

645 S.W.3d 276
Supreme Court of Texas.

IN RE Greg ABBOTT in His Official Capacity as
Governor of the State of Texas; Jaime Masters in
Her Official Capacity as Commissioner of the
Department of Family and Protective Services;
and the Texas Department of Family and
Protective Services, Relators

No. 22-0229

OPINION DELIVERED: May 13, 2022

Synopsis

Background: Parents of minor child diagnosed with gender dysphoria and physician who treated such children filed suit against Governor, Department of Family and Protective Services (DFPS), and DFPS Commissioner, seeking declaratory and injunctive relief, challenging Governor’s directive, in response to Attorney General opinion that certain sex-change procedures and treatment, when performed on child, could constitute child abuse under Texas law, that DFPS and other agencies act in accordance with opinion. The 353rd District Court, Travis County, 2022 WL 831383, Amy Clark Meachum, J., issued temporary injunction enjoining all defendants from taking certain enumerated actions against plaintiffs and “any and all persons.” State took interlocutory appeal, which necessarily superseded District Court’s injunction. The Austin Court of Appeals, 2022 WL 837956, issued temporary order reinstating injunction in its entirety pending disposition of appeal. State petitioned for writ of mandamus directing Court of Appeals to vacate its order.

Holdings: The Supreme Court, Blacklock, J., held that:

Attorney General opinion had no binding legal effect on DFPS’s statutory obligation to undertake prompt and thorough investigations of reports of child abuse or neglect;

appellate rule authorizing Court of Appeals to issue temporary orders necessary to preserve rights of parties did not authorize Court to issue orders granting rights to “any and all persons” on state-wide basis who were not parties to case; and

in opinion by Bland, J., for majority of Court, mandamus

would issue to order Court of Appeals to vacate temporary order to extent it enjoined Governor from taking actions that Governor had no authority to do.

Petition granted in part and denied in part.

Lehrmann, J., filed concurring opinion.

Blacklock, J., filed opinion concurring in part and dissenting in part, in which Boyd and Devine, JJ., joined.

Procedural Posture(s): Petition for Writ of Mandamus; On Appeal; Motion for Preliminary Injunction.

***278** On Petition for Writ of Mandamus

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Opinion

Justice Blacklock delivered the opinion for a unanimous Court as to Parts I and II. Justice Bland delivered the opinion of the Court as to Part III, in which Chief Justice Hecht, Justice Lehrmann, Justice Busby, and Justice Huddle joined.

***279** On February 18, 2022, the Attorney General issued Opinion No. KP-0401, which concludes that certain “ ‘sex

change’ procedures and treatments ... when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code.” Relying on this opinion, the Governor sent a letter to the Commissioner of the Department of Family and Protective Services (DFPS) expressing his view that “a number of so-called ‘sex change’ procedures constitute child abuse under existing Texas law.” The letter closes with the instruction that “DFPS and all other state agencies must follow the law as explained in OAG Opinion No. KP-0401.” DFPS then issued the following statement to the media: “In accordance with Governor Abbott’s directive today to Commissioner Masters, we will follow Texas law as explained in Attorney General opinion KP-0401.”

This lawsuit followed. The plaintiffs are a married couple who are the parents of a child diagnosed with gender dysphoria and a doctor who treats such children. They sued the Governor, the DFPS Commissioner, and DFPS, challenging the Governor’s “directive” and the statement made by DFPS to the media. The plaintiffs contend that DFPS’s press statement improperly announces a new agency rule without the notice-and-comment procedure required by law. *See* TEX. GOV’T CODE §§ 2001.023, .029, .033. They also challenge DFPS’s authority to investigate their use of medical treatments deemed unlawful by the Governor’s letter.

The district court issued a temporary injunction that “restrains the following actions by the Defendants”:

- (1) taking any actions against Plaintiffs based on the Governor’s directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton’s Opinion No. KP-0401 which they reference and incorporate; (2) investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either ***280** the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed

gender-affirming medical treatment; (3) prosecuting or referring for prosecution such reports; and (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

The State took an interlocutory appeal, which automatically superseded the district court’s injunction. *See* TEX. R. APP. P. 29.1(b); TEX. CIV. PRAC. & REM. CODE § 6.001(b). The court of appeals then issued a Rule 29.3 temporary order reinstating the temporary injunction in its entirety. *See* TEX. R. APP. P. 29.3

The State now petitions this Court for a writ of mandamus directing the court of appeals to vacate its Rule 29.3 order. As explained below, we conditionally grant the State’s petition as to the portions of the court of appeals’ order that purport to have statewide application. The court of appeals lacked any authority under Rule 29.3 to afford relief to nonparties throughout the state. We also conditionally grant relief with respect to the order’s injunction against the Governor, as there is no allegation that he is taking, or has authority to take, the enforcement actions the order enjoins. Finally, the Court concludes that the State has not established its entitlement to mandamus relief as to the other parts of the court of appeals’ order applicable to the plaintiffs in this case. Mandamus relief is denied as to those parts of the order.

I.

Neither the courts nor the public can properly assess our government’s decisions without first correctly identifying which actors within the government are responsible for those decisions. In litigation, we see this principle reflected in the requirement that plaintiffs who want the courts to pass judgment on the legality of government action must seek relief against the particular government official or agency responsible for the challenged action. In politics, the people of Texas—by whose authority and for whose benefit our government exists—cannot allocate

political responsibility for the government’s decisions unless they understand which government officials have the lawful authority to make or to change those decisions.

Although this case comes to us in its early stages, it appears already to have been infected by a misapprehension of the proper roles played by the various government actors involved. Before resolving the State’s mandamus petition, we first must clarify who within the government is responsible for the decisions complained of by the plaintiffs. We address this preliminary, but essential, question without regard to the merits of the underlying case.

Unlike the federal constitution, the Texas Constitution does not vest the executive power solely in one chief executive. Instead, the executive power is spread across several distinct elected offices, and the Legislature has over the years created a wide variety of state agencies—including DFPS—whose animating statutes do not subject their decisions to the Governor’s direct control.¹

The State does not contend in this Court that the Governor’s letter formally *281 changed the legal obligations of DFPS, of parents in Texas, or of medical professionals in Texas. Nor does it contend that the Attorney General’s opinion did so. Unlike some executive orders of the Governor that are afforded binding legal effect by statute, the Governor’s letter cites no legal authority that would empower the Governor to bind state agencies with the instruction contained in the letter’s final sentence, and we are directed to none.

Likewise, it is well-settled that an Attorney General opinion interpreting the law cannot alter the pre-existing legal obligations of state agencies or private citizens.² *See Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996) (stating Attorney General opinions are “not controlling”). Nor does the Attorney General have any formal legal authority to direct the investigatory decisions of DFPS. In sum, we are directed to no source of law obligating DFPS to base its investigatory decisions on the Governor’s letter or the Attorney General’s Opinion. The Governor and the Attorney General were certainly well within their rights to state their legal and policy views on this topic, but DFPS was not compelled by law to follow them.³

DFPS’s press statement, however, suggests that DFPS may have considered itself bound by either the Governor’s letter, the Attorney General’s Opinion, or both. Again, nothing before this Court supports the notion that DFPS is so bound. Instead, the Legislature has granted to DFPS, not to the Governor or the Attorney

General, the statutory responsibility to “make a prompt and thorough investigation of a report of child abuse or neglect.” TEX. FAM. CODE § 261.301(a). And, when deciding whether and how to exercise that authority, DFPS—not the Governor or the Attorney General—naturally must assess whether a report it receives is actually “a report of child abuse or neglect.” *Id.* Of course, the Legislature, by statute, may constrain DFPS’s discretion in this regard (subject to constitutional limitations),⁴ but neither the Governor nor the Attorney General has statutory authority to directly control DFPS’s investigatory decisions. They have every right to express their views on DFPS’s decisions and to seek, within the law, to influence those decisions—but DFPS alone bears legal responsibility for its decisions.

The central role played by courts in the child-welfare system should also be clarified. DFPS’s preliminary authority to *investigate* allegations does not entail the ultimate authority to *interfere* with parents’ decisions about their children, decisions which enjoy some measure *282 of constitutional protection whether the government agrees with them or not. *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). Before it can impose consequences on a family beyond an investigation, DFPS generally must seek court orders authorizing it to intervene.⁵ See generally TEX. FAM. CODE § 262.001 *et seq.* In other words, DFPS does not need permission from courts to *investigate*, but it needs permission from courts to *take action* on the basis of an investigation. At that stage, before issuing orders, a court would have to decide whether the child abuse investigated and alleged by DFPS qualifies as such under Texas law. The normal judicial role in this process is to act as the gatekeeper against unlawful interference in the parent–child relationship, not to act as overseer of DFPS’s initial, executive-branch decision to investigate whether allegations of abuse may justify the pursuit of court orders.

With these preliminary observations in mind, we turn to the State’s petition for writ of mandamus.

II.

The State’s petition seeks relief from an order issued by the court of appeals under the authority afforded to that court by Rule 29.3 of the Texas Rules of Appellate Procedure. “Mandamus relief is appropriate when a petitioner demonstrates a clear abuse of discretion and has no adequate remedy by appeal.” *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019). A court clearly abuses its discretion when it makes an error of law. *Id.*

As noted above, the trial court’s temporary injunction was superseded by operation of law when the State appealed it. See TEX. R. APP. P. 29.1(b); TEX. CIV. PRAC. & REM. CODE § 6.001(b). However, Rule 29.3 authorizes courts of appeals, during an interlocutory appeal, to “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal.” TEX. R. APP. P. 29.3. We have recognized that, depending on the circumstances, this rule may authorize a court of appeals “to preserve the status quo and prevent irreparable harm” to the parties during the pendency of the appeal, even if the temporary order has “the same practical effect as denying supersedeas of the trial court’s injunction.” *In re Tex. Educ. Agency*, 619 S.W.3d 679, 680 (Tex. 2021); see also *Geomet*, 578 S.W.3d at 90.⁶

The text of Rule 29.3 plainly limits the scope of the available relief to that which is necessary to preserve *the parties’* rights. Part (1) of the court of appeals’ order protects only the plaintiffs and therefore does not, in terms of its scope, exceed the appellate *283 court’s Rule 29.3 power. However, parts (2), (3), and (4) of the order exceed the court of appeals’ authority because they apply broadly to “any and all persons” who are not parties to this lawsuit. This affords relief not to the parties, but to “any and all” nonparties who may find themselves in circumstances similar to the plaintiffs’. Rule 29.3 does not provide authority for such an order.

The plaintiffs respond that the nature of their Administrative Procedure Act challenge to DFPS’s press statement expands the relief that should be available under Rule 29.3. They contend that a district court could enjoin an invalid rule’s application on a statewide basis, so it follows that a court of appeals must have the same authority. Whether or not the plaintiffs are right about the scope of a district court’s power to enjoin an administrative rule, that question is beside the point. The issue is the court of appeals’ power under Rule 29.3, which provides only the limited authority to “preserve the parties’ rights,” not the general authority to reinstate temporary injunctions of any nature. The plaintiffs make no effort to grapple with the party-specific language of Rule 29.3, which forecloses their position regardless of the nature of their claims in the district court. Just as the Governor lacks authority to issue a binding “directive” to DFPS, the court of appeals lacks authority to afford statewide relief to nonparties.

The court of appeals abused its discretion by using Rule 29.3 to issue a statewide order. The State lacks an adequate appellate remedy by which to avoid this invalid aspect of the court of appeals’ order. Mandamus relief is

appropriate as to the order’s application to “any and all” nonparties.⁷

III.

The remaining question is whether the State is entitled to mandamus relief from the court of appeals’ order as it applies to the plaintiffs in this case. As discussed in Part II above, we have recognized appellate courts’ authority to preserve the status quo and prevent irreparable harm to the parties during the pendency of an appeal. *See also In re State*, --- S.W.3d ---, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021) (per curiam) (granting stay to preserve status quo without comment on merits of request for temporary injunction). But none of the State’s argument in this Court focuses on the circumstances of this child. Without commenting on the merits of any party’s claims or defenses, the Court denies mandamus relief from the order’s application insofar as it governs conduct among these parties while the appeal proceeds, with one exception. Ordering the Governor not to “investigat[e] reports” of abuse, “prosecut[e]” such reports, or “impos[e] reporting requirements” was improper because, as we hold above, the Governor does not have authority to do any of those things with respect to these plaintiffs. Nor have the plaintiffs alleged that the Governor is engaging or threatening to engage in such conduct. Because the Governor lacks the authority to investigate or prosecute the *284 plaintiffs, and no party alleges that he has threatened to do so, an order prohibiting him from engaging in such conduct has no support in this record. In all other respects, the Court denies mandamus relief as to the order’s application to the defendants’ conduct with respect to these plaintiffs, while the appeal is pending.⁸

With relief partially denied and partially granted, we are left with (1) a court of appeals order that protects only the plaintiffs as against DFPS and its Commissioner’s actions, and not as against the Governor; (2) a nonbinding Attorney General Opinion; (3) a nonbinding statement by the Governor; and (4) a state agency, DFPS, with the same discretion to investigate reports of child abuse that it had before issuance of OAG Opinion No. KP-0401 and the Governor’s letter.⁹

Justice Lehrmann filed a concurring opinion.

Justice Blacklock filed an opinion dissenting as to Part III, in which Justice Boyd and Justice Devine joined.

Justice Young did not participate in the decision.

Justice Lehrmann, concurring.

This case comes to us in its early stages and in a particular procedural posture: we are asked to mandamus the court of appeals for exceeding its authority under Texas Rule of Appellate Procedure 29.3 to issue temporary orders while an interlocutory appeal is pending in that court. Given Rule 29.3’s express limitations on the court of appeals’ authority to grant such relief—to preserve *the parties’* rights until disposition of the appeal—and the role played by the named defendants in the actions about which the plaintiffs complain, I join the Court’s partial grant of mandamus relief. I write separately to highlight the narrow scope of what is before us in contrast to the broader underlying dispute, lest we lose the forest for the trees.

First, as the Court notes, this dispute began when DFPS issued a statement indicating that it was implementing policy changes in response to a letter from the Governor that closes with the instruction that “DFPS and all other state agencies must follow the law as explained in OAG Opinion No. KP-0401.” However, the issue before us is not whether the plaintiffs’ claims challenging those actions are meritorious. Rather, today the Court addresses only the narrow question of whether the court of appeals abused its discretion by temporarily reinstating the trial court’s temporary injunction under Rule 29.3 while the interlocutory appeal of that injunction is pending. In this regard, the Court: (1) denies mandamus relief as to the portion of the order that applies to the named parties except to the extent that it enjoins the Governor from engaging in enforcement actions that he has no authority to undertake—and has not threatened or attempted to undertake—in the first instance, as such an injunction would serve no purpose; and (2) grants relief as to the portion of the order that applies to nonparties. Neither the interlocutory appeal of the trial court’s temporary injunction nor the merits of the plaintiffs’ underlying *285 claims are affected by today’s decision. *Ante* at 284 n.8.

Second, I find it helpful to take a step back and survey the bigger picture of the underlying dispute. The plaintiffs allege that the Governor’s February 22, 2022 letter and DFPS’s summary implementation of the directive in that letter resulted in an immediate, dramatic change in DFPS’s interpretation of its legal obligations with respect to investigating child abuse in the context of adolescent minors receiving medical treatment for gender dysphoria. The plaintiffs’ petition references statements of numerous

professional medical associations condemning the change as a rejection of evidence-based medical care for patients diagnosed with gender dysphoria that would restrict access to such care for affected adolescents.¹ The plaintiffs further allege that parents and families across the State are now fearful of the consequences of following the recommendations of their medical providers and equally fearful of the effect *not* following those recommendations will have on their children's health. Similarly, they allege, professionals with the duty to report suspected child abuse are faced with the dilemma of choosing between the possibility of referral for prosecution for failing to report conduct that has now been deemed abusive—along with the associated impact that could have on their professional licenses and livelihoods—and violating their own professional and ethical obligations.

The plaintiffs' underlying causes of action premised on these events include (1) a claim for a declaratory judgment that DFPS's statement regarding its implementation of the Governor's directive amounts to an invalid rule under the Administrative Procedures Act (APA), (2) a claim for a declaratory judgment that the Governor and the Commissioner engaged in *ultra vires* conduct, and (3) claims of various constitutional violations. Again, the merits of those claims are not before us and are not affected by our narrow decision today, which addresses only the propriety of the court of appeals' temporary order.

Third, I feel compelled to discuss an argument made by the State that the Court need not and does not address. Specifically, in seeking mandamus relief from the court of appeals' order, the State argues that it lacks an adequate appellate remedy because the order "prohibit[s] DFPS from even *investigating* possible child abuse" in cases involving gender dysphoria *286.² The dissent appears to agree with this reading of the order, which would indeed risk the irreparable harm to children that the State fears. As the Court explains, DFPS bears the responsibility of investigating reports of child abuse or neglect, which necessarily includes "assess[ing] whether a report it receives is actually 'a report of child abuse or neglect.'" *Ante* at 281. A proper judicial remedy cannot go so far as to curb that discretion beyond legislative and constitutional limits. That is, the remedy for an allegedly improper limitation on DFPS's investigatory discretion cannot be the placement of a different but equally improper limitation on DFPS's investigatory discretion; either amounts to a change in the status quo that the court is seeking to preserve.

However, in my view, neither the State nor the dissent

properly construes the scope of the court of appeals' order. The reinstated injunction prohibits DFPS from investigating reports "based *solely* on ... facilitating or providing gender-affirming care ... where the *only grounds* for the purported abuse" are "facilitation or provision of gender-affirming medical treatment." (Emphases added). The order further makes clear that the injunction is intended to restrain enforcement of "the Governor's directive and DFPS rule, both issued February 22, 2022."

In other words, the order temporarily reinstates DFPS's policies as they were prior to the February 22 directive, leaving DFPS free to screen and investigate reports based on its preexisting policies regarding medical abuse and neglect. Although the order exceeds the permissible bounds of Rule 29.3 by applying to nonparties and is erroneous on that basis, it does not, as the State implies, create entirely new restrictions on DFPS's authority to carry out its statutory obligations. That is, it does not preclude DFPS from investigating reports that a child diagnosed with gender dysphoria is receiving treatment that is medically unnecessary or inappropriate. To the contrary, it requires DFPS, as has always been its responsibility, to investigate reports of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare. TEX. FAM. CODE § 261.301(a). And DFPS has a detailed process for screening reports and initiating and conducting those investigations. *See* TEX. ADMIN. CODE §§ 707.447–.517. These standards apply regardless of a child's diagnosis with gender dysphoria. The order would simply bar DFPS from initiating investigations and making referrals based *solely* on the new grounds set out in the Governor's directive.

DFPS's own statements support this reading of the reach of the order. As the plaintiffs note, after the court of appeals issued the order, DFPS employees were informed that it did not prevent them from assessing intakes and beginning investigations when "*independent grounds* that warrant an investigation are reported." Accordingly, DFPS itself recognizes that the court of appeals' order—even if it were not deficient under Rule 29.3—does not bar it from investigating child abuse and neglect associated with *inappropriate* or *medically unnecessary* treatment for gender dysphoria; it simply must use preexisting criteria and procedures in determining whether a particular case justifies intervention.

*287 By contrast, DFPS's summary change in policy pursuant to the Governor's directive—whether or not based on an erroneous view of the Governor's authority to

issue it and whether or not it amounts to an invalid rule under the APA—actually served to *narrow* the discretion of DFPS employees with respect to screening reports and conducting such investigations. For example, the plaintiffs presented evidence that after the directive and agency statement were issued, employees were told that they no longer had the authority to “Priority None” cases in which allegations were made that minors were receiving medical care for gender dysphoria, meaning they had no discretion to determine that such cases could be closed without further investigation even if a treating physician determined that such treatment was medically appropriate. See TEX. FAM. CODE § 261.3015 (authorizing DFPS, except in certain exigent circumstances, to “conduct an alternate response” to a report of abuse and to “administratively close a reported case of abuse or neglect without completing the investigation or alternative response and without providing services or making a referral to another entity for assistance if the department determines, after contacting a professional or other credible source, that the child’s safety can be assured without further investigation, response, services, or assistance”).³ Yet there is absolutely no indication that DFPS’s preexisting criteria and policies for investigating abuse were insufficient to address allegations of medically inappropriate treatment. See TEX. ADMIN. CODE § 707.489 (DFPS responses to a report of abuse or neglect, depending on the circumstances, range from “administrative closure” to “an abbreviated investigation” to “a thorough investigation” to “an alternative response”).

With these additional thoughts, I join the Court’s opinion and concur in the partial denial and partial grant of mandamus relief.

Justice Blacklock, joined by Justice Boyd and Justice Devine, concurring in part and dissenting in part.

I agree with the Court that Rule 29.3 does not authorize the court of appeals to afford statewide relief to non-parties. The remaining question is whether the State is entitled to mandamus relief from the court of appeals’ order with respect to the plaintiffs. The Court denies that portion of the State’s petition except as to the Governor, but I would grant further relief.

***288** This mandamus petition arises from the court of appeals’ Rule 29.3 order reinstating the district court’s temporary injunction against the State. The well-established temporary-injunction standard applied by the district court requires the party seeking the injunction

to establish: “(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). We have not previously articulated the standard a court of appeals asked to reinstate a temporary injunction using Rule 29.3 should apply. The Court’s decision today does not comment on that question.

In my view, it would make little sense to require the Rule 29.3 movant under these circumstances to establish any more or any less than what was initially required to obtain the injunction in the district court. Thus, in determining whether to issue its own order effectively reinstating a superseded temporary injunction, the court of appeals should have considered *de novo* the same factors considered by the district court. Consequently, the question for this Court, on mandamus, is whether the court of appeals abused its discretion by concluding that the plaintiffs had made a sufficient showing under the traditional temporary-injunction factors.

To begin, I agree with the Court that the State is not entitled to mandamus relief as to part (1) of the court of appeals’ order, which prohibits the defendants from “taking any actions against Plaintiffs based on the Governor’s directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton’s Opinion No. KP-0401” As the Court holds, neither the Governor’s letter nor the Attorney General Opinion changed the legal landscape in a way that altered DFPS’s discretion to make investigatory decisions regarding alleged child abuse. Nor do DFPS’s subsequent media statements or internal directions to its staff in reliance on the Governor’s letter and the Attorney General Opinion bind DFPS in the future exercise of its investigatory discretion or formally alter the legal obligations of parents, doctors, or anyone else. I understand part (1) of the order to simply reinforce the reality that there has been no change in law that, of its own force, authorizes any action by DFPS against the plaintiffs.

The question remains, however, whether part (2) of the order can stand as applied to the plaintiffs. Part (2) prohibits DFPS from even investigating the possibility of harm to the plaintiffs’ child. Although none of the defendants’ challenged statements provide an independent legal basis for such an investigation, the real crux of the matter is whether, under pre-existing law, DFPS had the background authority, grounded in the Family Code, to investigate whether gender-dysphoria treatment may constitute child abuse in particular cases and to go to court to seek orders on that basis. We should not resolve that question at this time. But, at this stage, we should ask

whether the plaintiffs have established a probable right to relief on their claim that DFPS cannot even so much as look into the plaintiffs' medical decisions in this regard without first undertaking notice-and-comment rulemaking.

The plaintiffs have not made the required showing. They cite no case in which an injunction has been obtained prohibiting the executive branch from exercising its well-established prerogative to investigate whether the law has been broken. As the Court rightly observes, if DFPS concludes on the basis of an investigation that further action is warranted, that action cannot take place without court authorization. Until then, the courts' normal role in this process is not to tell DFPS what it can *289 and cannot investigate. Instead, the courts' role is to decide whether DFPS may take action based on its investigation. The court of appeals' order, however, would prohibit DFPS from even beginning an investigation to determine whether cause for concern meriting the pursuit of court orders might exist. In other words, the injunction amounts to *one court* ordering DFPS not even to *look into* whether it should seek orders from *another court*. We are pointed to no precedent for this kind of preemptive short-circuiting of the normal relationship between the investigatory power of the executive branch and the judicial power of the courts.¹

The plaintiffs, their experts, and their supporting amici are firmly convinced that the disputed treatments are fully reversible and completely justified. The Attorney General and the Governor vehemently disagree. All involved are entitled to their opinions, but the Legislature has assigned to DFPS—not to the Governor or to the plaintiffs' experts and amici—the authority to investigate such matters on behalf of the State. In my view, an injunction preemptively prohibiting the executive branch from even investigating the possibility that injury to a child may result from the disputed treatments is likely beyond the proper scope of the judicial power. The court of appeals' injunction prohibiting any investigation of these matters by DFPS was an abuse of discretion, including as to the plaintiffs.²

For these reasons, I respectfully dissent from Part III of the Court's decision.

All Citations

645 S.W.3d 276, 65 Tex. Sup. Ct. J. 1071

Footnotes

¹ The Governor frequently appoints these officers, but the state agencies' enabling statutes rarely give the Governor formal control over the officers' decisions once appointed.

² AG Opinions have been understood to provide a shield against liability in certain circumstances, and we make no comment in that regard. *See, e.g., Weaver v. Head*, 984 S.W.2d 744, 746 (Tex. App.—Texarkana 1999, no pet.) (“[AG opinions] sometimes become important for use by a public official to avoid personal liability for official acts by a showing of good faith in acting in reliance on an attorney general's opinion.”). The pertinent question for now is whether AG Opinions *create or change* legal obligations, as opposed to explaining them. They do not.

³ We are not blind to the many informal mechanisms by which a governor or an attorney general may validly seek to influence the behavior of state agencies as part of the normal give-and-take between departments of state government. Ultimately, however, one department or another has the final say, and a court must correctly identify the true decision-maker before assessing the decision.

⁴ During the most recent regular session, the Legislature considered, but did not pass, proposed legislation that would have amended the Family Code to add certain treatments for gender dysphoria to the definition of “child abuse.”

Tex. S.B. 1646, 87th Leg., R.S. (2021).

⁵ DFPS has limited authority in extreme, emergency situations to take temporary custody of children before obtaining a court order. See TEX. FAM. CODE § 262.104. The plaintiffs do not allege that they face a credible threat of such action.

⁶ The State contends that, under an 1880 decision of this Court, courts of appeals exercising appellate jurisdiction lack any authority to “protect the parties from damage during the pendency of the appeal.” *City of Laredo v. Martin*, 52 Tex. 548, 554 (1880). As we observed in *Geomet*, in which no party raised *Martin*, such a line of argument “amounts to a constitutional attack on Rule 29.3.” 578 S.W.3d at 89–90. We further noted in *Geomet* that a state of affairs in which no court can protect parties’ rights during an interlocutory appeal would raise constitutional questions about the automatic stay of trial court proceedings afforded by section 51.014(b) of the Civil Practice and Remedies Code. *Id.* at 90. Likewise, the limitation on appellate courts’ Rule 29.3 authority suggested by the State would raise constitutional questions about the State’s statutory right to automatically supersede injunctions on appeal. We do not purport to resolve any of these questions in this expedited mandamus posture.

⁷ We need not address the State’s additional arguments for the invalidity of the statewide order. The plaintiffs contend that, even if the order is invalid, the State has an adequate remedy by the appeal of the district court’s temporary injunction. But the whole purpose of the State’s mandamus petition is to establish its rights during the pendency of the interlocutory appeal. The fact that an improper judicial imposition on the executive branch’s prerogatives may only be temporary does not make it any less improper. The State has no adequate remedy, other than mandamus relief, by which to remedy the effects of the court of appeals’ order.

⁸ We express no opinion on the pending interlocutory appeal of the district court’s temporary injunction or on the merits of the plaintiffs’ underlying claims seeking various forms of declaratory and injunctive relief against the Governor, the Commissioner, and DFPS, which remain pending in the district court.

⁹ The State’s Emergency Motion for Temporary Relief, which accompanied its mandamus petition, is dismissed as moot.

¹ In this Court, we received amicus briefs in opposition to the State’s mandamus petition from numerous professional medical associations and child advocacy organizations, including: the Texas Medical Association, the American Medical Association, the Texas Pediatric Society, the American Academy of Pediatrics, the Academic Pediatric Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the Association of American Medical Colleges, the American Association of Physicians for Human Rights, the American College of Obstetrics and Gynecologists, the American College of Osteopathic Pediatricians, American College of Physicians, the American Pediatric Society, the American Psychiatric Association, the Association of Medical School Pediatric Department Chairs, the Endocrine Society, the National Association of Pediatric Nurse Practitioners, the Pediatric Endocrine Society, the Ray E. Helfer Society, the Society for Adolescent Health and Medicine, the Society for Pediatric Research, the Society of Pediatric Nurses, the Societies for Pediatric Urology, the World Professional Association for Transgender Health, American Professional Society on the Abuse of Children,

Children’s Advocacy Institute, Futures Without Violence, Social Current, The Kempe Center for the Prevention and Treatment of Child Abuse and Neglect at the University of Colorado, The National Association of Social Workers, First Focus on Children, The National Foundation to End Child Abuse and Neglect, FosterClub, and iFoster.

² The Court’s holding that the State lacks such a remedy is based on other grounds. *Ante* at 283 n.7.

³ The State appears to assert that every allegation that a minor is receiving treatment for gender dysphoria must be fully investigated in order to evaluate whether that treatment falls within a category that could amount to abuse. For example, the OAG Opinion discusses surgical procedures that could fall within the Health and Safety Code’s definition of “female genital mutilation,” an independently criminal act, which clearly could be investigated. And in their discussion of the protocols governing medically accepted treatment for gender dysphoria, the plaintiffs cite evidence that such treatment includes no pharmaceutical or surgical intervention before puberty and no genital surgery before the age of majority. There is no plausible argument that DFPS is foreclosed from investigating these types of nonmedically approved procedures as possible child abuse, either before or after the injunction. This is in stark contrast to medically accepted treatments like the administration of puberty-suppression drugs prescribed by a treating physician. By essentially equating treatments that are medically accepted and those that are not, the OAG Opinion raises the specter of abuse every time a bare allegation is made that a minor is receiving treatment of any kind for gender dysphoria. In my view, a parent’s reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse.

¹ Like the Court, I would not foreclose the possibility that such an “injunction against investigation” could ever be available. If, for instance, DFPS opened an investigation into a parent’s religious instruction of his children, the mere investigation could chill the exercise of rights enumerated in the U.S. and Texas Constitutions. *See* TEX. CONST. art. I, § 6 (“No human authority ought, *in any case whatever*, to control or *interfere* with the rights of conscience in matters of religion.”) (emphasis added).

² The State makes no argument that parts (3) or (4) of the order are invalid as applied to the plaintiffs, so I agree with the Court’s decision to deny relief on those portions of the order as to the plaintiffs.

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