IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § § §	Civil No. 1:21-cv-796

UNITED STATES' OPPOSED MOTION TO EXCEED PAGE LIMITATIONS

Pursuant to Local Rule CV-7(B), the United States respectfully requests leave to file a motion that exceeds the page limit set forth in Local Rule CV-7(C)(2). The Government seeks leave to file a 35-page Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, which would be fifteen pages longer than permitted under the Local Rules. In support of this motion, the Government states as follows:

1. On September 9, 2021, the United States filed its complaint in this case against the State of Texas, seeking a declaratory judgment stating that Texas's Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8") (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)) is invalid, null, and void, as well as injunctive relief prohibiting any and all enforcement of S.B. 8 by the State. Dkt. 1, Compl., Prayer for Relief.

2. The United States' emergency motion seeks to enjoin the effect of S.B. 8 on numerous legal grounds including that S.B. 8 was enacted in violation of the Supremacy Clause and the Fourteenth Amendment and that S.B. 8 prevents the very individuals it injures from vindicating their rights through the ordinary process of judicial review. The additional pages are needed so that the

United States adequately can explain these legal issues and the basis for its emergency request to enjoin S.B. 8.

3. Texas will not be prejudiced by this extension, as they are free to file a motion for excess pages for their response brief under the rules. The United States anticipates consenting to any such motion that is proportional to the relief sought here.

4. Pursuant to Local Rule CV-7(G), undersigned counsel conferred with counsel for the State of Texas in a good faith attempt to resolve this motion by agreement, and counsel for the State indicated that the State is opposed to the requested relief.

WHEREFORE, the United States respectfully requests that this Court grant it leave to file a 35-page brief in support of its Emergency Motion for a Temporary Restraining Order or Preliminary Injunction. A proposed order is attached.

Dated: September 14, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

MICHAEL H. BAER
Counsel to the Acting Assistant Attorney General, Civil Division

ALEXANDER K. HAAS
Director, Federal Programs Branch

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

DANIEL SCHWEI
Special Counsel

/s/ Lisa Newman
Lisa Newman (TX Bar No. 24107878)
James R. Powers
Joshua M. Kolsky
Kuntal Cholera

Christopher D. Dodge
Cody T. Knapp
Olivia Hussey Scott
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-5578
lisa.n.newman@usdoj.gov

Counsel for the United States

CERTIFICATE OF CONFERENCE

I certify that I conferred via email with counsel for the State of Texas regarding the relief requested in this application. Counsel for the State indicated that the State is opposed to the requested relief.

/s/ Lisa Newman
Lisa Newman

CERTIFICATE OF SERVICE

I certify that a copy of this filing was emailed to Kenneth Paxton, Attorney General for the State of Texas, and Brent Webster, the First Assistant to the Texas Attorney General. I further certify that parties will also be served pursuant to Rule 5(b) of the Federal Rules of Civil Procedure.

/s/ Lisa Newman
Lisa Newman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Case No. 1:21-cv-796-RP

UNITED STATES' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

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INTRODUCTION

The State of Texas adopted S.B. 8[1] to prevent women from exercising their constitutional rights. Even though "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992), Texas has banned abortions months before viability—at a time before many women even know they are pregnant.

When other States have enacted laws abridging reproductive rights to the extent that S.B. 8 does, courts have enjoined enforcement of the laws before they could take effect. In an effort to avoid that result, Texas devised an unprecedented scheme that seeks to deny women and providers the ability to challenge S.B. 8 in federal court. This attempt to shield a plainly unconstitutional law from review cannot stand. The United States seeks a temporary restraining order or a preliminary injunction enjoining the enforcement of S.B. 8. This relief is necessary to protect the constitutional rights of women in Texas and the sovereign interest of the United States in ensuring that its States respect the terms of the national compact. It is also necessary to protect federal agencies, employees, and contractors whose lawful actions S.B. 8 purports to prohibit.

Although S.B. 8 was designed to create jurisdictional obstacles to the ability of women and providers to sue to protect their rights, those obstacles do not impede the relief sought through this suit—an action brought by the United States against the State of Texas itself. The United States has the authority and responsibility to ensure that Texas cannot insulate itself from judicial review for its constitutional violations and to protect the important federal interests that S.B. 8 impairs. Accordingly, this Court should enjoin enforcement of S.B. 8.

BACKGROUND

I. Legal Background

Nearly fifty years ago, the Supreme Court held that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). Thirty

[1] Senate Bill No. 8, 87th Leg., Ch. 62 Reg. Sess. (Tex. 2021) (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)).

years ago, the Court in *Casey* "'reaffirmed' 'the most central principle'" of *Roe*—"a woman's right to terminate her pregnancy before viability." *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment) (quoting *Casey*, 505 U.S. at 871 (plurality op.)). *Casey* also reaffirmed *Roe*'s "essential holding" recognizing the "right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 834. The Fifth Circuit has likewise recognized that, "[i]n an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021) (hereafter *Jackson I*). Indeed, the Fifth Circuit declared invalid a law enacted by Mississippi that, like S.B. 8, imposed a near-total ban on abortions after detection of a fetal heartbeat. *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (hereafter *Jackson II*). Other courts have done the same.[2]

II. Senate Bill 8

On May 19, 2021, the State of Texas enacted S.B. 8, which effectively bans abortions performed after cardiac activity has been detected in the embryo. Specifically, S.B. 8 provides that "a physician may not knowingly perform or induce an abortion . . . if the physician detect[s] a fetal heartbeat." Tex. Health & Safety Code § 171.204(a). An ultrasound can typically detect cardiac activity

[2] *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772-73 (8th Cir. 2015) (affirming injunction against North Dakota law that "generally prohibits abortions" after "fetal heartbeats are detectable" because "there is no genuine dispute that" the law "generally prohibits abortions before viability" and "Supreme Court precedent hold[] that states may not prohibit pre-viability abortions"); *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-cv-508, 2021 WL 672406, at *2 (D.S.C. Feb. 19, 2021) (enjoining a similar South Carolina law, noting that "courts have 'universally' invalidated laws that ban abortions beginning at a gestational age prior to viability" and collecting cases); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1306 (N.D. Ga. 2020) (enjoining Georgia law that "prohibits abortions once" a fetus "has been determined to have a 'detectable human heartbeat.'"); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 803 (S.D. Ohio 2019) (Ohio law prohibiting abortions when the fetus has detectable cardiac activity "places an 'undue burden' on a woman's right to choose a pre-viability abortion.").

beginning at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period. *See* Decl. of Allison Gilbert, M.D. (Ex. A.) ("Gilbert Decl.") ¶ 17; *Whole Woman's Health v. Jackson*, No. 1:21-CV-616-RP, 2021 WL 3821062, at *2 n.3 (W.D. Tex. Aug. 25, 2021). S.B. 8 contains no exceptions for pregnancies that result from rape, sexual abuse, or incest, or for cases involving serious fetal anomalies, including those incompatible with life after birth. The law includes only an exception for "a medical emergency . . . that prevents compliance" with the law. Tex. Health & Safety Code § 171.205(a).

Texas designed S.B. 8 with the specific objective of evading judicial review of its unconstitutional provisions, as its architects have made clear. For example, Texas State Senator Bryan Hughes, one of the principal architects of S.B. 8, lauded the statute's "very elegant use of the judicial system"[3] and acknowledged that S.B. 8's structure was intended to avoid the fate of other "heartbeat" bills that have been struck down as unconstitutional.[4] An attorney who participated in drafting the legislation described it as an effort to "counter the judiciary's constitutional pronouncements."[5] And the legislative director of Texas Right to Life stated that one of the "main motivations" for S.B. 8's design was a desire to stymie judicial review.[6]

Because any state official responsible for enforcing an unconstitutional state law could be sued

[3] Jenna Greene, "Column: Crafty lawyering on Texas abortion bill withstood SCOTUS challenge," Reuters (Sept. 5, 2021, 1:52 p.m.), attached as Exhibit A to Declaration of Newman, https://reuters.com/legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05/.

[4] Jacob Gershman, "Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea," The Wall Street Journal (Sept. 4, 2021, 9:38 a.m.), attached as Exhibit B to the Newman Decl., https://www.wsj.com/articles/behind-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683 (quoting Sen. Hughes as stating "We were going to find a way to pass a heartbeat bill that was going to be upheld.").

[5] Michael S. Schmidt, "Behind the Texas Abortion Law, a Persevering Conservative Lawyer," N.Y. Times (Sept. 12, 2021), attached as Exhibit C to the Newman Decl., https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html.

[6] Emma Green, "What Texas Abortion Foes Want Next," The Atlantic (Sept. 2, 2021), attached as Exhibit D to the Newman Decl., https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/ (asserting that S.B. 8 was crafted out of "frustrat[ion]" with courts that "block[] pro-life laws because they think they violate the Constitution or pose undue burdens").

for pre-enforcement injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), S.B. 8 purports to withdraw enforcement responsibilities from the State's executive and administrative officers and employees. *See* Tex. Health & Safety Code § 171.207(a) ("No enforcement of this subchapter . . . may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208."). Instead, Texas chose to rely on private persons to enforce S.B. 8 through the Texas judicial system. S.B. 8 creates a civil action that allows "[a]ny person, other than an officer or employee of a state or local governmental entity in this state," to enforce S.B. 8 by filing a lawsuit in state court. *Id.* § 171.208(a). Such civil claims may be brought against any person who performs a prohibited abortion, anyone who "knowingly engages in conduct that aids or abets" the performance of a prohibited abortion, and even anyone who "intends" to perform or aid a prohibited abortion. *Id.* § 171.208(a)(1)-(3). There is no requirement that the private enforcer have any connection to or injury from the abortion or the aiding and abetting of it. Under the statute, aiding and abetting includes "paying for or reimbursing the costs of an abortion through insurance or otherwise." *Id.* § 171.208(a)(2). A successful claimant can obtain an injunction "sufficient to prevent the defendant from violating" S.B. 8, and is further entitled to at least $10,000 in "statutory damages" for each abortion the defendant has performed, aided, or abetted. *Id.* § 171.208(b). S.B. 8 also contains a one-way fee-shifting provision that allows successful plaintiffs to recover their costs and attorney's fees, but forbids defendants sued under S.B. 8 from recovering their fees and costs. *Id.* §§ 171.208(b)(3), 171.208(i).

Where an S.B. 8 enforcement action is brought, the statute purports to further limit the available defenses. In particular, it is no defense to rely "on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in [the] conduct," or to rely "on any state or federal court decision that is not binding on the court in which the action has been brought." *Id.* § 171.208(e)(2)-(4).

Although binding precedent establishes that *any* prohibition on pre-viability abortion is unconstitutional, *see Casey*, 505 U.S. at 846, S.B. 8 contains a defense based on a narrow and distorted

version of the "undue burden" test that applies to regulations, rather than prohibitions, of pre-viability abortions. Under S.B. 8, that defense may be invoked only by a defendant who "has standing to assert the third-party rights of a woman or group of women seeking an abortion," and it applies only if "the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion." Tex. Health & Safety Code § 171.209(b). To make the required "undue burden" demonstration, the defendant must "introduce[] evidence proving that: (1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion." *Id.* § 171.209(c). An undue burden cannot be established by relying on the law's effects on other providers and alleged aiders and abettors—*i.e.*, by "merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion," or that "an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion." *Id.* § 171.209(d). And even this limited "undue burden" defense may be retroactively revoked, to the extent the Supreme Court overrules its past decisions. *Id.* § 171.209(e).

Stepping back, the clear intent of S.B. 8's provisions is to deprive women of their constitutional rights while simultaneously preventing any court from enjoining the statute's enforcement. The law uses the threat of civil liability to cut off the supply of post-six-week abortions in the State. It creates a widespread class of potential plaintiffs who might file harassing lawsuits, stacks the decks of such suits in favor of the plaintiffs—through the one-way fee-shifting system and the systematic limitation of affirmative defenses—and extends liability to *anyone* who plays a role in facilitating a prohibited abortion. Thus far, the statute has had the desired effect of deterring abortion providers from offering virtually any abortions. *See infra* pp. 7-12. So long as providers are chilled from performing, inducing, or attempting these newly prohibited abortions in Texas, state courts will not have occasion to rule on the constitutionality of the statute in an enforcement proceeding. And even if individual providers decide to reinstate their services, they could at most prevail in an enforcement dispute against a single private plaintiff, leaving other providers in legal limbo.

Normally, a statute that so successfully stripped a state's citizens of their constitutional rights would fall victim to a slew of pre-enforcement challenges. But Texas has sought to save S.B. 8 from that fate by washing its hands of responsibility for enforcing the law. By purporting to deprive individual plaintiffs of state officials to sue, and then leveraging the interplay of the doctrines of standing and sovereign immunity, Texas has endeavored to stymie anyone who challenges the law in court. As outlined below, the State's brazen gambit has thus far paid off.

III. Procedural History: Other Relevant Lawsuits

Given the clear constitutional violation at its core, S.B. 8 naturally prompted legal challenges prior to its effective date. But because of the State's efforts to impede federal judicial review, the other actions have been beset by procedural complications. Most notably, a group of abortion providers and other advocates who support patients in need of an abortion challenged S.B. 8 before this Court in *Whole Woman's Health v. Jackson*, No. 1:21-CV-616-RP (W.D. Tex.). They filed suit against a state court judge and a county clerk (in their official capacities and as class representatives for such state officials), against various Texas executive officials in their official capacities, and against an individual who previously expressed his intent to bring enforcement actions under S.B. 8. *See Whole Woman's Health*, 2021 WL 3821062, at *6.

After this Court rejected the Texas officials' motion to dismiss, *see id.* at *8-23, the defendants took an immediate appeal to the Fifth Circuit, which stayed this Court's proceedings, including a scheduled preliminary injunction hearing, and declined to enter its own injunction pending appeal. *See Whole Woman's Health v. Jackson*, No. 21-50792 (5th Cir. 2021).

On September 1, 2021, the Supreme Court denied the plaintiffs' emergency application for an injunction pending appeal, over the dissent of four Justices. *See Whole Woman's Health v. Jackson*, No. 21A24, --- S. Ct. ---, 2021 WL 3910722 (Sept. 1, 2021). The Court's order noted that the plaintiffs had "raised serious questions regarding the constitutionality of the Texas law at issue," but denied relief, finding that the plaintiffs had not "carried their burden" as to the "complex and novel antecedent procedural questions." *Id.* at *1. For example, the majority found it unclear whether "state judges

asked to decide a lawsuit under Texas's law" could be enjoined under *Ex parte Young* if the law is unconstitutional. *Id.*

In dissent, Chief Justice Roberts noted that "[t]he statutory scheme before the Court is not only unusual, but unprecedented," because "[t]he legislature has imposed a prohibition on abortions after roughly six weeks, and then essentially delegated enforcement of that prohibition to the populace at large," with the "desired consequence appear[ing] to be to insulate the State from responsibility for implementing and enforcing the regulatory regime." *Id.* The Chief Justice stated that he "would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner." *Id.* at *2. Justices Breyer, Sotomayor, and Kagan each wrote a dissenting opinion, noting the need to preserve judicial review in the face of S.B. 8's unusual enforcement regime. *See id.* at *3-5.

On September 10, 2021, the Fifth Circuit denied the plaintiffs' motion to dismiss the private defendant's appeal, stayed all district court proceedings in *Whole Woman's Health* pending appeal, and expedited the appeal. *Whole Woman's Health v. Jackson*, No. 21-50792, 2021 WL 4128951(5th Cir. Sept. 10, 2021).

IV. IMPACTS OF S.B. 8 ON PATIENTS

Amidst the flurry of legal challenges, S.B. 8 took effect on September 1, 2021. The devastating effects warned of in the pre-enforcement litigation immediately became a reality for patients and providers in Texas. *See Whole Woman's Health v. Jackson*, No. 1:21-CV-616-RP (W.D. Tex.). S.B. 8 has gravely and irreparably impaired women's ability to exercise their constitutional right to an abortion across the State. Gilbert Decl. ¶¶ 25-27. Due to the prospect of ruinous liability for clinics and providers, beginning September 1, abortion providers in Texas ceased providing abortions after six weeks, absent a medical emergency, which likely amounts to between 85 and 95% of all abortions previously provided. Decl. of Amy Hagstrom Miller (Ex. 3) ("Hagstrom Decl.") ¶ 11; Gilbert Decl. ¶ 13; Decl. of Melaney A. Linton (Ex. 4) ("Linton Decl.") ¶¶ 13, 21. One Planned Parenthood affiliate provided 205 abortions in the week before S.B. 8 went into effect and only 52 abortions in the week after the law went into effect. Linton Decl. ¶¶ 25-26. Because all providers in Texas are adhering to

S.B. 8, Linton Decl. ¶ 17; Hagstrom Decl. ¶ 30, the vast majority of women seeking abortions in Texas are being turned away. Hagstrom Decl. ¶ 15. All the while, clinics in neighboring states are receiving panicked calls from patients in Texas and continue to see "large increases in minor patients, survivors of sexual assault, patients with a maternal or fetal diagnosis, and patients with later gestational ages." Decl. of Rebecca Tong (Ex. 5) ("Tong Decl.") ¶ 29.

Some women with the ability to travel are forced to seek treatment options in Oklahoma, Kansas, New Mexico, and Colorado where abortion providers have been overwhelmed with Texas residents unable to obtain abortions in Texas. Decl. of Vicki Cowart (Ex. 6) ("Cowart Decl.") ¶¶ 8, 13, 18; Decl. of Anna Rupani (Ex. 7) ("Rupani Decl.") ¶ 22. Women are being forced to travel hundreds—and sometimes thousands—of miles to obtain an abortion under harrowing circumstances in the middle of a COVID surge. Tong Decl. ¶ 21; Gilbert Decl. ¶ 38 (complications wrought by COVID); Rupani Decl. ¶ 22; Cowart Decl. ¶¶ 9, 19. One patient "got in her car at midnight in Texas so that she could drive through the night and make it to Oklahoma in the morning for her abortion appointment, and then she had to turn around the same day to travel back to Texas." Decl. of Joshua Yap, M.D., MPH, AAHIVS (Ex. 8) ("Yap Decl.") ¶19; Rupani Decl. ¶ 26 (patient "piled her children into her car and drove over 15 hours overnight to obtain a medication abortion"). Patients from Texas are traveling sometimes five to eight hours each way to get to a health center in Oklahoma, Yap Decl. ¶ 20, and on average patients are traveling 650 miles each way to reach abortion clinics in the southwest, Cowart Decl. ¶ 9 (detailing trips of 790 miles, 930 miles, 1000 miles each way). One minor, who was raped by a family member, traveled eight hours from Galveston to Oklahoma to get an abortion, Yap. Decl. ¶ 22, and other survivors of sexual assault have to bear the additional burden of taking time off work and arranging childcare because abortions are not available in Texas, Yap. Decl. ¶ 23; Linton Decl. ¶ 31. Another patient facing violence at the hands of her husband is "discreetly attempting to leave Texas without her husband finding out," and is "desperate" and "selling personal items" to scrape together the funds needed for an out-of-state abortion. Cowart Decl. ¶ 10. Another "patient traveled six hours (one way) to get to Oklahoma and said she drove alone because she was worried" that asking someone to "accompany her" would subject that person to liability under S.B. 8.

Yap Decl. ¶ 19; Gilbert Decl. ¶ 46. In one day, one patient drove a 1000 mile round trip *alone* "because she didn't have paid time off work and couldn't afford" to miss her shift. Cowart Decl. ¶ 12.

Lengthy trip times have caused women to miss hard-to-obtain appointments, stitch together transportation from others, ride-shares, buses, and planes; obtain overnight accommodation that women often cannot afford; and solicit additional childcare for their family. Yap. Decl. ¶ 21; Gilbert Decl. ¶ 38; Rupani Decl. ¶¶ 16-17, 22; Cowart Decl. ¶¶ 10-12. The law is also "having a particularly burdensome effect on minors who need a judicial bypass," Linton Decl. ¶ 30; Hagstrom Decl. ¶ 33; and on those who are homeless, Linton Decl. ¶ 31. The waiting times and logistical hurdles inherent in traversing multiple states to get an abortion have made it such that some women are no longer eligible for a medication abortion and instead are subjected to more invasive procedural abortions. Yap Decl. ¶18; Tong Decl. ¶ 25; Gilbert Decl. ¶ 47. One provider's on-the-ground account describes the dire state of affairs:

> What I have seen unfold since S.B. 8 took effect has been absolutely devastating. The patients that are able to make it to Oklahoma to get their abortion are having to make substantial sacrifices and overcome numerous obstacles, including struggling to come up with the funds to make the trip to Oklahoma. They are also scared that someone may find out that they had an abortion when they go back home to Texas and are unsure of what could happen to them under S.B. 8. Those patients who are seeking abortions in the context of intimate partner violence or other family violence are risking more than they already do in order to travel out of state to end their unwanted pregnancies. People are also worried about having to travel long distances in the middle of a pandemic and what that could mean for the health and safety of themselves and their families. And I too fear that this increased travel puts myself, our staff, and our patients at greater risk of contracting COVID-19. I also know that we are seeing only a fraction of the people in Texas who are seeking to have an abortion, with some finding care in other states and others who simply cannot travel out of state or are afraid to do so. I fear that many people, especially those with the fewest resources, will not be able to obtain safe abortion care at all and will either seek to terminate their pregnancies themselves outside the medical system, or be forced to carry unwanted pregnancies to term.

Yap Decl. ¶¶ 26-27.

Though some women may be able to scrape together the necessary resources to travel out of state, the reality in Texas is that a majority of patients simply will "not be able to travel out of state to obtain an abortion due to their work, school, family, or childcare responsibilities and the high costs."

Hagstrom Decl. ¶ 32; Rupani Decl. ¶ 18. For example, some women facing immigration-related restrictions are unable to travel out of the Rio Grande Valley to obtain abortions. Hagstrom Decl. ¶ 14; Gilbert Decl. ¶ 45. These obstacles will make it such that "[t]he majority of pregnant Texans who want an abortion will be forced to carry those pregnancies to term and face the risks—medical and financial—attendant with childbirth." Hagstrom Decl. ¶ 32. The effects on patients forced to carry a pregnancy to term can be serious. Women face "debilitating physical symptoms," an increased risk that "abusive partners or family members" will discover a pregnancy, higher costs and medical risks that increase with gestational age, and "the life-altering consequences of having to go through childbirth against their will." Hagstrom Decl. ¶ 36; Tong Decl. ¶ 25; Gilbert Decl. ¶ 31. For women who are able to travel out of state, time-sensitive appointments are now severely delayed for three weeks or more because of the demand. Tong Decl. ¶ 13 (appointments previously available within a few days now booking three weeks out); Rupani Decl. ¶¶ 23, 26; Cowart Decl. ¶ 14; Yap Decl. ¶ 5.

Not only has S.B. 8 imperiled the rights of Texas residents; it has had an extreme impact on the rights of women in other states, including in Oklahoma, Kansas, Colorado, Nevada, and New Mexico. Since S.B. 8 took effect, clinics in Tulsa and Oklahoma City have "seen an overall staggering 646% increase of Texan patients" as compared to the first six months of the year. Yap Decl. ¶¶ 14-16. One provider there described the "surge of Texas patients" who are "scared and frantically trying to get appointments" in a state outside of Texas. Yap Decl. ¶ 13. Texas residents are claiming between 50% and 75% of appointments available at Planned Parenthood's Oklahoma health centers, causing women in Oklahoma to face scheduling backlogs of several weeks. Yap Decl. ¶¶ 15, 17; Tong Decl. ¶ 11 (two-thirds of patient calls in Oklahoma City coming from Texas); *id.* ¶ 20 (half of calls from patients in Texas); Cowart Decl. ¶ 8 (53% of monthly patient volume from Texas in one week). Some clinics in neighboring states do not have "the capacity to accommodate large numbers of out-of-state patients" in addition to the communities they already serve, Tong Decl. ¶ 31; Cowart Decl. ¶¶ 17-18. By way of comparison, in 2020 there were 55,966 abortions performed in Texas on Texas residents, 10,368 abortions performed in Colorado, and 2,735 abortions performed in New Mexico. Cowart Decl. ¶ 18. "[T]here is simply no way" that out-of-state clinics can "increase capacity by that sort of

magnitude" to absorb the influx of Texas patients. Cowart Decl. ¶ 18. To make matters worse, clinics are finding it nearly impossible to hire additional doctors and support staff given the current threats from S.B. 8 layered atop the challenges of hiring in a pandemic, Tong Decl. ¶ 32; Cowart Decl. ¶ 19.

In addition to the effects on patients, S.B. 8 has emboldened vigilante activities against providers and staff, including "relentless harassment," Linton Decl. ¶ 36; "trespassing; conducting drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; [and] trying to follow staff home." Linton Decl. ¶ 37. The threat of lawsuits began almost immediately after S.B. 8 was signed into law, including from vigilantes who snuck into a clinic to encourage individuals to report violations of S.B. 8, and attempted to slow down, harass, and intimidate women who were seeking an abortion on the evening before S.B. 8 went into effect. Hagstrom Decl. ¶¶ 44-46; Gilbert Decl. ¶ 44 (dramatic increase in the number of protesters and threatening phone calls). This harassment continued on Reddit forums discussing how individuals could turn in doctors and messages to one doctor threatening murder. Linton Decl. ¶ 37.

In addition, many physician providers, including those who are licensed in multiple states, now fear that lawsuits under S.B. 8 "might trigger investigations and other repercussions, including loss of licensure, that will follow these professionals for the rest of their careers, even if they choose to practice outside Texas." Hagstrom Decl. ¶ 40. For more physicians and staff, the risk of ruinous liability makes it such that "the risk [is] too great to even come to work." Hagstrom Decl. ¶ 41; Gilbert Decl. ¶ 40 (describing the "catastrophic" effect of S.B. 8); Gilbert Decl. ¶¶ 50-52 To take one example, at Whole Woman's Health, which currently has 17 physicians on staff at its Texas clinics, only one physician has unconditionally agreed to work after September 1. Hagstrom Decl. ¶¶ 38-41 (losing one staff member a week); Gilbert Decl. ¶ 41 (only two of eight physicians providing care); Linton Decl. ¶ 39 (prospective staff declined job offers because of S.B. 8).

Thus, S.B. 8 has effectively deterred providers from performing any abortions that would violate its terms. The continued shutdown of Texas clinics may have the effect of closing some abortion clinics for good. Hagstrom Decl. ¶¶ 22, 42. Without court ordered relief, Whole Woman's Health

"will have to shutter [its] doors and stop providing any healthcare to the communities" it serves. Hagstrom Decl. ¶ 42; Gilbert Decl. ¶¶ 43, 53 (Southwestern clinic in Dallas).

The continued applicability of an unquestionably unconstitutional law to patients in Texas presents more than a theoretical question about the viability of abortion rights. The constitutional right to a pre-viability abortion guaranteed by *Roe* and *Casey* rings hollow every day for many women in Texas—some who must travel great lengths to obtain an abortion and for others who cannot and may have to carry a pregnancy to term or dangerously take matters into their own hands.

STANDARD OF REVIEW

A court may enter a temporary restraining order or a preliminary injunction as a means of preventing harm to the movant before the court can fully adjudicate the claims in dispute. Fed. R. Civ. P. 65(a), (b). The movant seeking either form of relief bears the burden to establish that (1) it is likely to succeed on the merits of its case; (2) it is likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of the equities tips in its favor; and (4) an injunction would be in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Bluefield Water Ass'n v. City of Starkville*, 577 F.3d 250, 252-53 (5th Cir. 2009). When the Federal Government is a party, the last two factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

The United States satisfies all requirements necessary for a temporary restraining order and preliminary injunction. Under settled principles of constitutional law, the United States has "a substantial likelihood that [it] will prevail on the merits[.]" *Bluefield*, 577 F.3d at 252-53. Unless enforcement of S.B. 8 is enjoined, the United States will be injured by Texas's attempt to circumvent its obligations under the Federal Constitution by thwarting mechanisms of judicial review provided by federal law, as well as by S.B. 8's effect on the operations of the Federal Government. Those threatened injuries to the sovereign interests of the United States outweigh any conceivable harm that Texas could claim were this Court to enjoin enforcement of a clearly unconstitutional law.

I. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS

The United States is likely to succeed on the merits because S.B. 8 was enacted in violation of the Fourteenth Amendment and the Supremacy Clause. The United States has the authority to seek redress from this Court against the State of Texas, particularly in light of the procedural obstacles that Texas erected to shield S.B. 8 from judicial scrutiny in suits by directly affected persons.

A. S.B. 8 Violates the Federal Constitution.

Under the Supremacy Clause, the United States Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see also Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (noting that the Constitution itself displaces inconsistent state laws). It is well-settled that the Fourteenth Amendment prevents states from banning abortion before a fetus is viable. Because S.B. 8 has that effect, it is plainly unconstitutional under binding precedent. Moreover, pursuant to the doctrines of preemption and intergovernmental immunity, "states have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by [C]ongress to carry into effect the powers vested in the national government." *M'Culloch v. Maryland*, 17 U.S. 316, 317 (1819); *see also Mayo v. United States*, 319 U.S. 441, 445 (1943). S.B. 8 impermissibly regulates the Federal Government in a number of different contexts and poses unlawful obstacles to the accomplishment of federal objectives.

1. S.B. 8 Violates the Fourteenth Amendment and the Supremacy Clause.

There can be no dispute that S.B. 8 is contrary to the decades of precedent prohibiting states from banning abortions before fetal viability. *See supra* pp. 1-2. The Act prohibits any "abortion on a pregnant woman if the physician detected a fetal heartbeat," Tex. Health & Safety Code § 171.204(a), with only a limited exception for "medical emergenc[ies]" that prohibit compliance with the Act, *id.* § 171.205. A "fetal heartbeat" can be detected months before viability. *See id.* § 171.201(1); *see also Jackson II*, 951 F.3d at 248 (per curium). Indeed, before the Supreme Court, Texas did not even attempt to defend the constitutionality of S.B. 8 on the merits. *See Whole Woman's Health v. Jackson*, 2021 WL 3910722, at *3 (Sotomayor, J., dissenting) ("The Act is clearly unconstitutional under existing

precedents. The respondents do not even try to argue otherwise. Nor could they: No federal appellate court has upheld such a comprehensive prohibition on abortions before viability under current law." (citations omitted)). Accordingly, S.B. 8 is an affront to the Fourteenth Amendment of the U.S. Constitution.

That affront is deepened by the extraordinary procedural mechanisms Texas has designed to prevent women from vindicating their Fourteenth Amendment rights. S.B. 8 denies the individuals whose constitutional rights are violated a mechanism by which they can protect those rights in court. And by delegating enforcement authority to private bounty hunters, the statute ensures that the only way providers may challenge the constitutionality of S.B. 8 is by performing abortions prohibited by the law and risking ruinous penalties—a prospect that has succeeded in its intended goal of chilling the prohibited activity altogether. *See supra* pp. 7-12. The Act's design thus converts an already severe intrusion on constitutionally protected rights into an effective blockade of those rights. That scheme is plainly irreconcilable with the Fourteenth Amendment, and amounts to an unprecedented and impermissible attempt to circumvent the supremacy of the U.S. Constitution itself. *Cf. Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009) (explaining that "the Supremacy Clause cannot be evaded by formalism," as a "contrary conclusion . . . would provide a roadmap for States wishing to circumvent our prior decisions"); *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 383 (1990) ("The force of the Supremacy Clause is not so weak" that a state may "overrule our [prior] decision" by selectively withholding jurisdiction). It also subverts the mechanisms Congress designed—42 U.S.C. § 1983 and the Declaratory Judgment Act—to ensure that plaintiffs may bring suit to challenge and enjoin unconstitutional laws before they are enforced. *See Felder v. Casey*, 487 U.S. 131, 138 (1988); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007).

S.B. 8's "undue burden" affirmative defense does not cause the statute to satisfy *Casey*. Under *Casey*, the undue burden standard applies to laws that regulate, but do not prohibit, pre-viability abortion; if such laws impose an "undue burden" on a woman's right to obtain an abortion before viability, they violate the Fourteenth Amendment. 505 U.S. at 846. *Casey* made plain that the undue-burden standard "does not disturb the central holding of *Roe*": "[A] State may not prohibit any woman from

making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879 (plurality op.). Thus, a ban like S.B. 8 is unconstitutional without regard to an undue burden analysis.

In any event, S.B. 8's "undue burden" defense is available—at best—only to those sued in relation to those abortions performed despite S.B. 8; it does nothing for women who cannot obtain an abortion because doctors who might perform the procedure or organizations that might fund it decline to do so due to the *threat* of a civil lawsuit under S.B. 8. Many providers may understandably forgo performing abortions rather than risk the significant monetary penalties—and the certain, unrecoverable legal fees, *see* Tex. Health & Safety Code § 171.208(i)—provided for under S.B. 8. Hagstrom Decl. ¶¶ 27-29; Gilbert Decl. ¶¶ 51-52. The effect of S.B. 8 is to dismantle the network of providers so that women seeking an abortion cannot get one. That outcome itself imposes an undue burden on women's rights.

Moreover, S.B. 8's affirmative defense bears no resemblance to the "undue burden" standard established in *Casey*. It is available only to those with "standing to assert the third-party rights of a woman or group of women seeking an abortion," and it requires courts to evaluate the defense through the narrowest lens possible—*i.e.*, without reference to any effect the law may have on a woman's ability to "obtain[] support or assistance, financial or otherwise, from others in their effort to obtain an abortion," and without reference to any effect the law may have on "other defendants or other potential defendants," Tex. Health & Safety Code § 171.209(b), (d), even though courts evaluating undue burden claims must consider the real-world, cumulative effects of the challenged state law.[7] Under S.B. 8's undue burden defense, a provider thus must show that imposing liability against it alone will impose an undue burden on a woman's ability to obtain an abortion, without consideration

[7] *See Casey*, 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose *or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." (emphasis added)); *see also, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309, 2312-18 (2016) (evaluating significant evidence regarding the real-world effects of the law, including on clinic closures and geographic availability); *Gonzales v. Carhart*, 550 U.S. 124, 164-65 (2007) (citing approvingly *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976), which "invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method," because it was "an unreasonable or arbitrary regulation designed to inhibit, and *having the effect of inhibiting*, the vast majority of abortions after the first 12 weeks" (emphasis added)).

of the impact of liability or the threat of liability against other providers. *Id.* But that standard will likely be impossible to meet in most cases, having the effect of depriving women of the right to obtain a pre-viability abortion. Indeed, in enacting a law so clearly at odds with binding judicial precedents, Texas appears to have acted with the *purpose* of infringing women's constitutional rights. That alone renders the law invalid. *See Casey*, 505 U.S. at 878 (plurality op.) ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."). Accordingly, the affirmative defense does not cure S.B. 8's flaws; the Act plainly and facially violates the Fourteenth Amendment and the Supremacy Clause and its enforcement should be enjoined.

2. As Applied to Programs of the Federal Government, S.B. 8 Violates Principles of Preemption and Intergovernmental Immunity.

Even apart from S.B. 8's direct conflict with the Fourteenth Amendment, the Act further violates the Supremacy Clause by impermissibly purporting to regulate the Federal Government's activities and posing an obstacle to the accomplishment of federal objectives under these programs. That interference occurs across a number of federal contexts, and renders S.B. 8 invalid under the Supremacy Clause.

Under the doctrine of conflict preemption, "state laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). The preemption doctrine "includes cases where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* Additionally, under the doctrine of intergovernmental immunity, States can neither "control the operations of the constitutional laws enacted by Congress" nor directly impede the Executive Branch's "execution of those laws." *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020); *see also Mayo*, 319 U.S. at 445; *Arizona v. California*, 283 U.S. 423, 451 (1931) ("The United States may perform its functions without conforming to the police regulations of a state."). They accordingly cannot impose civil or criminal liability on federal officials for carrying out their federal duties. *See In re Neagle*, 135 U.S. 1 (1890); *see also, e.g.*, *Denson v. United States*, 574 F.3d 1318,

1346-48 (11th Cir. 2009); *Wyoming v. Livingston*, 443 F.3d 1211, 1213 (10th Cir. 2006). Nor can they regulate the performance of the Federal Government by regulating its contractors. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) ("[A] federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation."); *United States v. California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019) ("For purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself."), *cert. denied,* 141 S. Ct. 124 (2020); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (holding unconstitutional a state law that "directly interfere[d] with the functions of the federal government" by "mandat[ing] the ways in which [a contractor] renders services that the federal government hired [it] to perform").

S.B. 8 interferes with the accomplishment of federal objectives and impermissibly regulates the Federal Government in several ways. First, S.B. 8 purports to prohibit federal personnel and contractors from carrying out their federal obligations to assist in providing access to abortion-related services to persons in the care and custody of federal agencies and to impose damages liability on them. For example, to allow federal inmates to exercise their constitutional rights, Federal Bureau of Prison ("BOP") regulations provide that a BOP prison's Clinical Director "*shall* arrange for an abortion to take place" after a pregnant inmate signs a statement choosing an elective abortion. 28 C.F.R. § 551.23(c) (emphasis added). BOP also bears certain costs when it facilitates an inmate's decision to have an abortion; for example, BOP "assumes all costs" "in the case of rape or incest." Decl. of Alix McLearen, Ph.D. (Ex. 9) ("McLearen Decl.") ¶¶ 8-13. And "[i]n all cases[,] . . . whether the [BOP] pays for the abortion or not, the [BOP] may expend funds to escort the inmate to a facility outside the institution to receive" an abortion procedure. 28 C.F.R. § 551.23(c); *see also* McLearen Decl. ¶¶ 8-13 (explaining BOP's policies concerning abortion for inmates). S.B. 8, however, threatens civil liability on persons who aid or abet the performance of an abortion, including those who "pay[] for or reimburs[e] the costs of an abortion," regardless of whether the abortion is the result of rape or incest. Tex. Health & Safety Code § 171.208(a)(2); *see also id.* § 171.208(j) (providing only that civil actions "may not be *brought by a person who* impregnated the abortion patient through an act of rape, sexual

assault, incest, or" other prohibited acts (emphasis added)). The law thus "disrupts the performance of required duties of BOP staff" by, among other operational disruptions, likely "creat[ing] confusion among BOP staff employed in Texas to whether they can follow established BOP policy." McLearen Decl. ¶ 15 (further explaining S.B. 8 "may also create fear of personal liability for complying with established BOP rules and policy, undermining BOP staff's performance of their duties and responsibilities"). By purporting to impose civil liability on BOP personnel for performing their federal duties, S.B. 8 violates the Supremacy Clause. *See Ohio v. Thomas*, 173 U.S. 276, 283 (1899) ("[F]ederal officers who are discharging their duties in a state . . . are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal authority."); *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) ("By constraining the conduct of federal agents and employees, the ordinances seek to regulate the government directly."); *cf. Neagle*, 135 U.S. at 76 (deputy U.S. marshal "acting under the authority of the law of the United States" was "not liable to answer in the courts of California" for acts taken under that authority).[8] S.B. 8 is accordingly preempted insofar as it would prohibit the furnishing of such assistance by BOP personnel.

The United States Marshals Service ("USMS"), which is responsible for the pretrial detainment of inmates, is similarly situated to BOP. *See generally* Decl. of John Sheehan (Ex. 10). Like BOP inmates, individuals in USMS custody may elect to have an abortion under the agency's policy directives. *Id.* ¶ 7. In cases of rape or incest, or where the pregnancy could endanger the life of the mother, USMS policy requires the agency to pay for the procedure after certain requirements are met. *Id.* ¶¶ 8-9. Where an inmate elects to have an abortion, USMS arranges transportation and guard services to move the inmate to and from the location for the procedure. *Id.* ¶ 11. S.B. 8 therefore purports to

[8] Texas's jurisdictional tactics, *see* Part I.B, *infra*, likewise cannot defeat preemption. Regardless of the likelihood of a person bringing an enforcement action against BOP or its employees, the dispositive point is that S.B. 8 purports to impose a duty on BOP and its employees not to facilitate, or provide reimbursement for, almost all abortions after six weeks, and that duty itself conflicts with BOP regulations and policy. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000) ("[T]his Court's pre-emption cases do not ordinarily turn on . . . how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily assume compliance with the state-law duty in question." (emphasis omitted)).

impose civil liability on USMS staff for performing duties similar to their BOP colleagues, with similar attending disruptions to USMS operations. *Id.* ¶¶ 13-19.

Military service members similarly have a statutory entitlement to medical care, including abortion services at military medical treatment facilities ("MTFs") in cases where the mother's life would be endangered by carrying the fetus to term or in instances of rape or incest. 10 U.S.C. §§ 1074; 1093(a). S.B. 8 purports to impede the Department of Defense's ("DoD") implementation of its statutory obligation to provide such medical services to service members by outlawing pre-viability abortions after a fetal heartbeat is detected in the case of rape or incest, and by threatening civil liability against DoD personnel involved in providing such services.

Also, the Department of Health and Human Services' Office of Refugee Resettlement ("ORR") is statutorily obligated to care for certain unaccompanied noncitizen children, who are defined by statute as individuals without lawful immigration status under the age of 18 without a parent or legal guardian in the United States who is available to provide care and physical custody. These individuals are in the legal custody of the United States. *See* 6 U.S.C. § 279(b)(1), (g)(2); *see also* 8 U.S.C. § 1232(b)(1). This population includes tender-aged children, pregnant and parenting teens, and youth who have been trafficked. Decl. of James De La Cruz (Ex. 11) ("De La Cruz Decl.") ¶ 7. The D.C. Circuit has already held that minors in ORR custody cannot be obstructed in exercising their constitutional right to access abortion and abortion-related services. *See J.D. v. Azar*, 925 F.3d 1291, 1337 (D.C. Cir. 2019). Consistent with its obligations to provide care for the unaccompanied children in its custody in Texas and to allow them to exercise their constitutional rights, ORR must provide access to abortion services when requested and permitted by law, including in cases of rape or incest, following judicial bypass procedures or parental consent, and subject to appropriations restrictions on paying for certain abortions. De La Cruz Decl. ¶ 12. S.B. 8 erects a manifestly unconstitutional restriction on access to pre-viability abortion for unaccompanied minors in ORR custody and purports to regulate ORR's administration of a federal program by, in effect, requiring ORR to move unaccompanied children out of Texas in order to make available abortion services that are required under federal law. De La Cruz Decl. ¶ 18.

Second, S.B. 8 interferes with federal directives to third-party providers who are contractually obligated to provide abortion-related services. For example, the Department of Labor's ("DOL") Job Corps is a program funded by Congress and administered by DOL that assists eligible young people ages 16 through 24 with completing their high school education, preparing for meaningful careers, and obtaining gainful employment. *See* 29 U.S.C. § 3191(1). This assistance is provided through Job Corps centers, which are primarily operated by private contractors that have contractual relationships with DOL. *Id.* § 3197(a), (d); Decl. of Patrice Rachel Torres (Ex. 12) ("Torres Decl.") ¶¶ 5, 9.

All Job Corps contractors are required to comply with the requirements of the Job Corps Policy and Requirements Handbook ("PRH"), which was "developed to include all mandatory program operation and reporting requirements in one document." Decl. of Jillian Matz (Ex. 13) ("Matz Decl.") ¶ 6; *see also* Torres Decl. ¶ 11. The PRH requires contractors to offer enrollees a family planning program that includes counseling and information about options to terminate a pregnancy, as well as to provide transportation for purposes of obtaining an abortion. Torres Decl. ¶¶ 12-15. Each of DOL's contracts with the operators of the Texas Job Corps centers incorporates the PRH's requirements by reference. Matz Decl. ¶¶ 6-7. In light of S.B. 8, compliance with these contractual terms will require DOL's Texas contractors to expose themselves to civil liability or to incur expenses that will ultimately be passed on to DOL. *See id.* ¶¶ 11-13. S.B. 8 thus interferes with the ability of DOL's contractors to carry out DOL directives by purporting to prohibit the provision of such contracted services and to impose liability on the contractors and their personnel providing those services.

S.B. 8 similarly burdens the operations of the Office of Personnel Management ("OPM"). OPM is responsible for negotiating and approving the health benefits plans made available to federal employees, annuitants, and certain other statutorily eligible employees. Each year, OPM negotiates and contracts with qualified carriers to establish a slate of health benefits plan options from which federal employees may select. *See* 5 U.S.C § 8902; Decl. of Laurie Bodenheimer (Ex. 14) ("Bodenheimer Decl.") ¶ 3. OPM has entered into contracts with qualified carriers that cover abortion procedures in permitted circumstances, such as when the pregnancy is the result of an act of rape or incest. Bodenheimer Decl. ¶ 5; Consolidated Appropriations Act, 2021, PL 116-260, 134 Stat 1182 §§ 613-14

(Decl. 27, 2020) (incorporating Hyde Amendment restrictions). S.B. 8 interferes with these federal functions by purporting to impose liability on any Federal Employees Health Benefits Program health plan that covers the cost of an abortion in Texas. *See* S.B. 8 § 171.208(a)(2) (creating liability for "paying for or reimbursing the costs of an abortion through insurance or otherwise"). Due to S.B. 8, carriers may breach the terms of their agreed-upon health benefit plans and refuse to provide reimbursement for abortions performed in Texas. *See* Bodenheimer Decl. ¶¶ 9-12. Further, "S.B. 8 may also impact OPM's negotiations with carriers regarding health benefits to be provided in future years" since "[c]arriers may refuse to continue to cover abortion services that they determine conflict with S.B. 8," materially "interfer[ing] with OPM's statutory duty and discretion to approve plans containing terms that OPM finds to be necessary and desirable in FEHB plan contracts."[9] *Id.* ¶ 14.

Finally, S.B. 8 also violates statutory and regulatory provisions applicable to the Medicaid program in Texas, which is a cooperative state-federal program federally administered by Centers for Medicare & Medicaid Services ("CMS"). States that participate in the Medicaid program must cover various medically necessary procedures that fall within certain service categories such as inpatient and outpatient hospital services (as specified in 42 U.S.C. § 1396d(a)(1) and (a)(2)) and physician services (as specified in 42 U.S.C. § 1396d(a)(5)(A)). 42 U.S.C. § 1396a(a)(10)(A). "Abortions that are necessary to save the life of a pregnant person, or resulting from rape or incest," may fall within the scope of procedures that may be medically necessary and covered by the mandatory service categories under this statute and optional service categories covered under the Texas state plan. Decl. of Anne Marie Costello (Ex. 15) ("Costello Decl.") ¶ 9**.** In accord with Medicaid coverage requirements, the Fifth Circuit has held that States may not categorically prohibit the coverage of medically necessary abortion services for which federal funds are permitted to be expended, including medically necessary abortions of pregnancies arising from rape or incest. *See Hope Med. Grp. for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995) (holding Louisiana statute that "categorically prohibits funding for abortions in cases

[9] 5 U.S.C. § 8902(m) expressly notes that "[t]he terms of any contract" negotiated by OPM and a carrier "which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans."

of rape or incest without regard to whether the procedures might be medically necessary" violated Title XIX of the Social Security Act). Although States may specify the amount, duration, and scope of each covered service, they may not "arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition," and each service must be covered so as to "reasonably achieve its purpose." 42 C.F.R. § 440.230(a), (b), (c). S.B. 8 conflicts with these provisions of federal law by prohibiting payment by Medicaid for all abortions in Texas arising from rape or incest after fetal cardiac activity is detected. The statute arbitrarily denies Medicaid beneficiaries coverage for a procedure for which Medicaid coverage is available under mandatory service categories and optional service categories covered in the State, and the limits imposed by the statute restrict coverage to the extent that the State's coverage of these service categories is not sufficient to reasonably achieve the service's purpose. Costello Decl. ¶ 14.

B. This Suit Is a Proper Means by Which to Challenge S.B. 8, Given Texas's Attempt to Foreclose Other Means of Judicial Review.

Texas's primary tactic in the related litigation pending before the Fifth Circuit has been not to defend S.B. 8 on the merits but instead to contend that lawsuits filed to challenge the Act are procedurally flawed, principally arguing that the *Ex parte Young* exception to sovereign immunity is unavailable given S.B. 8's novel enforcement scheme. That asserted procedural flaw is not implicated in this lawsuit, however, which is filed by the United States, and thus is not subject to the same jurisdictional hurdles that have thus far impeded other litigants. As explained below, the United States has the authority to sue the State of Texas, the State is a proper defendant against whom to seek relief, and this Court can enjoin Texas from enforcing S.B. 8 and thereby redress the United States' injuries.

1. The United States Has Authority to Bring This Suit.

It is well established that the United States may seek equitable relief to protect federal interests, including injuries to its sovereignty. The Supreme Court has consistently applied this principle, including in *In re Debs*, 158 U.S. 564 (1895), in which the Court recognized that the United States had authority to seek an injunction against the Pullman rail strike. The Court explained that "[e]very gov-

ernment, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter." *Id.* at 584; *see also, e.g.*, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) ("Our decisions have established, too, the general rule that the United States may sue to protect its interests."). The Supreme Court has repeatedly recognized the authority of the United States, even without an express statutory cause of action, to seek equitable relief to vindicate various federal interests and constitutional guarantees, including to alleviate burdens on interstate commerce, *Debs*, 158 U.S. at 584; protect the public from fraudulent patents, *United States v. American Bell Tel. Co.*, 128 U.S. 315 (1888); protect Indian tribes, *Heckman v. United States*, 224 U.S. 413 (1912); carry out the Nation's treaty obligations, *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925); and challenge state measures that interfere with an agency's administration of federal law, *Arizona*, 567 U.S. at 405.

The Fifth Circuit recognized the same authority to protect federal interests in *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), holding that the United States could challenge racial segregation that burdened interstate commerce. *Id.* at 14-17. The Fifth Circuit reasoned that "[w]hen a State, not by some sporadic act against a particular individual but by a law or pattern of conduct, takes action motivated by a policy which collides with national policy as embodied in the Constitution, the interests of the United States 'to promote the interest of all' gives it standing to challenge the State in the courts." *Id.* at 14.

In the last decade alone, the United States has brought numerous cases for equitable relief to protect interests of the federal government, notwithstanding the absence of express statutory authority to do so. *See, e.g.*, *Arizona*, 567 U.S. 387; *United States v. State Water Res. Control Bd.*, 988 F.3d 1194 (9th Cir. 2021); *United States v. Washington*, 971 F.3d 856 (9th Cir. 2020), *as amended*, 994 F.3d 994 (9th Cir. 2020); *United States v. California*, 921 F.3d 865, 876 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020); *United States v. Bd. of Cnty. Comm'rs of Cnty. of Otero*, 843 F.3d 1208 (10th Cir. 2016); *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269, 1279 (11th Cir.

2012); *United States v. City of Arcata*, 629 F.3d 986, 988 (9th Cir. 2010).[10] That is in keeping with the "maxim of equity stat[ing] that '[e]quity suffers not a right to be without a remedy.'" *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)). The Supreme Court has therefore recognized that equity will provide a cause of action where no adequate remedy at law exists. *See, e.g.*, *Paine Lumber Co. v. Neal*, 244 U.S. 459, 476-77 (1917) ("where a threatened infringement" of a constitutional right "will produce injury and damage for which the law can afford no remedy . . . resort may be had to equity; and when this does appear, the right to an injunction arises because that is the only appropriate relief"); *Watson v. Sutherland*, 72 U.S. 74, 79 (1866) ("The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case.").

Applying the foregoing principles, the United States has the authority to sue here. This litigation implicates numerous federal interests, which support the authority of the United States to seek equitable relief in this Court.

A suit by the United States in equity is appropriate based on the extraordinary facts of this case because Texas has sought to inhibit other pathways for federal judicial review of an enactment that clearly violates the constitutional rights of its citizens, thereby depriving individuals of an adequate and effective remedy at law. To begin, S.B. 8 is an extraordinary and unprecedented attempt to evade a State's obligation to respect the Fourteenth Amendment through the mechanisms established by Congress. Texas has enacted a law that indisputably violates individuals' constitutional rights, and has simultaneously structured that law to prevent the very individuals it injures from vindicating their rights through the established process of federal judicial review. In particular, the law appears tailor-made to evade 42 U.S.C. § 1983, which Congress enacted to "ensure" that individuals could turn to the federal courts to secure relief—including the equitable remedy of an injunction—against violations

[10] *See also United States v. Texas*, 2021 WL 3362598 (W.D. Tex. Aug. 3, 2021); *United States v. New Jersey*, 2021 WL 252270 (D.N.J. Jan. 26, 2021); *GEO Grp., Inc. v. Newsom*, 493 F. Supp. 3d 905, 916 (S.D. Cal. 2020), *appeal filed*, No. 20-56172 (9th Cir. Nov. 6, 2020); *United States v. King Cnty.*, 2020 WL 2745745, at *1 (W.D. Wash. May 27, 2020); *United States v. California*, 2018 WL 5780003 (E.D. Cal. Nov. 1, 2018); *United States v. Kernen Constr.*, 349 F. Supp. 3d 988 (E.D. Cal. 2018); *U.S. Postal Serv. v. City of Berkeley*, 2018 WL 2188853 (N.D. Cal. May 14, 2018).

of federal constitutional rights committed under color of state law. *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). Section 1983 "assign[s] to the federal courts a paramount role in protecting constitutional rights." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982); *see Mitchum v. Foster*, 407 U.S. 225, 241 (1972). And that statute provides a mechanism for judicial review *before* individuals expose themselves to liability by violating an unconstitutional law. *See Patsy*, 457 U.S. at 504 (finding that Congress, in enacting the precursor to § 1983, intended to "'throw open the doors of the United States courts' to individuals *who were threatened with* . . . the deprivation of constitutional rights, and to provide these individuals *immediate* access to the federal courts notwithstanding any provision of state law to the contrary" (emphasis added) (citation omitted)).

S.B. 8 seeks to thwart the mechanisms established by Congress and to circumvent Texas's obligation to respect the federal constitutional right to abortion within its borders, by removing enforcement responsibility from state executive officials, who would ordinarily be enjoined under the doctrine of *Ex parte Young*—and thus far, it has largely succeeded. *See supra* pp. 7-12. "The threatened continuation" of this attempt by Texas to violate the Constitution and strip individuals of their rights to challenge this law qualifies as "a special exigency, one which demand[s] that the courts should do all that courts can do." *Debs*, 158 U.S. at 579; *see also Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) (suit in equity appropriate where the right's holder "had no remedy at law at all except at the pleasure of an adversary"). The United States therefore brings this suit to vindicate its substantial sovereign interest and duty to "take Care that the Laws be faithfully executed" by preventing States from attempting to insulate their flagrant violations of the Constitution from judicial review. *See* U.S. Const. art. II, § 3; *see also Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("constitutional rights . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted ingeniously or ingenuously").

The unique circumstances presented here—including, most notably, S.B. 8's deliberate attempt to thwart ordinary mechanisms of federal judicial review through a congressionally conferred cause of action—distinguish this case from past cases where courts have held that the mere fact that federal constitutional rights are being violated does not necessarily authorize the United States to sue.

See, e.g., *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980); *United States v. Solomon*, 563 F.2d 1121, 1123 (4th Cir. 1977). There is no need for this court to consider whether the United States can sue to enjoin other state conduct that violates individuals' constitutional rights. It is sufficient for this case simply to recognize that the United States can sue to enjoin state conduct where the state law's substantive prohibition exceeds the State's constitutional authority, the law has widespread impact, and the State has additionally designed its laws in order to preclude the ability of the persons whose rights it is violating—here, pregnant individuals—to prevent the State from depriving them of their rights, including through the ordinary mechanism of relief in federal court. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (courts "must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge"). S.B. 8 seeks to absolve the State of responsibility for the statute's effects and enforcement, while at the same time seeking to deter the exercise of constitutionally protected conduct by deputizing enforcement authority to private persons throughout the United States who need not have any personal connection to the conduct, but who are deliberatively incentivized to sue by a bounty of at least $10,000 per abortion. And the State's singling out of this core federal constitutional right and simultaneous effort to obstruct access to a federal forum and remedy presents circumstances far different from *City of Philadelphia*. *Cf. Testa v. Katt*, 330 U.S. 386, 394 (1947); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2169-70 (2019). Where, as here, systemic constitutional violations implicate distinctly federal interests, the United States may seek to prevent the constitutional violations on behalf of the "public at large," *see Debs*, 158 U.S. at 564, 583-85, to protect the integrity of our constitutional structure and to provide for review and relief in a federal court that Congress provided but that Texas has effectively denied to the persons whose rights are violated.

Moreover, the United States has an interest because Texas's violation of constitutional rights interferes with interstate commerce. *See City of Jackson*, 318 F.2d at 14 ("When the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause, the United States has a duty to protect the 'interests of all'. The courts offer the first avenue for counter-action by the Nation."); *see also Debs*, 158 U.S. at 583-84.

Here, S.B. 8 undoubtedly interferes with interstate commerce. S.B. 8 purports to impose liability on persons anywhere in the nation who aid or abet (or even intend to aid or abet) the provision of an abortion in Texas. Texas thereby impermissibly burdens the interstate commercial activities of, *e.g.*, out-of-state insurance companies that provide reimbursement for prohibited abortions in Texas, banks that may process the payment of such reimbursements, and the sellers of medical devices used to carry out abortion procedures. Compl. ECF No. 1, ¶ 40. Prohibiting nearly all abortions after six weeks in Texas also drives women to providers in other states (including some women who would have traveled into Texas from elsewhere), overburdening out-of-state clinics and creating backlogs for residents of other states seeking care. *See infra* pp. 10-11. That a regulation of abortion may implicate interstate commerce has already been recognized by Congress, as when it relied on the Commerce Clause to pass the ban on "partial-birth abortions." *See* 18 U.S.C. § 1531(a) (restricting the provision of such procedures "in or affecting interstate or foreign commerce").

The United States' authority to bring this suit is also independently grounded in other specific federal interests. For example, Texas's violations are distinctly felt by individuals in the United States' care and custody, such as unaccompanied children in the custody of ORR and individuals incarcerated within the Bureau of Prisons. "[T]he United States" has "a real and direct interest in [a] matter" that "arises out of its guardianship" over certain persons whose rights are at stake and who are "entitled to [the United States'] aid and protection." *United States v. Minnesota*, 270 U.S. 181, 194 (1926). In these circumstances, the United States has a "right to invoke the aid of a court of equity [to] remov[e] unlawful obstacles to the fulfillment of its obligations." *Id.* Here, as explained above, the United States is responsible for the protection of unaccompanied minors in ORR's custody and persons in BOP and USMS custody, and so the United States may bring suit to challenge "unlawful" deprivations of those individuals' constitutional rights. In the absence of judicial relief from this Court, the established Fourteenth Amendment rights of these various populations within the United States' care and custody may be violated.

Finally, independent of all of the considerations discussed above, the United States may seek equitable relief because, as already demonstrated, S.B. 8 concretely interferes with the Federal Government's activities. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 474 n.13 (1976) (recognizing that the United States has standing to bring preemption claims); *cf. Arizona*, 567 U.S. at 405. As explained above, the Federal Government possesses various legal authorities and obligations to facilitate or fund certain pre-viability abortions, which are now proscribed by S.B. 8. *See supra* pp. 16-22. Thus, there is a credible threat of an enforcement action being brought based on the federal government's activities—*i.e.*, by any one of the millions of individuals Texas has deputized with authority to bring such actions. *Cf. City of Arcata*, 629 F.3d at 989 (holding that the United States had Article III standing to challenge municipal ordinances because "[t]he ordinances, which are enforced by civil penalties, proscribe some activity encouraged by federal law"). Texas can hardly dispute that a credible threat of enforcement exists, as that is the very point of S.B. 8—to enable and encourage such enforcement actions, and to coerce compliance based on the threat of such enforcement proceedings. *Cf. Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979) (credible threat exists unless fear of prosecution is "imaginary or wholly speculative").

Thus, the United States has authority to bring this equitable suit against Texas for its violations of the Constitution and interference with the administration of federal programs.[11]

2. Texas is a Proper Defendant and Relief Against It Will Redress the United States' Injury.

The State of Texas is also a proper defendant against whom to bring this action, notwithstanding the State's efforts to avoid review through S.B. 8's unprecedented enforcement mechanism.

As a threshold matter, Texas is not shielded from this suit by sovereign immunity. Unlike in suits brought by private individuals, state sovereign immunity does not apply to suits for injunctive relief brought by the United States against a State. *See Alden v. Maine*, 527 U.S. 706, 755 (1999) ("In

[11] The United States has suffered injury-in-fact sufficient to support Article III standing for the reasons set forth above. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

ratifying the Constitution, the States consented to suits brought . . . by the Federal Government."); *United States v. Mississippi*, 380 U.S. 128, 140 (1965).

Texas also doubtless causes the injuries that the United States now seeks to remedy. The State of Texas enacted S.B. 8 and continues to authorize individuals to file suit under its auspices to enforce that law. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 615-16 (1989) (finding state action where the government removed "all legal barriers" to private conduct at issue and "made plain . . . its strong preference" that private parties engaged in the conduct).

Moreover, the United States' injuries are redressable by this Court through relief issued against the State of Texas. Equitable relief entered against a State may be enforced against whichever "governmental power" and agencies of the State may be needed to vindicate the judgment. *See Virginia v. West Virginia*, 246 U.S. 565, 593-600 (1918). Here, Texas has entrusted the power of enforcing S.B. 8 to private parties, and they—acting on the State's behalf—exercise that power through civil suits filed in state court. Accordingly, to prevent Texas from implementing and enforcing its unconstitutional scheme, this Court should any enjoin state court proceedings initiated under S.B. 8.

The civil actions that S.B. 8 incentivizes are an appropriate target of injunctive relief. Although the Anti-Injunction Act generally provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State," 28 U.S.C. § 2283, that rule "does not apply when the United States seeks the injunction[.]" *In re Grand Jury Subpoena*, 866 F.3d 231, 233 (5th Cir. 2017). Federal courts may therefore enjoin state court proceedings that the Constitution prohibits. *See Dombrowski v. Pfister*, 380 U.S. 479, 485-86, 497 (1965) (where "defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights" but, rather, would entail "a substantial loss or impairment of freedoms of expression," equitable relief restraining state prosecution is appropriate). Here, it is appropriate for the United States to essentially "obtain[] a stay of state court proceedings" where doing so would "prevent threatened irreparable injury to a national interest." *Leiter Minerals, Inc. v. United* States, 352 U.S. 220, 290-91 (1957). The Court could thus redress the United States'

injuries by simply enjoining state-court proceedings to enforce S.B. 8.[12] Alternatively, to the extent the Court concludes that more specific relief is necessary or appropriate, it could craft injunctive relief in one or more of three ways.

First, the Court could enjoin any person who files suit under S.B. 8 from prosecuting his or her claim. Here, an injunction against Texas can run to the individuals who file civil enforcement actions because, at a minimum, those individuals would qualify as "persons who are in active concert or participation with" the State. Fed. R. Civ. P. 65(d)(2)(C). The purpose of Rule 65 is to prevent defendants from creating schemes to evade judicial review and enforcement by ensuring that injunctive relief "not only binds the parties defendants but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *See Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945). This rule is based on the principle that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Id.* Accordingly, an injunction may run against a nonparty that is in "'privity' with an enjoined party," including a "nonparty whose interests were represented adequately by a party in the original suit." *Texas v. Dep't of Labor*, 929 F.3d 205, 211 (5th Cir. 2019).

Individuals who bring suits under S.B. 8 meet that test. S.B. 8 vests those individuals with law-enforcement authority, a traditionally exclusive state power, in a manner and to a degree that appears to be "unprecedented," *Whole Woman's Health v. Jackson*, 2021 WL 3910722 at *1 (Roberts, C.J., dissenting)—among other things, by giving them unsupervised authority to police violations of the law, and by enabling them to obtain civil penalties against anyone in the state without any showing of personal injury. Individuals suing under S.B. 8 are not suing "for violation of distinct legal duties owed" to them as individuals, but instead are suing "for violation of legal duties owed the public." *Texas v. Dep't of Labor*, 929 F.3d at 213. Moreover, unlike federal statutes such as Title VII and the

[12] For the reasons discussed herein, the United States meets the traceability and redressability elements of Article III standing. *See Spokeo*, 136 S. Ct. at 1547.

Fair Labor Standards Act where the Fifth Circuit has deemed agencies not to be in privity with individuals, here S.B. 8 does not "authorize[] both government litigation and private actions" for violation of distinct legal duties owed to each. *See id.* S.B. 8 instead authorizes only private litigation for the vindication of injuries to the public at large, rather than any individual litigant.[13] At bottom, Texas has deputized enforcement of S.B. 8 to private parties in the hopes that they would be beyond the reach of any pre-enforcement relief. Rule 65 does not permit such a result. *Cf. United States v. Hall*, 472 F.2d 261, 267-68 (5th Cir. 1972) (injunctions under Rule 65 can extend to private persons not party to the suit when they are "in a position to upset the court's adjudication" between the existing parties). The application of an injunction to private persons who commence a suit under S.B. 8 is reinforced by the proposition that in a proceeding brought against a State itself, the State is properly regarded as representing its citizens. *Cf. New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (recognizing "the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens" (citation omitted)).

Second, an injunction against the State—enjoining proceedings initiated under S.B. 8—could specify that it runs to the state judiciary. It has "long been established by decisions of th[e] [Supreme] Court" that "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*,

[13] Indeed, individuals who file suits under S.B. 8 are properly considered state actors—a result courts have endorsed where a state sanctions or is significantly involved in conduct that would be unconstitutional if engaged in by the state itself. *See, e.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (finding state action where law "authorize[d] . . . racial discrimination in the housing market"); *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (state's establishment of primary system made party that set up an all-white primary "an agency of the state"); *Nixon v. Condon*, 286 U.S. 73 (1932) (state's conferral of authority to party committee to determine who may vote in primary created state action); *Skinner*, 489 U.S. at 615-16 (1989) (finding state action where the government removed "all legal barriers" to private conduct at issue and "made plain . . . its strong preference" that private parties engaged in the conduct). Moreover, in light of the details of the S.B. 8 enforcement scheme outlined above, the individuals who file suits under S.B. 8 should be considered "agents" of the State under Rule 65 and would be subject to an injunction against the State on that basis, *see* Fed. R. Civ. P. 65(d)(2)(B). But this Court does not need to decide whether such individuals are "agents" because the provision of Rule 65 covering individuals "in active concert or participation" with a party plainly applies here.

334 U.S. 1, 14 (1948). And it also well established that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). Although relief against a judicial officer should be "reserved for really extraordinary causes," *id.* at 538, this case presents just such an extraordinary situation. Texas has established a scheme to largely extinguish a constitutional right within its borders while purporting to prohibit any executive official from enforcing that scheme, for the purpose of making it more difficult for individuals to seek redress of the constitutional violation in federal court. Having attempted to ensure that individuals whose rights are violated may not sue the state actors normally responsible for enforcing state law, Texas cannot persuasively contend that state judges may not be enjoined from playing a role in the State's unconstitutional scheme.[14]

Finally, an injunction prohibiting the State of Texas from enforcing S.B. 8 could also specify that it enjoins all state employees and officers needed to administer civil actions regarding S.B. 8 or to enforce judgments arising from those actions. Relief against the State could bind, for example, clerks that would docket complaints seeking S.B. 8 damages, as well as officers of the State charged with enforcing any money judgment pursuant to the statute.

[14] The United States recognizes that the Fifth Circuit recently decided in parallel litigation that the plaintiffs could not pursue injunctive relief as to S.B. 8 against state court judges. *Whole Women's Health v. Jackson*, No. 21-50792, Dkt. 95, at 11-14 (5th Cir. Sept. 10, 2021) (per curiam). But neither of the grounds for the Courts of Appeals' decision apply here. First, the Fifth Circuit's conclusion that sovereign immunity protects Texas judges, *id.* at 11, is inapposite because as previously discussed, actions for equitable relief by the United States are not limited by the State's sovereign immunity. Second, the Fifth Circuit's conclusion in *Whole Woman's Health* that no "actual controversy" exists as to judicial officers because "judges are disinterested neutrals," *id.* at 12, is also inapposite. The fact that the judges are neutral and disinterested does not change the fact that they are the state officers who oversee the proceedings that are the linchpin of Texas' effort to deny (or unduly burden) women's exercise of their constitutional rights. Moreover, there is certainly an "actual controversy" here between the United States and Texas, which enacted S.B. 8 and has encouraged lawsuits pursuant to it. Even if a suit directly against a judge could not proceed, this is a suit against Texas, including its officers, employees, and agents. And, as noted, injunctive relief may run against state court judges in "extraordinary causes" *Pulliam*, 466 U.S. at 538, such as this one, where the United States seeks to protect its federal interest in preventing States from skirting the obligations of our National compact by attempting to preclude pre-enforcement review of a blatantly unconstitutional law."

For all of these reasons, the United States has authority to bring this suit, and has demonstrated a likelihood of success that S.B. 8 is unconstitutional and should be enjoined.

II. THE GOVERNMENT FACES IRREPARABLE HARM

As the Supreme Court and other courts have long established, irreparable harm results from the enforcement of a state law that violates the Constitution. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 366-67 (1989) (assuming that irreparable injury may be established "by a showing that the challenged state statute is flagrantly and patently violative of . . . the express constitutional prescription of the Supremacy Clause") (citation and internal quotation marks omitted); *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) ("We have 'stated that an alleged constitutional infringement will often alone constitute irreparable harm.'"); *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 809 (W.D. Tex. 2017) (noting that "[f]ederal courts at all levels have recognized that a violation of constitutional rights constitutes irreparable harm as a matter of law and no further showing of irreparable injury is necessary" (citing cases)). Indeed, Texas recently "conceded that the United States has suffered per se irreparable harm" where a Texas state law violated the Supremacy Clause and Texas failed to contest that a violation constitutes per se irreparable harm. *United States v. Texas*, No. 3:21-cv-173-KC, ECF No. 52, at 15 (W.D. Tex. Aug. 26, 2021) (noting Texas failed to contest that a violation constitutes per se irreparable harm). As already demonstrated above, S.B. 8 deprives women in Texas of their constitutional rights while presently preventing them from vindicating those rights in court, in clear violation of the Fourteenth Amendment and the Supremacy Clause. The Act harms the United States' interest in ensuring that States do not evade their obligations under the Constitution and then try to insulate their actions from judicial review, as well as its interest in protecting the constitutional rights of women in its care and custody. To allow States to circumvent the Federal Constitution in this manner would offend the basic federal nature of the Union. Thus, the unconstitutionality of S.B. 8 alone suffices to establish irreparable harm.

In addition, S.B. 8 also irreparably injures the United States by restricting the operations and responsibilities of the Federal Government. As discussed above, S.B. 8 conflicts with programs and activities administered by numerous federal agencies, including BOP, USMS, DOD, ORR, DOL,

OPM, and CMS and interferes with the Federal Government's ability to provide access to, assistance for, or funding for abortions in instances required or permitted by federal law, such as in the case of rape or incest. S.B. 8 would thus significantly impede the Federal Government's ability to fulfill its responsibilities and authorities under Federal law.

III. THE BALANCE OF EQUITIES TIP IN FAVOR OF AN INJUNCTION

The final two factors—the balance of equities and the public interest—merge where the federal government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (Government's "harm and the public interest are one and the same, because the government's interest *is* the public interest"). Here, these factors manifestly favor the United States. The United States has a strong and legitimate interest in ensuring that states respect their obligations under the Constitution, and in fulfilling the United States' responsibilities under Federal law. If Texas's attempt to nullify the Constitution of the United States prevails, it may become a model for action in other areas, by other states, and with respect to other constitutional rights and judicial precedents.

In contrast, Texas will not suffer any cognizable harm from an injunction. The clear purpose and effect of S.B. 8 is to deny women rights guaranteed to them by the U.S. Constitution, while attempting to evade judicial review. Texas plainly lacks any legitimate interest in that impermissible objective, and it has no valid interest in insulating its unconstitutional laws from judicial review. *See Velazquez*, 531 U.S. at 545. An injunction, therefore, would serve the public interest by not only protecting constitutional rights but also by advancing the rule of law. In sum, the balance of the equities and the public interest tilt decidedly in favor of enjoining S.B. 8.

IV. SCOPE OF RELIEF

This Court should temporarily or preliminarily enjoin enforcement of S.B. 8. The United States requests that this injunction prohibit the maintenance of any civil proceeding pursuant to S.B. 8 and that it bind all of Texas's officers, employees, and agents, as well as those persons in active concert or participation with them. *See* Fed. R. Civ. P. 65(d)(2). For the reasons stated above, the Court could further specify the scope of that relief, including by expressly stating that it applies to

private individuals who attempt to initiate enforcement proceedings under S.B. 8. Of course, Texas is also free to propose the specific terms of an injunction that would prevent proceedings filed under S.B. 8 from being maintained. Texas is responsible for crafting S.B. 8, and it is therefore well positioned to shed light on the provisions of an injunction that would prevent the State from implementing its unconstitutional scheme.

Finally, in any injunction it issues, the Court should require the State of Texas to take affirmative steps to provide individuals who seek to bring actions under S.B. 8 with actual notice of the injunction—such as by requiring Texas to post the injunction on court websites and inform all state court judges and judicial employees about the injunction. There is no unfairness in requiring the State of Texas to undertake these acts to provide sufficient notice of the injunction, given that it was the State of Texas itself that chose to delegate its public enforcement authority to the citizenry at large.

CONCLUSION

For these reasons, the Court should temporarily or preliminarily enjoin enforcement of S.B. 8.

Date: September 14, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

MICHAEL H. BAER
Counsel to the Acting Assistant Attorney General, Civil Division

ALEXANDER K. HAAS
Director, Federal Programs Branch

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

DANIEL SCHWEI
Special Counsel

/s/ Lisa Newman
Lisa Newman (TX Bar No. 24107878)
Kuntal Cholera
James R. Powers
Joshua M. Kolsky
Cody T. Knapp
Christopher D. Dodge
Olivia Hussey Scott
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-5578
lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

CERTIFICATE OF CONFERENCE

I certify that I conferred via email with counsel for the State of Texas regarding the relief requested in this application. Counsel for the State indicated that the State is opposed to the requested relief.

/s/ Lisa Newman
Lisa Newman

CERTIFICATE OF SERVICE

I certify that a copy of this filing was emailed to counsel for the State of Texas: Will Thompson, Beth Klusmann, and Natalie Thompson at the Office of the Attorney General. I further certify that parties will also be served pursuant to Rule 5(b) of the Federal Rules of Civil Procedure.

/s/ Lisa Newman
Lisa Newman

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § § §	Civil No. 1:21-cv-796

[PROPOSED] ORDER

Upon consideration of the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, and the parties' respective submissions in support thereof and in opposition thereto, the Court finds as follows:

A preliminary injunction is necessary to preserve the status quo and prevent irreparable harm to the United States from the effects of Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)) ("S.B. 8"). The United States is substantially likely to succeed on its claims against the State of Texas. The threatened harm to the United States and its interests outweigh any potential harm that a preliminary injunction might inflict on Texas. The public interest also will be advanced by enjoining the operation of S.B. 8.

It is therefore, ORDERED, ADJUDGED, AND DECREED, that the United States' motion is GRANTED, and

FURTHER ORDERED that enforcement proceedings pursuant to S.B. 8 are temporarily and preliminary enjoined until further order of this Court; and

FURTHER ORDERED that the State of Texas, including Texas's officers, employees, and agents, as well as those persons in active concert or participation with them, including private

individuals who initiate enforcement proceedings under S.B. 8, are enjoined from enforcing S.B.8 or maintaining any civil proceeding pursuant to S.B. 8. *See* Fed. R. Civ. P. 65; and

FURTHER ORDERED that the State of Texas undertake, at minimum, the following measures to ensure the effectiveness of this Court's order:

a. The State of Texas is required to post this injunction along with a copy of the United States' complaint on all court websites for the State of Texas;

b. The State of Texas is required to provide a copy of this injunction along with a copy of the United States' complaint to all state court judges and judicial employees;

c. The State of Texas is required to provide a copy of this injunction along with a copy of the United States' complaint to all civil claimants filing any new cases that are in any way authorized by the provisions of S.B. 8; and

d. The State of Texas is directed to keep records showing that each civil claimant described above was affirmatively notified of this injunction.

This order shall remain in force until resolution of this action on the merits.

SO ORDERED.

Dated: _____

_____
HON. ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT LIST

Pursuant to Local Rule CV-7(C)(1), the United States hereby identifies that the following exhibits are appended to its concurrently filed Emergency Motion for a Temporary Restraining Order or Preliminary Injunction:

Exhibit No.	Exhibit Name
1	Declaration of Allison Gilbert, M.D. in Support of Motion of United States of America for Temporary Restraining Oder and Preliminary Injunction ("Gilbert Decl.")
2	Declaration of Lisa Newman ("Newman Decl.")
A	Jenna Greene, *CORRECTED COLUMN: Crafty lawyering on Texas abortion bill withstood SCOTUS challenge*, Reuters (Sept. 5, 2021, 2:40 PM EDT)
B	Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, The Wall Street Journal (Sept. 4, 2021, 9:38 AM)
C	Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 12, 2021 7:46 AM EST)
D	Emma Green, *What Texas Abortion Foes Want Next*, The Atlantic (Sept. 2, 2021)
3	Declaration of Amy Hagstrom Miller in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction ("Hagstrom Miller Decl.")
4	Declaration of Melaney A. Linton in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction ("Linton Decl.")

5	Declaration of Rebecca Tong in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction ("Tong Decl.")
6	Declaration of Vicki Cowart in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction ("Cowart Decl.")
7	Declaration of Anna Rupani in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction ("Rupani Decl.")
8	Declaration of Joshua Yap, M.D., MPH, in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction ("Yap, M.D., MPH Decl.")
9	Declaration of Alix McLearen, PhD. ("McLearen Decl.")
10	Declaration of John Sheehan ("Sheehan Decl.")
11	Declaration of James S. De La Cruz ("De La Cruz Decl.")
12	Declaration of Patrice Rachel Torres ("Torres Decl.")
13	Declaration of Jillian Matz ("Matz Decl.")
14	Declaration in Support of the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction ("Bodenheimer Decl.")
15	Declaration of Anne Marie Costello ("Costello Decl.")

Declaration of Anne Marie Costello

Dated: September 14, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

MICHAEL H. BAER
Counsel to the Acting Assistant Attorney General, Civil Division

ALEXANDER K. HAAS
Director, Federal Programs Branch

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

DANIEL SCHWEI
Special Counsel

/s/ Lisa Newman
Lisa Newman (TX Bar No. 24107878)
Kuntal Cholera
Christopher D. Dodge
Cody T. Knapp
James R. Powers
Joshua M. Kolsky
Olivia Hussey Scott
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-5578
lisa.n.newman@usdoj.gov

Counsel for the United States

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 1

Declaration of Allison Gilbert, M.D. in Support of Motion of United States of America for Temporary Restraining Oder and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 1:21-cv-796-RP
	)	
THE STATE OF TEXAS,	)	
	)	
Defendant.	)	

DECLARATION OF ALLISON GILBERT, M.D., IN SUPPORT OF THE MOTION OF THE UNITED STATES OF AMERICA FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

ALLISON GILBERT, M.D., declares under penalty of perjury that the following statements are true and correct:

1. I am the Medical Director of Southwestern Women's Surgery Center ("Southwestern"), a licensed ambulatory surgical center in Dallas. I am also a Staff Physician at Southwestern.

2. I submit this declaration in support of the United States of America's Motion for Temporary Restraining Order and Preliminary Injunction to prevent enforcement of Texas Senate Bill 8 ("S.B. 8"). The facts I state here and the opinions I offer are based on my education, training, and practical experience as an OB/GYN and an abortion provider; my expertise as a doctor and abortion provider; my personal knowledge; my review of Southwestern's business records and information obtained through the course of my duties at Southwestern; and my research and familiarity with relevant medical literature recognized as reliable in the medical profession.

My Background

3. I am licensed to practice medicine in Texas, Alabama, and Massachusetts, and am board-certified in Obstetrics and Gynecology. I am a member of the American College of Obstetricians and Gynecologists ("ACOG"), the Society of Family Planning, the Texas Medical Association, and the Dallas County Medical Association. I provide the full spectrum of reproductive health care to women and pregnant people, including obstetric care for low-, medium-, and high-risk pregnancies, and am trained to provide abortion care up to 24 weeks as dated from the first day of the patient's last menstrual period ("LMP").

4. I graduated from the University of Oklahoma College of Medicine with an M.D. in 2014. I completed my internship in obstetrics and gynecology in 2015 and my residency in obstetrics and gynecology in 2018, both at the University of Alabama at Birmingham. After residency, I completed a two-year fellowship in family planning at Brigham and Women's Hospital in Boston, Massachusetts. I also graduated from the Harvard T.H. Chan School of Public Health with a Master in Public Health degree in 2019. My *curriculum vitae*, which sets forth my experience and credentials, is attached as Exhibit 1.

5. I began working at Southwestern in August of 2020, as a Staff Physician and as Co-Medical Director. As of September 1, 2021, I am a Staff Physician and Medical Director. I moved to Texas because I wanted to increase abortion access for underserved populations in the South.

6. As Medical Director of Southwestern, I oversee Southwestern's policies and procedures, guided by evidence-based medicine, to ensure that we are following current and best practices. I also review patients' charts to make sure that Southwestern is following those procedures, and I review any patient complications in the rare circumstances in which they arise.

7. In my role as Medical Director, I work closely with the OB/GYN program directors at several medical residency programs throughout the state to provide training in abortion care to

OB/GYN and family medicine residents during their clinical rotations at Southwestern. I occasionally teach residents from other in-state residency programs as well as medical students and fellows from out-of-state programs. Southwestern has a robust training program for residents, and I have personally worked with approximately twenty residents over the last year.

8. In addition to my management responsibilities, I am also a full-time Staff Physician at Southwestern. As a Staff Physician, I provide a wide range of gynecological care to our patients, including but not limited to, abortion care, contraception, pregnancy testing, STI testing, and diagnosis of ectopic pregnancies. I spend approximately three days a week providing clinical care at Southwestern and an additional day doing administrative work at the clinic.

Southwestern Women's Surgery Center

9. Southwestern operates a licensed ambulatory surgical center in Dallas, Texas. Before S.B.8 took effect, the clinic provided medication abortion and procedural abortion care up to the legal limit in Texas, as well as miscarriage management and contraceptive services. Before S.B. 8 took effect, Southwestern provided medication abortion up to 10 weeks from the first day of a patient's last menstrual period ("LMP") and procedural abortions through 21 weeks and 6 days LMP. Since September 1, 2021, Southwestern has provided only procedural abortions up until detection of a "fetal heartbeat" as defined under S.B. 8 and described below.

10. In a typical year, prior to S.B. 8 taking effect, the clinic performed approximately 9,000 medication and procedural abortions, and I personally performed between 2,000 and 3,000 abortions at Southwestern over the last year.

11. In a medication abortion, the patient takes two medications, mifepristone and misoprostol, that together cause a pregnancy termination in a process similar to a miscarriage. Since S.B. 8 took effect, the clinic has stopped providing medication abortions because of a concern that in the rare instance where the medication fails to complete the abortion, the clinic would be unable

to provide the medically appropriate procedure to complete the abortion. Medication abortion is thus not an option we feel we can provide patients in light of S.B. 8's restrictions, even though it is medically preferred for many patients.

12. Procedural abortion is performed using gentle suction, sometimes along with the insertion of instruments through the vagina and cervix, to empty the patient's uterus. After approximately 18 weeks LMP (and in some instances after 16 weeks LMP), a procedural abortion may involve two separate appointments—along with an additional state-mandated counseling and ultrasound appointment[1]—to prepare the cervix for the abortion and then perform the procedure. Although sometimes known as "surgical abortion," abortion by procedure does not involve surgery in the traditional sense: It does not require an incision into the patient's skin or a sterile field.

13. The vast majority of abortion patients at Southwestern before S.B. 8 took effect were 6 or more weeks LMP. In 2020, Southwestern performed only 936 abortions for patients up to 5 weeks, 6 days LMP—only 10% of the 8,623 abortions the clinic provided in total that year.

S.B. 8 Bans Abortion Before Viability

14. I have reviewed the provisions of S.B. 8, which bans abortion once a "fetal heartbeat" has been detected and establishes civil penalties for physicians who provide and others who aid or abet the provision of that care.[2] S.B. 8 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."[3]

15. My understanding is that exceptions to S.B. 8 are very narrow. A physician could provide an abortion after a "fetal heartbeat" is detectable only if there is a medical emergency, which Texas law defines as "a life-threatening physical condition aggravated by, caused by, or arising from

[1] Tex. Health & Safety Code §§ 171.011-171.016.
[2] Tex. Health & Safety Code §§ 171.204, 171.208.
[3] Tex. Health & Safety Code § 171.201(a).

a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[4]

16. S.B. 8's use of terminology is confusing and, in many cases, medically inaccurate. In the field of medicine, physicians measure pregnancy from the first day of a patient's last menstrual period ("LMP"). Fertilization of the egg typically occurs at two weeks LMP. Pregnancy begins one week later, at three weeks LMP, when the fertilized egg implants in the uterus and lasts until 40 weeks LMP. For the first nine weeks LMP, an embryo develops in the uterus. It is not until approximately 10 weeks LMP that clinicians recognize the embryo as a fetus.

17. In a typically developing embryo, cells that form the basis for development of the heart later in gestation produce cardiac activity that can be detected with ultrasound. Detection of this cardiac activity with ultrasound happens very early in pregnancy at approximately 6 weeks, 0 days LMP, and sometimes sooner.[5] At this point in pregnancy, an ultrasound may reveal a fluid-filled sac—or gestational sac—within the uterus. An ultrasound at this early gestation may also show a dot within the gestational sac, which represents the developing embryo, and an electrical impulse that appears as a visual flicker within that dot. No fully developed heart is present at this time.

18. As a result, S.B. 8 defines "fetal heartbeat" to include not just "heartbeat" in the medical sense, but also early electrical impulses present in the embryo before the full development of the cardiovascular system.

19. Viability is medically impossible at 6 weeks LMP, the time at which early cardiac activity is generally detectable and at which S.B. 8 bans abortion. Viability is medically understood as the point when a fetus has a reasonable likelihood of sustained survival after birth, with or without

[4] Tex. Health & Safety Code §§ 171.204(a), 171.205(a), 171.002(3).

[5] I personally have observed cardiac activity as early as 5.4 weeks LMP.

artificial support. This is an individual medical determination that occurs much later in pregnancy—at approximately 24 weeks LMP—if at all.[6]

S.B. 8 Bans Abortion Before Many Patients Know They Are Pregnant

20. Many patients do not know they are pregnant at 6 weeks LMP and thus seek abortion care only after cardiac activity is detectable. That is because the commonly known markers of pregnancy—a missed menstrual period and pregnancy symptoms—are not the same for all pregnant people.

21. First, not every pregnant person can rely on a missed menstrual period to determine whether they are pregnant. In people with an average menstrual cycle (e.g., a period every 28 days), fertilization begins at 2 weeks LMP, and they miss their period at 4 weeks LMP. Many people do not experience average menstrual cycles, though. Some people have regular menstrual cycles but only experience periods every 6 to 8 weeks, or even further apart. Others do not know when they will experience their next period because they have irregular cycles, which are caused by a variety of factors, including polyps, fibroids, endometriosis, polycystic ovary syndrome, eating disorders, and other anatomical and hormonal reasons. Some people may have irregular menstrual cycles because they are taking contraceptives or are breastfeeding. As a result, many people may not suspect they are pregnant until much later than 4 weeks LMP.

22. Second, many people will not exhibit the commonly known symptoms of pregnancy. For instance, people may have negative results from over-the-counter pregnancy tests even when pregnant because these tests often cannot detect a pregnancy at 4 weeks LMP or earlier. Additionally, symptoms such as nausea or fatigue differ for each pregnant person, and some people never experience those symptoms. Further complicating early detection of pregnancy, it is common

[6] Some embryos and fetuses are never viable, such as those in ectopic pregnancies and those with certain fetal diagnoses.

for pregnant people to experience light bleeding when the fertilized egg is implanted in the uterus and mistake that bleeding for a menstrual period.

23. Most patients obtain an abortion as soon as they are able. In fact, the vast majority of abortions in the United States and in Texas take place in the first 12 weeks of pregnancy. Still, most patients are at least 6 weeks LMP into their pregnancy when they make an abortion appointment.

24. In Texas, physicians are required to perform an ultrasound on a patient before performing an abortion. Ultrasounds typically cannot detect a pregnancy until sometime between 4 and 5 weeks LMP; before that time, the gestational sac is simply too small for the ultrasound to detect.

25. As a practical matter, S.B. 8 is a near total ban on abortion. It prohibits abortion care at the earliest moments that a pregnancy may be detected and often before a patient has any reason to suspect that they may be pregnant.

26. Even under the best circumstances, if a Texan determines they are pregnant as soon as they miss their period, they would have roughly two weeks to decide whether to have an abortion, comply with state-mandated procedures for obtaining an abortion, resolve all financial and logistical challenges associated with abortion care in Texas, and obtain an abortion.

27. As a result of S.B. 8, the many pregnant people who do not learn that they are pregnant until after 6 weeks LMP may never access abortion in Texas.

S.B. 8 Is Devastating for Pregnant People in Texas.

28. Abortion is a common procedure. Approximately one in four women in this country will have an abortion by the age of forty-five.[7] Providers in Texas performed over 50,000 abortions

[7] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 Am. J. Pub. Health 1904, 1907 (2017).

last year,[8] and others in the state self-manage their abortions (*i.e.*, on their own without following a physician's advice) using a range of methods that can include herbs and vitamins, birth control pills, alcohol or drugs, and misoprostol obtained over the counter in Mexico.[9]

29. Abortion is also one of the safest medical procedures.[10] Fewer than 1% of pregnant people who obtain abortions experience a serious complication.[11] And even fewer abortion patients—only approximately 0.3%—experience a complication that requires hospitalization.[12]

30. Abortion is far safer than pregnancy and childbirth.[13] The risk of death from carrying a pregnancy to term is approximately 14 times greater than the risk of death associated with abortion.[14] In addition, complications such as blood transfusions, infection, and injury to other organs are all more likely to occur with a full-term pregnancy than with an abortion.

31. Pregnant patients have a multitude of reasons for seeking abortion care. For many, maternal health concerns make abortion desirable and even necessary. Pregnancy, including an uncomplicated pregnancy, significantly stresses the body, causes physiological and anatomical changes, and affects every organ system. It can worsen underlying health conditions, such as diabetes and hypertension. Some people develop additional health conditions simply because they are pregnant—conditions such as gestational diabetes, gestational hypertension (including

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[8] Tex. Health & Human Servs. Comm'n, ITOP Statistics, https://www.hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics.

[9] *See* Liza Fuentes *et al.*, *Texas Women's Decisions and Experiences Regarding Self-Managed Abortion*, 20 BMC Women's Health 6 (2020).

[10] *See, e.g.*, Comm. on Reprod. Health Servs., Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States* 10, 59, 77-79, 162-63 & tbl. 5-1 (2018).

[11] Ushma Upadhyay, et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 175 (2015).

[12] *Id.*

[13] E.G. Raymond & D.A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 215-19 (2012).

[14] *See id.* at 215.

preeclampsia), and hyperemesis gravidarum (severe nausea and vomiting). People whose pregnancies end in vaginal delivery may experience significant injury and trauma to the pelvic floor. Those who undergo a caesarean section (C-section) give birth through a major abdominal surgery that carries risks of infection, hemorrhage, and damage to internal organs.

32. Many Texans seek abortion care due to family considerations. The majority of pregnant people who have abortions are already parents: sixty-one percent of pregnant patients who obtain abortions already have at least one child.[15] They do not desire—and, as described below, may not be able to afford or properly care for—another child.

33. Many Texans obtain abortions because they are unable to meet their basic needs. Pregnant patients who seek abortion care are often low-income and below the federal poverty line. 14.7% of working Texans live in poverty, and 34.5% are low income.[16] This number is even higher for women of color; 19.1% of Black women and 20.5% of Latina women live in poverty in Texas.[17] These patients are in dire financial circumstances and often struggle to pay for needs like housing, food, and medical care.[18] As a result, these patients believe that obtaining an abortion is the best decision for themselves and for their families.

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[15] Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (2016), https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014.

[16] Every Texan, *Poverty in Texas: 4.1 Million Texans Live in Poverty*, https://everytexan.org/images/2019_Poverty_in_Texas.pdf; *see also Nat'l Women's L. Ctr., Poverty Rates State by State, 2018* (2019), https://nwlc.org/wp-content/uploads/2019/10/Poverty-Rates-State-by-State-2018.pdf.

[17] Nat'l Women's L. Ctr., *supra* at 16.

[18] United for ALICE TX, *ALICE in Texas: A Financial Hardship Study* (2020), https://www.unitedforalicetx.org/sites/unitedforalicetx.org/files/2020ALICEReport_TX_FINAL.pdf.

34. Other patients seek abortions because having another child is not right for them and their families at the present time.[19] Sixty-six percent of abortion patients intend to have at least one child in the future.[20] Some Texans become pregnant when they are young or still in school and want to wait to have children later in life.[21] Some become pregnant with a partner with whom they do not wish to share a child.[22] Others may be managing their own unrelated health issues, such as substance abuse disorders, and may determine that having a child would not be the best choice for them in their current condition.[23]

35. Some patients choose to have an abortion because their pregnancies are the result of rape, incest, or other intimate partner violence. For patients who have been abused, being pregnant often subjects them to increased surveillance and decreased control over their lives.[24] Being pregnant also may make it more likely that their abusers will perpetrate more physical violence against them.[25] Terminating the pregnancy may be critical for their physical health and psychological well-being.

36. Still other Texans obtain abortions following a diagnosis of fetal anomalies, which can result in severe disabilities or be lethal for the fetus. These diagnoses are made later in pregnancy—well after 6 weeks LMP. In fact, some genetic anomalies cannot be identified until closer to 18 to 20 weeks LMP.

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[19] *See, e.g.*, Laura D. Lindberg et al., *Early Impacts of the COVID-19 Pandemic: Findings from the 2020 Guttmacher Survey of Reproductive Health Experiences*, Guttmacher Institute (2020), https://www.guttmacher. org/report/early-impacts-covid-19-pandemic-findings-2020-guttmacher-survey-reproductive-health.

[20] Nat'l Abortion Fed'n, *Women Who Have Abortions*, https://prochoice.org/wp-content/uploads/women_who_have_abortions.pdf.

[21] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health 19 (2013).

[22] *Id.*

[23] *Id.*

[24] Sarah C.M. Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, 12 BMC Medicine 144 (2014).

[25] *Id.*

37. Even after patients learn that they are pregnant and decide they want an abortion, Texans already face multiple challenges when they seek abortion care, and these burdens make it exceedingly difficult to obtain abortions before 6 weeks LMP. Pregnant patients living less than 100 miles from an abortion provider must make two trips to the clinic to receive state-mandated counseling and an ultrasound during a first appointment and then an abortion procedure no less than 24 hours later during a second appointment.[26] No telehealth appointments are permitted, either for the state-mandated counseling[27] or for medication abortion.[28] Patients who are eighteen years old or younger also must obtain written parental authorization or a court order for an abortion.[29]

38. These additional requirements—which are medically unnecessary—are particularly burdensome for pregnant patients who are seeking abortion care for any of the reasons described above. Patients must coordinate transportation to the clinic, childcare for their family, lodging if they live far from a clinic, and time off from work (which may not be paid). For patients traveling long distances to the clinic, avoiding possible exposure to COVID-19 brings additional challenges. Patients may drive instead of relying on public transportation, carry their own food and water to avoid public spaces, or make multiple trips instead of staying overnight. These logistical hurdles are doubled because of Texas' two-trip requirement. Further, for the many poor and low-income Texans, obtaining an abortion is impossible without financial assistance—hopefully from a supportive source like an abortion fund, but often from predatory lenders. These logistical and financial burdens undoubtedly delay pregnant people from obtaining abortions. And because many people may not know they are pregnant at 6 weeks LMP, these burdens make it so that even those

[26] Tex. Health & Safety Code Ann. §§ 171.011-171.016.
[27] *Id.*
[28] *Id.* § 171.063.
[29] *Id.* §§ 33.001-33.014.

patients who do know they are pregnant are unable to obtain abortion care at such an early point in pregnancy.

S.B. 8 Has Been Devastating for Southwestern and Its Patients

39. Southwestern has weathered short-term abortion bans in Texas before and barely survived. Last year, when Southwestern was shut down for approximately three weeks due to the COVID-19 executive order shutdown, the impact was severe. Repeatedly having to stop and restart services, as various court orders allowed us to reopen only to be shut down again hours later, created absolute chaos for our patients and staff. The COVID-19 shutdown took an immense emotional toll on our staff and drove our clinic to the financial brink. When the executive order was ultimately lifted, it took us months to work through the patient backlog. Even then, we were unable to see every patient who needed our services.

40. S.B. 8 is like no other abortion restriction or abortion ban we have dealt with before. Seeing no other choice, Southwestern has been complying with S.B. 8 since it took effect on September 1. The immediate impact of S.B. 8 on our patients, staff, and physicians has been truly catastrophic.

41. Our staff is plagued by fear and instability. I am one of only two physicians, out of the eight physicians that typically provide care at our clinic, who is currently providing abortions at Southwestern. While our other physicians are willing to provide S.B. 8-compliant abortions, we feel constrained to limit the potential liability of our physicians to lawsuits brought under S.B. 8 by having fewer physicians providing abortions. Bringing in additional providers also adds to the clinic's costs at a time when Southwestern confronts an unknown period of higher security costs and significantly reduced patient volume. Most of our staff remain seriously concerned that even providing abortions in compliance with S.B. 8 will draw lawsuits from anti-abortion vigilantes or others seeking financial gain under S.B. 8's bounty hunting scheme.

42. The limited number of staff members who are willing to continue to work with S.B. 8 in effect find themselves scrambling to help as many patients as we can. Our staff are staying at the clinic later and later each night, until 9 p.m. sometimes, to serve every single patient we can while they are still eligible for care under S.B. 8. This situation is obviously not healthy or sustainable.

43. Because Southwestern has a sister clinic in Albuquerque, New Mexico, our management also made the decision to temporarily send 13 of our staff members to Albuquerque, and pay for their housing there, to help serve the influx of patients from Texas. While these staff members agreed to be away from their families in Texas for a short amount of time, the arrangement is neither financially nor practically sustainable and is far from a solution to the problems posed by S.B. 8. If the law is not struck down soon, Southwestern's clinic in Dallas will inevitably close.

44. Since September 1, 2021, we have seen a significant uptick both in protester activity and threatening calls to the clinic. The number of protesters camped outside our facility on a daily basis has doubled, including one protester who regularly stands outside the clinic in scrubs covered in fake blood, screaming at everyone who enters the clinic things like "no mommy, don't kill me." While we used to receive a threatening phone call every few weeks, we are now getting them nearly every day. Last week, a caller yelled at the staff member that answered the phone: "I'm going to tie up staff in chains and torture them! God protects these babies. I met him and I know he will torture you!" Another caller yelled at the staff: "Did you know Gov Greg Abbott is coming by tomorrow? You didn't know that? He is coming tomorrow, and he is going to shut y'all down, you bitch!" Other callers say things like "you know abortions are illegal in Texas, right?" Our staff are understandably scared to come to work every day.

45. The impact of S.B. 8 on our patients has been devastating. Since September 1, we are only able to help a fraction of the patients we ordinarily would see and treat, as most patients who

come into our clinic are beyond the gestational limit imposed by S.B. 8. We are turning away patients in droves, and while some are able to travel to our sister clinic in Albuquerque or elsewhere, the majority are not. For example, there have been multiple undocumented patients who were ineligible for an abortion under S.B. 8, but who stated that traveling out of state was not an option for fear of being stopped by border patrol and deported. Another patient said she could not travel out of state because she could not tell her unsupportive family that she was having an abortion and "disappear for a few days" without an explanation.

46. Patients are panicked, both for themselves and their loved ones. The second day the law took effect, I saw a patient for counseling who was eligible for an abortion under S.B. 8 but nonetheless broke down in tears because she was so scared that her sister, who was planning to drive her to the clinic the next day for her procedure, would be sued under S.B. 8 for aiding and abetting. Other patients are making appointments before they have received a positive pregnancy test, seeking unnecessary blood tests and procedures, for fear that if they are pregnant, they will be unable to access care. I saw another patient last week who has been taking the same contraception consistently for a decade and nonetheless found herself pregnant. She was only 5.4 weeks LMP but had detectible cardiac activity, so I had to turn her away.

47. As stated above, our clinic has been forced to stop providing medication abortion to our patients while S.B. 8 is in effect. We are concerned that in the rare instance where the medication fails to complete the abortion, we would be unable to provide the medically appropriate procedure to complete the abortion. While medication abortion is medically preferred for many patients, it is not an option we feel we can provide in light of S.B. 8's restrictions. For example, I had two patients last week who are minors, who had never had a pelvic exam before, and who both preferred a medication abortion that I was unable to provide.

48. Texas's pre-existing 24-hour waiting period, which has always been a substantial hurdle for patients, is also compounding the burden of S.B. 8 on patient care. Since September 1, about 1 out of every 15 of my patients have become ineligible for abortion care between their first and second appointments. These patients are devastated to learn that after two appointments at our facility, their only option for abortion care is to leave Texas, which not all can do. One patient, for example, showed cardiac activity when she arrived for her abortion and upon learning she was ineligible for an abortion, she broke down in tears. I talked to a colleague in Alabama who saw a patient last week from Dallas who drove ten hours to get to her, only to be forced to wait several days for her procedure due to Alabama's 48-hour waiting period.

49. At the same time, because under S.B. 8 patients only have a very limited window of time after discovering they are pregnant to decide that they want an abortion, S.B. 8 is forcing some patients to make a decision about their abortion before they are truly ready to do so.

S.B. 8 Is Devastating for Abortion Providers in Texas

50. S.B. 8 is intended to take away my ability as a highly trained OB/GYN to provide the care to patients which I have been licensed by the State of Texas to provide. I moved to Texas because I am morally compelled to provide abortion care to patients in need. Not being able to do the job that I spent years being trained to do is personally devastating. I am deeply concerned about what S.B. 8 means for my chosen profession, for the certifications I worked so hard to obtain, and for my future as both a doctor and a Texan.

51. The civil penalties and burdens of litigation threatened by this ban are severe and, as described above, have already prevented abortion providers from carrying out our medical and ethical duties.

52. Because S.B. 8 allows almost anyone to sue me, Southwestern, and the staff who work with me, I continue to worry that just by coming to work, I risk exposure to multiple lawsuits

that will take time and emotional energy—and prevent me from providing the care my pregnant patients need. These lawsuits will also impose a heavy financial burden on me even if they are ultimately unsuccessful. I am already severely constrained in the care I am able to legally provide under S.B. 8, and continuing to comply with this cruel, unconstitutional law, is neither feasible nor sustainable for much longer.

53. If S.B. 8 remains in effect for many more weeks to come, Southwestern will be unable to keep its doors open and may never be able to reopen.

Dated: September 13, 2021

/s/ *Allison Gilbert*

Dr. Allison Gilbert

Exhibit 1

ALLISON LYNNE GILBERT, MD, MPH

8616 Greenville Ave, Ste 101
Dallas, TX 75243
agilbert@southwesternwomens.com
(214) 742-9310 (p)
(214) 969-9468 (f)

EDUCATION

July 2018-May 2019	Master of Public Health Harvard T.H. Chan School of Public Health Boston, MA
Aug 2010-May 2014	Doctor of Medicine University of Oklahoma College of Medicine Oklahoma City, OK
Aug 2006-May 2010	Bachelor of Arts in Biology Colorado College Colorado Springs, CO

POST-DOCTORAL TRAINING

July 2018-June 2020	Family Planning Fellowship Division of Family Planning, Department of Obstetrics, Gynecology and Reproductive Biology Brigham and Women's Hospital Boston, MA
June 2014-June 2018	Obstetrics and Gynecology Residency Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL

CLINICAL WORK EXPERIENCE

Sept 2021-Present	Medical Director & Staff Physician Southwestern Women's Surgery Center Dallas, TX
Aug 2020-Aug 2021	Co-Medical Director & Staff Physician Southwestern Women's Surgery Center Dallas, TX
July 2018-June 2020	Clinical Fellow Department of Obstetrics, Gynecology and Reproductive Biology Brigham and Women's Hospital Boston, MA
July 2018-June 2020	Physician (part-time) Wellesley Women's Care Newton Wellesley Hospital Newton, MA

BOARD CERTIFICATION AND LICENSURE

2020	Advanced Cardiac Life Support (ACLS)/Basic Life Support (BLS)
2020	Texas Medical License, Active
2020	American Board of Obstetrics and Gynecology Certifying Examination, passed
2018	Massachusetts Medical License, Active
2018	American Board of Obstetrics and Gynecology Qualifying Examination, passed
2015	Alabama Medical License, Active

HONORS AND AWARDS

2020	Outstanding Medical Student Teaching Department of Obstetrics, Gynecology and Reproductive Biology Brigham and Women's Hospital Harvard Medical School Boston, MA
2018	Chairman's Award of Excellence Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2018	Best Teaching Chief Resident Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2018	Alpha Omega Alpha Honor Society University of Alabama at Birmingham Birmingham, AL
2017, 2018	The Society for Academic Specialists in General Obstetrics and Gynecology Resident Award for Academic Excellence Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2015, 2018	Resident Research Award Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2015, 2016	Resident Teaching Award Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL

RESEARCH INTERESTS

2018-Present	Medication abortion management in the setting of pregnancy of unknown location

PUBLICATIONS

Goldberg A, Hofer R, Cottrill A, Fulcher I, Fortin J, Dethier D**, Gilbert A,** Janiak E, Roncari D. Mifepristone and misoprostol abortion for undesired pregnancy of unknown location. NAF's 2021 Virtual Annual Meeting Oral Abstracts. Contraception. 2021; 103 (5): 373-375.

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POSTERS

Gilbert A, Clay V, Wang M, Arbuckle J, Boozer M, Harper L. "You can't get pregnant:" Contraceptive counseling by non-gynecologic specialties. Poster presented at: Society for Maternal Fetal Medicine Annual Clinical Meeting; Las Vegas, NV; Feb 2019.

Becker D, Thomas E, **Gilbert A**, Boone J, Straughn JM, Huh W, Bevis K, Leath C, Alvarez R. Improved outcomes with dose-dense paclitaxel-based neoadjuvant chemotherapy in advanced epithelial ovarian carcinoma. Poster presented at: Society of Gynecologic Oncology Annual Clinical Meeting; San Diego, CA; March 2016.

Bryant C, **Gilbert A**, Arnold K, Nightengale L. Improving awareness and knowledge of advocacy and impacting outcomes in the local medical community. Poster presented at: Doctors for America Leadership Conference; Washington, D.C.; March 2014.

TEACHING AND PRESENTATIONS

2021	Family planning Jeopardy! Resident lecture given at: University of Oklahoma, Dept. Ob/Gyn, Oklahoma City, OK
2021	Providing abortions in a hostile state. Family Planning Division lecture given at: Brigham and Women's Hospital, Boston, MA
2021	Abortion complications and management. Resident lecture given at: University of Oklahoma, Dept. Ob/Gyn, Oklahoma City, OK
2020	Medical management of early pregnancy loss. Grand Rounds given at: Newton Wellesley Hospital, Dept. Ob/Gyn, Newton, MA
2020	Contraception for those with medical co-morbidities. Resident lecture given at: Tufts Medical Center, Boston, MA
2020	Pregnancy options counseling and difficult patient cases. Medical student lecture given at: Harvard Medical School, Boston, MA
2020	Abnormal uterine bleeding. Medical student lecture given at: Harvard Medical School, Boston, MA
2020	Anticoagulation and abortion. Family Planning Division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	Pregnancy options counseling and difficult patient cases. Resident lecture given at: University of Oklahoma, Oklahoma City, OK
2019	Introduction to OR Culture and Skills, Transitions to the PCE (PWY150). Medical student simulation given at: Harvard Medical School, Boston, MA
2019	Combination oral contraceptives: Troubleshooting "The Pill." Gynecology Division lecture (1500 Lecture) given at: Brigham and Women's Hospital, Boston, MA
2019	Gynecologic office practice. Resident simulation given at: Brigham and Women's Hospital, Boston, MA
2019	Vasectomy and updates in male contraception. Family Planning Division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	Contraception in women with cardiovascular disease. Cardiology Division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	Combination oral contraceptives. Resident lecture given at: Tufts Medical Center, Boston, MA
2019	Contraceptive technology. Undergraduate lecture given at: Massachusetts Institute of Technology, Cambridge, MA
2019	Following declining human chorionic gonadotropin values in pregnancies of unknown location: When is it safe to stop? Regional journal club given at: Planned Parenthood League of Massachusetts, Boston, MA
2019	Natural family planning methods. Family Planning division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	LARCs, papaya and post-abortion hemorrhage workshop. Resident simulation given at: Brigham and Women's Hospital, Boston, MA
2017	Combination oral contraceptives. Resident lecture given at: University of Alabama at Birmingham, Birmingham, AL
2017	Anticoagulation and abortion. Family Planning Division lecture given at: University of North Carolina Chapel Hill, Chapel Hill, NC
2016	Secondary amenorrhea. REI Division lecture given at: University of Alabama at Birmingham, Birmingham, AL
2016	Postoperative PCA management. Resident lecture given at: University of Alabama at Birmingham, Birmingham, AL

LEADERSHIP

2017-2018	Administrative Chief of Education Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2016-2018	Young Professionals Council Planned Parenthood Southeast Birmingham, AL
2016-2018	Resident Coordinator for Immediate Postpartum LARC Program Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2016-2017	Resident Selection Committee Chair Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2015-2016	Philanthropy Committee Co-Chair Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
	American College of Obstetrics and Gynecology
2016-2017	District VII Junior Fellow Secretary and Treasurer
2015-2016	District VII Junior Fellow Advocacy Chair
2015-2016	Alabama Section Junior Fellow Chair
2014-2015	Alabama Section Junior Fellow Vice Chair

PROFESSIONAL MEMBERSHIPS

2021-Present	Dallas County Medical Association
2021-Present	Texas Medical Association
2018-Present	Society of Family Planning
	American College of Obstetricians and Gynecologists
2021-Present	Fellow
2012-2021	Junior Fellow

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 2

Declaration of Lisa Newman

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § § §	Civil No. 1:21-cv-796

DECLARATION OF LISA NEWMAN

Pursuant to 28 U.S.C. § 1746, I, Lisa Newman, hereby declare:

1. I am an attorney in the U.S. Department of Justice, Civil Division, Federal Programs Branch. I am assigned to represent the United States in the above-captioned case. The statements made herein are based on my personal knowledge, and on information made available to me in the course of my duties and responsibilities as Government counsel in this case.

2. I submit this declaration in support of the United States' concurrently filed Emergency Motion for a Temporary Restraining Order or Preliminary Injunction.

3. Filed herewith as United States' Exhibits A-D are true and correct copies of the following documents that I downloaded from the indicated websites:

Exhibit No.	Exhibit Name
A	Jenna Greene, *CORRECTED COLUMN: Crafty lawyering on Texas abortion bill withstood SCOTUS challenge*, Reuters (Sept. 5, 2021, 2:40 PM EDT), *available at* https://reuters.com/legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05/ (last visited Sept. 14, 2021)
B	Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, The Wall Street Journal (Sept. 4, 2021, 9:38 AM), *available at*

	https://www.wsj.com/articles/behind-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683 (last visited Sept. 13, 2021)
C	Michael S. Schmidt, Behind the Texas Abortion Law, a Persevering Conservative Lawyer, N.Y. Times (Sept. 12, 2021 7:46 AM EST), *available at* https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html (last visited Sept. 14, 2021)
D	Emma Green, What Texas Abortion Foes Want Next, The Atlantic (Sept. 2, 2021), *available at* https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/ (last visited Sept. 13, 2021)

I swear under penalty of perjury that the foregoing is true and correct. Executed on September 14, 2021.

/s/ Lisa Newman
Lisa Newman

Counsel for the United States

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT A

Jenna Greene, *CORRECTED COLUMN: Crafty lawyering on Texas abortion bill withstood SCOTUS challenge*, Reuters (Sept. 5, 2021, 2:40 PM EDT)

NewsRoom

9/5/21 Reuters News 02:40:41

Reuters News

September 5, 2021

CORRECTED-COLUMN-**Crafty lawyering on Texas abortion bill withstood SCOTUS challenge**: Greene

Jenna Greene

Sept 4 (Reuters)

(This story corrects who can be sued under the Texas abortion law. It is those who perform or assist in abortions, not women who seek abortions.)

By Jenna Greene

Sept 4 (Reuters) - Ever since the U.S. Supreme Court decided Roe v. Wade in 1973, abortion opponents have been trying to scale back or undo it. Texas state senator Bryan Hughes, a former personal injury lawyer and author of the "Heartbeat Act," led a team in succeeding, at least for now, where so many others have failed.

As a social policy, the law, which imposes a near-total ban on abortions in Texas but leaves enforcement up to individual citizens, is deeply controversial. House speaker Nancy Pelosi on Thursday said it "delivers catastrophe to women in Texas."

Still, some supporters stress that Hughes and the co-architects of the law, which included former Texas Solicitor General Jonathan Mitchell, deserve credit for what amounts to creative lawyering in drafting the measure, known as SB 8. These lawyers figured out how to apply qui tam statutes, which allow private citizens to pursue a lawsuit on behalf of the government, to receive an award in the abortion law context.

Hughes, 52, in an interview said the new law "is a very elegant use of the judicial system."

The impetus for creating the unique state-wide legislation came after district attorneys around the country, including some in Texas, publicly stated they would not enforce laws that criminalized early abortions, said Hughes, a Republican from Mineola, Texas.

His conclusion? "We had to find another way."

As a lawyer and legislator, he was familiar with qui tam statutes such as the Texas Medicaid Fraud Prevention Act, which allows private citizens to bring a fraud case and collect a bounty.

"The concept was there," Hughes said.

SB 8's enforcement mechanism also was modeled after an anti-abortion ordinance enacted by the town of Waskom, Texas, in 2019, Hughes said. The ordinance also delegates enforcement to private citizens bringing lawsuits.

Mitchell, a former law clerk to the late U.S. Supreme Court Justice Antonin Scalia, provided legal advice to anti-abortion advocates in drafting the ordinance, which was copied by about 30 other cities across the state.

He declined to comment.

"We continued to refine it," Hughes said of the Waskom law. "Lots of lawyers and law professors helped us out," including Mitchell, whom he describes as a longtime friend and a "very sharp guy."

To John Seago, legislative director of anti-abortion advocacy group Texas Right to Life, the novelty of SB 8 "was that it expands who has standing and takes out the other (criminal) penalties and prohibits state action."

Under the statute, Texas officials have no authority to enforce the new law, which bars abortion after the sixth week of pregnancy. Private citizens alone are empowered to sue women and anyone who assists them for violating the ban.

That private citizen component of the law was key in thwarting the abortion-provider plaintiffs, on procedural grounds, from winning an injunction from the U.S. Supreme Court. The defendants whom the abortion providers had named in the injunction action included a state court judge and a private citizen who allegedly threatened to sue women for seeking abortions.

But as the high court majority noted https://www.supremecourt.gov/opinions/20pdf/21a24_8759.pdf, it's not clear that any of them "can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention." The private citizen, Mark Lee Dickson, said in an affidavit that he has no present intention to try to enforce the law, and no cases are before the judge.

So who could the court seek to stop?

According to both Hughes and Seago, no one has attempted to sue anyone for performing or assisting in a post-heartbeat abortion since the law went into effect on Sept. 1. Until someone does, SB 8 seems likely to stay on the books, shielded from judicial review.

A Texas judge on Friday temporarily barred https://www.reuters.com/world/us/planned-parenthood-wins-restraining-order-against-texas-anti-abortion-group-2021-09-04 Texas Right to Life from suing Planned Parenthood to enforce the new law.

Still, SB 8 won't get a free pass forever. The five-justice majority wrote that their decision "in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts."

It just might take awhile.

In crafting the legislation, Hughes, who was elected to the state senate in 2016 and served in the Texas House of Representatives for 14 years prior, said he drew on his legal background.

"Usually in politics, being a lawyer is a negative, but it does come in handy sometimes," he said.

From 2003 to 2008, Hughes was a litigator at The Lanier Law Firm, which has scored billions of dollars in verdicts for plaintiffs in cases involving hip implants, diabetes medication and talcum powder.

Founder Mark Lanier in an email described Hughes as "a gifted lawyer strongly motivated by what he thinks is right."

Opinions expressed here are those of the author. Reuters News, under the Trust Principles, is committed to integrity, independence and freedom from bias.

(Reporting by Jenna Greene; Editing by Leigh Jones) ((jenna.greene@thomsonreuters.com))

---- Index References ----

Company: SCOTUS INC; THE TEXAS RIGHT TO LIFE COMMITTEE, INC.; STATE GAS LIMITED; The Lanier Law Firm P C; US House of Representatives

News Subject: (Abortion (1AB77); Health & Family (1HE30); Health & Wellness (1HE60); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05); Judicial Cases & Rulings (1JU36); Top World News (1WO62); U.S. House of Representatives (1US72); Lobby & Pressure Groups (1LO18); Intellectual Freedoms & Civil Liberties (1IN08); Corporate Events (1CR05); Legal (1LE33); Legislation (1LE97); Regulatory Affairs (1RE51); Gender Relations (1GE36); Government (1GO80); Corporate Governance (1XO27); U.S. Supreme Court (1US13); Non-Governmental Organizations (1NO36); Social Issues (1SO05); U.S. Legislation (1US12))

Industry: (Bioethics (1BI56); Contraception (1CO66); Healthcare (1HE06); Healthcare Practice Specialties (1HE49); Women's Health (1WO30); Women's Health (1WO30); Healthcare (1HE06))

Region: (Americas (1AM92); North America (1NO39); Texas (1TE14); U.S. Southwest Region (1SO89); USA (1US73); Texas (1TE14); Americas (1AM92); USA (1US73))

Language: EN

Other Indexing: (U.S. Supreme Court; House; Republican; Texas House of Representatives; SCOTUS; Texas Right to Life; state; The Lanier Law Firm) (Jenna Greene; Bryan Hughes; Bryan Hughes; Nancy Pelosi; Jonathan Mitchell; John L. Mitchell; Antonin Scalia; John Seago; Mark Lee Dickson; Mark Lanier; Leigh Jones)

Keywords: Abortion; Abortion in Louisiana; Abortion in Texas; Abortion in the United States; American society; Anti-abortion movement in the United States; Heartbeat bill; Planned Parenthood; Roe v. Wade; Texas Heartbeat Act; Texas House Bill 2; Texas statutesa1312cat:k

Word Count: 874

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT B

Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, The Wall Street Journal (Sept. 4, 2021, 9:38 AM)

Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea; Jonathan F. Mitchell taught law and clerked for Supreme Court Justice Antonin Scalia before devising a provision that has confounded abortion-rights advocates and animated their opponents

The Wall Street Journal Online

September 4, 2021

THE WALL STREET JOURNAL.

Section: US; U.S. News

Length: 1064 words

Byline: By Jacob Gershman

Body

Behind a Texas law that has confounded legal scholars and given abortion opponents hope is a publicity-shy, 45-year-old West Coast litigator known for his command of abstruse legal theory.

The Texas Heartbeat Act has survived a brush with the Supreme Court and made Texas the most restrictive in the nation for abortion access, thanks largely to its unusual enforcement scheme. The law puts ordinary Texans-not any government official-in charge of enforcing a prohibition on performing or aiding abortions after six weeks of pregnancy, making it more difficult to challenge in court.

The principal architect of the private-enforcement provision is Jonathan F. Mitchell, a constitutional litigator, former Justice Antonin Scalia clerk and law professor who in his spare time works pro bono advising the Republican legislators in Texas, according to people familiar with the legislation's development. He is active with the Federalist Society, the conservative legal group.

Mr. Mitchell helped draft the bill at the suggestion of state Sen. Bryan Hughes, an East Texas Republican, who said he sponsored it as a way for Texas to enact a so-called heartbeat bill that many other states passed into law.

But the senator said he also wanted to avoid the fate of those other bills, which were all struck down by judges who said the laws placed an undue burden on women seeking an abortion before the fetus was viable. District attorneys in Texas' more liberal cities were already saying they wouldn't enforce abortion bans in the event of a Supreme Court ruling overturning Roe v. Wade. So Mr. Hughes wanted a bill that could remain effective even without prosecutions.

"We knew we had to have another way," said Mr. Hughes, chairman of the chamber's influential Senate State Affairs policy-making committee. "We were going to find a way to pass a heartbeat bill that was going to be upheld."

Some legal scholars, including conservatives, are dubious that the Texas law can survive a more sustained legal review and expect courts-either at the federal or state level-to halt it with some kind of general injunction. But they say Mr. Mitchell still has defied the odds by seeing the law go into effect.

"He would have been a pretty successful legal academic," said Ilya Somin, a George Mason University law professor and former colleague of Mr. Mitchell's. "He's a creative legal thinker."

Mr. Mitchell has taught law at several law schools, including George Mason University and Stanford Law School, before entering state government in 2010 as the Texas' solicitor general under Gov. Rick Perry. He left the job when Mr. Perry's tenure ended. In 2017, President Donald Trump said he would tap Mr. Mitchell to lead the Administrative Conference of the United States, an obscure federal agency that advises on administrative law and regulatory procedures. But his confirmation never came up for a vote.

In 2018, Mr. Mitchell drafted "The Writ-of-Erasure Fallacy," a Virginia Law Review article that articulated the legal theories that would eventually find their way into the Texas abortion law. The article was a deep dive into the subject of judicial review and raised the idea that when a court rules a statute unconstitutional, the law isn't erased from the books and could be modified to allow for "private enforcement."

He described how laws could be constructed to "enable private litigants to enforce a statute even after a federal district court has enjoined the executive from enforcing it," without going in-depth about the applicability to abortion laws.

After opening a solo law practice, Mr. Mitchell extended the idea to abortion in 2019 when he advised an antiabortion East Texas pastor in drafting an ordinance adopted by a number of smaller Texas cities, including the city of Lubbock, that allowed Texas citizens to obtain an injunction against anyone performing or helping to carry out an abortion. Efforts by abortion-rights advocates to stop enforcement of the Lubbock ordinance failed in federal court, where a judge ruled that the plaintiff, Planned Parenthood, couldn't sue the government over the law.

The Texas Heartbeat Act, or SB 8, as the Texas law is known, is a legal labyrinth of statutory construction that has confounded some of the legal profession's most seasoned minds. Abortion-rights activists have denounced the law as diabolical, while some legal scholars have marveled at its creative clauses.

In a typical challenge to an antiabortion law, abortion-rights advocates can sue government officials tasked with enforcing the statute and wage their fights in courts and regions of their choosing. SB 8, which many Republican lawyers in the statehouse helped shape into its final form, turns the table on the geographic advantage. Claimants can sue on their home turf, even if the abortion-provider defendant is located elsewhere, and avoid courts in more Democratic areas. With no government official to sue, plaintiffs lack standing to move pre-emptively against the laws.

The law brims with financial enticements for claimants and their lawyers. The law sets a floor for damages at $10,000 per unlawful abortion but sets no limit on how much money claimants can recover. If they prevail, they can also demand the losing party pay their legal bills. If they lose in court and their case is dismissed, they owe the defendant nothing.

The law permits multiple lawsuits to be filed by different individuals over a single abortion. Once a claimant collects damages, though, the others suing may not collect more money from the same defendant for the same violation.

The Republican-led state Senate and House passed the measure in May with votes almost entirely split along party lines. Between the two chambers, only two Democrats voted for the bill. No Republicans voted against the ban. Texas Gov. Greg Abbott, a Republican, signed the bill on May 19, and it went into effect Wednesday.

In an unsigned 5-4 order, the Supreme Court declined to block the law from taking effect. The conservative majority wrote that there were "serious questions regarding the constitutionality of the Texas law" but said the court might

lack the jurisdiction to act because of procedural technicalities. The three liberal justices and Chief Justice John Roberts filed dissents.

Write to Jacob Gershman at jacob.gershman@wsj.com

Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea

Notes

PUBLISHER: Dow Jones & Company, Inc.

Load-Date: September 7, 2021

End of Document

THE UNITED STATES DISTRICT COURT
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EXHIBIT C

Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 12, 2021 7:46 AM EST)

Behind the Texas Abortion Law, a Persevering Conservative Lawyer

The New York Times

September 12, 2021 Sunday 07:46 EST

Section: US; politics

Length: 2296 words

Byline: Michael S. Schmidt

Highlight: Jonathan Mitchell has never had a high profile in the anti-abortion movement, but he developed and promoted the legal approach that has flummoxed the courts and enraged abortion rights supporters.

Body

Jonathan Mitchell has never had a high profile in the anti-abortion movement, but he developed and promoted the legal approach that has flummoxed the courts and enraged abortion rights supporters.

Jonathan F. Mitchell grew increasingly dismayed as he read the Supreme Court's decision in June 2016 striking down major portions of a Texas anti-abortion bill he had helped write.

Not only had the court gutted the legislation, which Mr. Mitchell had quietly worked on a few years earlier as the Texas state government's top appeals court lawyer, but it also had called out his attempt to structure the law in a way that would prevent judicial action to block it, essentially saying: nice try.

"We reject Texas' invitation to pave the way for legislatures to immunize their statutes" from a general review of their constitutionality, Justice Stephen G. Breyer wrote in the majority's opinion.

For Mr. Mitchell, a onetime clerk to Justice Antonin Scalia, the decision was a stinging rebuke, and he vowed that if he ever had the chance to help develop another anti-abortion law, he would ensure it survived at the Supreme Court.

Last month, he got his chance. With its ideological balance recast by President Donald J. Trump, the court refrained from blocking a new law in Texas that all but bans abortion — a potential turning point in the long-running fight over the procedure. And it was the deeply religious Mr. Mitchell, a relative unknown outside of Texas in the anti-abortion movement and the conservative legal establishment, who was the conceptual force behind the legislation.

The court's decision did not address the law's constitutionality, and the legislation will no doubt face more substantive challenges. But already, the audacious legislative structure that Mr. Mitchell had conceived of — built around deputizing ordinary citizens to enforce it rather than the state — has flummoxed lower courts and sent the Biden administration and other supporters of abortion rights scrambling for some way to stop it.

"Jonathan could have given up, but instead it galvanized him and directly led to the more radical concepts we see" in the new Texas law, said Adam Mortara, a conservative legal activist who is one of Mr. Mitchell's closest friends.

Mr. Mitchell represents a new iteration of the anti-abortion campaign. Instead of focusing on stacking the courts with anti-abortion judges, trying to change public opinion or pass largely symbolic bills in state legislatures, Mr. Mitchell has spent the last seven years honing a largely below-the-radar strategy of writing laws deliberately devised to make it much more difficult for the judicial system — particularly the Supreme Court — to thwart them, according to interviews.

How he pulled it off is a story that brings to life the persistence of the anti-abortion movement and its willingness to embrace unconventional approaches based more on process than moral principle.

Never an especially prominent, popular or financially successful figure in the conservative legal world — he was best-known for litigation seeking to limit the power of unions — Mr. Mitchell, 45, is only now emerging as a pivotal player in one of the most high-profile examples yet of the erosion of the right to abortion.

As his role has started to become more widely known, he has drawn intense criticism from abortion rights supporters not just for restricting access to the procedure but also for what they see as gaming the judicial system through a legislative gimmick they say will not withstand scrutiny.

“It grinds my gears when people say what’s been done here is genius, novel or particularly clever — it was only successful because it had a receptive audience in the Supreme Court and Fifth Circuit,” said Khiara M. Bridges, a professor of law at the University of California at Berkeley, referring to the conservative-leaning federal appeals court that also weighed in on the Texas law.

“If you want to overturn Roe v. Wade, you create a law that is inconsistent with the Supreme Court’s precedent and someone will challenge it and you work it through the federal courts,” she said. “You don’t create a law that is designed to evade judicial review.”

This article is based on interviews with anti-abortion activists who worked with Mr. Mitchell, reproductive rights advocates, friends and legal experts, and a review of Mr. Mitchell’s writings.

Mr. Mitchell briefly addressed his work in a statement.

“The political branches have been too willing to cede control of constitutional interpretation to the federal judiciary,” he said. “But there are ways to counter the judiciary’s constitutional pronouncements, and Texas has shown that the states need not adopt a posture of learned helplessness in response to questionable or unconstitutional court rulings.”

From Local Story to National

Mark Lee Dickson, an anti-abortion activist, was sitting in a Chick-fil-A in eastern Texas in the late spring of 2019. Rumors were circulating that an abortion clinic in the nearby city of Shreveport, Louisiana, might relocate over the state line to the border town of Waskom, Texas.

The mayor of Waskom had asked Mr. Dickson to draft an ordinance that would outlaw abortion clinics in the town of 2,000 people.

But, Mr. Dickson recalled, he was concerned about giving the ordinance to the mayor, fearing that if the town enacted it, groups like the American Civil Liberties Union would quickly sue, saddling it with legal bills that would bankrupt it.

Mr. Dickson texted Bryan Hughes, a Republican Texas state senator who represented the area.

Mr. Hughes replied that he had the perfect lawyer for him: Jonathan Mitchell, who had left his role as Texas solicitor general in 2015 and was running a one-man law firm.

Mr. Hughes described Mr. Mitchell’s bona fides.

“He was a law clerk for Scalia and had been quoted by Alito and Thomas and was the former solicitor general of Texas — I automatically had respect for him because being in those positions, he was definitely the right person to talk to,” Mr. Dickson said.

Sitting in his 2008 white Ford F-150 pickup truck in the parking lot of the Chick-fil-A, Mr. Dickson had a conference call with Mr. Mitchell and Mr. Hughes, and Mr. Mitchell said that he had a solution.

Drawing from an idea that he had first floated in a 2018 law review article, Mr. Mitchell said that there was a provision that could be added to the ordinance outlawing abortion in Waskom while stripping the town government of authority for enforcing the ban. Instead enforcement power would be given to ordinary citizens, who could bring lawsuits themselves to uphold the ban.

Mr. Mitchell's explanation convinced Mr. Dickson that the provision would protect the town from being bankrupted. The two men worked together to have the provision added to the ordinance and in June 2019, the City Council, in a 5-to-0 vote, passed it.

All five votes for the ordinance were cast by men. At the time, the ordinance received little attention, even though it appeared to be the first time that a city in the United States had passed a law that outlawed abortion since the Roe v. Wade decision 46 years earlier.

In the end, it proved largely symbolic, since no abortion provider tried to move to Waskom.

But the passage of the ordinance galvanized Mr. Dickson and Mr. Mitchell. Throughout 2020, Mr. Dickson crisscrossed Texas, meeting with local officials — many who represented cities and towns that were unlikely to ever become home to an abortion clinic — to press them to enact similar ordinances.

With Mr. Mitchell helping with the legal wording needed in the ordinance, Mr. Dickson persuaded over 30 cities to adopt the law. Mr. Mitchell was so confident in the provision that he assured the towns he would represent them at no cost to taxpayers if they were sued.

Anti-abortion activists and legal experts closely watching the issue across the state — and the country — started taking notice.

"We would not have the Texas abortion law without Waskom" said Mary Ziegler, a law professor at Florida State University and legal historian.

"It was a super local story," she said, "and something people ignored, but ended up changing the national conversation."

A Winding Career Path

The oldest of seven brothers, Mr. Mitchell was raised in a religious Christian home in Pennsylvania. He attended Wheaton College, a small school in Illinois that "prepares students to make an impact for Christ," according to its website. Friends refrain from calling him on Sundays, as they know he spends at least several hours at church.

Despite his Supreme Court clerkship and having held jobs with the state of Texas and the Justice Department and in academia, he had struggled to find a consistent paying job in the years after he was replaced as solicitor general in Texas.

Concluding that writing provocative and novel legal analysis would attract the attention of the top law schools, Mr. Mitchell wrote a law review article based on his experience in Texas, where he saw up close how the vulnerabilities in laws produced by the State Legislature were being used to challenge them in court.

That article, "The Writ-of-Erasure Fallacy," published in 2018, would set out the approach that he would go on to use in the municipal ordinances across Texas and then in the 2021 state law: helping states protect themselves from judicial review by delegating enforcement authority to private citizens.

But his writings failed to win him a tenure track teaching offer, and efforts to land a job in Washington after Mr. Trump was elected president in 2016 also fizzled.

After losing out on jobs in the Justice Department and the Office of Management and Budget, he was nominated by Mr. Trump to lead the Administrative Conference of the United States, an obscure federal agency that tries to make the government more efficient.

But Senator Sheldon Whitehouse of Rhode Island, a top Democrat on the Judiciary Committee, demanded that Mr. Mitchell answer questions about whether he had taken money from donors to pursue cases that would help the far right, including his anti-union work, according to a copy of a letter Mr. Whitehouse sent him.

In response, Mr. Mitchell said that he had not received such funds. But the answers failed to satisfy Mr. Whitehouse, who essentially killed his nomination.

Colleagues say that one reason Mr. Mitchell struggled to find employment is that he shows no interest in the subtleties of politics. He is often so focused on the weedy legal issues of the day, they said, that he failed to pay attention to the world around him. During his tenure as a clerk on the Supreme Court, he ate lunch nearly every day at the same Mexican restaurant, but after a year of going there, he still did not know its name.

By the summer of 2018, Mr. Mitchell decided to open a one-person law firm. With Mr. Trump driving the Supreme Court rightward with his nominees, Mr. Mitchell calculated that the court would be more sympathetic to cases in areas like religious freedom, abortion, and affirmative action that big law firms would not take on because they were politically divisive.

To keep his one-man shop going, Mr. Mitchell reached an agreement with Juris Capital, a company that finances small law firms in exchange for a share of damages they win in litigation. Juris agreed to give him $18,000 a month to finance his firm's operations.

A Second Chance

Back at the Texas State Legislature in late 2020, Mr. Hughes was helping plot Republican plans for their legislative agenda. Mr. Hughes mentioned to Mr. Mitchell that he planned to introduce a so-called heartbeat bill, which would make it illegal to have an abortion after early fetal cardiac activity is detected roughly six weeks into pregnancy.

Mr. Mitchell told him that was a terrible idea. A pattern had emerged in which similar laws passed by state legislatures were thwarted by federal judges.

Mr. Hughes asked whether there was any way they could come up with a bill that would survive challenges in the court. Mr. Mitchell immediately cited the growing success of the municipal-level effort that had started in Waskom to alter the way anti-abortion laws would be enforced.

"It's going to require outside-the-box thinking and you to persuade your colleagues of a different approach — it can be done; give me the pen and I'll give you the language," Mr. Mitchell told Mr. Hughes.

Mr. Mitchell wrote into the heartbeat bill the same provision that he had written about in the journal article and that served as the core of ordinances in dozens of cities across Texas.

Republican state senators remained skeptical. How could a law be enforced that the state itself was being prohibited from enforcing? Why was it not a criminal law — would that not make it toothless?

Mr. Hughes arranged a conference call between Mr. Mitchell and a dozen staff members and senators. Mr. Hughes listened as Mr. Mitchell walked his colleagues through his idea.

"No lawyer can guarantee it will work — I can't guarantee it's going to work, but it will have a fighting chance, and will have a better chance than a regular heartbeat law," Mr. Mitchell said.

By the end of the call, nearly everyone was on board.

In May, when Gov. Greg Abbott signed the law, he did not thank or even mention Mr. Mitchell. Mr. Mitchell did not attend the ceremony.

Matthew Cullen contributed research.

Matthew Cullen contributed research.

PHOTOS: Protesting for abortion rights last week at the Supreme Court. Texas' law is a potential turning point in the fight over the procedure.; In a largely procedural ruling last month, the Supreme Court declined to block the Texas law. (PHOTOGRAPHS BY KENNY HOLSTON FOR THE NEW YORK TIMES); Jonathan F. Mitchell is a one-time Supreme Court clerk and former Texas solicitor general. (PHOTOGRAPH VIA JONATHAN F. MITCHELL) (A18)

Load-Date: September 12, 2021

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT D

Emma Green, *What Texas Abortion Foes Want Next*, The Atlantic (Sept. 2, 2021)

What Texas Abortion Foes Want Next

Atlantic Online

September 2, 2021 Thursday

Length: 1796 words

Byline: Emma Green

Body

Sometimes, the Supreme Court does the most when it does nothing. Last night, the justices denied an emergency petition by abortion providers in Texas seeking to block S.B. 8, a law banning pregnancy terminations after roughly six weeks' gestation. A 5"4 majority of the justices argued that they had no power to stop the law from going into effect, since none of the citizens who are now empowered under the law to sue abortion clinics for providing the procedure has yet attempted to do so. Legal challenges likely lie ahead. But abortion opponents see this as a victory, however temporary. For now, at least, abortion clinics in Texas are largely suspending their work and abiding by the ban.

John Seago, the legislative director of Texas Right to Life, shepherded and supported the passage of this law. "This is a phenomenal victory and the most significant accomplishment for the Texas pro-life movement since Roe," he told me. Just five years ago, his group and its allies faced a major legal defeat in Whole Woman's Health v. Hellerstedt, in which the Supreme Court overturned legislation restricting abortion procedures in Texas. Today, Seago and his allies feel much more optimistic that they can end legal abortion, and not just with S.B. 8. This fall, the justices are slated to consider Mississippi's 15-week abortion ban and potentially reevaluate the constitutional right to abortion laid out in the landmark 1973 case Roe v. Wade.

If Seago and his allies get their way, abortion would be completely illegal in the United States. But would they be ready, if that were to become reality? I spoke with Seago yesterday afternoon. Our conversation has been condensed and lightly edited for clarity.

[Read: Science is giving the pro-life movement a boost]

Emma Green: I'm curious why your legal approach here was not a full-frontal attack on Roe, but rather to create a private right of action for citizens so they can sue abortion providers. What was the motivation behind that approach?

John Seag There are two main motivations. The first one is lawless district attorneys that the pro-life movement has dealt with for years. In October, district attorneys from around the country publicly signed a letter saying they will not enforce pro-life laws. They said that even if Roe v. Wade is overturned, they are not going to use resources holding the abortion industry to account. That shows that the best way to get a pro-life policy into effect is not by imposing criminal penalties, but civil liability.

The second is that the pro-life movement is extremely frustrated with activist judges at the district level who are not doing their job to adjudicate conflicts between parties, but who in fact go out of their way to score ideological points-blocking pro-life laws because they think they violate the Constitution or pose undue burdens.

Green: How much of your strategy is about optics? Instead of passing legislation that would send doctors or women seeking abortions to jail, these questions get played out in civil court.

Seag There's a question of morality: Is it ethical to penalize women seeking abortions in Texas? We have categorically argued that women need to be treated differently than abortionists. Even with civil liability, we say that women cannot be the defendants. That's not the goal.

Green: All things being equal, do you think that doctors who provide abortions should be put in jail?

Seag Yes. Absolutely. There is an unethical procedure at the heart of this debate. Elective abortion is the epitome of an injustice. It is a larger, stronger group using violent force to take the life of a smaller, weaker party. You don't have to have a religious background or be motivated by faith to realize that's not the kind of society we want to live in. I'll look forward to the day when our laws reflect that we have moral obligations to the most vulnerable populations around us.

[Read: The anti-abortion-rights movement prepares to build a post-Roe world]

Green: This law bans abortion after roughly six weeks' gestation, pegged to being able to detect a heartbeat on an ultrasound. That's really early into a pregnancy. This is essentially a total ban on abortion. So why start with the heartbeat? Why not just totally ban abortion?

Seag You have to think about the compelling state interest. How can we articulate that as the state of Texas? The heartbeat is a morally significant biological moment where we can detect whether someone is alive or not. If you see someone [passed out] on the side of your jogging trail, you go and check for the signs of life-a heartbeat. That was very appealing to a lot of pro-life Texans. That was appealing to a lot of elected officials.

You're right that it is more ethically consistent to ban all abortions and say, "At the moment of sperm-egg fusion, you have an independent, individual human being who is unlike anyone else-no longer an organ, but an organism." However, whenever we look at legislation, you have to have a majority. You have to have the votes. The heartbeat ban was a really popular piece of legislation. It was easy to explain to even some individuals who identified as pro-choice.

Green: I'm curious about the state of play in Texas. Just five years ago, Hellerstedt was a major defeat for pro-lifers in Texas. Do you feel more optimistic now than you did then that it will be possible to permanently ban abortion in Texas?

Seag Absolutely. Yes. There's been a ton of momentum for the pro-life movement since then. Hellerstedt was an extremely disappointing decision from a legal standpoint. Abortion jurisprudence is built on some fundamental legal and scientific and moral errors. What we want to do as an organization is pass aggressive legislation that highlights those errors. Things like the ridiculous viability standard-the idea that, ethically, it's okay to take a life if it can't survive on its own, but once it can survive on its own, all of a sudden it is unethical to take that life. That violates common ethical reasoning.

We want to pass legislation to show the Supreme Court that they need to tear down and rebuild the legal foundation they have relied upon when it comes to abortion legislation. We're invested in that, but that's really a different project than the heartbeat act.

Green: I'm going to ask the question that all of your opponents have on their mind. All of the women in abusive relationships, or who are straining to take care of the kids they have, or who can't afford to buy food, or whose babies are diagnosed with severe disabilities or genetic abnormalities-this law in Texas is potentially going to change the course of their lives. Aren't you worried about hurting them?

Seag Yes, we are. At the same time, as we passed S.B. 8, we invested $100 million in the Alternatives to Abortion program, and we increased funding to the Healthy Texas Women program. We're concerned about not just saying no to abortion but supporting women who are facing unexpected pregnancies or other difficult circumstances. That needs to be the pro-life vision for the state of Texas. Part of our core agenda every session is increasing funding to these programs that support women and their families.

We are the organization that drags Republicans, sometimes kicking and screaming, into investing more money into social services for pregnant women. However, we face a major injustice: more than 50,000 elective abortions and the intentional killing of innocent human life. That's not good for mothers.

[Read: A pastor's case for the morality of abortion]

Green: I want to push you on that, because, as an environment for pregnant women, Texas is pretty harsh. For example: It's one of roughly a dozen states across the country that didn't expand Medicaid under the Affordable Care Act. So poor women have less access to insurance coverage and health care. Critics would say that you shouldn't prioritize a heartbeat bill; you should prioritize improving Medicaid access so that poor women can see a way to potentially keep a pregnancy. Are you going to advocate that Texas expands Medicaid access?

Seag Medicaid expansion is one issue. But we have to be mindful of our political atmosphere and what is possible. We will continue to advocate for policies that are good for pregnant women and open up access to social and medical services. There's much more we can do as far as serving pregnant women. We're open to those things, but we have to realize that we don't drive the legislature. Just because we're a pro-life organization doesn't mean we get everything we ask for.

Green: That's really interesting, because obviously the pro-life movement is strongly associated with the Republican Party across the country. Do you ever feel frustrated with the Republican Party-that sometimes it says it's pro-life, but it doesn't necessarily put its money and its policy where its mouth is, in terms of doing everything it can to make sure that pregnant women are able to thrive?

Seag Absolutely. The Republican Party does not have 100 percent of my support. There are areas where I think their policies and priorities are hurtful to human flourishing, and actually unethical.

The problem is that when I compare the parties, I see that while the Democratic Party may be better on disability rights and access to health care, ultimately they are turning a blind eye to significant, glaring injustices. At the end of the day, I'm working with the Republican Party because they are the only party at this moment that is willing to boldly stand up against the gross injustice of elective abortion.

Green: For the past 48 years, the pro-life movement has been fighting Roe and trying to put an end to legal abortion in the United States. In some ways, it seems like that goal is closer now than ever. That potentially means the world we're going to be living in will be very different-including hundreds of thousands more babies and children running around. Is the pro-life movement financially and politically ready to support that world? If you got what you wanted, would you be ready?

Seag To be honest, it would require a higher level of commitment and investment that we have not seen. However, the infrastructure is already there. The commitment is already there. Think of the pregnancy-center movement: small nonprofits around the state that are seeking to support women in making sure they have a safe home and access to food or can apply for a job or put a rsum together. Pregnancy-center directors are seeing an influx of women come through their doors. These people who are sitting down with pregnant women and trying to help them-that's really where the heart of the pro-life movement is. That is the kind of self-sacrifice and compassion that it's going to take to live in an abortion-free state.

Load-Date: September 9, 2021

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 3

Declaration of Amy Hagstrom Miller in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. 1:21-cv-796-RP
The State of Texas,	)	
	)	
Defendant.	)	

DECLARATION OF AMY HAGSTROM MILLER
IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

AMY HAGSTROM MILLER hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the President and Chief Executive Officer ("CEO") of Whole Woman's Health, LLC ("WWH").

2. WWH currently operates three licensed abortion facilities in Texas, in Fort Worth (the "Fort Worth Clinic"), McAllen (the "McAllen Clinic"), and McKinney (the "North Texas Clinic"). WWH also operates abortion clinics in Baltimore, Maryland; Bloomington, Minnesota; and Alexandria, Virginia.

3. As President and CEO of WWH, I am responsible for the management of these clinics and therefore am familiar with our finances and operations, including the services we provide and the communities we serve.

4. I am also the President and CEO of Whole Woman's Health Alliance ("WWHA").

5. WWHA is a nonprofit organization incorporated under Texas law. Its mission is to provide abortion care in underserved communities, shift the stigma around abortion in our culture,

and ensure that every pregnant person deserves the compassion, respect, and dignity of being able to safely and legally end a pregnancy.

6. WWHA currently operates an abortion clinic in Austin, Texas (the "Austin Clinic"), as well as abortion clinics in South Bend, Indiana and Charlottesville, Virginia. The Austin Clinic opened in 2017 and is a licensed abortion facility.

7. As President and CEO of WWHA, I oversee all aspects of the organization's work.

8. The clinics operated by both WWH and WWHA are independent abortion providers, or abortion clinics that are not affiliated with any national organization (such as Planned Parenthood). Independent abortion providers provide approximately 60% of abortion care in the country. More than half of the abortion clinics in Texas are independent abortion providers.

9. I have been working in the abortion care field since 1989. I have done virtually every clinic job over the past three decades, from receptionist to sonographer to pathology technician to surgical assistant to counselor. I have spent thousands of hours talking with abortion patients over the course of my career. In my current role, I oversee all operations at the WWH and WHHA clinics, from staff management, to clinic security, to clinical services for patients. I am thoroughly familiar with all aspects of abortion clinic operations and patient care.

10. I provide the following testimony based on my personal knowledge and review of WWH's and WWHA's business records.

Provision of Abortion Care at the WWH and WWHA Clinics in Texas

11. Before September 1, 2021, the Austin, Fort Worth, and McAllen clinics offered procedural abortions up to 17.6 weeks and medication abortions up to 70 days gestation, as measured from the first day of a patient's last menstrual period ("LMP"). The McKinney clinic offered medication abortions up to 70 days gestation. In 2020, the four WWH/WWHA clinics in

Texas provided approximately 9,200 abortions. Of these patients, less than 10% were at gestations less than 6 weeks LMP.

12. Multiple barriers to abortion care in Texas make it difficult, if not impossible, for patients to seek abortion care early in pregnancy. For example, Texas forces patients to receive in-person state-mandated biased counseling at least 24 hours before an abortion, requires minors to receive parental consent, and prohibits coverage of abortion care through its Medicaid program and in nearly all private insurance plans.

13. Most of WWH/WWHA's patients in Texas are Black, Latinx, or people of color from marginalized communities. Our patients overcome significant logistical and financial burdens to access abortion care at our clinics. The majority of our patients are poor or low-income and receive at least partial financial assistance for their abortions.

14. The patients we serve at our McAllen clinic face additional barriers to care. A majority of patients at the McAllen Clinic are Spanish speakers, and many face immigration-related restrictions on traveling outside of the Rio Grande Valley. For example, while many of the patients are in this country legally, their visas prohibit them from traveling outside of the Rio Grande Valley, so they cannot travel to New Mexico or even to San Antonio for any reason, including to access abortion services.

15. Since S.B. 8 took effect on September 1, 2021, all four WWH/WWHA clinics in Texas have stopped offering both medication and procedural abortions for patients whose pregnancies have cardiac activity, meaning that our clinics are only providing abortions to patients with gestational ages under approximately 6 weeks LMP. We have already turned away more than 100 patients since September 1, and every day the law is in effect, we are forced to turn away the majority of patients seeking an abortion.

History of Clinic Closures in Texas

16. Texas has a long history of using restrictive abortion laws to shutter clinics.

17. In 2013, Texas passed House Bill 2, a law that required all abortion facilities to be licensed ambulatory surgical facilities and all abortion providers to have local hospital admitting privileges. Because WWH lacked sufficient physicians with admitting privileges in Beaumont and Austin, we had to shut those clinics down. Additionally, our clinic in McAllen was shut down for eleven months and was only reopened because of an injunction awarded by the United States District Court for the Western District of Texas. Ironically, one of our physicians in Austin was able to obtain admitting privileges in Fort Worth, and so he commuted by plane in order to keep our clinic in Fort Worth open. The cost of flights put further economic pressure on WWH.

18. While H.B. 2 was ultimately struck down in 2016 as unconstitutional by the Supreme Court, WWH was severely strained by the litigation. And things have only gotten worse since 2013, as WWH has been forced to litigate three additional severe abortion restrictions since 2016.

19. Because the regulatory environment in Texas is so hostile, the clinics shuttered by H.B. 2 have largely not reopened. Before 2013, there were 44 clinics providing abortion in Texas, and today there are only 20. In fact, the WWH clinic in Austin (now operated by Whole Woman's Health Alliance) is the only WWH clinic closed by H.B. 2 to have reopened since the Supreme Court struck it down.

20. Less than two years after reopening, the Austin clinic was forced to close again because an anti-abortion pregnancy crisis center, Austin LifeCare, bought out the lease for our existing building. The Austin Clinic had to find a new location and relocate our operations, reopening again in February 2019.

21. In my experience, the Austin clinic is the exception, not the rule. Independent abortion providers will not be able to recover from clinic closures. Once abortion clinics close, they remain closed permanently.

22. Abortion providers had a similar experience last year when Governor Abbott issued a COVID-19 executive order that forced all of the abortion providers in the state to stop providing abortions for around three weeks. Even this short closure had a devastating and lasting impact on both the clinics and our patients. Had the closure lasted even a few weeks more, many clinics would have closed for good.

23. WWH and WWHA faced immense financial and institutional strain during the COVID-19 shutdown. Even though we were in compliance with all court orders issued during the shutdown, one of our physicians was targeted by anti-abortion activists who submitted a meritless complaint with the Texas Medical Board. While the complaint was ultimately dismissed, we were forced to devote immense staff time and attorney resources to mounting the physician's defense.

24. We also kept a waiting list of our patients during the COVID-19 shutdown in hopes that we would be able to serve them as soon as the ban was lifted. We know that most of our patients were unable to travel out of state during the COVID shutdown. It took us months to recover from the patient backlog.

Senate Bill 8

25. I understand that Texas Senate Bill 8 ("S.B. 8") requires physicians to determine if a "fetal heartbeat" is present before performing an abortion. *See* Tex. Health & Safety Code § 171.203(b). If the physician detects a "fetal heartbeat" or fails to test for it, they are prohibited from performing the abortion. *See* Tex. Health & Safety Code § 171.204(a).

26. Fetal or embryonic cardiac activity can be detected as early as six weeks LMP. By prohibiting abortions at or after six weeks LMP, S.B. 8 bans approximately 90% of the abortions we previously performed at the three WWH clinics and one WWHA clinic in Texas.

27. I further understand that a private right of civil action can be brought by any person against a) someone who performs an abortion in violation of S.B. 8; b) someone who aids or abets the performance of an abortion in violation of S.B. 8; or c) someone who intends to engage in a) or b). *See* Tex. Health & Safety Code § 171.208(a). If the person suing is a Texas resident, they can file the case in a court in their home county. *See* Tex. Health & Safety Code § 171.210(a)(4).

28. I understand that if we lose any S.B. 8 lawsuit, we will be ordered to pay at least $10,000 for each violation and costs and attorney's fees for the prevailing claimants. *See* Tex. Health & Safety Code § 171.208(b)(1). We will also face a mandatory injunction, violation of which would expose us to additional contempt orders. *See* Tex. Health & Safety Code § 171.208(b)(2). And even if we prevail in those S.B. 8 lawsuits, we will spend thousands in costs and attorney's fees that S.B. 8 bars us from recovering from the unsuccessful claimant. *See* Tex. Health & Safety Code § 171.208(i).

29. Even if there is no basis for the suits we know will be filed, I understand that our physicians, nurses, and staff will be forced to travel to the claimant's home county, hire a lawyer, and spend months, if not years, defending themselves.

Impact of S.B. 8 on Abortion Access in Texas

30. S.B. 8 has had an immediate and devastating effect on abortion care in Texas. I have had personal conversations with the majority of independent abortion clinics in Texas regarding S.B. 8 and can affirm that the independent abortion providers in Texas are all complying with S.B. 8. All of these clinics continue, for now, to provide abortions only for pregnant people without any embryonic or fetal cardiac activity, meaning that we are forced to turn away the majority of patients seeking abortion in Texas.

31. Now that abortion is almost entirely inaccessible in Texas, patients have few options and each of their stories is more heartbreaking than the last. The first patient we saw at our Fort Worth clinic on September 1 was ineligible under S.B. 8. She had a 3-month-old daughter and had just started a new job. She had just left an unsupportive partner and moved in with her parents and feared that if she told them about her pregnancy, they would kick her out. Similarly, we saw a patient on September 1 at our Austin clinic who was so stunned to learn she was 10 weeks LMP and ineligible for abortion in Texas that she was in too much shock to process our suggestions for where to turn for care. We saw another patient last week with consistent periods who had no signs of pregnancy other than a positive pregnancy test. The patient thought she was likely 4-5 weeks LMP but was shocked to learn that her ultrasound showed that she was beyond 13 weeks. The patient already has a young infant at home, less than a year old. We have not heard from any of these patients since they left our clinics.

32. The majority of pregnant Texans who want an abortion will be forced to carry those pregnancies to term and face the risks—medical and financial—attendant with childbirth. Based on our prior experiences with clinic shutdown laws, we know that the majority of our patients will not be able to travel out of state to obtain an abortion due to their work, school, family, or childcare responsibilities and the high costs. In addition, many of our patients have cited fears about travel during the COVID-19 pandemic or an inability to travel due to COVID-19 as one of the many reasons they cannot travel out of state for care. Travel is particularly difficult, if not impossible, for our patients in the Rio Grande Valley, many of whom cannot travel out of state for fear of being deported. One patient told our staff she was unable to travel out of state and would instead try to obtain pills from Mexico.

33. My staff is particularly concerned about the unaccompanied migrant teenagers who often present at our McAllen clinic, as the logistical barriers to these patients' care mean that they are unable to reach us for treatment prior to 9 weeks LMP. This is in part because the judicial bypass

process usually takes at least 2 weeks. The majority of these patients do not become pregnant through consensual sex and tend to be much younger than other minor patients we treat.

34. Traveling out of state for abortion care presents significant, if not insurmountable, logistical and financial challenges for the majority of Texans that WWH and WWHA serves. Over the last week and a half, we have seen some of our patients attempt to travel out of state, but even the lucky ones able to travel are both delayed in obtaining care and need to travel hundreds more miles to reach an abortion provider. For example, we saw one patient in McAllen who had already made a backup appointment in Oklahoma, an 11-hour drive away. I have also spoken to colleagues in Michigan, Florida, New York, New Mexico, and Georgia who have all seen patients from Texas in the last week.

35. S.B. 8 also exacerbates the shame and stigma surrounding abortion access in Texas. Pregnant Texans are concerned that "any person"—from an abusive partner to a complete stranger—will prevent them from terminating their pregnancies and are now limited in their access to critical medical care to which they are constitutionally entitled.

36. Being forced to delay a wanted abortion is nerve-wracking. Patients who are delayed from accessing abortion must continue to cope with the physical symptoms of pregnancy, which for many include debilitating nausea and vomiting. The longer a patient remains pregnant, the more likely it is that others will discover the pregnancy, including abusive partners or family members. The cost of abortion care (as well as the medical risks of pregnancy and abortion) increase significantly with gestational age. Patients who are delayed from accessing abortion must also cope with the fear of not being able to obtain abortion care in time (based on other states' gestational age limits, as most of the states surrounding Texas ban abortion after 22 weeks LMP)—and of the life-altering consequences of having to go through childbirth against their will. We have seen at least two patients who obtained medication abortions before September 1 and returned at their follow-up visits after September 1 with

ongoing pregnancies—meaning they were in the very small fraction of patients for whom the medication abortion was unsuccessful. In the past, we would have provided these patients with procedures to complete their abortions, as that is the medical standard of care, but because of S.B. 8 we were forced to turn these patients away. One of these patients was only 18 years old. Our physician was so upset that a staff member had to help the doctor break the news to the patient.

37. Inevitably, if S.B. 8 is not blocked, many Texans will be forced to carry pregnancies to term against their will.

Impact of S.B. 8 on WWH and WWHA Clinics

38. Even before September 1, the uncertainty created by S.B. 8 had a significant impact on our clinics. For months our staff have worried that our clinics will be forced to close and they will be out of a job. Staff have tremendous anxiety about being laid off or experiencing disruption to their incomes that will prevent them from supporting their families. This anxiety is exacerbated by the COVID-19 pandemic that is still raging in Texas and has interrupted schooling and childcare for the majority of our workforce. Our clinic staff have lived experience with work disruption related to prior clinic shutdowns in Texas (H.B. 2 and the COVID-19 executive order), and this current ban triggers worry and trauma from those prior experiences ten-fold.

39. While we generally have low staff turnover, ever since S.B. 8 started receiving public attention, staff began to express serious fears that their jobs would no longer exist come September 1. In fact, over the last several months, we have lost around one staff member every week, including two of our clinic directors. We have been interviewing replacements for these positions, but every applicant brings up S.B. 8 during their interview, asking questions we just can't answer.

40. Our physicians in particular, many of whom are licensed in multiple states and travel to Texas to provide patient care, are extremely concerned about their potential personal and professional liability under S.B. 8. Our physicians and nurses worry that lawsuits under S.B. 8 might

trigger investigations and other repercussions, including loss of licensure, that will follow these professionals for the rest of their careers, even if they choose to practice outside Texas.

41. Beginning on September 1, WWH and WWHA began complying with S.B. 8, feeling we had no other choice. Even though we are complying, our staff remains incredibly concerned that lawsuits will be filed against them that will cause ruinous personal liability. We currently have 17 physicians that work at our Texas clinics, but only one of our physicians unconditionally agreed to come to work on September 1. The rest of our physicians, particularly the ones that travel from out of state, are concerned that if lawsuits are filed against them, they will be required to report these lawsuits to their professional licensure boards and hospitals in every state where they are licensed, and that they will ultimately lose their professional privileges and credentials. For most of our physicians, the risk was too great to even come to work.

42. Compliance with S.B. 8 is not a long-term solution for our clinics. If the law remains in effect for an extended period of time, and we are only able to serve a fraction of our patients with a fraction of our staff, we will have to shutter our doors and stop providing any healthcare to the communities we serve. I believe that, without court-ordered relief in the next couple of weeks, S.B. 8 will shutter most if not all of the remaining abortion clinics in Texas. The independent providers in Texas are most at risk, as their only source of regular income is fees for providing abortions. We simply cannot stay open if we are only providing a fraction of patient services.

43. I also have no doubt that WWH, WWHA, our physicians, our nurses, and our staff will be targeted by individuals opposed to abortion who will file lawsuits under S.B. 8, including the protesters who frequently picket our clinics and harass us and our patients. Indeed, we already have.

44. The threat of lawsuits began almost immediately after Governor Abbott signed S.B. 8 into law. In late May, an individual snuck into the Austin Clinic by following a patient through the front door to evade our security. Once inside, the individual distributed a letter about S.B. 8 to our

Austin Clinic staff and those present in the reception area. This letter is attached as Exhibit 1 to my declaration. The individual was asked to leave, but once outside, the individual was joined by another person and both individuals continued to distribute the letter to staff outside, still on the clinic's private property. This letter informs staff that they can be sued for providing or facilitating abortions after the detection of a "fetal heartbeat" and encourages them to report their colleagues to the letter's authors—"K+W Partnership." The letter gives a phone number and email address for individuals to use to report violations of S.B. 8 and states: "please call or send us a text at any time." If anti-abortion individuals would go to this length to encourage lawsuits several months before S.B. 8 was scheduled to take effect, I have no doubt that they will bring suits against us if we begin providing abortions after 6 weeks LMP without a court order.

45. The threats have continued despite our public statements that we would be and now are in compliance with S.B. 8. On the day before S.B. 8 took effect, our Fort Worth clinic opened at 7:30 am and was working until 11:56 pm to serve as many patients as possible before the law took effect at midnight. Our physician and staff were in tears, terrified that they would not be able to see every patient who was still sitting in the waiting room before the deadline. All the while, our clinic was under surveillance from anti-abortion activists stationed outside. Protesters flooded the areas around our clinic, shining flashlights into the cars of patients as they entered and exited the parking lots. After nightfall, the protesters brought in giant lights and shined them at the clinic, illuminating the parking lot and the building in order to track our every move. The protesters called the fire and police departments multiple times throughout that day in an attempt to stop our work or slow down the last abortions we would be able to provide after six weeks LMP.

46. Since September 1, the threats have only gotten worse. Several days before S.B. 8 took effect, my staff brought to my attention a website run by Texas Right to Life called prolifewhistleblower.com. Screenshots from this website are attached as Exhibit 2 to my declaration.

The website requests information from individuals interested in enforcing S.B. 8, including those interested in "litigating" or becoming a "plaintiff." See Ex. 2 at 7. My staff also identified a subreddit called "TexasBountyHunters" where individuals have posted plans to enforce S.B. 8. In addition, WWH and WWHA have seen an uptick in protester activity at our clinics, and threatening calls, emails, and social media posts. For example, one message we received read: "It's a shame we can no long murder innocent babies in their mother's womb. If your women are so about 'Their body, their choice' then let's make the law say this: As long as a woman is willing to die along with her unborn child we'll allow her to get rid of it. You see? It's not about her body at all, it's about the body of the unborn child which is a human at conception. Thank God for the sane people that still exist in this world. You should be in prison for life."

47. The longer S.B. 8 remains in effect without an injunction blocking its enforcement, the more probable it is that the law will permanently close WWH and WWHA in Texas and destroy abortion access for millions of Texans.

Dated: September 14, 2021

/s/ Amy Hagstrom Miller
AMY HAGSTROM MILLER

Exhibit 1

K+W PARTNERSHIP

(512) 366-2893 kwpartnership@protonmail.com

May 22, 2021

To all employees both medical and clerical:

The 'Heartbeat bill' has been signed into Texas law and will become effective September 1st 2021. Those who provide or facilitate abortions after a fetal heartbeat has been detected will be in violation of the law and are subject to private lawsuits. Fetal heartbeat can be detected as early as 3 weeks gestation and almost always by 6 ½ weeks. Please be aware that if you are involved in such an abortion one of your employees has the right to report you.

If you are aware of any babies in danger of being aborted at or around 6 weeks gestation, please call or send us a text at any time.

Thank you,

K+W Partnership
512-366-2893
kwpartnership@protonmail.com

Exhibit 2


Help enforce the Texas Heartbeat Act
JOIN THE TEAM
SEND AN ANONYMOUS TIP

GETTING INVOLVED

During the Regular Session of the 87th Legislature, Texas lawmakers passed Senate Bill 8, the Texas Heartbeat Act.

SB 8 requires an abortionist to use standard medical practice to detect the preborn child's heartbeat before an elective abortion. If the heartbeat is detected, then the abortion is prohibited. A heartbeat is generally detectable around six weeks of gestation.

If the abortionist is acting in bad faith or does not properly document the method and results of the heartbeat detection the law is violated. Individuals who aid or abet an illegal abortion can also be sued under SB 8.

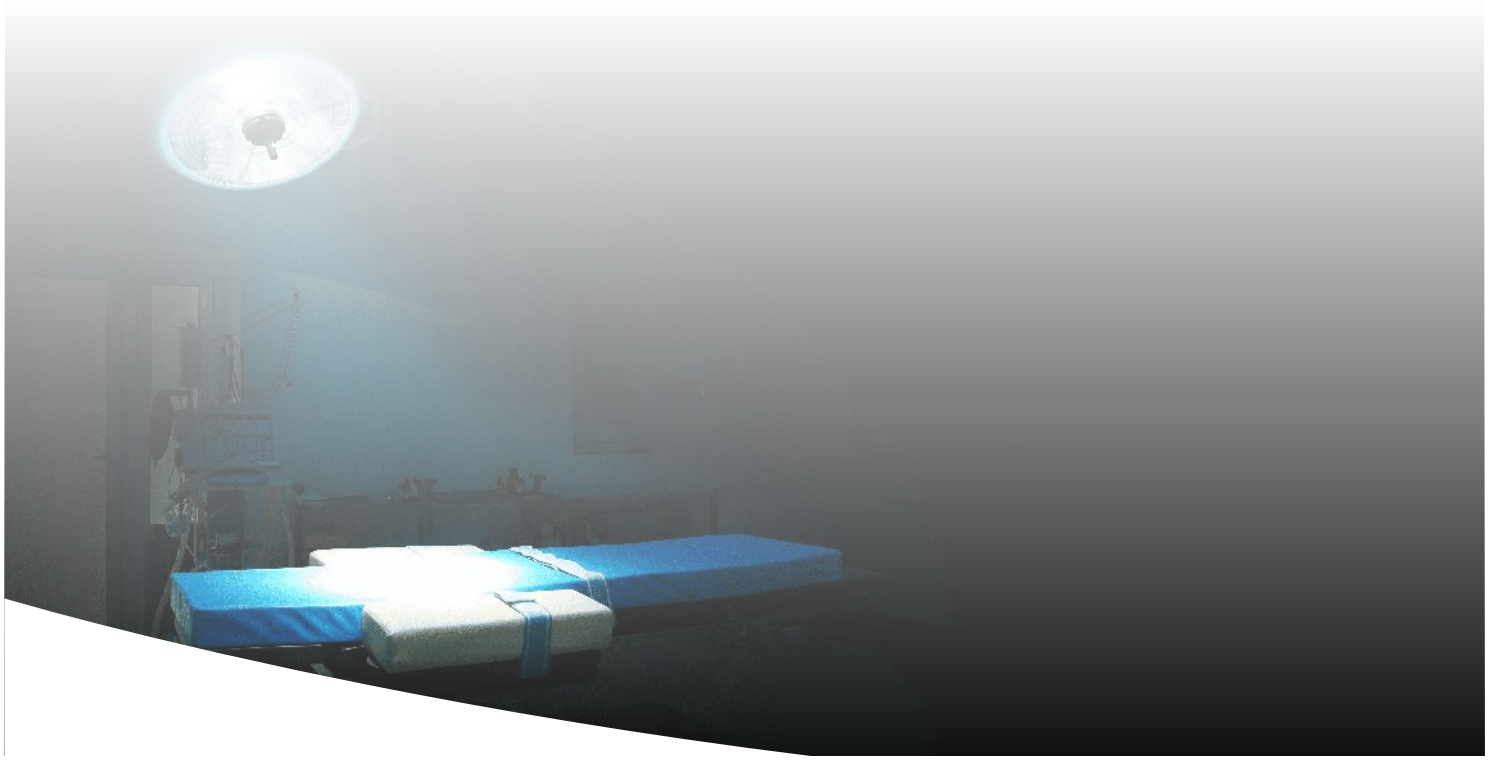
SB 8 is unique since enforcement is in the hands of private citizens. The Texas Heartbeat Act calls upon citizens to hold abortionists accountable to following the law. Any Texan can bring a lawsuit against an abortionist or someone aiding and abetting an abortion after six weeks. If these individuals are proved to be violating the law, they have to pay a fine of at least $10,000.

Join the team of Pro-Lifers working to enforce the Texas Heartbeat Act.

Click Here

Send an anonymous tip or information about potential violations of the Texas Heartbeat Act.

Click Here




Help enforce the Texas Heartbeat Act
JOIN THE TEAM
SEND AN ANONYMOUS TIP

Fill out this questionnaire to help us plug you into the best way you can enforce the law and hold the abortion industry accountable:

Name *

E.g. John Doe

Street Address *

E.g. 42 Wallaby Way

Apartment, suite, etc

City

E.g. Sydney

State/Province

E.g. New South Wales

ZIP / Postal Code

E.g. 2000

Country

Select country

Phone *

E.g. +1 300 400 5000

Email Address *

E.g. john@doe.com

Occupation

0 / 150

Employer

0 / 15

Are you currently or have you ever been elected to public office? *

- [ ] Yes
- [ ] No

How are you involved in the Pro-Life movement? *

- [ ] Sidewalk counselor
- [ ] Pray outside abortion facilities
- [ ] Volunteer at pregnancy center
- [ ] Other

Are you involved in a local Pro-Life organization?

- [ ] Yes
- [ ] No

How are you interested in enforcing the Texas Heartbeat Act? *

- [ ] Litigating
- [ ] Plaintiff
- [ ] Data collection
- [ ] Other

Is there an abortion provider currently in your city? *

- [ ] Yes
- [ ] No

Best time for TRTL team member to call you to talk about enforcing the Texas Heartbeat Act? *

Hours

0

Minutes

0

AM

If applicable: Do you have information about potential violations of the Texas Heartbeat Act?

Please include as much detail as possible.

0 / 500

Submit


Help enforce the Texas Heartbeat Act
JOIN THE TEAM
SEND AN ANONYMOUS TIP

If you want to help enforce the Texas Heartbeat Act anonymously, or have a tip on how you think the law has been violated, fill out the form below. We will not follow up with or contact you.

How do you think the law has been violated?

Please include as much detail as possible.

0 / 500

If you have any attachments of evidence for how you think the law is being violated, please attach them below

Drag and Drop (or) **Choose Files**

Pictures, files, etc.

How did you obtain this evidence?

0 / 200

Clinic or Doctor this evidence relates to

0 / 20

City

0 / 30

State

0 / 30

Zip

0 / 5

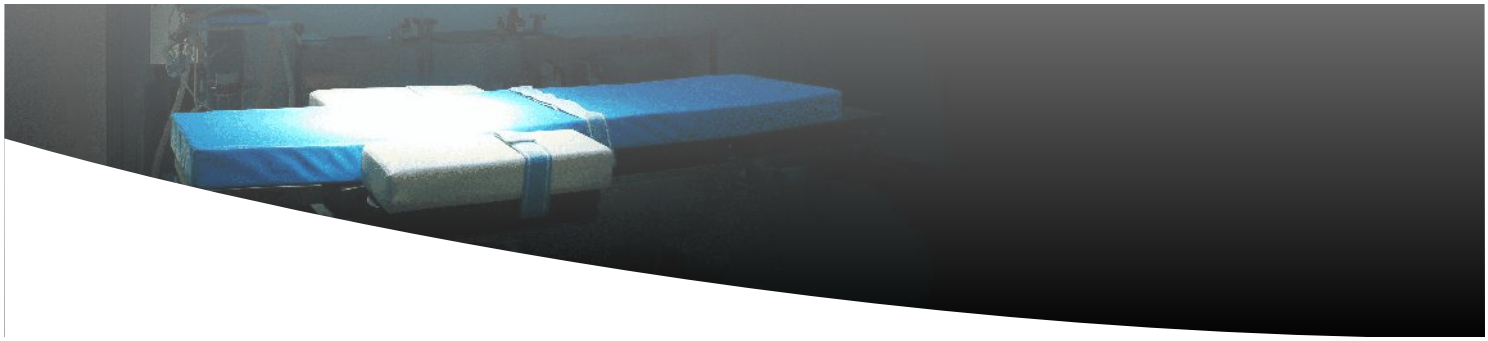
County

0 / 30

Are you currently elected to public office?

- [ ] Yes
- [ ] No

Submit



THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 4

Declaration of Melaney A. Linton in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Civil Action No. 1:21-cv-00796-RP

DECLARATION OF MELANEY A. LINTON IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I, Melaney A. Linton, declare as follows:

1. I am over the age of 18. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

2. I am President and CEO of Planned Parenthood Gulf Coast, Inc. ("PPGC"). PPGC is a Texas not-for-profit corporation headquartered in Houston. We operate six health centers in the Houston Metropolitan area that provide a range of family planning services and other preventative care, including physical exams, contraception and contraceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, screening and treatment for sexually transmitted infections, pregnancy testing and counseling, and certain procedures, including biopsies and colposcopies. In addition to those centers, PPGC has a facilities and services agreement with a separate organization, Planned Parenthood Center for Choice, Inc. ("PPCFC"), which has licenses

that allow it to provide abortion services at two health centers, and of which I am also the President and CEO. PPCFC is also a Texas not-for-profit corporation that is headquartered in Houston. It operates a licensed ambulatory surgical center ("ASC") in Houston and a licensed abortion facility in Stafford. PPCFC and its predecessor organizations have provided abortion in Houston and southeast Texas since 1973.

3. I am responsible for the management of these organizations and therefore am familiar with our operations and finances, including the services we provide and the communities we serve. In addition to PPGC, there are two other Planned Parenthood affiliates who provide health care services in Texas. Due to the nature of our affiliation with Planned Parenthood Federation of America, I am familiar with those affiliates' operations as well, although they are independent entities controlled by boards and management wholly separate from PPGC and PPCFC.

4. One of those affiliates, Planned Parenthood South Texas ("PPST"), is the parent corporation of Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), both not-for-profit corporations headquartered in San Antonio. PPST Surgical Center operates an ASC licensed by the Texas Health and Human Services Commission ("HHSC") and two HHSC-licensed abortion facilities—all of which are located in San Antonio. Prior to S.B. 8, PPST Surgical Center provided abortions, miscarriage management, and contraception at each of its three HHSC-licensed facilities to the degree permitted by state law.

5. The other affiliate is Planned Parenthood of Greater Texas ("PPGT"). PPGT is a Texas not-for-profit corporation headquartered in Dallas, and is the parent corporation to two separate entities that provide reproductive health care services throughout central, east, north, and west Texas. One of those entities, Planned Parenthood of Greater Texas Family Planning and

Preventative Health Services, provides a range of family planning and other health services at 18 health centers throughout its service areas. Those services include physical exams; contraception and contraceptive counseling; clinical breast exams; HIV testing; pre-exposure prophylaxis ("PrEP") and post-exposure prophylaxis ("PEP") HIV prevention; screening and prevention for cervical cancer; testing for certain sexually transmitted infections; pregnancy testing and counseling; gender-affirming hormone therapy; and certain procedures such as biopsies and colposcopies. The other entity, Planned Parenthood of Greater Texas Surgical Health Services ("PPGTSHS") provides abortion, miscarriage management, and contraception at ASCs licensed by HHSC in Austin, Dallas, and Fort Worth and HHSC-licensed abortion facilities in Waco, El Paso, and Lubbock, Texas.[1]

6. Taken together, these Planned Parenthood entities operate eleven of the approximately two dozen facilities licensed by HHSC as either abortion facilities or as ASCs that provide abortions in the state.

7. I submit this declaration in support of Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction. On September 1, 2021, Texas Senate Bill 8 ("S.B. 8" or the "Act") took effect and banned the provision of abortion in Texas after embryonic cardiac activity can be detected, which usually occurs by approximately 6 weeks of pregnancy—but can occur days sooner—as measured from the first day of a patient's last menstrual period ("LMP"). As a result, Texas abortion providers have been legally prohibited from providing abortions after

[1] Abortion services are temporarily unavailable in El Paso due to the COVID-19 pandemic, and are currently unavailable in Lubbock due to a City ordinance banning abortion that is subject to an ongoing legal challenge. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, No. 5:21-CV-114-H, 2021 WL 2385110 (N.D. Tex. June 1, 2021) (dismissing case for lack of jurisdiction), *mot. for reconsideration filed* (June 29, 2021), ECF No. 52.

approximately 6 weeks of pregnancy since September 1, 2021, leaving the vast majority of people seeking abortion services without access to care at our health centers, or indeed anywhere in Texas.

8. The Act has made it virtually impossible to access abortion in Texas because it bans abortion at a point in pregnancy before many patients even realize they are pregnant. While some patients have been able to pull together the resources to travel out of state for medical care, many others cannot do so and are being forced to carry their pregnancy to term against their will or to seek ways to end their pregnancies on their own.

Planned Parenthood Abortion Services in Texas

9. As noted above, prior to September 1, PPCFC, PPGTSHS, and PPST Surgical Center provided abortion, as well as miscarriage management and contraception, to patients in Texas.

10. Prior to S.B. 8 taking effect, PPCFC's Houston ASC offered medication abortion through 10 weeks LMP and procedural abortion through 21 weeks 6 days LMP; the Stafford abortion facility offered medication abortion through 10 weeks LMP. Prior to August 2021, PPCFC provided approximately between 400 and 500 abortions per month.

11. PPST Surgical Center offered medication abortion through 10 weeks LMP and procedural abortion through 15 weeks 6 days LMP. Prior to August 2021, PPST Surgical Center provided approximately between 200 and 300 abortions per month.

12. PPGTSHS's Austin health center is licensed as an ASC and offered medication abortion through 10 weeks LMP and procedural abortion through 21 weeks 6 days LMP; its Dallas health center is licensed as an ASC and offered medication abortion through 10 weeks LMP and procedural abortion through 18 weeks 6 days LMP; its Fort Worth health center is licensed as an

ASC and offered medication abortion through 10 weeks LMP and procedural abortion through 13 weeks 6 days LMP; and its Waco health center is licensed as an abortion facility and offered medication abortion through 10 weeks LMP and procedural abortion through 15 weeks 6 days LMP.

13. While most patients obtain an abortion as soon as they are able, most patients are nonetheless at least 6 weeks LMP into their pregnancy by the time they come in for an abortion. In 2019, approximately 92% of abortions that PPCFC provided were at 6 weeks LMP or later. This means only 8% of 2019 PPCFC patients would have likely qualified for an abortion under the Act, although for some, there may have been embryonic cardiac activity at the time of the abortion prior to six weeks. In 2019, PPGTSHS performed 6,984 abortions, and approximately 93.4% were performed at 6 weeks LMP or later. In 2019, approximately 90% of abortions PPST Surgical Center provided were done at 6 weeks LMP or later.

14. Patients likely reach us at or after 6 weeks LMP because they do not learn they are pregnant before that time. Even for someone with normal periods, 6 weeks LMP is only two weeks after a missed period, and many patients (including young people and those on birth control) do not have normal periods. And even after a patient learns that they are pregnant and decides they want to terminate the pregnancy, arranging an appointment for an abortion may take some time. Even assuming an appointment is available at a health center that is accessible to a patient, they need to come in for at least two visits (due to a different Texas law), and have to take time off work, arrange child care, and deal with other logistical issues that can result in some delay. For our patients living in poverty and/or without insurance, which is most, travel-related and financial barriers also help explain why the vast majority of our patients do not—and realistically could not—obtain abortions before 6 weeks LMP.

15. The near impossibility of obtaining an abortion within the time permitted by the Act is all the more clear for our minor patients. Minor patients without a history of pregnancy may be less likely to recognize early symptoms of pregnancy than older patients who have been pregnant before. In addition, some of these patients cannot obtain written parental authorization for an abortion as required by state law and must obtain a court order permitting them to receive care. Tex. Fam. Code §§ 33.001–33.014. A court may take up to five business days to rule on a patient's petition to bypass the state's parental-consent law for abortions, *id.* § 33.003, not including any time that may be necessary for a minor patient to appeal an unfavorable decision. That process cannot realistically happen before a patient's pregnancy reaches 6 weeks LMP.

Effects of S.B. 8's Abortion Ban

16. Since S.B. 8 took effect on September 1, exactly what we feared would happen has come to pass.

17. S.B. 8 exposes PPCFC, PPGTSHS, and PPST Surgical Center, as well as their doctors, nurses, and other staff members, to substantial liability for providing or assisting an abortion prohibited by the law and requires courts to enjoin violations. The risk of civil liability, damages, and certain cost of litigation if a provider offers abortion in violation of S.B. 8 (as well as the possibility of a court order stopping the provider from providing abortions) means that none of the Planned Parenthood providers—and, to my knowledge, no other abortion provider in Texas—has offered services after embryonic cardiac activity is detected since September 1.

18. Given the strong anti-abortion sentiments held by some Texans and others outside of Texas, I am certain that lawsuits under S.B. 8 would be filed against us if we were to provide abortions in violation of S.B. 8. Indeed, opponents of abortion rights have subjected us to

harassment and false complaints in the past, even when we have complied fully with our legal obligations. We nearly always have protestors outside our health centers, monitoring who enters and exits the building. They have made complaints to government officials based on completely unfounded allegations. By way of example, a few years ago, a protestor called local law enforcement falsely alleging that we had performed an abortion after the state's legal gestational age limit, which at the time was 21 weeks and 6 days LMP (but is now around 6 weeks LMP under S.B. 8). Authorities then opened a criminal homicide investigation, which included grand jury proceedings. Although the investigation was ultimately completed with no findings of any wrongdoing (because, of course, we did not do what the protestor alleged we did), we nevertheless had to divert time and resources to comply with the baseless investigation.

19. As another example, after a secretly recorded video alleging that we participated in unlawful tissue donation practices appeared online, we were investigated by multiple federal, state, and local government officials. No government entity has found us guilty of any crime and the allegations have been widely discredited; in fact, a Houston grand jury cleared us, and instead, indicted the filmmakers (though those charges were dismissed on procedural grounds). Nevertheless, the resulting investigations were very distressing for staff and costly to the organization.

20. The costs of defending against what could be a flood of lawsuits in every county in Texas would be impossible for abortion providers to absorb, even if they were to win each case.

21. Because of the real possibility that PPST Surgical Center and its physicians and staff will be sued for providing *any* abortions, and be forced to defend against these meritless lawsuits, it has suspended all abortion services as of September 1.

22. Both PPCFC and PPGTSHS are offering abortion services in compliance with S.B. 8. That means that when a patient calls PPCFC, they are informed that if they are unsure of the date of their last menstrual period or if they believe they might have a gestational age of 6 weeks LMP or less, they can come in for an ultrasound appointment to date the pregnancy and check for embryonic cardiac activity. Under Texas law, most patients must come to the health center to receive a state-mandated ultrasound and information from the same physician who is to perform the abortion at least 24 hours before the procedure. Tex. Health & Safety Code § 171.012.

23. PPCFC call centers also inform patients that if there is embryonic cardiac activity, they will have to seek abortion out of state, and so if they think the pregnancy is greater than six weeks LMP, they may come in for an ultrasound to help them determine the gestational age of their pregnancy, but we will not be able to perform their abortion. Explaining the new law to people and the fact that it means we cannot provide them an abortion, and then helping them navigate a way to get out of state and get to another provider, means that calls with patients are taking twice as long as they used to. As a result, our hold times have increased significantly, which in turn makes it harder for us to reach and schedule those people who may still be eligible for an abortion but have a short window to get in for an appointment before they are banned.

24. Currently, for patients who do come in for an ultrasound appointment, the pregnancy is dated and we check for embryonic cardiac activity. If there is cardiac activity, the only option for that patient is to be referred out of state for the abortion, which we have had to do for the vast majority of patients. In the event that there is no embryonic cardiac activity, the patient is scheduled for a second appointment, which must be at least 24 hours later per Texas law.

25. From 9/1/21 to 9/10/21 PPCFC performed 123 ultrasounds at the patient's (day 1) ultrasound appointment (which, again, for most patients, must occur at least 24 hours before the abortion procedure per Texas law). We had 63 patients scheduled to have abortions from 9/2/21 to 9/11/21. But because some patients had embryonic cardiac activity by the time they returned, from 9/2/21 to 9/11/21, we were only able to perform abortions for 52 patients.

26. Overall, the number of patients that PPCFC has been able to provide abortions to has dropped dramatically. To put these numbers in perspective, before S.B. 8 took effect, we performed, on average, 25 abortions per day. And in the week before S.B. 8 took effect, from 8/25/21–8/31/21, we provided 205 abortions (of which 184 were for people who live in Texas).

27. Unfortunately, we have had to inform some patients at their second visit that they were barred under S.B. 8 from having an abortion. At their first visit, there was no embryonic cardiac activity on the ultrasound, but when they came back the next day after the state-mandated waiting period, there was embryonic cardiac activity and we were not able to provide the abortion. This means patients can lose their ability to access abortion in Texas literally overnight. As a result, our physicians have to caution patients that even though cardiac activity is not shown at the ultrasound appointment, it could occur on the day of the abortion, which causes patients significant stress.

28. Another patient was found to be about five weeks pregnant without embryonic cardiac activity, so she could have qualified for an abortion, but at the same visit, she also learned she had COVID-19. By the time she would finish the mandatory quarantine, she would be too far along in her pregnancy to get an abortion in Texas.

29. We have also had patients where embryonic cardiac activity was shown days earlier than 6 weeks LMP. It's difficult to explain to these patients that although this typically doesn't occur until 6 weeks LMP, their pregnancy is showing embryonic cardiac activity sooner and therefore they cannot have an abortion. These patients are incredibly frustrated because they feel like they did everything "right" under the law by trying to get to the abortion clinic as soon as possible, but they still are being blocked from having an abortion. As a result, our physicians explain to patients that S.B. 8 is effectively a near total ban on abortion.

30. As we anticipated, the law is having a particularly burdensome effect on minors who need a judicial bypass. We have already seen minors who do not show embryonic cardiac activity at their initial ultrasound appointment, but will inevitably show cardiac activity by the time that they come back for the abortion because it will take them days to get a judicial bypass. These patients are so desperate, and we are worried that they will do something unsafe because the only alternative for them to get an abortion is to go out of state, which is incredibly difficult for a minor to do on their own. It is also our experience that some minors seeking a judicial bypass do so because they cannot tell their parents about their pregnancy and abortion decision for fear of violence. We worry S.B. 8 will force them into a dangerous situation.

31. We have also had to turn away other patients in particularly distressing situations, including patients who are experiencing sexual assault and patients who are homeless.

32. Of course, none of this data captures the likely many patients who have seen the news and have learned about S.B. 8 becoming law and just do not call.

33. Obviously, this has been extremely hard on our patients who are trying to make personal, private decisions about their families and their lives, and who now must travel hundreds

(and perhaps thousands) of miles to access care that we would otherwise be able to provide safely and in their own communities. Even for those patients with the means to get out of state, travel will delay patients in obtaining care, which may push them into a later, more expensive abortion that carries greater risks.

34. For many, due to their incomes, their work and family situations, their immigration status, and other reasons, travel out of state is just not a feasible option and they are now left with nowhere to turn. We have already had a woman who came to one of our health centers reporting that because she had no money or resources, she said she had turned to the internet where she found some "abortion tea." She took it, and it didn't work. The ultrasound showed embryonic cardiac activity, and so we had to tell her that her only option was to try and travel out of state.

35. In addition to these devastating effects of S.B. 8 on our patients, the past 10 days have been nothing short of agonizing for our staff. No one should be forced to risk overwhelming costs of litigation and crushing penalties to provide safe and common health care. No one should be subject to state-directed harassment for caring for patients in need.

36. Abortion providers deal with relentless harassment from abortion opponents, including as they come into work each day, which has increased since S.B. 8 took effect. For example, Texas Right to Life ("TRTL") launched a "whistleblower" website to recruit S.B. 8 claimants, as well as "informants" to support S.B. 8 enforcement suits by providing information about abortion providers' and support networks' perceived violations. Though the website, which could previously be found at www.prolifewhistleblower.com, is currently down, TRTL has expressed its intention to quickly restore it.[2] The website stated that "[a]ny abortion performed in violation of

[2] BeLynn Hollers, *Texas Right to Life Says It Plans to Restart Abortion Whistleblower Webiste*, Dallas Morning News (Sept. 9, 2021), https://www.dallasnews.com/news/2021/09/09/texas-right-to-life-

the Texas Heartbeat Act is a criminal offense, and any individual or entity that aids or abets an abortion on a child with a detectable heartbeat in Texas is violating the law as well." It further provided that "[TRTL] will ensure that these lawbreakers are held accountable for their actions" and invited visitors to "[j]oin the Team of Pro-Lifers working to enforce" S.B. 8 and "[s]end an anonymous tip or information about potential violations" of the Act. Recruits who clicked on the button inviting them to become a "team member" by submitting contact information were asked: "How are you interested in enforcing the Texas Heartbeat Act?" with response options of "Litigating," "Plaintiff," "Data Collection," and "Other" and they were also asked to provide the "best time for a TRTL team member to call you to talk about enforcing" S.B. 8. Individuals who selected the option to send an anonymous tip were asked to provide "as much detail as possible" on "how [they thought] the law ha[d] been violated," as well as "how [they] obtain[ed] this evidence" and the "Clinic or Doctor this evidence relate[d] to."

37. Our staff have also had to endure protestors trespassing; conducting drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; trying to follow staff home; and more. On the first day S.B. 8 went into effect, we had to call the police because a protestor was blocking the driveway with his vehicle. He came back the next day, and even had a porta-potty delivered. The next day, someone trespassed on the property and vandalized a few of our signs. We are also aware that someone created a forum on Reddit where numerous individuals posted discussions on how they could be bounty hunters under S.B. 8 and turn doctors into the police, which has since been taken down.

says-it-plans-to-restart-abortion-whistleblower-website-tomorrow/.

One of our physicians who has been in the news talking about the Texas law has personally received messages calling him a murderer and saying that he should be killed. As a result, we have had to expend more resources ensuring our health centers and staff and patients remain safe.

38. Despite the harassment, our dedicated staff return to work because they are committed to Planned Parenthood's mission of providing comprehensive reproductive health care services. They have devoted their lives and careers to serving and advocating for their patients. And now S.B. 8 has prevented them from fulfilling our mission. Our physicians will do anything, as long as it is safe and legal, to help patients get access to care. In fact, one of our providers at PPCFC is setting up an arrangement to provide services at a different provider in a neighboring state in order to try to help ease, to some degree, the situation there due to an influx of Texas patients. And given the shortage of abortion providers, it is not unusual for abortion providers to provide care at multiple locations, including in several states. I know that prior to S.B. 8, there was a physician who routinely flew from New England to San Antonio to provide care at PPST Surgical Center.

39. If we are not able to resume providing abortion services soon, I am worried about our ability to retain staff. Even before S.B. 8 took effect, the Act was already taking a negative toll on our ability to recruit new staff. PPCFC has already had two prospective staff members decline job offers specifically because of fear of S.B. 8.

40. In addition, both practically and emotionally, abortion providers and their staff are now barely hanging on due to S.B. 8. Our staff are doing all they can to help patients navigate this awful law, including working long hours to get patients in as quickly as possible for their appointments. They are doing their best to provide as many ultrasounds on a daily basis as they can in order to catch those few patients where cardiac activity will not be detected, but there are only so

many working hours in a day and our staff are still dedicated to providing high-quality care. This experience has also been traumatic for our physicians and staff as they must tell patient after patient that they cannot care for them, despite that, medically, they should be able to and, indeed, went through significant medical training to provide the very medical care that their patients are asking them to provide and are entitled to receive. They are essentially being forced to inflict trauma on their patients.

41. Every day that S.B. 8 is in effect, our patients are in jeopardy. Draconian laws like S.B. 8 do not stop people from needing abortions, and they don't stop abortions from happening—by eliminating safe and legal options, they only force abortion care underground with potentially devastating consequences. This cruel and dangerous law is causing irreparable harm to our patients and the communities we serve.

42. In short, both for the abortion providers in Texas and tens of thousands of patients who are being denied access to critical health care and whose health, safety, and lives are in jeopardy, it is critical that the court grants the relief sought by the U.S. Government in order to restore our patients' access to safe, legal abortion as soon as possible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 13, 2021

/s/ Melaney A. Linton

Melaney A. Linton

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 5

Declaration of Rebecca Tong in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. 1:21-cv-796
The State of Texas,	)	
	)	
Defendant.	)	

DECLARATION OF REBECCA TONG
IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

REBECCA TONG hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the Acting Co-Executive Director of Trust Women Foundation ("Trust Women").

2. Trust Women operates clinics offering high-quality reproductive healthcare, including abortion, transgender care, STI testing, well woman care, gynecological care, and contraceptive services. We provide this medical care for people in underserved communities. Trust Women opened its first clinic, Trust Women South Wind Women's Center (d/b/a "Trust Women Wichita"), in Wichita, Kansas in 2013. Trust Women opened a second clinic, Trust Women Oklahoma City, in Oklahoma City, Oklahoma in 2016.

3. As the Acting Co-Executive Director of Trust Women, I oversee operations at both Trust Women Wichita and Trust Women Oklahoma City. I am responsible for managing and supporting the directors at both clinics, including with scheduling and physician and staff hiring. I am familiar with the policies and procedures at the clinics and am in frequent contact with Trust Women's directors, clinical staff, and physicians.

4. I provide the following testimony based on my personal knowledge from Trust Women's operations.

Provision of Abortion Care at Trust Women Oklahoma City

5. Trust Women Oklahoma City provides medication abortion up to 11 weeks as measured from the first day of the patient's last menstrual period ("LMP") and procedural abortions through 21.6 weeks LMP, which is the legal gestational limit in Oklahoma. Trust Women Oklahoma City is the only clinic in Oklahoma that provides abortions after approximately 18 weeks LMP.

6. The vast majority of abortion patients at Trust Women Oklahoma City are in the first trimester.

7. Due to Oklahoma's burdensome anti-abortion restrictions, there are only four abortion clinics in the state, all of which are located in Oklahoma City and Tulsa. Pregnant people in rural areas of Oklahoma, including the panhandle and southwestern corner of the state, must travel hundreds of miles to reach the nearest abortion provider.

8. Very few doctors who live in Oklahoma are willing to provide abortion care. The regulatory requirements are extremely burdensome, and physicians who do provide abortions are subject to discrimination in the medical and local communities, harassment, and threatened and actual violence. Trust Women Oklahoma City regularly has protestors outside their doors attempting to intimidate both providers and patients. Harassment, stigma, and security concerns contribute to the reluctance of physicians located in Oklahoma to provide abortions.

9. Trust Women Oklahoma City is therefore staffed entirely by Oklahoma-licensed physicians based in other states who travel to Oklahoma City to provide abortion care. These physicians have professional and personal commitments in their home states. As a result, Trust Women Oklahoma City is able to offer abortion appointments only two days each week.

10. Before S.B. 8 took effect on September 1, 2021, Trust Women Oklahoma City provided abortions for approximately 40 patients each week. Typically, only about a quarter of those patients are from Texas—generally the Texas Panhandle region.

11. Trust Women Oklahoma City has experienced a dramatic increase in patient volume since Texas Senate Bill 8 went into effect. Since August 31, 2021, the clinic's call volume has more than doubled from approximately 15 patient appointment calls per day to 30 to 40. About two-thirds of our patient appointment calls now come from Texas patients seeking abortions that are unavailable throughout their home state.

12. Trust Women Oklahoma City is scheduling as many abortion appointments as it can accommodate, but due to our staffing constraints, we have had to cap the volume at 40 patient appointments scheduled per clinic day, or 80 patients per week.

13. Even now, less than two weeks since S.B. 8 took effect, Trust Women Oklahoma City has been forced to delay patients' abortions because of the volume of appointments needed. Before September 1, if a patient called on Monday for an appointment, the clinic would generally be able to schedule the patient for an abortion on a Thursday or Friday of the same week (with the mandatory 72-hour delay required by Oklahoma law). Now, the clinic is scheduling patients for appointments three weeks in advance—a significant delay for a time-sensitive medical procedure, and a delay that was extremely rare before September 1.

Provision of Abortion Care at Trust Women Wichita

14. Trust Women Wichita provides abortion care to approximately 1500 patients per year.

15. Trust Women Wichita provides medication abortion up to 11 weeks LMP, and procedural abortions through 21.6 weeks LMP, which is the legal gestational limit in Kansas.

16. The vast majority of abortion patients at Trust Women Wichita are in the first trimester.

17. Trust Women Wichita provides critical abortion care in Kansas that might otherwise be unavailable for many of our patients. There are only four abortion clinics in Kansas, serving the state's nearly three million residents, and all four clinics are in the Wichita or Kansas City metropolitan areas.

18. Trust Women Wichita currently schedules patients for abortions two days each week. Our schedule is limited by the availability of our physicians, nearly all of whom fly into Wichita from out of state to perform abortions and have other practices in their home states, and the capacity of our nurses and our staff.

19. Before S.B. 8 took effect on September 1, 2021, Trust Women Wichita provided abortions for approximately 20 to 40 patients each week. Very few of these patients were from Texas. Indeed, in 2019, Kansas abortion providers cumulatively provided abortions for only 25 patients from Texas. *See* Kansas Department of Health and Environment, *Abortions in Kansas, 2019* at 7 (May 2020).[1] In 2020, that number soared to 289 because many abortions were unavailable in Texas and Oklahoma for approximately one month. *See* Kansas Department of Health and Environment, *Abortions in Kansas, 2020*, at 7 (May 2021).[2]

20. Trust Women Wichita immediately felt the impact of Texas's near total ban on abortions. Since August 31, 2021, the clinic's total call volume has doubled, and approximately half of our calls now come from Texas patients seeking abortions that they are no longer able to obtain in their home state. Trust Women Wichita is scheduling as many abortion procedures as it can—approximately 30 patients per clinic day, or 60 patients per week.

21. Whereas Trust Women Wichita previously served mostly patients living in Kansas, the clinic is now providing abortions for many out-of-state pregnant people. About half of our patients

[1] https://www.kdheks.gov/phi/abortion_sum/2019_Preliminary_Abortion_Report.pdf.
[2] https://www.kdheks.gov/phi/abortion_sum/2020_Preliminary_Abortion_Report.pdf.

since September 1 are from Texas, including from as far away as San Antonio and Houston. Some patients are now traveling 600 miles each way for a medication abortion, which involves taking pills. We are also now serving patients from Louisiana who previously would have traveled to a clinic in Texas for their abortion.

22. As a result, Trust Women Wichita is now having to schedule patients farther out than we typically would, forcing patients to delay their abortion care. Although we generally try to schedule patients for the first available appointment we have, we are having to prioritize appointments for patients who are approaching the legal gestational limit.

Delayed Abortion Care

23. Both of Trust Women's clinics are now unable to serve patients as quickly as they normally would. This means that, unless patients are able to find appointments at other out-of-state clinics and make the necessary logistical and financial arrangements, most or all of our patients are now being delayed in obtaining an abortion.

24. Although abortion is an extremely safe medical procedure, the risks increase as the pregnancy progresses. Pregnancy is painful for some women, so delay extends this experience. Delays also increase the stress and burdens of maintaining an unwanted pregnancy. This is particularly true for pregnant people who have a medical condition that makes pregnancy a significant health risk or who are pregnant as a result of sexual assault or incest. Delays can result in adverse mental health consequences for pregnant people who are forced to carry their pregnancies longer than they desired or intended.

25. Delays in accessing abortions can push pregnant people beyond the limit for obtaining a medication abortion. Since medication abortion is available only in the first 10 to 11 weeks of pregnancy, patients who are delayed beyond this limit can no longer choose this option. Medication abortion may be preferred over procedural abortion for medical reasons, and many patients strongly

prefer medication to a procedural abortion. Because most of Trust Women Wichita's patients are in the first trimester, a delay of a few weeks will make medication abortion unavailable for many.

26. Additionally, although abortions at any gestational age are very safe, delays will push patients towards more complicated procedural abortions in their second trimester. Later-stage procedural abortions carry increased medical risks, may involve multiple visits to the clinic over two days, and involve significantly more financial cost to patients—creating even more hardship for the economically and medically vulnerable populations we serve.

27. Most alarmingly, delays in abortion care might prevent some pregnant people from obtaining an abortion altogether. Although we are working to mitigate that possibility, the need to accommodate so many additional patients will mean that Trust Women may become unable to see some patients before they reach the legal gestational limit for abortion in Kansas.

28. Almost all of our patients pay for their procedures out of pocket. We work with abortion funds that provide financial assistance, but now patients are also having to try to scrape together the means to travel hundreds of miles each way for an abortion—further delaying patient care.

29. Patients are calling several clinics, panicking, and trying to find the clinic where they can be seen the soonest. In the past two weeks, we have seen large increases in minor patients, survivors of sexual assault, patients with a maternal or fetal diagnosis, and patients with later gestational ages.

Difficulty Managing Influx of Patients

30. I am extremely concerned about Trust Women's ability to provide abortion care to all pregnant people who contact us. Based on my experience, the increased numbers we have seen so far in September are only a small fraction of the numbers we will see if S.B. 8 remains in effect.

31. We have direct experience with abortion bans in neighboring states and know that the influx of patients in Kansas and Oklahoma will require capacity we do not have. For example, during the COVID-19 emergency in 2020, when both Texas and Oklahoma had executive orders preventing pregnant people in those states from accessing abortions, Trust Women Wichita provided abortions to 200 Texans. Both of those abortion bans were short-lived but taught us that we do not have the capacity to accommodate large numbers of out-of-state patients in addition to the patients living in the communities we typically serve.

32. Both clinics are providing abortions to as many patients as they can, given physician and support staff availability. We are also working hard to expand our capacity and increase the number of patients we can serve at both clinics. In order to meet the current and anticipated demand, we are working toward adding more clinic days at both locations. Hiring and scheduling physicians and other support staff is no simple feat, though. In both Kansas and Oklahoma, it is difficult to find in-state physicians who are willing to provide abortion care because of the documented stigma, harassment, and violence abortion providers face. As a result, we must recruit doctors from other states who will travel to our clinics. These physicians work with us on a part-time basis and maintain medical practices and personal lives in their home states. It is challenging to find out-of-state abortion providers willing to travel to our clinics, and even when we do find them, they must become licensed in Kansas or Oklahoma before they can provide there.

33. Our clinics also have a critical need for additional support staff. In particular, we need more nurses on our staff in order to provide abortions for more patients on more clinic days. Hiring this medical staff during a pandemic is challenging to do.

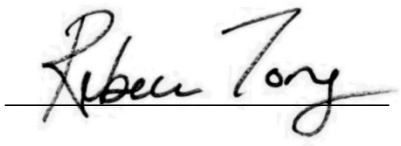
34. Trust Women Oklahoma City has already asked its physicians to increase their clinic days to provide abortions three days each week. Some doctors are able to make this arrangement, but others cannot. If S.B. 8 is not blocked, we will work toward providing abortions four days per week

(up from two days), but such a move is entirely dependent on our ability to hire and schedule new physicians and staff.

35. But even if the two Trust Women clinics do expand their capacity, I fear that we still will not be able to serve Texans and other out-of-state patients affected by S.B. 8. That is because Oklahoma has passed five anti-abortion laws, all of which will take effect on November 1, 2021, unless blocked by court order. At least two of those laws would decimate abortion access in the state: (1) H.B. 1102, which is essentially a total ban on abortion that declares provision of abortion to be unprofessional conduct by physicians that carries a penalty of, at a minimum, suspension of medical licensure for one year, and (2) H.B. 2441, which bans abortion at approximately six weeks LMP.

36. In the less than two weeks the law has been in effect, S.B. 8 has strained resources in Kansas and Oklahoma and forced Kansas and Oklahoma patients to delay their abortions. I am worried that Trust Women Wichita and Trust Women Oklahoma City will not be able to keep up with the volume of patients and will be forced to turn away patients, including the patients we normally serve in Kansas and Oklahoma.

Dated: September 14, 2021



REBECCA TONG

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 6

Declaration of Vicki Cowart in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Civil Action No. 1:21-cv-00796-RP

DECLARATION OF VICKI COWART IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I, Vicki Cowart, declare as follows:

1. I am over the age of 18. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization.

2. I am President and CEO of Planned Parenthood of the Rocky Mountains, Inc. ("PPRM"). PPRM is a non-profit headquartered in Denver, Colorado. We operate 22 health centers in the states of Colorado, New Mexico, and Nevada that provide a range of family planning services and other preventative care, including abortions; well-woman preventative care visits; breast exams; Pap tests; sexually transmitted infection (STI) testing and treatment; PrEP and PEP (HIV prevention prescription regimens); a wide range of FDA-approved contraception methods, including highly effective, long-acting reversible contraceptives, or LARCs; pregnancy testing; gender affirming hormone therapy; urinary tract infection treatment; and cervical cancer and testicular cancer screening.

3. Specifically, we provide procedural and medication abortion at four health centers in Colorado (in Denver, Colorado Springs, Durango, and Fort Collins). We also offer medication

abortion at ten additional Colorado health centers in Alamosa, Arvada, Aurora, Boulder, Cortez, Glenwood Springs, Greeley, Littleton, Steamboat Springs, and Salida. In New Mexico, we offer procedural and medication abortion in Albuquerque and medication abortion in Santa Fe, and we offer medication abortion at two health centers in Las Vegas, Nevada.

4. I am responsible for PPRM's management and therefore am familiar with our operations and finances, including the services we provide and the communities we serve.

5. I submit this declaration in support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction.

6. I understand that Texas Senate Bill 8 ("S.B. 8" or the "Act"), which took effect on September 1, 2021, bans the provision of abortion in Texas after embryonic cardiac activity can be detected, which occurs by approximately 6 weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"). I understand that the Act imposes severe penalties on providers such that no abortion provider in Texas is currently offering abortion care in the state if embryonic cardiac activity can be detected, which means people in Texas seeking abortions beginning at approximately 6 weeks LMP must attempt to find a provider in another state in order to get their abortion.

7. Since S.B. 8 has taken effect, and also in the days leading up to its effective date, we have seen a significant spike in the percentage of our patients traveling from Texas seeking abortions at our health centers in New Mexico and Colorado.

8. Prior to S.B. 8 taking effect, on average, PPRM provided abortions to 8.8 patients per week from Texas. Yet, in a one-week period (9/3/21–9/9/21), PPRM provided abortion services to 20 Texas patients—which is 53% of our typical monthly patient volume with less than a third of the month elapsed. In addition, there are at least 64 Texas residents who have scheduled appointments at our health centers in the coming weeks, including at our health centers in Las

Vegas, NV, with a daily increase while S.B. 8 is in effect. And this number may be an underestimation as we don't require patients to provide their address or location when making an appointment. We anticipate the number of Texas residents we see to grow, as we have been flooded with calls from Texas residents since S.B. 8 took effect.

9. Patients from Texas travel incredibly long distances to reach our health centers in New Mexico and Colorado; one patient even traveled all the way to one of our Southern Nevada health centers. For example, we have had Texas patients travel from Fort Worth to Boulder, CO (approximately 790 miles one way); San Antonio to Park Hill, CO (approximately 930 miles one way); and Houston to Fort Collins, CO and Aurora, CO (approximately 1000 miles one way). Even those Texas patients who have come from cities that are closer to the New Mexico border (such as El Paso and Amarillo) are having to make 4-hour drives (one way) to reach our Albuquerque, NM health center. When faced with longer wait times at their "nearest" location within our states, some patients have had to travel longer distances to access the care they need. On average, the Texas patients we have seen since S.B. 8 went into effect have traveled approximately 650 miles (one way) to access abortion out of state.

10. Requiring individuals to seek out-of-state abortion care and travel significant distances can be very burdensome for patients. Specifically, for patients who are experiencing intimate partner violence, seeking an out-of-state abortion poses numerous challenges. For example, one patient told us that she is discreetly attempting to leave Texas without her husband finding out because he is abusive and she does not want to carry this pregnancy to term. She has told our staff that she is desperate, and is going to extraordinary lengths to scrape together the funds (including selling personal items) to be able to make the additional expenses of an out-of-state trip, but is very worried that her husband will find out given all the logistical planning that she is doing.

11. We have also seen patients who are homeless and face tremendous difficulties navigating how to travel a long distance to get an abortion. One Texas patient, for example, told us that by the time they realized they were pregnant, they could not have an abortion under S.B. 8 but they did not have any funds to travel out of state. The patient told us they felt defeated, but knew that having an abortion was the best choice for them for a number of reasons. Fortunately, we were able to get them an appointment at our health center in Colorado and provide assistance for them to get there. Sadly, this level of personal and individualized support will simply not be possible for everyone who contacts us (and there are so many more who will never contact us).

12. Carless individuals trying to find transportation to our health centers from Texas are also experiencing numerous obstacles to travel. For example, we recently provided care to a Texas patient who was 7 weeks pregnant, but who did not have her own credit card to rent a car (which many rental companies require) in order to travel to New Mexico for an appointment. Although the patient is employed full-time, saving the funds to rent the car and pay for gas (in addition to the cost of the abortion) was difficult for her. The patient told us she was ultimately able to secure a rental car by using a friend's credit card, and drove alone out and back to her appointment in the same day—over 1000 miles round trip—because she didn't have paid time off work and couldn't afford to miss the hours.

13. With the influx of Texas patients seeking out-of-state abortion care, a significant percentage of the appointments available in our relatively small New Mexico health centers are going to Texas residents. For example, on August 31, the day prior to the law taking effect, all of our online abortion appointments for PPRM's Albuquerque health center were made by Texas residents. From September 1 to September 11, Texas patients made up close to one-third (29%) of the total abortion patients we saw at our New Mexico health centers.

14. In the coming weeks, we expect this trend to continue, but it will inevitably lead to significant scheduling delays. Indeed, as of date, given the high demand in services, we are having to schedule abortion patients approximately two weeks out. The wait times can be even longer for people seeking abortions after 18 weeks, as we do not provide abortions past 18 weeks LMP in New Mexico or Nevada. Understandably, people are devastated that they cannot access health care closer to home and that they are having to wait longer and face tremendous barriers than if Texas had not forced abortion providers to shut down. One Texas patient had planned her pregnancy but recently learned that the fetus had an anomaly incompatible with life. She was told by her doctor in Texas that there is no exception under S.B. 8 for her circumstances, and that her only options were either to carry to term with the fetus dying after birth, or to leave the state to receive the needed care to terminate the pregnancy. Understandably, she was stricken with grief in dealing with this added burden. Our patient does not want to incur the trauma of being forced to carry the pregnancy to term, and is hoping to move past this loss to continuing planning her family. Faced with this heartbreaking "option," she decided to make the long trip to Colorado to seek care out of state.

15. Unfortunately, this is not the first time we have seen Texas patients in these dire situations. When Governor Abbott banned abortion care in Texas by executive order during the early part of the COVID-19 pandemic, PPRM saw a similar influx of patients from Texas at our health centers. During the approximately five weeks when Texas deemed abortion services non-essential (3/22/20–4/25/20), PPRM saw 198 patients from Texas where we would have expected only 44 patients based on prior monthly averages. This was a 350% increase over expected patient volume from Texas, and is a relevant case study for what we can anticipate since Texas' ban on abortions after 6 weeks went into effect. During the time that the COVID-19 executive order was in place, we were referring patients from New Mexico to our Colorado health centers in Durango and Cortez, negatively impacting their ability to seek care closer to their homes in New Mexico.

16. At its peak during the COVID-19 ban, PPRM saw double the Texas patients in one week (64) than would typically be observed in an entire month. Naturally, the numbers from this five-week period only captured Texas patients who had the means, funding, and could take time away from school, work and other responsibilities to facilitate travel outside of Texas for abortion care and undercounts the true demand for services. For a host of reasons, many people will be unable to make the long out-of-state trips to bordering states at all.

17. If we averaged the number of patients seen over the 5-week COVID-19 ban in Texas and assumed the current ban would follow a similar pattern, PPRM would expect to see 2,080 patients from Texas per year, up from 458 (Sept 2020–Aug 2021). This would be 4.5 times as many patients as PPRM usually sees from Texas. Even before the pandemic, this would have strained operations and impacted patients from across our region. But, as I explain further below, over time, the pandemic has put significant strain on our operations and we are not operating today at the same capacity as we were when Texas banned abortion in 2020. Thus, while I expect the demand to be the same (if not greater), I believe even fewer people from Texas seeking out-of-state care will be able to be served in a timely manner, or at all, this time around.

18. While we are doing our best to open up access at our health centers for Texas residents fleeing the state in search of abortion care, we know that we are unable to catch everyone. Indeed, according to the most recent publicly available data, in 2019, there were 55,966 abortions performed in Texas on Texas residents,[1] whereas in 2019, the total number of abortions performed in New Mexico was 2,735.[2] In 2020, there were 10,368 total abortions performed in Colorado.[3]

[1] Tex. Health & Hum. Servs., *2019 Induced Terminations of Pregnancy for Texas Residents*, at 2 (Dec. 23, 2020), *available at* https://www.hhs.texas.gov/sites/default/files/documents/about-hhs/records-statistics/research-statistics/itop/2019/2019-itop-narrative-texas-residents.pdf.

[2] N.M. Bur. of Vital Records & Health Stat., *New Mexico Selected Health Statistics Annual Report 2019*, N.M. Dep't of Health, at 60, *available at* https://www.nmhealth.org/data/view/vital/2504/.

[3] Colo. Vital Stat. Program, *Reported Induced Terminations of Pregnancy: Colorado Occurrences, 1967-2020*, Colo. Dep't of Pub. Health & Env't, at itop1,

Thus, despite sound operations, exhausting effort, and deep dedication to all patients regardless of their zip code, there is simply no way we can increase capacity by that sort of magnitude to absorb tens of thousands Texas patients seeking their important, legal health care.

19. Moreover, like all health care providers, especially during the COVID-19 pandemic, our ability to expand services are limited by the physical facilities we operate and our available staffing. Currently, we are at 75% staff capacity with significant shortages of licensed providers and support staff. Indeed, right now due to staffing shortages, two New Mexico sites are sharing providers as we work to increase staffing. Dealing with an influx of patients traveling long distances from another state also adds to the stress and concerns our staff have about their own health and safety in avoiding contracting COVID-19. Moreover, the strain on our system from Texas patients will have a significant impact on our ability to serve patients from New Mexico and Colorado specifically, which we experienced during the COVID-19 ban. Absorbing thousands of Texas residents will have a domino effect on access and wait times, and will interfere with our ability to provide timely reproductive and sexual health care to the communities we currently serve. Thus, patients living in New Mexico, Colorado, and Nevada must delay preventative care or go without, which may result in undetected cervical or breast cancer, the continued transmission of STIs, or more unintended pregnancies as the result of lapses in access to birth control.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 14, 2021

/s/ Vicki Cowart

Vicki Cowart

https://drive.google.com/file/d/1V31fU628FZXRvs3GzKY1Jh7KvNZgRExB/view (last visited Sept. 9, 2021).

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 7

Declaration of Anna Rupani in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Civil No. 1:21-cv-796

DECLARATION OF ANNA RUPANI IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I, Anna Rupani, declare as follows:

1. I am Co-Executive Director of Fund Texas Choice ("FTC"), a nonprofit corporation incorporated in Texas that arranges and pays for transportation, lodging, and childcare for Texans seeking abortion care.

2. Our mission is to help vulnerable Texans access abortion through safe, confidential, and comprehensive practical support. FTC was founded in 2013 in response to H.B. 2, a Texas statute that shuttered over half of the state's abortion facilities, imposing long wait-times on abortion patients and forcing them to travel long distances for abortion care.

3. As Co-Executive Director, my primary responsibility is to help ensure that the organization fulfills its mission. To this end, I serve as a liaison between our staff and Board of Directors, monitor and build our budget, supervise staff in the administration of our programmatic work, and develop client-centered policies.

4. I bring to this position considerable experience as an attorney and licensed social worker who has provided direct services to survivors of intimate partner violence ("IPV") and human trafficking and unaccompanied minors seeking healthcare, including abortion care. This experience

inspired me to dedicate much of my time and energy to getting the many resources Texans need to obtain an abortion to the most vulnerable residents of the state.

5. I provide the following testimony based on personal knowledge acquired through my service at FTC, including consultation with staff and Board members, and review of the organization's business records.

FTC's Services

6. FTC currently employs two full-time staff members and one part-time staff member, and we serve people throughout Texas. A program coordinator fields texts and calls from Texans seeking abortion care who cannot afford to travel to an abortion provider. The coordinator then works with those who have abortion appointments to help plan and support their trip.

7. We book and directly pay vendors for bus tickets, ride shares, and lodging—and air fare for those forced out of Texas for abortion care. FTC also books and directly pays for the transportation and lodging of companions for minor clients or clients who have a fetal anomaly. Additionally, FTC provides a food stipend to clients.

8. We reimburse clients for gasoline costs incurred during their journey. Further, most abortion providers do not allow patients to bring their children to their appointments, particularly during the COVID-19 pandemic. So, when clients are unable to find affordable childcare, we work with them to match their child(ren) with a caretaker, or we try to reimburse them for the care they can secure.

9. FTC connects callers unable to pay for the abortion itself to nonprofit organizations that provide cash subsidies to defray the cost of abortion services. These organizations are generally known as "abortion funds."

10. Occasionally, we help callers identify the closest abortion provider that is appropriate for them and try to secure an abortion appointment for them despite long wait times.

11. We accept intakes until we have exhausted our budget. On average, we spend over $15,000 a month on practical support for clients. Our policy is to follow up with them twice after their abortion appointment —first a few days after the appointment when they have returned home, and then again weeks afterwards.

12. In addition to providing practical support to access abortion care, FTC helps interested clients tell the stories of how they obtained their abortion care, which includes connecting them to the media. We regard this as a way to combat abortion stigma, which furthers our mission.

FTC's Clients

13. In 2020, 404 Texans reached out to FTC for help accessing an abortion. We were able to provide practical support to 330 of them.

14. Almost all of our callers have pregnancies past six weeks gestational age for a variety of reasons. Many are unaware they are pregnant before that point. Others exceed six weeks trying to cobble together resources to travel to an abortion provider, making a second, State-mandated trip to the abortion provider, or petitioning for a judicial bypass of Texas's parental consent requirement for adolescents.

15. These factors can also push clients past 22 weeks of pregnancy, the gestational age cut-off for obtaining an abortion in Texas, subject only to narrow circumstances. Consequently, even before Texas Senate Bill 8 ("S.B. 8") took effect, on September 1, 2021, about 35% of our clients had no choice but to obtain an abortion out of state.

16. Virtually every expense associated with long-distance travel, whether it be transportation, lodging, or childcare, is magnified when our clients leave the state due to the greater length of the journey and higher cost of living in some states. Additionally, having to navigate a new environment exacerbates the stress and anxiety that some clients experience in connection with their pregnancy.

17. The low-income population we serve generally cannot absorb the costs of an unforeseen medical expense, much less the costs of traveling out of state for that care. These include lost wages from significant time off from work, for which we are unable to reimburse clients. Thus, many of our clients must stitch together resources from multiple organizations within and outside of Texas to ultimately obtain an abortion.

18. In following up with clients after their scheduled abortion appointments, we find that, each year, some fall short of the resources needed to reach the abortion provider despite significant financial and practical support. Because the cost of an abortion increases with the gestational age of the pregnancy, the time it takes to gather resources delays some clients to a point when they can no longer afford their abortion, triggering another cycle of having to gather resources and further delaying their care. Some of our clients are IPV survivors whose abusers prevent them from accessing abortion care when the abusers learn of the survivors' intentions, despite the survivors' best efforts to conceal their pregnancies from their abusers. Others have no option but to travel out of state for abortion care, but are unable to do so because they cannot spend the necessary time away from work, school, or home. This includes IPV survivors who cannot leave home for an extended period without arousing the suspicions of their abusers, and minors who cannot leave home or school for an extended period without arousing the suspicions of coercive, unsupportive or abusive family members.

Impact of SB 8 on FTC and its Clients

19. I understand S.B. 8 to have banned abortion care in Texas at approximately six weeks of pregnancy, prohibited "aiding or abetting" such abortions, and prohibited intending to do either. I also understand S.B. 8 to have enabled private parties to sue anyone who engages in these activities for a *minimum* of $10,000 per abortion.

20. In the two weeks that S.B. 8 has been in effect, it has ravaged abortion access in Texas, inflicted profound suffering on our clients, and severely strained our capacity.

21. The number of callers seeking assistance from FTC has shot up from approximately ten per week to ten to fifteen per day. All but one has been unable to obtain an abortion in Texas because no abortion provider is offering abortion care in the state after approximately six weeks of pregnancy, and virtually all our clients are past six weeks.

22. As a result, our callers are frantically trying to secure the resources needed to attend abortion appointments out of state. By driving virtually all Texas residents out of state for abortion care and saddling abortion facilities closer to various areas of Texas with long wait times, S.B. 8 has forced our callers to secure appointments in farther and farther locations, including Tulsa and Oklahoma City, Oklahoma; Wichita, Kansas; Santa Fe and Albuquerque, New Mexico; Denver, Colorado; and Seattle, Washington. Traveling to any of these locations from Texas has been much more expensive, logistically demanding, and nerve-wracking for our clients than traveling within the state, particularly during the COVID-19 pandemic. It has required air-fare for some of the cities outside of Texas in addition to car- or bus-fare for the abortion appointments themselves, and forced clients concerned about contracting COVID-19 into crowded airports, planes, and bus terminals. The out-of-state travel precipitated by S.B. 8 has also required lodging spanning multiple days, added food costs, extended time away from work depriving clients of critical wages and jeopardizing their jobs, extended time away from children requiring alternate care arrangements, extended time away from home making it difficult to conceal a pregnancy or abortion from an abuser, and extended time away from school compromising minors' confidentiality before their parents.

23. One of our clients obtained an ultrasound, as required by another Texas abortion restriction, on September 1, after S.B. 8 had taken effect, only to learn there was cardiac activity and she would be unable to obtain an abortion in Texas. To do so, she traveled almost 200 miles round-trip within the state. Since then, she has struggled to secure enough time off of work to leave Texas. The client's appointment is not for another three weeks, in Oklahoma City, Oklahoma, which will

require her to make close to a 1,000-mile round-trip for abortion care. It remains unclear whether she will be able to obtain the time off needed to complete her journey.

24. Another client has an appointment today in Albuquerque, New Mexico and called us in a panic yesterday because, despite fighting tooth and nail, she had been unable to come up with the funds for a hotel or any ground transportation. Fortunately, we were able to work with another practical support organization to make sure she could obtain her abortion.

25. Significantly, the time needed to collect the resources and make the arrangements needed to leave the state is pushing our clients later into their pregnancies. Another consequence of S.B. 8 is that most of our current clients must end their pregnancies without the support of loved ones, who can rarely make lengthy trips without substantial financial and practical support either.

26. Since S.B. 8 took effect, the process of traveling out of state for abortion care is all the more stressful for our clients because the facilities in neighboring states are now booked well-beyond capacity, with multi-week wait times for appointments. As a result, our clients now have to choose between obtaining earlier appointments in even more distant locations or delaying their abortion care even longer to get an appointment *closer* (but not close) to home. Most of our clients attempt to travel farther because they are committed to ending their pregnancies as soon as possible. For some, the urgency stems from the medical risks and symptoms of ongoing pregnancy, including debilitating nausea. One Texan faced with this dilemma, piled her children into her car and drove over 15 hours overnight to obtain a medication abortion in Kansas rather than struggle to patch together the money needed for air-fare and childcare or remain in limbo. Another Texan traveled 12 hours round-trip to Oklahoma during the day to get her procedure because she did not want her partner to know and was scared he would find out if she was not home overnight.

27. At the same time, S.B.8 has constrained FTC's ability to increase its budget to match the surge in callers and greater scope of their needs. In the seven business days thus far in September,

we have already spent $10,000. We estimate that we will expend at least $25,000 before October, or a minimum of $10,000 more than usual. Yet, at least fifteen potential donors have expressed fear that funding FTC could be understood as aiding or abetting under the statute. Accordingly, we have been unable to increase the number of callers we help since S.B. 8 took effect.

28. When FTC lacks the resources to help a caller leave the state for abortion care, we refer them to other practical support organizations throughout the country. Because these organizations are serving the same influx of Texans, however, they too are often at capacity. Several callers have been unable to obtain assistance from any of us and thus unable to leave Texas for an abortion. Notably, almost all of them have at least one child at home and have expressed that they cannot afford to care for their existing children if they are forced to have another. In my experience, these callers will carry to term against their will if S.B. 8 remains in effect.

29. Other clients are stuck in Texas with unwanted pregnancies *despite* assistance from FTC, other practical support organizations, or abortion funds. Now that the schoolyear has begun, minors who cannot confide in their families about their pregnancies or desire for an abortion are unable to explain a protracted absence from school. Thus, S.B. 8 condemns minors to carry to term or take matters into their own hands.

30. FTC has a lot of experience helping vulnerable Texans navigate the regime of abortion restrictions in our state. Despite our staff working 12- to 14-hour days, however, we cannot meet the level and scope of need we are seeing since S.B. 8 took effect. Indeed, no network of organizations can serve the untold number of Texans seeking abortions whose only option now is to leave the state, but who cannot afford to or are practically unable to do so. Currently, the relatively fortunate clients are those who are able to leave Texas, subject nonetheless to delayed abortion care, lengthy travel, and significant time away from work and home. In these ways, S.B. 8 has triggered an unprecedented crisis that will persist until the statute is invalidated.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 14, 2021

Anna Rupani

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 8

Declaration of Joshua Yap, M.D., MPH, in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Civil Action No. 1:21-cv-00796-RP

DECLARATION OF JOSHUA YAP, M.D., MPH, AAHIVS IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I, Joshua Yap, M.D., MPH, AAHIVS, declare as follows:

1. I am over the age of 18 and competent to testify as to the matters contained herein. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to me.

2. I am a board-certified Family Medicine physician and am licensed to practice medicine in Oklahoma, Kansas, Arkansas, Missouri, California, and Tennessee. I graduated from medical school at Loma Linda University School of Medicine in 2015. I completed my internship and dual residency in Family Medicine and Preventive Medicine at Montefiore Medical Center and Albert Einstein College of Medicine in 2019. I obtained my Master of Public Health degree in 2019 from the City University of New York School of Public Health. I obtained training in abortion care during my dual residency at Montefiore Medical Center and Albert Einstein College of Medicine, as well as during an extended training in abortion care in Illinois and in Texas.

3. I am employed by and provide health care services at Planned Parenthood of Arkansas & Eastern Oklahoma ("PPAEO")'s Tulsa, Oklahoma health center. I also provide health care services on a regular basis at Comprehensive Health of Planned Parenthood Great Plains, Inc. ("CHPPGP")'s Oklahoma City health center.

4. I understand that Texas Senate Bill 8 ("S.B. 8" or the "Act") bans the provision of abortion in Texas after embryonic cardiac activity can be detected, which, based on my clinical experience and training, occurs by approximately 6 weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP").

5. Since S.B. 8 took effect on September 1, 2021, I have witnessed the devastating effect S.B. 8 has had on Texans and their ability to exercise their constitutional right to choose abortion. I have treated numerous individuals who reside in Texas and who have been forced to travel to Oklahoma to terminate their pregnancies. The surge of Texans that we have provided abortions to in our Oklahoma health centers since September 1 is unprecedented, and the demand only continues to grow. Indeed, as I explain further below, this is causing our schedules to become very backlogged and I fear that we will not be able to continue to serve our existing patient population in Oklahoma in a timely manner given the overflow of patients coming from Texas. I believe this will force many patients to have abortions later in pregnancy, pressure patients from communities in Oklahoma to scramble to seek care in other states farther away, influence some patients to attempt to terminate their pregnancies outside the medical system altogether in unsafe ways, or result in people carrying unwanted pregnancies to term.

6. I submit this declaration in support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction.

Planned Parenthood's Provision of Abortion Services in Oklahoma

7. PPAEO's and CHPPGP's Oklahoma health centers provide a broad range of sexual and reproductive health care and education services, including abortion care, contraception care and counseling, pregnancy testing and prenatal referrals, testing and treatment for sexually transmitted infections, PrEP, PEP, clinical breast exams, breast and cervical cancer screenings, colposcopies and biopsies, condyloma treatment, and gender-affirming hormone therapy and hormone replacement therapy.

8. We have provided abortions in Oklahoma to over 1,300 patients already this calendar year. We provide procedural abortion care[1] for patients up through approximately 17 weeks gestational age as measured from a patient's LMP and medication abortion up through 77 days gestational age.

9. I am the only abortion provider at our Tulsa health center. Although we aim to staff our Oklahoma City health center with other physicians, including out-of-state doctors who each travel to Oklahoma to provide care a few days per month, so that I can focus on providing care in Tulsa, I still occasionally travel to Oklahoma City to provide abortions there when no other provider can.

10. Patients seek abortion care for a variety of reasons, including, for example, being unable to divert time, financial resources, or caretaking resources away from existing children or other family members; being unable to absorb the additional financial burden; having become pregnant as the result of rape; having an abusive partner; being unable to take time away from their educational or career paths; being in the military and on the cusp of deployment; and medical

[1] This is also sometimes referred to as "surgical abortion," though it does not involve making any incisions.

reasons, including, for example, a fetal diagnosis, a history of previous high risk pregnancies, or a cancer diagnosis that requires choosing between effective treatment and pregnancy.

11. People seeking abortions already have a difficult time accessing abortion care. Nationwide, the majority of abortion patients live near or below the federal poverty line and many more are low-income.[2] As a result, many have difficulty obtaining the funds for an abortion, obtaining transportation to a health center (particularly as Oklahoma has virtually no public transportation outside the major cities), being able to get and afford to take a day off from work, and finding childcare for existing children. All of these logistics need to be arranged before a patient can obtain an abortion and that all takes time. Moreover, the State of Oklahoma imposes a 72-hour waiting period before anyone can obtain an abortion. These obstacles that patients need to overcome to access an abortion can be significantly worse for people who must travel long distances and cross state lines to access an abortion.

12. Abortion is a time sensitive medical procedure. Delays can result in patients being pushed past the point when they can obtain a medication abortion, even if that would be the preferable method for that patient. Delays can also push patients beyond the point by which they can obtain abortion care at all in Oklahoma.

Impact of S.B. 8

13. As I mention above, since S.B. 8 took effect, we are seeing a surge of Texas patients seeking abortion care in Oklahoma. Pregnant people from Texas are scared and are frantically trying to get appointments. They are doing everything they can to get to a state that will allow them to terminate their pregnancies.

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[2] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. J. Pub. Health 1904, 1906 (2017).

14. Since S.B. 8 took effect twelve days ago, I was the sole provider at our Tulsa and Oklahoma City health centers from 9/1/21 to 9/12/21 and treated 69 patients who reside in Texas. In the days leading up to S.B. 8's effective date, I also treated many patients from Texas who had heard about the law in the news and were already scared about what it meant for them. To put this data in context, while we have always provided abortions in Oklahoma to patients who live in other states, including Texas, in the first six months of 2021 we treated a total of 175 Texas residents. That means that we saw 40% of the total number of patients from Texas that we would normally see in six months in just twelve days. And since S.B. 8 took effect, we have seen an overall staggering 646% increase of Texan patients per day compared to the first six months of the year.

15. Currently, people who are traveling from Texas to get an abortion in Oklahoma are taking up at least 50% (and on some days nearly 75%) of the appointments we have available at our Oklahoma health centers. For example, on Saturday, September 10, I provided abortions at our Tulsa health center and of the 28 patients that received abortions, 17 were from Texas. The day before when I provided abortions in Oklahoma City, of the 30 patients who received abortions, 23 of those patients were from Texas.

16. We expect this trend to only worsen over the coming weeks. Indeed, there are over 240 Texans that have made appointments to have abortions at our Oklahoma health centers this week and next week. Specifically, for the week of September 13, there are 101 people scheduled to have abortions at our Tulsa health center, of which 52 are from Texas. And at our Oklahoma City health center, there are 219 people scheduled to have abortions, of which 137 are people who live in Texas.

17. We are doing everything we can to accommodate this surge from Texas, but our schedule is still becoming backlogged, and it is resulting in our patients experiencing even longer delays than usual. We are currently scheduling for initial abortion consult appointments out into late September and early October, after which (per Oklahoma's mandatory delay law) patients still have to wait at least 72 hours before they can get an abortion.

18. We have already had one woman from Texas who made an appointment to have an abortion in Oklahoma but by the time she was scheduled, completed the consult appointment, and made it in for the abortion appointment, we learned she was past the gestational age limit by which we could provide an abortion at our clinic. We regrettably had to refer that Texas patient to a health center hours away in Colorado. We have had at least two patients from Texas make appointments to have a medication abortion but after they had traveled to our Tulsa health center, we determined that they were ineligible for a medication abortion and had to be rescheduled for another day to get a procedural abortion. This meant they had to travel back to Texas, and then make *another* round trip from Texas to Oklahoma—traveling hundreds of miles to get an abortion. We had to reschedule one of these patients for one week later because—due to her work schedule—the only day she could make the long trip to Oklahoma was the following Saturday. This is a concern we have heard from other Texas patients, too. Our schedule was already booked but we made an exception because otherwise this patient would have had to wait two weeks, forcing her to have a more expensive procedure, which she said she could not afford.

19. While historically (before S.B. 8 took effect) the patients we treated from Texas tended to live near the border, we are now seeing patients in Oklahoma who are traveling from all across Texas. I treated one patient, for example, who got in her car at midnight in Texas so that she

could drive through the night and make it to Oklahoma in the morning for her abortion appointment, and then she had to turn around the same day to travel back to Texas. Another patient traveled six hours (one way) to get to Oklahoma and said she drove alone because she was worried about asking someone to accompany her in case they could get in trouble under S.B. 8.

20. Just since S.B. 8 took effect, I have treated patients who have traveled from as far as Austin, Houston, Round Rock and San Antonio, which means patients are traveling anywhere from 5 to 8 hours (one way) to get to our health centers in Tulsa or Oklahoma City. I have also treated patients coming from cities in Texas that are closer, like Dallas-Fort Worth, Paris, and Wichita Falls, but even these patients had to make 2- to 4-hour trips (one way) to get to our Oklahoma health centers. While almost all of the Texas patients we have seen have traveled by car or bus, I can think of at least one patient who got a last minute ticket to come by plane, and returned back to Texas the same day.

21. I also treated a patient from Texas who found someone to give her a ride to Tulsa, Oklahoma for her appointment, but the trip took longer than expected and they arrived too late for her to get an abortion that day. We managed to accommodate her on the Oklahoma City schedule for the next day, but she had to scramble to find a hotel in Oklahoma for the night and get assistance to be able to pay for the hotel. Unfortunately, her ride could not spend the night in Oklahoma so she had to also find help to get to Oklahoma City from Tulsa, and then we had to help her with a bus ticket to get back to Texas. There was only one bus that she could take, so we had to get her in and out of the abortion clinic with enough time to make it to the bus station. This is just one example of the numerous obstacles patients have to overcome when they are forced to travel long distances and across state lines to get an abortion. And while we are going to extraordinary

measures to accommodate patients due to S.B. 8, this is not a sustainable way to operate our health centers.

22. One of the most heart-wrenching cases I have seen recently was of a Texas minor who had been raped by a family member and traveled (accompanied by her guardian) all the way from Galveston, Texas—a 7- to 8-hour drive, one way—to get her abortion in Oklahoma because she was more than six weeks pregnant and could not get an abortion in Texas. And this patient is not the only sexual assault survivor from Texas that I have treated recently.

23. I provided an abortion to another woman from Texas who had been raped and could not get an abortion in Texas because of S.B. 8. She was upset and furious that she could not get an abortion close to home and in her own state. She had to figure out how to take extra time off from work to make the trip to Oklahoma, as well as find childcare for her children. I know of at least one other patient from Texas on our schedule for this upcoming week who has indicated that their pregnancy was a result of sexual assault. Several patients from Texas have commented that they can't believe their state would ban abortion, and that they are so disappointed in their home state of Texas.

24. Because our schedules in Oklahoma are quickly filling up, we have also begun telling people that they can travel to our health centers in Kansas, or even Arkansas, to get an appointment sooner. Although that is an even farther drive for some patients from Texas, we have seen a few patients from Texas at those health centers and even more are making appointments for the coming weeks.

25. The high level of frustration and trauma that these Texas patients are experiencing is also taking a physical and emotional toll on our staff, who are helping them manage this horrible

situation. Our staff are working to their best of ability to try to deal with the influx of patients, but they are growing tired and stressed and need to take breaks because it is traumatic for them too.

26. I have devoted my career to providing high-quality sexual and reproductive health care. What I have seen unfold since S.B. 8 took effect has been absolutely devastating. The patients that are able to make it to Oklahoma to get their abortion are having to make substantial sacrifices and overcome numerous obstacles, including struggling to come up with the funds to make the trip to Oklahoma. They are also scared that someone may find out that they had an abortion when they go back home to Texas and are unsure of what could happen to them under S.B. 8. Those patients who are seeking abortions in the context of intimate partner violence or other family violence are risking more than they already do in order to travel out of state to end their unwanted pregnancies. People are also worried about having to travel long distances in the middle of a pandemic and what that could mean for the health and safety of themselves and their families. And I too fear that this increased travel puts myself, our staff, and our patients at greater risk of contracting COVID-19.

27. I also know that we are seeing only a fraction of the people in Texas who are seeking to have an abortion, with some finding care in other states and others who simply cannot travel out of state or are afraid to do so. I fear that many people, especially those with the fewest resources, will not be able to obtain safe abortion care at all and will either seek to terminate their pregnancies themselves outside the medical system, or be forced to carry unwanted pregnancies to term.

28. Abortion is one of the safest medical procedures, but by forcing patients to travel long distances and likely delay their procedures, Texas is endangering its citizens. Not only is there no medical basis for this ban, but it is already inflicting serious hardship and trauma on patients who are making very personal decisions that are right for them and their families.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 13, 2021

/s/ Joshua Yap

Joshua Yap, M.D., MPH, AAHIVS

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 9

Declaration of Alix McLearen, PhD.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Case No. 1:21-cv-796**
	)	
STATE OF TEXAS,	)	
	)	

DECLARATION OF ALIX M. McLEAREN, PH.D.

In accordance with 28 U.S.C. § 1746, I, Alix M. McLearen, Ph.D., make the following sworn declaration, under penalty of perjury.

PERSONAL BACKGROUND

1. I am the Senior Deputy Assistant Director for the Reentry Services Division for the Federal Bureau of Prisons (BOP). I am also a licensed clinical psychologist and career law enforcement officer. Since obtaining my doctorate, I have been employed in positions of increasing responsibility with the BOP for more than 18 years. Prior positions I have held include Chief of Psychology Services at the Federal Correctional Institution in Memphis, Tennessee, and the agency's first Branch Chief overseeing the management of women and special population inmates.

2. In my current capacity, I retain responsibility for oversight of female offender issues and also manage the day to day operations of all reentry services, including education, residential reentry, chaplaincy, and psychology services. I authored the Female Offender Manual, the agency's policy pertaining to the management of pregnant offenders. This program statement includes references to federal regulations and the agency's procedures for managing

pregnancy termination issues. *See generally* Exhibit A - BOP Program Statement 5200.07, *Female Offender Manual*, May 12, 2021.

3. I make the following statements based on my personal knowledge and information made available to me in the course of my official duties.

4. This declaration is submitted in support of the United States' Emergency Motion for a Temporary Restraining Order and a Preliminary Injunction.

THE FEDERAL BUREAU OF PRISONS (BOP)

5. Pursuant to 18 U.S.C. § 4042, the BOP, under the direction of the Attorney General, has charge of the management and regulation of all Federal penal and correctional institutions. The BOP's mission is to ensure that federal offenders serve their sentences of imprisonment in facilities that are safe, humane, cost-efficient, and appropriately secure, as well as to provide reentry programming to ensure their successful return to the community in the interests of public safety and welfare. As of the date of this declaration, the BOP operates 122 federal prisons and manages an inmate population of 155,763.

6. The BOP operates 28 facilities housing women, three of which are located in Texas. These facilities are the Federal Medical Center Carswell located in Fort Worth, Texas (FMC Carswell), the Federal Prison Camp located in Bryan, Texas (FPC Bryan), and the Federal Detention Center located in Houston, Texas (FDC Houston).

7. In addition, more than 400 women are currently in community custody under BOP supervision in Texas. Community custody includes women placed in a Residential Reentry Center (RRC) or on home confinement while they serve the remainder of their federal sentences. Because of their placement in the community, it is possible that these women could become pregnant while still serving their federal sentences under BOP supervision.

FEMALE OFFENDER MANAGEMENT

8. Federal regulations allow a woman in BOP custody, whether that be in the community or a secure facility, to seek and obtain an abortion if she is pregnant and desires to terminate the pregnancy. *See* 28 C.F.R. §§ 551.20, *et seq.*; *see also* BOP Program Statement 5200.07, Female Offender Manual, at 12, 16-17.

9. Pursuant to Federal regulation and BOP policy, the Warden of the facility where a pregnant inmate is located shall ensure that inmate is provided medical, case management, and counseling services. *See* 28 C.F.R. § 551.22(a). The Warden shall also offer the pregnant inmate medical, religious, and social counseling to aid her in making the decision whether to carry the pregnancy to term or to have an elective abortion. *Id.* § 551.23(b); *see also* BOP Program Statement 5200.07 at 16-17. Indeed, BOP itself issues a booklet to pregnant women to ensure they educated about their rights concerning pregnancy, including the choice of whether or not to terminate that pregnancy. *See* Exhibit B – A Guide to Expecting Moms in the BOP.

10. If the inmate elects to have an abortion, she signs a written statement to that effect, which is processed through her unit management team. The Clinical Director of the BOP institution where the inmate is housed shall then arrange for an abortion to take place with an outside specialist in the community. Ordinarily, the provider is located within or near the community where the facility is located for reasons of practicality.

11. If the inmate is in secure custody, BOP staff provide escort and follow-up services associated with the procedure. These staff include mental health and medical professionals, but also unit management, financial, and custody personnel. In practice, this means staff schedule the appointment for the inmate and take her to and from the appointment. Every case is different, but staff may have to take the inmate back for monitoring or medical issues that

develop. They may also provide mental health or other monitoring contacts once she returns to the facility that relate to her abortion procedure. Upon receipt of billing information, staff are also responsible for transferring funds from the inmate's account to ensure payment is remitted.

12. If the inmate is in community custody, BOP staff and third-parties under contract with BOP assist the inmate by approving appointments, travel, or missed work. The BOP is required to coordinate interstate travel by an inmate housed in the community with the United States Probation Office; personnel from that agency would be involved as well if an inmate housed in the community needs to travel out of state because their approval would also be required.

13. The BOP assumes all costs associated with the abortion procedure when the life of the mother would be endangered if the fetus is carried to term, or in the case of rape or incest. Otherwise, non-BOP funds must be used to pay for any abortion procedure, or else the planned abortion may not be performed. In all cases, however, whether the BOP pays for the abortion or not, the BOP may expend funds to escort the inmate to a facility outside the institution to receive the procedure. *See* BOP Program Statement 5200.07 at 17.

S.B. 8'S IMPACTS ON BOP OPERATIONS

14. S.B. 8 interferes with the BOP's obligation under its regulations and policy to facilitate abortion care for inmates in several respects.

15. S.B. 8 disrupts the performance of required duties of BOP staff. It is my belief this law will create confusion among BOP staff employed in Texas as to whether they can follow established BOP policy, and perform aspects of their duties and responsibilities, in order to assist the inmate with the process of electing to have an abortion; BOP is already having difficulty determining how S.B. 8 affects is policies and practices. In so doing, it may also create fear of

personal liability for complying with established BOP rules and policy, undermining BOP staff's performance of their duties and responsibilities. The BOP is a policy-driven agency and compliance with applicable BOP policy and regulations is required for maintaining orderly running of BOP operations.

16. For the same reasons, S.B. 8 also similarly disrupts the performance of BOP contractors, who are also bound to adhere to BOP's rules and policies. Like BOP staff, the agency's contractors must comply with the statement of work, applicable BOP policies, and regulations in order to ensure orderly running of operations.

17. Furthermore, S.B. 8 also interferes with the BOP's ability to make appropriate housing and designation determinations for inmates. Pursuant to 18 U.S.C. § 3621(b), the BOP has the exclusive authority to designate the place of an inmate's imprisonment, taking into consideration certain factors including but not limited to Court recommendations, the inmate's programming needs, the inmate's mental and medical health needs, faith-based requests, and BOP security concerns. Furthermore, the BOP is required to attempt designation to an institution within 500 miles from the inmate's primary residence. As a result of the Texas law, the BOP now has to consider housing pregnant women, who are from Texas, outside the state.

18. That added consideration is particularly burdensome because BOP's only medical facility for women is FMC Carswell. Pregnant women with comorbid medical and mental health conditions have no options to be housed outside of Texas if secure BOP custody is required because FMC Carswell is the only BOP facility in the nation equipped to treat such individuals.

19. S.B. 8 also imposes a direct burden on BOP resources and personnel. In abortion cases, BOP expends resources to transport and escort women to an abortion procedure in the community. Because S.B. 8 severely restricts legal abortion procedures available in Texas, and

further may have the practical effect of causing many abortion clinics to close, BOP may be forced to either escort women within Texas out of state to a private clinic to receive an abortion after six weeks of pregnancy or, alternatively, transfer the inmate to a suitable BOP facility in another state. Even in cases where an inmate is not yet six weeks pregnant, S.B. 8's likely practical effect of closing down many Texas clinics will likely require BOP to escort inmates greater distances to an available clinic, either within Texas or outside of the state, if transfer to a suitable BOP facility in another state is not possible. S.B. 8 is thus likely to interfere with how BOP carries out its regulatory duties and policies. And further, S.B. 8 is likely to place additional burdens on BOP personnel and resources due to more onerous travel and escort requirements for women seeking abortion procedures.

20. Similarly, in cases of rape or incest, BOP assumes all costs of an abortion procedure. Because S.B. 8 contains no exception for abortions in cases of rape or incest, BOP will also have to alter practices in adhering to its regulatory mandate to assume the costs of an abortion in such cases, particularly where interstate transfer of the inmate may be required.

21. S.B. 8 also may cause confusion among inmates in Texas as to whether they can exercise their right under BOP policy to have an abortion. Women in BOP custody request and obtain abortions, and staff have followed BOP policies and regulations in order to assist these female offenders who elect to have abortions.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 14th day of September 2021.

_____

Alix M. McLearen, Ph.D.
Senior Deputy Assistant Director
Reentry Services Division
Federal Bureau of Prisons

BOP Exhibit A

U.S. Department of Justice
Federal Bureau of Prisons

P R O G R A M S T A T E M E N T
OPI: RSD/FOB
NUMBER: 5200.07
DATE: May 12, 2021

Female Offender Manual

/s/
Approved: M.D. Carvajal
Director, Federal Bureau of Prisons

1. PURPOSE AND SCOPE

To ensure the Bureau provides programs, services, and policies that are gender-responsive, trauma-informed, culturally sensitive, and address the unique needs of incarcerated females at facilities that house female offenders.

This Program Statement addresses specific needs of female offenders within the Bureau of Prisons; this Program Statement is not intended to provide preferential treatment based solely on gender.

Definitions

- *Gender-responsive* approaches are based on an understanding of the ways females are different from men. They aim to address issues of importance to females.
- *Trauma-informed* approaches recognize the experiences and outcomes of all types of trauma and take steps to address them through policy and programs.
- *Culturally sensitive* approaches understand persons of different ethnic or demographic backgrounds may differ or be similar, and value diversity regardless.
- *Stakeholders* are a person, group, or organization that has interest or concern in the Bureau of Prisons. Stakeholders can affect or be affected by the Bureau's actions, objectives, and policies. Some examples of key stakeholders are judges, directors, professors, employees, government agencies, unions, and community.

Federal Regulations from 28 CFR are shown in this type.
Implementing instructions are shown in this type.

a. **Summary of Changes**

Program Statement Rescinded
P5200.02, CN-1 Female Offender Manual (1/2/18)

- Expands requirements for stocking feminine hygiene items.
- Expands requirements for offering programs in pretrial facilities.
- Changes references to the Female Offender Branch (now the Women and Special Populations Branch).
- Added the requirements of section 301 of the First Step Act (FSA), codified at 18 U.S.C. § 4322, for use of restraints on prisoners during the period of pregnancy and postpartum recovery.
- Defines use of restraints on pregnant inmates

b. **Program Objectives**. Expected results of this program are:

- The unique needs of female offenders will be considered as Bureau program statements are developed and revised.
- Divisions with institutional programs will develop measurable objectives to ensure female offenders and related special population inmates can access programs and services that meet their individual needs and prepare them to return to the community.
- Sufficient resources/staffing should be allocated to deliver appropriate programs and services to female offenders and related special populations. This goal is particularly important at female satellite facilities attached to male institutions.
- Inmates will have appropriate information about pregnancy prevention options, programs for pregnant females, and counseling or assistance offerings.
- Staff will receive adequate training, enabling them to work effectively with female offenders and related special populations.
- The Women and Special Populations Branch's role is defined, maximizing efficiency of oversight and resource utilization.

c. **Institution Supplement**. None required. Should local facilities make any changes outside changes required in national guidance or establish any additional local procedures to implement national guidance, the local Union may invoke to negotiate procedures or appropriate arrangements.

Section 1. POLICIES AND APPLICABILITY

1. APPLICABILITY

This program statement applies to all Bureau of Prisons institutions that house female offenders. Guidance that does not apply or differs for facilities housing pretrial or holdover inmates is noted below.

2. STAFF RESPONSIBILITIES

The following Bureau components are responsible for ensuring consistent establishment of the programs, services, and resource allocations necessary for female offenders.

a. Central Office

(1) The **Women and Special Populations Branch** is the agency's source for expertise on classification, management, and intervention programs and practices for females in Bureau custody. The Branch is led by a licensed clinical psychologist and staffed by programming and policy authorities. The Branch is responsible for the following functions:

- Engaging with stakeholders, including serving as the primary point of contact on issues affecting incarcerated females. Feedback is obtained from stakeholders on at least an annual basis.
- Ensuring the Bureau offers appropriate services to inmates that are gender-responsive and trauma-informed.
- Preparing budgetary requests to deliver national and pilot programs or services affecting females.
- Providing guidance and direction to Regional staff and institution leadership.
- Developing and implementing staff training.
- Building a research-based foundation for the Bureau's work with females.
- Presenting at internal and external conferences/events regarding the agency's female offender practices.
- Developing and monitoring monthly reports on the female population and institutional programs.
- Issuing an annual report on the state of female offenders in the Bureau.
- Advising agency leadership on female offender needs through the submission of Executive Staff Papers.
- Obtaining feedback from female offenders on an annual basis and sharing results with internal and external stakeholders.
- Providing national oversight of pilot programs and initiatives serving female offenders.

- Launching recruitment and retention initiatives for staff interested in working with female offenders.

(2) The **Central Office Branches/Divisions** of Correctional Services, Psychology Services, Chaplaincy Services, Education, Correctional Programs, Reentry Affairs, Residential Reentry Management, Health Services, Social Work, Office of General Counsel, Program Review, Intelligence and Counter Terrorism, and Trust Fund meet annually with the Women and Special Populations Branch to discuss female population needs and to evaluate current gender-responsive services. A national union representative from the Council of Prison Locals will be invited to these meetings. During these meetings, the Branches/Divisions share program participation information within their discipline area. The Program Review Division notifies the Branch quarterly of any deficient or acceptable ratings at female institutions within these disciplines based on national guidance.

b. **Regions**

- Ensure staffing at female facilities is appropriate. This includes satellite camps, which must have designated positions to provide programming.
- Establish a Regional Female Offender Coordinator Collateral Duty Assignment. This individual meets quarterly with the Women and Special Populations Branch to discuss staffing and programming needs. He/she should be allotted twenty percent of his/her duty time to fulfill this role.
- Provide oversight to institutions regarding new programs and other relevant trends.
- Consult with the Women and Special Populations Branch based on the branch's monitoring of program utilization.
- Ensuring women in detention facilities have access to programs similar to those offered at facilities housing sentenced women. This is accomplished by the Regional Female Offender Coordinator conducting an annual review of all programs and providing a report to the Women and Special Populations Branch.

c. **Institutions**

- Offer established programs and services that target the needs and interests of female offenders.
- Track participation in programs by updating SENTRY and other databases as appropriate.
- Compile a list of gender-responsive programs for posting at the facility, with a copy provided quarterly to the regional coordinator.
- Participate (Wardens) in quarterly meetings with the Women and Special Populations Branch.
- Ensure institution volunteers are appropriately trained in the needs of female offenders.

3. STAFF TRAINING SPECIFIC TO FEMALE OFFENDERS

Staff learn to work with inmates from special populations through the completion of general and specialized training offered throughout their careers.

All staff at institutions or complexes housing female offenders are required to complete training developed by the Women and Special Populations Branch and the trauma-informed correctional care module. Thereafter, refresher information is provided locally on annual basis.

Wardens shall remain aware of gender responsivity issues via mandatory quarterly videoconferences with the Women and Special Populations Branch. The Union will be invited to participate.

4. SPECIAL POPULATIONS

Research has demonstrated that program effectiveness is maximized when services target specific population needs. While some programs may be appropriate for any inmates, offenders' needs may also vary based on gender, age, ability, or other factors. Guidance must also take into account that not all inmates are the same, and ensure the needs of members of smaller populations are adequately addressed and treated. Individuals may be members of more than one special population. This section defines membership in special populations and identifies programming considerations for inmates who are also members of these populations.

Some special populations of offenders include:

- Geriatric Inmates.
- Lesbian, Gay, Bisexual, Transgender, or Intersex Inmates.
- Inmates from Unique Jurisdictions (e.g., Illegal Aliens).
- High Security Unit Females.

a. **Geriatric Inmates**. Geriatric inmates are defined as those at least 65 years of age or older, although aging inmates may seek similar services at age 50. Studies suggest members of the inmate population may present as physiologically older than their actual age due to a combination of lifestyle factors. Considerations for the management of elderly inmates may include the need for longer time to travel across the compound, the possibility of placement in a housing unit near Health Services or the dining hall, the need for an inmate companion, or housing on the bottom level of a facility. Programming considerations may include the need for larger print material or the need for specialty program implementation. The Women and Special Populations Branch should be consulted about program implementation or modification issues.

b. **Lesbian, Gay, Bisexual, Transgender, or Intersex Females**. Lesbian, Gay, Bisexual, Transgender, or Intersex (LGBTI) inmates are a diverse population. Lesbian, gay, and bisexual refer to the sexual orientation of the inmate. Transgender refers to inmates who identify as being a different gender than they were designated at birth. Intersex inmates are persons who, due to prenatal development factors, may not fit into recognized chromosomal or reproductive categories of male or female. Females may fall into more than one of these categories. Staff are encouraged to consult Program Statement **Transgender Offender Manual** for current policies and practices concerning transgender inmates for additional guidance.

LGBTI individuals are more likely than some other inmate populations to have experienced victimization, which may affect their interactions with staff and inmates. Institutions are encouraged to provide access to self-help materials with reentry resource information for this population.

c. **Inmates from Unique Jurisdictions**. Female offenders from jurisdictions with unique rules may have different reentry needs from the rest of the population. Information about release to these areas is distributed to the field, and should be part of an inmate's release planning. The physical location of children and families in the designation and transfer of inmates who are not U.S. citizens should be considered.

d**. High Security Females.** Generally, females in the Bureau are classified at minimum or low security levels. A small, but service-intensive proportion of the female population requires more secure conditions of confinement due to behavioral/management or criminal history issues. Females requiring this level of security may require a higher rate of individualized services, as limited group options are likely to be available.

5. **PROGRAM STATEMENT**

Managers consider the needs of female offenders and consult with the Women and Special Populations Branch as appropriate during the development of this Program Statement.

Section 2. MANAGEMENT OF FEMALE OFFENDERS

1. CLASSIFICATION AND DESIGNATION

The Bureau's classification system takes into account the different ways risk factors for recidivism may apply to females. Management variables should not be used to over-classify females.

a. **Distance from Home**. Females are incarcerated at much lower rates than males. As a result, there are fewer institutions housing female offenders, meaning females are, on average, housed at greater distances from home than men. Staff will consider location of children and families, not just release destination, and involve the inmates in a discussion of options.

b. **Female Administrative Unit**. High security female inmates may be housed in administrative units, such as the one currently at the Federal Medical Center (FMC) Carswell. The majority of female offenders are appropriate for housing at minimum or low security facilities. A very small number of females may require more secure confinement. Female offenders will receive mental health screening prior to placement on this unit consistent with the procedures for male inmates referred to the Administrative Maximum Penitentiary (ADX) described in the Program Statement **Treatment and Care of Inmates With Mental Illness**.

The Women and Special Populations Branch can provide assistance in establishing appropriate programs for these inmates. In addition, the Regional Director will receive an annual justification from the Warden or designee for each inmate who continues to be placed in the administrative unit, except for those sentenced to death. This rationale is informed by an annual Extended Restrictive Housing Placement Review conducted by Psychology Services consistent with the format described in the Program Statement **Treatment and Care of Inmates With Mental Illness**. The Regional Director will provide this justification to the Assistant Director, Reentry Services Division.

If an inmate's mental health appears to have deteriorated during placement in an administrative unit, the institution's Chief Psychologist works with the Women and Special Populations Branch and Psychology Services Branch to mitigate the impact or identify an alternative placement. Consultation will also be made with the Bureau's Chief Psychiatrist through the Psychology Services Branch.

2. CORRECTIVE ACTION

The purpose of this section is to provide guidance in dealing with female offenders. Discipline should be applied equally to all inmates for their actions according to the Program Statement

Inmate Discipline Program.

Discipline should be corrective and not punitive when sanctioning inmates. The Discipline Hearing Officer (DHO) and Unit Disciplinary Committee (UDC) should consider all factors and the described behavior within the incident report when disciplining inmates. This entails focusing on the influence of trauma, gender, staff-inmate interactions, and input from both staff and inmates. For chronic infractions, referral to an appropriate program should be considered.

Section 3. FEMALE OFFENDER PROGRAMS

All institutions housing female offenders must meet basic standards for offering gender-responsive programs and for ensuring staff responsible for providing the programs have the knowledge and skills to deliver these services. Programs are divided into three categories: National Programs, Model Programs, and local activities or leisure-time programs.

1. PROGRAMMING

National programs rely on standardized admission and delivery criteria across sites, which include at least one full-time staff position. Ordinarily, these programs are also supported by evidence of their impact on recidivism or other desired intervention targets. Examples include the Resolve Program and the Residential Drug Abuse Program. A complete list of national programs is maintained by the Reentry Services Division. Generally, these programs are offered to both male and female inmates, often via the same curricula with gender-appropriate modifications.

The decision to locate a national program at a particular institution is made by Central Office, based on capacity monitoring with existing programs or data demonstrating need for new programs. Ordinarily, all minimum and low security facilities housing female offenders have a Resolve Program. Administrative facilities housing primarily pretrial females are not required to offer the full Resolve Program, but ordinarily provide the Trauma in Life Workshop quarterly.

Offenders are encouraged to participate in national programs. In some cases, a determination will be made at the Central Office level that the needs of a particular population dictate a modified version of a national program be created. Examples of this approach include female versions of the Residential Drug Abuse Program (RDAP), Skills, and Sex Offender Treatment Programs. In these cases, the Women and Special Populations Branch Administrator will work with the appropriate Divisions and Regions to develop and implement the modified program.

The FSA Approved Programs Guide contains a growing number of programs that have been determined to represent evidence-based or promising practices. Evidence-based and promising

practices evolve quickly, therefore a full list is not provided in this Program Statement. Instead, these programs are maintained in the Bureau's FSA Approved Programs Guide. Local implementation of programs will be consistent with all procurement authorities, if applicable.

Evidence-based and promising programs from the FSA Approved Programs Guide specifically for female offenders are considered essential practices. If an institution has resources to deliver programming, institutions will select from gender-responsive programs contained in the FSA Approved Programs Guide. If an institution identifies a program need area for which a gender-responsive program does not exist, the Regional Female Offender Coordinator should contact Central Office for program development consultation.

Each minimum, low, or administrative security institution housing female offenders ensures at least one program from the FSA Approved Programs Guide is designed specifically for females is offered each quarter. This requirement is also extended to facilities housing pretrial women. Foundation is a program designed to assist women in assessing their individual needs and translating that information into attainable goals while building a supportive community. Foundation is offered at least once annually at minimum, low, administrative, and pretrial facilities. It is to be used for women at the beginning of the service of their sentences and can help them plan future program choices. Copies of materials can be obtained from the Women and Special Populations Branch. Completion of the program should be documented. Ordinarily this program is delivered by the Social Worker or Special Populations Coordinator.

Holdover facilities housing female offenders offer at least one FSA Approved Programs annually. Gender-responsive programming options must also be available to females in restrictive housing and in FMC Carswell's Administrative Unit. The Regional Female Offender Coordinator tracks and reports each type of program being provided to the Women and Special Populations Branch quarterly.

Programs not developed specifically for females may also be appropriate to offer at female facilities.

2. LOCAL ACTIVITIES AND LEISURE-TIME PROGRAMS

Beyond required services, institutions housing females offer a number of other activities to meet population needs and develop leisure-time skills. Institutions generally offer Recreation and Adult Continuing Education Programs on an ongoing basis. These programs are implemented based on an understanding of the unique needs of females and other special populations, and take into account females' activity preferences. These services may also be provided by volunteers from the community who demonstrate understanding of issues common to females in corrections.

3. PROGRAM SELECTION AND ASSIGNMENT

Assigning individual females to programs and services should be prioritized based on need; e.g., work history, skill level, resources, sentence length. Waiting lists should be maintained at the institution level for all female offender Programs.

Local programming at each institution may vary based on population needs. To ensure adequate availability of programming options, the Women and Special Populations Branch will provide a forum for internal and external stakeholder feedback on an annual basis to identify potential FSA Approved Program submissions. In addition, because the Women and Special Populations Branch relies on feedback from the field to make resource determinations, institutions should track program participation in SENTRY or other databases, and WASP Central Office monitor this information as needed to ensure adequate service delivery.

Specification of Vocational Certification and Apprenticeship Programs is beyond the scope of this Program Statement. In implementing these programs locally, attention is given to workforce trends, and job skill or training opportunities are provided to females in male-dominated fields as well as more traditional career paths.

4. PROMOTING HEALTHY RELATIONSHIPS

Research has demonstrated the importance of family reunification and supportive community connections in preventing recidivism. In addition, inmates may have supportive relationships which fall outside legal definitions of family. The Bureau of Prisons encourages family engagement and maintenance of these support networks.

a. **Visiting Room Standards**. Visiting rooms at each institution should include child-friendly materials in the waiting area and in a Children's Center within the actual physical visiting space. Institutions are encouraged to contact Central Office for recommendations.

b. **Parent-Child Activities.** If parent-child activities are held at local facilities, local and national policies will be followed, to include dress code. Central Office, including the Women and Special Populations Branch, must be consulted in the development of these activities.

c. **Peer Relationships**. Research has shown the formation and maintenance of relationships to be of particular importance to females. Many females enter prison as the result of criminal behavior tied to a significant relationship. When incarcerated females are separated from their families, they have a tendency to seek new relationships in prison. Sexual relationships are prohibited in all correctional facilities. The Bureau of Prisons supports healthy, appropriate

relationships among female inmates. Female offenders benefit from common areas in which to congregate and engage in supportive social communities, and areas are designated for such activities when space allows.

5. **COMMISSARY**

All institutions housing females are required to implement standardized gender-responsive commissary lists. This information is available on the Women and Special Populations Branch Sallyport page.

The First Step Act of 2018, Section 611:

> (a) AVAILABILITY.—The Director of the Bureau of Prisons shall make the healthcare products described in subsection (c) available to prisoners for free, in a quantity that is appropriate to the healthcare needs of each prisoner.
>
> (b) QUALITY PRODUCTS.—The Director shall ensure that the healthcare products provided under this section conform with applicable industry standards.
>
> (c) PRODUCTS.—The healthcare products described in this subsection are tampons and sanitary napkins.

Hair styling irons (curling iron, flat iron) and hair dryers must also be made available to inmates.

Wardens will ensure inmates are provided the following products (at no cost to the inmates):

- Tampons, regular and super size.
- Maxi Pads with wings, regular and super size.
- Panty liners, regular.

Additional products of this type may be purchased and issued by the facility at the discretion of the Warden. Institutions will purchase the products in accordance with National Acquisitions guidance. These products are provided in addition to those required via the standardized gender-responsive commissary list.

In issuing feminine hygiene products, staff may not ration these items. For inmates in general population, all products must be made available in common areas, either a bathroom or accessible area of the housing unit. Women must have access to these items at all times of the day and may keep them in their cell, consistent with personal property requirements. Monthly issuance of these items is strictly prohibited, and unit replenishment of supplies must be done

with 24 hours of notification that a particular product is lacking. For women in restrictive housing, all five products must be available for issuance on a daily basis.

Misuse of items for other than intended purposes is not cause for withholding access, but is managed via routine disciplinary procedures.

6. PILOT PROJECTS

Research on best practices with the female population are evolving quickly. Pilot Projects aimed at enhancing gender-responsive programs and services are to be anticipated. These initiatives must be approved in accordance with the Program Statement **Pilot Initiatives, Approval and Evaluation.**

7. BIRTH CONTROL, PREGNANCY, CHILD PLACEMENT, AND ABORTION

§551.20 Purpose and scope.

The Bureau of Prisons provides an inmate with medical and social services related to birth control, pregnancy, child placement, and abortion. The Warden shall ensure compliance with the applicable law regarding these matters.

Pregnant females in Bureau custody represent a small population with a significant service need. The Bureau of Prisons provides programs to females, develops procedures for identifying pregnant females, and specifies any special precautions that apply to them.

§551.21 Birth control.

Medical staff shall provide an inmate with advice and consultation about methods for birth control and, where medically appropriate, prescribe and provide methods for birth control.

Medical staff shall provide interested inmates information pertaining to appropriate methods for birth control. The medical indication and appropriateness of prescribing birth control in a correctional environment ordinarily is limited to hormone replacement therapy. Refer to the Program Statement **Patient Care** for more information.

For inmates in or transferring to Residential Reentry Centers, on home confinement, or otherwise in a community setting while under Bureau supervision, birth control may be available under the terms of the Program Statement **Patient Care**.

§551.22 Pregnancy.

(a) The Warden shall ensure that each pregnant inmate is provided medical, case management, and counseling services.

(b) In order to ensure proper medical and social services, the inmate shall inform the institution medical staff as soon as she suspects she is pregnant.

(c) Medical staff shall arrange for the childbirth to take place at a hospital outside the institution.

Medical staff screen for pregnancy during intake, physical, and any contacts where this is appropriate. Upon learning of the inmate's pregnancy either by self-report or clinical diagnostics and assessment, the inmate is immediately notified (within 48-hours after confirmation of pregnancy) of the restraint restrictions as well as how to report any perceived staff misuse of restraints.

The First Step Act of 2018, Section 301 (codified at 18 U.S.C. § 4322):

(a) PROHIBITION.—Except as provided in subsection (b), beginning on the date on which pregnancy is confirmed by a healthcare professional, and ending at the conclusion of postpartum recovery, a prisoner in the custody of the Bureau of Prisons, or in the custody of the United States Marshals Service pursuant to section 4086, shall not be placed in restraints.

(b) EXCEPTIONS.—

(1) IN GENERAL.—The prohibition under subsection (a) shall not apply if—

(A) an appropriate corrections official, or a United States marshal, as applicable, makes a determination that the prisoner—

(i) is an immediate and credible flight risk that cannot reasonably be prevented by other means; or

(ii) poses an immediate and serious threat of harm to herself or others that cannot reasonably be prevented by other means; or

(B) a healthcare professional responsible for the health and safety of the prisoner determines that the use of restraints is appropriate for the medical safety of the prisoner.

(2) LEAST RESTRICTIVE RESTRAINTS.—In the case that restraints are used pursuant to an exception under paragraph (1), only the least restrictive restraints necessary to prevent the harm or risk of escape described in paragraph (1) may be used.

(3) APPLICATION.—

(A) IN GENERAL.—The exceptions under paragraph (1) may not be applied—

(i) to place restraints around the ankles, legs, or waist of a prisoner;

(ii) to restrain a prisoner's hands behind her back;

(iii) to restrain a prisoner using 4-point restraints; or

(iv) to attach a prisoner to another prisoner.

(B) MEDICAL REQUEST.—Notwithstanding paragraph (1), upon the request of a healthcare professional who is responsible for the health and safety of a prisoner, a corrections official or United States marshal, as applicable, shall refrain from using restraints on the prisoner or shall remove restraints used on the prisoner.

(c) REPORTS.—

(1) REPORT TO THE DIRECTOR AND HEALTHCARE PROFESSIONAL.—If a corrections official or United States marshal uses restraints on a prisoner under subsection (b)(1), that official or marshal shall submit, not later than 30 days after placing the prisoner in restraints, to the Director of the Bureau of Prisons or the Director of the United States Marshals Service, as applicable, and to the healthcare professional responsible for the health and safety of the prisoner, a written report that describes the facts and circumstances surrounding the use of restraints, and includes—

(A) the reasoning upon which the determination to use restraints was made;

(B) the details of the use of restraints, including the type of restraints used and length of time during which restraints were used; and

(C) any resulting physical effects on the prisoner observed by or known to the corrections official or United States marshal, as applicable.

(2) SUPPLEMENTAL REPORT TO THE DIRECTOR.—Upon receipt of a report under paragraph (1), the healthcare professional responsible for the health and safety of the prisoner may submit to the Director such information as the healthcare professional determines is relevant to the use of restraints on the prisoner.

(d) NOTICE.—Not later than 48 hours after the confirmation of a prisoner's pregnancy by a healthcare professional, that prisoner shall be notified by an appropriate healthcare professional, corrections official, or United States marshal, as applicable, of the restrictions on the use of restraints under this section.

(e) VIOLATION REPORTING PROCESS.—The Director of the Bureau of Prisons, in consultation with the Director of the United States Marshals Service, shall establish a process through which a prisoner may report a violation of this section.

(f) TRAINING.—

(1) IN GENERAL.—The Director of the Bureau of Prisons and the Director of the United States Marshals Service shall each develop training guidelines regarding the use of restraints on female prisoners during the period of pregnancy, labor, and postpartum recovery, and shall incorporate such guidelines into appropriate training programs. Such training guidelines shall include—

(A) how to identify certain symptoms of pregnancy that require immediate referral to a healthcare professional;

(B) circumstances under which the exceptions under subsection (b) would apply;

(C) in the case that an exception under subsection (b) applies, how to apply restraints in a way that does not harm the prisoner, the fetus, or the neonate;

(D) the information required to be reported under subsection (c); and

(E) the right of a healthcare professional to request that restraints not be used, and the requirement under subsection (b)(3)(B) to comply with such a request.

(2) DEVELOPMENT OF GUIDELINES.—In developing the guidelines required by paragraph (1), the Directors shall each consult with healthcare professionals with expertise in caring for women during the period of pregnancy and postpartum recovery.

(g) DEFINITIONS.—For purposes of this section:

(1) POSTPARTUM RECOVERY.—The term 'postpartum recovery' means the 12-week period, or longer as determined by the healthcare professional responsible for the health and safety of the prisoner, following delivery, and shall include the entire period that the prisoner is in the hospital or infirmary.

(2) PRISONER.—The term 'prisoner' means a person who has been sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense, or a person in the custody of the Bureau of Prisons, including a person in a Bureau of Prisons contracted facility.

(3) RESTRAINTS.—The term 'restraints' means any physical or mechanical device used to control the movement of a prisoner's body, limbs, or both.

Section 301 of the First Step Act mandates inmates in the custody of the Bureau shall not be placed in restraints, beginning on the date on which the pregnancy is confirmed by a healthcare professional, and ending at the conclusion of the postpartum recovery, which is the 12 week period after birth (or longer as determined by a health care professional). This prohibition shall not apply if an appropriate corrections official (under routine operations the Warden unless an immediate use of force is required) determines the inmate:

- is an immediate and credible flight risk that cannot be prevented by other means;
- poses an immediate and serious threat of harm to herself or others that cannot be

reasonably prevented by other means;

- or if a healthcare professional for the health and safety of the inmate determines that the use restraints is appropriate for the medical safety of the inmate.

If restraints are used, under one of the exceptions listed above, only the least restrictive restraints necessary to prevent harm or escape may be used. Under these exceptions, restraints may not be placed around the ankles, legs or waist of the inmate; may not restrain the inmate's hands behind her back; and may not restrain the inmate using 4-point restraints or restraining inmates to one another.

If restraints are used on a pregnant inmate, the individual involved is required to submit a memo to the Warden who will submit a report (not later than 30 days after placing the prisoner in restraints), to the Director describing the reasons for their use, the details of their use (including the date, type of restraints used and the length of time), and any observable effects of their use. The restraint of a pregnant inmate must be reported by the Warden to the Assistant Directors of Correctional Programs Division and Health Services Division as well as the Administrator of the Women and Special Populations Branch, Central Office.

A PRE-NATAL MDS code will be loaded in SENTRY within one calendar day by the Health Services staff member responsible for entering all medical duty status (MDS) assignments (See Attachment A). This code is replaced with a POSTPARTUM MDS code when the inmate is in postpartum recovery, which is the 12-week period after birth, or longer as determined by the healthcare professional. Medical staff immediately notify the Case Manager and the Social Worker as well as all other institution staff. In cases where there is no local Social Worker, the Regional Social Worker is notified. The Social Worker meets with the inmate to discuss options for child placement, abortion, and programming. Health Services staff document this contact and the inmate's notification of residential parenting program options in an electronic database within five calendar days of the meeting. Additional MDS codes related to residential parenting placement referrals will be entered as soon as a determination for placement is made.

§551.23 Abortion.

(a) The inmate has the responsibility to decide either to have an abortion or to bear the child.

(b) The Warden shall offer to provide each pregnant inmate with medical, religious, and social counseling to aid her in making the decision whether to carry the pregnancy to full term or to have an elective abortion. If an inmate chooses to have an abortion, she shall sign a statement to that effect. The inmate shall sign a written statement acknowledging that she has been provided the opportunity for the counseling and information called for in this policy.

When medical, religious, and social counseling sessions are completed, each staff member involved documents the session in a memorandum to the inmate's Central File.

A copy of each request for an elective abortion and the supporting documentation from the medical, religious, and social counseling sessions is sent for information purposes to the Medical Director's attention.

(c) Upon receipt of the inmate's written statements required by paragraph (b) of this section, ordinarily submitted through the unit manager, the Clinical Director shall arrange for an abortion to take place.

The Bureau assumes all costs associated with the abortion procedure only when the life of the mother would be endangered if the fetus is carried to term, or in the case of rape or incest. In all other cases non-Bureau funds must be used to pay for any abortion procedure, or else the planned abortion may not be performed. In all cases, however, whether the Bureau pays for the abortion or not, the Bureau may expend funds to escort the inmate to a facility outside the institution to receive the procedure.

Staff shall have knowledge of, and shall be guided by, applicable Federal and state laws and regulations. The Regional Counsel shall be consulted if there are questions concerning the interpretation of laws and regulations.

Pursuant to Section 103 of the Department of Justice Appropriations Bill for Fiscal Year 1996 (Public Law 104-134), the Bureau may not use appropriated funds to require any person to perform or facilitate the performance of an abortion. Staff who wish to have no involvement in facilitating the performance of abortions must advise their supervisor of this fact. Supervisors must not order a staff member's involvement in facilitating this procedure.

§551.24 Child placement.

(a) The Warden may not permit the inmate's new born child to return to the institution except in accordance with the Bureau of Prisons policy governing visiting.

(b) Child placement is the inmate's responsibility. The Warden shall provide opportunities for counseling by institution staff and community social agencies to aid the inmate with placement.

(c) The institution staff shall work closely with community agencies and persons to ensure the child is appropriately placed. The staff shall give notice to the

responsible community agency of the inmate's plan for her child. Child welfare workers may come to the institution in appropriate cases to interview and counsel an inmate.

Social work staff must establish a liaison with the welfare agency or its equivalent and ensures the Bureau receives advance notice of the intended child placement to allow sufficient time for their investigation of potential home sites for the child.

Social Workers also meet with the inmate to provide information regarding Bureau programs for pregnant females. These programs include Mothers and Infants Together (MINT) and the Residential Parenting Program (RPP). The social worker documents this informational contact in the Electronic Medical Record and notifies the Women and Special Populations Branch Administrator, Regional Social Worker, and institution Clinical Director of any inmate wishing to participate in either program.

Administrative discretion is used in deciding to pay for immediate post-natal care of an inmate's child while in custody when the Bureau finds itself responsible for the cost by default (no other resources can be compelled to pay). It is reasonable that the Bureau provides for the child's medical expenses for the first three days after routine vaginal birth or up to seven days for a Caesarean section.

Prior to the birth, the mother must make arrangements for a custodian to take care of the child. At this time, the CEO ensures the person or agency taking custody of the child is also asked to be responsible for medical care costs beyond three days after birth. (**Note**: This may be extended by the Regional Director for an additional seven days for extenuating circumstances on a case-by-case basis.) The person(s) receiving custody of the child should sign a Statement of Responsibility for medical care costs, clearly indicating that the signing party accepts financial responsibility. Unit management advises the inmate to obtain the statement while the inmate is still in the institution. Unit management will then forward copies to the Health Services Administrator (HSA) for placement in the HSA's outside hospitalization file, and to the Business Office.

7. MOTHERS AND INFANTS TOGETHER (MINT) PROGRAM

MINT is a residential program promoting bonding skills for designated pregnant inmates housed in RRC Facilities. The inmate resides with the child at all times inside a contract Residential Reentry Center (RRC). Female inmates are eligible to enter the program at the RRC generally during their last two months of pregnancy. After birth, the mother is allowed at least three additional months to bond with the child, although a minimum of six months is recommended.

The mother is then returned to an institution to complete her sentence, if necessary. If she is eligible for prerelease services, she may remain at that facility only if she is going to be supervised in that judicial district.

The CEO may approve early or extended placements with a recommendation by the treating obstetrician and Clinical Director's concurrence. A placement extending beyond 180 days requires the Regional Director's approval. The Assistant Directors of Health Services and Reentry Services are advised of these placement approvals and denials. Direct court commitments have a secondary designation noted on form BP-A0377, Inmate Load and Security Designation form. This is used to determine the institution responsible for the inmate's medical expenses while she is confined in the MINT Program.

Health Services staff confirm an inmate's pregnancy and evaluate her medical condition. For inmates not yet in custody, reviews are conducted before arrival whenever possible to allow the inmate to go straight to a MINT site. Health Services staff indicate whether RRC placement is medically appropriate and document this on form BP-A0351, Medical/Psychological Pre-Release Evaluation, which is forwarded to unit management. Unit management expeditiously completes the referral and forwards to the Residential Reentry Management Branch for consideration. When unit management has concerns regarding the appropriateness of such a placement, procedures are followed according to Program Statement **Community Corrections Center (CCC) Utilization and Transfer Procedures**. Additional guidance on RRC placement concerns is located in this program statement. When a pregnant inmate is determined not medically appropriate for placement, the Women and Special Populations Branch must be notified.

To qualify for the program, inmates must be pregnant upon commitment, with an expected delivery prior to release. The inmate or guardian must assume financial responsibility for the child's care, medical and support, while residing at the RRC. Should the inmate or the guardian be unable or unwilling to bear the child's financial cost, the inmate may be transferred back to her parent institution. An inmate who becomes pregnant while on furlough, has more than five years remaining to serve on her sentence(s), or plans to place her baby up for adoption must not be referred for MINT placement.

Referrals should state a specific date of placement approximately two months prior to the inmate's expected delivery date.

The RRC's Terminal Report should fully describe the inmate's experience in, and reaction to, the MINT Program. It should also summarize counseling received in the program and include medical or program recommendations for the institution to facilitate the inmate's transition.

Inmates in need of foster care placement assistance are referred to the institution Social Worker, or, if the institution does not have a Social Worker, the regional Social Worker, who should facilitate community assistance.

8. **RESIDENTIAL PARENTING PROGRAM (RPP)**

The Bureau has an inter-governmental agreement with the Washington Department of Corrections (WADOC) to place qualified, interested pregnant inmates in the RPP at the Washington Correctional Center for Females in Gig Harbor. This voluntary program allows designated pregnant inmates to reside with their child for up to 30 months post-delivery. After 30 months, inmates are released to their home residence if their sentences have been completed, or placed in home confinement if their sentences have not been completed and they meet the statutory requirements for home confinement. Participating females are transferred to WADOC upon acceptance and are responsible for caring for the child while living in a supervised environment. Inmates in the program are eligible for a variety of services (mental health and medical care, vocational training, etc.); childcare is provided while the inmate is participating in these activities.

The Bureau provides for the infant's medical expenses for the first three days after routine vaginal birth or up to seven days for a Caesarean section. Postnatal care and future expenses of the child born to an inmate in the program will be covered by the Department of Social and Health Services in Washington State.

Upon notification of interest from the social worker and verification of pregnancy from medical staff, the unit team completes form BP-A0210, Institutional Referral for CCC Placement, and submits it to the Seattle Residential Reentry Manager. Furloughs are only accepted Tuesdays through Thursdays at RPP. Release residence can be to any state.

The Designation and Sentence Computation Center (DSCC) may also refer initial designations to the Seattle Residential Reentry Manager, with a copy to the Women and Special Populations Branch Administrator.

To qualify for the program, designated inmates must:

- Be pregnant upon commitment, with an expected delivery date prior to release.
- Be scored as minimum security with Out or Community custody.
- Have release dates or home detention eligibility dates within 30 months of the expected delivery date.
- Have no 200 or higher series incident reports in the last six months.
- Have satisfactory or higher work evaluations (if available).

- Be clear of all serious disciplinary violations of an aggressive/assaultive nature.
- Have no current no-contact orders with minor children, no sex offense convictions, no crimes against a child, no domestic violence or other violent convictions, and no contact-founded allegation or inconclusive referrals for neglect or abuse with Child Protective Services.
- Be physically and mentally capable of caring for a child as determined by medical and mental health staff.
- Volunteer, and acknowledge program participation entails involvement in prenatal and postnatal programming related to parenting, use of the child development center and approved inmate caregivers, and maintenance of a schedule.

9. SPECIAL CONSIDERATIONS

Some pregnant inmates may choose not to participate or may be unqualified for participation in the above-described programs. Because these inmates may require special accommodations as the pregnancy progresses, the unit team arranges for inmates to wear different uniforms upon notification of pregnancy. These items are tailored to allow comfort during pregnancy-related weight gain.

Generally, pregnancy does not interfere with an inmate's ability to participate in Bureau programs. When medical exemption from programming is necessary, medical staff indicate this through the SENTRY and Bureau's Electronic Medical Record (BEMR) Medical Duty Status functions. Staff are also reminded of other considerations related to pregnant inmates:

- The Department of Justice's "Report and Recommendations Concerning The Use of Restrictive Housing" states, "Women who are pregnant, who are post-partum, who recently had a miscarriage, or who recently had a terminated pregnancy should not be placed in restrictive housing. In very rare situations, a woman who is pregnant, is postpartum, recently had a miscarriage, or recently had a terminated pregnancy may be placed in restrictive housing as a temporary response to behavior that poses a serious and immediate risk of physical harm. Even in such cases, this decision must be approved by the agency's senior official overseeing women's programs and services, in consultation with senior officials in health services, and must be reviewed every 24 hours."
- The Bureau of Prisons will carefully consider restrictive housing placements affecting females in any of the specified categories, taking into account the severity of the inmate's behavior and the Program Statements **Inmate Discipline Program** and **Special Housing Units**. When placing any of these offenders in restrictive housing, the Warden must contact the Women and Special Populations Branch Administrator, the Bureau Medical Director, and the Correctional Services Administrator for further guidance and continuation of care.
- There are significant special considerations on the use of restraints with pregnant females. If restraints are used, under one of the exceptions listed above, only the least restrictive

restraints necessary to prevent harm or escape may be used. Under these exceptions, restraints may not be placed around the ankles, legs or waist of the inmate; may not restrain the inmate's hands behind her back; and may not restrain the inmate using 4-point restraints or restrain inmates to one another.

- Medical staff may authorize additional nutritional or commissary items. This information is documented in BEMR and provided to the Food Service Administrator and Trust Fund Supervisor.
- Unit staff may consider giving additional family visits or telephone calls, consistent with national guidance, as the time of delivery nears, and after the birth of the child.
- Medical staff may recommend a change in housing (closer to Health Services) or lower bunk for safety reasons.
- Post-natal care of the inmate does not necessarily end when she returns from the hospital. Medical staff will evaluate and indicate through SENTRY and BEMR Medical Duty Status functions any activity limits. Inmates are also referred to the institution's Social Worker (or Regional Social Worker if a local position is vacant) to address any concerns following return to prison.
- Females who have given birth have the option to pump breast milk with a pump provided by the institution for as long as desired. Pumping allows the mother to nurse the child during visits or to retain her milk supply until her release. Ordinarily, this milk is not stored, but rather is disposed of by the inmate under staff supervision. There may be exceptions when milk is stored at the facility; in these rare instances, the Warden requests approval from the Health Services Division.
- Nursing infants is permitted in the visiting room.

REFERENCES

Program Statements

P1210.23 Management Control and Program Review Manual (8/21/02)
P1221.66 Directives Management Manual (7/21/98)
P1315.07 Legal Activities, Inmate (11/5/99)
P1542.06 Inmate Library Services (2/18/97)
P2100.04 Budget Execution Manual (3/18/14)
P4500.12 Trust Fund/Deposit Fund Manual (3/15/18)
P5100.08 Inmate Security Designation and Custody Classification (9/04/19)
P5267.09 Visiting Regulations (12/10/15)
P5270.09 Inmate Discipline Program (11/18/20)
P5270.11 Special Housing Units (11/23/16)
P5300.21 Education, Training, and Leisure Time Program Standards (2/18/02)
P5300.22 Volunteer Services (11/7/16)
P5310.15 Minimum Standards of Administration, Interpretation, Use of Education Tests (09/04/96)
P5310.16 Treatment and Care of Inmates with Mental Illness (5/01/14)
P5310.17 Psychology Services Manual (8/25/16)
P5330.11 Psychology Treatment Programs (4/25/16)
P5350.24 English-as-a-Second Language Program (ESL) (7/24/97)
P5350.27 Inmate Manuscripts (7/27/99)
P5350.28 Literacy Program (GED Standard) (12/1/03)
P5353.01 Occupational Education Programs (12/17/03)
P5354.03 Postsecondary Education Programs for Inmates (12/17/03)
P5355.03 Parenting Program Standards (01/20/95)
P5360.09 Religious Beliefs and Practices (6/12/15)
P5370.11 Recreation Programs, Inmates (6/25/08)
P5538.07 Escorted Trips (12/10/15)
P6031.04 Patient Care (6/3/14)
P7310.04 Community Corrections Center (CCC) Utilization and Transfer Procedure (12/16/98)

Other References

U.S. Department of Justice DOJ Report and Recommendations Concerning The Use of Restrictive Housing (1/25/16)

*ACA Standards (See Program Statement **Directives Management Manual**, Sections 2.5 and 10.3).*

- American Correctional Association Standards for Adult Correctional Institutions,. 5-ACI-3D-04, 5-ACI-3D-05, 5-ACI-6A-10, 5-ACI-6A-21, 5-ACI-5E-02, 5-ACI-5E-10

- American Correctional Association Performance Based Standards for Adult Local Detention Facilities, 4th Edition: 4-ALDF-4C-13, 4-ALDF-4C-22M, 4-ALDF-6B-02.
- American Correctional Association Standards for Administration of Correctional Agencies, 2nd Edition.

BOP Forms

BP-A0210	Institutional Referral for CCC Placement
BP-A0337	Inmate Load and Security Designation
BP-A0351	Medical/Psychological Pre-Release Evaluation

Records Retention

Requirements and retention guidance for records and information applicable to this program are available in the Records and Information Disposition Schedule (RIDS) on Sallyport.

Attachment A

Health Services staff are required to enter the MDS codes listed below.

ASSIGNMENT CODE	**DESCRIPTION**
PRE-NATAL	Pre-natal – Pregnancy Confirmed – Inmate is notified of Restraint Restrictions
PREG EDD	Pregnancy-Expected Due Date
MRNOTIFIED	MINT/Res Parent Notified of
MINTRPPINT	MINT/Res Parent Interest
MINTRPPDCL	MINT/Res Parent I/M Declined
MR MED YES	MINT/Res Parent Med Appvl YES
MR MED NO	MINT/Res Parent Med Appvl NO
MINTUNTYES	MINT Unit Team Refd YES
MINTUNTNO	MINT Unit Team Refd NO
RPP UNTYES	RPP Unit Team Refd YES
RPP UNT NO	RPP Unit Team Refd NO
MINTDENIED	Denied MINT Placement
RPPDENIED	Denied Res Parent Placement
MINT PL DT	MINT Date of Placement
RPP PL DT	Res Parent Date of Placement
POSTPARTUM	Postpartum Recovery
BRSTPMP	Breast Pump Provided

BOP Exhibit B

RETURNING TO THE INSTITUTION

Either post-delivery or after completing MINT/RPP, you may return to the institution if you are not releasing. If so, the following information will be helpful for you:

- Health Services staff and the Social Worker will follow-up with you to answer questions or address any post-natal concerns.
- If desired, you will be given the option to pump breast milk with a pump provided by the institution. Ask your Health Services provider for more information.
- You may nurse your infant during visitation.

IF YOU ELECT NOT TO CARRY TO TERM

- Please note that laws related to the termination of pregnancy vary among states.
- You will be responsible for the expenses related to the abortion procedure. The BOP will only assume the cost of the abortion in certain circumstances.
- In all cases, whether you or the BOP pays for the abortion, the BOP will arrange to escort you to an outside facility to receive the procedure.
- You will be asked to sign a written statement acknowledging you have been provided the opportunity for counseling and that you are choosing not to carry the child to term.
- Staff such as your Social Worker, Health Services, Psychology, and Religious Services are available to provide you with guidance and counseling throughout the abortion process.

Your Social Worker, Medical Provider, or Unit Team can provide additional information and guidance. Also, you can refer to Program Statement 5200.07.

A Guide for Expecting Moms in the BOP

Federal Bureau of Prisons
Women and Special Populations Branch (WASPB)

July 2021

The Bureau of Prisons provides an inmate with medical and social services related to pregnancy, child placement, and abortion.

THE PURPOSE AND BENEFIT OF THIS GUIDE

Being pregnant means that you have many important decisions to make. This guide will provide you with information related to programs and services offered by the Bureau of Prisons (BOP) during and after pregnancy in hopes of making motherhood a less challenging experience for you and your baby.

PREGNANCY CONFIRMATION

When you arrive at the institution, you will be screened for pregnancy by Health Services staff. If you think or know you are pregnant, you should let them know right away. If you have a medical condition that might complicate your pregnancy, it is important for you to notify staff of this as well.

Once your pregnancy has been confirmed by Health Services staff, all necessary BOP staff will be notified, to include your Case Manager and Social Worker. You may choose to involve Psychology or other staff.

RESTRAINT RESTRICTIONS

Use of restraints on prisoners during the period of pregnancy and postpartum recovery period (12 weeks or longer after delivery, as determined by the healthcare provider) is prohibited unless it is determined:

- the inmate is an immediate and credible flight risk that cannot reasonably be prevented by other means;
- or poses an immediate and serious threat of harm to herself or others that cannot reasonably be prevented by other means;
- or a healthcare professional responsible for the health and safety of the prisoner determines that the use of restraints is appropriate for the medical safety of the prisoner.

In the case that restraints are used, only the least restrictive restraints necessary to prevent the harm or risk of escape, may they be used.
The restraints may not be applied: around the ankles, legs, or waist of a prisoner; to restrain a prisoner's hands behind her back; to restrain a prisoner using four-point restraints; or to attach a prisoner to another prisoner. If you may have been placed in restraints inappropriately, notify BOP staff promptly.

DECIDING WHAT TO DO

The Social Worker will meet with you to discuss options for child placement, abortion, and programming. Medical, religious, and social counseling will be provided to assist you in making decisions. However, it is your responsibility to decide how to handle your pregnancy.

RESIDENTIAL PARENTING PROGRAM (RPP)

RPP is located outside of the federal prison in the Washington Correctional Center for Women in Gig Harbor. RPP allows mothers to reside and bond with their children for up to 30 months post-delivery. Mothers and children reside together at all times, in private living spaces, except when the mother is participating in programs. Mothers have a variety of program options such as educational, vocational, parenting, mental health treatment to choose from. RPP also hosts family friendly events, which include mothers, children, and approved outside visitors. After 30 months, mothers are released to their home residence if their sentences have been completed, or placed in home confinement if their sentences have not been completed and they meet certain requirements.

To be referred for RPP, you must meet these criteria:

- Be pregnant upon commitment, with an expected delivery date prior to release.
- Be scored as Minimum security with Out or Community custody.
- Have release dates or home detention eligibility dates within 30 months of the expected delivery date.
- Have no 200 or higher series incident reports in the last six months.
- Have satisfactory or higher work evaluations (if available).
- Be clear of all serious disciplinary violations of an aggressive/assaultive nature.
- Have no current no-contact orders with minor children, no sex offense convictions, no crimes against a child, no domestic violence or other violent convictions, and no contact-founded allegation or inconclusive referrals for neglect or abuse with Child Protective Services.

DURING PREGNANCY

- You will receive routine prenatal care through Health Services providers in the institution. For services not available at the institution, appointments will take place in doctors' offices and hospitals in the community.
- Your overall health impacts the health of your baby. You are encouraged to select healthy menu options and stay active with activities such as walking. Consult with your Health Services provider about healthy diet options and safe exercise plans.
- Unit Team will arrange for you to wear different uniforms to allow for maximum comfort due to pregnancy-related weight gain.
- If you are making plans for your child to be in the care of a TCP, you may be asked to provide information and documentation to the Social Worker or your Unit Team. If at any time your plans for child placement change, you must notify staff as soon as possible.
- The TCP will be asked to sign a Statement of Responsibility form. By signing this form, the TCP accepts responsibility for the child's medical care three days after birth.
- Make sure the TCP is on your approved Visiting List.

AFTER DELIVERY

- The BOP Social Worker and the hospital Social Worker will collaborate and determine when the TCP and approved family members can either visit (if approved) and/or pick up the infant. Keep in mind each situation will be different.
- The BOP Social Worker will contact your TCP and tell them where the hospital is located and what time to arrive. The TCP should not arrive until the stated time of the visit and/or transfer of infant to their care.
- BOP staff will supervise the visit and/or transition of the infant to the TCP. If the TCP should not arrive, the infant may be placed in the state custody.
- The TCP should bring the following items to the hospital when preparing for the infant to be released from the hospital:
    - Valid photo ID
    - Appropriate infant car seat
    - Weather-appropriate baby clothing
    - Bottles
    - Formula
    - Diapers
    - Wipes
- If the TCP has identified a pediatrician that will care for the child, this information should be provided to hospital staff, so that medical records can be forwarded after birth.
- It is recommended for the TCP to take the Temporary Care Agreement to their local Social Services Office to inquire about healthcare coverage, the Women, Infants, and Children (WIC) Program, or any other available services.

BOP Residential Programs

The Bureau offers two residential programs for expecting mothers, Mothers and Infants Together (MINT) and the Residential Parenting Program (RPP).

MOTHERS AND INFANTS TOGETHER (MINT) PROGRAM

MINT is a community residential program, which allows expecting mothers to move outside of the federal institution into a Residential Reentry Center (RRC) during the last two months of pregnancy. During this time, mothers prepare for the upcoming birth of their babies. After birth, mothers stay at the RRC for three additional months, and up to six months, to allow for additional bonding time with their child. Mothers and their babies live together in a private-room setting. Throughout their stay, mothers are encouraged to participate in a variety of programs such as parenting, educational, vocational, mental health, and life skills.

Currently, there are five MINT sites: Dallas/Fort Worth, TX; Greenbrier, WV; Phoenix, AZ; Springfield, IL; and Tallahassee, FL.

To be eligible to participate in MINT, the following criteria must be met:

- Be pregnant upon commitment, with an expected delivery date prior to release.
- Mother or TCP must assume financial responsibility for the child's care, medical and support, while residing at the RRC.
- If the mother or TCP are unable or unwilling to bear the child's financial cost, you may be transferred back to the institution.
- Must have less than five years remaining on your sentence.
- Cannot have plans of placing your child up for adoption.

"Personally for me, the MINT/RPP Program helped because I got that bonding time with my son. I think it's important that you get to be there for the milestones. The staff there is really great. They push you even when you don't want to push yourself. It feels like a home. You know they're staff but you feel that family bond with them. They guide you instead of shaming you with helping you."

Former MINT Participant

IF YOU ELECT TO CARRY TO TERM

- Now that you've decided to carry your baby to term, the next step in the planning process is for you to determine the best placement for your child. You and the Social Worker will discuss three placement options to include:
  - *Temporary Care Provider (TCP):* you may choose someone to act as your baby's caregiver while you are in prison. This person will assume temporary care of the child after delivery and while you are incarcerated, including financial responsibility for the child's medical expenses. This can be a family member, friend, or any other person that you specify.
  - *Adoption*: if you do not wish to raise your baby and/or do not have anyone who can take care of your baby while you are in prison, adoption may be an option for you. Be aware that adoption permanently ends your rights as a parent. It can also impact the rights of other family members to have contact with your child.
  - *Foster Care*: in the event that you do not identify a person to take responsibility for your child, the Social Worker will make arrangements with the Department of Human Services to ensure that the baby is properly taken care of until your release.
- Once you determine what placement option is best for you, the Social Worker, Health Services staff, and Unit Team will assist you with the next steps.
- Your Social Worker will provide information to you regarding programs offered by the BOP to assist you both before and after delivery; these programs include Mothers and Infants Together (MINT) Program and the Residential Parenting Program (RPP).
- Health Services staff will indicate whether a MINT/RPP placement is medically appropriate for you. If it is determined you are medically approved, documentation will be sent to your Unit Team.
- With a recommendation from Health Services, your Unit Team will determine if you meet certain eligibility requirements. MINT and RPP requirements are listed later in this guide. Once it is determined that you are eligible, your Unit Team will complete a referral. Your referral should include a specific date of placement, approximately two months prior to your expected delivery date.
- You will not be referred for MINT/RPP placement if you are putting your baby up for adoption.

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 10

Declaration of John Sheehan

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
v.	)	**Civil No. 1:21-cv-786**
THE STATE OF TEXAS,	)	
Defendant	)	

DECLARATION OF JOHN SHEEHAN

I, John Sheehan, declare the following to be true and correct:

PERSONAL BACKGROUND

1. I currently serve as the Assistant Director for the Prisoner Operations Division (POD), United States Marshals Service (USMS). I have been with the USMS since June of 1998. I was initially assigned to POD as a Deputy Assistant Director in March 2017. I later became the Acting Assistant Director for POD in February 2019; and was named the Assistant Director in January 2020.

2. I make the following statements based on my personal knowledge and other information made available to me in the course of my official duties as Assistant Director of POD.

3. This declaration is submitted in support of the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction.

THE UNITED STATES MARSHALS SERVICE (USMS)

4. The USMS is responsible, among numerous other duties, for detention management matters for individuals remanded into USMS custody by the Federal Courts. Detention management includes the housing, medical care, and transportation for federal pretrial detainees throughout the United States and its territories, including the State of Texas. POD is the Headquarters level Division of the USMS which oversees that mission.

5. The USMS does not own or operate detention facilities, but partners with state and local government agencies using intergovernmental agreements (IGAs) to house prisoners. Additionally, the USMS houses prisoners in available Federal Bureau of Prisons facilities and in private detention facilities. It is common for IGA and private contract facilities to transport and guard USMS prisoners when they are taken outside of the jail for medical care, in accordance with provisions in the agreement or contract.

6. To fulfill its mission of providing adequate medical care to persons within its custody, the USMS has compiled a comprehensive Prisoner Medical Policy. This includes Policy Directive 9.5 (attached as Exhibit A) which addresses medical care for pregnant prisoners in USMS custody. My duties require me to be familiar with the Prisoner Medical Policy, including Policy Directive 9.5.

USMS ABORTION POLICIES

7. Directive 9.5 states that a USMS prisoner may elect to have an abortion consistent with state law. *See* Policy Directive 9.5(D)(8), (F)(4)(a).

8. In accordance with federal law, federal funds may not be utilized for an abortion unless the pregnancy is the result of rape or incest, or when the pregnancy could endanger the mother's life. *See* Policy Directive 9.5(D)(8), (F)(4)(c).

9. In such circumstances, the USMS District Offices must notify POD of the prisoner's request for an abortion and upload supporting documentation showing the pregnancy stemmed from an act of rape or incest, or that carrying the pregnancy to term endangers the mother's life. *See* Policy Directive 9.5(F)(4)(d)-(e). Medical personnel in POD review the provided documentation, and then the Office of General Counsel (OGC) reviews the documentation to ensure the requirements of federal law have been met. *Id.* If the OGC concludes sufficient documentation exists to conclude that the pregnancy is the result of rape or incest, or would endanger the life of the mother, the USMS pays all costs of the abortion procedure, including the transportation and guard costs. *See* Policy Directive 9.5(F)(4)(f). USMS District Office staff are then required to "[m]ake the necessary arrangements for the prisoner to have an abortion at an appropriate medical facility at government expense." Policy Directive 9.5(F)(4)(f)(2).

10. In situations where federal funds may not be utilized for the abortion, the prisoner may still elect to have an abortion consistent with state law and federal law. *See* Policy Directive 9.5(F)(5)(a).

11. Where federal funds cannot be used to for the abortion, the USMS District Office must notify POD medical staff of the prisoner's request and include documentation confirming the pregnancy. *See* Policy Directive 9.5(F)(5)(b)-(c). The prisoner and her counsel are responsible for making arrangements with a provider in the community, and the prisoner must sign a written statement acknowledging her decision to

have an abortion, and that she will be responsible for the costs of the procedure. *See* Policy Directive 9.5(F)(5)(c). The prisoner may access community resources to assist with funding the abortion. Even in these cases, the USMS will provide and/or pay for the transportation and guard services to transport the prisoner to and from the location for the procedure to ensure appropriate prisoner security is maintained. *See* Policy Directive 9.5(F)(5)(d).

12. Presently, the USMS has approximately 14,664 prisoners in Texas, and 1,545 of those prisoners are female. The medical staff in POD has reviewed data and reported to me that from January 1, 2017, to September 10, 2021, there have been 403 pregnancies reported from USMS districts in the State of Texas. During that same period, there have been three prisoner abortion requests reported from USMS districts in the State of Texas. Two of these were elective abortions, where the USMS covers only the transportation and guard costs associated with the abortion, and one federally funded abortion, where the USMS absorbed the full cost of the abortion because of risk to the life of the prisoner. The USMS facilitated all three requests in accordance with policy.

S.B. 8 INTERFERES WITH USMS OPERATIONS IN TEXAS

13. S.B. 8 will likely create significant logistical, safety, and resource challenges and burdens for the USMS Districts in Texas far beyond challenges in any other state at this time.

14. S.B. 8 also impacts USMS staff's ability to make detention management and transportation decisions for inmates. For example, where a female prisoner requests an abortion beyond the time limit established in S.B. 8, the USMS will be required to temporarily move the prisoner out of state to provide the prisoner access to the procedure

if required by federal law. The mode of transportation will depend on the individual circumstances in each case and could include ground transport; commercial air; small aircraft (SOAP flight); or possibly, in extraordinary circumstances, a medical charter flight. USMS policy governing transportation of inmates is set out in USMS Policy Directive 16.1(D).

15. Once the prisoner is moved out of state for the purpose of accessing the procedure, she will be housed at a local facility near the abortion provider. Following the procedure, the prisoner will be returned to the facility where she is being temporarily housed and will remain there until such time as she is medically cleared for transportation back to her original housing facility in Texas. Because this is the movement of an in-custody prisoner, USMS personnel will be required where IGA or private facility staff may otherwise have sufficed, which will result in additional resource and manpower demands on USMS. IGA facilities are not typically authorized to transport prisoners out of state, so all transportation in such circumstances will require USMS personnel involvement. S.B. 8 thus imposes a significant operational change on USMS with respect to transporting and escorting inmates.

16. These burdens are compounded by the fact that most USMS prisoners are federal pretrial detainees, meaning that their movement must also be coordinated with the Federal Courts.

17. It is critical to USMS's mission that all personnel follow the agency's rules and regulations to ensure the orderly and safe detention of inmates. S.B. 8 harms that mission by creating concern and uncertainty among staff that adhering to USMS's rules and policies could expose them to civil liability and suit.

18. Separately, S.B. 8 creates the prospect that individual USMS employees involved in facilitating, transporting, and guarding prisoners receiving abortions out of state, in the course of their ordinary USMS duties, could potentially be named as defendants in lawsuits under S.B. 8.

19. S.B. 8 also interferes with USMS's contractors and contractual relationships. As explained, IGA and private contract facilities in Texas provide certain transportation and escort services to USMS inmates. While they would not be responsible for transporting inmates to facilities outside of Texas, they likely would play some role in preparing inmates housed at IGA and private facilities for transport, and in facilitating inmate access to resources in the community regarding abortion access. S.B. 8 thus also creates the prospect of civil liability and suit for these contractors.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

John P. Sheehan

John Sheehan
Assistant Director
Prisoner Operations Division
United States Marshals Service

Executed on: 9/14/21

USMS Exhibit A

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 11

Declaration of James S. De La Cruz

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Case No. 1:21-cv-796

DECLARATION OF JAMES S. DE LA CRUZ

I, James S. De La Cruz, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am employed in the position of Senior Federal Field Specialist (FFS) Supervisor within the Office of Refugee Resettlement (ORR), a component of the Administration for Children and Families (ACF) within the U.S. Department of Health and Human Services (HHS).

2. I have held the position of Senior Federal Field Specialist Supervisor since 2013. In this capacity, my job duties include supervision of the FFS Team. The FFS staff I supervise routinely make release and transfer decisions. Staff have a wide array of professional backgrounds, including Master Level Social Workers, previous Child Care Administrators, and some have licenses in their field to include Licensed Clinical Social Workers and PhD level psychologists. Best Interest Recommendations made by these individuals are based on best child welfare practices. From 2013 to 2018, I also oversaw the ORR Intakes Team.

3. Prior to assuming my current position, I held the position of FFS. In that capacity, I worked with care providers to ensure appropriate and safe care for children, responded to requests to assist care providers, provided training and technical assistance to colleagues and care providers, and liaised with community stakeholders. I also routinely made release and transfer decisions.

4. I have a Bachelor's Degree in Public Justice, which is a multidisciplinary degree that includes education in social work, psychology and the United States justice system. I also have a Master's Degree in Public Administration, focusing on public institutions and systems. I have a Master's in Social Work as well. Both my career and formal education focus on systems and institutions that provide for care and services for children and families.

5. From approximately 1984 to 2004 I worked with a private, non-profit agency that worked with "at risk youth." Children I worked with were referred by the Texas Department of Protective Services, various juvenile probation departments, runaway and drop-in children, parolees from the Texas Youth Commission, and Immigration and Naturalization Services. By 2004, I served as agency administrator, overseeing several programs for children aged 5 to 17 years. I also developed and opened a Transitional Living Program that provided transitional services to children turning 18 and services for young adults up to 21 years of age.

6. My testimony in this declaration is based upon my personal knowledge, information acquired by me in the course of performing my official duties (such as my knowledge of ORR policies and procedures, including the ORR Guide[1]) and my review of HHS records, systems, and information maintained by ORR in the regular course of my employment. I am familiar with the allegations in this matter, and submit this declaration in order to describe the

[1] https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied

immediate and irreparable harm ORR will suffer as a result of Texas's Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) (S.B. 8).

7. ORR is the agency charged by Congress with the care and custody of UC. The UC population includes tender-age children, pregnant and parenting teens, and youth who have been trafficked. UC are defined by statute as individuals without lawful immigration status under the age of 18 without a parent or legal guardian in the United States who is available to provide care and physical custody; they are in the legal custody of the United States. *See* 6 U.S.C. § 279(b)(1), (g)(2); *see also* 8 U.S.C. § 1232(b)(1) ("[T]he care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.").

8. Within ORR, the UC Program is responsible for the administration of a network of facilities throughout the country that care for UC arriving in the United States prior to those children being placed with sponsors in the United States, typically a parent or related adult. ORR is not responsible for immigration enforcement and is not a federal law enforcement agency—ORR is a federal child welfare agency.

9. ORR does not directly operate any child-care facilities itself, but rather provides grants to child-care providers throughout the United States, who care for UC on ORR's behalf pursuant to cooperative agreements with ORR. As of September 2021, ORR oversees at least 240 grantee facilities under at least 50 separate grants. Within Texas, there are at least 67 care-provider facilities operating under various grants. In addition to these grantee care-provider facilities, ORR also operates two Emergency Intake Sites (EIS) in Texas, which are emergency facilities that were set-up to decompress overcrowded U.S. Customs and Border Protection (CBP) facilities. EIS facilities minimize the time UC must spend in CBP custody and provide basic care

to UC while they await release to a sponsor or transfer to a licensed ORR shelter.

ORR's Provision of Health Care for Unaccompanied Children

10. ORR facilitates and funds access to health care for all UC in its custody. ORR has developed its health care services policies with the goals of ensuring the children's physical and mental well-being and the safety of care providers, medical personnel, and communities. *See* ORR Policy Guide: Alien Children Entering the United States Unaccompanied, Health Care Services, 3.4, available at https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-3#3.4. ORR provides access to medical care in accordance with standards of care set by, *inter alia*, applicable state welfare laws and regulations, the 1997 Flores Settlement Agreement (*Flores v. Reno*, Case CV-85-4544-RJK(px) (C.D. Cal.)), and the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. No. 110-457 § 235, 122 Stat. 5044, 5074-5082 (Dec. 23, 2008) (codified at 8 U.S.C. § 1232).

11. ORR's internal guidelines state that ORR must provide "[a]ppropriate routine medical and dental care, family planning services, including pregnancy tests and comprehensive information about and access to medical reproductive health services and emergency contraception" to unaccompanied minors, per the terms of the Flores Settlement Agreement. ORR Policy Guide: Alien Children Entering the United States Unaccompanied, Care Provider Required Services, 3.3, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-statesunaccompanied-section-3#3.3. The same guidelines also state that "[c]are providers must comply with all applicable State child welfare laws and regulations and . . . must deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied alien child." *Id.*

12. An ORR Policy Memorandum on Medical Services Requiring Heightened ORR Involvement provides instructions on requests for abortion, significant surgical and medical procedures, and procedures that may threaten the life of a child. ORR Policy Memorandum: Medical Services Requiring Heightened ORR Involvement, available at https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf. The policy also addresses confidentiality and notification procedures for minors who are pregnant, considering an abortion, or have had an abortion. ORR care providers are required to comply with state law governing access to abortion and abortion services. *Id.*

13. ORR's policy memorandum on Medical Services Requiring Heightened ORR Involvement is the direct result of a settlement reached in *Garza v. Hargan*, Case 1:17-cv-02122-TSC (D.D.C), implementing a preliminary injunction entered by the court. The *Garza* court enjoined ORR from preventing a UC's transportation to an abortion facility or otherwise interfering with or obstructing a UC's access to an abortion, including by further forcing her to disclose her abortion decision against her will or disclosing her decision, forcing her to obtain pre- and/or post-abortion counseling from an anti-abortion entity, and/or retaliating against her for her abortion decision. *Id.* at Dkt. 29. Therefore, much of the contents of ORR's policy memorandum are Court-ordered and obligate ORR to adhere to the policies outlined therein.

14. Consistent with its obligations to provide care for the UC in its custody, ORR must provide access to abortion services when requested and permitted by law, including in cases of rape or incest, following judicial bypass procedures or parental consent and subject to appropriations restrictions on paying for certain abortions. ORR Policy Memorandum: Medical Services Requiring Heightened ORR Involvement, available at https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf

15. UC in ORR custody in Texas have previously requested abortions that would violate S.B. 8. ORR anticipates that requests for abortions in Texas that would violate S.B. 8 will continue to be made.

S.B. 8 will Interfere with ORR's Operations and Increase ORR's Costs

16. I understand that in nearly all cases S.B. 8 bans abortions performed by a physician licensed by the State of Texas if fetal cardiac activity has been detected. Specifically, S.B. 8 provides that "a physician may not knowingly perform or induce an abortion . . . if the physician detect[s] a fetal heartbeat . . . or fail[s] to perform a test to detect a fetal heartbeat." Tex. Health & Safety Code § 171.204(a). S.B. 8 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestation sac." *Id.* § 171.201(1).

17. I understand that S.B. 8 contains no exceptions for pregnancies that result from rape, sexual abuse, or incest, or for pregnancies involving serious fetal anomalies, including those incompatible with life after birth. The law provides an exception only for a "medical emergency . . . that prevents compliance" with the law. *Id.* § 171.205(a).

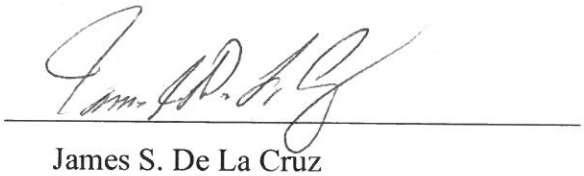
18. I understand that the prohibitions in S.B. 8 purport to apply to anyone who performs or induces a prohibited abortion, anyone who "knowingly" "aids or abets" the performance or inducement of a prohibited abortion, and anyone who "intends" to perform or aid a prohibited abortion. *Id.* § 171.208(a)(1)–(3). Under the statute, aiding and abetting includes "paying or reimbursing the costs of an abortion through insurance or otherwise." *Id.* § 171.208(a)(2).

19. S.B. 8's prohibition on "knowingly" "aid[ing] or abet[ting]" the performance or inducement of a prohibited abortion, and imposition of liability on anyone who "intends" to

perform or aid a prohibited abortion, will interfere with ORR's operations and likely increase the costs of ORR's transport of unaccompanied children in their care who request abortion-related services constitutionally protected by federal law but prohibited by S.B. 8. *See* 6 U.S.C. § 279(a), (b).

20. By prohibiting nearly all abortions in Texas after six weeks of pregnancy, without exceptions for rape, sexual abuse, or incest, S.B. 8 conflicts with ORR's statutory, judicially mandated, and constitutional responsibilities. Where ORR is obligated to provide access to the abortion services that S.B. 8 outlaws, S.B. 8 purports to require ORR to refrain from providing access to those services within Texas and therefore must relocate women who wish to access those services out of Texas. Thus, S.B. 8 purports to regulate ORR's administration of a federal program and will increase costs to the extent that ORR must incur increased transportation and other costs to move UCs out of Texas in order to provide access to abortion services to which UCs are constitutionally entitled but that are prohibited by S.B. 8.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 14, 2021.



James S. De La Cruz
Senior Federal Field Specialist Supervisor
Division of Children's Services
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 12

Declaration of Patrice Rachel Torres

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Case No. 1:21-cv-796

DECLARATION OF PATRICE RACHEL TORRES

I, Patrice Rachel Torres, make the following declaration pursuant to 28 U.S.C. § 1746 to the best of my knowledge and belief.

1. I am currently the Administrator of the Office of Job Corps (OJC), Employment and Training Administration (ETA), United States Department of Labor (DOL). I have served in this position since April 2021. In my capacity as Administrator, I am responsible for providing executive management and oversight of the Job Corps program. Prior to this position, from 2004 until March 2021, I served in several leadership positions within DOL, including Job Corps Budget Director and Associate Administrator with the Wage and Hour Division.

2. My testimony in this declaration is based upon my personal knowledge of the Job Corps Program and information provided to me in my official capacity. I submit this declaration in support of the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction in the above-captioned matter.

The Job Corps Program

3. Job Corps is a primarily residential career and education training program authorized under Subtitle C of Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. § 3191, et. seq.

4. The program assists eligible individuals ages 16 through 24 to complete their high school education and provides vocational training designed to help program graduates enter the workforce or an apprenticeship, go on to higher education, or join the military.

5. Job Corps centers are residential facilities that provide enrollees room and board for up to three years, basic health care, a living allowance, certain transportation benefits, and career transition assistance. Job Corps center operators also offer academic instruction and skills training, work-based learning experience, and residential support services.

6. Since it was first established, Job Corps has trained and educated over two million individuals. Job Corps is the largest residential, educational, and career technical training program in the nation.

7. There are 123 Job Corps centers nationwide, with at least one Job Corps center in each of the 50 states, the District of Columbia, and Puerto Rico.

8. Ninety-nine centers are operated by private entities under a contract with DOL while 24 are operated by the United States Department of Agriculture's (USDA's) Forest Service under an interagency agreement with DOL (USDA-DOL IAA). DOL's Office of the Senior Procurement Executive, Job Corps Acquisition Services ("JCAS") awards and administers all Job Corps center operations contracts.

9. Program Managers and Contracting Officer Representatives ("CORs") in DOL's Office of Job Corps ("OJC") work alongside JCAS Contracting Officers ("CO") to oversee contractor performance and contract compliance. A JCAS CO works alongside CORs in DOL's Dallas,

Texas regional office to award, administer, and oversee performance of 16 Job Corps center operations contracts that are under the purview of the Dallas region, which covers parts of the South and the Midwest, including those centers in Texas.

Pregnancy-Related Services Through the Job Corps Program

10. While enrolled, Job Corps participants receive tuition-free housing, meals, a living allowance, and career transition assistance after they have completed the program. DOL regulations require Job Corps to provide access to basic medical, dental, and mental health care services during the program. 20 C.F.R. § 686.530(d).

11. Job Corps' Policy and Requirements Handbook (June 15, 2021) (PRH), available at https://prh.jobcorps.gov/Pages/Home.aspx, contains the requirements for the operation of each Job Corps center. These requirements are incorporated by reference into every contract for contractor-operated centers and into the USDA-DOL IAA for the operation of U.S. Forest Service centers.

12. The PRH requires centers to provide basic health services, to include a family planning program and pregnancy-related services. PRH § 2.3 R.7. It further requires that centers afford students who are pregnant and/or experiencing pregnancy-related medical conditions "the same access to medical services, leave, and medical separation as any other student experiencing a medical condition." *Id.* § 2.3 R.7(b). Centers are required to provide pregnancy-related services, including identifying available community health and social resources and services and making arrangements for transportation for the purpose of obtaining such resources and services. *Id.* § 2.3 R.7(c)(3).

13. The PRH requires that "[p]regnancy-related services must include information on the options of continuing or terminating the pregnancy." PRH § 2.3 R.7(d).

14. Unless a student wishes to rely on a friend or family member, the PRH requires centers to provide transportation to and from off-center medical appointments, including medical appointments for the purpose of terminating a pregnancy. PRH §§ 2.3 R.7(c)(3), 6.7 R.9(d).

15. The services described in PRH § 2.3 R.7 are required to be provided for the duration of the pregnancy, and abortion-related services are not limited to the period prior to a fetal heartbeat being detected.

Implications of S.B. 8 for Job Corps Program Operations in Texas

16. There are four Job Corps centers located in the state of Texas, each operated by a private entity under a contract with DOL (hereinafter "Texas Job Corps Contractors"):

a. The David L. Carrasco Job Corps Center, operated by Odle Management Group and located in El Paso, Texas;

b. The Gary Job Corps Center, operated by Adams and Associates and located in San Marcos, Texas;

c. The Laredo Job Corps Center, operated by Strategix Management and located in Laredo, Texas; and

d. The North Texas Job Corps Center, operated by Serrato Corporation and located in McKinney, Texas.

17. At full capacity, the four Job Corps centers in Texas have the ability to serve 2,632 students. The centers are currently at a reduced capacity due to the COVID-19 pandemic. There are currently 626 students enrolled at these four centers, with 303 of these students residing on site. Job Corps began virtually enrolling students in May 2021; since May 25, 2021, 244 students have virtually enrolled at the Texas Job Corps Centers. Contingent on the improvement of COVID-19 pandemic conditions in Texas, these students will transition into

on-site participation. As a result, the number of students will be steadily increasing over the next three months as centers return more students to campus.

18. In accordance with Job Corps' requirements, Texas Job Corps Contractors must provide counseling on the option of abortion and/or transportation to an abortion to any Job Corps enrollees they learn are pregnant.

19. The four centers in Texas have provided family planning services to over 100 students over the past three years, including transportation to access such services. That number likely would have been higher had the pandemic not decreased the number of students in the program and on site since March 2020.

20. If pregnancy-related services required under the PRH are unavailable in Texas, Texas Job Corps Contractors must locate such services in another state, advise the enrollee of the availability of such services, and provide transportation for the student to obtain those services, if requested.

21. To the extent that abortions are unavailable in Texas for students seeking to terminate their pregnancies after a fetal heartbeat has been detected, the centers in Texas will need to provide transportation for students outside of Texas in order to comply with their obligations under the PRH. For the Carrasco Job Corps Center, it will cost between $800 (for car transportation) and $2,000 (by air) to transport an enrollee to the nearest, out-of-state abortion provider, including labor and transportation costs. For the Gary Job Corps Center, it will cost between $335 (by car) and $965 (by air) to transport an enrollee to obtain abortion services; for North Texas, between $350 (by car) and $532 (by air); and for Laredo, transportation expenses will be approximately $522.

22. All of the Texas Job Corps Contractors have indicated to DOL that they intend to continue complying with their contractual obligations with respect to the provision of abortion-related counseling and transportation services.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED at Washington, D.C., on this 14th day of September, 2021.

Patrice Rachel Torres Digitally signed by Patrice Rachel Torres
Date: 2021.09.14 14:47:12 -04'00'

Patrice Rachel Torres
Administrator
Office of Job Corps
Employment and Training Administration
U.S. Department of Labor

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 13

Declaration of Jillian Matz

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Case No. 1:21-cv-796

DECLARATION OF JILLIAN MATZ

I, JILLIAN MATZ, make the following declaration pursuant to 28 U.S.C. § 1746 to the best of my knowledge and belief.

1. I am currently the Senior Director of Job Corps Acquisition Services (JCAS), Office of the Senior Procurement Executive (OSPE), Office of the Assistant Secretary for Administration and Management (OASAM), United States Department of Labor (DOL). I have served in this position since September 2020. In my capacity as Senior Director, I am the Head of Contracting Activity for JCAS, responsible for providing executive management and oversight of contracting to support the Job Corps program, specifically Job Corps center operator contracts and construction contracts, including the award and administration of such contracts.

2. Prior to this position, from 2011 until September 2020, I served in several procurement-related leadership positions within DOL, including the Division Chief of Job Corps Procurement, and the Director of DOL's Office of Procurement Policy.

3. My testimony in this declaration is based upon my personal knowledge of the Job Corps program, Job Corps procurement actions, and of the rules and regulations governing the award and administration of Job Corps center operator contracts, and information provided to me in my official capacity. I am submitting this declaration in support of the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction in the above-captioned matter.

Texas Job Corps Center Operator Contracts

4. Job Corps is a primarily residential career and education training program authorized under Subtitle C of Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. § 3191, et. seq. The program operates through 123 Job Corps centers nationwide.

5. There are four Job Corps centers located in the state of Texas. Each is operated by a private entity under a contract with DOL (hereinafter "Texas Job Corps Contractors"). They are:

   a. The David L. Carrasco Job Corps Center, operated by Odle Management Group and located in El Paso, Texas;

   b. The Gary Job Corps Center, operated by Adams and Associates and located in San Marcos, Texas;

   c. The Laredo Job Corps Center, operated by Strategix Management and located in Laredo, Texas; and

   d. The North Texas Job Corps Center, operated by Serrato Corporation and located in McKinney, Texas.

6. The Job Corps program's Policy and Requirements Handbook (PRH), available at https://prh.jobcorps.gov/Pages/Home.aspx, contains requirements for the operation of each Job Corps center. The requirements in the PRH are incorporated by reference into every

contract for contractor-operated centers. For instance, DOL's contract with Adams and Associates for the Gary Job Corps Center states:

> The Job Corps Policy and Requirements Handbook (hereinafter referred to as the PRH) has been developed to include all mandatory program operation and reporting requirements in one document and is hereby incorporated into this RFP and the resultant contract by reference.

DOL Contract No. 1630J4-18-C-0001, Section C.1(D), Governing Regulations, Handbook, General Provisions, Statement of Work, at 13. Similar language to the same effect is found in the contracts for the other three Texas Job Corps Contractors. *See* DOL Contract No. DOL-ETA-17-C-0022, Section C.1(D), Governing Regulations, Handbook, General Provisions, Statement of Work, at 12 (Carrasco Job Corps Center); DOL Contract No. 1605JW-21-C-0013, Section C.1(B), Governing Statute, Regulations, and Handbook, General Provisions, Statement of Work, at 15 (Laredo Job Corps Center) ("The Contractor shall comply with the PRH, which is hereby incorporated by reference in the Contract."); DOL Contract No. 1605JW-21-C-0008, Section C.1(B), Governing Statute, Regulations, and Handbook, General Provisions, Statement of Work, at 8-9 (North Texas Job Corps Center) ("The Contractor shall comply with the ePRH, which is hereby incorporated by reference in the Contract.").[1]

7. As explained in greater detail by the Declaration of Patrice Rachel Torres, Administrator of the Office of Job Corps, the PRH, and thus DOL's contracts with the Texas Job Corps Contractors, require the provision of abortion-related counseling and transportation services. *See* PRH § 2.3 R.7.

Effects of S.B. 8 on DOL Contracts with the Texas Job Corps Contractors

8. DOL's contracts with the Texas Job Corps Contractors require the provision of abortion-related counseling and transportation services, and so any damages imposed under S.B. 8 on

[1] DOL will provide copies of the referenced contracts, under seal or with appropriate redactions of confidential business information, if requested by the Court.

contractors and their staff acting within the scope of their employment would be allowable and allocable contract costs and would have to be paid by DOL, subject to procedural and other requirements for payment of costs and claims under the contracts.

9. Two of the Texas Job Corps Contractors (the Carrasco Job Corps Center and the Gary Job Corps Center) operate under cost reimbursement contracts. Federal contractors working under cost reimbursement contracts are entitled to reimbursement of costs necessary to contract performance that are "reasonable," "allocable," and "allowable." *See* 48 C.F.R. § 31.201-2(a). The cost of fines and penalties resulting from the failure of the contractor to comply with state law are allowable and thus recoverable from DOL where the fines and penalties are "incurred as a result of compliance with specific terms and conditions of the contract." 48 C.F.R. § 31.205-15(a). Thus, the operators of the Carrasco and Gary Job Corps Centers will be entitled to reimbursement of the reasonable additional costs they incur as a result of complying with the contractual terms set forth in the PRH.

10. The other two Texas Job Corps Contractors (the Laredo Job Corps Center and the North Texas Job Corps Center) operate under fixed price contracts. They can obtain equitable (upward) adjustments to the contract price, citing an unforeseen change in circumstances beyond their control and not the result of their negligence or fault, and provided notification and other requirements for such adjustments are followed, which would include costs attributable to S.B. 8. Job Corps center operators are well acquainted with the procedures for requesting equitable adjustments of their contracts to address increased prices, and with the rules entitling them to such adjustments. For example, DOL recently implemented new policies requiring unvaccinated Job Corps center staff to undergo periodic COVID testing. Two Texas Job Corps contractors – the operators of the Carrasco and Gary Job Corps

Centers – have recently indicated to DOL that they intend to file requests to recover the increased costs associated with the Department's new COVID testing requirements.

11. If a Texas Job Corps Contractor, in keeping with its statutory, regulatory, and contractual obligations, transports a student so that that student may obtain abortion services, any judgment levied against that contractor would be a cost that is ultimately borne by DOL.

12. DOL will also likely incur financial costs if a contractor, intimidated by the financial penalty imposed by Texas, declines to perform its contractual and regulatory duties. In that case, the contractor could be in breach of its contract obligations. To ensure the Government receives the required services and the full value of its contract, DOL would obtain a new contractor who will comply with federal guidelines in the face of contrary state law. DOL would then seek appropriate remedies from the contractor that declined to comply, in the form of damages for excess procurement costs and other administrative and programmatic impacts. For example, these costs would include the staff time at the contracts office and the Job Corps program office spent to negotiate and issue any necessary modifications to the contracts, including market research and negotiation of prices with replacement contractors.

13. Job Corps center contractors are contractually required to offer Job Corps enrollees transportation services so that they can obtain medical services, including abortions. *See* PRH § 2.3(R7), (R9)(d). Those transportation costs are allowable, reimbursable costs under DOL's contracts with the operators of the Carrasco Job Corps Center and the Gary Job Corps Center. The operators of the Laredo Job Corps and the North Texas Job Corps Centers would be entitled to an equitable adjustment in contract prices for those unforeseen, additional transportation costs, provided such costs are reasonable. Thus, if Texas Job Corps Contractors must transport students outside of Texas in order to terminate their pregnancies after a fetal heartbeat is detected, these new and additional costs that are reasonably necessary

for contract performance will ultimately be passed through to DOL and payable by DOL under its contracts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. EXECUTED at Washington, D.C., on this 14th day of September, 2021.

JILLIAN MATZ

Digitally signed by JILLIAN MATZ
Date: 2021.09.14 14:19:42 -04'00'

JILLIAN MATZ

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 14

Declaration in Support of the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction ("Bodenheimer Decl.")

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, et al., *Plaintiff,* v. THE STATE OF TEXAS, *Defendant.*	Case No. 1:21-CV-796

DECLARATION IN SUPPORT OF THE UNITED STATES' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

I, Laurie Bodenheimer, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Associate Director, Healthcare and Insurance, of the United States Office of Personnel Management ("OPM"). I have served in this role at OPM since May 2019. From May 2019 until February 2021, I served as Acting Director of Healthcare and Insurance; in February 2021, I was appointed as permanent Associate Director. In this capacity, I am part of the Federal Employees Health Benefits (FEHB) Program team that negotiates with carriers to establish health benefits plan options in which Federal employees and eligible annuitants may enroll.

2. The statements contained in this Declaration are based on my personal knowledge and information made available to me in my official capacity. I have reviewed the Complaint in this matter and understand that this Declaration is being submitted in support of the United States' emergency motion for a temporary restraining order or temporary injunction in the above-captioned matter.

3. Each year, OPM negotiates with carriers over what the FEHB plans will cover and

the rates that the carriers will charge for enrollment in those plans. Upon reaching an agreement, OPM and the carrier enter into a contract executed by each party. Eligible federal employees and annuitants may then elect to enroll in the carrier's plan.

4. Carriers with which OPM contracts include, for example, the Blue Cross and Blue Shield Association, the Government Employees Health Association, Inc., and the NALC Health Benefit Plan. Many carriers offer nationwide plans. Other carriers offer local plans, including local Texas plans that cover federal employees and annuitants within their geographic service areas in Texas.

5. The FEHB plans that are currently in place for 2021 were negotiated in the summer of 2020, and all contain coverage for abortions under certain circumstances. In accordance with federal law, these plans exclude services, drugs, or supplies related to abortions, but this exclusion does not apply "when the life of the mother would be endangered if the fetus were carried to term, or when the pregnancy is the result of an act of rape or incest." *See*, *e.g.*, Blue Cross and Blue Shield Service Benefit Plan Section 6. General Exclusions at 134 (e-page 137), https://www.fepblue.org/our-plans/-/media/PDFs/Brochures/Standard-and-Basic-Option-brochure_2021.pdf.

6. Approximately 122,505 women in Texas were enrolled in health plans in the FEHB Program during 2020. Of these female enrollees, approximately 62,806 were active federal employees and approximately 59,699 were annuitants. These numbers include only enrollees; OPM does not have data identifying the number of female family members covered under an employee's or annuitant's enrollment, including spouses, adult children up to age 26, or dependent children. Thus, the total number of females in Texas insured through the FEHB Program exceeds 122,505, likely by a substantial amount.

7. If a woman insured under a FEHB plan receives a covered abortion in Texas, the carrier of her health plan funds the abortion to the extent that any network, deductible, or other cost sharing requirements are satisfied. The mechanism of funding may vary by the carrier, plan type, and circumstances of the procedure. Carriers might transmit payment for the procedure to the provider, pay providers through capitated agreements over time, or — in certain circumstances — reimburse the patient for the cost of the procedure. Some health maintenance organizations (HMOs) may employ providers and pay their salaries rather than paying for individual services.

8. S.B. 8 prohibits abortions that are covered under FEHB plans for federal employees, annuitants and their covered family members and appears to impose liability for the paying or reimbursing of the costs of an abortion through insurance or otherwise. Carriers will be placed in the untenable position of either complying with their contract with OPM or violating S.B. 8, thereby raising the possibility that carriers will refuse to pay for or provide covered abortions as required under their FEHB contracts.

9. As such, S.B. 8 likely will materially interfere with OPM's administrative authority to conduct the FEHB Program to the extent that S.B. 8 may cause carriers to become unwilling to provide coverage for abortion services, or to the extent that providers are unwilling to perform abortion services, which OPM and the carrier have already negotiated for and approved as covered under FEHB contracts.

10. Pursuant to 5 U.S.C. 8902(j), each FEHB contract requires the carrier to agree to pay for or provide a health service in an individual case if OPM finds that the covered individual is entitled thereto under the terms of the contract. If a FEHB carrier denied a claim because of S.B. 8 for an abortion that is covered under the terms of the FEHB health benefits plan, such a denial could result in costly and time-consuming litigation for OPM.

11. The covered individual who sought the abortion would be entitled to invoke OPM's disputed claims process in accordance with 5 C.F.R. 890.105, by seeking reconsideration of the carrier's denial of the claim. If the carrier continued to deny the claim, the covered individual could appeal to OPM for administrative review of the coverage decision. If OPM were to find the health service covered, OPM would then issue a final administrative decision finding the covered individual entitled to coverage for the abortion under the terms of the FEHB plan, and OPM would direct the carrier to pay for or provide the service.

12. A carrier's failure to comply with an OPM directive would be cause for a contract dispute between OPM and the carrier. If OPM were not able to compel coverage by the carrier, OPM could be exposed to litigation by the covered individual for failure to appropriately enforce its contract with the carrier.

13. In the case of an HMO, if a provider employed by or under contract with the carrier chose not to provide an abortion that is covered under the terms of a health benefits plan negotiated with OPM, OPM could determine pursuant to 5 C.F.R. 890.103(d) that such a refusal constituted an impaired relationship between the patient and the plan's provider that jeopardized adequate medical care. In that case, OPM could terminate the covered individual's enrollment in that HMO and permit enrollment in another FEHB plan. However, S.B. 8 creates the real potential that no providers may be available to provide this service under any FEHB plan in the individual's geographic area or even in the entire state.

14. S.B. 8 may also impact OPM's negotiations with carriers regarding health benefits to be provided in future years. Carriers may refuse to continue to cover abortion services that they determine conflict with S.B. 8. Consequently, S.B. 8 may materially interfere with OPM's statutory duty and discretion to approve plans containing terms that OPM finds to be necessary and desirable in FEHB plan contracts. Because nationwide plans must cover uniform benefits for all covered

individuals nationwide, a carrier for a nationwide plan may refuse to cover abortions prohibited by S.B. 8 not only for insureds in Texas, but in all states, in order to ensure uniformity in coverage nationwide and comply with S. B. 8. If this were to occur, OPM would be thwarted in its ability to ensure the availability of FEHB plans that contain necessary and desirable terms.

15. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 14, 2021

LAURIE BODENHEIMER

Digitally signed by LAURIE BODENHEIMER
Date: 2021.09.14 13:28:13 -04'00'

Laurie Bodenheimer
Associate Director, Healthcare and Insurance
U.S. Office of Personnel Management

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	Civil No. 1:21-cv-796

EXHIBIT 15

Declaration of Anne Marie Costello

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § § § §	Case No.: 1:21-cv-796

DECLARATION OF ANNE MARIE COSTELLO

I, Anne Marie Costello of the Center for Medicaid and CHIP Services (CMCS) at the Centers for Medicare & Medicaid Services (CMS), declare that the following statements are true and correct to the best of my knowledge and belief, and that they are based on my personal knowledge as well as information provided to me in the ordinary course of my duties.

Declarant's Background

1. I am employed by the Department of Health and Human Services (HHS) in CMCS at CMS. I am the Deputy Director for CMCS. I have held this position since January, 2020. Before that, I served as the Director of the Children and Adults Health Programs Group within CMCS. I have been employed at CMS since 2010.

2. CMCS is a component of CMS. It is charged with administering the Medicaid program and serves as CMS's focal point for assistance with formulation, coordination, integration, and implementation of all national program policies and operations relating to Medicaid, the Children's Health Insurance Program (CHIP), and the Basic Health Program (BHP). CMCS works in partnership with states, assists state agencies in successfully carrying

out their responsibilities for effective program administration and protecting beneficiaries, and, as necessary, supports states in correcting problems and improving the quality of their operations. CMCS also identifies and proposes modifications to program measures; regulations; laws; and policies to reflect changes or trends in the health care industry, program objectives, and beneficiaries' needs.

3. Due to the nature of my official duties, I am familiar with Medicaid state plans and the coverage of services under such plans.

Medicaid Program

4. Medicaid is a joint state and federal program that generally provides for making medical assistance available to eligible individuals under Title XIX of the Social Security Act. "Medical assistance" is defined in section 1905(a) of the Social Security Act (the Act) as payment for all or part of the cost of specified care and services, the care and services themselves, or both. *See* 42 U.S.C. 1396d.

5. States are not required to participate in the Medicaid program. If a state decides to participate in Medicaid, then it agrees to provide services to Medicaid beneficiaries that meet federal requirements. In exchange, CMS provides matching funds, known as Federal Financial Participation ("FFP"), to the states. States initially pay providers for furnishing covered services to Medicaid beneficiaries, and then claim their expenditures for federal matching. Federal matching funds are paid at statutorily-specified matching rates, which generally vary by state.

6. The state of Texas participates in Medicaid. For federal fiscal year 2021, the federal medical assistance percentage – the federal matching rate for most medical assistance expenditures – is 68.01 percent for Texas (including a temporary 6.2 percentage point increase under section 6008 of the Families First Coronavirus Response Act, which is available during the

COVID-19 public health emergency as long as Texas meets statutorily specified conditions). Texas has claimed FFP for one abortion during the period between January 1, and April 30, 2021.

7. The Medicaid statute sets forth a series of mandatory services that states must provide, and optional services that states may provide to eligible beneficiaries. Section 1902(a)(10)(A) of the Act specifies that inpatient and outpatient hospital services (as defined in sections 1905(a)(1) and (a)(2)) and physician services (1905(a)(5)(A)) must be covered for all individuals eligible under a state plan. In addition, states must cover a unique benefit called "early and periodic screening diagnostic, and treatment services" (EPSDT) for beneficiaries under age 21 pursuant to sections 1905(a)(4)(B) and 1905(r) of the Act. The EPSDT benefit includes "[s]uch other necessary health care, diagnostic services, treatment, and other measures described in section 1905(a) to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." See section 1905(r)(5) of the Act. Optionally, states may also cover clinic services, as specified in section 1905(a)(9) of the Act. Under its State Plan, Texas covers mandatory services, including physician, in- and outpatient hospital, and EPSDT services, as well as optional clinic services.

8. As specified in regulations codified at 42 C.F.R. § 440.230(a), the state plan must specify the amount, duration, and scope of each service covered under the plan. The state may place appropriate limits on a service based on, for example, medical necessity or utilization control criteria, but each service must be sufficient in amount, duration, and scope "to reasonably achieve its purpose." *Id*. § 440.230(b), (d). For anyone covered in a categorically needy group, whether optional or mandatory, or for medically needy beneficiaries whom the state may

optionally cover, the state "may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 or 440.220 to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition." *Id.* § 440.230(c).

Abortion Services Under Medicaid

9. Abortion services are not a discrete category of care and services within the definition of medical assistance; however, abortion may fall under one or more categories of mandatory services, including physician services, in- or out-patient hospital services, or services medically necessary for a beneficiary under age 21 under the EPSDT benefit, or under the optional category of clinic services. Abortions that are necessary to save the life of a pregnant person, or resulting from rape or incest, fall within the scope of services comprising "medical assistance" that may be medically necessary for a particular person in a particular circumstance.

10. Since 1976, Congress has restricted the use of federal Medicaid funds for abortions, limiting their use to certain circumstances. The Hyde Amendment, Division H, Title V, Sections 506 and 507 of the Consolidated Appropriations Act, 2021, provides that in general, none of the funds appropriated under HHS's appropriations act "shall be expended for any abortion." Consolidated Appropriations Act, 2021, Division H, Title V, §§ 506, 507, Pub. L. 116-260, 134 Stat 1182, 1622 (Dec. 27, 2020); 42 U.S.C. § 1397ee(c)(7). This limitation however, does not apply if the pregnancy is the result of an act of rape or incest, or if a pregnant person suffers from a physical disorder, physical injury, or physical illness that a physician certifies would place the pregnant person in danger of death unless an abortion is performed. This means that federal Medicaid matching funds are available to pay for any abortion in these Hyde-excepted circumstances as provided in regulations codified at 42 C.F.R. part 441, subpart E.

11. The rape and incest exceptions to the Hyde Amendment's abortion funding restriction were present from the first version of the Hyde Amendment in 1976 through 1981, when these exceptions were eliminated. The exceptions were added again in 1993 and on December 28, 1993, CMS (then called the Health Care Financing Administration or HCFA) issued a State Medicaid Director (SMD) Letter discussing recent changes to the Hyde Amendment. (Attachment A). That letter stated:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

12. The substance of the December 28, 1993 letter was reiterated in a subsequent 1998 SMD Letter that continues to be in effect. (Attachment B). That letter states:

> As with the language in effect since October 1, 1993, the revised Hyde Amendment provides for funding for abortions if the pregnancy is the result of an act of rape or incest. As discussed in my December 28, 1993 letter, all abortions covered by the Hyde Amendment, including those abortions related to rape or incest, are medically necessary services and are required to be provided by states participating in the Medicaid program.

13. CMS continues to interpret the Medicaid statute and regulations and the Hyde Amendment to cover abortions in cases of rape or incest, in addition to endangerment to the life of the pregnant person, as stated in the 1993 and 1998 SMD Letters. States may not impose unreasonable limits on these services or restrict them so that they do not allow them to reasonably achieve their purpose.

Impact of S.B. 8

14. I understand Texas Senate Bill 8 as drafted to provide no exceptions for situations in which persons have experienced rape or incest. The law therefore purports to prevent pregnant persons in Texas from obtaining a service authorized under both mandatory and optional benefit categories that Texas covers under Medicaid. This is at odds with federal law. Texas Senate Bill 8 places unreasonable limits on Medicaid coverage for abortions in the case of rape or incest and restricts that coverage so that it does not allow such benefits to reasonably achieve their purpose. It therefore violates Title XIX of the Social Security Act and associated federal regulations.

Pursuant to 28 U.S.C. § 1746, and under penalty of perjury, I declare the foregoing is true and correct to the best of my knowledge.

9-14-21
Date

ANNE MARIE COSTELLO
Deputy Director
Center for Medicaid and CHIP Services
Centers for Medicare & Medicaid Services