

No. 03-22-00126-CV

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

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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,
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 353rd Judicial District of Travis County, Texas
Cause No. D-1-GN-22-000977, Hon. Amy Clark Meachum

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

Respectfully submitted,

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IDENTITY OF AMICI AND DISCLOSURE OF INTEREST

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

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

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

Melissa Perez resigned as a Conservatorship Supervisor II in June 2022 after seven and a half years of service.

Shelby McCowen resigned in May 2022 after almost a year as a CPS Investigator at DFPS.

Morgan (f/k/a Kelly) Davis resigned in May 2022 after about one year as a CPS Investigator for DFPS. Mr. Davis is an openly transgender man.

Jessica Davis has been employed by DFPS for fifteen years and is currently a DFPS Manager.

Candace Henson resigned after nine years with DFPS, most recently as a Conservatorship Case Worker.

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

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

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

Natalie Arevalo has been with DFPS in various positions for six and a half years, until last month as a CPS Investigations Supervisor. She has recently transferred within DFPS and her current title is Management Analyst.

Amicus A has been employed by DFPS for 15 years and is an Investigations Program Director.

Amicus B has been employed by DFPS for nearly 5 years and is an Investigations Supervisor.

Amicus C has been employed by DFPS for fifteen years and is an Investigator.

Amicus D has been employed by DFPS for five years as an Investigations Supervisor.

Amicus E has been a Conservatorship Worker at DFPS for two and a half years.

Amicus F has been employed by DFPS for at least a decade and is currently a Supervisor.

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

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

SUMMARY OF ARGUMENT

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

This matters because if the new policies are a “Rule,” then they were adopted in violation of the Administrative Procedure Act. If the Rule was adopted in violation of the Administrative Procedure Act, then it follows that Sovereign Immunity does not apply, that Plaintiffs are likely to succeed on the merits, and that preservation of the *status quo* requires the District Court’s injunction to remain in effect.

But if these policy changes were just a “press statement” or other non-binding thing without any legal consequence, as the State argues in its brief, then the APA would not apply.

Amici, current and former DFPS employees who worked in Child Protective Services in February 2022 were at the front line of carrying out DFPS policy at the time these policy changes were made. It was their

job to carry out DFPS policies and follow DFPS rules for child abuse investigations.

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

The February 22 Directive and new DFPS Rules represent a radical departure from the *status quo* meaning of the term “abuse” as it has been interpreted by Texas courts and by DFPS and its predecessor agencies throughout history prior to February 22, 2022. Allowing this radical new interpretation to become effective would irreparably harm morale and effectiveness at DFPS, which are already in crisis, as well as transgender children and their parents who have no cause to be involved with the child welfare system and the thousands of youths throughout Texas who continued to be failed by that system. The Department should not be investigating conduct that does not meet any historical, ethical, legally precedented, or reasonable definition of “abuse.” This is especially the case considering that the February 22 and new DFPS Rules’ unprecedented definition of child abuse was not adopted through the

proper legislative or regulatory channels and violates the rights of transgender youth and their families.

Amici and the other professionals at DFPS did not enter the child protection profession to remove children from loving homes with parents or guardians merely because they follow medical advice and a doctor's care, only to place them in a foster care system that is riddled with actual abuse, sexual assault, and even sex trafficking. *Amici* write at this stage of the proceedings to offer the Court their perspective that DFPS, an agency that is already "failing children," cannot withstand the division, attrition, and harm to children and families wrought by the February 22 Directive and New DFPS Rules.

ARGUMENT

I. The February 22 Directive and New DFPS Rules were Rules.

a. The February 22 Directive and New DFPS Rules Were Experienced by Amici as Rules.

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

Rather, the “string of departures” that occurred after the February 22 Directive and new DFPS Rules was the “last straw” for many CPS employees precisely because it was a Rule.² The District Court was correct to conclude that it was an “improper rulemaking” that “changed the *status quo*” while being “given the effect of a new law or new agency rule.”³

¹ Cayla Harris, *Flood of 2,3000 Departing Workers Leaves Texas Child Welfare Agency Scrambling: ‘Absolutely a Crisis,’* HOUS. CHRON. (Aug. 18, 2022),

² *Id.*; see also Samantha Michaels, *Texas Child Welfare Officials Were Secretly Pissed About the Order to Investigate Trans Kids*, MOTHER JONES (Aug. 24, 2022) (reporting on internal emails obtained through open records requests in which various DFPS employees called the February 22 Directive and New DFPS Rules “BS,” “Effing bull poop,” and “an “Infringement on Civil Liberties,” among other expressions of dissent).

³ Appellee’s Appendix E at 2.

Until February 22, 2022, a report that a parent or guardian had simply taken their kid to a doctor and followed that doctor's treatment based on medical best practices would never have been grounds to open a DFPS investigation. After the February 22, 2022 Directive and New DFPS Rule, CPS workers had no discretion but to advance such a report to investigation.⁴

The mandatory nature of the new DFPS Rule was evidenced at the March 11, 2022 hearing by the testimony of six-year DFPS veteran Randa Mulanax, a supervisor in the CPS Investigations division who recently resigned because of her ethical objections to the unlawfulness and harm of the February 22 Directive and new DFPS Rule and their betrayal of DFPS's precedents and mission. Ms. Mulanax's testimony substantiates *Amici's* contention that the February 22 Directive and new DFPS Rules marked a radical and binding change from prior DFPS abuse investigation policies.

Ms. Mulanax testified that, in reaction to the February 22 Directive and new DFPS Rules, DFPS leadership in her region called a previously unplanned emergency all-hands meeting of her District's CPS

⁴ See generally 2RR 36–39.

investigations staff on February 24, 2022.⁵ At that meeting, and in follow-up communications, Ms. Mulanax and other *Amici* were instructed that future reports of children being administered medical care covered by the February 22 Directive would no longer be eligible for a “Priority None” determination or referral to DFPS’s “Alternative Response” program.⁶ Prior to the February 22 Directive, the only cases that investigators would not have the authority to categorize as “Priority None” if it appeared no abuse was occurring would have been “child death cases or cases that are open with conservatorship.”⁷ This policy changed after February 22, 2022, when *Amici* and other CPS investigation staff were instructed that any case covered by the February 22 Directive and new DFPS Rules were to be categorically ineligible for a “Priority None” designation.⁸

⁵ 2RR 34:21-35:9.

⁶ 2RR 36:22-37:6; 2RR 48:5-8.

⁷ 2RR 37:2-6; *see also* Tex. Fam. Code § 261.3015 (establishing the “alternative response system” and providing that “the department may, in accordance with this section and department rules, conduct an alternative response to a report of abuse or neglect if the report does not: (1) allege sexual abuse of a child; (2) allege abuse or neglect that caused the death of a child; or (3) indicate a risk of serious physical injury or immediate serious harm to a child.”

⁸ 2RR 36:22-37:6.

Ms. Mulanax’s testimony was particularly unequivocal that the February 22 Directive and New DFPS Rules were communicated to DFPS employees as mandatory and binding policies affecting not just the internal workings of CPS but the procedures affecting the course of their investigations of private citizens. Ms. Mulanax testified that on February 24, 2022, a meeting was held with all of CPS’s leadership within Region 7 and that at that meeting she and other CPS personnel were told expressly “[t]hat we had to be investigating these cases” and “cannot Priority None these cases.”⁹

Contrary to Appellants’ assertion that its promulgation of the rule that reports of gender-affirming healthcare was merely a “press statement,” Ms. Mulanax testified that she both participated in a phone call with her regional leadership at CPS and received an email from her regional director reenforcing the mandatory nature of the new rule.¹⁰ In

⁹ 2RR 36:7-11; *see also* 2RR 36:24–37:1 (“I have been told about that directly ... that we cannot Priority None these cases by my leadership.”); 2RR 38:24–39:1 (“We cannot Priority None these cases, and they are also not eligible for alternative response.”); 4RR 191 (PX18) (Mulanax resignation letter) (“We were instructed that these cases HAD to be investigated, that we did not have the ability to Priority None (PN) them, and that they would not be considered for Alternative Response.”).

¹⁰ 2RR 43:4-17; 2RR34:25–36:7; *see also* 4RR 190 ((PLX 17) (Agenda for Leadership Meeting 2.24.2022) (“When you get a case that involves the specific allegation we talked about you ***need to immediately*** send an email to your PD, your PA, Lisa

an apparent effort to maintain plausible deniability about the mandatory nature of the rule and evade the APA by characterizing the rule as a “press statement” or the like, Ms. Mulanax’s regional director instructed her and other CPS caseworkers not to send any written communications about these cases.¹¹ Ms. Mulanax also testified that the mandate to open an investigation in cases of gender affirming was a change from prior DFPS policy that resulted directly in investigations being opened affecting the private rights of parents involved in these “specific cases,” including Appellees in this case.¹²

These new policies imposed by DFPS after the February 22 Directive and new DFPS Rules were major, unprecedented changes to DFPS’s investigation procedures and the substantive treatment of the so-called “specific cases.”¹³ Ms. Mulanax testified that “these intakes are not

Guyton, and Gabina DeHoyoz for tracking and to possibly schedule a staffing.”) (emphasis added).

¹¹ 4RR 190 ((PLX 17) (Agenda for Leadership Meeting 2.24.2022) (“Any communication you have regarding these cases needs to be done in a Teams meeting, telephone call, or fact to face. Do not send text messages or emails in regards to these specific cases.”); *see also* 2RR 44:1-25 (Mulanax testifying that this directive not to put anything in writing was unprecedented in her 6 years of experience at CPS and reiterating the mandatory nature of the directive that “we **had to initiate an investigation.**”) (emphasis added).

¹² 2RR 45:7-16).

¹³ *See* 4RR 190 (PLX 17) (Agenda for Leadership Meeting 2.24.2022) (referring to these cases euphemistically as “Specific Cases”).

being treated the same as every other case that we receive.”¹⁴ Rather, the mandates that DFPS staff could not “Priority None” these cases nor send them to “Alternative Response,” as well as the secrecy and staffing changes were all effectively changes in DFPS policy, implemented only for those cases covered by the February 22 Directive and new DFPS Rules.¹⁵

Ms. Mulanax testified that her understanding of having been told by her regional leadership that these cases could not be classified as Priority None and could not go to alternative response was “a change in DFPS policy.”¹⁶ *Amici* agree with this understanding, which comports with the ordinary understanding of a mandatory directive from one’s superiors within an organization.¹⁷

b. The February 22 Directive and New DFPS Rules are Rules Under the Texas Government Code and this Court’s Precedents.

In addition to being experienced directly as rules by *Amici* CPS workers, the February 22 Directive and New DFPS Rules meet the

¹⁴ 2RR 32:20-22.

¹⁵ See 2RR 52:7-53:8.

¹⁶ 2 RR 53:2-8.

¹⁷ See, e.g. The American Heritage Dictionary of the English Language (5th ed. 2011) (defining “Rule” as “[a]n authoritative, prescribed direction for conduct, ...”), available at <https://www.ahdictionary.com/word/search.html?q=rule> (last visited Aug. 23, 2022).

definitions and criteria for a “rule” under the APA. Under the APA, the word “rule”:

- (A) means a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.¹⁸

The Texas Family Code requires the development and adoption of standards for persons who investigate suspected child abuse or neglect, such as *Amici*, “by rule.”¹⁹ Despite Appellants’ efforts to call the February 22 Directive and DFPS Rules anything other than a “rule,” under the statutory definitions and this Court’s precedents, they clearly meet the definition.

This Court’s precedents clearly establish that binding instructions issued by an agency changing the standards for investigation of an

¹⁸ Tex. Gov’t Code § 2001.003(6).

¹⁹ Tex. Fam. Code § 261.310(a).

alleged violation of the law within an agency's jurisdiction is a Rule within the meaning of the APA.²⁰

The February 22 Directive and DFPS Rules were “binding instructions” on CPS agents that “affect the private rights of all” parents, or at least all parents of transgender children.²¹ “They are agency statements that implement, interpret or prescribe law or policy; they amend or repeal a prior enforcement policy of” DFPS; “and they do not constitute statements regarding only the internal management or organization” of DFPS.²² They also describe the procedure or practice requirements of an agency, making enforcement and investigation non-discretionary for an entire category of cases that previously would have been beyond DFPS's investigatory reach.

Nor is there any support for Appellant's position that merely calling the February 22 Directive and New DFPS Rules anything other than a “rule” allows them to evade the requirements of the APA.

Amici's understanding that the February 22 Directive and new DFPS Rules had the same binding effect as a rulemaking is not

²⁰ *Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Texas, Inc.*, 997 S.W.2d 651, 660 (Tex. App.—Austin 1999)

²¹ *Id.*

²² *Id.*

idiosyncratic. Indeed, as the Supreme Court noted, statements by Commissioner Masters and others at DFPS “suggest[] that DFPS may have considered itself bound by either the Governor’s letter, the Attorney General’s Opinion, or both.”²³

Justice Lehrmann recognized this deviation from the status quo when she wrote, in concurrence, that this Court’s prior Rule 29.3 order “temporarily reinstates DFPS’s policies as they were prior to the February 22 directive, leaving DFPS free to screen and investigate reports based on its preexisting policies regarding medical abuse and neglect.”²⁴ As Justice Lehrmann observed, “DFPS’s own statements support this reading of the order.”²⁵ Specifically, Justice Lehrmann noted that DFPS’s recognized that this Court’s prior Rule 29.3 did not “bar it from investigating child abuse and neglect associated with *inappropriate* or *medically unnecessary* treatment for gender dysphoria, it simply must use preexisting criteria and procedures in determining whether a particular case justifies intervention.”²⁶ Thus, contrary to Appellants’ protestations, nothing about the temporary injunction will prevent (or

²³ *In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022).

²⁴ *Id.* at 286 (Lehrmann, J., concurring).

²⁵ *Id.*

²⁶ *Id.*

has prevented) DFPS from carrying out its statutory duty to investigate reports of child abuse consistent with the ordinary and legal understanding of child abuse that it applied throughout its history up until February 22, 2022.

II. The February 22 Directive and New DFPS Rules are an Unprecedented Disruption of the Status Quo That Merit a Temporary Injunction.

Because, for the reasons stated above, the February 22, 2022 Directive and New DFPS Rules were a “rule” for purposes of the APA but were adopted in violation of the substantive and procedural requirements of the APA. Appellee’s suit under the APA is likely to prevail on the merits.

While the most relevant injury before the Court are the injuries Appellees amply detailed in their brief, *Amici* are also concerned about the significant and irreparable disruptions to the *status quo ante* at DFPS that would follow if the February 22 Directive and New DFPS Rules are allowed to operate pending trial on the merits.

The *status quo ante* at DFPS was that allegations that a child was being provided medically recommended healthcare under the treatment and supervision of a doctor and with the informed consent of both the

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

“The purpose of a temporary injunction is to preserve the status quo of the subject matter of a suit pending final disposition of the case on its merits.”²⁷ Here, the *status quo* means the state of affairs before the Governor’s February 22 Directive and DFPS Rules, namely that the mere allegation that a child was receiving gender affirming care under a doctor’s prescription was insufficient to warrant the opening of an investigation.

Prior to February 22, 2022, never in DFPS’s history was investigating parents who merely followed medically recommended care prescribed by a doctor and with the consent of the child considered “child abuse.” Parents and guardians have long administered medical care in good faith reliance on licensed doctors’ advice, and never before February

²⁷ *Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators of Texas, Inc.*, 997 S.W.2d 651, 654 (Tex. App.—Austin 1999) (citing *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex.1978)).

22, 2022, has that good-faith reliance, in and of itself, been alleged to constitute abuse.

The uncontroverted evidence presented at the March 11, 2022 Travis County District Court hearing demonstrated that this *status quo* radically changed overnight after the Governor’s February 22 Directive and new DFPS rules.

Amici and other DFPS employees were also ordered to staff cases involving transgender healthcare with numerous specified supervisors up to the Program Administrator level and including the General Counsel.²⁸ This instruction was highly unusual. Including senior staff at this early stage was not required for other types of cases, or for any cases prior to the February 22 Directive and new DFPS Rules.²⁹

Appellants mistakenly claim that “[w]hether 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.”³⁰ This claim that DFPS’s investigations involve individualized assessments of treatment is not

²⁸ 2RR 48-50.

²⁹ *Id.*

³⁰ Appellants Br. at 11.

consistent with the February 22 Directive and New DFPS Rules' categorical conclusion that all gender affirming care is child abuse requiring an investigation. But to the extent that CPS staff retain any discretion, the sort of medical judgment about "whether a particular child's" physician-prescribed, parent-and-patient-consented "medical care is appropriate and necessary ... or unnecessary and abusive" has never been within the ambit of *Amici* or other DFPS employees before implementation of the order.

The February 22 Directive and new DFPS Rules violated the proper role of Child Protective Services investigations and DFPS staff, who for the most part are not doctors or medical professionals and thus are not qualified to second-guess medical advice and decisions made by doctors, patients, and their parents and guardians. Requiring DFPS staff to interfere in the parent-child and doctor-patient relationships in this way was "an overreach, and it was placing us in a situation [DFPS] should not be in, in [] private, medical decisions between parents, a child, and doctors, and we are not qualified to say that [a] statement from a doctor and psychiatrist and other medical professionals is not correct." ³¹

³¹ 2RR 32:2-8.

Contrary to Appellants' assertion, *Amici* and other CPS agents are being put in the position, for the first time, of being required to investigate a family merely because of an allegation that a child is receiving recommended doctor's care, and in the untenable and "not correct" position of second-guessing the decisions made by medical doctors and consented to by the parents and child.

The February 22 Directive and new DFPS Rules were implemented with an unprecedented level of internal secrecy mandated by DFPS. Rather than calling these cases by any ordinary description, *Amici* and other DFPS employees were instructed to refer to them only as "specific cases."³² DFPS staff were instructed not to discuss these cases in emails, text messages, or any other form of writing that could provide a record of the investigation or "be pulled by media if requested," but only to discuss them on Microsoft Teams or over the phone.³³ Ms. Mulanax testified that she had never received a similar order not to document her investigation in her six years at DFPS.³⁴ Prior to the February 22 Directive and new DFPS Rules "even when cases of abuse and neglect involved very serious

³² 2RR 35:22-36:3.

³³ *Id.*; 2RR 44:1-21.

³⁴ *Id.*

and sensitive allegations,” DFPS staff would “still use email and texts to talk about those cases.”³⁵

Nor does the State’s argument, presented at the District Court hearing, that providing hormone therapy can be abuse under pre-February 22 interpretations because “testosterone is a controlled substance” in any way suggest that the February 22 Directive and new DFPS Rules were consistent with DFPS’s pre-February 22 *status quo*.³⁶

Providing such medical care to children had never been considered abuse before February 22, 2022. Indeed, DFPS actively trains CPS staff, foster parents, residential providers, and other youth medical consenters in how to exercise informed consent for the administration of psychotropic medication. In that training, DFPS repeatedly makes clear that youth medical consenters must consult, consider, and often follow a doctor’s recommendation in making an informed consent decision to administer medicine that is in the best interest of the child.³⁷

³⁵ *Id.*

³⁶ *See* 2RR 67-69.

³⁷ *See, e.g.*, Department of Family Protective Services, PowerPoint Presentation: *Psychotropic Medication for Children in Texas Foster Care*, (Effective Nov. 20, 2013) at Slide 23 (“If the caregiver or medical consentor needs help understanding the diagnosis, they should talk with the medical provider”), Slide 31 (“If the medical consentor is not sure whether to consent to the medication, he or she should discuss his or her concerns first with the prescribing medical provider,”), *available for*

As reflected in DFPS's own training materials about administration of psychotropic medication and other controlled substances, it is lawful to administer a controlled substance subject to a doctor's prescription.³⁸ Parents and guardians have lawfully administered or consented to the administration of prescribed controlled substances to their children for as long as there has been the Controlled Substances Act. From various chemotherapy and pain management drugs for cancer patients to stimulants used to treat attention deficit hyperactivity disorder (ADHD) and anesthetics prior to surgery or dental procedures, it is commonplace for parents to administer or consent to the administration of appropriate prescription drugs to their children when those medications have been prescribed by a doctor.

Allowing the Directive and new DFPS Rules to become effective even temporarily prior to the final determination of their legality on the merits would permanently undermine the principle that the State should

download at

https://www.dfps.state.tx.us/Training/Psychotropic_Medication/docs/Psychotropic_Medication_Training.ppt.

³⁸ See, e.g. 21 C.F.R 1306 (allowing and regulating the prescription of controlled substances by medical professionals).

not separate children from their parents merely because the parents followed a licensed doctor's prescriptions in good faith.

The uncontroverted record evidence thus supports *Amici's* contention that the February 22 Directive and new DFPS Rules marked a seismic change in policy with regard to DFPS handling of cases in which the only allegation is that parents or guardians are providing their child with medically necessary care under a doctor's supervision.

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

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

Appellants intend to consign children who are subject to no "abuse" and are simply receiving medically recommended care to conditions in the foster care system which are so abysmal that the United States

District Court for the Southern District of Texas and the Fifth Circuit have held that Appellants are “deliberately indifferent” to children’s welfare to such an extent that it “shocks the conscience.” *M.D. v. Abbott*, 152 F.Supp.3d 684 (S.D. Tex. 2015); *M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 258 (5th Cir. 2018) (*Stukenberg I*). “The combination of unmanageable caseloads and high caseworker turnover creates a ‘cycle of crisis’ that allows children to ‘fall through the cracks.’” *Stukenberg I*, 907 F.3d at 258. Repeatedly in recent years, a federal court has held Appellant DFPS in contempt for continued failures to adequately protect foster children’s constitutional rights to adequate care. *See, e.g., M.D. bnf Stukenberg v. Abbott*, 509 F.Supp.3d 683 (S.D. Tex. 2020).

According to a report by DFPS, there has been a “marked” and “exponential” increase in the number of children without placement (CWOPs) in the State’s care.³⁹ In part due to mandated standards and monitoring stemming from the *M.D. v. Abbott* court’s injunction, approximately 25% of facilities that house foster children in Texas have

³⁹ Texas Department of Family and Protective Services, *Children Without Placement*, September 2021, at 1, https://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/CPS/documents/2021/2021-09-14-DFPS_CWOP_Report.pdf (hereafter DFPS CWOP Report).

been closed in recent years.⁴⁰ As a result, hundreds of children under the State’s care have been forced to sleep in hotels and office buildings, sometimes supervised by unlicensed caretakers.⁴¹

To meet this increased demand, DFPS has been forced to conscript employees throughout the Agency to work overtime supervising children and teenagers in the CWOP program, a policy known as “Child Watch” duty.⁴² Between September 2020 and July 2021, 6,270 staff worked an average of 29.4 hours per month supervising youth in CWOP, with the average CPS employee working 35.7 hours of overtime in July 2021 doing CWOP supervision for which they are not trained and that is beyond their ordinary job duties.⁴³ In the 11 months between September 2020 and July 2021, DFPS staff worked approximately 714,083 hours of overtime on Child Watch, roughly equivalent to 343 employees working full time for an entire year. When DFPS staff are being conscripted into

⁴⁰ Edward McKinley, *Faced With Similar Foster Care Woes, Oklahoma Made Fixes While Texas Keeps ‘Failing Children,’* HOUS. CHRON. (Nov. 21, 2022), <https://www.houstonchronicle.com/politics/texas/article/Faced-with-similar-foster-care-woes-Oklahoma-16636568.php>.

⁴¹ *Id.*

⁴² Jamie Landers, *Foster Care Workers at Dallas Town Hall Forum Detail Pressures of Helping Kids in Overwhelmed System,* DALL. MORNING NEWS, (Dec. 12, 2021), <https://www.dallasnews.com/news/2021/12/12/foster-care-workers-at-dallas-town-hall-forum-detail-pressures-of-helping-kids-in-overwhelmed-system>; *see also* 2RR 19:13-20 (describing this overtime “child watch” duty).

⁴³ DFPS CWOP Report, *supra* Note 39, at 8-9.

overtime doing the work of 343 full-time employees, their ability to effectively investigate new cases of actual abuse and care for children in the foster care system further suffers. The Directive's divisive mandate to investigate every alleged case of a transgender child receiving medically advised and necessary care will only further distract DFPS staff from the ability to investigate actual abuse and care for children in the foster care system.

The scandals and tragedies from DFPS's constant state of crisis continue to make horrifying headlines across the State. At least 23 children have died in Texas foster care since 2019.⁴⁴ Between July 31, 2019, and April 30, 2020, eleven foster children in the State's permanent care died—a rate higher than one child death per month.⁴⁵ According to

⁴⁴ Update to the Court Regarding Regarding Child Fatalities, Docket No. 1245 in *M.D. bnf Stukenberg v. Abbott et al.*, Case No. 2:11-cv-00084 in the U.S. Dist. Ct. for S.D. Tex. (June 1, 2022); *See also* Jill Ament & Caroline Covington, *New Report Shows Texas Foster Care System Still Falling Short*, THE TEX. STANDARD, (May 10, 2021), <https://www.texasstandard.org/stories/new-report-shows-texas-foster-care-system-still-falling-short/#:~:text=At%20least%2023%20children%20have,rather%20than%20in%20foster%20homes>.

⁴⁵ Julie Chang, *After 11 Foster Children Die, Texas to Be in Contempt of Court – Again*, AUSTIN AMERICAN-STATESMAN, (Sep. 4, 2020), <https://www.statesman.com/story/news/politics/state/2020/09/04/after-11-foster-children-die-texas-to-be-in-contempt-of-court-ndash-again/42383213/>

the United States District Judge, some of these recent deaths were avoidable.⁴⁶

The inadequacy of DFPS’s resources to keep foster children safe is being shockingly highlighted yet again in a federal court hearing in the ongoing *M.D. v. Abbott* litigation. In a March 28, 2022 filing, the court-appointed Monitors in that case largely substantiated reports that girls between the ages of 11 and 17 who had been placed in the foster care system as victims of sex trafficking were being sex trafficked yet again at the Bastrop foster care shelter “The Refuge.”⁴⁷ The Monitors concluded that there was “ample evidence of violations” at the Refuge, including but not limited to “a strong possibility of human trafficking based on staff’s inducement of children to sell nude photographs in exchange for drugs.”⁴⁸ In their most recent update to the United States District Court regarding The Refuge, the Monitors again found that “DFPS’s response ... shows a

⁴⁶ *Id.*

⁴⁷ Update to the Court Regarding the Refuge for DMST, Docket No. 1218 in *M.D. bnf Stukenberg v. Abbott et al.*, Case No. 2:11-cv-00084 in the U.S. Dist. Ct. for S.D. Tex. (March 28, 2022); *see also* Editorial Board, *Editorial: Texas’ Shame: It Keeps Failing Foster Kids*, HOUS. CHRON. (Mar. 16, 2022), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Texas-shame-It-keeps-failing-17004547.php>) (hereafter “Editorial: Texas’ Shame”); Reese Oxner, *Child Welfare Monitors Say There’s ‘Ample Evidence’ Kids Were Abused at Bastrop Foster Care Facility, Disputing Texas Rangers*, TEX. TRIB. (Mar. 28, 2022), <https://www.texastribune.org/2022/03/28/texas-foster-care-child-abuse>.

⁴⁸ Monitor Report at 28.

lack of concern related to the allegations that staff may have allowed child victims of sex trafficking access to their personal cell phones” and that “rather than continuing to investigate and pursuing other means to determine the veracity of the allegations, DFPS closed the investigations.”⁴⁹ That report concluded by noting that there had been “gaps in the investigations” and raising concerns about “failing to address what may be a systemic threat to child safety.”⁵⁰

The added burden and distraction of the February 22 Directive and new DFPS Rules would only make it harder for DFPS to prevent scandals like this in the future, and would risk consigning children currently in safe home conditions to this type of abuse in the foster care system.

The crisis in DFPS’s inability to meet the needs of Texas’s children is undisputed. As Commissioner Masters testified in a recent hearing in the *M.D. v. Abbott* case, “I do feel like I am failing children.”⁵¹ On this point, *Amici Curiae* agree with Commissioner Masters. Because of a persistent lack of desire and/or ability to provide at least the

⁴⁹ Amended Third Update to the Court Regarding the Refuge for DMST at 10, Docket No. 1249 in *M.D. bnf Stukenberg v. Abbott et al.*, Case No. 2:11-cv-00084 in the U.S. Dist. Ct. for S.D. Tex. (June 2, 2022).

⁵⁰ *Id.* at 16.

⁵¹ See Editorial: Texas’ Shame, *supra* Note 47.

Constitutional baseline of care to foster children in Texas's care, foster children are dying, being sex trafficked, and generally lacking in the level of supervision and care necessary to keep them safe. The problems with Texas's DFPS and foster care system are years old, but the crisis has never been more acute.

Overturing the Temporary Injunction would add fuel to the already simmering crises described above and will likely cause further attrition and discontent among DFPS workers, making it even harder for DFPS to meet the needs of Texas's foster children and victims of actual abuse. Several of *Amici* and other DFPS employees either have resigned in protest of the February 22 Directive and DFPS Rules or are considering doing so.⁵² Morale in the Agency was already at an all-time low due to the crises described above, but the Directive and Rules have driven it to a new nadir. Just this month, the associate commissioner for Child Protective Investigations, the top child abuse investigator in the

⁵² See Cayla Harris, *Flood of 2,3000 Departing Workers Leaves Texas Child Welfare Agency Scrambling: 'Absolutely a Crisis,'* HOUS. CHRON. (Aug. 18, 2022); see also 2RR 53:17–55:5; 4RR 191–93 (PX18) (Mulanax resignation letter).

Department, joined this exodus, resigning after less than a year on the job.⁵³

The great mass of DFPS employees did not choose the child welfare profession to break up loving families who, with no ill motive, malice, or negligence toward their child, are simply following medical advice and administering medicine under a doctor's supervision. This has never been DFPS practice because no court in Texas has ever construed the child abuse statute to reach such a situation. CPS employees especially object to doing so when they are already stretched beyond their resources and unable to help the thousands of Texas children in the CPS system who are victims of actual neglect or abuse as those terms were understood prior to February 22 and as construed by Texas court precedents.

Amici's objections to being forced to choose between harassing or even breaking up loving families and continuing their work with CPS are reinforced by the secrecy being imposed by CPS leadership in carrying out DFPS's new Rules. For the first time in their employment, *Amici* are being told not to put any communications regarding these so-called

⁵³ Eleanor Klibanoff, *Head of Embattled Texas Child Abuse Investigations Resigns After Less Than a Year*, Texas Tribune (Aug. 12, 2022).

“specific cases” in writing.⁵⁴ This imposed secrecy, in the eyes of many *Amici*, shows consciousness of guilt by DFPS leadership that their actions are controversial, political, and based on a tenuous and novel interpretation of the law. To *Amici*’s knowledge, this policy of secrecy has never been applied to any prior category of cases.⁵⁵ This bar on written communications will likely impact the ability of families being investigated to discover the basis for and contents of the investigation and for DFPS to track or determine whether its own investigations have been conducted according to its properly promulgated rules and policies. For this reason, Ms. Mulanax testified that this gag rule, which deprives the people of Texas of their right to open and recorded government, was “very unethical.”⁵⁶

Being compelled to investigate families who do not meet any prior historical, precedented, regulatory, or plain meaning of the statutory term “abuse” is particularly insulting to the professionals who work at DFPS because the public statements of the Governor’s staff have made clear that the February 22 Directive was not motivated by any concern

⁵⁴ 2RR 35:22-36:3, 44:1-21.

⁵⁵ *Id.*

⁵⁶ *Id.* at 166 (Hearing Record 44:16).

for the welfare of Texas’s vulnerable children but by the desire to create a political “wedge issue” for electoral purposes.⁵⁷ As career public servants, *Amici* rely on the principle, embodied in the Administrative Procedure Act, that agency decisions and policies should not be motivated by bare political concerns but must comply with both the procedural requirements for rulemaking and the substantive requirements of the Family Code and the Texas Constitution.

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

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

⁵⁷ See, e.g., Rex Huppke, *Texas’ Transgender Order Isn’t a Political ‘Winner.’ It’s Cruelty Writ Large*, USA TODAY, (Mar. 4, 2022), <https://www.usatoday.com/story/opinion/columnist/2022/03/04/texas-parents-transgender-kids-child-abuse/9363397002/?gnt-cfr=1> (quoting the Governor’s senior political advisor as calling the issue “a 75-80% winner” and nonsensically comparing provision of prescribed medications to “cutting off a child’s hand”).

and emotional needs are being cared for to a foster system that has demonstrably and persistently proved “deliberately indifferent” to foster children’s Constitutional right to care. Each one of these cases risks moving a child from a loving, safe home where they are receiving medical care in line with the guidance of every major medical association⁵⁸ and into a foster care system with unacceptable rates of abuse, sex trafficking, and death. These actual tangible harms to innocent children outweigh any abstract interest advanced by Appellants and weigh heavily in favor of upholding the Temporary Injunction against the February 22 Directive and new DFPS Rules pending trial on the merits.

III. Conclusion

The February 22 Directive and New DFPS Rules were unquestionably “rules” under the ordinary meaning of the term, as experienced by *Amici* as CPS employees, and under the definitions of the APA as reflected in this Court’s precedents. That these rules were

⁵⁸ See, e.g., Letter from James L. Madara, MD, CEO and Executive Vice President of the American Medical Association, to Bill McBride, Executive Director of the National Governors Association (April 26, 2021), *available at* <https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf> (stating that “[e]very major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.”).

adopted without any of the required rulemaking processes of the APA and in violation of both the DFPS enabling statutes and the Texas Constitution demonstrates that Appellees are likely to prevail on the merits of their lawsuit against these rules under the APA.

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

The unprecedented expansion of the definition of child abuse to include prescribed medical care disrupts the *status quo* and violates the APA, DFPS enabling statutes, and the Texas Constitution. Overturning the Temporary Injunction would irreparably injure not only the families

and children who are targeted by the Directive, but also the morale and attrition rate among DFPS employees, and the welfare of the thousands of children currently under DFPS care who would bear the brunt of exacerbated division, distraction, and dysfunction at DFPS. The costs of the Directive and new DFPS Rules will be measured in the lives and safety of those children.

PRAYER

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

Dated: August 25, 2022

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I certify on behalf of Amici Curiae that this Amicus brief contains 6,875 words according to the word count feature of the Microsoft Word software used to prepare this brief, excluding portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

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Natalie Thompson	24088529	natalie.thompson@oag.texas.gov	8/25/2022 5:58:38 PM	SENT
Courtney Corbello		courtney.corbello@oag.texas.gov	8/25/2022 5:58:38 PM	SENT
Ryan Kercher		ryan.kercher@oag.texas.gov	8/25/2022 5:58:38 PM	SENT

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Joel Wright on behalf of Holt Lackey

Bar No. 24047763

jwright@equalrights.law

Envelope ID: 67681226

Status as of 8/26/2022 8:33 AM CST

Associated Case Party: Transgender Education Network of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
J. Richard Hammett	24001054	jrichard.hammett@bakermckenzie.com	8/25/2022 5:58:38 PM	SENT
M'Alyssa Mecenas		Malysa.Mecenas@bakermckenzie.com	8/25/2022 5:58:38 PM	SENT
Karen Wagner		karen.wagner@bakermckenzie.com	8/25/2022 5:58:38 PM	SENT

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Joel Wright on behalf of Holt Lackey

Bar No. 24047763

jwright@equalrights.law

Envelope ID: 67681226

Status as of 8/26/2022 8:33 AM CST

Associated Case Party: Jane Doe

Name	BarNumber	Email	TimestampSubmitted	Status
Omar Gonzalez-Pagan		ogonzalez-pagan@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Nicholas Guillory		nguillory@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
John Ormiston	24121040	john.ormiston@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Nischay Bhan	24105468	Nischay.bhan@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Michele Clanton-Lockhart		mclanton@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Raylynn Howell		Raylynn.Howell@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Stacy Benson		Stacey.Benson@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Anjana Samant		asamant@aclu.org	8/25/2022 5:58:38 PM	SENT
Christine Choi		cchoi@aclu.org	8/25/2022 5:58:38 PM	SENT
Carolina Caicedo		ccaicedo@aclu.org	8/25/2022 5:58:38 PM	SENT
Parul Aggarwal		Parul.aggarwal@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Maia Zelkind		mzelkind@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Paul Castillo		pcastillo@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Stephen Paul		spaul@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Brian Klosterboer		bklosterboer@aclutx.org	8/25/2022 5:58:38 PM	SENT
Maddy Dwertman		maddy.dwertman@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Currey Cook		ccook@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Camilla Taylor		ctaylor@lambdalegal.org	8/25/2022 5:58:38 PM	SENT
Chase Strangio		cstrangio@aclu.org	8/25/2022 5:58:38 PM	SENT
James Esseks		jesseks@aclu.org	8/25/2022 5:58:38 PM	SENT
Kath Xu		kxu@aclu.org	8/25/2022 5:58:38 PM	SENT
Savannah Kumar		skumar@aclutx.org	8/25/2022 5:58:38 PM	SENT
Andre Segura		asegura@aclutx.org	8/25/2022 5:58:38 PM	SENT
Brandt Roessler		brandt.roessler@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
David Goode		david.goode@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Derek McDonald		derek.mcdonald@bakerbotts.com	8/25/2022 5:58:38 PM	SENT
Sharon McGowan		smcgowan@lambdalegal.org	8/25/2022 5:58:38 PM	ERROR
Shelly L.Skeen		ssskeen@lambdalegal.org	8/25/2022 5:58:38 PM	ERROR
Shelly Skeen		slskeen@gmail.com	8/25/2022 5:58:38 PM	ERROR

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Joel Wright on behalf of Holt Lackey

Bar No. 24047763

jwright@equalrights.law

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Associated Case Party: RoyL.Austin

Name	BarNumber	Email	TimestampSubmitted	Status
Alan York		ayork@reedsmith.com	8/25/2022 5:58:38 PM	SENT

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Joel Wright on behalf of Holt Lackey

Bar No. 24047763

jwright@equalrights.law

Envelope ID: 67681226

Status as of 8/26/2022 8:33 AM CST

Associated Case Party: RoyLAustin

Name	BarNumber	Email	TimestampSubmitted	Status
Alan York		ayork@reedsmith.com	8/25/2022 5:58:38 PM	SENT
Alan York		ayork@reedsmith.com	8/25/2022 5:58:38 PM	SENT

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Joel Wright on behalf of Holt Lackey

Bar No. 24047763

jwright@equalrights.law

Envelope ID: 67681226

Status as of 8/26/2022 8:33 AM CST

Associated Case Party: Ronald Beal

Name	BarNumber	Email	TimestampSubmitted	Status
Ronald Beal		ron_beal@baylor.edu	8/25/2022 5:58:38 PM	SENT

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Joel Wright on behalf of Holt Lackey

Bar No. 24047763

jwright@equalrights.law

Envelope ID: 67681226

Status as of 8/26/2022 8:33 AM CST

Associated Case Party: Texas Medical Association

Name	BarNumber	Email	TimestampSubmitted	Status
Donald Wilcox		rocky.wilcox@texmed.org	8/25/2022 5:58:38 PM	SENT
Kelly Walla		kelly.walla@texmed.org	8/25/2022 5:58:38 PM	SENT
Eamon Reilly		eamon.reilly@texmed.org	8/25/2022 5:58:38 PM	SENT