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

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al*., Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, *et al*., Defendants.	No. 1:20-cv-00323-LY

MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Planned Parenthood Center for Choice ("PP Houston"), Planned Parenthood of Greater Texas Surgical Health Services ("PPGT Surgical Health Services"), Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), Whole Woman's Health, Whole Woman's Health Alliance, Southwestern Women's Surgery Center ("Southwestern"), Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center ("Austin Women's"), and Dr. Robin Wallace, M.D. move for a temporary restraining order, followed by a preliminary injunction, to enjoin Defendants' efforts to immediately ban most abortion procedures during the COVID-19 pandemic through their application of Governor Greg Abbott's March 22, 2020, Executive Order GA 09, "Relating to hospital capacity during the COVID-19 disaster" and the Texas Medical

Board's ("TMB") emergency amendment to 22 Tex. Admin. Code § 187.57 ("Emergency Rule"), which imposes the same requirements as Executive Order GA 09.[1]

As the American College of Obstetricians and Gynecologists ("ACOG") has recognized, abortion care is essential care because it cannot be delayed without risking the health and safety of the patient.[2] Accordingly, Plaintiffs' provision of this care is entirely consistent with the Governor's Executive Order, which bars all "surgeries and procedures" in Texas that are "not immediately medically necessary" during the coronavirus disease 2019 (COVID-19) outbreak ("Executive Order") (attached as Ex. B to Compl. for Injunctive & Declaratory Relief, ECF No. 1 ("Compl.")).

However, on March 23, 2020, Texas Attorney General Ken Paxton issued a news release singling out abortion providers, suggesting that continuing to provide most abortions (other than those performed in an immediate medical emergency) would violate the Executive Order, and noting that "[t]hose who violate the governor's order will be met with the full force of the law." Ken Paxton, Attorney Gen. of Tex., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to

[1] On March 24, 2020, the TMB adopted an emergency rule to enforce the Executive Order. Under preexisting law, the TMB can temporarily suspend or restrict a physician's license if the physician's "continuation in practice would constitute a continuing threat to the public welfare." 22 TAC § 187.57(b). The Emergency Rule expands this basis for discipline to include "performance of a non-urgent elective surgery or procedure." 22 Tex. Admin. Code §187.57 (emergency regulation adopted Mar. 23, 2020), *available at* https://tinyurl.com/v4pz99u (attached as Ex. C to Compl.). Because the Emergency Rule contains the same requirement to postpone surgeries and procedures that are not immediately necessary, *see id.*, Plaintiffs discuss the Emergency Rule together with the Executive Order above and throughout.

[2] ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020) (attached as Ex. A to Compl.).[3] By stating that the Executive Order applies to "*any type* of abortion," the Attorney General's news release suggests the Attorney General interprets the Executive Order as limiting even the provision of medication abortion, which involves only taking medications by mouth and is not "surgery" or a "procedure" that falls within the terms of the Executive Order. *See id* (emphasis added).

During the COVID-19 outbreak, Plaintiffs—like all healthcare providers—have an important role to play in serving their communities, including by preserving much-needed medical resources that are in short supply during the pandemic and taking steps to reduce the transmission and spread of COVID-19, while continuing to provide essential healthcare services. They are doing their part by stopping all non-essential procedures that require health care staff to use personal protective equipment ("PPE"), such as sterile and non-sterile gloves and masks, and by reducing as much as possible the use of PPE during procedural abortions and other essential medical procedures that they intend to continue to provide in keeping with the terms and purpose of the Executive Order.

Given the Attorney General's aggressive threats of criminal liability, however, Plaintiffs have been forced to cancel numerous medication abortion and procedural abortion appointments this week and will be forced to cancel hundreds of future appointments, throwing abortion access in the state into disarray. The State's actions violate nearly five decades of Supreme Court precedent that categorically prohibits states from banning abortion before viability, and they are, therefore, unconstitutional.[4] Absent an order from this Court, Plaintiffs' patients will be denied

[3] *Available at* https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all.

[4] At minimum, even if the Executive Order does not apply to medication abortion, on the Attorney General's interpretation it bans abortions after the ten-week cutoff for medication abortion.

their right to access safe and legal previability abortion in Texas and be forced to carry pregnancies to term against their will amidst a health system overburdened by responding to COVID-19. Accordingly, Plaintiffs seek to restrain and preliminarily enjoin Defendants, their officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them from enforcing or complying with the Attorney General's interpretation of the Executive Order to prohibit abortion procedures.

STATEMENT OF FACTS

A. The Governor's Executive Order

In March 2020, the United States declared a state of emergency and the State of Texas declared a state of disaster related to the COVID-19 pandemic. *See* Executive Order at 2; Proclamation by the Governor of the State of Texas (Mar. 13, 2020)[5]; Proclamation No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020). The virus has reached every state in the country, with nearly 1,000 confirmed cases in Texas and twelve deaths at the time of this filing.[6] Federal and state officials and medical professionals expect a surge of infections that will test the limits of a health care system already facing a shortage of PPE,[7] particularly N95 masks.[8]

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[5] *Available at* https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

[6] Ctrs. for Disease Control & Prevention, *Cases in U.S.* (last updated Mar. 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html; Tex. Dep't of State Health Servs., *Texas Case Counts: COVID-19* (last updated Mar. 25, 2020), https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83.

[7] Ctrs. for Disease Control & Prevention, *Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States* (last updated Feb. 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html.

[8] Andrew Jacobs, Matt Richtel & Mike Baker, *'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire*, N.Y. Times, Mar. 19, 2020, https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html.

In light of this new reality, on March 22, 2020, Governor Greg Abbott issued an executive order barring "all surgeries and procedures that are not immediately medically necessary," effective immediately. Executive Order at 3.[9] By way of justification, the Executive Order states that "a shortage of hospital capacity or personal protective equipment would hinder efforts to cope with the COVID-19 disaster" and "hospital capacity and personal protective equipment are being depleted by surgeries and procedures that are not medically necessary" *Id.* at 2. Although the Executive Order does not define "personal protective equipment," Plaintiffs understand that term to refer, for example, to N95 masks, surgical masks, non-sterile and sterile gloves, disposable protective eyewear, disposable gowns, hair covers, and shoe covers, which are commonly used in surgical procedures, including—for some types of PPE—procedural abortions. Decl. of Polin C. Barraza in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Barraza Decl.") ¶ 7, attached hereto as Ex. 1; Decl. of Alicia Dewitt-Dick in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Dewitt-Dick Decl.") ¶¶ 6, 19, attached hereto as Ex. 2; Decl. of Andrea Ferrigno in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Ferrigno Decl.") ¶¶ 10, 21, attached hereto as Ex. 3; Decl. of Amy Hagstrom-Miller in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Hagstrom-Miller Decl.") ¶¶ 13, 22, attached hereto as Ex. 4; Decl. of Jessica Klier in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Klier Decl.") ¶¶ 6, 11, attached hereto as Ex. 5; Decl. of Ken Lambrecht in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Lambrecht Decl.") ¶¶ 7, 12, attached hereto as Ex. 6; Decl. of Ann Schutt-Aine, M.D. in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Schutt-Aine Decl.") ¶¶ 8, 25, attached hereto as Ex.

[9] The Executive Order cites as its authority section 418.012, which allows the Governor to issue Executive Orders with the "force and effect of law," and section 418.061(a), which permits the Governor to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." Executive Order at 2 (citing Tex. Gov't Code §§ 418.012, 418.016(a)).

7; Decl. of Pl. Robin Wallace, M.D. in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Wallace Decl.") ¶¶ 7, 12, attached hereto as Ex. 8.

> In full, the Executive Order describes the care covered by the Executive Order as all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

Executive Order at 3. The Executive Order does not define "serious medical condition" or "serious adverse medical consequences." It further states that procedures that "would not deplete the . . . personal protective equipment needed to cope with the COVID-19 disaster" are exempt from the order. *Id*.

The Executive Order remains in effect until 11:59 PM on April 21, 2020, at the earliest, or until Governor Abbott rescinds or modifies it. *Id.* Federal officials and medical professionals expect the pandemic to last for a year or eighteen months.[10] The current shortage of PPE is expected to continue for the next three or four months.[11] Failure to comply with the Executive Order is a criminal offense punishable by a fine of up to $1,000, confinement in jail for up to 180 days, or both fine and confinement. Executive Order at 3 (citing Tex. Gov't Code § 418.173). These criminal penalties may in turn trigger administrative enforcement by the Texas Health and Human Services Commission, the Texas Medical Board, and the Texas Board of Nursing, which are authorized to pursue disciplinary action against licensees who violate criminal laws.[12]

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[10] Denise Grady, *Not His First Epidemic: Dr. Anthony Fauci Sticks to the Facts*, N.Y. Times, Mar. 8, 2020, https://www.nytimes.com/2020/03/08/health/fauci-coronavirus.html.

[11] Ctrs. for Disease Control & Prevention, *Healthcare Supply of Personal Protective Equipment*, (last updated Mar. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/healthcare-supply-ppe.html; *see also*, 22 Tex. Admin. Code § 187.57 (TMB emergency regulation does not expire until July 20, 2020).

[12] 25 Tex. Admin. Code §§ 139.32(b)(6), 135.24(a)(1)(F); 22 Tex. Admin. Code § 185.17(11); Tex. Occ. Code Ann. §§ 164.051(a)(2)(B), (a)(6); 301.452(b)(3), (B)(10).

B. Abortion in Texas

Individuals seek abortion for a multitude of personal and often complex reasons. By way of example, some patients have abortions because they conclude that it is not the right time to become a parent or have additional children, they desire to pursue their education or career, or they lack the necessary financial resources or a sufficient level of partner or familial support or stability. Ferrigno Decl. ¶ 32; Hagstrom-Miller Decl. ¶ 30; Schutt-Aine Decl. ¶ 20. Other patients seek abortions because continuing with the pregnancy could pose a greater risk to their health. Schutt-Aine Decl. ¶ 20.

There are two main methods of abortion: medication abortion and procedural abortion. Schutt-Aine Decl. ¶ 12. Both methods are equally effective in terminating a pregnancy. Schutt-Aine Decl. ¶ 12. Medication abortion involves the patient ingesting a combination of two pills: mifepristone and misoprostol. Schutt-Aine Decl. ¶ 13. The patient takes the mifepristone in the health center and then, typically twenty-four to forty-eight hours later, takes the misoprostol at a location of their choosing, most often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage. Schutt-Aine Decl. ¶ 13. Although medication abortion is safe and effective through eleven weeks as measured from the first day of a pregnant person's last menstrual period ("LMP"), Texas law restricts this method to the first ten weeks LMP.[13] Plaintiffs provide medication abortion to that ten-week limit.

Despite sometimes being referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incision, no need for general anesthesia, and no requirement of a sterile field. Schutt-Aine Decl. ¶ 16. In the procedural abortion known as

[13] Texas Health and Safety Code section 171.063 restricts the first drug to the limit on the federally approved label, which is ten weeks. *See* U.S. Food & Drug Admin., *Mifeprex (mifepristone) Information* (last updated Feb. 5, 2018), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information.

aspiration, the clinician uses gentle suction from a narrow, flexible tube to empty the contents of the patient's uterus. Schutt-Aine Decl. ¶ 16. Before inserting the tube through the patient's cervix and into the uterus, the clinician may dilate the cervix using medication and/or small, expandable rods. Beginning around fifteen weeks LMP, clinicians generally must use instruments to complete the procedure, a technique called dilation and evacuation ("D&E"). Later in the second trimester, the clinician may begin cervical dilation the day before the procedure itself. Schutt-Aine Decl. ¶ 16. For some patients, medication abortion is contraindicated or there are other factors that would necessitate a procedural abortion, such as when the patient has an allergy to the medications or other medical conditions that make procedural abortion relatively safer. Schutt-Aine Decl. ¶ 17. Plaintiffs provide procedural abortion in both the first and second trimester. Texas law prohibits abortion care except in narrow circumstances at or after twenty-two weeks LMP. *See* Tex. Health & Safety Code § 171.044.[14]

Neither method of abortion requires extensive PPE. In fact, for medication abortion, providing patients with the medication does not require the use of any PPE. Barraza Decl. ¶ 7; Dewitt-Dick Decl. ¶ 19; Ferrigno Decl. ¶ 10; Hagstrom-Miller Decl. ¶ 13; Lambrecht Decl. ¶ 12; Klier Decl. ¶ 11; Schutt-Aine Decl. ¶ 25; Wallace Decl. ¶ 12. For procedural abortion, providers use PPE such as gloves, a surgical mask, disposable protective eyewear, disposable or washable gowns, hair covers, and shoe covers. Barraza Decl. ¶ 7; Dewitt-Dick Decl. ¶ 19; Ferrigno Decl. ¶¶ 10, 12; Hagstrom-Miller Decl. ¶¶ 13, 15; Klier Decl. ¶ 11; Lambrecht Decl. ¶ 12; Schutt-Aine

[14] This provision prohibits abortion when "the probable post-fertilization age of the unborn child is 20 or more weeks." Tex. Health & Safety Code § 171.044. "Post-fertilization age" means "the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum," *id*. § 171.042, which occurs approximately two weeks after the first day of a patient's last menstrual period. Thus, twenty weeks post-fertilization is twenty-two weeks LMP.

Decl. ¶ 25; Wallace Decl. ¶ 12.[15] Most Plaintiffs do not have N95 masks, and those that do have only a small supply that they rarely, if ever, use. (Out of all of Plaintiffs' facilities and physicians, only one physician has used an N95 mask since the beginning of the COVID-19 pandemic and that physician has been reusing the same single mask as an extra precaution during all patient interactions.) Barraza Decl. ¶ 8; Ferrigno Decl. ¶ 13; Hagstrom-Miller Decl. ¶ 16; Klier Decl. ¶ 6; Lambrecht Decl. ¶ 12; Schutt-Aine Decl. ¶ 27. Plaintiffs could further conserve PPE during the pandemic were Defendants willing to waive medically unnecessary abortion restrictions such as mandated extra in-person visits prior to the abortion, the unnecessary gestational age limit for medication abortion, ultrasound requirements, and in-person follow-up requirements.[16]

Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. Decl. of Kamyon Conner in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Conner Decl.") ¶ 5, attached hereto as Ex. 9; Dewitt-Dick Decl. ¶ 22; Schutt-Aine Decl. ¶ 23. Patients will need to schedule an appointment, gather the resources to pay for the abortion and related costs, Conner Decl. ¶ 5; Dewitt-Dick Decl. ¶ 22; Schutt-Aine Decl. ¶ 23, and

[15] Gloves are typically needed for any transvaginal ultrasound or laboratory exam, but are not required for transabdominal ultrasounds. Per CDC guidance, Plaintiffs also provide patients for whom there is a concern for COVID-19 or other upper respiratory disease with a mask. Ctrs. for Disease Control & Prevention, *Frequently Asked Questions about Personal Protective Equipment* (Mar. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirator-use-faq.html.

[16] Temporarily lifting these restrictions to minimize unnecessary in-person visits would be consistent with Defendants' general response to the pandemic. 28 Tex. Admin. Code § 35.1 (emergency regulation adopted Mar. 17, 2020) (suspending regulations related to telemedicine); Tex. Med. Bd., *Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Telemedicine During Texas Disaster Declaration for COVID-19 Pandemic* (Mar. 19, 2020), http://www.tmb.state.tx.us/idl/A2936385-466D-15D1-0F9E-F486D0491A27 (same); Executive Order at 3 (suspending certain hospital regulations); Office of the Tex. Governor, *Governor Abbott Takes Action to Expand Texas Hospital Capacity* (Mar. 25, 2020), https://gov.texas.gov/news/post/governor-abbott-takes-action-to-expand-texas-hospital-capacity (waiving certain requirements for hospitals, free-standing emergency medical facilities, and end-stage renal facilities).

arrange transportation to a clinic, time off of work, and possibly childcare during appointments, often without any paid sick leave or other paid time off work. Conner Decl. ¶¶ 5, 11; Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 33; Schutt-Aine Decl. ¶ 23. Delays result in higher financial and emotional costs to the patient. Conner Decl. ¶¶ 5, 11; Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 34; Hagstrom-Miller Decl. ¶ 33; Schutt-Aine Decl. ¶ 23; Wallace Decl. ¶ 16.

Meanwhile, Texas legal restrictions on abortion, which are some of the harshest in the country, impose burdens that weigh even more heavily during the current pandemic and that also undermine Defendants' stated goal of preserving PPE. For example, Texas law requires most patients to make at least two in-person appointments for an abortion, even though most patients could obtain care just as safely in one visit.[17] Texas law also mandates medically unnecessary ultrasounds,[18] as well as in-person follow-up visits that could safely be provided through telemedicine.[19] Texas law unnecessarily restricts medication abortion to ten weeks when it can safely be provided through eleven weeks, thereby eliminating an evidence-based method to reduce the need for abortion by procedure.[20] And minor patients, unless emancipated, must obtain either written consent from a parent or a judicial bypass order before they can receive care.[21] During the COVID-19 pandemic, patients must navigate these barriers against the backdrop of job insecurity,

[17] Tex. Health & Safety Code § 171.012 (mandating that patients receive an ultrasound at least twenty-four hours before an abortion procedure).

[18] *Id*.

[19] Tex. Health & Safety Code § 171.063(e), 25 Tex. Admin Code § 139.53(b)(4). Indeed, to respond to the pandemic, the state has suspended restrictions on telemedicine generally, 28 Tex. Admin. Code § 35.1 (emergency regulation adopted Mar. 17, 2020); Tex. Med. Bd., *supra* note 16, and could suspend the existing restrictions barring Plaintiffs from using telemedicine to provide medication abortion and post-abortion follow-up care. Tex. Occ. Code § 111.005(c); Tex. Health & Safety Code § 171.063(e), 25 Tex. Admin Code § 139.53(b)(4).

[20] Tex. Health & Safety Code § 171.063(a)(2).

[21] Tex. Family Code § 33.003.

minimal public transit availability, and limited childcare assistance due to mandatory social-distancing and shelter-in-place orders.

The window during which a patient can obtain an abortion in Texas is limited. Pregnancy is generally forty weeks in duration, and Texas prohibits abortion except in narrow circumstances after twenty-two weeks LMP. Ferrigno Decl. ¶ 35; Hagstrom-Miller Decl. ¶ 34; Schutt-Aine Decl. ¶ 21; Wallace Decl. ¶ 10. Although abortion is a very safe medical procedure, the health risks associated with it increase with gestational age. Dewitt-Dick Decl. ¶ 22; Ferrigno Decl. ¶ 36; Hagstrom-Miller Decl. ¶ 35; Schutt-Aine Decl. ¶ 22. As ACOG and other well-respected medical professional organizations have observed, specifically in relation to the COVID-19 pandemic, abortion "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[22]

Indeed, while much is unknown about COVID-19, including whether it can complicate pregnancy, some pregnant people may be exposed to additional health risks from the disease. ACOG has warned that "pregnant women are known to be at greater risk of severe morbidity and mortality from other respiratory infections such as influenza and SARS-CoV. As such, pregnant women should be considered an at-risk population for COVID-19."[23]

The COVID-19 pandemic has exacerbated existing burdens on patients seeking abortion care. It has limited public transit availability, caused layoffs and other work disruptions, shuttered

[22] ACOG et al., *supra* note 2.

[23] ACOG, *Practice Advisory - Novel Coronavirus 2019 (COVID-19)* (last updated Mar. 13, 2020), https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019; *see also* Ctrs. for Disease Control & Prevention, *Information for Healthcare Providers: COVID-19 and Pregnant Women* (last updated Mar. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html.

schools and childcare facilities, and otherwise limited patients' options for transportation and childcare support during a time of recommended social-distancing and shelter-in-place orders.[24] Indeed, jobless claims are soaring due to the virus.[25] Conner Decl. ¶¶ 8, 11; Dewitt-Dick Decl. ¶ 23; Ferrigno Decl. ¶ 33; Hagstrom-Miller Decl. ¶ 32; Schutt-Aine Decl. ¶ 24.

C. Plaintiffs' Implementation of the Executive Order

Plaintiffs are committed to doing their part and following the Governor's Executive Order in an effort to "flatten the curve," protect patients and staff, and minimize the use of PPE. Even before the order, Plaintiffs had taken numerous steps in this direction by, for example, limiting the number of individuals present for any procedure who would require PPE. Barraza Decl. ¶ 11; Dewitt-Dick Decl. ¶¶ 9, 11; Klier Decl. ¶ 13; Lambrecht Decl. ¶ 15; Schutt-Aine Decl. ¶ 30; Wallace Decl. ¶ 13.

Plaintiffs immediately prepared to comply with the Executive Order, for example adopting policies identifying the numerous relevant factors to determine whether a procedure would be

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[24] Tex. Exec. Order No. GA-08 (Mar. 19, 2020) (closing Texas schools and discouraging Texans from participating in non-essential activities); Jacqulyn Powell, *Will Child Care Centers Shut Down During COVID-19 Outbreak?*, KXAN (Mar. 23, 2020), https://www.kxan.com/news/education/will-child-care-centers-shut-down-during-covid-19-outbreak/ (saying that 2,400 child care operations in the state have reported closures); Metro. Transit Authority of Harris Cty., *METRO Response to Coronavirus (COVID-19)*, https://www.ridemetro.org/Pages/Coronavirus.aspx (last visited Mar. 24, 2020) (noting a "sharp ridership decline," reducing frequency of bus services, and reducing customer seating in Harris County); *see also* White House, *The President's Coronavirus Guidelines for America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; Rebecca Shabad, *Fauci Predicts Americans Will Likely Need to Stay Home for at Least Several More Weeks*, NBC News (Mar. 20, 2020) https://www.nbcnews.com/politics/donald-trump/fauci-predicts-americans-will-likely-need-stay-home-least-several-n1164701.

[25] *See* Matt Largey, *COVID-19 Is Costing People Their Jobs. Here's How to Apply for Unemployment in Texas*, KUT 90.5, Mar. 19, 2020, https://www.kut.org/post/covid-19-costing-people-their-jobs-heres-how-apply-unemployment-texas (Texas unemployment claims between March 15 and March 18 were eleven times higher than for the same period in 2019); Tex. Workforce Comm'n, *TWC Extends Call Center Hours* (Mar. 23, 2020), https://twc.texas.gov/news/twc-extends-call-center-hours (Texas Workforce Commission reporting that they have received "an unprecedented call volume as a result of COVID-19").

permissible under the Order. Barraza Decl. ¶ 3; Ferrigno Decl. ¶ 22; Hagstrom-Miller Decl. ¶ 23; Klier Decl. ¶ 17; Lambrecht Decl. ¶ 8; Schutt-Aine Decl. ¶ 9. They did so while continuing to make every effort to conserve PPE and to reduce the possibility of spread and transmission of COVID-19. Barraza Decl. ¶¶ 11–13; Dewitt-Dick Decl. ¶¶ 10–13; Ferrigno Decl. ¶¶ 15–19; Hagstrom-Miller Decl. ¶¶ 18–20; Klier Decl. ¶¶ 13–16; Lambrecht Decl. ¶¶ 15–16; Schutt-Aine Decl. ¶¶ 30–31; Wallace Decl. ¶ 13.

Consistent with the Executive Order, Plaintiffs determined that abortion is a time-sensitive service and an essential component of comprehensive care, for which a delay of thirty days or even less increases the risks to patients, or makes abortion completely inaccessible, and that such delay in accessing or inability to access an abortion exposes patients to risk of a serious adverse medical consequence. In reaching this determination, Plaintiffs considered such facts and authorities as the following:

- "The purpose and text of EO GA 09, namely: concern for 'a shortage of hospital capacity or personal protective equipment' that could 'hinder efforts to cope with the COVID-19 disaster.'"
- "The stated 30-day duration of the delay, taking into account the Ambulatory Surgery Center Association's 'COVID-19: Guidance for ASCs for Necessary Surgery,' issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, 'including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent.'"[26]
- "The fact that pregnancy has a duration of approximately forty weeks, as measured from the first day of a woman's last menstrual period (LMP) and that most abortions are banned in Texas beginning at 20 weeks gestation [the equivalent of 22 weeks LMP]. Tex. Health & Safety Code § 171.044."

[26] *See also* Am. Surgical Ctr. Ass'n, *COVID-19: Guidance for ASCs on Necessary Surgeries* (last updated Mar. 19, 2020), https://www.ascassociation.org/asca/resourcecenter/latestnewsresourcecenter/covid-19/covid-19-guidance (quoting Am. Coll. of Surgeons, *COVID-19: Recommendations for Management of Elective Surgical Procedures* (Mar. 13, 2020), https://www.facs.org/about-acs/covid-19/information-for-surgeons/elective-surgery).

- "The fact that, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g.,* Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States 77–78, 162–63 (2018). Delay is of particular concern during the COVID-19 crisis, given guidance from the Centers for Disease Control ('CDC') and American College of Obstetricians and Gynecologists ('ACOG') that pregnant women may be at heightened risk of severe illness, morbidity, or mortality from viral respiratory infections such as COVID-19."[27]

- "The Joint Statement by the American College of Obstetricians and Gynecologists ('ACOG'), the American Association of Gynecologic Laparoscopists, *et al.*, on Elective Surgeries,[28] issued March 16, 2020, which states that 'Obstetric and gynecologic procedures for which a delay will negatively affect patient health and safety should not be delayed. This includes gynecologic procedures and procedures related to pregnancy for which delay would harm patient health. Obstetrician–gynecologists and other health care practitioners should be aware of the unintended impact that policies responding to COVID-19 may have, including limiting access to time-sensitive obstetric and gynecological procedures.'"

- "The Joint Statement by the ACOG, the American Board of Obstetrics & Gynecology, *et al.,* on Abortion Access During the COVID-19 Outbreak,[29] issued March 18, 2020, which states that to 'the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure' because it 'is an essential component of comprehensive health care' and 'a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible.'"

See, e.g., Ex. A to Barraza Decl. (PPST Surgical Center policy); Ferrigno Decl. ¶¶ 10–19; Hagstrom-Miller Decl. ¶¶ 13–20; Ex. A to Lambrecht Decl. (PPGT Surgical Health Services policy); Ex. B to Schutt-Aine Decl. (PP Houston policy); Klier Decl. ¶¶ 11–12; Dewitt-Dick Decl. ¶ 26; Wallace Decl. ¶¶ 11–14.

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[27] ACOG, *Practice Advisory: Novel Coronavirus 2019 (COVID-19), supra* note 23; Ctrs. for Disease Control & Prevention, *Information for Healthcare Providers: COVID-19 and Pregnant Women*, *supra* note 23.

[28] Am. Ass'n of Gynecologic Laparoscopists et al., *Joint Statement on Elective Surgery During COVID-19 Pandemic* (Mar. 16, 2020), https://www.aagl.org/news/joint-society-message-on-covid-19/.

[29] ACOG et al., *supra* note 2.

D. The Attorney General's Threat to End Abortion Access and the Resulting Impact

Late in the afternoon on March 23, 2020, Plaintiffs received word of the Texas Attorney General's press release suggesting that he believes continuing to provide *any* abortion care (other than for an immediate medical emergency) would violate the Executive Order, and warning that "[t]hose who violate the governor's order will be met with the full force of the law." Plaintiffs sought clarification from the Attorney General's office as to whether he was interpreting the Executive Order to apply to medication abortion as well as procedural abortion. The office provided no such clarification.

If the Executive Order is enforced as interpreted by the Attorney General, it effectively bans almost all abortions in Texas for the duration of the COVID-19 public health emergency. Given the Attorney General's enforcement threat and the serious criminal and other penalties specified in the Executive Order and Emergency Rule, Plaintiffs, their physicians, and staff have been forced to cancel scheduled appointments and to stop providing *all* abortion care (other than for an immediate medical emergency) that entails the use of PPE. Barraza Decl. ¶ 15; Dewitt-Dick Decl. ¶ 8; Ferrigno Decl. ¶ 28; Hagstrom-Miller Decl. ¶ 28; Klier Decl. ¶ 17; Lambrecht Decl. ¶ 18; Schutt-Aine Decl. ¶ 33; Wallace Decl. ¶ 15. Even if the Executive Order is understood (consistent with its plain language) not to apply to medication abortion, which is provided through medications by mouth and is not a "procedure," it still operates as a previability ban for those patients who would otherwise obtain a procedural abortion—that is, all those who are ten or more weeks pregnant and those with earlier pregnancies for whom medication abortion is not appropriate.

Under either interpretation, the Executive Order will deprive Plaintiffs' patients of the freedom to make a very personal decision in consultation with their families and doctors, which is all the weightier given the increased health risks to pregnant persons during the COVID-19

pandemic. Lambrecht Decl. ¶ 18; Schutt-Aine Decl. ¶¶ 10, 36. It will harm patients' physical, emotional, and financial wellbeing and the wellbeing of their families. Conner Decl. ¶ 9; Dewitt-Dick Decl. ¶ 28; Ferrigno Decl. ¶ 34; Hagstrom-Miller Decl. ¶ 33; Lambrecht Decl. ¶ 18; Schutt-Aine Decl. ¶ 36; Wallace Decl. ¶ 16. Without access to Plaintiffs' services, patient care will be delayed, and in some cases, denied altogether. Barraza Decl. ¶ 15; Conner Decl. ¶¶ 9–11; Dewitt-Dick Decl. ¶ 8; Ferrigno Decl. ¶¶ 26–29, 34–35; Hagstrom-Miller Decl. ¶¶ 27–29, 33–34; Klier Decl. ¶¶ 17–18; Lambrecht Decl. ¶¶ 18–20; Schutt-Aine Decl. ¶¶ 33–39; Wallace Decl. ¶ 15. As a result, these patients will be forced to carry pregnancies to term, resulting in a deprivation of their fundamental right to determine when and whether to have a child or to add to their existing families, as well as in greater health and other risks to them and their children. Conner Decl. ¶ 11; Ferrigno Decl. ¶ 34; Hagstrom-Miller Decl. ¶ 33; Schutte-Aine Decl. ¶ 38; Wallace Decl. ¶ 16. Finally, by targeting abortion, the Executive Order is likely to *increase* the need for other pregnancy-related healthcare and attendant medical facilities, personnel, and PPE. Schutt-Aine Decl. ¶¶ 35–36.

ARGUMENT

Plaintiffs seek a temporary restraining order, and thereafter, a preliminary injunction, to prevent the Attorney General's enforcement threats and the Executive Order from inflicting harm on Plaintiffs' patients who are unable to access abortion in Texas under the Executive Order as interpreted by the Attorney General. In ruling on such a motion, the Court considers four factors, all of which weigh heavily in Plaintiffs' favor: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the injury to Plaintiffs outweighs any harm the injunction might cause Defendants; and (4) granting the injunction will not disserve the public interest. *See*, *e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) ("*Jackson I*"); *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

As discussed below, Plaintiffs are entitled to injunctive relief because they are likely to succeed on the merits of their claims. The Attorney General's interpretation of the Executive Order as banning almost all abortions directly contravenes decades of binding Supreme Court precedent holding that a state may not ban abortion before viability. Moreover, injunctive relief will prevent severe and irreparable harm to Plaintiffs' patients; is consistent with the balance of hardships; and serves the public interest. Accordingly, this Court should grant injunctive relief.

I. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR SUBSTANTIVE DUE PROCESS CLAIM.

Plaintiffs are certain to succeed on the merits of their claim that the Attorney General's interpretation of the Executive Order violates Plaintiffs' patients' liberty rights under the Fourteenth Amendment by banning abortion before viability. Nearly five decades ago, the Supreme Court struck down as unconstitutional a state criminal abortion statute proscribing all abortions except those performed to save the life of the pregnant person. *Roe v. Wade*, 410 U.S. 113, 166 (1973). Specifically, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects a woman's right to choose abortion, *id.* at 153–54, and prior to viability, a state has *no interest* sufficient to justify a ban on abortion, *id.* at 163–65. Rather, a state may proscribe abortion only *after* viability, and even then it must allow abortion where necessary to preserve the life or health of the patient. *Id.* at 163–64.

The Supreme Court has repeatedly adhered to this core holding. For example, more than twenty-five years ago, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe*'s "central principle" that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." 505 U.S. 833, 846, 871 (1992); *id.* at 871 (asserting that any state interest is "insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions"). Although a plurality in *Casey* announced an "undue burden"

standard, under which "a provision of law [restricting previability abortion] is invalid[] if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion," 505 U.S. at 878 (plurality opinion), it emphasized:

> Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

Id. at 879; *see also id.* at 846 ("*Roe*'s essential holding . . . is a recognition of the right of the woman to choose to have an abortion before viability."). *Roe*'s central principle has been repeatedly reaffirmed by the Court, including as recently as 2016. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Unsurprisingly, attempts to ban abortion prior to viability have been uniformly rejected by courts across the country and by the Fifth Circuit as recently as last month. *See*, *e.g.*, *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) ("*Jackson III*") (ban on abortions starting at six weeks); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) ("*Jackson II*") (ban on abortions starting at fifteen weeks); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (ban on abortions after six weeks), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117–19 (8th Cir. 2015) (ban on abortions after twelve weeks), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (ban on abortions starting at twenty weeks), *cert. denied*, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (ban on abortions starting at twenty weeks), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (ban on all abortions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992) (ban on all abortions), *cert. denied*, 506 U.S. 1011 (1992); *Bryant v. Woodall*, 363 F. Supp. 3d 611,

630–32 (M.D.N.C. 2019) (ban on abortions starting at twenty weeks), *appeal docketed*, No. 19-1685 (4th Cir. June 26, 2019); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *1 (W.D. Ky. Mar. 15, 2019) (ban on abortions after six weeks).

In 2019, several states passed a number of bans on abortion—and in each place where a ban restricted access to abortion, every single court blocked the ban from taking effect. *See, e.g.*, *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1059 (M.D. Ala. 2019) (ban on nearly all abortions); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 410 F. Supp. 3d 1327, 1350 (N.D. Ga. 2019) (ban on abortions after six weeks); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631, 640 (W.D. Mo. 2019), *as modified*, 408 F. Supp. 3d 1049, 1053 (W.D. Mo. 2019) (ban on abortions after various weeks), *appeal docketed*, Nos. 19-2882, 19-3134 (8th Cir. Oct. 3, 2019); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1324 (E.D. Ark. 2019) (ban on abortions after eighteen weeks), *appeal docketed*, No. 19-2690 (8th Cir. Aug. 9, 2019); *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549, 252 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246, 248 (5th Cir. 2020) (ban on abortions after six weeks); Order Granting Stipulated Preliminary Injunction as to State Defendants, *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah Apr. 18, 2019), ECF No. 34 (ban on abortions after eighteen weeks).

The Fifth Circuit has consistently applied controlling precedent holding that states may not enact measures that ban all or nearly all previability abortions, including twice in just the last six months. *See Jackson III*, 951 F.3d at 248 (holding that previability abortion bans are "unconstitutional under Supreme Court precedent without resort to the undue burden balancing test," and striking down a ban on abortions as early as six weeks with exceptions); *Jackson II*, 945 F.3d at 268 (holding "[s]tates may *regulate* abortion procedures prior to viability so long as they

do not impose an undue burden on the woman's right, but they may not ban abortions," and striking down ban on previability abortions at fifteen weeks with exceptions); *Jackson I*, 760 F.3d at 459 (preliminarily enjoining abortion restriction that would shut down the only remaining clinic in the state and force patients to travel to a neighboring state as an unconstitutional undue burden); *see also Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) ("A measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*."), *vacated on reh'g en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001); *Sojourner T.*, 974 F.2d at 29, 31 (striking down ban on all abortions with exceptions).

It is beyond dispute that the Attorney General's interpretation of the Executive Order has the effect of banning all abortions (other than those performed in an immediate medical emergency) in Texas starting at ten weeks LMP, and even earlier among patients for whom medication abortion is not appropriate. *Cf. Jackson II*, 945 F.3d at 271 (holding that challenged law was a previability *ban* on abortion and not a *regulation* on abortion because it "peg[ged] the availability of abortions to a specific gestational age that undisputedly prevents the abortions of some non-viable fetuses"). But the Attorney General's statement goes even further and appears to threaten enforcement against medication abortion in many instances as well, which has forced Plaintiffs to cancel hundreds of scheduled abortion appointments. In any event, whether or not the ban extends to medication abortion, it remains a ban on previability abortions, which contravenes decades of Supreme Court precedent, including *Roe.*

Because the Executive Order operates as a ban on previability abortion, this Court need not look further; however, even if the Court were to apply the undue-burden test from *Casey*, Plaintiffs would certainly succeed on the merits. "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." *Casey*, 505 U.S. at 877. A restriction that, "while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Whole Woman's Health*, 136 S. Ct. at 2309 (alteration in original) (quoting *Casey*, 505 U.S. at 877). As the Supreme Court has held, "*Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2298.

Here, in terms of the burdens, the Attorney General's current enforcement threat operates as a ban, whether for all abortions or for all abortions after ten weeks.[30] The Executive Order is in effect for at least thirty days, and in fact could remain in effect for months, which would push many abortion patients past the legal limit for an abortion in Texas. Moreover, even if some patients affected by the order are able to obtain an abortion if the order is lifted sooner than anticipated, they will still suffer increased risks to their health by the delay in access to abortion care. Ferrigno Decl. ¶¶ 34, 36; Hagstrom-Miller Decl. ¶¶ 33, 35; Klier Decl. ¶ 18; Schutt-Aine Decl. ¶ 39. Thus, the Executive Order overwhelmingly harms individuals seeking an abortion.

These harms vastly outweigh any potential benefits from the Executive Order as interpreted by the Attorney General. The State asserts two interests—neither of which is furthered by the Attorney General's interpretation. On its face, the Executive Order is intended to preserve hospital capacity and PPE. Plaintiffs share those interests, but a blanket abortion ban does not serve either one and, in fact, as so interpreted the Executive Order is more likely to aggravate than alleviate the public health crisis arising from the pandemic. As to the first interest, legal abortion is safe,

[30] Even on the narrower construction, the Executive Order would not only ban abortion after ten weeks but also harm patients presenting before ten weeks for whom procedural abortion is medically indicated or the only appropriate option.

and complications associated with abortion—including those requiring hospital care—are exceedingly rare. *Whole Woman's Health*, 136 S. Ct. at 2311–2312, 2315. Nearly all abortions in Texas are provided in outpatient facilities, such as Plaintiffs' abortion facilities and ambulatory surgical centers, not hospitals.[31] Thus, Plaintiffs' provision of abortion would not deplete hospital capacity.

Regarding the second interest stated in the Executive Order—to preserve PPE—even in the absence of the Attorney General's threat to ban procedural abortion, Plaintiffs have already taken steps to preserve PPE, including by, for example, limiting the number of individuals allowed into the facility and during a procedural abortion and postponing other in-person, non-essential visits that may require PPE. Plaintiffs are exploring additional measures to preserve PPE, such as washable masks and gowns. Moreover, Plaintiffs either do not use N95 masks or do so only rarely, and this is the PPE that appears to be in shortest supply in battling the COVID-19 pandemic in Texas and around the country.[32] As such, banning abortions does little to nothing to prevent the

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[31] Tex. Health & Human Servs., *Induced Terminations of Pregnancy, 2017 Selected Characteristics of Induced Terminations of Pregnancy (2018)*, https://hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics (in 2017, 99.8% of abortions among Texas residents in Texas were provided in abortion facilities or ambulatory surgical centers).

[32] *See*, *e.g.*, Ariana Eunjung Cha et al., *Hospital Workers Battling Coronavirus Turn to Bandannas, Sports Goggles and Homemade Face Shields Amid Shortages*, Wash. Post (Mar. 19, 2020), https://www.washingtonpost.com/health/2020/03/19/hospital-workers-battling-coronavirus-turn-bandanas-sports-goggles-homemade-face-shields-amid-shortages/ ("Darrell Pile, CEO of the Southeast Texas Regional Advisory Council, which is responsible for distributing resources to local health providers from the Strategic National Stockpile, said the amount it had received so far is 'horribly inadequate to meet existing demand.'"); Mike Marut, *'We Are in a War': Austin Doctors Running Out of Protective Equipment to Treat Coronavirus Patients*, KVUE (Mar. 20, 2020), https://www.kvue.com/article/news/health/coronavirus/coronavirus-doctors-masks-austin-protective-equipment-goggles/269-a803b7ac-1ab0-4a6a-bfb8-af8b08d72028; Scott Friedman, *Running Low on Supplies, Firefighters, Paramedics Scramble to Find Ways to Protect Themselves Against COVID-19*, NBCDFW (Mar. 24, 2020), https://www.nbcdfw.com/news/coronavirus/as-north-texas-first-responders-tear-through-protective-masks-firefighter-says-unprecedented-is-a-good-word-to-be-using-right-now/2337271/; Amelia Nierenberg, *Where Are All the Masks?*, N.Y. Times (Mar. 22, 2020), https://www.nytimes.com/article/face-masks-coronavirus.html ("Many

"deplet[ion]" of the personal protective equipment needed "to cope with the COVID-19 disaster." Executive Order at 2.

Even before the Executive Order, Plaintiffs had taken steps to preserve PPE by minimizing the number of encounters a patient needs for care, Barraza Decl. ¶¶ 11–12; Wallace Decl. ¶ 13, but Texas law restricts this flexibility. Plaintiffs could make further progress in preserving PPE, as well as reducing overall contagion risks during the pandemic, were Defendants willing to consider temporarily waiving medically unnecessary abortion restrictions that limit their ability to adapt to this crisis—such as Texas's requirement that patients make an extra trip to the health center and receive an ultrasound before returning for an abortion.[33]

Indeed, far from being necessary to address the COVID-19 crisis, an interpretation of the Executive Order that broadly prohibits abortion could well exacerbate the COVID-19 crisis, including by forcing patients to attempt to travel to other states to try to access abortion care, and potentially using public transportation, even though public health experts have advised the public to minimize activities outside the home. Conner Decl. ¶ 11; Hagstrom-Miller Decl. ¶ 32; Klier Decl. ¶ 18; Schutt-Aine Decl. ¶¶ 37–38. Moreover, the Executive Order may delay access for patients experiencing health problems because providers are uncertain as to whether these problems meet the Executive Order's emergency exception, which could endanger those patients

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doctors said they were being given just one mask, to use indefinitely. Between patients, they spray it down with a disinfectant or wipe it off, hoping for the best."); Associated Press, *US Struggles to Fill Requests for Protective Gear*, N.Y. Times (Mar. 18, 2020), https://www.nytimes.com/aponline/2020/03/18/business/ap-us-virus-outbreak-supplies.html (CDC sending masks from strategic stockpile that have exceeded their shelf life "due to the potential urgent demand caused by the COVID-19 public health emergency").

[33] As the Executive Order states, it is within the Governor's power to suspend regulatory requirements that "in any way prevent, hinder, or delay necessary action in coping with a disaster." Executive Order at 1 (quoting Tex. Gov't Code § 418.016(a)).

and potentially require that they receive *more* invasive care (with attendant use of PPE) or even hospital-based care. Schutt-Aine Decl. ¶ 36. Finally, delaying patients in accessing abortion ultimately requires increased use of PPE. Even if the Executive Order is ultimately limited to thirty days, this delay will push patients early in pregnancy now beyond the time for which they would be legally eligible for medication abortion (PPE is not needed to hand a patient pills), instead requiring one-day aspiration procedures. Ferrigno Decl. ¶ 35; Hagstrom-Miller Decl. ¶ 34; Schutt-Aine Decl. ¶ 35; Wallace Decl. ¶ 15. For some patients, the delay will push them into two-day D&E procedures, which necessarily require more PPE than a single visit or a medication abortion. Ferrigno Decl. ¶ 35; Hagstrom-Miller Decl. ¶ 34; Klier Decl. ¶ 18; Schutt-Aine Decl. ¶¶ 35, 39.

Even if banning or restricting abortion during the COVID-19 crisis would result in some small, temporary preservation of PPE, the harm to patients from not being able to access abortion for a month or more, if ever, is extreme and simply cannot be outweighed by any benefits of Defendants' application of the Executive Order. While Plaintiffs are mindful of the need for everyone in Texas and around the country to do their utmost to mitigate the effects of COVID-19 on our health systems, the reality is that very little, if any, PPE would actually be conserved by banning or restricting abortion. Most procedural abortions in Texas are single-day procedures, where a patient encounters either one or two clinicians, who each wear, at most, a paper mask (not an N95 respirator), two-to-three pairs of gloves, and a gown. Dewitt-Dick Decl. ¶ 16; Hagstrom-Miller Decl. ¶ 13; Klier Decl. ¶ 11; Schutt-Aine Decl. ¶ 25. However, patients forced by Defendants to wait until the middle of the second trimester or later might be forced to undergo a two-day procedure, which would mean two consecutive trips to a health center; twice as much contact with health care providers; and at least twice the amount of PPE used—for a total of three visits.

Patients who are prevented from obtaining abortions at all and thus who must seek prenatal care—or those who must seek prenatal care during the months they must wait for the Executive Order to expire—will also have to endure at least one (though often multiple) trips to heath care facilities to meet with health care providers and obtain services that involve the use of PPE. Schutt-Aine Decl. ¶ 26. Ultimately, then, pregnant patients will require care from health care providers using PPE, whether the pregnancy is terminated or not. Moreover, the public health crisis caused by the COVID-19 pandemic involves not only a shortage of PPE, but also a shortage of hospital beds. Unlike labor and delivery, hospital beds are not utilized in providing outpatient abortion.

The benefit of reducing the use of PPE in one segment of the healthcare system cannot possibly outweigh the burdens here, where abortion care is time-sensitive, and where barring abortion (but not any other essential surgery or procedure) would have only a minimal effect on the availability of PPE and no effect on the PPE in shortest supply (the N95 mask). Plaintiffs therefore have established that they are likely to succeed on the merits of their claim that the Executive Order violates the substantive due process rights of their patients.

II. PLAINTIFFS' PATIENTS WILL SUFFER IRREPARABLE HARM IF THE BAN IS ENFORCED.

Plaintiffs' patients will suffer serious and irreparable harm in the absence of a temporary restraining order and preliminary injunction. The Attorney General's interpretation of the Executive Order prevents Texans from exercising their fundamental constitutional right to terminate a pregnancy. It is well established that, where a plaintiff establishes a constitutional violation, no further showing of irreparable injury is necessary. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further

showing of irreparable injury is necessary." (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995))); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981) (When "the constitutional right of privacy is 'either threatened or in fact being impaired,' . . . this conclusion mandates a finding of irreparable injury." (quoting *Elrod*, 427 U.S. at 373)).

In addition, as many medical professional organizations, including ACOG, have recently concluded, abortion is "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[34] Indeed, for some patients, such a delay will deprive them of any access to abortion. Tex. Health & Safety Code § 171.044 (prohibiting abortions after twenty-two weeks LMP). Forcing patients to forgo abortion care and remain pregnant against their will inflicts serious physical, emotional, and psychological consequences that alone constitute irreparable harm. *See e.g.*, *Elrod*, 427 U.S. at 373–74; *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013). Likewise, a delay in obtaining abortion care causes irreparable harm by "result[ing] in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 832 (7th Cir. 2018) (alteration in original) (quoting *Van Hollen*, 738 F.3d at 796), *petition for cert. filed*, No. 18-1019 (Feb. 4, 2019). This "disruption or denial of . . . patients' health care cannot be undone after a trial on the merits." *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied sub nom. Andersen v. Planned Parenthood of Kan. & Mid-Mo.*, 139 S. Ct. 638 (Mem.) (2018).

[34] ACOG et al., *supra* note 2.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST SUPPORT INJUNCTIVE RELIEF.

Plaintiffs' requested relief will "essentially continue[] the status quo," tipping the balance of equities toward Plaintiffs and serving the public interest. *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013), *aff'd*, 760 F.3d 448 (5th Cir. 2014); *United States v. State of Texas*, 508 F.2d 98, 101 (5th Cir. 1975). In addition, given the duration of the Executive Order and the likelihood that it will be extended, it is likely that many of Plaintiffs' patients will be forced to forgo an abortion entirely and carry an unwanted pregnancy to term. As the Fifth Circuit has made clear, "the grant of an injunction will not disserve the public interest . . . when an injunction is designed to avoid constitutional deprivations." *Jackson Women's Health Org.*, 940 F. Supp. 2d at 424; *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Moreover, as set forth more fully above, the benefits of a limited potential reduction in the use of some PPE (and not the most limited PPE) by abortion providers is outweighed by the harm of eliminating abortion access in the midst of a pandemic that increases the risks of continuing an unwanted pregnancy, as well as the risks of traveling to other states in search of time-sensitive medical care. Particularly where Plaintiffs are already taking steps—in line with those required of other medical professionals who continue to provide essential health care—to preserve PPE as much as possible, Dewitt-Dick Decl. ¶ 11; Klier Decl. ¶¶ 13–14; Schutt-Aine Decl. ¶¶ 29–31; Wallace Decl. ¶ 13, injunctive relief here is supported by the balance of harms and the public interest.

IV. A BOND IS NOT NECESSARY IN THIS CASE.

This Court should waive the Federal Rule of Civil Procedure 65(c) bond requirement. The Fifth Circuit has long held "the [trial] court may elect to require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996); *see also Planned Parenthood of Greater Tex.*

Family Planning & Preventative Health Servs., Inc. v. Smith, 236 F. Supp. 39 974, 979 (W.D. Tex. 2017), *overruled on other grounds*, 913 F.3d 551 (5th Cir. 2019); *City of Atlanta v. Metro Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (waiving bond requirement where plaintiffs engaged in public-interest litigation, "an area in which the courts have recognized an exception to the Rule 65 security requirement"). This Court should use its discretion to waive the bond requirement here, where the relief sought will result in no monetary loss to Defendant.

CONCLUSION

For these reasons, this Court should grant Plaintiffs' motion for a temporary restraining order and/or preliminary injunction to enjoin enforcement of the Executive Order and Emergency Rule, as interpreted by Defendants, to prohibit abortions.

Dated: March 25, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 25th day of March, 2020, I personally emailed a copy of the above document to the following individuals:

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/s/ *Julie Murray*
Julie Murray

EXHIBIT 1

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

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al*., Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, *et al*., Defendants.	No. 1:20-cv-00323-LY

DECLARATION OF POLIN C. BARRAZA IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Polin C. Barraza declares as follows:

1. I am President and Board Chair of Plaintiff Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), a not-for-profit corporation headquartered in San Antonio. PPST Surgical Center operates a licensed ambulatory surgical center and a licensed abortion facility in San Antonio. PPST Surgical Center provides a range of reproductive health services, including medication and surgical abortions.

2. I am responsible for the management of PPST Surgical Center (as well as the operations of its parent organization, Planned Parenthood South Texas), and therefore am familiar with our operations and finances, including the services we provide and the communities we serve.

3. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Executive Order

No. GA-09, as interpreted by the Texas Attorney General to ban all previability abortion in the state except where immediately necessary to protect the life or health of a pregnant person, as well as the Texas Medical Board's emergency amendment to 22 TAC § 187.57 ("Emergency Rule"), which imposes the same requirements as the Executive Order. I am familiar with the Executive Order, a press release by the Texas Attorney General interpreting it, and the Emergency Rule. PPST Surgical Center has adopted a policy to implement the Executive Order, a true and correct copy of which is attached as Exhibit A.

4. The facts I state here are based on my experience, my review of PPST Surgical Center business records, information obtained in the course of my duties at PPST Surgical Center and PPST, and personal knowledge that I have acquired through my service at PPST Surgical Center and PPST. If called and sworn as a witness, I could and would testify competently thereto.

PPST Surgical Center's Provision of Abortion Care

5. In 2019 PPST Surgical Center provided 1855 abortions, and of those, 1258 were medication abortions and 597 were surgical abortions.

6. In January and February 2020, PPST Surgical Center performed 550 abortions, and of those, 396 were medication abortions and 154 were surgical abortions.

7. Neither medication nor surgical abortion requires extensive PPE or otherwise would deplete PPE. In fact, for medication abortion, providing patients with the medication does not require the use of *any* PPE. And while surgical abortion at PPST Surgical Center requires the use of sterile gloves for each procedure, a surgical mask that includes protective eyewear (one per provider per day, unless a mask becomes soiled), disposable gowns (one per provider per

day, unless a gown becomes soiled), disposable hair and shoe covers, and reuable lab coats and face shields, only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.[1] PPST uses only non-sterile gloves or condoms to perform ultrasound or laboratory exam, including one that accompanies medication or surgical abortion.

8. PPST Surgical Center does not use or have any N95 respirators, which I understand are the PPE in shortest supply during the COVID-19 pandemic.

9. PPST Surgical Center does not provide inpatient care, nor is it set up to do so.

PPST Surgical Center's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

10. PPST Surgical Center is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

11. Since the COVID-19 outbreak, PPST Surgical Center has taken steps to preserve much-needed medical resources that are in short supply during the pandemic. Even before the Governor's Executive Order, for example, we had excluded residents and medical students from observing or participating in surgeries or procedures, which reduced the number of individuals requiring PPE.

12. We have also taken numerous steps to help prevent the spread of COVID-19 infection in the communities where we offer services. Although in normal times we welcome support companions accompanying abortion patients, we have decided not to allow such

[1] Per CDC guidance, Plaintiffs provide patients for whom there is a concern for COVID-19 or other upper respiratory disease with a mask.

companions (except parents accompanying minors) to enter our health centers in order to reduce the number of overall people exposed to one another.

13. We have also made dramatic changes to the flow of our patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms. Only those individuals who are positively screened can proceed to the front desk to check in and provide their phone number. Patients are then asked to wait in their cars, where a medical assistant will contact them to do as much intake as possible by phone. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them. We have reconfigured our waiting rooms and check-in practices to limit the number of people in our facility, as well as to ensure they can and are maintaining the recommended social-distance.

14. More recently, PPST has curtailed other non-abortion services that can safely be delayed, such as annual well-person visits and routine STI tests.

15. In light of the Executive Order, we have cancelled surgical abortions scheduled for this week, and PPST Surgical Center will cancel non-emergency future surgical abortions appointments unless and until the Executive Order and Emergency Rule expire or are rescinded, or unless the Court grants relief. Additionally, PPST Surgical Center has stopped providing non-emergency medication abortions because of concerns about whether these abortions are permissible under the Attorney General's interpretation of the Executive Order.

16. I declare under penalty of perjury that the foregoing is true and correct.

Executed March 25, 2020

Polin C. Barraza

EXHIBIT A

Planned Parenthood®

Planned Parenthood
Policy In Response to Texas Executive Order GA 09
Relating to Hospital Capacity During the COVID-19 Disaster

PURPOSE

In light of the global pandemic of COVID-19, Governor Abbott signed Executive Order ("EO") GA 09 on March 22, 2020, attached, which is in effect until 11:59 p.m. on April 21, 2020. EO GA 09 directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." EO GA 09 goes on to state that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID- 19 disaster."

POLICY

To comply with EO GA 09, Planned Parenthood hereby establishes the following policies which shall remain in effect until rescinded or modified:

1. Surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician, and which would deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster, are not to be scheduled while this policy is in effect.

2. Physicians shall determine on a case-by-case basis whether a procedure that would deplete hospital capacity or personal protective equipment needed to cope with COVID-19 can be delayed without risk for serious adverse medical consequences or death.

3. Planned Parenthood physicians have made the determination that abortion is a time-sensitive service and an essential component of comprehensive care, for which a delay of 30 days, or even less, increases the risks to patients, or make abortion completely inaccessible, and that such delay in accessing or inability to access an abortion exposes patients to risk of a serious adverse medical consequence.

4. In making this determination, Planned Parenthood physicians considered or will consider the following:

a. The purpose and text of EO GA 09, namely: concern for "a shortage of hospital capacity or personal protective equipment" that could "hinder efforts to cope with the COVID-19 disaster."

b. The stated 30-day duration of a the delay, taking into account the Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

c. The fact that pregnancy has a duration of approximately forty weeks, as measured from the first day of a woman's last menstrual period (LMP) and that most abortions are banned in Texas beginning at 20 weeks gestation. Tex. Health & Safety Code § 171.044.

d. The fact that, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g.,* Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018). Delay is of particular concern during the COVID-19 crisis, given guidance from the Center for Disease Control ("CDC") and American College of Obstetricians and Gynecologists ("ACOG") that pregnant women may be at heightened risk of severe illness, morbidity, or mortality from viral respiratory infections such as COVID-19.[1]

e. The Joint Statement by the American College of Obstetricians and Gynecologists ("ACOG"), the American Association of Gynecologic Laparoscopists, *et al.*, on Elective Surgeries[2], issued March 16, 2020, which states that "Obstetric and gynecologic procedures for which a delay will negatively affect patient health and safety should not be delayed. This includes gynecologic procedures and procedures related to pregnancy for which delay would harm patient health. Obstetrician–

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[1] Available at https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019 and https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html

[2] Available at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-elective-surgeries

gynecologists and other health care practitioners should be aware of the unintended impact that policies responding to COVID-19 may have, including limiting access to time-sensitive obstetric and gynecological procedures."

f. The Joint Statement by the ACOG, the American Board of Obstetrics & Gynecology, *et al.*, on Abortion Access During the COVID-19 Outbreak[3], issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

3. All procedures which cannot be reasonably delayed and thus which *are* scheduled and performed, in accordance with the above considerations and in compliance with EO GA 09, shall be performed while making every effort to conserve PPE and to reduce the possibility of spread and transmission of COVID-19.

[3] Available at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak

Planned Parenthood®

Parenthood Policy In Response to the Texas Executive Order GA 09 Policy Relating to Hospital Capacity During the COVID-19 Disaster has been reviewed and approved by:

Polin C. Barraza
President & Chair

3.24.20
Date

Gerard Honoré, MD
Medical Director

3/24/20
Date

EXHIBIT 2

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

PLANNED PARENTHOOD CENTER FOR CHOICE, et al., Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, et al., Defendants.	No. 1:20-cv-00323-LY

DECLARATION OF ALICIA DEWITT-DICK IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, ALICIA DEWITT-DICK, declare as follows:

1. I am the administrator of Plaintiff Southwestern Women's Surgery Center ("Southwestern").

2. Southwestern operates a licensed ambulatory surgical center in Dallas. Southwestern provides medication abortion up to 10 weeks as measured from the first day of the woman's last menstrual period ("LMP") and procedural abortions through 21.6 weeks LMP, as well as miscarriage management and contraceptive services. Southwestern provides care to approximately 9000 patients a year.

3. As administrator, I oversee operations at the clinic and am familiar with all aspects of our policies and practices. The facts I state here are based on my experience, my review of Southwestern's business records, information obtained in the course of my duties at Southwestern, and personal knowledge that I have acquired through my service at Southwestern.

4. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin the March 22, 2019 Executive Order No. GA-09 (the "Executive Order"), as interpreted by the Texas Attorney General on March 23, 2020 to ban all previability abortion procedures in the state except where immediately necessary to protect the life or health of a patient. I have reviewed the Executive Order and the interpretation by the Attorney General.

5. The Executive Order, effective until 11:59 p.m. on April 21, 2020, although it may be extended, directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." *Id.* at 1. The Executive Order states that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster." *Id.*

6. Southwestern understands the term PPE to refer to surgical masks, N95 respirators (a face covering designed to block at least 95 percent of very small test particles), sterile and non-sterile gloves, disposable protective eyewear, disposable gowns, and disposable shoe covers. The services Southwestern provides do not involve significant amounts of PPE or deplete PPE.

7. On Monday, March 23, 2020, the Attorney General issued a press release interpreting the Executive Order, titled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic." The press release states that the Executive

Order applies to "all surgeries and procedures that are not immediately medically necessary," including "most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother." The release invokes the order's application to abortion providers four times. It states that a "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time" and warns that "[t]hose who violate the governor's order will be met with the full force of the law."

8. Southwestern is uncertain as to the scope of the Executive Order and the subsequent press release by the Attorney General, and, as a result, largely stopped seeing patients on March 23, 2020. The clinic has cancelled approximately 225 appointments for the last two days, March 24 and March 25. Unless we obtain immediate relief, we intend to continue canceling appointments going forward.

Southwestern's Response to COVID-19:

9. Approximately a month prior to the Executive Order, in late February, Southwestern began to take actions within the clinic to address the spread of COVID-19 around the country and developed practices directed at reducing the risk of transmission and preserving PPE.

10. On February 24, 2020, the clinic began screening all patients for potential exposure to COVID-19, using screening questions related to existing respiratory symptoms and recent travel. We instructed staff to stay home if they were experiencing any symptoms associated with COVID-19.

11. On March 13, 2020, we also began limiting the number of people in waiting areas to ensure social distancing of at least 6 feet between all persons, and implemented staff techniques to minimize the use of PPE, including restricting the use of new surgical masks and gowns.

12. On March 16, 2020, Southwestern began checking the temperatures of all patients upon arrival in addition to continuing to ask patients screening questions regarding their symptoms and travel. Southwestern also began requiring that patients complete admission paperwork and wait in their vehicles to be seen by the physician.

13. On March 18, 2020, we began checking temperatures of staff daily.

14. There have only been a few instances where staff have experienced potential symptoms or contact that raises a low but non-negligible possibility of infection, and we have sent the staff members home.

15. Southwestern has only canceled an appointment for one patient due to concern for a possible COVID-19 infection.

16. While we have a limited number of N95 masks at the clinic, we would only use them if we were treating a patient with a suspected or confirmed COVID-19 infection. We have not used any of these masks to date during the pandemic.

17. Southwestern has also suspended its training program for residents and fellows until the end of April and halted onboarding of new staff.

Southwestern Uses Minimal PPE:

18. In 2019, Southwestern performed 8800 abortions, including 2321 medication abortions prior to 10 weeks LMP. Of the procedural abortions, 5689 were performed at or before 14.6 weeks LMP via suction procedure. The remaining 790 were performed from 15 weeks LMP through 21.6 weeks LMP. Southwestern also performed 240 miscarriage management procedures

in 2019. The clinic does not have 2020 data available yet, but the first months of 2020 are in line with these earlier figures.

19. For consults and ultrasounds, Southwestern typically only uses one pair of non-sterile gloves per patient, but has reduced such use in light of the COVID-19 pandemic. PPE is not typically used for dispensing medication abortion. For procedures prior to approximately 15 weeks LMP, the physician will use 3 non-sterile gloves per patient, and assisting staff might use 2-3 additional pairs of non-sterile gloves per patient. For procedures beyond 15 weeks LMP, the physician typically uses a gown, face shield, and one pair of sterile gloves, and other staff assisting in the procedure wear non-sterile gloves. For some procedures beyond 15 weeks LMP, Southwestern may also use reusable eyewear. Staff assisting with abortion procedures will typically wear 1-2 pairs of shoe coverings every day.

20. Based on Southwestern's patient load, in an average week, we use the following PPE: a few boxes of non-sterile gloves; approximately 15 pairs of sterile gloves for procedures after 15 weeks LMP; approximately 15 gowns; around 24 pairs of shoe coverings per day; and a handful of simple surgical masks and reusable eyewear.

21. The clinic has a small number of N95 masks on hand. In early March, when the clinic was taking action addressing the COVID-19 pandemic, we were in touch with Dallas County Health and Human Services who recommended that we keep some N95 masks on site.

Harm to Southwestern and our Patients:

22. Although abortion is a very safe medical procedure, the health risks associated with an abortion procedure generally increase with gestational age. The complexity of the procedure, the PPE needed to complete the procedure, and the associated expense also increase with gestational age. Our patients generally seek abortion as soon as they are able, but many face

logistical obstacles that can delay their access to abortion care. Some come from over a hundred miles to receive care at our clinic. Patients need to schedule an appointment, gather the resources to pay for the abortion and related costs, and arrange transportation to a clinic, time off of work, and possibly childcare during appointments. Texas law requires them to make these arrangements multiple times for repeated trips to the clinic, even though most patients could safely obtain care in one visit. These existing delays already result in higher financial and emotional costs for our patients.

23. The COVID-19 pandemic has only exacerbated these burdens. It has limited public transit availability, caused layoffs and other work disruptions, shuttered schools and childcare facilities, and otherwise limited patients' options for transportation and childcare support during a time of recommended social-distancing.

24. Many recent patients have expressed gratitude that they were able to receive care with us. Many have expressed that they feel protected by the clinic's measures, and that they are relieved that the clinic was operating and continuing to provide services that are so time-sensitive and essential.

25. The patients whose appointments have been cancelled in light of the Executive Order and the Attorney General's interpretation have been extremely upset. Some of the dozens of patients we intended to see this week will be pushed out of eligibility for receiving a medication abortion. Others will be pushed into more complex procedures. And, some may not be able to return for their procedure with us at all.

26. Southwestern reasonably fears the Attorney General's threat of enforcement, given that the Attorney General may understand the Executive Order to prohibit procedural abortions that our physicians deem necessary to "correct a serious medical condition of … a patient who

without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician," as permitted by the Executive Order. Our physicians also reasonably fear that the Attorney General will understand the Order to prohibit medication abortions, despite the fact that these are not "procedures" under the common medical understanding of the term, and therefore do not fall within the terms of the Executive Order as understood by our medical staff.

27. Based on this enforcement risk, Southwestern is unsure how to proceed but plans to resume certain appointments where care does not involve new PPE.

28. If the Executive Order, as interpreted by the Attorney General, is enforced, it will delay and deny access to care for our patients. It will, as a result, harm patients' physical, emotional, and financial wellbeing and the wellbeing of their families.

I declare under penalty of perjury that the foregoing is true and correct.

Alicia Dewitt-Dick

Executed March 25, 2020

EXHIBIT 3

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

PLANNED PARENTHOOD CENTER FOR CHOICE; *et al.*,	)	
	)	CIVIL ACTION
Plaintiffs,	)	
	)	CASE NO. 1:20-cv-323-LY
v.	)	
	)	
GREG ABBOTT, in his official capacity as Governor; *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF ANDREA FERRIGNO

ANDREA FERRIGNO hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the Corporate Vice-President with Whole Woman's Health ("WWH"), a plaintiff in this case.

2. WWH is a consortium of limited liability companies, each incorporated under Texas law. The consortium includes a property management company, healthcare management company specializing in the management of abortion clinics, and a network of abortion clinics.

3. WWH currently owns and operates two abortion clinics in Texas, one in Fort Worth (the "Fort Worth Clinic") and one in McAllen (the "McAllen clinic"). WWH also owns and operates an abortion clinic in Baltimore, Maryland; Minneapolis, Minnesota; and Alexandria, Virginia.

4. My responsibilities as Corporate Vice-President include ensuring that each clinic complies with all statutes and regulations concerning the provision of the health services they offer, including abortion care, as well as recruiting physicians.

5. I have worked at WWH in a variety of roles since 2004, when I first joined as a Patient Advocate. As a result, I am well-versed in abortion clinic operations and patient care.

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

Provision of Abortion Care at the WWH Clinics in Texas

7. Both the Fort Worth and McAllen clinics offer surgical abortions up to 17.6 weeks gestation, as measured from the first day of a patient's last menstrual period ("lmp"). Texas law prohibits licensed abortion facilities from providing surgical abortions past this gestational age. *See* Tex. Health & Safety Code § 171.004.

8. Both clinics also offer medication abortions up to 10 weeks lmp. Texas law prohibits the provision of medication abortion past this gestational age. *See* Tex. Health & Safety Code § 171.063(a)(2).

Use of PPE in WWH Clinics in Texas

9. Texas law requires abortion patients who live within 100 miles of a licensed abortion facility to make two trips to obtain care. *See* Tex. Health & Safety Code § 171.012(a)(4), (b). During the first visit, we must provide the patient with State-mandated information and perform an ultrasound examination. *See id.* The physician cannot provide the patient an abortion until the second visit. *See id.*

10. There is minimal use of personal protective equipment ("PPE") at the WWH clinics in Texas. Physicians do not use it to provide medication abortions and use sterile gloves and

surgical gowns to provide surgical abortions. Some physicians also use surgical masks, disposable shoe covers and reusable goggles for dilation & evacuation ("D&E") abortions.

11. Additionally, physicians do not use PPE to perform an abdominal ultrasound examination before an abortion and use only gloves to perform a transvaginal ultrasound examination before an abortion.

12. After a surgical abortion, a staff member examines the tissue removed from the patient in the pathology laboratory. To do so, the staff member may use gloves, a surgical gown, face shield, or disposable shoe covers.

13. The WWH clinics in Texas do not have or intend to acquire any N-95 respirators, which are face coverings designed to block at least 95 percent of very small test particles.

14. Our abortion patients rarely require hospitalization.

WWH's Response to the COVID-19 Public Health Crisis

15. WWH has adopted certain policies to help ensure the safety of its patients and staff during the COVID-19 public health crisis.

16. We screen staff members for symptoms of COVID-19 and require anyone who is exhibiting them or has been exposed to someone with a confirmed case to self-quarantine for at least fourteen consecutive days.

17. Additionally, staff members screen all potential patients by phone for symptoms of COVID-19. If a patient is exhibiting symptoms, we ask them to self-quarantine, contact their primary care provider, and not visit the clinic unless they have been asymptomatic for at least fourteen consecutive days.

18. Further, we limit the number of people in a clinic at any given time and help ensure patients keep a safe distance from each other in the waiting room and recovery area.

19. We also train staff on best practices to prevent the spread of infection and require them to observe strict practices for handwashing and disinfecting surfaces. Texas law prohibits the provision of State-mandated information using telemedicine. *See, e.g.*, Tex. Occ. Code § 111.005(c); Tex. Health & Safety Code § 171.063(c); 25 Tex. Admin. Code § 139.53(b)(5).

Effect of the Governor's Executive Order

20. On March 22, 2020, Governor Abbott issued Executive Order GA-09 ("Executive Order"), which concerns hospital capacity during the COVID-19 public health crisis, and applies until 11:59 p.m. on April 21, 2020, assuming it is not renewed. The Executive Order directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." *Id.* at 1. The Executive Order clarifies that the prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." *Id.*

21. The Executive Order does not define PPE. We at WWH understand PPE to include surgical masks, N-95 respirators, sterile and non-sterile gloves, disposable protective eyewear, surgical gowns, and disposable shoe covers.

22. Both the Fort Worth and McAllen clinics are willing and able to continue providing abortion care consistent with the Executive Order.

23. On March 23, 2020, however, WWH received a copy of an email from the Texas Office of the Attorney General announcing a press release by Attorney General Paxton, entitled

"Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic."

24. The press release states that the Executive Order applies to "all surgeries and procedures that are not immediately medically necessary," including "most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother." It states that a "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time" and warns that "[t]hose who violate the governor's order will be met with the full force of the law."

25. WWH's clinics in Texas were concerned that they would be prosecuted given the Attorney General's interpretation of the Executive Order as prohibiting "any type of abortion" even though the Executive Order permits abortions that physicians have determined are necessary to "correct a serious medical condition of … a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician," and/or those that "would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 health disaster."

26. On March 24, the Fort Worth Clinic cancelled appointments for 13 abortion patients, who now are unable to obtain care anywhere in Texas. The following day, the clinic cancelled another 18 appointments for abortion patients, who now are unable to obtain an abortion in the State.

27. On March 24, the McAllen Clinic cancelled appointments for two abortion patients, who now are unable to obtain care anywhere in Texas. The following day, the clinic cancelled

another two appointments for abortion patients, who now are unable to obtain an abortion in the State.

28. People continue to seek appointments at both clinics. We must turn them away unless we are certain that no aspect of their care will involve the use of PPE. Between today and April 21, 2020, we anticipate turning away over 100 patients from the Fort Worth Clinic and at least 40 patients from the McAllen Clinic.

29. Each of our abortion clinics has a maximum capacity based on the size of our facility and the availability of our physicians. The maximum capacity of the Fort Worth Clinic is 130 patients per week and the maximum capacity of the McAllen Clinic is about 60 patients per week. Even if we were able to resume abortion care on April 22, 2020, it would take us a significant amount of time to treat all of the patients that we will have to turn away between now and then, in addition to our regular patient load.

Impact on Patients

30. A majority of the patients at the Fort Worth Clinic are people of color and Spanish speakers. They hail from all over Texas.

31. A majority of the patients at the McAllen Clinic are Spanish speakers and many face immigration-related restrictions on traveling outside of the Rio Grande Valley.

32. The patients at both clinics seek abortion care for a variety of reasons. Many are low-income, uninsured, and the parents of dependent children.

33. And many would suffer substantial burdens if they were forced to seek abortion care out-of-state ordinarily. Such long-distance travel is virtually impossible now due to travel restrictions, more severe financial constraints for those in need of abortion care, school closures, and the unlikelihood of finding childcare.

34. Consequently, our patients and would-be patients will be forced to live with an unwanted pregnancy for an indefinite amount of time—if they are able to obtain an abortion at all. This can involve physical symptoms, such as morning sickness, considerable stress and anxiety, and the increased possibility that an abusive partner or family member will learn of the pregnancy.

35. People who are delayed past ten weeks lmp will no longer be able to obtain a medication abortion. *See* Tex. Health & Safety Code § 171.063(a)(2). Similarly, those who are delayed past 14-16 weeks lmp will no longer be able to obtain an aspiration abortion, a type of surgical abortion, and will instead have to receive a D&E, which is a lengthier and more complex procedure. Those who are pushed past 18 weeks lmp, *see* Tex. Health & Safety Code § 171.004, will no longer be able to obtain an abortion at an abortion clinic, while those who are delayed past 22 weeks lmp will no longer be able to obtain an abortion in Texas at all, absent a medical emergency. *See* Tex. Health & Safety Code § 171.044.

36. The medical risks of abortion and pregnancy, as well as the costs of abortion care, increase with gestational age.

37. Thus, the patients that WWH will be forced to turn away for fear of prosecution will suffer in significant and lasting ways.

Dated: March 25, 2020

/S/Andrea Ferrigno
Andrea Ferrigno
Corporate Vice-Present
Whole Woman's Health

EXHIBIT 4

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

PLANNED PARENTHOOD CENTER FOR CHOICE; *et al.*,	)	
	)	CIVIL ACTION
Plaintiffs,	)	
	)	CASE NO. 1:20-CV-00323-LY
v.	)	
	)	
GREG ABBOTT, in his official capacity as Governor; *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF AMY HAGSTROM MILLER

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 Alliance ("WWHA"), a plaintiff in this case.

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

3. WWHA currently operates an abortion clinic in Austin, Texas (the "Austin clinic"), as well as abortion clinics in Indiana and Virginia. The Austin clinic opened in 2017 and is licensed in accordance with Texas law.

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

5. I have been working in the abortion care field since 1989. Prior to my work at WWHA, I founded a consortium of limited liability companies involved in the provision of abortion care throughout the United States. These companies do business under the name "Whole

Woman's Health." I continue to serve as President and CEO of Whole Woman's Health, which opened its first abortion clinic in 2003.

6. I am thoroughly familiar with all aspects of abortion clinic operations and patient care.

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

Provision of Abortion Care at the Austin Clinic

8. The Austin clinic provides surgical abortions up to 17.6 weeks of pregnancy as measured from the first day of a patient's last menstrual period ("lmp"). Under Texas law, licensed abortion facilities are not permitted to provide surgical abortions beyond this gestational age. *See* Tex. Health & Safety Code § 171.004.

9. The Austin clinic provides medication abortions up to 70 days lmp. Under Texas law, medication abortions are prohibited after this gestational age. *See* Tex. Health & Safety Code § 171.063(a)(2).

10. In a typical week, the Austin clinic provides surgical abortions to approximately 30 patients.

11. In a typical week, the Austin clinic provides medication abortions to approximately 30 patients.

12. Texas law requires abortion patients who reside within 100 miles of a licensed abortion clinic to make two separate visits to the clinic to obtain care. *See* Tex. Health & Safety Code § 171.012(a)(4), (b). During the first visit, we must provide the patient with certain state-mandated information and perform an ultrasound examination. *See id.* During the second visit, we provide abortion care. Most of our patients reside within 100 miles of the Austin clinic.

13. Providing abortion care requires minimal use of personal protective equipment ("PPE"). In fact, medical staff members at the Austin clinic do not utilize any PPE when providing medication abortion to patients. Doctors who provide surgical abortions at the Austin clinic typically wear sterile or non-sterile gloves that are discarded after each procedure but do not utilize other forms of PPE. If a patient is receiving sedation, a nurse is also present in the procedure room and will utilize sterile or non-sterile gloves. One or more surgical assistants may also be present for a procedure, but they do not utilize any PPE.

14. Likewise, pre-procedure ultrasound examinations require minimal PPE. Use of PPE is typically not required at all for abdominal ultrasound examinations. For vaginal ultrasound examinations, doctors and ultrasound technicians typically wear non-sterile gloves that are discarded after each scan. When laboratory testing is required, technicians likewise utilize only non-sterile gloves.

15. Following a surgical abortion procedure, the tissue removed from a patient is examined in the pathology laboratory. This task is typically performed by a single staff member who utilizes one washable gown per shift, either one disposable face shield per shift or one set of reusable goggles, one set of disposable shoe covers per shift, one disposable hair cap per shift, and one or more sets of non-sterile gloves.

16. WWHA does not use or have any N95 respirators.

17. Abortion patients seldom require hospitalization. The Austin clinic had only a single hospital transfer during all of last year. Further, we keep detailed complication logs that record, among other things, when a patient receives hospital treatment after being discharged from the clinic. This happens only a handful of times each year.

WWHA's Response to the COVID-19 Outbreak

18. In response to the COVID-19 outbreak, WWHA has adopted policies to protect its patients and staff members from exposure to the virus.

19. For example, staff members screen all patients by telephone before they come to the Austin clinic to determine if they have symptoms of COVID-19. Symptomatic patients are directed to self-quarantine and contact their primary healthcare providers. We will not schedule a patient for a clinic visit unless the patient has been symptom free for fourteen days. We are also limiting the number of people who enter the clinic and ensuring that patients maintain a safe distance from one another in the waiting room and recovery area. In addition, we are screening staff members for symptoms and directing everyone who is symptomatic or who has come in contact with someone who has a confirmed case of the virus to self-quarantine for at least fourteen days.

20. We have provided staff members with training on best practices to prevent the spread of infection, and we are vigilant about enforcing protocols for hand washing and disinfecting surfaces. In other states, we have begun using telehealth platforms for pre-abortion counseling, which reduces unnecessary trips to the clinic for patients and providers, but Texas law requires that certain mandatory disclosures be delivered in person prior to the abortion.

Suspension of Services Following the Governor's Executive Order

21. On March 22, 2020, Texas Governor Greg Abbott issued Executive Order GA-09 ("Executive Order"), relating to hospital capacity during the COVID-19 pandemic. It is in effect until 11:59 p.m. on April 21, 2020, although it may be extended. It directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve

the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." *Id.* at 1. The Executive Order states that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster." *Id.*

22. Although the order does not define PPE, I understand that term to refer to surgical masks, N95 respirators (a face covering that is designed to block at least 95 percent of very small test particles and which, when used appropriately, is a more effective filtration system than a surgical mask), sterile and non-sterile gloves, disposable protective eyewear, disposable gowns, and disposable shoe covers.

23. I believe that the Austin clinic can continue to provide abortion care in a manner consistent with the Executive Order, and WWHA has adopted policies and procedures to ensure that the care that we provide while the Executive Order remains in effect is fully compliant with its letter and spirit.

24. On Monday, March 23, 2020, WWHA received a copy of an email from the Texas Office of the Attorney General announcing a press release by Attorney General Ken Paxton. That press release was entitled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic."

25. The press release states that the Executive Order applies to "all surgeries and procedures that are not immediately medically necessary," including "most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type

of abortion that is not medically necessary to preserve the life or health of the mother." It states that a "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time" and warns that "[t]hose who violate the governor's order will be met with the full force of the law."

26. WWHA reasonably fears the Attorney General's threat of enforcement, given that the Attorney General and other enforcement officials may understand the Executive Order to prohibit "any type of abortion" that entails the use of PPE even though the Executive Order expressly permits abortions that WWHA's physicians have determined are necessary to "correct a serious medical condition of … a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician," and/or those that "would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 health disaster."

27. Based on this enforcement risk, WWHA has cancelled appointments for more than 20 abortion patients since receiving the Attorney General's press release. At least two of these patients were in the second-trimester of pregnancy and will be past the legal limit for abortion in Texas by the time the Executive Order expires.

28. Patients continue to call the clinic to schedule appointments. We have to turn them away unless we can be sure that no aspect of their care will require the use of PPE. We expect that, between today and April 21, 2020, we will have to turn away dozens of patients.

29. The Austin clinic's capacity is limited by the size of the facility, doctor availability, and the need for most patients to make two trips to the clinic to obtain care. The maximum capacity of the Austin clinic is sixty to seventy patients per week. Even if we were able to resume providing

abortion care on April 22, 2019, which is uncertain, we would not be able to treat all the patients who had been previously been turned away within a week.

Impact on Patients

30. Our patients seek abortion care for a variety of reasons. Many do not have the resources to add an additional child to their family. Some are students who want to complete their education before having children. Some do not want to be tied financially or emotionally to the putative father, or fear abuse if their pregnancy is discovered.

31. Many of the patients who seek care at the Austin clinic are low-income, and many are parents of dependent children. The majority are uninsured.

32. It would be difficult for many of our patients to travel out of state to access abortion care even during normal times. But now, given the travel restrictions and business closures resulting from the COVID-19 crisis, it is nearly impossible. Moreover, in the current circumstances, long-distance travel is both risky and nerve-wracking.

33. Being forced to delay a wanted abortion is also nerve-wracking. Patients who are delayed from accessing abortion must continue to cope with the physical symptoms of pregnancy, which for many include morning sickness. Weight gain will require some to buy new clothes, which can be a financial strain. The longer a patient remains pregnant, the more likely it is that others will discover the pregnancy, including abusive partners or family members. Patients who are delayed from accessing abortion must also cope with the fear of not being able to obtain abortion care in time—and of the life-altering consequences of having to carry an unwanted pregnancy to term.

34. Patients who are delayed past 70 days lmp are no longer eligible for a medication abortion. *See* Tex. Health & Safety Code § 171.063(a)(2). Patients who are delayed past 14-16

weeks lmp are no longer eligible for an aspiration abortion, a type of surgical abortion available early in pregnancy, and must instead have a D&E abortion, which is a lengthier and more complex procedure. Patients who are delayed past 17.6 weeks lmp are no longer eligible for an abortion at the Austin clinic or any abortion clinic in Texas. *See* Tex. Health & Safety Code § 171.004. Patients who are delayed past 22 weeks lmp are no longer able to obtain an abortion in Texas at all, absent a medical emergency. *See* Tex. Health & Safety Code § 171.044.

35. The cost of abortion care (as well as the medical risks of pregnancy and abortion) increase significantly with gestational age.

36. The patients that the Austin clinic is forced to turn away because of the Attorney General's threat of enforcement will therefore be harmed in significant and irreparable ways.

Dated: March 25, 2020

Amy Hagstrom Miller

AMY HAGSTROM MILLER

EXHIBIT 5

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

PLANNED PARENTHOOD CENTER FOR CHOICE, et al., Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, et al., Defendants.	No. 1:20-cv-00323-LY

DECLARATION OF JESSICA KLIER IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

JESSICA KLIER, declares under penalty of perjury that the following statements are true and correct:

1. I am the Administrator at Austin Women's Health Center and Brookside Women's Medical Center, a position that I have held for 16 years. Along with the Medical Director, I provide overall leadership for the clinic. My responsibilities include carrying out the clinic's organizational goals, developing and implementing clinic policies and procedures with operational oversight of financial and budgetary activities, and ensuring compliance with all regulatory agencies governing health care delivery.

2. Austin Women's Health Center is a licensed abortion facility and Brookside Women's Medical Center is a gynecological and primary care practice. Together, these two facilities (collectively "Austin Women's") have provided high-quality reproductive services to Texas women for over 40 years. Austin Women's provides medication abortion up to 70 days of gestation and procedural abortions (sometimes referred to as "surgical abortions") up to 17

weeks, 6 days as dated from the first day of the patient's last menstrual period. Austin Women's also provides contraception, miscarriage management, and gynecologic surgical procedures, including colposcopies, biopsies, and loop electrosurgical excision procedures ("LEEPs"), in which a layer of cervical tissue is removed to diagnose and treat cancer or precancerous cells.

3. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Executive Order No. GA-09 (the "Executive Order"), as interpreted by the Texas Attorney General to ban all previability abortion procedures in the state except where immediately necessary to protect the life or health of a pregnant person. I have reviewed the Executive Order and a press release by the Texas Attorney General interpreting it.

4. The facts I state here are based on my experience, my review of Austin Women's business records, information obtained in the course of my duties at Austin Women's, and personal knowledge that I have acquired through my service at Austin Women's.

5. On March 22, 2020, Texas Governor Greg Abbott issued the Executive Order, relating to hospital capacity during the COVID-19 pandemic. That order is in effect until 11:59 p.m. on April 21, 2020, although it may be extended. It directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." *Id.* at 1. The Executive Order states that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical

practice, would not deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster." *Id.*

6. Although the order does not define PPE, I understand that term to refer to surgical masks, N95 respirators, sterile and non-sterile gloves, disposable protective eyewear, disposable gowns, and disposable shoe covers. Austin Women's stocks surgical masks, non-sterile gloves, disposable protective eyewear, disposable gowns, and disposable shoe covers. We also have a small number of N95 respirators that we generally do not use.

7. On Monday, March 23, 2020, Austin Women's received a copy of an email from the Texas Office of the Attorney General announcing a press release by Attorney General Ken Paxton, entitled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic."

8. The press release states that the Executive Order applies to "all surgeries and procedures that are not immediately medically necessary," including "most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother." The release invokes the order's application to abortion providers four times. It states that a "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time" and warns that "[t]hose who violate the governor's order will be met with the full force of the law."

9. In 2019, Austin Women's performed 3058 abortions, 1601 of which were medication abortions.

10. In January and February 2020, Austin Women's performed 570 abortions, 309 of which were medication abortions.

11. Neither medication nor procedural abortion requires extensive, if any, PPE or otherwise would deplete PPE necessary to address the current pandemic. Before the COVID-19 outbreak, Austin Women's used no PPE for medication abortion, and limited PPE for procedural abortions—non-sterile gloves and disposable shoe covers for most procedures, with the addition of gowns, face masks, and face shields for second trimester procedures.

12. An ultrasound or laboratory exam, including one that accompanies medication or procedural abortion at Austin Women's, requires only non-sterile gloves, similar to what are used in nearly all medical visits by health care providers.

13. Since the COVID-19 outbreak began, Austin Women's has taken extra steps to conserve PPE while protecting our patients and staff from potential sources of transmission. Austin Women's primary physician, for example, has been wearing and reusing a single N95 mask during all face-to-face interactions with patients and switched to using washable gowns during procedural abortions.

14. We have also taken numerous steps to help prevent the spread of COVID-19 infection in our facility. We have taken measures to ensure social distancing, including utilizing the large outdoor space around our clinic, where, where the weather is pleasant, we have set up chairs at least six feet apart. Inside the facility we have similarly spaced chairs in the waiting room at least six feet apart. We now ask patients to fill out paperwork and wait for their procedure in their car. In addition, although we normally welcome support companions accompanying abortion patients, we have decided not to allow such companions (except parents

accompanying minors or language translators) to enter our facility to reduce the number of overall people exposed to one another.

15. We have also begun spacing out appointments to reduce crowding in our facility and have deactivated the automatic online appointment feature on our website to prevent double booking. We have also changed the patient flow in our facility so that each patient stays in their assigned patient room for the duration of their visit, instead of going back and forth to the waiting room in between visits with different staff members.

16. We have also been screening patients both on the phone when they make their appointment and upon entry for potential infection, including: asking each patient if she has a fever or a cough, asking if she has been exposed to potential COVID-19 patients, and taking each patient's temperature upon entry to the facility. Beginning this week, we were planning to start screening staff members each day for fever and other potential symptoms.

17. Based on the risk of enforcement of the Executive Order, we have already had to cancel nearly 100 abortion patient appointments, though we are still seeing some patients including for follow-ups and urgent gynecological care. If we are unable to see certain patients for the rest of the week, we will need to cancel dozens of additional patient appointments.

18. Many, if not all of these patients, in addition to the patients Austin Women's planned to serve through April 21, will be significantly burdened by the delays in their access to care. Many will be unable to access abortion at all, while others will be forced to travel out of state. All will suffer increased risks to their health by the delay in access to abortion care. Many will also face increased costs related to abortion, as their abortion access is pushed to later gestational points when abortion is more expensive and may require a two-day procedure, instead of one, and thus additional use of PPE.

I declare under penalty of perjury that the foregoing is true and correct.

Jessica Klier

Executed March 25, 2020

EXHIBIT 6

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

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al*.,

Plaintiffs,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, *et al*.,

Defendants.

No. 1:20-cv-00323-LY

DECLARATION OF KEN LAMBRECHT IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Ken Lambrecht, declare as follows:

1. I am the CEO of Planned Parenthood Greater Texas, Inc. ("PPGT") as well as of its related entity, Planned Parenthood of Greater Texas Surgical Health Services ("PPGTSHS"). 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.

2. PPGT is a not-for-profit organization incorporated in Texas and headquartered in Dallas, Texas. It operates health centers throughout Central and North Texas, including Austin, Dallas, El Paso, Fort Worth, Paris, Tyler, Waco, and surrounding communities. PPGT provides comprehensive reproductive health care services, including birth control, emergency contraception, testing and treatment for sexually transmitted infections (STIs), pregnancy testing and prenatal referrals, clinical breast exams, breast and cervical cancer screenings, PrEP, PEP,

colposcopy, Loop Electrosurgical Excision Procedure (LEEP), and condyloma treatment. PPGT also provides Gender Affirming Hormone Therapy and hormone replacement therapy.

3. An ancillary of PPGT, PPGTSHS, also provides medication and procedural abortion at three health centers.

4. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Executive Order No. GA-09, as interpreted by the Texas Attorney General to ban all previability abortion in the state except where immediately necessary to protect the life or health of a pregnant person, as well as the Texas Medical Board's emergency amendment to 22 TAC § 187.57 ("Emergency Rule"), which imposes the same requirements as the Executive Order. I am familiar with the Executive Order, a press release by the Texas Attorney General interpreting it, and the Emergency Rule.

5. The facts I state here are based on my experience, my review of PPGT and PPGTSHS business records, information obtained in the course of my duties at PPGT and PPGTSHS, and personal knowledge that I have acquired through my service at PPGT and PPGTSHS. If called and sworn as a witness, I could and would testify competently thereto.

The Executive Order and Threatened Enforcement

6. On March 22, 2020, Texas Governor Greg Abbott issued the Executive Order, relating to hospital capacity during the COVID-19 pandemic. That order is in effect until 11:59 p.m. on April 21, 2020, although it may be extended. It directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician."

Id. at 1. The Executive Order states that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster." *Id.*

7. Although the order does not define PPE, I understand that term to refer to surgical masks, N95 respirators (a face covering that is designed to block at least 95 percent of very small test particles and which, when used appropriately, is a more effective filtration system than a surgical mask), sterile and non-sterile gloves, protective eyewear, gowns, and shoe covers.

8. PPGTSHS has adopted a policy to implement the Executive Order, a true and correct copy of which is attached as Exhibit A. That policy permitted PPGTSHS to continue offering procedural and medication abortion, consistent with the Executive Order's purpose and plain language and the views of trusted national medical organizations.

9. On Monday, March 23, 2020, PPGTSHS received a copy of an email from the Texas Office of the Attorney General announcing a press release by Attorney General Ken Paxton that interprets the Executive Order and which threatens abortion providers with enforcement measures if they violate the order.

PPGTSHS' Provision of Abortion Care

10. In 2019 PPGTSHS performed 6,982 abortions. Of those, 1,643 occurred beyond 10 weeks LMP, and were therefore necessarily performed as procedural abortion. Of those 5,339 occurring before 10 weeks LMP, 1,668 were done by procedural abortion and the remainder by medication abortion.

11. In January and February 2020, PPGTSHS performed 924 abortions, 285 of which occurred beyond 10 weeks LMP and were therefore necessarily performed as procedural abortions.

Of those 639 abortions occurring before 10 weeks LMP, 197 were done by procedural abortion and the remainder by medication abortion.

12. Neither medication nor procedural abortion requires extensive PPE or otherwise would deplete PPE. In fact, for medication abortion, providing patients with the medication does not require the use of *any* PPE. And while procedural abortion at PPGTSHS requires the use of five non-sterile gloves for each procedure, a procedural mask that includes protective eyewear (one per provider per day, unless a mask becomes soiled), disposable gowns and hair cover (one per provider per day, unless they become soiled), and disposable shoe covers, only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.[1] For an ultrasound or laboratory exam, including one that accompanies medication or procedural abortion, our providers currently use non-sterile gloves. PPGTSHS does not use or have any N95 respirators, which I understand are the PPE in shortest supply during the COVID-19 pandemic.

13. PPGTSHS does not provide inpatient care, nor is it set up to do so.

PPGTSHS' Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

14. PPGTSHS is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

15. Since the COVID-19 outbreak, PPGTSHS has taken extensive steps to preserve much-needed medical resources that are in short supply during the pandemic and help prevent the

[1] Per CDC guidance, PPGTSHS provides patients for whom there is a concern for COVID-19 or other upper respiratory disease with a mask. Ctrs. for Disease Control & Prevention, *Frequently Asked Questions about Personal Protective Equipment* (Mar. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirator-use-faq.html.

spread of COVID-19 in the communities where we offer services. Even before the Governor's order, for example, we had excluded residents and medical students from observing or participating in surgeries or procedures, which reduced the number of individuals requiring PPE. As a result of the outbreak, we have reduced our patient volume to ensure that we comply with current social-distancing recommendations. In addition, although in normal times we welcome support companions accompanying abortion patients, we have decided not to allow such companions (except parents accompanying minors) to enter our health centers in order to reduce the number of overall people exposed to one another.

16. We have also made changes to the flow of patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever. Only those individuals who are positively screened can proceed to the front desk to check in and provide their phone number. Patients are then asked to wait in their cars, where a nurse will call them to do as much intake as possible by phone. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

Harms Caused by the Executive Order and the Attorney General's Interpretation of It

17. PPGTSHS reasonably fears the Attorney General's threat of enforcement, given that the Attorney General may understand the Executive Order to prohibit procedural abortions that PPGTSHS's physicians have determined are necessary to "correct a serious medical condition of . . . a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician," as permitted by the Executive Order. It also reasonably fears that the Attorney General will understand the order to prohibit medication abortions, despite the fact that these are not "procedures" and therefore do not fall within the terms of the Executive Order at all.

18. Based on this enforcement risk, PPGTSHS cancelled twenty-two medication abortions and six procedural abortions on Tuesday, March 24. Even if each one of these patients were able to access abortion after the order's current expiration date (i.e., even if the order is not extended), many of the medication abortion patients would require procedural abortions instead (and correspondingly greater amounts of PPE), and five of the six procedural abortion patients would require a comparatively more complicated procedural abortion method known as the D&E (or Dilation & Evacuation) technique. That technique requires more time in the clinic and a larger number of staff than aspiration abortion. Moreover, because these patients would continue to be pregnant for a longer period of time, they would be at increased risk of negative health outcomes if they are diagnosed with COVID-19.[2]

19. Between Wednesday and Friday of this week, PPGTSHS has seventeen medication abortions and eleven procedural abortions scheduled. Even if each one of these patients were able to access abortion after the order's current expiration (i.e., it is not extended), many medication abortion patients would require procedural abortions instead (and correspondingly greater amounts of PPE). One of the procedural abortion patients would be beyond the legal gestational limit for abortion in Texas, another would be within days of that limit, and two others would be more than twenty weeks pregnant.

20. PPGTSHS will cancel non-emergency future surgical abortion appointments unless and until the Executive Order and Emergency Rule expire or are rescinded, or unless the Court grants relief. Additionally, because of the AG's interpretation of the Executive Order, we have

[2] Ctrs. for Disease Control & Prevention, *Information for Healthcare Providers: COVID-19 and Pregnant Women* (last updated Mar. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html.

cancelled all non-emergency medication abortions until we obtain clarity on the scope of the Executive Order or the Court grants relief.

21. I declare under penalty of perjury that the foregoing is true and correct.

Ken Lambrecht

Executed March 25, 2020

EXHIBIT A

Planned Parenthood of Greater Texas, Inc.
Policy In Response to Texas Executive Order GA 09
Relating to Hospital Capacity During the COVID-19 Disaster

PURPOSE

In light of the global pandemic of COVID-19, Governor Abbott signed Executive Order ("EO") GA 09 on March 22, 2020, attached, which is in effect until 11:59 p.m. on April 21, 2020. EO GA 09 directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." EO GA 09 goes on to state that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID- 19 disaster."

POLICY

To comply with EO GA 09, Planned Parenthood of Greater Texas, Inc. (PPGT) hereby establishes the following policies which shall remain in effect until rescinded or modified:

1. Surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician, and which would deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster, are not to be scheduled while this policy is in effect.

2. Physicians shall determine on a case-by-case basis whether a procedure that would deplete hospital capacity or personal protective equipment needed to cope with COVID-19 can be delayed without risk for serious adverse medical consequences or death.

3. PPGT's physicians have made the determination that abortion is a time-sensitive service and an essential component of comprehensive care, for which a delay of 30 days, or even less, increases the risks to patients, or make abortion completely inaccessible, and that such delay in accessing or inability to access an abortion exposes patients to risk of a serious adverse medical consequence.

4. In making this determination, PPGT's physicians considered or will consider the following:

a. The purpose and text of EO GA 09, namely: concern for "a shortage of hospital capacity or personal protective equipment" that could "hinder efforts to cope with the COVID-19 disaster."

b. The stated 30-day duration of a the delay, taking into account the Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

c. The fact that pregnancy has a duration of approximately forty weeks, as measured from the first day of a woman's last menstrual period (LMP) and that most abortions are banned in Texas beginning at 20 weeks gestation. Tex. Health & Safety Code § 171.044.

d. The fact that, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g.,* Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018). Delay is of particular concern during the COVID-19 crisis, given guidance from the Center for Disease Control ("CDC") and American College of Obstetricians and Gynecologists ("ACOG") that pregnant women may be at heightened risk of severe illness, morbidity, or mortality from viral respiratory infections such as COVID-19.[1]

e. The Joint Statement by the American College of Obstetricians and Gynecologists ("ACOG"), the American Association of Gynecologic Laparoscopists, *et al.*, on Elective Surgeries[2], issued March 16, 2020, which states that "Obstetric and gynecologic procedures for which a delay will negatively affect patient health and safety should not be delayed. This includes gynecologic procedures and procedures related to pregnancy for which delay would harm patient health. Obstetrician–gynecologists and other health care practitioners should be aware of

[1] Available at https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019 and https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html

[2] Available at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-elective-surgeries

the unintended impact that policies responding to COVID-19 may have, including limiting access to time-sensitive obstetric and gynecological procedures."

f. The Joint Statement by the ACOG, the American Board of Obstetrics & Gynecology, *et al.,* on Abortion Access During the COVID-19 Outbreak[3], issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

3. All procedures which cannot be reasonably delayed and thus which *are* scheduled and performed, in accordance with the above considerations and in compliance with EO GA 09, shall be performed while making every effort to conserve PPE and to reduce the possibility of spread and transmission of COVID-19.

Kenneth S. Lambrecht

[NAME, TITLE]

President & CEO

PP Greater TX

[3]Available at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak

EXHIBIT 7

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

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,

Defendants.

No. 1:20-cv-00323-LY

DECLARATION OF ANN SCHUTT-AINE, M.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Ann Schutt-Aine, M.D., declare as follows:

1. I am a board-certified obstetrician and gynecologist licensed to practice in the state of Texas, and I have been practicing in Houston, Texas, since 2008. I have served as the Chief Medical Officer of Planned Parenthood Center for Choice ("PPCFC") since 2017.

2. PPCFC is a Texas not-for-profit corporation that is headquartered in Houston. It operates a licensed ambulatory surgical center 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. In my current role at PPCFC, I supervise physicians and clinicians and have oversight responsibility for PPCFC's medical services. This includes responsibility for the quality assurance of those medical services, as well for the promulgation of and adherence to the medical protocols pursuant to which the services are provided. I also provide abortion care.

4. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Executive Order No. GA-09 as interpreted by the Texas Attorney General to ban all previability abortion in the state except where immediately necessary to protect the life or health of a pregnant person, as well as the Texas Medical Board's emergency amendment to 22 TAC § 187.57 ("Emergency Rule"), which imposes the same requirements as the Executive Order. I am familiar with the Executive Order, the Emergency Rule, and a press release by the Texas Attorney General interpreting the Executive Order.

5. The facts and opinions included here are based on my education, training, practical experience, information, and personal knowledge I have obtained as an OBGYN and an abortion provider; my attendance at professional conferences; review of relevant medical literature; and conversations with other medical professionals. If called and sworn as a witness, I could and would testify competently thereto.

6. My curriculum vitae, which sets forth my experience and credentials more fully, is attached as Exhibit A.

The Executive Order and Threatened Enforcement

7. On March 22, 2020, Texas Governor Greg Abbott issued the Executive Order, relating to hospital capacity during the COVID-19 pandemic. That order is in effect until 11:59 p.m. on April 21, 2020, although it may be extended. It directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician."

Id. at 1. The Executive Order states that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster." *Id.*

8. Although the order does not define PPE, I understand that term to refer to surgical masks, N95 respirators (a face covering that is designed to block at least 95 percent of very small test particles and which, when used appropriately, is a more effective filtration system than a surgical mask), sterile and non-sterile gloves, protective eyewear, gowns, and shoe covers.

9. PPCFC has adopted a policy to implement the Executive Order, a true and correct copy of which is attached as Exhibit B. That policy permitted PPCFC to continue offering procedural and medication abortion, consistent with the Executive Order's purpose and plain language and the views of trusted national medical organizations.

10. On Monday, March 23, 2020, PPCFC received a copy of an email from the Texas Office of the Attorney General announcing a press release by Attorney General Ken Paxton. A true and correct copy of that release, entitled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic," is attached as Exhibit C.

11. The press release states that the Executive Order applies to "all surgeries and procedures that are not immediately medically necessary," including "most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother." It states that a "[f]ailure to comply with an executive order issued by the governor related to the COVID-

19 disaster can result in penalties of up to $1,000 or 180 days of jail time" and warns that "[t]hose who violate the governor's order will be met with the full force of the law."

PPCFC's Provision of Abortion Care

12. Legal abortion is one of the safest medical procedures in the United States.[1] There are two main methods of abortion: medication abortion and procedural abortion. Both methods are effective in terminating a pregnancy.[2] Complications from both medication and procedural abortion are rare, and when they occur they can usually be managed in an outpatient clinic setting, either at the time of the abortion or in a follow-up visit. Major complications—defined as complications requiring hospital admission, surgery, or blood transfusion—occur in less than one-quarter of one percent (0.23%) of all abortion cases: in 0.31% of medication abortion cases, in 0.16% of first-trimester procedural abortion cases, and in 0.41% of procedural cases in the second trimester or later.[3] Abortion-related emergency room visits constitute just 0.01% of all emergency room visits in the United States.[4]

13. Medication abortion involves a combination of two pills: mifepristone and misoprostol.[5] The patient takes the first medication in the health center and then, typically twenty-four to forty-eight hours later, takes the second medication at a location of their choosing, most

[1] Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States 77–78, 162–63 (2018).

[2] Luu Doan Ireland et al., *Medical Compared With Surgical Abortion for Effective Pregnancy Termination in the First Trimester*, 126 Obstetrics & Gynecol. 22 (2015).

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

[4] Ushma Upadhyay, et al., *Abortion-related Emergency Room Visits in the United States: An Analysis of a National Emergency Room Sample*, 16(1) BMC Med. 1, 1 (2018).

[5] Nat'l Acads., *supra* note 1, at 51.

often at their home, after which they expel the contents of the pregnancy in a manner similar to a miscarriage. Medication abortion is not a "procedure."

14. Current medical evidence demonstrates that medication abortion is safe and effective through eleven weeks of pregnancy as measured from the first day of a pregnant patient's last menstrual period ("LMP"). However, Texas law, Tex. Health & Safety Code § 171.063, restricts the first drug used in medication abortion to use as described in the federally approved label, which is for pregnancies less than ten weeks. *See* FDA, *Mifeprex (mifepristone) Information* (last updated Feb. 5, 2018), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information. Accordingly, although PPCFC would provide medication abortion up to eleven weeks LMP if it could legally do so, it currently cannot provide this method of abortion in Texas beyond ten weeks LMP (through seventy days).

15. Texas law also requires that medication abortion be preceded by an ultrasound, Tex. Health & Safety Code § 171.012(a)(4), and followed by an in-person follow-up appointment within fourteen days, Tex. Health & Safety Code § 171.063(a)(2), (e), even though neither step is medically necessary in every case.

16. While sometimes referred to as "surgical abortion," procedural abortion is not what is commonly understood to be "surgery"; it involves no incision, no need for general anesthesia, and no requirement of a sterile field. Up to approximately fifteen weeks LMP, clinicians use the aspiration abortion technique, which involves dilating the natural opening of the cervix using medications and/or small, expandable rods, inserting a narrow, flexible tube into the uterus, and emptying the uterus through suction. This procedure typically takes five to ten minutes. To perform abortions after that gestational point in pregnancy, clinicians must dilate the cervix further and use instruments to empty the uterus, which is called the dilation and evacuation ("D&E") technique.

Later in the second trimester, the clinician may begin cervical dilation the day before the procedure itself. In the absence of a lethal fetal anomaly, PPCFC performs procedural abortion up to twenty-one weeks, six days LMP.

17. For some patients with pregnancies less than ten weeks LMP, medication abortion is not available because it is contraindicated or there are other factors that necessitate a procedural abortion, such as where the patient has an allergy to the medications or other medical conditions that make procedural abortion relatively more safe.[6]

18. In 2019, PPCFC performed 6,152 abortions. Of those, 1,083 occurred beyond ten weeks LMP, and were therefore necessarily performed as procedural abortion. Of those 5,069 occurring before ten weeks LMP, 2,877 were done by procedural abortion and the remainder by medication abortion.

19. In January and February 2020, PPCFC performed 1,074 abortions, 216 of which occurred beyond ten weeks LMP and were therefore necessarily performed as procedural abortions. Of those 858 abortions occurring before ten weeks LMP, 429 were done by procedural abortion and the remainder by medication abortion.

20. Individuals seek abortion for a multitude of complicated and personal reasons. By way of example, some patients have abortions because they conclude it is not the right time to become a parent or have additional children,[7] they desire to pursue their education or career, or they lack the necessary financial resources or a sufficient level of partner or familial support or

[6] Nat'l Acads., *supra* note 1, at 51–52.

[7] Indeed, a majority of women having abortions in the United States already have at least one child. Guttmacher Inst., Induced Abortions in the United States 1 (2018), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf; *see also* Jenna Jerman, Rachel K. Jones & Tsuyoshi Onda, Guttmacher Inst., Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, at 6, 7 (2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

stability.[8] Other patients seek abortions because continuing with the pregnancy could pose a greater risk to their health.[9] Indeed, while much is unknown about COVID-19, including whether it can complicate pregnancy, some pregnant people may be exposed to additional health risks from the disease. The American College of Obstetricians and Gynecologists ("ACOG") has warned that "pregnant women are known to be at greater risk of severe morbidity and mortality from other respiratory infections such as influenza and SARS-CoV. As such, pregnant women should be considered an at-risk population for COVID-19."[10]

21. The window during which a patient can obtain an abortion in Texas is limited. Pregnancy is generally forty weeks in duration, but Texas prohibits abortion after twenty-two weeks LMP. *See* Tex. Health & Safety Code § 171.044.[11]

22. Although abortion is a very safe medical procedure, the health risks associated with it increase with gestational age.[12] As ACOG and other well-respected medical professional organizations have observed, abortion "is an essential component of comprehensive health care"

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[8] That strain is all the more apparent if one considers that the vast majority—approximately 75%—of abortion patients nationwide are poor or have low incomes. Guttmacher Inst., Induced Abortions in the United States 1, *supra* note 7.

[9] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health 7 (2013).

[10] Am. Coll. of Obstetricians & Gynecologists, *Practice Advisory - Novel Coronavirus 2019 (COVID-19)* (last updated Mar. 13, 2020), https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/ novel-coronavirus-2019; see also Ctrs. for Disease Control & Prevention, *Information for Healthcare Providers: COVID-19 and Pregnant Women* (last updated Mar. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html.

[11] This provision prohibits an abortion when "the probable post-fertilization age of the unborn child is 20 or more weeks." *Id.* "Post-fertilization age" means "the age . . . as calculated from the fusion of a human spermatozoon with a human ovum," *id.* § 171.042, which is two weeks before a patient's last menstrual period. Thus, twenty weeks post-fertilization age is twenty-two weeks LMP.

[12] Nat'l Acads., *supra* note 1, at 77–78, 162–63.

and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."[13]

23. Patients generally seek abortion as soon as they are able, but many face logistical obstacles that can delay access to abortion care. Patients will need to schedule an appointment, gather the resources to pay for the abortion and related costs,[14] and arrange transportation to a clinic, time off of work (often unpaid, due to a lack of paid time off or sick leave), and possibly childcare during appointments.[15] Texas law requires most patients to make these arrangements multiple times even though they could just as safely obtain care in one visit. Tex. Health & Safety Code § 171.012 (mandating that patients receive an ultrasound at least twenty-four hours before an abortion procedure).[16] Delay results in higher financial and emotional costs to the patient. Minor patients, unless emancipated, must also obtain written consent from a parent or a judicial order before they can receive care. Tex. Family Code § 33.003.

24. The COVID-19 pandemic has only exacerbated these burdens on patients seeking abortion care. It has limited public transit availability, caused layoffs and other work disruptions,

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[13] ACOG et al., *Joint Statement on Abortion Access During the COVID-19 Outbreak* (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

[14] Texas prohibits public insurance, including Medicaid, and insurance purchased on the state health exchange from covering abortion services except in the very limited circumstances where a patient's physical health or life is at risk, or where the pregnancy is a result of rape or incest that has been reported to law enforcement. Tex. Insurance Code § 1218.001; Tex. Human Resources Code § 32.024.

[15] Jerman et al., *supra* note 7; Sarah E. Baum et al., *Women's Experience Obtaining Abortion Care in Texas After Implementation of Restrictive Abortion Laws: A Qualitative Study*, 11 PLoS One 1, 7–8, 11 (2016); Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh, & Ann M. Moore, T*iming of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 Contraception 334, 335 (2006).

[16] A patient who lives more than 100 miles from the nearest abortion provider can rely on a waiver of the twenty-four requirement, but will still be subjected to a two-hour requirement. *See id.*

shuttered schools and childcare facilities, and otherwise limited patients' options for transportation and childcare support during a time of recommended social-distancing.[17] Indeed, jobless claims are soaring due to the virus.[18]

25. Neither medication nor procedural abortion requires extensive PPE or otherwise would deplete PPE. In fact, for medication abortion, providing patients with the medication does not require the use of *any* PPE. And while clinicians performing procedural abortion at PPCFC use some PPE, such as gloves for each procedure, a mask, and protective eyewear, only a small number of workers are physically present for these procedures or their preparation/recovery and therefore in need of PPE.[19] For an ultrasound or laboratory exam, including one that accompanies medication or procedural abortion, we use only non-sterile gloves.

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[17] Tex. Exec. Order No. GA-08 (Mar. 19, 2020) (closing Texas schools and discouraging Texans from participating in non-essential activities); Jacqulyn Powell, *Will Child Care Centers Shut Down During COVID-19 Outbreak?*, KXAN, Mar. 23, 2020, https://www.kxan.com/news/education/will-child-care-centers-shut-down-during-covid-19-outbreak/ ("Statewide, the Department of Health and Human Services says 2,400 child care operations have reported closures due to COVID-19."); Metro. Transit Authority of Harris Cty., *METRO Response to Coronavirus (COVID-19)*, https://www.ridemetro.org/Pages/Coronavirus.aspx (last visited Mar. 24, 2020) (public transit authority in Harris County noting a "sharp ridership decline" and announcing reduced frequency of bus services and reducing customer seating); *see also* White House, *The President's Coronavirus Guidelines for America* (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; Rebecca Shabad, *Fauci Predicts Americans Will Likely Need to Stay Home for at Least Several More Weeks*, NBC News, Mar. 20, 2020, https://www.nbcnews.com/politics/donald-trump/fauci-predicts-americans-will-likely-need-stay-home-least-several-n1164701.

[18] *See* Matt Largey, *COVID-19 Is Costing People Their Jobs. Here's How to Apply for Unemployment in Texas*, KUT 90.5, Mar. 19, 2020, https://www.kut.org/post/covid-19-costing-people-their-jobs-heres-how-apply-unemployment-texas (Texas unemployment claims between March 15 and March 18 were eleven times higher than for the same period in 2019); Tex. Workforce Comm'n, *TWC Extends Call Center Hours* (Mar. 23, 2020), https://twc.texas.gov/news/twc-extends-call-center-hours (Texas Workforce Commission reporting that it has received "an unprecedented call volume as a result of COVID-19").

[19] Per CDC guidance, PPCFC provides patients for whom there is a concern for COVID-19 or other upper respiratory disease with a mask. Ctrs. for Disease Control & Prevention,

26. By comparison, even if a provider of prenatal care reduces the scheduling of such care during the COVID-19 outbreak, it will still involve use of masks, sterile gloves, and potentially other PPE during multiple visits.[20] A patient continuing a pregnancy will thus require significantly more PPE than a patient presenting for abortion. Furthermore, every time a pregnant person presents to the hospital for evaluation prior to labor, which could happen multiple times, this will require the use of masks and sterile gloves. An actual birth could involve anywhere from seven to ten gowns, masks, and sterile gloves.

27. PPCFC does not use or have any N95 respirators, which I understand are the PPE in shortest supply during the COVID-19 pandemic.

28. PPCFC does not provide inpatient care, nor is it set up to do so.

PPCFC's Efforts to Prevent COVID-19 Spread and Conserve Needed Resources

29. PPCFC is committed to doing its part to reduce the spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

30. Since the COVID-19 outbreak, PPCFC has taken steps to preserve much-needed medical resources and help prevent the spread of COVID-19 in the communities where we offer services. Even before the Governor's order, for example, we had reduced our patient volume to ensure that we comply with current social-distancing recommendations. In addition, although in normal times we welcome support companions accompanying abortion patients, we have decided

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Frequently Asked Questions about Personal Protective Equipment (Mar. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirator-use-faq.html.

[20] ACOG, *Examples of Alternate or Reduced Prenatal Care Schedules* (Mar. 24, 2020), https://www.acog.org/en/Clinical%20Information/Physician%20FAQs/-/media/287cefdb936e4cda99a683d3cd56dca1.ashx.

not to allow such companions (except parents accompanying minors) to enter our health centers in order to reduce the number of overall people exposed to one another.

31. We have also made dramatic changes to the flow of our patient care. Before patients may enter a health center, we screen them for COVID-19 symptoms, including by checking for fever. Only those individuals who are thoroughly screened can proceed to the front desk to check in and provide their phone number. Patients are then asked to wait in their cars, where a nurse will call them to do as much intake as possible by phone. Patients are only permitted to reenter the health center when a room has opened for them and a clinician is available to see them.

Harms Caused by the Executive Order and the Attorney General's Interpretation of It

32. PPCFC reasonably fears the Attorney General's threat of enforcement, given that the Attorney General may understand the Executive Order to prohibit procedural abortions that PPCFC's physicians have determined are necessary to "correct a serious medical condition of … a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician," as permitted by the Executive Order. It also reasonably fears that the Attorney General will understand the order to prohibit medication abortions, despite the fact that these are not "procedures" and therefore do not fall within the terms of the Executive Order at all.

33. Based on this enforcement risk, PPCFC has already cancelled services for more than fifty abortion patients through Wednesday of this week.

34. PPCFC will cancel non-emergency future procedural abortion appointments unless and until the Executive Order and Emergency Rule expire or are rescinded, or unless the Court grants relief. Additionally, because of the AG's interpretation of the Executive Order, we have

cancelled all non-emergency medication abortions until we obtain clarity on the scope of the Executive Order or the Court grants relief.

35. Even if each one of these patients were able to access abortion after the order's current expiration date (i.e., even if the order is not extended), many of the medication abortion patients would require procedural abortions instead (and correspondingly greater amounts of PPE), and some procedural abortion patients would require a comparatively more complicated procedural abortion method using the D&E technique. That technique requires more time in the clinic and a larger number of staff than aspiration abortion, another method of procedural abortion. Moreover, because these patients would continue to be pregnant for a longer period of time, they would also be at increased risk of negative health outcomes if they are diagnosed with COVID-19.[21] Other patients could be foreclosed from receiving an abortion altogether because the delay of the order would extend their pregnancies beyond the legal gestational limit for abortion in Texas.

36. The Executive Order could well exacerbate the COVID-19 crisis, by delaying abortion care for patients with health problems until they need intensive emergency care or by forcing patients to travel to other states, potentially using public transportation, even though public health experts have advised the public to minimize activities outside the home. If the Executive Order, as interpreted by the Attorney General, is enforced, it will deprive PPCFC's patients of the freedom to make a very personal decision, in consultation with their families and doctors, regarding whether to continue or end their pregnancies. It will harm patients' physical, emotional, and financial wellbeing and the wellbeing of their families.

[21] Ctrs. for Disease Control & Prevention, *Information for Healthcare Providers: COVID-19 and Pregnant Women*, *supra* note 10.

37. Without access to PPCFC's abortion services and those of other Texas abortion providers, some patients will be forced to travel hundreds of miles across state lines to try to access abortion care. Given the logistical hurdles of traveling out-of-state, particularly during the COVID-19 pandemic, these patients are likely to obtain abortions later than they would have had they accessed care from PPCFC, which necessarily entails greater risks than an earlier procedure.[22] Efforts to travel are also likely to expose both patients and other people to additional risk of contagion, at a time when other states and Texas's most populous counties have given urgent directives to their citizens to stay home as much as possible to avoid inadvertently spreading the COVID-19 virus.

38. For other patients, travel to another state will simply not be possible to the extent travel remains legally possible during the pandemic. As a result, these patients will be forced to carry unwanted pregnancies to term, resulting in a deprivation of their fundamental right to determine when and whether to have a child or to add to their existing families, as well as greater health and other risks to them and their children.

39. Even if some patients affected by the Executive Order *are* able to obtain an abortion after the order is lifted, they will still suffer increased risks to their health by the delay in access to abortion care.[23] Many will also face increased costs related to abortion, as their abortion access is

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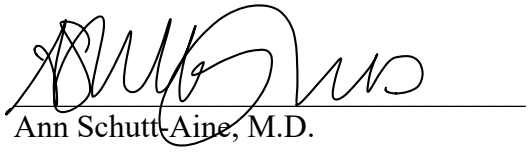
[22] As of this filing, eighteen Texas counties have issued stay-at-home orders. *See* Wes Wilson, *Here's Which Texas Cities and Counties Have Issued Stay-at-Home Orders*, KXAN (last updated Mar. 24, 2020), https://www.kxan.com/news/coronavirus/heres-which-texas-cities-and-counties-have-issued-stay-at-home-orders/; Alex Samuels, *Texas' Largest Counties Are Issuing Stay-at-Home Orders*, Tex. Tribune (Mar. 23, 2020), https://www.texastribune.org/2020/03/23/austin-travis-county-issue-stay-home-order-tuesday/. In some counties, non-compliance with these orders is punishable by fines or jail time. *See, e.g., Texas County's Curfew Amid Coronavirus Spread is Punishable by Fines Up to $1,000, Jail Time*, WHNT News 19 (Mar. 21, 2020), https://whnt.com/news/texas-countys-curfew-amid-coronavirus-spread-is-punishable-by-fines-up-to-1000-jail-time/.

[23] Nat'l Acads., *supra* note 1, at 77–78, 162–63.

pushed to later gestational points when abortion is more expensive and may require a two-day procedure, instead of one. These costs, in turn, will likely lead to additional delay and present an even greater hardship to vulnerable populations during the economic fallout of the COVID-19 pandemic.

40. Although the Order indicates that it will expire after a 30-day period, the likelihood that it will be extended is high. Certainly it is clear that the pandemic is likely to continue well beyond this period.[24]

41. I declare under penalty of perjury that the foregoing is true and correct.



Ann Schutt-Aine, M.D.

Executed March 25, 2020

[24] *See, e.g.*, Ctrs. for Disease Control & Prevention, *Healthcare Supply of Personal Protective Equipment*, (last updated Mar. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/healthcare-supply-ppe.html.

EXHIBIT A

Ann I. Schutt-Ainé, MD, FACOG

Education and Training

Undergraduate:	
September 1992 – May 1996	Yale University New Haven, CT BS, Biology, 1996 *cum laude*, distinction in Biology
Graduate:	
September 1996 – June 2000	Harvard Medical School Boston, MA MD, 2000
Postgraduate:	
June 2000 – June 2004	Magee-Womens Hospital of the University of Pittsburgh Medical Center Pittsburgh, PA
Obstetrics, Gynecology and Reproductive Sciences	

Professional Experience

August 2017 – Present	Chief Medical Officer Planned Parenthood Gulf Coast Houston, TX
April 2017 – August 2017	Medical Director Planned Parenthood Gulf Coast Houston, TX
September 2008 – Present	Assistant Professor, Obstetrics and Gynecology Baylor College of Medicine Houston, TX
September 2011 – March 2017	Associate Medical Director Planned Parenthood Gulf Coast and PPCfC Houston, TX
August 2008 – Present	Contract Physician Planned Parenthood Center for Choice (PPCfC) Houston, TX
August 2007 – July 2008	Associate Medical Director, Ob/Gyn

	Planned Parenthood Golden Gate San Francisco Bay Area
July 2004 – July 2007	Obstetrician/Gynecologist Primary Care Health Services, Inc. Pittsburgh, PA
March 2004 – June 2007 Planned Parenthood of Western Pennsylvania	Contract Physician Pittsburgh, PA

Additional training/experience

October 2018 – March 2019	US Physician Leadership Academy *A six-month program produced by Deloitte and the Wharton School, "targeted to practicing physicians who have taken on increasing levels of leadership and administrative responsibility in their careers and aspire to be enterprise-wide leaders."*
February 2015	Excellence in Family Planning Research Course *An intensive one week course in epidemiology, research design, and evidence-based medicine.*
September 2009 – April 2010	Fellow – Leadership Training Academy Physicians for Reproductive Choice and Health *An eight-month, intensive program aimed to develop and internalize the skills and attributes needed to be a powerful, effective advocate for comprehensive sexual and reproductive health care.*

Appointments and Positions

Academic

September 2008 – present Director – Ryan Residency Training Program in Family Planning (2010-2018)	Assistant Professor, Obstetrics and Gynecology
July 2004 – July 2007	Clinical Assistant Professor of Obstetrics, Gynecology and Reproductive Sciences University of Pittsburgh School of Medicine

Non-Academic

April 2011 – April 2019	Board of Directors, National Abortion Federation

Chair, Quality Assessment and Improvement Committee
Chair-Elect, Board of Directors: 2015-2016
Chair, Board of Directors: 2016-2018

Committees/Other Activities

ACOG District XI Legislative Committee (2013)
ACOG Committee on Healthcare for Underserved Women (2015-2019)
Baylor College of Medicine, Department of Ob/Gyn Clinical Competencies Committee
Ben Taub Hospital Ob/Gyn Quality Committee
Ben Taub OB/GYN Peer Review Committee
Houston Endowment's Improving Maternal Health Initiative – Implicit Bias Workgroup
Society of Family Planning Clinical Affairs Subcommittee
Trainer – Merck/Nexplanon contraceptive implant (2011 – 2016)

Certification and Licensure

Medical Licensure:
Texas medical license
Louisiana medical license
California medical license (expired)
Pennsylvania medical license (expired)
DEA license

Specialty Certification:
Certified Diplomate of the American Board of Obstetrics and Gynecology, December 2006

Membership in Professional and Scientific Societies

American College of Obstetricians and Gynecologists, 1999 – present
National Medical Association, 2001 – present
Pennsylvania Medical Society, 2005 – 2007
Pittsburgh Obstetrical and Gynecology Society, 2005 – 2007
Association of Reproductive Health Professionals, 2007 – present
Harris County Medical Society, 2007 – present
Houston Medical Forum, 2009 – present
National Abortion Federation, 2010 – present
Society of Academic Specialists in General Obstetrics and Gynecology, 2013 – present

Honors

National Health Service Corps Scholarship Recipient, 1997
Medical Student Teaching Award, 2001
National Medical Association/NIH Resident Travel Award, 2001
Fulbright and Jaworski Faculty Excellence Award in Training and Evaluation, 2012

Languages Spoken

English
Spanish

Publications

Schutt-Aine A, Crabtree D, Peck M and Levy JS. R1022: 34-year-old G2P2 Caucasian female who desires contraception [Internet]. Newtown Square, PA: CaseNetwork; 2015. http://cases.casenetwork.com.

Contraceptive Procedures
Beasley A and Schutt-Ainé A. Obstet Gynecol Clin North Am. 2013 Dec;40(4):697-729.

Schutt-Aine AI and Timmins AE (2013). Sexual Assault Examination. In EF Reichman (Ed.), Emergency Medicine Procedures (Second Edition). New York: McGraw Hill Education.

Linares AC and Schutt-Aine, AI (2011). Contraception. In R. Rakel and D.Rakel (Eds.), Textbook of Family Medicine (Eighth Edition). Philadelphia: Saunders.

Invited Presenter/Panelist

"What do women need and want with respect to contraception after medical abortion?" – Gynuity Health Projects Conference, Contraception after Medical Abortion: Evidence-based Practice to Meet Women's Needs; Santa Monica, CA; March 2016

"Real World Systems Change" – Physicians for Reproductive Health Alumni Professional Development Summit; Washington, DC; May 2016

"Métodos y esquemas medicamentosos para la interrupción lega del embarazo (ILE)" – Gynuity Health Projects and Corporación Miles Conference, Uso de Mifepristona y Misoprostol en la Ginecología y Obstetricia; Santiago, Chile; August 2017.

"In Pursuit of Healthcare Equality, The Healthcare Crisis for Women in Texas: Maternal Mortality and Other Medical Issues" – Anti-Defamation League Women's Initiative Breakfast; Houston, TX; March 2018

Keynote Address – ACLU of Texas Reproductive Freedom in Action Annual Conference; April 2018

EXHIBIT B

Planned Parenthood Center for Choice ("PPCFC")
Policy in Response to Texas Executive Order GA 09
Relating to Hospital Capacity During the COVID-19 Disaster

PURPOSE

In light of the global pandemic of COVID-19, Governor Abbott signed Executive Order ("EO") GA 09 on March 22, 2020, attached, which is in effect until 11:59 p.m. on April 21, 2020. EO GA 09 directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." EO GA 09 goes on to state that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID- 19 disaster."

POLICY

To comply with EO GA 09, PPCFC hereby establishes the following policies which shall remain in effect until rescinded or modified:

1. Surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician, and which would deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster, are not to be scheduled while this policy is in effect.

2. Physicians shall determine on a case-by-case basis whether a procedure that would deplete hospital capacity or personal protective equipment needed to cope with COVID-19 can be delayed without risk for serious adverse medical consequences or death.

3. PPCFC's physicians have made the determination that abortion is a time-sensitive service and an essential component of comprehensive care, for which a delay of 30 days, or even less, increases the risks to patients, or make abortion completely inaccessible, and that such delay in accessing or inability to access an abortion exposes patients to risk of a serious adverse medical consequence.

4. In making this determination, PPCFC's physicians considered or will consider the following:

a. The purpose and text of EO GA 09, namely: concern for "a shortage of hospital capacity or personal protective equipment" that could "hinder efforts to cope with the COVID-19 disaster."

b. The stated 30-day duration of a the delay, taking into account the Ambulatory Surgery Center Association's "COVID-19: Guidance for ASCs for Necessary Surgery," issued March 18, 2020, which states that consideration of whether delay of a surgery is appropriate must account for risk to the patient of delay, "including the expectation that a delay of 6–8 weeks or more may be required to emerge from an environment in which COVID-19 is less prevalent."

c. The fact that pregnancy has a duration of approximately forty weeks, as measured from the first day of a woman's last menstrual period (LMP) and that most abortions are banned in Texas beginning at 20 weeks gestation. Tex. Health & Safety Code § 171.044.

d. The fact that, while abortion is an extremely safe medical procedure, delay increases the risk to the health of the patient. *See, e.g.,* Nat'l Acads. of Scis. Eng'g & Med., The Safety & Quality of Abortion Care in the United States at 77-78, 162-63 (2018). Delay is of particular concern during the COVID-19 crisis, given guidance from the Center for Disease Control ("CDC") and American College of Obstetricians and Gynecologists ("ACOG") that pregnant women may be at heightened risk of severe illness, morbidity, or mortality from viral respiratory infections such as COVID-19.[1]

e. The Joint Statement by the American College of Obstetricians and Gynecologists ("ACOG"), the American Association of Gynecologic Laparoscopists, *et al.*, on Elective Surgeries[2], issued March 16, 2020, which states that "Obstetric and gynecologic procedures for which a delay will negatively affect patient health and safety should not be delayed. This includes gynecologic procedures and procedures related to pregnancy for which delay would harm patient health. Obstetrician–

[1] Available at https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019 and https://www.cdc.gov/coronavirus/2019-ncov/hcp/pregnant-women-faq.html

[2] Available at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-elective-surgeries

gynecologists and other health care practitioners should be aware of the unintended impact that policies responding to COVID-19 may have, including limiting access to time-sensitive obstetric and gynecological procedures."

f. The Joint Statement by the ACOG, the American Board of Obstetrics & Gynecology, *et al.,* on Abortion Access During the COVID-19 Outbreak[3], issued March 18, 2020, which states that to "the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure" because it "is an essential component of comprehensive health care" and "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks [to patients] or potentially make it completely inaccessible."

3. All procedures which cannot be reasonably delayed and thus which *are* scheduled and performed, in accordance with the above considerations and in compliance with EO GA 09, shall be performed while making every effort to conserve PPE and to reduce the possibility of spread and transmission of COVID-19.

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[3] Available at https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak

EXHIBIT C

March 23, 2020

Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic

Texas Attorney General Ken Paxton today warned all licensed health care professionals and all licensed health care facilities, including abortion providers, that, pursuant to Executive Order GA 09 issued by Gov. Greg Abbott, they must postpone all surgeries and procedures that are not immediately medically necessary.

On Saturday, Gov. Abbott issued an executive order that "all licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." This prohibition applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother.

The COVID-19 pandemic has increased demands for hospital beds and has created a shortage of personal protective equipment needed to protect health care professionals and stop transmission of the virus. Postponing surgeries and procedures that are not immediately medically necessary will ensure that hospital beds are available for those suffering from COVID-19 and that PPEs are available for health care professionals. Failure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time.

"We must work together as Texans to stop the spread of COVID-19 and ensure that our health care professionals and facilities have all the resources they need to fight the virus at this time," said Attorney General Paxton. "No one is exempt from the governor's executive order on medically unnecessary surgeries and procedures, including abortion providers. Those who violate the governor's order will be met with the full force of the law."

For information on the spread or treatment of Coronavirus (COVID-19), please visit the Texas Department of State Health Services (https://dshs.texas.gov/coronavirus/) website.

EXHIBIT 8

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

PLANNED PARENTHOOD CENTER FOR CHOICE, et al., Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, et al., Defendants.	No. 1:20-cv-00323-LY

DECLARATION OF PLAINTIFF RO IN WALLACE M D IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Robin Wallace, M.D., declare as follows:

1. I am a board-certified family medicine physician, with additional specialty training in family planning, and an M.A.S. in clinical research. I am licensed to practice in Texas. I am a Plaintiff in this case, representing myself and my patients.

2. I am the co-medical director of Southwestern Women's Surgical Center ("Southwestern"), a licensed ambulatory surgical center in Dallas, Texas. Southwestern provides medication abortion through 10 weeks as measured from the first day of the patient's last menstrual period ("LMP") and procedural abortion services through 21.6 weeks LMP. Southwestern does not provide inpatient care, nor is it set up to do so.

3. As co-medical director, my responsibilities include: review and development of clinic protocols, training of all new physician staff, quality assurance review, and representing the medical staff on the administrative management team and governing board. In addition to my other

responsibilities as co-medical director, I also personally provide abortion care to patients through 21.6 weeks LMP.

4. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order followed by a preliminary injunction, which seeks to enjoin Executive Order No. GA-09 (the "Executive Order"), as interpreted by the Texas Attorney General to ban all previability abortion procedures in the state except where immediately necessary to protect the life or health of a pregnant person. I have reviewed the Executive Order and a press release by the Texas Attorney General interpreting it.

5. The facts I state here are based on my experience, my review of Southwestern's business records, information obtained in the course of my duties at Southwestern, and personal knowledge that I have acquired through my service at Southwestern. If called and sworn as a witness, I could and would testify competently thereto.

The E e uti e Order and Threatened En or ement

6. On March 22, 2020, Texas Governor Greg Abbott issued the Executive Order, relating to hospital capacity during the COVID-19 pandemic. That order is in effect until 11:59 p.m. on April 21, 2020, although it may be extended. It directs "all licensed health care professionals and all licensed health care facilities" to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician." *Id.* at 1. The Executive Order states that this prohibition does not apply to "any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not

deplete the hospital capacity or the personal protective equipment ["PPE"] needed to cope with the COVID-19 disaster." *Id.*

7. Southwestern understands the term PPE to refer to surgical masks, N95 respirators (a face covering designed to block at least 95 percent of very small test particles), sterile and non-sterile gloves, disposable protective eyewear, disposable gowns, and disposable shoe covers. The services Southwestern provides do not involve significant amounts of PPE or deplete PPE.

8. On Monday, March 23, 2020, the Attorney General issued a press release interpreting the Executive Order, titled "Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic." The press release states that the Executive Order applies to "all surgeries and procedures that are not immediately medically necessary," including "most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother." The release invokes the order's application to abortion providers multiple times. It states that a "[f]ailure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time" and warns that "[t]hose who violate the governor's order will be met with the full force of the law."

9. Southwestern is uncertain as to the scope of the Executive Order and the subsequent press release by the Attorney General, and, as a result, largely stopped seeing patients on March 23, 2020. The clinic has cancelled approximately 225 appointments for the last two days, March 23 and March 24. Unless we obtain immediate relief, we intend to continue canceling appointments.

10. The window during which a patient can obtain an abortion in Texas is limited. Pregnancy is generally forty weeks in duration, but Texas prohibits abortion after twenty-two weeks LMP except in very narrow circumstances. See Tex. Health Safety Code 171.044.

Southwestern's E orts to Pre ent COVID-19 Spread and Conser e Needed Resour es

11. Southwestern is committed to doing its part to minimize spread of COVID-19 and to otherwise help ensure that our public health system has sufficient resources to meet the challenge of responding to a potential surge of illness.

12. Neither medication nor procedural abortion requires extensive PPE or otherwise would deplete PPE. In fact, for medication abortion, providing patients with the medication does not require the use of any PPE. Based on Southwestern's patient load, in an average week, we use the following PPE: a few boxes of non-sterile gloves; approximately 15 pairs of sterile gloves for procedures after 15 weeks LMP; approximately 15 gowns; around 24 pairs of shoe coverings per day; and a handful of simple surgical masks and reusable eyewear.

13. Since the COVID-19 outbreak, and prior to the Executive Order, Southwestern took extensive steps to protect patients and staff and minimize the use of PPE. For example, we have been screening our patients and staff for COVID-19; we have cancelled trainings for medical students, residents, and fellows; and have begun restricting the use of new surgical masks and gowns.

Harms Caused the E e uti e Order and the Attorne General's Interpretation o It

14. Southwestern reasonably fears the Attorney General's threat of enforcement, given that the Attorney General may understand the Executive Order to prohibit procedural abortions that Southwestern's physicians have determined are necessary to "correct a serious medical condition of … a patient who without immediate performance of the surgery or procedure would

be at risk for serious adverse medical consequences or death, as determined by the patient's physician," as permitted by the Executive Order. It also reasonably fears that the Attorney General will understand the order to prohibit medication abortions, despite the fact that these are not "procedures" and therefore do not fall within the terms of the Executive Order at all.

15. Based on this enforcement risk, Southwestern cancelled 225 appointments scheduled for Tuesday, March 24 and Wednesday, March 25. Southwestern is unsure how to proceed but plans to resume certain appointments where care does not involve new PPE. Still, some patients who would have had medication abortions as scheduled prior to the Executive Order will require procedural abortions instead (and correspondingly greater amounts of PPE). And, some procedural patients may be pushed within days of the limit in Texas or beyond it.

16. If the Executive Order, as interpreted by the Attorney General, is enforced, it will deprive some patients of the freedom to make an intimate and personal decision essential to their dignity and autonomy. It will immeasurably harm patients' physical, emotional, and financial wellbeing and the wellbeing of their families.

I declare under penalty of perjury that the foregoing is true and correct.

Dr. Robin Wallace

Executed March 25, 2020

EXHIBIT 9

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

PLANNED PARENTHOOD CENTER FOR CHOICE; *et al.*,	)	
	)	CIVIL ACTION
Plaintiffs,	)	
	)	CASE NO. 1:20-cv-323-LY
v.	)	
	)	
GREG ABBOTT, in his official capacity as Governor; *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF KAMYON CONNER, M.S.W.

KAMYON CONNER, M.S.W. hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the Executive Director of the North Texas Equal Access Fund ("TEA Fund"), a Dallas-based nonprofit organization that provides direct financial assistance to people who want to end a pregnancy but cannot afford abortion care in Texas.

2. I have provided services at TEA Fund for nearly fifteen years, first as a volunteer fielding calls for assistance to our hotline, known as the Helpline, from 2006 to 2013, and then as a Board Member and Intake Coordinator until 2018. In the latter roles, I helped shape the mission and strategy of the organization based on our clients' experiences, and I participated in the TEA Fund's financial and resource distribution planning .

3. In my current role as Executive Director of the TEA Fund, I oversee our Helpline; Client Engagement Program, which supports clients throughout the process of terminating a pregnancy, including in-person support during an abortion procedure; Caller Engagement Program, which organizes people throughout Texas to advocate for abortion access with dignity,

including by sharing stories of their abortion experiences; and Communications. These programs are run by six other staff members and over 125 active volunteers.

4. I provide the following testimony based on personal knowledge acquired through my service at the TEA Fund and review of the organization's business records.

Ongoing Challenges to Obtaining Abortion Care in Texas

5. In 2019, the Helpline received over 6,500 calls from people seeking help paying for an abortion. The calls came from 110 counties in Texas, many of them rural. At least 70% of the callers already had a child. Texas requires most patients to make two trips to obtain abortion care, which imposed transportation and childcare costs on many of the callers while depriving them of wages. For some, efforts to gather resources on their own had forced them to delay their appointments, which only increased the cost of their abortion care because it occurred at a later gestational age.

6. The TEA Fund allocates funds for abortions per week and only provides financial assistance for those scheduled within seven days of a call. A caller can qualify for assistance depending on their financial circumstances, the amount of financial aid they are able to obtain from other sources, and the total cost of the abortion. When a caller qualifies, the TEA Fund sends a financial voucher to the abortion provider with whom the patient's appointment is scheduled and pays the provider after the patient has received care. In 2019, the TEA Fund provided over $277,000 to assist 924 Texas residents in obtaining abortions.

7. Unfortunately, financial constraints prevent us from providing financial assistance to every caller who needs it and from covering the full cost of the abortion for the callers we can help. In 2019, we were able to provide financial assistance to about one-quarter of the people who requested it. Through our Client Engagement Program, we have observed that some callers who

receive our assistance experience an emotional strain from having to meet the remaining costs, which makes their overall abortion experience stressful.

Impact of Executive Order

8. The public health crisis precipitated by COVID-19 has exacerbated the difficulties Texans, particularly low-income people and people of color, have affording abortion care. Many of our recent callers are struggling with layoffs and furloughs, dealing with the possibility of eviction, experiencing other unforeseen medical costs, and contending with increased utility bills caused by sheltering at home.

9. I understand that Attorney General Paxton has interpreted an Executive Order by Governor Abbott concerning the public health crisis to ban most abortions. I also understand that this interpretation would eliminate most or all abortion care for my clients, which would have a devastating effect on their well-being.

10. The TEA Fund began committing funding for abortions in Texas for the current seven-day period on Thursday, March 19. The Attorney General publicized its interpretation on Monday, March 23. Between March 19 and 23, we committed funding to more than two dozen clients, many of whom will now be unable to obtain an abortion in Texas while the Executive Order remains in effect. At least four of those clients are over 18 weeks lmp. They will undoubtedly lose the ability to obtain an abortion in Texas before the Executive Order expires on April 21, 2020.

11. The inability to receive an abortion in Texas usually drives TEA Fund clients to seek that care out-of-state, including New Mexico, Colorado, and Louisiana. But long-distance travel is increasingly dangerous and difficult during the public health crisis given the toll of COVID-19 on already-limited resources and the pronounced difficulty of securing childcare

during the crisis. Moreover, my understanding from collaborating with abortion funds and providers in other states is that abortion care is presently unavailable in Louisiana. Clients who are unable to access abortion in Texas or do so in another State are forced to remain pregnant against their will, which can cause them and their families extreme anguish, and potentially forced to carry to term.

Dated: March 25, 2020

/S/ Kamyon Conner
Kamyon Conner
Executive Director
TEA Fund

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

PLANNED PARENTHOOD CENTER FOR CHOICE, *et al*.,

Plaintiffs,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, *et al*.,

Defendants.

No. 1:20-cv-00323-LY

[PROPOSED] TEMPORARY RESTRAINING ORDER

Plaintiffs have moved for a temporary restraining order to enjoin Defendants' efforts to immediately ban most abortion during the COVID-19 pandemic through their application of Governor Greg Abbott's March 22, 2020, Executive Order GA 09, "Relating to hospital capacity during the COVID-19 disaster" and the Texas Medical Board's emergency amendment to 22 Tex. Admin. Code § 187.57, which imposes the same requirements as Executive Order GA 09.

The Court, having considered the pleadings, legal authority, and argument presented in support of Plaintiffs' Motion, as well as the Declarations submitted with that Motion, has found and concluded, for the specific reasons required under Federal Rule of Civil Procedure 65(d) and Local Rule 65.01, that Plaintiffs have shown (1) a likelihood of success on the merits, (2) that they will suffer irreparable harm if a preliminary injunction is not granted, (3) that the balance of equities tip in Plaintiffs' favor, and (4) that a temporary restraining order is in the public interest.

Specifically, the Court finds that Plaintiffs have established a substantial likelihood of success on the merits of their claim that the Executive Order, as interpreted by the Texas Attorney

General, violates Plaintiffs' patients' liberty rights under the Fourteenth Amendment by banning abortion before viability. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects a woman's right to choose abortion, *Roe v. Wade*, 410 U.S. 113, 153–54 (1973), and prior to viability, a state has *no interest* sufficient to justify a ban on abortion, *id.* at 163–65; *see also Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 846, 871 (1992) (reaffirming *Roe*'s "central principle" that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion."); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019). The Attorney General's interpretation of the Executive Order would either ban all non-emergency abortions in Texas or ban all non-emergency abortions in Texas starting at ten weeks of pregnancy, and even earlier among patients for whom medication abortion is not appropriate. On either interpretation, it would amount to a previability ban, which contravenes decades of Supreme Court precedent, including *Roe.* Plaintiffs are likely to succeed on the merits of their Fourteenth Amendment substantive due process claim.

In addition, Plaintiffs' patients will suffer serious and irreparable harm in the absence of a temporary restraining order. The Attorney General's interpretation of the Executive Order prevents Texans from exercising their fundamental constitutional right to terminate a pregnancy. It is well established that, where a plaintiff establishes a constitutional violation, no further showing of irreparable injury is necessary. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981). Plaintiffs' requested relief will "essentially continue[] the status quo," tipping the balance of equities toward Plaintiffs and serving the public

interest. *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013), *aff'd*, 760 F.3d 448 (5th Cir. 2014); *United States v. Texas*, 508 F.2d 98, 101 (5th Cir. 1975).

THEREFORE, it is hereby ORDERED that the motion (Doc. ___) is GRANTED and that Defendants and their employees, agents, successors, and all others acting in concert or participating with them, are TEMPORARILY RESTRAINED from enforcing Governor Greg Abbott's March 22, 2020, Executive Order GA 09, "Relating to hospital capacity during the COVID-19 disaster," and the Texas Medical Board's emergency amendment to 22 Tex. Admin. Code § 187.57, as applied to medication abortion or procedural abortion.

This Temporary Restraining Order shall expire on _____, 2020 at _____ _.m., unless extended by the parties and the Court.

Plaintiffs shall not be required to post bond.

IS SO ORDERED.

SIGNED this _____ day of _____, 2020.

_____
HON. LEE YEAKEL
UNITED STATES DISTRICT JUDGE