

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

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

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, individually 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.

On Appeal from the 353rd Judicial District of Travis County, Texas
Cause No. D-1-GN-22-002569, Hon. Amy Clark Meachum

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER EMPLOYEES OF
TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES JOINED
BY TEXAS STATE EMPLOYEES UNION

Respectfully submitted,

/s/ Holt M. Lackey

Holt M. Lackey

Texas State Bar No. 24047763

holt@holtmajorlackey.com

Holt Major Lackey, PLLC

111 W. Anderson Ln., Ste. D-211

Austin, Texas 78751

(512) 949-9598

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IDENTITY OF *AMICI* AND DISCLOSURE OF INTEREST

This brief is tendered on behalf of a group of individuals who are current or former employees of Appellant Texas Department of Family Protective Services (DFPS). As child protection professionals currently or formerly employed at DFPS, *Amici* share an interest in the protection of minor victims of abuse and neglect, in the morale and adequate functioning of DFPS as the agency charged with protecting such minors, and in preservation of the Rule of Law at DFPS. Like the bulk of their coworkers, they recognize the policy changes directed in Governor Abbott's February 22, 2022 Directive and the new Rule imposed by DFPS in response to that letter as a drastic departure from the *status quo* interpretation of Texas law by all previous Texas courts and agencies.

Individual *Amici* are current and former DFPS employees in a range of different positions with many years of experience between them. They appear in their individual capacities and some appear pseudonymously to minimize the risk of retaliation by Appellants.

Randa Mulanax resigned in March 2022 from DFPS after six years of service, most recently as a CPS Investigations Supervisor.

Shelby McCowen resigned in May 2022 after almost a year as a CPS

Investigator at DFPS.

Morgan Davis resigned in May 2022 after about one year as a CPS Investigator for DFPS. Mr. Davis is an openly transgender man.

Candace Henson resigned after nine years with DFPS, including as a Conservatorship Supervisor, a caseworker, and a policy and best practices specialist at the State Office.

Sharon Berger resigned in February 2022 after twenty-three years with DFPS, most recently as Conservatorship Program Director in Travis County, responsible for about 450 foster children, many of whom are/were gender questioning and LGBTQIA, and about whose welfare she remains particularly concerned.

Lisa Drain resigned in January 2021 after nearly five years as a Child Protective Investigator.

Quinlyn Hackman was a Transitional Investigator for DFPS from October 2016 until July 2019.

Allison Cummings served in various positions in Investigations for 15 years before resigning in September 2022.

Amicus A has been employed by DFPS for four years and is a conservatorship worker.

Amicus B has been employed by DFPS for over six years, including service as an investigator, investigation supervisor, and investigation trainer.

Texas State Employees Union is a near 10,000 strong member organization of and for state employees and retirees. TSEU members live in every part of the state, and work in nearly every state agency, including a significant number who work at DFPS.

No persons or parties to this case have made any monetary contribution to the preparation or submission of this Amicus brief.

SUMMARY OF ARGUMENT

Among the central questions in this case is whether the new policies promulgated by Commissioner Masters and the DFPS in February 2022 amounted to a “Rule” for purposes of the Texas Administrative Procedure Act. The Parties’ briefs pointedly disagree on this issue. Appellants refuse to ever call it a “rule,” trivializing it instead as a “press statement.” Appellees, on the other hand, like the District Court below, refer to it as the “DFPS Rule.”

This matters because if the new policies are a “Rule,” then they were adopted in violation of the Administrative Procedure Act. Appellants do not meaningfully dispute that the procedures required under the APA were not followed in this case. As demonstrated below, the Rule also substantively violates the APA because it was adopted in violation of DFPS’s enabling statutes and the Texas Family Code. If the Rule was adopted in violation of the Administrative Procedure Act, then it follows that Sovereign Immunity does not apply, that Plaintiffs are likely to succeed on the merits, and that preservation of the *status quo* requires the District Court’s injunction to remain in effect.

But if these policy changes were just a “press statement” or other

non-binding *thing* without any legal consequence, as Appellants argue in their brief, then the APA would not apply.

Amici, current and former DFPS employees who worked in Child Protective Services in February 2022, were at the front line of carrying out DFPS policy at the time these policy changes were made. It was their job to carry out DFPS policies and follow DFPS rules for child abuse investigations.

Amici file this brief to advise the Court that, from their front-line perspective, the sea change in policy regarding CPS investigations of families with a child receiving gender-affirming care was unquestionably a new Rule.

Governor Abbott's February 22, 2022 Directive (the "Abbott Directive") and new DFPS Rule represent a radical departure from the *status quo* meaning of the term "abuse" as defined in the Texas Family Code or as interpreted by Texas courts and by DFPS and its predecessor agencies throughout history prior to February 22, 2022. Never before February 22, 2022 was a report *solely* that a parent was administering prescribed medical treatment to their child under a doctor's care sufficient for CPS to initiate an investigation.

This *status quo ante* reflected both the common-sense reality that a parent following a doctor's prescription for the care of a child is not "abuse" as well as the Texas Family Code's definition of "abuse" as an act or omission that causes at least an "injury," "impairment," or "harm" to a child. Parents following a doctor's prescription and medical advice based on the consensus and best available medical knowledge is by definition not an act of injuring, impairing, or harming the child but an act of caring, nurturing, and protecting the child. Neither *Amici* nor Appellants are qualified to second-guess a child's medical doctor following the medically recommended standard of care, and that a parent is consenting to a doctor's recommended medical treatment, taken alone, is not enough to plausibly allege abuse or justify an intrusive and resource-draining investigation.

Allowing this radical new interpretation to become effective would irreparably harm morale and effectiveness at DFPS, which are already in crisis, as well as transgender children and their parents who have no cause to be involved with the child welfare system, and the thousands of youths throughout Texas who continued to be failed by that system. The Department should not be investigating conduct that does not meet any

historical, ethical, legally precedented, or reasonable definition of “abuse.” This is especially the case considering that Abbott’s Directive’s and new DFPS Rule’s unprecedented definition of child abuse was not adopted through the proper legislative or regulatory channels and violates the rights of transgender youth and their families.

Amici and the other professionals at DFPS did not enter the child protection profession to remove children from loving homes with parents or guardians merely because they follow medical advice and a doctor’s care, only to place them in a foster care system that is riddled with actual abuse, sexual assault, and even sex trafficking. *Amici* write at this stage of the proceedings to offer the Court their perspective that DFPS, an agency that is already “failing children,” cannot withstand the division, attrition, and harm to children and families wrought by Abbott’s Directive and the new DFPS Rule.

ARGUMENT

I. **Abbott’s Directive and the New DFPS Rule were Rules.**

a. Abbott’s 22 Directive and the New DFPS Rule Were Experienced by Amici as Rules.

The Houston Chronicle reported last Summer that almost 2,000 Department of Family and Protective Services employees had resigned in the first seven months of last year alone, “the highest voluntary exit rate the department has seen since it became an independent agency in Fall 2017.”¹ These workers did not quit because of a “press statement.”

Rather, the “string of departures” that occurred after Abbott’s Directive and the new DFPS Rule was the “last straw” for many CPS employees precisely because it was a Rule.² The District Court was correct to conclude that “DFPS implemented a new rule” by mandating

¹ Cayla Harris, *Flood of 2,300 Departing Workers Leaves Texas Child Welfare Agency Scrambling: ‘Absolutely a Crisis,’* HOUS. CHRON. (Aug. 18, 2022), available at https://www.houstonchronicle.com/us-world/article/Flood-of-2-300-departing-workers-leaves-Texas-17382543.php?utm_source=ourcommunitynow&utm_medium=web.

² *Id.*; see also Samantha Michaels, *Texas Child Welfare Officials Were Secretly Pissed About the Order to Investigate Trans Kids*, MOTHER JONES (Aug. 24, 2022) (reporting on internal emails obtained through open records requests in which various DFPS employees called the Abbott Directive and new DFPS Rule “BS,” “Effing bull poop,” and “an ‘Infringement on Civil Liberties,’” among other expressions of dissent).

the investigation of reports of gender-affirming medical and making those allegations categorically ineligible for priority none dispositions, and that “this new rule was improperly promulgated.”³ The District Court was likewise correct that the “DFPS Rule changed the *status quo*” and that the Temporary Injunctions were necessary to “maintain[] the status quo prior to February 22, 2022.”⁴

Until February 22, 2022, a report that a parent or guardian had simply taken their kid to a doctor and followed that doctor’s treatment based on medical best practices would never have been grounds to open a DFPS investigation. After the Abbott Directive and New DFPS Rule, CPS workers had no discretion but to advance such a report to investigation.

The mandatory nature of the new DFPS Rule was evidenced at the July 6, 2022 hearing by the testimony of six-year DFPS veteran Randa Mulanax, a supervisor in the CPS Investigations division who resigned shortly after the new DFPS Rule took effect because of her ethical objections to its unlawfulness, its harm to Texas families, and its

³ 2SCR 4—5.

⁴ 1CR 548—49.

betrayal of DFPS’s precedents and mission. Ms. Mulanax’s testimony substantiates *Amici*’s contention that Abbott’s Directive and the new DFPS Rule marked a radical and binding change from prior DFPS abuse investigation policies.

Ms. Mulanax testified that, in reaction to Abbott’s Directive and the new DFPS Rules, DFPS leadership in her region called a previously unplanned emergency all-hands meeting of her District’s CPS investigations staff on February 24, 2022.⁵ At that meeting, and in follow-up communications, Ms. Mulanax and other *Amici* were instructed that future reports of children being administered medical care covered by Abbott’s Directive would no longer be eligible for a “Priority None” determination or administrative closure.⁶ Prior to Abbott’s Directive, the only cases that investigators categorically would not have the authority to categorize as “Priority None” if it appeared no abuse was occurring would have been “child death cases or cases involving children in conservatorship.”⁷ This policy changed after February 22, 2022, when

⁵ 2RR 136:5—137:4.

⁶ *Id.* 137:24—138:2.

⁷ *Id.* 138:5—8; *see also* Tex. Fam. Code § 261.3015 (establishing the “alternative response system” and providing that “the department may, in accordance with this section and department rules, conduct an

Amici and other CPS investigation staff were instructed that any case covered by the Abbott Directive and new DFPS Rule were to be categorically ineligible for a “Priority None” designation.⁸

The Abbott Directive and New DFPS Rule were communicated to DFPS employees as mandatory and binding policies affecting not just the internal workings of CPS but the procedures affecting the course of their investigations of private citizens. The CPS caseworker who told Wanda Roe that she “had to investigate” the report that Ms. Roe had given gender-affirming care to her son because “any case involving a parent giving gender-affirming therapy to their minor child was to be prioritized above every other case as directed by Governor Abbott” accurately stated the binding and mandatory nature of the DFPS Rule and its effects on the investigations of private citizens.⁹ Indeed, under the DFPS Rule, CPS employees including *Amici* were unambiguously told that these cases

alternative response to a report of abuse or neglect if the report does not: (1) allege sexual abuse of a child; (2) allege abuse or neglect that caused the death of a child; or (3) indicate a risk of serious physical injury or immediate serious harm to a child.”

⁸ 2RR 136:5—137:4.

⁹ 2RR 149:9—14.

categorically “were not eligible for priority none status” and “also not eligible for administrative closure if it fit the current policy.”¹⁰

Contrary to Appellants’ assertion that the DFPS Rule was merely a “press statement,” Ms. Mulanax testified that the mandatory nature of the new DFPS Rule was emphasized to CPS caseworkers in both a meeting and follow-up conversations with program directors and supervisors.¹¹ In an apparent effort to maintain plausible deniability about the mandatory nature of the rule and evade the APA by characterizing the rule as a “press statement” or the like, CPS caseworkers were specifically instructed not to send any written communications about these cases.¹²

Indeed, the unprecedented level of secrecy imposed by DFPS in implementing the DFPS Rule strongly suggests that DFPS was

¹⁰ 2RR 137:24—138:2.

¹¹ 2RR 136:5—16; *see also* 3RR at Plaintiffs’ Exhibit No. 15 (hereafter PLX 15) (Agenda for Leadership Meeting 2.24.2022) (“When you get a case that involves the specific allegation we talked about you ***need to immediately*** send an email to your PD, your PA, Lisa Guyton, and Gabina DeHoyoz for tracking and to possibly schedule a staffing.”) (emphasis added).

¹² 2RR 136:11—13; (PLX 15) (Agenda for Leadership Meeting 2.24.2022) (“Any communication you have regarding these cases needs to be done in a Teams meeting, telephone call, or fact to face. Do not send text messages or emails in regards to these specific cases.”).

consciously trying to evade the APA by implementing the rule in secrecy. Rather than calling these cases by any ordinary description, *Amici* and other DFPS employees were instructed to refer to them only as “specific cases.”¹³ DFPS staff were instructed not to discuss these cases in emails, text messages, or any other form of writing that could provide a record of the investigation, but only to discuss them in person, on Microsoft Teams, or over the phone.¹⁴

The DFPS Rule represented a change from prior DFPS policy that resulted directly in investigations being opened affecting the private rights of parents involved in these “specific cases,” including Appellees in this case.

These new policies imposed by DFPS after the new DFPS Rule were major, unprecedented changes to DFPS’s investigation procedures and the substantive treatment of the so-called “specific cases.”¹⁵ The result was, in Ms. Mulanax’s view and the view of other *Amici*, “discriminatory towards these cases because the only other cases prioritized that way

¹³ 2RR 136:9—16.

¹⁴ *Id.*

¹⁵ *See* (PLX 15) (Agenda for Leadership Meeting 2.24.2022) (referring to these cases euphemistically as “Specific Cases”).

were child death investigations or cases involving children in conservatorship.”¹⁶ By mandating that “specific cases” could not be closed without an investigation, the DFPS Rule effected a change in DFPS policy that was a “rule” both under Texas law and any ordinary understanding of a mandatory directive from one’s superiors within an organization.¹⁷

b. The New DFPS Rule is a “Rule” Under the Texas Government Code and this Court’s Precedents.

In addition to being experienced directly as a rule by *Amici* CPS workers, the DFPS Rule meets the definitions and criteria for a “rule” under the APA. Under the APA, the word “rule”:

- (A) means a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a

¹⁶ 2RR 138:5—8.

¹⁷ *See, e.g.* The American Heritage Dictionary of the English Language (5th ed. 2011) (defining “Rule” as “[a]n authoritative, prescribed direction for conduct, ...”), *available at* <https://www.ahdictionary.com/word/search.html?q=rule>.

state agency and not affecting private rights or procedures.¹⁸

The Texas Family Code requires the development and adoption of standards for persons who investigate suspected child abuse or neglect, such as *Amici*, “by rule.”¹⁹ This requirement that DFPS sets its policies “by rule” specifically applies to the Commissioner “assign[ing] priorities and prescrib[ing] investigative procedures for investigations.”²⁰ Thus while Appellants are correct that the Legislature has given DFPS the authority to prioritize various categories of cases and their respective investigative procedures, the Legislature was unambiguous in the relevant statute that DFPS was to do this “by rule.”²¹

Despite Appellants’ efforts to call the DFPS Rule anything other than a “rule,” under the statutory definitions and this Court’s precedents, they clearly meet the definition. This Court’s precedents clearly establish that binding instructions issued by an agency changing the standards for

¹⁸ TEX. GOV’T CODE § 2001.003(6).

¹⁹ TEX. FAM. CODE § 261.310(a).

²⁰ *Id.* § 261.301(d).

²¹ *Id.*

investigation of an alleged violation of the law within an agency's jurisdiction is a Rule within the meaning of the APA.²²

The Abbott Directive and DFPS Rule were “binding instructions” on CPS agents that “affect the private rights of all” parents, or at least all parents of transgender children.²³ The DFPS Rule is an “agency statement[s] of general applicability” that “implements, interprets or prescribes law or policy”; it “describes the procedure or practice requirements of a state agency”; it “amend[s] or repeal[s] a prior” enforcement policy of DFPS; and it does not constitute “a statement regarding only the internal management or organization” of DFPS but “affect[s] private rights or procedures.”²⁴ They bring an entire category of cases previously beyond CPS's ambit into that ambit, and make enforcement and investigation non-discretionary for that entire category of cases.

There is no support for Appellants' position that merely calling the new DFPS Rule anything other than a “rule” allows them to evade the

²² *Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Texas, Inc.*, 997 S.W.2d 651, 660 (Tex. App.—Austin 1999)

²³ *Id.*

²⁴ TEX. GOV'T CODE § 2001.003(6); *see also Amusement & Music Operators*, 997 S.W.2d at 660.

requirements of the APA. Allowing agencies to avoid the APA by mere word games would render the statute a dead letter.

Amici's understanding that the Abbott Directive and new DFPS Rule had the same binding effect as a rulemaking is not idiosyncratic. Indeed, as the Supreme Court noted, statements by Commissioner Masters and others at DFPS “suggest[] that DFPS may have considered itself bound by either the Governor’s letter, the Attorney General’s Opinion, or both.”²⁵

Justice Lehrmann recognized this deviation from the status quo when she wrote, in concurrence, that this Court’s prior Rule 29.3 order in the *Doe v. Abbott* case “temporarily reinstates DFPS’s policies as they were prior to the Abbott Directive and new DFPS Rule, leaving DFPS free to screen and investigate reports based on its preexisting policies regarding medical abuse and neglect.”²⁶ As Justice Lehrmann observed, “DFPS’s own statements support this reading of the order.”²⁷ Specifically, Justice Lehrmann noted that DFPS’s recognized that this Court’s prior Rule 29.3 order did not “bar it from investigating child abuse and neglect

²⁵ *In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022).

²⁶ *Id.* at 286 (Lehrmann, J., concurring).

²⁷ *Id.*

associated with *inappropriate* or *medically unnecessary* treatment for gender dysphoria, it simply must use preexisting criteria and procedures in determining whether a particular case justifies intervention.”²⁸

Thus, contrary to Appellants’ protestations, nothing about the temporary injunctions will prevent (or has prevented) DFPS from carrying out its statutory duty to investigate reports of child abuse consistent with the ordinary and legal understanding of child abuse that it applied throughout its history up until February 22, 2022.

Nor does Appellants’ argument that Appellees must show that medications used in providing gender-affirming care can “*never*” be harmful follow in any way. The District Court’s injunction would not prevent DFPS from investigating a report that the relevant medications were being administered in abusive doses or otherwise not as “prescribed” by a doctor for “medical treatment for gender dysphoria.”²⁹ Preventing investigations based solely on “prescribed medical treatment” does not, as Justice Lehrmann noted, prevent an investigation of “inappropriate or medically” unnecessary treatment.³⁰

²⁸ *Id.*

²⁹ 1CR 549.

³⁰ *In re Abbott*, 645 S.W.3d at 286 (Lehrmann, J., concurring).

The District Court’s Order only prevents investigations based “*solely*” on allegations that the child is being “prescribed medical treatment for gender dysphoria.”³¹ Many drugs, such as chemotherapy prescribed for cancer or amphetamines prescribed for ADHD, have the potential to harm a patient if administered improperly, but would never be considered abusive based solely on their being prescribed as medical treatment for a diagnosed medical condition. Just as one need not demonstrate that chemotherapy or amphetamines are “never” harmful in order to conclude that their administration as part of a prescribed medical treatment alone is insufficient to establish abuse, so with the medically necessary prescribed medications at issue here.

II. The Abbott Directive and New DFPS Rules are an Unprecedented Disruption of the *Status Quo* That Merit a Temporary Injunction.

Because, for the reasons stated above, the new DFPS Rule was a “rule” for purposes of the APA but was adopted in violation of the substantive and procedural requirements of the APA, Appellee’s suit under the APA is likely to prevail on the merits.

³¹ *Id.* (emphasis in original).

While the most relevant injury for purposes of the temporary injunction inquiry are the injuries Appellees amply detailed in their brief, *Amici* are also concerned about the significant and irreparable disruptions to the *status quo ante* at DFPS that would follow if the Abbott Directive and new DFPS Rule are allowed to operate pending trial on the merits.

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 the parents and the child could not, by itself, be the basis for an investigation of child abuse. Here, that means the pre-February 22, 2022 understanding of Texas’s child abuse laws that was based on Texas court precedent and had defined DFPS rules and policies throughout *Amici*’s careers.

“The purpose of a temporary injunction is to preserve the status quo of the subject matter of a suit pending final disposition of the case on its merits.”³² Here, the *status quo* means the state of affairs before Abbott’s Directive and the new DFPS Rule, namely that the mere allegation that

³² *Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Texas, Inc.*, 997 S.W.2d 651, 654 (Tex. App.—Austin 1999) (citing *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex.1978)).

a child was receiving gender affirming care under a doctor's prescription was insufficient to warrant the opening of an investigation.

Prior to February 22, 2022, never in DFPS's history was investigating parents who merely followed medically recommended care prescribed by a doctor and with the consent of the child considered "child abuse." Parents and guardians have long administered medical care in good faith reliance on licensed doctors' advice, and never before February 22, 2022, has that good-faith reliance, in and of itself, been alleged by DFPS to constitute abuse.

The uncontroverted evidence presented at the July 6, 2022, Travis County District Court hearing demonstrated that this *status quo* radically changed overnight after the Governor's February 22, 2022 Directive and new DFPS Rule.

The Abbott Directive and new DFPS Rule violated the proper role of Child Protective Services investigations and DFPS staff, who for the most part are not doctors or medical professionals and thus are not qualified to second-guess medical advice and decisions made by doctors, patients, and their parents and guardians. Contrary to Appellants' assertion, *Amici* and other CPS agents are being put in the position, for

the first time, of being required to investigate a family merely because of an allegation that a child is receiving recommended doctor's care, and in the untenable position of second-guessing the decisions made by medical doctors and consented to by the parents and child.

Nor does Appellant's argument that providing hormone therapy can be abuse because of alleged potential harms in any way suggest that the Abbott Directive and new DFPS Rule were consistent with DFPS's pre-February 22 *status quo*. Providing prescribed medical care (gender-affirming care or otherwise) to children had never been considered abuse before February 22, 2022. Indeed, DFPS actively trains CPS staff, foster parents, residential providers, and other youth medical consenters in how to exercise informed consent for the administration of psychotropic medication.³³ In that training, DFPS repeatedly makes clear that youth medical consenters must consult, consider, and often follow a doctor's

³³ See, e.g., Department of Family Protective Services, *Psychotropic Medication for Children in Texas Foster Care*, available at https://www.dfps.texas.gov/Training/Psychotropic_Medication/default.aspx.

recommendation in making an informed consent decision to administer medicine that is in the best interest of the child.³⁴

As reflected in DFPS's own training materials about administration of psychotropic medication and other controlled substances, it is lawful to administer a controlled substance subject to a doctor's prescription.³⁵ Parents and guardians have lawfully administered or consented to the administration of prescribed controlled substances to their children for as long as there has been the Controlled Substances Act. From various chemotherapy and pain management drugs for cancer patients to stimulants used to treat attention deficit hyperactivity disorder (ADHD) and anesthetics prior to surgery or dental procedures, it is commonplace for parents to administer or consent to the administration of appropriate prescription drugs to their children when those medications have been prescribed by a doctor. That any of these drugs could potentially be harmful if misused does not change the lawfulness, propriety, or non-abuse status of administering medicine subject to a doctor's prescription.

³⁴ See, e.g., *id.* at Slide 23 (“If the medical consentor is not sure whether to consent to the medication, he or she should discuss his or her concerns first with the prescribing medical provider,”).

³⁵ See, e.g. 21 C.F.R. Part 1306 (allowing and regulating the prescription of controlled substances by medical professionals).

Allowing the Directive and new DFPS Rules to become effective even temporarily prior to the final determination of their legality on the merits would permanently undermine the principle that the State should not separate children from their parents merely because the parents followed a licensed doctor's prescriptions in good faith.

The uncontroverted record evidence thus supports *Amici's* contention that Abbott's Directive and the new DFPS Rule marked a seismic change in policy with regard to DFPS handling of cases in which the *only* allegation is that parents or guardians are providing their child with medically necessary care under a doctor's supervision.

III. Overturning the Temporary Injunction Would Irreparably Harm an Already Overburdened DFPS.

The seismic changes described above are being imposed on a Department of Family Protective Services that is already failing to meet its core mission of protecting children in Texas's foster care system. Solely for political purposes, Appellants are deliberately distracting and shifting resources away from that core mission by compelling investigation of loving families who support their transgender adolescents by ensuring they receive medically necessary healthcare in consultation with their physicians and other healthcare providers.

Appellants intend to consign children who are subject to no “abuse” and are simply receiving medically recommended care to conditions in the foster care system which are so abysmal that the United States District Court for the Southern District of Texas and the Fifth Circuit have held that Appellants are “deliberately indifferent” to children’s welfare to such an extent that it “shocks the conscience.” *M.D. v. Abbott*, 152 F.Supp.3d 684 (S.D. Tex. 2015); *M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 258 (5th Cir. 2018) (*Stukenberg I*). “The combination of unmanageable caseloads and high caseworker turnover creates a ‘cycle of crisis’ that allows children to ‘fall through the cracks.’” *Stukenberg I*, 907 F.3d at 258. Repeatedly in recent years, a federal court has held Appellant DFPS in contempt for continued failures to adequately protect foster children’s constitutional rights to adequate care. *See, e.g., M.D. bnf Stukenberg v. Abbott*, 509 F.Supp.3d 683 (S.D. Tex. 2020). As recently as March 27, 2023, the monitoring team in the *M.D. v. Abbott* case reported that, based on their site visits of foster care facilities, “the State of Texas continues to place vulnerable children and youth in poorly supervised residential settings, exposing children to unreasonable risks of serious

harm.” *M.D., b/n/f Sarah R. Stukenberg et al. v. Greg Abbott, et al.*, CA No. 2:11-cv-00084, Dkt. No. 1337 (Mar. 27, 2023).

According to a report by DFPS, there has been a “marked” and “exponential” increase in the number of children without placement (CWOPs) in the State’s care.³⁶ In part due to mandated standards and monitoring stemming from the *M.D. v. Abbott* court’s injunction, approximately 25% of facilities that house foster children in Texas have been closed in recent years.³⁷ As a result, hundreds of children under the State’s care have been forced to sleep in hotels and office buildings, sometimes supervised by unlicensed caretakers.³⁸

To meet this increased demand, DFPS has been forced to conscript employees throughout the Agency to work overtime supervising children and teenagers in the CWOP program, a policy known as “Child Watch”

³⁶ Texas Department of Family and Protective Services, *Children Without Placement*, September 2021, at 1, available at https://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/CPS/documents/2021/2021-09-14-DFPS_CWOP_Report.pdf (hereafter DFPS CWOP Report).

³⁷ Edward McKinley, *Faced With Similar Foster Care Woes, Oklahoma Made Fixes While Texas Keeps ‘Failing Children,’* HOUS. CHRON. (Nov. 21, 2022), <https://www.houstonchronicle.com/politics/texas/article/Faced-with-similar-foster-care-woes-Oklahoma-16636568.php>.

³⁸ *Id.*

duty.³⁹ Between September 2020 and July 2021, 6,270 staff worked an average of 29.4 hours per month supervising youth in CWOP, with the average CPS employee working 35.7 hours of overtime in July 2021 doing CWOP supervision for which they are not trained and that is beyond their ordinary job duties.⁴⁰ In the 11 months between September 2020 and July 2021, DFPS staff worked approximately 714,083 hours of overtime on Child Watch, roughly equivalent to 343 employees working full time for an entire year. When DFPS staff are being conscripted into overtime doing the work of 343 full-time employees, their ability to effectively investigate new cases of actual abuse and care for children in the foster care system further suffers. The DFPS Rule's divisive mandate to investigate every alleged case of a transgender child receiving medically advised and necessary care will only further distract DFPS staff from investigating actual abuse and care for children in the foster care system.

³⁹ Jamie Landers, *Foster Care Workers at Dallas Town Hall Forum Detail Pressures of Helping Kids in Overwhelmed System*, DALL. MORNING NEWS (Dec. 12, 2021), available at <https://www.dallasnews.com/news/2021/12/12/foster-care-workers-at-dallas-town-hall-forum-detail-pressures-of-helping-kids-in-overwhelmed-system>.

⁴⁰ DFPS CWOP Report, *supra* Note 36, at 8-9.

The scandals and tragedies from DFPS's constant state of crisis continue to make horrifying headlines across the State. At least 23 children have died in Texas foster care since 2019.⁴¹ Between July 31, 2019, and April 30, 2020, eleven foster children in the State's permanent care died—a rate higher than one child death per month.⁴² According to the United States District Judge, some of these recent deaths were avoidable.⁴³

The inadequacy of DFPS's resources to keep foster children safe is being shockingly highlighted yet again in a federal court hearing in the ongoing *M.D. v. Abbott* litigation. In a March 28, 2022 filing, the court-appointed Monitors in that case largely substantiated reports that girls

⁴¹ Update to the Court Regarding Regarding Child Fatalities, Docket No. 1245 in *M.D. bnf Stukenberg v. Abbott et al.*, Case No. 2:11-cv-00084 in the U.S. Dist. Ct. for S.D. Tex. (June 1, 2022); *See also* Jill Ament & Caroline Covington, *New Report Shows Texas Foster Care System Still Falling Short*, THE TEX. STANDARD (May 10, 2021), <https://www.texasstandard.org/stories/new-report-shows-texas-foster-care-system-still-falling-short/#:~:text=At%20least%2023%20children%20have,rather%20than%20in%20foster%20homes>.

⁴² Julie Chang, *After 11 Foster Children Die, Texas to Be in Contempt of Court – Again*, AUSTIN AMERICAN-STATESMAN (Sep. 4, 2020), <https://www.statesman.com/story/news/politics/state/2020/09/04/after-11-foster-children-die-texas-to-be-in-contempt-of-court-ndash-again/42383213/>

⁴³ *Id.*

between the ages of 11 and 17 who had been placed in the foster care system as victims of sex trafficking were being sex trafficked yet again at the Bastrop foster care shelter “The Refuge.”⁴⁴ The Monitors concluded that there was “ample evidence of violations” at the Refuge, including but not limited to “a strong possibility of human trafficking based on staff’s inducement of children to sell nude photographs in exchange for drugs.”⁴⁵ In their most recent update to the United States District Court regarding The Refuge, the Monitors again found that “DFPS’s response ... shows a lack of concern related to the allegations that staff may have allowed child victims of sex trafficking access to their personal cell phones” and that “rather than continuing to investigate and pursuing other means to determine the veracity of the allegations, DFPS closed the

⁴⁴ Update to the Court Regarding the Refuge for DMST, Docket No. 1218 in *M.D. bnf Stukenberg v. Abbott et al.*, Case No. 2:11-cv-00084 in the U.S. Dist. Ct. for S.D. Tex. (March 28, 2022); *see also Editorial: Texas’ Shame: It Keeps Failing Foster Kids*, HOUS. CHRON. (Mar. 16, 2022), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Texas-shame-It-keeps-failing-17004547.php>) (hereafter “Editorial: Texas’ Shame”); Reese Oxner, *Child Welfare Monitors Say There’s ‘Ample Evidence’ Kids Were Abused at Bastrop Foster Care Facility, Disputing Texas Rangers*, TEX. TRIB. (Mar. 28, 2022), <https://www.texastribune.org/2022/03/28/texas-foster-care-child-abuse>.

⁴⁵ Monitor Report at 28.

investigations.”⁴⁶ That report concluded by noting that there had been “gaps in the investigations” and raising concerns about “failing to address what may be a systemic threat to child safety.”⁴⁷

The added burden and distraction of the Abbott Directive and new DFPS Rule would only make it harder for DFPS to prevent scandals like this in the future, and would risk consigning children currently in safe home conditions to this type of abuse in the foster care system.

The crisis in DFPS’s inability to meet the needs of Texas’s children is undisputed. As former Commissioner Masters testified in a 2022 hearing in the *M.D. v. Abbott* case, “I do feel like I am failing children.”⁴⁸ On this point, *Amici Curiae* agree with Ms. Masters. Because of a persistent lack of desire and/or ability to provide at least the Constitutional baseline of care to foster children in Texas’s care, foster children are dying, being sex trafficked, and generally lacking in the level of supervision and care necessary to keep them safe. The problems with

⁴⁶ Amended Third Update to the Court Regarding the Refuge for DMST at 10, Docket No. 1249 in *M.D. bnf Stukenberg v. Abbott et al.*, Case No. 2:11-cv-00084 in the U.S. Dist. Ct. for S.D. Tex. (June 2, 2022).

⁴⁷ *Id.* at 16.

⁴⁸ See Editorial: Texas’ Shame, *supra* Note 44.

Texas’s DFPS and foster care system are years old, but the crisis has never been more acute.

Overturing the Temporary Injunctions would add fuel to the already simmering crises described above and will likely cause further attrition and discontent among DFPS workers, making it even harder for DFPS to meet the needs of Texas’s foster children and victims of actual abuse. Several of *Amici* and other DFPS employees either have resigned in protest of the Abbott Directive and new DFPS Rule or are considering doing so.⁴⁹ Morale in the Agency was already at an all-time low due to the crises described above, but Abbott’s Directive and the new DFPS Rule have driven it to a new nadir. In August 2022, the associate commissioner for Child Protective Investigations, the top child abuse investigator in the Department, joined this exodus, resigning after less than a year on the job.⁵⁰ In November 2022, the continued dysfunction at DFPS resulted in

⁴⁹ See Cayla Harris, *Flood of 2,3000 Departing Workers Leaves Texas Child Welfare Agency Scrambling: ‘Absolutely a Crisis,’* HOUS. CHRON. (Aug. 18, 2022); see also 2RR 132:15–16 (Mulanax testimony that “I ultimately left due to the order sent out by Governor Abbott and the legal opinion by Ken Paxton”).

⁵⁰ Eleanor Klibanoff, *Head of Embattled Texas Child Abuse Investigations Resigns After Less Than a Year*, TEX. TRIB. (Aug. 12, 2022), available at <https://www.texastribune.org/2022/08/12/texas-child-abuse-agency-rich-richman>.

Governor Abbott firing Commissioner Masters.⁵¹ The “weaponiz[ation] of DFPS against transgender children and families” was widely understood and reported to be one of the major contributing factors to the dysfunction that culminated in Commissioner Masters’ termination.⁵²

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 no 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, 2022, and as construed by Texas court precedents.

Amici’s objections to being forced to choose between harassing or even breaking up loving families and continuing their work with CPS are

⁵¹ Cayla Harris, *Gov. Greg Abbott Fires Head of Embattled Child Welfare Agency*, HOUS. CHRON. (Nov. 29, 2022), available at <https://www.houstonchronicle.com/politics/texas/article/Gov-Greg-Abbott-fires-head-of-embattled-child-17618300.php>.

⁵² *Id.*

reinforced by the secrecy being imposed by CPS leadership in carrying out DFPS's new Rules. For the first time in their employment, *Amici* are being told not to put any communications regarding these so-called "specific cases" in writing.⁵³ This imposed secrecy, in the eyes of many *Amici*, shows consciousness of guilt by DFPS leadership that their actions are controversial, political, and based on a tenuous and novel interpretation of the law. To *Amici's* knowledge, this policy of secrecy has never been applied to any prior category of cases. This bar on written communications deprives the people of Texas to their right to open and recorded government and will likely impact the ability of families being investigated to discover the basis for and contents of the investigation and for DFPS to track or determine whether its own investigations have been conducted according to its properly promulgated rules and policies.

Being compelled to investigate families who do not meet any prior historical, precedented, regulatory, or plain meaning of the statutory term "abuse" is particularly insulting to the professionals who work at DFPS because the public statements of the Governor's staff have made clear that the Abbott Directive was not motivated by any concern for the

⁵³ 2RR 136:9—16

welfare of Texas’s vulnerable children but by the desire to create a political “wedge issue” for electoral purposes.⁵⁴ As career public servants, *Amici* rely on the principle, embodied in the Administrative Procedure Act, that agency decisions and policies should not be motivated by bare political concerns but must comply with both the procedural requirements for rulemaking and the substantive requirements of the Family Code and the Texas Constitution.

The costs, consequences, and potentially irreparable injuries from compelling DFPS employees to investigate every case of medically recommended gender affirming health care as “abuse” are not merely talking points. They are real.

Each one of these cases prevents the DFPS staff assigned to it from devoting that time to a child who is unsafe and suffering actual physical or sexual abuse or neglect, as that language was applied by Texas courts prior to February 22, 2022. Each one of these cases creates a risk that a

⁵⁴ See, e.g., Rex Huppke, *Texas’ Transgender Order Isn’t a Political Winner.’ It’s Cruelty Writ Large*, USA TODAY (Mar. 4, 2022), available at <https://www.usatoday.com/story/opinion/columnist/2022/03/04/texas-parents-transgender-kids-child-abuse/9363397002/?gnt-cfr=1> (quoting the Governor’s senior political advisor as calling the issue “a 75-80% winner” and nonsensically comparing provision of prescribed medications to “cutting off a child’s hand”).

child will be moved from a loving, supportive home where their medical and emotional needs are being cared for to a foster system that has demonstrably and persistently proved “deliberately indifferent” to foster children’s Constitutional right to care. Each one of these cases risks moving a child from a loving, safe home where they are receiving medical care in line with the guidance of every major medical association⁵⁵ and into a foster care system with unacceptable rates of abuse, sex trafficking, and death. These actual tangible harms to innocent children outweigh any abstract interest advanced by Appellants and weigh heavily in favor of upholding the Temporary Injunction against the Abbott Directive and new DFPS Rule pending trial on the merits.

IV. Conclusion

The new DFPS Rule was unquestionably a “rule” under the ordinary meaning of the term, as experienced by *Amici* as CPS

⁵⁵ See, e.g., Letter from James L. Madara, MD, CEO and Executive Vice President of the American Medical Association, to Bill McBride, Executive Director of the National Governors Association (April 26, 2021), *available at* <https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf> (stating that “[e]very major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.”).

employees, and under the definitions of the APA as reflected in this Court's precedents. That the rule was adopted in secrecy, without any of the required rulemaking processes of the APA, and in violation of both the DFPS enabling statutes and the Texas Constitution demonstrates that Appellees are likely to prevail on the merits of their lawsuit under the APA.

The District Court's Temporary Injunctions are necessary to preserve the *status quo* pending that litigation. The *status quo* prior to February 22, 2022, was that the provision of medically necessary care in consultation with physicians is not, on its own, child abuse. DFPS is already deeply in crisis and is failing Texas's most vulnerable children, violating their Constitutional rights, and subjecting them to further abuse. As career DFPS employees, *Amici* respectfully advise the Court that DFPS is on the brink of collapse, and that the politically motivated decision to compel DFPS employees like themselves to investigate non-abusive loving and supportive families who merely rely in good faith on their doctor's advice would put DFPS over that brink.

The unprecedented expansion of the definition of child abuse to include prescribed medical care disrupts the *status quo* and violates the

APA, DFPS enabling statutes, and the Texas Constitution. Overturning the Temporary Injunctions would irreparably injure not only the families and children who are targeted by the Directive, but also the morale and attrition rate among DFPS employees, and the welfare of the thousands of children currently under DFPS care who would bear the brunt of exacerbated division, distraction, and dysfunction at DFPS. The costs of Abbott's Directive and the new DFPS Rule will be measured in the lives and safety of those children.

PRAYER

For the reasons stated above, *Amici* respectfully urge the Court to affirm the District Court's Temporary Injunctions.

/s/ Holt M. Lackey

Holt M. Lackey

Texas State Bar No. 24047763

holt@holtmajorlackey.com

Holt Major Lackey, PLLC

111 W. Anderson Ln., Ste. D-211

Austin, Texas 78752

(512) 949-9598

**Counsel for *Amici Curiae*
Current and Former DFPS
Employees Randa Mulanax,
Shelby McCowen, Morgan Davis,
Jesica Davis, Candace Henson,
Sharon Berger, Lisa Drain,
Quinlyn Hackman, *Amici***

**A-C, and Texas State Employees
Union**

Dated: April 18, 2023

CERTIFICATE OF COMPLIANCE

I certify on behalf of Amici Curiae that this Amicus brief contains 6,983 words according to the word count feature of the Microsoft Word software used to prepare this brief, excluding portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Holt M. Lackey _____
Holt M. Lackey

CERTIFICATE OF SERVICE

I certify that on April 18, 2023, a true and correct copy of the above and foregoing Amicus brief has been served to all attorneys of record registered to receive filings through the e-filing system to the counsel listed below:

Derek R. McDonald
State Bar No. 00786101
Maddy R. Dwertman
State Bar No. 24092371
John Ormiston
State Bar No. 24121040
BAKER BOTTS L.L.P.
401 S. 1st Street., Suite 1300
Austin, Texas 78704
T: (512) 322-2500
F: (512) 322-2501
derek.mcdonald@bakerbotts.com
maddy.dwertman@bakerbotts.com
john.ormiston@bakerbotts.com

Brandt Thomas Roessler
Texas State Bar No. 24127923
Nischay K. Bhan
Texas State Bar No. 24105468
Nicholas F. Palmieri*
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, New York 10112
T: (212) 408-2500
brandt.roessler@bakerbotts.com
nish.bhan@bakerbotts.com
nick.palmieri@bakerbotts.com

Susan Kennedy
State Bar No. 24051663
BAKER BOTTS L.L.P
2001 Ross Ave, Ste. 900
Dallas, Texas 75201
(T): (214) 953-6500
susan.kennedy@bakerbotts.com

Paul D. Castillo
State Bar No. 24049461
Shelly L. Skeen
Texas State Bar No. 24010511
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Ave., Suite 500
Dallas, Texas 75219
T: (214) 219-8585
F: (214) 481-9140
pcastillo@lambdalegal.org
sskeen@lambdalegal.org

Omar Gonzalez-Pagan*
M. Currey Cook*
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005
T: (212) 809-8585
ogonzalez-
pagan@lambdalegal.org
ccook@lambdalegal.org
Karen L. Loewy*
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006
T: (202) 804-6245
kloewy@lambdalegal.org

Brian Klosterboer
State Bar No. 24107833
Chloe N. Kempf
State Bar Number 24127325
Savannah Kumar
State Bar No. 24120098
Adriana Piñon
State Bar No. 24089768
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
5225 Katy Fwy., Suite 350
Houston, Texas 77007
T: (713) 942-8146
bklosterboer@aclutx.org
ckempf@aclutx.org
skumar@aclutx.org
apinon@aclutx.org

Elizabeth Gill*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, California 94111
(T): (415) 621-2493
egill@aclunc.org

Chase Strangio*
Anjana Samant*
Hina Naveed*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
T: (917) 345-1742
cstrangio@aclu.org
asamant@aclu.org
hnaveed@aclu.org

Counsel for Appellees

Courtney Corbello
Texas State Bar No. 24097533
Assistant Attorney General
Johnathan Stone
Texas State Bar No. 24071779
Assistant Attorney General
General Litigation Division
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548, Capitol Station
Austin, Texas 78711
Phone: (512) 463-2120
Fax: (512) 320-0667
courtney.corbello@oag.texas.gov
johnathan.stone@oag.texas.gov

Counsel for Appellants

 /s/ Holt Major Lackey
Counsel for Amici Curiae

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Holt Lackey on behalf of Holt Lackey

Bar No. 24047763

holt@holtmajorlackey.com

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Associated Case Party: PFLAG, INC.

Name	BarNumber	Email	TimestampSubmitted	Status
Derek McDonald		derek.mcdonald@bakerbotts.com	4/18/2023 4:55:19 PM	SENT
Maddy Dwertman		maddy.dwertman@bakerbotts.com	4/18/2023 4:55:19 PM	SENT
Carolina Caicedo		ccaicedo@aclu.org	4/18/2023 4:55:19 PM	SENT
Maia Zelkind		mzelkind@lambdalegal.org	4/18/2023 4:55:19 PM	SENT
Nick Palmieri		nick.palmieri@bakerbotts.com	4/18/2023 4:55:19 PM	SENT
Susan Kennedy		susan.kennedy@bakerbotts.com	4/18/2023 4:55:19 PM	SENT
John Ormiston		john.ormiston@bakerbotts.com	4/18/2023 4:55:19 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Courtney Corbello	24097533	ccorbello@ifs.org	4/18/2023 4:55:19 PM	SENT
Paul Castillo	24049461	pcastillo@lambdalegal.org	4/18/2023 4:55:19 PM	SENT
Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	4/18/2023 4:55:19 PM	SENT
Nischay Bhan	24105468	Nischay.bhan@bakerbotts.com	4/18/2023 4:55:19 PM	SENT
Adriana Pinon	24089768	apinon@aclutx.org	4/18/2023 4:55:19 PM	SENT
Brian Klosterboer	24107833	bklosterboer@aclutx.org	4/18/2023 4:55:19 PM	SENT
Savannah Kumar	24120098	skumar@aclutx.org	4/18/2023 4:55:19 PM	SENT
Elizabth Gill		egill@aclunc.org	4/18/2023 4:55:19 PM	SENT
Chase Strangio		cstrangio@aclu.org	4/18/2023 4:55:19 PM	SENT
James Esseks		jesseks@aclu.org	4/18/2023 4:55:19 PM	SENT
Anjana Samant		asamant@aclu.org	4/18/2023 4:55:19 PM	SENT

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Bar No. 24047763

holt@holtmajorlackey.com

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Case Contacts

Karen Loewy		KLoewy@lambdalegal.org	4/18/2023 4:55:19 PM	SENT
Omar Gonzalez-Pagan		ogonzalez-pagan@lambdalegal.com	4/18/2023 4:55:19 PM	ERROR
M. CurreyCook		ccook@lambdalegal.org	4/18/2023 4:55:19 PM	SENT
Shelley Skeen		sskeen@lambdalegal.org	4/18/2023 4:55:19 PM	SENT
Brandt Roessler	24127923	brandt.roessler@bakerbotts.com	4/18/2023 4:55:19 PM	SENT

Associated Case Party: ADAM BRIGGLE, individually and as parent an

Name	BarNumber	Email	TimestampSubmitted	Status
Hina Naveed		hnaveed@aclu.org	4/18/2023 4:55:19 PM	SENT

Associated Case Party: AMBER BRIGGLE, individually and as parent and

Name	BarNumber	Email	TimestampSubmitted	Status
Chloe Kempf	24127325	chloenkempf@gmail.com	4/18/2023 4:55:19 PM	SENT