

In re Abbott: How Texas Fails Transgender Youth by Ignoring the Definition of Care

I.	OVERVIEW	259
II.	BACKGROUND.....	261
	A. <i>Child Abuse in Texas</i>	261
	B. <i>Attorney General Opinions</i>	262
	C. <i>Temporary Injunctive Relief</i>	263
	1. Trial Courts	263
	2. Appellate Courts	264
	3. Texas Supreme Court	265
III.	COURT’S DECISION.....	265
IV.	ANALYSIS.....	269

I. OVERVIEW

Gender-affirming care is defined as “a spectrum of ‘social, psychological, behavioral or medical (including hormonal treatment or surg[ical]) interventions designed to support and affirm an individual’s gender identity.’”¹ This type of treatment has been the subject of recent controversy, especially regarding youth access.² However, the general consensus among health care providers and medical professionals is that “[g]ender-affirming care . . . is about validating and supporting children and loving them for who they are as they explore their gender identity.”³ Nonetheless, on February 18, 2022, Texas Attorney General Ken Paxton issued Opinion No. KP-0401, which categorized gender-affirming care as a form of child abuse under Texas law.⁴

In addition to the attorney general’s opinion, Texas Governor Greg Abbott wrote a letter to the commissioner of the Department of Family

1. Lindsey Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>.

2. *Id.*

3. *What to Know About Gender Affirming Care for Children and Adolescents*, HEALTH MATTERS, <https://healthmatters.nyp.org/what-to-know-about-gender-affirming-care-for-children-and-adolescents/> (last visited Mar. 15, 2023).

4. *Whether Certain Medical Procedures Performed on Children Constitute Child Abuse*, Tex. Att’y Gen. Op. No. KP-0401, 2 (Feb. 18, 2022).

and Protective Services (DFPS) stating “a number of so-called ‘sex change’ procedures constitute child abuse under existing Texas law.”⁵ Governor Abbott concluded the letter with a directive “[t]o protect Texas children from abuse, DFPS and all other state agencies *must* follow the law as explained in OAG Opinion No. KP-0401.”⁶ Shortly after receiving Governor Abbott’s letter, the DFPS released a press statement that it would comply with the governor’s directive.⁷ The agency then opened at least nine investigations into parents of transgender children.⁸

On March 1, 2022, Lambda Legal, the American Civil Liberties Union (ACLU), and the ACLU of Texas, on behalf of the plaintiffs,⁹ brought suit against Greg Abbott in his official capacity as governor, Jaime Masters in her official capacity as commissioner of the DFPS, and the DFPS as a whole.¹⁰ Ten days later, on March 11, the District Court of Travis County, Texas, granted the plaintiffs’ request for a temporary injunction which restrained the 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 . . .
- (2) investigating reports in the state of Texas against any and all persons . . . 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

5. Letter from Greg Abbott, Governor of Tex., to Jaime Masters, DFPS Commissioner, 1, (Feb. 22, 2022) (on file with the Office of the Texas Governor).

6. *Id.* at 1 (emphasis added).

7. Eleanor Klibanoff, *Texas Resumes Investigations Into Parents of Trans Children, Families’ Lawyer Confirms*, TEX. TRIB., (May 20, 2022), <https://www.texastribune.org/2022/05/20/trans-texas-child-abuse-investigations/>.

8. *Id.*

9. The plaintiffs were (1) the parents of a transgender teen, and (2) a licensed psychologist who provided medical care to transgender youth patients. All plaintiffs were concerned about potential prosecution if they continued to facilitate gender-affirming care.

10. *In re Abbott*, 645 S.W.3d 276, 278-79 (Tex. 2022).

are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.¹¹

The state took an interlocutory appeal, which overruled the district court's injunction.¹² The Texas Court of Appeals, Third District then issued a Rule 29.3 temporary order, reinstating the district court's temporary injunction in full.¹³ The state then petitioned the Texas Supreme Court to issue a writ of mandamus directing the court of appeals to vacate its reinstatement of the temporary injunction. The Supreme Court of Texas *held* that the court of appeals' reinstatement of parts (2), (3), and (4) was erroneous, therefore the DFPS had discretion to open child abuse investigations into parents who provide their children with gender-affirming care. *In re Abbott*, 645 S.W.3d 276, 280 (Tex. 2022).

II. BACKGROUND

The noted case relies heavily on dense Texas precedent to reach this holding, and this section attempts to unpack it. First, because DFPS investigations into child abuse are central issues, it is necessary to define their scope through statute and case law. Second, this section will try to resolve the debate over the enforceability of attorney general opinions on state actors. Finally, the last issue concerns judicial grants of temporary relief, at the trial, appellate, and Texas Supreme Court levels. Although the cited authority is murky, it provides more insight into how the Supreme Court of Texas justifies its three holdings in the noted case.

A. *Child Abuse in Texas*

Statutorily, the DFPS derives most of its authority from the Texas Family Code.¹⁴ Section 001 of Chapter 261 of the Texas Family Code classifies abuse as the “observable and material impairment [of a] child’s growth, development, or psychological functioning” that is the result of (A) any “act or omission” that causes “mental or emotional injury,” (B) enabling or allowing situations that may cause “mental or emotional injury,” (C) “physical injury that results in substantial harm” or a substantial threat of harm, and (D) failing to take “reasonable effort[s] to prevent . . . action[s]” by other persons that result in physical harm.¹⁵ The

11. Doe v. Abbott, No. D-1-GN-22-000977, 2022 WL 831383, *2 (Tex. Dist.); *In re Abbott* at 279-80.

12. *In re Abbott* at 280.

13. *Id.* at 280.

14. *Id.* at 281 (quoting TEX. FAM. CODE ANN. § 261.301(a)).

15. TEX. FAM. CODE ANN. § 261.001(1)(A)(B)(C)(D)(West 2021).

statute also covers all forms of sexual violence against children as forms of child abuse.¹⁶ Additionally, the Texas Family Code is clear that “department” is always in reference to the DFPS.¹⁷

The Texas courts clarified the DFPS’s investigative power in the 1976 case of *Wiley v. Spratlan*.¹⁸ This case illustrated the DFPS’s authority to conduct child abuse investigations, but reserved the exclusive right to interfere in a parent-child relationship with the courts.¹⁹ This means the DFPS has the discretion to investigate reports of child abuse if they fall within the agency’s internal criteria, but intervention “which break[s] the ties between a parent and child ‘can never be justified without the most solid and substantial reasons.’”²⁰ The Supreme Court of Texas makes this distinction because the “legal system should . . . oblig[e] the state to bear a serious burden of justification before intervention”²¹ As such, the decision to seize custody is one that rests exclusively with the courts as a check on the State’s power to undermine parental rights.²² Even with this judicial check, the DFPS still has a large amount of internal discretion as far as what they investigate as child abuse.²³

B. Attorney General Opinions

Attorney general opinions are offered as an “interpretation of existing law,”²⁴ but there has been much debate about whether they are legally binding on state agencies.²⁵ The Texas Supreme Court resolved this question in the 1996 case of *Holmes v. Morales*.²⁶ In *Holmes*, Attorney General Morales’s opinion interpreted Texas Rule Section 552.108 to mean that a prosecutor could withhold information *only* if its release would adversely impact crime prevention.²⁷ The plaintiff disagreed, arguing that Morales’s opinion misconstrued both the text and the case law of the statute, and therefore should not be enforced on state

16. *Id.* at FAM. § 261.001(1)(E).

17. *Id.* at FAM. §261.001(2).

18. 543 S.W.2d 349, 351 (Tex. 1976).

19. *Id.* at 352.

20. *Id.* (quoting *State v. Deaton*, 93 Tex. 243, 248 (Tex. 1900)).

21. *Id.* (quoting Stuart Baskin, *State Intrusion into Family Affairs: Justification and Limitations*, 26 STANFORD L. REV. 1383, 1385 (1974)).

22. *See id.*

23. *See* TEX. FAM. CODE ANN. § 261.001(1) (West 2021).

24. *Attorney General Opinions*, TEX. ATT’Y. GEN. <https://www.texasattorneygeneral.gov/attorney-general-opinions> (last visited Nov. 5, 2022).

25. *Holmes v. Morales*, 924 S.W.2d. 920, 924 (Tex. 1996).

26. *Id.*

27. *Id.* at 923 (emphasis added).

actors.²⁸ The court agreed with the plaintiff, writing that “[w]hile Attorney General opinions are persuasive, they are not controlling on the courts.”²⁹ This distinction is necessary because attorney general opinions are statements of legal interpretation, but do not themselves mark changes to law and policy.³⁰

Three years later, in *Weaver v. Head*, the Texas Supreme Court clarified this position.³¹ *Weaver* centers around a Texarkana sheriff who threatened to seize the a suspected gambling machine from the plaintiff on the basis of a recently issued attorney general opinion.³² The trial court blocked the sheriff from relying on the opinion to justify the arrest or prosecution of the plaintiff.³³ The Supreme Court reversed, stating that attorney general opinions can sometimes shield public officials from personal liability for official acts if they can show “good faith in acting in reliance on an Attorney General’s opinion.”³⁴ Materially, attorney general opinions cannot force state officials to act, but can guard against personal liability for official actions.³⁵ This is important because attorney general opinions need not be accurately based on case law or text of a statute, yet still provide a legal loophole for state actors to implement policy changes that might not otherwise be permitted.³⁶

C. *Temporary Injunctive Relief*

1. Trial Courts

Temporary injunctions are “extraordinary remed[ies]” issued to maintain the status quo for the parties of a case while a ruling on the merits is pending.³⁷ The decision whether to grant or deny this form of relief often rests exclusively with trial courts.³⁸ In the 2002 case of *Butnaru v. Ford Motor Co.*, the Texas Supreme Court defined an applying party’s burdens of production and persuasion which must be met in order to

28. *Id.* at 924.

29. *Id.* (citing *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. App. 1975)).

30. *See id.*

31. 984 S.W.2d 744, 746 (Tex. App. 1999).

32. *Id.* at 745.

33. *Id.*

34. *Id.* at 746 (citing *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 548 (Tex. App. 1998)).

35. *Id.*

36. *See id.*

37. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

38. *Id.*

obtain a temporary injunction.³⁹ The *Butnaru* test first requires standing, or a legitimate cause of action against the defendant.⁴⁰ Second, there must be an actual right to the anticipated remedy, where the law has or would allow this type of relief in similar cases.⁴¹ Finally, the applicant must prove a likely, “imminent, and irreparable injury in the interim.”⁴² The Texas Supreme Court, acknowledging the vagueness of the language, defines an irreparable injury as one that cannot adequately be remedied by monetary damages.⁴³ Put more simply, in order to be granted a temporary injunction, a party must show they are being legally harmed, by the opposing party, in a way that exceeds the scope of damages.⁴⁴ As such, trial courts often consider granting temporary injunctions when individual rights are impacted by policy changes.⁴⁵

2. Appellate Courts

Although the right to grant or deny orders of temporary injunctive relief is usually unique to the trial courts, courts of appeals may intervene in extraordinary circumstances.⁴⁶ After an interlocutory order has been perfected, Rule 29.3 of the Texas Rules of Appellate Procedure allows appellate courts to grant any “temporary orders necessary to preserve the parties’ rights until disposition of the appeal,” so long as they do not suspend a trial court’s similar order.⁴⁷ While Rule 29.3 is written clearly, the Supreme Court of Texas further explained its scope in the 2019 case of *In re Geomet Recycling LLC*.⁴⁸ In that case, the plaintiffs improperly interpreted Rule 29.3 as an expansion of the appellate courts limited original jurisdiction to issue temporary injunctions, and consequently believed they were entitled to mandamus relief.⁴⁹ The Texas Supreme Court disagreed, noting that Rule 29.3 falls within a court of appeals’ broad discretion to grant temporary orders in response to interlocutory appeals that are *already* within their appellate jurisdiction.⁵⁰ The court

39. *Id.*

40. *Id.* (citing *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968)).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

45. *Id.* at 209.

46. *See id.* at 204.

47. TEX. R. APP. P. 29.3.

48. 578 S.W.3d 82, 90 (Tex. 2019).

49. *Id.*

50. *Id.* (emphasis added).

also stated that mandamus relief is only appropriate when a party can show a clear abuse of discretion that cannot be properly remedied by an appeal.⁵¹ Accordingly, the Texas Supreme Court held that an appellate court has not abused its discretion when they use Rule 29.3 to “prevent irreparable harm to parties that have properly invoked its appellate jurisdiction in an interlocutory appeal.”⁵² The holding limits Rule 29.3 application to only the parties involved in the judicial proceedings, but grants appellate courts considerable discretion on temporary orders preserving said parties’ rights.⁵³

3. Texas Supreme Court

As discussed in subsections (1) and (2), both trial and appellate courts may grant temporary orders in order to maintain the status quo without abusing their discretion.⁵⁴ The 2021 case of *In re State* ruled that the Texas Supreme Court had a similar authority.⁵⁵ *In re State* concerned an employment-related COVID-19 vaccine mandate and the state’s request for mandamus relief.⁵⁶ Instead of addressing the merits of the case, the Supreme Court of Texas stayed the mandate in order to preserve the parties’ rights, because “the status quo between the parties is not local control over vaccine mandates.”⁵⁷ In doing so, the Texas Supreme Court expanded its own ability to choose whether to address the merits in a politically-charged case, with the only limitation being the preservation of the status quo.⁵⁸ Similar to the holdings in *Butnaru* and *In re Geomet Recycling LLC*, *In re State* enables Texas courts to ignore meritorious questions of individual rights in favor of resolving procedural issues.⁵⁹

III. COURT’S DECISION

In the noted case, the Texas Supreme Court held that the appellate court’s reinstatement of parts (2), (3), and (4) of the district court’s temporary injunction was an abuse of discretion under Rule 29.3.⁶⁰ The court also ruled that part (1) of the temporary order was correctly applied

51. *Id.* at 91.

52. *Id.* at 90.

53. *Id.*

54. *Id.*; *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

55. No. 21-0873, 2021 WL 4785741, at *1 (Tex. 2021) (per curiam).

56. *Id.*

57. *Id.*

58. *See id.*

59. *See id.*; *Butnaru*, 84 S.W.3d at 204; *In re Geomet Recycling LLC*, 578 S.W.3d at 90.

60. Tex. R. App. P. 29.3; *In re Abbott*, 645 S.W.3d. at 283.

to the plaintiffs, but only so far as it implicated the DFPS and not the governor.⁶¹ Finally, the court clarified that the DFPS, although not bound by the attorney general's opinion nor the governor's directive, could rely on its own authority to investigate allegations of parental facilitation of gender-affirming care as child abuse.⁶²

In Part I of the decision, the court first tackled the question of governmental responsibility "the decisions complained of by the plaintiffs."⁶³ Justice Blacklock, who wrote the majority opinion for Parts I and II, but not III, began by chiding both the plaintiffs and the State for their misunderstanding of "the proper roles played by the various government actors involved."⁶⁴ He first addressed the governor's directive, specifically whether it was legally binding on the DFPS.⁶⁵ It is quickly settled that the DFPS is a legislatively-created state agency, "whose animating statutes do not subject their decisions to the Governor's direct control."⁶⁶ Therefore, Justice Blacklock noted that, although Governor Abbott's directive could have been perceived as changing the obligations of DFPS, the letter "cite[d] no legal authority that would empower the Governor to bind state agencies with the instruction contained in the . . . final sentence, and [the court is] directed to none."⁶⁷ Once established that the governor's directive was nonbinding, the analysis shifted to whether the attorney general's opinion created a legal obligation.⁶⁸ In Texas, it is "well-settled that an Attorney General opinion interpreting the law cannot alter the pre-existing legal obligations of state agencies or private citizens."⁶⁹ Because these opinions are interpretive documents and do not signal changes to state policy, General Paxton lacked the "formal legal authority" to direct the DFPS to change their policy based on his opinions of the law.⁷⁰ Both the governor and attorney general are entitled to state their views on child abuse law in Texas, but simply doing so did not create an official policy change for the DFPS.⁷¹

Next, the court addressed the state's claim of mandamus relief based on the court of appeals' temporary order reinstating the district court's

61. *In re Abbott*, 645 S.W.3d. at 282-83.

62. *Id.* at 282.

63. *Id.* at 280.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 281.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

temporary injunction.⁷² Rule 29.3 recognizes that appellate courts have the power to issue temporary orders in order “to preserve the status quo and prevent irreparable harm to the parties during the pendency of an appeal.”⁷³ The state alleged that Rule 29.3’s authority is limited to only those who are parties in the suit, and cannot be generally applied.⁷⁴ Instead of responding to this argument, the plaintiffs “ma[d]e no effort to grapple with the party-specific language of Rule 29.3, which forecloses their position regardless of the nature of their claims in the district court.”⁷⁵ Because Rule 29.3’s text supports only the protection of the parties, the court agreed with the state as to parts (2), (3), and (4) of the temporary injunction, which sought to protect “any and all persons” affected by the DFPS’s policy change.⁷⁶ According to the Texas Supreme Court, the court of appeals cannot reach beyond those who are directly in front of them, and attempting to do so is an abuse of discretion.⁷⁷ As a result, the court granted the state’s petition of mandamus relief on parts (2), (3), and (4) of the temporary injunction, as those sections did not affect the plaintiffs.⁷⁸

In Part III, Justice Bland replied to the state’s petition for mandamus relief on part (1) of the temporary injunction.⁷⁹ Part (1) of the temporary injunction protected only the plaintiffs from the DFPS’s child abuse investigation.⁸⁰ As such, the court of appeals properly used their discretion in reinstating part (1) of the injunction.⁸¹ However, Justice Bland was clear that part (1)’s restriction on the governor was improperly reinstated.⁸² As Justice Blacklock wrote in Part I, the governor had no authority to “‘investigat[e] reports’ of abuse, ‘prosecut[e]’ such reports, or ‘impos[e] reporting requirements’” on the DFPS.⁸³ Consequently, an order prohibiting him from actions he has no authority to take, “has no support in [the] record.”⁸⁴ Even still, the court held that the court of appeals’ reinstatement of part (1) was mostly proper, but only so far as it

72. *Id.* at 282.

73. *Id.*

74. *Id.* at 282-83.

75. *Id.* at 283.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 279.

81. *Id.*

82. *Id.* at 284.

83. *Id.* at 283.

84. *Id.* at 284.

prevented the DFPS commissioner from continuing to investigate the plaintiffs while the appeal was pending.⁸⁵

Justice Lehrmann's concurrence began by clarifying the narrow scope of this case in light of the large underlying dispute, "lest we lose the forest for the trees" and rephrased the majority's three holdings.⁸⁶ Two paragraphs later, Justice Lehrmann explained how *In re Abbott* fits into the "forest," or the underlying dispute over individual rights by briefly acknowledging the plaintiffs' three claims of relief.⁸⁷ Justice Lehrmann's third point addressed the state's argument that the plaintiffs lack an appropriate appellate remedy, because they interpreted the temporary injunction as a prohibition on investigating child abuse in *any* cases involving transgender youth.⁸⁸ This point was resolved through the text of the injunction, which prevents the DFPS from investigating child abuse "based *solely* on . . . facilitating or providing gender-affirming care."⁸⁹ While Justice Lehrmann's whole concurrence addressed the merits significantly more than the majority does, it still prioritized procedural issues.⁹⁰ Still, it is relevant because it hints how the court might decide if it were asked about the merits more directly.⁹¹

Justice Blacklock, joined by Justice Boyd and Justice Devine, concurred with the majority's holdings in Parts I and II, but dissented to the decision in Part III regarding the State's petition of mandamus relief as applied to the plaintiffs.⁹² Although the majority denied only this portion of the State's petition,⁹³ the concurrence in part did not agree the plaintiffs made the required showing to get this result.⁹⁴ Justice Blacklock was specifically concerned with part (2) of the temporary order, which he interpreted as undermining the DFPS's authority to investigate "the possibility that injury to a child may result from the disputed treatments."⁹⁵ Because the plaintiffs allegedly fail to provide sufficient case law supporting judicial intervention into executive branch (DFPS) investigations, the concurrence in part believes the majority's decision is

85. *Id.*

86. *Id.* (Lehrmann, J., concurring).

87. *Id.* at 285 (Lehrmann, J., concurring).

88. *Id.* at 285 (Lehrmann, J., concurring).

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

90. *Id.* at 285-86 (Lehrmann, J., concurring).

91. *Id.* (Lehrmann, J., concurring).

92. *Id.* at 287 (Blacklock, J., concurring in part and dissenting in part).

93. Except as far as it implicates the governor.

94. *Id.* (Blacklock, J., concurring in part and dissenting in part).

95. *Id.* at 289 (Blacklock, J., concurring in part and dissenting in part).

“likely beyond the proper scope of the judicial power.”⁹⁶ Therefore, it was improper for any court to prevent the DFPS from conducting investigations, including those into the plaintiffs.⁹⁷ This concurrence in part is significant because it advocates for even less check on the DFPS’s investigative discretion than even the majority allows.⁹⁸

IV. ANALYSIS

The holdings in the noted case are not significant changes to Texas law, but they make it clear that the rights of transgender youth will remain under attack in the state.⁹⁹ While the DFPS is not bound by the governor, nor the attorney general, the noted case guarantees the agency’s investigative authority will stay largely unchallenged by the courts.¹⁰⁰ Essentially, the courts will not step in if the DFPS internally chooses to continue investigating parental facilitation of gender-affirming care as child abuse.¹⁰¹ Because the plaintiffs were individually protected from a continued investigation, however, organizations who champion LGBTQ rights celebrated the decision as a step in the right direction.¹⁰² In doing so, these organizations ignored the possibility that the DFPS’s unchecked discretion would continue to create stress for all families not party to the suit in *In re Abbott*.¹⁰³ This is most clearly demonstrated in the September case of *Masters v. Voe*, yet another Texas legal challenge arising out of the DFPS’s child abuse investigations into the families of transgender kids.¹⁰⁴ The DFPS’s unchecked discretion to define child abuse however they see fit, especially in the midst of pervasive anti-trans political actions, marks a dangerous future for transgender youth in Texas.¹⁰⁵ The noted case all but ensures this.¹⁰⁶

96. *Id.* at 289 (Blacklock, J., concurring in part and dissenting in part).

97. *Id.* (Blacklock, J., concurring in part and dissenting in part).

98. *Id.* (Blacklock, J., concurring in part and dissenting in part).

99. *See In re Abbott* at 280.

100. *Id.* at 280.

101. *See id.* at 280.

102. Press Release, Lambda Legal & Tex. ACLU., *Lambda Legal, ACLU Statement on Texas Supreme Court Ruling Partially Upholding Injunction Blocking Investigations into Families of Transgender Youth* (May 13, 2022), <https://www.aclu.org/press-releases/aclu-lambda-legal-statement-texas-supreme-court-ruling-partially-upholding-injunction>

103. Klibanoff, *supra* note 7.

104. *Masters v. Voe*, No. 03-22-00420-CV, 2022 WL 4359561, *1 (Tex. App. Sept. 20, 2022).

105. Elena Rivera, *What Life is Like for Trans Youth in Texas After Abbott’s Calls to Investigate Gender-Affirming Care*, KERA NEWS, (Oct. 10, 2022), <https://www.keranews.org/health-wellness/2022-10-10/trans-youth-health-care-texas-investigation-greg-abbott>.

106. *See generally* *In re Abbott*.

First, the noted case makes certain that the DFPS is able to investigate child abuse based on whatever criteria it sees fit.¹⁰⁷ Justice Blacklock makes this clear in Part I, which concerns the attorney general and governor's executive authority over the DFPS, and the concurrence in part which advocates for even less check on the DFPS's investigative discretion than even the majority allows.¹⁰⁸ Because the agency is not legally obligated to follow any of the policy changes outlined by either, the court is explicit that it is self-governed and not subject to executive control.¹⁰⁹ Justice Blacklock notes that it is also not the role of the court to interfere with the DFPS's investigative authority.¹¹⁰ This statement appears to be a neutral statement of existing law, as Justice Blacklock largely disregards the politically-charged merits of the noted case in his legal analysis.¹¹¹ The omission of the meritorious claims in the noted case gives the illusion that no one will be harmed by the court's decision. Instead, the postured neutrality implies that the court will not stop the DFPS from investigating gender-affirming care as child abuse.¹¹² Regardless of the court's stated position, it does not attempt to discourage the DFPS's interpretation of Texas child abuse law, even through non-binding dicta.¹¹³ This intentional exclusion, taken with the explicit assurance of unchecked DFPS discretion, indicates the court's negative posture towards transgender rights in Texas.¹¹⁴

However, to Lambda Legal and the ACLU of Texas, the Texas Supreme Court's decision marked a "win" for transgender rights because the court upheld the district court's injunction solely as it related to their clients.¹¹⁵ Both organizations wrote that "Texas law has not changed and no . . . DFPS employee is required to take . . . action based on the governor's directive."¹¹⁶ This is not an incorrect statement of the law following the noted case, but it underestimates the DFPS's power to continue investigating reports of child abuse solely based on parental

107. *Id.* at 281.

108. *Id.* at 280; *id.* at 288 (Blacklock, J., concurring in part and dissenting in part).

109. *Id.* at 281.

110. *Id.*

111. *Id.*

112. *See id.*

113. *See id.*

114. Paul J. Weber, *Texas Supreme Court to Allow State to Investigate Trans Youth Parents*, PBS NEWSHOUR, (May 13, 2022), <https://www.pbs.org/newshour/politics/texas-supreme-court-to-allow-state-to-investigate-trans-youth-parents>.

115. Press Release, Lambda Legal & Tex. ACLU, *supra* note 103.

116. *Id.*

facilitation of gender-affirming care.¹¹⁷ Lambda Legal and the ACLU of Texas further brush aside the large-scale implications of the court's decision by stating that "[i]t would be unconscionable for [the] DFPS to continue these lawless investigations while this lawsuit continues, and we will not stop fighting the protect the safety and lives of transgender youth here in Texas."¹¹⁸ These LGBTQ rights organizations celebrated because they were briefly able to turn a blind eye to the DFPS's unchecked discretion.¹¹⁹ They ignored the question of whether the DFPS commissioner intended to be "a child welfare law professional, or a politician[.]"¹²⁰ This was answered seven days after the opinion in the noted case was published, when the Texas DFPS informed a few families of transgender children that the agency was going to continue their earlier investigations based on reports of gender-affirming care.¹²¹

Not only did this create panic for Texas families, it assured a backlog of litigation over the continued investigations.¹²² Four months after the Texas Supreme Court decided the noted case, the Court of Appeals of Texas, Austin, heard arguments on a nearly identical suit.¹²³ The case, *Masters v. Voe*, only differed because of an "irreparable harm" argument made by additional parents of transgender kids who worried about helping their children in the months following *In re Abbott*.¹²⁴ Despite predictions of morality by LGBTQ rights organizations, it is evident the DFPS disagreed that investigations of this kind were "unconscionable."¹²⁵ The results of the *Masters* case were largely the same, with the court of appeals choosing to uphold an additional temporary injunction which was "necessary to preserve the parties' rights during the pendency of [the] appeal."¹²⁶ Even though *Masters* also individually protected the plaintiffs from investigations, it still shows the court's unfettered deference to DFPS discretion in creating these stressful circumstances.¹²⁷ *Masters* is not only the best example of the additional judicial backlog created by the

117. *Id.*

118. *Id.*

119. *See id.*

120. Klibanoff, *supra* note 7.

121. *Id.*

122. *Id.*

123. *Masters v. Voe*, No.03-22-00420-CV, 2022 WL 4359561, *1 (Tex. App. Sept. 20, 2022).

124. *Id.* at *3.

125. Press Release, *supra* note 98.

126. *Masters* at *4.

127. *See id.*

noted case, but it also makes clear that the courts will continue to value procedural issues over transgender protection.¹²⁸

In both the noted case and *Masters*, the court signaled its lack of regard for any parental stress that may arise out of the DFPS's investigations.¹²⁹ The agency's addition of gender-affirming care into the definition of child abuse increased the potential workload for individual investigators already stretched too thin.¹³⁰ While some tried to make the process more comfortable for families caught up in this undertaking, investigations remain an incredibly invasive exercise requiring home visits, surprise inspections at the children's school, and interviews with the initial reporter.¹³¹ The court in the noted case did not see the harm of such investigations, as the DFPS must have the court's permission to take any intervening action on the basis of their findings.¹³² However, this is still frightening to many Texas families because there is no guarantee the court *would* prevent the DFPS from taking further action.¹³³ Especially because personnel changes are a possibility during every election, there is no promise that new justices would continue to block intrusion into the parent-child relationship if they dislike gender-affirming care.¹³⁴ This is best summarized by a Texas attorney who represented parents in this position, who wrote "God and CPS, those are the two entities that have the power to give you children and take them away, so these investigations are a big deal."¹³⁵

With all of this in mind, the noted case is a dangerous shift in the legal and social understanding of Texas child abuse law.¹³⁶ Although there is much agreement among medical experts that gender-affirming care is "life-saving" for transgender youth because it reduces the risks of anxiety, depression, and suicide, the DFPS has the authority to call this abusive.¹³⁷ The agency's unfettered investigatory discretion does not change existing Texas law, but it does make the world more perilous for people whose

128. *See id.* at *1.

129. *Id.*; *In re Abbott*, 645 S.W.3d 276, 282 (Tex. 2022).

130. Casey Parks, *He Came Out as Trans. Then Texas Had Him Investigate Parents of Trans Kids*, WASH. POST, (Sept. 23, 2022), <https://www.washingtonpost.com/dc-md-va/2022/09/23/texas-transgender-child-abuse-investigations/>.

131. Klibanoff, *supra* note 7.

132. *In re Abbott*, 645 S.W.3d at 282.

133. Klibanoff, *supra* note 7.

134. Parks, *supra* note 126.

135. Klibanoff, *supra* note 7.

136. Weber, *supra* note 110.

137. Parks, *supra* note 126.

identities are political spaces.¹³⁸ Given the state of transphobia in the United States, partisan attacks on transgender rights did not begin or end with the noted case, but they are allowed to continue as a result of its holdings.¹³⁹

Ellison Smith*

138. *Id.*

139. *Id.*

* © 2023 Ellison Smith. Tulane Journal of Law and Sexuality. J.D. 2024, Tulane University School of Law; B.A. in Study of Women and Gender, 2021, Smith College. The author would like to thank Professors Saru Matambanadzo and Catherine Hancock for their counsel, as well as Olivia Marks and Zachary Phillips for their guidance and support during the writing of this Case-Note. Ellison looks forward to serving as Editor-in-Chief of Volume 33 of this journal, expected to be published in Spring of 2024.