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Don't Mess with Texans' Rights: Protecting Transgender Youth from the Paternalistic Policies of State Executives

Mary Franklin*

Texas Attorney General Ken Paxton issued an opinion in 2022 detailing how gender-affirming care for transgender minors constituted child abuse under the Texas Family Code. As a result of this opinion, multiple families of trans teens engaging in various forms of gender-affirming care were investigated by the Texas Department of Family and Protective Services. This Article applies the constitutional standards imposed by the equal protection clause, substantive due process, and parental authority to Paxton's recommendation, using both the U.S. and Texas Constitutions. Ultimately, this Article concludes that Paxton's opinion fails to meet these constitutional standards and recommends action from the Texas Legislature to prevent further misinterpretation of the Texas Family Code. Specifically, this Article implores the legislature amend the Texas Family Code to provide explicit protections for parental authority over voluntary medical procedures with proven scientific benefits.

INTRODUCTION

Texas thirteen-year-old Adelyn Vigil is native to the Rio Grande Valley, but travels to north Texas every few months to receive gender affirming care. Adelyn is a transgender teen who receives gender affirming care because “it makes [her] feel who [she] truly is.”¹ Adelyn states that because of her treatment, “I don't feel singled out for not being like other girls in school anymore.”² Adelyn, a normally outspoken student and peer, began having panic attacks in school as she approached puberty.³ However, the attacks abated upon beginning treatment.⁴

In February 2022, Texas Attorney General Ken Paxton issued an opinion addressing whether gender-affirming care is child abuse under Chapter 261 of the Texas Family Code.⁵ In this opinion, Paxton declares gender-affirming care does qualify as child abuse.⁶ As a result of this opinion, Texas Governor Greg Abbott sent a letter to the Texas Department of Family and Protective Services (DFPS)

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¹ Sneha Dey & Karen Brooks Harper, *Transgender Texas Kids are Terrified After Governor Orders That Parents be Investigated for Child Abuse*, THE TEX. TRIB. (Feb. 28, 2022), <https://www.texastribune.org/2022/02/28/texas-transgender-child-abuse/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ 2022 Tex. Op. Att'y Gen. No. KP-0401.

⁶ *Id.*

expressing his view that DFPS and all other state agencies must follow the law as interpreted by Paxton’s opinion.⁷ DFPS then issued a media statement confirming they would be following the Governor and attorney general’s recommendations that gender-affirming care be investigated as child abuse. Abbott and DFPS were challenged in court as a result of these investigations, and in May 2022 the Texas Supreme Court overturned a lower court’s injunction prohibiting the investigations from continuing.⁸ The court determined that DFPS alone bears the responsibility for its decisions regarding investigations, and neither the Governor nor the attorney general possess the authority to order DFPS to conduct certain investigations.⁹ However, the injunction was nonetheless overturned on procedural grounds.¹⁰

After the actions of the state attorney general and governor, Adelyn Vigil’s panic attacks began again.¹¹ Adelyn stated she was “terrified she [would] be forcibly separated from her mother. So great [was] her anxiety that she [didn’t] want to sleep in her own bed.”¹² Gender-affirming care can “prevent suicide and severe depression caused in part by gender dysphoria—discomfort related to feeling a disconnect between one’s person gender identity and the gender assigned at birth.”¹³ Studies have revealed that “more than 40% of transgender youth attempt suicide,” and the U.S. Centers for Disease Control and Prevention reported that “the rate of suicide attempts among transgender youth is three times higher than among their cisgender counterparts.”¹⁴ Moreover, the U.S. Department of Health and Human Services issued a statement indicating that denying trans youth healthcare is discriminatory and illegal under federal law.¹⁵ Since the Governor’s order, Adelyn has been reconsidering whether she wants to continue engaging in gender-affirming treatment, likely due to the emotional turmoil instilled by the actions of Texas executives.¹⁶ Adelyn is just one of many transgender minors in Texas facing the potential of stopping gender-affirming treatment, which can save the lives of trans minors,¹⁷ due to fear of the possibility of investigation and potential removal by DFPS.

⁷ *In re Abbott*, 645 S.W.3d 276 (Tex. 2022).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Dey & Brooks Harper, *supra* note 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Elizabeth Sharrow & Isaac Sederbaum, *Texas Isn't the Only State Denying Essential Medical Care to Trans Youth. Here's What's Going On.*, THE WASH. POST (Mar. 10, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/03/10/texas-trans-kids-abortion-lgbtq-gender-ideology/>.

¹⁶ Dey & Brooks Harper, *supra* note 1.

¹⁷ *E.g.*, Amy E. Green, Jonah P. DeChants, Myeshia N. Price & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643, 647 (2022) (finding a “significant relationship between access to [gender-affirming hormone therapy] and lower depression and suicidality among transgender and nonbinary youth”).

In September 2022, a Travis County District Judge granted an injunction prohibiting the investigation of more than 600 members of Texas PFLAG (Parents and Families of Lesbians and Gays), a statewide LGBTQ+ support network.¹⁸ The suit was brought by the American Civil Liberties Union and Lambda Legal on behalf of the members of PFLAG. As of right now, families of trans teenagers engaging in gender-affirming care who are not members of PFLAG remain subject to investigation at DFPS's discretion. Moreover, Paxton and Abbott's actions continue to have far-reaching effects on trans minors in Texas and the general culture surrounding LGBTQ+ rights in the state.

Attorney General Ken Paxton's opinion rests largely on ill-informed notions of gender-affirming care. The opinion relies on conservative ideals that gender-affirming care for transgender minors consists largely of "genital mutilation" and harmful surgical procedures.¹⁹ Paxton argues these treatments not only physically harm minors but also infringe on their fundamental right to procreation as defined in *Skinner v. Oklahoma*.²⁰ Paxton also emphasizes the fact that minors lack the legal competence to consent to such treatments.²¹ Because minors in these situations necessarily must depend on adults to engage in gender-affirming care, the crux of the question addressed by the attorney general is "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."²² The opinion continues, "there is no evidence that long-term mental health outcomes are improved or that rates of suicide are reduced by hormonal or surgical intervention."²³ In his opinion, Paxton wrote that the legislature has broadly defined child abuse in chapter 261 so as to provide vast protections for minors in harmful situations, justifying state infringement into the family realm for situations like this.²⁴

On the other hand, advocates for access to gender-affirming care for minors argue that restricting access to such treatments is more harmful. Most major medical associations—including the American Medical Association, the American Academy of Pediatrics, and the American Psychological Association—issued statements noting the importance of access to gender-affirming care for trans youth

¹⁸ Eleanor Kilbanoff, *Texas' Child Welfare Agency Blocked From Investigating Many More Parents of Trans Teens*, THE TEX. TRIB. (Sept. 16, 2022, 5:00 PM), https://www.texastribune.org/2022/09/16/texas-trans-teens-investigation-child-abuse/?gclid=CjwKCAiAy_CcBhBeEiwAcoMRHHE22Z8v7ZqUZQMX0GRO-3qycSNeI7QP_nf1FRiC95WYdG8YoKfL0hoCxxv0QA_vD_BwE.

¹⁹ 2022 Tex. Op. Att'y Gen. No. KP-0401.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

and stating the harmful effects of denying such care.²⁵ In response to Governor Abbott’s directive, twenty-three medical associations or societies submitted an amicus brief stating that restricting access to gender-affirming care would irreparably harm the health of trans minors.²⁶ Proponents of access to gender-affirming care also emphasize the collateral effects of this restrictive executive action, such as pressures on healthcare providers. In the face of directives prohibiting gender-affirming care for minors, providers are forced to choose between acting in the best interest of their patient, and potentially facing professional sanctions or legal consequences.

Because Paxton’s recommendation fails to survive constitutional standards and presents an unjust infringement on parental authority, the legislature should amend the Texas Family Code to prevent further misinterpretation. By codifying protections for parental decision-making over voluntary medical procedures with scientifically proven benefits, the legislature reflects sentiments present in the Texas Constitution and safeguarded by settled case law. Abbott’s subsequent directive relying on the opinion, has resulted in unjust investigations by DFPS that may continue—upon DFPS discretion—barring legislative action. These investigations not only infringe on the protected realm of parental authority, but also violate constitutional principles, specifically the equal protection clause and substantive due process protections. This Article will focus on the rationale proposed by Paxton in his recommendation that gender-affirming care for minors constitutes child abuse under the Texas Family Code. Paxton’s opinion will be subjected to constitutional standards, which display the overreach of his recommendation and demonstrate the need for legislative action to protect this area of parental authority.

First, this Article will detail the standards imposed by the equal protection clause (I. A.), substantive due process rights (I. B.), and recognized rights of parental authority (I. C.) under both the United States and Texas Constitutions. This Article will also provide a brief explanation on the state of trans issues in Texas (I. D.) and the importance of an agency’s independence from the executive branch (I. E.) Then, this Article will propose a solution, and Paxton’s opinion will be applied to each standard to determine constitutionality (II. A–B). Finally, this Article will address potential counterarguments (II. C.), practical considerations (II. D.), and public policy considerations (II. E.).

²⁵ Linsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>.

²⁶ *Id.*

I. BACKGROUND

A. *The Equal Protection Clause Prohibits Arbitrary Government Discrimination Toward a Protected Class*

i. United States Constitution

The Fourteenth Amendment requires that no state shall make or enforce any law that abridges the privileges and immunities of United States citizens.²⁷ In *City of Cleburne v. Cleburne Living Center*, the Court found the Fourteenth Amendment also protects citizens from unjustified, government-imposed sanctions.²⁸ A law is deemed unconstitutional when it creates arbitrary or irrational distinctions between classes of people.²⁹

An equal protection challenge to a facially discriminatory law requires the court to first determine what level of scrutiny applies—rational basis, intermediate scrutiny, or strict scrutiny. While race-based classifications are “inherently suspect” and must be “strictly scrutinized,”³⁰ sex-based classification are “quasi-suspect” and held to intermediate scrutiny.³¹ In *Grimm v. Gloucester County School Board*, the Court found that the school’s policy prohibiting transgender students from using restrooms that did not match their biological gender should be treated as gender-based discrimination and judged with intermediate scrutiny.³² Moreover, in *Bostock v. Clayton County* the court found that discrimination based on homosexual or transgender status violated Title VII as sex-based discrimination.³³ The Court reasoned that it was impossible to “discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”³⁴

To withstand intermediate scrutiny, the government’s policy must be “substantially related to a sufficiently important government interest.”³⁵ In *Hecox v. Little*, the court addressed an equal protection challenge to an Idaho statute precluding transgender female athletes from participating in women’s sports.³⁶ The court applied heightened scrutiny, specifying that the “[c]ourt must examine the Act’s actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or

²⁷ U.S. CONST. amend. XIV, § 1.

²⁸ 473 U.S. 432 (1985).

²⁹ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020).

³⁰ *Adarand Constructors v. Peña*, 515 U.S. 200, 223–224 (1995).

³¹ *Grimm*, 972 F.3d 586.

³² *Id.*

³³ 140 S. Ct. 1731 (2020).

³⁴ *Id.* at 1741.

³⁵ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

³⁶ 479 F. Supp. 3d 930 (D. Idaho 2020).

second-class status.”³⁷ Moreover, the Idaho court unequivocally states “bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”³⁸ Ultimately, the Idaho law failed to meet the standard of intermediate scrutiny.³⁹

In their analysis, the *Hecox* court noted that intermediate scrutiny is used to “ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.”⁴⁰ Moreover, the court stated that under intermediate scrutiny, the “[c]ourt must examine the Act’s ‘actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.’”⁴¹ The court relied on scientific evidence to conclude that transgender women are a historically disadvantaged group and found that the state lacked sufficient justification for the discriminatory policy.⁴² *Hecox* exemplifies the importance of the equal protection clause and its underlying rationale, as interpreted by the judiciary. The Fourteenth Amendment was passed to extend constitutional rights to those viewed by most as undeserving and was meant to protect a minority population from discrimination at the hands of the state. As *Bostock* and *Hecox* display, the transgender community is currently facing discriminatory attacks from various states and relies heavily on the equal protection clause to quash these unjustified infringements into constitutional liberty.

ii. Texas Constitution

Texas courts have considered Article I § 3 of the Texas Constitution to be the Texas-specific expression of the equal protection clause in the Fourteenth Amendment.⁴³ Texas courts use a three-step process for evaluating equal protection claims.⁴⁴ First, the court decides whether equality under the law has been denied.⁴⁵ If the court concludes equality was denied because of a person’s membership in a protected class (race, sex, national origin, etc.), the legislation must be narrowly tailored to serve a compelling government interest in order to survive judicial scrutiny.⁴⁶

³⁷ *Id.* at 976.

³⁸ *Id.* at 983.

³⁹ *Id.*

⁴⁰ *Id.* at 973 (quoting *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (9th Cir. 2014)).

⁴¹ *Id.* (quoting *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014)).

⁴² *Id.* at 977.

⁴³ George D. Braden, David A. Anderson, R. Stephen Bickerstaff, Darrell Blakeway, Ron Patterson, Seth S. Searcy III, Thornton C. Sinclair & Richard A. Yahr, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 13 (1977), <https://www.sll.texas.gov/assets/pdf/braden/04-article-i.pdf>.

⁴⁴ *In the Interest of McLean*, 725 S.W.2d 696, 697 (Tex. 1987).

⁴⁵ *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002).

⁴⁶ *See generally id.*

The Texas Court of Appeals for the 14th District described the equal protection clause to be “essentially a directive that all persons similarly situated should be treated alike.”⁴⁷ Moreover, the Court reiterated that the “same requirements are applied under the Texas Constitution as under the United States Constitution.”⁴⁸ To assert an equal protection claim, “a party must establish that the challenged statute resulted in her being treated differently than other similarly situated parties.”⁴⁹

Texas courts addressed the equal protection clause in the Texas Constitution in a family law context in *In the Interest of D.G.R.*; in that case, the appellant father of the minor argued that the child support orders issued by the court violated the equal protection clause in the Texas Constitution.⁵⁰ There, the court rejected appellant’s arguments and found no equal protection violation in the imposed child support obligations.⁵¹ Though the *D.G.R.* court declined to recognize an equal protection claim in that particular case, they recognized that equal protection nonetheless plays a crucial role in family law, even noting that “[t]he Family Code specifically prohibits discrimination based on the sex of the obligor, obligee, or child.”⁵² Conclusively, Texas constitutional requirements dictate that a law that if a law discriminates on the basis of sex, the legislation must be narrowly tailored to serve a compelling government interest.

B. Substantive Due Process Protects Fundamental Rights from Unjust Government Infringement

i. United States Constitution

The Fourteenth Amendment provides constitutional guarantees for procedural and substantive due process—including the right to establish a home and bring up children and “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁵³ The substantive component of due process is said to “provide[] heightened protection against government interference with certain fundamental rights and liberty interests.”⁵⁴ The Supreme Court described that a parent’s interest in the care, custody, and control of their children “is perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁵⁵ The Court went on to state “it is

⁴⁷ *In the Interest of L.C.L.*, No. 14-19-00062-CV, 2019 Tex. App. LEXIS 6018 at *29 (July 16, 2019).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *In the Interest of D.G.R.*, No. 04-05-00439-CV, 2006 Tex. App. LEXIS 10585 at *10 (Dec. 13, 2006).

⁵¹ *Id.* at *11.

⁵² *Id.* at *10–11 (quoting TEX. FAM. CODE ANN. § 154.010 (West 2002)).

⁵³ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵⁴ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

⁵⁵ *Id.*

cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁵⁶ Ultimately, American jurisprudence “historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”⁵⁷

Under the doctrine of substantive due process, legislation infringing on a fundamental right is subject to strict scrutiny.⁵⁸ To withstand scrutiny, substantive due process claims face the same analysis as procedural due process claims—the infringement must be narrowly tailored to serve a compelling state interest.⁵⁹ The Court has emphasized that substantive due process protections are limited to “fundamental liberty interests.”⁶⁰ Moreover, only “fundamental rights and liberties which are ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ qualify for such protection.”⁶¹ Frequently, the Court has been reluctant to expand the doctrine of substantive due process.⁶²

However, the Court has already applied the doctrine of substantive due process to protect parental rights.⁶³ The Supreme Court held in multiple cases that a parent’s authority in raising their child as they see fit is a fundamental liberty protected by substantive due process. In *Prince v. Massachusetts* and *Troxel v. Granville*, the Court reiterated the constitutional right for parents to direct the upbringing of their children and noted that the state should not infringe or hinder a parent’s obligations or freedoms.⁶⁴

In *Prince v. Massachusetts* the Court detailed some of the limitations in a parent’s substantive due process rights, stating that “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation.”⁶⁵ Moreover, the Court wrote that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.”⁶⁶ In *Prince*, the Court addressed whether the appellant had violated Massachusetts child labor laws by permitting her child to preach and sell religious materials beside a public highway.⁶⁷ The Massachusetts law was held to be “appropriately designed

⁵⁶ *Id.* at 65–66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

⁵⁷ *Id.* at 66 (quoting *Parhman v. J.R.*, 442 U.S. 584, 602 (1979)).

⁵⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵⁹ *Glucksberg*, 521 U.S. at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

⁶⁰ *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁶¹ *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

⁶² *See Chavez*, 538 U.S. at 775 (collecting cases).

⁶³ *See generally Troxel v. Granville*, 530 U.S. 57 (2000); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁶⁴ *Id.*

⁶⁵ *Prince*, 321 U.S. at 166 (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890)).

⁶⁶ *Id.* at 167.

⁶⁷ *Id.* at 161–162.

to reach such evils . . . within the state’s police power, whether against the parent’s claim to control of the child or one that religious scruples dictate contrary action.”⁶⁸ Ultimately, the Court curtailed the appellant’s rights as a parent in order to effectuate the necessary intention of the legislature to protect against child labor. In this decision, the *Prince* Court illuminated the sort of governmental and public interest that must be so compelling as to warrant limitations on parental rights.

In the past, the Supreme Court has enacted a balancing test of a number of factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁶⁹

When analyzing a substantive due process claim, it is necessary to apply the strict scrutiny test and consider the applicable factors. The factors enumerated by the Court reveal the thought process behind a substantive due process analysis—weighing the government interest in public welfare against the private interest being infringed upon. Understanding the Court’s process of analyzing constitutional claims is crucial in assessing the constitutionality of Paxton’s opinion.

ii. Texas Constitution

Article I § 19 of the Texas Constitution provides protection for procedural and substantive due process.⁷⁰ In their interpretation of this action, Texas courts echo the national doctrine that there are constitutional protections for parental rights. The *In re C.J.C.* court reiterated the presumption in Texas that fit parents act in the best interest of their children and that the “custody, care, and nurture of the child reside first in the parents.”⁷¹ The court continued to highlight the deeply embedded presumption that it is in a child’s best interest to be raised by his or her parents.⁷²

In *C.J.C.*, the Texas Supreme Court decided whether this presumption should apply even during the modification of an existing order that names a parent as the child’s managing conservator.⁷³ Finding that the presumption does apply in such scenarios, the court then emphasized that the “fundamental right of parents to make decisions concerning the care, custody and control of their children” is

⁶⁸ *Id.* at 169.

⁶⁹ *Parham v. J.R.*, 442 U.S. 584, 599–600 (1979) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁷⁰ TEX. CONST. art. I § 19.

⁷¹ *In re C.J.C.*, 603 S.W.3d 804, 812 (Tex. 2020) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

⁷² *Id.*

⁷³ *Id.* at 808.

“perhaps the oldest of the fundamental liberty interests recognized by this court—within the Fourteenth Amendment.”⁷⁴ In Texas, the “fit-parent presumption is ‘deeply embedded in Texas law’ as part of the determination of a child’s best interest.”⁷⁵ Relying heavily on Texas precedent and the *Troxel* decision, the *C.J.C* court found that in modifying the child’s conservatorship against the wishes of a fit parent, “the trial court essentially substituted its determination of [the child’s] best interest for her father’s.”⁷⁶ Ultimately, the court concluded that “a court must apply the presumption that a fit parent—not the court—determines the best interest of the child in any proceeding in which a non-parent seeks conservatorship or access over the objection of a child’s fit parent.”⁷⁷

The Texas Supreme Court’s opinion in *In re C.J.C* highlights the state’s protections afforded to a parent’s fundamental right to make decisions regarding the upbringing of their child and the high burden of overcoming the fit-parent presumption.⁷⁸ Moreover, the court reflected on the enshrined importance of the fundamental rights of fit parents. Like the United States Constitution, the Texas Constitution protects such fundamental rights with substantive due process principles. Clearly, the substantive due process clauses of both the United States and Texas Constitutions present robust security around a fit parent’s right to act in the best interest of their children. Because of the long-emphasized importance of this right and the gravity of the constitutional protections it implicates, overcoming the Fourteenth Amendment’s substantive due process clause requires a formidable showing of necessity.

C. Safeguards For Parental Authority are Deeply Embedded in Judicial Precedent

i. Federal Case Law

Aside from the constitutional standards involved with assessing a parent’s decision-making authority over their children, the judicial system has established a plethora of precedent analyzing parental authority. *Troxel v. Granville* protects a parent’s due process rights by safeguarding their ability to make important decisions about the “care, custody, and control of their children” without government interference.⁷⁹ Moreover, in *Parham v. J.R.*, the Supreme Court recognized a parent’s “dominant” role in the medical decision-making process of their children and that “the traditional presumption that the parents act in the best

⁷⁴ *Id.* at 811–812 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

⁷⁵ *Id.* at 812 (quoting *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000)).

⁷⁶ *Id.* at 815.

⁷⁷ *Id.* at 817.

⁷⁸ *Id.*

⁷⁹ 530 U.S. 57, 65 (2000).

interests of their child should apply.”⁸⁰ In *Parham*, the Court addressed whether Georgia’s statutory scheme regarding the voluntary commitment process of children under 18 to state mental hospitals violated the due process rights of the minors institutionalized.⁸¹ Under the statute, a child could be voluntarily committed at the request of a parent or guardian and upon authorization of the hospital superintendent, so long as the superintendent observed “evidence of mental illness” and that the child is “suitable for treatment.”⁸² The Court held that the scheme did not violate a child’s due process rights so long as a neutral fact-finder determined whether the statutory requirements for admission are met.⁸³ The Court rejected appellant’s assertions that the magnitude of child abuse in these situations was so high as to rationalize the parent’s traditional interests in the upbringing of their child being subordinate to the child’s interests.⁸⁴ Instead, the Court emphasized previous case law, highlighting the large amount of deference given to parents in terms of medical decision making in other situations—such as an appendectomy or tonsillectomy.⁸⁵

In *Halderman v. Pennhurst State School and Hospice*, the Third Circuit Court of Appeals explained that parents, “as the head of the family unit, have the right, protected by the due process clause, ‘to direct the upbringing and education of [their] children . . . [and that this right could] not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.’”⁸⁶ The court determined based on previous federal case law:

[P]arents have a substantial constitutional right, as head of the family unit, to direct and control the upbringing and development of their minor children. If the parental decisions amount to abuse or neglect of the minor child then the parental right is no longer constitutionally protected, and the state, as *parens patriae*, may intervene to protect the child. Absent a showing of abuse or neglect, however, the parental right remains substantial and may be subject to government interference only when such interference is supported by a significant government interest.⁸⁷

In *Halderman* the court ultimately concluded that the district court had not accorded the appellant parents’ desire the substantial weight it deserved, given a lack of abuse, neglect, or a significant contrary government interest.⁸⁸

⁸⁰ 442 U.S. 584 (1979).

⁸¹ *Id.*

⁸² *Id.* at 602.

⁸³ *Id.* at 606.

⁸⁴ *Id.* at 603.

⁸⁵ *Id.* at 603.

⁸⁶ 707 F.2d 702, 709 (3rd. Cir. 1983) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925)).

⁸⁷ *Id.* at 707.

⁸⁸ *Id.*

ii. Texas Case Law

Texas courts follow similar sentiments in their case law, broadly providing deference to parental authority.⁸⁹ *In re Berryman* specified that mere disagreement by the state with the parent’s decision is insufficient to “justify governmental intrusion into the family unit.”⁹⁰ There, the 12th Circuit Court of Appeals addressed allegations of physical abuse of an infant against a Texas mother.⁹¹ Specifically, it was alleged that the mother placed the infant in a closet and allowed her to cry “excessively” until she fell asleep.⁹² The court ultimately concluded that this conduct did not reach the level of abuse as defined in the Texas Family Code.⁹³ Specifically, the court found that DFPS’s mere disapproval of a parent’s methods is insufficient to overcome a parent’s fundamental decision-making right.⁹⁴ The court found the Department’s affidavit recommending removal failed to reach the abuse requirements because it was not unheard of for parents to convert a walk-in closet into a nursery, nor was it “uncommon for a parent to allow an infant to cry herself to sleep, which is a known method of sleep training.”⁹⁵ To substantiate this claim, the court pointed to advice issued by the Department of State Health Services.⁹⁶ In their opinion, the court also relied on existing federal precedent.⁹⁷

In *Berryman*, the court emphasized the right to privacy afforded to fit parents.⁹⁸ The court quoted *Troxel* in stating “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”⁹⁹ Furthermore, “[t]he State’s responsibility to protect children from abusive parents does not authorize the State to oversee the internal affairs of every family.”¹⁰⁰ Quoting *Parham*, the *Berryman* court wrote “the statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.”¹⁰¹ Clearly, Texas courts not only reiterate national sentiments to protect parental authority

⁸⁹ *E.g.*, *In re Berryman*, 629 S.W.3d 453 (Tex. App. 2020).

⁹⁰ *Id.* at 460.

⁹¹ *Id.*

⁹² *Id.* at 455.

⁹³ *Id.* at 460–61.

⁹⁴ *Id.* at 460.

⁹⁵ *Id.*

⁹⁶ *Id.* at 460 n.6.

⁹⁷ *Id.* at 461.

⁹⁸ *Id.* at 453.

⁹⁹ *Id.* at 461 (quoting *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 461 (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979)) (emphasis removed).

but also emphasize the importance of a family's right to privacy outside the government's reach.

Moreover, Texas courts have declined to extend the definition of child abuse under chapter 261 of the Texas Family Code "so broadly as to encourage governmental overreach."¹⁰² Texas courts reiterate again and again the broad parental authority over their children and that the state may interfere with family autonomy only "to protect children from genuine abuse and neglect by parents who are unfit."¹⁰³ Ultimately, Texas courts mimic the national protections afforded to parents in terms of decision-making for their children.

D. The State of Transgender Issues in Texas Reflects the Clashing Opinions Underscoring the Discussion

Paxton touts his opinion as quashing "certain procedures done on minors such as castration, fabrication of a 'penis' using tissue from other body parts . . . prescription of puberty-suppressors and infertility-inducers and the like" by deeming them "abuse" under § 261.001 of the Texas Family Code."¹⁰⁴ Typically, the argument for such paternalistic policies rests on dated notions of the traditional family and gender norms. For example, the Heritage Foundation, a prominent conservative think tank in Washington D.C. published an article in 2018 detailing the "contradictions" imposed within "transgender ideology."¹⁰⁵ In this article, the author argues "feeling like a man" does not "make someone a man" and that feelings cannot change the objective question of sex.¹⁰⁶ Ultimately, the author determines that transgender "beliefs" do not "determine reality."¹⁰⁷ These antiquated notions of identity reflect the traditional idea that a person's biological sex as assigned at birth determines their gender identity for the remainder of their life.

On the other hand, critics of anti-affirmation legislation usually point to the scientific evidence backing gender-affirming care. For example, a 2010 study of transgender adults and adolescents found those receiving gender-affirming care

¹⁰² *Id.* at 461; *see also* *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 468 (Tex. 2020) ("Courts must construe statutes to avoid constitutional infirmities").

¹⁰³ *E.g.*, *In re A.M.*, 630 S.W.3d 25, 26 (Tex. 2019).

¹⁰⁴ *AG Paxton Declares So-Called Sex-Change Procedures on Children and Prescription of Puberty Blockers to Be "Child Abuse" Under Texas Law*, OFF. TEX. ATTY GEN. (Feb. 21, 2022), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-declares-so-called-sex-change-procedures-children-and-prescription-puberty-blockers-be>.

¹⁰⁵ Ryan T. Anderson, *Transgender Ideology is Riddled with Contradictions. Here are the Big Ones.*, THE HERITAGE FOUND. (Feb. 9, 2018), <https://www.heritage.org/gender/commentary/transgender-ideology-riddled-contradictions-here-are-the-big-ones>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

reported an improvement in their quality of life.¹⁰⁸ Untreated gender dysphoria is associated with depression, anxiety, suicidal thoughts, and other mental health problems.¹⁰⁹ Transgender youth engaging in gender-affirming care, however, experience a decrease in depression, anxiety, suicidal thoughts, and psychological distress.¹¹⁰ Ultimately, research “consistently demonstrates that gender diverse youth have better mental health outcomes’ when they have access to gender-affirming healthcare.”¹¹¹

Paxton’s recommendation is not unique in its attempt to minimize trans youth, but it is unique in his direction that Texas DFPS investigate families of trans children engaging in gender-affirming care.¹¹² Another aspect that makes the Texas climate unique is Governor Abbott’s subsequent directive ordering DFPS to begin investigations.¹¹³ Although this directive and subsequent investigations were halted through a court injunction,¹¹⁴ the actions of Texas officials seriously affected the trans community in Texas.

E. Agency Independence From the Executive is a Critical Aspect in the Infrastructure of the Texas Government

Another aspect of Texas’s government that is important to understand in addressing the actions of the executive is the long-standing history of an autonomous system of administrative agencies. The Texas Constitution provides unique protections to state administrative agencies. Under the Texas Constitution, the executive power is “spread out across several distinct elected offices, and the [l]egislature has over the years created a wide variety of state agencies . . . whose animating statutes do not subject their decisions to the Governor’s direct control.”¹¹⁵

¹⁰⁸ Alexa Sussmane, *The Far-Right Push to Outlaw Gender-Affirming Treatment for Minors*, 30 TUL. J.L. & SEXUALITY 91, 99 (2021). To read the study in full, see Mohammad Hassan Murad, Mohamed B Elamin, Magaly Zumaeta Garcia, Rebecca J Mullan, Ayman Murad, Patricia J Erwin & Victor M Montori, *Hormonal Therapy and Sex Reassignment: A Systemic Review and Meta-Analysis of Quality of Life and Psychosocial Outcomes*, 72 CLINICAL ENDOCRINOLOGY 214 (2010)).

¹⁰⁹ THE TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020 3 (2020), <https://www.thetrevorproject.org/survey-2020/>.

¹¹⁰ *Developments in the Law- Intersection in Healthcare and Legal Rights: Chapter One: Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Care for Minors*, 234 HARV. L. REV. 2163, 2168 (2021).

¹¹¹ *Id.* at 2168 (quoting AACAP Statement Responding to Efforts to Ban Evidence-Based Care for Transgender and Gender Diverse Youth, AM. ACAD, CHILD & ADOLESCENT PSYCHIATRY (Nov. 8, 2019), https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx).

¹¹² Eleanor Klibanoff, *Ken Paxton, Lawyers for Parents of Trans Kids Disagree on Whether Child Abuse Investigations Can Continue*, THE TEX. TRIB. (Mar. 15, 2022), <https://www.texastribune.org/2022/03/14/transgender-child-abuse-paxton-appeal/>.

¹¹³ *Id.*

¹¹⁴ *In re Abbott*, 645 S.W.3d 276 (Tex. 2022).

¹¹⁵ *Id.* at 280.

One such agency with power vested from the legislature is the state DFPS office.¹¹⁶ Because no similar protections are provided under the U.S. Constitution, the Department relies largely on state protections for independence. The independence afforded to state agencies means neither the attorney general’s opinion nor the Governor’s directive for investigation bound DFPS into actually undergoing such investigations.¹¹⁷

In 2022, the Texas Supreme Court made clear that “neither the Governor nor the Attorney General has statutory authority to directly control DFPS’s investigatory decisions.”¹¹⁸ Although the Court acknowledged that “DFPS may have considered itself bound” by the executive’s actions, the “[l]egislature has granted to DFPS, not to the Governor or the Attorney General, the statutory responsibility to ‘make a prompt and thorough investigation of a report of child abuse or neglect.’”¹¹⁹ The judicial system, unlike the executive, *does* play a central role in child welfare.¹²⁰ Though DFPS does not need court authorization to investigate a potentially abusive situation, it does rely on court authorization to actually intervene in the circumstances.¹²¹ Because of this position of the judiciary, the court “act[s] as the gatekeeper against unlawful interference in the parent-child relationship.”¹²² On the basis of these principles the court in *In re Abbott* affirmed the Department’s discretion to investigate reports of child abuse regardless of the non-binding opinions of the Governor and Attorney General. The actions of the *In re Abbott* court highlight the importance of preserving the autonomy of administrative agencies against intrusion from the executive.

II. ARGUMENT

A. Proposed Legislative Solution

States other than Texas have introduced legislation protecting healthcare for LGBTQ+ people.¹²³ California, for example, implemented insurance nondiscrimination laws, which bar health insurers from explicitly refusing to cover transgender healthcare benefits.¹²⁴ Moreover, certain states’ Medicaid policy explicitly covers healthcare related to gender transition for transgender individuals.¹²⁵ Although there are no laws currently in place specifically protecting

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 281.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting TEX. FAM. CODE § 261.301(a))

¹²⁰ *Id.*

¹²¹ *Id.* at 282.

¹²² *Id.*

¹²³ *Medicaid Coverage of Transgender-Related Health Care*, MOVEMENT ADVANCEMENT PROJECT, <https://www.mapresearch.org/equality-maps/healthcare/medicaid> (last visited Oct. 15, 2023).

¹²⁴ *Id.*

¹²⁵ *Id.*

a transgender minor's right to engage in gender-affirming care with parental consent, such legislation would bolster the constitutional protections in place thereby limiting the prohibition of such healthcare. One way to prevent further misinterpretation of the Texas Family Code would be to amend the code to provide some protections for the healthcare of transgender adolescents.

Texas legislators should propose legislation clarifying a parent's authority to make medical decisions for their child and protecting the right to medical treatments with proven scientific benefits. Specifically, legislators must codify protections for parental authority to make decisions regarding optional medical procedures with scientifically proven benefits to certain populations, with approval by a licensed medical professional. With these protections, parents of trans minors would have the discretion to allow their child to engage in gender-affirming care upon approval from a medical professional, while still protecting children from potentially abusive medical treatments. Although bills have been introduced in the Texas Legislature limiting access to gender-affirming care, no such bill has been passed by the House or Senate. By amending the Texas Family Code, the legislature could cement protections for constitutionally recognized parental authority and initiate protections for transgender minors in the state.

B. Applying the U.S. and Texas Constitutions to Paxton's Recommendation

Attorney General Ken Paxton's recommendation violates multiple principles in the United States and Texas Constitutions, and the Texas legislature should amend the Texas Family Code to prevent future infringement into constitutionally protected areas. The following Part will apply Paxton's recommendation to the constitutional principles detailed above and explain the violations that would result from implementing Paxton's recommendation.

i. Equal Protection

Because of the Court's ruling in *Bostock* and denial of cert in *Grimm*, the Texas Supreme Court should treat Paxton's discriminatory regulation as a gender-based classification, thus making it subject to intermediate scrutiny. In order to survive intermediate scrutiny, Paxton's recommendation must be substantially related to a legitimate government interest.¹²⁶ The underlying rationale of the opinion appears to be aimed at protecting the best interest of a child.¹²⁷ The Supreme Court has previously recognized the legitimate state interest in protecting the welfare of the child.¹²⁸ The actions of the Texas executive could be viewed as an attempt to protect the welfare of a child, thus making it a legitimate state interest; however, scientific data fails to support the idea that gender-affirming care harms a

¹²⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

¹²⁷ 2022 Tex. Op. Att'y Gen. No. KP-0401.

¹²⁸ *See generally Santosky v. Kramer*, 455 US 745, 766–767 (1982) (describing the *parens patriae* interest).

trans child's welfare.¹²⁹ The bulk of Paxton's argument lies in the idea of "genital mutilation"—that medical procedures are being done on children with the effect of sterilization.¹³⁰ However, the World Professional Association for Transgender Health (WPATH) specifies in their recommended guidelines that gender reassignment surgery should not be undergone until stringent criteria are met, including that the patient be over eighteen years old.¹³¹ Under these guidelines, which provide the leading standards for gender-affirming care, no "genital mutilation" is being performed on any minors in Texas. There is little, if any, evidence showing Texas parents are consenting to gender reassignment surgery at such a high rate as to warrant governmental interference into child welfare.

Moreover, Paxton and Abbott claim gender-affirming treatment for transgender teens harms the child's physical and mental welfare.¹³² In reality, scientific surveys have revealed an overwhelming success rate following gender-affirming treatments, including significant mental health improvements.¹³³ Further, science does not support Paxton's claim that gender-affirming care physically harms children even beyond surgical procedures. Treatments typically used for gender-affirming care, like GnRH analogues (or puberty blockers), are also used as therapy for prostate cancer, infertility, and particularly precocious puberty transitions for cisgender children.¹³⁴ Because of the lack of scientific evidence indicating actual harm to a child's welfare as a result of gender-affirming care, Paxton's recommendation is not substantially related to the legitimate state interest of protecting a child's welfare.

Previous cases addressing similar discriminatory sentiments provide insight into analyzing an equal protection claim under these circumstances. In *Baskin v. Bogan*, the 7th Circuit Court of Appeals published an equal protection analysis with arguments analogous to Paxton's opinion.¹³⁵ There, the court addressed an equal protection challenge to laws in Indiana and Wisconsin refusing to authorize same-sex marriage or to recognize same-sex marriages from other states.¹³⁶ In its decision, the court detailed the relationship between policies that are discriminatory toward a minority group and the equal protection clause.¹³⁷ The court cited

¹²⁹ Sussmane, *supra* note 108, at 99.

¹³⁰ 2022 Tex. Op. Att'y Gen. No. KP-0401.

¹³¹ E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH (SPECIAL ISSUE) 1, 5, 66 (2022).

¹³² 2022 Tex. Op. Att'y Gen. No. KP-0401.

¹³³ Chantal Wiepjes, Nienke Nota, Christel de Blok, Maartje Klaver, Annelou de Vries, Annelijn Wensing-Kruger, Renate de Jongh, Mark-Bram Bouman, Thomas Steensma, Peggy Cohen-Kettenis, Louis Gooren, Baudewijntje Kreukels & Martin den Heijer, *The Amsterdam Cohort of Gender Dysphoria Study (1972-2015): Trends in Prevalence, Treatment, and Regrets*, 15 J. SEXUAL MED. 582, 589 (2018).

¹³⁴ *Gonadotropin Releasing Hormone (GnRH) Analogues*, NAT'L LIBR. MED. (Mar. 20, 2018), <https://www.ncbi.nlm.nih.gov/books/NBK547863/#~:text=The%20GnRH%20analogues%20all%20require,puberty%2C%20gender%20dysphoria%20and%20infertility.>

¹³⁵ 766 F.3d 648 (7th Cir. 2014).

¹³⁶ *Id.* at 653–54.

¹³⁷ *Id.* at 654–55.

scientific evidence indicating that sexual orientation is an immutable characteristic,¹³⁸ then went on to analyze the harm of the policy on the minority group.¹³⁹

The court noted that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, [and] the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community.”¹⁴⁰ In order to justify their discriminatory policy, the state must “establish a clearly offsetting governmental interest in that rejection [of same-sex marriage].”¹⁴¹ Relying again on scientific evidence to rebut the alleged harms that result from same-sex marriage, the court determined that “when there is no justification for government’s treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws.”¹⁴²

In rejecting Wisconsin’s justification for their discriminatory policy, the court stated “tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition.”¹⁴³ The court unequivocally ruled that “if no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does them harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause.”¹⁴⁴ Ultimately, both statutes were struck down for failing to survive equal protection scrutiny.¹⁴⁵

The court’s ruling in *Baskin* can be applied to Paxton’s recommendation; Paxton’s opinion, and the Governor’s directive, are based largely on notions of tradition. However, scientific evidence reveals that these traditional notions are unsound and harmful to a minority group. LGBTQ+ youth, particularly transgender youth, are a targeted minority subject to discrimination and hate. Because of this, the state’s discriminatory policy must be supported with sufficient justification.¹⁴⁶ Paxton’s opinion is not backed by sufficient evidence indicating justification. Instead, the evidence contradicts Paxton’s claim that gender-affirming care is harmful to trans minors.

An analysis under the Texas equal protection clause leads to similar conclusions. As discussed previously, the Texas Constitution requires legislation that discriminates based on class be narrowly tailored to serve a compelling state

¹³⁸ *Id.* at 657–658.

¹³⁹ *Id.* at 658.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 659.

¹⁴² *Id.* at 664.

¹⁴³ *Id.* at 666.

¹⁴⁴ *Id.* at 667 (emphasis removed).

¹⁴⁵ *Id.* at 672.

¹⁴⁶ *E.g., id.* at 654–55 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003); *United States v. Virginia*, 518 U.S. 515, 531–33 (1996)).

interest.¹⁴⁷ Protecting a child's welfare is a compelling state interest, but that alone is insufficient to survive an equal protection challenge. The government action must also be narrowly tailored.¹⁴⁸ Though the evidence behind the attorney general's attempt to safeguard child welfare is contradictory at best, should a court find Paxton's opinion to be protecting a compelling state, the proposed action must be narrowly tailored in order to withstand judicial scrutiny. The actions of the Texas executive branch allow government intrusion into the private family realm—particularly in the medical decision-making process—well beyond access to gender-affirming care.¹⁴⁹ Not only does state-sanctioned investigations into families of trans minors infringe on their medical autonomy, but Paxton's proposal would also create significant barriers to patients relying on puberty blockers and hormone treatments to treat other diagnoses. This sort of expansive categorization of certain medical treatments necessitates a broader scope than the one intended by Paxton. As a result, Attorney General Paxton's opinion fails to satisfy the narrowly tailored requirement imposed by the Texas equal protection clause.

A careful analysis under the equal protection clauses of both the United States and Texas Constitutions reveals the inherent flaws in Paxton's opinion and Abbott's subsequent directive. Under the federal intermediate scrutiny standard, the attorney general's recommendation falls short due to evidentiary holes underlying his central claims—significantly undermining the justification necessary for such discriminatory state action. Under the Texas Constitutional standards, Paxton's argument fails for being over-broad, and struggles to survive the compelling state interest requirement because of the tenuous relationship between the proposed government action and actually protecting child welfare.

ii. Substantive Due Process

Under the Fourteenth Amendment's due process protections, legislation that is arbitrary or without reasonable relation to some purpose within the competency of the state will fail.¹⁵⁰ Paxton's recommendation is not only arbitrary and capricious in its targeting of trans youth, but also fails to serve a purpose within the competency of the state. There is no legitimate state interest in attempting to legislate trans youth out of existence, and Paxton's recommendation fails to display any genuine need for governmental interference into a parent's constitutionally protected right to raise their children as they see fit. Moreover, Paxton's opinion lacks reasonable relation to some purpose within the competency of the state. Although protecting the physical and mental well-being of children does fall within the competence of the state in certain circumstances, those circumstances involve

¹⁴⁷ Bell v. Low Income Women of Tex., 95 S.W.3d 253, 257 (Tex. 2002).

¹⁴⁸ *Id.*

¹⁴⁹ 2022 Tex. Op. Att'y Gen. No. KP-0401.

¹⁵⁰ Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

genuine abuse or neglect.¹⁵¹ Beyond broad claims of genital mutilation, Paxton lacks sufficient evidence of actual physical or mental harm being done to Texas minors undergoing gender-affirming care necessary to rebut the overwhelming evidence indicating the benefits of these treatments and outweigh a parent's fundamental right to the care, custody, and control of their children.¹⁵² Conversely, there is substantial evidence indicating that providing access to gender-affirming care—instead of restricting it—improves the mental well-being of transgender minors.

When compared to the standards laid out by the court in *Troxel* and *Prince*, Paxton's recommendation clearly fails to meet the heightened level of scrutiny required to justify infringement on a parent's constitutionally protected right over the "care, custody, and control" of their children.¹⁵³ Providing access to gender-affirming care for transgender teens suffering from the damaging effects of gender dysphoria can hardly be said to be an "evil within the state's police power" as required by *Prince*.¹⁵⁴ Here, the private interest that will be affected by the official action greatly outweighs the moral argument posed in favor of the government's interest.

Article 1 § 19 of the Texas Constitution provides protection for procedural and substantive due process rights. This provision echoes the United States Constitution by protecting fundamental rights and liberties against government interference.¹⁵⁵ Texas courts found the right to privacy to be a fundamental right,¹⁵⁶ as well as the right to personal decisions involving raising a child.¹⁵⁷ Paxton's recommendation would infringe upon the privacy rights of transgender minors and their families, and encroach upon the parents' personal decision-making rights in raising their children. Moreover, the Attorney General's opinion lacks sufficient justification connecting it to the legitimate state interest of protecting child welfare.

The fit-parent presumption embedded in Texas law also presents a challenging obstacle for the executive's actions to overcome. In 2020, the Texas Supreme Court reiterated the state's presumption that fit parents act in the best interest of their child.¹⁵⁸ In order to overcome this presumption meant to protect a family's right to privacy, the state must show that remaining in the situation would "significantly impair the child's physical health or emotional development."¹⁵⁹ Moreover, in *C.J.C.*, the court highlighted a parent's fundamental right to make

¹⁵¹ *E.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

¹⁵² *See* 2022 Tex. Op. Att'y Gen. No. KP-0401.

¹⁵³ *Troxel*, 530 U.S. at 65.

¹⁵⁴ *Prince*, 321 U.S. at 169.

¹⁵⁵ *Estes v. State*, 566 S.W.3d 342, 347 n.8 (Tex. App. 2018).

¹⁵⁶ *Doe v. Tarrant Cnty. Dist. Att'y's Off.*, 269 S.W.3d 147, 155 (Tex. App. 2008).

¹⁵⁷ *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

¹⁵⁸ *In re C.J.C.*, 603 S.W.3d 804, 807 (Tex. 2020).

¹⁵⁹ *Id.* at 813 (quoting TEX. FAM. CODE § 153.131(a)).

decisions regarding the upbringing of their child.¹⁶⁰ In this case, the court determined that the “fit parent presumption” applies in proceedings in which a non-parent seeks conservatorship over the objection of a child’s fit parent.¹⁶¹ Here, the fit parent presumption should apply as it involves a parent’s fundamental right to make a decision regarding the upbringing of their child.

Moreover, just as in *C.J.C.*, it would be inappropriate for a branch of government to substitute its determination of the child’s best interest for the parent’s.¹⁶² Because there is no evidence of genuine abuse or neglect occurring in cases where a parent is allowing their child to engage in gender-affirming care, there is no reason why the fit parent presumption should not remain intact. Paxton’s opinion fails to place forth any argument compelling enough to overcome the high burden of rebutting the fit parent presumption. Ultimately, Attorney General Paxton’s proposed state action does not satisfy the substantive due process requirements in the United States and Texas Constitutions.

iii. Parental Authority

Troxel protects a parent’s due process right by safeguarding their ability to make important decisions about the “care, custody, and control of their children” without government interference.¹⁶³ In *Parham*, the Supreme Court recognized a parent’s “dominant” role in the medical decision-making process of their children, and that “the traditional presumption that parents act in the best interests of their child should apply.”¹⁶⁴ On the other hand, *Prince* specifies that parental authority can be limited in decision making to prevent injury to the child.¹⁶⁵ When applying these principles to Paxton’s recommendation, the only justification for infringing on a parent’s dominant right in medical decision making would be to prevent injury to the child.

Peer reviewed scientific studies have detailed the physical and mental health of adolescents before, during, and after receiving gender-affirming care and found a significant increase in the psychosocial functioning in the twelve months following treatment.¹⁶⁶ Furthermore, the Office of Population Affairs found research demonstrating gender-affirming care “improves the mental health and overall well-

¹⁶⁰ *Id.* at 812.

¹⁶¹ *Id.* at 819.

¹⁶² *Id.* at 815.

¹⁶³ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹⁶⁴ *Parham v. J.R.*, 442 U.S. 584 (1979).

¹⁶⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

¹⁶⁶ Rosalia Costa, Michael Dunsford, Elin Skagerberg, Victoria Holt, Polly Carmichael & Marco Colizzi, *Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria*, 12 *J. SEXUAL MED.* 2206, 2206 (2015).

being of gender diverse children and adolescents.”¹⁶⁷ When considering the scientific evidence, it is clear that gender-affirming care does not injure a child’s wellbeing, and Paxton’s opinion lacks sufficient justification to infringe on a parent’s federal right of medical decision making.

Both federal and state courts have permitted infringement on fundamental constitutional rights in circumstances in which science clearly indicates the best course of action for the minor. For example, in *O.G. v. Baum*, the Texas Court of Appeals addressed the relationship of freedom of religion and parental authority with life-saving measures.¹⁶⁸ There, Harris County Child Protective Services was appointed temporary managing conservator of a 16-year-old boy that was struck by a train and severely injured, consenting to a blood transfusion on behalf of the minor that was deemed necessary by a doctor to save the right arm of the child.¹⁶⁹ However, the minor had signed a form in which he refused consent for a transfusion and released the hospital from all liability resulting from following his request.¹⁷⁰ CPS filed suit and was appointed temporary managing conservator on the sole ground of the “parent’s refusal to allow physicians to administer a transfusion during the minor’s upcoming surgery, if necessary.”¹⁷¹

In its opinion, the *Baum* court noted that a parent’s constitutional right to religious freedom “does not include the liberty to expose their child to ill health or death.”¹⁷² The *Baum* court also cited other federal decisions in determining a refusal to recognize “parental constitutional rights to refuse blood transfusions for their minor children when a court appoints a guardian with the authority to consent to a transfusion over the parents’ objections.”¹⁷³ Ultimately, Texas courts have carved out narrow exceptions when the state’s interest in protecting the life of the minor overrides supposed constitutional freedoms.

Texas courts mirror sentiments similar to the national standard in their case law, providing broad deference to parental authority.¹⁷⁴ *In re Berryman* specified that mere disagreement by the state with the parent’s decision is insufficient to “justify governmental intrusion into the family unit.”¹⁷⁵ Moreover, Texas courts have declined to extend the definition of child abuse under Chapter 261 of the Texas Family Code “so broadly as to encourage governmental overreach.”¹⁷⁶ Again and again Texas courts reiterate the broad parental authority over their children and

¹⁶⁷ *Gender-Affirming Care and Young People*, OFF. OF POPULATION AFFS., <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf> (last visited Jan. 26, 2023).

¹⁶⁸ *O.G. v. Baum*, 790 S.W.2d 839 (Tex. App. 1990).

¹⁶⁹ *Id.* at 840.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1941)).

¹⁷³ *Id.* at 841.

¹⁷⁴ *E.g.*, *In re Berryman*, 629 S.W.3d 453 (Tex. App. 2020).

¹⁷⁵ *Id.* at 460.

¹⁷⁶ *Id.* at 461 (citing *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 468 (Tex. 2020)).

that the state may interfere with family autonomy only “to protect children from genuine abuse and neglect by parents who are unfit.”¹⁷⁷ The courts’ narrow interpretation of child abuse demands genuine physical abuse or neglect in order for state interference to be justified.

Paxton’s recommendation posits that gender-affirming treatment could result in sterilization, which would deprive the minor of the fundamental right to reproduce.¹⁷⁸ Paxton alleges this right to procreate is protected under the Fourteenth Amendment because of *Skinner v. Oklahoma*.¹⁷⁹ This deprivation, Paxton claims, results in substantial harm to the child.¹⁸⁰ However, in *Skinner v. Oklahoma*, the Supreme Court addressed whether the involuntary sterilization of inmates violated the equal protection clause.¹⁸¹ Though the Court did state that “marriage and procreation are fundamental to the very existence and survival of the [human] race,” it did not institute the requirement that states take all measures to ensure the opportunity for marriage and procreation are readily available to everyone regardless of personal decisions.¹⁸² If *Skinner* required states to provide access to what Paxton claims is a fundamental right to procreate, the state must also provide accommodations to people struggling with infertility and would likely severely limit access to hysterectomies and vasectomies.

As stated earlier, gender-affirming bottom surgeries, which can lead to sterilization, are not recommended for children under eighteen.¹⁸³ GnRHA-based pubertal suppression treatments are entirely reversible and can be reversed for most patients, but can be irreversible for some.¹⁸⁴ While fertility is affected while treatments are being undergone, resumption in menstruation began approximately a year after discontinuing treatments.¹⁸⁵ The fertility effects following estrogen and testosterone therapies are not as clear.¹⁸⁶ However, it is much more uncommon for minors to engage in hormone therapies than puberty suppressants.¹⁸⁷ In fact, less than 15,000 transgender minors engaged in hormone treatments from 2017 to 2021;

¹⁷⁷ *In re A.M.*, 630 S.W.3d 25, 26 (Tex. 2019).

¹⁷⁸ 2022 Tex. Op. Att’y Gen. No. KP-0401.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 316 U.S. 535, 536 (1942)

¹⁸² *Id.* at 541.

¹⁸³ E. Coleman, et al., *supra* note 131.

¹⁸⁴ Philip J. Cheng, Alexander W. Pastuszak, Jeremy B. Myers, Isak A. Goodwin & James M. Hotaling, *Fertility Concerns of the Transgender Patient*, 8 TRANSLATIONAL ANDROLOGY AND UROLOGY 209, 211 (2019).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See generally*, Robin Respaut & Chad Terhune, *Putting Number on the Rise in Children Seeking Gender Care*, REUTERS INVESTIGATES (Oct. 6, 2022, 11:00 AM), <https://www.reuters.com/investigates/special-report/usa-transyouth-data/#:~:text=At%20least%2014%2C726%20minors%20started,according%20to%20the%20Komodo%20analysis>.

this comprises less than 12% of the total number of children aged 6 to 17 who were diagnosed with gender dysphoria from 2017 to 2021.¹⁸⁸

The scientific evidence so clearly indicates the harmful effects of anti-affirmation legislation that the American Medical Association sent a letter to governors “urging governors across the country to oppose legislation prohibiting transition-related care for minors”¹⁸⁹ and the American Academy of Pediatrics released a statement expressing its ongoing support for access to gender-affirming care for transgender youth.¹⁹⁰ Because of the questionable relationship between Paxton’s proposal and substantiated claims of genuine harm to the wellbeing of minors, his recommendation lacks the necessary foundation to justify state intrusion into the protected family sphere.

C. Counterarguments to Providing Access to Gender-Affirming Care

Paxton characterizes his recommendation as a critical response to the “horrors that flow from the merging of medicine and misguided ideology.”¹⁹¹ Moreover, the brunt of Paxton’s recommendation characterizes gender-affirming care as consisting almost entirely of “genital mutilation” and fertility killing hormone therapies.¹⁹² As previously discussed, the number of Texas adolescents engaging in hormone treatments with the possibility of long-term fertility effects is near negligible. Instead, puberty blockers with reversible effects are more commonly prescribed. Nonetheless, it is important to protect the rights and health of children with gender dysphoria, regardless of how small a population it might be in Texas. Transgender teenagers face a higher rate of depression and suicide compared to their cisgender counterparts, with more than 50% of transgender and nonbinary youths reporting they had considered killing themselves.¹⁹³ Over 20% have actually attempted suicide.¹⁹⁴ Although Paxton writes under the guise of protecting the well-being of Texas youth, the population being targeted by his

¹⁸⁸ *Id.*

¹⁸⁹ Dan Avery, *American Medical Association Urges Governors to Veto Transgender Medical Bans*, NBC NEWS (Apr. 27, 2021, 5:24 PM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/american-medical-association-urges-governors-veto-transgender-medical-rcna779>.

¹⁹⁰ Alyson Sulaski Wyckoff, *AAP Continues to Support Care of Transgender Youths as More States Push Restrictions*, AAP NEWS (Jan. 6, 2022), <https://publications.aap.org/aapnews/news/19021/AAP-continues-to-support-care-of-transgender?autologincheck=redirected>.

¹⁹¹ *AG Paxton Declares So-Called Sex-Change Procedures on Children and Prescription of Puberty Blockers to Be “Child Abuse” Under Texas Law*, *supra* note 105.

¹⁹² 2022 Tex. Op. Att’y Gen. No. KP-0401.

¹⁹³ *Facts About LGBTQ Youth Suicide*, THE TREVOR PROJECT (Dec. 15, 2021), <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/>.

¹⁹⁴ *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, HUM. RTS. CAMPAIGN (Sept. 12, 2018), <https://www.hrc.org/news/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen> (detailing that more than half of teenage trans men, almost a third of teenage trans women, and just over 40% of nonbinary teens have attempted suicide).

recommendation will almost certainly experience negative impacts on their mental health.

Many safeguards are in place to ensure hasty decisions are not made regarding gender-affirming care.¹⁹⁵ In order to qualify for puberty suppressing hormones, the WPATH requires at minimum that the adolescent demonstrate a long-lasting and intense pattern of gender dysphoria, gender dysphoria must emerge or worsen with the onset of puberty, any other psychological or medical problems are addressed and the adolescent is stable enough to start treatment, and the adolescent must give informed consent.¹⁹⁶ More stringent criteria must be met for hormonal treatments, but informed consent by the adolescent is still required.¹⁹⁷ Because of this requirement, the adolescent must be informed about the potential fertility consequences of certain treatments.¹⁹⁸ Unlike Paxton's depiction of gender-affirming care, the process of receiving healthcare as a transgender adolescent is a rigorous process with multiple safeguards. Though WPATH standards of care only provide a flexible guideline for practitioners, they exemplify the important criteria that should be met before permitting minors to engage in gender-affirming care. The most important of these criteria—consent of the minor—should be emphasized by any future legislation addressing this issue.

Another argument for limiting access to gender-affirming care is that gender confusion is normal among children, and unnecessary medical interventions might harm the child and cement lifelong problems. However, scientific evidence again illuminates the actual consequences of gender-affirming care on those who choose to de-transition. Adolescents on puberty suppressants are able to easily stop treatment and continue the natural puberty process of their sex assigned at birth.¹⁹⁹ In a study of patients who chose to discontinue or reverse gender-affirming treatment, it was found that 78% of participants expressed positive feelings, ambivalence, or no regrets associated with their past interventions.²⁰⁰ This study illuminates the true crisis at the brunt of Paxton's argument—what if the minor undergoing gender-affirming care changes their mind. Not only is most of the gender-affirming care undergone by minors reversible, but a vast majority of participants did not report any negative or regretful feelings for having undergone gender-affirming care then discontinuing or reversing treatments.

In general, the study found the need for more understanding from medical professionals toward those choosing to de-transition rather than limit access to gender-affirming care.²⁰¹ Because transgender teens experience depression and

¹⁹⁵ E. Coleman, et al., *supra* note 131.

¹⁹⁶ *Id.* at 59–64.

¹⁹⁷ *Id.* at 37–38, 61–62.

¹⁹⁸ *Id.* at 39.

¹⁹⁹ *Id.* at 112.

²⁰⁰ Kinnon R. MacKinnon, Hannah Kia, Travis Salway, Florence Ashley, Ashley Lacombe-Duncan, Alex Abramovich, Gabriel Enxuga & Lori E. Ross, *Health Care Experiences of Patients Discontinuing or Reversing Prior Gender-Affirming Treatments*, JAMA NETWORK, July 25, 2022, at 7.

²⁰¹ *See id.* at 8.

anxiety at much higher rates than their peers, restricting access to gender-affirming care with proven benefits to transgender mental health likely causes more harm to adolescents than the (unlikely) possibility that a minor who undergoes gender-affirming care comes to regret their decision. Reliable evidence substantiating the idea that restricting access to gender-affirming care negatively impacts the well-being of transgender youth continually discounts Paxton's extreme claim that the harm to children is so severe as to authorize investigations by the Texas DFPS.

Nuanced consideration of Paxton's proposed role of the state's DFPS reveals further irrationality underscoring the attorney general's opinion. More specifically, the combined commands from Paxton and Abbott for DFPS function as the enforcement mechanism for the misguided labeling of gender-affirming care as child abuse places an undue burden on the already struggling Department. Paxton's recommendation calls upon DFPS to investigate claims of "child abuse" spurring from parents allowing their children to participate in gender-affirming care.²⁰² Governor Greg Abbott echoed Paxton's sentiments by ordering the DFPS to investigate families who have provided gender-affirming care.²⁰³ The DFPS response to this directive included a large number of resignations and internal confusion as to what the directive demanded—reflecting the fragile architecture of a system facing massive challenges with chronically overworked, overwhelmed, and underpaid employees.²⁰⁴

Aside from Paxton and Abbott's directives, the working conditions at the Department are described as a "complete and utter chaos."²⁰⁵ The Department struggles to address the growing number of children suffering from true abuse or neglect due to an extreme lack of suitable placements for the children.²⁰⁶ In 2021, it was reported that over 200 children in the Texas foster care system were sleeping in offices as a result of the "capacity crisis."²⁰⁷ In response to this crisis, the Texas Legislature passed a new law barring foster children from sleeping in offices.²⁰⁸ The capacity crisis is just the newest struggle facing the state's DFPS; in 2011, a class action lawsuit was brought against Texas by children under the state's conservatorship, alleging the state failed to protect them from an unreasonable risk

²⁰² 2022 Tex. Op. Att'y Gen. No. KP-0401.

²⁰³ Eleanor Klibanoff, *Distraught Over Orders to Investigate Trans Kids' Families, Texas Child Welfare Workers are Resigning*, THE TEX. TRIB. (Apr. 11, 2022), <https://www.texastribune.org/2022/04/11/texas-trans-child-abuse-investigations/>.

²⁰⁴ *Id.*

²⁰⁵ Jamie Landers, *Foster Care Workers at Dallas Town Hall Forum Detail Pressures of Helping Kids in Overwhelmed System*, THE DALL. MORNING NEWS (Dec. 12, 2021, 4:48 PM), <https://www.dallasnews.com/news/2021/12/12/foster-care-workers-at-dallas-town-hall-forum-detail-pressures-of-helping-kids-in-overwhelmed-system/>.

²⁰⁶ *Id.*

²⁰⁷ Avery Travis, *'A Catastrophe': More Than 200 Kids Sleeping in CPS Offices as Need for Foster Care Intensifies*, KXAN (May 5, 2021, 2:08 PM), <https://www.kxan.com/news/texas/237-children-sleeping-in-cps-offices-as-texas-foster-care-capacity-crisis-worsens/>.

²⁰⁸ See S.B. 1896, 87th Leg R.S. (Tex. 2021).

of harm.²⁰⁹ In 2015, a U.S. District Court ruled in favor of the children.²¹⁰ Not only did the district court opinion condemn the current Texas system, but it also instituted specific orders regarding the operation of foster group homes and developing an implementation plan to address the ongoing issues within the system, such as unmanageably high caseloads and high employment turnover, capacity and placement concerns, and failures in the administration and investigation of cases.²¹¹ After years of non-compliance and resulting sanctions, in 2022 the district court announced that it would begin levying “substantial fines” against the state for failing to address the struggling foster care system.²¹² This is on top of the \$50,000 fine per day imposed by the court in 2019, which lasted for three days.²¹³ Because of the existing issues with DFPS, Paxton’s recommendation incorrectly places an undue burden for unnecessary investigations on the Department. For an already struggling foster care system, the last thing Texas DFPS needs is to be responsible for frivolous investigations into legitimate parental decision-making.

On a larger scale, LGBTQ+ youth face unique challenges in the foster care system. Studies have shown that LGBTQ+ youth are overrepresented in the child welfare system—“30% of youth in foster care identify as LGBTQ+ and 5% as transgender, in comparison to 11% and 1% of youth not in foster care.”²¹⁴ Moreover, 13% of LGBTQ+ youth reported being treated poorly by the foster care system, as opposed to the 6% of non-LGBTQ+ youth.²¹⁵ In one study, 78% of LGBTQ+ youth “were removed or ran away from foster placements because of the caregiver’s hostility toward their sexual orientation or gender identity.”²¹⁶ And “[o]ther research has found that as many as 56% of LGBT[Q+] youth in out-of-home care have spent some time without stable housing because they felt safer on the streets than in group or foster homes.”²¹⁷ Considering the struggles faced by Texas DFPS and the particular risk attributed to being LGBTQ+ in the foster care system, it is not only impractical, but also harmful to trans youth to be subjected to investigations.

²⁰⁹ M.D. ex rel. Stukenberg v. Abbot, 152 F. Supp.3d 684, 693–94 (S.D. Tex. 2015), *aff’d in part and rev’d in part*, 907 F.3d 237 (5th Cir. 2018). The case bounced from the Southern District to the Fifth Circuit and back again after the 2018 partial reversal. 977 F.3d 479 (5th Cir. 2020). The most recent order can be found at 509 F. Supp.3d 683 (S.D. Tex. 2020).

²¹⁰ 152 F. Supp. 3d at 828.

²¹¹ *Id.* at 822–828.

²¹² Reese Oxner, *Judge Plans to Levy “Substantial Fines” After Texas Failed to Comply With Court-Ordered Fixes to its Foster Care System*, THE TEX. TRIB. (June 6, 2022, 7:00 PM), <https://www.texastribune.org/2022/06/06/texas-foster-care-sanctions/>.

²¹³ *Id.*

²¹⁴ *Child Welfare*, YOUTH.GOV (last visited Jan. 26, 2023), <https://youth.gov/youth-topics/lgbtq-youth/child-welfare>.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

D. The Practical Consequences of Paxton's Recommendation

The Texas Supreme Court in *Abbott* found the governor and attorney general lacked the statutory authority to directly control the Department's investigatory services.²¹⁸ Although both actors are free to express their views on the Department's investigations, DFPS alone bears legal responsibility for its decisions.²¹⁹ By vesting discretion to investigate in DFPS, the legislature insulates the Department from the whims of the ever-changing executive branch. The Attorney General's opinion and the Governor's directive display the harmful effects that can result from the Department believing it is subject to the control of the executive. Because Paxton's opinion lacks any legitimate legal or scientific basis for his claim that gender-affirming care constitutes child abuse, the Department too lacked any real justification for their investigations.

The actions of the Texas executives also resulted in long-term effects for the Department. Partially due to the Department's decision to investigate families engaging in gender-affirming care, DFPS lost nearly 2,300 employees in 2022—the “highest voluntary exit rate the agency has seen since it became independent in 2017.”²²⁰ As a result of the Attorney General and Governor's actions, in March 2022 the Department had at least nine open investigations into families of trans minors engaging in gender-affirming care.²²¹ Trans minors affected by the Department's investigations have experienced panic attacks, suicidal thoughts, and increased anxiety as a result.²²² One of the unfortunate effects of DFPS involvement in the state's attack on transgender minors is the subversion of public faith in the institution. One of the most important aspects of maintaining agency autonomy is remaining consistent even in the face of the fickle whims of the executive branch. By insulating state administrative agencies from the precarious desires of the executive, the Department is able to minimize their intrusion on the family unit by focusing only on cases of genuine abuse or neglect.

In March 2022 State District Judge Amy Clark Meachum issued an injunction halting investigations into families with transgender minors engaging in gender-affirming care; this decision was then affirmed by the Supreme Court.²²³ The court's injunction protected all members of PFLAG, which included over 600 members in Texas, from investigation by the Department for seeking gender-

²¹⁸ *In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022).

²¹⁹ *Id.*

²²⁰ Casey Parks, *He Came Out as Trans. Then Texas had Him Investigate Parents of Trans Kids.*, THE WASH. POST (Sept. 23, 2022, 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/09/23/texas-transgender-child-abuse-investigations/>.

²²¹ *Id.*

²²² *Id.*

²²³ *In re Abbott*, 645 S.W.3d 276 (Tex. 2022), *aff'g* Doe v. Abbot, No. D-1-GN-22-000977, 2022 WL 831383 (Tex. D. Ct. March 11, 2022).

affirming care.²²⁴ Although Paxton's recommendation is not currently being implemented, it is crucial to pass legislation protecting the right to gender-affirming care in order to prevent future attempts to restrict necessary access to beneficial treatments.

E. Public Policy Considerations Concerning the Effects of State-Sanctioned Discrimination

In Texas, the general public is best served by leaving medical decision-making power in the hands of capable parents. Unless parents are found to have been abusing or neglecting their child, their authority should be respected by the state. Allowing state intervention in any instance in which the state might disagree with a parent's decision in raising their child would create an over-broad reach for the state to infringe on family affairs. Moreover, the state provides vast deference to parents in other areas as well. Parents are given the freedom to raise their child in a certain religion or with specific morals, regardless of whether the state might believe this action to be the best option for the child.²²⁵ Further, we give parents the option to opt out of public or private education institutions and homeschool their children instead—providing even more room for parents' broad discretion over their child's upbringing.²²⁶ Allowing access to gender-affirming care is a serious decision to be made within the family free from state interference. Just as religion and education are largely left in the hands of parents, the fundamental right of fit parents to make decisions regarding the well-being of their child should remain protected from government intrusion.

Restricting the right to gender-affirming care violates constitutional principles and results in real harm to transgender adolescents. Because the substantive due process protections guard an individual's right to generally enjoy privileges of an orderly pursuit of happiness,²²⁷ the government should not intervene in an area with proven increases in mental health. The well-researched connection between transgender youth and mental illness indicates that restricting access to gender-affirming care will likely harm the mental health of many transgender individuals.

These tragic consequences have manifested for Texas teens in different ways, some potentially devastating. For example, the day Governor Abbott announced his directive that families of transgender children receiving gender-affirming care would be investigated by DFPS, Antonio Voe, a transgender teen and recipient of

²²⁴ See *PFLAG v. Abbott*, ACLU (Dec. 21, 2023), <https://www.aclu.org/cases/pflag-v-abbott#:~:text=PFLAG%20joined%20this%20case%20to,600%20members%20across%20the%20state>.

²²⁵ See generally *O.G. v. Baum*, 790 S.W.2d 839, 841 (Tex. App. 1990).

²²⁶ *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994).

²²⁷ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

puberty suppressants, attempted to kill himself because of the State's directives.²²⁸ Voe is just one example of the real, permanent, and life altering effects of restricting gender-affirming care to adolescents suffering from gender dysphoria. According to the American Civil Liberties Union, at least thirteen Texas families have been investigated for participating in gender-affirming care.²²⁹ Each of these investigations has real and painful implications on the entire family and can be devastating to transgender minors—a group already more likely to suffer from severe mental illness. Practically speaking, Paxton's recommendation results in harm to families with transgender children and lacks sufficient support to warrant intrusion into the private family unit.

CONCLUSION

Attorney General Ken Paxton's opinion, concluding that gender-affirming care for transgender minors constitutes child abuse under Chapter 261 of the Texas Family Code, fails to meet numerous constitutional standards. Specifically, it fails an intermediate scrutiny analysis, a strict scrutiny analysis, and is incompatible with settled case law. Paxton's opinion lacks sufficient scientific evidence to support his claim that gender-affirming care presents actual mental or physical harm to the trans teens who engage in such treatments. In contrast, there is a plethora of evidence indicating the benefits of providing trans minors with access to gender-affirming care.

Because of contradictory scientific evidence and the opinion's failure to survive constitutional standards, Paxton's interpretation of the Texas Family Code is flawed in terms of its relationship to gender-affirming care. In order to prevent further misinterpretation—and rectify the executive's discriminatory attempts to investigate gender-affirming care—the Texas Legislature should amend the Texas Family Code to protect a parent's authority to make decisions regarding optional medical procedures with proven benefits. Because the evidence clearly indicates that gender-affirming care is beneficial in treating minors with gender dysphoria, engaging in such treatment with parental consent would fall squarely outside of the government's control.

Paxton's opinion and Governor Abbott's subsequent directive relying on the opinion's interpretation of the law display an unconstitutional overreach into the realm of parental authority. More importantly, the actions of Texas officials caused immense harm to transgender minors. By restricting access to gender-affirming care, Paxton and Abbott further alienate the transgender community and encourage the minimization of gender dysphoria by refusing to recognize it as a legitimate medical condition. Aside from equating gender-affirming care with child abuse, Paxton's opinion also attempts to eliminate the existence of transgender minors by

²²⁸ Declaration of Mirabel Voe at 3, PFLAG v. Abbott, No. D-1-GN-22-002569 (Tex. D. Ct. June 6, 2022), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/2022.06.08_original_petition_-_ex_5_declaration_of_mirabel_voe.pdf; Parks, *supra* note 220.

²²⁹ Parks, *supra* note 220.

refusing to provide them any access to medical care. The Texas Legislature should address this issue by firmly rejecting Paxton's interpretation of the Texas Family Code and amending the code to prevent future investigations based on misguided attempts to suppress the presence of transgender minors in Texas.

However, due to the current political climate in Texas, no such protections are likely to be passed by the legislature in the near future. After the 2022 midterms, Republicans retained control of the Texas legislature by a comfortable margin, free to pass whatever legislation they see fit. Instead, it is more likely that legislation will be passed attacking the rights of trans minors and LGBTQ+ Texans in general. In fact, in 2021, "more than forty proposed bills in Texas targeted trans and nonbinary youth."²³⁰ Also in 2021, the state succeeded in limiting athletic participation by transgender students.²³¹

As a result, much of the responsibility to protect the LGBTQ+ community in Texas rests in the hands of the judiciary. As seen by the Texas Supreme Court's response to the executive's actions in *In re Abbott*, the court system has already begun to curb some of the anti-trans measures being taken in Texas. Moreover, the protections afforded to members of PFLAG by the court also indicate a willingness to stand against attacks on the trans communities. Until the legislature takes steps to codify protections for trans minors, the court must continue to provide a defense to parental authority and the transgender community. The office of Texas Attorney General equips Paxton with a platform to implement discriminatory recommendations targeting a vulnerable population. However, federal and state constitutional protections present authoritative barricades around fundamental rights; and comparing the attorney general's recommendation to the stringent standards imposed by the equal protection clause, substantive due process, and well-established judicial precedent unveils the gross inaccuracies and shortcomings underlying the central themes of his opinion. Until the legislative branch deigns to recognize the inherent value and rights of transgender youth—and codifies protections for fit-parents' medical decision-making authority—the judicial branch bears the responsibility of defending a minority group from prejudicial, invidious, and harmful state action at the hands of public officials sworn to defend constitutional rights for *all* Texans.

²³⁰ Rina Torchinsky, *In Texas, an Unrelenting Assault on Trans Rights is Taking a Mental Toll*, NPR (Feb. 25, 2022, 3:30 PM), <https://www.npr.org/2022/02/25/1082975946/anti-trans-bills-texas>.

²³¹ Dey & Brooks Harper, *supra* note 1.