GOODSILL ANDERSON QUINN & STIFEL
A LIMITED LIABILITY LAW PARTNERSHIP LLP

LISA WOODS MUNGER 3858-0
lmunger@goodsill.com
NICOLE Y. ALTMAN 9452-0
naltman@goodsill.com
999 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
Telephone: (808) 547-5600
Facsimile: (808) 547-5880

Attorneys for Nonparty
JANE DOE, M.D.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WHOLE WOMAN'S HEALTH; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; ALAMO CITY SURGERY CENTER PLLC d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES; SOUTHWESTERN WOMEN'S SURGERY CENTER; and NOVA HEALTH SYSTEMS, INC. d/b/a REPRODUCTIVE SERVICES, each on behalf of itself, its staff, physicians and patients; and CURTIS BOYD, M.D.; ROBIN WALLACE, M.D.; BHAVIK KUMAR, M.D.; and ALAN BRAID, M.D., each on behalf of himself and his patients,

Plaintiffs,

MC CASE NO. _____

[Case No. 1:17-CV-00690-LY Pending in the Western District of Texas Austin Division]

NONPARTY JANE DOE, M.D.'S **MOTION TO QUASH** DEPOSITION SUBPOENA ISSUED BY DEFENDANTS PAXTON, ET AL.; **MEMORANDUM IN SUPPORT** OF MOTION; **DECLARATION** OF MELISSA A. COHEN; **DECLARATION** OF MICHAEL D. BOPP; **EXHIBITS** 1 – 3; **DECLARATION** OF NONPARTY JANE DOE, M.D.; **CERTIFICATE OF SERVICE**

vs.

KEN PAXTON, Attorney General of Texas; MARGARET MOORE, District Attorney for Travis County; NICHOLAS LAHOOD, Criminal District Attorney for Bexar County; JAIME ESPARZA, District Attorney for El Paso County; FAITH JOHNSON, District Attorney for Dallas County; SHAREN WILSON, Criminal District Attorney for Tarrant County; RICARDO RODRIGUEZ, JR., Criminal District Attorney for Hidalgo County; ABELINO REYNA, Criminal District Attorney for McLennan County; and KIM OGG, Criminal District Attorney for Harris County, each in their official capacities, as well as their employees, agents, and successors,

Defendants.

TRIAL DATE: None Set

NONPARTY JANE DOE, M.D.'S
MOTION TO QUASH DEPOSITION SUBPOENA
ISSUED BY DEFENDANTS PAXTON, ET AL

Nonparty Jane Doe, M.D. ("Nonparty Doe"), by and through her attorneys, Goodsill Anderson Quinn & Stifel, LLP, respectfully moves this Court for an order quashing the Subpoena to Testify at a Deposition in a Civil Action, October 19, 2017 ("Subpoena").[1] This Motion should be granted because the Subpoena places an undue burden on Dr. Doe, including grave security and safety

[1] The Subpoena was issued out of the United States District Court for the Western District of Texas in *Whole Woman's Health, et al. vs. Ken Paxton, et al.* – Civil Action No. 1:17-CV-000690-LY.

threats to her and her family, in addition to inappropriate seeking irrelevant testimony and unretained expert testimony, in violation of Fed. R. Civ. P. 45(d)(3)(A)(iv) and (d)(3)(A)(iv).

This Motion is brought pursuant to Fed. R. Civ. P. 45, and is based upon the attached memorandum of law, the declarations and exhibits attached thereto, the records and files herein, and such other and further matters as may be presented to the Court before or at the hearing on this Motion.

DATED: Honolulu, Hawai‘i, October 23, 2017.

/s/ Nicole Y. Altman
LISA WOODS MUNGER
NICOLE Y. ALTMAN

Attorneys for Nonparty JANE DOE, M.D.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WHOLE WOMAN'S HEALTH; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; ALAMO CITY SURGERY CENTER PLLC d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES; SOUTHWESTERN WOMEN'S SURGERY CENTER; and NOVA HEALTH SYSTEMS, INC. d/b/a REPRODUCTIVE SERVICES, each on behalf of itself, its staff, physicians and patients; and CURTIS BOYD, M.D.; ROBIN WALLACE, M.D.; BHAVIK KUMAR, M.D.; and ALAN BRAID, M.D., each on behalf of himself and his patients,

Plaintiffs,

vs.

KEN PAXTON, Attorney General of Texas; MARGARET MOORE, District Attorney for Travis County; NICHOLAS LAHOOD, Criminal District Attorney for Bexar County; JAIME ESPARZA, District Attorney for El Paso County; FAITH JOHNSON, District Attorney for Dallas County; SHAREN WILSON, Criminal District Attorney for Tarrant County; RICARDO RODRIGUEZ, JR., Criminal District Attorney for Hidalgo County; ABELINO REYNA, Criminal

MC CASE NO. _____

[Case No. 1:17-CV-00690-LY Pending in the Western District of Texas Austin Division]

MEMORANDUM IN SUPPORT OF MOTION

District Attorney for McLennan County; and KIM OGG, Criminal District Attorney for Harris County, each in their official capacities, as well as their employees, agents, and successors,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

Other Authorities

TABLE OF AUTHORITIES *(continued)*

Page(s)

Rules

Treatises

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Nonparty Jane Doe, M.D. seeks this Court's immediate action to quash the subpoena issued by Defendants in the Western District of Texas on October 19, 2017 commanding her personal appearance and testimony (the "Subpoena").[2] The Subpoena is invalid and must be quashed.

First, Dr. Doe, a physician and an obstetrician-gynecologist, is a complete stranger to the proceedings in the Western District of Texas (the "Texas Litigation") in which her testimony is sought. Absent this Subpoena, she has no involvement in or connection to the parties or subject matter at issue in the underlying litigation. Any factual testimony to be elicited from Dr. Doe would have tangential relevance at best, and would be duplicative of facts that have already been or can be obtained by party discovery or other third parties. To the extent that Dr. Doe, a provider of second-trimester abortions who does not practice in Texas, would have *any* factual knowledge pertaining to the Texas statute at issue in the Texas Litigation, that information is readily available from the parties to the litigation—which include three physician-plaintiffs that perform second-trimester

[2] Defendants initially issued a subpoena on September 20, 2017 seeking Dr. Doe's appearance for a deposition on October 6, 2017. Since the date the subpoena was issued, the parties have been negotiating in good faith seeking to resolve their disagreements about Dr. Doe's testimony. However, negotiations have now broken down, necessitating the filing of this Motion.

abortions in Texas—or from one of the nonparties Defendants have already deposed. The burden imposed by the subpoena is therefore by definition "undue" as there is no value to Dr. Doe's testimony. The subpoena must be quashed for this reason alone.

Second, assuming *arguendo* that there is some marginal value to Dr. Doe's testimony, the subpoena still imposes an undue burden on Dr. Doe. It places her and her family in physical danger if enforced. Dr. Doe recently has been the target of death threats that extend to her and her family—serious issues that have resulted in physical injury and death for some similarly situated reproductive health care providers in the United States. Attaching Dr. Doe's name to the proceedings in Texas would place her and her family in significant physical danger, and puts her mental health at risk.

3

Public association with the Texas Litigation—a challenge to a statute of a state in which she does not practice, in litigation to which she is not a party and has no other connection—poses a legitimate and significant risk of re-opening the wounds from these prior events and threatening the security of Dr. Doe and her family. This undue burden is a mandatory ground for quashing the Subpoena.

Third, Dr. Doe has no actual factual knowledge of the issues in the Texas Litigation. She is not licensed to practice medicine in Texas and does not in fact practice there. Doe Decl. at ¶ 5. She is not employed by any of the parties to the Texas Litigation. *Id.* She had no role in drafting the legislation whose validity is

being challenged in the Texas Litigation. *Id.* at ¶ 4. Defendants' own articulated rationale for seeking Dr. Doe's testimony is her scientific knowledge and authorship of scientific studies that they believe relevant to the litigation. Bopp Decl. ¶ 9, 16. Dr. Doe has not been retained by either party as an expert, is not on Plaintiffs' witness list, and has not conducted any research or reached any conclusions pertaining to the Texas statute at issue. Dr. Doe Decl. ¶ 4; Declaration of Melissa Cohen ¶ 8, 11.

It is therefore impossible that she could be called upon to provide relevant non-duplicative factual information—the only reason the Defendants could possibly want her testimony is in an expert capacity. But the Federal Rules of Civil Procedure are clear that Defendants cannot abuse the subpoena power of the court to turn Dr. Doe into an unwilling and uncompensated expert. *See* Fed. R. Civ. P. 45(d)(3)(B)(ii). It therefore contravenes Federal Rule of Civil Procedure 45(d)(3)(B)(ii).

II. BACKGROUND

A. Jane Doe

Jane Doe, M.D. is a physician and an obstetrician-gynecologist licensed to practice in . Dr. Doe Decl. ¶ 1. She is not licensed to practice in Texas. *Id.* at ¶ 5.

. Dr. Doe Decl. ¶ 2. is a distinct entity from the Plaintiffs. Cohen Decl. ¶ 10. Dr. Doe has never been employed by any of the plaintiff-providers, is not licensed to practice medicine in Texas, and has never practiced in Texas. Dr. Doe Decl. ¶ 5.

[4]

4

These were not idle threats. The history of violence against abortion providers and clinics is well-documented. Anti-choice extremists have murdered doctors, clinic employees, a clinic escort, a security guard, and a policy officer.[5] Since 1991, there have been at least 26 attempted murders and 11 murders resulting from this violence. *Id.* Acts of violence or threats against reproductive healthcare providers have also included bombings, arsons, threats of assaults, death threats, bioterrorism, clinic invasions, butyric acid attacks, kidnappings, and stalking.[6] In November 2015, a Planned Parenthood clinic in Colorado Springs, Colorado was attacked by a gunman that resulted in the deaths of a police officer, an Iraq War veteran, and a mother of two children who was accompanying a friend

[5] *See* NARAL Pro-Choice Am. Found., *Anti-Choice Violence and Intimidation* (Jan. 1, 2010), https://www.prochoiceamerica.org/wp-content/uploads/2017/01/1.-Anti-Choice-Violence-and-Intimidation.pdf.

[6] *See* Natl. Abortion Federation, *NAF Violence and Disruption Statistics*, http://5aa1b2xfmfh2e2mk03kk8rsx.wpengine.netdna-cdn.com/wp-content/uploads/Stats_Table_2014.pdf.

at the clinic.[7] According to one law enforcement official, who spoke on the condition of anonymity to a Washington Post reporter, the shooter said "No more baby parts" to explain his motive for the shooting,

.[8]

In addition to this episode, there are thousands of documented cases where violence has been threatened or exacted on abortion providers. In recent memory, four doctors have been murdered for simply doing their jobs.[9] Thousands of other cases of threats and violence directed at reproductive healthcare providers have been documented, ranging from trespassing and vandalism to bombings, invasions, and stalking.[10] Tens of thousands of disruption cases of harassing phone calls or mail directed to physicians and workers and obstructions of access to clinics have also occurred. *Id*.

---

[7] *See* Sarah Kaplan, *'I'm a warrior for the babies,,' Planned Parenthood Suspect Declares in Court,* WASH. POST (Dec. 10, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/im-a-warrior-for-the-babies-planned-parenthood-suspect-declares-in-court/?utm_term=.6996dcf26181; Danielle Kreutter, *Iraq War Veteran Identified as Victim in Planned Parenthood Shooting*, KKTV (Nov. 29, 2015), http://www.kktv.com/home/headlines/Family-Identifies-Victim-in-Planned-Parenthood-Shooting-358094491.html.

[8] *See* Kaplan, *supra* note 6.

[9] *See* NARAL Pro-Choice Am. Found., *Anti-Choice Violence and Intimidation* (Jan. 1, 2010), https://www.prochoiceamerica.org/wp-content/uploads/2017/01/1.-Anti-Choice-Violence-and-Intimidation.pdf.

[10] See Natl. Abortion Federation, *NAF Violence and Disruption Statistics*, http://5aa1b2xfmfh2e2mk03kk8rsx.wpengine.netdna-cdn.com/wp-content/uploads/Stats_Table_2014.pdf.

B. The Underlying Litigation

On July 20, 2017, ten Texas healthcare providers that provide second-trimester abortions and one Texas physician with an ownership interest in one of the facilities (collectively, "Plaintiffs") filed suit in the Western District of Texas, Austin Division against the Attorney General of Texas and various Texas county criminal prosecutors in their official capacities. *See* Bopp Decl. Ex. 2 ¶ 7-26.[11] The lawsuit alleges that Texas Senate Bill 8, enacted during the 2017 legislative session, violates Plaintiffs' patients' constitutional right to an abortion. *Id.* at ¶ 2.

C. Defendants' Third-Party Subpoena To Dr. Doe

Defendants have served numerous discovery requests harassing a number of non-party witnesses. Cohen Decl. ¶ 13. This has included deposing another physician as recently as October 11, 2017

. Cohen Decl. ¶ 14.

As part of this campaign, on September 20, 2017, Defendants served a subpoena on Dr. Doe issued in the Western District of Texas seeking her appearance for a deposition on October 6, 2017 in Honolulu, Hawaii. Bopp Decl. ¶ 3. Subsequently, Defendants, through the Western District of Texas, issued a second subpoena on Dr. Doe on October 19, 2017 for a deposition on October 26,

[11] Exhibit 2 is Plaintiffs' First Amended Complaint, filed August 18, 2017.

2017 in Honolulu, Hawaii. Accordingly, the District of Hawaii is the "district where compliance is required." *See* Fed. R. Civ. P. 45(d)(3)(A).

Since the date the first subpoena was served, while preserving her rights and all objections, Dr. Doe, through her counsel, sought to negotiate with Defendants' counsel to arrive at an agreement that would protect her safety while still providing Defendants with the testimony sought. Bopp Decl. ¶ 7-19. However, those negotiations broke down when it became apparent that the Defendants were unwilling to agree to restrict its questioning of Dr. Doe to relevant areas, or agree to appropriate measures to safeguard Dr. Doe's safety. *Id.* at ¶ 19.

Among other things, Dr. Doe asked that Defendants restrict their questioning and agree not to ask about such totally irrelevant areas as abortion techniques not implicated by the law at issue in the Texas Litigation, her patients, and her work outside of Planned Parenthood. *See id.* at ¶17. She asked that her likeness not be shown in open court, and that if a witness wished to refer to her, that witness use a pseudonym. Defendants initially seemed willing to agree to these conditions, but then deleted them from the proposed motion for protective order drafted by Dr. Doe's counsel. *See id.* at ¶ 19.

Thus, Dr. Doe now has no choice but to seek an order quashing this subpoena from this Court to protect her identity, her safety, and to prevent her from being forced into servitude as an uncompensated expert for the Defendants.

III. ARGUMENT

A. The Subpoena Fails To Comply With Federal Rule Of Civil Procedure 45

Federal Rule of Civil Procedure 45 requires that a court must quash any subpoena that fails to provide "reasonable" notice. Fed. R. Civ. Proc. 45(d)(a)(i). In this case, the Subpoena was issued a mere six days before the date on which it seeks Dr. Doe's appearance, in Hawaii. Bopp Decl. Ex. 1. Courts in this circuit have held that this amount of notice (and even longer notice) is unreasonably short, particularly where, as here, the party seeking the deposition was aware that the deponent intended to contest the taking of the deposition. *In re Stratosphere Corp. Securities Litigation* (D. Nev. 1999) 183 F.R.D. 684, 687; *see also AngioScore, Inc. v. TriReme Medical, Inc.*, No. 12-CV-03393-YGR(JSC), 2014 WL 6706898, at *1 (N.D. Cal., Nov. 25, 2014) (nine days' notice unreasonable). Courts in other districts have reached the same conclusion. *See, e.g., Tri Investments, Inc. v. Aiken Cost Consultants, Inc.*, No. 2:11CV4, 2011 WL 5330295, at *2 (W.D.N.C., Nov. 7, 2011) (finding that "six total days and four business days is not a reasonable time to comply with a subpoena and notice of deposition," and citing other cases reaching similar results.)

While Dr. Doe was aware of Defendants' desire to take her deposition because of the initial subpoena seeking her testimony on October 6, 2017, she has been clear with Defendants all along that her safety and privacy was of the utmost

importance. Setting a deposition for six days from the date of issuance makes it virtually impossible, absent extraordinary relief from this Court, for Dr. Doe to get adequate protections in place before moving forward with the deposition. This reason alone warrants quashing the subpoena.

B. The Subpoena Imposes An Undue Burden On Dr. Doe

1. Dr. Doe Is Entitled To Extra Protection As A Third Party

"The Ninth Circuit has long held that nonparties subject to discovery requests deserve extra protection from the courts." *Lemberg Law LLC v. Hussin*, No. 16-mc-80066-JCS, 2016 WL 3231300, at *5 (N.D. Cal. June 13, 2016) (quotation omitted); *see also United States v. C.B.S., Inc.*, 666 F.2d 364, 371-72 (9th Cir. 1982) ("Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party.").

Pursuant to Federal Rule of Civil Procedure 45(d)(3), a court *must* quash or modify a subpoena if the subpoena, *inter alia*, "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv) (emphasis added). In addition, a court "may" quash or modify a subpoena if it requires, among other things, "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party." Fed. R. Civ. P. 45(d)(3)(B)(ii). The Subpoena to Dr. Doe violates both provisions. It

places an undue burden on her while providing little or no benefit to Defendant's case and seeks to elicit her unretained and uncompensated expert testimony. As such, it must be quashed.

2. The Subpoena Must Be Quashed Because It Imposes an Undue Burden on Nonparty Dr. Doe

"An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." *St. Paul Mercury Ins. Co. v. Homes*, No. 2:15-CV-0037 TLN, 2015 WL 7077450, at *2 (E.D. Cal. Nov. 13, 2015) (internal quotation omitted); *see also Gonzales v. Google Inc.*, 234 F.R.D. 674, 680 (N.D. Cal. 2006) (stating that "a court determining the priority of a subpoena balances the relevance of the [testimony] sought, the requesting party's need, and the potential hardship to the party subject to the subpoena").

A subpoena that seeks irrelevant information by definition imposes an undue burden.[12] *See AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995 (D.C. Cir. 2014) ("If a subpoena compels disclosure of information that is not properly discoverable, then the burden it imposes, however slight, is necessarily undue: why require a party to produce information the requesting party has no right to obtain?"). Furthermore, a third-party subpoena imposes an undue burden where it

[12] A third-party deposition subpoena may impose an undue burden even if it does not require the deponent to produce documents. *See St. Paul Mercury Ins. Co.*, 2015 WL 7077450, at *3.

seeks information that is obtainable from the parties. *See, e.g., Soto v. Castlerock Framing & Transport, Inc.*, 282 F.R.D. 492, 505 (E.D. Cal. 2012) ("[T]here is a preference for parties to obtain discovery from one another before burdening non-parties with discovery requests."); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 577 (N.D. Cal. 2007) (party may seek to quash a subpoena by emphasizing the documents may be sought from another party or alternative source); *see also* 9A Wright & Miller, Federal Practice and Procedure § 2463.1 (3d ed. 2010) (court determining a subpoena's reasonableness is required to consider, *inter alia*, "whether it is available from any other source"); *cf.* Fed. R. Civ. P. 26(b)(2)(C)(i) (a court "must" limit discovery if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"); *Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 13-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) ("[A] party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case."). In this case, the Subpoena clearly imposes an undue burden on Dr. Doe.

3. The Subpoena Does Not Seek Relevant Evidence

First, Dr. Doe possesses no factual evidence relevant to the underlying litigation. Dr. Doe is not a current or former employee of any of the healthcare providers that are plaintiffs to the litigation, and has no affiliation to these entities.

Dr. Doe Decl. ¶ 5. Dr. Doe is not licensed to practice, and has never practiced medicine in, the state of Texas. *Id.* Dr. Doe has had no involvement with the Texas statute at issue in the litigation. Dr. Doe played no role in legislating the statute, lobbying or advocating for or against it, or providing advice, guidance, or information to the Plaintiffs in challenging it or to the Defendants in defending it. Dr. Doe Decl. ¶ 4.

Dr. Doe has no relevant factual knowledge, and Defendants have not provided another proper basis for deposing Dr. Doe. As such, the Subpoena should be quashed for this reason alone. *See AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995 (D.C. Cir. 2014) ("If a subpoena compels disclosure of information that is not properly discoverable, then the burden it imposes, however slight, is necessarily undue: why require a party to produce information the requesting party has no right to obtain?") The plaintiffs do not intend to call Dr. Doe as a witness to testify at trial. Cohen Decl. ¶ 11.

Second, any relevant, factual information that Dr. Doe may possess is easily obtainable from other sources, including from the parties involved and the non-parties that Defendants have subpoenaed and received discovery from. Thus, there is no reason to burden Dr. Doe in this way. *See* Fed. R. Civ. P. 26(b)(2)(C)(i) (a court "must" limit discovery if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient,

less burdensome, or less expensive"). In fact, the plaintiffs state in their Complaint that some physicians in Texas use digoxin to attempt to cause fetal demise. *See* Bopp Decl. Ex. 2 ¶ 50. The plaintiffs in the matter, who include physicians practicing in Texas, are the proper party from whom to seek discovery. *See* Fed. R. Civ. P. 26(b)(2)(C)(i).[13]

4. Compliance With The Subpoena Will Impose Tremendous Hardship On Dr. Doe

Bringing Dr. Doe into the Texas Litigation would create a significant safety risk to Dr. Doe and her family. As discussed *supra*, Dr. Doe has been dragged into the spotlight regarding abortion before, and the result was harassment, threats to her safety and that of her family, and the need for costly and burdensome security. The harassment that Dr. Doe suffered also had a severe impact on her ability to do her job and her mental health. Doe Decl. ¶ 14–16.

This is more than sufficient justification for quashing the Subpoena. *See, e.g.*, *In re Ohio Execution Protocol Litigation*, 845 F.3d 231, 238 (6th Cir. 2016) (entering a protective order where revealing the identities of suppliers or manufacturers of lethal injection drugs would subject them to "the risk of harm,

[13] Furthermore, the case scheduling order stipulates that by October 23, 2017 at 5pm CDT, the parties shall have filed and served proposed designations, objections, and counter-designations of deposition testimony, with corresponding clips of any video segments, that the designating party may seek to use at trial. *See* Bopp Decl. ¶ 5. Given that this deadline has nearly passed, deposing non-party Dr. Doe at this late stage in discovery and on the eve of trial would provide no value to Defendants.

violence, and harassment"), *Doe No. 2 v. Kolko*, 242 F.R.D. 193, 196 (E.D.N.Y. 2006) (permitting plaintiff to proceed under a pseudonym as public disclosure would expose plaintiff to retaliation and ostracism).

Compliance with the Subpoena would be an undue burden to risk putting Dr. Doe and Dr. Doe's family through the physical and emotional trauma again, particularly as any factual testimony offered by Dr. Doe would be repetitive to that already in the record, already obtained from discovery, or easily obtainable from parties to the underlying litigation. Balanced against this oppressive burden is factual testimony that is either irrelevant, duplicative of testimony or discovery already obtained, or that would be better obtained from parties to the litigation. For these reasons, the Court must quash the Subpoena. *See* Fed. R. Civ. P. 45(d)(3)(A)(iv).

C. The Subpoena Should be Quashed Because It Improperly Seeks Dr. Doe's Unretained Expert Testimony

In addition to placing an undue burden on Dr. Doe with almost no counterbalancing value, the Subpoena is also improper and must be quashed for the separate and independent reason that it seeks expert opinion testimony, and would compel Dr. Doe to act as an unretained expert on Defendants' behalf.

An order quashing a subpoena is warranted when it requires "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested

by a party." Fed. R. Civ. Proc. 45(d)(3)(B)(ii); *cf.* Fed. R. Evid. 701 (prohibiting non-expert opinion testimony if based on "scientific, technical, or other specialized knowledge"). This rule is necessary because "compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services." Fed. R. Civ. P. 45 advisory committee's note; *see also Convolve, Inc. v. Dell, Inc.*, 2011 WL 1766486 at *2 (N.D. Cal. May 9, 2011) (quashing a subpoena that improperly required the nonparty to effectively act as an unretained expert witness).

In the meet-and-confer process, Defendants stated that they expect to question Dr. Doe regarding: (1) The use, safety, and efficacy of techniques for causing fetal demise, including digoxin, potassium chloride (KCl), and umbilical cord transection; (2) Articles and/or studies participated in or written by Dr. Doe; (3) Dr. Doe's work for Planned Parenthood Federation of America ("PPFA") and personal knowledge of PPFA practices; and (4) Documents, including policies, procedures, and other communications, related to the above. Bopp Decl. ¶ 16.

The only possible way to construe these categories of testimony is as that of an expert. These studies were conducted independent of the underlying litigation, prior to the enactment of the Texas statute at issue. *See* Dr. Doe Decl. ¶ 6. Plaintiffs have not and do not seek to use Dr. Doe as a witness. Cohen Decl. ¶ 11. The studies do not "describe specific occurrences in dispute" in the Texas

Litigation. As explained above, Dr. Doe has no relevant factual knowledge and is a complete stranger to the Texas Litigation. Dr. Doe's expert opinion was not sought by either party. Cohen Decl. ¶ 11–12. Thus, Defendant's proposed use clearly calls for "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party" and should be quashed as non-compliant with the nonparty subpoena power. *See* Fed. R. Civ. P. 45(d)(3)(B)(ii); *see also* 29 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6265.2 (2d ed. 2017) (explaining that "[E]xpert testimony helps where it clarifies esoteric matters beyond the ken of most lay people. . . . . [it] does not help where [] the jury can easily reach reliable conclusions based on common sense, common experience, the jury's own perceptions, or simple logic."); *Contessa Food Prod., Inc. v. Lockpur Fish Processing Co., Ltd.*, 2003 WL 25778704, at *5 (C.D. Cal. 2003) (rejecting argument that testimony was non-expert because it was only based on personal knowledge and explaining that a "declaration [that] offers only generalized opinions based on his specialized knowledge of the [] industry and is devoid of any personal knowledge of the facts at issue in the instant action" is "precisely what expert testimony is.").

To the extent Defendants also seek Dr. Doe's knowledge of abortion practices nationwide, or experiences with the same, this too is nothing more or less

than unretained expert testimony. *See Verinata Health, Inc. v. Sequenom, Inc.*, 2014 WL 2582097, at *1-3 (N.D. Cal. 2014) (quashing a nonparty deposition subpoena where information sought was based on the nonparty's "unique understanding of the market" and "experience in the marketplace"); *MedImmune, LLC v. PDL Biopharma, Inc.*, 2010 WL 2794390, at *1-3 (N.D. Cal. 2010) ("Although MedImmune argues that it is a 'fact' that Dr. Wilson's opinion agrees with those of MedImmune experts, it is Dr. Wilson's opinion that MedImmune really wants to put before the jury.") Like the subpoenaing party in *MedImmune*, Defendants cannot cast the testimony they seek from Dr. Doe as fact. Nor can Defendants show a "substantial need for the testimony that cannot be otherwise met without undue hardship," *id.* at *2, as this testimony can be obtained from party witnesses and documents, and Defendants could have retained an expert on these topics if it wished to do so.

The Subpoena thus is an improper attempt to compel Dr. Doe to testify as an unretained expert, and must be quashed for this separate and independent reason.

IV. CONCLUSION

For the foregoing reasons, the Court should quash the subpoena issued to Dr. Doe. The Subpoena fails to provide "reasonable" notice as required by Federal Rule of Civil Procedure 45. Defendants seek testimony that is of minimal factual value and is easily obtainable through party discovery or nonparty discovery that

has already occurred, and outweighed by the burden imposed—most significantly, the particularized security risk involved. The Subpoena also improperly seeks uncompensated expert testimony from Dr. Doe. Either purpose is an improper use of the third-party subpoena power. This Court should quash the Subpoena.

DATED: Honolulu, Hawai‘i, October 23, 2017.

/s/ Nicole Y. Altman
LISA WOODS MUNGER
NICOLE Y. ALTMAN

Attorneys for Nonparty JANE DOE, M.D.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WHOLE WOMEN'S HEALTH et. al., Plaintiffs, v. KEN PAXTON et al., Defendants.	MC CASE NO. _____ [Case No. 1:17-CV-00690-LY Pending in the Western District of Texas Austin Division] **DECLARATION OF MELISSA A. COHEN**

DECLARATION OF MELISSA A. COHEN

I, Melissa A. Cohen, declare as follows:

1. I am an attorney licensed to practice in the State of New York and am a staff attorney for the Planned Parenthood Federation of America. I represent plaintiffs Planned Parenthood Center for Choice, Planned Parenthood of Greater Texas Surgical Health Services, and Planned Parenthood South Texas Surgical Center in the above-captioned action.

2. I have personal knowledge of the facts contained within this Declaration, and, if called as a witness, could and would competently testify as to their accuracy.

3. As counsel for the three Planned Parenthood plaintiffs in the above-captioned action in the Western District of Texas (the "Texas Litigation"), I have personal knowledge of the status of the ongoing litigation.

4. The identity of Jane Doe, M.D., who is the subject of a subpoena for a deposition issued by Defendants in the above-captioned case (the "Subpoena"), is known to me.

5. Dr. Doe is not a plaintiff in the Texas Litigation.

6. Dr. Doe was not involved in drafting or filing the complaint in the Texas Litigation.

7. Dr. Doe is not referenced or cited in the complaint.

8. Dr. Doe has not been retained by the plaintiffs to the Texas Litigation as an expert.

9. Dr. Doe has no personal involvement in the Texas Litigation, other than being the subject of the Subpoena.

10. The three Planned Parenthood plaintiffs are legally distinct entities from

the entity that Dr. Doe works for.

11. The matter is currently scheduled for trial on November 2, 2017. The plaintiffs in the Texas Litigation do not intend to call Dr. Doe as a witness to testify during the trial.

12. The deadline for the parties in the Texas litigation to designate additional trial witnesses without leave of court has passed and Dr. Doe was not

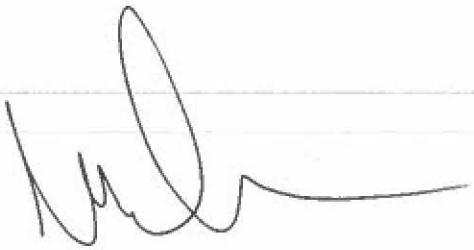
identified on Defendants' witness list. The deadline to designate deposition testimony in the case has also passed.

13. Defendants have served numerous discovery requests directed at the parties as well as at non-parties, including the deposition subpoena directed to Dr. Doe.

14. Defendants took the deposition of another third-party physician in this action on October 11, 2017. In that deposition, Defendants asked numerous questions regarding

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

Dated: New York, New York, October 19, 2017.



Planned Parenthood Federation of America
123 William Street
New York, NY 10038
Tel: (212) 261-4649
Fax: (212) 247-6811
melissa.cohen@ppfa.org

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WHOLE WOMEN'S HEALTH et. al., Plaintiffs, v. KEN PAXTON et al., Defendants.	MC CASE NO. _____ [Case No. 1:17-CV-00690-LY Pending in the Western District of Texas Austin Division] **DECLARATION OF MICHAEL D. BOPP; EXHIBIT 1; EXHIBIT 2; EXHIBIT 3**

DECLARATION OF MICHAEL D. BOPP

I, Michael D. Bopp, declare as follows:

1. I am an attorney licensed to practice in the District of Columbia and the State of New York and am a partner in the Washington, D.C. office of the law firm Gibson, Dunn & Crutcher LLP ("Gibson Dunn").

2. I have personal knowledge of the facts contained within this Declaration, and, if called as a witness, could and would competently testify as to their accuracy.

3. On Wednesday, September 20, 2017, I agreed to accept service of a subpoena issued by the Western District of Texas in the above-captioned matter (the "Texas Litigation") for a deposition of Jane Doe, M.D. noticed to occur in Honolulu, Hawaii. The identify of Jane Doe, M.D. is known to me and the parties to the Texas Litigation. The purpose of the pseudonym is to protect Dr. Doe's identity. This is of paramount importance to Dr. Doe given recent prior history of

harassment and death threats resulting from her profession as a physician and obstetrician-gynecologist who provides, among other medical services, abortion procedures.

4. On Thursday, October 19, 2017, Defendants issued, through the Western District of Texas, a new subpoena in the above-captioned matter for a deposition of Jane Doe, M.D. noticed to occur in Honolulu, Hawaii on October 26, 2017. A true and correct copy of the Subpoena is attached hereto as **Exhibit 1**, and is submitted under seal.

5. This litigation originated when, on July 20, 2017, ten Texas healthcare providers that provide second-trimester abortions and one Texas physician with an ownership interest in one of the facilities (collectively, "Plaintiffs") filed suit in the Western District of Texas, Austin Division against the Attorney General of Texas and various Texas county criminal prosecutors in their official capacities. A true and correct copy of the First Amended Complaint in the action is attached hereto as **Exhibit 2**. A true and correct copy of the Scheduling Order in the action is attached as **Exhibit 3**.

6. From a review of the docket in this matter, it appears to me that trial for the matter is currently set for November 2, 2017. As related to this matter, I have corresponded with Christopher D. Hilton, Assistant Attorney General of the

Office of the Attorney General of the State of Texas, who I understand to be one of the attorneys representing the Defendants.

7. Since service of the Subpoena, I have corresponded with Mr. Hilton on multiple occasions via e-mail and telephone. These conversations have focused around the Defendants' interest in deposing Dr. Doe, the subject matter(s) for the deposition; Dr. Doe's concerns that public involvement with the Texas Litigation would jeopardize her and her family's personal safety; the bases upon which Dr. Doe could move to quash the subpoena; and the possibility that, notwithstanding these bases, Dr. Doe agree to the deposition, subject to agreement on a protective order sufficient to protect Dr. Doe's identity and safety.

8. On Wednesday, September 20, 2017, I spoke with Mr. Hilton by telephone about the Defendants' interest in deposing Dr. Doe. Mr. Hilton responded that Dr. Doe has

During that call, I informed Mr. Hilton that I, as Dr. Doe's counsel, was considering whether to file a motion to quash the subpoena.

9. On Friday, September 22, 2017, I spoke with Mr. Hilton by telephone about the Defendants' interest in deposing Dr. Doe. Mr. Hilton responded that Dr. Doe

10. During the September 22, 2017 call, I asked Mr. Hilton whether

would be used by the Defendants during the deposition. Mr. Hilton stated that he was familiar with and that the determination had not yet been made.

11.

12. During the September 22, 2017 call, I asked Mr. Hilton whether

would be used by the Defendants during the deposition. Mr. Hilton stated that the determination had not yet been made.

13. During the September 22, 2017 call, I asked Mr. Hilton whether the Defendants intended to ask Dr. Doe about fetal tissue donation or the techniques used for harvesting fetal tissue for donation. Mr. Hilton stated that he could not "foreclose it." I also asked Mr. Hilton whether the Defendants intended to ask

Dr. Doe about digoxin and other techniques used for fetal demise in second-term abortions, and Mr. Hilton responded that Defendants "probably would."

14. During the September 22, 2017 call, I explained Dr. Doe's security concerns to Mr. Hilton. We agreed to attempt to seek mutual agreement on protective measures to adequately address Dr. Doe's security concerns and confidentiality.

15. I spoke with Mr. Hilton again on October 2, 2017 by telephone. My colleague, Perlette Jura, a partner in the Los Angeles office of Gibson Dunn, was also on this call. We again explained Dr. Doe's concerns regarding public affiliation with the Texas Litigation and certain protective measures necessary to guard against these safety risks. During this call, Mr. Hilton indicated that the Defendants would agree to a half day's (3.75 hours) worth of testimony and likely would be comfortable not raising .

Mr. Hilton further indicated that, although the Defendants could not help prepare a joint submission, they would take a position of non-opposition if Dr. Doe drafted papers to protect her identity, subject to agreement on content.

16. On Friday, October 6, 2017, Mr. Hilton e-mailed me and Ms. Jura a list of topics that the Defendants intended to be the subjects of Dr. Doe's deposition. These were: "[t]he use, safety, and efficacy of techniques for causing fetal demise, including digoxin, potassium chloride (KCl), and umbilical cord

transection," "[a]rticles and/or studies participated in or written by Dr. [Doe]," "Dr. [Doe's] work for PPFA and personal knowledge of PPFA practices," and "[d]ocuments, including policies, procedures, and other communications, related to the above." He further stated that the Defendants wished to reserve the right to question Dr. Doe about

17. On Monday, October 9, 2017, Ms. Jura responded via electronic letter to Mr. Hilton's email. The letter explained that although there are numerous bases upon which to move to quash the subpoena, Dr. Doe may be willing to proceed with the deposition in the interest of permitting Defendants' access to Dr. Doe to discuss defined factual matters that Defendants believe are relevant to the issues in the litigation. The letter also explained that such an agreement was contingent on the adoption of measures to protect the safety risk inherent in Dr. Doe's public involvement in the Texas Litigation, and detailed certain protective measures necessary for inclusion in the unopposed protective order. The letter also made clear that during the deposition would be a "deal-breaker" for Dr. Doe's agreement to voluntarily submit to the deposition.

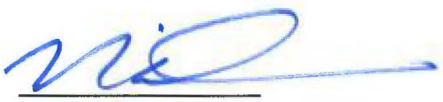
18. On Friday, October 13, 2017, my colleague Vanessa Adriance, an associate in the Los Angeles office of Gibson Dunn, sent working drafts of the unopposed motion for a protective order, motion to seal, and accompanying draft

order and supporting declarations to Mr. Hilton and his colleague Andrew Stephens. These working drafts reflected our discussions with the Defendants thus far, including the protections outlined in our October 9, 2017 letter.

19. On Tuesday, October 17, 2017, the Defendants returned an edited version of the unopposed motion for a protective order. The Defendants removed certain protections, including the prohibition of public disclosure of any portion of the transcript of Dr. Doe's deposition testimony unless all identifying information, including descriptions that would lead to identification, is removed. Defendants further deleted the provision that, "In the event that a party reasonably expects to elicit testimony from a witness that will call for Dr. Doe's name or identity, that witness shall be instructed to refer to Dr. [Doe] by her pseudonym prior to the commencement of any examination in open court."

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

Dated: Washington, D.C., October 23, 2017.



GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
MBopp@gibsondunn.com

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

WHOLE WOMAN'S HEALTH, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	CAUSE NO. 1:17-CV-00690-LY
	§	
KEN PAXTON, et al.,	§	
	§	
Defendants.	§	

DEFENDANT KEN PAXTON'S NOTICE OF SUBPOENA TO DEPOSITION IN A CIVIL ACTION PURSUANT TO FED. R. CIV. P. 45

TO: Plaintiffs Whole Woman's Health, Planned Parenthood Center for Choice, Planned Parenthood of Greater Texas Surgical Health Services, Planned Parenthood South Texas Surgical Center, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, Southwestern Women's Surgery Center, and Nova Health Systems, Inc. d/b/a Reproductive Services, each on behalf of itself, its staff, physicians and patients, and Curtis Boyd, M.D., Jane Doe, M.D., Bhavik Kumar, M.S., and Alan Braid, M.D., each on behalf of itself and its patients, by and through their attorneys of record, Patrick J. O'Connell, 2525 Wallingwood, Bldg 14, Austin, Texas 78746, (512) 852-5918, pat@pjofca.com.

Pursuant to Federal Rule of Civil Procedure 45, Defendant hereby provides notice that he will issue a subpoena commanding the named individual to appear and testify at a deposition by stenography on October 26, 2017, as described in the attached subpoena. A copy of the subpoena is attached hereto. The deposition and any exhibits thereto may be used at trial pursuant to Federal Rule of Civil Procedure 32.

Exhibit 1

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

DARREN MCCARTY
Special Counsel for Civil Litigation
Texas Bar No. 24007631

ANGELA V. COLMENERO
Chief, General Litigation Division

/s/ Andrew B. Stephens
ANDREW B. STEPHENS
Texas Bar No. 24079396
ADAM A. BIGGS
Texas Bar No. 24077727
SUMMER R. LEE
Texas Bar No. 24046283
EMILY ARDOLINO
Texas Bar No. 24087112
BENJAMIN S. WALTON
Texas Bar No. 24075241
Assistant Attorneys General
General Litigation Division

HEATHER GEBELIN HACKER
Assistant Solicitor General
Texas Bar No. 24103325

JOHN S. LANGLEY
Assistant Attorney General
Administrative Law
Texas Bar No. 11919250

Office of the Attorney General
300 West 15th Street
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2120 (phone)
(512) 320-0667 (fax)

Attorneys for Defendant Ken Paxton

CERTIFICATE OF SERVICE

I certify that on October 19, 2017, this document was served through the Court's CM/ECF Document Filing System or through electronic mail, upon the following counsel of record:

Patrick J. O'Connell
Law Offices of Patrick J. O'Connell PLLC
2525 Wallingwood Dr., Bldg. 14
Austin, TX 78746
(512) 222-0444
pat@pjofca.com

Christopher D. Hilton
300 West 15th Street
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2120 (phone)
(512) 320-0667 (fax)

Janet Crepps
Molly Duane
Center for Reproductive Rights
199 Water St. 22nd Floor
New York, NY 10038
(864) 962-8519
(917) 637-3631
jcrepps@reprorights.org
mduane@reprorights.org

J. Alexander Lawrence
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 336-8638
alawrence@mofo.com

Melissa Cohen
Planned Parenthood Federation of America
123 William Street
New York, NY 10038
(212) 261-4649
melissa.cohen@ppfa.org

/s/ Andrew B. Stephens
ANDREW B. STEPHENS
Assistant Attorney General

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Texas

Whole Woman's Health, et al.,
Plaintiff
v.
Ken Paxton, et al.,
Defendant

Civil Action No. 1:17-CV-00690

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: , by and through Perlette Jura, Gibson Dunn, 333 South Grand Avenue, Los Angeles, CA 90071

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Planned Parenthood Honolulu Health Center 1350 S. King Street, Suite 310, Honolulu HI 96814	10/26/2017 10:00 am

The deposition will be recorded by this method: Stenography

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/19/2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* , who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:17-CV-00690

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows:

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because:

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

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

WHOLE WOMAN'S HEALTH; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; ALAMO CITY SURGERY CENTER PLLC d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES; SOUTHWESTERN WOMEN'S SURGERY CENTER; and NOVA HEALTH SYSTEMS, INC. d/b/a REPRODUCTIVE SERVICES, each on behalf of itself, its staff, physicians and patients; and CURTIS BOYD, M.D.; ROBIN WALLACE, M.D.; BHAVIK KUMAR, M.D.; and ALAN BRAID, M.D., each on behalf of himself and his patients, Plaintiffs, v. KEN PAXTON, Attorney General of Texas; MARGARET MOORE, District Attorney for Travis County; NICHOLAS LAHOOD, Criminal District Attorney for Bexar County; JAIME ESPARZA, District Attorney for El Paso County; FAITH JOHNSON, District Attorney for Dallas County; SHAREN WILSON, Criminal District Attorney for Tarrant County; RICARDO RODRIGUEZ, JR., Criminal District Attorney for Hidalgo County; ABELINO REYNA, Criminal District Attorney for McLennan County; and KIM OGG, Criminal District Attorney for Harris County, each in their official capacities, as well as their employees, agents, and successors, Defendants.	)	CAUSE NO. A-17-CV-690-LY

FIRST AMENDED COMPLAINT

Exhibit 2

Plaintiffs, by and through their undersigned attorneys, bring this Complaint against the above-named Defendants, their employees, agents and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. Pursuant to 42 U.S.C. § 1983, Plaintiffs, Texas healthcare providers, bring this action on behalf of themselves, their staff, physicians, and patients. They challenge certain provisions of Texas Senate Bill 8, enacted during the 2017 legislative session ("S.B. 8"), that ban the dilation and evacuation abortion procedure ("D & E"), the safest and most common method of abortion after approximately 15 weeks of pregnancy. S. B. 8, creating Tex. Health & Safety Code §§ 171.151-154. A copy of S.B. 8 is attached hereto as Exhibit 1. These provisions are scheduled to take effect on September 1, 2017.

2. The ban on D & E threatens the health of Plaintiffs' patients and their access to abortion care, subjects Plaintiffs to criminal penalties, and violates Plaintiffs' patients' constitutional rights. Specifically, a ban on D & E procedures imposes an undue burden on women seeking second-trimester abortions. In addition, to the extent that any physician can continue to provide D & E procedures, the ban violates Plaintiffs' patients' right to bodily integrity because it would require them to accept unnecessary, invasive, and potentially painful medical procedures, in order to access their constitutional right to abortion.

3. To protect Plaintiffs and their patients from these constitutional violations, and to avoid irreparable harm, Plaintiffs seek declaratory and injunctive relief to prevent enforcement of the D & E ban.

II. JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction over Plaintiffs' federal claims under 28 U.S.C. §§ 1331 and 1343(a)(3).

5. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this court.

6. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) because Defendants Ken Paxton and Margaret Moore, who are sued in their official capacities, carry out their official duties in this district.

III. PLAINTIFFS

7. Plaintiff Whole Woman's Health operates licensed abortion facilities in Austin, Fort Worth, McAllen, and San Antonio. Whole Woman's Health provides a range of reproductive health services, including medication and surgical abortions. Whole Woman's Health provides abortions in the second trimester of pregnancy, including D & E procedures that would be banned should S.B. 8 take effect. Whole Woman's Health sues on behalf of itself, its staff, physicians, and patients.

8. Plaintiff Planned Parenthood Center for Choice ("PP Houston") operates a licensed ambulatory surgical center in Houston. PP Houston provides a range of reproductive health services, including medication and surgical abortions. PP Houston provides abortions in the second trimester of pregnancy, including D & E procedures that would be banned should S.B. 8 take effect. PP Houston sues on behalf of itself, its staff, physicians, and patients.

9. Plaintiff Planned Parenthood of Greater Texas Surgical Health Services ("PPGT Surgical Health Services") operates licensed ambulatory surgical centers in Austin, Dallas, and Fort Worth, and a licensed abortion facility in Waco. PPGT Surgical Health Services provides a range of reproductive health services, including medication and surgical abortions. PPGT Surgical Health Services provides abortions in the second trimester of pregnancy, including D & E procedures that would be banned should S.B. 8 take effect. PPGT Surgical Health Services sues on behalf of itself, its staff, physicians, and patients.

10. Plaintiff Planned Parenthood South Texas Surgical Center ("PPST Surgical Center") operates a licensed ambulatory surgical center in San Antonio. PPST Surgical Center provides a range of reproductive health services, including medication and surgical abortions. PPST Surgical Center provides abortions in the second trimester of pregnancy, including D & E procedures that would be banned should S.B. 8 take effect. PPST Surgical Center sues on behalf of itself, its staff, physicians, and patients.

11. Plaintiff Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo Women's"), is a licensed ambulatory surgical center in San Antonio. Alamo Women's provides a range of reproductive health services, including medication and surgical abortions. Alamo Women's provides abortions in the second trimester, including D & E procedures that would be banned should S.B. 8 take effect. Alamo Women's sues on behalf of itself, its staff, physicians, and patients.

12. Plaintiff Southwestern Women's Surgery Center ("Southwestern") operates a licensed ambulatory surgical center in Dallas. Southwestern provides a range of reproductive health services, including medication and surgical abortions. Southwestern provides abortions in

the second trimester, including D & E procedures that would be banned should S.B. 8 take effect. Southwestern sues on behalf of itself, its staff, physicians, and patients.

13. Plaintiff Nova Health Systems, Inc. d/b/a Reproductive Services ("Reproductive Services"), operates a licensed abortion facility in El Paso. Reproductive Services provides a range of reproductive health services, including medication and surgical abortion. Reproductive Services provides abortions in the second trimester, including D & E procedures that would be banned should S.B. take effect. Reproductive Services sues on behalf of itself, its staff, physicians, and patients.

14. Curtis Boyd, M.D., is a family practice physician licensed to practice in the State of Texas. Dr. Boyd has an ownership interest in Southwestern. He provides D & E procedures that would be banned should S.B. 8 take effect. Dr. Boyd sues on his own behalf and on behalf of his patients.

15. Robin Wallace, M.D., M.A.S., is a board-certified family medicine physician licensed to practice in the State of Texas. Dr. Wallace is the medical director at Southwestern. She provides D & E procedures that would be banned should S.B. 8 take effect. Dr. Wallace sues on her own behalf and on behalf of her patients.

16. Bhavik Kumar, M.D., M.P.H., is a board-certified family medicine physician licensed to practice in the State of Texas. Dr. Kumar is the medical director for the Whole Woman's Health clinics in Texas. He provides D & E procedures that would be banned should S.B. 8 take effect. Dr. Kumar sues on his own behalf and on behalf of his patients.

17. Alan Braid, M.D. is a board-certified obstetrician/gynecologist licensed to practice in the State of Texas. Dr. Braid has an ownership interest in Alamo Women's. He provides D & E

procedures that would be banned should S.B. 8 take effect. Dr. Braid sues on his own behalf and on behalf of his patients.

IV. DEFENDANTS

18. Defendant Ken Paxton is the Attorney General of Texas. He is empowered to assist county and district attorneys in the prosecution of criminal offenses, Tex. Govt. Code § 574.004, and therefore criminal violations of S.B. 8. He is sued in his official capacity and may be served with process at 300 West 15th Street, Austin, Texas 78701.

19. Defendant Margaret Moore is the District Attorney for Travis County. She is responsible for prosecuting criminal violations of the D & E ban occurring in Travis County. She is sued in her official capacity and may be served with process at 509 West 11th Street, Room 300, Austin, Texas 78701.

20. Defendant Nicholas LaHood is the Criminal District Attorney for Bexar County. He is responsible for prosecuting criminal violations of the D & E ban occurring in Bexar County. He is sued in his official capacity and may be served with process at 101 West Nueva Street, 4th Floor, San Antonio, Texas 78205.

21. Defendant Faith Johnson is the District Attorney for Dallas County. She is responsible for prosecuting criminal violations of the D & E ban occurring in Dallas County. She is sued in her official capacity and may be served with process at 133 North Riverfront Boulevard, LB 19, Dallas, Texas 75207.

22. Defendant Jaime Esparza is the District Attorney for El Paso County. He is responsible for prosecuting criminal violations of the D & E ban occurring in El Paso County. He is sued in his official capacity and may be served with process at El Paso County Courthouse, 500 East San Antonio Avenue, Room 201, El Paso, Texas 79901.

23. Defendant Kim Ogg is the Criminal District Attorney for Harris County. She is responsible for prosecuting criminal violations of the D & E ban occurring in Harris County. She is sued in her official capacity and may be served with process at 1201 Franklin Street, Suite 600, Houston, Texas 77002.

24. Defendant Ricardo Rodriguez, Jr., is the Criminal District Attorney for Hidalgo County. He is responsible for prosecuting criminal violations of the D & E ban occurring in Hidalgo County. He is sued in his official capacity and may be served with process at 100 East Cano, Edinburg, Texas 78539.

25. Defendant Abelino Reyna is the Criminal District Attorney for McLennan County. He is responsible for prosecuting criminal violations of the D & E ban occurring in McLennan County. He is sued in his official capacity and may be served with process at 219 North 6th Street, Suite 200, Waco, Texas 76701.

26. Defendant Sharen Wilson is the Criminal District Attorney for Tarrant County. She is responsible for prosecuting criminal violations of the D & E ban occurring in Tarrant County. She is sued in her official capacity and may be served with process at the Tim Curry Criminal Justice Center, 401 West Belknap Street, Fort Worth, Texas 76196-0201.

V. FACTUAL ALLEGATIONS

Background

27. Legal abortion is extremely safe, and safer for a woman than carrying a pregnancy to term and giving birth.

28. Nonetheless, the earlier in pregnancy a woman is able to accesses abortion care, the safer it is for her because remaining pregnant itself entails risks and the risks associated with abortion increase as pregnancy advances.

29. In Texas, as in the nation as a whole, the vast majority of women who seek abortion care do so in the first trimester of pregnancy. Likewise, the great majority of second-trimester abortions occur in the early weeks of the second trimester. Still, a significant number of women in Texas seek abortions between 14 and 22 weeks, as measured from the first day of the woman's last menstrual period ("LMP").

30. Women seek abortion during the second trimester for the same reasons they seek earlier procedures, including a variety of personal and medical reasons. Women may also seek abortion during the second trimester because they have been delayed due to late confirmation of pregnancy or difficulty gathering funds to pay for the procedure or organizing the logistics of necessary travel, time off work and child care. In addition, the identification of major anatomic or genetic anomalies in the fetus most commonly occurs in the second trimester, and women may choose to terminate a pregnancy for that reason.

31. Women face many obstacles accessing abortion care in Texas.

32. Many abortion patients are low income, and struggle to make arrangements for, and absorb the cost of, missed work, childcare if they have children, which most do, transportation to and from the clinic, and any needed hotel rooms. These burdens are increased by Texas's mandate that a woman make an additional, unnecessary trip to a physician, to receive state-mandated counseling and an ultrasound in person, and then delay at least 24 hours before making another trip to obtain her abortion.

33. As a result of existing Texas regulations, an abortion of a fetus age 16 weeks gestational age or more may be performed only at an ambulatory surgical center or hospital licensed to perform the abortion. Tex. Health & Safety Code § 171.004. In addition, abortions

are prohibited after 20 weeks post-fertilization, except in narrow circumstances. Tex. Health & Safety Code § 171.044.

34. S.B. 8 is the latest in a long string of attempts by Texas to place burdensome, medically unnecessary restrictions on women's access to abortion. In 2003, Texas instituted a 24-hour mandatory delay between a woman providing informed consent for an abortion and her obtaining the procedure. In 2011, Texas amended its informed consent requirements regarding abortion to include a mandatory ultrasound at least 24 hours before the procedure (or two hours for patients who live at leave 100 miles from the nearest licensed abortion facility). In June of 2016, the United States Supreme Court struck down two provisions of another Texas anti-abortion law, because the burdens imposed by the restrictions outweighed any benefits the requirements advanced. *Whole Woman's Health v. Hellerstedt*, __ U.S. ___, 136 S. Ct. 2292 (2016). Just four days after the Supreme Court issued its decision, the Texas Department of State Health Services published proposed regulations eliminating the typical, medically appropriate methods of disposal for embryonic and fetal tissue, and instead requiring healthcare facilities to dispose of all such tissue from abortion and miscarriage by burial or cremation. This court granted a preliminary injunction blocking the amendments from taking effect, noting that the circumstances suggested that "the actual purpose of the Amendments is to limit abortion access in Texas." *Whole Woman's Health v. Hellerstedt*, No. 1:16-cv-01300-SS, __ F. Supp. 3d ___, 2017 WL 462400 (W.D. Tex. Jan. 27, 2017), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 1, 2017).

35. The Texas legislature introduced more than fifty restrictive abortion bills during the 2017 regular session. S.B. 8 as originally drafted and debated was an unrelated abortion restriction. The D & E ban and other restrictions were attached as last minute amendments, without committee hearings and with scant debate.

The Ban on D & E Procedures

36. The challenged provisions of S.B. 8 criminalize the performance of what the statute calls a "dismemberment abortion." Although this is not a medical term that is used by physicians or that appears in any medical literature, the definition in the statute clearly prohibits a procedure referred to in the medical profession as dilation and evacuation or "D & E." D & E, which can be performed in an outpatient setting, is the safest and most common method of abortion after approximately 15 weeks of pregnancy.

37. S.B. 8 defines "dismemberment abortion" as follows:

> "[D]ismemberment abortion" means an abortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of the unborn child's body to cut or rip the piece from the body. The term does not include an abortion that uses suction to dismember the body of an unborn child by sucking pieces of the unborn child into a collection container. The term includes a dismemberment abortion that is used to cause the death of an unborn child and in which suction is subsequently used to extract pieces of the unborn child after the unborn child's death.

S.B. 8, creating Tex. Health & Safety Code § 171.151.

38. The only exception to S.B. 8's prohibition on D & E procedures is for instances in which a "medical emergency" exists. Although not further defined within the subchapter creating the D & E ban, "medical emergency" is defined elsewhere in the same chapter of the Texas Health and Safety Code to mean: "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed." Tex. Health & Safety Code § 171.002(3).

39. Violation of the ban is a "state jail felony," S.B. 8, creating § 171.153, punishable by a minimum of 180 days to a maximum of two years in jail, and a fine of up to $10,000. Tex. Penal Code § 12.35(a)-(b).

40. S.B. 8 also separately bans a distinct variant of the D & E procedure, known by the medical term dilation and extraction ("D & X"), a procedure previously used by a minority of physicians later in the second trimester. S.B. 8, creating §§ 171.101-106. This prohibition, which purports to ban so-called "partial-birth" abortions, is substantially similar to a federal prohibition that is currently in effect, 18 U.S.C. § 1531, and is not challenged here.

The Impact of the D & E Ban on Women Seeking Second-Trimester Abortions

41. S.B. 8 bans dilation and evacuation abortion, or D & E, the safest and most common abortion method used after approximately 15 weeks of pregnancy. Enforcement of the ban would threaten women's bodily autonomy, health, and access to abortion in Texas.

42. In the first trimester of pregnancy, abortions are performed using medical or instrumental (also called surgical) means. Medication abortions, which are typically available up to 10.0 weeks LMP, involve the ingestion of two medications to terminate the pregnancy, in a process similar to a miscarriage. Instrumental abortions in the first trimester are performed using a suction device to aspirate (or empty) the uterus.

43. For all instrumental abortions, before the physician can remove the products of conception, it is necessary to dilate the cervix to allow the passage of instruments. Adequate cervical preparation is critical to ensuring the procedure is performed safely and without trauma to the cervix. Dilation can be accomplished by a variety of means, depending on the patient and the length of the pregnancy. Methods include the use of mechanical dilators, ingestion of

medications, and, after the first trimester, can include the insertion of osmotic dilators into the cervix, which absorb moisture and gradually expand.

44. Starting at approximately 14.0 weeks LMP, physicians may use a combination of suction and forceps or other instruments to remove the fetus and other products of conception from the uterus. Because the cervical opening is smaller than the fetus, separation or disarticulation of fetal tissue usually occurs as the physician uses instruments to bring the tissue through the cervix. A procedure in which the physician uses instruments, alone or in conjunction with suction, to empty the uterus in this manner is known as D & E.

45. D & E is safely performed as an outpatient procedure throughout the second trimester of pregnancy. The evacuation phase takes approximately 10 minutes.

46. Other than D & E, the only other medically-proven abortion method available throughout the second trimester is induction abortion, where a physician uses medication to induce labor and delivery of a non-viable fetus. Induction of labor accounts for only about 5% of second-trimester abortions nationally. Induction abortions must be performed in a hospital or similar facility that has the capacity to monitor a patient overnight. Induction abortions can last anywhere from five hours to three days; are extremely expensive; entail more pain, discomfort, and recovery time for the patient—similar to that of a woman giving birth—than D & E; and are medically contraindicated for some patients.

47. Many Texas hospitals prohibit abortions except in very limited circumstances and therefore the option of second-trimester induction, in addition to the added time, expense, and physical and emotional burdens, is not available to most women in Texas.

48. The D & E ban does not apply in instances in which the physician—through a separate procedure—causes fetal demise prior to starting the evacuation phase of the D & E. This does not, however, materially narrow the scope of the ban or lessen its impact.

49. Before 18 weeks LMP, there is no reliable, safe, studied, or medically appropriate way for Plaintiffs to attempt to cause fetal demise. Attempting to do so would be difficult and would impose risks with no medical benefit to the patient, and is virtually untested, has unknown risks and uncertain efficacy. Requiring demise in every instance would be outside the standard of care and would in some circumstances amount to experimental procedures.

50. Starting at 18 or 20 weeks LMP, some, but not all, physicians in Texas use a hypodermic needle to inject a drug called digoxin transabdominally (through the abdomen into the uterus) or transvaginally (through the vaginal wall or through the cervix) to attempt to cause fetal demise.

51. Because digoxin can take up to 24 hours to cause fetal demise, even if such injections were feasible and medically appropriate prior to 18 weeks LMP—which they are not—its use in the early second trimester would require women to make an additional and unnecessary trip to the clinic because, but for the need for demise, the physician could achieve adequate dilation and complete the procedure in one visit. This extra trip would be a tremendous burden on patients, compounding the burdens patients already face, and introducing untested and unnecessary health risks.

52. The physicians who use digoxin to attempt to induce fetal demise do so for a variety of reasons, including out of fear of prosecution under the federal ban on so-called partial-birth abortions, now also prohibited by S.B. 8, creating Texas Health and Safety Code §§ 171.101-106. While some physicians feel that demise makes the procedure easier because the fetal tissue may

soften as a result of demise, published data show that use of digoxin provides no clear medical benefit to the patient. According to the American Congress of Obstetricians and Gynecologists: "No evidence currently supports the use of induced fetal demise to increase the safety of second-trimester medical or surgical abortion." Am. Coll. Obstetricians & Gynecologists, *Practice Bulletin Number 135: Second-Trimester Abortion* (June 2013).

53. Risks associated with digoxin injections include infection, delivery of the fetus outside of a healthcare facility, and an increased risk of hospitalization. The procedure, which involves injection using a long needle, can also be painful and cause severe anxiety for many women. In addition, the procedure is more difficult for some women due to anatomical characteristics, such as obesity, fibroids, and cesarean scars from previous deliveries, and more risky for women with certain heart conditions should the digoxin enter the maternal circulation.

54. Digoxin also sometimes fails to cause fetal demise in the expected period of time after the injection. If the D & E ban were to go into effect, a second injection would be necessary in this situation, but this is unstudied and is not accepted medical practice for the vast majority of patients, who are already adequately dilated and otherwise ready to proceed with the procedure. A second injection would add yet another day to the procedure, increase the risk of infection and extramural delivery, particularly for patients already well dilated, as well as increase the burdens on women seeking second-trimester abortions, with no medical justification. Physicians who currently use digoxin rarely, if ever, administer second injections of digoxin.

55. It is not clear whether the medical emergency exception provides physicians with protection from criminal prosecution if faced with the scenario in which digoxin has failed to cause demise within the expected time, but it is in the patient's best medical interest to complete the procedure, because it is unlikely that a physician could certify, on pain of criminal penalty, that

the condition, although serious, comes within the extremely narrow definition of medical emergency. Tex. Health & Safety Code § 171.002(3).

56. There are no other reliable, safe, and available methods of attempting to cause fetal demise in the outpatient setting. An injection of KCl (potassium chloride) directly into the fetal heart does effectively cause demise, but requires years of specialized training and hospital-grade equipment, and can be fatal to the woman if administered incorrectly.

57. Moreover, current Texas law prohibits the off-label prescription of an "abortion-inducing drug." Tex. Health & Safety Code § 171.063. This law applies to the provision of abortions using medications, rather than abortions using instruments. However, on its face, the law could also apply to the use of any substance, including digoxin or KCl, to cause fetal demise prior to abortion because neither of these drugs are labeled for that purpose. Out of an abundance of caution, some Texas physicians do not use digoxin to cause fetal demise for fear of prosecution under this provision.

58. Nor is umbilical cord transection, where a clinician attempts to grasp and divide the umbilical cord to cause demise, a realistic means of avoiding criminal prosecution under the D & E ban. Umbilical cord transection can be very difficult, especially at earlier gestational ages, and it may not be possible for every patient. A physician cannot know ahead of time if he or she will be able to safely grasp the cord, but at that point the procedure is underway and it exposes the woman to increased risks, such as risk of infection, not to complete the procedure. Umbilical cord transection also exposes patients to increased risk of uterine perforation, cervical injury, and bleeding; and would prolong the D & E, also increasing risks. Additionally, there is a risk that a physician attempting to grasp the cord will instead grasp fetal tissue, and therefore violate, rather than circumvent, the D & E ban.

59. The safest and most efficacious way for a physician to perform a D & E procedure or to attempt to induce fetal demise if the physician believes there are reasons to do so, is by using the techniques with which the physician is familiar and comfortable, based on his or her training and experience.

60. Before starting a D & E, it is impossible to know whether an attempt to cause fetal demise will be possible or successful. Thus, the effect of S.B. 8 is that Plaintiffs may be prevented from starting any D & E because they know they may not be able to complete the procedure without violating the D & E ban.

61. S.B. 8 therefore imposes a criminal ban, and significant penalties, on the performance of D & E, the safest and most common method of second-trimester abortion after approximately 15 weeks of pregnancy, leaving physicians with no reasonable alternatives by which to continue providing this abortion care.

62. Enforcement of the D & E ban would irreparably harm women seeking second-trimester abortions by denying them access to the safest and most common method of abortion after approximately 15 weeks of pregnancy. Even if limited access remains available, the ban forces women seeking second-trimester abortions to undergo more complex and risky procedures, including compelling them to undergo painful, untested, and invasive medical procedures, in order to access their constitutional right to abortion.

63. Enforcement of the D & E ban would also subject Plaintiffs' patients to irreparable harm from the violation of their constitutional rights.

CLAIMS FOR RELIEF

COUNT I

(Due Process—Undue Burden on Plaintiffs' Patients' Right to Liberty and Privacy)

64. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 63.

65. By banning the safest and most common method of abortion used after approximately 15 weeks of pregnancy, the D & E ban violates Plaintiffs' patients' right to liberty and privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it imposes an undue burden on women seeking to terminate a pregnancy before viability.

COUNT II

(Due Process—Plaintiff's Patients' Right to Bodily Integrity)

66. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 65.

67. By forcing women to undergo additional, invasive, and potentially painful procedures to obtain a second-trimester abortion or continue a pregnancy, the D & E ban violates Plaintiffs' patients' right to bodily integrity as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

INJUNCTIVE RELIEF

68. The D & E ban subjects Plaintiffs' patients to irreparable harm for which there exists no adequate remedy at law, and threatens Plaintiffs with substantial penalties for providing constitutionally protected abortion care.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

A. To issue a preliminary injunction and permanent injunction restraining Defendants and their successors in office from enforcing the D & E ban, and specifically those provisions of S.B. 8 creating Texas Health and Safety Code §§ 171.151-154.

B. To enter a judgment declaring that the D & E ban, and specifically those provisions of S.B. 8 creating Texas Health and Safety Code §§ 171.151-154, violate the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

C. To award Plaintiffs their attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

D. To grant such other and further relief as the Court deems just and proper.

Dated: August 18, 2017

Respectfully submitted,

/s/ Patrick J. O'Connell
Patrick J. O'Connell
Texas Bar No. 15179900
Law Offices of Patrick J. O'Connell PLLC
2525 Wallingwood, Bldg. 14
Austin, Texas 78746
(512) 852-5918
pat@pjofca.com

Attorney for all Plaintiffs

Janet Crepps*
Molly Duane*
Center for Reproductive Rights
199 Water St. 22nd Floor
New York, NY 10038
(864) 962-8519 (Janet Crepps)
(917) 637-3631 (Molly Duane)
jcrepps@reprorights.org
mduane@reprorights.org

J. Alexander Lawrence*
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 336-8638
alawrence@mofo.com

Attorneys for Plaintiffs Whole Woman's Health, Alamo City Surgery Center, Southwestern Women's Surgery Center, Nova Health Systems, Curtis Boyd, M.D., Robin Wallace, M.D., Bhavik Kumar, M.D., and Alan Braid, M.D.

Melissa Cohen*
Planned Parenthood Federation of America
123 William Street
New York, NY 10038
(212) 261-4649
melissa.cohen@ppfa.org

Attorney for Plaintiffs Planned Parenthood Center For Choice, Planned Parenthood of Greater Texas Surgical Health Services, and Planned Parenthood South Texas Surgical Center

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I certify that on this 18th day of August 2017, I electronically filed a copy of the above document with the Clerk of the Court using the CM/ECF system.

/s/ Patrick J. O'Connell
Patrick J. O'Connell

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

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	
v.	)	CASE NO. 1:17-CV-0690-LY
	)	
KEN PAXTON, et al.,	)	
	)	
Defendants.	)	

NOTICE OF FILING: AGREED SCHEDULING ORDER

TO THE HONORABLE COURT:

Plaintiffs file the Agreed Scheduling Order ("Agreed Order"), attached hereto as Exhibit A, which has been negotiated with and agreed to by Defendants.

WHEREFORE, Plaintiffs respectfully ask the Court to enter the Agreed Scheduling Order.

Dated: September 18, 2017

Respectfully submitted,

/s/ Patrick J. O'Connell

Patrick J. O'Connell
Texas Bar No. 15179900
Law Offices of Patrick J. O'Connell PLLC
2525 Wallingwood, Bldg. 14
Austin, Texas 78746
(512) 852-5918
pat@pjofca.com

Attorney for all Plaintiffs

Exhibit 3

Janet Crepps
Molly Duane
Center for Reproductive Rights
199 Water St. 22nd Floor
New York, NY 10038
(864) 962-8519 (Janet Crepps)
(917) 637-3631 (Molly Duane)
jcrepps@reprorights.org
mduane@reprorights.org

J. Alexander Lawrence
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 336-8638
alawrence@mofo.com

Attorneys for Plaintiffs Whole Woman's Health, Alamo City Surgery Center, Southwestern Women's Surgery Center, Nova Health Systems, Curtis Boyd, M.D., Robin Wallace, M.D., Bhavik Kumar, M.D., and Alan Braid, M.D.

Melissa Cohen
Planned Parenthood Federation of America
123 William Street
New York, NY 10038
(212) 261-4649
melissa.cohen@ppfa.org

Attorney for Plaintiffs Planned Parenthood Center For Choice, Planned Parenthood of Greater Texas Surgical Health Services, and Planned Parenthood South Texas Surgical Center

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	CAUSE NO. 1:17-CV-00690-LY
	§	
KEN PAXTON, et al.,	§	
	§	
Defendants.	§	

[PROPOSED] AGREED SCHEDULING ORDER

Pursuant to Rule 16, Federal Rules of Civil Procedure, the Court issues the following scheduling order.

IT IS ORDERED THAT:

1. Each party shall serve on all other parties, but not file, their designation of testifying experts and the materials required by Federal Rule of Civil Procedure 26(a)(2)(B) on or before September 20, 2017 at 5:00 pm CDT.

2. Each party shall serve on all other parties, but not file, their designation of rebuttal experts and materials required by Federal Rule of Civil Procedure 26(a)(2)(B) for such rebuttal experts on or before October 4, 2017 at 5:00 pm CDT.

3. Each party shall serve on all other parties, but not file, all proposed designations of deposition testimony by page and line of the transcript, with corresponding clips of any video segments the designating party may seek to use at trial on or before October 16, 2017 at 5:00 pm CDT.

4. Each party shall serve on all other parties, but not file, a list of all witnesses the

party intends to call to testify at trial (except those to be used for impeachment only) on or before October 16, 2017 at 5:00 pm CDT. If any party seeks to call a witness to testify (except those to be used for impeachment only) who is not on the list, the party must file a motion for leave of Court for the witness to testify.

5. Each party shall file and serve on all other parties any objections to the use of any party's proposed designations of deposition testimony at trial under Rule 32 of the Federal Rules of Civil Procedure on or before October 19, 2017 at 5:00 pm CDT.

6. Each party shall serve on all other parties, but not file, all proposed counter-designations of deposition testimony by page and line of the transcript, with corresponding clips of any video segments the designating party may seek to use at trial on or before October 23, 2017 at 5:00 pm CDT.

7. In advance of trial, the parties shall coordinate so that for each witness whose testimony is to be submitted by video of the witness's deposition, the testimony will be introduced in chronological order without duplication of each witness's testimony. All objections to admission of the testimony at trial shall be reserved for trial, except as may be otherwise required under Rule 32 of the Federal Rules of Civil Procedure.

8. Each party shall file and serve on all other parties on or before October 30, 2017 at 5:00 pm CDT, the following: (1) proposed findings of fact and conclusions of law; (2) any proposed stipulated facts; (3) an appropriate identification of each exhibit (except those to be used for impeachment only), separately identifying those that the party expects to offer and those that the party may offer if the need arises; and (4) the name and, if not previously provided, the address and telephone number of each witness (except those to be used for

impeachment only), separately identifying those whom the party expects to call and those whom the party may call if the need arises.

9. Each party may, but is not required to, file and serve on all other parties any supplemental or amended proposed findings of fact and conclusions of law on or before November 15, 2017 at 5:00 pm CDT.

10. Neither pretrial dispositive motions nor motions in limine shall be filed. They will not be considered.

The parties shall not complete the following paragraph. It will be completed by the Court at the initial pretrial conference to be scheduled by the Court.

11. This case is set for final pretrial conference, in chambers, on the __ day of _____, 20__, at_____and trial commencing on November 2, 2017 at 9:00 a.m. The final pretrial conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

SIGNED this day of , 20 .

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 18th day of September 2017, I electronically filed a copy of the above document with the Clerk of the Court using the CM/ECF system, and personally served all Defendants.

/s/ Patrick J. O'Connell
Patrick J. O'Connell

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WHOLE WOMEN'S HEALTH et. al., Plaintiffs, v. KEN PAXTON et al., Defendants.	MC CASE NO. _____ [Case No. 1:17-CV-00690-LY Pending in the Western District of Texas Austin Division] **DECLARATION OF JANE DOE**

DECLARATION OF JANE DOE

I, Jane Doe, hereby state the following facts relevant to the above-referenced motion:

1. I am a physician and obstetrician-gynecologist, and am licensed to practice medicine in

2. I am currently

3. I have been subpoenaed by the Defendants to provide deposition testimony in the above-captioned litigation (the “Texas Litigation”).

4. Other than this subpoena, I have no involvement in the Texas Litigation. I had no role in the legislation of the Texas statute at issue in the litigation; have not conducted any research or published any works on the statute or its potential effects; have not been asked or provided any guidance regarding the statute or litigation by either party; have not been retained as an expert witness by either party; nor have I been asked or agreed to testify at trial on behalf of any party.

5. Other than this subpoena, I also have no connections to Texas. I have never been licensed to practice medicine in Texas, nor have I ever done so. I have never been employed by or affiliated with any of the plaintiffs in the litigation.

6. In my professional career, I have conducted research and published findings on various topics. However, these were conducted completely independent of the Texas statute or litigation, and were all conducted prior to June 2017.

7. I am filing this declaration under a pseudonym because I fear for my safety and the safety of my family should my name be publicly associated with the Texas Litigation.

8.

9.

10.

11.

12.

13.

14.

15.

16. The entire episode was extraordinarily emotionally taxing. It caused me to withdraw from many daily activities – going to work, seeing friends, even appearing in public. I tried not to even deal with it for the first year. I thought it would get better by then, but it didn't.

17. Now that over two years have passed, I am just now starting to return to a regular schedule. I have resumed work full-time,

18. However, these events are never far from my mind. I no longer have security screening of my e-mails and voicemails, but still use my home alarm system, which I pay for personally. I am constantly in fear that something will cause these events to re-surface, and for the horrors to repeat.

19. For these reasons, it is of paramount importance to me that I not be publicly associated with the Texas Litigation, a case to which I otherwise have no involvement or connection.

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

Dated: Sunday, October 22, 2017.

Jane Doe, M.D.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WHOLE WOMAN'S HEALTH; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; ALAMO CITY SURGERY CENTER PLLC d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES; SOUTHWESTERN WOMEN'S SURGERY CENTER; and NOVA HEALTH SYSTEMS, INC. d/b/a REPRODUCTIVE SERVICES, each on behalf of itself, its staff, physicians and patients; and CURTIS BOYD, M.D.; ROBIN WALLACE, M.D.; BHAVIK KUMAR, M.D.; and ALAN BRAID, M.D., each on behalf of himself and his patients,

Plaintiffs,

vs.

KEN PAXTON, Attorney General of Texas; MARGARET MOORE, District Attorney for Travis County; NICHOLAS LAHOOD, Criminal District Attorney for Bexar County; JAIME ESPARZA, District Attorney for El Paso County; FAITH JOHNSON, District Attorney for Dallas County; SHAREN WILSON, Criminal District Attorney for Tarrant County; RICARDO RODRIGUEZ, JR., Criminal District Attorney for Hidalgo County; ABELINO REYNA, Criminal District Attorney for McLennan County;

MC CASE NO. _____

[Case No. 1:17-CV-00690-LY Pending in the Western District of Texas Austin Division]

CERTIFICATE OF SERVICE

and KIM OGG, Criminal District Attorney for Harris County, each in their official capacities, as well as their employees, agents, and successors,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below service of a copy of the foregoing document was made upon the parties below via U.S. PRIORITY MAIL EXPRESS, postage prepaid, addressed as follows:

ANDREW B. STEPHENS
Assistant Attorney General
Office of the Attorney General
300 West 15th Street
11th Floor
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2121 (phone)
(512) 320-0667 (fax)

CHRISTOPHER D. HILTON
300 West 15th Street
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2120 (phone)
(512) 320-0667 (fax)

PATRICK J. O'CONNELL
Law Offices of Patrick J. O'Connell PLLC
2525 Wallingwood R., Bldg. 14
Austin, TX 78746
(512) 222-0444
pat@pjofca.com

JANET CREPPS
MOLLY DUANE
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
(864) 962-8519
(917) 637-3631
jcrepps@reprorights.org
mduane@reprorights.org

J. ALEXANDER LAWRENCE
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 336-8638
alawrence@mofo.com

MELISSA COHEN
Planned Parenthood Federal of America
123 William Street
New York, NY 10038
(212) 261-4649
melissa.cohen@ppfa.org

DATED: Honolulu, Hawai‘i, October 23, 2017.

/s/ Nicole Y. Altman
LISA WOODS MUNGER
NICOLE Y. ALTMAN

Attorneys for Nonparty JANE DOE, M.D.