No. 03-22-00126-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JAIME MASTERS IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

Appellants,

v.

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,

Appellees.

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

BRIEF FOR APPELLANTS

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ORAL ARGUMENT REQUESTED

Identity of Parties and Counsel

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Jaime Masters in her official capacity as Commissioner of 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
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Dr. Megan Mooney

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STATEMENT OF THE CASE

Nature of the Case: Plaintiffs-Appellees sued the Governor, the Commissioner of the Department of Family and Protective Services, and the Department of Family and Protective Services (DFPS) to enjoin them from investigating alleged child abuse as discussed in an Attorney General Opinion concluding that certain medical procedures can constitute child abuse under the Texas Family Code.

Course of Proceedings: The trial court denied Defendants' plea to the jurisdiction, CR.232, App'x Tab A, and granted Plaintiffs' motion for a temporary injunction, CR.233-37, App'x Tab B.

Trial Court: 353d Judicial District, Travis County
Hon. Amy Clark Meachum presiding
Case No. D-1-GN-22-000977

Disposition in the Trial Court: Defendants challenged the trial court's subject-matter jurisdiction by filing a plea to the jurisdiction based on Defendants' sovereign immunity, Plaintiffs' lack of standing, and because Plaintiffs' claims are not ripe. CR.71-80. The trial court denied their plea. CR.232. It also issued a temporary injunction against the Governor, the Commissioner of DFPS, and DFPS, which applies not just to DFPS's investigation into *the parties'* self-reported actions, but also to *any* instance of reported medical abuse of a child based on "gender-affirming medical care." CR.236. Defendants-Appellants timely noticed this interlocutory appeal. CR.226-28.

Plaintiffs filed an emergency motion for temporary relief pursuant to Texas Rule of Appellate Procedure 29.3, which this Court granted. *See* Order (March 21, 2022). Defendants-Appellants filed a petition for writ of mandamus in the Supreme Court of Texas, which the Supreme Court conditionally granted in part. *See In re Abbott*, No. 22-0229, 2022 WL 1510326 (Tex. May 13, 2022).

Statement Regarding Oral Argument

The trial court's temporary injunction prevents a state agency from carrying out its statutory duty to investigate reported child abuse. An order empowering the courts to superintend the executive branch in this way raises not only significant separation-of-powers questions, but also the jurisdictional doctrines of standing, ripeness, and sovereign immunity. Moreover, Plaintiffs' lawsuit rests on a novel interpretation of the Administrative Procedure Act's limited waiver of sovereign immunity. Oral argument would aid the Court in assessing and addressing these important and complex issues.

Issues Presented

1. Whether a government agency's investigation into possible wrongdoing is a cognizable injury sufficient to create standing to sue or a ripe claim for relief.

   Whether the Texas Administrative Procedure Act's waiver of sovereign immunity for challenges to "rule[s]" applies to (a) communications between the Governor and an executive agency, or to (b) an executive agency's statement to the press about the agency's internal operations.

2. Whether a government official acts *ultra vires* any time he misinterprets a law.

3. Whether a court has authority to issue an injunction for the benefit of non-parties or an injunction that does not remedy the plaintiff's alleged harm.

4. Whether a court can issue an injunction against a government official who lacks authority to take the challenged action and has not threatened to take the challenged action.

To the Honorable Third Court of Appeals:

Parents have the primary duty to care for their children. *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019). But if a parent shirks that duty by abusing or neglecting a child, the State intervenes to protect the child. *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014). This case was filed after Defendant-Appellant DFPS began investigating a self-report of possible child abuse by Plaintiff-Appellee Jane Doe, who is a DFPS employee.

The trial court erred in issuing a temporary injunction prohibiting DFPS from so much as investigating the possibility of such abuse, not only as to the Does, but as to *anyone*. If a bare denial of wrongdoing warranted an injunction barring the State so much as investigating alleged child abuse—here, based on Jane Doe's own self-report—every DFPS investigation could immediately be enjoined. That would make it impossible for the State to protect Texas's vulnerable children. And that is why courts refuse to enjoin investigations, the very point of which are to determine whether there has been any wrongdoing. More troubling still, the trial court's overreach implicates its subject-matter jurisdiction and the limits of its remedial power. "[T]he need for courts to mind their jurisdictional bounds is perhaps at its greatest in cases" like this, "involving questions of public importance, where the potential for undue interference with the other two branches of government is most acute." *Morath v. Lewis*, 601 S.W.3d 785, 789 (Tex. 2020).

And the trial court's injunction went further than enjoining DFPS from investigating Ms. Doe's self-report—it issued a "statewide" injunction barring DFPS from investigating *anyone* for the challenged type of alleged child abuse. The

judicial power does not extend so far. Any court's authority to issue injunctive relief is limited to remedying an injury to the party before it.

BACKGROUND

Many months ago, the Attorney General received an official request to analyze "whether the performance of certain medical and chemical procedures on children—several of which have the effect of sterilization—constitute child abuse." App'x Tab D, Op. Tex. Att'y Gen. No. KP-0401, 2022 WL 579379, at *1 (Feb. 18, 2022). The Attorney General opined that certain "'sex change' procedures and treatments . . . when performed on children, can legally constitute child abuse under" the Family Code. *Id.* at *1. The opinion specified that it did "not address or apply to medically necessary procedures." *Id.*

The Governor conveyed the opinion to the Commissioner of DFPS. The Governor's accompanying letter explained that the opinion "makes clear[] it is already against the law to subject Texas children to a wide variety of elective procedures for gender transitioning."[1] The letter directed DFPS to "follow the law," as set forth in sections 261.301(a)–(b) and 261.001(1)(A)–(D) of the Family Code, by "conduct[ing] a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas." *Id.* In a statement

[1] App'x Tab E, Letter from Gov. Greg Abbott to Commissioner Jaime Masters (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.

responding to a press inquiry, a DFPS spokesman acknowledged that DFPS would follow Texas law as interpreted by the Attorney General.[2]

Jane Doe, a DFPS employee, told her supervisor that she was providing her child with hormone-altering medication and puberty blockers, 2.RR.117, 131-34, and that she believed she could be an "alleged perpetrator" under the child-abuse laws as interpreted by the Attorney General. 2.RR.132; 3.RR.13. As is DFPS's standard practice, Ms. Doe was placed on paid administrative leave while her self-reporting was investigated. 2.RR.85. A DFPS caseworker conducted an interview at which the Does were free to—and did—decline to answer questions. 2.RR.90; CR.24-25 (alleging "the CPS investigator sought access through releases to Mary Doe's medical records, which the Doe Plaintiffs refused to sign"). Ms. Doe (joined by her husband and child) then filed suit to not only stop this DFPS investigation, but also to prevent *any* investigations of allegations of child abuse involving the medical procedures addressed in the Attorney General's opinion. CR.3-70.

The last plaintiff-appellee, Dr. Megan Mooney, is a psychologist. 3.RR.17-19. She fears having to report transgender youth clients seeking or engaging in certain therapies. *See* CR.26-28; 3.RR.25. She does not allege DFPS or the Governor is investigating her or that either has authority to take disciplinary action against her. *See* CR.62-70; 3.RR.26.

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[2] CR.8 (citing Isaac Windes, *Texas AG says trans healthcare is child abuse. Will Fort Worth schools have to report?*, Fort Worth Star-Telegram (Feb. 23, 2022), https://www.star-telegram.com/news/local/crossroads-lab/article258692193.html; *see also* 4.RR.PX03, App'x Tab F.

Plaintiffs filed their Petition on March 1, 2022, in Travis County District Court. *See* CR.3-52. Their lawsuit "challeng[es] the Governor's 'directive' and the statement made by DFPS to the media." *In re Abbott*, 2022 WL 1510326, at *1 (Tex. May 13, 2022) (unanimous op.). As summarized by the Supreme Court of Texas:

> The plaintiffs contend that DFPS's press statement improperly announces a new agency rule without the notice-and-comment procedure required by law. *See* Tex. Gov't Code §§ 2001.023, .029, .033. They also challenge DFPS's authority to investigate their use of medical treatments deemed unlawful by the Governor's letter.

Id. Defendants-Appellants filed a plea to the jurisdiction raising sovereign immunity as well as lack of standing and ripeness. CR.71-78.

On March 11, 2022, the trial court held a hearing on Plaintiffs' motion for temporary injunction. At the close of arguments, the trial court denied the plea to the jurisdiction and, referencing a pre-written script, stated its findings on the record and granted Plaintiffs' motion. *See* 3.RR.144-49; CR.232; CR.233-37. The trial court issued the universal injunction Plaintiffs sought, enjoining Defendants from:

> (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.

CR.235-36 (emphases added).

Defendants immediately filed a notice of appeal pursuant to Texas Civil Practice and Remedies Code section 51.014(a)(4) and (8). CR.226. Defendants' appeal superseded the injunction by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. R. App. P. 29.1(b). At Plaintiffs-Appellees' request, and over Defendants-Appellants' objection, this Court reinstated the temporary injunction pursuant to Texas Rule of Appellate Procedure 29.3. *See* Order (March 31, 2022).

Defendants sought mandamus from the Supreme Court of Texas, which granted relief in part. *See In re Abbott*, 2022 WL 1510326, at *4 (unanimous op.), *5 (majority op.). The Supreme Court unanimously instructed this Court to vacate "the portions of the court of appeals' order that purport to have statewide application," because "[a] court of appeals lacks authority to afford statewide relief to nonparties." *Id.* at *2, *4. Further, the Court explained that the Governor does not have statutory authority to direct DFPS as to how to exercise its investigatory discretion. *Id.* at *2-3. Consequently, the Supreme Court instructed this Court to vacate its "injunction against the Governor, as there is no allegation that he is taking, or has authority to take, the enforcement actions the order enjoins." *Id.* at *2; *see also id.* at *4-5. The majority of the Court concluded Defendants had not carried their heavy mandamus burden to vacate the injunction entirely, however. *Id.* at *4 (majority). "Without

commenting on the merits," therefore, the Court "denie[d] mandamus relief from the order's application insofar as it governs conduct among these parties while the appeal proceeds." *Id.*

Justices Boyd, Devine, and Blacklock would have "grant[ed] further relief." *Id.* at *8 (Blacklock, J., concurring in part and dissenting in part). They concluded Plaintiffs have not established "a probable right to relief on their claim that DFPS cannot even so much as look into the plaintiffs' medical decisions in this regard without first undertaking notice-and-comment rulemaking." *Id.* "[A]n injunction preemptively prohibiting the executive branch from even investigating the possibility that injury to a child may result from the disputed treatments is likely beyond the proper scope of the judicial power," Justice Blacklock explained. *Id.* at *9. "As the Court rightly observes, if DFPS concludes on the basis of an investigation that further action is warranted, that action cannot take place without court authorization. Until then, the courts' normal role in this process is not to tell DFPS what it can and cannot investigate." *Id.*; *see also id.* at *3 (unanimous op.).

SUMMARY OF THE ARGUMENT

This appeal is based on two independent grounds for interlocutory appellate jurisdiction: the denial of a governmental defendant's plea to the jurisdiction and the grant of a temporary injunction. Both necessitate reversal.

I. Defendants' plea to the jurisdiction should have been granted because the trial court lacks subject-matter jurisdiction and because the suit is barred by sovereign immunity. A bare investigation is not a judicially cognizable injury, so the Doe Plaintiffs lack standing. Much more so for Dr. Mooney, who does not claim she

has been investigated at all. They all lack an injury-in-fact. And even if not, their claims against the Governor must be dismissed because there is no causal connection between the Governor and the injury (investigation) Plaintiffs allege. The Governor does not investigate reports of child abuse—DFPS does that.

Plaintiffs' claims are likewise unripe. Dr. Mooney identifies no actual or imminent enforcement action—or even an investigation—that could injure her. And while DFPS has initiated an investigation into Ms. Doe's self-report of possible child abuse based on her child's medical treatments, a claim based on an investigation is unripe. The claim might ripen if DFPS takes any action on the basis of what it finds, but unless and until that happens, the Doe Plaintiffs do not have a ripe claim that a court can meaningfully adjudicate.

Plaintiffs' claims are also barred by sovereign immunity. The APA's waiver for challenges to "rules" does not apply because a gubernatorial letter and a DFPS press statement are not "rules." Such things do not affect the rights of private parties. Nor does the UDJA help Plaintiffs; although it waives sovereign immunity for a constitutional challenge to a "statute or ordinance," Plaintiffs do not have such a claim. Finally, they cannot use an *ultra vires* theory to pursue their claims against the Governor and the Commissioner. The Governor has no role in investigating possible child abuse, as the Supreme Court made clear in granting mandamus relief in part. And the Commissioner has discretion in carrying out DFPS's statutory duty to conduct such investigations.

II. The trial court's temporary injunction also must be vacated. For all of the above reasons, it is unlawful. A court without subject-matter jurisdiction cannot

issue any injunction, even temporarily. Plaintiffs lack a cause of action against Defendants. They also have not shown a probable right to the injunctive relief they seek. The Governor cannot be enjoined from taking actions he is not charged with handling in the first place, as the Supreme Court explained. No court can issue a universal injunction to protect the world at large. And the four provisions of the temporary injunction are each independently unlawful. Finally, Plaintiffs did not show irreparable harm that the temporary injunction would remedy.

This Court should reverse, vacate the temporary injunction, and render judgment dismissing Plaintiffs' claims.

Standard of Review

A defendant may challenge the trial court's subject-matter jurisdiction, including by raising the absence of standing or ripeness, in a plea to the jurisdiction. *Bland ISD v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000). Sovereign immunity, too, "implicates courts' subject-matter jurisdiction." *Hous. Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016). Both an order denying a plea to the jurisdiction and the grant of a temporary injunction are reviewed de novo. *See id.*; *Matzen v. McLane*, No. 20-0523, 2021 WL 5977218, at *3 (Tex. Dec. 17, 2021).

Argument

I. The Trial Court Lacked Subject-Matter Jurisdiction, So Defendants' Plea to the Jurisdiction Should Have Been Granted.

Because the trial court lacked subject-matter jurisdiction for three separate reasons, Defendants' plea to the jurisdiction should have been granted and

Plaintiffs' claims dismissed. Plaintiffs's claims are not ripe, they lack standing to sue, and Defendants' sovereign immunity bars the exercise of jurisdiction.

A. Plaintiffs' claims are not ripe.

The trial court lacked jurisdiction because Plaintiffs' claims are not ripe. Ripeness requires a showing that "the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). As the Supreme Court explained, "DFPS does not need permission from courts to *investigate*, but it needs permission from courts to *take action* on the basis of an investigation." *In re Abbott*, 2022 WL 1510326, at *3; *see also id.* at *9 (Blacklock, J., concurring in part and dissenting in part).

1. Claims based on an allegedly improper investigation typically are not ripe because 'after reviewing information submitted by [the plaintiff], the agency might agree" that there has been no wrongdoing. *Winter v. Cal. Med. Rev., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir. 1994). The claim may ripen if the agency finds wrongdoing and takes action against the subject, but until it has done so there is nothing for a court to adjudicate. *See Rea v. State*, 297 S.W.3d 379, 383-84 (Tex. App.—Austin 2009, no pet.) (noting that ripeness and finality examine whether the "initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (internal citations omitted)); *accord Am. Sw. Ins. Managers, Inc. v. Tex. Dep't of Ins.*, No. 03-10-00073-CV, 2010 WL 4053726, at *4-5 (Tex. App.—Austin Oct. 15, 2010, no pet.).

2. Beyond the constitutional minimum, courts must consider the "prudential part of ripeness," which looks to whether, even assuming the constitutional ripeness threshold is met, the issues are "fit . . . for judicial decision." *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1123 (9th Cir. 2022); *see also Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) ("[T]he [Texas] ripeness doctrine is similar to the federal ripeness doctrine in that it has both constitutional and prudential dimensions."). As the Supreme Court has explained, "[t]he ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes." *Mayhew*, 964 S.W.2d at 928. Prudential ripeness balances the relative harm to the parties if the case goes forward, including harm to the government by being unable to investigate possible wrongdoing. *See Twitter*, 26 F.4th at 1124.

This case is not prudentially ripe. The Doe Plaintiffs say that they have not committed child abuse, but that "is the very thing [DFPS] is trying to investigate." *Id.* at 1125. Plaintiffs do not dispute that the same medical treatment that is indicated for some patients could be unnecessary and abusive for others. Indeed, Dr. Mooney testified that appropriate medical care for a patient diagnosed with gender dysphoria is "a highly individualized decision," and agreed that "[o]ne treatment that you prescribe for one patient that's a child might be the completely wrong treatment to prescribe to another patient that's a child." 3.RR.40; *see also* 3.RR.21. Moreover, Plaintiffs allege that *no* medical intervention is medically necessary for pre-pubescent children, that surgical intervention is not recommended for minors, and that transgender individuals *not* diagnosed with gender dysphoria do not need medical

treatment at all because "[b]eing transgender is not itself a medical condition to be cured." CR.16. Whether a particular child's medical care is appropriate and medically necessary, on the one hand, or unnecessary and abusive, on the other, is precisely what a DFPS investigation is meant to find out.

Here, DFPS has not yet determined whether it believes there has been abuse—that is the whole point of conducting an investigation. If DFPS ever does allege wrongdoing and seek court authorization to intervene, the Doe Plaintiffs will have the opportunity to raise their arguments in defense. *See Twitter*, 26 F.4th at 1124; *In re Abbott*, 2022 WL 1510326, at *3 ("before issuing orders, a court would have to decide whether the child abuse investigated and alleged by DFPS qualifies as such under Texas law"). But this pre-enforcement lawsuit is unripe. *See In re Abbott*, 2022 WL 1510326, at *9 (Blacklock, J., concurring in part and dissenting in part) (explaining that "the courts' normal role in this process is not to tell DFPS what it can and cannot investigate," but to "decide whether DFPS may take action based on its investigation").

B. Plaintiffs do not have standing to sue.

To have standing to sue in Texas courts, the "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 799 (Tex. 2021). These requirements "parallel the federal test for Article III standing," *id.*, so Texas courts look to federal precedent to inform their standing analysis. To be cognizable in court, the Plaintiffs' injury must be "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398,

409 (2013); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). A "theoretical possibilit[y]" of injury does not suffice. *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) (per curiam).

1. Dr. Mooney has not alleged an injury-in-fact.

Dr. Mooney does not identify an actual or imminent injury. Her theory of injury is that her failure to report child abuse raises "the prospect of civil and criminal penalties, the loss of her license, and other severe consequences." CR.27. But she does not allege any government agency has so much as investigated her, much less that any government actor has threatened to prosecute her or to revoke her license to practice as a psychologist. *See* CR.26-28. The "theoretical possibilit[y]" this could happen someday does not suffice. *In re Gee*, 941 F.3d at 164; *see also Clapper*, 568 U.S. at 410 (injury that "relies on a highly attenuated chain of possibilities" does not support standing).

And even if such theoretical possibilities *were* actionable, the government agencies that could seek such penalties are not parties to this lawsuit. Plaintiffs admit that psychologists' licenses are overseen by the Behavioral Health Executive Council, not DFPS or the Governor. *See* 3.RR.26. And criminal prosecutions are brought by District Attorneys. The Governor and DFPS cannot be enjoined from taking some official action that they have no role in administering. *See In re Abbott*, 2022 WL 1510326, at *4 ("Ordering the Governor not to 'investigat[e] reports' of abuse, 'prosecut[e]' such reports, or 'impos[e] reporting requirements'" was improper "because . . . the Governor does not have authority to do any of those things with respect to these plaintiffs.").

2. Plaintiffs' alleged injuries—even if they were actionable—are not traceable to the Governor.

Plaintiffs lack standing to sue the Governor for yet another reason. They do not identify anything the Governor has done or is likely to do that would cause them injury. The Doe Plaintiffs' alleged injury is DFPS's investigation, but as the Supreme Court explained, "neither the Governor nor the Attorney General has statutory authority to directly control DFPS's investigatory decisions." *In re Abbott* 2022 WL 1510326, at *3. Without a causal connection between the Governor's conduct and Plaintiffs' alleged injury, they lack standing to sue him. *See Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) ("[T]he relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' *of the defendant*, not to the provision of law that is challenged." (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). And, for the reasons explained by the Supreme Court, the trial court lacked authority to enter an injunction prohibiting the Governor from taking some official action he has no role in administering. *See In re Abbott*, 2022 WL 1510326, at *3-4. "[S]uch an injunction would serve no purpose[.]" *Id.* at *5 (Lehrmann, J., concurring).

The same applies to Dr. Mooney, who does not identify any causal connection between the Governor and any injury she might have alleged (though she has not alleged injury-in-fact at all, *see supra* 12).

C. Plaintiffs' lawsuit is barred by sovereign immunity.

Sovereign immunity also bars Plaintiffs' claims, so the trial court erred in denying Defendants' plea to the jurisdiction. That is an independently sufficient reason why this Court must reverse and render judgment dismissing the petition.

1. In support of their claims against the Commissioner and DFPS, Plaintiffs begin with the waiver of sovereign immunity for challenges to a "rule" under the APA. CR.29. That theory fails. "Not every statement by an administrative agency is a rule" under the APA. *TEA v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994). Rather, a "rule" is "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." Tex. Gov't Code § 2001.003(6)(A).

Here, the purported "rule" is a statement the agency's spokesman gave to a reporter. An agency spokesman must be able to "practically express its views to an informal conference," *Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764, 769 (Tex. App.—Austin 1999, no pet.), but only "[t]he commissioner" may "oversee the development of rules," Tex. Hum. Res. Code § 40.027(c)(3). Press statements do not "implement[], interpret[], or prescribe[] law or policy." Tex. Gov't Code § 2001.003(6)(A)(i). Nor do they "describe[] the procedure or practice requirements of a state agency." *Id.* § 2001.003(6)(A)(ii). Press statements therefore are not "rules."

As the Supreme Court observed, DFPS has "the same discretion to investigate reports of child abuse that it had before issuance of OAG Opinion No. KP-0401 and the Governor's letter." *In re Abbott*, 2022 WL 1510326, *5; *see also id.* at *8

(Blacklock, J., concurring in part and dissenting in part) (explaining that "the real crux of the matter is whether, under pre-existing law, DFPS had the background authority, grounded in the Family Code, to investigate whether [a particular medical] treatment may constitute child abuse in particular cases and to go to court to seek orders on that basis"). DFPS's press statement is not a "rule" that implicates the APA's limited waiver of sovereign immunity.

And even if the press statement could otherwise constitute a rule, it would be excluded from the APA's scope because, at most, it governs how DFPS will interpret the Family Code's definition of abuse for purposes of its discretionary investigatory decisions. A "statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures" is excluded from the APA's definition of a "rule." Tex. Gov't Code § 2001.003(6)(C); *see Brinkley*, 986 S.W.2d at 770. "[S]uch statements have no legal effect on private persons absent a statute that so provides or some attempt by the agency to enforce its statement against a private person," neither of which applies here. *Brinkley*, 986 S.W.2d at 770.

The "core concept" distinguishing a "rule" from the internal management exception is that "the agency statement must *in itself* have a binding effect on private parties." *Slay v. TCEQ*, 351 S.W.3d 532, 546 (Tex. App.—Austin 2011, pet. denied) (emphasis added). At most, the DFPS press statement directs DFPS's employees to apply the law as explained in the Attorney General's opinion when investigating potential child abuse. That would not "itself have a binding effect on private parties." *Id.* And even if the press statement itself caused investigations, those investigations do not themselves alter private rights. As the Supreme Court

explained, "[b]efore it can impose consequences on a family beyond an investigation, DFPS generally must seek court orders authorizing it to intervene." *In re Abbott*, 2022 WL 1510326, at *3 (unanimous op.). The press statement does no such thing: plaintiffs have not alleged, much less shown, that the press statement binds the judges who will ultimately decide whether a child is in danger. And that an individual would prefer not to be investigated for child abuse does not mean that private rights have been determined. *See DPS v. Salazar*, 304 S.W.3d 896, 905 (Tex. App.—Austin 2009, no pet.) (holding that providing special formatting for drivers licenses issued to non-citizens does not "have any legal effect on private persons" because the licenses "remain valid").

2. Plaintiffs also seek relief under the UDJA, CR.152, but that does not get them around sovereign immunity. The UDJA "is not a general waiver of sovereign immunity." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). As this Court has explained, "[t]he UDJA's sole feature that can impact trial-court jurisdiction to entertain a substantive claim is the statute's implied limited waiver of sovereign or governmental immunity that permits claims challenging the validity of *ordinances or statutes*." *Ex parte Springsteen*, 506 S.W.3d 789, 799 (Tex. App.—Austin 2016, pet. denied) (emphasis added); *see* Tex. Civ. Prac. & Rem. Code § 37.006(b). Plaintiffs do not challenge the constitutional validity of an ordinance or a statute. Their claim is that Defendants have misinterpreted the statute defining "child abuse," not that that statute is itself unconstitutional.

What Plaintiffs seem to really want is to have a court declare that the statutory provision defining "child abuse" does not include the medical procedures addressed

in the Attorney General's opinion. But the UDJA's limited waiver of sovereign immunity does not extend to a "bare statutory construction claim" like that. *McLane Co. v. TABC*, 514 S.W.3d 871, 876 (Tex. App.—Austin 2017, pet. denied); *see Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (2011).[3]

3. Plaintiffs next try to avoid sovereign immunity by suing the Governor and the Commissioner under an *ultra vires* theory. CR.34. That too fails. "An *ultra vires* action requires a plaintiff to 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)). Plaintiffs rely on the "without legal authority" theory, *see* CR.36-37, CR.152, alleging the Governor's letter and the Commissioner's statement "exceed[] the Governor's and the Commissioner's authority," CR.152, and violate "separation of powers" under the Texas Constitution by "redefining" the Legislature's statutory definition of child abuse, CR.153. These theories do not allege *ultra vires* conduct that would get Plaintiffs around sovereign immunity.

As to the first theory, Plaintiffs seemingly assume "that any legal mistake is an *ultra vires* act," but that is "[n]ot so." *Hall*, 508 S.W.3d at 241. The Governor has a duty and corresponding power to "cause the laws to be faithfully executed," Tex. Const. art. IV, § 10, as Plaintiffs themselves concede, *see* CR.38. And as the Supreme

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[3] And to the extent Plaintiffs mean to invoke the UDJA in support of *ultra vires* claims against the Governor or Commissioner, *see* CR.152-53, that theory fails because the UDJA authorizes suits against governmental entities, not *ultra vires* claims against government officials. *See Patel v. TDLR*, 469 S.W.3d 69, 76 (Tex. 2015).

Court explained, the Governor may "express [his] views on DFPS's decisions and to seek, within the law, to influence those decisions." *In re Abbott*, 2022 WL 1510326, at *3. Even if the Governor were wrong to agree with the Attorney General's interpretation of the Family Code—though he is not—merely holding an incorrect understanding of the law does not support an *ultra vires* suit unless the government official does some injury to the Plaintiff based on that understanding. *Sefzik*, 355 S.W.3d at 621 (noting "the proper defendant in an *ultra vires* action is the state official *whose acts or omissions allegedly trampled on the plaintiff's rights*" (emphasis added)).

Plaintiffs do not identify any *ultra vires* act by the Governor that allegedly infringes on their rights. The Supreme Court emphasized that *DFPS*, not the Governor, has the ultimate statutory authority to investigate reported child abuse or neglect. *In re Abbott*, 2022 WL 1510326, at *2-3 (unanimous op.) (citing Tex. Fam. Code § 261.301(a)). There is no dispute about that. *See, e.g.*, 2.RR.13. And the Governor's letter refers to the Attorney General's opinion interpreting the existing provisions of the Family Code, and all agree that the Attorney General's opinion, too, is nonbinding. *See In re Abbott*, 2022 WL1510326, at *2 (unanimous op.) ("The State does not contend in this Court that the Governor's letter [or the Attorney General's opinion] formally changed the legal obligations of DFPS, of parents in Texas, or of medical professionals in Texas."). The Governor's letter referring to the opinion does not purport, as Plaintiffs allege, to "order the Commissioner to adopt a particular rule." CR.38. Even if it were *ultra vires* for the Governor to send a letter to the Commissioner, that act did not cause the injury Plaintiffs allege.

Nor has the Commissioner acted *ultra vires*. According to the newspaper article on which Plaintiffs rely, DFPS issued "a statement that it would 'follow Texas law as explained in (the) Attorney General opinion'" and noted that "[i]f any such allegations are reported to us, they will be investigated under existing policies of Child Protective Investigations." *See supra* n.2. That statement is not *ultra vires*; it comports with DFPS's statutory obligation to "make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare." Tex. Family Code § 261.301(a); *see In re Abbott*, 2022 WL 1510326, at *3 (unanimous op.). To do so, "DFPS . . . naturally must assess whether a report it receives is actually 'a report of child abuse or neglect.'" *In re Abbott*, 2022 WL 1510326, at *3 (unanimous op.) (quoting Tex. Family Code § 261.301(a)). Moreover, a statement to the press has "no legal effect on private persons." *Brinkley*, 986 S.W.2d at 770; *see supra* 15-16.

Plaintiffs also argue that the Commissioner's decision violated DFPS's general statutory duty to protect children and support families. CR.39-40. But disagreements about the best way to help children are not *ultra vires*. How best to protect children is a highly discretionary determination. That is why that task is given to an agency with expertise in child protection. It is also why courts cannot superintend the process through *ultra vires* suits. *See Heinrich*, 284 S.W.3d at 372 ("To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion . . . ."); *cf. In re Abbott*, 2022 WL 1510326, at *3 (unanimous op.) (the "judicial role" is "not to act as overseer of DFPS's initial, executive-branch decision to investigate").

Also unavailing is Plaintiffs' theory that Defendants have infringed on the Legislature's authority in violation of Article II's separation-of-powers provision. *See* CR.154-55. At bottom, Plaintiffs' claims are premised on a misunderstanding of what the Governor and the Commissioner have done. Plaintiffs attempt to characterize the Governor's letter as "redefining child abuse," CR.153, but it does no such thing. Both the Governor's letter and the DFPS statement to the press refer directly to the Attorney General's opinion, which interprets existing law, including the definition of child abuse in the Family Code. *See* 2022 WL 579379, at *7 ("Section 261.001 defines abuse through a broad and nonexclusive list of acts and omissions."). None of these statements could replace the statutory definition with a new one, as Plaintiffs erroneously assume, and none of them purport to do so. *See In re Abbott*, 2022 WL 1510326, at *2 (unanimous op.). Yet the Governor and Attorney General "have every right to express their views on DFPS's decisions and to seek, within the law, to influence those decisions." *Id.* at *3.

II. The Trial Court Erred in Issuing a Temporary Injunction.

The temporary injunction should be vacated not only because the trial court lacked jurisdiction, as explained above, but because Plaintiffs have not carried their heavy burden to obtain the extraordinary remedy of injunctive relief. Plaintiffs had a duty to "plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A court that lacks subject-matter jurisdiction cannot enter injunctive

relief "even temporarily." *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (orig. proceeding) (per curiam).

A. Plaintiffs do not have a probable right to injunctive relief.

To obtain an injunction, a plaintiff must show "not only that the [challenged law] is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). That is because a court cannot enjoin a law itself. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (per curiam). Rather, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Mellon*, 262 U.S. at 488. That means plaintiffs could not obtain the relief they really seek, which is an injunction against the Attorney General's interpretation of the Family Code.

Plaintiffs are not entitled to any injunctive relief against the Governor, as the Supreme Court has already held. *See In re Abbott*, 2022 WL 1510326, at *2, *4 (unanimous op.). As for DFPS and the Commissioner, the temporary injunction includes four provisions, CR.235-36, and each is unlawful for multiple independent reasons.

(a) First, the trial court to enjoined the defendants from "[t]aking 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." CR.235-36. To the extent this first provision of the injunction means DFPS cannot investigate Ms. Doe's self-report of possible child abuse at all—even if it does not rely on the challenged gubernatorial letter,

DFPS press statement, or the Attorney General's opinion—the provision is unlawful because DFPS has preexisting statutory authority independent of the challenged instruments. As the Supreme Court unanimously explained, the Attorney General's opinion, the Governor's letter, and DFPS's press statement do not change DFPS's preexisting statutory duties. *In re Abbott*, 2022 WL 1510326, at *2-3 (unanimous op.); *id.* at *8 (Blacklock, J., concurring in part and dissenting in part). And Plaintiffs do not contend it has always been unlawful for DFPS to investigate such reports of potential child abuse under Texas Family Code section 261.301(a); rather, they contend it is unlawful for DFPS to do so under the auspices of the Governor's letter, DFPS's press statement, or the Attorney General's opinion. To the extent the first provision of the temporary injunction prohibits DFPS from investigating Plaintiffs in any respect (as opposed to investigating Plaintiffs under authority thought to proceed from the Attorney General's opinion, the Governor's letter, or its own press statement), this provision is overbroad in relation to Plaintiffs' claims.

But four justices of the Supreme Court suggested the first provision has a narrower scope. As Justice Lehrmann read it, this provision does not "create entirely new restrictions on DFPS's authority to carry out its statutory obligations." *In re Abbott*, 2022 WL 1510326, at *6 (Lehrmann, J., concurring). Similarly, Justices Devine, Boyd, and Blacklock read the provision merely to "reinforce the reality that there has been no change in law that, of its own force, authorizes any action by DFPS against the plaintiffs." *Id.* at *8 (Blacklock, J., concurring in part and dissenting in part). On that reading, DFPS retains its ability to investigate reported child abuse

even if the alleged abuse involves the "medical and chemical procedures" addressed in the Attorney General's opinion. Op. Tex. Att'y Gen. No. KP-0401, 2022 WL 579379, at *1. It just cannot do so using the nonbinding Attorney General's opinion or Governor's letter as the legal basis for doing so. (And in any event, there is no reason to think DFPS incorrectly treated the Attorney General's opinion as binding. *In re Abbott*, 2022 WL1510326, at *2 (unanimous op.) ("The State does not contend" that the Governor's letter or the Attorney General's opinion "formally changed the legal obligations of DFPS.").)

Given this narrower reading, the first component of the temporary injunction remains unlawful for two separate reasons. First, it is insufficiently specific to put Defendants on notice of what exactly is prohibited. *See* Tex. R. Civ. P. 683 ("Every order granting an injunction . . . shall be specific in terms" and "shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained."). In an abundance of caution, Defendants heretofore read the injunction to target *any* investigation of Plaintiffs based on the subject of the Attorney General's opinion. If its prohibitions are in fact narrower, as four justices believed, there is a fatal ambiguity in the injunction's terms. The trial court must craft an injunction that is sufficiently clear to put Defendants on notice of what "acts" are and are not "restrained." Tex. R. Civ. P. 683.

Second, and more fundamentally, the provision is unlawful because an injunction must target some "act[] of the official." *Mellon*, 262 U.S. at 488. If the provision does not stop DFPS from exercising its preexisting statutory discretion to investigate Ms. Doe's self-report of potential abuse within the subject matter of the

Attorney General's opinion, as the narrower reading indicates, then it does nothing to remedy Plaintiffs' alleged injury. And a court cannot issue a temporary injunction like that. *See, e.g.*, *Ohio v. Yellen*, 539 F. Supp. 3d 802, 821 (S.D. Ohio 2021) (refusing to enter a preliminary injunction that would not remedy the injury).

To be sure, the four justices who articulated this narrower reading declined to issue mandamus relief as to the first provision, but that reflects the posture of a petition for a writ of mandamus. To obtain mandamus relief, *Defendants* had to show "manifest and urgent necessity." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). It's reasonable to conclude that an injunction without any real-world consequences does not warrant this "extraordinary remedy." *Id.* And on the narrower reading offered by four justices, the first provision seemingly has no real-world consequences. But in *this* posture, the burden is on Plaintiffs to show imminent and irreparable harm that the injunction will prevent. No court has authority to issue an injunction that does nothing to prevent the alleged harm, so Plaintiffs cannot meet their burden here.

Under either reading, the first provision of the temporary injunction, CR.235-36, must be vacated.

(b) The Supreme Court's opinion shows that Plaintiffs are not entitled to injunctive relief under the balance of the provisions of the temporary injunction, either. As applied to Plaintiffs, the second provision prohibits Defendants from:

> investigating reports . . . against [Plaintiffs] based solely on alleged abuse . . . in facilitating and 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 . . .

CR.236. The Governor's letter and the Commissioner's press statement did not change DFPS's "pre-existing legal obligations." *In re Abbott*, 2022 WL 1510326, at *2 (unanimous op.). Plaintiffs believe the Attorney General's interpretation of those obligations is incorrect, but they do not contest that DFPS is charged with deciding how to interpret and apply the definition of "child abuse" in carrying out its duty to investigate. Put differently, Plaintiffs seem to agree that DFPS can investigate and even take action against "facilitating and providing gender-affirming care to transgender minors," CR.236, if DFPS independently believes the "care" at issue constitutes "child abuse" under section 261.001(a). *See also In re Abbott*, 2022 WL 1510326, at *6 (Lehrmann, J., concurring); *id.* at *8 (Blacklock, J., concurring in part and dissenting in part). Plaintiffs are not entitled to the flat prohibition embodied in the trial court's injunction.

And even setting aside Plaintiffs' legal theory, they have not made an evidentiary showing that could support a probable right to a prohibition on all such investigation. As explained above, Plaintiffs seemingly agree that the same medical interventions that would be appropriate for one child might be abusive for another. *See supra* 10-11. Plaintiffs can "cite no case in which an injunction has been obtained prohibiting the executive branch from exercising its well-established prerogative to investigate whether the law has been broken." *In re Abbott*, 2022 WL 1510326, at *9 (Blacklock, J., concurring in part and dissenting in part); *see also id.* at *6 (Lehrmann, J., concurring) ("A proper judicial remedy cannot go so far as to curb [DFPS's investigatory] discretion beyond legislative and constitutional limits.").

(c) The temporary injunction's second, third, and fourth provisions are applicable to the world at large, and in that respect too they are unlawful. CR.236. The trial court's temporary injunction enjoined Defendants from "investigating reports [of alleged child abuse] in the State of Texas against *any and all persons*," "prosecuting or referring for prosecution such reports," or "imposing reporting requirements on *persons* in the State of Texas who are aware of others who" engage in the conduct at issue. CR.236. The Supreme Court directed this Court to vacate its corresponding Rule 29.3 order, explaining that this Court "lacks authority to afford statewide relief to nonparties." *In re Abbott*, 2022 WL 1510326, at *4 (unanimous op.). The Supreme Court rested its holding on the text of Rule 29.3, which "plainly limits the scope of the available relief to that which is necessary to preserve *the parties'* rights." *Id.*

But the same principles apply to the temporary injunction. A court lacks power to "grant[] a remedy beyond what [i]s necessary to provide relief to [the plaintiffs]." *Lewis v. Casey*, 518 U.S. 343, 360 (1996); *see also Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 568 (Tex. 1998). So the trial court could not properly "enjoin enforcement of [a challenged law] as to anyone other than the named plaintiffs." *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *judgment vacated as moot sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021); *accord McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[P]laintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties.").

In addition, the APA permits, at most, a declaratory judgment, so the APA provides no basis for the trial court's temporary injunction. Tex. Gov't Code § 2001.038(a); *see State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 362 (Tex. App.—Austin 2009, pet. denied) ("[T]he [APA] remedy . . . is limited to declarations concerning the rule—that the rule is null and void, in the case of a validity challenge, or that the rule did not impose a right, duty, or obligation on the plaintiff, in the case of an applicability challenge.").

(c) The injunction's third and fourth provisions are also improper. First, they enjoin enforcement action that the Governor and DFPS do not have responsibility to take in the first place: "prosecuting or referring for prosecution" and "imposing reporting requirements." CR.236. Defendants understand those provisions to refer, respectively, to criminal prosecution and to the mandatory reporting requirements found in Texas Family Code section 261.101. *Cf.* CR.13 (alleging fear of "criminal prosecution"); CR.34 (referring to "mandatory reporter" obligations and penalties for knowing failure to report); CR.49 (alleging risk of "criminal prosecution" for failure to report). Any criminal prosecution for child abuse would be brought by the appropriate district attorney, and reporting requirements are imposed by the Legislature, not by the Governor or DFPS.[4]

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[4] Upon request, DFPS must notify a district attorney "of some or all reports of suspected abuse or neglect of children who were in the county at the time the report was made or who were in the county at the time of the alleged abuse or neglect." Tex. Fam. Code § 261.1055. DFPS does not understand the temporary injunction's prohibition on "referring for prosecution," CR.236, to include its compliance with such notification duties. Nor did Plaintiffs show that any district attorney has requested such notification. If Plaintiffs contend the temporary injunction does

Second, to the extent provision (3)'s prohibition on "prosecuting" also prohibits DFPS from initiating *civil* court proceedings, that too is improper as injunctive relief. Should DFPS ever decide it must do so, a court will consider its allegations and the Doe Plaintiffs' contrary arguments. Plaintiffs have not shown a probable right to relief preventing DFPS from so much as asking a court to consider allegations of abuse. *See supra* 10-11.

B. Plaintiffs have not shown irreparable harm that could be remedied by a temporary injunction.

Plaintiffs also failed to show irreparable harm. The injuries Plaintiffs allege do not give rise to even subject-matter jurisdiction, *see supra* 8-13, so these injuries cannot support a temporary injunction. A plaintiff's burden to show irreparable injury is greater than what is necessary to meet the "constitutional minimum" necessary for standing. *Lujan*, 504 U.S. at 560; *see Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). To obtain a preliminary injunction, allegations are not enough; the plaintiff must carry the burden of persuasion with "a clear showing" of irreparable harm. *Mazurek*, 520 U.S. at 972. Plaintiffs made no such showing.

The temporary injunction cannot remedy the central injury alleged. Even if DFPS is enjoined from investigating possible abuse during the pendency of this litigation, the Does' actions will not be immunized from scrutiny if the temporary injunction is vacated. *See, e.g.*, *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985); *Ohio*, 539 F. Supp. 3d at 821-22. After all, a

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extend to notification pursuant to section .1055, it must be vacated for failure to "describe in reasonable detail" the acts enjoined. Tex. R. Civ. P. 683.

temporary injunction prohibiting enforcement ceases to be binding if "it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947). Should the trial court's temporary injunction be reversed on appeal—as it should be for all the reasons discussed above—it will not be a defense to subsequent enforcement action, should DFPS determine that is necessary. *See Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment); *Am. Postal Workers Union*, 766 F.2d at 722. Put another way, child abuse remains child abuse even if a court temporarily prevented the State from acting to prevent it, so a temporary injunction that is later vacated will not remedy Plaintiffs' alleged harms. Plaintiffs appear to recognize as much. *See* 2.RR.95 (testifying "that even if this particular investigation" were "closed, that [wouldn't] stop" subsequent investigations). So a temporary injunction could not alleviate Plaintiffs' fears that their actions might be addressed as child abuse (or failure to report it) in the future. *See Am. Postal Workers*, 766 F.2d at 722 (explaining, in a First Amendment claim, that "since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction," a temporary injunction could not issue). And a court cannot issue an injunction that does not alleviate the plaintiff's harm. *See id.*; *Ohio*, 539 F. Supp. 3d at 821-22.

* * *

Plaintiffs disagree with the Attorney General's reading of the Texas Family Code's definition of child abuse. But Texas courts lack jurisdiction to issue advisory

opinions, so disagreement about the meaning of the law does not allow Plaintiffs' suit. If DFPS determines Plaintiffs have violated the law, it will have to seek a court order before it can intervene—and if that happens, Plaintiffs will have every opportunity to show that their actions are not child abuse. The same is true of anyone else who might be violating the law as interpreted by the Attorney General. Texas courts cannot enjoin DFPS from so much as investigating reports of abuse or neglect in the meantime.

Prayer

This Court should reverse, vacate the temporary injunction, and render judgment dismissing Plaintiffs' claims.

Respectfully submitted.

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Certificate of Service

On May 25, 2022, this document was served on Shelly L. Skeen, lead counsel for Appellees, via sskeen@lambdalegal.org.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance

Microsoft Word reports that this document contains 8,136 words, excluding exempted text.

/s/ Judd E. Stone II
Judd E. Stone II

No. 03-22-00126-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

GREG ABBOTT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JAIME MASTERS IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,

Appellants,

v.

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,

Appellees.

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

APPENDIX

TAB A: ORDER DENYING DEFENDANTS' PLEA TO THE JURISDICTION (CR.232)

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~~ AMC

DISMISSED WITHOUT PREJUDICE in their entirety.

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

SIGNED this 11th day of MARCH, 2022.

HON. AMY CLARK MEACHUM
201st DISTRICT COURT JUDGE

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On 04/15/2022 10:09:26

VELVA L. PRICE
DISTRICT CLERK
By Deputy: SH

TAB B: ORDER GRANTING TEMPORARY INJUNCTION (CR.233-37)

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").

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

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 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.

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.

DISTRICT COURT OF TRAVIS COUNTY TEXAS

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

JUDGE AMY CLARK MEACHUM

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office

On 04/15/2022 10:09:28

VELVA L. PRICE
DISTRICT CLERK
By Deputy: SH

Tab C: Texas Family Code §§ 261.001, .301

Texas Family Code
Title 5
Subtitle E
Chapter 261
Subchapter A

Section 261.001. DEFINITIONS.

In this chapter:

(1) "Abuse" includes the following acts or omissions by a person:

(A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(B) 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;

(C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;

(D) 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;

(E) sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children under Section 21.02, Penal Code, indecency with a child under Section 21.11, Penal Code, sexual assault under Section 22.011, Penal Code, or aggravated sexual assault under Section 22.021, Penal Code;

(F) failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code, including compelling or encouraging the child in a manner that constitutes an offense of trafficking of persons under Section 20A.02(a)(7) or (8), Penal Code, prostitution under Section 43.02(b), Penal Code, or compelling prostitution under Section 43.05(a)(2), Penal Code;

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by Section 43.21, Penal Code, or pornographic;

(I) the current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;

(J) causing, expressly permitting, or encouraging a child to use a controlled substance as defined by Chapter 481, Health and Safety Code;

(K) causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by Section 43.25, Penal Code;

(L) knowingly causing, permitting, encouraging, engaging in, or allowing a child to be trafficked in a manner punishable as an offense under Section 20A.02(a)(5), (6), (7), or (8), Penal Code, or the failure to make a reasonable effort to prevent a child from being trafficked in a manner punishable as an offense under any of those sections; or

(M) forcing or coercing a child to enter into a marriage.

. . .

Subchapter D

Section 261.301. INVESTIGATION OF REPORT.

(a) With assistance from the appropriate state or local law enforcement agency as provided by this section, the department shall make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare. The investigation shall be conducted without regard to any pending suit affecting the parent-child relationship.

. . .

TAB D: ATTORNEY GENERAL OPINION KP-0401

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.*

[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").

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

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.

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/.

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,

[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/.

¶ 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).

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

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

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*

[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.

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.

> 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

[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).

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

[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)).

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).

S U M M A R Y

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
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

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MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

AARON REITZ
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RALPH M. MOLINA
Special Counsel to the First Assistant Attorney General

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

CHARLOTTE M. HARPER
Assistant Attorney General, Opinion Committee

TAB E: LETTER FROM GOV. GREG ABBOTT TO COMMISSIONER JAIME MASTERS (FEB. 22, 2022)

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
Governor

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

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.*

[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").

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

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.

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/.

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,

[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/.

¶ 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).

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

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

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*

[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.

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.

> 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

[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).

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

[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)).

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).

S U M M A R Y

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,

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Tab F: Plaintiffs' Exhibit 03

Statement on Governor's Letter/AG Opinion

In accordance with Governor Abbott's directive today to Commissioner Masters, we will follow Texas law as explained in Attorney General opinion KP-0401.
At this time, there are no pending investigations of child abuse involving the procedures described in that opinion. If any such allegations are reported to us, they will be investigated under existing policies of Child Protective Investigations.

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Valeria Alcocer on behalf of Judd Stone
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Envelope ID: 64867157
Status as of 5/26/2022 9:05 AM CST

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