

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

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

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

JEFFREY D. KYLE
CLERK

Appellants,

v.

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

Appellees.

On Appeal from the 201st Judicial District of Travis County, Texas

BRIEF OF AMICUS CURIAE AMERICAN OVERSIGHT

Kennon L. Wooten
State Bar No. 24046624
kwooten@scottdoug.com

SCOTT DOUGLASS &
McCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 Phone
(512) 495-6399 Fax

COUNSEL FOR AMICUS CURIAE AMERICAN OVERSIGHT

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APPENDIX

The following items are included in the Appendix to this brief:

- Ex. A American Oversight’s April 04, 2022 Public Information Request Letter to Texas Department of Family and Protective Services (“DFPS”)
- Ex. B DFPS Record Management Group’s August 19, 2022 Email to American Oversight Containing Requested Information
- Ex. C DFPS Records (Bates Range TX-DFPS-22-0329-A-000831 – TX-DFPS-22-0329-A-000832)
- Ex. D DFPS Records (Bates Range TX-DFPS-22-0329-A-000927 – TX-DFPS-22-0329-A-000928)
- Ex. E DFPS Records (Bates Range TX-DFPS-22-0329-A-000363)
- Ex. F DFPS Records (Bates Range TX-DFPS-22-0329-A-000062 – TX-DFPS-22-0329-A-000064)
- Ex. G DFPS Records (Bates Range TX-DFPS-22-0329-A-000238 – TX-DFPS-22-0329-A-000240)
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- Ex. M DFPS Records (Bates Range TX-DFPS-22-0329-A-000097 – TX-DFPS-22-0329-A-000098)
- Ex. N DFPS Records (Bates Range TX-DFPS-22-0329-A-000107 – TX-DFPS-22-0329-A-000108)

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- Ex. V DFPS Records (Bates Range TX-DFPS-22-0329-A-000230 – TX-DFPS-22-0329-A-000231)
- Ex. W DFPS Records (Bates Range TX-DFPS-22-0329-A-000038)
- Ex. X DFPS Records (Bates Range TX-DFPS-22-0329-A-000251 – TX-DFPS-22-0329-A-000252)

IDENTITY OF AMICI AND DISCLOSURE OF INTEREST

Amicus curiae American Oversight (“Amicus” or “American Oversight”) is a nonpartisan, nonprofit section 501(c)(3) organization committed to promoting transparency in government, educating the public and other stakeholders about government activities, and ensuring the accountability of government officials, particularly through the use of public records requests. As part of its regular activities, Amicus filed requests under the Texas Public Information Act (“PIA”) seeking information regarding Governor Abbott’s directive to the Texas Department of Family and Protective Services (“DFPS”) to investigate families of transgender adolescents receiving gender-affirming care. Specifically, on April 4, 2022, Amicus submitted a PIA request to DFPS seeking records “regarding the Texas directive that classifies gender-affirming care as child abuse,” including analyses, reports, and email communications. In response, American Oversight received records from DFPS, including contemporaneous communications reflecting DFPS’s own understanding of and actions implementing Governor Abbott’s directive.

Where, as here, records obtained by American Oversight shed light on a matter before an executive, legislative, or judicial authority, American Oversight has an interest in ensuring that these records are brought to the attention of the relevant authority. By submitting this brief, Amicus seeks to make the Court aware of records it obtained through the PIA and to ensure government accountability for statements and representations relevant to this matter. Amicus also seeks to make available

records from DFPS demonstrating that DFPS’s adoption of and actions implementing the Governor’s directive to investigate gender-affirming care as child abuse constituted a new rule under the Texas Administrative Procedure Act (“APA”).

American Oversight submits this amicus brief pursuant to Texas Rule of Appellate Procedure 11. *See Tex. Ass’n of Bus. v. City of Austin*, 565 S.W.3d 425, 434 (Tex. App.—Austin 2018, pet. denied) (“[A]nyone who follows the applicable procedural rules can file an amicus brief with a court.”). No parties to this case made any monetary contribution to the preparation or submission of this amicus brief. American Oversight is the source of the only fee for preparing this amicus brief.

SUMMARY OF ARGUMENT

A key question in this case is whether Appellants, former DFPS Commissioner Jaime Masters¹ and DFPS, violated Texas law by requiring DFPS to investigate gender-affirming care as child abuse. Central to that question is whether DFPS's rule announced in the February 22, 2022 DFPS statement adopting the Governor's directive to DFPS ("Abbott's Directive" regarding an opinion from Attorney General Ken Paxton) and DFPS's subsequent implementation thereof (collectively the "DFPS Rule"), constitute a new "rule" for purposes of the APA.² *See* Tex. Gov't Code Ann. §§ 2001.001–2001.903 (the APA). Appellees and Appellants are at extreme odds on this issue, which has significant implications for determining whether Appellants violated the law, and therefore whether the Court has jurisdiction to decide this case and whether the district court abused its discretion in issuing the temporary injunction against Appellants. Public records of Appellants and of other government agencies directly contradict Appellants' own claims in this matter.

¹ As Commissioner Masters has left office, her successor Commissioner Stephanie Muth has been substituted as a party. Tex. R. App. P. 7.2.

² Amicus uses terms as defined by Appellees in Appellees' Brief, filed on January 19, 2023. Specifically, "Abbott's Directive" is defined as the "[d]irective issued by Greg Abbott on February 22, 2022 directing DFPS to investigate reports of 'gender transitioning procedures' as 'child abuse' and ordering all licensed professionals to report such 'abuse'." "DFPS Rule" is defined as "[t]he instant challenged rule announced in DFPS's statement adopting Abbott's Directive and DFPS's subsequent implementation thereof." Appellees' Br. at xiii-xiv.

The APA defines a “[r]ule” as “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[.]” *Id.* § 2001.003(6)(A)(i)–(ii). Appellants maintain that the DFPS Rule is not a “rule” under Texas law. (Appellants’ Br. at 36–40.) By contrast, Appellees argue that the DFPS Rule constituted a dramatic change in the State’s treatment of transgender adolescents, their families, and medical professionals who offer care for gender dysphoria. (Appellees’ Br. at 42–46.) The district court determined that the “DFPS Rule was adopted without following the necessary procedures under the APA” because the “DFPS Rule was given the effect of a new law or new agency rule, despite no new legislation, regulation or even valid agency policy,” and there was a “substantial likelihood that Plaintiffs will prevail after a trial on the merits.” (1CR547–48, 2SCR4–5.)

Amicus is committed to government transparency through the use of public records requests, and, consistent with that mission, submitted a request to DFPS soon after Abbott’s Directive and the DFPS Rule, seeking records regarding the agency’s change in policy. (Exhibit A.) DFPS responded to this request by producing 928 pages of records to Amicus on August 19, 2022. (Exhibit B.)³ These records provide

³ In an effort not to overburden the Court, Amicus has not included the full production that can be found on American Oversight’s website at <https://www.americanoversight.org/document/texas->

a contemporaneous view of the agency’s response to the Attorney General’s opinion and Abbott’s Directive. Specifically, the records demonstrate a clear understanding from DFPS employees and officials up to the highest level that Abbott’s Directive was a mandate from the Governor to DFPS requiring the agency to change its procedures and practices regarding families with adolescents who are receiving gender-affirming care. These public records show the following: 1) the DFPS Rule was a direct response to Abbott’s Directive; 2) DFPS put new procedures and practices in place almost immediately to implement Abbott’s Directive; and 3) DFPS staff reacted with confusion and, in some cases, strong disagreement with the change in policy and procedure.

The records produced to Amicus indicate that Appellants intended, and DFPS staff interpreted, the statements from the Governor and agency to mandate the classification of gender-affirming care as “child abuse” and require investigation—logically leading to removal proceedings for transgender adolescents and potentially prosecutions against parents—based solely on the allegation that gender-affirming care is being provided for adolescents, and that DFPS implemented new policies and practices accordingly.

[department-of-family-and-protective-services-records-regarding-state-directive-classifying-gender-affirming-care-as-child-abuse](#). American Oversight regularly adds its own watermark and Bates number to the bottom of productions posted publicly on its website. Exhibits C–X constitute excerpted pages that are from the full production posted on American Oversight’s website and that include the watermark and Bates numbers added by American Oversight.

Amicus files this brief to advise the Court that contemporaneous records from within DFPS around the time of Abbott’s Directive and the DFPS Rule support Appellees’ position and the district court’s findings that DFPS’s responsive implementation of new policies and procedures constitutes improper rulemaking under the APA.⁴

ARGUMENT

Contemporaneous records show that the DFPS Rule was understood by DFPS staff and other relevant entities to be a new, generally applicable policy and interpretation, including changed procedures and limits on how certain cases would be assessed, investigated, and prosecuted, despite Appellants’ explicit claims to the contrary. Specifically, Abbott’s Directive was understood by DFPS officials up to the highest level, including former DFPS Commissioner Jaime Masters, to be a mandate to the agency, which then instituted the DFPS Rule in response. Records

⁴ This Court may take judicial notice of facts reflected in documents released by a governmental body to the public. *See, e.g.*, Tex. R. Evid. 201(b)(2) (“The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”), (d) (“The court may take judicial notice at any stage of the proceeding.”); *Off. of Pub. Util. Couns. v. Pub. Util. Comm’n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994) (per curiam) (“A court of appeals has the power to take judicial notice for the first time on appeal.”), *cited with approval in Serafine v. Crump*, No. 03-21-00053-CV, 2023 WL 1425778, at *8 n.2 (Tex. App.—Austin Jan. 31, 2023, no pet. h.). In any event, the records produced to Amicus and included in this brief are directly related to and underscore the district court’s findings in this case. (Order Granting the Voe and Roe Appellees Application for Temporary Injunction, 1CR546–50; Order Granting the Briggles and PFLAG Appellees’ Application for Temporary Injunction, 2SCR3–8.) Even if this Court declines to consider the documents produced to Amicus after the district-court proceedings, the existence of the documents demonstrates that, at the very least, it would be appropriate to remand this case to the district court to consider the addition of government documents, like those described in this brief, to the record.

show that the DFPS Rule was understood to be a change in policies and procedures, as shown by the opening of new investigations, changes in staffing procedures, and requests for guidance on the changes to investigations and removal proceedings from outside of the agency. The rule change was also clear from DFPS staff reaction.

1. Abbott's Directive Mandated a Rule Change for DFPS Investigations.

Records produced to Amicus show that Abbott's Directive on February 22, 2022 was understood by top DFPS personnel to be a mandate for a rule change. Even before Abbott's Directive was sent, DFPS officials were discussing its policy implications in response to a tweet from the Governor announcing: "The Texas Dept. of Family & Protective Services will enforce [the Attorney General's] ruling and investigate & refer for prosecution any such abuse." (Ex. C.) DFPS Director of Communications Patrick Crimmins⁵ circulated the Governor's tweet at 9:58 AM on February 22 to Commissioner Masters, as well as other top DFPS officials, including General Counsel Vicki Kozikoujekian and Deputy Commissioner Corliss Lawson.⁶

⁵ Patrick Crimmins, LinkedIn, <https://www.linkedin.com/in/patrick-crimmins-111646a1> (last visited Apr. 14, 2023). If an individual referenced in this brief is identified by their job title in the cited communication, Amicus does not provide a citation to their job title. If they are not identified by their job title in the communication, Amicus has cited the best available public source for that job title.

⁶ Corliss Lawson, LinkedIn, <https://www.linkedin.com/in/corliss-lawson-b02a7413> (last visited Apr. 14, 2023). Please note that, while Ms. Lawson's LinkedIn lists her as Deputy Commissioner, the DFPS website currently lists Jennifer Sims as Deputy Commissioner, a role her biography states she has held since January 2023. Jennifer Sims, Tex. Dep't of Family & Protective Servs., https://www.dfps.texas.gov/About_DFPS/Executives/Sims_Jennifer.asp (last visited Apr. 14, 2023). Regardless of the discrepancy, Ms. Lawson seems to have held the role of Deputy Commissioner at the time of the relevant communication.

In the version of the email circulating the tweet that was produced to Amicus, the paragraph following the tweet is redacted under Tex. Gov. Code § 552.111 and labeled a “Policy Discussion.” Thus, even before DFPS had received Abbott’s Directive on February 22, and certainly before DFPS received any reports regarding gender-affirming medical care (see Appellants’ Br. at 8–9, stating DFPS received reports of children receiving gender-affirming care for the first time “after the Attorney General opinion was issued”), the agency was aware of and preparing for the policy implications of a directive from the Governor.

By 5:14 PM that same day, Director of Communications Crimmins reported to top DFPS officials that he had circulated the statement crafted by DFPS in response to Abbott’s Directive to eight media sources announcing that, “[i]n accordance with Governor Abbott’s directive today to Commissioner Masters,” the agency will now be following the Attorney General’s opinion and start investigating reports of gender-affirming care as child abuse. (Ex. D).

The next day, Stephen Black, Associate Commissioner for Statewide Intake,⁷ emailed several DFPS employees the following message:

A legal opinion was released by the AG’s office on February 21, 2022. The governor subsequently provided further direction to DFPS to these reported matters.

⁷ Executives, Tex. Dep’t of Family & Protective Servs., https://www.dfps.state.tx.us/About_DFPS/Executives/Black_Stephen.asp (last visited Apr. 14, 2023).

Those two documents are attached to this communication which gives guidance and direction regarding how the department is to handle intakes related to gender transitioning.

Please consult with your PA regarding any questions you may have.

(Ex. E.) Attached to the email message were files labeled “AG Ken Paxton’s [sic] Legal Opinion” and “Gov Greg Abbott’s [sic] letter to DFPS Commissioner Masters.” *Id.* It is clear from this message that a high-ranking DFPS staff member understood Abbott’s Directive to set new requirements for “intakes related to gender transitioning” such that he instructed DFPS staff to read Abbott’s Directive for “guidance and direction” regarding the department’s handling of these specific matters going forward.

On February 24, 2022, Supervisor Kyndall Trahan wrote the following message to more than a dozen DFPS employees:

FYI – Essentially the Governor wants reporters (professional and personnel) to report any parents that are encouraging/allowing/involved in allowing their minor children, who identify as transgendered [sic], to go through the transition process. Governor Abbott is also mandating that DFPS investigate these parents and to have SWI process the intakes for field response.

(Exhibit F.) DFPS management clearly understood the change in policy to be coming directly from the Governor. According to one supervisor, Brittany Bailey, “[t]his new change is coming straight from state office” (Ex. G.) Furthermore, Abbott’s Directive was not understood to be merely a suggestion, but a new *mandate*

for DFPS to institute a rule change requiring the agency to investigate parents of adolescents receiving gender-affirming care.

Another supervisor confirmed on March 1 that DFPS's shift in policy was based on Abbott's Directive. Protective Services Intake Supervisor Nathan Ulmer⁸ emailed several DFPS staff stating:

I read Abbott's letter more thoroughly and it appears that allowing a child to take hormone blockers is also something we now constitute as PHAB [physical abuse⁹], not just the physical reassignment surgery. Our directive is more accurately explained in the governor's letter verse [sic] AG's opinion.

(Ex. H.) DFPS management's communications reflect the agency's understanding that Abbott's Directive dictated that DFPS change its policies and behavior to "now" recognize and require investigation of gender-affirming care as "physical abuse."

2. DFPS Changed Its Policies to Comply with Abbott's Directive.

Appellants falsely contend that DFPS "conducts [investigations involving the use of gender affirming medical care] like any other," (Appellants' Br. at 59), and that "procedure did not change" after Abbott's Directive (Appellants' Reply Br. at 20). Appellant's own records, however, show a slew of new policies put in place immediately after Abbott's Directive. The wave of changes implemented at DFPS

⁸ Nathan Ulmer, LinkedIn, <https://www.linkedin.com/in/nathan-ulmer-8841096a> (last visited Apr. 14, 2023).

⁹ Child Protective Services Handbook 2113.1, Tex. Dep't of Family and Protective Servs., https://www.dfps.state.tx.us/handbooks/cps/files/CPS_pg_2000.asp (abbreviating "physical abuse" as PHAB).

in the days after Abbott’s Directive—including the opening of new cases, establishment of new secrecy provisions, adjustments to staffing practices, and provision of guidance to partner entities—clearly substantiate the claim that Abbott’s Directive necessitated a new rule for the agency and the agency took every step necessary to adopt and implement that rule.

a. New Policies and Procedures in the DFPS Rule Had an Immediate Impact on Families and Medical Providers.

Though DFPS’s public announcement of the rule change stated that the agency, at that point, had “no pending investigations of child abuse involving the procedures described in [the Attorney General’s] opinion,” (Ex. D), by the next day it had several possible investigations in the intake stage (Ex. I). On February 23, 2022, Director of Investigation and Alternative Response Marta Talbert emailed DFPS staff stating:

I believe we have three right now in the intake stage—or being worked on by SWI [Statewide Intake Division¹⁰]. Stephen will send me the case numbers as soon as he has them for us to be aware in order to assist our staff with these cases.

Id. The opening of intakes was clearly precipitated by the rule change—as Statewide Intake Supervisor J.R. Uribe-Woods wrote on February 23, 2022, despite “sexual reassignment surgery for non-medical purposes” already being classified as physical

¹⁰ Statewide Intake, Tex. Dep’t of Family & Protective Servs., https://www.dfps.state.tx.us/About_DFPS/Statewide_Intake/ (last visited Apr. 14, 2023).

abuse in the agency’s guidelines, “[s]o far I have not seen this situation come up, nor have I heard it come up prior to this change in guidelines.” (Ex. J.) The immediate opening of new potential investigations where none had existed before, despite the fact that there is no reason to believe the number of children receiving gender-affirming medical care changed between February 22 and February 23, demonstrates the implementation of a new rule.

These intakes were not only opened but required to *stay* open and escalate to full investigations, contradicting DFPS’s usual process for assessing families. On February 25, 2022, Supervisor Tracy Giancola at the Children’s Advocacy Center of Collin County emailed staff stating that screeners in the field “have been informed they may not PN [Priority None¹¹]” any transgender-related cases. (Ex. K.) According to DFPS’s Glossary of Terms, PN is the lowest of three priority groups assigned by statewide intake during screening “based on the immediacy of risk and severity of harm to the child[.]”¹² Following Abbott’s Directive and the adoption of the DFPS Rule, DFPS changed its standard procedure to prohibit staff from making a “priority none” finding in any case involving a transgender adolescent and required

¹¹ “A report may be classified as a PN” or Priority None by statewide intake “when there is a history of abuse or neglect, but no current or foreseeable risk; or an incident of abuse or neglect may have met legal definitions at the time that the past incident occurred, but at the time of the new intake report, there are no current safety concerns and there is no known risk of recurrence in the foreseeable future.” CPI/CPS Glossary, Tex. Dep’t of Family & Protective Servs., https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Resources/glossary.asp (last visited Apr. 14, 2023).

¹² *Id.*

elevation of these cases regardless of the observed behavior of the families. This meant that, in contrast to normal procedures, families had no chance of avoiding a full, invasive investigation even if the intake screener would have normally determined that there were no safety concerns. Once again, these changes reflected in the public record directly contradict Appellants' claims.

The effects of the rule changes on families and medical professionals were recognized by stakeholders outside of DFPS. For example, Tarrant County Assistant District Attorney (ADA) Cindy Williams¹³ sent an email on February 25, 2022, indicating that “[t]his is being received by DFPS as a directive to remove certain children” (Ex. L.) And ADA Williams did not expect this change to be merely hypothetical, stating that she had “requested direction from” another Tarrant County employee “on how she would like us to proceed with a request for removal.” *Id.* ADA Williams also recognized the effect of the mandate on not just families but medical professionals, stating: “With the new mandate to report placed on doctors/medical professionals, I suspect we shall see more of these cases being investigated.” *Id.* Those involved in the process, both inside and outside DFPS, recognized the concrete impacts of the DFPS Rule on families and medical professionals—a surge in full, invasive investigations into families, including those

¹³ Cindy Williams, LinkedIn, <https://www.linkedin.com/in/cindy-williams-567352122> (last visited Apr. 14, 2023).

initiated by new mandated reporting from medical professionals where there would ordinarily be no safety concerns. These investigations necessarily resulted in increased risk of removals of transgender adolescents from their families.

b. DFPS Implemented New Communication Protocols as Part of the DFPS Rule.

Despite Appellants' reliance on testimony from Director Talbert that the agency had not "implemented anything new or different" in response to Abbott's Directive, (Appellants' Br. at 61), and their own declaration that "procedure did not change," (Appellants' Reply Br. at 20), email communications show DFPS management imposing new requirements for communicating about investigations involving gender-affirming medical care. Several directors and supervisors emphasized that discussion of these cases was to happen by phone, not emails or texts. On February 24, 2022, CPI Regional Director for Region 3 East Toni Sutton wrote: "[p]lease ensure we are not communicating about these cases via email and text, internally and externally, due to the sensitive nature." (Ex. M.) On February 25, 2022, Investigations Program Director Patricia Salinas¹⁴ circulated a similar warning, stating: "If you get any intakes regarding this issue, please immediately CALL ME to staff; no emails or texts are allowed." (Ex. N.) Investigations Supervisor Alexis Lipham specified that employees should "**only call**" with

¹⁴ Patricia Salinas, LinkedIn, <https://www.linkedin.com/in/patricia-salinas-med-lpc-25567370> (last visited Apr. 14, 2023).

questions regarding the Attorney General’s opinion and Abbott’s Directive, (Ex. O, emphasis in original), and CPI supervisor Maria Monreal told her staff “[f]or these type [sic] of cases, I will not be sending an email or text that you have been assigned [sic] this case. I would be calling you.” (Ex. P.)

Not only were staff instructed not to put anything in writing internally, but they also were asked not to put anything in writing to the families being investigated. On February 24, 2022, DFPS Investigative Program Director Jarita Wharton¹⁵ wrote: “[it] is being asked that these cases are worked thoroughly without text messages/emails to the family etc.” (Ex. Q.) The commands from directors and supervisors to their staff against putting information in writing, as well as the repeated and consistent instructions not to email or text about these cases even with the families under investigation, are indicators that the agency departed from the usual practices and procedures in implementing Abbott’s Directive, as part of the new DFPS Rule.

c. DFPS Changed Staffing Procedures in Response to Abbott’s Directive as Part of the DFPS Rule.

Contemporaneous emails show that DFPS quickly instituted a policy change and elevated cases arising out of the rule change to a certain class of DFPS employees, rather than individual field staff, contradicting testimony by Director

¹⁵ Jarita Wharton, LinkedIn, <https://www.linkedin.com/in/wharton-jarita-44385549> (last visited Apr. 14, 2023).

Talbert that no steps in the usual investigations process changed in response to Abbott's Directive. (Appellants' Br. at 60–61.) The change was so sudden that some supervisors were not even sure if they had any employees in that class or who those employees were.

Emails in the days following Abbott's Directive and the adoption of the DFPS Rule show a change in DFPS practice regarding the individuals who would be investigating these cases. On February 24, 2022, Investigative Program Director Wharton told coworkers: "We will need to discuss having a designated caseworker handle these special cases when they come up." (Ex. Q.) On February 25, 2022, DFPS employee Martin Lopez emailed other employees stating: "Basically we do have to investigate these cases, kind of. Actually the worker V's in the region are [investigating] so if you get one let me know because Im [sic] certain we do not have any worker V's." (Ex. R.) The message further reflects the change in policy, stating:

Gender-Transitioning Cases and our practice moving forward. We will need to investigate these cases and legal action can be taken based on medical procedures that have been performed on the child toward gender transitioning. . . . These cases will need to be worked by the Worker V caseworkers in the region.

Id. The assignment of any gender-transitioning cases to the Worker V class of workers is reflected in a February 25, 2022 email from another DFPS supervisor, Stacy Weston, who wrote, "Worker V's (which I don't even know who they are....) will be assigned to do these." (Ex. S.) On February 24, 2022, CPI Regional Director

Sutton wrote that cases arising from the rule change “will be investigated by our worker V’s” and emphasized that, if the office “receive[s] intakes about this, please ensure I am notified immediately.” (Ex. M.) Other communications show assignments arising out of the change going to Worker IV for the Region, rather than Worker V and specify that these cases will not be assigned “to individual field staff.” (Ex. T.) Investigations Program Director Salinas changed procedure to involve herself in staffing cases, indicating that cases arising out of Abbott’s Directive and the DFPS Rule were not following usual staffing procedure. (Ex. N.) Regardless of where DFPS planned to assign these cases, communications make clear that changes to staffing procedures were precipitated by the knowledge that these cases were to be handled in new and different ways than other matters. CPI Regional Director Keith Gailes admitted as much on February 24, 2022, stating that his office “need[s] to ensure our high performing workers are assigned these cases because there will be a lot of eyes on them.” (Ex. U.)

Not only were these cases singled out and elevated for special staffing, but the staff assigned to these cases were stripped of authority to make individualized determinations in these cases. As discussed in Section 2.a, *supra*, one supervisor made it clear to staff that screeners assessing families could not assess any family reported in matters subject to the Abbott Directive as “priority none” and close the case before the investigation stage. (Ex. K.) Instead, DFPS changed its standard

procedure to prohibit the closing of any case involving a transgender adolescent at the intake stage and to require elevation of these cases without regard to the employees' experiences with a family or professional judgment about the risk of harm.

d. At Least One Other Affected Entity Outside of DFPS Changed Its Procedures in Response to the DFPS Rule.

Records show that at least one other affected entity also recognized the DFPS Rule as a new rule that necessitated a change in its own procedures. In an email sent in response to an email circulating the Attorney General's opinion and Abbott's Directive, Tarrant County ADA Williams stated:

CPI [Child Protective Investigations¹⁶] will not remove before they have staffed the case with state office, and [DFPS Director¹⁷] Matt Gilbert has stated he will include our office in those staffings. I have requested direction from Sharen on how she would like us to proceed with a request for removal. I will keep you apprised of any changes.

(Ex. L.) The statement explaining that prosecutors would be included on staffing for cases arising out of Abbott's Directive indicates a change in existing practice. ADA Williams also noted that further changes might come in response to her request for more guidance, as evidenced by her promise to keep the email recipients apprised of those changes.

¹⁶ Child Protective Investigations (CPI), Tex. Dep't of Family & Protective Servs., <https://www.dfps.state.tx.us/Investigations/> (last visited Apr. 14, 2023).

¹⁷ Matthew Gilbert, Government Salaries Explorer, Tex. Trib., <https://salaries.texasribune.org/employees/matthew-gilbert-11932/> (last visited Apr. 14, 2023).

3. DFPS Staff Recognized that the Operationalization of Abbott’s Directive Constituted a Rule Change by Seeking Guidance and Expressing Discomfort with the New Rule.

In addition to the changes in procedure and practice from DFPS managers, contemporaneous communications from DFPS employees show a clear recognition of the existence of a new rule and confusion regarding how to implement the rule change. Top agency officials recognized that the agency was breaking new ground with DFPS’s rule change. On February 24, 2022, Supervisor Trahan stated: “I know there are lots of feelings around this and more questions than answers right now. Upper management is very involved as this is totally new ground for the agency.” (Exhibit F.) Another supervisor, Brittany Bailey, circulated the Attorney General’s opinion and Abbott’s Directive and specified that this was a “new change.” (Ex. G.) Among DFPS employees, email communications reflect that they did not see Abbott’s Directive and the DFPS Rule as business as usual in the agency, in stark contrast to Appellants’ assertion that “procedure did not change,” (Appellants’ Reply Br. at 20), and Director Talbert’s contention that the agency had not “implemented anything new or different.” (Appellants’ Br. at 61.)

Furthermore, strong discontentment among DFPS staff in response to the rule change makes evident that this rule change was anything but the status quo. One worker asked “[c]an we be forced to do this?” and stated “I refuse to punish those that are part of the community simply because they are trans.” (Ex. V.) In a separate

email, that employee also said, “I have told my boss I will resign before I RTB [Reason to Believe¹⁸] on a family whose child is transitioning.” (Ex. W; *see also* Ex. X.) The strong employee reaction, including and up to threatening resignation, substantiates the claim that this was a significant shift in policy for DFPS. Records show that, on every level of the chain of command, agency staff recognized the enormity of the changes made by Abbott’s Directive and as part of the DFPS Rule.

CONCLUSION AND PRAYER

The contemporaneous records Amicus American Oversight obtained through a PIA request to DFPS demonstrate the falsity of Appellants’ claims that operationalizing Abbott’s Directive was business as usual for DFPS. In actuality, for DFPS top officials, including former Commissioner Masters, management, and staff, as well as families of transgender youth and medical professionals providing gender-affirming care, the status quo undoubtedly changed. Furthermore, that change impacted the Texas families and medical professionals who are now the subjects of DFPS’s new scrutiny. New investigations were opened. There was implementation of policies and procedures regarding communication, new staffing rules, and a prohibition on finding that such matters represented low or no risk. Additionally, those charged with prosecuting child abuse had to seek guidance from

¹⁸ Child Protective Servs. Handbook 2281.2, Tex. Dep’t of Family & Protective Servs., https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2281_2 (last visited Apr. 14, 2023).

DFPS. These records show that, as a result of Abbott's Directive and the DFPS Rule, DFPS was prepared not just to investigate with new and unusual policies and procedures, but to remove children and initiate prosecutions. The agency's own records bolster Appellees' claim that DFPS's implementation of Abbott's Directive was a rule change under the APA, and therefore, the district court's findings that Appellees would likely succeed on the merits of their case was not an abuse of discretion.

For the reasons stated above, Amicus American Oversight respectfully urges the Court to consider these records of the Appellant as they relate to the existence of a rule under the APA and affirm the district court's temporary injunction.

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Respectfully submitted,

By: /s/ Kennon L. Wooten
Kennon L. Wooten
State Bar No. 24046624
kwooten@scottdoug.com

SCOTT DOUGLASS &
McCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 Phone
(512) 495-6399 Fax

*Counsel for Amicus Curiae American
Oversight*

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief was prepared using Microsoft Word 2019 and that, according to its word-count function, the sections of the brief covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure contain 4,995 words.

/s/ Kennon L. Wooten
Kennon L. Wooten

CERTIFICATE OF SERVICE

I certify that, on April 18, 2023, a true and correct copy of the foregoing brief was served electronically through the electronic filing manager if the email address of the attorney to be served was on file with the electronic filing manager, and otherwise by email, on the following attorneys, including all attorneys of record:

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

Camilla B. Taylor
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
65 E. Wacker Place, Suite 2000
Chicago, IL 60601-7245
Phone: (312) 663-4413
ctaylor@lambdalegal.org

Karen L. Loewy
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245
kloewy@lambdalegal.org

Omar Gonzalez-Pagan
M. Currey Cook
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3919
Phone: (212) 809-8585
ogonzalez-pagan@lambdalegal.org
ccook@lambdalegal.org

Brian Klosterboer
Texas State Bar No. 24107833
Andre Segura
Texas State Bar No. 24107112
Chloe N. Kempf
Texas State Bar No. 24127325
Savannah Kumar
Texas State Bar No. 24120098
Adriana Piñon
Texas State Bar No. 24089768
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
5225 Katy Fwy., Suite 350
Houston, Texas 77007
Phone: (713) 942-8146
Fax: (346) 998-1577
bklosterboer@aclutx.org
asegura@aclutx.org
ckempf@aclutx.org
skumar@aclutx.org
apinon@aclutx.org

Derek R. McDonald
Texas State Bar No. 00786101
Maddy R. Dwertman
Texas State Bar No. 24092371
John Ormiston
Texas State Bar No. 24121040
BAKER BOTTS L.L.P.
98 San Jacinto Blvd, Ste 1500
Austin, Texas 78701-4078
Phone: 512-322-2500
derek.mcdonald@bakerbotts.com
maddy.dwertman@bakerbotts.com
john.ormiston@bakerbotts.com

Brandt Thomas Roessler
Texas State Bar No. 24127923
Nischay K. Bhan
Texas State Bar No. 24105468
Nicholas Palmieri
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, New York 10112-4498
Phone: (212) 408-2500
brandt.roessler@bakerbotts.com
nischay.bhan@bakerbotts.com
nick.palmieri@bakerbotts.com

Chase Strangio
James Esseks
Anjana Samant
Kath Xu
Hina Naveed
AMERICAN CIVIL
LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (917) 345-1742
cstrangio@aclu.org
asamant@aclu.org
hnaveed@aclu.org
kxu@aclu.org
jesseks@aclu.org

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

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

Counsel for Appellees

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

Ken Paxton
Attorney General of Texas
Texas State Bar No. 15649200
Brent Webster
Texas State Bar No. 24053545
First Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711
Phone: (512) 936-1700
Fax: (512) 474-2697

Counsel for Appellants

/s/ Kennon L. Wooten
Kennon L. Wooten
*Counsel for Amicus Curiae American
Oversight*