

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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December 7, 2016

VIA EMAIL AND FIRST CLASS MAIL

The Honorable Loretta Lynch
Attorney General
c/o Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Attorney General Lynch:

On October 7, 2015, the U.S. House of Representatives passed H. Res. 461, which created the Select Investigative Panel (the "Panel") and empowered it to conduct a full and complete investigation regarding the medical practices of second- and third-trimester abortion providers and the practices of entities that procure and transfer fetal tissue. This includes investigation of partial-birth abortion and the standard of care for infants who survive the abortion procedure.

Over the course of our investigation, we have collected statements and video from former employees and a patient of [REDACTED] who allege numerous violations of law at one or more of his clinics, describing the practitioner as conducting himself with depraved indifference to infant life and committing acts of murder.

Allegations Against [REDACTED]

[REDACTED] is an abortion provider who has operated at three locations in Houston, Texas, including the Aaron Women's Clinic ("Aaron"), the Texas Ambulatory Surgery Center, and the Women's Pavilion; and at the Northpark Medical Group in Dallas. Several former employees who worked with him at one or more of the Houston locations have come forward alleging numerous violations of law.

According to several of his employees, including *Employee #1* and *Employee #2*, who were medical assistants, and *Employee #3*, who assisted with administrative tasks, numerous patients of [REDACTED] delivered infants alive prior to their demise, which the doctor himself brought about. Specifically, *Employee #1*, who assisted the doctor in the operating room at Aaron, estimated that "[d]uring a typical week with a full patient load, . . . [REDACTED] would perform

abortions at 20 or more weeks gestation, *i.e.*, later in the second trimester or in the third trimester, on approximately 40 patients.”¹ Of that number, *Employee #1* asserted:

approximately three or four infants would show signs of life. This typically happened when infants were extracted from the cervix in a breech position. At times, the infant would slide completely out because of the extent of the dilation caused by the laminaria administered to patients. In all such cases, [REDACTED] would terminate their lives. The signs of life they exhibited would include movement of the stomach as the infant breathed or movement of the toes or fingers.²

[REDACTED] would terminate the lives of these infants, *Employee #1* further alleges based on those incidents she witnessed, by any of several methods, including the following:

snipping the infant’s spinal cord with scissors; cutting the neck with Sopher forceps or similar instruments; twisting the infant’s head; using forceps, other instruments, or his finger to crush the “soft spot” of the infant’s head, or crushing it by the same means through its stomach; or inserting his finger down its throat. If the infant’s cranium was coming out first, he would usually use his index finger to puncture its head, but if it was coming out feet first, he would instead insert an instrument in the back of the infant’s head.³

Several of the same allegations were also made by *Employee #2*.⁴

Employee #3 was not in the treatment rooms when abortions took place, but she alleges she learned from her coworkers of numerous infants whose lives were terminated by [REDACTED] after showing signs of life following partial or full extraction from the uterus.⁵ On one occasion, she stated that she learned from a coworker of an infant killed by the doctor after surviving an abortion; as he was preparing to put it into a bag for disposal, she maintained, the infant had “opened up his eyes and grabbed his hand.”⁶

Employee #1 stated that “[o]f the three to four infants terminated in a typical week by [REDACTED] while showing signs of life, on average, approximately one or two would be put to death after they had left the birth canal entirely. The balance were terminated while they were partially out of the birth canal.”⁷ *Employee #1* added that she never observed [REDACTED] “make an attempt to keep alive or resuscitate any infant who showed any signs of life or to direct anyone else to do so,” an observation consistent with *Employee #3*’s understanding.⁸

¹ Affidavit of *Employee #1*, Dec. 5, 2016, ¶¶ 1-2, attachment 1 [hereinafter *Employee #1* Aff.].

² *Id.* ¶ 3.

³ *Id.* ¶ 4.

⁴ See Redacted video—see key, attachment 2 [hereinafter Redacted video] (“Sometimes he would go through the stomach as well. . . . He would like force it [the instrument] through the stomach . . . and he twists it.”) (“he would put, like, his finger . . . through the throat”) (statements of *Employee #2*).

⁵ Affidavit of *Employee #3*, Dec. 6, 2016, ¶ 2, attachment 3 [hereinafter *Employee #3* Aff.].

⁶ Redacted video.

⁷ *Employee #1* Aff. ¶ 5.

⁸ *Id.* ¶ 5; *Employee #3* Aff. ¶ 2.

Employee #1 also alleged that “[REDACTED] performed numerous abortions during the third trimester in cases that did not involve any serious threats to the mother’s or the infant’s health.”⁹ *Employee #2* asserted, “As long as the patients had the cash, he was going to do it past the 25 weeks.”¹⁰ Four photographs identified by *Employee #1* and *Employee #3* as taken in the sterilization room of the Women’s Pavilion in 2012 depict the remains of infants clearly in their third trimester when they were allegedly terminated by [REDACTED].¹¹ According to *Employee #1*, the tears in the neck line visible in the photos are “inconsistent with” terminations done “while the infant[s were] entirely inside the uterus.”¹² Thus, besides being late-term abortions, they were likely either partial-birth abortions or homicides committed after full delivery.

Employee #1 and two other employees at the clinic, *Employee #3* and *Employee #4*, additionally allege that the doctor regularly falsified sonogram results to misrepresent the gestational age of the fetus. Some sonograms, they maintain, would be falsified to “overstate the gestational age of the fetus in order to overbill customers.”¹³

In other cases, according to *Employee #1* and *Employee #3*, “sonograms would be falsified to conceal the advanced gestational age of the fetus beyond the legal limit in Texas.”¹⁴ *Employee #1* claimed:

I have witnessed this happen in cases involving fetuses as old as 28 weeks. [REDACTED] [REDACTED] would typically tell his ultrasound technician in cases involving fetuses beyond a certain gestational age to allow him to perform the ultrasound himself; he would then bring the patient an ultrasound picture showing another fetus at the gestational age he was misrepresenting to the patient.¹⁵

An affidavit from a patient attached hereto alleges another specific case of manipulation: *Patient #1*, a woman who obtained an abortion in 2002 at “24 to 25 weeks” gestation, “worried that I was too far along. The girl doing my ultrasound told me that ‘ultrasounds can be manipulated.’ The clinic determined me to be 23 weeks.”¹⁶ “On two occasions that I witnessed,” *Employee #1* also alleges that “[REDACTED] failed to inform a patient she was pregnant with twins.”¹⁷

According to *Employee #1* and *Employee #3*, the doctor “would regularly make use of pre-drawn medicine,” including Demerol and Nubain, “without properly logging or storing it.” They added:

This included improperly storing medicine in a food refrigerator. On one occasion, [REDACTED] concealed these practices during an inspection from the

⁹ *Employee #1* Aff. ¶ 6.

¹⁰ Redacted video.

¹¹ *Employee #1* Aff. ¶ 6; *Employee #3* Aff. ¶ 3. According to *Employee #3*, the photos were taken July 26, 2012. *Id.*

¹² *Employee #1* Aff. ¶ 6.

¹³ *Id.* ¶ 7; *Employee #3* Aff. ¶ 4; Statement of *Employee #4*, Nov. 23, 2012, attachment 4, at 1.

¹⁴ *Employee #1* Aff. ¶ 7; *Employee #3* Aff. ¶ 4.

¹⁵ *Employee #1* Aff. ¶ 7.

¹⁶ Affidavit of *Patient #1*, June 17, 2013, attachment 5.

¹⁷ *Employee #1* Aff. ¶ 8.

Harris County Public Health office by having a nurse put pre-drawn medicine in basins, which she hid in the trunk of her car while the inspector was present.”¹⁸

Employee #1 and *Employee #3* also allege the doctor failed to keep a registered nurse on site in the recovery room at Aaron, which “left unqualified workers to draw and administer drugs.”¹⁹ *Employee #1* added that ██████████ concealed this deficiency from authorities by “hir[ing] a nurse from a temp agency for a few days at a time when a government inspection was scheduled.”²⁰ *Employee #1* recorded examples of storage, recordkeeping, and personnel violations in an undercover video from 2011 attached hereto.²¹

Additionally, according to *Employee #1*:

██████████ would regularly fail to observe proper sterilization procedures. This included the doctor’s habitual reuse of a bottle of Betadine, which is used for cleaning prior to the procedure, that was not cleaned or stored, and which he handled with his gloved hand for patient after patient when going inside the cervix. Additionally, after removing instruments such as Hawkins-Ambler’s dilators and Bierer and Sopher forceps from sterile packages, he would place unused instruments back in the sterile package to use on other patients. He often would do so wearing gloves that he did not change between seeing one patient and another, or between trips to the restroom. . . . Instruments in ██████████’s clinic were not regularly soaked in sterilizing solutions as they needed to be for specified periods of time in order to be sterile. The exception to this occurred prior to government inspections. The vast majority of the doctor’s assistants in the sterilization room were uninformed on proper methods of sterilization. In order to reduce his costs, ██████████ also habitually disposed of biohazardous waste in standard garbage bags instead of sterile bags required for such waste.²²

The same failure with respect to sterilization was also alleged by *Employee #2*, *Employee #3*, and *Employee #4*.²³

Violations of Applicable Laws

Federal law makes clear that infants that are born, regardless of whether naturally or by extraction during an abortion, are entitled to the same protections given to every other person. Under the Born-Alive Infants Protection Act of 2002, “every infant member of the species homo sapiens who is born alive at any stage of development” is considered a person.²⁴ This is so

¹⁸ *Id.* Aff. ¶ 9; *Employee #3* Aff. ¶ 5. See also Redacted video.

¹⁹ *Employee #1* Aff. ¶ 10; *Employee #3* Aff. ¶ 6.

²⁰ *Employee #1* Aff. ¶ 10. For additional information regarding the deficiencies in ██████████’s nursing staff and other allegations regarding possible violations at his clinics, see Statement of *Employee #1* in support of Complaint against ██████████ D.O., Apr. 26, 2010, attachment 6.

²¹ Aaron Women’s Clinic video by *Employee #1*, attachment 7.

²² *Employee #1* Aff. ¶¶ 11-12. See also Statement of *Employee #1* in support of Complaint against ██████████ D.O., Apr. 26, 2010, attachment 6, at 3.

²³ Redacted video; Statement of *Employee #4*, Nov. 23, 2012, attachment 4, at 1.

²⁴ 1 U.S.C. § 8(a).

whenever an infant undergoes “complete expulsion or extraction from his or her mother” and “has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.”²⁵ The Partial-Birth Abortion Ban Act of 2003 makes clear that such protections apply even if the infant is only partially extracted from the mother’s body at the time its life is ended. Specifically, a prohibited “partial-birth abortion” occurs when a person knowingly commits “an overt act . . . that kills the partially delivered living fetus” after the fetus is partially delivered with its entire head “outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel.”²⁶ The only exceptions occur when such a procedure “is necessary to save the life of a mother whose life is endangered” by certain categories of physical conditions.²⁷ Violations of the 2003 act are punishable by fines, imprisonment for up to two years, or both.²⁸

The foregoing allegations advance numerous federal violations against ██████████ of the Partial-Birth Abortion Ban Act in those cases involving his terminations of partially delivered infants and of the Born-Alive Infants Protection Act in those cases where the infants have completely exited a mother’s body. In at least the latter cases, they also amount to allegations that ██████████ violated Texas’ criminal homicide statutes. First, the allegations constitute murder, defined by the Texas Penal Code as “intentionally or knowingly caus[ing] the death of an individual.”²⁹ Second, the allegations against ██████████ constitute capital murder under Texas law in both of the following circumstances, either one of which is sufficient to establish that offense:

- “the person murders more than one person . . . during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct,”³⁰ and
- “the person murders an individual under 10 years of age”³¹

The murders alleged against ██████████ occurred on a repeated basis, and all occurred pursuant to his course of conduct as a provider of abortion who was alleged to have systematically killed any infant aborted while showing signs of life. The second circumstance is independently established by the obvious fact that every alleged victim was under 10 years of age.

██████████’s alleged conduct would also violate the gestational age limit established under Texas law. Former employees of the doctor allege he performed abortions as late as the third trimester.³² Third trimester abortions are prohibited with narrow exceptions, inapplicable according to the allegations in the instant case, where “the abortion is necessary to prevent the death of the woman,” the “unborn child has a severe, irreversible brain impairment; or . . . the woman is diagnosed with a significant likelihood of suffering imminent severe, irreversible brain

²⁵ 1 U.S.C. § 8(b).

²⁶ 18 U.S.C. § 1531(b)(1).

²⁷ 18 U.S.C. § 1531(a).

²⁸ *Id.*

²⁹ Tex. Penal Code § 19.02(b)(1).

³⁰ Tex. Penal Code § 19.03(a)(7).

³¹ Tex. Penal Code § 19.03(a)(8).

³² *Employee #1 Aff. ¶ 6; Employee #3 Aff. ¶ 2.*

damage or . . . paralysis.”³³ Since H.B. 2 became effective October 29, 2013, abortions additionally have been prohibited when “the probable post-fertilization age of the unborn child is 20 or more weeks.”³⁴ [REDACTED]’s abortion practice is believed to continue to the present day, so it merits investigation whether he has violated both gestational limits.

The allegations that [REDACTED] regularly falsified sonogram results to misrepresent the gestational age of the fetus also potentially implicate both state and federal law. Regardless of whether the patient or another entity is responsible for payment, Texas law clearly prohibits fraudulent billing. Such conduct would constitute a form of theft³⁵ in addition to violating Texas’ prohibition on insurance fraud.³⁶ In those cases in which patients were eligible for Medicaid coverage, such allegations would implicate numerous federal criminal prohibitions on false statements to federal agencies³⁷ and on false statements involving health care benefit programs,³⁸ as well as the prohibitions on health care fraud.³⁹ Such conduct would also violate the federal False Claims Act⁴⁰ and Texas’ prohibition of Medicaid fraud.⁴¹

Other provisions of Texas law prohibit additional conduct alleged above on the part of [REDACTED], including the following:

- Misrepresentation of sonogram readings: In addition to violating the above-cited statutes prohibiting fraud, tampering and altering records containing patient data is prohibited under 25 Tex. Admin. Code § 135.9(d).
- Failure to properly store and log medication: The obligation to maintain and provide drugs safely and to properly log their use is set forth in detail under 22 Tex. Admin. Code § 291.76 and made applicable to ambulatory surgical centers under 25 Tex. Admin. Code § 135.12.
- Lack of adequate medical staff: 25 Tex. Admin. Code § 135.7 requires health care practitioners to meet numerous requirements that include necessary and appropriate training and to adhere to state law and “the standards and ethics of their professions.” 25

³³ Tex. Occ. Code § 164.052(a)(18). The Texas Health and Safety Code contains an additional prohibition of third-trimester abortions, under which such abortions are permitted only when they are “necessary to prevent the death or a substantial risk of serious impairment to the physical or mental health of the woman” or “the fetus has a severe and irreversible abnormality,” in which case the physician is required to submit a written certification of the applicable conditions to the Department of State Health Services. Tex. Health & Safety Code §§ 170.002(b)-(c).

³⁴ Tex. Health & Safety Code §§ 171.044, 171.045. Exceptions apply when abortion is deemed necessary “to avert the woman’s death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a psychological condition.” Tex. Health & Safety Code § 171.046. Note that these provisions of H.B. 2 were not challenged in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

³⁵ Tex. Penal Code § 31.03.

³⁶ Tex. Penal Code § 35.02.

³⁷ 18 U.S.C. § 1001; 18 U.S.C. § 287. An accompanying prohibition on conspiracy in connection with such claims is established by 18 U.S.C. § 286.

³⁸ 18 U.S.C. § 1035.

³⁹ 18 U.S.C. § 1347; 42 U.S.C. § 1320a-7b(a). If fraud is proven to have been carried out by utilizing either the mails or other applicable interstate carriers or communications, the federal mail and wire fraud statutes would also be implicated. See 18 U.S.C. §§ 1341, 1343.

⁴⁰ 31 U.S.C. § 3729(a)(1).

⁴¹ Tex. Penal Code § 35A.02.

Tex. Admin. Code § 135.15 specifies requirements for an organized nursing service under the direction of a qualified registered nurse and other personnel that must be present at the medical facility. [REDACTED]'s former employees' allegations amount to a violation of these sections. Additional investigation is warranted into whether clinic practices were in compliance with other requirements for adequate medical staff, including 25 Tex. Admin. Code § 135.10, which addresses additional facility requirements, and 25 Tex. Admin. Code § 135.11, which addresses anesthesia and surgical services.

- Failure to observe proper sterilization procedures and disposal practices: 25 Tex. Admin. Code § 135.11(b)(12) requires the development, implementation, and enforcement of such procedures, and 25 Tex. Admin. Code § 135.52(d)(14) requires sterilizing facilities to be included and properly maintained and utilized.
- Fraudulent concealment from government authorities of the foregoing alleged violations: The fabrication, alteration, and in applicable cases concealment involved in these allegations entail conduct proscribed by Tex. Penal Code § 37.09. It also subverts the state's right to inspect facilities containing controlled substances pursuant to Tex. Health & Safety Code § 481.181.

[REDACTED] was previously referred to the District Attorney of Harris County, but the investigation into the matter was deficient. In light of the gravity of the allegations outlined above and the supporting documentation, I urge your office to conduct a thorough investigation into whether [REDACTED] violated federal and state law, and, if you agree that such violations occurred, to take all appropriate action. If you have any questions about this request, please contact Frank Scaturro, at (202) 225-2927, Frank.Scaturro@mail.house.gov.

Sincerely yours,



Marsha Blackburn
Chair
Select Investigative Panel

Attachment(s)

cc: The Honorable Jan Schakowsky
Ranking Member
Select Investigative Panel