

CAUSE NO. D-1-GN-23-000968

AMANDA ZURAWSKI, et al.,	§	IN THE DISTRICT COURT OF
<i>Plaintiffs,</i>	§	
	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
	§	
STATE OF TEXAS, et al.,	§	
<i>Defendants.</i>	§	353RD JUDICIAL DISTRICT

**DEFENDANTS’ AMENDED PLEA TO THE JURISDICTION AND
RESPONSE TO PLAINTIFFS’ APPLICATION FOR TEMPORARY INJUNCTION**

Defendants the State of Texas, Ken Paxton, in his official capacity as Attorney General of Texas, the Texas Medical Board (“TMB”), and Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board, file this DEFENDANTS’ AMENDED PLEA TO THE JURISDICTION AND RESPONSE TO PLAINTIFFS’ APPLICATION FOR TEMPORARY INJUNCTION and the attached APPENDIX, and respectfully offer the following in support:

BACKGROUND

A medical exception exists to Texas’ general prohibition on abortion when a physician, in their reasonable medical judgment, concludes that a pregnant female “has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.” Tex. Health & Safety Code § 170A.002(b)(2). When this exception applies, the physician is required to perform “the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless” that manner would create “a greater risk of the pregnant female’s death” or “a

serious risk of substantial impairment of a major bodily function of the pregnant female.” Tex. Health & Safety Code § 170A.002(b)(3). Texas law removes from its definition of abortion any act done “with the intent to (A) save the life or preserve the health of an unborn child; (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or (C) remove an ectopic pregnancy.” Tex. Health & Safety Code § 245.002(1). It is an affirmative defense that the physician exercised their reasonable medical judgment when choosing to perform the abortion in response to an ectopic pregnancy or a previable premature rupture of membranes (“PPROM”). Tex. Civ. Prac. & Rem. Code § 74.552 (eff. Sept. 1, 2023), Tex. Occ. Code § 164.055(c) (eff. Sept. 1, 2023), Tex. Pen. Code § 9.35 (eff. Sept. 1, 2023) (collectively, H.B. 3058).

Plaintiffs bring several types of claims. First, Plaintiffs bring claims under the Uniform Declaratory Judgment Act (“UDJA”) asking this Court to “clarify” the scope of the medical exception by adopting a new version that includes “any emergent medical conditions that pose a risk to pregnant people’s lives or health (including their fertility).” PLS.’ AM. PET. ¶¶ 452, 455-56, 460, 463-64, 467, 471-72, 475-76, 479-80, PRAYER; PLS.’ TEMP. INJ. APPL. at 2-3, 9, 12-15; PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 5. Plaintiffs proposed medical exception would, by design, swallow the rule. It would, for example, permit abortions for pregnant females with medical conditions ranging from a headache to feelings of depression. App’x 23 at 86:17-88:11. Plaintiffs further ask this Court, after adopting their version of the medical exception, to enjoin the enforcement of any other interpretation of the medical exception as *ultra vires*. PLS.’ AM. PET. ¶¶ 448, 456, 464, 472, 480, PRAYER; PLS.’ TEMP. INJ. APPL. at 10; PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 2-3, 5.

Plaintiffs' goal is to "change the law." To that end, they've gone on a media tour, *see e.g.* Eleanor Klibanoff, *Women denied abortions sue Texas to clarify exceptions to the laws*, Tex. Trib. (Mar. 7, 2023), <https://www.texastribune.org/2023/03/07/texas-abortion-lawsuit>, recruited fellow activists to join them in "telling their stories" to "be part of changing the law," PLS.' AM. PET. at ¶¶ 63, 137, 153, 169, 174, 186, 203, and raised more than \$50,000 in donations, *id.* at ¶ 173; *see also* <https://gofund.me/9cf7bce0>.

But splashy news conferences and media tours do not transform Texas courts into the proper venue for Plaintiffs to "tell their stories," nor are they the place to "change the law" after failing to convince the Legislature to adopt their preferred version of the medical exception. *See* Senate Judiciary Hearing on Texas Abortion Pill Ruling, CSPAN (Apr. 26, 2023), <https://www.c-span.org/video/?527656-1/senate-judiciary-hearing-texas-abortion-pill-ruling>.

Second, to the extent that any medical conditions fall outside the scope of the statutory exceptions or Plaintiffs otherwise fail in their quest to change the law, Plaintiffs alternatively allege that Texas' abortion laws wholly violate the Texas Constitution. *See* PLS.' AM. PET. at ¶¶ 421-38, 450-80; *see also* PLS.' RESP. TO DEFS' PTJ at 4-5.

SUMMARY OF THE ARGUMENT

Plaintiffs seek declaratory and injunctive relief interpreting Texas's abortion bans' statutory exceptions as allowing physicians to provide abortions to patients with any medical conditions that could pose any degree of risk to a patient's life or health. PLS.' AM. PET. at ¶¶ 336-45, 439-49. They contend that all other interpretations of the medical exception violate the Texas Constitution's substantive due process, equal protection, and equality under the law protections. *Id.* at ¶¶ 421-38, 450-80.

Plaintiffs cannot meet any of the elements of standing because they have not alleged an injury in fact, that is fairly traceable to Defendants, and that would be redressed by a favorable decision. Patients lack standing because their alleged prospective injuries are not particularized to them, as opposed to every other person who could become pregnant in Texas. Their alleged prospective injuries are also not imminently likely to occur when there are no allegations that they are certain to become pregnant again, and the only two patients who are currently pregnant have no complications. Finally, their alleged prospective injuries are purely hypothetical, relying on contingent events and speculation about what might or might not occur during a future pregnancy. Even if Patients had alleged an injury in fact, it is not fairly traceable to Defendants because of the intervening independent actions of their treating medical providers. And, finally, even if they could establish the first two elements, Patients cannot meet the redressability element because the requested relief, rewriting state law and issuing an advisory opinion, is outside this Court's authority. Moreover, by the admission of their own expert, the requested relief will still leave physicians confused about the scope of the medical exception.

Abortionists, similarly, lack standing. Their prospective injuries fail to allege an injury in fact because "confusion" is not an actionable harm, and their testimony shows that they have never been prevented from performing an abortion because of their personal fear or confusion about the scope of the exception. They also cannot show that their alleged prospective injuries are fairly traceable to Defendants due to the independent and intervening hospital policies, attorneys, and necessary second opinions of their colleagues. The requested relief, moreover, will still leave Abortionists confused about the scope of the medical exception; therefore, they also fail the

redressability element. And, in Texas, Abortionists cannot assert third-party standing on behalf of their patients.

Plaintiffs' claims, such as they are, are also not ripe because they depend on hypothetical and contingent events that may or may not come to pass. Patients allege that they fear that they *might* get pregnant at an indeterminate point in the future, and they *might* experience an unknown complication during the pregnancy, and then they *might* be harmed if an unknown medical provider in the future is confused and uncertain about the scope of the exception. Similarly, Abortionists allege that they fear that their confusion about the scope of the medical exception means they *might* not know whether unknown patients presenting at an indeterminate point in the future with unknown conditions will qualify for the medical exception. These are hypothetical and contingent scenarios; therefore, they are not ripe for review.

Plaintiffs' claims are also moot, to the extent they contend that they could experience complications involving preterm premature rupture of membranes (PPROM). Texas law has been amended since the filing of this suit to provide the relief requested by adding an affirmative defense for physicians in cases involving PPROM.

Even if Plaintiffs had standing, their claims were ripe, and their claims were not mooted, they still fail because they cannot overcome Defendants' entitlement to sovereign immunity. Plaintiffs *ultra vires* claims cannot be made against the State of Texas or the Texas Medical Board, nor can Plaintiffs challenge the validity of the medical exception through an *ultra vires* suit against the Attorney General and Executive Director, and Plaintiffs have not alleged that either the Attorney General or the Executive Director *will* violate the Texas Constitution through

enforcement of the law. Finally, Plaintiffs' *ultra vires* claims fail because they seek to exert control over the State by redefining the medical exception.

Plaintiffs UDJA claims also fail because there is no waiver of sovereign immunity for challenges to the validity of Texas' abortion laws, UDJA claims cannot be brought against the Attorney General and Executive Director, and because they failed to join all necessary parties.

Additionally, there is no waiver of sovereign immunity where Plaintiffs' constitutional claims are not viable. All of Plaintiffs' constitutional claims are subject to rational basis review—which the medical exception easily passes because protecting the life of a pregnant woman is rationally related to the governmental interest of respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

Finally, Plaintiffs are not entitled to temporary injunctive relief. They have not stated viable causes of actions against Defendants, they have not shown a probable right to the relief sought, and they have not shown a probable, imminent, and irreparable injury in the absence of interim relief.

STANDARDS OF REVIEW

Plea to the Jurisdiction

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). Subject matter jurisdiction is “never presumed and cannot be waived.” *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). “When a plea to the jurisdiction challenges the pleadings, [the court] determine[s] if the pleader has alleged facts that affirmatively demonstrate

the court’s jurisdiction to hear the cause.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). “If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.” *Id.* at 227.

Temporary Injunction

“[A] temporary injunction is an extraordinary remedy and does not issue as a matter of right.” *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). The purpose of a temporary injunction is to preserve the status quo pending trial on the merits. *Id.* Status quo is defined as “the last, actual, peaceable, noncontested status which preceded the pending controversy.” *Transp. Co. v. Robertson Transps., Inc.*, 261 S.W.2d 549, 553–54 (1953) (internal quotations omitted). The applicant’s burden is to establish a probable right of recovery following a trial on the merits and a probable injury in the interim, warranting preservation of the status quo pending the trial. *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin 2000, no pet.). “To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). *see also In re Tex. Nat. Res. Conserv. Comm’n*, 85 S.W.3d 201, 204 (Tex. 2002) (noting a request for a temporary injunction “has more stringent proof requirements” than a request for a temporary restraining order).

Moreover, “the proof required to support a judgment issuing a writ of temporary injunction may not be made by affidavit.” *Millwrights Local Union No. 2484 v. Rust Eng’g Co.*, 433 S.W.2d 683, 687 (Tex. 1968). Instead, a temporary injunction may issue only after the court conducts a

hearing and only if the plaintiff offers evidence that “establishes a probable right of recovery” on the merits. *Id.* Absent that showing, “no purpose is served” by the issuance of a temporary injunction because its purpose is likewise to maintain the status quo pending a trial on the merits. *In re Tex. Nat. Res. Conserv. Comm’n*, 85 S.W.3d at 204 (quotation omitted).

ARGUMENTS AND AUTHORITIES

I. Plaintiffs lack standing to bring this suit.

“Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable.” *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). “A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it.” *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing “require[s] an actual, not merely hypothetical or generalized grievance.” *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). To the extent not contradicted by state law, Texas courts “look to the more extensive jurisprudential experience of the federal courts on the subject [of standing] for any guidance it may yield.” *Id.*

To have standing, each plaintiff must meet three elements: (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected or cognizable interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—that is, the injury must be fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court; and (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Heckman*, 369 S.W.3d at 155.

A. Plaintiffs have suffered no injury in fact.

The first element of standing in an action seeking only declaratory and injunctive relief requires an alleged *continuing or threatened future* harm that is “concrete and particularized, actual or imminent, not hypothetical.” *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008); *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (injunctive relief “cannot conceivably remedy any past wrong”); *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011) (declaratory relief is not available to address past harms).

1. Patients lack standing because their alleged threaten injuries are not particularized, not imminent, and are hypothetical.

Patients’ prior pregnancies and their related medical complications are not before this Court. *Id.*; PLS.’ AM. PET. ¶¶6-236. Plaintiffs, instead, seek only prospective relief for threatened future harms. *Id.* at ¶449. Specifically, they allege that *if* they were to get pregnant at an indeterminate point in the future, and *if* an unknown complication arises during pregnancy that qualifies for the medical exception, then they *might* be injured *if* an unknown medical provider providing them with treatment is confused or uncertain whether they qualify for the medical exception. PLS.’ AM. PET. ¶¶263, 331; PLS.’ TEMP. INJ. APPL. at 14. These alleged prospective harms fail because they are not particularized, are not imminent, and ask this Court to adjudicate conjecturally.

First, Patients lack standing because the alleged prospective injuries are not particularized. “In general, regardless of the claim asserted, a plaintiff must show that [s]he has suffered a particularized injury distinct from the general public.” *Perez v. Turner*, 653 S.W.3d 191, 198 (Tex. 2022), *reh’g denied* (Oct. 21, 2022) (quoting *Andrade v. Venable*, 372 S.W.3d 134, 137 (Tex. 2012)). Plaintiffs allege only generalized grievances. *See generally* PLS.’ AM. PET. They contend that they,

and every other person in Texas who could get pregnant, are threatened by the alleged uncertainty and confusion among medical providers about the scope of the medical exception. *See id.* at ¶¶331, 365, 399, 438; *S. Texas Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (plaintiff lacked standing where he did not allege that he was treated differently than any other city resident); *see also Garcia v. City of Willis*, 593 S.W.3d 201, 206–08 (Tex. 2019) (holding appellant lacked standing to bring prospective claims regarding the constitutionality of red-light traffic cameras because he “st[ood] in the same shoes as any other citizen who might potentially be fined for running a red light” and therefore “lack[ed] the particularized interest for standing that prospective relief requires”). Because Patients have alleged only generalized grievances indistinguishable from every other Texan who could become pregnant, they lack standing.

Second, Patients lack standing because the alleged threatened injuries are not imminent. “A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Harm is imminent if it is relatively certain to occur rather than being remote and speculative. *Limon v. State*, 947 S.W.2d 620, 625 (Tex. Ct. App.—Austin 1997, no writ); *DaimlerChrysler Corp.*, 252 S.W.3d at 304–05. With two exceptions, none of the Patients are currently pregnant. PLS.’ AM. PET. ¶¶2-236. The two patients who are pregnant admit that they have experienced no complications during their pregnancies. *Id.* at ¶64, 79. Patients contend that “they would like to get pregnant again but fear irreparable injuries....” PLS.’ TEMP. INJ. APPL. at 14. But importantly, none allege that they are relatively certain to become pregnant. PLS.’ AM. PET. ¶¶6-236. In fact, several of the Patients have admittedly struggled to get pregnant—both in the past and in the present, and have electively received repeated, ongoing, and invasive

unsuccessful fertility treatments—thereby making any future pregnancies even more uncertain. PLS.’ AM. PET. ¶¶8, 26, 27, 29, 116, 142, 154, 177, 187. Even given the foregoing, there are no allegations that any of the Patients have become pregnant in the four months since the filing of this lawsuit. *Id.* At most, Patients contend that they *might* become pregnant at some indeterminate point in the future—which is a far cry from alleging with relative certainty that they *will* become pregnant. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. at 564 (holding that plaintiffs’ “someday” intentions to return to locations where they might be deprived of the opportunity to observe endangered animals did not support a finding of the actual or imminent injury required.).

And, even if Patients had alleged that they were relatively certain to become pregnant again, they still lack standing because there are no allegations that they are relatively certain to experience complications qualifying for the medical exception to Texas’ abortion laws during their hypothetical future pregnancy. PLS.’ AM. PET. ¶¶2-236. Many have birthed other children without complication, *see id.* at ¶¶33, 56, 98, 116, 157, while others allege that it will be “difficult, if not impossible” for them to get pregnant in the future, *id.* at ¶ 29. Even if they were relatively certain to become pregnant again *and* experience a pregnancy complication qualifying for the medical exception, there are no allegations that they are relatively certain to be treated by a medical provider who is confused or uncertain about the scope of Texas’ medical exception. *See generally* PLS.’ AM. PET. This Court should find, consequently, that Patients have not alleged an imminent threatened harm sufficient to confer standing.

Third, Patients lack standing because the alleged prospective injuries are purely hypothetical. District Courts “do not give advice or decide cases upon speculative, hypothetical or contingent situations.” *Camarena v. Texas Emp. Comm’n*, 754 S.W.2d 149, 151 (Tex. 1988) (citing

Coalson v. City Council of Victoria, 610 S.W.2d 744 (Tex.1980)). Patients cannot simply conjure standing by imagining a future scenario wherein they might be harmed. *Id.*; PLS.’ AM. PET. ¶¶263, 331; PLS.’ TEMP. INJ. APPL. at 14-15. They have not, because they cannot, identify the medical complications they will allegedly experience in the future during their theoretical pregnancies. Because the threatened harms are hypothetical, this Court should find that Patients lack standing. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

2. Abortionists lack standing because “confusion” is not a harm.

The Abortionists allege that they fear they will be unable to provide medically necessary abortions due to their “confusion” about when their patients qualify under Texas’ abortion statutes. PLS.’ AM. PET. at ¶¶237-53, 320, 331; PLS.’ TEMP. INJ. APPL. at 14-15.

The Texas Supreme Court has held that “confusion” is not an actionable harm sufficient to confer standing. *In re Abbott*, 601 S.W.3d 802 (Tex. 2020). In *Abbott*, a group of judges challenged an executive order suspending statutes authorizing trial judges to release jail inmates with violent histories. *Id.* at 805 (Tex. 2020). The judges argued that they were injured because the challenged executive order “sowed confusion” among the parties in their courts. *Id.* at 811. The Texas Supreme Court rejected this contention, holding that “if the parties who appear before a judge are confused about the law that applies to their case, the remedy lies in the judge, whose job is to resolve such confusion to the best of his or her ability, based on the applicable law.” *Id.* The Texas Supreme Court continued, “[t]hat the judge *may also be confused* about applicable law does not give the judge standing to sue the lawmaker. The judge’s job is to determine and apply the law to individual cases, even if doing so is difficult.” *Id.* (emphasis added).

Similarly, that Abortionists may be confused about the scope of the medical exception does not give them standing to challenge the law because it is their job to determine whether their

patients qualify—even if doing so is difficult. Tex. Health & Safety Code §170A.002. Making difficult medical decisions is a part of practicing medicine and, irrespective of abortion, *always* has the potential to result in civil liability, Tex. Civ. Prac. Rem. Code Ch. 74, criminal penalties, *see Duntsch v. State*, 568 S.W.3d 193, 198 (Tex. App. 2018), or administrative discipline, Tex. Occ. Code § 164.001. Abortion is no different.

No medical exception involving discretion can eliminate all ambiguity. The medical exception contained in Texas’ abortion laws is intentionally crafted with an appropriate broadness, to give physicians the discretion to perform abortions that they have determined, based on their education, experience, and expertise, are medically necessary. *See* PLS.’ AM. PET. ¶344 (acknowledging that Texas’ medical exception is “comparatively broad” when compared to every other state with similar exceptions). Abortionist Karsan testified that, as written, the medical exception is confusing because it is *too broad*. App’x 81 at 50:2-51:11. Yet the new medical exception proposed by Plaintiffs is *even broader*. PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 2-3, 5. And, as Abortionist Karsan admitted, there is no medical exception that can be crafted without leaving some degree of confusion. PLS.’ AM. PET. ¶ 243; *see also* App’x 82, 56:23-57:4 (testifying that no matter how the medical exception is written, “I think it’s near impossible to assure there won’t be some confusing or unclear cases.”). This Court should find, as the Texas Supreme Court did in *Abbott*, that “confusion” is not a sufficient harm to establish standing.

Finally, Abortionists lack standing where the evidence disproves the alleged harm. Abortionist Karsan testified that she *first* became harmed by the medical exception in 2021 with the passage of S.B. 8—despite the same medical exception having existed for decades. *See* Tex. Health & Safety Code § 170.002 (1999); App’x 71 at 13:5-8. Karsan testified that she never used

the medical exception prior to 2021, *id.* at 10:11-12:1, that she does not know what the prior medical exception was before S.B. 8, *ibid.*, nor whether it has changed, *id.* at 12:2-24. She testified that the medical exception was “irrelevant” to her, prior to S.B. 8. *Id.* at 82, 57:18-23. Since the passage of S.B. 8, she has not performed an abortion because she “was able to find alternate care for [her] patients, most of whom have means” and “do[es] not want to get crossways with the law.” App’x 71-72, 13:16-14:2. She was unable to identify a single instance where her fear of enforcement or her confusion about the law actually prevented her from performing an abortion; instead, she testified that she has only encountered a handful of cases she thought *might* qualify and, in the *one case* she thought did qualify, she did not perform an abortion because her colleague disagreed. *See id. generally.* In other words, Karsan’s testimony demonstrates that she is not confused, and therefore is not likely to encounter a case— certainly not imminently— where she is confused and is subsequently unable to provide medically necessary care due to the threat of repercussion. Moreover, the Abortionists lack standing because they have not alleged an injury in fact.

B. Plaintiffs cannot show that their alleged injuries are fairly traceable to Defendants.

The second element of standing requires that the plaintiff’s alleged injury be “fairly traceable” to the defendant’s conduct because “a court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 155 (Tex. 2012)).

1. Patients alleged past injuries are a result of the intervening decisions and actions of their treating medical providers and are not fairly traceable to Defendants.

Patients claim that they face a substantial risk of future harm if they were to get pregnant again because they were harmed in the past due to the uncertainty and confusion by their medical providers as to what conditions qualify for the medical exception to Texas' abortion laws. PLS.' AM. PET. at ¶¶263, 483. Even assuming *arguendo* that this is true, the alleged past injuries were the result of the independent actions of each medical provider. These independent decisions by third-party medical providers, right or wrong, break any purported chain of causation between the Patients and their purported past injuries (which they claim could reoccur).

Amanda Zurawski alleges that she became septic when she was released from the care of her medical provider after being diagnosed with preterm premature rupture of membranes (PPROM). PLS.' AM. PET. at ¶¶7-30. Zurawski claims that she “nearly lost her own life and spent days in the ICU” “because of Texas’s abortion bans.” *Id.* at ¶24. But Zurawski fails to allege any facts that tie actions of any of the Defendants to the decision which ultimately led to her sepsis: her medical providers’ decision to release her from their care after her water had broken and after she was diagnosed with PPRM. *See generally id.* Her alleged injuries were, instead, the result of her medical providers’ decision to wait to induce her labor until she was admitted to the emergency room with a septic infection. *See id.* at 7–8.

Lauren Miller similarly alleges that she would have had an abortion after she was hospitalized with dehydration and diagnosed with hyperemesis gravidarum (“a severe form of persistent nausea”). PLS.' AM. PET. at ¶¶31-52. She alleges she was pregnant with twins, one of whom appeared to have trisomy 18. *Id.* at ¶38. When she found out one of the twins had trisomy 18, she elected to travel to Colorado to abort that baby. *Id.* at ¶45. Miller does not allege any facts— or cite any law—demonstrating that her inability to procure an abortion in Texas was traceable to

any action by Defendants. *See generally id.* Plaintiff contends the source of her injuries was the confusion and frustration she felt after speaking to her medical providers, and her personal disagreement with her maternal-fetal medicine specialist’s opinion that she did not meet the requirements for a medical exception to obtain an abortion in Texas. *Id.* at ¶¶39-42. Plaintiff has not and cannot link the independent intervening actions of these third parties to Defendants. *See generally id.* Moreover, she fails to allege that her baby’s apparent diagnosis threatened her life; absent such an allegation, Miller had no legal right to abort her baby in Texas instead of Colorado. *See generally* Tex. Health & Safety Code Chs. 170-71; *see also* Tex. Civ. Stat. art. 4512.6 (when necessary to save the life of the mother, abortion is not criminal).

Dr. Austin Dennard alleges that she was unable to procure an abortion in Texas for her baby who was diagnosed with anencephaly and she felt “silenced” and “marginalized.” PLS.’ AM. PET. at ¶¶53-65. She elected to abort her baby on the East Coast. *Id.* at ¶59-60. Dennard fails to allege that her personal feelings and inability to abort her baby in Texas were traceable to the actions of any of the Defendants. *See generally id.* Further, she fails to allege that her baby’s diagnosis posed a threat to her life such that she would qualify for an abortion under one of the exceptions in Texas’s abortion statutes. *See generally id.*

Like Dennard, Lauren Hall’s baby was also diagnosed with anencephaly. PLS.’ AM. PET. at ¶¶66-80. Hall decided that she wanted to abort her baby to preempt her fear that she “would not get proper care for this pregnancy in Texas.” *Id.* at ¶71. A threat to her life did not develop and she declined to join a support group for patients who give birth to babies with anencephaly. *Id.* at ¶74. She instead went to Seattle and aborted her baby. *Id.* at 16. Hall’s failure to allege that there was any threat to her life such that she would qualify for one of the exceptions to Texas’ prohibition on

abortion is fatal to her claims. *See generally id.* Her fear that she “would not get proper care” is not traceable to any Defendant’s actions. *See generally id.*

Like Zurwaski, Anna Zargarian alleges that she was diagnosed with PPROM after a visit to the emergency room at 19 and a half weeks pregnant. PLS.’ AM. PET. at ¶¶81-96. After the diagnosis, Zargarian alleges that she “decided go home so [she] could begin researching abortion options” and, “fear[ful] for her life,” flew to Colorado to abort her baby. *Id.* at ¶90-93. Zargarian alleges no facts to demonstrate that there was a threat to her life, thereby failing to establish that she would have qualified for one of Texas’s exceptions to the prohibition on abortion. She also fails to allege that her “stress and anxiety” from her choice to leave the hospital and take an elective trip to Colorado was traceable to any Defendant’s actions; instead, the cause of her alleged injuries appears to be the intervening independent actions of her treatment providers who determined that she did not qualify for the medical exception to Texas’ abortion laws. *See generally id.*

Ashley Brandt alleges that she was pregnant with twins when, at her twelve-week ultrasound, she was told that one twin “likely had acrania.” PLS.’ AM. PET. at ¶¶97-114. “[W]ithout guidance from her Texas physicians,” and before confirming the diagnosis with a specialist, Brandt called an abortion provider in Colorado and made the decision to abort that twin. *Id.* at ¶101. Brandt alleges no facts that demonstrate a threat to her life, thus failing to establish that she qualified for one of Texas’s exceptions to the prohibition on abortion. *See generally id.* In fact, the only physical complications she alleges took place immediately *after* procuring an abortion in Colorado. *Id.* at ¶108-0; *see also id.* at ¶284 (claiming that abortion is safer than pregnancy). Furthermore, Brandt does not allege any facts to show that her “icky” feelings or her “fear and

stress” after her out-of-state elective abortion are traceable to any action by any Defendant. *See generally id.*

Kylie Beaton alleges that, at her 20-week anatomy scan, her baby was diagnosed with alobar holoprosencephaly. PLS.’ AM. PET. at ¶¶115-40. Beaton alleges that she sought to procure an abortion in other states, but many refused because the baby’s “size was past the gestational cutoff,” so she chose to continue the pregnancy. *Id.* at ¶120. Beaton’s baby passed away five days after his birth. ¶133. Beaton does not allege that her life was threatened at any point; and even had she qualified for an abortion in Texas, her inability to procure an abortion is not traceable to any action by any Defendant. *See generally id.*

Jessica Bernardo alleges that her baby, already diagnosed with Down Syndrome, had fetal anasarca and was showing signs of heart failure. PLS.’ AM. PET. at ¶¶141-55. After conducting “her own research,” Bernardo decided that continuing the pregnancy was “detrimental to [her] mental health” and “wanted to be able to grieve, start healing, and ultimately, try to get pregnant again.” *Id.* at ¶149. Bernardo alleges that she ultimately traveled to Seattle to abort her baby. *Id.* at ¶151-52. Bernardo does not allege any facts that indicate her life was threatened, thus failing to show that she would have qualified for one of Texas’s exceptions to the prohibition on abortion. *See generally id.* Furthermore, not only is her “terr[or] to get pregnant naturally again in Texas” not traceable to any action by any Defendant, but her claim is also undermined by the fact that she alleges in the very next sentence that she is undergoing IVF to get pregnant again. *Id.* at ¶154.

Samantha Casiano alleges that her baby was diagnosed with anencephaly at her 20-week anatomy scan. PLS.’ AM. PET. at ¶¶156-75. She alleges that she sought to receive an abortion out-of-state but chose to carry the pregnancy to term after learning of the costs. *Id.* at ¶160. Casiano’s

baby passed away four hours after birth. *Id.* at ¶169. Casiano, at no point, alleges that her life was threatened and, therefore, does not show that she qualified for an exception to Texas’s prohibition on abortion. *See generally id.* Further, she does not allege that her injuries are fairly traceable to any Defendants’ actions; instead, the cause of her alleged injuries appears to stem from a lack of resources and the intervening independent actions of her treatment providers who determined that she did not qualify for the medical exception to Texas’ abortion laws. *See generally id.*

Taylor Edwards alleges that her baby was diagnosed with encephalocele at her 17-week anatomy scan. PLS.’ AM. PET. at ¶¶176-88. She alleges that she was told “that no fetal surgery could correct the issue” and, thus, “decided she needed an abortion.” *Id.* at ¶¶179-81. Edwards does not allege any facts that demonstrate that her life was threatened; however, she elected to travel to Colorado to abort her baby anyway. *Id.* at ¶185. Her “fears [of] being pregnant again” are not traceable to any action by any Defendant and, like Bernardo, her claims are undermined because she is allegedly seeking to get pregnant again through IVF. *Id.* at ¶187.

Kiersten Hogan alleges that, weeks after S.B.8 took effect, her “water broke . . . around 19 weeks pregnant” and that she was diagnosed with cervical insufficiency. PLS.’ AM. PET. at ¶¶189-204. She alleges that her physically and emotionally abusive boyfriend tried to force her to have an abortion. *Id.* at ¶192. She alleges that, at the hospital, she was given a battery of bad legal advice, including that “if she tried to leave the hospital, it would be used as evidence that she was trying to kill her baby” and that “criminal charges could be brought against her.” *Id.* at ¶198; *but see* Tex. Health & Safety Code §§ 171.204(a), 171.206(b) (stating that “a *physician* may not knowingly perform or induce an abortion” and that nothing in S.B.8 is to be construed as authorizing civil or criminal charges against a woman on whom an abortion is performed in violation of S.B.8)

(emphasis added). Hogan does not allege that, at any point, her life was threatened such that she would have qualified for an exception to the prohibition of abortion in S.B.8. *See generally* PLS.’S AM. PET. She claims that “Texas law caused [her] to be detained against her will for four days and made to feel like a criminal” *Id.* at ¶199. She gave birth to a stillborn child. *Id.* at ¶200. However, Hogan does not allege any action or statement by any Defendant that is traceable to her alleged experience at the hospital. *See generally id.* And, just as with the other plaintiffs, the source of her alleged injuries, if any, was the result of the independent actions of her medical providers—not Defendants.

Lauren Van Vleet alleges that her baby was diagnosed with anencephaly at about 23 weeks gestation. PLS.’ AM. PET. at ¶¶205-217. She alleges that she was told “she could either continue with the pregnancy or she could go to Colorado or New Mexico for an abortion.” *Id.* at ¶209. Van Vleet chose to abort her baby and travelled to Maryland to do so. *Id.* at ¶¶212-13. Like the other plaintiffs, she fails to allege any threat to her life that would have qualified her for an exception to Texas’s prohibition on abortion. *See generally id.* Further, she also does not allege any action by any Defendant that is traceable to her conflicting desire for children and feelings of being “scared to be pregnant in Texas again.” *Id.* at 38.

Elizabeth Weller alleges that at “19 weeks pregnant [] her water broke” and “she was told that while her cervix was still closed, she had lost a lot of amniotic fluid.” PLS.’ AM. PET. at ¶¶218-36. She claims she was told that “if she did not terminate the pregnancy, she *could* get an infection that *could* cause her to lose her uterus or even her life.” *Id.* at ¶224 (emphasis added). Weller alleges that hospital staff did not disclose the severity of her medical situation and “might even be lying to her.” *Id.* at ¶223. Weller alleges that, three days later, she was ultimately diagnosed with

chorioamnionitis and, after a medical review board determined that she met the medical exception to Texas' abortion laws, her doctor performed an abortion. *Id.* at ¶230. In other words, Weller suffered no injury because she qualified, and obtained, an abortion under the medical emergency exception to Texas' abortion laws. To the extent she contends that this determination should have occurred earlier, that decision was made by her medical providers—not Defendants. *See generally id.*

The Patients' assertion of standing collectively rests on pedestal of misplaced blame rather than actual traceability to Defendants. Instead of simply acknowledging that their respective medical providers *did* in fact make decisions regarding course of treatment— right or wrong, desirable or not, thereby negating their claim of confusion— Patients instead rely on an assertion of standing using a cyclical argument that seeks to abdicate each medical provider from the ownership of their professional decisions by instead blaming Defendants. Specifically, Plaintiffs adopt a “but-for” argument: “but-for” the current Texas laws, “the Patient Plaintiffs’ medical providers would not have needed to make any determination about whether the medical exception applied; [they] would have received the abortions they needed without delay.” *see also* PLS.’ RESP. TO DEFS’ PTJ at 16. Not only is that incorrect, as Texas has had a medical exception within its abortion laws for decades, but the Patients seem to posit an ability to dictate what medical procedures they *think* they should receive, without taking into account the independent decision of their medical providers to determine whether to perform that procedure or not. The treatment that Patients received (or failed to receive) was ultimately due to the discretion of their treating medical provider(s), who, using their education, expertise, and medical judgment, determined whether each Plaintiff’s specific condition qualified them for certain care, at certain times,

consistent with state law. That the Patients were dissatisfied with those treatment decisions does not impute blame to Defendants and does not render the statutes unconstitutional. This Court should, accordingly, find that Patients lack standing because their alleged threatened injuries, like their past injuries, cannot be fairly traced to Defendants due to the independent actions of the third-party treating medical providers.

2. Abortionists cannot show that their “confusion” is fairly traceable to the actions of Defendants.

Abortionist Karsan testified that she holds privileges at three hospitals that perform abortions—Children’s, Methodist, and Women’s Hospital. App’x 73-74, 19:3-22:13. Children’s and Methodist Hospitals have policies that required Abortionist Karsan to check with the hospital’s attorneys if she believes a case may qualify for the medical exception. *Id.* Women’s Hospital has a policy requiring Abortionist Karsan to obtain a second opinion from a colleague and requires both must agree that the patient qualifies for the medical exception before the abortion can be performed. *Id.*

This testimony is fatal to Abortionists’ claims. They cannot show that their “confusion” is fairly traceable Defendants because it is self-inflicted and any causal connection is broken by the independent actions of third-party hospitals, hospital attorneys, and Abortionists’ colleagues.

First, Abortionist so-called “confusion” is self-inflicted. An injury is self-inflicted so as to defeat standing if ‘the injury is so completely due to the plaintiff’s own fault as to break the causal chain.’” *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344 (2d Cir. 2015). The Supreme Court has held that a plaintiff “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l. USA*, 568 U.S. 398, 416-18 (2013). “If the law were otherwise, an enterprising plaintiff would be

able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear.” *Id.* at 416. Here, Abortionist Karsan claims that she is confused by the scope of the medical exception to Texas’ abortion laws. PLS.’ AM. PET. at ¶¶ 237-45. Yet her “confusion” is self-inflicted. She testified that, other than reading the law, the only other source she’s “relied on” for guidance about the medical exception is “the hospital attorneys.” App’x 74, 23:23-24:4. Yet she went on to testify that she’s *never* spoken with *any* hospital attorneys about the medical exception, either generally, or in the two cases she thought might qualify. *Id.* at 74, 30:1-19; 78, 41:2-5.

In sum, hospitals have attorneys and other administrative staff available to provide guidance to medical providers about the scope and parameters of current laws, and to provide them with clarification, specifically, in individual cases. However, instead of consulting with them to dispel any “confusion” about the medical exception to Texas’ current abortion laws, Abortionist Karsan chose to instead file this lawsuit asking a Travis County District Judge to adopt a wholly new version of the medical exception that, by her own admission, will still leave her confused about the scope of the medical exception. This is the very definition of a self-inflicted injury. Karsan’s contention that she is harming her patients because she is “confused” about the medical exception is not a viable claim of injury—it is a *confession* to engaging in medical malpractice. PLS.’ AM. PET. at ¶¶ 237-45. Given the foregoing, the Court should find that the Abortionists lack standing where their injuries are self-inflicted.

Second, the Abortionists fail to allege how their “confusion” about the medical exception is fairly traceable to Defendants, whose only role is in enforcement. *See generally* PLS.’ AM. PET.

To reinforce this manufactured traceability, Abortionists have misconstrued the law. The Abortionists seek to analogize their circumstances to those present in the recent United States Supreme Court ruling, *303 Creative LLC v. Elenis*, No. 21-476, --- S. Ct. ---, 2023 WL 4277208 (June 30, 2023). Abortionists assert that there, the United States Supreme Court found Plaintiff had standing because, “violating the law exposed the plaintiff to the risk of a \$500 fine and possible cease-and-desist orders and mandatory training programs.” PLS.’ RESP. TO DEFS’ PTJ at 8. This is incorrect; standing was found, not because Plaintiff was subjected to fines and other punishments, but because the Colorado statute sought to compel speech from Plaintiff— a constitutionally protected right— which she did not wish to produce. *303 Creative LLC*, 2023 WL 4277208, at *5. There is no such right at issue here.

Third, even if Abortionists *could* show a link between their “confusion” and Defendants enforcement authority, this chain is broken by the independent actions of third parties not before this Court. Specifically, the hospitals’ policies and procedures (or lack thereof), hospital attorneys, and the required second opinions of colleagues are *the reason* that Abortionists have felt unable to perform any abortions pursuant to the medical exception—not any threatened enforcement action by Defendants. App’x 73-74, 19:3-22:13. Consequently, they have failed to establish the necessary traceability element of standing.

C. Plaintiffs alleged harms will not be redressed by a favorable decision.

Even if Plaintiffs alleged an imminent, concrete and particularized, injury that was fairly traceable to Defendants, they still lack standing because the requested relief would not redress their alleged injuries. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 155 (Tex. 2012) (the third element of standing requires that the plaintiff’s alleged injury be “likely to be redressed by the requested relief...”).

First, the Court cannot issue an advisory opinion addressing Plaintiffs' hypothetical future injuries. The distinctive feature of an advisory opinion is that rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). Texas courts have no jurisdiction to render such opinions. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). As discussed *supra*, both the Patients and Abortionists assert hypothetical future injuries. Patients allege that they *might* get pregnant at an indeterminate point in the future, and they *might* experience an unknown complication during the pregnancy, and then they *might* be harmed if an unknown medical provider in the future is confused and uncertain about the scope of the exception. Abortionists, similarly, assert that their "confusion" about the scope of the medical exception means they *might* not know, in the future, whether unknown patients presenting with unknown conditions will qualify. The Court does not have the power to rule on hypothetical scenarios by issuing advisory opinions.

Second, Plaintiffs alleged injuries are not redressable by a favorable decision because the Court cannot *rewrite* state law. The UDJA, in pertinent part, allows a person whose rights are affected by a statute to "have determined any question of construction or validity arising under the [statute] and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). Plaintiffs ask this Court to issue a temporary injunction, and presumably a final judgment, rewriting the medical exception as "any conditions that a physician has determined, in their good faith judgment and in consultation with the patient, pose a risk to a patients' lives and/or health (including their fertility)." PLS.' TEMP. INJ. APPL. PROPOSED ORDER at 5; PLS.' AM. PET. at ¶¶274-99. Plaintiffs have not and cannot cite to any legal authority permitting the Court to enter such an order. The decision, instead, is binary; the medical exception

is either valid or invalid as applied to Plaintiffs. *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) (“Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.”). Plaintiffs’ alleged injuries are not redressable because the Court cannot grant the relief requested.

Third, Plaintiffs alleged injuries are not likely to be redressed by a favorable decision rewriting the medical exception because it will still leave medical providers confused and uncertain. There is no guarantee, or even likelihood, that this Court can issue a judgment “clarifying” the medical exception in a manner that will be any less confusing to medical providers. The medical exception that Plaintiffs ask this Court to adopt is copied, verbatim, from Dr. Aaron B. Caughey’s Affidavit at ¶¶ 31, 33. He testified that he did not expect Texas to adopt his medical exception as law. App’x 20, 77:12-21. He testified, instead, that he was just trying to create “a conversation” with the proposed language. *Id.* at 21, 78:8-10. And, when asked if it should be adopted as law in Texas, he testified, “**I don’t think that it’s specific enough or provides probably enough guidance....**” *Id.* at 79:14-23. He proceeded to testify that his medical exception would still be confusing to Texas physicians, *id.* at 22, 83:19-85:18, concluding:

Q: Would you agree with me that because the definition in Paragraph 33 is still not specific and could lead to confusions, its not something that you believe should be adopted by Texas as our medical exception to our abortion laws, as written?

A: You mean the language exactly as written in 33?

Q: Yes.

A: No. No, I believe its inadequate on its own.

Id. at 26, 98:3-14.

Yet this is the very relief sought by Plaintiffs—an Order adopting a new medical exception that by its author’s own admission is inadequate and will still leave medical providers confused about the scope of the medical exception. PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 5.

No medical exception adopted by this Court will satisfy Plaintiffs. The new medical exception sought by Plaintiffs is *even broader* than the current medical exception that Abortionist Karsan testified is already *too broad*. App’x 81 at 50:2-51:11; PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 2-3, 5. Abortionist Karsan admitted that, no matter what the Court does, “it’s near impossible to assure there won’t be some confusing or unclear cases.” App’x 82, 56:23-57:4. She concluded:

Q: And is it your testimony that they can’t use their medical judgment without fear of liability if there’s a broad definition of “medical emergencies?”

A: Yes.

Q: So, conversely, would they not have the fear of liability if there was a more specific definition of “medical emergency”?

A: It’s an impossible situation.

Id. at 81, 51:7-15.

This Court need go no further. The relief sought is impossible to grant; therefore, Plaintiffs lack standing.

Fourth, Plaintiffs alleged injuries will not be redressed because the Court cannot issue declaratory nor injunctive relief relating to the enforcement of the Texas Penal Code. The law is well-settled that generally a court exercising equitable jurisdiction in a suit (as opposed to criminal jurisdiction) cannot render naked declarations of rights, status, or other legal relationships arising under a penal statute or ordinance. *See, e.g., State v. Morales*, 869 S.W.2d 941, 945 (Tex.1994) (holding that trial court exercising equitable jurisdiction in civil declaratory judgment action did

not have jurisdiction to declare penal code section unconstitutional); *City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex.App.-Houston [1st Dist.] 2007, pet. denied). So, this Court lacks jurisdiction to render a decision in this case because any ruling will necessarily impact the enforcement of Texas' criminal laws relating to abortion.

This Court should, for all the foregoing reasons, find that Plaintiffs lack standing because their alleged injuries will not be redressed by a favorable ruling.

D. Abortionists cannot assert third-party standing on behalf of their patients or other physicians.

The standing requirement in Texas “derives from the Texas Constitution’s separation of powers among the departments of government, which denies the judiciary the authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a ‘person for an injury done him.’” *DaimlerChrysler Corp.*, 252 S.W.3d at 304 (quoting Tex. Const. art. I, § 13). Thus, to demonstrate standing under Texas law, a plaintiff must be *personally* aggrieved, and his alleged injury must be concrete and particularized, actual or imminent, not hypothetical. *Id.* at 304–05. If a plaintiff lacks an actual or threatened injury, he is not “personally aggrieved,” has no personal stake in the litigation, and lacks standing. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001).

Injuries to others—who are not plaintiffs—typically do not suffice to create standing. As the Supreme Court has stated, “the standing inquiry begins with determining whether the plaintiff has personally been injured, that is, ‘he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.’” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman*, 369 S.W.3d at 155); accord *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (noting that to have standing in a typical lawsuit, a litigant must assert his

own rights, not those of a third party). When challenging the constitutionality of a statute a plaintiff must (1) “suffer some actual or threatened restriction under that statute,” and (2) “contend that the statute unconstitutionally restricts the plaintiff’s rights, not somebody else’s.” *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996) (stating “the plaintiff must contend that the statute unconstitutionally restricts the plaintiff’s own rights”).

The few instances in Texas law in which someone is permitted to sue for another’s injuries are supported by statute or rule. Texas law gives parents the right to represent their children in court. Tex. Fam. Code § 151.001(a)(7). Certain personal injury actions survive in favor of heirs or an estate’s legal representative. Tex. Civ. Prac. & Rem. Code § 71.021(b). The Legislature has also provided for derivative standing in some circumstances involving corporations. *See, e.g.*, Tex. Bus. Org. Code §§ 20.002(c)(1), 21.552, 153.402. And Texas law recognizes class actions, Tex. R. Civ. P. 42, although the named plaintiff must still be personally injured, *Heckman*, 369 S.W.3d at 151.

None of those situations exist here. Thus, under Texas law, Abortionists cannot assert the rights of their patients. To the extent Abortionists are attempting to assert that Texas’ abortion laws restrict their rights, they have no legal right to perform abortions. Tex. Health & Safety Code Chs. 170-71. Furthermore, Defendants have not taken nor threatened any enforcement action against either of them individually. Because they have not been personally injured by Defendants, Plaintiffs lack standing to bring those claims, and the claims must be dismissed.

The federal third-party standing doctrine is inapplicable. The United States Supreme Court has created an exception to the general article III requirement in the U.S. Constitution that a litigant must assert his own injury: litigants may assert the rights of third parties when (1) the

litigant has “a close relationship” with the third party; and (2) some “hindrance” affects the third party’s ability to protect her own interests. *Kowalski*, 543 U.S. at 130 (citations omitted). But unlike its federal counterpart, the Texas Supreme Court has never recognized a general third-party standing doctrine that parties may (attempt to) apply to any given situation. And doing so here would be contrary to the Texas Supreme Court’s repeated statements that standing requires an injury to the plaintiff—not to someone else. *Meyers*, 548 S.W.3d at 485.

Regardless, even if the Court were to apply the federal third-party standing doctrine here, Abortionists would still lack standing to bring claims on behalf of their patients. They do not have a close relationship with their hypothetical future patients, and women in Texas are capable of bringing lawsuits themselves to challenge the abortion statutes— as the Patient Plaintiffs have done here.

Abortionists do not have the requisite “close relationship” with their hypothetical future patients— a point on which The United States Supreme Court’s decision in *Kowalski* is instructive. There, the Court held that attorneys lacked third-party standing to bring constitutional claims on behalf of criminal defendants who would be their future clients. 543 U.S. at 131. The Court contrasted an “*existing* attorney-client relationship,” which could support third-party standing under federal law, with a “*hypothetical* attorney-client relationship,” which could not. *Id.* The Court ultimately concluded that the attorneys “d[id] not have a ‘close relationship’ with their alleged ‘clients’; indeed, they ha[d] no relationship at all.” *Id.*

There is no appreciable difference between the hypothetical attorney-client relationship that was insufficient in *Kowalski* and the hypothetical provider-patient relationship in this litigation. Here, Abortionists are seeking injunctive relief by bringing suit on behalf of hypothetical

future patients who would be affected by Texas's law. *Kowalski* rejects this nonexistent relationship as grounds to permit third-party standing.

Abortionists have also not shown a “hindrance” to women bringing their own lawsuit challenging the medical exception. As a factual matter, women can and do bring suits to challenge abortion regulations. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137 (1996) (per curiam); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Matheson*, 450 U.S. 398; *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam); *Maher v. Roe*, 432 U.S. 464 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

II. Plaintiffs' claims are not ripe.

Like standing, ripeness emphasizes the need for a concrete injury to have a justiciable claim. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). The ripeness inquiry focuses on when the action may be brought, rather than on who may bring it, and seeks to conserve judicial time and resources for real and current controversies rather than hypothetical or remote disputes. *Id.* The plaintiff must show that “at the time a lawsuit is filed, the facts are sufficiently developed ‘so that injury has occurred or is likely to occur, rather than being contingent or remote.’” *Patel v. Texas Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 75-76 (Tex. 2015) (quoting *Gibson*, 22 S.W.3d at 851-52). A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass. *Gibson*, 22 S.W.3d at 851.

The alleged threatened injuries to both Patients and Abortionists are hypothetical and contingent on future events; therefore, their claims are not yet ripe. “The essence of the ripeness doctrine is to avoid premature adjudication ... [and] to hold otherwise would be the essence of an

advisory opinion, advising what the law would be on a hypothetical set of facts.” *Robinson v. Parker*, 353 S.W.3d 753, 756 (Tex. 2011) (cleaned up).

Patients alleged threatened injuries are hypothetical. Patients allege that they fear that they *might* get pregnant at an indeterminate point in the future, and they *might* experience an unknown complication during the pregnancy, and then they *might* be harmed if an unknown medical provider in the future is confused and uncertain about the scope of the exception. But the patients might not get pregnant again. And, even if they do, they might not have complications. Even if they do become pregnant again and have complications, those complications may not be severe enough to qualify for the medical exception. And even if all these contingent events occur, Patients still might be treated by a medical provider who is neither confused nor uncertain about the scope of the medical exception.

Similarly, Abortionists allege that they fear that their confusion about the scope of the medical exception means they *might* not know whether unknown patients presenting an indeterminate point in the future with unknown conditions will qualify for the medical exception. This claim necessarily relies on the hospitals and hospital attorneys similarly being so confused and uncertain about the scope of the medical exception that they are unable to give the Abortionists guidance. There are no allegations that either are confused or uncertain, and Abortionist Karsan testified that she has deliberately avoided seeking their counsel in the lone case—in her entire career—that she believed qualified for the medical exception.

These contingencies, which may or may not happen, mean that the claims are not yet ripe for review.

III. Plaintiffs’ claims are moot.

Last Session, the Texas Legislature passed and Governor Abbott signed, H.B. 3058, which states that, effective September 1, 2023, physicians may assert an affirmative defense when performing abortions on patients diagnosed with PPROM, pursuant to the emergency medical exception. <https://capitol.texas.gov/tlodocs/88R/analysis/html/HB03058S.htm>.

Here, several Patients allege that they previously had pregnancy complications involving PPROM and they fear that they could face similar complications during future pregnancies that could be treated by physicians confused about whether they qualify for the medical exception. PLS.’ AM. PET. At ¶¶ 12, 85, 95, 104. These claims are mooted by H.B. 3058, which provides the relief requested and ensures that these injuries are not likely to reoccur in the future.

IV. Plaintiffs’ Claims are Barred by Sovereign Immunity.

Sovereign immunity deprives a court of subject-matter jurisdiction in suits against the State. *Miranda*, 133 S.W.3d at 224. A suit against a state official lawfully exercising his governmental functions is considered a suit against the State. *Dir. of Dep’t of Ag. & Env’t v. Printing Indus. Ass’n of Tex.*, 600 S.W.2d 264, 265–66, 270 (Tex. 1980). Public officials sued in their official capacities are protected by the same sovereign or governmental immunity as the governmental unit they represent. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843–44 (Tex. 2007) (holding that “an official sued in his official capacity would assert sovereign immunity[,]” and that “[w]hen a state official files a plea to the jurisdiction, the official is invoking sovereign immunity from suit held by the government itself”).

For a plaintiff to overcome a defendant’s assertion of sovereign immunity, “the plaintiff must affirmatively demonstrate the court’s jurisdiction by alleging a valid waiver of immunity.” *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Plaintiffs have not

sufficiently pled facts to show an exception to sovereign immunity applies. Therefore, all of Plaintiffs' claims are barred by sovereign immunity.

A. *Ultra Vires*

An exception to sovereign immunity is the *ultra vires* doctrine. To fall within the *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. See *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017); see also *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Thus, *ultra vires* suits do not seek to alter government policy, but rather to enforce existing policy. *Heinrich*, 284 S.W.3d at 372. If a plaintiff has not actually alleged such an action, the claims remain jurisdictionally barred. *Hall*, 508 S.W.3d at 240–41 (holding the official capacity defendant acted within legal discretion and therefore was entitled to sovereign immunity).

Merely asserting legal conclusions or labeling a defendant's actions as "*ultra vires*," "illegal," or "unconstitutional" does not suffice to plead an *ultra vires* claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed. *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.).

The Supreme Court of Texas recently clarified what it means for an official to act "without legal authority." *Hall*, 508 S.W.3d at 238. The court stated, "a government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority,' and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself." *Id.* "Ministerial acts," on the other hand, are those "where the law prescribes and defines the duties

to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Id.* (citing *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quoting *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994))).

1. Plaintiffs cannot assert *ultra vires* claims against either the State or the Texas Medical Board.

Plaintiffs *ultra vires* claims against the State and the Texas Medical Board are barred as a matter of law. PLS.’ AM. PET. ¶¶254, 256. “[*U*]ltra vires suits . . . cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity.” *City of El Paso v. Heinrich*, 284 S.W3d 366, 373 (Tex. 2009). Governmental entities remain immune from suit and are not proper parties in an *ultra vires* action. *Id.* at 372–73. Thus, Plaintiffs’ *ultra vires* claims against both the State of Texas and the Texas Medical Board are barred by sovereign immunity.

2. Plaintiffs fails to state *ultra vires* claims against the Attorney General and Executive Director.

Plaintiffs contend that the medical exception, as written, violates the Texas Constitution and, therefore, any attempt to enforce it will be *ultra vires*. PLS.’ AM. PET. ¶¶255, 257, 261, 446–449, 456, 464, 472, 480, PRAYER; *see also* PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 5.

i. Plaintiffs cannot challenge the validity of the medical exception through an *ultra vires* action against the Attorney General and Executive Director.

Plaintiffs cannot challenge the constitutionality of the medical exception in a suit against the Attorney General and Executive Director in their official capacities. It is well-settled law in Texas that *ultra vires* claims against state officials in their official capacities are improper mechanisms to challenge the constitutionality of a statute. *Patel v. Tex. Dep’t of Licensing & Reg.*, 469 S.W.3d 69, 76–77 (Tex. 2015) (“[B]ecause the [plaintiffs] challenge the validity of the []

statutes and regulations . . . the *ultra vires* exception does not apply.”). To challenge the constitutionality of a statute, the challenger must sue the relevant state entity—*not* an official capacity defendant and *not* through an *ultra vires claim*. *Id.*; *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011). This Court should, accordingly, dismiss the *ultra vires* claims against the Attorney General and Executive Director.

ii. Plaintiffs fail to allege the Attorney General and the Executive Director threaten to imminently violate the Texas Constitution.

An *ultra vires* claim will lie against an official when he: (1) exceeds the bounds of his granted authority or acts in conflict with the law itself; or (2) fails to perform a purely ministerial act, one that is defined by the law with such precision and certainty that it affords the official no discretion or room for judgment. *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017); *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 68 (Tex. 2018). But if the official’s act was not on its face beyond his authority or in conflict with the law, the plaintiff has not stated a valid *ultra vires* claim that bypasses the official’s governmental immunity. *Matzen v. McLane*, 659 S.W.3d 381, 388 (Tex. 2021).

Plaintiffs have not alleged that either the Attorney General or the Executive Director intend to enforce the medical exception in a manner inconsistent with the Texas Constitution. *See generally* PLS.’ AM. PET. The sole basis for their claims against the Attorney General is an advisory stating that he will “strictly enforce” the law. *Id.* at ¶255. Yet, nothing about this statement implies any action by the Attorney General that would exceed the scope of his authority under the Texas Constitution. Plaintiffs claims against the Executive Director, similarly, are based solely on his “capacity serv[ing] as the chief executive and administrative officer” of the Texas Medical Board. PLS.’ AM. PET. at ¶257. Plaintiffs do not allege that the Executive Director intends

to enforce the law in a manner inconsistent with the Texas Constitution. *Id.* Plaintiffs attempt to plead around this problem by claiming that “any official” enforcing the medical exception, as written, would act *ultra vires*. PLS.’ AM. PET. ¶¶261, 446-449, 456, 464, 472, 480, PRAYER; *see also* PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 5. But this lawsuit isn’t against “any official.”

Plaintiffs fail to state an *ultra vires* claim where they have not pled any factual allegations showing the Attorney General and the Executive Director enforced the medical exception in the past in a manner inconsistent with the Texas Constitution—nor that they threaten to imminently do so in the future.¹

iii. Plaintiffs cannot use *ultra vires* claims to exert control over the State.

Ultra vires suits do not attempt to exert control over the state—they attempt to reassert the control of the state. *Heinrich*, 284 S.W.3d at 372. Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy. *Id.*

Plaintiffs seek to alter State policy. They ask this Court to: (1) *wholly rewrite* the statutory language of the medical exception to exempt any circumstance where a physician determines that a “pregnant person has a physical emergent medical condition for which abortion would prevent or alleviate a risk of death or risk to their health (including their fertility);” and (2) rule that Defendants act *ultra vires* if they enforce the medical exception as written, instead of using the rewritten one they’ve asked this Court to adopt. PLS.’ AM. PET. ¶¶255, 257, 261, 446-449, 456, 464, 472, 480, PRAYER; *see also* PLS.’ TEMP. INJ. APPL. PROPOSED ORDER at 5. This is a bald attempt

¹ Plaintiffs also fail to state an *ultra vires* claim because their constitutional claims are facially invalid for all the reasons discussed *infra*. *See Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015); *see, e.g., Caleb v. Carranza*, 518 S.W.3d 537, 545 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (*ultra vires* claims pleaded did not defeat official’s governmental immunity because plaintiff’s pleaded constitutional claims were facially invalid).

to seize control of state government. Plaintiffs ask this Court to exert control over the Legislature by rewriting the medical exception. *Id.* Then they ask this Court to exert control over the Executive by compelling Defendants to enforce the newly rewritten law. *Id.* This Court should find that Plaintiffs cannot state an *ultra vires* claim seeking to alter state policy, rather than enforce existing policy.

iv. Plaintiffs cannot challenge the constitutionality of S.B. 8 in a suit against the Attorney General or the Executive Director.

The United States and Texas Supreme Courts have ruled that plaintiffs cannot challenge the constitutionality of S.B. 8 by suing the Attorney General and Executive Director because they lack the authority to enforce it. See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 539 (2021); *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569 (Tex. 2022).² To the extent Plaintiffs seek to challenge the constitutionality of S.B. 8 through *ultra vires* claims against the Attorney General and Executive Director—such claims are barred as a matter of law. *Id.*

B. Declaratory Judgment Act.

The Uniform Declaratory Judgment Act (“UDJA”) does not contain a general waiver sovereign immunity. See *Acosta v. Univ. of Tex. at El Paso*, No. 3:06-cv-408, 2007 WL 9701442, at *2 (W.D. Tex. 2007) (“A litigant cannot circumvent [sovereign immunity] by pleading a claim under the Declaratory Judgment Act.”); *Beacon Nat’l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 266 (Tex. App.—Austin 2002, no pet.) (“[T]he UDJA does not establish subject-matter jurisdiction.”). It is “merely a procedural device for deciding cases already within a court’s jurisdiction.” *Abbott v. Mex. Am. Legislative Caucus, Tex. House of Representatives*, 647 S.W.3d 681,

² For the same reason, any injury alleged caused by S.B. 8 cannot be traced to any Defendant, leaving Plaintiffs’ without standing to challenge S.B. 8.

708 (Tex. 2022). The UDJA provides only a limited waiver of sovereign and governmental immunity for challenges to the validity of a statute or ordinance. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). “UDJA claims requesting other types of declaratory relief are barred absent a legislative waiver of immunity with respect to the underlying action.” *Id.* at 553; *see Heinrich*, 284 S.W.3d at 370.

1. Plaintiffs UDJA claims are barred by sovereign immunity.

The Legislature explicitly provided that the UDJA *does not waive* sovereign immunity for challenges to the validity of Texas’ abortion laws. Tex. Health & Safety Code § 171.211 (“This section prevails over any conflicting law, including: (1) the Uniform Declaratory Judgments Act.... This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.”). Plaintiffs fail to identify any other vehicle through which they purport to bring their claims against Defendants. The Court need go no further in its analysis of Plaintiffs’ claims. *Id.* The Legislature did not waive sovereign immunity for challenges to the validity of Texas’ abortion laws; consequently, this Court lacks subject matter jurisdiction to consider them.³ *Id.*

³ Similarly, to the extent Plaintiffs ask the Court to “clarify” the scope of the medical exception—not strike it down as invalid—they cannot state a UDJA claim. PLS.’ AM. PET. PRAYER (“To enter a judgment against Defendants granting appropriate declaratory relief to *clarify* the scope of the exception to Texas’s abortion bans consistent with the Texas Constitution.” (emphasis added)); PLS.’ TEMP. INJ. APPL. at 9 (“Plaintiffs seek a declaration clarifying the scope of the medical exception to Texas’s abortion bans....”). The UDJA does not waive sovereign immunity for “bare statutory construction” claims. *McLane Co., Inc. v. Texas Alcoholic Beverage Comm’n*, 514 S.W.3d 871, 875 (Tex. App. 2017). This is one of the reliefs sought by Plaintiffs. PLS.’ TEMP. INJ. APPL. at 13 (“if the Court disagrees with all or part of Plaintiffs’ *construction of the statute*....” (emphasis added)). Plaintiffs UDJA claims are barred to the extent they assert bare statutory construction claims asking the Court to declare their rights under the scope of the medical exception.

2. Plaintiffs failed to join all interested parties.

Plaintiffs cannot bring a UDJA claim challenging the validity of S.B. 8 because they've failed to join every citizen of Texas. "The UDJA requires all with an interest who would be affected by a declaration be made parties to any declaratory judgment action." *Montemayor*, 86 S.W.3d at 268; Tex. Civ. Prac. & Rem. Code § 37.006(a) ("When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties."). Senate Bill 8 expressly states that the statute "shall be enforced exclusively through the private civil actions" of private citizens. Tex. Health & Safety Code § 171. 207(a). Here, Plaintiffs purport to sue *every citizen of Texas in their individual capacities* by suing that State and claiming that "the State" "includes private citizens that could potentially enforce S.B. 8." PLS.' AM. PET. ¶254. Plaintiff has not and cannot cite to any legal authority allowing them to bring individual capacity claims against every citizen of Texas through a suit against the State.

3. Alternatively, Plaintiffs cannot bring UDJA claims against the Attorney General and the Executive Director.

The UDJA provides a narrow waiver of sovereign immunity for declaratory judgment actions that challenge the constitutionality of a statute, which only applies to "the relevant governmental entities," not state officials. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Gant v. Abbott*, 574 S.W.3d 625, 633–34 (Tex. App.—Austin 2019, no pet.). So, to the extent Plaintiffs assert UDJA claims against the Attorney General and Executive Director, their claims are barred as a matter of law by sovereign immunity.

4. Alternatively, Plaintiffs fail to state viable UDJA claims against the State and TMB.

To the extent that Plaintiffs seek declaratory relief from the State or TMB, their claims must meet the requirements laid out in the UDJA. Plaintiffs' claims do not. First, any declaratory relief only applies to "challenges to the validity of an ordinance or statute." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). To overcome sovereign immunity in such a suit, Plaintiffs must establish a viable constitutional claim. See *Abbott*, 647 S.W.3d at 699; *Tex. Tech Univ. Health. Sci. Ctr. v. Enob*, 545 S.W.3d 607, 624 (Tex. App—El Paso 2016, no pet.) Additionally, "[t]he UDJA requires all with an interest who would be affected by a declaration be made parties to any declaratory judgment action." *Montemayor*, 86 S.W.3d at 268. Here, as discussed *infra*, Plaintiffs have not asserted viable constitutional claims, nor made party to this suit all who would be affected. Thus, their request for declaratory relief is barred by sovereign immunity.

C. Constitutional Claims

Sovereign immunity is only waived for constitutional claims that are viable. See *General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001); *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015); see also *Abbott*, 647 S.W.3d at 686; *Combs v. Webster*, 311 S.W.3d 85 (Tex. App. – Austin 2009, pet. denied); *Combs v. B.A.R.D. Industries, Inc.*, 299 S.W.3d 463 (Tex. App. – Austin 2009, no pet.).

Here, none of Plaintiffs' constitutional claims are viable because the medical exception passes rational basis review.

1. Plaintiffs fail to state a viable due course of law claim.

To overcome sovereign immunity, a plaintiff must establish a viable due course of law claim. *Tex. Tech Univ. Health.*, 545 S.W.3d at 624. "The Texas due course clause is nearly identical to the federal due process clause," and, though textually different, Texas courts analyze these

clauses without substantive distinction. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); Tex. Const. art. I, § 19. “A claimant prevails on a substantive due process claim by establishing it holds a constitutionally protected property right to which the Fourteenth Amendment’s due process protection applies and by establishing that the challenged governmental action is not rationally related to furthering a legitimate state interest.” *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 757 (Tex. App.—San Antonio 2008), *aff’d*, 369 S.W.3d 814 (Tex. 2012).⁴ Furthermore, “the government may not infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Zaatari v. City of Austin*, 615 S.W.3d 172, 192 (Tex. App.—Austin 2019, pet. denied) (citing *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)).

i. Patients fail to state a viable due course of law claim because the medical exception passes rational basis review.

Patients’ claims are subject to rational basis review. They contend that the medical exception violates the fundamental rights of “pregnant people.” PLS.’ AM. PET. ¶¶421-26, 452. The Supreme Court, however, has held that the “provision of abortion,” “*is not a fundamental constitutional right.*” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2283 (2022) (emphasis added). Because Texas courts analyze due course of law claims like the federal due process clause, “a law that does not affect fundamental rights or interests . . . is valid if it merely bears a rational relationship to a legitimate state interest.” *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1995)).

⁴ Several Justices on the Texas Supreme Court have recently questioned the scope of the rights protected by the due-course clause. *Tex. Dep’t of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 664 (Tex. 2022) (Young, J., concurring). But as was the case in *Crown Distributing*, there is no formulation of the due-course clause that would support Plaintiffs’ claims.

Thus, Patients claims are unquestionably subject to rational basis review.

It is not the Courts' duty to second guess legislative factfinding, "improve" on, or "cleanse" the legislative process by allowing relitigation of the facts that led to the passage of a law. *Heller v. Doe*, 509 U.S. 312, 320 (1993) (providing that a state "has no obligation to produce evidence to sustain the rationality of a statutory classification"). Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 (1985). As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citing cases); *see also Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014).

A law "based on rational speculation unsupported by evidence or empirical data" satisfies rational basis review. *Beach Commc'ns*, 508 U.S. at 315. There is "never a role for evidentiary proceedings" under rational basis review. *Abbott*, 748 F.3d at 596 (quoting *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir.1995)). The fact that reasonable minds can disagree on legislation, moreover, suffices to prove that the law has a rational basis. *Id.*

The medical exception passes rational basis review because it is rationally related to a legitimate government interest. Texas has a legitimate interest "in respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Dobbs*, 142 S. Ct. at 2284; *see also* Tex. Health

& Safety Code § 171.202(3) (“Texas has compelling interests from the outset of a woman’s pregnancy in protecting the health of the woman and the life of the unborn child . . .”). The medical exception is rationally related to these interests by permitting abortions in instances where continuing the pregnancy poses a risk to the life of the pregnant woman.

Patients cannot credibly claim otherwise. To the extent they cite to Rehnquist’s dissent in *Roe*, 410 U.S. at 173, the quoted language states the *prohibiting* abortions where the mother’s life is in jeopardy would likely lack a rational relation to a valid state objective. PLS.’ TEMP. INJ. APPL. at 13. But Texas’ medical exception does exactly the opposite, it *does not* prohibit abortions when the mother’s life is in jeopardy.

This Court should find that Patients fail to state viable due course of law claims because the medical exception passes rational basis review.

ii. Abortionists fail to state a viable due course of law claim because they do not have a vested property interest in performing abortions.

Liberty or property interests protected under the Due Process Clause “attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law....” *Paul v. Davis*, 424 U.S. 693, 710–11 (1976). “The due-course clause is not so broad as to protect *every* form and method in which one may choose to work or earn a living, and some work-related interests do not enjoy constitutional protection at all.” *Tex. Dep’t of State Health Servs. v. Crown Distrib., LLC*, 647 S.W.3d 648, 654 (Tex. 2022) (emphasis in original). In order for a “work-related interest” to be constitutionally protected, the interest must be “vested” and, thus, not subject to “the legislature’s right to change the law and abolish the interest.” *Id.* at 655 (internal quotations omitted). A professional license is a property right, but it is one that has been created by statute and is subject to the state’s power to impose conditions upon the granting or revocation

of the license for the protection of society. *Scally v. Texas State Bd. of Med. Examiners*, 351 S.W.3d 434, 446 (Tex. App. 2011). “Maintaining a medical license is not a fundamental right, and physicians are not a suspect class.” *Id.* at 448.

Abortionists cannot state a viable due course of law claim because they do not have a vested interest in performing abortions whenever they see fit. PLS.’ AM. PET. ¶¶473-80. The “medical profession is extensively regulated and has licensure requirements.” *Zadeh v. Robinson*, 928 F.3d 457, 465 (5th Cir. 2019). When an interest “is predicated upon the anticipated continuance” of an existing law and is “subordinate to” the legislature’s right to change the law and “abolish” the interest, the interest is not vested. *Crown Distrib.*, 647 S.W.3d at 654. It is beyond dispute that the performance of abortions is a work-related interest that is subordinate to the Legislature’s right to limit, or even abolish. *See Dobbs*, 142 S. Ct. at 2239. Thus, it is not a constitutionally protected interest subject to the due process of law clause.

Even assuming, *arguendo*, that Abortionists do have a vested work-related property interest in performing abortions whenever they see fit, they still fail to state a viable due course of law claim because the medical exception passes rational basis review and is not oppressive. A “party making an as-applied challenge to an economic regulation under the Due Course of Law provision must make a showing under either of the two *Patel* prongs: (1) the statute’s purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute’s actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.”⁵ *Garrett v. Texas State Bd. of Pharmacy*, No. 03-21-00039-CV, 2023 WL 376900, at *3–4

⁵ Alternatively, Abortionists due course clause claims fail under traditional rational basis review for the same reasons as Patients, discussed *supra*.

(Tex. App. Jan. 25, 2023); *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69, 90 (Tex. 2015).

Plaintiffs seemingly do not dispute that “Texas has compelling interests from the outset of a woman’s pregnancy in protecting the health of the woman and the life of the unborn child” Tex. Health & Safety Code § 171.202(3).

The medical exception is arguably rationally related to this interest by permitting abortions in instances where continuing the pregnancy poses a substantial risk to the health of the woman. *See Mauldin v. Texas State Bd. of Plumbing Examn’rs*, 94 S.W.3d 867, 873 (Tex. App.—Austin 2002, no pet.) (explaining that “[a] legislative choice ... may be based on rational speculation unsupported by evidence or empirical data” (quoting *Heller*, 509 U.S. at 320–21)). Abortionists contend that the medical exception is poorly worded such that they are confused about its scope. But the relevant test under the due course clause is whether the governmental action is “rational,” not whether an alternative wording would be “superior” or even “perfect.” *Garrett*, 2023 WL 376900, at *5-6 (“At most, Doctors have demonstrated that states have undertaken different approaches to regulating the dispensing of prescription medication, and that there may be benefits and detriments associated with either physicians or pharmacists having final authority over dispensing medication. But picking between such alternatives is a policy decision of the Legislature.”). Abortionists have not and cannot state a viable due course clause claim based on the contention that the medical exception could have been better worded. *Id.* Accordingly, this Court should find that Abortionists have failed to satisfy the high burden of demonstrating that the medical exception is not rationally related to the legitimate governmental interest in protecting the health of the woman and the life of the unborn child.

Abortionists also fail the second *Patel* factor because they cannot show that the medical exceptions actual, real-world effect, as applied to them, could not be rationally related to a government interest or is so burdensome as to be oppressive. In *Patel*, eyebrow threaders had to undertake 320 hours of irrelevant training as part of an esthetician license to legally practice eyebrow threading in Texas. 469 S.W.3d at 89; *see also Live Oak Brewing*, 537 S.W.3d at 656 (explaining that eyebrow threaders in *Patel* were “entirely shut out from practicing their trade” until they completed training, including paying for training and losing the opportunity to make money while actively practicing their trade). Conversely, in *Garrett*, a group of physicians were required to attend pharmacy school, complete a 1,000-hour internship, and pass two exams before being allowed to dispense medication at cost. *Garrett*, 2023 WL 376900, at *6. The Third Court of Appeals found that regulation on the scope of the physicians’ practice in *Garrett* did not serve as a barrier to entry into the medical profession, therefore it did not deprive them of their occupational freedom under the second *Patel* factor. *Id.* The same is true for Abortionists. Unlike *Patel*, the challenged medical exception does not serve as a *barrier to entry* into the medical profession, instead, like the regulation in *Garrett*, it merely serves as a limit on the scope of their practice. *Id.* This Court should, accordingly, find that Abortionists have not and cannot show that the medical exception is “so burdensome as to be oppressive.”

2. Plaintiffs fail to state a viable equal protection claim.

Plaintiffs sex-based equal protection claims are dead on arrival. PLS.’ AM. PET. ¶¶457-72. The United States Supreme Court held in *Dobbs* that abortion regulations are not sex-based classifications subject to heightened scrutiny under the equal protection clause. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245 (2022). It went on to hold that sex-based equal protection claims, like those made by Plaintiffs, are “*squarely foreclosed by our precedents*, which

establish that a state's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications." *Id.* (emphasis added). The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other." *Id.* at 2245-46 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20 (1974)). "Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures." *Id.* at 2246.

The Texas Supreme Court has similarly held that "[i]n this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex." *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 260 (Tex. 2002). "The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender." *Id.* at 263.

Plaintiffs do not allege that the medical exception is pretext designed to effect invidious discrimination against members of one sex or another. *See generally* PLS.' AM. PET. As a matter of fact, the word "pretext" does not appear anywhere in Plaintiffs' pleadings. *Id.*; *see also generally* PLS.' TEMP. INJ. APPL. "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). The "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Dobbs*, 142 S. Ct. at 2246 (citing *Bray v. Alexandria*

Women's Health Clinic, 506 U.S. 263, 273–274 (1993) (internal quotation marks omitted). So, rational basis review applies to Plaintiffs equal protection claims.

The medical exception, as discussed *supra*, passes rational basis review because permitting abortions in instances where continuing the pregnancy poses a risk to the health of the woman is rationally related to the State's legitimate interests "in respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Dobbs*, 142 S. Ct. at 2284; *see also* Tex. Health & Safety Code § 171.202(3).⁶

Plaintiffs have not and cannot assert a sex-based discrimination claim, rational basis applies and, for the reasons above, they fail to plead a viable equal protection claim. Thus, sovereign immunity bars these claims.

V. Plaintiffs are not entitled to injunctive relief—temporary or otherwise.

"To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204. As explained above, this Court lacks subject matter jurisdiction and should dismiss the action in its entirety. But even if the Court concludes otherwise, Plaintiffs are not entitled to the relief sought.

⁶ It is difficult to see how Plaintiffs' equal protection challenge would benefit them. If the medical exception violates equal protection remedy would be to strike down completely. *See Downs v. State*, 244 S.W.3d 511, 519 n.3 (Tex. App. 2007).

Plaintiffs have not shown a probable right to recovery or success on the merits, and the injuries they allege do not show a threat of irreparable harm.

A. Plaintiffs have neither stated a claim, nor demonstrated a probable right to relief.

Plaintiffs, as discussed *supra*, have failed to state a viable claim, much less a probable right for relief. *Butnaru*, 84 S.W.3d at 204 (holding a plaintiff “must plead *and prove* . . . a cause of action against the defendant” to be entitled to a temporary injunction (emphasis added)). While “unlawful acts of public officials may be restrained when they would cause irreparable injury,” a plaintiff must do more than name a cause of action and assert a constitutional violation. *See Tex. State Bd. of Exam’rs in Optometry v. Carp*, 343 S.W.2d 242, 245 (Tex. 1961). Plaintiffs have not stated any viable claims and cannot demonstrate a probable right to relief; consequently, they are not entitled to injunctive relief.

B. Plaintiffs cannot demonstrate a probable, imminent, and irreparable injury.

“An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.” *Butnaru*, 84 S.W.3d at 204 (citing *Canteen Corp. v. Republic of Tex. Props., Inc.*, 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ)). Plaintiffs bear the burden to *prove* their damages are incalculable. *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171, 177 (Tex. App.—Houston 2009, no pet.). Here, Plaintiffs only make conclusory allegations that there is “no adequate remedy at law” and that “money damages are insufficient” to redress any alleged injuries. PLS.’ AM. PET. at ¶485. They have not met their burden that their damages are “incalculable” based solely on their conclusory allegations. *N. Cypress Med. Ctr.*, 296 S.W.3d at 177.

Further, Plaintiffs must establish that they are “entitled to preservation of the status quo pending trial on the merits” and demonstrate “a probable injury in the interim.” *Walling*, 863 S.W.2d at 57-58. “[T]he requirement of demonstrating an interim injury is not to be taken lightly.” *Id.* at 57. Plaintiffs do not allege that Defendants have taken or threatened any enforcement action against them individually, and they do not demonstrate that any alleged injury is “probable” or “imminent” before trial. *Butnaru*, 84 S.W.3d at 204. Likewise, their claim that any alleged injury is imminent is belied by the fact that they did not request a temporary injunction until over two months after filing their original petition, and they scheduled a hearing four months after filing suit. Any alleged harm that Plaintiffs baselessly fear they may imminently incur is not based on any action by Defendants and, thus, is not “probable” to occur before any trial on the merits. Therefore, Plaintiffs are not entitled to a temporary injunction.

CONCLUSION

For these reasons, Defendants respectfully request this Court to grant their Plea to the Jurisdiction and dismiss Plaintiffs’ claims, including their Application for Temporary and Permanent Injunction, in their entirety.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2023, a true and correct copy of the foregoing document was served via File and Serve Texas to all counsel of record.

s/Johnathan Stone
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Assistant Attorney General

CAUSE NO. D-1-GN-23-000968

AMANDA ZURAWSKI, et al.,	§	IN THE DISTRICT COURT OF
<i>Plaintiffs,</i>	§	
	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
	§	
STATE OF TEXAS, et al.,	§	
<i>Defendants.</i>	§	353RD JUDICIAL DISTRICT

**DEFENDANTS' AMENDED PLEA TO THE JURISDICTION AND
RESPONSE TO PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION**

Appendix

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Respectfully submitted.

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v.	*	TRAVIS COUNTY, TEXAS
	*	
STATE OF TEXAS, et al.	*	
Defendants.	*	353RD JUDICIAL DISTRICT

VIDEOTAPED ORAL DEPOSITION

OF

AARON CAUGHEY, M.D.

Wednesday, June 28, 2023

(REPORTED REMOTELY)

VIDEOTAPED ORAL DEPOSITION OF AARON CAUGHEY, M.D., produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on Wednesday, June 28, 2023, from 10:01 a.m. to 1:30 p.m., before Debbie D. Cunningham, CSR, remotely reported via Machine Shorthand, pursuant to the Texas Rules of Civil Procedure and/or any provisions stated on the record or attached hereto.

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(Wednesday, June 28, 2023, 10:01 a.m.)

P R O C E E D I N G S

THE REPORTER: Today's date is Wednesday, June 28, 2023. The time is 10:01 a.m. Central Standard Time. This is the videotaped oral deposition of Aaron Caughey, M.D.; and it is being conducted remotely. The witness is located in Charleston, South Carolina.

My name is Debbie Cunningham, CSR Number 2065. I am administering the oath and reporting the deposition remotely by stenographic means from Austin, Texas.

Would Counsel please state their appearances and locations for the record, beginning with Plaintiffs' counsel?

MS. ACKERMAN: Astrid Ackerman. I'm located in New York and counsel for Plaintiffs.

MR. STONE: And Jonathan Stone appearing on behalf of Defendants in the case. I'm located in Austin, Texas; and I'm here with my cocounsel, Amy Pletscher.

MS. ACKERMAN: Molly --

THE REPORTER: Doctor --

MR. STONE: -- do you want to introduce yourself? Sorry.

MS. DUANE: Sure. Molly Duane for the

6	<p>1 Plaintiffs, and I am in New Jersey. 2 AARON CAUGHEY, M.D., 3 having been duly sworn, testified as follows: 4 EXAMINATION 5 BY MR. STONE: 6 Q. Good morning. Could you tell me how to 7 pronounce your last name? 8 A. "Coy." 9 Q. "Coy." 10 And do you mind if I call you Dr. Caughey 11 during the course of this deposition, or do you prefer 12 "Professor"? 13 A. Oh, Dr. Caughey is just fine. Thank you so 14 much. 15 Q. Okay. Thank you, Dr. Caughey. 16 Have you ever been deposed before? 17 A. Yes, sir. 18 Q. Okay. When were you last deposed? 19 A. I think in May or April of this year. 20 Q. And what was the -- what did the case involve 21 that you were deposed in? 22 A. I don't recall. 23 Q. Do you recall the name of the case? 24 A. No, sir. 25 Q. The deposition -- and this is a deposition</p>	8
7	<p>1 we're talking about that occurred a couple of weeks ago; 2 is that correct? 3 A. Months ago, yes. 4 Q. A couple of months ago or a couple of weeks 5 ago? 6 A. Months, sir. 7 Q. Months ago. 8 Okay. In what capacity were you 9 testifying in that case? 10 A. I was a witness for the defense in that case. 11 Q. And were you a fact witness? 12 A. No, I was a medical expert witness. 13 Q. A medical expert. 14 What did the -- what was the nature of 15 the claims in that case if you can recall? 16 A. I just can't -- 17 MS. ACKERMAN: Objection to form. 18 THE WITNESS: Sorry. 19 A. I can't recall, sir. 20 Q. (BY MR. STONE) Have you been deposed -- 21 strike that. 22 Approximately how many times have you 23 been deposed? 24 A. Probably 100 to 120 times. 25 Q. In all of those depositions, were you</p>	9

<p style="text-align: right;">10</p> <p>1 practice medicine? 2 A. Oregon and Washington. 3 Q. Have you previously been licensed to practice 4 medicine in any other states? 5 A. Yes, sir. 6 Q. Which states? 7 A. California and Massachusetts. 8 Q. Do you currently hold any hospital privileges? 9 A. Yes, sir. 10 Q. Which hospitals do you hold privileges at? 11 A. I have privileges at Oregon Health and Science 12 University Main Campus Hospital. I have privileges at 13 Oregon Health and Science University Hillsboro Medical 14 Center in Hillsboro. I have privileges at PeaceHealth 15 Southwest Washington Medical Center. And I have 16 privileges at Legacy Salmon Creek, also in Washington 17 state. 18 Q. Do you currently treat patients? 19 A. Yes, sir. 20 Q. How many patients, approximately, did you 21 treat last week? 22 A. Approximately 30? 30. 23 Q. And on average in 2023, how many patients 24 would you approximate that you treat on a weekly basis? 25 A. It would vary widely. Some weeks it would be</p>	<p style="text-align: right;">12</p> <p>1 Q. Other than your affidavit, the language of the 2 abortion ban, and the documents referenced in the 3 footnotes of your Affidavit, did you review any other 4 documents in preparation for your testimony today? 5 A. Oh, yes, sir. The Complaint and the Amended 6 Complaint. 7 Q. Other than the Affidavit that you wrote, the 8 language of the abortion ban, and the documents 9 referenced in the footnotes of your Affidavit, as well 10 as the Amended Complaint, were there any other documents 11 that we haven't discussed so far that you reviewed in 12 preparation for your testimony today? 13 A. I don't believe so. 14 Q. Did you meet with anyone in preparation for 15 your deposition testimony today? 16 A. Yes, sir. 17 Q. Who did you meet with? 18 A. Plaintiffs' counsel, Astrid Ackerman and Molly 19 Duane. 20 Q. When did you meet with them? 21 A. Last week; I don't remember the day. And on 22 Sunday and on Monday, so two days ago and three days 23 ago. 24 Q. So you met a total of three times? 25 A. Yes, sir.</p>
<p style="text-align: right;">11</p> <p>1 zero. Some weeks it might be 60 to 80. Something 2 probably -- probably 20 to 40 -- it depends a lot on our 3 antepartum service, how busy it is; but probably 20 to 4 40 per week is about average. 5 Q. For your testimony today -- so I'd like to 6 talk a little bit about your testimony today. Did you 7 review any documents in preparation for your testimony 8 today? 9 A. Yes, sir. 10 Q. What documents did you review in preparation 11 for your testimony today? 12 A. I reviewed the Affidavit that I drafted a 13 couple of months ago, and I reviewed -- can I look in my 14 file for the name of the documents? Or I can describe 15 them to you. I reviewed the language of abortion ban 16 law from Texas. I don't remember the exact numbers or 17 names of it. And I reviewed some -- a couple of the 18 references that were applied to my Affidavit, that I 19 added to my Affidavit. And I think that's it. 20 Q. You said a couple of the references in your 21 Affidavit. What do you mean by "references"? 22 A. I think in the Affidavit -- you know, 23 throughout the Affidavit, there are occasionally 24 footnotes that support the statements in the Affidavit. 25 So I looked through some of those references as well.</p>	<p style="text-align: right;">13</p> <p>1 Q. And how long, approximately, did you meet with 2 them the first time? 3 A. Probably about two hours. 4 Q. How long did you meet with them, 5 approximately, the second time? 6 A. I think about the same amount of time, about 7 two hours. 8 Q. And how long did you meet with them the third 9 time you met with them, on Monday? 10 A. Yeah. I think it was only an hour and a half 11 on Monday. 12 Q. What did you discuss during your meetings with 13 them? 14 MS. ACKERMAN: Objection. Objection to 15 form. 16 MR. STONE: State your objection. 17 MS. ACKERMAN: Communications between 18 attorney and expert are protected. 19 MR. STONE: Protected by what? 20 MS. ACKERMAN: By the Texas Rules of 21 Civil Procedure. 22 You can ask -- you can reframe the 23 question and there's certain -- there are certain 24 communications that you are able to obtain information, 25 but not generally what we and Dr. Caughey discussed.</p>

14	<p>1 It's privileged.</p> <p>2 Q (BY MR. STONE) Go ahead, Dr. Caughey.</p> <p>3 A. Oh, hello, sir.</p> <p>4 Q. Yes.</p> <p>5 A. I'm sorry. What's the question?</p> <p>6 Q. Go ahead and answer if you can.</p> <p>7 A. Can you reframe the question, sir?</p> <p>8 Q. Yeah. I asked: What did you discuss with</p> <p>9 the -- Ms. Ackerman and Ms. Duane during your first</p> <p>10 meeting with them in preparation for your deposition</p> <p>11 testimony today?</p> <p>12 MS. ACKERMAN: I'm going to instruct my</p> <p>13 witness not to answer that question to the extent that</p> <p>14 those communications are privileged.</p> <p>15 Q (BY MR. STONE) Okay. Go ahead, Dr. Caughey,</p> <p>16 if you can answer.</p> <p>17 A. Well, I've just been instructed --</p> <p>18 MS. ACKERMAN: I just -- I just</p> <p>19 instructed him not to answer. Communications between</p> <p>20 expert and attorney are protected.</p> <p>21 MR. STONE: Do you have a citation to a</p> <p>22 rule that says that?</p> <p>23 MS. ACKERMAN: Yes, give me one second.</p> <p>24 MS. DUANE: Johnathan, everyone knows</p> <p>25 that communications between experts and --</p>	16	<p>1 ask about those exceptions, of course -- and it tells</p> <p>2 the general rule.</p> <p>3 MR. STONE: Uh-huh.</p> <p>4 Q. (BY MR. STONE) So, Dr. Caughey, you</p> <p>5 understand you've been designated as an expert in this</p> <p>6 case, right?</p> <p>7 A. Yes, sir.</p> <p>8 Q. What specific subjects are you going to be</p> <p>9 testifying as an expert on in this case?</p> <p>10 A. I think that the specific subjects are laid</p> <p>11 out in the content of the Affidavit pretty clearly.</p> <p>12 Q. Okay. What are those subjects?</p> <p>13 A. So pregnancy, obstetrics, maternal-fetal</p> <p>14 medicine and the practice thereof, and the practice</p> <p>15 thereof in states that have abortion bans.</p> <p>16 Q. So I've got pregnancy, obstetrics, and the</p> <p>17 practice thereof in states that have abortions bans --</p> <p>18 abortion bans; is that accurate?</p> <p>19 A. No, sir. The third thing I said was</p> <p>20 maternal-fetal medicine.</p> <p>21 Q. Maternal...</p> <p>22 So it's pregnancy, obstetrics,</p> <p>23 maternal-fetal medicine and the practice thereof in</p> <p>24 states that have abortions -- abortion bans; is that</p> <p>25 accurate?</p>
15	<p>1 MR. STONE: I'm sorry. Who's speaking?</p> <p>2 MS. DUANE: This is Molly Duane.</p> <p>3 MR. STONE: Molly, I don't think</p> <p>4 you're -- I don't think you're an attorney that's</p> <p>5 supposed to be speaking during this deposition. I'm not</p> <p>6 sure that you appeared as the --</p> <p>7 MS. DUANE: I did enter an appearance.</p> <p>8 MR. STONE: Right, but only -- the only</p> <p>9 attorneys that are supposed to be speaking are the ones</p> <p>10 that are taking the deposition and defending.</p> <p>11 MS. DUANE: Well, I'm talking to you; and</p> <p>12 I'd like to know why you're trying to get our witness to</p> <p>13 waive privilege and wasting our time with this.</p> <p>14 MR. STONE: Yeah, I'm not going to</p> <p>15 recognize you. You're not authorized to speak during</p> <p>16 this deposition. So, I mean, if you could mute</p> <p>17 yourself, we'd appreciate it.</p> <p>18 MS. ACKERMAN: During the deposition I</p> <p>19 informed Ms. Cunningham that I was going to be defending</p> <p>20 the deposition and that Molly Duane was going to be</p> <p>21 second chairing the deposition.</p> <p>22 MR. STONE: Yeah, that --</p> <p>23 MS. ACKERMAN: The Texas Rule, if you</p> <p>24 want to check it out, is 195.5, Expert Communications</p> <p>25 are Protected. There's certain exceptions -- you can</p>	17	<p>1 A. Yes. Yes, sir.</p> <p>2 Q. Okay. Are there any other subjects that</p> <p>3 you'll be testifying as an expert on in this case?</p> <p>4 A. Well, again, I'd point you toward the</p> <p>5 Affidavit. And I'm happy to read the Affidavit to you</p> <p>6 if that would be more instructive, but I think those are</p> <p>7 the broad topics.</p> <p>8 Q. Are there any other subjects other than what</p> <p>9 is discussed in your expert report that you expect to</p> <p>10 testify as an expert on in this case?</p> <p>11 A. No, not at the moment. It obviously depends</p> <p>12 on what questions I'm asked.</p> <p>13 Q. Is it fair to say that your expert opinions in</p> <p>14 this case are all contained within your expert report?</p> <p>15 A. At this time, yes, I believe that's correct.</p> <p>16 Q. Are you an expert on Texas' abortion ban?</p> <p>17 A. No. I think I'm an expert in how physicians</p> <p>18 practice in regard to an abortion ban.</p> <p>19 Q. But you'd agree with me that you're not an</p> <p>20 expert specifically on Texas' abortion ban?</p> <p>21 MS. ACKERMAN: Objection to form, asked</p> <p>22 and answered.</p> <p>23 Q. (BY MR. STONE) Go ahead and answer.</p> <p>24 A. I said no, sir.</p> <p>25 Q. Are you an expert on the practice of medicine</p>

<p style="text-align: right;">18</p> <p>1 in Texas?</p> <p>2 A. Yes, sir.</p> <p>3 Q. Okay. You're not licensed in Texas, right?</p> <p>4 A. No, sir.</p> <p>5 Q. Okay. What is the basis for your knowledge on</p> <p>6 the -- to be qualified as an expert on the subject of</p> <p>7 the practice of medicine in Texas?</p> <p>8 A. The practice of medicine in the United States</p> <p>9 is generally a nationwide standard. So I've been</p> <p>10 recognized as an expert in the practice of obstetrics</p> <p>11 and medicine in Texas in the past. It's my</p> <p>12 understanding that with a nationwide standard of care,</p> <p>13 that I can provide medical expertise among the care of</p> <p>14 any of the states in the United States of America.</p> <p>15 Q. So it's your understanding that there's a</p> <p>16 nationwide standard of care?</p> <p>17 A. Yes, sir.</p> <p>18 Q. Okay. What is the standard of care?</p> <p>19 A. The standard of care is what a reasonably</p> <p>20 prudent clinician would do in the same or similar</p> <p>21 circumstances.</p> <p>22 Q. And do you agree with me that the standard of</p> <p>23 care can vary from state to state?</p> <p>24 A. It can -- well, circumstances can vary</p> <p>25 from state to state; and so one can describe the</p>	<p style="text-align: right;">20</p> <p>1 A. No, sir.</p> <p>2 Q. Was it more than once?</p> <p>3 A. Yes, sir.</p> <p>4 Q. Okay. Were you qualified as an expert to</p> <p>5 testify on the standard of care in Texas in the past ten</p> <p>6 years?</p> <p>7 A. Yes, sir.</p> <p>8 Q. In the last five years?</p> <p>9 A. I'm not sure.</p> <p>10 Q. Have you ever been struck as an expert?</p> <p>11 A. I'm not sure what you mean, sir.</p> <p>12 Q. Okay. Has your -- have you ever been found to</p> <p>13 not be qualified as an expert witness before in any of</p> <p>14 the 120 cases or so that you've participated in?</p> <p>15 A. I don't believe so, sir.</p> <p>16 Q. So it's your testimony that you're an expert</p> <p>17 on the standard of care in Texas, correct?</p> <p>18 A. Yes, sir.</p> <p>19 MS. ACKERMAN: Objection to form.</p> <p>20 MR. STONE: State your objection.</p> <p>21 MS. ACKERMAN: You're mischaracterizing</p> <p>22 prior testimony.</p> <p>23 Q (BY MR. STONE) Go ahead and answer.</p> <p>24 A. Yes, sir.</p> <p>25 Q. Okay. Are you an expert on the standard of</p>
<p style="text-align: right;">19</p> <p>1 circumstances and then apply what the standard of care</p> <p>2 would be in those states or in those individual</p> <p>3 situations.</p> <p>4 Q. And by "circumstances," that includes laws,</p> <p>5 correct?</p> <p>6 A. Yes, sir.</p> <p>7 Q. Right. So laws can help frame what the</p> <p>8 standard of care is from state to state?</p> <p>9 A. Yes, sir, that's correct.</p> <p>10 Q. So there isn't a nationwide standard of care.</p> <p>11 There's a standard of care for each individual state,</p> <p>12 depending on the local circumstances, right?</p> <p>13 MS. ACKERMAN: Objection to form, leading</p> <p>14 question.</p> <p>15 A. Generally, that's not true, sir. There is a</p> <p>16 nationwide standard of care that occasionally does vary</p> <p>17 from state to state among particular circumstances; but</p> <p>18 generally, there's a nationwide standard of care.</p> <p>19 Q. (BY MR. STONE) You said that you've been</p> <p>20 qualified as an expert to testify in the standard of</p> <p>21 care before in the state of Texas, right?</p> <p>22 A. Yes, sir, that's correct.</p> <p>23 Q. When?</p> <p>24 A. I don't recall, sir.</p> <p>25 Q. Do you recall the case?</p>	<p style="text-align: right;">21</p> <p>1 care in all cases --</p> <p>2 MS. ACKERMAN: Objection to form.</p> <p>3 Q. -- in Texas?</p> <p>4 A. I'm not sure I understand your question.</p> <p>5 MS. ACKERMAN: Objection to form.</p> <p>6 Q. (BY MR. STONE) Sure. Are you an expert on</p> <p>7 the standard of care in all cases in Texas?</p> <p>8 A. I don't understand what "all cases" means,</p> <p>9 sir.</p> <p>10 Q. Okay. Are you an expert on the standard of</p> <p>11 care in Texas in all medical subjects?</p> <p>12 A. Oh, no, sir.</p> <p>13 Q. Okay. So when you say that you're an expert</p> <p>14 on the standard of care in Texas, what specific things</p> <p>15 are you -- what specific standards of care do you</p> <p>16 consider yourself an expert on in the state of Texas?</p> <p>17 A. Obstetrics and gynecology and maternal-fetal</p> <p>18 medicine.</p> <p>19 Q. Okay. Have you ever practiced in the state of</p> <p>20 Texas --</p> <p>21 A. No, sir.</p> <p>22 Q. -- medicine?</p> <p>23 Have you ever been to the state of Texas?</p> <p>24 A. Yes, sir.</p> <p>25 Q. When were you last in the state of Texas?</p>

22	<p>1 A. April of this year.</p> <p>2 Q. What were you here for?</p> <p>3 A. Oh, I give the board exams in maternal-fetal</p> <p>4 medicine; and our board exams occur in Dallas, Texas.</p> <p>5 Q. Have you discussed this case with anyone</p> <p>6 located in Texas?</p> <p>7 A. Not this case, sir, no.</p> <p>8 Q. Have you discussed the Texas abortion ban with</p> <p>9 anybody located in Texas?</p> <p>10 A. Yes, sir.</p> <p>11 Q. Who?</p> <p>12 A. People that practice in Texas.</p> <p>13 Q. Yeah. Who?</p> <p>14 A. I won't name names, sir.</p> <p>15 Q. Are you refusing to answer the question?</p> <p>16 MS. ACKERMAN: Objection. Objection.</p> <p>17 Mr. Stone, this is a truncated hearing. I'm instructing</p> <p>18 the witness not to answer this question. We haven't</p> <p>19 entered into a Protective Order. The questions that</p> <p>20 you're asking, the information may be -- it's definitely</p> <p>21 sensitive; and it might be confidential.</p> <p>22 MR. STONE: If he's discussed the Texas</p> <p>23 abortion ban, the subject that he's testifying on</p> <p>24 today --</p> <p>25 MS. ACKERMAN: You're asking who --</p>	24
23	<p>1 you're asking who that he talked to.</p> <p>2 MR. STONE: Correct, that's right.</p> <p>3 MS. ACKERMAN: Yeah.</p> <p>4 MR. STONE: That's discoverable</p> <p>5 information. That's absolutely discoverable. So you're</p> <p>6 instructing him not to answer?</p> <p>7 Q (BY MR. STONE) Dr. Caughey --</p> <p>8 MS. ACKERMAN: I'm instructing --</p> <p>9 Q. -- will you answer the question?</p> <p>10 (Simultaneous speakers.)</p> <p>11 Q. (BY MR. STONE) Dr. Caughey, will you answer</p> <p>12 the question?</p> <p>13 A. Oh, no, sir.</p> <p>14 Q. How many people in Texas have you discussed</p> <p>15 the Texas abortion ban with?</p> <p>16 A. Well, I discussed the abortion ban when I</p> <p>17 was at the board exams back in April; and some of the</p> <p>18 providers are providers from Texas.</p> <p>19 Q. Is that the only time that you discussed the</p> <p>20 Texas abortion ban with individuals located in Texas?</p> <p>21 A. No.</p> <p>22 Q. Approximately how many people have you</p> <p>23 discussed the Texas abortion ban with that reside in</p> <p>24 Texas?</p> <p>25 A. I would estimate four to ten.</p>	25

26

1 Q. Do you believe that physicians in Texas
2 believe that no cases qualify for the medical exception
3 contained within Texas' abortion laws?
4 A. I think --
5 MS. ACKERMAN: Objection to form, vague
6 and ambiguous.
7 A. I think that they -- that people practicing in
8 Texas either believe that there are no exceptions or
9 that there are very few.
10 Q. (BY MR. STONE) What is the basis for that
11 opinion?
12 A. One of the bases of that opinion is that when
13 I gave the board exams in April, when I was examining
14 practitioners -- and I can't know the state they're
15 from; but three of them were -- three of my examinees
16 were from states with abortion bans. And when they were
17 faced with a situation that is a situation that you
18 would always offer an abortion or you would recommend
19 abortion, they stated they could not in their states.
20 Q. Is there any other basis for that opinion that
21 you've not just identified?
22 A. This is the basis for the opinion that there
23 are only a limited range of situations that Texas
24 physicians believe there's an abortion available for?
25 Q. Correct.

27

1 A. Well, the other thing would just be the basis
2 of -- when one reads the medical exception to the
3 abortion ban, the language is vague and ambiguous. And
4 so one can understand that when faced with severe
5 penalties, such as imprisonment and large fines,
6 combined with a vague statement, that there would be
7 confusion; and a physician is going to be inclined to
8 limit their own liability. So that would be another
9 basis, I guess.
10 Q. You said that with respect to the first basis
11 that it was based in part on conversations that you had
12 with health care providers at the board exam in April,
13 correct?
14 A. Yes, sir.
15 Q. But you're not sure if those physicians you
16 spoke with were from Texas; is that correct?
17 A. Yes, sir.
18 Q. All right. So you can't say whether or not
19 those individuals represent confusion among Texas
20 providers; is that accurate?
21 A. Yes, sir.
22 Q. Okay. Are there any Texas providers that you
23 spoke with that serve as a basis for your opinion that
24 providers in Texas are confused or do not believe that
25 any cases qualify for the exception to Texas' abortion

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1 laws?
2 A. Well, I've taken care -- well, I know that
3 I've spoken with one Texas provider that said that they
4 would not -- simply not be offering abortion any longer.
5 So I guess that would mean that they don't think that
6 there is a medical exception.
7 Q. Okay. I'm going to come back to that.
8 Is there any -- other than that one Texas
9 provider, are there any other Texas providers that
10 you've spoken with that serve as a basis for this
11 opinion that you've just given?
12 A. No, sir.
13 Q. Okay. Now with respect to that one Texas
14 provider, are you assuming that that person doesn't
15 believe that there's an exception just because they said
16 that they weren't going to be providing it any longer?
17 A. Yes, sir.
18 Q. That person -- that provider didn't actually
19 tell you that: The reason I'm not providing abortion
20 services any longer or referring people for abortions is
21 because I don't -- I'm confused about the law?
22 MS. ACKERMAN: Objection, leading
23 question.
24 MR. STONE: I'm sorry. Let's pause for a
25 moment.

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1 Counsel, is it your understanding that I
2 can't ask leading questions of your witness?
3 MS. ACKERMAN: Do you want me to show you
4 the Texas civil procedure rule again? You can ask the
5 question, but I am allowed to pose my objections. Then
6 the witness is then also -- as he has done, then has to
7 answer the question; but I can do the objections.
8 MR. STONE: Of course you can. I just
9 want to be clear --
10 MS. ACKERMAN: And leading -- leading --
11 yes, leading is --
12 MR. STONE: I am allowed to ask leading
13 questions during depositions. As the cross-examining
14 attorney, I'm allowed to ask leading questions.
15 Q (BY MR. STONE) Go ahead and answer.
16 A. I think I said yes, sir.
17 Q. Would you agree with me that -- would you
18 agree with me that the provider didn't actually -- did
19 not tell you that the reason that they were no longer
20 providing abortions or referring people for abortions
21 is because they believe that there is no longer an
22 exception to Texas' abortion laws?
23 A. That was not explicitly stated, sir.
24 Q. So it's just your speculation that that's
25 what the provider meant when they told you that they

30	<p>1 were no longer providing abortion services? 2 A. Well, it's not speculation, sir. I mean, if 3 someone is not providing abortion services and we -- and 4 there is a written medical exception, that means that 5 they are interpreting that medical exception essentially 6 to apply to no cases. 7 Q. But they didn't actually say that to you, 8 right? 9 A. No, but that's just logic, sir. I think 10 that's different from speculation, sir. 11 Q. Do you think there's any other logical 12 conclusion that you could come to based on that 13 statement? 14 A. No, sir. 15 Q. What about -- now, was this individual an 16 abortion provider? 17 A. No, sir. 18 Q. Who was this individual? 19 A. I will not name names, sir. 20 Q. Well, see, here's the problem: You just 21 testified that you relied on your conversation with them 22 as a basis for your expert opinion in this case. So 23 it's a real problem if you're relying on information 24 that you won't disclose to us during the deposition or 25 during the course of discovery in this case.</p>	32	<p>1 refusing to answer on the instruction of counsel? 2 A. Well, I guess I refused to answer before the 3 instruction of counsel; and then I refused to answer 4 along with the instruction of counsel. 5 Q. Okay. Let's talk about your expert report. 6 Did you write the expert report? 7 A. Yes, sir. 8 Q. Did you receive any assistance in the writing 9 of the expert report? 10 A. Yes, sir. 11 Q. Okay. Who assisted you in writing this expert 12 report? 13 A. I believe Astrid Ackerman assisted me, sir. 14 Q. Astrid, the attorney that's on -- representing 15 you in this case right now? 16 A. Yes, sir. 17 Q. Okay. 18 A. I don't believe she's representing me, sir. I 19 think she's representing her Plaintiffs. 20 Q. Right. Thank you for the clarification, 21 Doctor. 22 A. Yes, sir. 23 Q. Who wrote the first draft, you or Astrid? 24 A. The first draft was -- 25 MS. ACKERMAN: Objection, leading</p>
31	<p>1 So I'll ask you, again: Can you tell me 2 the name of this person, this physician in Texas, who 3 gave you this information? 4 MS. ACKERMAN: Again, I'm instructing the 5 witness not to answer. 6 You can ask him and he can testify, like 7 he's done, about the substance of the conversation; but 8 the identity of the person is what we're objecting to 9 and is what I'm instructing the witness not to answer. 10 Again, this is a truncated deposition. There's no 11 Protective Order. 12 What you're asking can be sensitive, 13 including confidential information. 14 MR. STONE: All right. Well, I just want 15 for the record to reflect that we believe we're being 16 materially prejudiced by being prevented from being able 17 to explore the veracity of these statements and confirm 18 they even happened and it forms the basis of an expert 19 opinion within this case. 20 Q. (BY MR. STONE) But we'll move on since you've 21 been instructed and you're refusing to answer. 22 Actually, I don't think I have this on 23 record: Dr. Caughey, are you refusing to answer? 24 A. Oh, yes, sir. 25 Q. Okay. And what is the basis -- are you</p>	33	<p>1 question. 2 A. The first draft -- 3 Q. (BY MR. STONE) Go ahead. 4 A. Yes. The first draft was created after -- 5 it was a memorialization of a conversation that 6 Ms. Ackerman and I had. We had a discussion where we 7 went through a number of the items and she agreed to 8 draft the language that we had discussed and then sent 9 it to me and then I edited it several times and 10 finalized it. 11 Q. Okay. So this expert report was written by 12 Astrid, correct? 13 MS. ACKERMAN: Object- -- objection to 14 form. 15 A. No, sir. The report was written by me. 16 Q. (BY MR. STONE) But Astrid drafted the first 17 draft of this report, correct? 18 A. She drafted the first draft -- 19 MS. ACKERMAN: Objection to form, asked 20 and answered. 21 A. -- that memorialized the conversations that we 22 had. So essentially that -- I wouldn't say took 23 dictation; that would be a little bit dismissive of her 24 understanding and taking part in those conversations. 25 But it was a draft of conversations that we had had, and</p>

<p style="text-align: right;">34</p> <p>1 then I needed to edit it. And so then I put it in a 2 form that sounded like me. 3 Q. Do you have a copy of that first draft that 4 was sent to you? 5 A. I don't, sir. 6 Q. What did you do with it? 7 A. I deleted it off of my computer. 8 Q. How long ago did you receive the first draft 9 of your expert report in this case from Ms. Astrid? 10 A. I don't know, sir. 11 Q. Why did you delete the copy of the draft that 12 Ms. Astrid sent you? 13 A. I always delete all the drafts, sir. 14 Q. Did you have to heavily edit the draft expert 15 report that Ms. Astrid sent you? 16 A. Yes, sir. 17 Q. I'm sending you in the chat what I'm marking 18 as Defendant's Exhibit A. 19 (Exhibit A marked.) 20 Q. (BY MR. STONE) Let me know once you open it. 21 It's a copy of your expert report. 22 A. So do you want me to double click on this? 23 Q. Yes, go ahead and open it. We're going to 24 talk about it. 25 A. It's open, sir.</p>	<p style="text-align: right;">36</p> <p>1 A. (Witness silently reading document.) 2 I'm finished. 3 Q. Did you write Paragraph 12 or did Astrid? 4 A. Oh, I believe that Astrid wrote Paragraph 12. 5 Q. Could you read Paragraph 13 and let me know 6 when you finish? 7 A. (Witness silently reading document.) 8 I'm done. 9 Q. Okay. Did you write Paragraph 13 or did 10 Astrid? 11 A. I -- I don't recall this one. I think this 12 was part of the conversation we had. I think this was 13 predominantly me. 14 Q. How do you know Texas law doesn't define what 15 it means to be alive or dead? 16 A. Because it doesn't say what is alive or dead. 17 Q. Okay. Anywhere in Texas law? 18 A. Well, in the abortion ban, it doesn't. 19 Q. But you don't say just the abortion ban in 20 this paragraph, do you? It says, "Texas law does not 21 define...'alive' or 'dead,'" right? 22 A. It does say that. That might have been a poor 23 choice of words by myself. I apologize. 24 Q. Would you agree that it might have -- Texas 25 might have a definition of "alive" or "dead" elsewhere</p>
<p style="text-align: right;">35</p> <p>1 Q. Can you go to Paragraph 11 of Exhibit A, and 2 read it silently to yourself. 3 A. (Witness silently reading document.) 4 Q. Let me know when you're done. 5 A. Oh, I'm done. 6 Q. Okay. Other than the documents identified in 7 Paragraph 11 of Exhibit A, is there anything else that 8 you reviewed in preparation for creating this expert 9 report? 10 A. I don't believe, so, sir. 11 Q. And just out of curiosity, did you write 12 Exhibit A or did Astrid? 13 MS. ACKERMAN: Objection to form -- 14 MR. STONE: I'm sorry. 15 MS. ACKERMAN: -- asked and answered. 16 MR. STONE: Strike that. Strike that. 17 Q. (BY MR. STONE) Did you write Paragraph 11 of 18 Exhibit A or did Astrid? 19 A. I believe that that was part of the original 20 draft, most of at least Paragraph 11 or Section 11 -- 21 Section 11. 22 Q. Astrid wrote Paragraph 11? 23 A. I believe so, sir. 24 Q. Could you read Paragraph 12 to yourself and 25 let me know when you finish?</p>	<p style="text-align: right;">37</p> <p>1 in Texas law? 2 A. It certainly may have, that is correct. 3 Q. Okay. So specifically what you're talking 4 about in Paragraph 13 here is: Within the Texas 5 abortion ban, there's no definition of "alive" or 6 "dead." Is that accurate? 7 A. Yes, sir. 8 Q. Okay. Let's keep going. Paragraph 14, can 9 you read it to yourself and then let me know when you 10 finish? 11 A. (Witness silently reading document.) 12 Yes. Yeah, I've read it, sir. 13 Q. And did Astrid write Paragraph 14 or did you? 14 A. Again, I'm not quite sure on this one. I 15 think it was -- again, it came out of the conversation 16 that we had. 17 Q. You're not sure if you wrote Paragraph 14 or 18 if Astrid did, right? 19 MS. ACKERMAN: Objection to form, asked 20 and answered. 21 Q. (BY MR. STONE) Go ahead. 22 A. Yes, that's correct, sir. 23 Q. There's a footnote at the end of Paragraph 14, 24 right? 25 A. Yes, sir.</p>

<p style="text-align: right;">38</p> <p>1 Q. It's a citation to the Texas Health & Safety 2 Code, right? 3 A. Yes, sir. 4 Q. Are you familiar with the blue book? 5 A. No, sir. 6 Q. The green book? 7 A. I'm familiar with the green book. I'm not 8 sure if it's the same green book that you're talking 9 about. 10 Q. When I say "green book," what does that mean 11 to you? 12 A. It's a book about neonatal encephalopathy. 13 Q. Ah. I'm talking about the citation book for 14 how to cite cases in Texas. I was just curious how you 15 knew how to cite to the Texas Health & Safety Code if 16 you -- specifically if you wrote this particular 17 paragraph. 18 A. Oh, I didn't create the citation, sir. 19 Q. Oh, okay. So Astrid did the citation? 20 A. Yes, sir, I'm sure of that. 21 Q. Okay. What about paragraph -- could you read 22 Paragraph 15 and then look up when you finish or tell me 23 when you finish? 24 A. Will do. 25 (Witness silently reading document.)</p>	<p style="text-align: right;">40</p> <p>1 Yes, sir. 2 Q. Okay. Did you write Paragraph 17 or Astrid? 3 A. I think 17 is mostly me. 4 Q. Okay. All right. You state here that you're 5 giving a medical opinion that "the language of the 6 exception to Texas' abortion ban does not provide 7 sufficient clarity to physicians to discern whether 8 providing an abortion would be a crime," right? 9 A. Yes, sir. 10 Q. How is -- can you explain to me the basis for 11 that medical opinion? 12 A. Well, I think it's laid out in the subsequent 13 paragraph, sir. 14 Q. Right. But I'm asking you, though. Could you 15 tell me? 16 A. Can we -- can I look at the language, again, 17 of the -- 18 Q. Sure, absolutely. If you need a moment to 19 skim it, you're welcome to. 20 A. So the language I'm talking about that I think 21 is confusing is "a life-threatening physical condition 22 aggravated by, caused by, or arising from a pregnancy 23 that, as certified...physician, places the woman in 24 danger of death or a serious risk of substantial 25 impairment of a major bodily function unless an abortion</p>
<p style="text-align: right;">39</p> <p>1 Yes, sir. 2 Q. Did you write Paragraph 15 or did Astrid? 3 A. I think that Astrid drafted most of 4 Paragraph 15. 5 Q. Okay. Other than the loss of a medical 6 license -- let me ask the question -- strike that. 7 I'm asking a question about Paragraph 15, 8 okay? 9 A. Yes, sir. 10 Q. Other than the loss of a medical license, up 11 to 99 years in prison, and exorbitant -- exorbitant 12 monetary penalties, are there any other severe penalties 13 for physicians for violating Texas' abortion laws that 14 you're aware of? 15 MS. ACKERMAN: Objection to form. 16 A. Those are all I'm aware of, sir. 17 Q. (BY MR. STONE) Could you read Paragraph 16 to 18 yourself and let me know when you finish? 19 A. (Witness silently reading document.) 20 Yes, sir. 21 Q. Did Astrid write Paragraph 16 or did you? 22 A. I believe Astrid drafted 16. 23 Q. Okay. Let's go to Paragraph 17. Could you 24 read Paragraph 17 and let me know when you finish? 25 A. (Witness silently reading document.)</p>	<p style="text-align: right;">41</p> <p>1 is performed." And I think that there's -- there's 2 confusion throughout that statement -- 3 Q. All -- 4 A. -- what is meant by "a life-threatening 5 physical condition," what is meant by "danger of death," 6 what is meant by "a serious risk," "substantial 7 impairment," and "major bodily function." 8 Q. And help me: What paragraph -- what did you 9 just -- what paragraph did you just read from? 10 A. Oh, I read from, in my Affidavit, 11 Paragraph 14. 12 Q. Oh, 14. 13 A. This was the -- this is the language from the 14 medical exception. 15 Q. Medical exception, singular, is it your 16 opinion that this is the only medical exception to 17 Texas' abortion law? 18 MS. ACKERMAN: Objection to form, calls 19 for a legal conclusion. 20 MR. STONE: Just a minute. Hold on. I 21 wasn't finished with the question, Astrid. 22 Strike that and let me start over. 23 Q. (BY MR. STONE) Is it your understanding that 24 the exception described in Paragraph 14 of Exhibit A is 25 the only exception to Texas' abortion law?</p>

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1 A. I'm not sure I fully understand the question,
 2 sir. I mean, I have a document that has this laid out
 3 as the medical exception. I mean, I didn't read the
 4 entire -- I mean, there's three different lines; but
 5 this is the major component of the medical conception --
 6 exception is my understanding.
 7 Q. Okay. So is it your understanding that as --
 8 what's contained in Paragraph 14 is the only medical
 9 exception to Texas' abortion law?
 10 A. I believe so.
 11 MS. ACKERMAN: Objection to form, calls
 12 for a legal conclusion.
 13 Q. (BY MR. STONE) Is there any other -- you say
 14 you believe so. What are you basing that belief on?
 15 A. Well, so maybe it would be useful to look at
 16 the written medical exception. Should we -- can we do
 17 that? And then -- I mean, because I think that it's --
 18 I don't know if you're pointing to something else; but
 19 this is the language around medical exception.
 20 Q. Right. This is the language that -- strike
 21 that.
 22 You reviewed Texas' abortion law in
 23 preparation for your testimony today, right?
 24 A. Yes, sir.
 25 Q. Did you review it this morning?

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1 A. Oh, yes, sir.
 2 Q. Okay. And you've met for almost six hours of
 3 depo prep with Astrid in preparation for your testimony
 4 today, correct?
 5 A. Yes, sir.
 6 Q. Okay. And your whole -- well, you have a
 7 25-page expert report in this case, correct?
 8 A. I think it's 26 pages; but yes, sir.
 9 Q. 26 pages. Thank you, sir.
 10 And is it your testimony today that
 11 you're uncertain if there's any other exceptions to
 12 Texas' abortion law other than what is described in
 13 Paragraph 14 of your report?
 14 A. Again, I don't know exactly --
 15 MS. ACKERMAN: Objection. He's not --
 16 he's not a legal expert, Mr. Stone.
 17 A. So I don't know exactly what you're referring
 18 to, but this is the language that I understand to be the
 19 medical exception to the Texas abortion law.
 20 Q (BY MR. STONE) And is that understanding
 21 based on your reading of Texas' abortion law in
 22 preparation for your testimony today and in the writing
 23 of this report, as well as the six hours of deposition
 24 prep you spent with Astrid?
 25 A. Yes, sir.

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1 Q. Okay. Let's go to Paragraph 18 of your -- of
 2 Exhibit A. Could you read it to yourself and then let
 3 me know when you finish?
 4 A. (Witness silently reading document.)
 5 Yes, sir.
 6 Q. Who wrote Paragraph 18, you or Astrid?
 7 A. I did.
 8 Q. You did.
 9 Okay. You say here that "Texas'
 10 definition of abortion does not conform to medical
 11 terms," right?
 12 A. Yes, sir.
 13 Q. Okay. Which states have definitions of
 14 abortion that you're aware of that conform to, quote,
 15 unquote, "medical terms"?
 16 MS. ACKERMAN: Objection to form, calls
 17 for a legal conclusion.
 18 A. I don't know the answer to that question, sir.
 19 Q (BY MR. STONE) Is this an opinion of yours in
 20 this case that Texas' definition of abortion does not
 21 conform to medical terms?
 22 A. Yes, sir.
 23 Q. Okay. What is the basis for that opinion in
 24 this case?
 25 A. I think the basis is there in Paragraph 18,

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1 yes, sir.
 2 Q. Okay. You go on to say that the, "Correct
 3 terminology" -- and when you say "correct terminology,"
 4 you mean correct medical terminology; is that correct?
 5 A. Yes, sir.
 6 Q. The correct medical -- the "Correct
 7 terminology would refer to stopping the growth of the
 8 fetus or embryo or interrupting the growth or function
 9 of the placenta, not the death of an," quote, unquote,
 10 "unborn," unquote, "child," right?
 11 A. Yes, sir.
 12 Q. Does Texas abortion law define an "unborn
 13 child"?
 14 MS. ACKERMAN: Objection to form, calls
 15 for a legal conclusion.
 16 A. I don't believe it does, sir.
 17 Q (BY MR. STONE) Would it change your opinion
 18 if you learned that Texas had a definition of "unborn
 19 child"?
 20 MS. ACKERMAN: Objection to form, calls
 21 for speculation.
 22 A. It possibly could. I would have to read that
 23 definition.
 24 Q (BY MR. STONE) Okay. So you reviewed Texas'
 25 abortion laws -- strike that.

46	<p>1 Is it your testimony today that in your 2 review of Texas' abortion laws, you did not see a 3 definition of "unborn child"?</p> <p>4 A. Yes, sir.</p> <p>5 Q. There's a footnote in here on this 6 Paragraph 18 that says that, "There are many patients 7 who are pregnant and are not women." Do you see that?</p> <p>8 A. Oh, yes, sir.</p> <p>9 Q. What does that mean?</p> <p>10 A. We use the term "pregnant person" because 11 there are people who do not prefer the gender of "woman" 12 but that can become pregnant.</p> <p>13 Q. But they're still a biological woman, right?</p> <p>14 A. No, sir. They're biologically female.</p> <p>15 They're not --</p> <p>16 Q. Oh.</p> <p>17 A. "Woman" is a gender term.</p> <p>18 Q. Yes, sir, I understand. I understand. 19 So would it be more accurate then if they 20 had said "a biological female" as opposed to "woman"?</p> <p>21 A. That would be more medically correct, sir.</p> <p>22 Q. Okay.</p> <p>23 A. I think the inclusive terminology, just to 24 address it, is we use "pregnant person."</p> <p>25 Q. Right, but you don't disagree, though, that</p>	48	<p>1 Q. Did you write Paragraph 19 or did Astrid?</p> <p>2 A. I would have written almost all or all of 3 Paragraph 19.</p> <p>4 Q. Okay. You wrote, "In the case of pregnancies 5 where there is no cardiac activity, there's no way of 6 knowing with certainty whether the pregnancy is actually 7 viable, a spontaneous abortion (an exception to Texas' 8 abortion bans), or an ectopic pregnancy (an exception to 9 Texas abortion bans -- abortion bans.) Is that true, 10 Dr. Caughey, that there is no way of knowing?</p> <p>11 A. With certainty, that is correct, sir.</p> <p>12 Q. But in the very next sentence you say, "A 13 physician in Texas would need to wait to see if they can 14 identify cardiac activity over time to assess whether 15 the pregnancy is viable," right?</p> <p>16 A. Yes, sir.</p> <p>17 Q. Okay. So there is a way to identify or to 18 know with certainty whether the pregnancy is actually 19 viable?</p> <p>20 MS. ACKERMAN: Objection, asked and 21 answered.</p> <p>22 A. So, again, that phrase, "with certainty," I 23 think is meant in a certain way. You can wait and see 24 and some will eventually develop cardiac activity, but 25 you don't know exactly how long to wait. And so, yes,</p>
47	<p>1 only a biological female can get pregnant, though, 2 right?</p> <p>3 A. I don't understand the question, sir.</p> <p>4 Q. Do you agree that only a biological female can 5 get pregnant?</p> <p>6 A. Yes, sir.</p> <p>7 Q. Let's go to Paragraph 19. Could you read it 8 to yourself and then let me know when you finish?</p> <p>9 A. Oh, sorry, sir. I just realized that is 10 actually incorrect. There are individuals that are 11 intersex, so they -- they're -- it is unclear that 12 they're biologically male or female; but they are 13 intersex -- intersexual. And so such individuals could 14 become pregnant, and they would not be considered 15 biologically female.</p> <p>16 Q. Have you ever -- have you ever treated an 17 intersex person who was pregnant?</p> <p>18 A. Yes, sir.</p> <p>19 Q. Did they identify as biologically female?</p> <p>20 A. No, sir.</p> <p>21 Q. All right. Let's go to Paragraph 19. Could 22 you read it to yourself and then let me know when you 23 finish? It's kind of long.</p> <p>24 A. (Witness silently reading document.) 25 Yes, sir.</p>	49	<p>1 some would become viable over time, but not all; and 2 it's unclear how long one should wait. Unfortunately, 3 waiting in this setting can be dangerous to patients.</p> <p>4 Q. Doctor, that's not what you said. You said, 5 "There is no way of knowing with certainty whether the 6 pregnancy is actually viable," right?</p> <p>7 A. Yes, sir. And I think what I -- what I 8 intended "with certainty" was at -- you know, in a 9 reasonable -- in a reasonable fashion.</p> <p>10 Q. When you say "reasonable fashion," within a 11 reasonable amount of time, right?</p> <p>12 A. Yes, sir, yes, sir -- well, no, no, no.</p> <p>13 Sorry. No. It's meant -- that would be one -- one 14 thing; or if there was a range of tests that could be 15 performed at the current time, but there aren't either.</p> <p>16 Q. So I just want to tie this down with some 17 specificity. So you agree with me that this is 18 inaccurate to say that there is no way of knowing with 19 certainty whether the pregnancy is actually viable or an 20 ectopic or a spontaneous abortion? Would you agree with 21 me that's an inaccurate statement?</p> <p>22 MS. ACKERMAN: Objection to form, asked 23 and answered; and you're mischaracterizing prior 24 testimony.</p> <p>25 Q (BY MR. STONE) Go ahead, Dr. Caughey.</p>

<p style="text-align: right;">50</p> <p>1 A. Yeah, I'm thinking, sir.</p> <p>2 Q. Oh, sorry.</p> <p>3 A. Be patient.</p> <p>4 I guess if we're going to say that you</p> <p>5 could have certainty if one waited until someone</p> <p>6 ruptured their ectopic pregnancy and bled out and died,</p> <p>7 then that's correct. You could wait until some horrible</p> <p>8 thing like that occurred. I think that is a fair</p> <p>9 statement; but I think you can understand why I would</p> <p>10 have used that language, because within the practice of</p> <p>11 medicine, one would never do that.</p> <p>12 Q. So I want to give you a chance to amend it if</p> <p>13 you'd like. Would you like to amend this sentence and</p> <p>14 say it differently here today: "In the case of</p> <p>15 pregnancies where -- pregnancies where there's no</p> <p>16 cardiac act- -- cardiac activity, there's no way of</p> <p>17 knowing with certainty whether the pregnancy is actually</p> <p>18 viable, a spontaneous abortion (an exception to Texas'</p> <p>19 abortion bans), or an ectopic pregnancy (an exception to</p> <p>20 Texas' abortion bans)?</p> <p>21 A. I mean, I'm pretty comfortable with that</p> <p>22 language. I understand your exception to it. I think</p> <p>23 that statement, I'm pretty comfortable. I guess we</p> <p>24 would -- I mean, I wouldn't want to do it on the fly. I</p> <p>25 would want to be thoughtful about it; but probably</p>	<p style="text-align: right;">52</p> <p>1 life-threatening often means that someone may die in the</p> <p>2 next brief period of time, but it can also mean a</p> <p>3 condition that may lead to a mortality in the future</p> <p>4 such as cancer or another terminal illness," right?</p> <p>5 A. Yes, sir.</p> <p>6 Q. Which of those two do you think that the Texas</p> <p>7 abortion law is referring to?</p> <p>8 A. I don't know, sir.</p> <p>9 Q. So you think that Texas' abortion law's</p> <p>10 definition -- or the definition in Texas -- strike that.</p> <p>11 Let me start again.</p> <p>12 So it's your testimony today that Texas'</p> <p>13 abortion law's definition of "life-threatening physical</p> <p>14 condition" could include conditions that could</p> <p>15 eventually lead to mortality in the future, such as</p> <p>16 cancer or another terminal illness?</p> <p>17 A. Yes --</p> <p>18 MS. ACKERMAN: Objection to form, calls</p> <p>19 for a legal conclusion.</p> <p>20 THE WITNESS: Sorry.</p> <p>21 A. Yes, sir.</p> <p>22 Q (BY MR. STONE) You talk about PPROM, right?</p> <p>23 A. Yes, sir.</p> <p>24 Q. What is PPROM?</p> <p>25 A. It's defined in the paragraph right before it.</p>
<p style="text-align: right;">51</p> <p>1 adding some kind of time modifier. I think we could</p> <p>2 probably edit that. We can do that in the future. I</p> <p>3 really wouldn't want to do it on the fly, though.</p> <p>4 Q. Okay. Let's go to Paragraph 20. Could you</p> <p>5 read it to yourself -- it's kind of long -- and then let</p> <p>6 me know when you finish?</p> <p>7 A. (Witness silently reading document.)</p> <p>8 Yes, sir.</p> <p>9 Q. Who wrote Paragraph 20, you or Astrid?</p> <p>10 A. I did.</p> <p>11 Q. Is it your understanding that the Texas</p> <p>12 abortion law does not define "life-threatening physical</p> <p>13 condition"?</p> <p>14 A. Yes, sir.</p> <p>15 Q. Would it change your opinion if Texas did have</p> <p>16 a definition of a "life-threatening physical condition"?</p> <p>17 MS. ACKERMAN: Objection to form, calls</p> <p>18 for speculation.</p> <p>19 A. It may.</p> <p>20 Q (BY MR. STONE) When you say it's unclear --</p> <p>21 you -- in your opinion, "It's unclear how 'life</p> <p>22 threatening' a risk must be," in Texas' abortion laws;</p> <p>23 is that correct?</p> <p>24 A. Yes, sir.</p> <p>25 Q. And then you go on to say, "In medical terms</p>	<p style="text-align: right;">53</p> <p>1 It's preterm premature rupture of the membranes.</p> <p>2 Q. You say in this, in your expert report, in</p> <p>3 Paragraph 20 that, "It is impossible to predict whether</p> <p>4 and when the condition will deteriorate to the point</p> <p>5 that it becomes life-threatening," right?</p> <p>6 MS. ACKERMAN: Objection. I'm going to</p> <p>7 object as to the characterization of this Affidavit as</p> <p>8 an expert report, just so that it's in the record.</p> <p>9 MR. STONE: Oh, okay. Wait. Oh, wait.</p> <p>10 That -- well, that kind of changes everything. Hold on.</p> <p>11 Q. (BY MR. STONE) Dr. Caughey, is Exhibit A an</p> <p>12 expert report?</p> <p>13 A. I believe so.</p> <p>14 Q. Okay. You can continue --</p> <p>15 A. I guess it's not. I guess, technically, it's</p> <p>16 an Affidavit.</p> <p>17 MS. ACKERMAN: We are in the discovery</p> <p>18 stage of this case yet. It is an Affidavit in support</p> <p>19 of our Temporary Injunction Motion.</p> <p>20 MR. STONE: Okay.</p> <p>21 Q. (BY MR. STONE) So, Dr. Caughey, are the</p> <p>22 opinions expressed in your Affidavit expert opinions in</p> <p>23 this case?</p> <p>24 A. Yes, sir.</p> <p>25 Q. Okay. So it's an Affidavit containing your</p>

<p style="text-align: right;">54</p> <p>1 expert opinions; is that accurate? 2 A. That is my understanding of the document, sir. 3 Q. Okay. You've been an expert in over a hundred 4 cases, right? 5 A. Yes, sir. 6 Q. Okay. Is this Affidavit containing your 7 expert report -- or expert opinions different than the 8 expert reports that you produced in those other cases? 9 A. Well, I guess, technically, expert reports 10 usually aren't affidavits. They're usually a separate 11 document from an Affidavit. Commonly the affidavits are 12 much shorter. 13 Q. Uh-huh. 14 A. But there are or have been affidavits that 15 I've worked on that were long like this, so. But I 16 guess, technically -- again, this is not my area of 17 expertise, the legal aspect; but I guess an Affidavit is 18 different, I guess, technically, from an expert report. 19 Q. Okay. So you're willing to concede today that 20 this is not -- Exhibit A is not an expert report in this 21 case, correct? 22 A. I think that's probably true, sir, yes. 23 Q. Okay. So we're not going to see this as an 24 expert report exhibited at the hearing, right? 25 A. I don't know, sir. I mean, I guess we</p>	<p style="text-align: right;">56</p> <p>1 uterus into the maternal bloodstream and the maternal 2 systemic system. 3 Q. Sure. I understand the when, Doctor, I do. I 4 understand the when. My question's about -- I should 5 have been more clear -- the whether. Is it impossible 6 to predict whether the condition will deteriorate to the 7 point that it would become life-threatening? 8 A. Yes, sir. 9 Q. Okay. So the converse is true, right, that 10 it's impossible to predict that it won't become 11 life-threatening, right? 12 MS. ACKERMAN: Objection to form, 13 mischaracterizes prior testimony. 14 A. Can you say that question again, sir? 15 Q. (BY MR. STONE) Sure. Is it also impossible 16 to predict -- would you agree with me that it's 17 impossible to predict whether the condition will 18 deteriorate to the point that it becomes life- 19 threatening? 20 A. Yes, sir, that's what I wrote. 21 Q. Okay. That's exactly what you wrote. 22 So in that case, if it's impossible to 23 predict, would you agree then that there are cases where 24 this condition will not deteriorate to the point that 25 it's life-threatening?</p>
<p style="text-align: right;">55</p> <p>1 could -- 2 Q. Okay. 3 A. -- we could take pieces of this and -- I mean, 4 I could take pieces of this and create an expert report. 5 I think it would have much of this content. 6 Q. How would an expert report -- strike that. 7 Let's go back to Paragraph 20. I just 8 read to you the sentence that, "It's impossible to 9 predict whether and when the condition will deteriorate 10 to the point that it becomes life-threatening," right? 11 A. Yes, sir. 12 Q. When you say that it's impossible to predict 13 whether the condition will deteriorate to the point that 14 it becomes life-threatening, what do you mean? 15 A. So in the case of previable PPROM -- this is 16 rupture of membranes prior to when the fetus would be 17 viable, that the fetus would not survive if it was 18 delivered -- the -- a significant portion of these cases 19 have subclinical infection that then becomes a clinical 20 infection over time. That amount of time can be twelve 21 hours, a day, two days, a week, three weeks. 22 And we don't have tools that can tell us 23 when someone is going to turn that corner and become 24 rapidly infected and septic; in other words, that the 25 infection goes from being around the membranes or in the</p>	<p style="text-align: right;">57</p> <p>1 A. Yes, sir. 2 Q. Okay. And you can never know if it's going 3 to deteriorate to the point that it becomes life- 4 threatening, right? 5 A. Again, it depends on the definition of the 6 language "life-threatening." If we're using -- in this 7 setting, I was using "life-threatening" around a very 8 short period of time; and so then that is correct. 9 MR. STONE: Why don't we take -- we've 10 been going for about an -- we're almost halfway done. 11 So why don't we take a -- do you want to take a 12 five-minute break? Will that work for you, Doctor; or 13 do you want to take a longer one, like, a ten-minute 14 break? 15 THE WITNESS: I don't need a break, sir; 16 whatever you need, sir. 17 MR. STONE: Okay. Why don't we go off 18 the record and take a brief five-minute break? I need 19 to brew a fresh cup of coffee. 20 MS. ACKERMAN: And, Doctor -- sorry -- 21 Ms. Cunningham, what is the time check? 22 THE REPORTER: Oh, I'm sorry. I'm having 23 trouble focusing. We're at 1 hour 11 minutes. 24 MS. ACKERMAN: An hour 11 minutes. 25 MR. STONE: Can we go off the record?</p>

<p style="text-align: right;">58</p> <p>1 THE REPORTER: We're going off the record 2 at 11:14 a.m. 3 (Off the record from 11:14 to 11:21 a.m.) 4 THE REPORTER: We're back on the record 5 at 11:21 a.m. 6 Q (BY MR. STONE) Dr. Caughey, other than 7 Exhibit A, have you looked at anything during the 8 course -- any other document during the course of this 9 deposition? 10 A. No, sir. 11 Q. And during the break, did you talk to anyone? 12 A. Is that the whole question, sir? 13 Q. That's the whole question. During the break, 14 did you talk to anyone? 15 A. No, sir. 16 Q. And you're not communicating with anybody at 17 this time, right? 18 A. Well, you. 19 Q. Other than -- oh, you're right. Let me -- let 20 me clarify that. 21 Other than us being on camera right now 22 and communicating in the course of this deposition, 23 you're not talking to anybody on, like, chat or 24 anything, right? 25 A. No, sir.</p>	<p style="text-align: right;">60</p> <p>1 A. Yes, sir. Paragraph 7 that starts on page 5, 2 sir? 3 Q. Yes, of Exhibit B. 4 A. Okay. 5 (Witness silently reading document.) 6 I've read the paragraphs, sir. 7 Q. Excellent. Thank you. 8 Let's start specifically at Paragraph 9. 9 In Paragraph 9, in your opinion, did Amanda Zurawski 10 qualify for an exception to the Texas' abortion laws? 11 MS. ACKERMAN: Objection to form. 12 A. I think what's hard is that the laws are vague 13 and unclear. So it's hard for me to answer the 14 question. I mean, in a sense, it's almost a legal 15 specification. I can tell you that -- 16 Q. (BY MR. STONE) I'm asking you in your medical 17 opinion. 18 A. Can I finish? Can I finish? 19 Q. Yes. 20 A. I can you tell you that at 17 weeks and 6 21 days, by having a cervix that dilated with prolapsed 22 membranes, her risk of dying increased. So it is 23 possible, depending on how one interpreted the language, 24 that it could qualify; but because the language is 25 unclear, I cannot answer the question.</p>
<p style="text-align: right;">59</p> <p>1 Q. Okay. Great. 2 Sorry. I should have clarified that at 3 the beginning of the deposition, so that's on me. 4 I want to show you what I'm -- I'm going 5 to switch gears a little bit. Let's look at what I'm 6 marking as Exhibit B. 7 (Exhibit B marked.) 8 A. It's downloading, sir. 9 Q. (BY MR. STONE) Okay. Let me know when you're 10 able to open it. 11 A. I think it's downloaded. Should I open it, 12 sir? 13 Q. Yes, go ahead and open it. I want to ask 14 questions about it. 15 A. Okay. I have it open. 16 Q. All right. Exhibit B is the Plaintiffs' 17 Amended -- First Amended Verified Petition for 18 Declaratory Judgment and Application of Temporary and 19 Permanent Injunction. Is this the document -- was this 20 the document that you reviewed in preparation for your 21 expert testimony today? 22 A. I believe so, sir. 23 Q. Could you go to -- I'd like you to read 24 Paragraphs 7 through 30, and let me know when you 25 finish. I'm going to ask some follow-up questions.</p>	<p style="text-align: right;">61</p> <p>1 Q. You say it's -- you say that it's possible 2 that the description in Paragraph 9 might mean the 3 definition of Texas' exception to its abortion ban, 4 right? 5 MS. ACKERMAN: Objection to form. 6 A. Yes, sir. 7 Q. (BY MR. STONE) Can you explain to me how it 8 could possibly meet that exception? 9 MS. ACKERMAN: Objection to form. 10 A. Can I look back at the language of the 11 exception again? 12 Q. (BY MR. STONE) Yeah, it's in... 13 A. I have it in Exhibit A on -- you know, that 14 bit I quoted to you before; or we have another document. 15 I don't have it open but -- that actually has the -- 16 whichever you prefer I look at. 17 Q. Well, is it -- I'm going to be asking a lot of 18 these questions. So I think it might be helpful for you 19 to go ahead and refresh your recollection. If you want 20 to go to Exhibit A, you can absolutely open that. Just let 21 me know which paragraph you're reading for the medical 22 exception, as you understand it, to Texas' abortion 23 laws. 24 A. Sure. I'm back at Paragraph 14 in Exhibit A. 25 Q. Okay.</p>

<p style="text-align: right;">62</p> <p>1 A. So, right, when we think about -- again, it 2 was Paragraph 9 -- and I must say that I'm also 3 including Paragraph 10, because there's more description 4 in Paragraph 10 of her situation than Paragraph 9. 5 Q. Sure, absolutely. 6 A. At that time she has cervical insufficiency 7 with prolapsing membranes. And so she would have a 8 physical condition that increases the risk of dying or 9 of -- again, I'm not sure exactly what "substantial 10 impairment of a major bodily function" means -- but it 11 would increase the risk that she's going to end up with 12 an infection of her uterus that could lead to scarring 13 of the uterus, that could lead to an interruption in her 14 reproductive function, which I would consider a major 15 bodily function; but others may not. 16 Again, I think the lack of clarity around 17 the definitions is problematic. So that's why I think 18 it could qualify; but that's just my interpretation of 19 legal language and that's, I think, wherein lies the 20 rub. I mean, this is the problem with this language is 21 it could be interpreted in different ways. 22 We spoke earlier about the life- 23 threatening; and, again, if what they mean is someone 24 would die, you know, likely in the next 30 minutes to an 25 hour, no, I don't believe someone with cervical</p>	<p style="text-align: right;">64</p> <p>1 MS. ACKERMAN: Objection to form. 2 A. I don't remember -- 3 MS. ACKERMAN: He's not a legal expert. 4 A. Oh, yeah, I'm not sure exactly what the 5 acronym stands for; but EMTALA essentially states that 6 if someone presents to your emergency department, you 7 have to provide adequate care before turning -- before 8 transferring them away. 9 Q. (BY MR. STONE) Right. And because you hold 10 hospital privileges, you have some familiar- -- 11 familiarity with what's required under EMTALA, right? 12 A. I have some familiarity, yes, sir. 13 Q. I'm sending you what I'm marking as Exhibit C. 14 (Exhibit C marked.) 15 Q. (BY MR. STONE) Let me know when you're able 16 to open it. 17 A. I can open it. 18 Q. Can you turn to page 5 of Exhibit C, which is 19 the EMTALA statute? 20 A. Yes, sir. 21 Q. Okay. Do you see a definition section? 22 A. Oh, yes, sir. 23 Q. Okay. Do you see under Number 1 where it 24 says, "The term 'emergency medical condition' means"? 25 A. Yes, sir.</p>
<p style="text-align: right;">63</p> <p>1 insufficiency is likely to die within the next hour. 2 That would be incredibly unlikely. Hence -- you know, 3 hence why the patient wasn't immediately admitted to the 4 hospital at that point; but it certainly increased her 5 risk. 6 So it did place her in danger of death 7 and of serious risk of impairment; but it -- but, again, 8 defining those things, I think, is the problem. That's 9 where it's unclear. And so I think that's where it 10 could qualify, but I can understand why many people 11 would think that it would not qualify. 12 Q. It's your testimony today that you don't 13 understand what a serious risk of substantial impairment 14 to a major bodily function means; is that correct? 15 A. What I'm saying is that I understand what each 16 of those words roughly mean in the English language; but 17 I think that delineating what they mean regarding 18 medical care is unclear, particularly as part of a law 19 that carries with it substantial risk to providing a 20 certain amount of care. 21 Q. What if it said "serious impairment to a 22 bodily function," would that be more clear? 23 A. No, sir. 24 Q. I see. What is EMTALA? 25 A. Oh, I don't remember what --</p>	<p style="text-align: right;">65</p> <p>1 Q. Okay. And do you see under Subsection (ii) 2 where it says, "serious impairment of bodily functions"? 3 A. "...to bodily functions," yes, sir. 4 Q. "...to bodily functions," right. 5 Is it your testimony that that phrase is 6 confusing or would be confusing to a physician? 7 A. Yes, sir. 8 Q. Okay. Let's go back to Exhibit B. 9 So I want to ask about Paragraph 11. 10 When Amanda's water -- they use the word "Amanda," so 11 I'll use "Amanda," okay? When Amanda's water broke that 12 night, in your opinion, would she have qualified at the 13 time that her water broke for Texas' exception to its 14 abortion laws? 15 MS. ACKERMAN: Objection to form, calls 16 for a legal opinion. 17 A. I think, similar to Paragraphs 9 and 10, 18 while, by the water breaking, it does change the 19 situation, it doesn't change it appreciably. Prolapsed 20 membranes is one step along the way, but it is not 21 particularly surprising. One would have anticipated 22 that her water would have broken in the next few days 23 more likely than not. 24 So it's the same -- I would say the same 25 situation as previously, that she -- depending on how</p>

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1 one interprets the language, she might qualify; but that
 2 many, many clinicians may also think that it doesn't
 3 qualify. And that ambiguity is the problem.
 4 Q. I want to follow up, based on the objection,
 5 is it your opinion that the decision of whether or not a
 6 patient meets the medical exception to Texas' abortion
 7 law -- abortion laws, is that a medical decision or a
 8 legal decision?
 9 A. Well, I guess --
 10 MS. ACKERMAN: Objection to form, calls
 11 for a legal conclusion.
 12 A. So I guess in the moment a physician could
 13 decide for themselves and for the patient whether it met
 14 it; and that would be a medical decision. The problem
 15 is that the decision whether to prosecute under that law
 16 is going to be a legal decision. And so then you have
 17 physicians trying to, you know, basically ascertain what
 18 was legally intended by language since it directly would
 19 punish them.
 20 Q. (BY MR. STONE) Do you think that if people
 21 have different opinions on how to treat something, that
 22 that is ambiguity?
 23 A. Umm.
 24 Q. That's an awkwardly worded question. I'm
 25 sorry. Strike it.

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1 Do you believe that medical providers
 2 having different opinions on how to treat something
 3 necessarily implies that there is some form of ambiguity
 4 involved?
 5 A. Not necessarily.
 6 Q. Okay. It could just be that two health care
 7 providers have different medical opinions, right?
 8 A. Yes, sir.
 9 Q. Okay. So do you understand that when I'm
 10 asking you these questions about whether, in your
 11 opinion, Amanda or any of the other Plaintiffs in this
 12 case, met Texas -- the exception to Texas' abortion
 13 laws, I'm asking for your medical opinion if at that
 14 moment they would have qualified? Do you understand
 15 that's what I'm asking?
 16 A. Yes, sir.
 17 Q. Okay. And it's your testimony that it's
 18 possible that Amanda met it, as described in
 19 Paragraph 11, when her water broke?
 20 MS. ACKERMAN: Objection to form.
 21 A. Yes, sir.
 22 Q. (BY MR. STONE) So in Paragraph 12 -- it's
 23 actually -- it starts at Paragraph 12, where she goes
 24 into the emergency room; and then it goes through
 25 Paragraph 15, when she's discharged. Do you believe

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1 that during this hospital visit, as described in
 2 Paragraphs 12 through 15, that Amanda qualified for the
 3 medical exception to Texas' abortion laws during that
 4 visit?
 5 MS. ACKERMAN: Objection to form.
 6 A. I don't believe between Paragraph 12 to
 7 Paragraph 15 anything -- I mean, as described here,
 8 anything changed from Paragraph 11. So my answer would
 9 be the same.
 10 Q. (BY MR. STONE) Possibly. That's maybe -- or
 11 I say "possibly." Would you -- is that the right word,
 12 or would you say "maybe"? How would you -- with what
 13 degree of specificity would you like to use for that?
 14 A. Yeah, I guess there's no degree of
 15 specificity. So, in other words, "maybe" or "possibly,"
 16 which I don't think differentiate much in terms of
 17 degree of specificity for my usage of them. Maybe --
 18 and, again, there's ambiguity. I mean, you may think of
 19 them as very different words; and I think of them as
 20 somewhat similar.
 21 And so, yeah, I mean, it's unclear
 22 because of the language whether that medical situation,
 23 which from a standard of care standpoint is implied
 24 that, you know, offering induction of labor or
 25 termination at this point would be what is -- what most

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1 providers would do; and, certainly, offering it would be
 2 universally what providers would do. But even
 3 recommending what providers would do, that in this
 4 situation, because of the abortion laws, that there's
 5 this ambiguity; and providers are frozen into inaction.
 6 Q. Would you agree with me that the provider that
 7 saw Amanda in Paragraph -- going back to Paragraph 9
 8 through 11, that the provider that saw her before going
 9 into the emergency room believed that she did not meet
 10 the exception to Texas' abortion laws at that time?
 11 MS. ACKERMAN: Objection to form.
 12 A. I would need to see that person deposed. I
 13 don't know whether they didn't know about the exception
 14 or whether they didn't think the case met the language
 15 of the exception. I would think it would be one of the
 16 two.
 17 Q. (BY MR. STONE) And how would you go about
 18 determining which of those two it was?
 19 A. You would ask the doctor.
 20 Q. Right. Do you know who the doctor was
 21 described in Paragraphs 9 through 11 here?
 22 A. No, sir.
 23 Q. Me neither.
 24 But you agree with me that it's possible
 25 that the physician who saw Amanda, as described in

70	<p>1 Paragraphs 9 through 11, maybe it wasn't ambiguous to 2 them; they just determined that she didn't meet the 3 exception? 4 A. Yes, sir, they may have -- their 5 interpretation of the language may have been such they 6 did not believe that she met that exception, that is 7 correct. 8 Q. And it could be that the physicians in the 9 emergency room, as described in Paragraphs 12 through 10 15, who saw Amanda, similarly determined -- there wasn't 11 any ambiguity; they determined that she just did not 12 qualify for the exception to Texas' abortion laws? 13 A. Yes, sir, that is certainly possible. 14 Q. Do you have any reason to believe that the 15 physicians in the emergency room here, as described in 16 Paragraphs 12 through 15, were confused about whether or 17 not Amanda qualified for the medical exception to Texas' 18 abortion laws? 19 A. I -- 20 MS. ACKERMAN: Objection to form. 21 A. I don't have such evidence, sir, no. 22 Q (BY MR. STONE) Going to Paragraph 18, do 23 you believe that Amanda qualified for Texas' medical 24 exception to its abortion laws under the presentation 25 that she gives in Paragraph 18 at that time?</p>	72
71	<p>1 A. Again, it doesn't appear that anything has 2 changed in her care in Paragraph 18. So the answer 3 would still be the same that she, given the language 4 that we've discussed previously from Exhibit A, that 5 she, depending on the interpretation of that language, 6 could meet that exception but that others may determine 7 that she would not meet that exception. 8 Q. All right. Under -- and the determination of 9 whether or not she met that exception would be based on 10 that provider's medical judgment, right? 11 A. Well, it would be based on a combination of 12 medical judgment but a need to interpret legal language. 13 Q. You have privileges at four hospitals, I 14 believe, right? 15 A. Yes, sir. 16 Q. Those hospitals have lawyers, right? 17 A. I believe so, sir. 18 Q. Do those hospitals have committees that 19 review -- that perform peer reviews? 20 A. What do you mean by "peer reviews," sir? 21 Q. What do you understand -- 22 MS. ACKERMAN: I think you were muted. 23 MR. STONE: I'm sorry? 24 MS. ACKERMAN: Sorry. I didn't hear your 25 question. I don't know if you was muted.</p>	73

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1 did meet the medical exception at that point, and so one
2 would hope that that would be deemed meeting the
3 exception. But it's -- again, reading the language,
4 it's hard to know that it would; but I would hope so.
5 Q. You would agree with me, though, that they, as
6 in the -- when I say "they," I mean the physicians that
7 were treating her at the time, determined that Amanda
8 met the exception, the medical exception to the Texas
9 abortion laws in Paragraphs 19 through 21?
10 A. I believe so. That's --
11 MS. ACKERMAN: Objection to form.
12 A. In particular in Paragraph 21, that's what it
13 appears to be describing.
14 Q. (BY MR. STONE) So it wasn't ambiguous to them
15 whether or not she met the definition, right?
16 A. Well, I don't think we know that. I mean, we
17 don't -- I don't think that we -- I mean, ultimately,
18 someone decided; but I can't think -- I don't think we
19 can say that folks taking care of her didn't find the
20 situation ambiguous.
21 Q. We can't say one way or the other, can we,
22 whether or not they thought it was ambiguous?
23 A. No, and I think -- it isn't so much whether or
24 not an individual clinician thinks it's ambiguous or not
25 because an individual clinician might choose to

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1 interpret to read the abortion ban one way or the other.
2 The problem is that then they choose to practice
3 medicine consistent with how they've interpreted it; but
4 if the State -- if the lawyers at this level of the
5 state decide to interpret it a different way, then the
6 physician can be found to be in violation of the
7 abortion ban and be prosecuted.
8 And so that's going to lean toward
9 pushing physicians, by and large, to be conservative, to
10 wait until someone gets so sick they are at death's door
11 such that, you know, then it seems very unlikely that
12 they would be deemed in violation.
13 Q. How many doctors have to sign off on an
14 abortion that's performed pursuant to the medical
15 exception to the Texas' abortion laws?
16 A. What does "sign off" mean?
17 Q. I mean, how many -- let me rephrase that.
18 Describe to me the process for a physician determining
19 whether or not a patient qualifies for the medical
20 exception to Texas' abortion laws.
21 MS. ACKERMAN: Objection to form.
22 A. I believe that the physician would evaluate
23 the patient and then read the language of the abortion
24 ban and decide whether they thought that those
25 conditions were met.

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1 Q. (BY MR. STONE) And is that the entire
2 process, as you understand it?
3 A. Yes.
4 Q. If a physician performs an abortion pursuant
5 to the medical exception to Texas' abortion laws, are
6 there any reporting requirements for that physician?
7 MS. ACKERMAN: Objection to form.
8 A. I don't -- I don't know the answer to that
9 question.
10 Q. (BY MR. STONE) Did you review the reporting
11 requirements for Texas' abortion ban in your preparation
12 for this case?
13 A. I don't recall doing that, sir, no.
14 Q. Does Texas' abortion ban define "reasonable
15 medical judgment"?
16 MS. ACKERMAN: Objection to form.
17 A. I don't recall that.
18 Q. (BY MR. STONE) You've put forward your own
19 definition that you want Texas to adopt as its law
20 through this case, right, of, "Abortion should be
21 offered as a med- -- for medical conditions arising
22 during pregnancy that pose a risk of infection,
23 hemorrhage, or other health risks that make continuing a
24 pregnancy unsafe for the pregnant person or medical
25 conditions that can exas- -- be exacerbated by

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1 pregnancy, cannot be effectively treated during
2 pregnancy, or that require recurrent invasive
3 intervention, or instances where there's a fetal
4 condition that makes the fetus unlikely to survive the
5 pregnancy or sustain life after birth," right?
6 MS. ACKERMAN: Objection. Can you let
7 us know what paragraph you're reading from? I'm
8 guessing -- it seems like you were reading off of some
9 of --
10 MR. STONE: I was. I was reading
11 Paragraph 33 of Exhibit A.
12 Q. (BY MR. STONE) Go ahead, Doctor, answer.
13 A. I think that you're -- your question was that
14 I'm putting forth that as something that I expect Texas
15 to adopt; is that correct? Is that the question?
16 Q. Correct.
17 A. No, I don't think I'm suggesting that Texas
18 adopt anything. I'm stating my medical opinion about
19 cases where you would consider that abortion would be
20 medically indicated. You know, obviously, Texas will
21 make the law as they see fit.
22 And my point is that -- the ambiguity of
23 the language right now, which talks about substantial
24 risk and risk of death. So I posed a number of
25 situations here, which is conditions that arise during

<p style="text-align: right;">78</p> <p>1 pregnancy or pre-existing medical conditions or fetal 2 conditions that are -- you know, that lead to lack of -- 3 lack of survivability, essentially, where one would -- 4 could understand that that would lead to a greater risk 5 to the mom, a greater risk to the pregnant person, than 6 not being pregnant and could potentially harm or, you 7 know, bodily function. 8 So, you know, I'm trying to create just a 9 conversation so that we understand what we're talking 10 about. 11 Q. I understand. 12 Okay. We should get on the same page. 13 Could you go to Exhibit A, Paragraph 33? 14 A. I'm there, yes, sir. 15 Q. Oh, you are there. Okay. Did you write this 16 or did Astrid? 17 A. I wrote this. 18 Q. Okay. You wrote this. 19 And it's your testimony today that 20 you're not actually asking Texas to adopt this as its 21 definition for the medical exception to its abortion 22 ban; is that correct? 23 MS. ACKERMAN: Objection to form, asked 24 and answered. 25 A. So I'm not, sir. I'm providing my medical</p>	<p style="text-align: right;">80</p> <p>1 Q. I'm so sorry for interrupting you. You were 2 talking, and I apologize for that nasty habit of mine. 3 I need to listen better. 4 Why don't you think that it's specific 5 enough? 6 A. Again, I mean, what I'm -- I mean, when I'm 7 reflecting on the lan- -- original language, which has 8 this -- you know, the risk language, you know, I just 9 say "a risk." And, obviously, there's something that 10 someone wants to be a serious risk. And so I think we 11 probably need to be more -- I mean, to meet the needs 12 of what Texas is trying to do, which I don't fully 13 understand, but probably clarification of what that 14 serious risk is. But this -- you are right that 15 these -- these could provide guide- -- such guidance. 16 Q. So to -- a couple of questions to follow up. 17 You're not sure -- what do you mean when you say you're 18 not sure what Texas is trying to do? 19 A. Well, the medical exception is written in a 20 way that, again, I think is quite confusing and vague; 21 and so -- and, obviously, by putting, you know, not 22 civil penalties but actually criminal penalties around 23 their abortion ban, obviously, there's a degree of 24 coercion to the medical practice that is quite extreme. 25 And so it is unclear what's trying to be accomplished by</p>
<p style="text-align: right;">79</p> <p>1 expertise about conditions that increase the risk of 2 mortality. I'm not a Plaintiff in this case. 3 Q (BY MR. STONE) Okay. Is it your 4 understanding that the Plaintiffs are asking Texas to 5 adopt your definition here for the medical exception to 6 Texas' abortion laws? 7 MS. ACKERMAN: Objection to form. 8 A. That is not my understanding, sir. 9 Q (BY MR. STONE) Do you think that this 10 definition should be the definition for Texas' medical 11 exception to its abortion laws? 12 MS. ACKERMAN: Objection to form. 13 A. You mean that paragraph, Paragraph 33? 14 Q. (BY MR. STONE) Correct. Do you think 15 the definition of -- that you've provided here in 16 Paragraph 33 should be the definition of the medical 17 exception to Texas' abortion laws in Texas? 18 A. I -- 19 MS. ACKERMAN: Objection to form. 20 A. I mean, it would be great; but I don't -- 21 I don't think that it's specific enough or provides 22 probably enough guidance but at least has more guidance 23 than the existing one. But, I mean, I would -- 24 Q. (BY MR. STONE) Why don't you think -- 25 A. Sorry. Go ahead, sir.</p>	<p style="text-align: right;">81</p> <p>1 that medical exception to the abortion ban. 2 I think it's pretty clear what the 3 abortion ban is trying to accomplish, but it's less 4 clear what they're really thinking they can allow. And 5 I've given examples here that I think would make sense. 6 It would make certainly medical sense that you would 7 want patients to be able to choose a safer situation for 8 themselves, but I'm not -- I'm not telling Texas how to 9 create its laws -- 10 Q. I see. 11 A. -- other than I think they could be more 12 clear. 13 Q. Okay. Do you mind if we jump in and let's 14 spend some time on 33 and let's talk about this 15 definition that you're proposing here. It says -- 16 let's start with Number 1, "Medical conditions that 17 arise [sic] during pregnancy that pose a risk of 18 infection, hemorrhage, or other health risk that makes 19 continuing a pregnancy unsafe for the pregnant person." 20 Question: How much of a risk would it 21 have to pose in order to qualify as a medical exception 22 under this definition? 23 MS. ACKERMAN: Objection to form. 24 A. I think that it could be any increased risk. 25 Q (BY MR. STONE) So any risk at all?</p>

<p style="text-align: right;">82</p> <p>1 A. That's above, you know -- above neutral, above 2 risk neutral, yes. 3 Q. Okay. So a minor risk? 4 A. What does the word "minor" mean? 5 Q. You tell me. What does a minor -- what does a 6 minor risk mean to you? 7 A. I don't know. I didn't use the language. 8 Q. Okay. So, well -- okay. So you said "risk." 9 All right. What -- 10 A. I think I answered the question. Let me 11 clarify: The language I used would be any increased 12 risk, right? 13 Q. Okay. So would a cut that could potentially 14 get infected pose a health risk that makes continuing 15 the pregnancy unsafe for the pregnant person? 16 A. Well, no, that wouldn't really be related to 17 the pregnancy. 18 Q. So it says, "medical conditions arising during 19 the pregnancy." It doesn't -- "arising during the 20 pregnancy" doesn't imply that it must be related to the 21 pregnancy, does it? 22 A. That's what was meant, actually, yes. 23 Q. Would you agree that it's confusing, though? 24 Like, reading that, I could think it could be any 25 medical condition that comes up during the course of the</p>	<p style="text-align: right;">84</p> <p>1 described in Paragraph 33 of Exhibit A as the medical 2 exception to Texas' abortion laws. Okay? I want you to 3 assume that this is the exception. What you wrote is 4 the exception to Texas' abortion laws. Okay? 5 A. Okay. 6 Q. All right. Do you think that the first 7 exception here, "the medical conditions arising during 8 pregnancy that pose a risk of infection, hemorrhage, or 9 other health risks that make continuing a pregnancy 10 unsafe for the pregnant person," could be confusing to a 11 physician in Texas? 12 MS. ACKERMAN: Objection, calls for 13 speculation. 14 A. Yes. 15 MR. STONE: It's a hypothetical. 16 A. Yeah, but -- and I agree. I think it 17 potentially could be. Again, we haven't specified 18 the exact amount of risk and all the -- all the same 19 concerns. That's exactly right. 20 Q. (BY MR. STONE) Okay. What about the 21 second -- well, let me stay with this. It says, 22 "...that makes continuing a pregnancy unsafe for the 23 pregnant person." Would you agree that it's confusing 24 about how unsafe it would have to be to continue the 25 pregnancy under this definition?</p>
<p style="text-align: right;">83</p> <p>1 pregnancy, even if it's unrelated to the pregnancy? 2 A. Yes, I think that's fair, which is why I 3 didn't propose it as a standing definition under which 4 to punish physicians for being -- you know, failing to 5 properly interpret it. 6 Q. I understand. I'm just trying to 7 understand -- I understand. So you're -- I understand. 8 Okay. So what you mean is that it should 9 be a medical condition not arising, but how about should 10 I put "relating"? Should I put "relating" here, 11 relating to the pregnancy? 12 MS. ACKERMAN: Objection to form. 13 A. I'm pretty happy with the way the language is 14 written. Again, I didn't write it for lawyers. I wrote 15 it for -- I mean, I wrote it the way that a physician 16 would write it. I actually -- and I give examples. And 17 so I think, by the examples below, it becomes clear 18 what's meant. 19 Q (BY MR. STONE) I understand. And we can get 20 into those examples in a minute; but I just want to -- 21 if I were to take this definition in isolation, if, 22 like -- so for -- let me tee it up properly. All right? 23 I want you to assume for the purposes of 24 the following questions that I'm going to ask you that 25 Texas law is now -- the Texas law is what you have</p>	<p style="text-align: right;">85</p> <p>1 A. I agree. 2 Q. Okay. All right. Let's go to Number 2, 3 "medical conditions that can be exacerbated by 4 pregnancy, cannot be effectively treated during 5 pregnancy, or that require recurrent invasive 6 intervention." Do you think that that definition 7 could be confusing for a physician practicing in Texas? 8 MS. ACKERMAN: Objection, calls for 9 speculation. 10 A. Yes, I would agree, again. And you keep 11 saying "definition." I'm not sure that I intended this 12 to be a definition, right? I mean, it's pretty clear 13 what this language is. I give -- at the very beginning 14 it says, "It is my medical opinion there are several 15 broad categories of patient health risks which, under 16 the standard of care, abortion should be offered," 17 right? These are just broad examples. They're not -- 18 I wasn't using -- trying to create specific definitions. 19 Q. (BY MR. STONE) I understand. But for the 20 purposes of the hypothetical, we'll just keep going 21 along. Okay? It's just a hypothetical. 22 A. I understand. 23 Q. Okay. So medical conditions that can be 24 exacerbated by pregnancy, that's a lot of medical 25 conditions, right?</p>

<p style="text-align: right;">86</p> <p>1 A. Yes, sir.</p> <p>2 Q. So under this medical exception, if a person</p> <p>3 had any medical condition that was exacerbated by</p> <p>4 pregnancy, they would be able to get an abortion?</p> <p>5 A. Yes, sir, that seems appropriate.</p> <p>6 Q. How much would it have to exacerbate it?</p> <p>7 A. I think even --</p> <p>8 MS. ACKERMAN: Objection to form.</p> <p>9 Q (BY MR. STONE) Go ahead.</p> <p>10 A. Oh, I think even the smallest amount. I</p> <p>11 think that a physician, a doctor and their patient,</p> <p>12 would discuss how much exacerbating and whether the</p> <p>13 patient wants to bear the risk of the exacerbation or</p> <p>14 the symptoms of the exacerbation versus ending the</p> <p>15 pregnancy. That's what we think is appropriate medical</p> <p>16 care.</p> <p>17 Q. What about headaches? What if a patient has</p> <p>18 recurrent headaches and they get worse during the</p> <p>19 pregnancy? Would the patient qualify under this medical</p> <p>20 exception under Number 2 here for an abortion?</p> <p>21 A. Absolutely. I would hope so. I've taken</p> <p>22 care of patients with severe migraine headaches that</p> <p>23 were worse during pregnancy, to make them essentially</p> <p>24 dysfunctional, where they have to just lie in bed all</p> <p>25 day; and so that would be a great example of someone</p>	<p style="text-align: right;">88</p> <p>1 an abor- -- for an abortion under the medical exception</p> <p>2 as described in Paragraph 33?</p> <p>3 MS. ACKERMAN: Objection to form, vague</p> <p>4 and ambiguous question.</p> <p>5 A. And, again, this is obviously a hypothetical.</p> <p>6 Q. (BY MR. STONE) Right.</p> <p>7 A. Paragraph 33 was not written as the medical</p> <p>8 exception. It, obviously, wasn't written as that kind</p> <p>9 of language; but, yes. I think in the way that you're</p> <p>10 framing the question, the answer is yes and for a</p> <p>11 variety of reasons.</p> <p>12 And the first is that, again, it is not,</p> <p>13 I think, up to the law to determine what a patient feels</p> <p>14 is a significant enough exacerbation that they would</p> <p>15 choose to terminate the pregnancy versus continue that</p> <p>16 exacerbation of whatever condition that might be,</p> <p>17 depression being something that is particularly</p> <p>18 dangerous to people. As you know, depression is</p> <p>19 associated with an increased risk of maternal mortality</p> <p>20 and, in fact, appears to be one of the major</p> <p>21 contributors in 20 to 30 percent of maternal</p> <p>22 mortalities.</p> <p>23 Additionally, the medications used to</p> <p>24 treat depression have contraindications in pregnancy,</p> <p>25 both the fetal effects and because of the way that</p>
<p style="text-align: right;">87</p> <p>1 that should qualify for a medical exemption for</p> <p>2 abortion.</p> <p>3 Q. And in that case you just described something</p> <p>4 that was severe; but what if it was minor? What if --</p> <p>5 what if they had minor headaches and they weren't even</p> <p>6 being, I don't know, treated for it?</p> <p>7 MS. ACKERMAN: Objection to form.</p> <p>8 A. I think that's the problem with trying to use</p> <p>9 language. There's your word "minor" again, which I</p> <p>10 don't really understand what it means. So that a</p> <p>11 patient and her physician, you know, would be best to</p> <p>12 figure out whether or not that patient thinks the</p> <p>13 exacerbation is bad enough that an abortion should be an</p> <p>14 option for them.</p> <p>15 Q (BY MR. STONE) What about depression? Would</p> <p>16 that -- if a patient was depressed and already had</p> <p>17 depression and got pregnant and their depression -- you</p> <p>18 talk about it, actually, in your report, a pregnancy</p> <p>19 example with -- involving depression; but let's say that</p> <p>20 there is -- it has a very minimal effect of exacerbation</p> <p>21 of the depression by being pregnant. Would they --</p> <p>22 MS. ACKERMAN: Objection --</p> <p>23 Q. -- still qualify --</p> <p>24 MS. ACKERMAN: Sorry.</p> <p>25 Q. (BY MR. STONE) Would they still qualify for</p>	<p style="text-align: right;">89</p> <p>1 they're dosed and the way that they are managed in</p> <p>2 pregnancy.</p> <p>3 Q. When you wrote this, was your goal to write a</p> <p>4 medical exception that would be all encompassing of any</p> <p>5 conceivable medical condition wherein a person just</p> <p>6 wanted to have an abortion?</p> <p>7 MS. ACKERMAN: Objection to form, vague</p> <p>8 and ambiguous.</p> <p>9 A. No. I think what's listed here is a range of</p> <p>10 conditions that I think of as pretty concerning, where,</p> <p>11 in my experience, patients have -- patients who would</p> <p>12 actually have -- (clearing throat) pardon me -- wanted</p> <p>13 to continue the pregnancy ultimately chose not to</p> <p>14 because of the change in conditions, whether it be,</p> <p>15 again, conditions that arose during the pregnancy, such</p> <p>16 as previable eclampsia or previable PPRM or</p> <p>17 hyperemesis, whether it be conditions that, as I</p> <p>18 mentioned, can be exacerbated during pregnancy, such as</p> <p>19 cancer or hypertension or diabetes or renal disease or</p> <p>20 lupus or that -- or conditions where the fetus is not</p> <p>21 viable and so, you know, there's really no hope or it's</p> <p>22 going to be so severely damaged or injured that an</p> <p>23 abortion seems to be the medically indicated thing to</p> <p>24 do.</p> <p>25 Q. (BY MR. STONE) If a patient came in to a</p>

<p style="text-align: right;">90</p> <p>1 provider and said, "Doctor, I'm -- I don't want to go 2 forward with this pregnancy. I just feel depressed. 3 Like, it's bumming me out. I don't want to -- I don't 4 want to be pregnant anymore. I want to have an 5 abortion," would that qualify under this definition in 6 Paragraph 33 for the medical exception? 7 MS. ACKERMAN: Objection to form, calls 8 for speculation. 9 A. I'd need more detail. So someone saying 10 they're bummed isn't a definition of major depression. 11 That would be -- need to be diagnosed medically. 12 Q. (BY MR. STONE) Why would it have to be major 13 depression in order for it to qualify? 14 A. Oh, sorry. The disease depression, when we 15 diagnose it, is called major depressive disorder. 16 That's the -- just the term that's used. 17 Q. Uh-huh. 18 A. The word "major" isn't being used as a 19 descriptor, like, "major" or "minor" or like -- or 20 "serious." It's just how it's defined. I apologize for 21 the -- that's just a medical thing, the way it's termed. 22 So I was just using the proper, you know, term, even 23 though I'm technically not a psychiatrist; but we take 24 care of major depressive disorders commonly in 25 pregnancy.</p>	<p style="text-align: right;">92</p> <p>1 effectively treated. So it probably would not qualify. 2 Q. So in this -- so here's my -- okay. This is 3 my confusion because it says, "medical conditions that 4 can be exacerbated by pregnancy, cannot be effectively 5 treated during pregnancy, or that require recurrent 6 invasive intervention." So I was reading each of those, 7 like, disjunctively, as, like, they were each a separate 8 thing. 9 Are you reading the first two together, 10 so it's got to be a medical condition that can be 11 exacerbated by pregnancy and cannot be effectively 12 treated during pregnancy or that requires current 13 invasive intervention? Is that how you're reading this? 14 A. I think it helps if you get to the specific 15 examples below; but, no, I think you could -- I think 16 you could read it properly separating the three apart. 17 I think that's fine. 18 Was your example -- I'm sorry if I 19 improperly answered your question. Your example about 20 the oral abscess or the tooth infection, did you mean 21 that that was exacerbated by pregnancy? 22 Q. Correct. And I was asking if in -- 23 A. Well -- sorry. 24 Q. I was proposing -- sure. 25 A. Go ahead.</p>
<p style="text-align: right;">91</p> <p>1 Q. Well, what if the patient came in and said, "I 2 have a toothache, a toothache; and I would like to have 3 an abortion? Would that qualify under -- under this 4 exception in Paragraph 33? 5 MS. ACKERMAN: Objection to form. 6 A. Probably not because it says "cannot be 7 effectively treated." I mean, I think you can usually 8 effectively treat a toothache in pregnancy. 9 Q (BY MR. STONE) Well, you could; but under 10 this definition, doesn't it say, "medical conditions 11 that can be exacerbated by pregnancy"? Don't you think 12 a toothache that arises -- I'm sorry -- a toothache 13 could be a condition that's exacerbated by the 14 pregnancy? Isn't -- well, let me let you answer. 15 A. That has not been my experience. 16 Q. Would you agree with me that, actually, it 17 could be an indicator of a serious condition if a woman 18 is having pain in her teeth during a pregnancy? 19 MS. ACKERMAN: Objection to form. 20 A. I'm not really sure what you're referring to, 21 sir. 22 Q (BY MR. STONE) Okay. What about a tooth 23 infection? If a patient came in and said -- and they 24 had an infected tooth, would that qualify? 25 A. Well, again, it can be -- I mean, it could be</p>	<p style="text-align: right;">93</p> <p>1 Q. Let me explain. I was proposing that a person 2 has a medical condition that can be -- that can be 3 exacerbated by pregnancy and I was asking if, under that 4 example, whether or not it would qualify for this 5 exception and your response was: No, because it could 6 be effectively treated during the pregnancy. Right? 7 A. That is my response because you did not 8 clarify that it was an example of something that was 9 exacerbated by pregnancy. I'm unaware that tooth 10 infections are exacerbated by pregnancy. 11 Q. Well, under this definition it doesn't say 12 that it is exacerbated by the pregnancy. It says "that 13 can be," as in future tense, it could be exacerbated by 14 the pregnancy, right? 15 A. I guess so, yeah. I guess that's the way it's 16 framed. 17 Q. So any condition that could potentially be 18 exacerbated by a pregnancy would qualify under this 19 exception? 20 A. In this hypothetical I guess that's correct; 21 although, I'm not sure how your example of a tooth 22 infection would qualify. 23 Q. The reason I'm using tooth infection, I -- 24 my wife -- we have kids and she had a tooth infection -- 25 that's why -- during the pregnancy and it was a whole</p>

<p style="text-align: right;">94</p> <p>1 emergency escapade. It was rough. Because of the 2 anesthesia they have to use, it's a whole thing. 3 A. Yep, it is a whole thing; but it's not really 4 exacerbated by the pregnancy. And it can be treated, 5 and so I'm not -- yeah. 6 Q. I understand. I understand. I understand 7 exactly. 8 Okay. So you agree with me that any 9 medical condition that could conceivably be exacerbated 10 by a pregnancy could potentially qualify under this 11 definition? 12 A. Again, I haven't called it a definition. 13 That's your language; but -- 14 Q. Right. 15 A. -- under this language that I've written, yes. 16 Q. Under number -- and was that your intent when 17 you wrote this? 18 A. Was what my intent? 19 Q. To be so all encompassing that any condition 20 that could conceivably be exacerbated by a pregnancy 21 would meet the definition of the medical exception to 22 Texas' abortion law if, in this hypothetical, it were 23 adopted? 24 MS. ACKERMAN: Objection to form, vague 25 and ambiguous.</p>	<p style="text-align: right;">96</p> <p>1 that's why I created that second group and when I think 2 about the things that I would think would potentially be 3 covered by a medical exception. 4 Q. But what is this last category, "Instances 5 where there's a fetal condition that makes the fetus 6 unlikely to survive the pregnancy or sustain life after 7 birth"? Isn't that already Texas law? 8 MS. ACKERMAN: Objection to form. 9 A. I -- I don't believe so. 10 Q (BY MR. STONE) Okay. It's your understanding 11 that Number 3 here is not already contained within the 12 medical exception to Texas' abortion ban? 13 MS. ACKERMAN: Objection to form, asked 14 and answered. 15 A. No, sir. 16 Q (BY MR. STONE) Do you think if it were in -- 17 if this third definition were added to Texas' abortion 18 ban, do you think it would be more clear? 19 A. I -- 20 Q. I can ask that more -- maybe I should rephrase 21 the question to make it more clear. So strike my prior 22 question. 23 If we added sub -- Part 3 of your 24 definition in Paragraph 33 to Texas' current abortion -- 25 medical exception to its abortion ban, do you think it</p>
<p style="text-align: right;">95</p> <p>1 A. Yes. I mean, I feel like you've asked this 2 before; but my intent, I think I described -- yeah, I 3 know that you asked this before because I already gave 4 you my intent. My intent was to give -- I have just -- 5 I mean, there's so many different conditions. 6 And so I think -- I'm a human being, like 7 other human beings; and human beings tend to like to 8 group things together. And it's to provide, you know, 9 examples of where I would think that we might start 10 talking about how to create an exception, a medical 11 exception, to the Texas abortion ban; and these would be 12 three of those categories. 13 They also are -- at least the first one 14 and the third one are examples, I think, taken directly 15 from the cases in Exhibit B. I guess I don't -- I'm not 16 recalling that anything in exhibit -- any of the cases 17 in Exhibit B really fall under the Number 2 here. 18 Q. Uh-huh. 19 A. In my background of taking care of patients 20 with medical conditions in pregnancy and facing these 21 questions over and over again about whether to continue 22 the pregnancy and knowing that, in terms of risk of 23 severe morbidity and mortality, that those are the -- 24 those are the largest body of patients that I take care 25 of that really are at extreme risk of pregnancy. So</p>	<p style="text-align: right;">97</p> <p>1 would be more clear for providers in Texas? 2 MS. ACKERMAN: Objection to form. 3 A. I'm not sure that it would be more clear. I 4 think it would give clarity around other conditions 5 being considered because I didn't understand that the 6 fetal condition was being considered at all in the 7 medical exception. 8 Q (BY MR. STONE) So is it your -- sorry. 9 So it's your testimony that it would add 10 clarity if -- strike that. 11 The definition that you've -- I keep 12 calling it "definition" -- but the definition that's 13 provided in Paragraph 33 here by you, was this just 14 intended to be sort of a jumping-off point to start a 15 conversation about what the medical exceptions should 16 look like? 17 MS. ACKERMAN: Objection to form. 18 A. I mean, I think -- look, I start the sentence 19 as a start -- the first sentence of 33 begins, 20 "Nonetheless, it is my medical opinion that there are 21 several broad categories of patient health risks for 22 which, under the standard of care, abortion should be 23 offered." So this gives broad ranges of where we think 24 medical risk is enough that abortion should be offered 25 to patients so they can make a reasoned decision about</p>

<p style="text-align: right;">98</p> <p>1 whether they want to endure the risks of the pregnancy 2 versus end the pregnancy. 3 Q. (BY MR. STONE) Would you agree with me -- 4 agree with me that because the definition in 5 Paragraph 33 is still not specific and could lead to 6 confusion, it's not something that you believe would -- 7 should be adopted by Texas as our medical exception to 8 our abortion laws, as written? 9 MS. ACKERMAN: Objection to form, calls 10 for a legal conclusion. 11 A. You mean the language exactly as written in 12 33? 13 Q. (BY MR. STONE) Yes. 14 A. No. No, I believe it's inadequate on its own. 15 Q. What is an -- does Texas -- Texas' abortion 16 laws, do they define a medical emergency? 17 MS. ACKERMAN: Objection to form, asked 18 and answered. 19 A. I don't recall that, sir. 20 Q (BY MR. STONE) This is the first time I'm 21 asking you that question, by the way. 22 A. Yeah, I think before, you talked about medical 23 emergency under -- or it was emergency medical for the 24 EMTALA thing. 25 Q. Right. If Texas had a definition of what --</p>	<p style="text-align: right;">100</p> <p>1 Week 20 of their pregnancy? 2 A. In many patients it does, that's correct. 3 Q. Is it possible to determine prior to Week 20 4 whether it will or will not clear up on its own? 5 A. That is a challenging thing to ascertain. 6 Q. Can you turn to Exhibit B? And I'd like you 7 to -- I want to talk about Patient Two. So could you 8 read Paragraphs 31 through 52 and then let me know when 9 you finish? And we'll talk about Patient Two. 10 A. Yes, sir. 11 (Witness silently reading document.) 12 I've read it. 13 Q. Lauren, or Patient Two here, had an abortion 14 at 15 weeks, right? 15 A. Umm. 16 Q. Paragraph 45. 17 A. Yes, sir. 18 Q. Would you agree with me that the patient's 19 hyperemesis gravidarum might have cleared up on its own 20 by Week 20 for Lauren? 21 MS. ACKERMAN: Objection to form. 22 A. It might have. 23 Q (BY MR. STONE) Even in the absence of the 24 abortion, right? 25 MS. ACKERMAN: Objection to form.</p>
<p style="text-align: right;">99</p> <p>1 of medical emergency, do you think that that might make 2 its abortion laws more clear to providers? 3 MS. ACKERMAN: Objection to form, calls 4 for speculation. 5 A. Can I look back at Paragraph 14 again? 6 Q. (BY MR. STONE) Absolutely. 7 A. I don't think the phrase "medical emergency" 8 was in Paragraph 14. So I guess it wouldn't help at 9 all. 10 MS. ACKERMAN: 14? Sorry. Are we 11 looking at Exhibit A? 12 THE WITNESS: Oh, yes, Exhibit A, 13 Paragraph 14. 14 A. It would be helpful if we probably had an 15 exhibit that was the actual language for the abortion 16 ban; but right now I'm putting what I cited. I may have 17 cited it not perfectly, and I apologize if that's the 18 case. 19 Q. (BY MR. STONE) What is -- I might say this 20 name wrong, so let me refer to you what I'm looking at. 21 Paragraph 39 of Exhibit A, hyperemesis gravidarum. Did 22 I pronounce that correctly? 23 A. We say "hyperemesis gravidarum." 24 Q. "Hyperemesis gravidarum." Isn't it true that 25 that condition typically clears up in most patients by</p>	<p style="text-align: right;">101</p> <p>1 A. It is possible. 2 Q (BY MR. STONE) Under Texas' current medical 3 exception to its abortion laws, did Lauren qualify at 4 any point, as described in this complaint by her, for a 5 medical exception to Texas' abortion laws? 6 MS. ACKERMAN: Objection to form. 7 You can answer, Dr. Caughey. 8 THE WITNESS: Oh, sorry. I'm thinking. 9 MS. ACKERMAN: Oh. 10 A. Again, if I'm using the language -- if we're 11 not going to go to the actual document but we're using 12 the language from Paragraph 14 that I copied from the 13 Texas -- the medical exception to the Texas abortion 14 ban, which is "a life-threatening physical condition 15 aggravated by, causing by -- caused by, or arising 16 during pregnancy that is certified by a physician places 17 the woman in danger of death or a serious risk of 18 substantial impairment of a major bodily function," I 19 think I would be hard-pressed to see how this condition 20 would qualify. 21 The way that it might is if patients -- 22 it really depends on more specifics about this case, so 23 I'd need some more specifics. If a patient has to get 24 what's called TPN, total parental nutrition, to feed 25 them, then a certain kind of line has to be placed; and</p>

<p style="text-align: right;">102</p> <p>1 the risk of line sepsis is appreciable. So then that 2 would be, I guess, the danger of death or serious risk 3 of impairment. 4 Additionally, if someone -- if someone 5 really has -- so there's a variety of ranges of 6 hyperemesis. There are cases where the patient just 7 feels nauseous all the time and just doesn't eat, and 8 there are other cases where they really do vomit all the 9 time. Repetitive vomiting can lead to something called 10 Mallory-Weiss tears, which are tears in the stomach to 11 the lower esophagus, which can -- someone can bleed out 12 from, "bleed out" meaning bleed to death. So, I guess, 13 then that would be the risk of death. 14 So it is possible; but when I think 15 broadly of hyperemesis, I wouldn't think of it meeting 16 that language for most people. But it really, again, 17 depends on the interpretation because the interpretation 18 is hard because of the vague language that's being used. 19 Q. (BY MR. STONE) What about your definition 20 in Paragraph 33 of Exhibit A, would -- hold on one 21 second -- Lauren. Would Lauren have qualified for an 22 abortion under that definition? 23 MS. ACKERMAN: Objection to form. 24 A. Again, if we use Paragraph 33 in this 25 hypothetical question as applicable --</p>	<p style="text-align: right;">104</p> <p>1 THE REPORTER: Yes. 2 MS. ACKERMAN: Okay. 3 Q. (BY MR. STONE) At what point would Lauren 4 have qualified under the -- hypothetically, under the 5 definition in Paragraph 33 of Exhibit A, at what point 6 can you identify in Exhibit B, which paragraph, at what 7 point she would have qualified for that medical 8 exception you just described? 9 A. I guess it would be Line 35 and -- so Line 34 10 talks about horrible nausea and vomiting; but it doesn't 11 give her the diagnosis of hyperemesis gravidarum, and 12 there is a distinction. It is pretty common for 13 pregnant people to experience nausea and vomiting; but 14 there are some specific criterion that are used to 15 diagnose hyperemesis gravidarum, I mean, either leading 16 to electrolyte abnormalities, changes in urine 17 concentration of electrolytes, and weight loss. 18 So it's one thing if someone doesn't gain 19 weight; it's a whole 'nother thing if they start losing 20 weight. And so Line 35 is when they -- when she 21 received that diagnosis, and so I think it would meet 22 that medical exception of Paragraph 33 from Exhibit A at 23 that point. 24 Q. And then you see in Paragraph 33 that she kept 25 a pregnancy journal?</p>
<p style="text-align: right;">103</p> <p>1 Q. (BY MR. STONE) Uh-huh. 2 A. -- then, yes, it would be a medical 3 condition -- well, interesting. Yeah, I guess it would 4 be a medical condition that arose during pregnancy that 5 led to an increased risk of other -- other -- it would 6 be the other health risks that makes continuing the 7 pregnancy unsafe for the pregnant person; and in this 8 case, it'd be because she had a substantial amount of 9 weight loss. 10 The description later on after that 11 paragraph that we just talked about, is she'd lost so 12 much weight that she wasn't able to get back to her 13 baseline weight for another 14 weeks after her 14 hyperemesis resolved. So that's a -- I don't know the 15 exact number, but that's a pretty significant amount of 16 weight loss. So that would be the other health risk 17 that make -- that would make continuing the pregnancy 18 unsafe for the pregnant person. 19 Q. How about -- 20 MS. ACKERMAN: I'm sorry. Can we just 21 do, Ms. Cunningham, a time check, please? 22 THE REPORTER: Two hours twenty-two 23 minutes. 24 MS. ACKERMAN: Two hours twenty-two 25 minutes?</p>	<p style="text-align: right;">105</p> <p>1 A. Yes, sir. 2 Q. Okay. Have you had an opportunity to review 3 her pregnancy journal? 4 A. No, sir. 5 Q. Okay. We haven't yet, either. 6 Would reviewing the pregnancy journal 7 assist you in determining whether or not in Paragraph 35 8 she would have qualified for the -- a medical exception 9 under the hypothetical presented from Paragraph 33? 10 MS. ACKERMAN: Objection to form. 11 A. No. I mean, it might help us understand 12 whether she would have qualified before then; but she 13 received a diagnosis of hyperemesis gravidarum at 14 that point. And I think that would meet -- I think 15 that would broadly meet what I'm describing in 16 Subsection (ii) of Paragraph 33. 17 Q. (BY MR. STONE) What about under Paragraph 38 18 here in Exhibit B, the diagnosis of tri- -- trisomy 18, 19 would that qualify under Texas' current, as it exists 20 right now, medical exception to Texas' abortion ban? 21 MS. ACKERMAN: Objection to form. He's 22 not an attorney. He's not a prosecutor. He's not a 23 judge. 24 A. From my reading as a physician, I don't 25 believe so.</p>

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1 Q (BY MR. STONE) Is this an actual -- based on
 2 what -- this Paragraph 38, is this an actual diagnosis
 3 of -- am I saying that right, trisomy 18?
 4 A. Trisomy 18, that's correct.
 5 Q. Is it -- are you reading this as an actual
 6 diagnosis in Paragraph 38, or is it just a possibility?
 7 Like, is it a working diagnosis?
 8 A. That's a good question. Again, this is not a
 9 medical record. This is someone recounting their
 10 experience. So the NIPT test, which stands for
 11 noninvasive prenatal test, which is a cell-free DNA
 12 test, which is conducted by four or five companies in
 13 our country and around the globe, when they come back
 14 with trisomy 18, it makes it incredibly likely they have
 15 trisomy 18; but it is not 100 percent.
 16 However, the difference in this case is
 17 the fact that the fetus had cystic hygromas, so some
 18 congenital anomalies. Having those congenital anomalies
 19 in addition to the findings from the NIPT test -- an
 20 NIPT test, would make this essentially a diagnosis.
 21 That being said, if I was counseling the patient, I
 22 would offer to make a more -- like, a more certain
 23 diagnosis doing either CVS or an amniocentesis,
 24 depending on gestational age.
 25 Q. Let me follow up on that. Is trisomy 18 a

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1 severe fetal abnormality?
 2 A. Well, it's a severe genetic anomaly in
 3 whomever has it, whether it be a fetus or a neonate.
 4 Q. Is it a life-threatening physical condition
 5 that, in reasonable medical judgment, regardless of the
 6 provision of life-saving medical treatment, would be
 7 incompatible with life outside the womb?
 8 MS. ACKERMAN: Objection to form, vague
 9 and ambiguous question.
 10 A. Generally, that's true.
 11 Q (BY MR. STONE) Okay. So let's go to your
 12 definition in Section 33 -- Paragraph 33 of Exhibit A.
 13 Would this qualify under Number 3, "instances" -- for
 14 a medical exception if this was the law in Texas,
 15 hypothetically, "instances where there is a fetal
 16 condition that makes the fetus unlikely to survive the
 17 pregnancy or sustain life after birth"?
 18 A. Yes, sir.
 19 Q. Would you be able to make that determination
 20 based on the information contained in Paragraphs 37 and
 21 38 of Exhibit B here, or would you need to do that
 22 additional CVS testing that you mentioned to ultimately
 23 make that trisomy 18 determination and whether it would
 24 qualify?
 25 A. In this -- well, in this case, because there

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1 were fetal anomalies in addition to the cell-free DNA
 2 test, I think it would be adequate to simply have those
 3 two pieces of information for trisomy 18. It would be
 4 different for other trisomies. But for trisomy 18, that
 5 would be adequate for most patients; but it depends on
 6 how much certainty someone desires. And because cell-
 7 free DNA is an imperfect test, the standard of care is
 8 generally to offer subsequent diagnostic testing.
 9 Q. I'm going to send you another exhibit. I'm
 10 sending you what I'm marking as Exhibit D in the chat.
 11 (Exhibit D marked.)
 12 Q (BY MR. STONE) Could you let me know when
 13 you're able to open it up and take a look?
 14 A. I can open it.
 15 Q. Okay. Yes, go ahead, please.
 16 A. I have it open.
 17 Q. Could you read Section (a), (a-1), and (a-2)
 18 and let me know when you finish?
 19 A. (Witness silently reading document.)
 20 Okay.
 21 Q. All right. Do you recall reviewing this law
 22 in preparation for your deposition testimony today?
 23 A. Yes, sir.
 24 Q. Do you believe -- going back to Exhibit B,
 25 Paragraph 38, earlier you testified that this would not

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1 have qualified for Texas' current medical exception to
 2 its abortion laws, right?
 3 A. Yes, sir.
 4 Q. Now that you've reviewed Texas' abortion laws
 5 or part of Texas' abortion laws, does that change your
 6 opinion at all?
 7 A. No, sir.
 8 MS. ACKERMAN: Objection to form.
 9 THE WITNESS: Sorry.
 10 A. No, sir.
 11 Q (BY MR. STONE) I see. So why would
 12 Paragraph 38 not qualify for the severe fetal
 13 abnormality exception to Texas' abortion laws?
 14 MS. ACKERMAN: Objection to form.
 15 A. I'll read (a-1). It says, "In Subsection (a),
 16 a 'severe fetal abnormality' means a life-threatening
 17 physical condition that, in reasonable medical judgment,
 18 regardless of the provision of lifesaving medical
 19 treatment, is incompatible with life outside the womb."
 20 So, I don't know, something like 6 to
 21 8 percent of trisomy 18 fetuses will stay alive for
 22 weeks to months. So, I mean, I think the language
 23 around compatible with life, it's a little unclear. If
 24 something else is different than just the ability to
 25 survive for even minutes is not meant by that, then

<p style="text-align: right;">110</p> <p>1 maybe it would; but it's -- again, I find that language 2 a little bit confusing. I would assume "incompatible 3 with life outside the womb" means that, you know, within 4 moments after birth, the fetus/now neonate would die; 5 and while that is the case in the majority of trisomy 6 18s, it's not the case in all of them. 7 Q. Do you recall testifying five minutes ago 8 that the condition described in Paragraph 38 was a 9 life-threatening physical condition that in a 10 reasonable -- in your reasonable medical judgment, 11 regardless of the provision of lifesaving medical 12 treatment, was incompatible with life outside the womb? 13 MS. ACKERMAN: Objection to form. 14 A. Well, you asked a question and it wasn't 15 written down and you kind of read it quickly like that. 16 And so I must have made a mistake if that's what I did, 17 but... 18 Q. (BY MR. STONE) So you testified to that 19 earlier; and then, when I showed you the definition, 20 then you've changed your testimony now. Is that 21 accurate? 22 A. Yes -- 23 MS. ACKERMAN: Objection to form. 24 A. -- and I don't remember exactly how you read 25 it previously, and what really matters is if we think</p>	<p style="text-align: right;">112</p> <p>1 (Witness silently reading document.) 2 Okay. 3 Q. Okay. In Paragraph 57 of Exhibit B, in 4 your opinion, should -- would Dr. Dennard's -- would 5 Dr. Dennard have qualified for Texas' medical exception 6 to its abortion law as currently written? 7 MS. ACKERMAN: Objection to form. 8 A. So the -- and this is -- and this -- we're 9 talking about Exhibit D, which was, I believe, the 10 exception for medical emergency that was to S.B. 8; is 11 that correct? 12 Q. (BY MR. STONE) I'm just asking based on 13 your -- I'm sorry. You're asking me a follow-up 14 question. I'm just asking for your -- set that aside. 15 I'm asking for your opinion in this case 16 based on I know you spent six hours preparing for this 17 deposition and you wrote the report and you reviewed all 18 the laws, including this morning. Just, in your 19 opinion, do you believe that, as Texas law currently 20 exists, in Paragraph 57 of Exhibit B, would Dr. Dennard 21 have qualified for the medical exception to Texas 22 abortion laws? 23 MS. ACKERMAN: Objection to form. 24 A. I think it's possible. I think it's -- again, 25 it's a little bit confusing; but I think it's possible,</p>
<p style="text-align: right;">111</p> <p>1 about -- 2 Q. (BY MR. STONE) I read it verbatim. 3 A. I'm sure you did, sir. And you read it so 4 quickly that I apologize if I missed some of the 5 language; but when you -- when I read it now, written 6 down, it's very clear that the language -- what it says 7 is -- if I can find it -- is "incompatible with life 8 outside the womb." And, again, if we're going to try 9 to parse words, I don't know what that means. 10 And if that -- if what is meant is 11 always incompatible, then the answer would be no, 12 because it isn't always. If it's more likely than not 13 incompatible, then the answer would be yes, because more 14 than 50 percent of fetuses with trisomy 18 don't -- 15 don't survive, you know, more than a few minutes outside 16 the womb. So then it depends. 17 Q. I see. Let's talk about Patient Three. Can 18 you read Paragraphs 53 through 65 and let me know when 19 you finish? 20 A. What was the starting paragraph, sir? 21 Q. It is -- yeah, let me clarify. Could you read 22 in Exhibit B, beginning on Paragraph 53 and then just 23 reading through Paragraph 65, for patient Dr. Austin 24 Dennard; and let me know when you finish? 25 A. Yes, sir.</p>	<p style="text-align: right;">113</p> <p>1 yes. 2 Q (BY MR. STONE) Why? 3 A. Why what? 4 Q. Well, why would -- why is it possible? 5 A. Oh. I think that even a stronger case can be 6 made for anencephaly to be considered to be incompatible 7 with life outside the womb. That being said and the 8 reason why I said possibly, as opposed to absolutely, is 9 that even kids with anencephaly can survive for four 10 days, for six days, and even longer, depending on what 11 kind of life -- you know, it says "regardless of the 12 provision of lifesaving medical treatment." 13 So, I mean, there are -- there's an 14 extensive amount of treatment that one could do to 15 even an anencephalous -- an anencephalic fetus. You 16 could intubate such a fetus -- or such a neonate and 17 provide a tube -- you know, intravenous feeding and keep 18 it alive. So, I mean, that's where I think it is 19 confusing if I'm -- I'm referring, obviously, to this 20 Subsection (a-1) and so -- but I think it would be 21 medically common for us to use the language 22 "incompatible with life" because most reasonable 23 clinicians, neonatologists would not intubate or, you 24 know, provide nutrition -- you know, intravenous 25 nutrition for an anencephalic neonate.</p>

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1 Q. And it says here on Paragraph 57 that her
 2 doctor confirmed that the condition was not compatible
 3 with survival, right?
 4 A. I believe -- yes, that's correct.
 5 Q. Is that consistent with not compatible with
 6 life outside the womb, do you think?
 7 A. I don't know. I mean, this is her
 8 interpretation of a conversation she had with her
 9 doctor. So I don't know exactly what was meant by that
 10 language, but that may be consistent.
 11 Q. Now, in Paragraph 54, this isn't just some
 12 random person, right? This is an obst- -- an OB/GYN,
 13 right?
 14 A. Yes, sir, she's a doctor of obstetrics and
 15 gynecology.
 16 Q. So when -- you're also an O -- you're an
 17 OB/GYN as well, right?
 18 A. Yes, sir.
 19 Q. So in Paragraph 57 here, do you understand
 20 that to be -- "not compatible with survival" to mean the
 21 same thing as "not compatible with life outside the
 22 womb"?
 23 MS. ACKERMAN: Objection to form, asked
 24 and answered.
 25 A. No, sir, I don't know exactly what language is

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1 intended. So "compatible with survival" could mean
 2 survive to age one. It could be viable survival as a
 3 child. It can mean a lot of things.
 4 The specific language about not
 5 compatible with -- what was it -- it was life outside
 6 the womb, again, you know, I'm using the word "life" as
 7 a physician, meaning, like, signs of life, meaning,
 8 like, that there's a heartbeat and that it can take a
 9 breath; but maybe that's not what's meant in
 10 Subsection (a-1).
 11 So, again -- and I'm not trying to just
 12 mince words -- but this is not a guideline for medical
 13 care. This is something that is mandating that care is
 14 provided in a very certain way that comes with it very,
 15 very stiff penalties. And so I think that -- I think
 16 just wanting to understand what was meant by the
 17 language and how it would be then understood by
 18 clinicians in a variety of circumstances is important.
 19 Q. So you're able to tell when a patient comes in
 20 with anencephaly that the baby will survive for one year
 21 outside the womb after birth?
 22 MS. ACKERMAN: Objection.
 23 A. I'm sorry, sir. What's the question?
 24 Q. (BY MR. STONE) Are you able to make a
 25 determination when a patient comes in with anencephaly

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1 that the baby's going to survive for one year after
 2 birth?
 3 A. No. That would be very unlikely, sir.
 4 Q. Okay. Then what do you mean when you say that
 5 the diagnosis of encephaly -- anencephaly is confusing
 6 because the baby could survive a year or six months or a
 7 few days? How would you -- how do you know that when
 8 you make the diagnosis?
 9 A. So, Number 1, I don't think I said that, sir.
 10 I think I said that in regard to trisomy 18. With
 11 regard to anencephaly, I don't know that I've heard of
 12 or taken care of a fetus -- a neonate that stayed alive
 13 more than a couple of days with anencephaly; but,
 14 regardless, you are correct. There's not something that
 15 predicts it perfectly.
 16 There are concomitant conditions, both in
 17 trisomy 18 and in anencephaly, such as severe cardiac
 18 conditions, that would -- that might make life longer
 19 than a few hours essentially impossible; but other than
 20 that, I can't think of something that would give us
 21 predictive power to know which fetus -- which neonate
 22 would be likely to survive more than several minutes
 23 versus one that might survive several days with
 24 anencephaly.
 25 Q. If we were to apply your definition in

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1 Paragraph 33 of Exhibit A to Dr. Dennard here, at what
 2 point would she have qualified for a medical exception
 3 under that definition, as described here in Exhibit B?
 4 MS. ACKERMAN: Objection to form, vague
 5 and ambiguous.
 6 A. I believe once she received a diagnosis of
 7 fetal anencephaly, she would have qualified.
 8 Q. (BY MR. STONE) And which -- in your
 9 definition under 33, would it be because -- strike all
 10 that.
 11 Is that because once she received that
 12 diagnosis, it would be an instance where there is a
 13 fetal condition that makes the fetus unlikely to survive
 14 the pregnancy or sustain life after birth?
 15 MS. ACKERMAN: Objection to form.
 16 A. Yes, sir.
 17 MS. ACKERMAN: Can we take a break and
 18 get a time count? And are you planning to take the full
 19 three hours, Mr. Stone?
 20 MR. STONE: Yes.
 21 MS. ACKERMAN: Okay. We'll likely need,
 22 you know, just a couple of minutes for Redirect, just so
 23 you know.
 24 MR. STONE: Okay. I was not aware
 25 that -- okay -- that you guys were planning on doing

<p style="text-align: right;">118</p> <p>1 Redirect. How much -- yeah, we should do a time check. 2 How much time do I have? 3 THE REPORTER: We have been on the record 4 for 2 hours and 45 minutes. 5 MR. STONE: Okay. We should go off the 6 record. Let's go off the record. 7 THE REPORTER: We're going off the record 8 at 12:56 p.m. 9 (Off the record from 12:56 to 1:06 p.m.) 10 THE REPORTER: We're back on the record 11 at 1:06 p.m. 12 MS. ACKERMAN: Thank you. 13 MR. STONE: Pass the witness. 14 MS. ACKERMAN: Thank you. 15 EXAMINATION 16 BY MS. ACKERMAN: 17 Q. Okay. Dr. Caughey, I'll direct you to 18 Exhibit D. Can you please read the title of the 19 exhibit? 20 A. You mean the -- I'm not sure exactly what you 21 mean by "title." Can you -- 22 Q. Can you read -- yeah. Sorry. Can you read 23 the words after the numbers 285.202? 24 A. Yes, ma'am. "Use of Tax Revenue for 25 Abortions: Exception for Medical Emergency."</p>	<p style="text-align: right;">120</p> <p>1 This witness previously testified that he 2 reviewed Exhibit D in preparation for his testimony. 3 Q (BY MS. ACKERMAN) You can answer. 4 A. Yeah. I mean, I believe that I've seen 5 language like this before and I'm not -- but I'm not 6 sure if it's this document. I'd have to -- 7 Q. Okay. 8 A. -- look at the other documents I have to see 9 if it is. 10 Q. Okay. So is it possible that you haven't read 11 the provision titled Section 28.85.202 [sic]? 12 A. Yes, ma'am. 13 Q. Okay. And if I told you that this definition 14 of medical emergency that is on Section (a) of that 15 document, Exhibit D, "'medical emergency' means," 16 knowing that there's a definition -- are you seeing it? 17 A. Yes, ma'am, I see that. 18 Q. Okay. If I told you that this definition of 19 medical emergency is not the one that applies to the 20 criminal abortion ban in Texas, would that clear up some 21 of the confusion that you had before about the emerg- -- 22 the medical exceptions that they were asking you? 23 MR. STONE: Objection to form. 24 A. Well, yes, ma'am, because, I mean, the medical 25 exception that I discussed in the Affidavit didn't,</p>
<p style="text-align: right;">119</p> <p>1 Q. Okay. And then can you go through the 2 document that has two pages? 3 A. Yes, ma'am. 4 Q. Just you can -- you can just skim it. 5 A. Just read it to myself? 6 Q. Yeah. 7 A. Okay. I think -- give me one second. 8 Q. Uh-huh. 9 A. (Witness silently reading document.) 10 Q. Let me know when you're done. 11 A. Uh-huh. 12 I'm done reading the words. 13 Q. Okay. Great. Do you -- have you seen this 14 provision before? 15 A. I -- I feel like it's something -- 16 MR. STONE: Objection. 17 A. Perhaps, but I don't recall. 18 Q. (BY MS. ACKERMAN) Okay. So you don't recall 19 if you've seen the provision titled "Use of Tax Revenue 20 for Abortions: Exceptions for Medical Emergency"? 21 MR. STONE: Objection, misquotes the 22 [computer glitch.] 23 THE REPORTER: I'm sorry. I missed the 24 last word. Misquotes what? 25 MR. STONE: The deponent.</p>	<p style="text-align: right;">121</p> <p>1 obviously, include this language. It was the language 2 for the law that's from 2022. This is -- this is, like, 3 effective back in 2011. 4 Q. (BY MS. ACKERMAN) So just to clarify, when 5 you were responding to some of the questions that 6 Mr. Stone was asking regarding -- based on Exhibit D, 7 that the definition in Exhibit D of "medical emergency," 8 that was based in your -- in a misunderstanding of what 9 exception we were discussing in this case? 10 MR. STONE: Objection, form. 11 A. Well, yes, ma'am. And I do apologize. I 12 actually had thought that this said, "Effective 13 September 28, 2021" and I now see it's 2011. I'd 14 assumed that this was somehow tied to S.B. 8, which was 15 enacted in the fall of 2021; but now I see this was ten 16 years earlier. 17 So now I'm -- I apologize. I'm becoming 18 even more confused as -- as time goes by. I don't -- it 19 seems likely that I have not reviewed this document 20 since it was not part of either S.B. 8 or the trigger 21 ban from 2022. 22 Q (BY MS. ACKERMAN) Okay. Thank you. 23 Now, in -- I just want to talk more in 24 general terms, nothing specific about the documents that 25 you were -- that you were given. So if a Court</p>

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1 clarified that the decision of whether a patient's
 2 medical condition qualifies under the medical exceptions
 3 for Texas abortion bans, that this should be left to the
 4 judgment of the physician, in consultation with the
 5 patient, do you think that will help clarify some of the
 6 confusion surrounding the emergency medical exception?
 7 MR. STONE: Objection, leading.
 8 A. So the question is, is if the language -- if
 9 the language around the medical exception included that
 10 the ultimate determination of whether a patient
 11 qualifies for a medical exception was left up to the
 12 treating physician, in consultation with their patient,
 13 would that clarify when the medical exception holds? Is
 14 that the question?
 15 Q. (BY MS. ACKERMAN) Correct.
 16 A. Yes, I think that would make it easier to
 17 interpret.
 18 Q. Can you explain why?
 19 A. Well, right now, in the language as it's
 20 written, it's unclear who is supposed to interpret it.
 21 I think that was -- it's implied, potentially -- and
 22 I feel like it's been implied earlier in this
 23 deposition -- that the pro- -- that the treating
 24 physician might decide to interpret it and then provide
 25 care; but what seems clear to me is that, as a treating

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1 physician, one might interpret it and apply care that is
 2 then re-interpreted by someone else later on.
 3 If you're making it clear that the
 4 interpretation will be by the treating physician and not
 5 superseded by someone else's judgment, then I think that
 6 would make it clear that the treating physician is
 7 allowed to interpret what's meant by the medical
 8 exception language.
 9 Q. Okay. Thank you.
 10 A. It doesn't necessarily -- it does mean, to be
 11 clear, that there would still be variation in care
 12 because different providers would likely interpret it
 13 different ways; but at least the physicians could
 14 interpret it freely without concern that they would be,
 15 I guess, fined or imprisoned if they interpreted it
 16 differently than someone else.
 17 Q. Okay. Now we're going to change gears. Let's
 18 go to Exhibit B, Paragraph 40.
 19 A. Yes, ma'am.
 20 Q. Okay. So Mr. Stone was asking you questions
 21 about one of the Plaintiffs, Lauren Miller. In
 22 Paragraph 4, it -- sorry, 40 -- can you read the second
 23 sentence?
 24 A. "The MFM confirmed via ultrasound that Baby B
 25 had multiple fetal structural abnormalities -- cystic

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1 hygromas where much of the brain should have been
 2 developing, a single artery umbilical cord, incomplete
 3 abdominal wall, abnormal heart, abnormal nuchal
 4 translucency -- and told Lauren M. and her husband that
 5 Baby B would likely not survive to birth."
 6 Q. Okay. And you testified earlier that in
 7 Lauren Miller's case, her pregnancy was incompatible
 8 with life outside of the womb?
 9 A. I don't believe I did that.
 10 Q. You -- I think your -- your testimony was that
 11 her pregnancy was incompatible with life. Under the
 12 definition --
 13 MR. STONE: Objection to form.
 14 A. I don't believe that I did testify to that.
 15 Q. (BY MS. ACKERMAN) And --
 16 A. I think --
 17 Q. Okay.
 18 A. -- the phrase "incompatible with life," I
 19 think we were talking about that and that that language
 20 is a bit ambiguous and unclear; but I would interpret it
 21 meaning that the baby could survive for even minutes
 22 outside the womb. And so it is possible that Baby B
 23 could survive for minutes outside the womb. I mean,
 24 this is a pretty bad case of trisomy 18, given the
 25 multiple fetal anomalies; but it is possible that

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1 there'd be survival for minutes to hours, even days.
 2 Q. Okay. And out of all -- all trisomy 18 cases,
 3 will all of them be necessarily incompatible with life
 4 outside of the womb?
 5 A. As defined or as the language that's used in
 6 document -- sorry -- Exhibit D, where it says -- in
 7 (a-1) it says, "...regardless of the provision of
 8 lifesaving medical treatment, is compatible [sic] with
 9 life outside the womb," and so, no. There are a small
 10 subset of trisomy 18 kids that will survive for one year
 11 or even longer, particularly, if they have a lot of
 12 medical treatment.
 13 Q. Okay. And what about cases of anencephaly,
 14 are all anencephaly cases necessarily incompatible with
 15 life outside of the womb?
 16 A. So anencephaly is worse than trisomy 18 in
 17 that regard. But, again, that language, "incompatible
 18 with life outside the womb," as I mentioned earlier,
 19 I've taken care of folks that have delivered anencephaly
 20 neonates; and those neonates have -- at least one has
 21 survived for several days. So they can survive for
 22 several days. I've not heard of an anencephaly neonate
 23 survive for longer than a month. I don't -- but I
 24 haven't reviewed the literature on that specifically,
 25 but I don't -- it's more severe than trisomy 18; but I

<p style="text-align: right;">126</p> <p>1 don't think that it would fall under exactly 2 "incompatible with life outside the womb" the way it's 3 written. 4 Q. Okay. Thank you. 5 MS. ACKERMAN: That's it. 6 THE WITNESS: Okay. 7 MR. STONE: Are you passing the witness? 8 MS. ACKERMAN: Yes, passing the witness. 9 FURTHER EXAMINATION 10 BY MR. STONE: 11 Q. So it's you testimony today, Doctor, that 12 you're not sure if you reviewed Exhibit D prior to your 13 testimony, correct? 14 A. Well, I'm becoming more sure that I probably 15 did not. When I -- when I -- when you had me look at 16 Exhibit D earlier, I thought that the date at the top 17 was 2021; and so I thought it was part of the S.B. 8 18 law. But given that it's dated 2011, it seems pretty 19 unlikely that I did not; but I could go through my 20 documents and see if I have it. Then I would know for 21 sure. 22 Q. So do you not believe that that is currently 23 good law in Texas, what I just showed you? 24 MS. ACKERMAN: Objection to form. 25 A. I don't know if it's -- I don't know what</p>	<p style="text-align: right;">128</p> <p>1 Did you only review the portions of 2 Texas' abortion laws that were provided to you by 3 Astrid? 4 A. Yes, sir. 5 Q. So it's possible that there's other parts of 6 Texas' abortion laws that were not provided to you by 7 Astrid that you have not yet reviewed? 8 MS. ACKERMAN: Objection to form. 9 A. Sure, it's possible. 10 MR. STONE: State your objection. 11 MS. ACKERMAN: This is outside of the 12 scope, and he's not a lawyer. 13 I also want to object, just for -- 14 Q. (BY MR. STONE) What are -- 15 MS. ACKERMAN: Sorry. Let me put in my 16 objection for the record. 17 This is Redirect, and you're introducing 18 new exhibits. This is outside of the scope of Redirect. 19 MR. STONE: It's not outside the scope of 20 Redirect. You specifically brought up that there were 21 documents that he had not reviewed as part of Texas law 22 and then told him that -- that it was no longer good 23 law -- or it seemed to imply that it was not, what was 24 shown in Exhibit D. So I absolutely think showing him 25 these exhibits to determine what then he did, indeed,</p>
<p style="text-align: right;">127</p> <p>1 "good law" means, but I don't know if it's law or not. 2 Q (BY MR. STONE) I see. In other words, 3 there's some now confusion in your mind of whether or 4 not Exhibit D is an accurate representation of what the 5 law is at this point today in Texas; is that fair? 6 A. Oh, yes, I don't know if that law applies, 7 that's correct. 8 Q. Okay. I'm going to show you Exhibit E, what 9 I'm marking as Defendant's Exhibit E. 10 (Exhibit E marked.) 11 Q (BY MR. STONE) And just let me know when 12 you've opened it up. 13 A. I have Exhibit E open. 14 Q. Okay. Can you read Subsection (c) of 15 Exhibit E out loud for the record? 16 A. Oh, yeah, sure. Subsection (c) of 17 Exhibit E would be, "The prohibitions and requirements 18 under Sections 171.043, 171.04 [sic], and 171.045 19 Subsection (b) do not apply to an abortion performed on 20 an unborn child who has a severe fetal abnormality." 21 Q. Did you review what is marked as Exhibit E in 22 preparation for your deposition testimony today? 23 A. I don't believe so. 24 Q. So you didn't review this part, either, 25 exhibit -- I mean -- strike that.</p>	<p style="text-align: right;">129</p> <p>1 review is within the scope of Redirect. 2 But that's something to take up with the 3 judge. I understand you're preserving your record. 4 Q. (BY MR. STONE) I'm going to show you what I'm 5 marking -- 6 MS. ACKERMAN: You're showing him 7 another -- another law. You're showing him another law. 8 MR. STONE: Yes, I can do that. 9 MS. ACKERMAN: Yeah. 10 MR. STONE: Yep. 11 Q. (BY MR. STONE) Exhibit F. 12 (Exhibit F marked.) 13 Q. (BY MR. STONE) I'm uploading what I'm marking 14 as Defendant's Exhibit F. 15 A. I have Exhibit F open. 16 Q. Okay. Did you -- did you review Exhibit F in 17 preparation for your testimony today? 18 A. I -- let me read it really carefully, sir. 19 Q. Okay. 20 A. (Witness silently reading document.) 21 Yes. 22 Q. Are you sure that you re- -- you, prior to 23 today, have reviewed what's contained in Exhibit F? 24 MS. ACKERMAN: Objection to form. You're 25 trying to confuse the witness by showing him, during</p>

<p style="text-align: right;">130</p> <p>1 Redirect, new exhibits, new portions of law that he's 2 already testified that -- to some of them that he hasn't 3 reviewed, in order to deliberately confuse him. 4 MR. STONE: No, I'm just not sure what 5 you gave him, Astrid. I just can't tell at this point 6 which parts of the law you gave him. So I think it 7 warrants some clarification. 8 Q. (BY MR. STONE) Go ahead and answer if you 9 can -- 10 MS. DUANE: Why would we give him 11 provisions of the law that are not operable? I don't 12 understand why you're trying to confuse our witness. Is 13 this really how you want to spend the remainder of your 14 minutes of this deposition? 15 MR. STONE: Yeah. I'm going to move to 16 strike everything that Molly just said as she's not an 17 attorney that's properly appearing on the record here, 18 and you're also using -- 19 MS. DUANE: Yeah, well, I can talk to 20 you. 21 (Simultaneous speakers.) 22 Q. (BY MR. STONE) Dr. Coy, you can go ahead -- 23 MS. DUANE: I'm allowed to talk on the 24 record. 25 Q. (BY MR. STONE) Dr. Coy, if you could go ahead</p>	<p style="text-align: right;">132</p> <p>1 A. Both, I guess, yes, sir. 2 Q. Okay. Oh, I'm sorry. Correct. Right, you 3 cite to both. I'm sorry. I was looking at the end 4 here, and I tripped myself up. 5 You do, indeed, actually cite to this; is 6 that fair? 7 A. Yes, sir. 8 Q. So does it feel like I'm confusing you by 9 showing this to you if you cite to it in your Affidavit? 10 A. No, sir. 11 MR. STONE: It's about -- actually, let's 12 stop. 13 Can I get a time check on where I am 14 right now? 15 THE REPORTER: You have used 2 hours 54 16 minutes; opposing counsel used almost 12 minutes. 17 MR. STONE: Pass the witness. 18 MS. ACKERMAN: We don't have any further 19 questions. 20 MR. STONE: Well, thank you so much, 21 Dr. Coy. I really appreciate you taking the time to 22 come in today. 23 THE WITNESS: Sure. My pleasure. 24 MS. ACKERMAN: Thank you, Dr. Coy. 25 THE REPORTER: Excuse me. Before you go,</p>
<p style="text-align: right;">131</p> <p>1 and respond, I'd appreciate it. 2 A. So I'll answer it as I had answered 3 previously. I believe that this is a document that I, 4 one, have reviewed, two, I specifically referenced. I 5 mean, remember, I had that quoted language that comes 6 from, I guess, Subsection (b-2) that I put in -- that's, 7 like, Paragraph -- from Paragraph 14 of Exhibit A; but 8 it'd be very easy for me to verify if this is the 9 document. I can open the folder where I have the 10 documents and look at the other documents. 11 Q. If you -- 12 A. My only concern is: Is there one line that's 13 missing? But it seems like the exact same document. 14 Q. Yeah. Do you see at the top here where it 15 says, "Texas Health & Safety Code Section 170A.002?" 16 A. Yes, sir. 17 Q. Okay. Can you look at -- go to Exhibit A, 18 your Affidavit, and look at Footnote Number 2? 19 MS. ACKERMAN: Objection to form. 20 Q. (BY MR. STONE) And let me know when you've 21 got there. 22 A. Yes, sir, there it is, Exhibit 171.002. 23 Perfect. 24 Q. Well, you cite to Section 171A.002(b), right, 25 in this footnote?</p>	<p style="text-align: right;">133</p> <p>1 I need to ask for orders, on the record, please, of the 2 transcript and video. 3 MR. STONE: Oh, okay. Defendants would 4 like an expedited transcript and a copy of the video in 5 electronic form. 6 THE REPORTER: How -- 7 MS. ACKERMAN: And Plaintiff -- sorry. 8 Go ahead, Ms. Cunningham. 9 THE REPORTER: I was just going to ask: 10 How expedited? 11 MR. STONE: How soon can you get it to 12 us? 13 THE REPORTER: I can get it as soon as 14 you want it. 15 MR. STONE: Oh. 16 THE REPORTER: There's a higher upcharge 17 the sooner you get it. 18 MR. STONE: Ah. Next week would be 19 great. 20 THE REPORTER: Okay. If you could 21 specify a date, that would be appreciated. 22 MR. STONE: Oh, okay. How about -- 23 sorry. How about a week from today? 24 THE REPORTER: Okay. That's fine. 25 MR. STONE: That's it.</p>

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1 THE REPORTER: That's fine.
 2 MS. ACKERMAN: And can we --
 3 THE REPORTER: Go ahead.
 4 MS. ACKERMAN: Can we get a rough draft
 5 of the deposition before next week?
 6 THE REPORTER: Yes. When? When do you
 7 need the rough?
 8 MS. ACKERMAN: If you can -- what's the
 9 earliest that you can get it to us? Can it be tomorrow?
 10 MR. STONE: Ooh, I... (Laughter.)
 11 THE REPORTER: Yes, I guess it can be.
 12 MS. ACKERMAN: Okay. Yeah, tomorrow
 13 would be great. Thank you, Ms. Cunningham.
 14 MR. STONE: Ooh, can I get a copy of the
 15 rough, then, too since we're -- if you're making it
 16 already, we'll go ahead and take a copy of that as well.
 17 THE REPORTER: Okay. That's fine.
 18 And, Ms. Ackerman, do you need the video?
 19 MS. ACKERMAN: Yes, just the same thing
 20 as Mr. Stone for us, next week and then -- I'll do the
 21 same thing, so then a rough draft tomorrow and then next
 22 week electronic and the video.
 23 THE REPORTER: All right. This concludes
 24 the deposition at 1:30 p.m.
 25 (Deposition concluded at 1:30 p.m.)

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1 I, AARON CAUGHEY, M.D., have read the
 2 foregoing deposition and hereby affix my signature that
 3 same is true and correct, except as noted herein.
 4
 5 _____
 6 AARON CAUGHEY, M.D.
 7
 8 THE STATE OF _____)
 9 BEFORE ME, _____, on
 10 this day personally appeared AARON CAUGHEY, M.D., known
 11 to me (or proved to me under oath or through
 12 _____) (description of identity card or other
 13 document) to be the person whose name is subscribed to
 14 the foregoing instrument and acknowledged to me that
 15 they executed same for the purposes and consideration
 16 therein expressed.
 17 Given under my hand and seal of office on
 18 this, the _____ day of _____, _____.
 19
 20
 21 _____
 22 NOTARY PUBLIC IN AND FOR
 23 THE STATE OF _____
 24 My Commission Expires: _____
 25

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1 CHANGES AND SIGNATURE
 2 WITNESS NAME: DATE OF DEPOSITION:
 3 AARON CAUGHEY, M.D. June 28, 2023
 4 PAGE/LINE CHANGE REASON
 5 _____
 6 _____
 7 _____
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 9 _____
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 25 _____

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1 CAUSE NO. D-1-GN-23-000968
 2 AMANDA ZURAWSKI, et al., * IN THE DISTRICT COURT OF
 3 Plaintiffs, *
 4 v. * TRAVIS COUNTY, TEXAS
 5 Defendants. * 353RD JUDICIAL DISTRICT
 6
 7 REPORTER'S CERTIFICATION
 8 VIDEOTAPED ORAL DEPOSITION
 9 OF
 10 AARON CAUGHEY, M.D.,
 11 Taken on June 28, 2023
 12 (Reported Remotely)
 13
 14 I, Debbie D. Cunningham, Certified
 15 Shorthand Reporter in and for the State of Texas, hereby
 16 certify to the following:
 17 That the witness, AARON CAUGHEY, M.D., was
 18 duly sworn by me, and that the transcript of the oral
 19 deposition is a true record of the testimony given by
 20 the witness;
 21 That the deposition transcript was
 22 submitted on June 30, 2023 to the witness
 23 or to the attorney for the witness for examination,
 24 signature, and return to me by July 20, 2023;
 25 That the amount of examination time used

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1 by each party at the deposition is as follows:
 2 BY MR. STONE: 02:58:27
 3 BY MS. ACKERMAN: 00:11:43
 4 BY MS. DUANE: 00:00:00
 5 BY MS. PLETSCHER: 00:00:00
 6 That pursuant to information given to the
 7 deposition officer at the time said testimony was taken,
 8 the following includes counsel for all parties of
 9 record:
 10 COUNSEL FOR PLAINTIFFS:
 11 CENTER FOR REPRODUCTIVE RIGHTS
 12 199 Water Street, 22nd Floor
 13 New York, New York 10038
 14 (T) 917.637.3600
 15 By: Astrid Ackerman, Esq.
 16 aackerman@reporights.org
 17 AND
 18 Molly Duane, Esq.
 19 mduane@reporights.org
 20
 21 COUNSEL FOR DEFENDANTS:
 22 OFFICE OF THE ATTORNEY GENERAL OF TEXAS
 23 General Litigation Division
 24 P.O. Box 12548, Capitol Station
 25 Austin, Texas 78711-2548
 (T) 512.475.4196
 By: Johnathan Stone, Esq.
 johnathan.stone@oag.texas.gov
 AND
 Amy Pletscher, Esq.
 amy.pletscher@oag.texas.gov
 I further certify that I am neither
 counsel for, related to, nor employed by any of the

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1 FURTHER CERTIFICATION UNDER RULE 203, TRCP
 2 The original deposition/errata sheet was / was not
 3 returned to the deposition officer on _____;
 4 If returned, the attached Changes and Signature
 5 page contains any changes and the reasons therefor;
 6 If returned, the original deposition was delivered
 7 to MR. STONE, Esq., Custodial Attorney;
 8 That \$_____ is the deposition officer's
 9 charges to the Defendants for preparing the original
 10 deposition transcript and copies of exhibits, if any;
 11 That the deposition was delivered in accordance
 12 with Rule 203.3, and that a copy of this certificate was
 13 served on all parties shown herein on _____
 14 and filed with the Clerk.
 15 Certified to by me on _____.
 16
 17
 18
 19 _____
 20 Debbie D. Cunningham, CSR
 21 CSR 2065
 22 Expiration: 6/30/25
 23 INTEGRITY LEGAL SUPPORT SOLUTIONS
 24 9901 Brodie Ln, Ste. 160-400
 25 Austin, Texas 78748
 www.integritylegal.support
 512-320-8690; FIRM # 528

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1 parties or attorneys in the action in which this
 2 proceeding was taken, and further that I am not
 3 financially or otherwise interested in the outcome of
 4 the action.
 5 Further certification requirements
 6 pursuant to Rule 203 of TRCP will be certified to after
 7 they have occurred.
 8 Certified to by me this day, June 30,
 9 2023.
 10
 11
 12 _____
 13 Debbie D. Cunningham, CSR
 14 CSR 2065
 15 Expiration: 6/30/25
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<p style="text-align: center;">Numbers</p> <p>100 7:24 106:15 10:01 5:4 11:14 58:2,3 11:21 58:3,5 120 7:24 20:14 12:56 118:8,9 170A.002 131:15 171.002 131:22 171.04 127:18 171.043 127:18 171.045 127:18 171A.002b 131:24 18s 110:6 195.5 15:24 1:06 118:9,11 1:30 134:24,25 2011 121:3,13 126:18 2021 121:13,15 126:17 2022 121:2,21 2023 5:4 10:23 2065 5:9 25-page 43:7 28.85.202 120:11 285.202 118:23</p>	<p>8 16:15,18,24 17:16,18,20 22:8, 23 23:15,16,20,23 24:12,14,15,18,21, 25 25:7,9 26:3,16, 18,19,24 27:3,25 28:4,19 29:22 30:1, 3,16 36:18,19 37:5 39:13 40:6,8,25 41:17,25 42:9,22 43:12,19,21 44:10, 14,20 45:12,25 46:2 48:7,8,9,9 49:20 50:18,19,20 51:12,22 52:7,9,13 60:10 61:3,22 65:14 66:6,7 67:12 68:3 69:4,10 70:12, 18,24 73:14 74:9 75:1,7,14,15,20,23 76:4,5,11,14,20 77:19 78:21 79:6, 11,17 80:23 81:1,3 84:2,4 85:16 86:4, 20 87:2,13 88:1 89:6,23 90:5 91:3 94:22 95:11 96:12, 17,24,25 97:22,24 98:8,15 99:2,15 100:13,24 101:3,5, 13 102:22 105:20 109:2,4,5,13 112:6, 22 120:20 122:3 127:19 128:2,6 abortions 16:17,24 28:20 29:20 29:20 118:25 119:20 above 82:1 82:1 82:1 abscess 92:20 absence 100:23 absolute 25:5,6 absolutely 23:5 40:18 61:20 62:5 86:21 99:6 113:8 128:24 accomplish 81:3 accomplished 80:25 accurate 16:18,25 27:20 37:6 46:19 54:1 110:21 127:4</p>	<p>Ackerman 5:15 12:18 14:9 32:13 33:6 134:18 acronym 64:5 act 50:16 activity 48:5,14,24 50:16 actual 99:15 101:11 106:1,2,5 actually 25:1 28:18 29:18 30:7 31:22 47:10 48:6,18 49:6, 19 50:17 61:15 67:23 78:20 80:22 82:22 83:16 87:18 89:12 91:16 121:12 132:5,11 add 97:9 added 11:19 96:17,23 adding 51:1 addition 106:19 108:1 additional 107:22 Additionally 88:23 102:4 address 46:24 adequate 64:7 108:2, 5 administering 5:9 admitted 63:3 adopt 76:19 77:15,18 78:20 79:5 adopted 94:23 98:7 Affidavit 11:12,18, 19,21,22,23,24 12:1,3,7,9 16:11 17:5 17:5 25:24 41:10 53:7,16,18, 22,25 54:6,11,17 120:25 131:18 132:9 affidavits 54:10,11, 14 after 33:4 77:5 96:6 103:10,13 107:17 110:4 115:21 116:1 117:14 118:23 again 17:4 29:4 31:1, 4,10 37:14,15 40:16 43:14 48:22</p>
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CAUSE NO. D-1-GN-23-000968

AMANDA ZURAWSKI, et al.,	*	IN THE DISTRICT COURT OF
Plaintiffs,	*	
	*	
v.	*	TRAVIS COUNTY, TEXAS
	*	
STATE OF TEXAS, et al.	*	
Defendants.	*	353RD JUDICIAL DISTRICT

VIDEOTAPED ORAL DEPOSITION

OF

DAMLA KARSAN, M.D.

Thursday, July 6, 2023

(REPORTED REMOTELY)

VIDEOTAPED ORAL DEPOSITION OF DAMLA KARSAN, M.D., produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on Thursday, July 6, 2023, from 9:38 a.m. to 12:04 p.m., before Debbie D. Cunningham, CSR, remotely reported via Machine Shorthand, pursuant to the Texas Rules of Civil Procedure and/or any provisions stated on the record or attached hereto.

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1 (Thursday, July 6, 2023 9:38 a.m.)

2 P R O C E E D I N G S

3 THE REPORTER: Today's date is Thursday,

4 July 6, 2023. The time is 9:38 a.m. Central Standard

5 Time. This is the videotaped oral deposition of Damla

6 Karsan M.D.; and it is being conducted remotely. The

7 witness is located in Houston, Texas.

8 My name a Debbie Cunningham, CSR

9 Number 2065. I am administering the oath and reporting

10 the deposition remotely by stenographic means from

11 Austin, Texas.

12 Would Counsel please state their

13 appearances and locations for the record, beginning with

14 Plaintiffs' counsel?

15 MR. KABAT: Nicolas Kabat in New York,

16 New York for the Plaintiffs.

17 THE REPORTER: Mr. Stone, we can't hear

18 you.

19 MR. STONE: Can you hear me now?

20 THE REPORTER: Yes.

21 MR. STONE: Okay. Jonathan Stone on

22 behalf of Defendants. I'm joined by my cocounsel, Amy

23 Pletscher; and I am located in Austin, Texas.

24 MR. KABAT: And, for the record, joining

25 me today is Molly Duane, in New York, New York, as well.

6	<p>1 DAMLA KARSAN, M.D.,</p> <p>2 having been duly sworn, testified as follows:</p> <p>3 EXAMINATION</p> <p>4 BY MR. STONE:</p> <p>5 Q. Good morning, Dr. Karsan.</p> <p>6 Before we begin, let me just kind of go</p> <p>7 over some of the rules of depositions for you. Do you</p> <p>8 understand that during the course of the deposition</p> <p>9 you'll need to answer verbally so that the court</p> <p>10 reporter can record your answer?</p> <p>11 A. I do.</p> <p>12 Q. And during the course of the deposition, do</p> <p>13 you understand that if you need to take a bathroom break</p> <p>14 or any other kind of break, you can simply ask?</p> <p>15 A. I do.</p> <p>16 Q. And do you understand that before you take</p> <p>17 that break, if there's a pending question, you'll need</p> <p>18 to answer the question before we take the break?</p> <p>19 A. I do.</p> <p>20 Q. And do you understand that if during the</p> <p>21 course of the deposition if any of my questions are</p> <p>22 vague or I speak too fast or you have any kind of</p> <p>23 difficulty understanding me, you can stop and ask me to</p> <p>24 clarify?</p> <p>25 A. I do.</p>	8
7	<p>1 Q. And, lastly, do you understand that during the</p> <p>2 course of the deposition, you'll hear objections made;</p> <p>3 but you'll still have to answer the question until</p> <p>4 specifically instructed not to by your attorney?</p> <p>5 A. I do.</p> <p>6 Q. Have you ever been deposed before?</p> <p>7 A. Once.</p> <p>8 Q. How long ago was that?</p> <p>9 A. Probably about ten years or more.</p> <p>10 Q. Have you ever testified in a case before?</p> <p>11 A. I have not.</p> <p>12 Q. You are bringing this case on behalf of</p> <p>13 yourself and your patients, right?</p> <p>14 A. Correct.</p> <p>15 Q. What harm has the medical exception to Texas'</p> <p>16 abortion laws specifically caused you?</p> <p>17 MR. KABAT: Objection, form.</p> <p>18 A. It has made it more difficult for me to do my</p> <p>19 job.</p> <p>20 Q. (BY MR. STONE) Let's start with your job.</p> <p>21 What is your job?</p> <p>22 A. I am an OB/GYN. I practice general obstetrics</p> <p>23 and gynecology.</p> <p>24 Q. How has Texas' medical exception to its</p> <p>25 abortion laws made it more difficult for you to do your</p>	9

<p style="text-align: right;">10</p> <p>1 A. Yes.</p> <p>2 MR. KABAT: Objection, form.</p> <p>3 Q. (BY MR. STONE) Prior to the Dobbs decision</p> <p>4 and S.B. 8, did you perform abortions in Texas pursuant</p> <p>5 to the medical exceptions to Texas' abortion laws?</p> <p>6 MR. KABAT: Objection, form.</p> <p>7 A. Yes -- I'm sorry. Let me ask for</p> <p>8 clarification. You said "prior to" or "after"?</p> <p>9 Q. (BY MR. STONE) Prior.</p> <p>10 A. Yes.</p> <p>11 Q. So you have experience before the passage</p> <p>12 of S.B. 8 in applying the medical exception to Texas'</p> <p>13 abortion laws in your practice?</p> <p>14 MR. KABAT: Objection, form.</p> <p>15 (Simultaneous speakers.)</p> <p>16 MR. KABAT: Restating my objection to</p> <p>17 form.</p> <p>18 Q. (BY MR. STONE) I'm sorry. Did you answer?</p> <p>19 A. I said yes.</p> <p>20 Q. Okay. Yes.</p> <p>21 As you understand it, what was the</p> <p>22 medical exception to Texas' abortion laws prior to the</p> <p>23 passage of S.B. 8 and the Dobbs decision?</p> <p>24 A. I believe abortion was legal up to 20 weeks</p> <p>25 from conception; and I did not perform abortions beyond</p>	<p style="text-align: right;">12</p> <p>1 exceptions were exactly.</p> <p>2 Q (BY MR. STONE) Okay. Let me ask this a</p> <p>3 little differently. Do you know what the medical</p> <p>4 exception to Texas' abortion laws were prior to the</p> <p>5 passage of S.B. 8 and the Dobbs decision?</p> <p>6 MR. KABAT: Objection, form.</p> <p>7 Q. (BY MR. STONE) I'm sorry. I couldn't hear</p> <p>8 your answer.</p> <p>9 A. I do not.</p> <p>10 Q. Okay. Do you believe that Texas' abortion --</p> <p>11 the medical -- strike that.</p> <p>12 In your opinion, did the medical</p> <p>13 exception to Texas' abortion laws change after the Dobbs</p> <p>14 decision?</p> <p>15 A. It's hard for me to say since I don't know</p> <p>16 what it is -- what it was. I know what the current</p> <p>17 exceptions are.</p> <p>18 Q. Do you have any reason to believe that the</p> <p>19 current medical exception to Texas' abortion laws is any</p> <p>20 different than it was prior to the S.B. 8 and the Dobbs</p> <p>21 decision?</p> <p>22 MR. KABAT: Objection, form.</p> <p>23 A. Again, I don't know since I don't have a point</p> <p>24 of comparison.</p> <p>25 Q (BY MR. STONE) So is it fair to say that the</p>
<p style="text-align: right;">11</p> <p>1 that gestation, so I did not have concerns about the</p> <p>2 exact exceptions beyond that. I mean, I -- because</p> <p>3 abortion was legal up to 20 weeks from conception, I did</p> <p>4 not have to concern myself with whether I was crossing a</p> <p>5 line with a medical exception or not.</p> <p>6 I did terminate pregnancies by delivery</p> <p>7 beyond that gestation, but not with the intent of</p> <p>8 terminating the life of the fetus. I can give you an</p> <p>9 example if that would help.</p> <p>10 Q. Well, I'm just asking about -- let's -- I'm --</p> <p>11 let's focus on the definition as you understood it,</p> <p>12 though.</p> <p>13 So you testified that prior to the S.B. 8</p> <p>14 and Dobbs, you performed abortions pursuant to the</p> <p>15 medical exception that existed at that time to Texas'</p> <p>16 abortion laws, right?</p> <p>17 MR. KABAT: Objection, form.</p> <p>18 A. I'm not sure that I know what the medical</p> <p>19 exceptions were, and I didn't concern myself with that</p> <p>20 because my understanding is that abortions were legal up</p> <p>21 to 20 weeks from conception. And I always filled out</p> <p>22 the appropriate paperwork and submitted it to the State.</p> <p>23 I was never advised by any of the authorities at any of</p> <p>24 the facilities where I worked that I needed to qualify</p> <p>25 for any exception. So I cannot tell you what those</p>	<p style="text-align: right;">13</p> <p>1 medical exception to Texas' abortion laws, in your</p> <p>2 opinion, did not harm you prior to the Dobbs decision?</p> <p>3 MR. KABAT: Objection, form.</p> <p>4 A. I think that's fair to say.</p> <p>5 Q (BY MR. STONE) At what point did the medical</p> <p>6 exception to Texas' abortion laws first begin to harm</p> <p>7 specifically you?</p> <p>8 A. With the passage of S.B. 8.</p> <p>9 Q. And what about the passage of S.B. 8 caused</p> <p>10 the medical exception to Texas' abortion laws to first</p> <p>11 begin causing harm specifically to you?</p> <p>12 A. Because it became -- it came into play at that</p> <p>13 point prior to 20 weeks from conception, where it had</p> <p>14 not come into play in any cases or in almost any cases</p> <p>15 that I had experience with.</p> <p>16 Q. Have you performed any abortions in Texas</p> <p>17 since the passage of S.B. 8?</p> <p>18 A. I have not.</p> <p>19 Q. Why not?</p> <p>20 A. Because I was able to find alternate care for</p> <p>21 my patients, most of whom have means.</p> <p>22 Q. Are there any other reasons other than that</p> <p>23 you were able the find alternate care for your patients,</p> <p>24 most of whom have means, that you have not performed any</p> <p>25 abortions since the passage of S.B. 8 in Texas?</p>

14	<p>1 A. Yes, I do not want to get crossways with the 2 law. I don't want to have to defend myself. 3 Q. If you are successful in this lawsuit, will 4 you resume performing abortions in the state of Texas? 5 A. If the situation necessitates it, I will feel 6 more comfortable taking care of my patients here in 7 Houston. 8 Q. Have any -- so is it fair to say that if 9 you're suc- -- the difference between now and if you're 10 successful in this lawsuit is that you'll feel more 11 comfortable performing abortions pursuant to the medical 12 exception to Texas' abortion laws if the situation 13 necessitates it? 14 MR. KABAT: Objection, form. 15 A. I will feel more protected and less persecuted 16 in my efforts. 17 Q (BY MR. STONE) How will you feel more 18 protected? 19 A. I will feel like the risk of losing my license 20 and being imprisoned for life and having major financial 21 fines or hardships placed on me is less likely. 22 Q. How are you being persecuted? 23 A. I feel like the legislator [sic] has inserted 24 itself into my relationship with my patients when trying 25 to make decisions about their care.</p>	16	<p>1 A. It has restricted their access to medically 2 reasonable and, often, necessary care. 3 Q. How has it restricted their access to 4 necessary care? 5 MR. KABAT: Objection, form. 6 A. It has created an environment of confusion and 7 fear where their ability to access an abortion has been 8 seriously restricted, almost completely negated. 9 Q. (BY MR. STONE) Well, if it's often necessary 10 care -- strike that. 11 Can you give me an example of a patient 12 that you've treated that required necessary care that 13 included an abortion who was unable -- who was unable to 14 do so because of the exception -- the medical exception 15 to Texas' abortion laws? 16 MR. KABAT: Objection, form. 17 A. Sure. I have a patient who was pregnant with 18 her second child and at her first ultrasound beyond the 19 initial confirmation that she was pregnant and that 20 there was a heartbeat, the maternal-fetal medicine 21 physician reading the ultrasound images described an 22 anomaly called body-stalk anomaly, where many of the 23 organs were outside the fetal body and the fetus was 24 connected to the placenta by its liver. 25 This is, in my understanding, universally</p>
15	<p>1 Q. So is it fair to say that you believe the 2 Legislature is persecuting you? 3 A. That the State is with the Legislature as the 4 representative of the constituents. 5 Q. Are there any particular legislators that are 6 persecuting you? 7 MR. KABAT: Objection, form. 8 A. No. 9 Q (BY MR. STONE) And you said that the State -- 10 just the State is persecuting you as well; is that 11 correct? 12 A. Yes. 13 Q. Is there any particular person in the state 14 that is persecuting you? 15 A. I would say all of the elected representatives 16 who have made these -- who have passed these laws. 17 Q. And is that only the elected representatives 18 that voted for the laws, or do you include all the 19 legislators in the legislature? 20 A. I guess, technically, it's those that voted 21 for the law which caused it to pass. 22 Q. And can you name any of them? 23 A. No, I cannot. 24 Q. How has the medical exception to Texas' 25 abortion laws specifically harmed your patients?</p>	17	<p>1 fatal; and the patient had to travel 14 hours by car 2 with her partner and her toddler, all the while 3 suffering a kidney stone attack, which also was 4 dangerous, in order to get an abortion, 14 hours there 5 and 14 hours back, because the abortion could not be 6 performed here in Houston. 7 Q. Why couldn't the abortion be performed in 8 Houston? 9 A. Because the law -- the exceptions are very 10 vague and the patient's life was not in imminent danger 11 and I was advised by my maternal-fetal colleagues that 12 it did not meet the exception, in their opinion. 13 Q. Wait. So you didn't make a determination 14 whether or not this patient that we're talking about 15 here met the medical exception to Texas' abortion laws. 16 Is that accurate? 17 MR. KABAT: Objection, form. 18 A. I was very confused. I was not sure that she 19 met the exception or did not meet the exception. It was 20 very unclear to me. 21 Q (BY MR. STONE) So is it fair to say that you 22 didn't make a determination as to whether or not the 23 patient met the medical exception? 24 A. Did or didn't? I'm sorry. I couldn't hear. 25 Q. Yeah, let me rephrase. Did you make a</p>

<p style="text-align: right;">18</p> <p>1 determination, you, make a determination that the 2 patient did not -- that this patient did not qualify for 3 the medical exception? 4 A. Yes, but that was in consultation with my 5 high-risk obstetrical colleagues. 6 Q. You didn't consult with an attorney when 7 making that decision. Is that accurate? 8 A. I have been advised -- I did not in that 9 specific case. 10 Q. I don't want to know what you specifically 11 said back and forth with the attorney. I'm just asking 12 if you consulted or spoke with an attorney about it. 13 A. Not in that specific case. 14 Q. Okay. So is it fair to say that you relied on 15 the advice of your colleagues when determining that this 16 patient did not meet the medical exception to Texas' 17 abortion laws? 18 MR. KABAT: Objection, form. 19 MR. STONE: State your objection. 20 MR. KABAT: I think you're 21 mischaracterizing her prior testimony. 22 A. I have been told that -- or I have been 23 required by the facility where I practice that I can 24 perform an abortion; but I must have a second physician, 25 preferably a high-risk obstetrician, write in the</p>	<p style="text-align: right;">20</p> <p>1 Does Methodist have a policy detailing under what 2 circumstances you can perform an abortion pursuant to 3 the medical exception in Texas? 4 A. I'm not sure; but, again, we've been told we 5 cannot perform abortions. 6 Q. And to be clear, Children's and Methodist 7 told -- let me start with Children's. 8 To be clear, if I'm understanding you 9 correctly, Children's told you that you cannot perform 10 an abortion under any circumstances. Is that accurate? 11 A. Not without counsel from the hospital 12 attorneys. 13 Q. Okay. So the policy at Children's is that 14 you -- in order to perform an abortion pursuant to the 15 medical exception to Texas' abortion laws, you have to 16 first consult with the hospital's attorneys. Is that 17 accurate? 18 A. (No audible response.) 19 Q. And is it the same policy at Methodist? 20 A. I believe so. 21 THE REPORTER: I'm sorry. I missed the 22 last answer before this. 23 THE WITNESS: "Yes." 24 THE REPORTER: Thank you. 25 THE WITNESS: Thank you.</p>
<p style="text-align: right;">19</p> <p>1 patient's chart that they agree that the abortion is 2 necessary. 3 Q (BY MR. STONE) Ah, okay. What is the name 4 of the facility where you work that we're talking about 5 right now? 6 A. It's the Woman's Hospital of Texas. 7 Q. Woman's Hos- -- can I just refer to it as 8 Woman's Hospital? 9 A. Sure. 10 Q. Okay. Now, Woman's Hospital has a policy 11 explaining under what conditions a medical condition 12 would qualify for the medical exception to Texas' 13 abortion laws. Is that accurate? 14 A. Yes. I also have privileges at two other 15 facilities. 16 Q. What are those facilities? 17 A. The Pavil- -- Texas Children's Hospital and 18 the Methodist Hospital. 19 Q. Does Children's Hospital have a policy 20 explaining under what circumstances a medical condition 21 qualifies for the medical exception to Texas' abortion 22 laws? 23 A. Not that I'm aware of. We've been told we 24 cannot do abortions there. 25 Q. Does -- the same question, but for Methodist.</p>	<p style="text-align: right;">21</p> <p>1 Q (BY MR. STONE) Have you had a cir- -- any 2 circumstances at Children's Hospital where you had to 3 consult with the hospital's counsel on whether or not a 4 patient met the medical exception to Texas' abortion 5 laws? 6 A. No. 7 Q. What about at Methodist? 8 A. No. 9 THE REPORTER: Excuse me, Counsel. I'm 10 sorry. I'm hearing some background noise, and it's 11 causing me to have difficulty hearing the witness' 12 answers. 13 MR. STONE: Do you know who -- is 14 everybody muted? I'm not sure who it is. I hear it, 15 too. 16 And it's gone. That's good. 17 THE WITNESS: Okay. 18 Q. (BY MR. STONE) Okay. So let's go back to 19 Woman's then. What is the policy at Woman's Hospital 20 before performing an abortion pursuant to the medical 21 exception in Texas? 22 A. The policy was that we could perform an 23 abortion as long as it met the legal requirements at the 24 time. There were no restrictions other than those 25 placed by the law.</p>

22	<p>1 Q. Does the -- I'm asking about currently. At 2 Woman's Hospital, are you also required to check with 3 counsel prior to performing an abortion pursuant to the 4 medical exception? 5 A. My understanding, the last that I've heard, is 6 that we need to document in the chart, in the patient's 7 chart, that we believe that it is necessary in order to 8 keep -- to preserve the patients health; and we need to 9 have a second physician on staff at the hospital, 10 preferably a high-risk obstetrician, document the same. 11 Q. Is that a written policy? 12 A. I have not seen it in writing. I was advised 13 at a meeting. 14 Q. So going back to the patient that we were 15 talking about a few minutes ago, who was pregnant with 16 her second child and she had a body-stalk anomaly; is 17 that acc -- did I say that correctly? 18 A. I believe so, yes. 19 Q. Body-stalk anomaly. Back to that patient, so 20 a second physician was not willing to sign off on the -- 21 that it was medically necessary for that patient to have 22 an abortion at Woman's Hospital. Is that accurate? 23 A. Yes. 24 Q. Setting aside that second physician, you -- as 25 the treating physician, were you willing to sign off in</p>	24	<p>1 Q. Other than reading the statutes themselves, 2 are you relying on any other sources for guidance as to 3 what qualifies under the medical exception? 4 A. The hospital attorneys. 5 Q. Has -- what is ACOG? 6 A. ACOG is the American College of OB/GYN. 7 Q. Have they issued any guidance to physicians in 8 Texas about what qualifies for the medical exception to 9 Texas' abortion laws? 10 A. Not that I'm aware of. 11 Q. What about the Texas Medical Association? 12 A. Not that I'm aware of. 13 Q. If they issued guidance, would that be 14 something -- explaining what the -- what conditions 15 might qualify under the medical exception to Texas' 16 abortion laws, would that be helpful to you? 17 A. To some degree. 18 Q. When you perform -- prior to S.B. 8, did you 19 perform abortions at Woman's Hospital? 20 A. Yes. 21 Q. Children's Hospital? 22 A. Yes. 23 Q. Methodist Hospital? 24 A. No, not that I can recall. 25 Q. Other than those three -- I'm sorry -- those</p>
23	<p>1 the charts that an abortion was medically necessary for 2 that patient? 3 A. No. 4 Q. So both you and your colleague agreed that 5 this patient did not qualify for the medical exception 6 to Texas' abortion laws? 7 MR. KABAT: Objection, form. 8 A. I was unsure. I had doubt. 9 Q (BY MR. STONE) Have there been any other -- 10 strike that. 11 How long ago was -- how long ago -- 12 strike that. 13 When was this decision made with respect 14 to the patient that we're talking about with the 15 body-stalk anomaly? 16 A. It's probably been about six months or more. 17 Q. Since the passage of S.B. 8, have there been 18 any patients at Woman's Hospital that you were willing 19 to sign off on their chart that they met the exception 20 to -- the medical exception to Texas' abortion laws? 21 A. None that I was involved in, no, and none that 22 I know of. 23 Q. Have you read the statutes creating the 24 medical exception to Texas' abortion laws? 25 A. I have.</p>	25	<p>1 two hospitals, was there any other facility where you 2 performed abortions prior to S.B. 8? 3 A. Yes, St. Luke's Hospital and Planned 4 Parenthood and in my residency in North Carolina. 5 Q. Ah. I may have asked a question without any 6 time restrictions. So let me -- when did you stop -- do 7 you currently hold privileges at St. Luke's? 8 A. No. 9 Q. How long has it been since you held privileges 10 at St. Luke's? 11 A. I let them expire maybe a couple -- a few 12 years ago. 13 Q. Years ago. Okay. 14 And Planned Parenthood, is Planned 15 Parenthood still open, the facility that you previously 16 performed abortions at? 17 A. Yes. 18 Q. Do they still offer abortion services at that 19 facility? 20 A. Not that I'm aware of. 21 Q. So is it fair to say that since the passage 22 of S.B. 8, the reason that you have not performed an 23 abortion in Texas is because you have not had a case 24 that qualified for the medical exception at Woman's 25 Hospital or at Children's Hospital?</p>

<p style="text-align: right;">26</p> <p>1 MR. KABAT: Objection, form.</p> <p>2 A. I have had a couple of cases that needed an</p> <p>3 abortion; but due to the vagueness of the law, I did not</p> <p>4 feel comfortable performing an abortion.</p> <p>5 Q. (BY MR. STONE) Okay. How many cases,</p> <p>6 approximately?</p> <p>7 A. A handful, two that I can recall the details</p> <p>8 of. I think there were maybe a couple of others.</p> <p>9 Q. Let's talk about those two that you can recall</p> <p>10 the details of. What was the circumstances in the first</p> <p>11 case -- we'll call them Case One and Case Two.</p> <p>12 What were the circumstances in Case One</p> <p>13 that made you believe that it might qualify for the</p> <p>14 medical exception to Texas' abortion laws?</p> <p>15 A. Well, the case we talked about, because</p> <p>16 the -- every pregnancy has risk; and the patient takes a</p> <p>17 risk in the hopes of having a viable child. And since</p> <p>18 that fetus did not have a chance of survival, there was</p> <p>19 risk -- there's always risk -- without any potential</p> <p>20 gain.</p> <p>21 Q. In Case Number One, with the body-stalk</p> <p>22 anomaly, in your opinion, did the -- did that involve</p> <p>23 a life-threatening physical condition that, in your</p> <p>24 reasonable medical judgment, regardless of the provision</p> <p>25 of lifesaving medical treatment, would be incompatible</p>	<p style="text-align: right;">28</p> <p>1 met the medical exception to Texas' abortion laws, why</p> <p>2 didn't you ask Woman's Hospital's attorneys for</p> <p>3 clarification?</p> <p>4 MR. KABAT: Objection, form.</p> <p>5 A. Well, for one, they're the hospital's</p> <p>6 attorneys and they are not my attorneys and I did not --</p> <p>7 I do not have the means to go out and hire an attorney</p> <p>8 every time I need to make a medical decision. And the</p> <p>9 hospital attorneys might give me permission to do the</p> <p>10 procedure, but they're not going to protect me or argue</p> <p>11 my case if I am found -- or dragged into court if the</p> <p>12 State wants to prosecute me for something they think</p> <p>13 does not meet the qualifications or the requirements.</p> <p>14 There's also a vigilante component. So</p> <p>15 it's not just the State; it's also any person who gets</p> <p>16 wind of the fact that an abortion was performed.</p> <p>17 Q. (BY MR. STONE) So is it fair to say that you</p> <p>18 didn't check -- strike that.</p> <p>19 Is it fair to say that you didn't ask the</p> <p>20 hospital attorneys for Woman's Hospital whether or not</p> <p>21 Case Number One qualified for the medical exception</p> <p>22 because they wouldn't represent you if you were</p> <p>23 subsequently prosecuted for violating Texas' abortion</p> <p>24 laws?</p> <p>25 A. That's one of many reasons.</p>
<p style="text-align: right;">27</p> <p>1 for life outside the womb for the fetus?</p> <p>2 A. Could you repeat that?</p> <p>3 Q. Sure. In your opinion, in Case Number One,</p> <p>4 involving the body-stalk anomaly, did that involve a</p> <p>5 severe fetal abnormality such that it was a</p> <p>6 life-threatening physical condition that, in your</p> <p>7 reasonable medical judgment, regardless of the</p> <p>8 provision of lifesaving medical treatment, would have</p> <p>9 been incompatible with life outside the womb for that</p> <p>10 child?</p> <p>11 A. Yes.</p> <p>12 Q. If -- here's what I don't understand, Doctor:</p> <p>13 If you were confused in Case Number One as to whether or</p> <p>14 not it qualified for the medical exception to Texas'</p> <p>15 abortion laws, why didn't you ask Woman's Hospital's</p> <p>16 attorneys?</p> <p>17 A. (No audible response.)</p> <p>18 Q. Am I muted?</p> <p>19 A. No.</p> <p>20 Q. Oh, okay. You can hear me. Okay.</p> <p>21 A. Was that the whole question?</p> <p>22 Q. Yes.</p> <p>23 A. Why didn't I ask the hospital's attorneys</p> <p>24 for...</p> <p>25 Q. If you were uncertain whether Case Number One</p>	<p style="text-align: right;">29</p> <p>1 Q. Okay. What were the -- what are the other</p> <p>2 reasons?</p> <p>3 A. I didn't have a maternal-fetal medicine</p> <p>4 specialist willing to stick their neck out and document</p> <p>5 that it was necessary, medically necessary.</p> <p>6 Q. Why would you need an M -- when you say</p> <p>7 "maternal-fetal medicine," can I call them "MFM"?</p> <p>8 A. Sure.</p> <p>9 Q. Why would it matter if an MFM was willing to</p> <p>10 stick their neck out for you to ask -- strike that.</p> <p>11 Have you ever asked counsel at Woman's</p> <p>12 Hospital to provide you with guidance in any other cases</p> <p>13 before?</p> <p>14 MR. KABAT: Objection. I'm going to</p> <p>15 instruct the witness not to answer and possibly reveal</p> <p>16 the conversations she may or may not have had with her</p> <p>17 hospital attorneys.</p> <p>18 MR. STONE: I'm not asking for the</p> <p>19 contents of the conversation. I'm asking if she's ever</p> <p>20 consulted with them on a case before. It's privileged,</p> <p>21 the contents of the communication, but not the existence</p> <p>22 of the conversations.</p> <p>23 MR. KABAT: If you'd like to, restate the</p> <p>24 question in that way.</p> <p>25 MR. STONE: Sure, sure.</p>

<p style="text-align: right;">30</p> <p>1 Q (BY MR. STONE) Without disclosing the 2 contents of the conversations, have you ever consulted 3 with the attorneys for Woman's Hospital on a case in the 4 past? 5 A. Not directly, no. 6 Q. Why would an MFM not being willing to stick 7 their neck out and say that Case Number One was 8 medically necessary hinder you from consulting with the 9 attorneys at Woman's Hospital on whether or not, in 10 their opinion, it met the medical exception to Texas' 11 abortion laws? 12 MR. KABAT: Objection, form. 13 A. Well, that was based on the guidance I had 14 received when S.B. 8 came out that the hospital 15 attorneys said that they would back us up or that they 16 would -- that the Hospital, itself, would support or 17 open the door to us performing an abortion if we had a 18 second consultant who was willing to document their 19 agreement with the decision. 20 MR. KABAT: Before we go any further, I 21 do want to -- 22 MR. STONE: Yeah. 23 MR. KABAT: -- caution Dr. Karsan that 24 any communications that are with the hospital attorneys, 25 the substance of those communications are privileged and</p>	<p style="text-align: right;">32</p> <p>1 the hospital would not defend you if you were prosecuted 2 for violating Texas abortion laws, were there any other 3 reasons that you didn't check with the attorneys for 4 Woman's Hospital in Case Number One to determine whether 5 or not it met the medical exception to Texas' abortion 6 laws? 7 A. I also felt that it would potentially be less 8 of a barrier to try to expedite the care for the patient 9 and not take additional steps to delay her care since 10 the later an abortion is performed, the more risky it is 11 for the mother. 12 Q. But is it fair to say that you don't know how 13 long it would have taken for the hospital attorneys to 14 give you an answer, right? 15 MR. KABAT: Objection, form. 16 A. I can only have an opinion based on prior 17 experience. 18 Q (BY MR. STONE) But didn't you testify earlier 19 that you hadn't actually directly consulted with the 20 attorneys at Woman's Hospital on any prior cases? 21 A. My prior experience is with the chain of 22 command, which is usually how this works in the 23 hospital. So I would go to the chief of obstetrics, who 24 would go to the CMO, who would then go to the attorneys. 25 Whenever we have a concern, we are to work through the</p>
<p style="text-align: right;">31</p> <p>1 should not be disclosed. And so I'm instructing you not 2 to answer any questions that go to the content of any 3 conversations you have had with the hospital attorneys, 4 either that they -- information they have told to you or 5 information -- 6 THE WITNESS: Passed on to us by 7 leadership, yeah. 8 A. Sorry. That was a one step removed. 9 Q. (BY MR. STONE) I see. So the attorneys 10 didn't tell you this. Somebody else at the hospital 11 told you this? 12 A. The leadership at the hospital, the 13 administration. 14 Q. The leadership. 15 But going along with what Nicolas said, 16 in none of the questions I'm asking you do I want you to 17 tell me anything an attorney, you know, had -- told you, 18 okay, just to be clear. That information's going to be 19 privileged, and I'm not asking that specific -- for 20 that specific information in my questions. Do you 21 understand? 22 A. Yes. 23 Q. So other than -- other than an MFM not being 24 willing to stick their neck out to say that it was 25 medically necessary and the fact that the attorneys for</p>	<p style="text-align: right;">33</p> <p>1 chain of command. 2 Q. And, in your prior experience, how long does 3 the -- how much of a delay is caused by having to work 4 through the bureaucracy of the chain of command? 5 A. A few days. Honestly, it was kind of a 6 Plan A/Plan B. I mean, if the patient hadn't been able 7 to find her own way and fund it, then I would have been 8 forced to pursue that. 9 Q. And who would have forced you to pursue it? 10 A. My ethics. I would say I'm in the minority in 11 being willing to fight for my patients. I'm probably in 12 the -- in the extreme. 13 Q. When you say that your ethics would have 14 forced you to -- strike that. 15 Okay. So in Case Number One, Plan A was 16 to do what? 17 A. To connect her with resources out of state to 18 support her in figuring out -- her and her partner in 19 figuring out how and where they could get the necessary 20 care. 21 Q. Ah. And did that patient eventually -- strike 22 that. 23 So the patient drove 14 hours to the 24 location where she had an abortion and 14 hours back. 25 So that is 28 hours in a car, right?</p>

34

1 A. Yes.

2 Q. Okay. And how long after you presented Plan A

3 to the patient did she wait before getting the abortion?

4 A. I don't remember exactly, but it might have

5 been all done within a week. There was a delay because

6 she had kidney stones that she might need to be

7 hospitalized for.

8 Q. So Plan A took about a week; and Plan B could

9 have taken, based on your prior experience with the

10 bureaucracy of the chain of command at Woman's Hospital,

11 a couple of days. Is that accurate?

12 A. I would say --

13 MR. KABAT: Objection, form.

14 THE WITNESS: Sorry.

15 A. I would say a few days, but that was just to

16 get clarification. That's not to have the procedure

17 scheduled and performed and completed.

18 Q (BY MR. STONE) Do you know how long it would

19 take, just if you know, between getting approval and

20 then scheduling and performing the abortion at Woman's

21 Hospital?

22 A. Typically, a few days.

23 Q. So it might have taken a few days to get

24 through the bureaucracy and then a few days to get it

25 scheduled and performed. Is that accurate?

35

1 A. I think that's fair.

2 Q. So, in your opinion -- strike that.

3 Did you present in Case -- the patient in

4 Case Number One with options, with Plan A and Plan B?

5 A. I told her that we could try to get it

6 approved, but I wasn't sure that we would get approval.

7 Q. What did she say when you told her that you

8 could try to get approval through the hospital, but you

9 weren't sure if you would get approval?

10 A. I -- I don't know that she said much. She --

11 I advised her to go ahead and start looking at her

12 options herself.

13 Q. So the patient never actually declined Plan B?

14 A. Not that I recall, no.

15 Q. Is that because -- strike that.

16 Let's talk about Case Number Two.

17 A. Okay.

18 Q. What do you recall about Case Number Two?

19 A. I was on call. I was called to the ER to see

20 a patient of one of my partner's who had come in

21 bleeding more than just spotting. She had reportedly

22 passed some clots, and she was 15 weeks pregnant. And

23 the ER physician had ordered an ultrasound, which

24 revealed a living 15-week fetus with anencephaly and a

25 large subchorionic hemorrhage.

36

1 Q. What was the word right before hemorrhage?

2 A. Subchorionic.

3 Q. And what does that mean?

4 A. It means that there was an area of bleeding

5 from the placenta that had accumulated outside the bag

6 that the fetus is in, the sac, the amniotic sac.

7 Q. Why did you think that Case Number Two might

8 qualify for the medical exception to Texas' abortion

9 laws?

10 A. Because the patient had an increased risk of

11 hemorrhage above that that any patient has and the fetus

12 had no possibility of survival.

13 Q. So would you agree that -- strike that.

14 When you say that the fetus had no

15 possibility of survival, do you mean that it had a

16 life-threatening physical condition that, in your

17 reasonable medical judgment, regardless of the provision

18 of lifesaving medical treatment, was incompatible with

19 life outside the womb?

20 A. Yes.

21 Q. So why didn't you perform -- strike that.

22 Were you willing to sign off on the

23 charts in Case Number Two that the patient met the

24 medical exception to Texas' abortion laws?

25 A. Yes.

37

1 Q. Did you, in fact, sign off on the medical

2 records for Case Number Two indicating that you believed

3 it met the medical exception to Texas' abortion laws?

4 A. I did not document it in the chart. I had

5 that conversation.

6 Q. Was there a second physician at Woman's

7 Hospital -- strike that.

8 Was Case Number Two at Woman's Hospital?

9 A. Yes, it was.

10 Q. Was there a second physician at Woman's

11 Hospital willing to sign off on the patient's chart

12 documenting that she met the medical exception to Texas'

13 abortion laws?

14 A. No.

15 Q. How many physicians did you speak with --

16 sorry. Strike that.

17 How do you know that there wasn't a

18 second physician willing to sign off on Case Number Two?

19 A. I am confident of that because the physician

20 that I consulted with is the physician at our hospital

21 who takes care of the highest of the highest risk

22 patients and is involved in hospital leadership.

23 Q. So, for the record, because, you know, we're

24 just lawyers; we don't work in a hospital environment,

25 how does the process work when you consult with -- when

<p style="text-align: right;">38</p> <p>1 you say that you consulted with a physician on the case 2 at the hospital? 3 A. I asked for a maternal-fetal medicine consult 4 from this physician who is my go-to for my highest risk 5 patients because she's so responsive and proactive. And 6 she actually agreed to see the patient right then and 7 there, even though it was the weekend. I put the 8 patient in a wheelchair from the ER and took her up to 9 the ultrasound room, where the physician met me; and she 10 performed an ultrasound and provided her opinion. 11 Q. What was her -- was that when the patient 12 received the anencephaly diagnosis? 13 A. I shared the results of the radiology 14 ultrasound with her, so that's when she found out. 15 Q. Okay. 16 A. And shortly after, she went for another 17 ultrasound performed by the maternal-fetal medicine 18 specialist. 19 Q. Did you discuss with the -- well, who is the 20 MFM that we're talking about in Case Number Two? 21 A. Am I required to share that? It's part of the 22 patient's protected -- 23 MR. KABAT: I'm going to request that she 24 not answer that unless we have a Protective Order in 25 place to make sure that confidential information like</p>	<p style="text-align: right;">40</p> <p>1 that? 2 A. I don't know that I said anything. I mean, 3 what am I supposed to say? I mean, that -- I was 4 frustrated; but I didn't say or document anything to 5 that effect. 6 Q. Did you consult with any other providers 7 at Woman's Hospital to see if they thought that Case 8 Number Two would meet the medical exception to Texas' 9 abortion laws? 10 A. I did not. Since one opinion had already been 11 given and the facts of the case were not in question, it 12 didn't require a medical opinion. 13 Q. What do you mean, it didn't require a medical 14 opinion? 15 A. A medical opinion was already given, and I 16 didn't feel that I would get a different consultation 17 from any other physician. 18 Q. So you didn't feel like any other physician 19 at the hospital would have given you a different answer 20 as to whether Case Number Two would meet the medical 21 exception to Texas' abortion laws. Is that accurate? 22 A. Correct. It's very difficult for a general 23 OB/GYN, in particular, to go against the recommendations 24 of a maternal-fetal medicine and it was the weekend and 25 there weren't -- you know, there were only a certain</p>
<p style="text-align: right;">39</p> <p>1 that is governed by a Protective Order. 2 MR. STONE: So...(laughing.) 3 So we sent you a -- Nicolas, we sent you 4 a Protective Order last week. Have you guys had an 5 opportunity to review the Protective Order that we sent? 6 MR. KABAT: We're still reviewing it. If 7 you understand, Jonathan, we've had depositions. It's 8 also been a holiday weekend. So we're still in the 9 process of reviewing it. We also have to discuss it 10 with 15 individual Plaintiffs. So that, of course, will 11 take time; but we are promising to get back to you on 12 it. 13 MR. STONE: Okay. 14 Q. (BY MR. STONE) So let's call this -- we'll 15 just call them the physicians. 16 Okay. So did you speak with the MFM that 17 you were consulting with specifically about whether or 18 not Case Number Two met the medical exception to Texas' 19 abortion laws? 20 A. Yes. 21 Q. And what did that provider say? 22 A. That since the patient was not actively 23 hemorrhaging, that she did not feel that the patient 24 qualified. 25 Q. How did you respond when the MFM told you</p>	<p style="text-align: right;">41</p> <p>1 number of people available on call. 2 Q. Did you consult with the attorneys for Woman's 3 Hospital in Case Number Two to determine whether they 4 believed it met the medical exception? 5 A. I did not. 6 MR. KABAT: Objection. 7 I just always want to clarify before 8 these questions about her conversations or possible 9 consultations with attorneys to remind Dr. Karsan that 10 any conversations with the hospital attorneys, including 11 conversations that are mediated through the hospital 12 administrators, should be not -- should not be 13 disclosed, as privileged. 14 THE WITNESS: Thank you. 15 Q. (BY MR. STONE) Did you send -- did you send 16 Case Number 2 up through Woman's Hospital's chain-of- 17 command bureaucracy to check if anyone else thought that 18 it meet the medical exception to Texas' abortion laws? 19 A. I did not. 20 Q. In Case Number Two was it also a Plan A/ 21 Plan B type situation, as was the case with Case 22 Number One? 23 A. Yes. 24 Q. In other words, in Case Number Two, if the 25 patient had any difficulty obtaining an abortion, then</p>

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1 you would have sent it up through the chain of command
 2 to check with counsel to see if it would have qual- --
 3 if they thought that it qualified?
 4 A. Potentially, yes.
 5 Q. Okay. Did you present Plan A and Plan B to
 6 the patient in Case Number Two?
 7 A. Yes, and Plan C.
 8 Q. Oh, and what was Plan C?
 9 A. To go home and come back if she starts
 10 hemorrhaging and that I would provide her an abortion
 11 on the spot.
 12 Q. If -- so when you say "abortion on the spot,"
 13 if she was hemorrhaging, would you still have needed a
 14 second doctor to sign off on that at Woman's Hospital?
 15 A. It depends how dire the situation was. I
 16 mean, I would have tried to get that as quickly as I
 17 could; but it wouldn't keep me from trying to save her
 18 life.
 19 Q. So if she was hemorrhaging and she came back,
 20 you would perform an abortion regardless -- for her
 21 regardless of whether a second physician signed off on
 22 it, depending on the severity?
 23 MR. KABAT: Objection. I think that's
 24 not -- that's misstating her testimony.
 25 A. I mean, yes, it would depend on -- this is a

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1 very -- these can be very fluid situations. So it
 2 would -- I would have to make a decision in the moment,
 3 as we often do.
 4 Q (BY MR. STONE) A decision on whether or not
 5 to get a second signature?
 6 A. Well, a decision how to proceed in the moment,
 7 depending on the urgency of the clinical situation.
 8 Q. Doctor, I'm confused. A moment ago you said
 9 Plan C was that you would send her home and if she
 10 started hemorrhaging, that she should come back and
 11 you would perform an abortion on the spot, right?
 12 A. That's what I said.
 13 Q. Okay. Are you saying that it's actually
 14 more nuanced than that; it would have depended on
 15 presentation and other circumstances on whether or not
 16 you would have performed an abortion on the spot?
 17 A. Well, it depends how you define "on the spot."
 18 I mean, there are times when we roll straight from the
 19 ER to the OR because the patient's life is in imminent
 20 danger in the moment; and there are more -- it's a
 21 continuum. So, you know, I may make calls, make
 22 consultations, as we are moving in that direction.
 23 Q. Got it. So what do you mean when -- strike
 24 that.
 25 What did you mean when you said "on the

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1 spot"?
 2 A. At the -- when she came back to the hospital,
 3 you know, on that admission.
 4 Q. Okay. So at some point during that admission
 5 is what you meant by "on the spot"?
 6 A. Correct.
 7 MR. STONE: We've been going for almost
 8 an hour and a half. Do you mind if we take a quick
 9 coffee break to refill and bathroom break, Doctor?
 10 THE WITNESS: No, not at all.
 11 MR. STONE: Okay. If it's okay with you
 12 Nicolas, why don't we go off the record?
 13 MR. KABAT: Sounds good.
 14 THE REPORTER: We're going off the record
 15 at 10:52 a.m.
 16 (Off the record from 10:52 to 11:00 a.m.)
 17 THE REPORTER: We're going back on the
 18 record at 11:00 a.m.
 19 Q (BY MR. STONE) In Case Number Two, did the
 20 patient obtain an abortion?
 21 A. I don't know.
 22 Q. Other than Cases Number 1 and 2, are there any
 23 other cases that you can recall the details of since the
 24 passage of S.B. 8 where you believed a patient may have
 25 qualified for the -- that you were treating at Woman's

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1 Hospital, may have qualified for the medical exception
 2 to Texas' abortion laws?
 3 A. There may have been a couple of anomalies, but
 4 none that had such pressing medical conditions.
 5 Q. I want to share with you in the chat what I'm
 6 marking as Exhibit A.
 7 (Exhibit A marked.)
 8 Q (BY MR. STONE) It's your affidavit in this
 9 case. Do you see Exhibit A in the chat?
 10 A. I'm pulling it up now.
 11 Yes, I see it.
 12 Q. I would like to start with a question about
 13 Paragraph -- let me step back. Strike that.
 14 Did you write Exhibit A?
 15 A. It was -- it was the result of consultation
 16 with my attorneys.
 17 Q (BY MR. STONE) Did you -- and I don't want to
 18 get into any of the contents of your conversations with
 19 your attorneys. I'm just asking, like: Who drafted up
 20 Exhibit A that has your signature on it?
 21 A. I provided the content. The actual draft was
 22 provided by legal counsel.
 23 Q. Okay. I want to ask about Paragraph Number 8
 24 on page 2 of Exhibit A. Could you turn to that and let
 25 me know when you have it on the screen?

<p style="text-align: right;">46</p> <p>1 A. I'm looking at it.</p> <p>2 Q. Okay. I want to ask about the first sentence.</p> <p>3 Could you read the first sentence, since it's really</p> <p>4 short, for the record?</p> <p>5 A. Sure. "This uncertainty regarding Texas'</p> <p>6 abortion bans has delayed or barred the provision of</p> <p>7 important obstetrical care, including abortion care for</p> <p>8 our patients, and put our patients' lives and health</p> <p>9 (including their fertility) at risk."</p> <p>10 Q. Have you delayed the provision of important</p> <p>11 obstetric care to patients because of your uncertainty</p> <p>12 about Texas' abortion ban -- sorry -- the medical</p> <p>13 exception to Texas' abortion laws?</p> <p>14 A. Yes.</p> <p>15 Q. How many patients have you delayed the</p> <p>16 provision of important obstetric care because of your</p> <p>17 uncertainty about Texas' -- the medical exception to</p> <p>18 Texas' abortion laws?</p> <p>19 UNKNOWN SPEAKER: Do you want this shut?</p> <p>20 THE WITNESS: Yes. Sorry.</p> <p>21 Sorry. Somebody was closing my door. I</p> <p>22 hadn't closed it all the way.</p> <p>23 A. The two are the most -- the two cases we</p> <p>24 discussed are the most clear-cut cases, in my mind.</p> <p>25 Q. (BY MR. STONE) Okay. So let's talk about</p>	<p style="text-align: right;">48</p> <p>1 had to get the same exact care elsewhere had there not</p> <p>2 been than a concern about the abortion ban in Texas.</p> <p>3 Q. I think I understand. Is the issue -- the</p> <p>4 issue's the abortion ban, not the medical exception to</p> <p>5 the abortion ban. Is that accurate as to what you're</p> <p>6 describing here in Paragraph 8?</p> <p>7 A. Well, the ban and the exceptions are very</p> <p>8 unclear. I think there's a lot of confusion and fear.</p> <p>9 Q. In Case Number Two, how long was the delay in</p> <p>10 the provision of important obstetric care to the patient</p> <p>11 due to the medical exception to Texas' abortion law?</p> <p>12 A. I don't know since I did not have ongoing care</p> <p>13 with that patient. That was an emergency call coverage</p> <p>14 situation. All I know is that she could have gotten</p> <p>15 care while she was there on that visit to the hospital,</p> <p>16 and that did not happen. Therefore, she continued to</p> <p>17 have a heightened risk for hemorrhage when she left the</p> <p>18 hospital.</p> <p>19 Q. I want to ask you about Paragraph Number 10 in</p> <p>20 Exhibit A. It's short. Could you read it, for the</p> <p>21 record, out loud?</p> <p>22 A. You said Paragraph 10?</p> <p>23 Q. Yes, ma'am -- or Doctor. I'm sorry.</p> <p>24 A. "I have also personally treated pregnant</p> <p>25 patients with emergent medical conditions since S.B. 8</p>
<p style="text-align: right;">47</p> <p>1 Case Number One. How much of a delay did your</p> <p>2 uncertainty about the medical exception to Texas'</p> <p>3 abortion law result in the provision of important</p> <p>4 obstetric care to the patient?</p> <p>5 MR. KABAT: Objection, form.</p> <p>6 A. I would say a week or two, but that's only</p> <p>7 because she could travel because she actually was able</p> <p>8 to do that on her own without my assistance.</p> <p>9 Q. (BY MR. STONE) I guess I'm confused because</p> <p>10 didn't you testify that in Case Number One, the issue</p> <p>11 was that a second physician, the MFM, was unwilling to</p> <p>12 sign off in the medical records that the case met the</p> <p>13 medical exception to Texas' abortion laws, right?</p> <p>14 A. Correct.</p> <p>15 Q. So how -- I guess I'm trying to understand:</p> <p>16 Where's the week or two delay?</p> <p>17 A. Previously, I would have scheduled the</p> <p>18 procedure if the patient wished to proceed; and I would</p> <p>19 have performed it here in Houston without her having to</p> <p>20 make an appointment out of state, having to take the</p> <p>21 time and expense of travelling. And I could have also</p> <p>22 addressed the other surrounding issues, like her kidney</p> <p>23 stones. It took that much time for her to make the</p> <p>24 appointment, make the arrangements, and to go, none of</p> <p>25 which she would have had to have done; she wouldn't have</p>	<p style="text-align: right;">49</p> <p>1 took effect and consulted with colleagues about the care</p> <p>2 of such patients. In my experience, an emergency [sic]</p> <p>3 condition or emergency situation cannot be formulaically</p> <p>4 defined and will always depend on the patient's unique</p> <p>5 situation."</p> <p>6 Q. So it's your opinion that the medical</p> <p>7 exception cannot be -- to Texas' abortion laws cannot be</p> <p>8 formulaically defined; is that correct?</p> <p>9 MR. KABAT: Objection, form.</p> <p>10 Q. (BY MR. STONE) I'm sorry. I couldn't hear</p> <p>11 your answer.</p> <p>12 A. Yes.</p> <p>13 Q. And just to remember, we're going to wait a</p> <p>14 beat so that Nicolas has an opportunity to unmute and</p> <p>15 object, okay?</p> <p>16 What do you mean by "formulaically</p> <p>17 defined"?</p> <p>18 A. I mean that every situation is unique and</p> <p>19 nuanced, that medical conditions are often a continuum;</p> <p>20 and it's very difficult to put each one in a box.</p> <p>21 Q. In your opinion, would it be impossible for</p> <p>22 Texas to have an emergency medical condition definition</p> <p>23 to its abortion laws?</p> <p>24 A. I would say it would be very, very, very</p> <p>25 difficult to have legislation that covered every</p>

<p style="text-align: right;">50</p> <p>1 scenario.</p> <p>2 Q. So would you agree that having a broad</p> <p>3 definition -- strike that.</p> <p>4 Do you agree with me that the medical</p> <p>5 exception to Texas' abortion laws is written broadly?</p> <p>6 A. Yes.</p> <p>7 Q. And it can encompass a whole host of different</p> <p>8 presentations that have -- that -- strike that.</p> <p>9 It's written broadly enough to cover many</p> <p>10 different scenarios or presentations that patients may</p> <p>11 present with?</p> <p>12 A. Or exclude --</p> <p>13 MR. KABAT: Objection, form.</p> <p>14 THE WITNESS: Sorry.</p> <p>15 A. Which is why it can also -- yes, which is why</p> <p>16 it can also exclude a lot of situations, like not cover</p> <p>17 but...</p> <p>18 Q. (BY MR. STONE) So because it's written so</p> <p>19 broadly, it excludes a lot of situations. Is that what</p> <p>20 you're saying?</p> <p>21 A. Well, I think it leaves room for confusion,</p> <p>22 debate, liability.</p> <p>23 Q. So you want -- so, ideally, we would have not</p> <p>24 a -- strike that.</p> <p>25 So, ideally, what we would want is a very</p>	<p style="text-align: right;">52</p> <p>1 Exhibit A. Could you just read the first sentence out</p> <p>2 loud?</p> <p>3 A. Let me pull it up again.</p> <p>4 Q. Okay.</p> <p>5 A. I put it down so I could see people's faces.</p> <p>6 So Paragraph 11.</p> <p>7 Q. Yes, just the first sentence.</p> <p>8 A. "Since Roe versus Wade was overturned, I have</p> <p>9 treated patients with emergent medical conditions,</p> <p>10 including patients carrying pregnancies with lethal</p> <p>11 fetal conditions who need [sic] treatment for</p> <p>12 complications like kidney stones, bipolar disorder, and</p> <p>13 hemorrhage."</p> <p>14 Q. So I had a couple of questions. Is the lethal</p> <p>15 fetal condition the kidney stones?</p> <p>16 A. No.</p> <p>17 Q. Okay. So is it -- so -- I'm trying to parse</p> <p>18 the sentence and understand it. So you've treated</p> <p>19 patients with emergency medical conditions, including</p> <p>20 patients who carry pregnancies with lethal fatal [sic]</p> <p>21 conditions. Is that accurate?</p> <p>22 [Indiscernible interruption.]</p> <p>23 THE WITNESS: I'm so sorry. I don't know</p> <p>24 how to turn that off. I gave my phone to my office</p> <p>25 manager, but it's linked to my laptop. And since I</p>
<p style="text-align: right;">51</p> <p>1 specific definition of "medical emergencies" in -- for</p> <p>2 the medical exception to Texas' abortion laws. Is that</p> <p>3 accurate?</p> <p>4 MR. KABAT: Objection, form.</p> <p>5 A. Ideally, we would allow physicians to use</p> <p>6 their medical judgment without fear of liability.</p> <p>7 Q. (BY MR. STONE) And is it your testimony that</p> <p>8 they can't use their medical judgment without fear of</p> <p>9 liability if there's a broad definition of "medical</p> <p>10 emergencies"?</p> <p>11 A. Yes.</p> <p>12 Q. So, conversely, would they not have the fear</p> <p>13 of liability if there was a more specific definition of</p> <p>14 "medical emergency"?</p> <p>15 A. It's an impossible situation.</p> <p>16 Q. Okay. So you want a definition of "medical</p> <p>17 emergency" that is both broad but also specific, and</p> <p>18 it's impossible to craft something like that. Is that</p> <p>19 fair?</p> <p>20 MR. KABAT: Objection, form.</p> <p>21 A. It's very, very, very difficult.</p> <p>22 Q. (BY MR. STONE) Before we switch to a</p> <p>23 different document, I want to -- well, let's finish with</p> <p>24 this one.</p> <p>25 So I want to ask about Paragraph 11 of</p>	<p style="text-align: right;">53</p> <p>1 couldn't get on from the desktop, it's still sending</p> <p>2 messages. I apologize.</p> <p>3 MR. STONE: Yeah. No problem -- or the</p> <p>4 court reporter can tell us if it's a problem if she's</p> <p>5 having difficulty reading [sic.]</p> <p>6 Q. (BY MR. STONE) I just wanted to parse this</p> <p>7 sentence, but I didn't entirely understand it as</p> <p>8 written.</p> <p>9 So since Roe versus Wade was overturned,</p> <p>10 you've treated patients with emergent medical</p> <p>11 conditions, including patients carrying pregnancies</p> <p>12 with lethal fetal conditions, right?</p> <p>13 A. Right, but that's in addition. That's the</p> <p>14 first part; but then, lethal fetal conditions who need</p> <p>15 treatment for conditions or complications. So emergent</p> <p>16 medical conditions are the kidney stones, bipolar</p> <p>17 disorder, and hemorrhage.</p> <p>18 Q. Okay. Okay. I see. So the emergent medical</p> <p>19 conditions are kidney stones, bipolar disorder, and</p> <p>20 hemorrhage; and, separately, those pregnancies also</p> <p>21 involved a pregnancy with a lethal fetal condition,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. Is it your -- is it your understanding of the</p> <p>25 law that a lethal fetal condition, in and of itself,</p>

<p style="text-align: right;">54</p> <p>1 does not qualify for the medical exception to Texas' abortion laws?</p> <p>2</p> <p>3 MR. KABAT: Objection, form.</p> <p>4 A. I'm not certain. Again, I'm not an attorney; and the language is confusing.</p> <p>5</p> <p>6 Q (BY MR. STONE) Right. I understand you're not an attorney and I'm not asking for a legal conclusion; but you determined in each of these cases that these patients did not qualify for the medical exception to Texas' abortion laws, right?</p> <p>7</p> <p>8 MR. KABAT: Objection, form.</p> <p>9</p> <p>10 MR. STONE: State your objection.</p> <p>11</p> <p>12 MR. KABAT: I think it's mischaracterizing her prior testimony.</p> <p>13</p> <p>14 Q (BY MR. STONE) Go ahead.</p> <p>15</p> <p>16 A. I think that the complicating factor is that when a patient has a lethal fetal anomaly and they have another condition where the treatment would be easier if they weren't pregnant and they have no chance of gaining a child from continuing that pregnancy, that it complicates the treatment and makes the decision about the pregnant -- continuing the pregnancy more complicated. It's just another layer of complication that confuses what's covered, what's not.</p> <p>17</p> <p>18 I mean, I think everybody would agree</p>	<p style="text-align: right;">56</p> <p>1 qualifies for the medical exception to Texas' abortion laws is a medical judgment or a legal judgment?</p> <p>2</p> <p>3 MR. KABAT: Objection, form.</p> <p>4</p> <p>5 A. I think it's a legal judgment. We're asked to follow the law.</p> <p>6</p> <p>7 Q (BY MR. STONE) Are you familiar with EMTALA?</p> <p>8</p> <p>9 A. I am.</p> <p>10</p> <p>11 Q. What is EMTALA?</p> <p>12</p> <p>13 A. It has to do with emergency care. In my case, I know it has to do with women in labor.</p> <p>14</p> <p>15 Q. Are there any other scenarios other than the medical exception to Texas' abortion laws where you believe you're called upon to make legal judgments?</p> <p>16</p> <p>17 A. Not in areas that I have found to be murky, vague.</p> <p>18</p> <p>19 Q. If the medical exception to Texas' abortion laws was reworded in a way that you found clearer, would you still have to make a legal judgment, in your opinion?</p> <p>20</p> <p>21 MR. KABAT: Objection, form.</p> <p>22</p> <p>23 A. Could you -- could you re -- repeat that question?</p> <p>24</p> <p>25 Q (BY MR. STONE) Sure. No matter how the medical exception to Texas' abortion laws is worded, do you believe it would still require you to have to make a</p>
<p style="text-align: right;">55</p> <p>1 that an uncomplicated pregnancy that then develops kidney stones, I feel like we're all clear that that does not meet the exception.</p> <p>2</p> <p>3 Q. So there's certain circum- -- there's certain presentations that we're all clear on that they don't meet the medical exception to Texas' abortion laws?</p> <p>4</p> <p>5 A. I think in the two extremes, it's clear; but there's a large area in between that is very murky.</p> <p>6</p> <p>7 Q. Were the patients that you're talking about in paragraph -- in this first sentence in Paragraph 11 in Exhibit A, were those patients that were in the gray or murky area in between you just described?</p> <p>8</p> <p>9 A. Yes.</p> <p>10</p> <p>11 Q. In those cases, did you make a determination as to whether or not the patient met the medical exception to Texas' abortion laws?</p> <p>12</p> <p>13 A. I did not make a legal judgment. I decided to avoid liability and look for alternative options for the patient to get the care they needed.</p> <p>14</p> <p>15 Q. What do you mean by "legal judgment"?</p> <p>16</p> <p>17 A. I mean the possibility of being dragged into a courtroom, missing work, having to pay for legal representation and facing the risk of all those consequences that we talked about previously.</p> <p>18</p> <p>19 Q. Do you think determining whether a patient</p>	<p style="text-align: right;">57</p> <p>1 legal judgment as to whether or not a patient qualified?</p> <p>2</p> <p>3 A. I think that there may be fewer confusing situations. I think it's near impossible to assure that there won't be some confusing or unclear cases.</p> <p>4</p> <p>5 Q. Okay. So -- strike that.</p> <p>6</p> <p>7 If the medical exception to Texas' abortion laws was reworded in the manner that you're seeking in this lawsuit, would you still be required to make a legal judgment as to whether or not patients qualified?</p> <p>8</p> <p>9 A. Potentially in some cases.</p> <p>10</p> <p>11 Q. Going back to Paragraph 11 of Exhibit A, in the second sentence you say, "Before S.B. 8, I would have offered abortion care to these patients. Now, I...have to give them information about where to seek abortion care out of state," right?</p> <p>12</p> <p>13 A. Yes.</p> <p>14</p> <p>15 Q. But isn't it fair to say that before the passage of S.B. 8, you would have offered abortion care to those patients but not under the medical exception to Texas' abortion laws?</p> <p>16</p> <p>17 A. It was irrelevant. The exceptions were irrelevant.</p> <p>18</p> <p>19 Q. I'm going to show you what I'm marking as Exhibit B.</p>

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1 (Exhibit B marked.)
2 Q (BY MR. STONE) This is a copy of your
3 verified Petition in the case. Just let me know when
4 you're able to open it.
5 A. I'm downloading it now.
6 Q. Okay.
7 A. Okay. I've opened it.
8 Q. Could you turn to Paragraph 343 of Exhibit B?
9 A. Oh, gosh, can you give me a page number?
10 Q. Yeah, it's on page 71.
11 A. Okay. Getting there.
12 Okay. All right. Which paragraph?
13 Q. 343.
14 A. Okay. I have it in front of me.
15 Q. Excellent. Could you read it to yourself and
16 let me know when you finish?
17 A. (Witness silently reading documenting.)
18 Okay. I've read it.
19 Q. Do you agree with the statement in your
20 Complaint that the medical emergency exception to Texas'
21 abortion laws is broader than the type of medical
22 conditions that physicians would consider emergencies
23 under, for example, EMTALA?
24 A. I believe so. I mean, the legal language
25 sometimes trips me up; but I believe so.

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1 Q. Do you agree that physicians every day have to
2 make decisions about whether a particular presentation
3 meets the definition of an emergency under EMTALA?
4 A. Really, that happens at the hospital more than
5 in our offices. So we're not as responsible for
6 following that, I guess. There are procedures and
7 protocols at the hospital that are in place to assure
8 that we don't go afoul of EMTALA.
9 Q. And is it similarly true that Woman's Hospital
10 has policies and procedures in place to ensure that you
11 don't run afoul of Texas' abortion laws?
12 A. I have not read any policies or procedures.
13 I'm assuming they have them. All I know is what I told
14 you previously that was shared with us about the trigger
15 ban.
16 Q. Okay. So let's read -- if you could, could
17 you read Paragraph 344 out loud for the record? It's
18 not very long.
19 A. Sure. "An analysis of Texas' Emergent Medical
20 Condition Exception and similar exceptions in other
21 states' abortion bans shows that Texas' language is
22 comparatively broad. Some states do not contain
23 'emergency,'" quote, unquote, "exceptions at all, but
24 only provide affirmative defenses to be used in
25 prosecutions. Some states do not explicitly exclude

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1 ectopic pregnancies and/or treatment for miscarriage
2 from their definitions of abortion. Some states
3 mention," quote, "impairment of a major bodily
4 function," quote, "but require such impairment to be,"
5 quote, "irreversible' in addition to," quote,
6 "substantial,' while...states limit their exception to
7 life-threatening conditions -- while other states limit
8 their exception to life-threatening conditions. And
9 some states require a second physician to confirm that
10 an exception applies."
11 Q. Now if I -- if I understand you correctly,
12 your contention is that it's a bad thing that the Texas
13 language is comparatively broad. Is that accurate?
14 MR. KABAT: Objection, form.
15 A. I think it's a bad thing that physicians are
16 not being allowed to exercise their medical judgment
17 without fear of retribution.
18 Q. (BY MR. STONE) What does that mean, that they
19 cannot exercise their medical judgment without fear of
20 retribution?
21 A. Well, first of all, there's the vigilante
22 component of S.B. 8. So everybody and anybody can bring
23 a civil suit against a physician for providing an
24 abortion. And, secondly, the trigger ban penalties are
25 so extreme that it leads physicians to doubt their

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1 judgment, not medically, but legally because no matter
2 what our medical judgment is, we are bound by the laws
3 of the state we live in.
4 Q. Would you agree with me that every medical
5 decision that you make has the potential to have
6 retribution in the form of medical malpractice lawsuits
7 or disciplinary action by the Texas Medical Board?
8 MR. KABAT: Objection, form.
9 A. In those situations, we are protected by the
10 standards of care as they are set forward from our
11 professional societies, and there is not legislation
12 that specifically makes those activities illegal.
13 Q (BY MR. STONE) So, yes, there's a potential
14 for retribution for every medical decision that you make
15 in the form of medical malpractice lawsuits or action by
16 the Texas Medical Board; but that's different than
17 abortion cases because they're illegal and there is a
18 criminal aspect to them. Is that fair?
19 A. Yes.
20 Q. What if a patient presented -- you know, what?
21 Let's -- sorry. I'm a little scattered, so strike all
22 that.
23 Could you read -- and this might be
24 the last time I ask you to read -- could you read
25 Paragraph 345 in Exhibit B out loud? I want to ask some

<p style="text-align: right;">62</p> <p>1 follow-up questions. 2 A. Okay. "Reading" -- 3 MR. KABAT: Johnathan, I just want to 4 clarify before she reads it, there are footnotes to -- 5 there were footnotes -- excuse me -- to Paragraph 344; 6 and it looks like there are footnotes to Paragraph 345. 7 You are not asking her to read those, but we are 8 agreeing that those are incorporated into what's being 9 read into the record? 10 MR. STONE: Sure, absolutely. 11 MR. KABAT: Okay. 12 A. Okay. "Reading the provisions of the 13 Emergency [sic] Medical Condition Exception together, 14 they permit physicians to provide an abortion to a 15 patient where, in the physician's good faith judgment, 16 the patient has a physical condition posing a risk 17 of death or a serious risk to the patient's health. 18 Such conditions include, but are not limited to, the 19 following: conditions that can lead to dangerous 20 bleeding or hemorrhage, including placental conditions; 21 dangerous forms of hypertension; conditions that can 22 lead to dangerous infection, including premature rupture 23 of membranes; and [sic] other medical conditions that 24 can become emergent during pregnancy, either because 25 being pregnant causes or exacerbates a chronic condition</p>	<p style="text-align: right;">64</p> <p>1 A. I mean, you could argue either way. I could 2 argue it either way. 3 Q. Okay. Let's argue for. What is the argument 4 for it meeting -- for it falling under one of the 5 categories of 345? 6 A. So, as I said before, every pregnancy has 7 risks and this patient also had a kidney stone flare or 8 attack and she was carrying a fetus that did not have 9 any chance of survival. And the patient was taking on 10 these risks that every pregnancy has for no potential 11 gain, but that's not really spelled out here in this 12 exception. 13 Q. At the end of the exception, the final couple 14 of lines, it says, "...certain fetal conditions or 15 diagnoses that can increase the risks to a pregnant 16 person's health such as that -- such that, when combined 17 with the patient's other comorbidities, a patient's 18 medical provider may determine that the patient has an 19 emergent condition necessitating abortion." Do you 20 think it might fall under -- that Case Number One might 21 fall under -- under that category? 22 A. Again, there are arguments for and against. I 23 think it's very unclear. 24 Q. What would be the argument against the 25 Case Number One falling within any of the categories</p>
<p style="text-align: right;">63</p> <p>1 or increases other health risks, or because treatment 2 for the chronic condition is unsafe while pregnant," 3 open parentheses, "(with the exception of conditions 4 whose emergent nature stems from the risk of self-harm, 5 which are statutorily excluded); and certain fetal 6 conditions or diagnoses that can increase the risks to 7 a pregnant person's health such that, when combined with 8 the patient's other comorbidities, a patient's medical 9 provider may determine that the patient has an emergent 10 condition necessitating abortion." 11 Q. (BY MR. STONE) Would you agree with me that 12 that is a fairly straightforward definition? 13 A. Relatively. 14 Q. Applying that definition to Case Number One 15 that we discussed earlier, would Case Number One qualify 16 for the medical exception to Texas' abortion laws, as 17 described in Paragraph 345? 18 A. I mean, again, I have to -- that's a lot. 19 (Witness silently reading document.) 20 I don't think it's clear. I really don't 21 think it's clear. 22 (Witness silently reading document.) 23 Q. And so you're not sure if body-stalk anomaly 24 would fall under any of these -- under any of the 25 categories described in Paragraph 345?</p>	<p style="text-align: right;">65</p> <p>1 described in Paragraph 345? 2 A. Well, it's -- you know, a lot of people would 3 argue that plenty of women take the risk of hemorrhage, 4 infection, premature rupture of membranes. Well, and 5 then you could argue that, for instance, in her case, 6 her kidney stones could be treated without terminating 7 the pregnancy and that the risks of those complications 8 from pregnancy were not significant enough to meet the 9 risk of -- oh, where does it say -- I mean, define -- 10 oh, what's the word -- unsafe. 11 You know, driving a car is unsafe, in 12 some people's mind. So, you know, you can argue how 13 unsafe is unsafe enough to meet the qualifications, I 14 guess. 15 Q. How unsafe is unsafe enough to meet -- strike 16 that. 17 What about Case Number Two, do you 18 believe that Case Number Two would meet any of the 19 exceptions, categorical exceptions, described in 20 Paragraph 345 of Exhibit B? 21 A. That one I'm a little more comfortable with, 22 which is why I would have offered her an abortion if I 23 had gotten someone else to agree with me. But, again, 24 it can be called into question because maybe she will 25 hemorrhage; maybe she won't. What percentage risk of</p>

<p style="text-align: right;">66</p> <p>1 hemorrhage is a high enough risk of dangerous -- quote, 2 unquote, "dangerous bleeding" or hemorrhage? You know, 3 is needing a transfusion dangerous enough; or is risk of 4 death danger--- the qualifier for dangerous and what 5 percentage risk of death? 6 Q. Well, that's left to the individual 7 physician's good faith judgment, right? 8 A. And that of the Courts and the juries and the 9 legislators. 10 Q. But, Doctor, you use your judgment every day 11 in making medical decisions, right? 12 A. Yes, and I hope that I will not be prosecuted 13 for that. 14 Q. And sometimes physicians just reach different 15 conclusions based on their medical judgment, right? 16 A. Yes. 17 Q. Looking at Paragraph 345, it says, "Conditions 18 that could -- or can lead to dangerous bleeding or 19 hemorrhage." In -- 20 A. Well it's a continuum, yeah. Sorry. I 21 interrupted you. 22 Q. Yeah. So in Case Number Two, I guess I'm 23 trying to understand the counterargument because it 24 seems to me if they had -- based on your prior 25 testimony, they had significantly increased risk of</p>	<p style="text-align: right;">68</p> <p>1 hemorrhage? 2 A. Well, there's a significant risk of hemorrhage 3 in any pregnancy beyond eight, nine weeks, I would say. 4 I discourage anyone having a miscarriage beyond eight 5 weeks to have a D&C so that they're not at home when -- 6 when it happens. So that was my concern for that 7 patient; but since she wasn't actively bleeding when I 8 saw her, that was the reason the maternal-fetal medicine 9 said that I could not terminate the pregnancy at that 10 moment in time. But any pregnancy that is bleeding is a 11 threatened miscarriage, by definition, prior to 12 viability. 13 Q. Do you believe that Patient -- in your 14 opinion, did Patient Number 2 -- Patient -- strike all 15 that. 16 Do you believe that the patient in Case 17 Number Two had a condition that could lead to a 18 dangerous infection? 19 A. No. 20 Q. Okay. I've got about -- 21 MR. STONE: Do you want to go off the 22 record? 23 MR. KABAT: Sure. 24 THE REPORTER: We're going off the record 25 at 11:54 a.m.</p>
<p style="text-align: right;">67</p> <p>1 hemorrhage, right, in Case Number Two? 2 A. Yes. 3 Q. So -- 4 A. Above that of any other pregnancy or the 5 average pregnancy. 6 Q. Is a hemorrhage -- I mean, again, we're 7 lawyers, so help us out here; we're not physicians. Is 8 a hemorrhage during a pregnancy always dangerous? 9 A. Again, that depends how you define 10 "dangerous." Ten percent of deliveries will have a 11 hemorrhage. Probably one to maybe three percent of 12 deliveries will require a blood transfusion, which 13 has its own risks, although less than it used to be in 14 our -- at least in this country. And, you know, our 15 maternal mortality rate is the highest of any developed 16 country. So, you know, pregnancy, in and of itself, is 17 dangerous. 18 Q. So if you were trying to determine whether or 19 not -- strike that. 20 In Patient Number 2 -- sorry. Strike 21 that. 22 In Case Number Two, when evaluating the 23 patient, what sorts of things would you be looking for 24 to determine whether or not the patient's condition 25 involved a risk of -- that could lead to a dangerous</p>	<p style="text-align: right;">69</p> <p>1 (Off the record from 11:54 to 12:01 p.m.) 2 THE REPORTER: We're back on the record 3 at 12:01 p.m. 4 Q (BY MR. STONE) Doctor, is it fair to say that 5 what you want out of this lawsuit is for Texas to create 6 a medical exception where it's left entirely up to the 7 medical provider to determine whether an abortion is 8 medically necessary pursuant to the standard of care? 9 A. That would be great. 10 Q. And is it your opinion that the laws that 11 exist right now doesn't accomplish that same goal? 12 A. Correct. 13 MR. STONE: I'll pass the witness. 14 MR. KABAT: Thank you, Johnathan. I have 15 no questions for the witness. 16 MR. STONE: Thank you so much, 17 Dr. Karsan. We really appreciate your help today. 18 THE WITNESS: Of course. 19 THE REPORTER: Counsel, would you please 20 state your orders on the record for the video and the 21 transcript? 22 MR. STONE: On our end, we would love to 23 get a rush order on the transcript and we just need a 24 digital copy and we also want a copy of the video as 25 well, please.</p>

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1 THE REPORTER: And by "rush," I need a
 2 date certain, please.
 3 MR. STONE: Oh, how soon could you get it
 4 to us?
 5 THE REPORTER: I mean, I can get it to
 6 you by tomorrow; but there is an upcharge.
 7 MR. STONE: How much of an upcharge?
 8 THE REPORTER: That's out of my
 9 wheelhouse.
 10 MR. STONE: Oh, okay.
 11 THE REPORTER: I would have to let you
 12 talk to my office.
 13 MR. STONE: Okay. Yeah, I don't want to
 14 get in trouble; but I -- yeah, if we could get it
 15 tomorrow, I think we would like that, ideally. So, yes,
 16 I'm ordering if for tomorrow, please.
 17 MR. KABAT: And, Ms. Cunningham,
 18 Plaintiffs would also appreciate a copy of the rush
 19 order and, of course, copies of the digital and final
 20 transcript.
 21 THE REPORTER: Do you need a copy of the
 22 video?
 23 MR. KABAT: Yes, please.
 24 THE REPORTER: Okay. This concludes the
 25 deposition at 12:04 p.m.

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1 CHANGES AND SIGNATURE
 2 WITNESS NAME: DATE OF DEPOSITION:
 3 DAMLA KARSAN, M.D. July 6, 2023
 4 PAGE/LINE CHANGE REASON
 5 _____
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____
 13 _____
 14 _____
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1 (Deposition concluded at 12:04 p.m.)
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1 I, DAMLA KARSAN, M.D., have read the
 2 foregoing deposition and hereby affix my signature that
 3 same is true and correct, except as noted herein.
 4
 5 _____
 6 DAMLA KARSAN, M.D.
 7
 8 THE STATE OF _____)
 9 BEFORE ME, _____, on
 10 this day personally appeared DAMLA KARSAN, M.D., known
 11 to me (or proved to me under oath or through
 12 _____) (description of identity card or other
 13 document) to be the person whose name is subscribed to
 14 the foregoing instrument and acknowledged to me that
 15 they executed same for the purposes and consideration
 16 therein expressed.
 17 Given under my hand and seal of office on
 18 this, the _____ day of _____, _____.
 19
 20
 21 _____
 22 NOTARY PUBLIC IN AND FOR
 23 THE STATE OF _____
 24 My Commission Expires: _____
 25

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1 CAUSE NO. D-1-GN-23-000968
 2 AMANDA ZURAWSKI, et al., * IN THE DISTRICT COURT OF
 Plaintiffs, *
 3 *
 v. * TRAVIS COUNTY, TEXAS
 4 *
 STATE OF TEXAS, et al. *
 5 Defendants. * 353RD JUDICIAL DISTRICT
 6
 7 REPORTER'S CERTIFICATION
 8 VIDEOTAPED ORAL DEPOSITION
 9 OF
 10 DAMLA KARSAN, M.D.,
 11 Taken on July 6, 2023
 12 (Reported Remotely)
 13
 14 I, Debbie D. Cunningham, Certified
 15 Shorthand Reporter in and for the State of Texas, hereby
 16 certify to the following:
 17 That the witness, DAMLA KARSAN, M.D., was
 18 duly sworn by me, and that the transcript of the oral
 19 deposition is a true record of the testimony given by
 20 the witness;
 21 That the deposition transcript was
 22 submitted on July 7, 2023 to the witness
 23 or to the attorney for the witness for examination,
 24 signature, and return to me by July 27, 2023;
 25 That the amount of examination time used

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1 parties or attorneys in the action in which this
 2 proceeding was taken, and further that I am not
 3 financially or otherwise interested in the outcome of
 4 the action.
 5 Further certification requirements
 6 pursuant to Rule 203 of TRCP will be certified to after
 7 they have occurred.
 8 Certified to by me this day, July 7, 2023.
 9
 10
 11 _____
 12 Debbie D. Cunningham, CSR
 13 CSR 2065
 14 Expiration: 6/30/25
 15 INTEGRITY LEGAL SUPPORT SOLUTIONS
 16 9901 Brodie Ln, Ste. 160-400
 17 Austin, Texas 78748
 18 www.integritylegal.support
 19 512-320-8690; FIRM # 528
 20
 21
 22
 23
 24
 25

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1 by each party at the deposition is as follows:
 2 BY MR. STONE: 02:10:43
 3 BY MR. KABAT: 00:00:00
 4 BY MS. DUANE: 00:00:00
 5 That pursuant to information given to the
 6 deposition officer at the time said testimony was taken,
 7 the following includes counsel for all parties of
 8 record:
 9 COUNSEL FOR PLAINTIFFS:
 10 CENTER FOR REPRODUCTIVE RIGHTS
 11 199 Water Street, 22nd Floor
 New York, New York 10038
 (T) 917.637.3600
 12
 By: Nicolas Kabat, Esq.
 13 nkabat@reprorights.org
 AND
 14 Molly Duane, Esq.
 mduane@reprorights.org
 15
 16 COUNSEL FOR DEFENDANTS:
 17 OFFICE OF THE ATTORNEY GENERAL OF TEXAS
 General Litigation Division
 18 P.O. Box 12548, Capitol Station
 Austin, Texas 78711-2548
 19 (T) 512.475.4196
 20 By: Johnathan Stone, Esq.
 johnathan.stone@oag.texas.gov
 AND
 21 Amy Pletscher, Esq.
 amy.pletscher@oag.texas.gov
 22
 23
 24 I further certify that I am neither
 25 counsel for, related to, nor employed by any of the

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1 FURTHER CERTIFICATION UNDER RULE 203, TRCP
 2 The original deposition/errata sheet was / was not
 3 returned to the deposition officer on _____;
 4 If returned, the attached Changes and Signature
 5 page contains any changes and the reasons therefor;
 6 If returned, the original deposition was delivered
 7 to MR. STONE, Esq., Custodial Attorney;
 8 That \$_____ is the deposition officer's
 9 charges to the Defendants for preparing the original
 10 deposition transcript and copies of exhibits, if any;
 11 That the deposition was delivered in accordance
 12 with Rule 203.3, and that a copy of this certificate was
 13 served on all parties shown herein on _____
 14 and filed with the Clerk.
 15 Certified to by me on _____.
 16
 17
 18
 19 _____
 20 Debbie D. Cunningham, CSR
 21 CSR 2065
 22 Expiration: 6/30/25
 23 INTEGRITY LEGAL SUPPORT SOLUTIONS
 24 9901 Brodie Ln, Ste. 160-400
 25 Austin, Texas 78748
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Numbers		
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