TRANSITIONING TEXAS LAW INTO THE MODERN ERA: A DISMANTLING OF THE TEXAS ATTORNEY GENERAL'S OPINION ON GENDER-AFFIRMING HEALTHCARE

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Gender-affirming healthcare is instrumental in ensuring youth survive adolescence when their gender identity differs from their assigned gender at birth. Contrary to medical recommendations, state governments across the Nation have embarked on a quest to ban access to this care for minors. These governments act under the guise of the "child's best interest," but in actuality are unnecessarily interfering in the complex patient–doctor relationship. In 2022, the Texas executive branch sought to label gender-affirming care as child abuse, paving the way for a successful legislative ban in 2023. Relying upon dubious legal principles, Texas Attorney General Ken Paxton issued a formal opinion arguing that providing puberty blockers, hormone therapies, and gender-affirming surgeries to minors constitutes child abuse. This Note examines each of the constitutional and statutory arguments Attorney General Paxton advanced, disproves each of his arguments in turn, and provides reassurance to concerned individuals that gender-affirming healthcare is adequately regulated and in the best interest of the child.

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INTRODUCTION

Gender-affirming care is vital for individuals whose gender identity differs from their gender assigned at birth.[1] These individuals identify in various ways,[2] but this Note will refer to them broadly as transgender.[3] Gender-affirming care may involve socially transitioning, which can include coming out to one's community, altering one's appearance, and legally changing one's name; it may also include medically transitioning, which can be supported by gender-affirming healthcare.[4] The Office of Population Affairs at the U.S. Department of Health and Human Services ("HHS") defines gender-affirming healthcare as a "supportive form of healthcare."[5] Services range from psychological and mental healthcare to medical and surgical care, including "anything that affirms someone's gender identity."[6]

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1. Yasemin Nicola Sakay, *The 'Life-Saving' Science Behind Gender-Affirming Care for Youth*, MED. NEWS TODAY (Mar. 29, 2022), https://www.medicalnewstoday.com/articles/the-life-saving-science-behind-gender-affirming-care-for-youth [https://perma.cc/FG6K-2XN3].

2. *See Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 12, 2023), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive [https://perma.cc/EE6Z-U6DQ] ("Most people—including most transgender people—are either male or female. But some people don't neatly fit into the categories of 'man' or 'woman,' or 'male or female.' . . . [S]ome people don't identify with any gender. Some people's gender changes over time."); *see also* HHS Office of Population Affairs, *Gender-Affirming Care and Young People*, OASH, https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf [https://perma.cc/3C59-LVD8] (defining "gender diverse," "nonbinary," and "transgender").

3. The HHS defines a transgender person as "a person whose gender identity and or expression is different from their sex assigned at birth, and societal and cultural expectations around sex." HHS Office of Population Affairs, *supra* note 2.

4. Meghan Holohan, '*Caring for the Whole Person': Experts Explain Why Gender-Affirming Care Is Important*, TODAY (June 30, 2022, 10:38 AM), https://www.today.com/health/health/why-is-gender-affirming-care-important-rcna35957 [https://perma.cc/HRT9-8PCZ].

5. HHS Office of Population Affairs, *supra* note 2.

6. *Id.*; Holohan, *supra* note 4.

Importantly, gender-affirming healthcare supports "the whole person" and is designed to address all of the person's needs.[7]

Gender-affirming healthcare is particularly important for children and adolescents.[8] Research shows that transgender youth experience poorer mental health than cisgender youth, including higher rates of depression, thoughts of suicide, attempted suicide, eating disorders, and substance abuse.[9] One Trevor Project study found that "42% of LGBTQ youth seriously considered attempting suicide in the past year, including more than half of" transgender youth.[10] Another study found that "[s]uicide attempt rates were more than seven times higher" among transgender youth than transgender individuals over 45.[11] Gender-affirming healthcare is a vital tool to combat this mental health epidemic. Appropriate care often improves child and adolescent mental health, which typically carries over into adulthood.[12] One endocrinologist reported that as their patients grew older, "they . . . repeatedly told us that gender-affirming care helped them survive adolescence and successfully transition into adulthood."[13]

Access to gender-affirming healthcare for adolescents is currently under attack. As of May 2023, at least 27 U.S. states have enacted or are attempting to enact laws that restrict access to gender-affirming healthcare.[14] Moreover, the

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7. Holohan, *supra* note 4 ("We're really working with the intrinsic nature of who someone is, how they feel deeply inside. And so gender-affirming care is a chance to really be able to care for that person's identity, care for that person's whole self.").

8. *See* HHS Office of Population Affairs, *supra* note 2 ("Research demonstrates that gender-affirming care improves the mental health and overall well-being of gender diverse children and adolescents.").

9. *See* Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643, 643 (2022); Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, MORBIDITY & MORTALITY WKLY. REP., Jan. 25, 2019, at 67, 67; Maureen D. Connolly et al., *The Mental Health of Transgender Youth: Advances in Understanding*, 59 J. ADOLESCENT HEALTH 489, 489 (2016).

10. *National Survey on LGBTQ Youth Mental Health 2021*, TREVOR PROJECT (2021), https://www.thetrevorproject.org/survey-2021/?section=Introduction [https://perma.cc/8BMR-Y9WW].

11. Josephine Mak et al., *Suicide Attempts Among a Cohort of Transgender and Gender Diverse People*, 59(4) AM. J. PREVENTIVE MED., 570, 570 (2020).

12. *See* Kara Connelly & Abby Walch, *Why Gender-Affirming Care for Youth Is Important*, OHSU (Mar. 29, 2022), https://news.ohsu.edu/2022/03/29/why-gender-affirming-care-for-youth-is-important [https://perma.cc/8ECC-HK48] ("[M]any research studies demonstrate overwhelmingly positive outcomes from gender-affirming care."); *see also* Jack L. Turban et al., *Access to Gender-Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults*, PLOS ONE, Jan. 12, 2022, at 1, 1; Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134(4) PEDIATRICS 696, 696–97 (2014).

13. Connelly & Walch, *supra* note 12.

14. *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map

following states have imposed restrictions on gender-affirming care for minors in some form: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky,[15] Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia.[16] Data provided by the Williams Institute at the UCLA School of Law shows that more than a third of transgender youth aged 13–17 have lost or are at risk of losing access to gender-affirming healthcare because of these legislative initiatives.[17]

While most states have relied on their legislatures to restrict access to gender-affirming care, Texas turned to its executive branch in 2022 after bills proposed by its legislature had failed.[18] In 2021 alone, six bills seeking to criminalize providing gender-affirming healthcare to minors died in the Texas House.[19] These bills sought either to revoke licenses and professional liability insurance coverage for physicians who provided gender-affirming healthcare to youth[20] or to add the administration of gender-affirming healthcare to the state's statutory definition of child abuse.[21]

Following these failures, Texas Governor Greg Abbott requested that the Texas Department of Family Protective Services ("DFPS") determine "whether genital mutilation of a child for the purposes of gender transitioning through reassignment surgery constitutes child abuse pursuant to state law."[22] Jaime Masters,

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[https://perma.cc/EC9L-DL6D] (last updated Sept. 5, 2023). Twenty states have enacted laws or policies that ban gender-affirming care for minors. *Id.* An additional seven states are considering laws or policies that ban gender-affirming care for minors. *Id.*

15. Kentucky is the only state with a Democratic governor to ban gender-affirming care for minors. Elliott Davis Jr., *States That Have Restricted Gender-Affirming Care for Trans Youth in 2023*, U.S. NEWS & WORLD REP. (July 19, 2023, 10:09 AM), https://www.usnews.com/news/best-states/articles/2023-03-30/what-is-gender-affirming-care-and-which-states-have-restricted-it-in-2023# [https://perma.cc/48AG-T8X6].

16. *Id.*

17. *See* Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States*, WILLIAMS INST. UCLA SCH. L. 9–10 (June 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/SMJ6-ND76]; *see also* Kerith J. Conron et al., *Prohibiting Gender-Affirming Medical Care for Youth*, WILLIAMS INST. UCLA SCH. LAW (Mar. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2022.pdf [https://perma.cc/QC4V-R6YD].

18. *Attacks on Gender-Affirming and Transgender Healthcare*, AM. COLL. PHYSICIANS (Apr. 24, 2023), https://www.acponline.org/advocacy/state-health-policy/attacks-on-gender-affirming-and-transgender-health-care [https://perma.cc/BDD5-HF94].

19. *Legislative Bill Tracker: Bans on Best-Practice Affirming Healthcare for Transgender Youth*, EQUAL. TEX., https://www.equalitytexas.org/legislative-bill-tracker/ [https://perma.cc/8PSN-H6H6] (last visited Sept. 22, 2023).

20. H.B. 1399, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1311, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 2693, 87th Leg., Reg. Sess. (Tex. 2021).

21. H.B. 68, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 4014, 87th Leg, Reg. Sess. (Tex. 2021).

22. Letter from Greg Abbott, Governor, Tex., to Jaime Masters, Comm'r, Tex. Dep't Fam. Protective Servs. (Aug. 6, 2021), https://gov.texas.gov/uploads/files/press/O-MastersJaime202108060890.pdf [https://perma.cc/N6DM-Y287].

the DFPS commissioner, responded affirmatively, stating that "[g]enital mutilation of a child through reassignment surgery is child abuse, subject to all rules and procedures pertaining to child abuse."[23] Thereafter, Matt Krause of the Texas House Committee on General Investigating asked Texas Attorney General Ken Paxton to affirm Masters's assessment.[24] Relying on constitutional and statutory arguments, Paxton then issued an official opinion in which he found that "facilitating (parent/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."[25] Consistent with Paxton's assessment, Governor Abbott then directed DFPS to investigate "any reported instances of these abusive [surgical] procedures."[26] Finally, DFPS issued the following statement: "In accordance with Governor Abbott's directive . . . we will follow Texas law as explained in Attorney General opinion KP-0401."[27] The Texas executive branch is now acting contrary to popular opinion[28] and has adopted a policy of investigating parents and medical providers alike for these "crimes."[29]

Paxton's opinion letter arguably paved the way for a successful legislative gambit in 2023. State Senator Donna Campbell, backed by nine other conservative legislators, introduced Senate Bill ("S.B.") 14 in March 2023.[30] The Bill amends the Texas Health and Safety Code to prohibit medical professionals from providing healthcare to minors "for the purpose of transitioning a [minor]'s biological sex . . . or affirming the [minor]'s perception of the [minor]'s sex"; this includes prohibitions on puberty blockers, hormone therapies, and gender-affirming surgeries.[31] The Bill requires minors who began gender-affirming treatments prior

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23. Letter from Jaime Masters, Comm'r, Tex. Dep't of Fam. Protective Servs., to Greg Abbott, Governor, Tex. (Aug. 11, 2021), https://gov.texas.gov/uploads/files/press/Response_to_August_6_2021_OOG_Letter_08.11.2021.pdf [https://perma.cc/SCC7-QSR2].

24. Letter from Matt Krause, Chair, Tex. Comm. Gen. Investigating, to Tex. Att'y Gen. Paxton (Aug. 23, 2021), https://s3.us-west-2.amazonaws.com/media.glaad.org/wp-content/uploads/2022/02/20061126/RQ0426KP-ebf.pdf [https://perma.cc/QY6N-DZXF].

25. TEX. ATT'Y GEN., OPINION NO. KP-0401, WHETHER CERTAIN MEDICAL PROCEDURES PERFORMED ON CHILDREN CONSTITUTE CHILD ABUSE (2022).

26. Letter from Greg Abbott, Governor, Tex., to Jaime Masters, Comm'r, Tex. Dep't of Fam. Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/7G6W-GP4A].

27. *In re* Abbott, 645 S.W.3d 276, 279 (Tex. 2022).

28. *See infra* Section II.A.

29. *See id.* Texas District Judge Amy Clark Meachum issued a series of temporary injunctions against Governor Abbott and DFPS Masters, blocking them from investigating the families of four plaintiffs for providing gender-affirming healthcare to minors. PFLAG, Inc. v. Abbott, No. D-1-GN-22-002569, at *5 (D. Tex. Sept. 16, 2022). The judge set a trial date for June 12, 2023, to decide the legality of the executive branch's policy. *Id.*

30. Andy Rose & Jack Forrest, *Texas Sends Ban on Gender-Affirming Care for Minors to Governor's Desk*, CNN (May 18, 2023, 8:31 AM), https://www.cnn.com/2023/05/18/politics/texas-gender-affirming-care-ban/index.html [https://perma.cc/2MAF-NUYZ].

31. S.B. 14, 88th Leg., 1st Called Sess. (Tex. 2023).

to June 1, 2023, to "wean off" of their treatments.[32] Numerous protests and procedural delays by Democratic legislators temporarily stalled the Bill's progress, but those efforts ultimately failed.[33] Following various amendments, the Texas House and Senate each approved the final version, which reached Governor Greg Abbott's desk on May 19, 2023.[34] The law took effect on September 1, 2023, making Texas the largest state to explicitly ban gender-affirming healthcare for minors.[35]

Contrary to popular support and medical best practices, the Texas legislature has nearly entirely stripped children of access to gender-affirming healthcare.[36] While the Texas executive branch investigates parents and medical providers for alleged child abuse,[37] S.B. 14 allows the State to revoke the licenses of physicians who provide gender-affirming healthcare.[38]

This Note proceeds in three parts. Part I discusses the differences between gender, sex, and gender identity before outlining the various forms of gender-affirming healthcare and who may receive each form. Part II responds to each of Paxton's arguments as to why gender-affirming healthcare should be considered child abuse and shows how these arguments likely informed the Texas legislature's motivation behind passing S.B. 14. The primary rejoinder is that parents have a fundamental right to make medical decisions for their children, and the State cannot interfere with this right when such interference contradicts the will of the parent, the child, and the child's physicians. Additionally, gender-affirming healthcare does not take away a child's fundamental right to procreate. Finally, Paxton cannot label gender-affirming healthcare child abuse because this healthcare is necessary to prevent further harm to children. Part III acknowledges viable fears for the welfare of children and provides a more reasonable alternative to address those fears: allowing the informed medical profession to regulate itself.

I. A PRIMER ON GENDER-AFFIRMING HEALTHCARE

Gender-affirming healthcare is vital for individuals whose gender identity differs from their socially assigned gender and sex assigned at birth.[39] This healthcare comes in three stages, with each stage increasing in the invasiveness of the treatment and differing in who can receive said treatment.[40]

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32. *Id.*
33. Rose & Forrest, *supra* note 30.
34. S.B. 14, 88th Leg., Reg. Sess. (Tex. 2023).
35. Jack Forrest, *Texas Governor Signs Ban on Gender-Affirming Care for Minors*, CNN (June 2, 2023, 7:55 PM), https://www.cnn.com/2023/06/02/politics/texas-gender-affirming-care-ban-minors/index.html [https://perma.cc/FX9C-JV2L]; Molly Hennessy-Fiske, *Texas's Gender Affirming Care Ban Worries Parents, Transgender Adults*, WASH. POST (May 19, 2023, 4:25 PM), https://www.washingtonpost.com/nation/2023/05/18/texas-gender-affirming-care-fears-greg-abbott/ [https://perma.cc/G36V-CGEF].
36. *See infra* Part III.
37. *In re* Abbott, 645 S.W.3d 276, 279 (Tex. 2022).
38. Tex. S.B. 14.
39. *See infra* Sections I.A, I.C.
40. *See infra* Sections I.B, I.C.

A. Gender, Sex, and Gender Identity

To understand the importance of gender-affirming care, one must first understand the relationship among gender, sex, and gender identity. Gender refers to "the characteristics of women, men, girls, and boys" and is primarily understood as a social construct.[41] An individual's gender often depends on how society relates the norms, behaviors, and roles of that individual to a demographic classification such as man or woman.[42] While sometimes correlated, the concept of gender is distinct from sex, particularly one's sex assigned at birth.[43] Sex refers to the individual's "biological and physiological characteristics . . . such as chromosomes, hormones, and reproductive organs."[44] Importantly, both sex and gender differ from gender identity.[45] Whereas gender and sex implicate society's outward perception of an individual, "[g]ender identity refers to a person's experience of gender, which may or may not correspond to their sex at birth."[46] Moreover, gender identity "can run anywhere along a continuum that includes man, woman, a combination of those, neither of those, and fluid."[47]

B. Stages of Gender-Affirming Healthcare

Gender-affirming healthcare seeks to reconcile an individual's sex and gender with their gender identity.[48] The goal of gender-affirming healthcare is often to treat gender dysphoria—psychological distress caused by the incongruence between a person's gender identity and assigned sex (and, often, their gender).[49] Notably, gender dysphoria commonly begins in childhood, making it even more important for children and adolescents to have access to gender-affirming healthcare.[50]

Gender-affirming healthcare "encompasses a range of social, psychological, behavioral, and medical interventions."[51] First, treatment is not a healthcare professional's only objective.[52] Providers seek to create a safe

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41. *Gender*, WORLD HEALTH ORG., https://www.who.int/europe/health-topics/gender#tab=tab_1 [https://perma.cc/NDA5-A7V6] (last visited Sept. 22, 2023).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *See* Patrick Boyle, *What Is Gender-Affirming Care? Your Questions Answered*, AAMC NEWS (Apr. 12, 2022), https://www.aamc.org/news-insights/what-gender-affirming-care-your-questions-answered [https://perma.cc/V85T-7Y6M].
48. *Id.*
49. Jack Turban, *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/MW8E-75RG]. However, not all individuals who struggle with their identity experience gender dysphoria. *Id.*
50. *Id.*
51. Boyle, *supra* note 47; *see also* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH, 2022, at S1, S7.
52. Boyle, *supra* note 47.

environment for the patient to explore their gender identity and ask questions.[53] Further, treatment is individualized, which implies that what works for one person may differ significantly from what helps another.[54] Therefore, not all individuals require, want, or will receive each of the following treatment stages.[55]

The least invasive and commonly first stage of treatment involves emotional, social, and psychological care.[56] Relevant experiences may include counseling, providing resources for social affirmation,[57] speech therapy, hair removal, and non-surgical body modifications such as breast binding and genital tucking.[58] All of these interventions are fully reversible, allowing individuals to continually reassess their gender identity throughout the process.[59]

The next stage of intervention is hormone-related therapy.[60] This therapy usually involves either puberty blockers or hormone therapy, depending on the individual's age.[61] A medical professional may prescribe a pre-pubescent individual puberty-blocking medication, "which suppresses the release of sex hormones, including testosterone and estrogen."[62] Puberty blockers slow an individual's natural maturation process, providing the adolescent with more time to explore their gender identity before developing permanent biological characteristics through puberty.[63] If adolescents stop using puberty blockers during puberty, their natural hormone development will resume.[64]

Alternatively, older adolescents and adults may use hormone therapy to "increase their levels of estrogen or testosterone so that they develop sex characteristics more closely aligned with their gender identity."[65] For example, those searching for more traditionally masculine features may receive testosterone and experience increased hair growth and muscle mass. At the same time, taking estrogen may help achieve a more traditionally feminine appearance, such as breast development and testicular atrophy.[66] Changes from hormone therapy often occur slowly and, depending on when the individual stops the treatment, the effects may be partially or fully reversible.[67]

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53. *Id.*
54. Coleman et al., *supra* note 51, at S7 ("It should be emphasized there is no 'one-size-fits-all' approach and [transgender] people may need to undergo all, some, or none of these interventions to support their gender affirmation.").
55. *Id.*
56. *See* Boyle, *supra* note 47.
57. Social affirmation includes "[a]dopting gender-affirming hairstyles, clothing, name[s], gender pronouns, and restrooms and other facilities." HHS Office of Population Affairs, *supra* note 2.
58. *See* Boyle, *supra* note 47.
59. *See id.*; *see also* HHS Office of Population Affairs, *supra* note 2.
60. *See* Boyle, *supra* note 47.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*; *see also* HHS Office of Population Affairs, *supra* note 2.
65. Boyle, *supra* note 47.
66. *Id.*
67. *Id.*

The final stage of intervention is gender-affirming surgery, also known as confirmation surgery. Gender-affirming surgical procedures ensure that an individual's "physical body matches their gender identity."[68] Options for surgeries include facial surgery, top surgery, or bottom surgery.[69] This form of medical care is "[t]ypically used in adulthood or case-by-case in adolescence" because confirmation surgery is not reversible.[70]

C. Who Receives Gender-Affirming Healthcare

When providing gender-affirming healthcare, many medical professionals follow the Standards of Care ("SOC") published by the World Professional Association for Transgender Health ("WPATH").[71] WPATH is a nonprofit organization comprised of experts in transgender healthcare who "work to further the understanding and treatment of gender dysphoria."[72] The WPATH SOC provides the "authoritative medical consensus" on gender dysphoria treatment.[73]

Treatment options for transgender children significantly differ from those available for adolescents.[74] The World Health Organization defines adolescents as individuals between 10 and 19, while children are under 10.[75] Because children's gender expressions "cannot be predicted and may evolve over time," the SOC recommends therapy and counseling, or the first stage above in Section B, for

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68. *Gender Affirmation (Confirmation) or Sex Reassignment Surgery*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery [https://perma.cc/8VSU-86RK] (last updated May 3, 2021).

69. *Id.* Facial surgery involves making the face appear more feminine or masculine. *Id.* Top surgery involves either the removal of breast tissue or enhancement of breast size and shape. *Id.* Bottom surgery involves reconstruction of one's genitals. *Id.*

70. HHS Office of Population Affairs, *supra* note 2.

71. *See generally* Coleman et al., *supra* note 51. Alternatively, medical professionals look to the Endocrine Society's Clinical Practice Guidelines for "Treatment of Gender-Dysphoric/Gender-Incongruent Persons," which provide similar recommendations to the SOC. *See generally* Wylie C. Hembree et al, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869 (2017). This Note will follow the SOC guidelines, as they are the worldwide "authoritative medical consensus" on transgender health. *Mission and Vision*, WPATH, https://www.wpath.org/about/mission-and-vision [https://perma.cc/M858-SC6C] (last visited Sept. 22, 2023). Additionally, although not every medical professional is legally bound to follow the SOC, these guidelines "inform[] what insurers will reimburse for care." Azeen Ghorayshi, *Doctors Debate Whether Trans Teens Need Therapy Before Hormones*, N.Y. TIMES (Jan. 13, 2022), https://www.nytimes.com/2022/01/13/health/transgender-teens-hormones.html [https://perma.cc/QD63-DT5F].

72. *Mission and Vision*, *supra* note 71.

73. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2166 (2021).

74. *See* Coleman et al., *supra* note 51, at S48–S79.

75. *Adolescent Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/adolescent-health#tab=tab_1 [https://perma.cc/C92A-67BX] (last visited Oct. 1, 2023).

children.[76] However, the SOC does not recommend the medical interventions prescribed in the second and third stages for children.[77]

In contrast, the SOC identifies adolescence as a time when one's gender identity begins to solidify.[78] For adolescents, the SOC recommends that healthcare professionals "involve . . . mental health and medical professionals" to decide whether the second or third stages are appropriate.[79] Notably, these additional stages must "remain indicated throughout the course of treatment," meaning the transgender individual's psychological state is benefited by the treatment, and their gender identity continues to require treatment.[80] SOC only suggests gender-affirming medical care or surgical treatments for individuals with an explicit gender dysphoria diagnosis.[81] Among other criteria,[82] a gender dysphoria diagnosis requires "a marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration."[83] For an individual under 18 to receive gender-affirming surgical treatments, they must often demonstrate "safety concerns in public areas" before treatment, as well as strong support from family and the ability to manage their post-treatment care.[84]

II. TEXAS'S LEGAL ARGUMENTS AGAINST GENDER-AFFIRMING HEALTHCARE FOR YOUTH

Paxton argues that the State has a constitutional duty to protect children, especially when they are deprived of their fundamental right to procreate, and thus, Texas must define the "harm" caused by gender-affirming healthcare as child abuse.[85] Paxton fails to acknowledge the constitutional and statutory right of parents to make medical decisions for their children.[86] Furthermore, Paxton ignores the fact that children do not receive surgeries that could result in their sterilization and that any potential harm to adolescents can be avoided through informed consent.[87]

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76. Coleman et al., *supra* note 51, at S67.

77. *See id.* at S48–S79.

78. *Id.* at S49.

79. *Id.* at S56.

80. *Id.*

81. *Id.* at S59 (recommending adolescents meet the "diagnostic criteria of gender incongruence . . . [or] gender dysphoria"). Although a gender dysphoria diagnosis is required for gender-affirming medical care, "such a classification alone does not indicate a person needs medical-affirming care." *Id.* at S60. Medical professionals should base their treatments on the patient's specified needs. *Id.*

82. Other criteria include, but are not limited to, a strong desire to be of or insistence they are a part of another gender, a strong dislike of one's sexual anatomy, and a strong desire for physical sex characteristics that match one's experienced gender. AMER. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2022).

83. *Id.*

84. Coleman et al., *supra* note 51, at S66.

85. TEX. ATT'Y GEN., *supra* note 25; *see infra* Section II.A.

86. *See* TEX. CONST. art. 1, § 19; U.S. CONST. amend. XIV; TEX. FAM. CODE ANN. § 151.001(a)(6) (West 2023); Meyer v. Nebraska, 262 U.S. 390 (1923); Troxel v. Granville, 530 U.S. 57 (2000); *See also infra* Section II.C.

87. *See infra* Sections II.D, II.E.2.

A. Healthcare that the Texas Executive Branch Sought to Prohibit

The slew of correspondence among Texas officials[88] about the legality of gender-affirming healthcare for youth focused on whether puberty blockers, hormone therapies, and gender-affirming surgeries constitute "child abuse" under § 261.001 of the Texas Family Code.[89] Section 261.001 defines *child abuse* as (A) mental or emotional injury resulting in "impairment in the child's growth, development, or psychological functioning"; (B) "causing or permitting the child to be in a situation where the child sustains" the injury defined in subsection (A); (C) "physical injury that results in substantial harm to the child"; or (D) "failure to make a reasonable effort to prevent an action by another individual" that causes the injury defined in subsection (C).[90]

The Texas legislature clearly declined to define gender-affirming care as child abuse when three bills attempting to do so died in the House.[91] Although not always the case, here, the Texas legislature's refusal to pass the bills represented the "will of the people." A 2022 poll revealed that 45% of Texas voters support transgender minors having access to gender-affirming care, whereas only 31% of voters oppose this access.[92] That same poll showed that 46% of Texas voters oppose making it illegal to provide gender-affirming care to youth, with only 35% of voters indicating support.[93]

Acting contrary to the people's will, both DFPS Commissioner Masters and Paxton wrote in separate letters that providing puberty blockers, hormone therapies, and gender-affirming surgeries to minors constitutes child abuse.[94] In particular, Paxton enumerated the following surgeries as "abusive": (1) those that could result in sterilization, including "castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, vaginoplasty"; (2) mastectomies; and (3) any surgery that removes an "otherwise healthy or non-diseased body part or tissue."[95] He also condemned any treatment that involved "providing, administering, prescribing, or dispensing drugs to children that induce transient or permanent infertility."[96]

Paxton's opinion involved a rather in-depth analysis of how the above methods of gender-affirming healthcare constitute child abuse.[97] First, Paxton argued that the State has a duty to step in to prevent harm to children under the

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88. *Infra* Introduction.

89. TEX. ATT'Y GEN., *supra* note 25; TEX. FAM. CODE ANN. § 261.001 (West 2023).

90. TEX. FAM. CODE ANN. § 261.001(1)(A)–(D) (West 2023).

91. H.B. 68, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 4014, 87th Leg., Reg. Sess. (Tex. 2021).

92. Letter from The Trevor Project, to the Morning Consult (June 2022), https://www.thetrevorproject.org/wp-content/uploads/2022/07/MC_Poll_FL__TX_Voters__anti-LGBTQ_policies_7_8_22.pdf [https://perma.cc/B784-WSUQ].

93. *Id.*

94. *See* Masters, *supra* note 23; TEX. ATT'Y GEN., *supra* note 25.

95. TEX. ATT'Y GEN., *supra* note 25, at 1–2.

96. *Id.*

97. *See id.* at 2–12.

doctrine of *parens patriae*,[98] even though doing so could undermine a parent's co-equal fundamental right to make medical decisions for their child in these situations.[99] Further, Paxton argued that gender-affirming procedures and treatments could result in sterilization, violating the child's fundamental right to procreate.[100] Finally, Paxton alleged that these gender-affirming treatments constitute child abuse because they cause injury and harm to the child, sterilize the child, and can be classified as genital mutilation.[101] He also alleged that parents of transgender children and adolescents have "factitious disorder imposed on another," otherwise known as Munchausen by proxy.[102]

B. Healthcare that S.B. 14 Prohibits

S.B. 14 and Paxton's opinion target the same healthcare with nearly identical language. The legislation prohibits healthcare providers from performing the following surgeries: those that sterilize a child, including castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; mastectomy; and any surgery that removes "otherwise healthy or non-diseased body part or tissue."[103] It also prohibits medical providers from "provid[ing], administer[ing], prescrib[ing], or dispens[ing] . . . drugs that induce transient or permanent infertility," i.e., puberty blockers and hormone therapies.[104] Given the textual similarity, Texas legislators must agree with at least some of the reasoning expounded in Attorney General Paxton's opinion.

The main difference between these two documents is that Attorney General Paxton's opinion delves into the reasoning behind the prohibitions, whereas the legislation only states the prohibitions. This Note does not argue that Paxton's opinion was the source of reasoning for the legislative action, but the connection between the two documents cannot be ignored. The executive branch only embarked on its quest to classify gender-affirming healthcare as child abuse when legislative actions aimed at banning such healthcare for minors had continually failed.[105] Notably, four of the six failed bills aimed at banning gender-affirming healthcare contain the same language as both Paxton's opinion and S.B. 14.[106] Bills with this language failed until Paxton used the language himself.[107] Moreover, Paxton's

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98. An explanation of the doctrine of *parens patriae* is provided in the next section. *See infra* Section II.C.

99. *See generally* TEX. ATT'Y GEN., *supra* note 25; *infra* Section II.C.

100. Opinion TEX. ATT'Y GEN., *supra* note 25, at 6; *see infra* Section II.D.

101. Opinion TEX. ATT'Y GEN., *supra* note 25, at 10–12; *see infra* Section II.E.

102. Opinion TEX. ATT'Y GEN., *supra* note 25, at 7–8; *see infra* Section II.E.4.

103. S.B. 14, 88th Leg., Reg. Sess. (Tex. 2023).

104. *Id.*

105. *See* H.B. 68, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 4014, 87th Leg., Reg. Sess. (Tex. 2021).

106. *See* H.B. 68, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 1399, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1311, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 2693, 87th Leg., Reg. Sess. (Tex. 2021).

107. Three bills seeking to ban gender-affirming healthcare with the same language failed in 2021. *See* H.B. 68, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1646, 87th Leg., Reg.

primary concern regarding minors' access to gender-affirming healthcare—sterilization—reverberates throughout the language of S.B. 14. Finally, the goals of the political branches are identical: outlawing gender-affirming healthcare for minors. At least some of the sociological rationales for pursuing this agenda must also align. Therefore, a legal analysis of Paxton's opinion can also help to inform early analyses of S.B. 14.

C. Parens Patriae

At the beginning of his opinion, Paxton argues that the State must be mindful of its "duty to protect its children" in the face of procedures that "impose significant and irreversible effects on [them]."[108] Paxton is correct—the U.S. Supreme Court has found "[t]he State 'has a *parens patriae* interest in preserving and promoting the welfare of the child.'"[109] The *parens patriae* doctrine "refers traditionally to the role of the state as sovereign and guardian of persons under legal disability."[110] Since minors are "not assumed to have the capacity to take care of themselves," the state has a supervisory duty to ensure minors receive care.[111] However, the government first assumes that children are "subject to the control of their parents."[112] Only when that "parental control falters" is the state's duty triggered.[113]

Although "a medical treatment decision made for a minor child, *contrary to the desires of the child's parents*," may fall under the state's *parens patriae* duty, it only does so in *limited circumstances*.[114] Namely, Texas courts have only allowed the State to override a parent's decision pertaining to their child's medical treatment when medical professionals simultaneously agree with the State's action *and* disagree with the parent's decision.[115] For example, Texas case law demonstrates

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Sess. (Tex. 2021); H.B. 4014, 87th Leg., Reg. Sess. (Tex. 2021). Attorney General Paxton issued his formal opinion using the same language as the bills on February 18, 2022. *See* TEX. ATT'Y GEN., *supra* note 25. Over a year later, Governor Abbott signed S.B. 14 into law. Alex Nguyen & William Melhado, *Gov. Greg Abbott Signs Legislation Barring Trans Youth from Accessing Transition-Related Care*, TEX. TRIB. (June 2, 2023), https://www.texastribune.org/2023/06/02/texas-gender-affirming-care-ban/ [https://perma.cc/XM2D-6NWE].

108. TEX. ATT'Y GEN., *supra* note 25, at 5.

109. *See id.*; Schall v. Martin, 467 U.S. 253, 263 (1984) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

110. T.L. v. Cook Child.'s Med. Ctr., 607 S.W.3d 9, 41–42 (Tex. Civ. App. 2020) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 n.8 (1982) (quoting BLACK'S L. DICTIONARY 1003 (5th ed. 1979))), *cert. denied*, 141 S. Ct. 1069 (2021).

111. *Id.*

112. *Schall*, 467 U.S. at 265.

113. *Id.*

114. *T.L.*, 607 S.W.3d at 41, 43 ("[*P*]*arens patriae* overrides a parent's medical treatment decision only in limited circumstances.").

115. *Id.* at 41 ("[I]f a parent refuses to consent to medical treatment recommended for the welfare of a child, the state—and only the state—has the sovereign authority to override the parent's refusal and to consent to the recommended treatment on behalf of the minor patient."); *see* Mitchell v. Davis, 205 S.W.2d 812, 813–14 (Tex. Civ. App. 1947), *writ refused*; O.G. v. Baum, 790 S.W.2d 839, 840–41 (Tex. App. 1990).

the State's successful invocation of *parens patriae* in instances when parents have refused treatment that medical professionals deemed necessary to save the life or limb of a child.[116] Medical professionals supported the State's action in each of these circumstances.[117]

1. State Action to Prohibit Gender-Affirming Healthcare Access for Minors Is Contrary to Medical Recommendations

The central contradiction of Paxton's opinion is that it argues for the State's *parens patriae* duty to prevent parents from providing their children with treatment *recommended by medical professionals*.[118] This posture dramatically diverges from the State's past lawful invocations of the doctrine. In *Mitchell v. Davis*,[119] a Texas court of appeals upheld a custody order that removed a child from their parent's care when the parent refused the medical treatment "outlined and recommended" by a physician for the "seriously ill" child.[120] Similarly, in *O.G. v. Baum*,[121] the State successfully stepped in to insist that a minor receive a blood transfusion for a surgery that the child's doctor deemed necessary to save his arm.[122] In both cases, the State acted in agreement with medical professionals.

Prohibiting minors from receiving gender-affirming care is problematic when the prohibition flies in the face of medical recommendations. Notably, gender-affirming recommendations have extremely low error rates, as demonstrated in studies finding that fewer than 1% of recipients regret their decisions[123] and 98% of individuals who began receiving gender-affirming treatment in adolescence continued treatment into adulthood.[124] Nonetheless, Paxton asserted that "[t]he medical evidence does not demonstrate that children and adolescents benefit from" later stages of gender-affirming care, and "[t]here is no evidence that long-term mental health outcomes are improved or that rates of suicide are reduced."[125] These claims are unfounded. Medical experts agree that "[g]ender-affirming care is

116. *See Mitchell*, 205 S.W.2d at 813–15; *Baum*, 790 S.W.2d at 840.
117. *See Mitchell*, 205 S.W.2d at 814; *Baum*, 790 S.W.2d at 840.
118. *See* TEX. ATT'Y GEN., *supra* note 25, at 5.
119. *Mitchell*, 205 S.W.2d 812.
120. *Id.* at 813, 815.
121. 790 S.W.2d 839, 842 (Tex. App. 1990).
122. *Id.* at 840.
123. Chantal M. Wiepjes et al., *The Amsterdam Cohort of Gender Dysphoria Study (1972–2015): Trends in Prevalence, Treatment, and Regrets*, 15(4) J. SEXUAL MED. 582, 582 (2018) (finding "[o]nly 0.6% of transwomen and 0.3% of transmen who underwent gonadectomy were identified as experiencing regret"); Valeria P. Bustos et al., *Regret After Gender-Affirmation Surgery: A Systemic Review and Meta-Analysis of Prevalence*, PLASTIC & RECONSTRUCTIVE SURGERY—GLOB. OPEN, 2021, at 1, 1.
124. Lisa Jarvis, *Trans Kids Don't Have the 'Regrets' Republicans Cynically Claim*, WASH. POST (Oct. 21, 2022, 3:12 PM), https://www.washingtonpost.com/business/trans-kids-dont-have-the-regretsrepublicans-cynically-claim/2022/10/21/843cb024-5134-11ed-ada8-04e6e6bf8b19_story.html [https://perma.cc/XHV4-8HLJ].
125. TEX. ATT'Y GEN., *supra* note 25, at 3–4.

medically necessary care that can be life-saving for transgender youth."[126] The HHS Office of Population Affairs has observed that for "children and adolescents, early gender-affirming care is crucial to overall health and well-being."[127] Additionally, the only large-scale study to examine "mental health among transgender and nonbinary youth who receive gender-affirming hormone therapy" found that access to gender-affirming care is associated with decreased mental health disparities, including lower rates of depression, thoughts of suicide, and suicide attempts.[128]

Further, Paxton's opinion seemingly argues that any minor could receive gender-affirming healthcare simply by obtaining parental consent.[129] This is not the case. Healthcare providers following SOC recommendations use many methods of evaluating an individual to determine the best treatment plan for them.[130] These providers will not initiate treatment simply at the request of the minor's parent.[131] Instead, the healthcare provider prioritizes the health and well-being of the minor.[132] Recall that the SOC does not recommend hormone therapy and surgical interventions for children and requires a gender dysphoria diagnosis for these treatments in adolescence.[133] Therefore, parents cannot unilaterally decide that their child will receive a course of treatment—medical professionals must also agree that the treatment is proper.

2. Parents Retain a Fundamental Right to Make Medical Decisions for Their Children

Parents have a fundamental right to make medical decisions for their children under both Texas and federal law.[134] The Texas Constitution contains a provision nearly identical to the Fourteenth Amendment to the U.S. Constitution, protecting citizens' rights to life, liberty, and property.[135] The U.S. Supreme Court has held that certain rights, though unenumerated in the Constitution, are so fundamental that the Document nonetheless protects them.[136] Many fundamental rights—including parental rights—fall under a broader right to privacy.[137]

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126. *Doctors Agree: Gender-Affirming Care Is Life-Saving Care*, ACLU (Apr. 1, 2021), https://www.aclu.org/news/lgbtq-rights/doctors-agree-gender-affirming-care-is-life-saving-care [https://perma.cc/DM5T-8EYT].

127. HHS Office of Population Affairs, *supra* note 2.

128. Green, *supra* note 9, at 643; *see also* Diana M. Tordoff et al., *Mental Health Outcomes in Transgender and Non-Binary Youths Receiving Gender-Affirming Care*, 5 JAMA NETWORK OPEN, no. 2, Feb. 25, 2022, at 1,1.

129. *See* TEX. ATT'Y GEN., *supra* note 25, at 7–8.

130. *See supra* Section I.C.

131. *Id.*

132. *Id.*

133. *See id.*

134. *See* TEX. CONST. art. 1, § 19; U.S. CONST. amend. XIV, § 1; Meyer v. Nebraska, 262 U.S. 390 (1923); Troxel v. Granville, 530 U.S. 57 (2000).

135. TEX. CONST. art. 1, § 19; U.S. CONST. amend. XIV, § 1.

136. Kelsey Y. Santamaria, *Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity* (Sept. 14, 2022), at 2, https://crsreports.congress.gov/product/pdf/LSB/LSB10820 [https://perma.cc/HSJ5-NKG6].

137. *Id.* at 3.

In *Meyer v. Nebraska*,[138] the U.S. Supreme Court held that parents have the fundamental right to make decisions regarding the upbringing of their children.[139] Reaffirmed in *Troxel v. Granville*,[140] the Court stated that parents are free to make decisions concerning "the care, custody, and control of their children."[141] Within this authority, parents have the right "to give, withhold, and withdraw consent to medical treatment for their children."[142]

Additionally, the state cannot step in "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks."[143] Texas law provides even more protection for a parent's right to make medical decisions for their children. Under the Texas Family Code, parents have the "right to consent to the child's . . . medical and dental care, and psychiatric, psychological, and surgical treatment."[144]

Paxton contends "this general right to consent to certain medically necessary procedures does not extend to elective . . . procedures and treatments."[145] Minors in Texas are not permitted to consent to their own medical procedures except in limited circumstances.[146] Further, Paxton alleges that parents cannot consent to elective procedures and treatments. Therefore, the logical conclusion is that minors are not permitted to receive *any* elective procedure without government approval. If gender-affirming treatments are elective, then, according to Paxton, parental consent does not matter because the underlying procedure is forbidden.[147] This argument is flawed in two ways: (1) minors receive elective treatment and procedures nearly every day, and (2) gender-affirming treatments and procedures are not elective.[148]

First, parents routinely consent to elective treatments and procedures for their children.[149] These treatments include, but are not limited to, cleft lip repair, tonsillectomies, and cosmetic surgeries (e.g., rhinoplasties and breast augmentations).[150] For example, isotretinoin, commercially known as Accutane, is a drug used to treat severe acne, which often carries material side effects.[151] Medical professionals only prescribe this medication after other treatments have failed.[152]

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138. 262 U.S. 390 (1923).
139. *See id.* at 399–400.
140. 530 U.S. 57 (2000).
141. *Id.* at 65.
142. T.L. v. Cook Child.'s Med. Ctr., 607 S.W.3d 9, 43 (Tex. Civ. App. 2020).
143. Parham v. J.R., 442 U.S. 584, 602–04 (1979).
144. TEX. FAM. CODE ANN. § 151.001(a)(6) (West 2023).
145. TEX. ATT'Y GEN., *supra* note 25, at 7.
146. *See* TEX. FAM. CODE § 32.003 (providing seven instances where a child may consent to their own treatment, none of which are relevant here).
147. TEX. ATT'Y GEN., *supra* note 25, at 7.
148. *See supra* Section II.D.
149. *See Elective Surgery*, NEMOURS KIDSHEALTH, https://kidshealth.org/en/parents/elective.html [https://perma.cc/X3QC-J7KK] (last visited Sept. 22, 2023).
150. *Id.*
151. *Isotretinoin (Oral Route)*, MAYO CLINIC, https://www.mayoclinic.org/drugs-supplements/isotretinoin-oral-route/proper-use/drg-20068178?p=1 [https://perma.cc/RS3G-9QYR] (last updated Sept. 1, 2023).
152. *Id.*

Additionally, patients must participate in a program known as iPLEDGE[153] throughout treatment and must receive blood testing and monthly pregnancy testing while taking the medication.[154] Possible side effects include severe liver problems; vision loss or serious brain issues; depressive tendencies such as suicidal thoughts and attempts; joint and muscle pain; pancreatitis; and congenital disabilities in future children.[155] Although medical professionals do not recommend this course of treatment for children under 12, adolescents may use the drug with caution.[156] There are no prohibitions on providing Accutane to minors in Texas.[157]

Second, Paxton mistakenly labels all gender-affirming treatments and procedures as elective.[158] An elective treatment or procedure is advantageous to the patient but not absolutely essential at the time.[159] Generally, if a "condition will significantly worsen" without the treatment, it is not elective.[160] However, physicians and healthcare organizations ultimately decide if a treatment or procedure is elective based on individualized urgency.[161] The Texas Medical Board provides that a physician should comply with generally accepted standards of medical practice in deciding if a proposed treatment is medically necessary.[162] In

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153. The iPLEDGE program is a "risk management program that was designed to reduce risk of birth defects as well as to inform [the patient], healthcare providers, and pharmacists about how to safely use isotretinoin and the risks that it can bring." *iPLEDGE Program*, ACCUTANE, https://www.rxaccutane.com/ipledge-program/ [https://perma.cc/9JX9-DZK3] (last visited Sept. 18, 2023). "Because some of the side effects can be serious, anyone prescribed isotretinoin . . . must adhere to the steps of the iPLEDGE Program." *Id.*

154. *Isotretinoin (Oral Route)*, *supra* note 151.

155. *Id.*

156. *Id.*

157. *See generally* TEX. FAM. CODE ANN. (West 2023) (no applicable law that prohibits providing Accutane to minors in the recodification of Texas's laws).

158. *See* TEX. ATT'Y GEN., *supra* note 25, at 2.

159. Charles Patrick Davis, *Definition of Elective*, RXLIST, https://www.rxlist.com/elective/definition.htm [https://perma.cc/5FKJ-2H4H] (last visited Sept. 18, 2023).

160. Brendan Murphy, *COVID-19 and Elective Surgeries: 4 Key Answers for Your Patients*, AM. MED. ASS'N (Mar. 30, 2020), https://www.ama-assn.org/delivering-care/public-health/covid-19-and-elective-surgeries-4-key-answers-your-patients [https://perma.cc/Q8P3-362Q].

161. *Id.*

162. *TMA Board of Councilors' Current Opinions, Medical Necessity*, TEX. MED. ASS'N, https://app.texmed.org/tma.archive.search/392.html#NECESSITY [https://perma.cc/9MDS-LGNJ] (last visited Sept. 18, 2023); *see also* Council on Medical Service, *Definitions of "Screening" and "Medical Necessity*" *H-320.953*, AM. MED. ASS'N, https://policysearch.ama-assn.org/policyfinder/detail/H-320.953?uri=%2FAMADoc%2FHOD.xml-0-2625.xml [https://perma.cc/2326-S9CL] (2016) ("Our AMA defines medical necessity as: Healthcare services or products that a prudent physician would provide to a patient for the purpose of preventing, diagnosing or treating an illness, injury, disease or its symptoms in a manner that is . . . in accordance with generally accepted standards of medical practice."); TEX. CIV. PRAC. & REM. CODE ANN. § 88.001(1) (West 2023) ("'Appropriate and medically necessary' means the standard for healthcare services as determined by physicians and healthcare providers in accordance with the prevailing practices and standards of the medical profession and community.").

following these standards, many medical professionals find that treatment for minors experiencing depression or suicidal ideation because of their gender identity is medically necessary.[163]

Further, medical providers following the SOC will only provide more advanced gender-affirming care, such as hormone therapy and gender confirmation surgery, to adolescents who have demonstrated an absolute need.[164] Therefore, a healthcare provider may consider these treatments and procedures as categorically necessary for the person's well-being rather than as elective.

In sum, the state can only invoke its *parens patriae* duty to care for children when medical professionals agree with the state's action. The state cannot employ this duty to effectively eliminate a parent's fundamental right to make medical decisions for their child.

D. The Fundamental Right to Procreate

The Supreme Court in *Skinner v. Oklahoma*[165] labeled the right to procreate a fundamental right, finding that a law requiring forced sterilization for a particular class of criminals was unconstitutional.[166] Paxton alleges that gender-affirming treatments and surgeries violate a child's constitutional right to procreate because they can "cause permanent damage to reproductive organs and functions of a child" before the child is legally competent to consent.[167] Paxton's argument is flawed in four ways: (1) the Due Process and Equal Protection clauses only protect the rights of individuals from state, rather than private, action;[168] (2) gender-affirming treatments do not necessarily cause permanent damage to reproductive organs and functions;[169] (3) sterilization does not necessarily take away an individual's right to procreate;[170] and (4) Texas law explicitly allows parents to consent to their children's medical care, psychiatric care, psychological care, and surgical treatments.[171]

First, the Fifth and Fourteenth amendments only protect an individual's fundamental rights from *government* action.[172] The Due Process Clause prohibits the government from depriving an individual of rights afforded to them by law.[173] Similarly, the Equal Protection Clause prohibits the government from passing discriminatory laws that treat citizens differently based on certain dimensions

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163. *See National Survey on LGBTQ Youth Mental Health 2021*, *supra* note 10; *supra* Introduction.

164. *See supra* Sections II.B, II.C.

165. 316 U.S. 535 (1942).

166. *Id.* at 541.

167. TEX. ATT'Y GEN., *supra* note 25, at 6.

168. *See* SANTAMARIA, *supra* note 136, at 2–3.

169. *See* OHSU, *Preserving Your Fertility*, DOERNBECHER CHILD.'S HOSP., https://www.ohsu.edu/sites/default/files/2020-12/Gender-Clinic-Fertility-Preservation-Handout.pdf [https://perma.cc/MH5V-CC7N] (last visited July 28, 2023).

170. *See* Alessandra J. Ainsworth et al., *Fertility Preservation for Transgender Individuals: A Review*, 95(4) MAYO CLINIC PROC. 784, 785–89 (2020).

171. For a more in-depth explanation, see *supra* Section II.C.2.

172. Santamaria, *supra* note 136, at 2–3.

173. *Id.* at 2.

without a compelling purpose.[174] Here, Paxton alleges that the gender-affirming healthcare sought and provided by private parties unconstitutionally violates a child's fundamental right to procreate.[175] Since neither Clause prohibits private parties from encroaching upon fundamental rights, the actions of the private parties here do not implicate Fifth or Fourteenth Amendment concerns.

Second, not all of the gender-affirming treatments Paxton discusses result in sterilization. The effects of puberty blockers are often reversible.[176] While undergoing this treatment, puberty is paused.[177] Once an adolescent stops treatment, puberty should resume within the year, along with normal fertility function.[178] Although hormone therapy comes with a risk of future infertility, the effects differ depending upon the type of hormones an individual takes.[179] For instance, if a person assigned female at birth stops taking testosterone as part of their treatment, their body will usually start producing eggs again, and normal fertility may resume.[180] However, persons assigned male at birth who take estrogen might experience lower sperm production, often leading to infertility.[181] The only method of achieving immediate, irreversible infertility is "bottom" gender-affirming surgery.[182]

Third, sterilization from gender-affirming treatments does not necessarily take away an individual's right to procreate.[183] One of the most essential aspects of gender-affirming treatments is tailoring the treatment to the individual.[184] To successfully tailor treatment, medical providers must not only ensure that each stage of treatment is medically necessary for that individual but also that the individual is informed of all their treatment options and side effects.[185] Importantly here, healthcare professionals should fully inform their patients of fertility risks and fertility preservation options to obtain informed consent.[186]

Although preservation options vary depending upon which stage of treatment the individual is in, at least some options exist until the individual receives "bottom" surgery.[187] This means that even if a transgender individual cannot

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174. *Id.* at 2–3.

175. TEX. ATT'Y GEN., *supra* note 25, at 5–6.

176. OHSU, *supra* note 169.

177. *See* Janella Hudson et al., *Fertility Counseling for Transgender AYAs*, 6(1) CLINICAL PRAC. PEDIATRIC PSYCH. 84, 88 (2018).

178. *See id. But see Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 14, 2023), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/D4FQ-9AJR] (future infertility could result if puberty blockers are started too early).

179. *See* OHSU, *supra* note 169.

180. *Id.*

181. *Id.*

182. *See* Ainsworth et al., *supra* note 170, at 787, 789.

183. Merriam Webster defines procreate as "to beget or bring forth offspring." *Procreate*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/procreate [https://perma.cc/TLZ5-V3Q3] (last updated Sept. 18, 2023). Therefore, so long as an individual can produce offspring, no matter the means, they can procreate.

184. Coleman et al., *supra* note 51, at S7.

185. *Id.* at S61 (discussing the importance of informed consent).

186. *Id.*

187. Ainsworth et al., *supra* note 170, at 785–89.

conceive a child through intercourse, if they so choose, their gametes can still be used for assisted reproduction through scientific means.[188] It should be noted that children and adolescents seeking gender-affirming healthcare may not be able to predict how vital fertility will be to them in the future. This makes it even more important that medical professionals provide parents and children with sufficient informed consent, as Texas law requires.[189]

One should not diminish the physical and psychological effects of puberty blockers, hormone therapy, and gender-affirming surgery.[190] These are life-changing treatments, and all individuals, not just children, should begin the treatment process with informed consent regarding all possible side effects.[191] Nonetheless, the risk of infertility should not be used to prohibit any child from receiving medically necessary treatment.[192]

E. Abuse

Paxton alleges that gender-affirming healthcare in the forms of puberty blockers, hormone therapy, and gender-affirming surgery all constitute child abuse.[193] Texas's Family Code § 261.001 provides a robust, yet arguably broad, definition of child abuse: (A) mental or emotional injury resulting in "impairment in the child's growth, development, or psychological functioning"; (B) "causing or permitting the child to be in a situation where the child sustains" the injury defined in subsection (A); (C) "physical injury that results in substantial harm to the child"; or (D) "failure to make a reasonable effort to prevent an action by another individual" that causes the injury defined in subsection (C).[194] Furthermore, the Texas Administrative Code differentiates between emotional abuse and physical abuse.[195] Emotional abuse includes mental and emotional injuries, resulting in "significant or serious negative effects on intellectual or psychological development

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188. For a fuller description of fertility preservation options for transgender individuals at each stage of treatment, see *id.*

189. *See supra* Section II.C.2.

190. *See* Ainsworth et al., *supra* note 170, at 784; *see generally* Coleman et al., *supra* note 51.

191. Coleman et al., *supra* note 51, at S118.

192. Children and adolescents frequently receive other treatments that have been linked to infertility, such as chemotherapy. *How Cancer and Cancer Treatment Can Affect Fertility in Females*, AM. CANCER SOC'Y, https://www.cancer.org/treatment/treatments-and-side-effects/physical-side-effects/fertility-and-sexual-side-effects/fertility-and-women-with-cancer/how-cancer-treatments-affect-fertility.html [https://perma.cc/6R5G-CBXD] (last updated Feb. 6, 2020); *How Cancer and Cancer Treatment Can Affect Fertility in Males*, AM. CANCER SOC'Y https://www.cancer.org/treatment/treatments-and-side-effects/physical-side-effects/fertility-and-sexual-side-effects/fertility-and-men-with-cancer/how-cancer-treatments-affect-fertility.html [https://perma.cc/8TNT-W56S] (last updated Feb. 6, 2020). Similar to gender-affirming treatments, it is common practice to inform cancer patients of how their treatment may affect fertility and discuss possible preservation options. *How Cancer and Cancer Treatment Can Affect Fertility in Females*, *supra*.

193. TEX. ATT'Y GEN., *supra* note 25, at 2.

194. TEX. FAM. CODE ANN. § 261.001(1)(A)–(D) (West 2023).

195. *Compare* 40 TEX. ADMIN. CODE § 707.453 (2023), *with* 40 TEX. ADMIN. CODE § 707.455 (2023).

or functioning."[196] In contrast, physical abuse results in "real and significant physical injury or damage to a child."[197] The Code provides various examples of such injuries, such as "impairment of or injury to any bodily organ or function," "permanent or temporary disfigurement," and "subjecting a child to Munchausen syndrome by proxy" as the most relevant to gender-affirming care.[198]

Paxton provides four arguments to support his conclusion that gender-affirming healthcare constitutes child abuse. First, he argues that gender-affirming surgery removes healthy body parts from children, constituting "a real and significant injury or damage to the child."[199] He also states that treatments short of body part removal or alteration can "cause mental or emotional injury . . . to the child."[200] Second, he states that gender-affirming care causes sterilization, and sterilization is per se physical injury resulting in substantial harm to the child.[201] Third, Paxton equates gender-affirming surgery with genital mutilation, which is itself a criminal act that constitutes abuse.[202] Fourth, he implies that parents consenting to such procedures suffer from Munchausen syndrome by proxy.[203]

1. Gender-Affirming Care Does Not Legally Injure Children

When pursued through medically appropriate avenues, gender-affirming healthcare does not cause "real and significant" injuries in children. To start, the only stage of gender-affirming healthcare that includes surgical alteration of an individual's body is the final stage.[204] The SOC does *not* recommend surgical treatment for children.[205] Importantly, both medical providers and those seeking gender-affirming care are typically bound by the SOC recommendations because insurance companies often will not fund treatments outside of the SOC recommendations.[206] Without insurance, patients are usually unable to afford the

196. 40 TEX. ADMIN. CODE § 707.453 (2023).
197. *Id.* § 707.455.
198. *Id.* § 707.455(b)(2)(A).
199. TEX. ATT'Y GEN., *supra* note 25, at 10.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 8.
204. *See supra* Section I.B.
205. *See supra* Section I.C.
206. Elizabeth Boskey, *Understanding Insurance Requirements for Gender Confirmation Surgery*, VERY WELL HEALTH, https://www.verywellhealth.com/insurance-requirements-for-gender-confirmation-surgery-4136743 [https://perma.cc/DK5A-8B8D] (last updated July 2, 2023); *see Letters from Health Care Providers*, NAT'L CTR. TRANSGENDER EQUAL., https://transequality.org/health-coverage-guide/health-care-provider-letters [https://perma.cc/WJL8-BYNB] (last visited Sept. 19, 2023) (recommending medical providers reference the WPATH SOC guidelines as "the recognized standard for the treatment of gender dysphoria"); *see also* Ledibabari Mildred Ngaage et al., *Gender-Affirming Health Insurance Reform in the United States*, 87 ANNALS PLASTIC SURGERY 119, 121 (2020) (finding that insurance providers may "create additional benchmarks" required for treatment besides the standards of care).

treatments, and medical providers do not often perform treatments without adequate compensation.[207]

Furthermore, the limited number of adolescents who receive gender affirming surgeries are not injured in the legal or colloquial sense of the word. For medical providers following the SOC guidelines, adolescents can only receive gender-affirming surgery with a gender dysphoria diagnosis, a show of incredible need for the adolescent's health and well-being, and a demonstration of an extraordinary support system to aid in their recovery.[208] In short, a medical provider must find that the current state of the adolescent's body is causing them so much harm that the drastic step of surgery is important to avoid any *further* injury.[209] It is not the alteration or removal of body parts that injures the adolescent in these circumstances, but the very presence of the original body part the surgery seeks to correct.

Importantly, Texas's definition of "abuse" very clearly seeks to combat "*mental or emotional* injury to a child."[210] While Paxton's opinion is seemingly focused on the potential impacts of gender-affirming care on a child's physical body, it completely ignores the mental and emotional needs addressed by gender-affirming care.[211] Of the healthcare options that Paxton addresses, neither puberty blockers nor hormone therapies involve the immediate, irreversible alteration of a child's body.[212] Puberty blockers are designed to postpone a child's puberty to provide the child more time to navigate their gender identity.[213] This postponement is vital to a child's mental and emotional well-being.[214] Without it, the child's body may begin to change in ways that make the child feel like an outsider in their own body. Further, hormone therapies provide adolescents with a slow transition to the gender characteristics with which they identify.[215] Hormones are vital to many adolescents' mental health because they help adolescents present themselves to the public according to their preferred gender identity.[216]

2. Sterilization

Alternatively, Paxton argues that gender-affirming surgery constitutes child abuse because it results in the immediate sterilization of the child and that hormonal treatments can cause mental or emotional injuries "by subjecting a child . . . [to] lifelong sterilization."[217] To start, the SOC does not recommend gender-affirming surgery for children.[218] Additionally, neither puberty blockers nor

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207. *See* Boskey, *supra* note 206.

208. *See* Coleman et al., *supra* note 51, at S66. These requirements are specifically for minors seeking a vaginoplasty and trans masculine youth seeking chest masculinization. *Id.* In contrast, the SOC does not recommend phalloplasty surgery for minors at all. *Id.*

209. *See id.*

210. TEX. FAM. CODE ANN. § 261.001(1)(A) (West 2023) (emphasis added).

211. *See* TEX. ATT'Y GEN., *supra* note 25.

212. *See supra* Section I.B.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. TEX. ATT'Y GEN., *supra* note 25, at 11.

218. *See supra* Section II.E.1.

hormone therapies necessarily result in sterilization.[219] Rather, sterilization is a possible side effect of a person's continued use of hormones.[220]

Even if a child is sterilized as a result of their hormone treatments, sterilization does not automatically constitute child abuse. The context in which sterilization occurs, particularly the degree to which infertility is externally imposed on the individual, matters. Paxton alleges that sterilization is "by definition" an "injury that results in substantial harm."[221] Based on Paxton's logic, any individuals who seek out sterilization as a method of birth control (e.g., tubal sterilization in females and vasectomy in males)[222] are injuring and harming themselves.

What differentiates these procedures from injurious sterilization procedures (e.g., genital mutilation)[223] is the individual's informed consent, meaning the individual is fully informed of the possible risks of their desired procedure and still chooses to undergo it.[224] Although a minor in Texas is not legally allowed to consent to their own sterilization, their parent is.[225] Before signing off on any treatments, a medical provider should fully inform a parent of all possible side effects, including sterilization.[226] Further, this extra hoop likely provides additional protection for a child's fertility. While minors may be too young to fully grasp how sterilization can impact their lives, parents provide a more mature view on the issue and may seek to ensure the child has a viable means of future reproduction before consenting. Informed consent ensures that the individual receives their desired outcome and takes away the risk of any unforeseen harms.

Recasting these voluntary, legal procedures as forms of self-harm would create a slippery slope of unprecedented legal consequence. Although many individuals rely upon sterilization for family planning, others rely upon it to ensure their survival.[227] Notably, many women suffer from conditions that pregnancy may exacerbate, causing life-threatening consequences; for example, an atonic uterus is more likely to cause hemorrhaging or blood clots that can form in major blood vessels and block blood flow to vital organs.[228] Paxton cannot condemn the possibility of informed sterilization of children as child abuse and simultaneously

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219. *See supra* Section II.D.

220. *Id.*

221. TEX. ATT'Y GEN., *supra* note 25, at 2 (quoting TEX. FAM. CODE ANN. § 261.001(1)(C) (West 2023)).

222. Mayo Clinic Staff, *Birth Control, Sterilization*, MAYO CLINIC (Feb. 9, 2023), https://www.mayoclinic.org/healthy-lifestyle/birth-control/basics/sterilization/hlv-20049454 [https://perma.cc/69M2-S72T].

223. *See supra* Section II.E.

224. Parth Shah et al., *Informed Consent*, NAT'L LIBR. MED., https://www.ncbi.nlm.nih.gov/books/NBK430827/ [https://perma.cc/D6YJ-XLQD] (last updated June 5, 2023).

225. TEX. FAM. CODE ANN. § 151.001(a)(6) (West 2023).

226. *See supra* Section II.D.

227. *See Conditions that Threaten Women's Lives in Childbirth & Pregnancy*, HEALTHTALK.ORG, https://healthtalk.org/conditions-threaten-womens-lives-childbirth-pregnancy/what-is-a-life-threatening-complication-in-pregnancy-and-childbirth [https://perma.cc/3NXY-STVR] (last visited Sept. 22, 2023).

228. *Id.*

leave informed sterilizations necessary for the life of the individual untouched. Paxton's rhetoric threatens more than just gender-affirming healthcare.

Furthermore, Paxton's idea that sterilization automatically causes an individual substantial harm perpetuates outdated ideals.[229] Family planning comes in various forms, with individuals commonly deviating from reproduction through intercourse.[230] In the event that a minor is sterilized from their gender-affirming treatment, preventive measures, such as gamete preservation, can ensure the child still has a means of reproducing genetically if they so choose.[231] To better protect a child's fertility, medical professionals should inform their transgender patients of all methods for maintaining fertility and possible future reproductive alternatives.[232]

3. Genital Mutilation

Genital mutilation involves the removal or injury of genital organs for nonmedical reasons.[233] These procedures carry no health benefits; their only purpose is gratuitously harming the mutilated individual.[234] The most common form of genital mutilation is female genital mutilation ("FGM").[235] The World Health Organization considers FGM to be a practice that represents deep-rooted inequality and extreme gender- or sex-based discrimination.[236] Women receive FGM for various cultural and social reasons, including conforming to social pressures, ideas of femininity and modesty, and local structures of power.[237] FGM is most commonly performed to "ensure premarital virginity and marital fidelity" by taking the pleasure out of sexual intercourse.[238] Notably, the World Health Organization discourages medical providers from performing FGM.[239]

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229. *See* Juan Marco Vaggione, *Families Beyond Heteronormativity*, *in* GENDER AND SEXUALITY IN LATIN AMERICA - CASES AND DECISIONS, 235–40 (Cristina Motta & Macarena Saez eds., 2013).

230. *See LGBTQ Family Building Survey*, FAM. EQUAL. COUNCIL (2019), https://www.familyequality.org/resources/lgbtq-family-building-survey/ [https://perma.cc/3WAG-L5MG] (key survey finding titled "The LGBTQ Community is Relying on Conception from Intercourse Significantly Less Often for Family Building").

231. *See supra* Section II.D.

232. For a fuller description of fertility preservation options for transgender individuals at each stage of treatment, see Ainsworth et al., *supra* note 170, at 785–89.

233. *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 31, 2023), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation [https://perma.cc/WY7Q-267A]; Sam Kaggwa & Moses Galukande, *Male Genital Mutilation (Amputation) and Its Complications: A Case Report*, NAT'L LIBR. MED. (Aug. 12, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4266893/ [https://perma.cc/2KMN-TD9L].

234. *Female Genital Mutilation*, *supra* note 233.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

In the broadest sense, both genital mutilation and gender-affirming surgeries involve cutting one's genitals.[240] But the purpose of gender-affirming procedures substantially differs from the purpose of genital mutilation. Whereas genital mutilation carries no health benefits and does not follow from medical necessity, gender-affirming procedures have been shown to substantially improve the mental health of recipients.[241] Studies demonstrate that people who undergo these procedures experience significantly less psychological distress and suicidal ideation than transgender people who have not undergone these procedures.[242]

Genital mutilation should be of very little concern in the realm of minors receiving gender-affirming healthcare. As stated previously, the SOC does not recommend gender-affirming surgery for children. Additionally, only adolescents diagnosed with gender dysphoria, displaying an urgent need, and demonstrating a strong support system are even considered for such procedures.

4. Factitious Disorder Imposed on Another—Munchausen Syndrome by Proxy

Factitious disorder imposed on another, more commonly known as Munchausen syndrome by proxy, occurs "when someone falsely claims that another person has physical or psychological signs or symptoms of illness, or causes injury or diseases in another person with the intention of deceiving others."[243] Paxton alluded to the idea that parents consenting to gender-affirming treatments and procedures have this disorder.[244] The Attorney General stated "[i]n situations such

240. Gender-affirmation surgeries are more similar to male circumcisions than genital mutilation. Male circumcision is the "surgical removal of the skin covering the tip of the penis." *Circumcision (Male)*, MAYO CLINIC (Mar. 22, 2022), https://www.mayoclinic.org/tests-procedures/circumcision/about/pac-20393550 [https://perma.cc/8Z9B-GUCX]. Circumcision is incredibly common across the world, including in the United States. *Id.* Although some people perform the procedure for cultural or religious reasons, the procedure is also associated with numerous health benefits, ranging from easier hygiene to decreased risks of infections and cancers. *Id.* Both male circumcisions and gender-affirming care involve the cutting of genitals for medical reasons. *Id.*; *Gender Affirmation (Confirmation) or Sex Reassignment Surgery*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery [https://perma.cc/36T6-EM5B] (last visited Sept. 22, 2023).

241. *Female Genital Mutilation*, *supra* note 233; *Mental Health Benefits Associated with Gender-Affirming Surgery*, HARV. T.H. CHAN SCH. PUB. HEALTH, https://www.hsph.harvard.edu/news/hsph-in-the-news/mental-health-benefits-associated-with-gender-affirming-surgery/ [https://perma.cc/YZ5K-YFHZ] (last visited Sept. 19, 2023); *Study Finds Long-Term Mental Health Benefits of Gender-Affirming Surgery for Transgender Individuals*, AM. PSYCHIATRIC ASS'N, https://psychiatry.org/news-room/news-releases/study-finds-long-term-mental-health-benefits-of-ge [https://perma.cc/RNP6-AZH8] (last updated Aug. 1, 2020).

242. *See* Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, NAT'L LIBR. MED. (Apr. 28, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8082431/ [https://perma.cc/T2FV-UPTS].

243. *Factitious Disorder*, MAYO CLINIC (Dec. 14, 2019), https://www.mayoclinic.org/diseases-conditions/factitious-disorder/symptoms-causes/syc-20356028 [https://perma.cc/63XS-M6FV].

244. TEX. ATT'Y GEN., *supra* note 25, at 7.

as this, an individual intentionally seeks to procure—often by deceptive means, such as exaggeration—unnecessary medical procedures or treatments . . . usually [for] their children."[245]

Paxton's argument is flawed for three reasons. First, his claims have no basis in documented fact. To date, there are no state or federal court decisions in the United States in which a parent consenting to gender-affirming treatments or procedures for their child was found to have a factitious disorder imposed on another.[246]

Second, individuals whose gender identity differs from their sex assigned at birth do not have an illness, disease, or mental disorder.[247] The 11th edition of the International Statistical Classification of Diseases and Related Health Problems ("ICD-11")[248] and the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5")[249] are the leading guides for the assessment and diagnosis of health conditions.[250] The ICD-11 purposefully revised its terminology surrounding transgender identities "to reflect [a] modern understanding of sexual health and gender identity" and move the discussion from mental health to sexual health.[251] In this edition, gender-identity-related health is discussed in a new chapter on "[c]onditions related to sexual health" and is referred to as "gender incongruence" rather than "gender identity disorder."[252] Similarly, in 2013, the DSM-5 eliminated

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245. *Id.*

246. In his opinion, Paxton cites to *Williamson v. State* as support. *Id.* However, this case discussed a mother, who allegedly had Munchausen syndrome by proxy, who inflicted serious bodily injury on her child by influencing the placement of a gastronomy tube and a vagal nerve stimulator. Williamson v. State, 356 S.W.3d 1, 7–10 (Tex. App. 2010). This case does not discuss gender-affirming healthcare. *Id.* Multiple Westlaw searches with various key words were performed, including "Munchausen," "Fictitious Disorder," "gender! affirm!," and "sex! change!."

247. *See Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd [https://perma.cc/P3Z8-625N] (last visited Sept. 22, 2023); AM. PSYCHIATRIC ASS'N, *supra* note 82, at 451.

248. The ICD-11 "was adopted by the 72nd World Health Assembly in 2019 and came into effect on 1st January 2022." *International Statistical Classification of Diseases and Related Health Problems (ICD)*, WORLD HEALTH ORG., https://www.who.int/classifications/classification-of-diseases [https://perma.cc/5U6A-YMC5] (last visited Sept. 19, 2023).

249. The DSM-5-TR was published in 2022 and written and reviewed by "more than 200 experts" and "four cross-cutting review groups," including a sex and gender review group. *About DSM-5-TR*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm/about-dsm [https://perma.cc/7EK8-T773] (last visited Sept. 19, 2023).

250. *See generally* AM. PSYCHIATRIC ASS'N, *supra* note 82.

251. *Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd [https://perma.cc/V25D-KMHJ] (last visited Sept. 22, 2023).

252. *Id.*

the "gender identity disorder" diagnosis, replacing it with "gender dysphoria."[253] The DSM-5 is careful to clarify that "gender variance is not the pathology, but dysphoria is from distress caused by the body and mind not aligning and/or societal marginalization of gender-variant people."[254] Additionally, the DSM-5 explicitly states that "gender non-conformity is not in itself a mental disorder."[255]

Third, a parent's claim that their child has gender dysphoria is not sufficient for a healthcare professional to provide treatment to a child because the SOC stages are highly individualized.[256] If healthcare providers follow the SOC guidelines, it would be difficult for a parent to convince a healthcare professional that their child needs gender-affirming care without a basis in reality.[257] As a reminder, although the SOC guidelines are not binding by themselves, most insurance providers require medical professionals to follow them as a condition of coverage.[258] The SOC calls for highly individualized treatment, meaning that the default for healthcare professionals is to take time to understand the minor's preferences and needs before initiating treatment.[259] Additionally, the SOC does not recommend the more advanced stages of treatment discussed in Paxton's opinion (e.g., hormone therapy and gender-affirming surgeries) for adolescents and requires a gender-dysphoria diagnosis before initiating them.[260] As such, a parent would not only need to deceive the surgeon performing the gender-affirming surgery but also convince their child that they have a gender incongruence to the point where the child could also convince their mental health provider of their gender dysphoria.[261]

This is not to say that it would be impossible for a parent to secure gender-affirming care for their child under false pretenses—just that such a feat would be incredibly difficult. Nonetheless, Paxton does not explain how the danger of a parent obtaining care for their child under false pretenses is higher in gender-affirming treatments than it is in any other medical treatment.[262] Presumably, the same risk is present for most treatments, even those with more broadly trusted diagnosis procedures.[263]

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253. *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS'N (Nov. 2017), https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis [https://perma.cc/SWN3-8E5H].

254. *Id.*

255. *Id.*

256. *See supra* Section I.B.

257. *See id.*

258. *See supra* Section II.E.1.

259. Coleman et al., *supra* note 51, at S7.

260. *Supra* Section I.C.

261. *See id.*

262. *See* TEX. ATT'Y GEN., *supra* note 25.

263. One popular story of a mother suffering from Munchausen syndrome by proxy fabricating her daughter's illnesses is that of Gypsy Rose Blanchard. Mahita Gajanan, *The True Story Behind Hulu's* The Act, TIME, https://time.com/5553735/the-act-hulu-true-story/ [https://perma.cc/7JBL-33SH] (last updated May 1, 2019, 7:27 AM). There, the mother fabricated that her daughter suffered from "epilepsy, sleep apnea, eye issues, muscular dystrophy, and chromosomal defects." *Id.* Diagnoses for these disorders ranges from asking

III. AN ALTERNATIVE TO BANNING GENDER-AFFIRMING HEALTHCARE

The top priority for most parents and medical providers is to ensure that children in their care are safe and healthy. Paxton raises many points that, although legally easily refutable, echo the concerns that parents may have about gender-affirming care. For example, Senator Bob Hall, the Texas Republican lawmaker who has sponsored many bills opposing gender-affirming care for minors, characterizes such legislation as providing "loving care" such that children have "the opportunity to reach a maturity where they can make a decision for themselves."[264]

However, classifying gender-affirming treatment as child abuse will have the opposite effect of ensuring children are safe and healthy. Gender-affirming healthcare is, at times, absolutely necessary for the health of transgender children and adolescents such that undue postponement can threaten their well-being.[265] Transgender youth suffer from mental health issues at alarmingly high rates; many of them contemplate suicide as a viable remedy for their pain.[266] Moreover, transgender youth attempt suicide at much higher rates than their adult counterparts.[267] Fortunately, research has shown that gender-affirming care "greatly improves the mental health and overall well-being" of transgender children and adolescents.[268] Additionally, medically supervised gender-affirming care can reduce self-medication and other illicit interventions (e.g., off-market hormones and construction-grade silicone injections) that can have detrimental health effects.[269]

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questions, performing physical examinations, conducting blood or electrical tests, or even performing biopsies and DNA tests. *See Seizures and Epilepsy in Children*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/epilepsy/seizures-and-epilepsy-in-children [https://perma.cc/2F9P-DBDT] (last visited Sept. 19, 2023); *Muscular Dystrophy*, NHS, https://www.nhs.uk/conditions/muscular-dystrophy/diagnosis/ [https://perma.cc/6NRP-KQPN] (last visited Sept. 22, 2023); *Sleep Apnea*, MAYO CLINIC (Apr. 6, 2023), https://www.mayoclinic.org/diseases-conditions/sleep-apnea/diagnosis-treatment/drc-20377636 [https://perma.cc/5PGX-3EP7]; *Testing for Chromosome Abnormalities*, BETH ISRAEL DEACONESS MED. CTR. (July 2019), https://fenwayhealth.org/wp-content/uploads/Screening-chromozomebooklet-horizontal201607.pdf [https://perma.cc/XPN5-3EKH].

264. Sergio Martinez-Beltran, *Texas Lawmakers Are Going After Gender-Affirming Care in 2023 Session*, TEX. PUB. RADIO (Jan. 21, 2023, 12:00 PM), https://www.tpr.org/government-politics/2023-01-21/830exas-lawmakers-are-going-after-gender-affirming-care-in-2023-session [https://perma.cc/8AN2-5N2X].

265. *See* Connelly & Walch, *supra* note 12 ("As our patients grow older, they have repeatedly told us that gender-affirming care helped them survive adolescence.").

266. *National Survey on LGBTQ Youth Mental Health 2021*, *supra* note 10.

267. Mak et al., *supra* note 11, at 570.

268. Kareen M. Matouk & Melina Wald, *Gender-Affirming Care Saves Lives*, COLUM. UNIV. DEP'T PSYCHIATRY (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/JL3W-BNCU].

269. Press Release, AMA, AMA to States: Stop Interfering in Health Care of Transgender Children (Apr. 26, 2021), https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children

Most national medical groups, including the American Medical Association ("AMA") and American Academy of Pediatrics, recognize the importance of gender-affirming care for youth and vehemently oppose legal arguments in the vein of Paxton's opinion.[270] In a letter to the National Governors Association in 2021, the AMA declared that "this legislation represents a dangerous governmental intrusion into the practice of medicine and will be detrimental to the health of transgender children across the country."[271] Similarly, major Texas medical groups have opposed legal bans on gender-affirming healthcare for youth.[272] The Texas Medical Association and Texas Pediatric Society, in a letter to Paxton, openly opposed "the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents."[273] These opinions call into question whether some politicians' concerns for child welfare are actually consistent with the informed views of expert medical professionals.

The alternative to banning gender-affirming healthcare for minors is simple: allow members of the medical community to continue regulating access to such care. The SOC provides carefully formulated guidelines[274] that are broadly endorsed by the American Academy of Pediatrics,[275] the American College of Obstetrics and Gynecology,[276] the Pediatric Endocrine Society,[277] the American College of Physicians,[278] and the American Psychological Association.[279] These

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[https://perma.cc/5KZP-YG2P]; *see* Coleman et al, *supra* note 51, at S7 ("Due to a lack of knowledgeable providers, untimely access, cost barriers and/or previous stigmatizing healthcare experiences, many [transgender] people take non-prescribed hormone therapy. This poses health risks associated with the use of unmonitored therapy in potentially supratherapeutic doses and the potential exposure to blood-borne illnesses if needles are shared for administration.").

270. Press release, AMA, *supra* note 269 ("The American Medical Association (AMA) today urged governors to oppose state legislation that would prohibit medically necessary gender transition-related care for minor patients, calling such efforts 'a dangerous intrusion into the practice of medicine.' In a letter to the National Governors Association (NGA), the AMA cited evidence that trans and non-binary gender identities are normal variations of human identity and expression, and that forgoing gender-affirming care can have tragic health consequences, both mental and physical.").

271. *Id.*

272. *See* Letter from the Tex. Med. Ass'n & Tex. Pediatric Soc'y, to Ken Paxton, Tex Att'y Gen. (March 10, 2022), https://www.texmed.org/uploadedFiles/Current/2016_Advocacy/AmicusBrief(D-1-GN-22-000977).pdf [https://perma.cc/C4M7-FFM5].

273. *Id.*

274. *See* Coleman et al., *supra* note 51, at S43–S79.

275. *See* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 1.

276. *Health Care for Transgender and Gender Diverse Individuals: ACOG Committee Opinion, Number 823*, 137 OBSTETRICS & GYNECOLOGY e75, e75–e76 (2021).

277. Wylie C Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869 (2017).

278. *See* Joshua D. Safer & Vin Tangpricha, *Care of the Transgender Patient*, 171 ANNALS INTERNAL MED. 773 (2019).

279. Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 832 (2015).

guidelines instruct physicians to personalize individual care at each stage of treatment and carefully consider the risks and benefits to each patient. Furthermore, any medical decisions should incorporate the opinions of the entire care team[280] as well as the patient and their parent. Additionally, and perhaps most pertinent to Paxton's concerns: these guidelines *do not recommend gender-affirming surgery for minors*.[281]

Medical professionals are bound by an ethical duty to "ensure that the care patients receive is safe, effective, patient centered, timely, efficient, and equitable."[282] For all medical interventions, this means following the generally accepted, best practices of the time.[283]

Best practices commonly govern even elective medical interventions for minors. Take, for instance, breast augmentations for people under 18.[284] Minors may be considered for plastic surgery as soon as they and their parents wish, but best practices indicate that a surgeon should wait at least two years after the child's first period to ensure they have finished their natural development and reached a stable weight.[285] Additionally, the patient and their guardian must provide their informed consent to the procedure, and the surgeon should ensure the patient is not receiving the surgery because of undue societal pressures.[286]

Gender-affirming healthcare for minors is no different, except for the numerous additional restrictions on providing that care within the medical community.[287] On top of best practices with respect to the minor's natural development, receiving informed consent, and ensuring the treatment is in the best interests of the child, there is an entire body of literature dedicated to providing even more guidance.[288]

The safest way for any person to receive any sort of medical care is to defer to medical professionals, not politicians. When the government intrudes in that space and overrides the consensus of medical professionals, urgent care will sometimes not be administered.[289] Banning gender-affirming healthcare for children only

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280. The care team should include therapists and specialized physicians.

281. *See* Coleman et al., *supra* note 51, at S66.

282. *Opinion 1.1.6: Quality*, AM. MED. ASS'N: CODE MED. ETHICS, https://www.ama-assn.org/system/files/code-of-medical-ethics-chapter-1.pdf [https://perma.cc/RX4C-6RCB] (last visited Sept. 22, 2023).

283. *Id.*

284. "Breast augmentation . . . involves using breast implants or fat transfer to increase the size of your breasts." *Breast Augmentation*, AM. SOC'Y PLASTIC SURGEONS, https://www.plasticsurgery.org/cosmetic-procedures/breast-augmentation [https://perma.cc/C4DJ-264M] (last visited Sept. 19, 2023).

285. *Ask a Surgeon*, AM. SOC'Y PLASTIC SURGEONS, https://www1.plasticsurgery.org/psconnect/askasurgeon/detail.aspx?thread=1126 [https://perma.cc/QV84-MJZE] (last visited Sept. 22, 2023).

286. *Id.*

287. *See* Coleman et al., *supra* note 51, at S43–S79.

288. *See id.*

289. Press release, AMA, *supra* note 269.

serves to hurt one of the most vulnerable populations in America.[290] To ensure these children remain safe and healthy and receive the support necessary to safeguard their survival, state governments must remove themselves from the patient–doctor relationship and allow medical professionals to do their jobs.

CONCLUSION

Texas Attorney General Ken Paxton's opinion and Senate Bill 14 have successfully eliminated access to gender-affirming healthcare for minors in Texas. The political branches' motivations at least partially include sincerely held concerns for the best interests of children. However, these officials' statements and actions are misplaced and misguided. Rather than seeking to ensure children have *safe* access to gender-affirming healthcare, these efforts place high-risk children directly in harm's way.

The state of gender-affirming healthcare in Texas reflects a common trend among the most politically conservative states. In 2023 alone, state legislatures introduced over 120 bills that sought to restrict minor access to this medically necessary care across the country.[291] Texas Attorney General Paxton's opinion provides important insight into the purported legal bases for much of the legislative action aimed at transgender youth—and those arguments manifest shortcomings.

290. *See* Arnold H. Grossman & Anthony R. D'augelli, *Transgender Youth: Invisible and Vulnerable*, 51 J. HOMOSEXUALITY 111, 111 (2006) ("Youth noted four problems related to their vulnerability in health-related areas: the lack of safe environments, poor access to physical health services, inadequate resources to address their mental health concerns, and a lack of continuity of caregiving by their families and communities.").

291. *Texas Senate Passes Sweeping Ban to Prohibit Trans Youth and Adults from Receiving Necessary Medical Care*, HUM. RTS. CAMPAIGN (Apr. 26, 2023), https://www.hrc.org/press-releases/texas-senate-passes-sweeping-ban-to-prohibit-trans-youth-and-adults-from-receiving-necessary-medical-care [https://perma.cc/KZL6-93G8].