

SB 359 VETO COALITION

VIA HAND DELIVERY

May 20, 2015

The Honorable Greg Abbott
GOVERNOR OF TEXAS
State Capitol
P.O. Box 12428
Austin, Texas 78711

Re: Request for Gubernatorial VETO of SB 359

Dear Governor Abbott:

On behalf of a broad coalition of national, statewide, and grassroots organizations as well as attorneys and advocates, we write to you today to urge you to VETO Senate Bill 359.

As you wrote so clearly about our mental health code in AG Opinion GA-0909¹, Texas has a fairly complex statutory scheme that attempts to balance safety against liberty interests.

As you know, much of what we currently have in statute was developed between 1991 and 1993 in response to massive and well-known fraudulent schemes that resulted in the unwarranted detention and psychiatric hospitalization of many, many Texans. The legislature considered the problem in two legislative sessions as well as numerous interim hearings in various parts of the state.

The result was a statutory scheme that was well considered and said just what the legislature meant it to say. These protections are still needed. As you put it, “The purpose of the Code includes providing access to humane care and treatment for persons suffering from mental illness, *and* safeguarding the person’s legal rights.”²

The transfer of detention powers from peace officers to the hospitals or physicians upsets that delicate balance, where a disinterested party who has neither a personal, financial, nor liberty interest in the case decides the need for detention or protective custody.

A local Sheriff’s Department wrote that last year they made nearly 900 calls to local hospitals to do detention evaluations and only 53% of those patients met the criteria for emergency detention.³

If peace officers had not been involved, how many of the other 47% of those patients would have been detained? Unlike the newly created parties that will now be involved in the detention, peace officers and courts have no conflicted interest.

¹ January 2012, Attorney General Opinion GA-0909.

² Ibid.

³ March 2015, Saenz, Williamson County Sheriff’s Office, letter to Senate HHS Committee members.

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As passed, SB 359 conflicts with multiple rules, statutes, and precedents ranging from the right to refuse medical treatment, the right to care in the least restrictive setting, not to mention parental rights and the rights of minorities and the individuals with disabilities.

In short, the bill upsets longstanding principles that many Texans hold dear.

We respectfully request the VETO of SB 359, because it:

- 1) Purports to do one thing, but actually does much more
- 2) Conflicts with longstanding precedents on the right to refuse medical care
- 3) Creates conflict between the rights of the patient and the vagaries of hospital policy
- 4) Creates opportunities for fraudulent or questionable detentions
- 5) Conflicts with Medicare conditions of participation
- 6) Grants sweeping powers to individual hospitals and facilities by allowing them to write their own detention policies with no guidance, no oversight, and no accountability
- 7) Jeopardizes parental rights, which are constitutional in nature, by placing doctors over parents
- 8) Creates avenues for discrimination of persons with disabilities and minorities

CONCERNS REGARDING SB 359

1) **SB 359 PURPORTS TO DO ONE THING, BUT ACTUALLY DOES MUCH MORE**

SB 359, and its companion HB 3677, was purported to be a bill about protecting mentally ill patients when they present at a medical facility voluntarily requesting services but then want to leave.

But SB 359 is much broader than the mental health context and would actually include ANY current or future patients receiving or requesting treatment at hospitals, emergency rooms, free-standing emergency rooms, or mental health facilities that choose to enact a warrantless detention policy, including parents seeking or receiving treatment for their children.

Due to broad and ambiguous wording, these bills apply to *all* patients in these facilities seeking *any treatment* (SB 359, page 2, beginning on line 6, the word treatment is not further qualified).

By making refusal of treatment and attempts to leave the trigger for assessing and then holding patients, instead of observed danger to self or others, the bill is contrary to individual and parental rights.

Ideally, any mental health detention would begin and end with dangerousness. This was contemplated by the US Supreme Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). According to the court: "In short, a State cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help

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of willing and responsible family members or friends..."⁴ Ironically, there was no evidence that Donaldson had ever been suicidal or a harm to himself, yet he spent 15 years in an institution. That is the risk we run when we allow easy detentions and commitments through vaguely worded statutes.

2) **SB 359 CONFLICTS WITH LONGSTANDING PRECEDENTS ON THE RIGHT TO REFUSE MEDICAL CARE**

The courts have long since decided that people have the right to refuse treatment, including life-saving treatment. (See *Union Pacific Railway Company v. Botsford*, 141 U.S. 250,(1891), *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914), *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

In addition, psych assessments in the ER are often inadequate and "treatment" generally limited to giving the patient drugs.⁵ This, too, seems to run afoul of *O'Connor v. Donaldson* since the court opined that a person confined against his will at a state mental institution has a "constitutional right to such treatment as will give him a reasonable opportunity to be 'cured' or improve his mental condition."⁶ We assume that same right applies to any patient confined against his will in any psychiatric setting.

Part of the problem with SB 359 is that it takes language meant to apply specifically to psychiatric settings and applies it to general medical settings. People in medical settings are often in distress due to potentially life threatening physical causes. Altered mental status is a key feature of several life threatening conditions.

Informed consent exemptions already exist in law for life threatening situations. There is also a hierarchy of surrogate decision-making for people who are temporarily incapacitated due to physical illness. These are contained in Texas Health and Safety Code Sec.313.

In the case of mental derangement, there are also protections in existing statute to cover emergencies. The bypass of medication informed consent in emergencies is in Texas Health and Safety Code Sec.576.025. Protection against criminal prosecution for restraining someone to keep them from harming themselves or others is in Texas Penal Code Sec.9.33 and 9.34.

Given that these protections already exist in law, we are concerned that the broad and vaguely worded provisions of SB 359 are more likely to apply to persons who are "not quite dangerous."

It is clear from *O'Connor v. Donaldson* that we don't get to deprive the "not quite dangerous" of their liberty.

⁴ *O'Connor v. Donaldson*, 422 U.S. 563 (1975), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=422&invol=563>

⁵ 2010, Alakeson et al, Health Affairs, A plan to reduce emergency room "boarding" of psychiatric patients, <http://content.healthaffairs.org/content/29/9/1637.full>

⁶ *Op Cit.* at 3

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The statutory language in SB 359 appears to be a hybrid language that on the one hand mimics the criteria for a peace officer to do a mental health detention without a warrant under Texas Health and Safety Code Sec. 573,⁷ and on the other hand, mimics the language contained in Texas Health and Safety Code Sec.572.004(c), which governs the discharge of a patient who voluntarily entered an inpatient mental health facility for treatment and later requests to be discharged. (Gives the physician 4 hours to release or initiate emergency detention.)

Next, the bill then triggers the detention process on the person's attempts to leave before examination or upon refusal of an unspecified treatment (SB359, page 2, beginning on line 6). Surely, the trigger for the deprivation of liberty should be fixed on dangerousness, not refusal of treatment and not eccentricity.

Clearly, competent adults have the right to make informed decisions about medical care, including the right to seek help elsewhere and the right to forego treatment altogether.

3) SB 359 CREATES CONFLICT BETWEEN THE RIGHTS OF THE PATIENT AND THE VAGARIES OF HOSPITAL POLICY

The committee testimony related to SB 359 pointed to moral and liability concerns over patients who wish to discharge from a hospital when the doctor feels they should stay longer. SB 359 attempts to solve this problem at the expense of the patient's liberty interests.

Unfortunately, liability concerns can lead to patients being detained. Some researchers have questioned liability concerns, and not lack of inpatient psychiatric capacity, as a reason for patients languishing in emergency rooms.⁸

Having to decide whether or not the patient is suicidal, in the very limited amount of time an emergency room physician can spend with a patient, doubtlessly leads to inappropriate admissions.⁹

By nature, an emergency room is a chaotic environment, lacks privacy or a secure environment to ensure the safety or adequate treatment of patients. In some hospitals, detained patients may be transferred to a general unit to get them out of the ER. Due to lack of a secure physical environment, patients can end up on powerful drugs, are sometimes restrained and often require a sitter 24 hours a day. In this regard, SB 359 conflicts with a 14th Amendment right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as may be required by these interests.¹⁰

⁷ <http://www.statutes.legis.state.tx.us/Docs/HS/htm/HS.573.htm>

⁸ 2009, The Lewin Group, A Literature Review: Psychiatric Boarding; <http://aspe.hhs.gov/daltcp/reports/2008/psybdlr.htm>

⁹ Ibid

¹⁰ Youngberg v Romeo, 457 U.S. 307 (1982)

<https://www.law.cornell.edu/supremecourt/text/457/307>

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By fostering the conditions listed above, SB 359 conflicts with a patient's right under Texas Health and Safety Code Sec.576 to individualized treatment in the least restrictive setting.¹¹ Emergency room detention is not only a problem in Texas. Other states have experienced similar problems. In August 2014, the Washington State Supreme Court ruled that that state's practice of detaining (boarding) patients in emergency rooms was unlawful.¹²

4) SB 359 CREATES OPPORTUNITIES FOR FRAUDULENT OR QUESTIONABLE DETENTIONS

While the vast majority of health care providers are honest, hardworking and diligent, SB 359 creates opportunities for those who are less than honorable.

In a little over a year, there have been several high dollar convictions for mental health fraud. In one case in Houston, several individuals, hospital personnel, and others were convicted in a \$158 million mental health fraud scheme.¹³ In yet another case, psychiatrists who owned another mental health clinic were convicted in a Medicare fraud scheme involving kickbacks.¹⁴

Given the vulnerable population involved, one needs a neutral referee to protect against fraud. SB 359 gets rid of that neutral referee. While not all allegations of fraud are legitimate, it does happen.

In April 2015, Citizens Medical Center in Victoria paid over \$23 million to settle a false claims suit alleging kickbacks.¹⁵ The physicians in the case "alleged the hospital paid above market salaries to emergency room physicians in exchange for referrals, among other things."¹⁶ Again, while we cannot speak to the legitimacy of the claims, they are a reminder that we must proceed with caution.

In March 2013, WFAA-TV in Dallas reported on three women who alleged they fell victim to psychiatric hospital recruiters in Denton, Texas. A former "assessor" for a psychiatric hospital told WFAA that if she "didn't refer patients to [the psychiatric hospitals] she'd have to discuss it with her supervisor." She also stated that she'd seen her evaluations altered.¹⁷

¹¹ Texas Health and Safety Code Sec.576.021(1); <http://www.statutes.legis.state.tx.us/Docs/HS/htm/HS.576.htm>

¹² <http://psychrights.org/States/Washington/DEvDSHSPierceCty.pdf>

¹³ October 2014, US Department of Justice, President of Houston Hospital and Three Others Convicted in \$158 Million Medicare Fraud Scheme,

¹⁴ January 2015, US Department of Justice, Physician Owners of Mental Health Clinic Sentenced for \$97 Million Medicare Fraud Scheme, <http://www.justice.gov/opa/pr/physician-owners-mental-health-clinic-sentenced-97-million-medicare-fraud-scheme>

¹⁵ April 2015, Law360, Texas County-Run Hospital to pay \$23.6 million to end FCA suit, <http://www.law360.com/articles/645795/texas-county-run-hospital-to-pay-23-6m-to-end-fca-suit>

¹⁶ March 3, 2015, Jessica Priest, Victoria Advocate, Lawsuit claiming kickbacks at county-owned hospital dismissed, <https://www.victoriaadvocate.com/news/2015/mar/03/lawsuit-claiming-kickbacks-at-county-owned-hospita/>

¹⁷ November 2013, WFAA-TV, Women Say Denton Mental Hospitals Mistreated Them, <http://www.wfaa.com/story/news/local/investigates/2014/08/19/14127094/>

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Many of the Texas statutes concerning fraud, patients' rights, detention and commitment were written when Texas was trying to address the fraud schemes that took place in the early 1990's. This includes statute modified by SB 359.

It is important to remember that in 1991, a private security company holding itself out as a mobile crisis unit was allowed to detain patients in San Antonio. Most notable was the case of Jeramy Harrell, who was picked up from his grandparents house by private security guards, with official looking papers, "including a legal 'application', as yet unsigned by a magistrate, giving authority for an emergency apprehension of the boy."¹⁸

In 2014 a federal judge in Texas ruled that a group of freestanding emergency rooms in East Texas had overbilled Aetna for more than \$9 million claiming a hospital affiliation that did not exist.¹⁹

Again, while not accusing anyone of fraud, we must remember the fraud triangle- motive, opportunity, and rationalization. Increase any corner of the triangle and you've increased your fraud risk. SB 359 increases at least one of these.

5) SB 359 CONFLICTS WITH MEDICARE CONDITIONS OF PARTICIPATION

Under 42 CFR 482.13²⁰, patients have a right to a clearly defined grievance process, a right to participate in the development and implementation of their treatment plan, and the right to appoint a representative under each state's law.

SB 359 does not address a patient's right to file a grievance, nor does it refer to any part of the code that would cover this requirement. Patients would not have time in a 4-hour period to file a grievance and complete the grievance process if they disagree with the need for a 4-hour hold in the first place.

SB 359 does not address a patient's right to participate in the development and implementation of the plan, including the right to refuse treatment, and in fact this may be in violation of federal requirements. Under SB 359, a 4-hour detention can be initiated as **soon as the patient first expresses the desire to leave, or attempts to leave the facility** (SB 359, page 3, beginning on line 11). The mere act of "participating" in the development of their plan by expressing the desire to NOT have a plan at all, i.e. asking to go home, is the trigger for the warrantless detention.

SB 359 may further violate federal requirements by not addressing the provision for a patient's designated representative to be allowed to make informed decisions related to their care. If the

¹⁸ 1994, Joe Sharkey, Bedlam, pages 29-31

¹⁹ August 2014, Health Payor News, Aetna to recoup \$8.4 million for inflated ER billing, [http://www.healthcarepayernews.com/content/Aetna-to-recoup-\\$8.4M-for-inflated-ER-billing%20#.VVu-M43bLUA](http://www.healthcarepayernews.com/content/Aetna-to-recoup-$8.4M-for-inflated-ER-billing%20#.VVu-M43bLUA)

²⁰ 42 CFR 482.13, <https://www.law.cornell.edu/cfr/text/42/482.13>

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designated patient representative disagrees with the doctor or facility and requests that the patient be allowed to leave, this further complicates the detention process. These questions are not addressed in the bill.

6) **SB 359 GRANTS SWEEPING POWERS TO INDIVIDUAL HOSPITALS AND FACILITIES BY ALLOWING THEM TO WRITE THEIR OWN DETENTION POLICIES WITH NO GUIDANCE, NO OVERSIGHT, AND NO ACCOUNTABILITY**

Typically, in any given bill that deals with hospitals or subjects related to medical care, the Health and Human Services Commission is given some oversight and asked to provide input in new rulemaking or policy-setting. In SB 359, there is no such check and balance. In fact, other than mimicking a portion of the peace officer language in Section 573.002 of Health and Safety Code²¹ in a patients file, SB 359 leaves it entirely up to the healthcare facility to dictate if and how they will write the policy (SB 359, page 2, beginning on line 6).

This is not common in the Texas healthcare system. Hospital policies that are dictated by state law usually include minimum standards outlined in the law as a guideline to that policy. For instance, under Section 241.009 there is a list of minimum standards hospitals must follow when outlining their photo identification badge policies.

Section 241.009 states:

b) A hospital shall adopt a policy requiring a health care provider providing direct patient care at the hospital to wear a photo identification badge during all patient encounters, unless precluded by adopted isolation or sterilization protocols. The badge must be of sufficient size and worn in a manner to be visible and must clearly state:

- (1) at minimum the provider's first or last name;*
- (2) the department of the hospital with which the provider is associated;*
- (3) the type of license held by the provider, if the provider holds a license under*

Title 3, Occupations Code; and

- (4) if applicable, the provider's status as a student, intern, trainee, or resident.²²*

While current law specifically dictates what must be listed on a hospital employee badge, SB 359 suspiciously does not even provide a standard for written policies on detaining people against their will. Under SB 359, no such policy guidelines are outlined by the bill nor are there any references to other parts of the code that might match up and give guidance to the written policy on detention. Will Texas law give more attention to what is on a healthcare workers badge than the possible constitutional rights violations of detaining a person by non-peace officers without a warrant?

²¹ Section 573.002, Texas Health and Safety Code

²² Section 241.009, Texas Health and Safety Code, <http://www.statutes.legis.state.tx.us/Docs/HS/htm/HS.241.htm>

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SB 359 leaves it open to each individual facility's choice on what their policy says, how they will design and implement it, and if or how they will even notify patients of that detention policy. Who will carry out the detention is left open to interpretation by the policy (SB 359, Page 2, line 7 "provides for the facility or a physician at the facility to detain a person . . .") Leaving such serious constitutional policy-writing choices up to facilities and open to their individual interpretation is not just bad judgement on the part of the legislature, it's downright reckless.

By giving hospitals, emergency facilities, and mental health facilities the authority to write a policy that allows their doctors merely through "belief" alone to declare the possibility that any given patient might be mentally ill, albeit no medical tests exist to prove such mental health conditions, doctors and hospitals with such written policies are handed extreme power over anyone walking through their doors for help.

7) SB 359 JEOPARDIZES PARENTAL RIGHTS, WHICH ARE CONSTITUTIONAL IN NATURE, BY PLACING DOCTORS OVER PARENTS

The United States Supreme Court has left no doubt that parents have the right to direct the upbringing and education of children. In *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), the Court stated that "Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that [the legislative act complained of] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children." *Pierce* also stated that: The child is not the mere creature of the state.

In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court stated:

It is cardinal to us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.

In *Troxel v. Granville*, 530 U.S. 57, 68-69, the Court (citing *Parham v. J.R.*, 99 S.Ct. 2493) stated:

"The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." [442 U.S., at 602, 99 S.Ct. 2493](#) (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

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"The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made." *Troxel* at 72-73.

SB 359 opens wide the door to abuse of parental rights by unethical professionals. While the bill as drafted looks to protect a person with a mental illness from himself or others, it also allows a doctor to force his preferences on parents who may disagree with proposed treatment or who want a second opinion.

Section 3 of the bill clearly contemplates children where it states that "a facility may detain a person ... who lacks the capacity to consent" (573.005(c)). This section gives police detention powers to facilities, including for-profit facilities. The criteria for exercising this power are vague and subjective. What is a mental illness: Depression? ADHD? What is the risk of harm? Speculation that the depressed child may be suicidal?

Many doctors already call CPS on a parent who chooses to move a child to another facility for treatment or who wants a second opinion before treatment begins. It is not a conspiratorial stretch to contemplate that a doctor, faced with a caring parent who wants a second opinion, to declare that the child is mentally ill (ADHD, depressed), that the *parents* are the substantial risk because they want to take the child from the facility (for a second opinion), and that the child must be restrained (locked in his room) until CPS can be called in to support the doctor's preference.

Hospitals already illegally place holds on children who are ready to leave the facility, while the hospital calls CPS. Also, CPS will demand the same from hospitals, which willingly comply. SB 359 will give official cover to this evil practice.

8) CREATES AVENUES FOR DISCRIMINATION OF PERSONS WITH DISABILITIES AND MINORITIES

The Americans with Disabilities Act states "Persons protected under the ADA are "qualified individuals with a disability."²³ SB 359 does not provide for protections for individuals with disabilities.

Individuals with disabilities should be protected from misunderstandings, miscommunications, or mistreatment due to their disabilities, but often fall victim to gaps in system policies. Healthcare systems are not immune to this problem.

²³ [42 U.S.C. §12102(2)], <https://www.law.cornell.edu/uscode/text/42/12102>

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SB 359 does not require facility policies to address unique situations that could be misconstrued as mental illness when they may only be the result of a person's disability. Individuals with disabilities will be at the mercy of the individual facility policies that will determine how their possible warrantless detention, and the reasons for it, will be applied. Since the bill makes no specific requirements whatsoever on how each facility can implement the detention, individuals with disabilities are at particular risk of harm.

Will the person have access to an interpreter when this is about to happen to them? Will the person have access to a patient representative? Will the person have any access to a specialist who understands his/her specific cognitive/processing issues? Will the person have an advocate or surrogate to help with communication and decision-making? Will the person have access to call another person to help them in this situation? These questions are not answered by this bill and no guidance is given to make sure that these questions are addressed. It cannot be left up to the facilities to decide when and/or if they will protect the rights of individuals with disabilities while attempting to detain without a warrant.

Furthermore, since SB 359 provides for NO criminal or civil liabilities, when/if the facilities discriminate against an individual with a disability, the individual's civil right to legal remedy over such a violation may be affected (SB 359, Page 3, lines 22 and 26).

For example, a hospital was sued under ADA for not providing interpreter services to an individual with a hearing impairment.²⁴ In a four-hour detention under this new law, will the policy created by any one hospital or facility properly provide for this need? According to this bill, it will be left up to the hospital or facility and they may face NO criminal or civil liability for not doing so.

Minorities may also be more adversely affected by warrantless detention policies under SB 359. Hispanics are three times as likely and African Americans are 6 times as likely as whites to access health care through an emergency room.²⁵ Just as persons of color are overrepresented in our criminal justice system and child welfare system, we are concerned that by virtue of health care demographics, these populations are at greater risk of emergency room detention if for no other reason than exposure.

In addition there is the problem of cultural competence. It is clear that patients from one culture or another may present symptoms differently from the medical textbooks.²⁶ Various cultures may have varying attitudes regarding treatments. Additionally, problems may exist with language barriers. Even misunderstandings about gestures or idioms can lead to trouble.

Again, since no standards are required in the bill, individuals with disabilities and minorities are particularly at risk for civil rights violations.

²⁴ <http://www.ada.gov/bethesda.htm>

²⁵ University of Texas School of Public Health, Poster, https://sph.uth.edu/content/uploads/2011/12/ER_Use_poster.pdf

²⁶ 2005, Health Affairs, Cultural Competence and Health Care Disparities: Key Perspectives and Trends, <http://content.healthaffairs.org/content/24/2/499.full>

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SUMMARY

As shown above, Senate Bill 359 is a constitutionally questionable intrusion into the safety and liberty of all Texans who access hospital services. Given the serious liberty issues involved, if enacted, it will almost certainly face legal challenges in the courts.

It is extremely important to protect the fundamental rights of an individual in a vulnerable situation, such as seeking medical treatment. The potential of this bill to seriously undermine the rights of all Texans cannot be overstated. Bestowing police powers on private entities is a recipe for disaster. For these reasons, we strongly urge and respectfully request that you VETO SB 359.

On behalf of our broad coalition, we thank you for your thoughtful consideration of this matter.

Respectfully,

Johana Scot, Executive Director (PGC)
On behalf of the
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