

Nos. 03-22-00420-CV & 03-22-00587-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

RECEIVED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
4/10/2023 4:54:35 PM

GREG ABBOTT, in his official capacity as Governor of the State of Texas; JAIME MASTERS, in her official capacity as the Commissioner of the Texas Department of Family and Protective Services; and TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

JEFFREY D. KYLE
Clerk

Appellants,

v.

PFLAG, Inc.; Mirabel Voe, individually and as parent and next friend of Antonio Voe, a minor; Wanda Roe, individually and as parent and next friend of Tommy Roe, a minor; Adam Briggie and Amber Briggie, individually and as parents and next friends of M.B., a minor,

Appellees.

On Appeal from the 201st Judicial District Court, Travis County

BRIEF OF AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AND
19 PROFESSIONAL CHILD WELFARE ORGANIZATIONS AS AMICI CURIAE IN
SUPPORT OF APPELLEES

Greg R. Wehrer
Texas Bar No. 24068592
Squire Patton Boggs (US) LLP
600 Travis Street, Suite 6700
Houston, TX 77002
(713) 546-5850
greg.wehrer@squirepb.com

Rafael M. Langer-Osuna
Squire Patton Boggs (US) LLP
475 Sansome Street, 16th Floor
San Francisco, CA 94111
(415) 954-0200
rafael.langerosuna@
squirepb.com

Mary Kelly Persyn
Persyn Law & Policy
912 Cole Street, PMB 124
San Francisco, CA 94117
(628) 400-1254
marykelly@persynlaw.com

Keith Bradley
Squire Patton Boggs (US) LLP
717 17th Street, Suite 1825
Denver, CO 80202
(303) 894-1776
keith.bradley@squirepb.com

Counsel for Amici Curiae

TABLE OF CONTENTS

LIST OF AMICI CURIAE	1
INTERESTS OF <i>AMICI CURIAE</i>	3
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. GENDER-AFFIRMING CARE IS NOT CHILD ABUSE.....	17
A. Child Abuse Is A Well-Established And Well-Defined Concept.....	17
B. Treating Gender-Affirming Care as “Child Abuse” Means Ignoring the Existence of Gender Dysphoria.....	19
C. Standards Established by APSAC and Other <i>Amici</i> Require the Protection and Affirmation of Transgender and Gender-Expansive Youth.....	23
1. Without Gender-Affirming Care Transgender Youth Face Further Elevated Risks Of Bullying, Depression, Anxiety, And Suicidality.....	26
II. THE DIRECTIVE WILL CAUSE THE EXACT TYPES OF HARM IT PURPORTS TO PREVENT BY MANDATING MEDICAL NEGLECT AND CAUSING TRAUMA THROUGH UNNECESSARY INVESTIGATIONS.....	28
A. The Directive May Force Parents Seeking to Avoid Investigation to Engage in Medical Neglect.....	29
1. Medical neglect is a form of child abuse.....	29
2. Medical neglect is dangerous and abusive, and can have lifelong impacts.....	30
B. For Those Parents Who Decline to Subject Their Children to Medical Neglect, Unwarranted Child Abuse Investigations and Child Removals Could Cause Significant, Unnecessary Trauma.....	32
C. Unnecessary child removal and placement in foster care can cause permanent damage.....	34
1. Unwarranted Placement in the Foster Care System Would Compound Any Pre-Existing Trauma Due to Instability in Housing, Education, and Healthcare Access for Youth Generally	35

2.	LGBTQ+ Youth Are at a Heightened Risk of Negative Effects of the Foster Care System.	35
III.	THE DIRECTIVE AND ITS IMPLEMENTATION UPEND TEXAS LAW AND HARM CHILDREN AND YOUTH.....	37
A.	The Governor and Attorney General Are Not Authorized to Establish DFPS’s Enforcement or Investigation Policy.	38
B.	DFPS Should Protect Children in Texas.....	39
1.	DFPS should scrutinize, rather than accept, the Directive.	39
	CONCLUSION.....	41
	CERTIFICATE OF COMPLIANCE.....	43
	CERTIFICATE OF SERVICE	44

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Abbott</i> , 645 S.W.3d 276 (Tex. 2022)	27, 38
<i>Fields v. Smith</i> , 653 F.3d 550 (7th Cir. 2011)	31
<i>M.D. ex rel Stukenberg v. Abbott</i> , No. 2:11-cv-84	34
Statutes	
40 TEX. ADMIN. CODE § 700.46	29
TEX. CONST. ART. IV	38
TEX. FAM. CODE § 261.001(1)	18, 29
TEX. FAM. CODE § 261.304(c)	33
TEX. FAM. CODE § 262.101	33
TEX. HUM. RES. CODE § 40.002(b)	40
Other Authorities	
<i>APSAC Position Statement: Gender-Affirming Care Is Not Child Abuse</i> (Mar. 7, 2022)	19, 24
Laura Baams et al., <i>LGBTQ Youth in Unstable Housing and Foster Care</i> , 143 Pediatrics e20174211 (2017)	35
Anne Butler, et al, <i>Association of Inappropriate Outpatient Pediatric Antibiotic Prescriptions with Adverse Drug Events and Health Care Expenditures</i> , JAMA	22
Endocrine Soc’y, <i>Transgender Health: An Endocrine Society Position Statement</i> (Dec. 16, 2020).....	20

Randi Feinstein et al., <i>Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System</i> , New York City: Urban Justice Center (2001).....	37
Jevay Grooms, <i>No Home and No Acceptance: Exploring the Intersectionality of Sexual/Gender Identities (LGBTQ) and Race in the Foster Care System</i> , 47 Rev. Black Political Econ. 177 (2020).....	36
Wylie C. Hembree et al., <i>Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons</i> , 102 J. Clinical Endocrinology & Metabolism 3869 (2017).....	20
Sara B. Johnson & Julia M. Pryce, <i>Therapeutic Mentoring: Reducing the Impact of Trauma for Foster Youth</i> , 92 Child Welfare 9, 9 (2013).....	35
Michael Kaval, <i>Texas transgender directive is “dangerous, discriminatory, and completely unacceptable</i> , First Focus on Children, Mar. 4, 2022.....	19
<i>Kempe Statement on Gender-Affirming Care</i> , at https://medschool.cuanschutz.edu/pediatrics/sections/child-abuse-and-neglect-kempe-center/about-us/statement-on-gender-affirming-care (last accessed Aug. 23, 2022).....	19
Laura L. Kimberly et al., <i>Ethical Issues in Gender-Affirming Care for Youth</i> , 142 Pediatrics e20181537 (2018).....	14, 25
Adam McCormick, <i>Texas’ faith-based foster care reforms could fail LGBT youth</i> (Nov. 30, 2016).....	37
Sarah Mountz et al., <i>‘Because We’re Fighting to Be Ourselves’: Voices from Former Foster Youth Who Are Transgender and Gender Expansive</i> , 96 Child Welfare 103 (2018).	16
Nat’l Ass’n of Social Workers, <i>NASW Condemns Efforts to Redefine Child Abuse to Include Gender-Affirming Care</i> (Feb. 25, 2022).....	19
Nat’l Ass’n of Social Workers, <i>Social Work Speaks</i> , 211 (11th ed. 2018-2020).....	10
Nat’l Child Abuse Coalition, <i>Statement Opposing Actions in Texas to Characterize Gender-Affirming Care as Child Abuse</i> (Mar. 2022).....	19

June C. Paul, <i>Exploring Support for LGBTQ Youth Transitioning from Foster Care to Emerging Adulthood</i> , 119 <i>Children & Youth Servs. Rev.</i> 1 (2020)	37
Myeshia Price-Feeney et al., <i>Understanding the Mental Health of Transgender and Nonbinary Youth</i> , 66 <i>J. Adolescent Health</i> 684 (2020).....	14
Sari L. Reisner et al., <i>Integrated and Gender-Affirming Transgender Clinical Care and Research</i> , 72 <i>J. Acquired Immune Deficiency Syndrome</i> S235 (2016).....	14
J. Stirling, <i>Understanding Medical Neglect: When Needed Care Is Delayed or Refused</i> , 13 <i>J. Child & Adolescent Trauma</i> , 271 (2019).....	30
Alison M. Stoner et al., <i>Predictors of Reduction in Symptoms of Depression for Children and Adolescents in Foster Care</i> , 24 <i>J. Child & Fam. Stud.</i> 784 (2015)	35
Texas CASA, <i>CASA Deep Dive: Supporting LGBTQ Youth in Foster Care</i> , June 24, 2019	36
Jack L. Turban et al., <i>Factors Leading to ‘Detransition’ Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis</i> , 8 <i>LGBT Health</i> 273 (2021).....	30
Jack L. Turban et al., <i>Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults</i> , 77 <i>JAMA Psychiatry</i> 68 (2020).....	31
B.D. Wilson et al., <i>Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles</i> , UCLA: The Williams Institute (2014).....	36
WPATH, <i>Standards of Care</i> , 10-16	20, 21
U.S. Dep’t of Health & Human Servs. Admin. on Children, Youth & Families, <i>Information Memorandum on Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care</i> (2011).....	36

LIST OF AMICI CURIAE

1. American Professional Society on the Abuse of Children
2. Center for the Study of Social Policy
3. Children’s Advocacy Institute
4. Children’s Defense Fund
5. Congressional Research Institute for Social Work and Policy
6. Foster America
7. FosterClub
8. Futures Without Violence
9. Guiding Hope
10. iFoster
11. Institute for Human Services
12. Kempe Center for the Prevention and Treatment of Child Abuse and Neglect at the University of Colorado
13. National Association of Counsel for Children
14. National Association of Social Workers
15. National Coalition to Prevent Child Sexual Abuse & Exploitation
16. National Foster Youth Institute
17. Partners for Our Children
18. Safe and Sound

19. Social Current

20. Think of Us

INTERESTS OF *AMICI CURIAE*¹

Amici curiae are nonprofit organizations dedicated to furthering the care and protection of children. They include the nation's leaders on social work and child abuse, and many of the nation's significant organizations on child welfare systems, including foster care. Collectively, the *amici* represent a significant body of expertise on what child abuse is (and is not); how to prevent it; how to treat it; what happens to a child in foster care; and what the experiences and outcomes are for children who suffer abuse or neglect and then enter child welfare systems.

The **American Professional Society on the Abuse of Children** (“APSAC”) is a national organization of professionals engaged in all aspects of services for maltreated children and their families. Its members are child-maltreatment professionals from all over the world. For over 35 years, it has been the leading organization on the standard of care for child abuse and neglect, and it disseminates information on state-of-the-art practices in all professional disciplines related to these issues.

The mission of APSAC is to improve society's response to the abuse and neglect of its children. APSAC envisions a world where all maltreated or at-risk

¹ No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to its preparation or submission.

youth and their families have access to the highest level of professional commitment and service.

The **Center for the Study of Social Policy** (“CSSP”) is a national organization dedicated to building a racially, socially, and economically just society. CSSP advocates with and for children, youth, and families marginalized by public policies and institutional practices, and is recognized for its work in reforming public systems to better serve families. CSSP focuses on transforming systems to be responsive to the needs of families of color; people with diverse sexual orientations, gender identities, or gender expression; immigrant families; and others who are often discriminated against through and by systems and institutions. CSSP works with communities across the country promoting strategies that are family-centered, multi-generational, anti-racist, and culturally responsive, with a goal of ensuring families have every possible opportunity to be healthy and successful.

The **Children’s Advocacy Institute** (“CAI”), founded at the University of San Diego School of Law in 1989, is an academic, research, and advocacy nonprofit organization working to improve outcomes for children and youth, with special emphasis on improving the child protection and foster care systems. In its academic component, CAI trains law students and attorneys to be effective child advocates, while its research and advocacy programs engage in impact litigation; regulatory, administrative and legislative advocacy; and public education.

The **Children’s Defense Fund** (“CDF”) is a child advocacy organization that has worked relentlessly for nearly five decades to ensure a level playing field for all children, with special attention to the needs of poor children and children of color. CDF works collaboratively at the federal, state, and local levels to achieve child welfare policy and practice reforms that keep children safe and give them the opportunity to thrive, while maintaining connections to family and community. CDF advocates for children across the country, and maintains offices in Austin, Houston, McAllen, and Tyler, Texas.

The Congressional Research Institute for Social Work and Policy (“CRISP”) was created in 2012 as a 501(c)4 nonprofit organization that would complement the mission and work of the Congressional Social Work Caucus. CRISP’S mission is to use the power of social work on the Hill. CRISP believes in Women's Right to comprehensive reproductive health care services with an emphasis on focusing on healthy equity for the most vulnerable populations, including foster youth.

Foster America connects and activates changemakers to break the cycle of injustice in the child welfare system and open pathways to opportunity, so every child, family, and community thrives. Working in and across communities, Foster America seeks out and supports the most promising talent; shares and scales knowledge; and amplifies innovative ideas and equitable solutions. Together with

6 communities, collaborators, and changemakers, Foster America is cultivating the resources and relationships necessary to achieve well-being for all children and families.

FosterClub is the national network for young people who experience foster care. FosterClub advocates for improvements in the child welfare system and provides direct support to children and youth. In particular, FosterClub provides a peer support network for children and youth in foster care, including a significant number of LGBTQ+ youth, to help them secure a brighter future for themselves and the foster care system through advocacy, education, and an extensive support network.

Futures Without Violence (“FUTURES”) is a national nonprofit organization, based in San Francisco, that has worked for more than 35 years to prevent and end violence against women and children in the United States (U.S.) and around the world. FUTURES works to eliminate child abuse, domestic violence, sexual assault, and human trafficking through education and prevention campaigns, training and technical assistance to state agencies, public and private entities, including health care and state and local child protective systems, judges and court systems, colleges and universities, and global organizations. FUTURES advances promising policies and practices at the state and federal level that prevent violence and help adult and child survivors of abuse and violence heal and thrive. FUTURES

staff are experts on child abuse, family violence prevention, sexual assault, and human trafficking and the services and supports necessary for children and women to heal from abuse, violence and trauma.

Guiding Hope is an organization dedicated to restorative justice. It serves the LGBTQ community in Texas by offering a safe haven for children to live in a home that recognizes them for who they are. Guiding Hope challenges systems to be responsive to the needs of all people by being culturally responsive.

iFoster is a national organization working to ensure that every child and youth growing up outside of the child's biological home has the resources and opportunities to become successful independent adults and reach that individual's full potential. iFoster serves over 125,000 children and youth in the child welfare system and those aging out, providing over \$150 million in resources annually. iFoster represents the largest community of transition-age foster youth (age 16-24), caregivers and agencies in child welfare with over 60,000 members and a network that can reach nearly every child in care nationwide.

The **Institute for Human Services** ("IHS") is an organization comprised of skilled professionals from social work, psychology, law, education, public administration, and public policy backgrounds dedicated to improving policy and practice in the child welfare and child maltreatment fields. In order to make the world a better place for vulnerable children and their families, IHS is dedicated to 8

driving meaningful and constructive systemic change by equipping organizations, professionals, and policymakers with the knowledge, strategies, and tools needed to achieve best practice and research-based policy implementation. IHS's core work involves helping organizations and policymakers navigate barriers and create structures that enable them to better protect and serve children and strengthen families through organizational development, training systems development, international capacity building, and policy development.

The **Kempe Center for the Prevention and Treatment of Child Abuse and Neglect at the University of Colorado** was the first academic center in the United States dedicated to the research and treatment of child abuse and neglect. Founded in 1972, the Kempe Center is home to approximately 80 experts in a variety of disciplines, including medicine, behavioral health, law, and social work, all of whom focus their research, teaching, and advocacy on the prevention and treatment of child abuse and neglect.

Founded in 1977, the **National Association of Counsel for Children** ("NACC"), is a child advocacy and professional membership association dedicated to advancing the rights, well-being, and opportunities of youth impacted by the child welfare system by promoting access to high-quality legal representation. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social

work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, and a robust training and technical assistance arm. NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts.

The **National Association of Social Workers** ("NASW"), founded in 1955, is the largest association of professional social workers in the United States with 110,000 members in 55 chapters. Its Texas Chapter has over 5,000 members. NASW develops high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education and enforces the NASW Code of Ethics. In alignment with its mission to ensure the efficacy and quality of practicing social workers, NASW provides resources and develops policy statements on issues of importance to the social work profession.

The NASW National Committee on Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning + Issues develops, reviews, and monitors programs of the Association that significantly affect LGBTQ+ individuals. NASW, including its Texas Chapter, is committed to advancing policies and practices that improve the status and wellbeing of all LGBTQ+ people. NASW strongly advocates for the availability of culturally appropriate, comprehensive health and mental health

services for LGBTQ+ people across their life span. Nat'l Ass'n of Social Workers, *Social Work Speaks*, 211, 215-16 (11th ed. 2018-2020). NASW asserts that discrimination and prejudice directed against any individuals on the basis of gender identity or gender expression, whether actual or perceived, are damaging to the social, emotional, psychological, physical and economic well-being of the affected individuals, as well as society as a whole. NASW supports the open availability of comprehensive health, psychological, and social support services for transgender people and their families that are respectful and inclusive, and provided by skilled, educated professionals who have been trained to work effectively with transgender people. *Id.* at 328. Furthermore, NASW supports children's rights to be treated with respect as individuals; to receive culturally responsive services; and to express their opinions about their lives and have those opinions considered. *Id.* at 38-39.

The National Coalition to Prevent Child Sexual Abuse & Exploitation ("Prevent Together Coalition") is a collaborative organization whose members are researchers and professionals in the field of abuse prevention. Its mission is to use advocacy and public education to promote prevention strategies to end child sexual abuse. Established over 15 years ago, the Coalition includes many of the largest and most influential youth-serving and family support organizations in the country. Its member organizations impact more than 45 million children and families annually in all 50 states. The Coalition's membership includes experts who have influenced

national, state, and local policy and practice on child protection and abuse prevention through their decades of providing training and organizational safety consultations, conducting research, serving youth, and writing a broad range of prominent publications.

The **National Foster Youth Institute** (“NFYI”) envisions a nation where all children are raised in safe and loving families and where the child welfare system serves as a beacon of hope for families in need. NFYI is working to revolutionize the child welfare system by building a national grassroots movement led by current and former foster youth who have lived experience in the child welfare system. There are over 400,000 children in foster care in the United States, and over one third of them identify as LGBTQIA+. NFYI is working to ensure that their voices, opinions and experiences inform child welfare policy.

Partners for Our Children (“P4C”), founded in 2007, is a state level nonprofit research and policy think tank located in Seattle, Washington that promotes healthy child development and intergenerational family well-being and prevents system involvement. P4C critically examine and work to transform the child welfare system into a prevention-oriented structure of supportive services while dismantling institutional and structural racism and oppressive policies and practices that have disproportionately affected Black, Indigenous, and People of Color, sexual and gender minorities, and those in poverty. P4C collaborates with

stakeholders, public agencies, communities, Tribes, providers, private funders and others to advance culturally relevant research and evidence-informed federal, state and Tribal policies, programs, and practices that are equity-driven, center the voices of persons with lived experience and support families and communities.

Safe & Sound is based in San Francisco, has worked for nearly 50 years to prevent child abuse and reduce its devastating impact across California. Safe & Sound's comprehensive programming aims to improve the health of children, families, and communities through trauma-informed interventions, trainings, and community resources. Safe & Sound leads the Child Abuse Prevention Councils for the Counties of San Francisco and Marin, and Safe & Sound is the designated mandated reporting trainer for San Francisco County. The organization provides evidence-informed direct services to parents and children to bolster parental resiliency and other protective factors shown to help families protect their children; educates children and adults to understand and report abuse; partners with governments and community organizations to strengthen the abuse response system and safety net; and provides trauma-informed interventions, trainings, and community resources to improve the health of children exposed to adverse childhood experiences and toxic stress. Safe & Sound promotes promising practices at the local, state, and national level to prevent child abuse and support families living in vulnerable circumstances.

Social Current is an organization that coordinates and serves social workers and their social service organizations. Social Current elevates the work of the social sector through collaboration, innovation, policy, and practice excellence. It provides education, resources, and intellectual capital to thousands of professionals whose services support children, youth, and families engaged in the child welfare system.

Think of Us operates as a research and design lab for child welfare, driving equitable systems change, so that the youth and families most impacted by foster care have the greatest power and opportunity to reshape it. Think of Us works to ensure that people with lived experience are at the center of designing, imagining, and building child welfare systems. Think of Us envisions a world that offers every person the conditions to heal, develop, and thrive.

Amici, as the leading organizations dealing with child abuse, strongly oppose recent attempts to criminalize and prohibit gender-affirming care by labeling it child abuse. Gender-affirming care is not child abuse.

Amici denounce the declarations and policies of the Attorney General and Governor of Texas that gender-affirming health care constitutes child abuse under Texas law. They submit this brief because the Court should have no doubt about the vast consensus among medical, mental health, and social work professionals that gender-affirming care is medically appropriate, when provided under the guidance

and with the judgment of appropriate professionals, indeed, *amici* are in agreement that gender-affirming care is not even an indicator of child abuse.

SUMMARY OF ARGUMENT

Gender-affirming care is, fundamentally, health care. *See, e.g.,* Sari L. Reisner *et al.*, *Integrated and Gender-Affirming Transgender Clinical Care and Research*, 72 *J. Acquired Immune Deficiency Syndrome* S235 (2016). It constitutes an important collection of tools for mitigating health risks to transgender youth and adults. Without gender-affirming care, transgender people suffer substantially more from societal bias and discrimination and increased risk of harm from poverty, homelessness, sexual exploitation, violence, sexually transmitted infections, depression, anxiety, and suicide. Myeshia Price-Feeney *et al.*, *Understanding the Mental Health of Transgender and Nonbinary Youth*, 66 *J. Adolescent Health* 684 (2020); Laura L. Kimberly *et al.*, “Ethical Issues in Gender-Affirming Care for Youth,” 142 *Pediatrics* e20181537, p.2 (2018) (“*Ethical Issues*”). Outlawing gender-affirming care will worsen outcomes for transgender youth, in part because clinicians have insufficient information about how to safely (and abruptly) remove patients from treatment. Kinnon R. Mackinnon *et al.*, “Health Care Experiences of Patients Discontinuing or Reversing Prior Gender-Affirming Treatments,” *JAMA Network Open*, p.8 (July 25, 2022). This makes sense, since removing a patient from treatment that has been demonstrated to provide benefit is neither ethically nor

medically appropriate. The World Professional Association for Transgender Health has established standards for gender-affirming care, and the American Academy of Pediatrics has repeatedly elucidated the careful and individualized evaluation necessary to successful treatment of transgender and gender nonconforming youth along a continuum of care. As medical professionals develop thoughtful, science-based practices, evaluations about how to implement these practices properly take place in licensed behavioral health and medical settings, not in the Governor’s office.

Put simply, gender-affirming care is not child abuse. *Amici* comprise organizations that establish and update the policy guidance and standards of care for preventing child abuse and ameliorating its harms. They do not regard the provision of gender-affirming care as even an indicator of child abuse, let alone as being child abuse itself. To do so would be contrary to the relevant standards of care, which medical professionals have carefully developed over decades.

The Department of Family and Protective Services (“DFPS”) will cause significant harm to children by investigating—or threatening to investigate—the provision of gender-affirming care as if it were child abuse. Research shows that a threat of a CPS investigation causes significantly heightened anxiety and fear among transgender youth, their families, and their health care providers. *See, e.g.,* The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, p.14 (“93% of transgender and nonbinary youth said that they have worried about transgender

people being denied access to gender-affirming medical care due to state or local laws.”). Initiating or threatening such investigations forces parents either to stop obtaining necessary care or face abuse investigations and possible removal of their children. Forcing parents to make that choice is not only unnecessary, but contrary to the recommendations of medical professionals; and is extremely distressing to parents and children. Providing gender-affirming care is in no way indicative of child abuse and should not be a trigger for investigation.

This country has long recognized the inherent harm of unwarranted investigations. That is why causes of action for malicious prosecution and abuse of process exist. Unwarranted child abuse investigations are no different. Unwarranted child abuse allegations, investigations, and subsequent potential removal from the child’s home and placement in foster care risk unnecessarily traumatizing the child. Sarah Mountz *et al.*, ‘*Because We’re Fighting to Be Ourselves*’: *Voices from Former Foster Youth Who Are Transgender and Gender Expansive*, 96 *Child Welfare* 103 (2018). Even the threat of a child abuse investigation may well dissuade parents from obtaining necessary care for a child. Creating a family safety plan is another possible remedy, but in a context where gender-affirming care is interpreted as child abuse, it is difficult to see what the plan would say except to cease that care.

Meanwhile, removing access to gender-affirming care likely constitutes medical neglect—which is both a crime and a form of child abuse. Removing access

to medical care at the prompting, or out of fear, of a government enforcement action might be a necessary response to the exigent circumstances of a family under investigation. It is harmful all the same, and does real damage to a child's health, well-being, and development.

None of this is warranted. For DFPS to investigate gender-affirming care as child abuse is contrary to the wide consensus of medical professionals, experts on childcare and child abuse, and mental health professionals. Such unwarranted, politically motivated investigations should indeed be enjoined.

ARGUMENT

I. GENDER-AFFIRMING CARE IS NOT CHILD ABUSE.

Gender-affirming care is not child abuse. Standard legal definitions of child abuse, position papers of major child abuse prevention and child advocacy organizations, and well-established principles of child abuse and maltreatment prevention all support the affirmation of gender-diverse youth, which promotes their health and well-being. Providing care in accordance with this well-accepted standard is the opposite of child abuse.

A. Child Abuse Is A Well-Established And Well-Defined Concept.

The Texas Family Code states that child abuse and neglect include specific acts or omissions by a person responsible for a child's care, custody, or welfare. Under Texas law, child abuse includes "mental or emotional injury to a child that

results in an observable and material impairment in the child’s growth, development, or psychological functioning”; “causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child’s growth, development, or psychological functioning”; and “physical injury that results in substantial harm to the child.” TEX. FAM. CODE § 261.001(1).

Relevant definitions of “neglect” include leaving children in situations where they are exposed to substantial risk of harm and, importantly, “failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury . . . resulting in observable and material impairment to the growth, development, or functioning of the child.” *Id.* § 261.001(4). “Medical neglect” is a separately defined category of child abuse, comprising a failure to “seek, obtain, or follow through with medical care for a child,” where that medical care is necessary for “the growth, development, or functioning of the child.” *Id.* § 261.001(4)(a)(ii)(b).

One feature that all branches of the Texas definitions of abuse and neglect have in common—as is true in most States—is a focus on the risk to the child. What makes an action cross the line to being abusive or neglectful is an injury (physical, mental, or emotional) to the affected child or a substantial risk of such injury.

Parental care that political actors like the Governor might not like is not abuse or neglect if it does not risk genuine harm to the child.

B. Treating Gender-Affirming Care as “Child Abuse” Means Ignoring the Existence of Gender Dysphoria.

The State lacks reliable evidence that gender-affirming care falls within any of the categories of abuse or neglect. Nor could it have such evidence. Gender-affirming care does not cause or risk injury to a child. It is not child abuse, but, to the contrary, medically necessary care. Many among the *amici* have laid out this view before, in reasoned explanations adopted after deliberations by their expert members.² These statements by child advocates and child abuse experts, along with the overwhelming majority of medical associations in the United States, underline the illegitimacy of DFPS policy and practice of treating that gender-affirming care as child abuse.

Governor Abbott, in directing DFPS to do this, relied on an opinion from the Attorney General concluding that gender-affirming care is child abuse. That opinion, in turn, dismissed the possibility that gender-affirming care is medically necessary. The opinion asserts that procedures for “children with a medically

² See, e.g., APSAC, *APSAC Position Statement: Gender-Affirming Care Is Not Child Abuse*, Mar. 7, 2022; The Kempe Center, *Kempe Statement on Gender-Affirming Care*, cuanschutz.edu (last accessed Aug. 23, 2022); National Child Abuse Coalition, *Statement Opposing Actions in Texas to Characterize Gender-Affirming Care as Child Abuse*, Mar. 2022; National Association of Social Workers, *NASW Condemns Efforts to Redefine Child Abuse to Include Gender-Affirming Care*, Feb. 25, 2022; Michael Kaval, *Texas transgender directive is “dangerous, discriminatory, and completely unacceptable.”* *First Focus on Children*, Mar. 4, 2022.

verifiable genetic disorder of sex development” “as determined by a physician through genetic testing” are “medically necessary,” and suggests that other gender-affirming care is not. 2022 Tex. Op. Atty Gen. No. KP-0401, at 2. In fact, well-established standards of care, along with the professional opinion of the American Academy of Pediatrics and other medical professionals, are based on the reality that gender dysphoria exists and, in appropriate cases, requires treatment. It is a genuine condition, experienced by patients, that can be assessed by trained professionals. Wylie C. Hembree *et al.*, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons*, 102 J. Clinical Endocrinology & Metabolism 3869 (2017); WPATH, Standards of Care, 10-16 (7th version), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf (“WPATH Guidelines”). “[T]he data are strong for . . . a biological underpinning to gender identity”; Endocrine Soc’y, *Transgender Health: An Endocrine Society Position Statement* (Dec. 16, 2020), <https://www.endocrine.org/advocacy/position-statements/transgender-health>; but those underpinnings are far broader and more variable than “genetic disorder[s] of sexual development,” 2022 Tex. Op. Atty Gen. No. KP-0401, at 2. The Attorney General’s presumption that only those cases could legitimately need gender-related care was contrary to current medical and scientific knowledge.

Having assumed—erroneously, irrationally, and against the weight of scientific evidence—that “verifiable genetic disorders of sexual development” are the only genuine cases needing gender-affirming care, the opinion then suggested that all the other cases may be instances of “Munchausen by proxy.” 2022 Tex. Op. Atty Gen. No. KP-0401, at 2. This notion ignores the well-considered guidelines for assessing and treating gender dysphoria that medical and mental health professionals have developed. Hembree, 102 J. Clinical Endocrinology & Metabolism 3869; WPATH Guidelines, at 10-21. Gender dysphoria is assessed by mental health professionals who are trained in child and adolescent psychology and in the distinctions between gender dysphoria and conditions that may at first present similarly. Hembree, 102 J. Clinical Endocrinology & Metabolism 3869. Care that is recommended and appropriate pursuant to standards of care that are widely agreed upon by professionals who treat child abuse, is not likely to be, in itself, child abuse. On the contrary, such care is the recommended course of action. A legal opinion that purports to declare otherwise, without considering or even acknowledging the vast consensus among medical, mental health, social work, and other healthcare professionals, is not a legitimate effort to interpret the law.

Respondents appear to think none of this consensus matters, because in theory, they say, gender-affirming care *could* be harmful and *could* be medically inappropriate. Reply Br. 17. Such theoretical possibilities are undeniable, they

assert, *id.*, and therefore they contend that gender-affirming care is like the breaking of a child’s arm, *id.*, and the “determination” whether care is harmful in a given instance is for DFPS to make, *id.* This careless analogy reveals more than Respondents expected. Breaking a child’s arm is nearly³ always harmful. The question in such a matter is not whether the breaking is harmful, but whether the breaking was a culpable act by the caregiver constituting abuse. By contrast, many different activities that occur in a variety of households, such as playing videogames or riding bikes, can be harmful;⁴ so can nearly all medical interventions, including antibiotics,⁵ X-rays,⁶ and antihistamines⁷ (much less surgeries). If DFPS began a program of investigating parents that give their children antibiotics, the Court would readily understand that this program is irrational; and if that program was accompanied by a variety of statements about antibiotics that were scientifically and medically inaccurate but politically potent, the Court would further understand that

³ With the conceivable exception of a case where the breakage was medically necessary, such as when a previously broken bone has knitted wrong and needs to be reset.

⁴ American Academy of Pediatrics, Biking, Care of the Young Athlete Patient Education Handouts, https://publications.aap.org/patiented/article-abstract/doi/10.1542/peo_document278/82137/Biking-Care-of-the-Young-Athlete?redirectedFrom=fulltext (last visited Apr 8, 2023).

⁵ Anne Butler, et al, *Association of Inappropriate Outpatient Pediatric Antibiotic Prescriptions with Adverse Drug Events and Health Care Expenditures*, JAMA Network, May 26, 2022.

⁶ *Radiation risk from medical imaging*, Harvard Health September 30, 2021, <https://www.health.harvard.edu/cancer/radiation-risk-from-medical-imaging> (last visited Apr 8, 2023).

⁷ Harvard Health Publishing Staff, *Common anticholinergic drugs like Benadryl linked to increased dementia risk* Harvard Health, Jan. 19, 2022, <https://www.health.harvard.edu/blog/common-anticholinergic-drugs-like-benadryl-linked-increased-dementia-risk-201501287667> (last visited Apr 8, 2023).

the program was not genuinely motivated to protect children from abuse in the form of antibiotics. The vast weight of medical consensus, and the record in this case,⁸ establishes that gender-affirming care is firmly in the category of medical treatments, Persyn, *The Quality Of Mercy*, LA Lawyer Magazine, February 2023, 30, carried out through the judgment and under the guidance of medical professionals—and is not at all like breaking a child’s arm. That Respondents characterize it like the latter confirms that their program is based on animus, not on fact.

C. Standards Established by APSAC and Other *Amici* Require the Protection and Affirmation of Transgender and Gender-Expansive Youth.

The vision of the American Professional Society on the Abuse of Children is “a world where all maltreated or at-risk children and their families have access to the highest level of professional commitment and service.” APSAC’s fellow *amici* similarly strive to protect and support children and their families by setting the highest standard of care, especially in service of the most vulnerable. The child-centered focus of these organizations drives them to seek out practices that best support the growth and health of children and youth, and they incorporate a public health perspective as well. As the American Academy of Pediatrics and our other medical colleagues have amply demonstrated, gender-affirming care improves the

⁸ Appellants rely on press coverage, a purported whistleblower report by a case worker, and video of “detransitioners” posted to Twitter. Reply at 17, 18, 17 n. 4 and 5. None of those opinionated anecdotes is a reliable source of scientific or medical information, and none of it was in the trial court record for Appellees to have an opportunity to refute it.

health and life outcomes of gender-expansive youth. Conversely, prohibiting the well-established standards of care described in the AAP *amicus* brief does harm to these youth with no discernible medical or legal justification. As APSAC has previously noted, transgender and gender-expansive youth are at a high risk of maltreatment, and gender-affirming care can protect their health and well-being. APSAC Position Statement: *Gender-Affirming Care Is Not Child Abuse*, Mar. 7, 2022, https://www.apsac.org/_files/ugd/c59607_b29b6dcd47cb45de990c036250eabe8a.pdf.

The Attorney General’s opinion is inappropriately dismissive of the possibility of medical and scientific consensus. “Legal and ethics scholars have suggested,” the opinion intones, that interfering in a child’s “normal physical development to ‘affirm’ a ‘gender identity’ that is at odds with bodily sex” is unethical. 2022 Tex. Op. Att’y Gen. No. KP-0401, at 8. In truth, the community of professionals that study and treat gender dysphoria engages in deeply thoughtful consideration of the related issues, and they are far more complex than the Attorney General recognizes. Issues include “maximiz[ing] treatment benefit to patients (beneficence), minimizing harm (nonmaleficence), supporting autonomy for pediatric patients during a time of rapid development, and addressing justice, including equitable access to care for [transgender and gender non-conforming]

youth.” Laura L. Kimberly *et al.*, *Ethical Issues in Gender-Affirming Care for Youth*, 142 *Pediatrics* e20181537 (2018). Meanwhile, the Attorney General’s opinion asserts that “medical professionals” can be ignored because, the opinion asserts, the opioid epidemic was “caused largely by pharmaceutical companies and medical professionals.”⁹ The leap that medical and scientific opinion and evidence can be ignored, regardless of the breadth of consensus and the extent of the research that has been conducted on gender dysphoria, *see generally* Endocrine Society Position Statement, is illogical. To be sure, no medical treatment is free of risk. Child- and youth-serving professionals must always weigh risk against benefit according to the individual circumstances of their patients. Gender-affirming care is no different. Here, as with all medical treatments, professionals—not politicians—should determine when benefit outweighs risk.

Gender-affirming care is the opposite of child abuse. Deprivation of this care, especially to youth already in a course of treatment, is dangerous medical neglect and child maltreatment.

⁹ The opinion mischaracterizes its source on this point; the opinion provides no evidence that medical experts promised opioids are “largely risk free,” and the source on which the opinion purports to rely actually says that because opioid use was increasing rapidly even before the medical community developed standards for pain treatment, “it is difficult to draw conclusions” about whether those standards affected the growth in opioid use. David W. Baker, *The Joint Commission's Pain Standards: Origins and Evolution* 5 (May 5, 2017), <https://perma.cc/RZ42-YNRC>.

1. Without Gender-Affirming Care Transgender Youth Face Further Elevated Risks Of Bullying, Depression, Anxiety, And Suicidality.

The vulnerabilities of untreated transgender youth are succinctly described in the *amicus* brief filed by the American Academy of Pediatrics (AAP) and associated health organizations:

If untreated or inadequately treated, gender dysphoria can cause depression, anxiety, self-harm, and suicidality. Research suggests the highly elevated rate of suicidality among transgender people. Indeed, in one recent national survey, over 60 percent of transgender adolescents and young adults reported having engaged in self-harm during the preceding 12 months, and over 75 percent reported symptoms of generalized anxiety disorder in the preceding two weeks. Even more troubling, more than 50 percent of this population reported having seriously considered attempting suicide, and more than one in three transgender adolescents reported having attempted suicide in the preceding 12 months.

Br. of the American Academy of Pediatrics as *Amicus Curiae*, p.7; see also *id.* at 19-24.

The Governor's Directive and Respondents' Reply pay no heed to the risks to life and health posed by untreated gender dysphoria. By declaring that an entire category of treatment is child abuse, the Texas Defendants-Appellants create a very real likelihood that proper and necessary treatment will be investigated and treated as a criminal act by executive fiat and without any public vetting under the Texas Administrative Procedure Act. This possibility is not merely theoretical; without the

injunction below, this outcome is imminent for many Texas families with children receiving gender-affirming treatments as well as for their healthcare providers.

As the leading organizations in child mistreatment prevention, response, and education, APSAC and its fellow *amici* have never viewed gender-affirming care as child abuse or medical abuse. Gender dysphoria is a medical condition for which there are established standards of care, which, in many cases, include gender-affirming medical treatments. Parents have the right to seek treatments that benefit their child's health and well-being. Healthcare providers must have the freedom—and, indeed, have the duty—to provide the standard of care to their patients. As Justice Lehrmann astutely noted in his concurrence to the Texas Supreme Court's May 13 *In re Abbott* opinion:

By essentially equating treatments that are medically accepted and those that are not, the OAG Opinion raises the specter of abuse every time a bare allegation is made that a minor is receiving treatment of any kind for gender dysphoria. **In my view, a parent's reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse.**

In re Abbott, 645 S.W.3d 276, 287 n. 3 (Tex. 2022) (emphasis added).

The *amici* agree with Justice Lehrmann that parents' reliance on well-established, accepted standards of medical care simply cannot and do not constitute child abuse.

II. THE DIRECTIVE WILL CAUSE THE EXACT TYPES OF HARM IT PURPORTS TO PREVENT BY MANDATING MEDICAL NEGLIGENCE AND CAUSING TRAUMA THROUGH UNNECESSARY INVESTIGATIONS.

DFPS has publicly indicated it will follow the Governor’s Directive, thus forcing parents of transgender youth into an impossible dilemma. Under the Directive’s strained misinterpretation of Texas law, gender-affirming care constitutes child abuse and requires, at minimum, an investigation.¹⁰ *See* 2022 Tex. Op. Atty Gen. No. KP-0401; Tex. Gov. Abbott Letter to Texas Department of Family and Protective Services, Feb. 22, 2022 (“Texas law also imposes a duty on DFPS to investigate the parents of a child who is subjected to these abusive gender-transitioning procedures . . .”). At the same time, because gender-affirming care is both the accepted standard of care and medically necessary for some youth diagnosed with gender dysphoria, parents should provide such care to their youth. A failure to do so could constitute criminal medical neglect, which is, in turn, a form of child abuse. On the other hand, being subjected, without cause, to a child abuse investigation and resulting consequences if the provision of gender-affirming care is deemed by DFPS to be child abuse, is itself traumatic.

¹⁰ The Texas Supreme Court’s May 13, 2022 opinion noted that even if the DFPS can legally *investigate* gender-affirming care as child abuse, a court must make the ultimate finding regarding “whether the child abuse investigated and alleged by DFPS qualifies as such under Texas law.” Op. at 7. But the initiation of unwarranted investigations of responsible parents for child abuse in itself causes fear, pain, and danger.

A. The Directive May Force Parents Seeking to Avoid Investigation to Engage in Medical Neglect.

1. *Medical neglect is a form of child abuse.*

In Texas, medical neglect is a defined subcategory of “neglect,” which includes:

Failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting an immediate danger of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child.

Withholding or reversing gender-affirming care is harmful to the adolescent patient; either action can be a dangerous and even lethal form of medical neglect.

TEX. FAM. CODE § 261.001(4)(A)(ii)(b); 40 TEX. ADMIN. CODE § 700.46.

When a medical professional, in consultation with the adolescent patient and parents, determines that treatment is necessary, forbidding the treatment by defining it as child abuse upends medical professional practice and function. At a bare minimum, criminalizing a form of medical treatment should be supported by a broad consensus of professional opinion condemning it. No such consensus exists here. To the contrary, the *amici* represent the consensus of professionals across a spectrum of disciplines—medical, mental health, social work, etc.—working with abused children, and they state unequivocally that the consensus supports providing gender-affirming care.

2. *Medical neglect is dangerous and abusive, and can have lifelong impacts.*

The harmful effects of childhood neglect are not minor and often negatively impact individuals well into adulthood.¹¹ In 2019, although medical neglect accounted for 2.3% of reports of child abuse, it constituted 7.8% of reported child fatalities.¹² Given the known risks of depression, self-harm, and suicidality among youth with untreated gender dysphoria, it is inevitable that the harms of withholding needed gender-affirming care will be grave. Forcible detransition of youth already receiving gender-affirming care is especially dangerous.¹³ Youth who have their medically prescribed treatments withdrawn will be destabilized, retraumatized, and forced to contend again with the unmitigated symptoms of gender dysphoria that drove their families to seek care for them in the first place. Thanks to the willingness of the Texas courts to give this matter their swift attention, insufficient time has

¹¹ J. Stirling, *Understanding Medical Neglect: When Needed Care Is Delayed or Refused*, 13 J. Child & Adolescent Trauma, 271 (2019).

¹² U.S. Dep't of Health & Human Servs., Admin. for Children & Families, "Child Maltreatment 2019," pp. 47, 56, at <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf>.

¹³ Although truly voluntary detransition does occur, this phenomenon is rare. A study from the Netherlands of more than 800 adolescents with gender dysphoria revealed that only 1.9% of adolescents who used pubertal suppression discontinued this treatment without proceeding to gender-affirming hormone therapy. Similarly, a recent analysis of a survey of individuals who had transitioned found that only 13.1% of respondents later detransitioned either temporarily or permanently. Of those individuals, 82.5% reported that they did so at least in part because of external factors such as societal pressure, while only 15.9%—only 2.1% of all survey respondents—cited internal factors such as uncertainty or change in their gender identity as influencing their decision to detransition. Jack L. Turban *et al.*, "Factors Leading to 'Detransition' Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis," 8 LGBT Health 273 (2021).

passed to gather and thoroughly validate population-level evidence of these harms that will result from the Governor's order and Attorney General's opinion. However, the federal Seventh Circuit Court of Appeals recently acknowledged the grave danger of forcibly and abruptly detransitioning patients from hormone therapy when it affirmed a decision enjoining an Illinois statute that restricted inmates' access to gender affirming care. The court found that the law prohibiting hormone therapy for transgender inmates constituted cruel and unusual punishment that violated the Eighth Amendment:

When hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise. The dysphoria and associated psychological symptoms may resurface in more acute form. In addition, there may be severe physical effects such as muscle wasting, high blood pressure, and neurological complications. All three plaintiffs in this case experienced some of these effects when DOC doctors discontinued their treatment following the passage of Act 105.

Fields v. Smith, 653 F.3d 550, 554 (7th Cir. 2011).¹⁴ Imposing such a fate on children should be unthinkable. The Directive effectively mandates medical neglect and will force parents to either commit harm or face investigation and potentially criminal prosecution or child removal.

¹⁴ Relatedly, research has documented harm caused by forcible "conversion therapy," including higher odds of severe psychological distress and increased suicide attempts compared to other interventions for gender dysphoria. Jack L. Turban *et al.*, "Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults," 77 JAMA Psychiatry 68 (2020).

B. For Those Parents Who Decline to Subject Their Children to Medical Neglect, Unwarranted Child Abuse Investigations and Child Removals Could Cause Significant, Unnecessary Trauma.

Testimony at the trial court hearing on the motion for temporary injunction in *Doe v. Abbott* provides useful background here, as both cases seek court injunction of the Directive. In that case, witnesses laid out the uniquely threatening nature of the investigations commanded by the Governor’s directive and the Department’s instructions to staff investigators. An investigation under these instructions has high stakes for the affected family and carries the threat or even likelihood of child removal. Because transgender and gender-expansive youth will be removed from their parents who are supportive, loving and not engaged in abuse, these investigations and the removals they threaten endanger the mental and emotional health and well-being not only of targeted youth, but also of their parents and siblings as well as their medical teams and their local school, religious, and neighborhood communities. Landon D. Hughes et al., “These Laws Will Be Devastating”: Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents. *J Adolescent Health* 69 (2021): 976-982; “This Could Mean Death for My Child”: Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents. *J Adolescent Health* 68 (2021): 1082-1088.

The Texas Family Code outlines the process for investigating top-priority child abuse reports, along with the process for removing a child from their home. TEX. FAM. CODE §§ 262.101 *et seq.* If certain criteria are met, the government may immediately take custody of a child. It is no answer for the Governor to respond that child removal has not yet happened as a result of these investigations, or to say that removal is unlikely. By operation of Texas law, the likelihood of removal is built into the decision to treat these investigations as priority cases. The potential injury of child removal for parents providing medically directed gender-affirming care is very real; indeed, the Directive seems intended to make it mandatory.

Besides, the mere fact of an unwarranted, unsubstantiated child abuse investigation purposefully initiated because of a political dislike of the generally accepted standard of care is itself a harm. Even the Texas Code acknowledges, implicitly, that an investigation may itself be a harm. The Texas Family Code establishes that if DFPS receives an anonymous tip of abuse or neglect, they shall conduct a preliminary investigation. But, “unless the department determines there is some evidence to corroborate the report of abuse, the department may not conduct the thorough investigation required by this chapter or take any action against the accused of abuse.” TEX. FAM. CODE § 261.304. In other words, when an investigation is based on the sort of unsubstantiated supposition of an anonymous tip, DFPS must overcome a presumption against initiating a child abuse

investigation. Here, that presumption is biased against a parent who is trying to seek medical care for their child.

C. Unnecessary child removal and placement in foster care can cause permanent damage.

Standard DFPS process amply demonstrates the potential of child removal into foster care. And a recent investigation revealed that Texas operates a disjointed and dangerous child protection system where harm to children is at critical times overlooked, ignored, or forgotten. First Court Monitors' Report, *M.D. ex rel Stukenberg v. Abbott*, No. 2:11-cv-84, p.12 (S.D. Tex. June 16, 2020). For example, Texas has placed children in the care of those with open child abuse allegations amid findings of physical restraints and injuries to children. *Id.* And if a transgender or gender-expansive child is removed from the child's home because the family affirmed the child's gender identity and facilitated the appropriate medical care, there is essentially no chance that the child will be placed with a foster family that will likewise affirm the child's identity.

In effect, DFPS's choice to follow the Directive guarantees the initiation of otherwise unwarranted investigations and creates an unjustifiable risk that children in loving and stable homes will be forced into the foster care system, which is already flooded with children in need of a stable home. Not only is this a solution in search of a problem, but it is no solution at all: rather, it creates a whole new problem for vulnerable children and youth.

1. ***Unwarranted Placement in the Foster Care System Would Compound Any Pre-Existing Trauma Due to Instability in Housing, Education, and Healthcare Access for Youth Generally***

In standard child welfare practice, children and youth are placed in the child welfare system due to abuse, neglect, or social instability. Alison M. Stoner *et al.*, “Predictors of Reduction in Symptoms of Depression for Children and Adolescents in Foster Care,” 24 J. Child & Fam. Stud. 784, 784 (2015). Of course, the child welfare system expects foster placement to offer advantages compared to the abusive home. Unfortunately, placement in foster care often compounds prior childhood trauma experienced by itself adding more layers of traumatic experiences, such as removal from home, multiple placements, and the loss of important relationships. Sara B. Johnson & Julia M. Pryce, “Therapeutic Mentoring: Reducing the Impact of Trauma for Foster Youth,” 92 Child Welfare 9, 9 (2013).

2. ***LGBTQ+ Youth Are at a Heightened Risk of Negative Effects of the Foster Care System.***

Although there have been few studies focusing directly on the foster care system’s impact on gender-expansive youth, studies regarding LGBTQ youth, in general, both include gender-expansive youth and are broadly instructive.

Regrettably, the child welfare system is particularly harmful to many LGBTQ youth, who are 2.7 times more likely to encounter the foster care system than others. Laura Baams *et al.*, “LGBTQ Youth in Unstable Housing and Foster Care,” 143

Pediatrics e20174211 (2017). Of LGBTQ youth in foster care, 57% are youth of color and experience additional discrimination as a result. B.D. Wilson *et al.*, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, UCLA: The Williams Institute (2014), at <https://escholarship.org/uc/item/6mg3n153>; Texas CASA, *CASA Deep Dive: Supporting LGBTQ Youth in Foster Care*, June 24, 2019, at <https://texascasa.org/2019/06/24/casa-deep-dive-supporting-lgbtq-youth-in-foster-care/>. Although further abuse is a known risk for any foster youth, LGBTQ youth face compounding challenges brought on by discrimination and stigma associated with their sexual orientation and/or gender identity. Jevay Grooms, *No Home and No Acceptance: Exploring the Intersectionality of Sexual/Gender Identities (LGBTQ) and Race in the Foster Care System*, 47 *Rev. Black Political Econ.* 177, 178 (2020). This vulnerable population is more than twice as likely as non-LGBTQ peers to report being treated poorly by the foster care system. U.S. Dep't of Health & Human Servs. Admin. on Children, Youth & Families, *Information Memorandum on Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (2011), at [http:// www.nrcyd.ou.edu/publication-db/documents/acyf-cb-im-11-03.pdf](http://www.nrcyd.ou.edu/publication-db/documents/acyf-cb-im-11-03.pdf). A staggering number of LGBTQ youth feel safer on the streets as a result: 78 percent of LGBTQ youth were removed or ran away from their foster care placements because of hostility regarding their gender identity or sexual orientation.

Randi Feinstein *et al.*, *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System*, New York City: Urban Justice Center (2001).

A 2020 study reported an extraordinary number of placement moves for LGBTQ foster youth, with several respondents specifying that they were moved at least once to a new placement due to their sexual orientation and/or gender identity. June C. Paul, “Exploring Support for LGBTQ Youth Transitioning from Foster Care to Emerging Adulthood,” 119 *Children & Youth Servs. Rev.* 1 (2020). The situation is exacerbated in Texas because of a shortage of LGBTQ-friendly foster homes. Adam McCormick, *Texas’ faith-based foster care reforms could fail LGBT youth*, TribTalk/The Texas Tribune (Nov. 30, 2016), at <https://www.tribtalk.org/2016/11/30/texas-faith-based-foster-care-reforms-could-fail-lgbt-youth/>.

III. THE DIRECTIVE AND ITS IMPLEMENTATION UPEND TEXAS LAW AND HARM CHILDREN AND YOUTH.

Because gender-affirming care is not child abuse, the Directive itself causes the harm it purports to prevent. The Directive was issued, without authority, by an official who has no child welfare, medical, or mental health experience or expertise. Further, it contradicts the well-established standards of care of the medical profession and contravenes the expert recommendations of *amici*.

A. The Governor and Attorney General Are Not Authorized to Establish DFPS's Enforcement or Investigation Policy.

Neither Governor Abbott nor Attorney General Paxton sets DFPS Policy. Nor are they even authorized to do so.¹⁵ Simply put, they are not child abuse professionals and do not have any pertinent medical background.

Both the Governor's and the Attorney General's powers are limited with respect to DFPS. The Texas Supreme Court has held as much in this very case. The Governor and the Attorney General cannot "directly control DFPS' investigatory decisions." *In re Abbott*, 645 S.W.3d 276, at 281 (Tex. 2022). The Governor's letter is not binding. *Id.* at 282, fn. 5. And "it is well-settled that an Attorney General opinion interpreting the law cannot alter the pre-existing legal obligations of state agencies or private citizens." *Id.* at 276 (internal citations omitted). Put simply, neither the Governor nor the Attorney General may re-define what constitutes child abuse.

This is entirely appropriate because neither is a child abuse professional. Neither the Governor nor the Attorney General is qualified to direct DFPS's investigatory activity. Governor Abbott was elected to serve as Governor and has no relevant background in child abuse investigations or medicine. Attorney General

¹⁵ The Texas Constitution enumerates the Governor's powers. They do not include setting policies for state agencies. *See generally* TEX. CONST. ART. IV. The Texas Constitution also circumscribes the Attorney General's powers, which do not include determining the law for other agencies. TEX. CONST. ART. IV, § 22.

Paxton was elected to serve as the chief lawyer for Texas and he, likewise, lacks sufficient background in child abuse investigations and medicine.

B. DFPS Should Protect Children in Texas.

1. DFPS should scrutinize, rather than accept, the Directive.

DFPS should not reverse the status quo by enforcing the improper Directive. “The *status quo ante* at DFPS was that allegations that a child was being provided medically recommended healthcare under the treatment and supervision of a doctor and with the informed consent of both the parents and the child could not, by itself, be the basis for an investigation of child abuse.” Br. of Current and Former DFPS Professionals, at 1. Before February 22, 2022, DFPS never investigated, on theories of “child abuse,” parents who only followed medically recommended care prescribed by a doctor and with the assent of the child. *Id.* Nor, prior to the Directive, has a parent or guardian’s good-faith reliance on a licensed doctor’s advice or medical care been alleged to constitute child abuse. *Id.* at 2.

This past practice at DFPS surely represented the considered judgment of the child-welfare professionals at the agency. In February 2022, nothing changed in the course of medical or scientific knowledge or opinion. No credible child abuse literature was published identifying gender affirming care as child abuse. The collective of child abuse prevention professionals, as noted above, remains convinced to the contrary. That DFPS is now conducting abuse investigations based

on gender-affirming care is an abdication of its responsibilities as an agency that is charged to implement policy based on the realities of child welfare and medical and mental health expertise.

On the one hand, the DFPS must prevent abuse, neglect, and exploitation. TEX. HUM. RES. CODE § 40.002(b). On the other hand, DFPS must also “provide family support and family preservation services that respect the fundamental rights of parents to control the education and upbringing of their children.” *Id.* § 40.002(b). Here, those goals are not in tension, and both compel a single conclusion: The DFPS must reject the Governor and Attorney General’s attempt to have DFPS define gender-affirming care as child abuse.

As noted by many DFPS professionals in their *amicus* brief:

The great mass of DFPS employees did not choose the child welfare profession to break up loving families who, with no ill motive, malice, or negligence toward their child, are simply following medical advice and administering medicine under a doctor’s supervision. This has never been DFPS practice because neither this Court nor any court in Texas has ever construed the child abuse statute to reach such a situation. CPS employees especially object to doing so when they are already stretched beyond their resources and unable to help the thousands of Texas children in the CPS system who are victims of actual neglect or abuse as those terms were understood prior to February 22 and as construed by Texas court precedents.

Br. of Current and Former DFPS Professionals, at 12; *see also id.* at 12-15. The views of these DFPS professionals are shared by child safety professionals around the country.

Enforcing the Governor's Directive would force DFPS to both impose medical neglect on transgender children and violate the fundamental rights of their parents to make informed medical decisions on their behalf; while at the same time, taking resources from the many children in real need of protection. The Governor's Directive runs directly contrary to DFPS' mission. And it upends the status quo, creating substantial harm where there previously was none. DFPS should therefore reject the Directive.

Because DFPS appears unwilling to do so, this Court should affirm the injunction entered by the trial court and thereby maintain the status quo.

CONCLUSION

Amici uniformly reject the notion that gender-affirming care is child abuse and conclude that investigations of gender-affirming care as child abuse is therefore unwarranted and harmful. They urge this Court to affirm the trial court's injunction.

Dated: April 10, 2023

Respectfully submitted,

/s/ Greg R. Wehrer

Greg R. Wehrer
Texas Bar No. 24068592
SQUIRE PATTON BOGGS (US) LLP
600 Travis Street, Suite 6700
Houston, Texas 77002
Phone: (713) 546-5850
Fax: (713) 546-5830
Email: greg.wehrer@squirepb.com

Rafael M. Langer-Osuna
SQUIRE PATTON BOGGS (US) LLP
475 Sansome Street, 16th Floor
San Francisco, California 94111
Phone: (415) 954-0200
Fax: (415) 393-9887
Email: rafael.langerosuna@squirepb.com

Keith Bradley
SQUIRE PATTON BOGGS (US) LLP
717 17th Street, Suite 1825
Denver, CO 80202
Phone: (303) 894-1776
Fax: (303) 894-9239
Email: keith.bradley@squirepb.com

Mary Kelly Persyn
Persyn Law & Policy
912 Cole Street, PMB 124
San Francisco, California, 94117
Phone: (628) 400-1254
Email: marykelly@persynlaw.com

COUNSEL FOR *AMICI CURIAE*

CERTIFICATE OF COMPLIANCE

Based on the word count function of Microsoft Word 365, this brief contains 9,114 words, excluding portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i).

/s/ Greg R. Wehrer

Greg R. Wehrer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Appellate Procedure on the 10th day of April, 2023 on each of the following persons listed below by the means indicated:

VIA EFILETEXAS.GOV E-SERVICE:

Courtney Corbello
Assistant Attorney General
Johnathan Stone
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Brandt Thomas Roessler
Nischay K. Bhan
Nicholas F. Palmieri
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, New York 10112-4498

Omar Gonzalez-Pagan
M. Currey Cook
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3919

Brian Klosterboer
Chloe N. Kempf
Savannah Kumar
Adriana Piñon
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
5225 Katy Fwy., Suite 350
Houston, Texas 77007

Susan Kennedy
BAKER BOTTS L.L.P.
2001 Ross Ave, Ste. 900
Dallas, Texas 75201

Derek R. McDonald
Maddy R. Dwertman
John Ormiston
BAKER BOTTS L.L.P.
401 S. 1st Street, Suite 1300
Austin, Texas 78704

Paul D. Castillo
Shelly L. Skeen
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Ave., Unit 500
Dallas, Texas 75219

Karen L. Loewy
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304

Chase Strangio
Anjana Samant
Hina Naveed
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004

Elizabeth Gill
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, California 94111

/s/ Greg R. Wehrer
Greg R. Wehrer

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Claudia Martinez on behalf of Greg Wehrer

Bar No. 24068592

claudia.martinez@squirepb.com

Envelope ID: 74495067

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Brief of American Professional Society on the Abuse of Children and 19 Professional Child Welfare Organizations as Amici Curiae in support of Appellees

Status as of 4/11/2023 9:21 AM CST

Associated Case Party: Greg Abbott

Name	BarNumber	Email	TimestampSubmitted	Status
Courtney Corbello		courtney.corbello@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Johnathan Stone		johnathan.stone@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Thomas Ray		thomas.ray@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
LaShanda Green		lashanda.green@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Ryan Kercher		ryan.kercher@oag.texas.gov	4/10/2023 4:54:35 PM	SENT

Associated Case Party: PFLAG, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Derek McDonald		derek.mcdonald@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
Madeleine Dwertman	24092371	maddy.dwertman@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
David Goode	24106014	david.goode@usdoj.gov	4/10/2023 4:54:35 PM	SENT
Nischay Bhan	24105468	Nischay.bhan@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
John Ormiston	24121040	john.ormiston@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
Nicholas Guillory	24122392	nicholasaguillory@gmail.com	4/10/2023 4:54:35 PM	SENT
Brandt Roessler	24127923	brandt.roessler@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
Karen Loewy		kloewy@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Savannah Kumar		skumar@aclutx.org	4/10/2023 4:54:35 PM	SENT
Carolina Caicedo		ccaicedo@aclu.org	4/10/2023 4:54:35 PM	SENT
Maia Zelkind		mzelkind@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Nick Palmieri		nick.palmieri@bakerbotts.com	4/10/2023 4:54:35 PM	SENT

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Claudia Martinez on behalf of Greg Wehrer

Bar No. 24068592

claudia.martinez@squirepb.com

Envelope ID: 74495067

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Brief of American Professional Society on the Abuse of Children and 19 Professional Child Welfare Organizations as Amici Curiae in support of Appellees

Status as of 4/11/2023 9:21 AM CST

Associated Case Party: PFLAG, Inc.

Susan Kennedy		susan.kennedy@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
Elizabeth Gill		egill@aclunc.org	4/10/2023 4:54:35 PM	SENT
Adriana Piñon		apinon@aclutx.org	4/10/2023 4:54:35 PM	SENT
Chase Strangio		cstrangio@aclu.org	4/10/2023 4:54:35 PM	SENT
James Esseks		jesseks@aclu.org	4/10/2023 4:54:35 PM	SENT
Anjana Samant		asamant@aclu.org	4/10/2023 4:54:35 PM	SENT
Andre Segura	24107112	asegura@aclutx.org	4/10/2023 4:54:35 PM	SENT
Brian Klosterboer	24107833	bklosterboer@aclutx.org	4/10/2023 4:54:35 PM	SENT
Michele Clanton-Lockhart		mclanton@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Paul Castillo		pcastillo@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Kath Xu		kxu@aclu.org	4/10/2023 4:54:35 PM	SENT
Omar Gonzalez-Pagan		ogonzalez-pagan@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Currey Cook		ccook@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Camilla Taylor		ctaylor@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Maddy Dwertman		maddy.dwertman@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
Guilly Guillory		nguillory@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Elizabeth Gill		egill@aclunc.org	4/10/2023 4:54:35 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Karlene Dunn Poll	24027297	Karlene@slatelaw.com	4/10/2023 4:54:35 PM	SENT

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Claudia Martinez on behalf of Greg Wehrer

Bar No. 24068592

claudia.martinez@squirepb.com

Envelope ID: 74495067

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Brief of American Professional Society on the Abuse of Children and 19 Professional Child Welfare Organizations as Amici Curiae in support of Appellees

Status as of 4/11/2023 9:21 AM CST

Case Contacts

Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Meredith Parekh	24075953	mparekh@drtx.org	4/10/2023 4:54:35 PM	SENT
LASHANDA GREEN		lashanda.green@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Thomas Ray		thomas.ray@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Alan York		ayork@reedsmith.com	4/10/2023 4:54:35 PM	SENT
Maddy Dwertman		Maddy.dwertman@bakerbotts.com	4/10/2023 4:54:35 PM	SENT
Shelly Skeen		sskeen@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Nicholas Guillory		nguillory@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Omar Gonzalez-Pagan		Ogonzalez-pagan@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
M. curry Cook		ccook@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Camilla Taylor		ctaylor@lambdalegal.org	4/10/2023 4:54:35 PM	SENT
Thomas Ray		thomas.ray@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Omar JAlaniz		oalaniz@reedsmith.com	4/10/2023 4:54:35 PM	SENT
Courtney Corbello		courtney.corbello@oag.texas.gov	4/10/2023 4:54:35 PM	SENT
Christopher Clay		cclay@aclutx.org	4/10/2023 4:54:35 PM	SENT
Christine Choi		cchoi@aclu.org	4/10/2023 4:54:35 PM	SENT
Clohe Kempf		ckempf@aclutx.org	4/10/2023 4:54:35 PM	SENT
Hina Naveed		hnaveed@aclu.org	4/10/2023 4:54:35 PM	SENT
Karen Wright		kwright@reedsmith.com	4/10/2023 4:54:35 PM	SENT

Associated Case Party: American Professional Society on the Abuse of Children and 19 Professional Child Welfare Organizations

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Claudia Martinez on behalf of Greg Wehrer

Bar No. 24068592

claudia.martinez@squirepb.com

Envelope ID: 74495067

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description: Brief of American Professional Society on the Abuse of Children and 19 Professional Child Welfare Organizations as Amici Curiae in support of Appellees

Status as of 4/11/2023 9:21 AM CST

Associated Case Party: American Professional Society on the Abuse of Children and 19 Professional Child Welfare Organizations

Name	BarNumber	Email	TimestampSubmitted	Status
Greg R.Wehrer		greg.wehrer@squirepb.com	4/10/2023 4:54:35 PM	SENT