelines established by the World Professional Association for Transgender Health (the WPATH Guidelines) for the treatment of gender dysphoria.[10] The drafting committee that prepared these guidelines included experts ***265** in the fields of endocrinology, pediatrics, and psychiatry. The deliberative process, which involved five years of thoughtful study, comment, and debate and over 119 authors, was robust and thorough.[11]

As *amici* point out, the guidelines are structured to

address the same concerns articulated by the State—concerns that I share. WPATH undertook a nineteen-step, five-year drafting, comment, and review process, the same approach taken by the American Medical Association in other areas of clinical research and recommendation. This process resulted in a treatment model (summarized in note 10, *supra*) that is comprehensive and conservative in its approach. It does not recommend that any medical intervention, including prescription of puberty blockers, be undertaken until the detailed criteria have been satisfied.

The widely accepted view in the professional medical community, including that of the American Pediatric Association, is that gender-affirming care is the appropriate treatment for gender dysphoria in some cases.[12] Empirical data shows that this care greatly reduces the negative physical and mental health consequences that result when gender dysphoria is untreated.[13] In line with this data, the American Psychological Association has also issued guidelines for the treatment of gender dysphoria that recommend gender-affirming care be provided when medically indicated.[14] The official treatment recommendations of the American Academy of Pediatrics also align with this research.[15]

The guidelines for treatment of adolescents with gender dysphoria were the product of the same drafting, comment, and review process that *amici* organizations use for other clinical practice guides.[16] The Endocrine Society followed the Grading of Recommendations Assessment, ***266** Development, and Evaluation (GRADE) system, which imposes internationally recognized evidentiary requirements.[17] The assessment was then reviewed, re-reviewed, and reviewed again by multiple, independent groups of professionals.[18] Tellingly, the State's own expert witness acknowledged the overwhelming majority view of the medical community, describing his contrary position as "essentially me versus the entire medical establishment."[19]

the right extends "only to those medical treatments that are legally available." *Id.* at 229. The legal analysis is circular at best. Under the Court's rationale, the Legislature's prohibition is subject to only a rational basis review because the treatment is unlawful—but the treatment is unlawful only because the Legislature has prohibited it. The unacceptable result is that the prohibition is necessarily insulated from meaningful constitutional scrutiny.

Recognizing the far-reaching implications of this illogical assessment, the Court clumsily attempts to cabin it. Unfortunately, it does so with a remarkable opacity. Specifically, the Court holds that "[S.B. 14] merely restricts the availability of new treatments with which medical providers may treat children diagnosed with a newly defined medical condition, gender dysphoria." *Id.* at 233. But it provides absolutely no guidance for Texans on what the Constitution does or does not allow, noting only that the novelty of the regulated conduct is a factor to consider when determining the level of constitutional scrutiny that applies. The Court fails to acknowledge the unfortunate reality that relatively new medical procedures and treatments are often the only options available to loving parents who are desperately seeking to help their children.

Based on the Court's amorphous reasoning, neither the State nor Texans are given clarity beyond a vague sense that there may be some restrictions that would be protected by strict scrutiny. The Court's opinion *may* allow the Legislature to prohibit children from receiving vaccines, or it may not. The Court's opinion *may* allow the Legislature to ban homeschooling, or it may not. The Court's objection to a consistent and predictable standard of scrutiny that is applied regardless of whether it agrees with the parental decision at issue is concerning. Surely, whether a parent's decision will be constitutionally protected does not depend on whether the Court agrees with that decision on personal or policy grounds. Such a conception of constitutional rights does a tremendous disservice to our Constitution.

II. Discussion

Today the Court boldly pronounces that S.B. 14 is not subject to strict scrutiny; it is thus constitutional if any articulated rational basis can justify it. *Ante* at 233–34. The Court relies on the fact that the State has the power to regulate the practice of medicine and holds that such regulations do not implicate parental autonomy because

*267 A. Parents Have a Fundamental Right to Make Decisions Concerning the Care, Custody, and Control of Their Children.

Parental rights and liberties have long been understood as fundamental and, though not enumerated, constitutionally protected. The Court today does not refute the maxim that

our Due Course Clause protects unenumerated substantive rights, nor could it. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015) ("Given the temporal legal context, Section 19's substantive due course provisions undoubtedly were intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution. That burden has been recognized in various decisions of Texas courts for over one hundred and twenty-five years.").

This Court has been steadfast in its recognition that the Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *In re C.J.C.*, 603 S.W.3d 804, 811 (Tex. 2020) (citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). In *Troxel*, even the U.S. Supreme Court justices who would not root this right in substantive-due-process jurisprudence nevertheless recognized a fundamental right of parents to direct the upbringing of their children. *Id.* at 812 (citing *Troxel*, 530 U.S. at 80, 120 S.Ct. 2054 (Thomas, J., concurring); *id.* at 91, 120 S.Ct. 2054 (Scalia, J., dissenting) (noting that the right "is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men ... are endowed by their Creator' " and "among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage' "); *id.* at 95, 120 S.Ct. 2054 (Kennedy, J., dissenting) ("As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.")).[20]

The Court today defines the contours of constitutional protection for fundamental parental rights to essentially encompass only those state actions that seek to irrevocably sever the parent–child relationship or that entirely prevent parents from making decisions at all. *See ante* at 230 ("Certainly, then, when the State seeks to sever the parent–child relationship, those proceedings must be 'strictly scrutinized.' "); *see also id.* at 233 ("[S.B. 14] merely restricts the availability of new treatments with which medical providers may treat children diagnosed with a newly defined medical condition, gender dysphoria."). However, this Court has never viewed the scope of parental liberty so narrowly. To the contrary, the Court has consistently recognized the presumption that it is for the parents, and not the State, to guide the raising and caretaking of their child. *Byrne v. Love*, 14 Tex. 81, 91 (1855) ("There is no doubt that a guardian, and especially a father acting as guardian by nature, has very ample authority in the control, management, rearing, and education of his children ...."); *Legate v. Legate*, 87 Tex. 248, 28 S.W. 281, 282 (1894) ("[The State] recognizes the fact that the interest of the child and of society is best promoted by leaving its education ***268** and maintenance during minority to the promptings of paternal affection, untrammeled by the surveillance of government ....").

The U.S. Supreme Court also recognizes a broadly construed "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66, 120 S.Ct. 2054. Not only has that Court taken such an approach for over a century, but this Court has consistently adopted and followed its guidance.[21]

In *Pierce v. Society of Sisters*, the Supreme Court was asked to consider the constitutionality of a state law that prohibited children of certain ages from attending private or parochial schools. 268 U.S. 510, 532, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). The law's challengers suggested that the requirement that children attend public school "conflicts with the rights of parents to choose schools where their children will receive appropriate mental and religious training." *Id.* Though it was undisputed that the State had the power to reasonably regulate all schools and to require that "all children attend some school" and be taught "certain studies plainly essential to good citizenship," *id.* at 534, 45 S.Ct. 571, the Supreme Court struck the law down. The Court held that it was "entirely plain that the [statute] unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35, 45 S.Ct. 571. The Court went on to explain: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535, 45 S.Ct. 571. Despite the states' constitutional authority to regulate education, and the fact that the challenged law merely limited the *type* of education available, the Court recognized a "fundamental theory of liberty" infringed by such legislative overreach. *Id.*

Of course, as the Court correctly observes today, the decision-making power of parents is not boundless. This is not remarkable—no rights, not even enumerated ones, are absolute. Parents have not only the autonomy, but the serious legal obligation, to make sure that their children are cared for properly. It follows, then, that the State may supersede parental action when that action subjects their children to harm. However, in no other context has this Court allowed the State's interests to supersede a fundamental right subject only to a rational-basis review. This analysis has no support in precedent, and it renders "parental autonomy" illusory. This is especially true here,

where the parental conduct at issue is based upon medically accepted advice from trusted physicians.

From the unexceptional premise that "parental control and authority have never been understood as constitutionally mandated absolutes," the Court makes a logically unsupported leap to the conclusion that strict scrutiny is not required. *Ante* at 230–31. To the contrary, the Texas Constitution does not permit the State to infringe upon the fundamental rights of parents simply because it believes a "better decision" could be made. *In re Mays–Hooper*, 189 S.W.3d 777, 778 (Tex. 2006); *see also In re A.M.*, 630 S.W.3d 25, 25 (Tex. 2019) (Blacklock, J., concurring in denial of petition for review) (noting that "this natural ***269** parental right [is] a basic civil right of man and far more precious than property rights"); *Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."). Rather, the right is "not absolute" in the sense that "the State may legitimately interfere with family autonomy" in limited circumstances, such as "to protect children from genuine abuse and neglect by parents who are unfit to discharge the 'high duty' of 'broad parental authority over minor children.' " *A.M.*, 630 S.W.3d at 25 (quoting *Parham*, 442 U.S. at 602, 99 S.Ct. 2493). That the right is not absolute in no way logically limits the breadth of that right, which this Court has always recognized.

B. "Care, Custody, and Control" Encompasses Medical Decision-Making.

As certain fundamental rights and liberty interests are undoubtedly protected by the Due Course Clause, the next question is whether they include a parent's right to make medical decisions for their children's welfare. In short, they do.

Both the U.S. Supreme Court and this Court have long recognized that the right of parents to make decisions regarding the health and well-being of their children is among the most fundamental of rights. This right, encompassing the ability—and, indeed, the obligation—to seek and receive recommended medical treatments when one's child is in need, has ubiquitously been considered fundamental to our notions of ordered liberty. The right is not conditioned on whether the medical treatment sought is new, controversial, popular, or even effective, and it does not inherently give way to countervailing interests. While such interests exist, such as the authority of the State to regulate the practice of medicine, those interests do not alter the scope of the constitutional right at issue. Again, while compelling state interests may justify infringing on even a fundamental right, if the infringement is narrowly tailored, they do not negate the existence or reduce the breadth of the right, contrary to the Court's analysis.

In *Parham v. J.R.*, the U.S. Supreme Court reviewed a Georgia statute's procedure governing the controversial practice of voluntary commitment of minors to state mental hospitals. 442 U.S. at 588, 99 S.Ct. 2493. While the specific issue concerned the procedural due process rights of the child, the first step of the Court's analysis—examining the private interests affected by the state action—included a consideration of "the interests of the parents who have decided, on the basis of their observations and independent professional recommendations, that their child needs institutional care." *Id.* at 601–02, 99 S.Ct. 2493. In analyzing that interest, the Court explained that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with *broad* parental authority over minor children." *Id.* at 602, 99 S.Ct. 2493 (emphasis added). "Surely," the Court held, a parent's right to make decisions concerning her children "includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice." *Id.* Because these rights and duties are so intertwined, parents "retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment." *Id.* at 604, 99 S.Ct. 2493.[22]

***270** This Court, following suit, has acknowledged the " 'high duty' to recognize symptoms of illness and to seek and follow medical advice" to be foundational under Texas law as well.[23] *Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003) (quoting *Parham*, 442 U.S. at 602, 99 S.Ct. 2493); *see also T.L. v. Cook Child.'s Med. Ctr.*, 607 S.W.3d 9, 43 (Tex. App.—Fort Worth 2020, pet. denied) ("This right includes the right of parents to give, withhold, and withdraw consent to medical treatment for their children."); *In re Zook*, No. 03-21-00180-CV, 2021 WL 2964264, at *2–3 (Tex. App.—Austin July 15, 2021, orig. proceeding); *In re Womack*, 549 S.W.3d 760, 766 (Tex. App.—Waco 2017, orig. proceeding [mand. denied]) ("Accordingly, under the plain language of subsection 32.101(c), [DFPS], having actual knowledge that [the parents] have expressly refused to give consent to [their child's] being immunized, may not consent to [the child's] being immunized."). Even when parents' decisions contradict recommended medical treatment, their right to guide the well-being of their children, while

not unchecked, is protected by the Constitution.

Here, the Legislature has superseded parental decision-making entirely to *prevent* the provision of medical treatment recommended by a medical consensus because the Legislature happens to disagree with that consensus. Our precedent demonstrates why that policy choice goes too far. *See Miller*, 118 S.W.3d at 767 ("[A]s long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened." (citing *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 n.13, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986))). If the right to reject recommended medical advice is protected by the Constitution, surely the ability to follow recommended medical advice is similarly protected. Contrary to the Court's deference to the Legislature today, "[d]etermination by the Legislature of what constitutes proper exercise of [plenary] power is not final or conclusive but is subject to supervision by the courts." *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

C. The Court's Ad Hoc Approach to Parental Rights Is Unprecedented.

Importantly, fundamental rights are not to be dissected into separate parts that are treated differently for purposes of constitutional protection. Nonetheless, the Court's opinion today does just that. The right of parents to direct whether their child should receive treatment for gender dysphoria is squarely encompassed within the broader fundamental right of parents ***271** to make medical decisions for their children. That right must be scrutinized accordingly.

As noted, this right of parental autonomy is among the "vital rights ... that courts must protect from fleeting majoritarian whim." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 666 (Tex. 2022) (Young, J., concurring). Thus, "the State may legitimately interfere with family autonomy" in only limited circumstances, such as "to protect children from genuine abuse and neglect by parents who are unfit to discharge the 'high duty' of 'broad parental authority over minor children.' " *A.M.*, 630 S.W.3d at 25 (citing *Parham*, 442 U.S. at 602, 99 S.Ct. 2493). This right, as this Court has articulated it throughout our history, has *always* been defined broadly. For example, in cases involving grandparents seeking court-ordered visitation, which requires overcoming a high statutory hurdle, the underlying constitutional right giving rise to that hurdle is not a parent's stand-alone right to prevent his children from seeing their grandparents, but a broader right to make decisions concerning "the care, custody, and control of [his] children." *E.g.*, *In re Derzapf*, 219 S.W.3d 327, 334–35 (Tex. 2007) (citing *Troxel*, 530 U.S. at 65, 120 S.Ct. 2054). The Court's analysis in these cases reflects an understanding that this fundamental right is not subject to ad hoc dissection.

In attempting to carve out an exception to parental medical decision-making rights, the Court concludes that novel concepts—or at least, *some* novel concepts—are not entitled to strict scrutiny. The Court relies on *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997), for the proposition that a novel concept is not subject to strict-scrutiny review. In *Glucksberg*, the new fundamental liberty interest at issue was assisted suicide; the Court held that this was not protected by substantive due process. *Id.* at 709, 117 S.Ct. 2302. In analogizing gender-affirming care to assisted suicide (because they both involve "novel concepts"), the Court concludes that governmental prohibition of treatment for gender dysphoria is subject to rational-basis review. Leaving aside that gender nonconformity is not in fact a novel concept, *see supra* note 5, the Court overlooks that a decision to provide gender-affirming treatment to a minor is a subset of the recognized fundamental right of parental decision-making, while assisted suicide is not. Today we are not asked to "break new ground in this field" as was required in *Glucksberg*—the right to assisted death had never been recognized as fundamental. Rather, we are asked to acknowledge a right that has long been recognized as fundamental, *see, e.g.*, *Parham*, 442 U.S. at 603, 99 S.Ct. 2493, and to apply the analysis that has long been required. The Court dissects the fundamental right of a parent to make medical decisions for their children into separate parts that are entitled to differing levels of constitutional protection based upon whether the decision involves novel concepts. In so doing, the Court dilutes the very essence of this basic constitutional right.

D. S.B. 14 Does Not Survive a Strict-Scrutiny Review.

Because the parental right at issue is fundamental, we must apply strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301–02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (applying strict scrutiny to the denial of fundamental liberty interests). For S.B. 14 to survive such review, the law

must be narrowly tailored in pursuit of a compelling state interest. *See Glucksberg*, 521 U.S. at 721, 117 S.Ct. 2302 (noting that the Fourteenth Amendment of the U.S. Constitution forbids the government from infringing ***272** on fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest); *see also Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 419 (6th Cir. 2019) (applying strict scrutiny to a state program that involved the ongoing storage of infants' blood samples collected without parental consent because it violated their fundamental rights to direct the medical care of their children).

As discussed, the established medical community's acceptance of the prohibited medical treatments when warranted significantly dilutes the State's interest in protecting children from the effects of such treatment. However, even assuming the existence of a compelling state interest, S.B. 14 is in no way narrowly tailored. Rather, the Legislature has decided unilaterally, and categorically, that medical treatment for minors with gender dysphoria is off the table as a therapeutic option without any consideration for the individual needs of any unique child. No evidence was presented in the case that the parent–plaintiffs were doing anything other than following medical advice and their own consciences about the best way to care for their children. *Cf. In re Abbott*, 645 S.W.3d 276, 287 n.3 (Tex. 2022) (Lehrmann, J., concurring) ("In my view, a parent's reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse."). Certainly, no evidence was presented that the parents were either intentionally or negligently harming their children. To the contrary, the evidence indicated that each parent was diligently and thoughtfully seeking medical advice about how best to deal with the difficult and sensitive situations in which they found themselves. As such, the Court today allows the State to substitute its judgment for that of conscientious parents—who, again, are seeking and following professional medical advice—regarding how best to care for their children. And the Court allows this substitution without subjecting the State's action to *any* meaningful scrutiny.

Because the Court applies a rational-basis review, it does not address whether S.B. 14 would survive strict scrutiny. The State argues that it would for two reasons. First, the State argues that parents' historic rights to the custody and care of their children do not extend to "ill treatment or cruelty." Second, it contends the Legislature has correctly determined as a policy matter that the prohibited treatments are too risky to be performed on children who lack the maturity to understand long-term consequences. *Id*. Neither of these justifications is sufficient to withstand strict scrutiny.

First, as noted, nothing in the record indicates, and the State has never argued, that the parent–plaintiffs were acting out of cruelty or ill intent. The State does not accuse these parents, or other parents of children receiving medical treatment for gender dysphoria, of "genuine neglect or abuse" justifying state interference. The State also put on no evidence of doctors in Texas overprescribing unnecessary medical intervention to children for whom it is not medically indicated. Instead, the State relied on sweeping claims that the entire medical establishment in America cannot be trusted; the State did not even attempt to argue that any significant or mainstream portion of the medical community agrees with its position. Indeed, as noted, the State's own expert witness described his position as "essentially me versus the entire medical establishment." The sheer breadth of the State's claim is astonishing. The State justifies a piece of legislation by assuming that the doctors who disagree with it—the overwhelming majority of ***273** physicians—are all acting in bad faith and violating their Hippocratic oath.

Second, by framing S.B. 14 as fundamentally a policy decision based on risks to children, the State directly undercuts any valid narrow-tailoring argument. *Parham*, 442 U.S. at 603, 99 S.Ct. 2493 ("Simply because the decision of a parent ... involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."). Nothing about S.B. 14 is narrowly tailored to ensure children are given proper medical care. S.B. 14 prohibits certain medical treatments *only* for the purpose of transitioning a child's biological sex, or for affirming the child's gender identity if that identity is incongruent with their biological sex at birth. If a child is prescribed hormone therapy to treat precocious puberty, prostate or breast cancers, or polycystic ovary syndrome, the law leaves the decisions to the medical community and their patients entirely. The State finds no risk in the medical treatments themselves, even for children. Here, the State seeks to intervene because it disagrees with the parents' decisions to pursue gender-affirming care of any kind for their children, regardless of any individual child's medical needs.

Notably, the WPATH or Endocrine Society guidelines could have been used by the State as part of a tailored approach to regulating gender-dysphoria treatment. These guidelines have built-in measures to ensure that drastic medical intervention is not a first step or hasty recommendation. The State's concern over the risks of mis-, or over-, prescription—again, a concern that I share—would be directly served by regulation

encompassing something like the WPATH or Endocrine Society guidelines. However, the Legislature instead chose to ignore these thoughtfully crafted standards. Because the Legislature adopted a categorical prohibition, it cannot withstand the scrutiny our Constitution requires of State intervention in parental medical decision-making. After all, "the statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U.S. at 603, 99 S.Ct. 2493 (emphases added). However compelling the State's concerns may be, a law that prevents parents from acquiring individualized medical treatment for their children, and instead imposes a categorical bar, because *some* children may not need *some* treatments cannot be held to be narrowly tailored.[24]

III. Conclusion

The political and moral implications of gender-affirming care have led to extreme disparities in the State's treatment of parents with children diagnosed with gender dysphoria and parents of children with other medical needs. But the Legislature does not get to decide when it must respect the fundamental rights of Texans. Because the Court permits the State to legislate away fundamental parental rights without the scrutiny required by our Constitution, I respectfully dissent.

All Citations

692 S.W.3d 215, Med & Med GD (CCH) P 308,149, 67 Tex. Sup. Ct. J. 1421

Footnotes

[1] According to the American Psychiatric Association, gender dysphoria is the psychological distress that results from an incongruence of at least six months' duration between one's sex at birth and one's gender identity. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION, TEXT REVISION 511–12 (2022).

[2] As of June 2024, at least twenty other states have enacted restrictions on both surgical and nonsurgical treatments for minors similar to those in Texas. *See* ALA. CODE § 26-26-4; ARK. CODE § 20-9-1502; FLA. STAT. § 456.52; GA. CODE § 31-7-3.5; IDAHO CODE § 18-1506C; IND. CODE § 25-1-22-13; IOWA CODE § 147.164; KY. REV. STAT. § 311.372; LA. STAT. § 40:1098.2; MISS. CODE § 41-141-5; MO. REV. STAT. § 191.1720; MONT. CODE § 50-4-1004; N.C. GEN. STAT. § 90-21.151; N.D. CENT. CODE § 12.1-36.1-02; OHIO REV. CODE § 3129.02; OKLA. STAT. tit. 63, § 2607.1; S.C. CODE § 44-42-320; S.D. CODIFIED LAWS § 34-24-34; TENN. CODE § 68-33-103; WYO. STAT. § 35-4-1001. At least four additional states have enacted laws that prohibit surgical procedures but not all nonsurgical treatments. *See* ARIZ. REV. STAT. § 32-3230; NEB. REV. STAT. § 71-7304; UTAH CODE § 58-68-502(1)(g); W. VA. CODE§ 30-3-20. Conversely, at least fourteen states, either by statute or executive order, provide various protections for those seeking or providing medical treatment for gender dysphoria. *See* CAL. PENAL CODE § 819; COLO. REV. STAT. § 12-30-121(2); CONN. GEN. STAT. §§ 52-571n(b), 54-155b; 735 ILL. COMP. STAT. 40/28-20; ME. STAT. tit. 22, § 1508; Md. Exec. Order 01.01.2023.08 (2023); MASS. GEN. LAWS ch. 12, § 11I 1/2(b); MINN. STAT. § 260.925; N.J. Exec. Order No. 326 (2023); N.M. STAT. § 24-34-3; N.Y. EDUC. LAW § 6531-b(2); OR. REV. STAT. § 414.769(3); VT. STAT. tit. 15, § 1152(a); WASH. REV. CODE §§ 7.115.020, .040.

In March of this year, England's National Health Service announced it would limit the use of puberty suppressing hormones for children, concluding that "there is not enough evidence to support the safety or clinical effectiveness of [puberty suppressing hormones] to make the treatment routinely available at this time." NHS ENGLAND, CLINICAL POLICY: PUBERTY SUPPRESSING HORMONES (PSH) FOR CHILDREN AND YOUNG PEOPLE WHO HAVE GENDER INCONGRUENCE/GENDER DYSPHORIA 3 (Mar. 12, 2024). And the health agencies in at least four other European nations have recently revised their health policies to restrict hormone treatments for children. *See* Azeen Ghorayshi, *Youth Gender Medications Limited in England, Part of Big Shift in Europe*, N.Y. TIMES, Apr. 9, 2024 (describing

restrictions recently implemented or adopted in Finland, Sweden, Norway, and Denmark).

[3] S.B. 14 received roughly sixty percent approval in both chambers of the Legislature. *See* Act of May 17, 2023 (noting that the bill was approved in the Senate by a vote of 19–12 and in the House by a vote of 87–56 with two present members not voting). It was signed by the Governor on June 2 and took effect on September 1, 2023. *Id.* § 9.

[4] "Physician" is defined as "a person licensed to practice medicine in this state." TEX. HEALTH & SAFETY CODE § 161.701(4).

[5] "Health care provider" is defined as "a person other than a physician who is licensed, certified, or otherwise authorized by this state's laws to provide or render health care or to dispense or prescribe a prescription drug in the ordinary course of business or practice of a profession." TEX. HEALTH & SAFETY CODE § 161.701(2).

[6] "Child" is defined as "an individual who is younger than 18 years of age." TEX. HEALTH & SAFETY CODE § 161.701(1).

[7] "Supraphysiologic" means "greater than normally present in the body." *Supraphysiological*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/medical/supraphysiologic.

[8] By agreement of the parties, the minor plaintiffs and their parents were permitted to proceed in all public filings under pseudonyms.

[9] Testosterone is a hormone that stimulates development of male sex characteristics, and estradiol is an estrogen hormone that stimulates development of female sex characteristics.

[10] At the time suit was filed, John Scott was serving as Provisional Attorney General during Ken Paxton's mandatory suspension from office. *See* TEX. CONST. art. XV, § 5. Plaintiffs' suit originally named Scott in his official capacity as Provisional Attorney General. By the time the temporary injunction was issued, Scott had been replaced as Provisional Attorney General by Angela Colmenero. While this appeal was pending, Paxton was reinstated as Attorney General.

[11] Although the trial court labeled as "findings" its conclusions that S.B. 14 likely violates the Constitution, we are not bound by this designation with respect to applying the appropriate standard of review. *Tex. Outfitters Ltd., LLC v. Nicholson*, 572 S.W.3d 647, 653 n.7 (Tex. 2019).

[12] In rejecting the dissenters' argument that only an adversarial hearing could protect the children's procedural due

process rights, the *Parham* Court criticized them for "[r]elying on general statements from past decisions dealing with governmental actions not even remotely similar to those involved here." 442 U.S. at 608 n.16, 99 S.Ct. 2493. The dissent here likewise relies on general statements regarding parental autonomy in unrelated contexts to support its one-size-fits-all approach to reviewing the Legislature's actions.

[13] The dissent describes the medical treatments at issue as the product of "well-established industry standards." *Post* at 264 (Lehrmann, J., dissenting). It relies heavily on standards of care promulgated less than two years ago by the World Professional Association for Transgender Health (WPATH), an organization whose mission includes "advocacy that affects the lives of [transgender and gender diverse] people." E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, INT'L J. TRANSGENDER HEALTH S1, S5 (2022). Although WPATH had previously issued standards of care for treatment of transgender individuals, it describes its 2022 standards as "the first to be developed using an evidence-based approach." WPATH, *SOC8 History and Purpose* 1.3, https://www.wpath.org/soc8/history (last visited June 26, 2024). In issuing its 2022 standards, however, WPATH "note[d] the paucity of research supporting the long-term effectiveness of medical treatment for adolescents with gender dysphoria." Chad Terhune et al., *As more transgender children seek medical care, families confront many unknowns*, REUTERS, Oct. 6, 2022, https://reuters.com/investigates/special-report/usa-transyouth-care/; *see also* Coleman, *supra*, at S46 ("[A] systematic review regarding outcomes of treatment in adolescents is not possible."). Earlier this year, a series of leaked internal communications revealed that "the provision of so-called gender-affirming care is riddled with far more doubt than WPATH's message that such treatments are 'not considered experimental'." *The WPATH files: Leaked conversations throw light on a controversial field of medicine*, THE ECONOMIST, Mar. 9, 2024, at 25.

The novelty of using medical treatments and procedures on children with gender dysphoria is further demonstrated by the fact that it is only within the last decade or so that medical organizations like the American Psychiatric Association and the World Health Organization moved away from characterizing gender dysphoria as a purely mental-health disorder. *See Transgender no longer recognised as "disorder" by WHO*, BBC NEWS (May 29, 2019), https://www.bbc.com/news/health-48448804; Traci G. Lee, *Being transgender no longer a "mental disorder": APA*, NBC NEWS (Dec. 4, 2012) https://www.nbcnews.com/id/wbna50075205.

[14] In applying this standard, we need not and do not decide whether every law that could be argued to infringe on a fit parent's interest in directing the care, custody, and control of her child would also be subject to the same level of scrutiny. Whether it would depends on many factors, including (to name just two): (1) whether there is express constitutional authorization for or prohibition against the challenged law; and (2) whether the regulated conduct is novel or firmly supported in our history and traditions. These considerations are not exhaustive but merely meant to illustrate that our holding today should not be read to mean that one size fits all. We do not foreclose the possibility that a different law that could be argued to constitute an impermissible encroachment on a fit parent's rights *could* be subject to heightened scrutiny.

[15] The dissent twice characterizes testimony from the State's expert, Dr. Cantor, as an admission that his position was contrary to "the entire medical establishment." *Post* at 266, 272–73 (Lehrmann, J., dissenting). Dr. Cantor was responding to a question pointing out that an Alabama federal district court judge (whose order enjoining a statute similar to Texas's was later vacated by the Eleventh Circuit) gave his testimony little weight. *See Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1142–43 (M.D. Ala. 2022), *rev'd sub nom. Eknes-Tucker v. Governor*, 80 F.4th 1205 (11th Cir. 2023). A fairer reading of his testimony is that he was theorizing that the district court judge may have justified minimizing his opinion by viewing it as "essentially me versus the entire medical establishment." As he made clear elsewhere in his testimony, Dr. Cantor's opinion is that the medical research studies do not support any established treatment for children with gender dysphoria, an opinion supported by health agencies in Europe. *See*

Ghorayshi, *supra* note 2.

[16] The specific statements plaintiffs identify in their pleadings are (1) one senator's depictions of gender dysphoria as a "social contagion" and a "mental delusion" and (2) one representative's reference to the medical treatment of gender dysphoria as "harmful experimentation" and comparing it to the opioid epidemic and the use of lobotomies to treat schizophrenia or depression.

[17] A divided Fourth Circuit, sitting en banc, recently concluded that state healthcare plans in North Carolina and West Virginia that excluded coverage for surgeries designed to treat gender dysphoria were subject to heightened (intermediate) scrutiny and were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Kadel v. Folwell*, 100 F.4th 122, 155–56, 156–57 (4th Cir. 2024) (en banc). *Kadel*'s reasoning is inapplicable here. The majority concluded that the states' restriction on surgeries to treat gender dysphoria necessarily discriminated based on sex or gender identity because "only transgender people would get" those surgeries. *Id.* at 148. This is contrary to *Bell*, in which we held that a restriction directed at a particular medical condition—pregnancy—that affected only women did not, for that reason, implicate our Equal Rights Clauses. *Bell*, 95 S.W.3d at 258; *see also Geduldig v. Aiello*, 417 U.S. 484, 496 n.20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) ("Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation ... on any reasonable basis ....").

[1] Michael North, *Translation of the Hippocratic Oath*, NATIONAL LIBRARY OF MEDICINE (2002), https://www.nlm.nih.gov/hmd/topics/greek-medicine/index.html (last visited June 26, 2024).

[2] Of course, science may demonstrate empirically that the childhood gender-transition treatments that exist today—which have a very limited track record—have harmful side-effects and do not deliver the mental-health benefits their proponents promise. This seems already to be happening. *See infra* note 5. But for those who hold the Transgender Vision, this scientific development would not resolve the deep questions driving the debate. It would instead drive an urgent search for new childhood gender-transition treatments.

[3] Some may balk at the suggestion that the Legislature answers moral questions. But most laws of any consequence arise from a moral vision and reflect the moral judgment of the lawmaker. Law cannot be separated from moral judgment. "Law is related to morality inasmuch as justice is a moral concept which is meaningless outside the area of morality." Arthur Scheller Jr., *Law and Morality*, 36 MARQ. L. REV. 319, 323 (1953). The question is not *whether* the law will reflect a moral vision of justice. The question is *whose* moral vision of justice the law will reflect.

Another question that should concern all of us is whether the moral vision reflected in the law is a true vision or a false vision. In Thomas Carlyle's characteristically colorful words:

> Needless to vote a false image true; vote it, revote it by overwhelming majorities, by jubilant unanimities and universalities; read it thrice or three hundred times, pass acts of parliament upon it till the Statute-book can hold no more,—it helps not a whit: the thing is not so, the thing is otherwise than so; and Adam's whole Posterity, voting daily on it till the world finish, will not alter it a jot. Can the sublimest sanhedrin, constitutional parliament, or other Collective Wisdom of the world, persuade fire not to burn, sulphuric acid to be sweet milk, or the Moon

to become green cheese? The fact is much the reverse.

THOMAS CARLYLE, *Stump-Orator, in* LATTER-DAY PAMPHLETS 146, 173 (London, Chapman & Hall 1850).

[4] "The term 'transgender' is said to have been coined 'in the early 1970s,' and the term 'gender identity,' ... apparently first appeared in an academic article in 1964." *Bostock v. Clayton County*, 590 U.S. 644, 715, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) (Alito, J., dissenting). "Transsexualism" was introduced in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders in 1980 and was replaced in 1994 by "gender identity disorder." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 784–85 (4th ed. 1994). At the time, it was categorized under "sexual and gender identity disorders." *Id.* Only in 2013 did "gender dysphoria" replace "gender identity disorder" in the official diagnostic manual. *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis (last visited June 26, 2024).

[5] By "medical establishment," I mean the bureaucratic organizations that present themselves to the world as the voices of official medical opinion. These organizations almost universally adopt the Transgender Vision in their public statements. *See, e.g., APA adopts groundbreaking policy supporting transgender, gender diverse, nonbinary individuals*, AM. PSYCHOLOGICAL ASS'N (Feb. 28, 2024), https://www.apa.org/news/press/releases/2024/02/policy-supporting-transgender-nonbinary; *Attacks on Gender-Affirming and Transgender Health Care*, AM. COLL. OF PHYSICIANS (Apr. 24, 2023), https://www.acponline.org/advocacy/state-health-policy/attacks-on-gender-affirming-and-transgender-health-care; *WMA Statement On Transgender People*, WORLD MED. ASS'N (Mar. 26, 2024), https://www.wma.net/policies-post/wma-statement-on-transgender-people/. How real-world doctors view the subject is a far more complicated matter. *See, e.g.*, Brief for Do No Harm as Amicus Curiae Supporting Appellants, at 1 ("Do No Harm is a diverse group of physicians, healthcare professionals, medical students, patients, and policymakers whose goal is to protect healthcare from a radical, divisive, and discriminatory ideology."); Devon Kent et al., *Assessing Comfort of Physicians to Provide Transgender-Specific Care*, 7 TRANSGENDER HEALTH 533, 537 (2022) ("[M]ost [Nevadan physicians] feel uncomfortable providing hormonal treatment.").

Any claim to "consensus" in the medical community—never a claim that reflected reality—seems to be crumbling quickly, even on its own terms. As the Court notes, many of the European countries that initially pioneered transgender treatments for minors are rapidly pulling back. *Ante* at 222 n.2; *see also* Azeen Ghorayshi, *Youth Gender Medications Limited in England, Part of Big Shift in Europe*, N.Y. TIMES (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/health/europe-transgender-youth-hormone-treatments.html. The Cass Review, a multi-year study commissioned by England's National Health Service—hardly a proponent of the Traditional Vision—recently cast serious doubt on the advisability of puberty blockers and hormone therapies for minors, even for those who hold the Transgender Vision. Perhaps most notably, the Review concluded that "the evidence does not adequately support the claim that gender-affirming treatment reduces suicide risk." INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE: FINAL REPORT 187 (chaired by Hilary Cass, 2024).

[6] As on many other questions, the American people have not fallen obediently in line with elite opinion. One recent survey found that only 19% of Americans support "[a]llowing transgender youth access to puberty blockers," while 54% oppose it. Taylor Orth, *Where Americans stand on 20 transgender policy issues*, YOUGOV (Feb. 16, 2024, 9:47 AM), https://today.yougov. com/politics/articles/48685-where-americans-stand-on-20-transgender-policy-issues.

[7] *What is Gender Dysphoria*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited June 26, 2024).

[8] As recently as the 1980s, Webster's had no entry for "gender identity," and the definition of "gender" was a single word: "sex." *See Gender*, WEBSTER'S NEW COLLEGIATE DICTIONARY (8th ed. 1981).

[9] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *Genesis* 1:27.

[10] On the other hand, would Texans in 1876 have understood either their Constitution or their pre-existing legal traditions to protect them from a government that tried to coerce parents, against their will, to allow transgender therapy for their children? I suspect that to ask this question is also to answer it.

[11] *See, e.g.*, Brief for Appellees, at 6 ("Gender identity refers to a person's core sense of belonging to a particular gender."; "A person's gender identity does not always match the sex the person was assigned at birth."; "People whose gender identity aligns with their sex assigned at birth are cisgender ...."; "Being transgender is not a condition to be cured. It is a core, defining trait of identity that a person should not be forced to change or abandon ....").

[12] Notwithstanding *Bostock v. Clayton County*, no serious argument can be made that the American people—or any of their elected representatives—made a deliberate decision in 1964 to grant Title VII employment-discrimination protections to men and women who "identify" as the opposite sex. *Bostock*'s textual analysis proceeds from moral and philosophical premises that were hardly imaginable in 1964. Like doctors who assume the Transgender Vision before telling us what is best for their pediatric patients, *Bostock* assumes the Transgender Vision before telling us what Title VII means. Consider this key passage from the majority opinion: "Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Bostock*, 590 U.S. at 660, 140 S.Ct. 1731.

As *Bostock* sees it, a biological female who "identifies" as a woman shares a "trait or action" in common with a biological male who "identifies" as a woman. This is the crux of the argument—that both of these people "identify" as women. To hire the biological female but fire the biological male because both identify as a woman is to discriminate against the biological male for being a biological male—in violation of Title VII, *Bostock* says. The unspoken philosophical assumption indispensable to this logic is that when a biological male "identifies" as a woman, something similar is happening as compared to when a biological female "identifies" as a woman. *Bostock* cannot get to its result, even on its own terms, without asserting that biological males who identify as women are similarly situated with biological females who identify as women. *Id.* at 657–58, 140 S.Ct. 1731. To support that claim, *Bostock* must assume that the way in which a biological woman perceives herself to be a woman is comparable to the way in which a biological man perceives himself to be a woman—i.e., that we are talking about essentially the same thing when we say of these two people that each "identifies" as a woman. This equivalence is perhaps *the* core assumption of the Transgender Vision. And if the equivalence is valid, as *Bostock* assumes it is, then there is force to *Bostock*'s argument that the employer is discriminating against the transgender person on the

basis of his biological sex.

But if the equivalence is not valid—that is, if a human female's innate identity as a woman is an immutable genetic given, rather than a feeling or a choice, and is therefore *different in kind* from a human male's declaration of a transgender identity, then *Bostock*'s logic falls apart. If a biological woman *correctly* identifying herself as a woman is a *far different thing* from a biological man *incorrectly* identifying himself as a woman, then the two people do not share a "gender identity," they are not at all similarly situated, and their employer is not treating the female better than the male on the basis of a trait or action they share in common. From within the Traditional Vision, the male who claims to identify as a woman does not thereby have anything in common with real women, who do not *identify* as women but simply *are* women. From within the Traditional Vision, a male who *believes* he is a woman and a female who *knows* she is a woman could hardly be less similarly situated with respect to the matter. She is right, and he is wrong. Her perception of reality is true, and his is false. The two have nothing in common—at least not in the realm of sex and gender. *Bostock*'s logic cannot stand if a person's declaration of a transgender identity is understood as a misguided break from reality, as it was by nearly everyone in 1964—rather than as a revelation of reality, as it is by some people today. From within the Traditional Vision, an employer who hires a woman who correctly perceives her true sex but declines to hire a man who incorrectly perceives his true sex is in no sense discriminating against the man on the basis of sex. He is discriminating on the basis of whether the applicant correctly perceives reality, which is not a characteristic with which Title VII is concerned.

In the end, if we read Title VII from the perspective of the Transgender Vision, the Court's position in *Bostock* is quite plausible. But if we read Title VII from the perspective of the Traditional Vision—the perspective from which it was written in 1964—then the Court's position quickly falls apart. Without saying so, the Court in *Bostock* chose a side in an ongoing moral and political debate. One obvious problem with the Court's choice is that virtually nobody in 1964 was on the Court's side. The result is that, like the Fourteenth Amendment, Title VII is now a living document that will follow fashionable 21st century opinion in enormously consequential ways that those who originally consented to its enactment could not have imagined.

[13] The Legislature's authority in this regard should be informed by the original meaning of the word "medicine," as used in the 1876 Texas Constitution. The conception of "medicine" reflected in the challenged legislation and described in this opinion is consistent with what I take to be the founding-era understanding of that term. *See, e.g., Medicine*, WEBSTER'S DICTIONARY 1828, https://webstersdictionary1828.com/Dictionary/medicine ("The art of preventing, curing or alleviating the diseases of the human body."); *Disease*, WEBSTER'S DICTIONARY 1828, https://webstersdictionary1828.com/Dictionary/disease ("any state of a living body in which the natural functions of the organs are interrupted or disturbed"); *Medicine*, 15 ENCYCLOPAEDIA BRITANNICA 794 (9th ed. 1883) ("Taking disease to be a deflexion from the line of health, the first requisite of medicine is an extensive and intimate acquaintance with the norm of the body.").

While the founding-era understanding of "medicine" is the relevant one for understanding the Legislature's constitutional authority, such a traditional conception of medicine—as ordered toward the preservation and restoration of the patient's biological health rather than toward the satisfaction of the patient's desires—is not a defunct relic of times gone by. To the contrary, this view continues to play an important role in contemporary debates about medical practice and medical ethics. *See, e.g.*, FARR CURLIN & CHRISTOPHER TOLLEFSEN, THE WAY OF MEDICINE: ETHICS AND THE HEALING PROFESSION 107 (2021) (arguing that a physician's ethical obligation is to promote the objective biological health of the patient, which may entail "resist[ing] inducements to interfere with, interrupt, or otherwise revise the healthy development, maturation, and function of male and female sexual organs and capacities"); Leon R. Kass, *Regarding the end of medicine and the pursuit of health*, 40 THE PUB. INTEREST 11, 13–16, 29 (1975) (advocating for the ancient view that the end of medicine is the patient's objective health—as opposed to the gratification of the patient's desires or the pursuit of the patient's happiness; on this view, health is "the well-working of the organism as a whole" or "an activity of the living body in accordance with its specific excellences").

[14] To be fair, from within the Transgender Vision, the Traditional Vision surely also has characteristics of a religion. Perhaps, as has been said before, "all human conflict is ultimately theological." HILAIRE BELLOC, THE CRUISE OF THE "NONA" 54 (Century Publ'g 1983) (quote attributed to Henry Edward Cardinal Manning).

[15] Tresa Baldas, *Religious defense planned in landmark Detroit genital mutilation case*, DETROIT FREE PRESS (May 21, 2017, 9:42 AM), https://www.freep.com/story/news/2017/05/21/female-genital-mutilation-religious-freedom/319911001/; *see also Female Genital Mutilation*, UNFPA SOMALIA, https://somalia.unfpa.org/en/topics/female-genital-mutilation-5 (last visited June 26, 2024) ("Despite United Nations resolutions calling for the elimination of FGM, the practice remains near universal in Somalia with a 99 per cent prevalence rate."); *Female genital mutilation*, UNFPA EGYPT, https://egypt.unfpa.org/en/node/22544 (last visited June 26, 2024) ("According to the Egyptian Family Health Survey (EFHS) 2021, 86 percent of Egyptian married women between the ages of 15 and 49 have undergone FGM, 74 percent of whom by doctors.").

[16] "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19.

[17] As I have written before, I am not convinced that constitutional protection for parental rights—the existence of which both this Court and the U.S. Supreme Court have repeatedly and rightly acknowledged—finds its most suitable grounding in substantive due process (or substantive due course of law). *See In re H.S.*, 550 S.W.3d 151, 177–78 (Tex. 2018) (Blacklock, J., dissenting) (suggesting the Privileges and Immunities Clause and the Ninth Amendment as potential alternative bases for recognizing that traditional parental authority over children has a constitutional dimension beyond the Legislature's reach).

[18] Because of circumcision's connection to religious practice, many of its proponents would likely succeed in opposing the government's prohibition of it by asserting their religious liberty—without resorting to the shakier ground of substantive due process. Even so, because of its roots in history and tradition, the parental right to circumcise a male child would likely fare much better under *Glucksberg* than would transgender treatments or female genital mutilation.

[1] THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[2] *Post* at 266–68 (Lehrmann, J., dissenting).

[3] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[4] U.S. CONST. amend. IX; *see Martin v. Hunter's Lessee*, 14 U.S. 304, 325, 1 Wheat. 304, 4 L.Ed. 97 (1816)

(acknowledging the people's "right ... to reserve to themselves those sovereign authorities which they might not choose to delegate to [government]").

[5] *E.g., In re H.S.*, 550 S.W.3d 151, 177 (Tex. 2018) (Blacklock, J., dissenting) (citing *Troxel*, 530 U.S. at 80, 120 S.Ct. 2054 (Thomas, J., concurring)).

[6] THE DECLARATION OF INDEPENDENCE para. 2.

[7] *Compare* U.S. CONST. amend. V, *and* TEX. CONST. art. I, § 19, *with Jurek v. Texas*, 428 U.S. 262, 276-77, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (rejecting Eighth Amendment challenge to Texas death penalty statute), TEX. PENAL CODE § 19.03, *and* TEX. CODE CRIM. PROC. art. 37.071.

[8] I recognize that there might be exceptional cases in which the grant of a narrow or specific power to legislate would be inconsistent with construing a general right to provide protection for individual conduct inconsistent with such legislation. I do not disagree with the Court that "express constitutional authorization for ... the challenged law" would be relevant in that case. *Ante* at 233 n.14. But this is not such a case.

[9] *See also Zivotofsky v. Kerry*, 576 U.S. 1, 48, 135 S.Ct. 2076, 192 L.Ed.2d 83 (2015) (Thomas, J., concurring in part) (describing "the protections for retained individual rights under the Constitution" as a "key limitation[ ] on [Congress's] jurisdiction"); *Pointer v. Texas*, 380 U.S. 400, 414, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (Goldberg, J., concurring) (observing that the Constitution "limit[s] the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual," "deny[ing] to [government] the power to impair a fundamental constitutional right"); *Block v. Hirsh*, 256 U.S. 135, 160, 41 S.Ct. 458, 65 L.Ed. 865 (1921) (McKenna, J., dissenting) ("[T]he Constitution is ... a restraint upon government, purposely provided and declared upon consideration of all the consequences of what it prohibits and permits, making the restraints upon government the rights of the governed. And this careful adjustment of power and rights makes the Constitution what it was intended to be and is, a real charter of liberty ....").

[10] *303 Creative LLC v. Elenis*, 600 U.S. 570, 592, 143 S.Ct. 2298, 216 L.Ed.2d 1131 (2023) ("[N]o public accommodations law is immune from the demands of the Constitution."); *Sessions v. Morales-Santana*, 582 U.S. 47, 52, 137 S.Ct. 1678, 198 L.Ed.2d 150 (2017); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (holding Congress "lacks the power to strip parties ... contesting matters of private right of their constitutional right to a jury trial").

[11] 1 ANNALS OF CONG. 456 (1789) (Joseph Gales ed., 1834). Madison also emphasized that the bill should not be understood to "disparage those rights which were not placed in that enumeration" or imply that such rights "were intended to be assigned into the hands of the General Government, and were consequently insecure." *Id.*

[12] THE FEDERALIST NO. 78, at 524.

[1] If we are applying labels, in my view the appropriate label would be "potentially life-saving" treatment rather than "novel" treatment. The lack of certainty about how unenumerated rights would be categorized leads me to agree with JUSTICE YOUNG that this type of reasoning is "opaque," at best. *Ante* at 257–58 (Young, J., concurring).

[2] Sam Levin, *More than 50% of Trans and Non-Binary Youth in US Considered Suicide this Year, Survey Says*, THE GUARDIAN (Dec. 17, 2022), https://www.theguardian.com/us-news/2022/dec/16/us-trans-non-binary-youth-suicide-mental-health?CMP=share_btn_url.

[3] *See generally* Josephine Mak, et al., *Suicide Attempts Among a Cohort of Transgender and Gender Diverse People*, 59 AM. J. OF PREVENTIVE MED. 570 (2020).

[4] *Ante* at 242–43, 243–44 (Blacklock, J., concurring).

[5] *See, e.g.*, Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL'Y REV. 589, 595 (2019) ("Although moral animus toward transgender people has existed in some quarters for quite some time, history teaches that respect for transgender people is a tradition far more deeply rooted, with 'individuals whom today we might call transgender[ ] ... play[ing] prominent roles in many societies, including our own[,] ... [f]rom prehistoric times to the present.' " (alteration in original) (citation omitted)); ROBERT BEACHY, GAY BERLIN: BIRTHPLACE OF A MODERN IDENTITY (Alfred A. Knopf, 2014) (discussing the significant transgender community in Weimar Republic-era Berlin); EMILY SKIDMORE, TRUE SEX: THE LIVES OF TRANS MEN AT THE TURN OF THE TWENTIETH CENTURY (NYU Press, 2017) (providing a historical inquiry into the existence and prevalence of transgender identity from the late 1800s through the early 1900s).

[6] *Ante* at 242 (Blacklock, J., concurring).

[7] As JUSTICE YOUNG'S concurrence recognizes, parents have the autonomy "to conduct their affairs without needing permission from the majoritarian political process." *Ante* at 254 (Young, J., concurring). This is particularly true here, where the decisions of these parents are aimed solely at their own children—they are in no way directed at, and have no bearing on, other families. Notwithstanding any implication to the contrary, no one is remotely suggesting that the government should be able to force parents to consent to transgender therapy against their will. *See ante* at 243 n.10 (Blacklock, J., concurring). Rather, the reverse is true—a legislative majority is forcing their views on these families. And in the process, they are blocking the ability of these parents to use their best judgment to protect their children.

[8] The DSM is the "universal diagnostic system used in diagnosing mental health disorders in the United States and much of the rest of the world." *Tex. St. Bd. of Exam'rs of Marriage & Fam. Therapists v. Tex. Med. Ass'n*, 511 S.W.3d

28, 31 (Tex. 2017).

[9] *See generally* Simona Martin et al., *Criminalization of Gender-Affirming Care—Interfering with Essential Treatment for Transgender Children and Adolescents*, 385 NEW ENG. J. MED. 579 (2021) (providing an overview of the scientific basis underlying gender-affirming care and its demonstrated effectiveness in "alleviating gender dysphoria").

[10] The WPATH Guidelines for the treatment of gender dysphoria in adolescents are summarized as follows:

1. A robust diagnostic assessment is made by a provider who is licensed by their statutory body and holds masters or equivalent in a relevant clinical field, has experience and received theoretical and evidence-based training in child, teen, and family mental health, and has expertise and training in several other relevant disorders and neurodevelopmental areas.

a. Before developing a treatment plan, the provider should conduct a "comprehensive biopsychosocial assessment" of the patient.

2. The guidelines recommend *only non-medical intervention* for prepubertal children.

a. The guidelines provide for mental health care for the patient and family, but no medical interventions.

3. Under certain circumstances, the guidelines allow medical intervention for adolescents with gender dysphoria.

a. Before medical intervention may be prescribed, there are several conditions that a qualified provider must determine are met:

i. The adolescent patient meets the diagnostic criteria of gender incongruence according to the WHO's International Classification of Diseases or other taxonomy.

ii. The adolescent has demonstrated a sustained and marked pattern of gender nonconformity or gender dysphoria.

iii. The adolescent has demonstrated the emotional and cognitive maturity required to provide informed consent for treatment.

iv. Any coexisting psychological, medical, or social problems that could interfere with diagnosis, treatment, or the adolescent's ability to consent have been addressed.

v. The adolescent has been informed of the reproductive effects of treatment in the context of their stage in pubertal development and discussed fertility preservation options.

vi. The adolescent has reached Tanner Stage 2 of puberty.

E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version* 8, 23 INT. J. TRANSGENDER HEALTH S48 tbl.12 (2022).

The Endocrine Society endorses similar criteria, with the additional requirements that a pediatric endocrinologist agree with the indication for treatment, confirm that the patient has started puberty, and confirm that there are no medical contraindications. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3878 tbl.5 (2017),

https://academic.oup.com/jcem/article/102/11/3869/4157558.

[11] Coleman, *supra* note 10, at S247–51.

[12] *See* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, AM. ACAD. OF PEDIATRICS 5–18 (2018); Br. of Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Plaintiffs, at 8–22.

[13] Christal Achille et al., *Longitudinal impact of gender-affirming endocrine intervention on the mental health and well-being of transgender youths: preliminary results*, 8 INT'L J. PEDIATRIC ENDOCRINOLOGY 1–5 (2020), https://pubmed.ncbi.nlm.nih.gov/32368216.

[14] Am. Psychological Ass'n, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70(9) AMERICAN PSYCHOLOGIST 832, 862 (2015).

[15] Rafferty, *supra* note 12, at 5.

[16] *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guide*, 102(11) J. CLINICAL ENDOCRINOLOGY & METABOLISM 3872–73 (Nov. 2017) (providing a high-level overview of its methodology).

[17] *See* Gordon Guyatt et al., *GRADE guidelines: 1. Introduction—GRADE evidence profiles and summary of findings tables*, 64 J. CLINICAL EPIDEMIOLOGY 383 (2011).

[18] For more information on the methodological rigor of the guidelines, *see* Amicus Br. of Am. Acad. of Pediatrics et al., at 16.

[19] The Court brushes off Dr. Cantor's plain words: "[I]t was essentially me versus the entire medical establishment ...." More concerningly, one of the concurrences seems to dismiss the entire "medical establishment," including the American Medical Association, as being composed of elitist bureaucrats unconcerned with upholding their Hippocratic Oath. *See ante* at 240–41 (Blacklock, J., concurring). I respectfully disagree.

[20] I agree with JUSTICE YOUNG'S observation that sometimes an unenumerated right "is *so* fundamental to our legal tradition and culture that reducing it to writing may never even have occurred to the drafters" and that "[p]arental

authority" is "part of the background assumptions of the law." *Ante* at 255 (Young, J., concurring).

[21] This Court has repeatedly modeled its analysis on the U.S. Supreme Court's articulation of parental rights. *See, e.g., C.J.C.*, 603 S.W.3d at 811–12; *Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003) (citing *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979)); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

[22] The Court dismisses *Parham* for being a procedural due process case in which the U.S. Supreme Court did not "suggest[ ] that it was recognizing a substantive constitutional right for parents to obtain novel medical care for their children." *Ante* at 232. The Court fails to address *Parham*'s discussion of the breadth of parental autonomy, which included medical decision-making for one's children. As discussed previously, the U.S. Supreme Court has steadfastly recognized a fundamental right of parents to direct the upbringing of their children, even though the Justices are not aligned on the source of that right. *C.J.C.*, 603 S.W.3d at 812 (citing *Troxel*, 530 U.S. at 80, 120 S.Ct. 2054 (Thomas, J., concurring)).

[23] Entirely unaddressed by the Court is the duty of parents, as a matter of both natural and statutory law, to seek out medical care for their children when needed. *See* TEX. FAM. CODE § 151.001(a)(3) (enumerating a parent's *duty* to "provid[e] the child with clothing, food, shelter, *medical and dental care*, and education" (emphasis added)); *see also id.* § 151.001(a)(6) ("A parent of a child has ... the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment ....").

[24] Because I conclude that S.B. 14 is unconstitutional under the Due Course Clause, I express no opinion on the claim that the law also violates the Equal Protection and Equal Rights Clauses of the Texas Constitution.