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THIRD COURT OF APPEALS
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CAUSE NO. 03-22-00126-CV

In the Third Court of Appeals

Austin, Texas

Greg Abbott, et al.,

Appellant,

v.

Jane Doe, et al.,

Appellee.

On Appeal from the 201st Judicial District Court

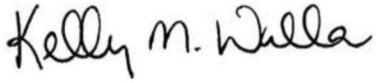
Travis County, Texas

Trial Court Cause No. D-1-GN-22-000977

BRIEF OF AMICUS CURIAE TEXAS MEDICAL ASSOCIATION IN SUPPORT OF APPELLEES

Respectfully submitted,

Texas Medical Association



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Greg Abbott, sued in his official capacity as Governor of the State of Texas; Jaime Masters, sued in her official capacity as Commissioner of the Texas Department of Family and Protective Services; and the Texas Department of Family and Protective Services.

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Appellees

Jane Doe, individually and as parent and next friend of Mary Doe, a minor; John Doe, individually and as parent and next friend of Mary Doe, a minor; and Dr. Megan Mooney.

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Interest of the Amicus Curiae

The Texas Medical Association ("TMA") is a private, voluntary, non-profit association of more than 56,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, TMA's maxim continues in the same direction: Physicians caring for Texans. TMA's diverse physician members practice in all fields of medical specialization. TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

TMA has a strong interest in this case, as demonstrated by TMA's policies. TMA policies: (1) recognize that transgender individuals have unique health care needs and suffer significant barriers in access to care that result in health care disparities, (2) oppose discrimination based on gender identity, (3) oppose efforts to criminalize evidence-based, gender-affirming care for transgender youth, (4) support the confidentiality of patients' medical information, and (5) oppose interference by the government or any other third party that impedes the patient-physician relationship. TMA's policies are adopted by TMA's House of Delegates—physicians who represent members' interests statewide. These policies, in relevant part, are set forth below for reference:

1. *Policy No. 55.035 Right to Confidential Care*. The Texas Medical Association upholds the right of adolescents to receive confidential care to protect their

health, except in situations where physicians and other health care professionals must abide by state and federal law.

2. *Policy No. 55.058 Sexual Orientation Change Efforts and Gender-Affirmation Therapies for Minors.* (1) The Texas Medical Association supports treatment and therapies rooted in acceptance and support regarding an individual's sexual orientation and gender identification and therefore opposes practices aimed at changing an individual's sexual orientation, including conversion therapy; (2) TMA supports physician efforts to provide medically appropriate therapies relating to gender identity and opposes the criminalization of these practices; (3) TMA supports the prohibition of any person licensed to provide mental health counseling from engaging in sexual orientation change efforts with patients younger than 18 years of age. TMA supports the practice of evidence-based therapies and will aggressively oppose the use of potentially harmful, unproven therapies for children.

3. *Policy No. 55.066 Opposition to Criminalization of Gender-Affirming Care for Transgender Youth.* The Texas Medical Association opposes efforts to criminalize evidence-based, gender-affirming care for transgender youth.

4. *Policy No. 60.008 Rejection of Discrimination*. The Texas Medical Association does not discriminate, and opposes discrimination, based on race, religion, disability, ethnic origin, national origin, age, sexual orientation, sex, or gender identity. TMA supports physician efforts to encourage that the nondiscrimination policies in their practices, medical schools, hospitals, and clinics be broadened to include "race, religion, disability, ethnic origin, national origin, age, sexual orientation, sex, or gender identity" in relation to patients, health care workers, and employees.

5. *Policy No. 60.010 Opposing Legislation that Mandates Physician Discrimination*. The Texas Medical Association… opposes legislation or regulation that mandates physicians and other health professionals discriminate against or limit access to health care for a specific patient population.

6. *Policy No. 105.006 Confidentiality of Patient Records*. All patients should be assured that the information contained in their medical records will be maintained in confidence, with appropriate and effective control measures, and penalties for violation as provided by law.

7. *Policy No. 245.003 Protections Against Interference in the Practice of Medicine and the Patient-Physician Relationship*. Physicians are observing a constant erosion of professional freedom to seek the best health and medical care for their patients based solely on the needs of each individual. The principal source of personal fulfillment for physicians rests in the free exercise of their art to satisfy mutual goals with their patients. Onerous and grievous burdens and intrusions have been implemented by the government and other third parties that directly interfere with the patient-physician relationship. These factors are progressively preventing the efficient, effective, and meaningful care of patients considered necessary by the profession. Our TMA therefore strongly condemns any interference by the government or any other third party that impedes the patient-physician relationship and compromises physicians' ability to use medical judgment as to the information and treatment that is in the best interest of their patients.

8. *Policy No. 265.028 Improving LGBTQ Health Care Access.* The Texas Medical Association recognizes that lesbian, gay, bisexual, transgender, queer, or questioning (LGBTQ) individuals have unique health care needs and suffer significant barriers in access to care that result in health care disparities.

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, TMA confirms that is has received no compensation or fees in connection with the preparation or submission of this Brief and will be responsible for all attorney fees incurred in filing this Brief.

Issues Presented

Whether the trial court was correct in denying the Defendants' Plea to the Jurisdiction and granting the Plaintiffs' Application for Temporary Injunction, which enjoined the Defendants from investigating reports of child abuse based solely on facilitating or providing gender-affirming care, or imposing reporting requirements for such care, including imposing reporting requirements on nonparties statewide.

Statement of Facts

On August 23, 2021, Texas Representative Matt Krause submitted an opinion request to the Texas Office of the Attorney General on two issues related to the care of transgender youth. First, whether certain surgical sex-change procedures, if performed on minors, constitute "abuse" under Chapter 261 of the Texas Family Code. Second, whether the administration of puberty-blockers or hormone therapy, as part of gender-affirming care of a minor, also constitutes "abuse" under Chapter 261.

On September 23, 2021, TMA and the Texas Pediatric Society submitted a brief in response to the request.[1] The brief limited its response to gender-affirming medical care—i.e., puberty blockers and hormone therapy—and did not address the issue of surgical care. The brief stated TMA's opposition to the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents. The brief also explained that Representative Krause's request was based on the premise of gender-affirming care being medically unnecessary, but evidence recognizes such care as medically necessary and appropriate.

On February 18, 2022, the Texas Office of the Attorney General released Opinion No. KP-0401, concluding that gender-affirming treatment of transgender

[1] The September 23, 2021 letter brief is included in the Appendix as Exhibit A.

children could legally constitute child abuse under Chapter 261 of the Texas Family Code.

Based on this opinion, on February 22, 2022, Texas Governor Greg Abbott sent a letter to the Commissioner of the Texas Department of Family and Protective Services (DFPS), Jaime Masters.[2] The Governor's letter directed the agency to investigate any reported instances of gender-affirming care of minors. The letter also noted that "Texas law imposes reporting requirements upon all licensed professionals who have direct contact with children who may be subject to such abuse, including doctors, nurses, and teachers, and provides criminal penalties for failure to report such child abuse."

On February 22, 2022, DFPS released a statement that the agency would comply with the Attorney General's opinion and Governor Abbott's letter and investigate reports of gender-affirming treatment of minors.

Plaintiff Jane Doe is the parent of Mary Doe, a transgender 16-year-old receiving gender-affirming care. Jane Doe is also a DFPS employee. On February 23, Jane Doe inquired with her direct supervisor about the impact of the Attorney General's opinion and Governor Abbott's letter on DFPS policy. Later that day, Jane Doe was placed on paid leave, and the following day was contacted by a Child

[2] Governor Abbott's February 22, 2022 letter, which contains the Attorney General's February 18, 2022 opinion, is included in the Appendix as Exhibit B.

Protective Services (CPS) investigator and informed that her family would be investigated for Mary Doe's gender dysphoria treatments.

On March 1, 2022, Jane Doe and her husband John Doe, individually and as parents of Mary Doe, filed suit against Governor Abbott, Commissioner Masters, and DFPS in Travis County District Court. Dr. Megan Mooney, PhD, a Houston psychologist who provides mental health evaluation for youth with gender dysphoria, was also named as a plaintiff in the lawsuit. The suit requested three avenues of relief:

1. A temporary restraining order (TRO) to preserve the status quo and restrain the defendants from investigating families based on the Governor's letter or the Attorney General's opinion;
2. A temporary injunction, followed by a permanent injunction, prohibiting the defendants from enforcing the Governor's letter, the Attorney General's opinion, or the DFPS statement, including the required reporting of children receiving gender-affirming care as suspected child abuse and the investigation of families of children being treated for gender dysphoria; and
3. Declaratory judgment that the DFPS statement is *ultra vires*, unconstitutional, and violates the Texas Administrative Procedures

> Act, and that the Governor's letter is also *ultra vires* and unconstitutional.

On March 2, 2022, the Honorable Judge Amy Clark Meachum issued an order granting the Plaintiffs' application for a temporary restraining order, enjoining the Defendants from taking any action against the Plaintiffs based on the Attorney General's opinion, the Governor's letter, or the DFPS statement. Judge Meachum's order also set a March 11, 2022, hearing date for the Plaintiffs' request for a temporary injunction for potential statewide application.

Defendants immediately appealed to this court, arguing that Judge Meachum's order implicitly denied the Defendants' plea to the jurisdiction and seeking an accelerated interlocutory appeal of that issue (Case No. 03-22-00107-CV). On March 9, 2022, this court dismissed the appeal for lack of jurisdiction.

On March 11, 2022, the Plaintiffs' application for a temporary injunction was heard before Judge Meachum. That afternoon, Judge Meachum ordered that application granted, finding that there was a substantial likelihood that the Plaintiffs would prevail after a trial on the merits due to the Governor's letter being *ultra vires*, beyond the scope of his authority, and unconstitutional, and the DFPS statement being similarly void. The court enjoined the Defendants from enforcing the Governor's letter, the DFPS statement, and the Attorney General's opinion:

> This Temporary Injunction restrains the following actions by the Defendants: (1) taking any actions against Plaintiffs based on

> the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate; (2) investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports; and (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

Judge Meachum also issued an order denying Defendants' Plea to the Jurisdiction and set the trial on the merits for July 11, 2022.[3]

That same evening, Defendants filed Notice of Accelerated Interlocutory Appeal, appealing the denial of their Plea to the Jurisdiction and the granting of Plaintiffs' Request for Temporary Injunction. In their notice, Defendants asserted that pursuant to the Texas Civil Practice and Remedies Code and Texas Rules of Appellate Procedure, the temporary injunction had been superseded by the filing of the appeal.

The case returned to this court. On March 17, 2022, the Plaintiffs filed an emergency motion for injunctive relief, requesting that this court reinstate the trial court's injunction during the pendency of the appeal. On March 18, 2022, TMA filed

[3] Judge Meachum's March 11, 2022 Orders are included in the Appendix as Exhibit C.

an amicus brief in support of the Plaintiffs' emergency motion, addressing similar issues as TMA's trial court amicus brief.

On March 21, 2022, this court granted the Plaintiffs' motion, reinstating the injunction as issued by the trial court.[4] On March 23, 2022, the Defendants filed a Petition for Writ of Mandamus to the Texas Supreme Court. The Defendants' petition requested that the Supreme Court issue a writ directing this court to withdraw its March 21 injunction.

On May 13, 2022, the Supreme Court released its decision, partially granting and partially denying the Defendants' requested relief. The Court struck down the injunction against investigating or requiring reporting by non-parties, on the basis that the rule of appellate procedure under which the injunction was imposed is limited to the parties to the appeal. The Court also struck down this court's injunction as applied to Governor Abbott, on the rationale that the governor does not have the power to investigate or prosecute child abuse, or to require reporting of child abuse.

The Supreme Court denied the Defendants' requested relief as applied to the named Plaintiffs, allowing the injunction's protections to remain in place for the Doe family and psychologist Megan Mooney. The Court also noted that it "express[ed]

[4] *Abbott, et al., v. Doe, et al.*, No. 03-22-00126-CV (Tex. App.—Austin Mar. 21, 2022) (per curiam), mandamus conditionally granted sub nom. *In re Abbott*, 645 S.W.3d 276 (Tex. 2022).

no opinion on the pending interlocutory appeal of the trial court's temporary injunction or on the merits of the plaintiffs' underlying claims… [that] remain pending in the district court."

The case then returned to this court to address the Defendants' interlocutory appeal of the trial court's March 11 injunction.

Summary of the Argument

This court should return the status quo that existed before the Governor's letter and DFPS statement of February 22, 2022 ("February Actions"), where there was no purported general requirement to investigate or report gender-affirming care as child abuse. This can be accomplished by a statewide injunction against investigating reports of alleged child abuse or imposing reporting requirements solely on the basis of a child receiving gender-affirming care. An injunction will help prevent the worsening of existing barriers to care for accepted and medically necessary treatment.

Argument

I. The Defendants should be enjoined statewide from investigating reports of child abuse based solely on facilitating or providing gender-affirming care and from imposing reporting requirements for such care, including imposing reporting requirements on nonparties statewide.

TMA supports a return to the status quo that existed prior to the February Actions, when there was no purported general requirement to investigate or report gender-affirming care as abuse. This could be achieved by restoring the trial court's statewide injunction against investigating or requiring reporting solely based on the child's receipt of gender-affirming care.

The February Actions are a rule under the Administrative Procedures Act (APA). Under the APA, the definition of a "rule" includes "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…."[5] The February Actions meet both (i) and (ii). DFPS stated that the agency will implement a new interpretation of law and new procedures for investigating gender-affirming care: "In accordance with Governor Abbott's directive today to Commissioner Masters, we will follow Texas law as explained in Attorney General opinion KP-0401."[6] And the governor's letter "direct[ed] [the] agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the

[5] Tex. Gov't Code §2001.003(6).
[6] *In re Abbott*, 645 S.W.3d 276, 279 (Tex. 2022).

State of Texas."[7] "A rule is invalid when an agency promulgates it without complying with the proper rulemaking procedures."[8]

In the context of rulemaking challenges, this court has repeatedly upheld trial court injunctions against agency defendants, with injunction language that broadly restricted the conduct of the defendants.[9] Though these cases do not explicitly state that their injunctions applied to nonparties, they contain language indicating that their injunctions' effects were statewide.[10] The opinions also noted the broad

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[7] Texas Governor Greg Abbott's February 22, 2022 letter to DFPS Commissioner Jaime Masters. The letter also noted that "Texas law also imposes a duty on DFPS to investigate the parents of a child who is subjected to these abusive gender-transitioning procedures, and on other state agencies to investigate licensed facilities where such procedures may occur." Id.

[8] *Tex. Tel. Ass'n v. Pub. Util. Comm'n of Tex.*, No. 03-21-00294-CV, 2022 WL 2374875 (Tex. App.—Austin June 30, 2022, no pet. h.)

[9] See *Tex. Health & Human Services Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 620 (Tex. App.—Austin 2013, no pet.) ("[T]he trial court enjoined HHSC from… denying eligibility of a Medicaid recipient under the age of 18 for medical transportation services….); *Combs v. Entm't Publications, Inc.,* 292 S.W.3d 712*,* 719 (Tex. App.—Austin 2009, no pet.) (internal citations omitted) (upholding the trial court's temporary injunction that "directed the Comptroller to desist and refrain from implementing and enforcing the New Rule described by the Comptroller's letters… unless and until the Comptroller properly enacts the New Rule according to the procedural requirements of the APA or until the [Trial] Court renders its final judgment."); *Tex. Alcoholic Beverage Comm'n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 653-654 (Tex. App.—Austin 1999, pet. dism'd w.o.j.) (Affirming the trial court's finding that "two [agency] memoranda constituted invalid rules because they were not passed in accordance with the APA's rulemaking requirements… [and] therefore ordering that the [agency] defendants were temporarily enjoined from relying on the [memoranda].").

[10] See *Advocates for Patient Access, Inc.*, 399 S.W.3d at 620 – 21 (("[T]he trial court enjoined HHSC from… requiring as a condition for eligibility for reimbursement for any visit or screening provided under the [EPSDT] program of the Medicaid program that a child younger than fifteen years of age be accompanied by the child's parent or guardian.…"); *Combs*, 292 S.W.3d at 724 (Explaining the harm that the Comptroller might suffer from the injunction would be "having to reassess its administrative rule and adopt a rule that complied with the procedural requirements of the APA."); *Tex. Alcoholic Beverage Comm'n,* 997 S.W.2d at 658 ("The court therefore determined that the memos met the definition of rules under the APA, and enjoined the Commission from taking any enforcement action in reliance on the memos.").

discretion given to the trial court in determining whether to issue a temporary injunction.[11]

Additionally, in federal challenges to invalid rulemaking, it is not uncommon for plaintiffs to seek—and for courts to grant—injunctive relief that extends beyond the defendant's conduct vis-à-vis the plaintiffs.[12] This is often referred to as a "nationwide injunction."[13] In determining whether to extend relief to non-parties, a court's discretion may include consideration of the equities of a given case and the overall public interest.[14]

There are also other policy considerations that favor broadly enjoining a government defendant's challenged conduct. Broad injunctions can "prevent widespread harm, reduce the burdens of litigation by eliminating the need for every

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[11] *Advocates for Patient Access, Inc.*, 399 S.W.3d at 629; *Combs*, 292 S.W.3d at 724; *Tex. Alcoholic Beverage Comm'n,* 997 S.W.2d at 654.

[12] See, e.g., *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) ("A nationwide injunction is appropriate when a party brings a facial challenge to agency action under the APA."); *Texas v. United States*, 201 F. Supp. 3d 810, 835 - 36 (N.D. Tex. 2016) ("Plaintiffs seek to apply the injunction nationwide.")

[13] See Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67, 72 (2019) ("My focus here is on injunctions that… govern the totality of a defendant's wrongful conduct, even with respect to nonparties."). Even in the federal context though, granting nationwide injunctions is not without controversy and has generated extensive scholarly discussion. See, e.g., Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020).

[14] See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) ("We leave the injunctions entered by the lower courts in place with respect to respondents *and those similarly situated,* as specified in this opinion. [] Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also consider the overall public interest.") (emphasis added) (internal citations and quotations omitted).

person affected by a challenged policy to bring suit, and promote consistency and the rule of law by uniformly halting allegedly illegal government actions."[15] And where the same courts would hear similar challenges, judicial economy favors extending relief to non-parties.[16]

These considerations are applicable in this case, particularly for the purported reporting requirement. First, under Chapter 261, "[a] person having reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter."[17] So for any person in Texas who has reasonable cause to believe that a child is receiving gender-affirming care, that person faces the harm of potential criminal prosecution for failing to report these allegations (if the February Actions are enforced).[18]

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[15] Congressional Research Service. *Nationwide Injunctions: Law, History, and Proposals for Reform*. Summary (Sept. 8, 2021); *see also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U.L. Rev. 1065, 1065 (2018) ("In some cases, nationwide injunctions are the only means… to prevent harm to thousands of individuals who cannot quickly bring their own cases before the courts.").

[16] See *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("Moreover, if persons adversely affected by an agency rule can seek review in [this court], as they often may…, our refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation. Even though our jurisdiction is not exclusive, an injunction issued here only as to the plaintiff organizations and their members would cause all others affected by the [challenged rule] (or at least all those with enough at stake and with astute enough lawyers) to file separate actions for declaratory relief in this circuit. Issuance of a broad injunction obviates such repetitious filings.").

[17] Tex. Family Code §261.101(a).

[18] For the general public's reporting requirement under Tex. Family Code §261.101(a), failure to report "is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the child was a person with an intellectual disability who resided in a state supported living center, the ICF-IID component of the Rio Grande State Center, or a facility

Second, the basis for granting injunctive relief to any of these persons would be the same. For the order granting the temporary injunction, the trial court found that there was a substantial likelihood of the Plaintiffs ultimately prevailing due to the February Actions being facially invalid.[19] As such, this underlying flaw in the February Actions would be present for any plaintiff seeking injunctive relief.

Third, it would also be unduly burdensome for every affected individual to bring suit. And limiting injunctive relief to those who do would result in inconsistency in the reporting requirements. Similar considerations weigh against allowing investigations of some individuals but not others for the same alleged conduct. As such, TMA supports restoring the trial court's statewide injunction, which maintains the status quo that existed prior to the February Actions.

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licensed under Chapter 252, Health and Safety Code, and the actor knew that the child had suffered serious bodily injury as a result of the abuse or neglect." Tex. Family Code §261.109(b). For the professional's reporting requirement under Tex. Family Code §261.101(b), failure to report "is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the actor intended to conceal the abuse or neglect." Tex. Family Code §261.109(c).

[19] See *Doe, et al. v. Abbott, et al.*, No. D-1-GN-22-000977 (201st Dist. Ct., Travis County, Tex. Mar. 11, 2022) ("For the reasons detailed in the Plaintiffs' Application and accompanying evidence, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is *ultra vires*, beyond the scope of his authority, and unconstitutional. The improper rulemaking and implementation by Commissioner Masters and DFPS are similarly void.").

II. Investigating and requiring reporting of medically accepted and necessary treatment solely on the basis that it is gender-affirming will worsen barriers to care.

Gender-affirming care is consistent with accepted clinical standards for the treatment of adolescents with gender dysphoria. Investigating or requiring reporting of this treatment would worsen existing barriers to care for transgender youth, an already vulnerable population. For these reasons, TMA urges that this court's holding return the pre-February status quo, which did not require investigation or reporting of accepted and necessary treatment solely on the basis that it is gender-affirming care.

A. Treatment of Adolescents with Gender Dysphoria

Providing gender-affirming care is consistent with accepted clinical standards for the treatment of adolescents with gender dysphoria. This treatment should not be criminalized or stigmatized.

For transgender adolescents with gender dysphoria, treatment with puberty-blockers and hormone therapy is consistent with the treatment guidelines from the World Professional Association for Transgender Health[20] and the Endocrine Society.[21] The latter guidelines are co-sponsored by the Pediatric Endocrine

[20] World Professional Association for Transgender Health. Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People, 7th Version (2012).
[21] Hembree W, et al. Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline. THE JOURNAL OF CLINICAL ENDOCRINOLOGY & METABOLISM, Volume 102, Issue 11, pages 3869–3903 (Nov. 2017).

Society.[22] As set forth below, these standards have been recognized and endorsed in the clinical guidance and publications of every American medical association that has addressed this area, as well as the in guidelines of the American Psychological Association.

The American Academy of Pediatrics:

> Gender affirmation among adolescents with gender dysphoria often reduces the emphasis on gender in their lives, allowing them to attend to other developmental tasks, such as academic success, relationship building, and future-oriented planning. Most protocols for gender-affirming interventions incorporate World Professional Association of Transgender Health and Endocrine Society recommendations.[23]

The American College of Obstetrics and Gynecology:

> [H]ormone therapy is a medically necessary treatment for many transgender individuals with gender dysphoria.[24]
>
> For more details on the provision of hormone therapy for these populations, obstetrician–gynecologists should see resources from the World Professional Association for Transgender Health and the Endocrine Society.[25]

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[22] Id. at 3869.
[23] Rafferty J. Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents. American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, Committee on Adolescence and Section on Gay, Lesbian, Bisexual and Transgender Health and Wellness. PEDIATRICS, Vol. 142, No. 4, page 6 (Oct. 2018).
[24] American College of Obstetricians and Gynecologists, Committee on Gynecologic Practice and Committee on Health Care for Underserved Women Health Care for Transgender and Gender Diverse Individuals. Committee Opinion No. 823, page 75 (Mar. 2021).
[25] Id. at 81.

The American College of Physicians:

> The Endocrine Society and WPATH provide straightforward approaches to medical care for transgender patients. For children and adolescents, [these] organizations promote a multidisciplinary approach that includes both mental health professionals for assessment and medical professionals for medical interventions. [26]

The American Psychological Association:

> The [psychological] Guidelines are intended to complement treatment guidelines for TGNC people seeking mental health services, such as those set forth by the World Professional Association for Transgender Health Standards of Care and the Endocrine Society. [27]
>
> [T]here is greater consensus that treatment approaches for adolescents affirm an adolescents' gender identity. Treatment options for adolescents extend beyond social approaches to include medical approaches. One particular medical intervention involves the use of puberty-suppressing medication or "blockers" (GnRH analogue), which is a reversible medical intervention used to delay puberty for appropriately screened adolescents with gender dysphoria.[28]
>
> **Hormone therapy (gender-affirming hormone therapy, hormone replacement therapy):** the use of hormones to masculinize or feminize a person's body to better align that person's physical characteristics with their gender identity…. Hormone therapy may be an important part of medically necessary treatment to alleviate gender dysphoria.[29]
>
> **Puberty suppression (puberty blocking, puberty delaying therapy):** a treatment that can be used to temporarily suppress the development of secondary sex characteristics that occur during puberty in youth, typically using gonadotropin-releasing hormone (GnRH)

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[26] Safer J, Tangpricha V. Care of the Transgender Patient. ANNALS OF INTERNAL MEDICINE, page 4 (Jul. 2019).
[27] American Psychological Association. Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. AMERICAN PSYCHOLOGIST. Vol. 70, No. 9, page 833 (Dec. 2015).
[28] Id. at 842.
[29] Id. at 862.

> analogues. Puberty suppression may be an important part of medically necessary treatment to alleviate gender dysphoria. Puberty suppression can provide adolescents time to determine whether they desire less reversible medical intervention and can serve as a diagnostic tool to determine if further medical intervention is warranted.[30]

Additionally, in 2020 the American Psychiatric Association affirmed its support for access to "affirming and supportive treatment for trans and gender diverse youth and their families," including puberty blockers and hormone therapy.[31]

B. Exacerbation of Existing Barriers to Care for Transgender Youth

TMA recognizes that transgender individuals have unique health care needs and suffer significant barriers in access to care, which result in health care disparities. Returning to the pre-February status quo will help prevent the creation of additional barriers and worsening these disparities.

The February Actions have already interfered with transgender adolescents' access to gender-affirming care in Texas. In response to Attorney General's opinion and Governor Abbott's letter, Texas Children's Hospital announced that it had paused hormone therapies for gender-affirming treatment.[32]

Gender-affirming care is provided to reduce distress and prevent harm. Transgender youth and adolescents are particularly at risk for depression and

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[30] Id.
[31] American Psychiatric Association. Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth (Jul. 2020).
[32] *See* Dey, Sneha. Houston hospital pauses hormone therapy for transgender children as threats of child abuse investigations loom. TEXAS TRIBUNE (Mar. 4, 2022).

suicidal ideations.[33] When transgender adolescents are provided with appropriate gender-affirming care though, depression and suicidal ideation decreases.[34] However, preventing or halting this treatment has the potential to worsen a transgender adolescent's gender dysphoria.[35]

The threat of investigations may also dissuade transgender adolescents from continuing to access medical care unrelated to their transgender status. Physicians are among the professionals required to report abuse under Chapter 261.[36] Transgender adolescents may fear that a visit to a physician could reveal that they have received gender-affirming treatment, triggering a DFPS investigation, and therefore avoid necessary care.

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[33] Rafferty J. Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents, page 3 ("In 1 retrospective cohort study, 56% of youth who identified as transgender reported previous suicidal ideation, and 31% reported a previous suicide attempt.").

[34] Turban JL, et al. Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. PEDIATRICS (Jan. 2020); *see also* American Psychiatric Association. Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth (Jul. 2020) ("Trans-affirming treatment, such as the use of puberty suppression, is associated with the relief of emotional distress, and notable gains in psychosocial and emotional development, in trans and gender diverse youth."); Rafferty J. Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents, page 5 ("The available data reveal that pubertal suppression in children who identify as TGD generally leads to improved psychological functioning in adolescence and young adulthood."); Tordoff D, et al. Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care. JAMA Netw Open, page 2 (Feb. 2022) ("This study found that gender-affirming medical interventions were associated with lower odds of depression and suicidality over 12 months.").

[35] *See* American Psychiatric Association. Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth (Jul. 2020) ("Due to the dynamic nature of puberty development, lack of gender-affirming interventions… is not a neutral decision; youth often experience worsening dysphoria and negative impact on mental health as the incongruent and unwanted puberty progresses..").

[36] Tex. Family Code § 261.101.

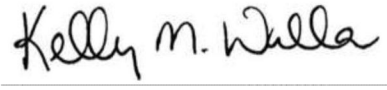
Conclusion and Prayer

For reasons above, Amicus Curiae Texas Medical Association respectfully requests that this Court's opinion restore the status quo that existed prior to the February Actions by reinstating the trial court's injunction.

Respectfully submitted,

Texas Medical Association

By:



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Certificate of Compliance

I certify that this Brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains approximately 5,314 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4. I also certify that this Brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font and 12-point Times New Roman font for footnotes

/s/ *Eamon J. Reilly*
Eamon J. Reilly

Appendix to Amicus Curiae's Brief

Tab:

A	September 23, 2021 letter brief from TMA and TPS.
B	Governor Abbott's February 22, 2022 letter, which contains the Attorney General's February 18, 2022 opinion.
C	The Honorable Judge Amy Clark Meachum's March 11, 2022 Orders.

Exhibit A

Exhibit A

September 23, 2021

Via Email: Opinion.Committee@oag.texas.gov

Honorable Ken Paxton
Office of Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Gender-Affirming Care of Transgender Youth, RQ-0426-KP

Dear Attorney General Paxton,

On behalf of our collectively more than 55,000 physician and medical student members, the Texas Medical Association (TMA) and the Texas Pediatric Society (TPS) appreciate the opportunity to submit briefing in response to the Honorable Matt Krause's August 24, 2021 Opinion Request, RQ-0426-KP ("Opinion Request"). TMA and TPS oppose the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents.[1] As discussed below, the full range of evidence recognizes gender-affirming support and care as medically necessary and appropriate. This brief is limited to a discussion of medical care and does not address the issue of gender affirming surgical care for minors.

The Opinion Request asks whether gender-affirming care of transgender youth and adolescents constitutes "abuse" under Texas Family Code Chapter 261. The definition of "abuse" includes physical injury that results in substantial harm to a child. Gender-affirming care of transgender youth and adolescent patients reduces emotional distress, improves their sense of well-being, and reduces the risk of suicide. As a general matter, gender-affirming care reduces and prevents harms and therefore does not constitute "abuse" under Chapter 261. An allegation that a specific instance of treatment resulted in harm to a particular patient would be inherently factual. Respectfully, such factual questions should not be resolved by the opinion process of the Attorney General's Office, in accordance with the office's long-standing precedent.

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[1] See TEXAS MEDICAL ASSOCIATION. Policy 55.066, Opposition to Criminalization of Gender-Affirming Care for Transgender Youth (Res. 332 2021) ("The Texas Medical Association opposes efforts to criminalize evidence-based, gender-affirming care for transgender youth"); Policy 55.058, Sexual Orientation Change Efforts and Gender-Affirmation Therapies for Minors (CM-CAH & TF Rep. 4-A-17; amended Res. 332 2021) ("(1) The Texas Medical Association supports treatment and therapies rooted in acceptance and support regarding an individual's sexual orientation and gender identification and therefore opposes practices aimed at changing an individual's sexual orientation, including conversion therapy; (2) TMA supports physician efforts to provide medically appropriate therapies relating to gender identity and opposes the criminalization of these practices; (3) TMA supports the prohibition of any person licensed to provide mental health counseling from engaging in sexual orientation change efforts with patients younger than 18 years of age. TMA supports the practice of evidence-based therapies and will aggressively oppose the use of potentially harmful, unproven therapies for children. In addition, the association supports any regulatory changes to prohibit coverage for conversion therapy under the state's Medicaid program as well as any health insurers in the state; (4) TMA encourages physicians to stay informed on the potential harms associated with sexual orientation change efforts and the criminalization of gender-affirming therapies.").

Exhibit A

I. Gender-Affirming Care

The full range of evidence and the current recommendations developed by the American Academy of Pediatrics,[2] and affirmed by every major American medical association, supports the medical necessity and appropriateness of providing gender-affirming support and care to transgender youth and adolescents.

Medical care for transgender youth and adolescents is evidence-based and has proven effectiveness. Guidelines for appropriate treatment have been carefully developed and endorsed by the American Academy of Pediatrics,[3] the American College of Obstetrics and Gynecology,[4] the Pediatric Endocrine Society,[5] the American College of Physicians,[6] the World Professional Association for Transgender Health,[7] and the American Psychological Association.[8] Moreover, in 2020 the American Psychiatric Association affirmed its support for access to "affirming and supportive treatment for trans and gender diverse youth and their families," including mental health and other appropriate medical treatments.[9]

The decision of whether and when to initiate gender-affirming treatment is personal and involves careful consideration of risks, benefits, and other factors unique to each patient and family. These are medical decisions reached in consultation between the patients, parents, physicians, therapists, and other members of the health care team. The process involves repeated psychological and medical evaluation, with the participation and consent of the youth or adolescent's parents.

Gender-affirming care is provided to reduce distress and prevent harm. Transgender youth and adolescents are particularly at risk of feeling unsafe and reporting suicidal ideations—over 50 percent have suicidal ideations and one third attempt suicide.[10] When transgender youth and adolescents are provided with appropriate gender-affirming care, including puberty suppressors, the risk of lifetime suicidal ideation falls dramatically.[11]

II. Gender-Affirming Care is not "Abuse"

Chapter 261 should not be interpreted to classify gender-affirming medical treatments as "abuse." Whether conduct constitutes "abuse" is a factual question, requiring examination on a case-by-case basis. This is

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[2] Rafferty J. Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents. Committee on Psychosocial Aspects of Child and Family Health, Committee on Adolescence and Section on Gay, Lesbian, Bisexual and Transgender Health and Wellness. Pediatrics. Oct 2018, 142 (4) e20182162.
[3] Id.
[4] Care for Transgender Adolescents. Committee on Adolescent Health Care, American College of Obstetricians and Gynecologists. Committee Opinion No. 685, January 2017 (Reaffirmed 2020).
[5] Hembree W, Cohen-Kettenis P, Gooren L, Hannema S, Meyer W, Murad M, Rosenthal S, Safer J, Tangpricha V, T'Sjoen T. Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline. The Journal of Clinical Endocrinology & Metabolism, Volume 102, Issue 11, 1 November 2017, Pages 3869–3903.
[6] Safer J, Tangpricha V. Care of the Transgender Patient. Annals of Internal Medicine. July 2, 2019.
[7] Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. The World Professional Association for Transgender Health. 2011.
[8] Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. American Psychological Association. American Psychologist, December 2015. Vol. 70, No. 9, 832–864.
[9] Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth. American Psychiatric Association, July 2020.
[10] Jones B, Arcelus J, Bouman W, Haycraft E. Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies. Sports Med. 2017; 47(4): 701–716.
[11] Turban JL, King D, Carswell JM, Keuroghlian AS. Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. Pediatrics. Jan. 2020.

particularly true where the conduct involves complex medical care, such as the treatment of transgender youth and adolescents. Texas law does not support an interpretation of Chapter 261 as defining medically necessary care as per se "abuse."

The Attorney General's Office does not engage in fact-finding in its opinions. Respectfully, the opinion process is not the appropriate venue for resolving these questions.

The Opinion Request also contains an unestablished factual premise—that medically unnecessary care is being provided to transgender youth and adolescents. While an opinion of the Attorney General's Office may presume the truth of the facts presented, an opinion based on presumed facts should note this limitation.

A. "Abuse" under Chapter 261 is a Question of Fact

The Opinion Request asks whether gender-affirming medical care of youth and adolescents constitutes "abuse" under Chapter 261 of the Texas Family Code. Whether questioned conduct—medical or otherwise—is "abuse" under Chapter 261 is a factual question. As such, it should not be answered by an opinion of the Attorney General's Office.

The fact-specific nature of what constitutes "abuse" makes it inappropriate to determine whether certain medical treatments constitute per se abuse under Chapter 261. As discussed above, gender-affirming medical care may be provided to transgender youth or adolescents to reduce their distress, improve their sense of well-being, and reduce the risk of suicide. As such, the result of this care is the reduction and prevention of mental or physical injury. Thus, gender-affirming medical care would generally not be considered as resulting in "substantial harm to the child." An allegation that a specific instance of treatment resulted in harm to a particular patient would be inherently factual.

The Attorney General's Office opinion process has long deferred from addressing questions of fact,[12] including whether "abuse" has occurred under Chapter 261.[13] And fact-finding is particularly necessary when applying Chapter 261 to medical care. Medically necessary care may involve physicians and their patients proceeding with a treatment to obtain a desired benefit in the face of potential harms.[14] Evaluating whether such conduct results in injury or harm would need to account for the circumstances of each individual patient.

The same fact-finding would be necessary for gender-affirming medical care. As discussed above, the decision to undertake gender-affirming care involves a thorough review of clinical guidelines, the patient's

[12] Tex. Att'y Gen. Op. No. GA-1027 (2013) ("Whether any particular set of circumstances will result in liability is a fact question beyond the purview of an attorney general opinion."); Tex. Att'y Gen. Op. No. DM-333 (1995) ("We note too, with regard to your question about liability, that, given their highly fact-specific nature, we do not generally speculate in an attorney general opinion about such matters.").

[13] Tex. Att'y Gen. Op. No. GA-0106 (2003) (citations omitted) (Whether a specific person has cause to believe that a child has been a victim of sexual abuse depends upon the facts within that person's knowledge. Questions about whether a person has a duty to report child sexual abuse under specific circumstances must be answered on a case-by-case basis by applying the law to the facts). Texas courts have similarly treated findings of abuse or neglect as questions of fact. See *Lucas v. Tex. Dep't of Protective & Regulatory Services*, 949 S.W.2d 500, 502 (Tex. App.—Waco 1997, pet. denied) (treating the trial court's conclusions that the father endangered the physical and emotional well-being of his children and sexually abused his children as findings of fact.); *Melton v. Dallas County Child Welfare Unit of Tex. Dep't of Human Res.*, 602 S.W.2d 119, 122 (Tex. Civ. App.—Dallas 1980, no writ) ("The question of whether the mother's conduct endangered the emotional well-being of the children was a question of fact rather than a question of law."); *Weston v. Weston*, 241 S.W.2d 753, 753 (Tex. Civ. App.—El Paso 1951, no writ) ("Whether or not a child is a dependent or neglected child within the meaning of [the statute] is a question of fact.").

[14] An obvious example is chemotherapy, where destruction of cancerous cells may also damage healthy cells.

individual conditions, and the potential benefits and risks of treatment. Whether a particular treatment results in "substantial harm" to a patient—or other injurious conduct within the meaning of "abuse" under Chapter 261—would necessarily require inquiry into the patient's initial condition, response to treatments through the clinical course of care, and subsequent well-being. Such a case-by-case inquiry requires fact-finding ill-suited to the Attorney General opinion process.

B. Per Se "Abuse"

As discussed above, the determinations sought by the Opinion Request—whether gender-affirming treatments constitute "abuse" under Chapter 261—require consideration and resolution of questions of fact. There is no basis in Chapter 261—or other Texas law[15]—to avoid this necessary fact-finding by interpreting Chapter 261 to include certain medical treatments within the meaning of "abuse" as a matter of law (i.e., per se "abuse").

The primary goal of statutory construction is ascertaining and effectuating the Legislature's intent, without unduly restricting or expanding the statute's scope.[16] Intent is derived from the plain meaning of the text.[17] In enacting a statute, it is presumed that constitutional compliance is intended.[18]

There is nothing in the language of Chapter 261 to support per se inclusion of medical treatments within the definition of "abuse." Section 261.001 contains the definition of "abuse."[19] Though containing 13 subsections setting forth conduct and omissions included within the definition of "abuse", there are no references to medical care. Conversely, the failure to obtain medical care is included within the definition of "neglect."[20]

Additionally, construing the meaning of "abuse" to include certain medical procedures as a matter of law would interfere with parents' fundamental rights. Parents have the right to make decisions regarding the medical treatment of their children.[21] This is based on recognition "that natural bonds of affection lead parents to act in the best interests of their children."[22] Opponents of gender-affirming care have argued, however, that the treatments pose risks meriting their wholesale prohibition. The validity of those claimed

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[15] Chapter 167 of the Health and Safety Code may seem a plausible basis for finding that gender-affirming care is statutorily prohibited, and thus conduct constituting per se abuse under Chapter 261. Chapter 167 prohibits genital mutilation of a female child. Under Chapter 167, "[a] person commits an offense if the person… knowingly circumcises, excises, or infibulates any part of the labia majora or labia minora or clitoris of another person who is younger than 18 years of age." However, section 167.001(c) also contains a specific exception for conduct performed by a licensed health care professional for medical purposes. Additionally, the legislative history of Chapter 167 also shows that the prohibited conduct was not intended to encompass medical care. The bill analysis specifically notes that the conduct the legislature intended to address "usually is performed by a nonmedical practitioner in a home or other nonclinical setting." House Research Organization, H.B. 91 Bill Analysis (May 4, 1999). The bill analysis indicates that it was meant to apply to the cultural practice of female circumcision in immigrant communities. Additionally, if the statute was meant to encompass gender-affirming care, its prohibition would not have been limited to female anatomy. Thus, Chapter 167 does not provide a basis in law to treat gender-affirming care as per se harm within Chapter 261's definition of "abuse."

[16] See, e.g., *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016).

[17] Id.

[18] Tex. Gov't Code §311.021.

[19] Tex. Family Code §261.001(1).

[20] Tex. Family Code §261.001(4)(A)(ii)(b).

[21] *Parham v. J. R.*, 442 U.S. 584, 602 (1979); see also *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003) (Citing to *Parham* and noting that "[t]he Texas Legislature has likewise recognized that parents are presumed to be appropriate decision-makers, giving parents the right to consent to their infant's medical care and surgical treatment.").

[22] *Parham*, 442 U.S. at 603.

risks aside, the possibility that a treatment involves risks does not nullify a parent's right to make treatment decisions.[23] The Texas legislature has also codified this right in the Texas Family Code.[24]

In analyzing a statute, "[i]f it is possible reasonably to construe statutory language so as to render the statute constitutional, [the Attorney General's Office], like a court, is compelled to do so."[25] An interpretation of "abuse" to include, as a matter of law, gender-affirming treatment(s) would interfere with parents' decisions to initiate gender-affirming care for their children. It is true, of course, that government also has an interest in children's safety. However, without fact-finding, the state would be unlikely to show its infringement on the parents' fundamental right is narrowly tailored.[26] Therefore, this interference with parents' rights to make treatment decisions for their children would likely be found unconstitutional.[27]

As such, the Attorney General's Office should not construe §261.001 to include gender-affirming medical care as per se "abuse."

III. Medical Necessity

The Opinion Request contains an unestablished factual premise: that gender-affirming medical care is being provided without medical necessity. For example, the Opinion Request subject line asks "[w]hether sex change procedures performed on children without medical necessity constitute child abuse." Additionally, the Opinion Request's final paragraph—discussing genetic disorders of sex development or lack of normal sex chromosome structure—references "instances of medical necessity." However, no such reference is made in the preceding two paragraphs' discussions of gender-affirming care. Referencing "medical necessity" when discussing treatment of sex development or chromosomal disorders but not when discussing gender-affirming treatments implies that the request does not consider the latter to be medically necessary, an unsubstantiated implication.

Whether a treatment is medically necessary is a question of fact, requiring consideration of accepted medical standards/guidelines and the circumstances of a specific patient.[28] The Attorney General's Office has previously noted that questions of medical necessity are factual, which, again, cannot be resolved in the opinion process.[29]

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[23] *Parnham*, 442 U.S. at 603 ("Simply because the decision of a parent… involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").

[24] Tex. Family Code §151.001(a)(6).

[25] Tex. Atty. Gen. Op. No JC-0012 (1999); see also *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990) ("Statutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with state and federal constitutions.")

[26] This is not to say that fact-finding necessarily renders infringement on a fundamental right constitutional; rather, that the absence of fact-finding is a factor weighing against constitutionality.

[27] See *Brandt v. Rutledge*, 4:21CV00450 JM, Supplemental Order, p. 10 (E.D. Ark., Aug. 2, 2021) (Finding that an Arkansas law prohibiting medical or surgical gender-transition procedures for children would infringe on a fundamental parental right—and thus be subject to strict scrutiny—but would be unlikely to even withstand either heightened scrutiny or rational basis review.).

[28] See, e.g., *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1252 (11th Cir. 2011) ("[W]hen the state's and a patient's experts disagree, material questions of fact arise as to whether a treatment is medically necessary."); *Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995) ("[W]hat the [medical community's] generally accepted standards were is a question of fact."); *U. S. v. Kaadt*, 171 F.2d 600, 603-04 (7th Cir. 1948) ("[A] consensus of medical opinion is a question of fact.").

[29] Tex. Atty. Gen. Op. No. JM-746 (1987) ("The determination of what specific services are medically necessary is a question of fact and cannot be resolved in the opinion process.").

Unsubstantiated facts do not necessarily preclude the Attorney General's Office from responding to the request, as the office may assume the facts presented are true and answer the legal questions presented based on those facts.[30] However, if the Attorney General's Office issues an opinion based on the presumed facts, the opinion should make clear that it is limited only to the factual scenario presented in the request (i.e., medically unnecessary gender-affirming care). This is consistent with the office's precedent and will limit confusion regarding the opinion's broader applicability.

IV. Treatment of Sex Development or Chromosome Structure Disorders

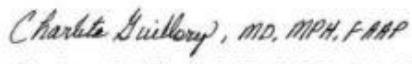
As with medical gender-affirming treatment for youth, the appropriateness of particular treatment for a genetic disorder of sex development or sex chromosome structure is factually dependent. The determination requires consideration of accepted medical standards/guidelines and the circumstances of a specific patient. Respectfully, it is inappropriate to resolve this inquiry via an opinion of the Attorney General's Office.

V. Conclusion

TMA and TPS appreciate the opportunity to submit this letter brief in response to the request for an Attorney General opinion regarding gender-affirming treatment for transgender youth and adolescents. If you have any questions, please do not hesitate to contact Donald P. "Rocky" Wilcox, Vice President and General Counsel, at rocky.wilcox@texmed.org; Kelly Walla, Associate Vice President and Deputy General Counsel, at kelly.walla@texmed.org; or Eamon Reilly, Assistant General Counsel, at eamon.reilly@texmed.org.

Sincerely,

E. Linda Villarreal, MD
President, Texas Medical Association



Charleta Guillory, MD, MPH, FAAP
President, Texas Pediatric Society

[30] See, e.g., Tex. Atty Gen. Op. No. KP-0143 (2017).

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GOVERNOR GREG ABBOTT

February 22, 2022

The Honorable Jaime Masters
Commissioner
Texas Department of Family and Protective Services
701 West 51st Street
Austin, Texas 78751

Dear Commissioner Masters:

Consistent with our correspondence in August 2021, the Office of the Attorney General (OAG) has now confirmed in the enclosed opinion that a number of so-called "sex change" procedures constitute child abuse under existing Texas law. Because the Texas Department of Family and Protective Services (DFPS) is responsible for protecting children from abuse, I hereby direct your agency to conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas.

As OAG Opinion No. KP-0401 makes clear, it is already against the law to subject Texas children to a wide variety of elective procedures for gender transitioning, including reassignment surgeries that can cause sterilization, mastectomies, removals of otherwise healthy body parts, and administration of puberty-blocking drugs or supraphysiologic doses of testosterone or estrogen. *See* TEX. FAM. CODE § 261.001(1)(A)–(D) (defining "abuse"). Texas law imposes reporting requirements upon all licensed professionals who have direct contact with children who may be subject to such abuse, including doctors, nurses, and teachers, and provides criminal penalties for failure to report such child abuse. *See id.* §§ 261.101(b), 261.109(a-1). There are similar reporting requirements and criminal penalties for members of the general public. *See id.* §§ 261.101(a), 261.109(a).

Texas law also imposes a duty on DFPS to investigate the parents of a child who is subjected to these abusive gender-transitioning procedures, and on other state agencies to investigate licensed facilities where such procedures may occur. *See* TEX. FAM. CODE § 261.301(a)–(b). To protect Texas children from abuse, DFPS and all other state agencies must follow the law as explained in OAG Opinion No. KP-0401.

Sincerely,

Greg Abbott

Greg Abbott
Governor

Exhibit B

GA:jsd

Enclosure

cc: Ms. Cecile Young, Executive Commissioner, Health and Human Services Commission
Mr. Stephen B. Carlton, Executive Director, Texas Medical Board
Ms. Katherine A. Thomas, Executive Director, Texas Board of Nursing
Dr. Tim Tucker, Executive Director, Texas State Board of Pharmacy
Mr. Darrell Spinks, Executive Director, Texas Behavioral Health Executive Council
Mr. Mike Morath, Commissioner, Texas Education Association
Ms. Cristina Galindo, Chair, Texas State Board of Educator Certification
Ms. Camille Cain, Executive Director, Texas Juvenile Justice Department

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KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2022

The Honorable Matt Krause
Chair, House Committee on General Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0401

Re: Whether certain medical procedures performed on children constitute child abuse (RQ-0426-KP)

Dear Representative Krause:

You ask whether the performance of certain medical and chemical procedures on children—several of which have the effect of sterilization—constitute child abuse.[1] You specifically ask about procedures falling under the broader category of "gender reassignment surgeries." Request Letter at 1. You state that such procedures typically are performed to "transition individuals with gender dysphoria to their desired gender," and you identify the following specific "sex-change procedures":

> (1) sterilization through castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; (2) mastectomies; and (3) removing from children otherwise healthy or non-diseased body part or tissue.

Id. at 1 (footnotes omitted). Additionally, you ask whether "providing, administering, prescribing, or dispensing drugs to children that induce transient or permanent infertility" constitutes child abuse. *See id.* at 1–2. You include the following categories of drugs: (1) puberty-suppression or puberty-blocking drugs; (2) supraphysiologic doses of testosterone to females; and (3) supraphysiologic doses of estrogen to males. *See id.*

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[1] *See* Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Aug. 23, 2021), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0426KP.pdf ("Request Letter"); *see also* Letter from Honorable Jaime Masters, Comm'r, Tex. Dept. of Family & Protective Servs., to Honorable Greg Abbott, Governor, State of Tex. at 1 (Aug. 11, 2021), https://gov.texas.gov/uploads/files/press/Response_to_August_6_2021_OOG_Letter_08.11.2021.pdf (on file with the Op. Comm.) (hereinafter "Commissioner's Letter").

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You qualify your question with the following statement: "Some children have a medically verifiable genetic disorder of sex development or do not have the normal sex chromosome structure for male or female as determined by a physician through genetic testing that require procedures similar to those described in this request." *Id.* at 2. In other words, in rare circumstances, some of the procedures you list are borne out of medical necessity. For example, a minor male with testicular cancer may need an orchiectomy. This opinion does not address or apply to medically necessary procedures.

I. Executive Summary

Based on the analysis herein, each of the "sex change" procedures and treatments enumerated above, when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code.

- These procedures and treatments can cause "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." TEX. FAM. CODE § 261.001(1)(A).

- These procedures and treatments can "caus[e] or permit[] the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning." *Id.* § 261.001(1)(B).

- These procedures and treatments can cause a "physical injury that results in substantial harm to the child." *Id.* § 261.001(1)(C).

- These procedures and treatments often involve a "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[.]" particularly by parents, counselors, and physicians. *Id.* § 261.001(1)(D).

In addition to analysis under the Family Code, we discuss below the fundamental right to procreation, issues of physical and emotional harm associated with these procedures and treatments, consent laws in Texas and throughout the country, and existing child abuse standards. Each of the procedures and treatments you ask about can constitute child abuse when performed on minor children.

II. Nature and context of the question presented

Forming the basis for your request, you contend that the "sex change" procedures and treatments you ask about are typically performed to transition individuals with gender dysphoria to their desired gender. *See* Request Letter at 1. The novel trend of providing these elective sex changes to minors often has the effect of permanently sterilizing those minor children. While you refer to these procedures as "sex changes," it is important to note that it remains medically impossible to truly change the sex of an individual because this is determined biologically at

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conception. No doctor can replace a fully functioning male sex organ with a fully functioning female sex organ (or vice versa). In reality, these "sex change" procedures seek to destroy a fully functioning sex organ in order to cosmetically create the illusion of a sex change.

Beyond the obvious harm of permanently sterilizing a child, these procedures and treatments can cause side effects and harms beyond permanent infertility, including serious mental health effects, venous thrombosis/thromboembolism, increased risk of cardiovascular disease, weight gain, decreased libido, hypertriglyceridemia, elevated blood pressure, decreased glucose tolerance, gallbladder disease, benign pituitary prolactinoma, lowered and elevated triglycerides, increased homocysteine levels, hepatotoxicity, polycythemia, sleep apnea, insulin resistance, chronic pelvic pain, and increased cancer and stroke risk.[2]

While the spike in these procedures is a relatively recent development,[3] sterilization of minors and other vulnerable populations without clear consent is not a new phenomenon and has an unsettling history. Historically weaponized against minorities, sterilization procedures have harmed many vulnerable populations, such as African Americans, female minors, the disabled, and others.[4] These violations have been found to infringe upon the fundamental human right to procreate. Any discussion of sterilization procedures in the context of minor children must, accordingly, consider the fundamental right that is at stake: the right to procreate. Given the uniquely vulnerable nature of children, and the clear dangers of sterilization demonstrated throughout history, it is important to emphasize the crux of the question you present today—*whether facilitating (parents/counselors) or conducting (doctors) medical procedures and treatments that could permanently deprive minor children of their constitutional right to procreate, or impair their ability to procreate, before those children have the legal capacity to consent to those procedures and treatments, constitutes child abuse.*

The medical evidence does not demonstrate that children and adolescents benefit from engaging in these irreversible sterilization procedures. The prevalence of gender dysphoria in children and adolescents has never been estimated, and there is no scientific consensus that these sterilizing procedures and treatments even serve to benefit minor children dealing with gender dysphoria. As stated by the Centers for Medicare and Medicaid Services, "There is not enough high-quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively."[5] Also, "several studies show a higher rate of regret at being sterilized among younger women than among those

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[2]*See* Timothy Cavanaugh, M.D., *Cross-Sex Hormone Therapy*, FENWAY HEALTH (2015), https://www.lgbtqiahealtheducation.org/wp-content/uploads/Cross-Sex-Hormone-Therapy1.pdf.

[3]SOCIETY FOR EVIDENCE BASED GENDER MEDICINE, https://segm.org/ (demonstrating a spike in referrals to Gender Identify Development Services around the mid-2010s).

[4]Alexandra Stern, Ph.D., *Forced sterilization policies in the US targeted minorities and those with disabilities – and lasted into the 21st Century*, (Sept. 23, 2020), https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasted-21st.

[5]Centers for Medicare and Medicaid Services, Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) (Aug. 30, 2016), http://www.lb7.uscourts.gov/documents/17-264URL1DecisionMemo.pdf.

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who were sterilized at a later age." 43 FED. REG. at 52,151, 52,152. This further indicates that minor children are not sufficiently mature to make informed decisions in this context.

There is no evidence that long-term mental health outcomes are improved or that rates of suicide are reduced by hormonal or surgical intervention. "Childhood-onset gender dysphoria has been shown to have a high rate of natural resolution, with 61-98% of children reidentifying with their biological sex during puberty. No studies to date have evaluated the natural course and rate of gender dysphoria resolution among the novel cohort presenting with adolescent-onset gender dysphoria."[6] One of the few relevant studies monitored transitioned individuals for 30 years. It found high rates of post-transition suicide and significantly elevated all-cause mortality, including increased death rates from cardiovascular disease and cancer, although causality could not be established.[7] The lack of evidence in this field is why the Centers for Medicare & Medicaid Services rejected a nationwide coverage mandate for adult gender transition surgeries during the Obama Administration. Similarly, the World Professional Association for Transgender Health states that with respect to irreversible procedures, genital surgery should not be carried out until patients reach the legal age of majority to give consent for medical procedures in a given country.[8]

Generally, the age of majority is eighteen in Texas. TEX. CIV. PRAC. & REM. CODE § 129.001. With respect to consent to sterilization procedures, Medicaid sets the age threshold even higher, at twenty-one years old. Children and adolescents are promised relief and asked to "consent" to life-altering, irreversible treatment—and to do so in the midst of reported psychological distress, when they cannot weigh long-term risks the way adults do, and when they are considered by the State in most regards to be without legal capacity to consent, contract, vote, or otherwise. Legal and ethics scholars have suggested that it is particularly unethical to radically intervene in the normal physical development of a child to "affirm" a "gender identity" that is at odds with bodily sex.[9]

State and federal governments have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Thus, states routinely regulate the medical profession and routinely update their regulations as new trends arise and new evidence becomes available. In the opioid context, for instance, states responded to an epidemic caused largely by pharmaceutical companies and medical professionals. Dismissing as "opioidphobic" any concern that "raising pain treatment to a 'patients' rights' issue could lead to overreliance on opioids," these experts created new pain standards and assured doctors that

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[6] SOCIETY FOR EVIDENCE BASED GENDER MEDICINE, https://segm.org/.

[7] *See* Cecilia Dhejne, et al., *Long-term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLOS ONE, Issue 2, 5 (Feb. 22, 2011) (19 times the expected norm overall (Table 2), and 40 times the norm for biological females (Table s1)), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885.

[8] WORLD PROFESSIONAL ASS'N FOR TRANSGENDER HEALTH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 59 (7th ed. 2012), available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341.

[9] Ryan T. Anderson & Robert P. George, Physical Interventions on the Bodies of Children to "Affirm" their "Gender Identity" Violate Sound Medical Ethics and Should Be Prohibited, PUBLIC DISCOURSE: THE JOURNAL OF THE WITHERSPOON INSTITUTE (Dec. 8, 2019), https://www.thepublicdiscourse.com/2019/12/58839/.

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prescribing more opioids was largely risk free.[10] *Id.* As we know now, the results were—indeed, *are*—nothing short of tragic.[11] There is always the potential for novel medical determinations to promote purported remedies that may not improve patient outcomes and can even result in tragic harms. The same potential for harm exists for minors who have engaged in the type of procedures or treatments above.

The State's power is arguably at its zenith when it comes to protecting children. In the Supreme Court's words, that is due to "the peculiar vulnerability of children." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979); *see also Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth."). The Supreme Court has explained that children's "inability to make critical decisions in an informed, mature manner" makes legislation to protect them particularly appropriate. *Bellotti*, 443 U.S. at 634. The procedures that you ask about impose significant and irreversible effects on children, and we therefore address them with extreme caution, mindful of the State's duty to protect its children. *See generally T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 42 (Tex. App.—Fort Worth 2020), *cert. denied*, 141 S. Ct. 1069 (2021) ("Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the [child]'s liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.") (citation omitted).

III. To the extent that these procedures and treatments could result in sterilization, they would deprive the child of the fundamental right to procreate, which supports a finding of child abuse under the Family Code.

A. The procedures you describe can and do cause sterilization.

The surgical and chemical procedures you ask about can and do cause sterilization.[12] Similarly, the treatments you ask about often involve puberty-blocking medications. Such medications suppress the body's production of estrogen or testosterone to prevent puberty and are being used in this context to pause the sexual development of a person that occurs during puberty. The use of these chemical procedures for this purpose is not approved by the federal Food and Drug Administration and is considered an "off-label" use of the medications. These chemical procedures prevent a person's body from developing the capability to procreate. There is insufficient medical evidence available to demonstrate that discontinuing the medication resumes a normal puberty process. *See generally Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1042 (D. Ariz. 2021), citing *Bell v. Tavistock and Portman NHS Foundation Trust*, 2020 EWHC 3274,

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[10] *See* David W. Baker, *The Joint Commission's Pain Standards: Origins and Evolution* 4 (May 5, 2017) (footnotes omitted), https://perma.cc/RZ42-YNRC ("[N]o large national studies were conducted to examine whether the standards improved pain assessment or control.").

[11] *See generally* U.S. HEALTH & HUMAN SERVS., WHAT IS THE U.S. OPIOID EPIDEMIC?, https://www.hhs.gov/opioids/about-the-epidemic/index.html.

[12] *See* Philip J. Cheng, *Fertility Concerns of the Transgender Patient*, TRANSL. ANDROL. UROL. 2019;9(3):209-218 (explaining that hysterectomy, oophorectomy, and orchiectomy "results in permanent sterility"), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6626312/.

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¶ 134 (Dec. 1, 2020) (referring to *Bell's* conclusion that a clinic's practice of prescribing puberty-suppressing medication to individuals under age 18 with gender dysphoria and determining such treatment was experimental). Thus, because the procedures you inquire about can and do result in sterilization, they implicate a minor child's constitutional right to procreate.

B. The United States Constitution protects a fundamental right to procreation.

The United States Supreme Court recognizes that the right to procreate is a fundamental right under the Fourteenth Amendment. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Almost a century ago, the Court explained the unique concerns sterilization poses respecting this fundamental right:

> The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

Id. To the extent the procedures you describe cause permanent damage to reproductive organs and functions of a child before that child has the legal capacity to consent, they unlawfully violate the child's constitutional right to procreate. *See generally* 43 FED. REG. at 52,146–52,152 (discussing ripeness for coercion and regret rates among minor children).

C. Because children are legally incompetent to consent to sterilization, procedures and treatments that result in a child's sterilization are unauthorized and infringe on the child's fundamental right to procreate.

Under Texas law, a minor is a person under eighteen years of age that has never been married and never declared an adult by a court. *See* TEX. CIV. PRAC. & REM. CODE § 129.001; TEX. FAM. CODE §§ 1.104, 101.003 (including a minor on active duty in the military, one who does not live with a parent or guardian and who manages their own financial affairs, among others). State law recognizes seven instances in which a minor can consent to certain types of medical treatment on their own. *See id.* § 32.003. None of the express provisions relating to a minor's ability to consent to medical treatment addresses consent to the procedures used for "gender-affirming" treatment. *See generally id.*

The lack of authority of a minor to consent to an irreversible sterilization procedure is consistent with other law. The federal Medicaid program does not allow for parental consent, has established a minimum age of 21 for consent to sterilization procedures, and imposes detailed requirements for obtaining that consent. 42 C.F.R. §§ 441.253(a); 441.258 ("Consent form requirements"). Federal Medicaid funds may not be used for any sterilization without complying with the consent requirements, meaning a doctor may not be reimbursed for sterilization procedures performed on minors. *Id.* § 441.256(a).

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The higher age limit for sterilization procedures was implemented due to a number of special concerns, including historical instances of forced sterilization. *See* 43 FED. REG. 52146, 52148. "[M]inors and other incompetents have been sterilized with federal funds and . . . an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization." *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977). In addition, the 21-year minimum age-of-consent rule accounted for concerns that minors were more susceptible to coercion than those over 21 and that younger women had higher rates of regret for sterilization than those who were sterilized at a later age. 43 FED. REG. at 52,151 (pointing to comments suggesting that "persons under 21 are more susceptible to coercion than those over 21 and are more likely to lack the maturity to make an informed decision" and acknowledging "these considerations favor protecting such individuals by limiting their access to the procedure"); *see id.* at 52,151–52,152 (pointing to "several studies [that] show a higher rate of regret at being sterilized among younger women than among those who were sterilized at a later age").

Regarding parental consent, Texas law generally recognizes a parent's right to consent to a child's medical care. TEX. FAM. CODE § 151.001(a)(6) ("A parent of a child has the following rights and duties: . . . (6) the right to consent to the child's . . . medical and dental care, and psychiatric, psychological, and surgical treatment . . ."). But this general right to consent to certain medically necessary procedures does not extend to elective (not medically necessary) procedures and treatments that infringe upon a minor child's constitutional right to procreate. Indeed, courts have analyzed the imposition of unnecessary medical procedures upon children in similar circumstances in the past to determine whether doing so constitutes child abuse.

One such situation that the law has addressed is often referred to as "Munchausen by proxy" or "factitious disorder imposed on another":

> [A] psychological disorder that is characterized by the intentional feigning, exaggeration, or induction of the symptoms of a disease or injury in oneself or another and that is accompanied by the seeking of excessive medical care from various doctors and medical facilities typically resulting in multiple diagnostic tests, treatments, procedures, and hospitalizations. Unlike the malingerer, who consciously induces symptoms to obtain something of value, the patient with a factitious disorder consciously produces symptoms for unconscious reasons, without identifiable gain.[13]

In situations such as this, an individual intentionally seeks to procure—often by deceptive means, such as exaggeration—unnecessary medical procedures or treatments either for themselves or others, usually their children. In Texas, courts have found that these "Munchausen by proxy" situations can constitute child abuse. *See generally Williamson v. State*, 356 S.W.3d 1, 19–21 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (recognizing that an unnecessary medical procedure

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[13] *Factitious disorder*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/factitious%20disorder.

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may cause serious bodily injury, supporting a charge of injury to a child under section 22.04 of the Penal Code).[14]

In the context of elective sex change procedures for minors, the Legislature has not provided any avenue for parental consent, and no judicial avenue exists for the child to proceed with these procedures and treatments without parental consent. By comparison, Texas law respecting abortion requires parental consent and, in extenuating circumstances, permits non-parental consent for a minor to obtain an abortion. TEX. OCC. CODE § 164.052(19) (requiring written consent of a child's parent before a physician may perform an abortion on an unemancipated minor); TEX. FAM. CODE § 33.003 (authorizing judicial approval of a minor's abortion without parental consent in limited circumstances). But the Texas Legislature has not decided to make those same allowances for consent to sterilization, and thus a parent cannot consent to sterilization procedures or treatments that result in the permanent deprivation of a minor child's constitutional right to procreate.[15] Thus, no avenue exists for a child to consent to or obtain consent for an elective procedure or treatment that causes sterilization.

IV. The procedures and treatments you describe can constitute child abuse under the Family Code.

Having established the legal and cultural context of this opinion request, we now consider whether these procedures and treatments qualify as child abuse under the Family Code. *See* Request Letter at 1. Where, as a factual matter, one of these procedures or treatments cannot result in sterilization, a court would have to go through the process of evaluating, on a case-by-case basis, whether that procedure violates any of the provisions of the Family Code—and whether the procedure or treatment poses a similar threat or likelihood of substantial physical and emotional harm. Thus, where a factual scenario involving non-medically necessary, gender-based procedures or treatments on a minor causes or threatens to cause harm or irreparable harm[16] to the child—comparable to instances of Munchausen syndrome by proxy or criminal injury to a child—or demonstrates a lack of consent, etc., a court could find such procedures to constitute child abuse under section 261.001.

A. The Texas Legislature defines child abuse broadly.

Family Code chapter 261 provides for the reporting and investigation of abuse or neglect of a child. *See* TEX. FAM. CODE §§ 261.001–.505; *see also* TEX. PENAL CODE § 22.04 (providing for the offense of injury to a child). Section 261.001 defines abuse through a broad and nonexclusive list of acts and omissions. TEX. FAM. CODE § 261.001(1); *see also In re Interest of*

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[14] *See also* Tex. Dep't of Fam. & Protective Servs., Tex. Practice Guide for Child Protective Servs. Att'ys, § 7, at 15 (2018), https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp.

[15] Federal Medicaid programs will not reimburse for these types of procedures on minors, regardless of whether the child or parent consents, because of the numerous concerns outlined in the Federal Register provisions discussed above. *See* 43 FED. REG. at 52,146–52,159.

[16] For example, a non-medically necessary procedure or treatment that seeks to alter a minor female's breasts in such a way that would or could prevent that minor female from having the ability to breastfeed her eventual children likely causes irreparable harm and could form the basis for a finding of child abuse.

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S.M.R., 434 S.W.3d 576, 583 (Tex. 2014). Of course, this broad definition of abuse would apply to and include criminal acts against children, such as "female genital mutilation"[17] or "injury to a child."[18]

Your questions implicate several components of section 261.001(1). Subsection 261.001(1)(A) identifies "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." Subsection 261.001(1)(B) provides that "causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning" is abuse. Subsection 261.001(1)(C) includes as abuse a "physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child." And subsection 261.001(1)(D) includes "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child."

Offering some clarity to the scope of "abuse" under subsection 261.001(1), the Texas Department of Family and Protective Services ("Department") adopted rules giving meaning to the key terms and phrases used in the definition. The Department acknowledges that emotional abuse is a subset of abuse that includes "[m]ental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning." 40 TEX. ADMIN. CODE § 707.453(a) (Tex. Dept. of Fam. & Protective Servs., What is Emotional Abuse?). The Department's rules provide that "[m]ental or emotional injury" means

> [t]hat a child of any age experiences significant or serious negative effects on intellectual or psychological development or functioning. . . . and exhibits behaviors indicative of observable and material impairment . . . . mean[ing] discernable and substantial damage or deterioration to a child's emotional, social, and cognitive development.

Id. § 707.453(b)(1)–(2).

With respect to physical injuries, the Department further clarified the meaning of the phrase "[p]hysical injury that results in substantial harm to the child," explaining that it means in relevant part a

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[17]A person commits an offense if the person: (1) knowingly circumcises, excises, or infibulates any part of the labia majora or labia minora or clitoris of another person who is younger than 18 years of age; (2) is a parent or legal guardian of another person who is younger than 18 years of age and knowingly consents to or permits an act described by Subdivision (1) to be performed on that person; or (3) knowingly transports or facilitates the transportation of another person who is younger than 18 years of age within this state or from this state for the purpose of having an act described by Subdivision (1) performed on that person. TEX. HEALTH & SAFETY CODE § 167.001.

[18]A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury. TEX. PENAL CODE § 22.04.

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> real and significant physical injury or damage to a child that includes but is not limited to . . . [a]ny of the following, if caused by an action of the alleged perpetrator directed toward the alleged victim: . . . *impairment of or injury to any bodily organ or function*; . . . .

Id. § 707.455(b)(2)(A) (emphasis added). The Department's rules also define a "[g]enuine threat of substantial harm from physical injury" to include the

> *declaring or exhibiting the intent or determination to inflict real and significant physical injury or damage to a child.* The declaration or exhibition does not require actual physical contact or injury.

Id. § 707.455(b)(1) (emphasis added).

Subsection 261.001(1) and these rules define "abuse" broadly to include mental or emotional injury in addition to a physical injury. To the extent the specific procedures about which you ask may cause mental or emotional injury or physical injury within these provisions, they constitute abuse.

Further, the Legislature has explicitly defined "female genital mutilation" and made such act a state jail felony. *See* TEX. HEALTH & SAFETY CODE § 167.001(a)–(b). While the Legislature has not elsewhere defined the phrase "genital mutilation", nor specifically for males of any age,[19] the Legislature's criminalization of a particular type of genital mutilation supports an argument that analogous procedures that include genital mutilation—potentially including gender reassignment surgeries—could constitute "abuse" under the Family Code's broad and non-exhaustive examples of child abuse or neglect.[20] *See* TEX. FAM. CODE § 261.001(1)(A)–(M); *see generally* Commissioner's Letter at 1 (concluding that genital "mutilation may cause a genuine threat of substantial harm from physical injury to the child"). Thus, many of the procedures and treatments you ask about can constitute "female genital mutilation," a standalone criminal act. But even where these procedures and treatments may not constitute "female genital mutilation" under Texas law, a court could still find that these procedures and treatments constitute child abuse under section 261.001 of the Family Code.

B. Each of these procedures and treatments can constitute abuse under Texas Family Code § 261.001(1)(A), (B), (C), or (D).

The Texas Family Code is clear—causing or permitting substantial harm to the child or the child's growth and development is child abuse. Courts have held that an unnecessary surgical

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[19]Your letter does not mention nor request an analysis under federal law. However, under federal law, there are at least two definitions of female genital mutilation. 8 U.S.C § 1374 and 18 U.S.C. § 116. For purposes of this opinion, we have not considered federal statutes, nor have we undertaken any analysis under state or federal constitutions beyond that included here.

[20]The Eighty-seventh Legislature considered multiple bills that would have amended Family Code subsection 261.001(1) to expressly include in the definition of abuse the performing of surgery or other medical procedures on a child for the purpose of gender transitioning or gender reassignment. Those bills did not pass. *See, e.g.*, Tex. H.B. 22, 87th Leg., 3d C.S. (2021).

Exhibit B

procedure that removes a healthy body part from a child can constitute a real and significant injury or damage to the child. *See generally Williamson v. State*, 356 S.W.3d 1, 19–21 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (recognizing that an unnecessary medical procedure may cause serious bodily injury, supporting a charge of injury to a child under section 22.04 of the Penal Code). The *Williamson* case involved a "victim of medical child abuse, sometimes referred to as Munchausen Syndrome by Proxy." *Id.* at 5. Munchausen syndrome by proxy is "where an alleged perpetrator . . . attempts to gain medical procedures and issues for [their] child for secondary gain for themselves . . . . [A]s a result, the children are subjected to multiple diagnostic tests, therapeutic procedures, sometimes operative procedures, in order to treat things that aren't really there." *Williamson*, 356 S.W.3d at 11. In the *Williamson* case, the abuse was perpetrated on the child when he was five and six years old by his mother. *Id.* The evidence showed that two surgeries performed on the child "were not medically necessary and that [his mother] knowingly and intentionally caused the unnecessary procedures to be performed by fabricating, exaggerating, and inducing the symptoms leading to the surgeries." *Id.*

Similarly, in *Austin v. State*, a court of appeals upheld the conviction for felony injury of a child of a mother suffering from Munchausen syndrome by proxy who injected her son with insulin. *See* 222 S.W.3d 801, 804 (Tex. App.—Austin 2007, pet. ref'd); *see also In re McCabe*, 580 S.E.2d 69, 73 (N.C. Ct. App. 2003) (concluding that abuse through Munchausen syndrome by proxy was abuse under state statute defining abuse in a similar manner as chapter 261); *Matter of Aaron S.*, 625 N.Y.S.2d 786, 793 (Fam. Ct. 1993), *aff'd sub nom. Matter of Suffolk Cnty. Dep't of Soc. Servs on Behalf of Aaron S.*, 626 N.Y.S.2d 227 (App. Div. 1995) (finding that a mother neglected her son by subjecting him to a continuous course of medical treatment for condition which he did not have and that he was a neglected child under state statute governing abuse of a child). In guidance documents published for its child protective services attorneys, the Texas Department of Family and Protective Services explains that "Munchausen by proxy syndrome is relatively rare, but when it occurs, it is frequently a basis for a finding of child abuse."[21] Whether motivated by Munchausen syndrome by proxy or otherwise, it is clear that unnecessary medical treatment inflicted on a child by a parent can constitute child abuse under the Family Code.

By definition, procedures and treatments resulting in sterilization cause "physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child" by surgically altering key physical body parts of the child in ways that render entire body parts, organs, and the entire reproductive system of the child physically incapable of functioning. Thus, such procedures and treatments can constitute child abuse under section 261.001(1)(C). Even where the procedure or treatment does not involve the physical removal or alteration of a child's reproductive organs (*i.e.* puberty blockers), these procedures and treatments can cause "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning" by subjecting a child to the mental and emotional injury associated with lifelong sterilization—an impairment to

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[21] TEX. DEP'T OF FAM. & PROTECTIVE SERVS., TEX. PRACTICE GUIDE FOR CHILD PROTECTIVE SERVS. ATT'YS, § 7, at 15 (2018), https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp (citing *Reid v. State*, 964 S.W.2d 723 (Tex. App.—Amarillo 1998, pet. ref'd) (mem. op.) (expert testimony admitted regarding general acceptance of Munchausen diagnosis as a form of child abuse)).

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one's growth and development. Therefore, a court could find these procedures and treatments to be child abuse under section 261.001(1)(A). Further, attempts by a parent to consent to these procedures and treatments on behalf of their child may, if successful, "cause or permit the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning[.]" and could be child abuse under section 261.001(1)(B). Additionally, the failure to stop a doctor or another parent from conducting these treatments and procedures on a minor child can constitute a "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[.]" and this "failure to make a reasonable effort to prevent" can also constitute child abuse under section 261.001(1)(D). Any person that conducts or facilitates these procedures or treatments could be engaged in child abuse, whether that be parents, doctors, counselors, etc.

It is important to note that anyone who has "a reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report" as described in the Family Code. TEX. FAM. CODE § 261.101(a). Further, "[i]f a professional has reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has reasonable cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code." TEX. FAM. CODE § 261.101(b). The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers. *Id.* A failure to report under these circumstances is a criminal offense. TEX. FAM. CODE § 261.109(a).

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SUMMARY

Each of the "sex change" procedures and treatments enumerated above, when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code.

When considering questions of child abuse, a court would likely consider the fundamental right to procreation, issues of physical and emotional harm associated with these procedures and treatments, consent laws in Texas and throughout the country, and existing child abuse standards.

Very truly yours,

Ken Paxton

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VIRGINIA K. HOELSCHER
Chair, Opinion Committee

CHARLOTTE M. HARPER
Assistant Attorney General, Opinion Committee

Exhibit C

Exhibit C

CAUSE NO. D-1-GN-22-000977

JANE DOE, individually and as parent and next friend of MARY DOE, a minor; JOHN DOE, individually and as parent and next friend of MARY DOE, a minor; and DR. MEGAN MOONEY	§	
Plaintiffs	§	IN THE DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
v.	§	353RD JUDICIAL DISTRICT
GREG ABBOTT, sued in his official capacity as Governor of the State of Texas; JAIME MASTERS, sued in her official capacity as Commissioner of the Texas Department of Family and Protective Services; and the TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,	§	
Defendants.	§	

ORDER GRANTING PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION

On this day the Court considered the application by Plaintiffs John and Jane Doe, individually and as parents and next friends of Plaintiff Mary Doe, a minor, and Dr. Megan Mooney (collectively, "Plaintiffs") for a Temporary Injunction (the "Application"), as found in Plaintiffs' Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and Request for Declaratory Relief ("Petition") filed against Defendants Greg Abbott, in his official capacity as Governor of the State of Texas, 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 ("DFPS") (collectively, "Defendants").

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Based on the facts set forth in Plaintiffs' Application, the supporting declarations, the testimony, the evidence, and the arguments of counsel presented during the March 11, 2022, hearing on Plaintiffs' Application, this Court finds sufficient cause to enter a Temporary Injunction. Plaintiffs state a valid cause of action against each Defendant and have a probable right to the declaratory and permanent injunctive relief they seek. For the reasons detailed in Plaintiffs' Application and accompanying evidence, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is *ultra vires*, beyond the scope of his authority, and unconstitutional. The improper rulemaking and implementation by Commissioner Masters and DFPS are similarly void.

The Court further finds that gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022. The series of directives and decisions by the Governor, the Executive Director, and other decision-makers at DFPS, changed the *status quo* for transgender children and their families, as well as professionals who offer treatment, throughout the State of Texas. The Governor's Directive was given the effect of a new law or new agency rule, despite no new legislation, regulation or even stated agency policy. Governor Abbott and Commissioner Masters' actions violate separation of powers by impermissibly encroaching into the legislative domain.

It clearly appears to the Court that unless Defendants are immediately enjoined from enforcing the Governor's directive and the DFPS rule enforcing that directive, both issued February 22, 2022, and which make reference to and incorporate Attorney General Paxton's Opinion No. KP-0401, Plaintiffs will suffer imminent and irreparable injury. For example, Jane Doe has already been placed on administrative leave at work and is at risk of losing her job, her livelihood, and the means of caring for her family. Jane, John and Mary Doe face the imminent

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and ongoing deprivation of their constitutional rights and the stigma attached to being the subject of a child abuse investigation. Mary faces the potential loss of medically necessary care, which if abruptly discontinued can cause severe and irreparable physical and emotional harms, including anxiety, depression, and suicidality. If placed on the Child Abuse Registry, Jane Doe would lose the ability to practice her profession, and both Jane and John Doe would lose their ability to work with minors and volunteer in their community. Absent intervention by this court, Dr. Mooney could face civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if Defendants' directives are enforced. If Defendants' directives remain in effect, Dr. Mooney will be required to report her patients who are receiving medically necessary gender-affirming care, in contravention of the code of ethics governing her profession and the medical needs of her patients. If Dr. Mooney does not report her patients, she could face immediate criminal prosecution, as set forth in the Governor's letter. Defendants' wrongful actions cannot be remedied by any award of damages or other adequate remedy at law.

The Temporary Injunction being entered by the Court today maintains the status quo prior to February 22, 2022, and should remain in effect while this Court, and potentially the Court of Appeals, and the Supreme Court of Texas, examine the parties' merits and jurisdictional arguments.

IT IS THEREFORE ORDERED that, until all issues in this lawsuit are finally and fully determined, Defendants are immediately enjoined and restrained from enforcing the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate. This Temporary Injunction RESTRAINS ~~restrains~~ the following actions by the Defendants: (1) taking any actions against Plaintiffs based on

Exhibit C

the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate; (2) investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports; and (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

IT IS FURTHER ORDERED that a trial on the merits of this case is July 11, 2022. The Clerk of the Court is hereby directed to issue a show cause notice to Defendants to appear at the trial.

The Clerk of the Court shall forthwith, on filing ~~by Plaintiffs of the Bond hereinafter required, and on proving of the same according to law~~, issue a temporary injunction in conformity with the laws and terms of this Order.

Plaintiffs have previously executed ~~and filed~~ with the Clerk a bond in conformity with the law in the amount of $100 dollars, and that bond amount will remain adequate and effective for this Temporary Injunction.

It is further ORDERED that this Order shall not expire until judgment in this case is entered or this Case is otherwise dismissed by the Court.

Exhibit C

Signed this 11th day of March 2022, at 5:22 P.M. o'clock in Travis County, Texas.

JUDGE AMY CLARK MEACHUM

Exhibit C

Filed in The District Court
of Travis County, Texas
MAR 11 2022
At 5:24 P. M.
Velva L. Price, District Clerk

No. D-1-GN-22-000977

JANE DOE, ET AL., *Plaintiff,*	IN THE DISTRICT COURT OF
v.	TRAVIS COUNTY, TEXAS
GOVERNOR ABBOTT, ET AL., *Defendants.*	201ST JUDICIAL DISTRICT

DENYING
ORDER ~~GRANTING~~ PLEA TO THE JURISDICTION

On this day, the Court considered Defendants' Plea to the Jurisdiction. After due consideration, the Court finds said plea ~~meritorious.~~ NOT FOUNDED AND without merit. DENIED.

IT IS THEREFORE ORDERED that Defendants' Plea to the Jurisdiction is ~~GRANTED~~.

~~IT IS FURTHER ORDERED that all of Plaintiffs' claims against Defendants are hereby~~ AEM DISMISSED WITHOUT PREJUDICE in their entirety.

~~This is a FINAL JUDGMENT, and all relief not specifically granted is denied.~~ AEM

SIGNED this 11th day of MARCH, 2022.

HON. AMY CLARK MEACHUM
201st DISTRICT COURT JUDGE

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