

No. 03-22-00420-CV & No. 03-22-00587-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS

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JEFFREY D. KYLE
Clerk

JAIME MASTERS, in her official capacity as Commissioner of the Texas
Department of Family and Protective Services; and the TEXAS

DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

Appellants,

v.

PFLAG, INC., MIRABEL VOE, individually and as parent and next friend of
ANTONIO VOE, a minor; WANDA ROE, individual and as parent and next
friend of TOMMY ROE, a minor; ADAM BRIGGLE and AMBER BRIGGLE,
individually and as parents and next friends of M.B., a minor,

Appellees.

BRIEF OF AMICI CURIAE

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STATEMENT OF INTEREST OF AMICI CURIAE

The National Center for Youth Law (“NCYL”) is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. For over 50 years, NCYL has worked to protect the rights of children and ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to youth in cases that have broad impact and has represented many youth in litigation to ensure that state child welfare systems provide safe placements that support their identities and facilitate their connections to their families and communities, including for LGBTQ youth.

Disability Rights Texas (“DRTX”) is the Protection and Advocacy System (“P&A”) for the State of Texas, whose purpose is to protect and advocate for the legal and human rights of individuals with disabilities. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977) and Tex. Att’y Gen. Op. No. JC-0461 (2002); *see also* Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041 et seq.; Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §§ 10801 et seq.; and Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e. DRTX has a Foster Care Team, which accepts court appointments from state district courts to act as attorneys ad litem for foster children with disabilities

who are in the Temporary Managing Conservatorship (“TMC”) or Permanent Managing Conservatorship (“PMC”) of the Department of Family and Protective Services (“DFPS”). In this capacity, DRTX foster care attorneys practice in counties around the state, both representing children in child welfare matters and representing foster children in ancillary litigation such as special education proceedings and Medicaid appeals.

DRTX attorneys have a wealth of experience advocating for foster children with mental health and behavioral health needs, intellectual and developmental disabilities, and youth on the cusp of aging out of care, including some youth who have needed gender affirming care. Due to the scope of practice, DRTX foster care attorneys have visited most congregate care facilities and psychiatric hospitals around the state. This team has operated for nearly 15 years, allowing them to witness both the long-term effects of foster care on children, and how the Texas child welfare system interacts with other state-run systems.

Equal Rights Advocates (ERA) is a California-based national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women, girls, and people of all marginalized genders. Since its founding in 1974, ERA has led efforts to combat sex-based and other forms of discrimination by litigating high-impact cases,

engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through its national Advice & Counseling program. ERA has filed hundreds of suits and appeared as *amicus curiae* in numerous cases to defend and enforce civil rights in state and federal courts, including the United States Supreme Court. ERA firmly believes that transgender youth deserve to be supported in existing as their full selves, and that families have the right to access necessary medical services, including gender affirming care on behalf of their children without the risk of state harm.

John Burton Advocates for Youth (JBAY) improves the quality of life for youth in California who have been in foster care or homeless by advocating for better laws, training communities to strengthen local practices, and conducting research to inform policy solutions. JBAY is a 501(c)(3) nonprofit founded by retired State Senator John Burton. JBAY works throughout California and is headquartered in San Francisco, with an office in Los Angeles and staff in San Diego. Providing timely, appropriate, and responsive gender-affirming and reproductive sexual healthcare is a core part of our activities.

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and

justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center was the first nonprofit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

For over fifty years, Public Counsel has worked with communities and clients to create a more just society through legal services, advocacy, and civil rights litigation. Public Counsel is committed to removing legal barriers for children, youth, families, and communities of color most impacted by racism and economic injustice. In its work with children and families, it sees how the long reach of the child welfare system separates children, both formally and informally, from their families, communities, and culture – creating trauma that reverberates through generations.

The Women's Law Project (WLP) is a nonprofit legal advocacy organization that seeks to advance the rights of women, girls, and LGBTQ+ people in

Pennsylvania and beyond. Founded in 1974, the WLP engages in impact litigation, direct legal assistance and representation, public policy advocacy, and community education. WLP fights policies and practices that entrench sex-based stereotypes, including discrimination against transgender and non-binary people. WLP also fights expanding definitions of child abuse that harm women and gender diverse people.

INTRODUCTION

After the Texas legislature refused to pass legislation that would criminalize medical treatment for transgender youth with gender dysphoria, Governor Abbott attempted to achieve the same result via a “directive” that instructed the Texas Department of Family and Protective Services (DFPS) to investigate the families of children who seek medical care for their children’s gender dysphoria. In his directive, Governor Abbott instructed “all licensed professionals who have direct contact with children” and “members of the general public” to report children receiving gender affirming care to DFPS. Attorney General Paxton also issued an opinion stating that treating a young person’s gender dysphoria could constitute “child abuse.” Accordingly, DFPS has complied with the opinion of the Attorney General and the directive of the Governor by investigating reports of “gender-transitioning procedures” as child abuse. DFPS’s rule has already led to investigations of families in Texas who have supported their children by following medical advice and allowing them access to medically necessary care, including mental healthcare and gender-affirming medical care. It has caused doctors in Texas to discontinue medically necessary gender-affirming medical care for youth. And it has frightened parents in Texas, who have been told by the highest officials of the state that if they seek needed, doctor-recommended medical treatment for

their children, the state might take away their children. Several lawsuits were filed to protect the right of Texas families to access medically necessary gender-affirming care for their children, and the right of transgender Texas youth to exist, including this one.

Amici submit this brief to highlight the many ways in which child welfare investigations can harm families, even when child welfare staff determine that abuse or neglect has not occurred and cases are closed. These harms include fear, stigma, and reduced access to supportive and even life-saving services; economic losses; trauma; and an increased likelihood that children will be removed from their families in the future.

ARGUMENT

I. EVEN DFPS INVESTIGATIONS CAUSE HARM TO TEXAS FAMILIES.

Although most contacts with DFPS do not lead to family separation or court involvement, these contacts still cause substantial harm to families.¹ Investigations by DFPS have traumatic and destabilizing effects for children, parents, families, and communities. Investigations often both cause harm and fail to protect children.

¹ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, *Child Maltreatment 2018* (2019). <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf> (last visited July 29, 2022). See also Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610 (2020).

Frivolous investigations that target groups of people are inherently unfair, and the Department of Justice has acted against such discriminatory investigations.² Moreover, even when the state investigates and finds that no abuse or neglect has occurred and children are not removed from their homes, as frequently occurs, the costs of investigations to families' livelihoods, homes, relationships, and mental health are high.

Most allegations of abuse or neglect that result in a child welfare investigation are found to be unsubstantiated.³ A child welfare investigation in Texas leads to one of three main findings, or dispositions, by DFPS. If DFPS workers believe that, based on a preponderance of the evidence, abuse or neglect has occurred, they will make a disposition of "Reason to Believe."⁴ This disposition is made without any court ruling. DFPS staff can also make dispositions of "Ruled Out," which means that DFPS staff determine that it is reasonable to conclude that

² U.S. DEPT. OF HEALTH & HUMAN SERVICES, VOLUNTARY RESOLUTION AGREEMENT, U.S. DEPT. OF HEALTH & HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND OREGON DEPT. OF HUMAN SERVICES (2019); U.S. DEPT. OF HEALTH & HUMAN SERVICES, VOLUNTARY RESOLUTION AGREEMENT, U.S. DEPT. OF HEALTH & HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND MASSACHUSETTS DEPT. OF CHILDREN AND FAMILIES (2020).

³ ADMIN. ON CHILDREN, *supra* fn. 1, at 27.

⁴ DFPS also uses another disposition, "Administrative Closure," in cases where DFPS intervention is not warranted based on information put forward after the beginning of an investigation, but data on that disposition was not available. See Child Protective Investigations (CPI), TEXAS DEP'T. OF FAMILY AND PROTECTIVE SERVICES, <https://www.dfps.state.tx.us/Investigations/> (last visited July 26, 2022).

abuse or neglect did not occur;; or “Unable to Determine,” when the other two dispositions do not apply.⁵ In Texas, almost three out of four DFPS investigations lead to a determination that abuse or neglect were “Ruled Out.”⁶

Investigations, however, are not harmless: even an investigation that is “Ruled Out” has consequences for families. The disruptive consequences of an investigation can lead to substantial economic costs to families, causing parents to lose jobs and even housing. Children and families can experience trauma from the invasive and destabilizing investigation process. Every investigation, even one that finds no abuse or neglect, creates a greater likelihood that a child will be removed from their family in the future. Due to the directive and DFPS rule, parents fear being reported by service providers and may avoid accessing the services required to support their children. And youth are deterred from seeking the healthcare that they need, including mental healthcare. Directing DFPS to investigate families simply for following medical advice and allowing their children access to medically

⁵ “Unable to Complete,” is another disposition, which means the investigation cannot be concluded. This lacks relevance here, as it generally involves an inability to locate the family at issue.

⁶ ADMIN. ON CHILDREN, *supra* fn. 1, at 27. *See also* Number of Completed Investigations by Disposition and Closure Action by State/Region/Stage County, TEXAS DEP’T. OF FAMILY AND PROTECTIVE SERVICES, https://databook.dfps.state.tx.us/views/cps_inv_03_dfps/monthlystatesummary?:showAppBanner=false&:display_count=n&:showVizHome=n&:origin=viz_share_link&:isGuestRedirectFromVizportal=y&:embed=y (last visited July 26, 2022).

necessary gender-affirming care, despite no evidence supporting that such care is abusive, will not protect children from harm. It will only lead to more families grappling with the serious consequences of child welfare investigations.

A. Fear and Stigma of Child Welfare Contact has Costs to Families and Youth.

Child welfare investigations carry a significant stigma for families. The stigma of child welfare contact, and of being labeled as an “abuser,” can cause substantial harm to families, including directly affecting their access to resources. Parents who have contact with the child welfare system express feeling stigmatized as “bad parent[s]”⁷ and shamed within their communities for having open child welfare cases. Parents report feeling perceived as not capable of providing their children with what they deserve.⁸

This stigma not only harms reputations but also can prevent parents from accessing the resources they need to provide for their families. Fear of child welfare contact can lead parents and youth to avoid services, including medical care, mental healthcare, and social service programs, ultimately negatively affecting the well-being of youth and families. Instead of protecting the well-being

⁷ Stephen A. Kapp & Jennifer Propp, *Client Satisfaction Methods: Input from Parents with Children in Foster Care*, 19 CHILD & ADOLESCENT SOC. WORK J. 227, 236 (2002).

⁸ Darcey H. Merritt, *Lived Experiences of Racism Among Child Welfare-Involved Parents*, 13 RACE & SOC. PROBS. 63, 209 (2021).

of children, this new directive discourages families from seeking help that their children may need.

The DFPS rule mandating investigation of families who seek gender-affirming care also disincentivizes transgender teenagers from seeking the services they need, including mental healthcare, for fear that their families may be reported for child abuse simply because they are transgender.⁹ Because any healthcare professional in Texas who suspects “child abuse” must report it, transgender youth in Texas now rightly fear that any healthcare they seek, including mental healthcare, could lead to an investigation of their family for child abuse.¹⁰ This rule places an intolerable burden on young people, namely, to choose between either jeopardizing their own health and well-being or placing their family in grave danger. Transgender youth face significant stigma and discrimination, which can impact their mental health and even lead to self-harm or suicide.¹¹ As a result of bigotry and intolerance, compared to youth who are not transgender, transgender youth

⁹ Attorney General Paxton’s opinion letter makes clear that anyone who suspects a child may be receiving gender-affirming medical care should report their family for child abuse. Texas Op. Attny’ Gen. No. KP-0401 (Feb. 18, 2022).

¹⁰ See *infra* Section II.A. Under state and federal law, professionals such as social workers, teachers, and child care providers are required to report suspected child abuse or neglect to authorities. TEX. FAM. CODE ANN § 261.101(b) (West 2015). In Texas, any person who suspects child abuse or neglect is required to report it. TEX. FAM. CODE ANN § 261.101(a) (West 2015).

¹¹ See Jaclyn M. White Hughto, et al., *Transgender Stigma & Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 SOC. SCIENCE & MED. 222, 226 (2015).

have a two- to three-fold risk of depression, anxiety disorders, and self-harm.¹² Further, transgender youth are more than twice as likely as youth who are not transgender to experience suicidal ideation, and three times as likely to attempt suicide.¹³ Mental health and gender-affirming care provide support and care that helps young people lead healthy lives and thrive within their families and communities. DFPS's rule, however, prevents youth and families from accessing needed medical care, including mental health services.

Transgender youth already face obstacles and have limited access to mental healthcare. Now, with the added threat of being reported to DFPS and removed from their families and the concomitant reduction in providers offering gender-affirming care due to fear of being prosecuted, youth and families are further at risk of harm and being unable to access necessary medical care.¹⁴ Given the state-imposed obstacles to accessing medical care and the infringement on privacy and

¹² Sari Reisner, et al., *Mental health of transgender youth in case at an adolescent urban community health center: A matched retrospective cohort study*, 56(3) J. ADOLESCENT HEALTH 274 (Jan. 2015). See also Hughto *supra* note 7.

¹³ Reisner *supra* note 11.

¹⁴ 48% of LGBTQ youth reported they wanted counseling from a mental health professional but were unable to receive it in the past year. *National Survey on LGBTQ Youth Mental Health 2021*, TREVOR PROJECT (2021), available at <https://www.thetrevorproject.org/survey-2021/> (last visited July 26, 2022); Ann Branigin, "In Texas, the nation's largest children's hospital is halting gender-affirming care for trans youths", WASHINGTON POST, (March 8, 2022), available at <https://www.washingtonpost.com/lifestyle/2022/03/08/texas-childrens-hospital-stops-gender-affirming-care-trans-youth/> (last visited Aug. 5, 2022).

the rights of families caused by this rule, transgender youth are being disincentivized from seeking mental healthcare to a reckless and dangerous extent.

Young people justifiably fear that DFPS will investigate their families if they seek mental healthcare or access other basic services. Youth who have sought necessary psychiatric care have been reported to DFPS because of DFPS's rule, leading to investigations into their families for the so-called abuse of allowing them access to gender-affirming care.¹⁵ Fear of a child welfare investigation could also lead transgender youth to avoid other services and programs that all young people need—from primary healthcare to education to social activities. DFPS has already begun to investigate transgender youth at school; this has led some young people to decide stop attending school in-person.¹⁶ And transgender youth who have not sought any gender-affirming healthcare have already been investigated by DFPS, and their teachers have been contacted in a search for evidence of abuse.¹⁷ Children whose parents have lovingly cared and provided for them, and never abused or neglected them, are facing the devastating consequences of child

¹⁵ Declaration of Mirabel Voe, *PFLAG v. Abbott*, D-1-GN-22-002569, at 4 (Tex. Dist. Ct., Travis Cnty., filed June 8, 2022).

¹⁶ Declaration of Tommy Roe, *PFLAG v. Abbott*, D-1-GN-22-002569, at 4 (Tex. Dist. Ct., Travis Cnty., filed June 8, 2022).

¹⁷ Declaration of Samantha Poe, *PFLAG v. Abbott*, D-1-GN-22-002569, at 4 (Tex. Dist. Ct., Travis Cnty., filed June 8, 2022).

welfare investigations because the state is targeting them unfairly. DFPS's rule puts every transgender child in Texas at risk of investigation and removal from their families. It has already caused families to leave the state entirely due to concern for their children's safety.¹⁸ This rule drives transgender youth away from the services they need and out of public life.

Further, laws and policies that target groups based on their identities for DFPS investigation inevitably increase stigma against those groups, and encourage others to target them and direct animosity, harassment, or even violence against them. Stigma is a significant contributor to the high rates of suicide attempt among transgender youth; in comparison, youth whose communities affirm their sexual orientation and gender identity report lower rates of suicide attempts.¹⁹ By increasing stigma against transgender youth and discouraging them from reaching out for help due to fear of triggering a DFPS investigation into their families, DFPS will intensify the harm transgender youth face rather than protect them from harm.

¹⁸ E.g. Madeline Carlisle, *As Texas Targets Trans Youth, A Family Leaves in Search of a Better Future*, TIME (July 14, 2022), <https://time.com/6196617/trans-kids-texas-leave/> (last visited July 26, 2022).

¹⁹ Transgender youth reported lower rates of suicide attempts when their pronouns were respected by the people they lived with and they were allowed to change their names and/or gender markers on legal documents; LGBTQ youth reported lower rates of suicide when they had access to a space that affirmed their gender or sexual identity. Being subjected to conversion therapy more than doubled the likelihood of suicide attempts by LGBTQ youth. *National Survey on LGBTQ Youth Mental Health 2021*, *supra* fn. 10.

In fact, the very care that DFPS’s rule categorizes as child abuse—gender-affirming healthcare—has been shown to reduce depression and suicidality in transgender youth, in both the short and long term.²⁰ By discouraging youth from seeking gender-affirming care and by punishing them by investigating and potentially removing them from their families if they do, the rule pushes youth toward isolation, mental illness, and even suicide.

The risk of DFPS contact leads many families in the state to avoid seeking needed services. This is harmful to children, who could benefit from the resources and stability that assistance programs provide. Parents of children of all genders have always risked child welfare system contact by seeking help for their families. Because parents are aware that assistance programs and social services are often accompanied by increased government access to their homes and personal information, as well as mandatory reporting requirements,²¹ they rightly fear that contact with social services could lead to a child welfare investigation. This

²⁰ See Diana M. Tordoff, et al., *Mental Health Outcomes in Transgender & Nonbinary Youths Receiving Gender-Affirming Care*, 5(2) JAMA NETWORK OPEN 1, 7 (2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423> (last visited July 26, 2022).

²¹ See *infra* Section II.A. Under state and federal law, professionals such as social workers, teachers, and child care providers are required to report suspected child abuse or neglect to authorities. TEX. FAM. CODE ANN § 261.101(b), *supra* note 2. In Texas, any person who suspects child abuse or neglect is required to report it. TEX. FAM. CODE ANN § 261.101(a), *supra* note 2.

extensive and intrusive government monitoring and regulating of families is known in child welfare literature as “surveillance.”²² Parents who, like those who provide gender-affirming care to their children, have never harmed or neglected their children fear that if they seek services or reveal that they are struggling, their children could be taken from them. Parents in Texas worry about where their children would live if that happened; they worry about the well-documented abuse and neglect that children in the custody of Texas DFPS face.²³ They worry that their children may be taken by DFPS and moved out of state, far away from them, or forced to live in a hotel room or a DFPS office because there are not enough foster care placements available.²⁴

Parents report declining even available services that they desperately need because of fears of investigation and additional actions of the state.²⁵ Denial or avoidance of social services because of fears of child welfare contact is widespread; in one study, one in six respondents declined services available to them because of

²² See, e.g., Fong, *supra* note 1; Brett Greenfield, et al., *Exploring State Level Factors Associated with Short-Stays in Child Welfare: The Role of Systemic Risk and Surveillance*, CHILD MALTREATMENT 1 (2022); Charlotte Baughman, et al., *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501 (2021).

²³ See *infra* Section II.D.

²⁴ *Id.*

²⁵ Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 SOCIAL FORCES 1785, 1794, 1797 (2018).

concerns about child welfare reporting and surveillance.²⁶ Mothers have been shown to be especially likely to avoid intensive services, like homeless shelters and home visiting programs, even if they believe the services could otherwise benefit them.²⁷ Parents who have used drugs have reported avoiding prenatal care out of fear of child welfare contact; parents may also not disclose mental health challenges to avoid further monitoring or intervention by child welfare agencies.²⁸ Although the purpose of these services is to help parents and families who are struggling, they also expose children to the risk of harm because of their parents' well-founded fear that they will be investigated and ultimately separated from their children.

Parents who have been investigated by child welfare agencies report reluctance to seek support from assistance programs that they previously relied on, out of fear of further child welfare contact.²⁹ Similarly, parents report becoming less involved in the children's education after schools make reports alleging abuse

²⁶ *Id.* at 1793.

²⁷ *Id.* at 1794, 1797.

²⁸ See Katie Woodruff, et al., *Pregnant People's Experiences Discussing their Cannabis Use with Prenatal Care Providers in a State with Legalized Cannabis*, 227 DRUG & ALCOHOL DEPENDENCIES 1 (2021); see also Baughman, *supra* note 21.

²⁹ Fong, *supra* note 1, at 628.

and neglect.³⁰ The threat and risk of child welfare contact incentivizes families to avoid services that could provide them with stability and support—contrary to the goal of child welfare systems to keep children safe. Investigations based on the child’s gender identity or gender-affirming care will only push families further away from services that they need and which are designed specifically to help them.

B. Investigations Harm Families Financially.

Although a child welfare investigation does not always result in the state removing children from their families, it can still be deeply destabilizing to parents and children—including their finances. The time that is required of parents to meet with DFPS investigators and submit to other aspects of investigation, such as home inspections, can interfere with parents’ work schedules. Parents report that taking time off from work to meet with child welfare investigators—frequently meeting with them repeatedly during the course of an investigation—has led to loss of income and even loss of jobs.³¹ Further, even an investigation that results in a

³⁰ See Rebecca Klein & Caroline Preston, *When schools use child protective services as a weapon*, THE HECHINGER REPORT (Nov. 17, 2018), available at <https://hechingerreport.org/when-schools-use-child-protective-services-as-a-weapon-against-parents/> (last visited July 26, 2022).

³¹ See Baughman, *supra* note 21, at 527; see also Michal Raz, *Calling Child Protective Services is a Form of Community Policing that Should be Used Appropriately: Time to Engage Mandatory Reporters as to the Harmful Effects of Unnecessary Reports*, 110 CHILD. & YOUTH SERVS. REV. 1, 2 (2020); Rachel Blustain & Nora McCarthy, *The Harmful Effects of New York City’s Over-Surveillance*, IMPRINT (Oct. 21, 2019), available at <https://imprintnews.org/child-welfare-2/the-harmful-effects-of-over-surveillance/38441> (last visited July 26, 2022).

finding of “Ruled Out,” “Unable to Complete,” or “Unable to Determine” can affect parents’ ability to find employment. These investigations may show up on background checks for employment. They certainly will show up and be considered in a background check for a job working with DFPS resources or clients or providing contracted services to populations that DFPS serves, such as children and the elderly.³²

Loss of jobs and income can lead to loss of housing and further instability, ultimately leading to harm to children that would not have occurred absent a (likely unsubstantiated) child welfare investigation. Families have also reported losing housing because of the stigma of contact with child welfare authorities. Families who previously had stable housing suddenly find themselves evicted because their landlords disliked the presence of child welfare agencies at the home.³³ Adjusting for baseline factors, families who were investigated by child welfare agencies reported higher rates of poverty than families that were not investigated—even if

³² Appendix 1: Abuse, Neglect, and Exploitation History Bars for DFPS Employees, Prospective Employees, Volunteers, and Interns, Non-DFPS Staff, and CASA Employees, Volunteers, and Board Members, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES (July 2022), *available at* https://www.dfps.state.tx.us/handbooks/Background Checks/Files/BC_px_1.asp (last visited July 28, 2022).

³³ See Baughman, *supra* note 21, at 527.

allegations of abuse or neglect were not substantiated.³⁴ Instead of protecting children, these investigations unduly stress families and cost them money, jobs, and security.

C. Investigations Traumatize Children and Families.

Far from being neutral, fact-finding missions, investigations are traumatizing for both parents and children, destabilizing the relationships within families. Investigatory interviews are frequently traumatizing for children and can by themselves damage a child's wellbeing.³⁵ They can involve investigators showing up at schools and homes unannounced, separating children from their parents and other supportive adults during interviews, and asking children very personal questions that may have nothing to do with the allegations at hand.³⁶ They may involve taking pictures of children and requesting children's private medical records³⁷ or conducting potentially invasive medical examinations.³⁸ Investigations

³⁴ Kristine A. Campbell, et al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment*, 164 ARCHIVES PEDIATRICS & ADOLESCENT MED. 943, 946 (2010).

³⁵ See David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 264 (2015); see also Blustain, *supra* fn. 27.

³⁶ Declaration of Tommy Roe, *supra* note 15, at 5.

³⁷ Declaration of Mirabel Voe, *supra* note 14, at 4.

³⁸ Texas law allows DFPS to request a child's medical, psychological, or psychiatric records and to request a medical, psychological, or psychiatric examination of a child who is the subject of a DFPS investigation. If the child's parent does not consent to the release of such records or to an

are frequently unexpected and confusing, especially for younger children.³⁹ Children report that they are “shocked and confused” by investigations and that they leave them feeling that their privacy and homes have been violated.⁴⁰ As a result of these investigations, children may no longer trust the adults who may have reported their families to child welfare services, affecting their willingness and ability to attend school or social activities.⁴¹

Child welfare investigations are also traumatizing to parents. Parents who face child welfare investigations and involvement report acute anxiety and feelings of helplessness as a result.⁴² Parents investigated by child welfare agencies report more depressive symptoms than their non-investigated peers, regardless of whether the agency substantiated allegations of abuse or neglect against the

examination, DFPS can seek a court order for records/examination. TEX. FAM. CODE ANN § 261.303 (West 2015).

³⁹ Brittany Bartkovaik, *The fine line between saving kids from trauma and making things worse*, MICH. RADIO, Feb. 27, 2015, available at <https://stateofopportunity.michiganradio.org/families-community/2015-02-27/the-fine-line-between-saving-kids-from-trauma-and-making-things-worse> (last visited July 26, 2022).

⁴⁰ Declaration of Tommy Roe, *supra* note 15, at 6.

⁴¹ Klein, *supra* note 29 (describing students who transferred schools due to “feeling uncomfortable and mistrustful” of the adults at their previous schools who reported their parents to CPS).

⁴² Blustain, *supra* note 30; Kapp, *supra* note 6, at 237.

family.⁴³ Even when investigators are confident that children will not be removed from their families, investigations heighten anxiety in parents and children.⁴⁴

Investigations can also impact the relationships between parents and children, ultimately affecting the mental and emotional health of the entire family. Surveillance by child welfare systems erodes trust between parents and children, which can cause children to lose respect for their parents' authority and ultimately lead to behavioral issues in children.⁴⁵ Children whose families are investigated by child welfare systems may feel uncertain about their parents' role as authority figures and protectors.⁴⁶ Child welfare system involvement also places such stress on families that it can exasperate tensions and compound trauma of past system involvement, eroding feelings of safety and security in the home.⁴⁷ This is especially concerning for Black families, who face higher rates of child welfare

⁴³ Campbell, *supra* note 33, at 943.

⁴⁴ Fong, *supra* note 1, at 627.

⁴⁵ "Implicit in the family regulation system intervention is the government's signal to children that their parent is no longer their protector." Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 799 (2021).

⁴⁶ Merritt, *supra* note 7, at 209.

⁴⁷ *Id.*

agency surveillance than most other groups.⁴⁸ Investigations into otherwise safe, stable families who are seeking to support their transgender children will only lead to incredible stress and trauma to children and parents and damage to the parent-child relationship.

D. Each Investigation Heightens the Risk of Further Harm.

As if each of the harms that child welfare investigations cause was not enough, each investigation can actually increase the likelihood that a family is investigated again or that children will be removed from the home in the future. Past contact with child welfare agencies can lead an agency to consider a family to be at “higher risk” of child abuse or neglect in the future, even if former investigations found allegations of abuse or neglect to be unsubstantiated. Many states rely on instruments that consider prior contact with child welfare agencies to be a “risk factor” that makes it more likely that children will be abused or neglected in the future. States use these instruments—essentially checklists—to help social workers determine if a child is at risk for abuse or neglect and if the child should be removed from the home. Texas DFPS uses two such instruments: a “Safety Assessment” to determine whether removal of children from the home is

⁴⁸ Frank Edwards, et al, *Contact with Child Protective Services is pervasive but unequally distributed by race and ethnicity in large US counties*, 118 PNAS (2021), available at <https://www.pnas.org/doi/10.1073/pnas.2106272118> (last visited July 26, 2022).

necessary, and a “Family Risk Assessment of Child Abuse/Neglect,” to determine the risk that a child will face abuse or neglect in the future.⁴⁹ The Safety Assessment is used to determine the likelihood of immediate danger of harm to children, while the Family Risk Assessment is used to predict future harm.⁵⁰

The Safety Assessment includes prior child and prior DFPS interventions that “represent serious, chronic and/or patterns of abuse/neglect allegations” as factors that can lead to a “danger indicator” getting checked off on the form, which then affects the “safety decision” made by the DFPS worker.⁵¹ For a DFPS worker to decide that such a “pattern of allegations” exists, DFPS does not need to have previously made a finding that abuse or neglect allegations were substantiated, and no court finding or even court involvement is necessary; the mere existence of the allegations is enough. The more factors checked off on the form, the higher the score and the more likely that a DFPS worker will make a “safety decision” that involves removing the child from their home or that recommends ongoing monitoring and surveillance by DFPS. This means that even children whose parents

⁴⁹ SAFETY AND RISK ASSESSMENT RESOURCE GUIDE, TEX. DEP’T FAM. & PROTECTIVE SERVS. 5, 43 (2020), available at https://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/Safety_and_Risk_Assessment_Resource_Guide.pdf.

⁵⁰ *Id.* at 30.

⁵¹ *Id.* at 28.

have never been found, by DFPS or any court, to have abused or neglected them are at increased risk of being removed from their parents just because their families have been investigated by DFPS in the past.

Texas’s second instrument for determining the risk of child abuse or neglect, the Family Risk Assessment, also considers families to be “higher risk” simply because they have been investigated in the past. This instrument looks at past allegations for any child and has implications for the whole family, not just one specific child. Prior investigations by DFPS, even if unsubstantiated, result in +1 “Risk of Future Neglect Score” on the Family Risk Assessment.⁵² A score of 5 places a family at “high” risk of future neglect and results in opening a case for ongoing services—and ongoing surveillance by DFPS—which again places children at a heightened risk of being removed from their families.⁵³ Having three or more prior investigations for neglect leads to a +2 on the assessment. Other factors that result in +1 “Risk of Future Neglect” include having a child under two years old in the home, having a child who is medically fragile, and having a child with a developmental, physical, or learning disability (all risk factors that are based on

⁵² *Id.* at 49.

⁵³ *Id.* at 47.

demographics of the child and family rather than actual abuse or neglect).⁵⁴ Taken together, a family with “risk factors” such as very young children or children with disabilities could be subjected to ongoing surveillance by DFPS simply because they have faced allegations of abuse and neglect in the past, even if DFPS has investigated those allegations and found that the children were safe. Thus, each investigation into a family compounds the likelihood of traumatic family separation and state custody for children in the future.

II. INCREASED SURVEILLANCE OF FAMILIES BY CHILD WELFARE SYSTEMS LEADS TO MORE INVESTIGATION, BUT NOT BETTER OUTCOMES FOR CHILDREN.

Increased surveillance of parents leads to more investigations but does not lead to better outcomes for children. In fact, it disproportionately harms communities that already face high rates of child welfare agency investigation and involvement. More investigations have the potential to lead to more unwarranted removals, further compounding the harm and trauma that children face.⁵⁵

A. Families Enrolled in Government Programs are Investigated at the Highest Rates.

Whether a family faces investigation by DFPS is more closely linked to the family’s enrollment in government services than to the potential risk of abuse or

⁵⁴ *Id.* at 43.

⁵⁵ See Pimentel, *supra* note 34, at 267.

neglect. As discussed in Section I.A, *supra*, these services lead to more contact with government officials and workers who are required to report families for suspected abuse or neglect, and they require families to disclose information that could be used as evidence of abuse or neglect, even when families are seeking services that will help them gain or maintain stability and safety. States with higher Supplemental Nutrition Assistance Program (SNAP) enrollment, for example, have greater rates of short stays in foster care, suggesting that “enrollment in a government program, rather than the need itself, may be related to the likelihood of experiencing a short-stay.”⁵⁶ Medicaid is similarly linked: a child’s Medicaid eligibility is a better predictor of removal to foster care after an emergency room visit than the severity of abuse the child may have endured.⁵⁷ Families that enroll in assistance programs seek resources to help provide safety and stability for their children, but the additional surveillance they face in these programs places them at heightened risk of child welfare system involvement.

⁵⁶ Greenfield, *supra* note 21, at 8. See also Frank Edwards, *Saving Children, Controlling Families: Punishment, Redistribution, and Child Protection*, 81 AM. SOC. REV. 575, 586 (2016) (“[F]oster care entries are positively associated with the interaction of TANF enrollment and welfare staffing levels, suggesting that increasing opportunities for surveillance produce more frequent entries into foster care.”).

⁵⁷ Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724 (2000).

Families that are already facing the challenges of poverty, or who are already disproportionately targeted by child welfare investigations—such as parents with disabilities and families of color—will be disproportionately impacted by the expansion of DFPS investigations resulting from the new directive. For instance, parents with disabilities are more frequently reported to child welfare agencies than parents without disabilities, and once involved, they are permanently separated from their children at disproportionately high rates.⁵⁸ Parents with disabilities may be punished for seeking medical care, state assistance, or assistance from family members by child welfare workers who determine that their need for this support means that they cannot take care of their children.⁵⁹ Investigations by the federal government have repeatedly shown that a parent’s disability, rather than the actual needs of children, can drive child welfare reports and investigations. The Office for Civil Rights has found that several states removed children from parents with disabilities on the basis of their disability alone and did not afford parents with disabilities an equal opportunity as parents without

⁵⁸ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES (2015), available at https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html (last visited July 26, 2022).

⁵⁹ L. Frunel & Sarah H. Lorr, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. OF RACE AND L. 1, 8-9 (2022).

disabilities to preserve their families.⁶⁰ Discrimination against parents with disabilities is so prevalent that the Department of Justice has repeatedly taken action against states for discriminating against parents with disabilities.⁶¹

Poverty and educational status have also been linked to child welfare involvement; one study showed that “inadequacy of income” increased a child’s chance of removal from the family by more than 120 times.⁶² Mothers with a high school education or less are far more likely to be reported to child welfare agencies than mothers with a college degree.⁶³ Families experiencing housing instability are more vulnerable to child welfare system involvement; children have been removed from their families because of one eviction.⁶⁴ In fact, ten percent of the children removed from their families by child welfare agencies were removed because of

⁶⁰ U.S. DEPT. OF HEALTH & HUMAN SERVICES, VOLUNTARY RESOLUTION AGREEMENT, U.S. DEPT. OF HEALTH & HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND OREGON DEPT. OF HUMAN SERVICES (2019), *supra* note 2; U.S. DEPT. OF HEALTH & HUMAN SERVICES, VOLUNTARY RESOLUTION AGREEMENT, U.S. DEPT. OF HEALTH & HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND MASSACHUSETTS DEPT. OF CHILDREN AND FAMILIES (2020), *supra* note 2.

⁶¹ See note 57, *supra*.

⁶² Guggenheim, *supra* note 53, at 1724, citing Duncan Lindsey, THE WELFARE OF CHILDREN 155 (1994).

⁶³ Kelley Fong, *Child welfare involvement in the contexts of poverty: The role of parental adversities, social networks, and social services*, 72 CHILDREN AND YOUTH SERV. REV. 5, 5 (2017).

⁶⁴ Jerry Milner and David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, THE IMPRINT (Jan. 17, 2020).

inadequate housing.⁶⁵ One study showed that more than 60% of homeless parents had faced allegations of abuse or neglect, and 17% had at least once child removed from them.⁶⁶ Child welfare systems so readily label families that are simply experiencing poverty as neglectful that it has resulted in calls from national leaders in child welfare to fundamentally alter the ways that child welfare systems address neglect.⁶⁷

Race has also been repeatedly linked to child welfare investigations, with Black and Native American families facing far higher rates of investigation and separation than white families.⁶⁸ Black children are far more likely to face child welfare investigations than any other group; more than 50% of Black children will experience a child welfare investigation in some parts of the country.⁶⁹ Black children are also more likely to be removed from their families and placed in foster care.⁷⁰ Black and Native children are disproportionately represented in Texas's child welfare system; Black children make up 25% of the children in foster care in

⁶⁵ Charissa Huntzinger, *Removing children from their parents doesn't just happen at the border*, THE HILL (July 2, 2019).

⁶⁶ Regan Foust et. al., *Child protection involvement among homeless families*, 15 J. OF PUB. CHILD WELFARE 518, 525 (2019).

⁶⁷ See Milner, *supra* note 63.

⁶⁸ Edwards, *supra* note 47, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1-2.

the state, despite constituting 15% of the children in the state.⁷¹ Native youth make up 2.7% of the children in foster care in the state, although only 1% of the children in Texas are Native American. Racism within child welfare systems allows for this massively disproportionate impact. Families investigated by child welfare systems also experience racism directly from child welfare workers; parents who interact with child welfare systems report feeling mistreated and judged by child welfare workers because of their race or ethnicity.⁷²

The stress of widespread child welfare surveillance and investigations on particular communities damages relationships and sows mistrust. When many community members are mandatory reporters of suspected child abuse or neglect, it undermines community responsibility; instead of finding ways to support neighbors who are struggling, or building community relationships, people are encouraged to rely on a third party agency to address perceptions of abuse or neglect.⁷³ This also creates distrust in communities by encouraging a “destructive

⁷¹ C. Puzzanchera, et al., *Disproportionality Rates for Children of Color in Foster Care Dashboard*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2022), available at http://ncj.org/AFCARS/Disproportionality_Dashboard.asp?selDisplay=2 (last visited July 26, 2022).

⁷² Merritt, *supra* note 7, at 216.

⁷³ Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention & Treatment Act & Delink Child Protection From Family Well-Being*, 11 COLUM. J. RACE & L. 1, 34 (2021).

alternative” to resolving neighborhood conflicts.⁷⁴ Institutions have been known to use child welfare investigations as a threat or punishment against parents; schools that want particular children to transfer, or want parents to change their behavior (even when it is not abusive or neglectful), have repeatedly reported parents to child welfare systems.⁷⁵ This increased mistrust impacts the ability of communities to work together, and impacts the ability of parents to gain assistance when they need it.

B. Designation as An Abusive or Neglectful Parent on a State Registry Has Costs for Families.

The stigma of child welfare contact has been enshrined into law through central registries of child abuse and neglect. Parents and caregivers who face child welfare investigations may be placed on Texas’s central registry of child abuse and neglect records—even if they are never found to have mistreated their children by the court.⁷⁶ Based on their presence on this registry, parents can be denied jobs

⁷⁴ Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. Soc. WELFARE & FAM. L. 426, 432 (2014).

⁷⁵ See Klein, *supra* note 29 (noting instances of schools contacting CPS when parents refuse to move their children to other schools).

⁷⁶ Advocates have raised due process concerns over the inclusion of individuals on central child abuse and neglect registries based solely on child welfare agency determinations and before cases go before a judge. The North Carolina Court of Appeals issued a decision in a 2010 case, *In the Matter of W.B.M.*, holding that listing an individual in the central registry prior to a court hearing violates an individual’s constitutionally protected due process rights.” 690 S.E.2d 41 (N.C. Ct. App. 2010). In the 2007 case *Jamison v. State Department of Social Services Division of Family Services*, the Supreme Court of Missouri held that an investigation alone is insufficient to support

and volunteer opportunities, as well as the opportunity to foster, adopt, or serve as a kinship caregiver for children.

An individual will be added to Texas’s central registry of child abuse and neglect records if a DFPS investigation results in a disposition of “reason to believe” that the alleged abuse or neglect occurred.⁷⁷ A “reason to believe” disposition is not a legal court finding; it is an administrative finding made by the investigating caseworker, before the case goes before a judge.⁷⁸ Individuals who are listed on the registry remain on it indefinitely unless they successfully appeal the outcome of the caseworker’s investigation.⁷⁹ While most states do not permit listing names on the central registry while an appeal is pending, Texas does. Moreover, Texas requires people listed on the registry to appeal the caseworker’s finding *twice* to DFPS before they can seek a hearing in front of the State Office of Administrative Hearings.⁸⁰ This process can take years to complete—years that parents and caretakers are listed on the central registry without a court finding that they abused

the loss of liberty that comes with being listed in the central registry if employment could be affected. 218 S.W.3d 399 (Mo. 2007).

⁷⁷ Appendix 1, *supra* note 31.

⁷⁸ *Central Registry Reform*, TEX. PUB. POL’Y FOUND. (Sept. 24, 2020), *available at* <https://www.texaspolicy.com/legeregistryreform/> (last visited July 26, 2022).

⁷⁹ *Id.* The state requirements for expunging someone’s record after a successful appeal can be found in Section 261.002 of the Texas Family Code. TEX. FAM. CODE § 261.002 (West 2017).

⁸⁰ TEX. PUB. POL’Y FOUND., *supra* note 77.

or neglected their children. Costs are also a barrier to appeal; challenging allegations of abuse or neglect can cost families thousands of dollars in legal fees, which many families who face child welfare investigations—who are disproportionately poor—simply do not have.⁸¹

More than one out of every three DFPS determinations appealed by alleged perpetrators are ultimately overturned.⁸² However, perhaps due to the lengthy timeline and heavy administrative burden, only three percent of cases with a “reason to believe” disposition are appealed each year;⁸³ this lack of review leaves open the possibility that a significant percentage of individuals listed on the central registry because of a “reason to believe” disposition would be removed from the registry if their case went before a judge.

Any individual who appears on the central registry also appears on background checks conducted as part of the approval process for prospective foster and adoptive parents and kinship caregivers, as well as for many jobs and volunteer positions that involve working with children.⁸⁴ Black and Latine women

⁸¹ See Klein, *supra* note 29.

⁸² TEX. PUB. POL’Y FOUND., *supra* note 77.

⁸³ *Id.*

⁸⁴ BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS, CHILDREN’S BUREAU 2 (2018), available at <https://www.childwelfare.gov/pubpdfs/background.pdf> (last visited July 29, 2022).

are disproportionately represented in child-care positions.⁸⁵ Women who are low income and women of color are disproportionately affected by central state registries and employment policies; thus, their children are disproportionately affected by the destabilization of their parents' incomes.⁸⁶

The central registry thus undermines the well-being of children, instead of protecting them, by increasing the risk of poverty and preventing other children from being placed with loving family members.⁸⁷ Directing the child welfare system to investigate families seeking gender-affirming care for their children will inevitably lead to an expansion of parents listed on the central registry, thereby increasing the number jobs lost and the number of children whose parents struggle to support them, as well as the number of children who cannot be placed with suitable family members.

C. Family Separation Harms Children.

Every DFPS investigation inherently carries the potential for family separation. More investigations will likely lead to more children being separated

⁸⁵ Colleen Henry, et al., *The Collateral Consequences of State Central Registries: Child Protection and Barriers to Employment for Low-Income Women and Women of Color*, 64 Soc. WORK 373 (2019) (“In 2017, 38 percent of these child care–related jobs were occupied by African American and Latinx women.”).

⁸⁶ *Id.* at 374.

⁸⁷ *Id.*

from their families by DFPS. DFPS is partially funded by the federal government, and the primary intervention for which it receives federal funding is removing the child from the home and placing them in foster care or another placement.⁸⁸ While no removal for providing medically necessary care would ever be justified, just permitting investigations into families that seek gender-affirming healthcare for their children will inevitably lead, in some cases, to children being removed from their families, especially for families living in poverty. Data show that families investigated are overwhelmingly poor and will likely be struggling with other issues related to poverty and without access to high quality legal representation. The chance of separation for these families is real.

⁸⁸ In 2022, the DFPS budget indicates that DFPS will receive almost 850 million dollars from the federal government to “Protect Children through an Integrated Service Delivery System.” Over 250 million of this is allocated to foster care payments, with another 276 million going towards Child Protective Services staff providing direct services. Meanwhile, federal Child Abuse Prevention Grants constitute less than 5 million dollars of the budget. TEXAS DEP’T OF FAMILY AND PROTECTIVE SERVICES, OPERATING BUDGET FOR FISCAL YEAR 2022 (Dec. 1, 2021), *available at* https://www.dfps.state.tx.us/About_DFPS/Budget_and_Finance/Operating_Budgets/FY22_Operating_Budget.pdf (last visited July 29, 2022). *See also* CONGRESSIONAL RESEARCH SERVICE, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT (Oct. 6, 2012), *available at* https://www.everycrsreport.com/files/20121026_R42792_af03bce2b991bc670bf39d819d95c754ef38ebf1.pdf (last visited July 29, 2022) (“[m]ore than two-thirds of all Title IV-E spending supports provision of foster care.”).

The harms of even short-term separations are well-documented in medical literature.⁸⁹ Children who are separated from their families are forced to reckon with the sudden disappearance of their parents and perhaps their siblings, as well as extended family support. The trauma of this separation can affect children's abilities to form social relationships and their mental health.⁹⁰ These effects are present even in children who experience relatively short separations from their families.⁹¹ Children who have been separated from their parents frequently exhibit anxiety and attachment disorders, as well as higher rates of aggression.⁹² Children can expect multiple, often unexpected, placements over the course of their time in foster care, which can further impact a child's psychological well-being and cause further grief and complex trauma.⁹³ Complex trauma can lead to body

⁸⁹ See, e.g., Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children who Spend Less Than Thirty Days in Foster Care*, 19.3 UNIV. OF PA. J. OF L. AND SOC. CHANGE 207, 210-12 (2017); see also Allison Eck, *Psychological Damage Inflicted By Parent-Child Separation is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018), available at <http://www.pbs.org/wgbh/novalnext/body/psychological-damage-inflictedby-parent-child-separation-is-deep-long-lasting> (last visited July 26, 2022) ("The scientific evidence against separating children from families is crystal clear . . .").

⁹⁰ See Roberts, *supra* note 73, at 430-31.

⁹¹ See Sankaran, *supra* note 88, at 212.

⁹² See generally Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. OF LAW AND SOC. CHANGE 523, 528-34 (2019); Kimberly Howard, et al., *Early Mother-Child Separation, Parenting, & Child Well Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5, 21 (2011).

⁹³ Vivek Sankaran, et al., *A Cure Worse than the Disease? The Impact of Removal on Children and their Families*, 102 MARQ. L. REV. 1163, 1166 (2019).

dysregulation, difficulty managing emotion, dissociation, poor self-regulation, cognitive impairment, and long-term health consequences for children.⁹⁴

Even after being reunited with their families, children who have been separated from their parents exhibit significant anxiety when their parents leave for even brief periods.⁹⁵ As severe as the harm of separation is, it does not account for the many dangers and harmful practices that children face once they are in state custody.⁹⁶ The evidence of the harm caused by involuntarily separating children from their parents is overwhelming. Dr. Charles Nelson, professor of Pediatrics at Harvard Medical School, has said of family separation that “[t]here's so much research on this that if people paid attention at all to the science, they would never do this.”⁹⁷ Allowing DFPS to continue investigating families for seeking gender-

⁹⁴ *Id.* See also Sara Goudarzi, *Separating Families May Cause Lifelong Health Damage*, SCIENTIFIC AMERICAN (June 20, 2018), available at <https://www.scientificamerican.com/article/separatingfamilies-may-cause-lifelong-health-damage/> (last visited July 26, 2022) (describing how removal can cause developmental regression, difficulty in sleeping, depression and acute stress, and can also lead to long-term chronic medical conditions like cardiovascular disease, hypertension, obesity and a shorter lifespan).

⁹⁵ Trivedi, *supra* note 91, at 530.

⁹⁶ See *infra* Section II.D.

⁹⁷ William Wan, *What Separation from Parents Does to Children: 'The Effect Is Catastrophic,'* WASH. POST (June 18, 2018), available at https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019f4e4_story.html (last visited July 26, 2022). See generally Sankaran, *supra* note 92, at 1167.

affirming care for their transgender children will inevitably lead to more children being removed from their families, and more children affected by the life-altering trauma of family separation.

Transgender youth who interact with the child welfare system face unique challenges and are frequently exposed to harm by the system itself. Transgender youth in foster care face hostility on many levels, from bullying and unjustifiable targeting for punishment by caseworkers, foster families, and group home staff to forcing transgender youth to live in group homes that do not match their gender identities. As a result of the mistreatment to which they are subjected in foster care, transgender youth in the foster care system frequently run away from their placements and face high rates of homelessness.⁹⁸ Transgender youth with supportive families are safest when they can live with their families and when they can seek out and receive the services that they need. Transgender youth with families who are supportive of their identities report lower rates of depression; transgender youth in foster care, on the other hand, report higher instances of suicide attempts in the past year than youth not in foster care.⁹⁹ Instead of

⁹⁸ Asgarian, Roxanna, *America's Foster Care System Is a Dangerous Place for Trans Teens. Now They're Fighting for Change*, TIME (Dec. 7, 2021), available at <https://time.com/6124930/oregon-foster-care-trans-youth-lawsuit/> (last visited Aug. 16, 2022).

⁹⁹ Lisa Simons, et al., *Parental Support and Mental Health Among Transgender Adolescents*, 53 J ADOLESCENT HEALTH 791, 792 (2013) ("parental support was significantly associated with

supporting this vulnerable population, DFPS’s rule seeks to further stigmatize these youth, taking youth out of a supportive family environment and putting them through the trauma of family separation and foster care. This is directly contrary to child protection and welfare, and will disproportionately impact transgender Black, Indigenous, multiracial, and Latine youth, who are already at heightened risk of attempting suicide.¹⁰⁰ The rule is also contrary to federal policy guidance on providing assistance to state child welfare organizations to improve their data collection about youth sexual orientation, gender identity, and religious affiliation in order to better support youth.¹⁰¹ This federal guidance clearly seeks to improve child welfare services for transgender youth, not needlessly remove them from their families and expose them to the harms of child welfare involvement.

higher life satisfaction, lower perceived burden, and fewer depressive symptoms [in transgender adolescents]”); *LGBTQ Youth with a History of Foster Care*, TREVOR PROJECT (May 12, 2021), available at <https://www.thetrevorproject.org/research-briefs/lgbtq-youth-with-a-history-of-foster-care-2/> (last visited July 26, 2022) (“LGBTQ youth who reported having been in foster care had three times greater odds of reporting a past-year suicide attempt compared to those who had not.”).

¹⁰⁰ *LGBTQ Youth with a History of Foster Care*, *supra* note 98.

¹⁰¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-22-104688, *Further Assistance from HHS Would be Helpful in Supporting Youth’s LGBTQ+ Identities and Religious Beliefs* (2022), available at <https://www.gao.gov/assets/gao-22-104688.pdf> (last visited July 29, 2022).

D. Texas’s Child Welfare System Is Itself Harmful to Children.

By categorizing gender-affirming medical care for children as abuse, DFPS’s rule puts transgender children at a higher risk of being taken from a safe home environment and placed in an unsafe foster care environment. Texas’s child welfare system has repeatedly been shown to be harmful to children, and has continued to cause children harm despite extensive efforts at reform. Instead of protecting children, the system itself has been found to violate children’s rights and place them at an unreasonable risk of harm.

In 2011, a group of children in Permanent Managing Conservatorship (PMC) of the State of Texas initiated *M.D. v. Abbott*, in which they brought claims under the Fourteenth Amendment of the Constitution alleging that the state “had long been aware of . . . deficiencies of the Texas foster care system, yet had failed to effectively address them.”¹⁰² These deficiencies included insufficient caseworkers, insufficient placement options for children, failures to enforce compliance with licensing standards, and failures to provide children with permanent homes.¹⁰³ After a jury trial, the U.S. District Court for the Southern District of Texas found that DFPS was deliberately indifferent towards practices that harm children and did not

¹⁰² *M.D. v. Abbott*, 509 F.Supp.3d 683, 689 (S.D. Tex. 2020) (holding Defendants in contempt).

¹⁰³ *M.D. v. Abbott*, 152 F.Supp.3d 684 (S.D. Tex. 2015).

exercise sufficient oversight over foster homes or maintain sufficient placements for children.¹⁰⁴ Despite these findings and years of work and investments to remedy the constitutional violations suffered by children in Texas’s custody, the state has twice been held in contempt for violating the court orders that resulted from *M.D. v. Abbott*—most recently in 2020.¹⁰⁵ Even with these court orders and oversight, DFPS and the state of Texas have repeatedly failed to protect the children in their custody. They have failed to comply with many of the remedial orders that resulted from the case, including failing to recognize problematic patterns in the histories of licensed foster care placements.¹⁰⁶

These repeated failures mean that children in Texas’s child welfare system still face substantial risk of harm. Children in the state’s custody are more likely to face abuse from their caretakers than from any other adults in their lives.¹⁰⁷ Placement shortages continue to plague Texas’s child welfare system, and children are forced to live in unlicensed foster homes, hotels, or DFPS offices instead of with licensed foster families or with their own families.¹⁰⁸ The court monitors in *M.D. v.*

¹⁰⁴ *Id.*

¹⁰⁵ *See M.D.*, 509 F.Supp.3d, *supra* note 101 at 893-95.

¹⁰⁶ *Id.* at 799-804, 825-28.

¹⁰⁷ *M.D. v. Abbott*, No. 211-cv-00084, First Court Monitors’ Report 2020, Dkt. No. 869 at 71 (S.D. Tex. June 16, 2020).

¹⁰⁸ *Id.* at 73.

Abbott found “substantial risks” to children in these unregulated placements and found that the absence of stability and appropriate mental health treatment in these settings has worsened many children’s mental health and behavioral challenges.¹⁰⁹ The number of children in these unregulated settings increased almost fivefold from January 2021, when an average of 22 children were without a placement each night, to June, when an average of 106 children were without a placement each night.¹¹⁰ The state also continues to place children in out-of-state facilities, where they face not only documented risks of neglect, but also fewer monitors of their safety and the loss of family and community connections.¹¹¹

As *M.D. v. Abbott* illustrates, the very system that should protect children from harm has instead perpetrated and exacerbated it. Years of monitoring and attempted reform have not resolved these serious issues. DFPS’s rule mandating investigations of families merely because they are following medical advice by seeking gender-affirming care for their children will risk exposing more children to Texas’s harmful child welfare system.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 72-73.

¹¹¹ Reese Oxner, “From Bad to Worse”: U.S. Judge Deplores Conditions for Texas Foster Kids Sent Out of State, TEX. TRIBUNE (Jan. 12, 2022), available at <https://www.texastribune.org/2022/01/12/texas-foster-care-system-fines/> (last visited July 26, 2022).

PRAYER

For the forgoing reasons, *amici* ask the Court to affirm the trial court's injunction.

Dated: April 7, 2023

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I certify that this **Brief of Amici Curiae** contains a total of 9,081 words, excluding the portions of the brief exempted under Texas Rule of Appellate Procedure 9.4(i)(1), as verified by Microsoft Word 2016. It therefore complies with Rule 9.4(i)(2)(B).

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