

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS’S MOTION TO EXCLUDE DEFENDANTS’ EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

On October 24, 2023, this Court ordered the parties to file any motions to exclude evidence or witnesses by November 20, 2023, *see* ECF No. 75. Then, on November 20, 2023, this Court extended the several pre-trial deadlines and the trial date and stated that “[a]ll other deadlines . . . remain unchanged.” ECF No. 91. Given that one of those “other deadlines” is Texas’s deadline to file a motion to exclude any evidence, *see* ECF No. 75; ECF No. 91, Texas hereby files a motion to exclude Defendants’ Exhibits 2, 3, 4, 7, 8, 11, and 15.

ARGUMENT

I. Defendants’ Exhibits 3, 7, and 15 Are Irrelevant.

This Court should exclude Defendants’ Exhibits 3, 7, and 15 as inadmissible because they are irrelevant to the present case. Generally, evidence must be relevant for it to be admissible. Fed. R. Evid. 402. Evidence is relevant when two elements exist: (1) the evidence “has any tendency to make a fact more or less probable than it would be without the evidence,” and (2) that fact “is of consequence in determining the action.” Fed. R. Evid. 401.

Here, Defendants’ exhibits are irrelevant because they do not have any tendency to make a fact of consequence more or less probable. *First*, Defendants’ Exhibit 3 (*i.e.*, the Second Declaration of Ms. Kelly Kinneen) and Defendants’ Exhibit 15 (*i.e.*, the First Declaration of Kelly Kinneen) are irrelevant because they speak to facts that have no bearing on the outcome of this

case or even the portions of the Consolidated Appropriations Act of 2023 (“the Act”) that Texas challenges, and they answer no questions that this Court posed in its October 20, 2023 Notice of Consolidation. *See* ECF No. 73. For example, paragraphs 4 through 10 of Defendants’ Exhibit 3 discuss some funding portions of the Act that may or may not expire by the end of Fiscal Year for 2023, but these paragraphs do not describe when the funds for the Case Management Pilot Program (“CMPP) expire: the only funding portion of the Act that Texas challenges in the present matter. *See* Ex. B at ¶¶ 4–10. Likewise, paragraphs 4 through 5 of Defendants’ Exhibit 15 discuss various discrete appropriations bills that touch on diverse topics with no relevance or relation to the CMMP program Texas challenges in this matter. *See* Ex. G at ¶¶ 4–5. Moreover, other paragraphs in these declarations speculate on the consequences of an injunction against the *entire* Act, not the consequences of barring implementation of the challenged portions of the Act. *See* Ex. B at ¶¶ 11–14; Ex. G at ¶¶ 19–24, 27–30. But Texas has made clear that it does not seek an injunction against the *entire* Act; it only seeks to bar the Defendants from “enforcing the Act’s amendments to Title VII against Texas and spending money on the pilot program.” *See* ECF No. 61 at 23. Therefore, because Defendants’ Exhibit 3 and Defendants’ Exhibit 15 relate to facts that are of no consequence to Texas’s claims in this case, they are irrelevant.

Second, Defendants’ Exhibit 7 (*i.e.*, the Declaration of Sean Dandridge) is irrelevant because it has no bearing on this case and does not have updated information. Indeed, according to Defendants’ Exhibit 7, Mr. Dandridge works for the Enforcement and Removal Operations (“ERO”) for the U.S. Immigration and Customs Enforcement (“ICE”), and even though “CMPP participants’ immigration cases remain under ICE ERO supervision,” he admits that “ICE ERO does not have any oversight over CMPP”—a challenged portion of the Act in this matter. *See* Ex. D at ¶¶ 1, 5–6. Thus, the information in Defendants’ Exhibit 7 is not tied to Texas’s challenges against the CMPP funds at issue in this case, and it does not answer any of the questions this Court asked in its October 20, 2023 order. *See* ECF No. 73. Hence, as Defendants have themselves

recognized in their objections to Texas’s Exhibits,¹ such evidence is irrelevant because it does not relate to a fact of consequence in this case—much less, make that fact more or less probable.

II. Defendants’ Exhibits 7, 8, 11, and 15 Are Needlessly Cumulative.

In addition to irrelevance, this Court should exclude several of Defendants’ exhibits as needlessly cumulative. Even if evidence is relevant, courts may still exclude it “if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence,” among other things. Fed. R. Evid. 403. Evidence may be cumulative because it is “identical” or has a “similarity” to other evidence. *See Wright v. Admin. Rev. Bd., United States Dep’t of Lab.*, 836 F. App’x 248, 253 (5th Cir. 2020) (determining that district judge did not abuse its discretion denying admission of exhibits that were identical or similar to other previously admitted exhibits).

Here, Defendants’ Exhibits 7, 8, 11, and 15 are needlessly cumulative because they are almost identical and extremely similar to the information provided in other declarations, and that redundancy substantially outweighs the minimal probative value such evidence provides. *First*, Defendants’ Exhibit 7 is needlessly cumulative because it provides little probative value outside of its explanation that “ICE ERO’s involvement in CMPP is limited to providing CRCL with a list of potential participants from which CRCL draws to enroll individuals in the program.” Ex. D ¶ 5. And tellingly, that assertion merely repeats Defendants’ Exhibit 11 (*i.e.*, the First Declaration of Peter Mina), which declares that “ICE provides the names of eligible participants to CRCL via an encrypted process solely for the purpose of the participants’ enrollment in CMPP.” *See* Ex. F at ¶ 11. Because most of the probative value found in Defendants’ Exhibit 7 is merely repeated information from Defendants’ Exhibit 11, the cumulative nature of Defendants’ Exhibit 7 substantially outweighs any of its limited probative value. Therefore, Defendants’ Exhibit 7 is needlessly cumulative.

Second, Defendants’ Exhibit 8 is needlessly cumulative because, when it summarizes how the funds for CMPP are administered, *see* Ex. E at ¶¶ 5–13, it is simply repackaging and repeated the

¹ *See* ECF No. 92 (objecting that an exhibit is irrelevant when “the information is not tied to CMPP funds”).

same general information as Defendants Exhibit 11, *see* Ex. G at ¶¶ 3–13 (summarizing how funds for the CMPP are implemented and obligated). And because of its similarity to Defendants’ Exhibit 11, Defendants’ Exhibit 8 is needlessly cumulative.

Third, Defendants’ Exhibit 11 and Defendants Exhibit 15 are needlessly cumulative because, outside of some minor updates to the information, these declarations represent the same declarants discussing the same information. For example, Defendants’ Exhibit 11 was signed and executed by the same declarant as Defendants’ Exhibit 4 and generally explains how the funding and administration for the CMPP program works—just like Defendants’ Exhibit 4. *Compare* Ex. G *with* Ex. C. The only real distinction between the two declarations is how current the information is—especially given that Defendants’ Exhibit 11 was executed and signed five months before Defendants’ Exhibit 4. *Compare* Ex. F *with* Ex. C. Thus, Defendants’ Exhibit 11 is needlessly cumulative with Defendants’ Exhibit 4, and that unnecessary repetitiveness substantially outweighs the probative value of Defendants’ Exhibit 11.

Fourth, and finally, Defendants’ Exhibit 15 is needlessly cumulative because it represents the same general information from the same declarant that reaches the same general opinions. Indeed, both Defendants’ Exhibit 15 and Defendants’ Exhibit 3 generally allege how an injunction against the entire Act “would present unprecedented challenges and disruptions.” Ex. G at ¶ 3; Ex. B at ¶ 3. The only difference between Defendants’ Exhibit 15 that Defendants’ Exhibit 3 is that Defendants’ Exhibit 15 contains out of date information as it was signed and executed by the same declarant five months before Defendants’ Exhibit 3. *Compare* Ex. G *with* Ex. B. Therefore, because Defendants’ Exhibit 3 is merely an updated version of Defendants’ Exhibit 15, Defendants’ Exhibit 15 is needlessly cumulative.

III. Defendants’ Exhibits 2, 3, 4, and 15 Constitute Improper Legal Conclusions and Improper Opinions.

This Court should further exclude Defendants’ Exhibits 2, 3, 4, and 15 on the grounds that they constitute improper legal conclusions and improper speculative opinions. In general, a witness may testify to matters that are (1) “rationally based on the witness’s perception;” (2) “helpful to

clearly understanding the witness's testimony or to determining a fact in issue; and (3) "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. A witness may also testify to a matter only if "the witness has personal knowledge of the matter." Fed. R. Evid. 602. Thus, "under Rule 704(a), testimony that amounts to a legal conclusion is improper." *United States v. Keys*, 747 F. App'x 198, 207 (5th Cir. 2018) (citing *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003)). And in general, "a non-expert witness may not offer legal conclusions." *United States v. Espino-Rangel*, 500 F.3d 398, 400 (5th Cir. 2007) (emphasis omitted).

Here, several of Defendants' exhibits fall outside of that permissible scope of witness testimony because they attempt to make legal conclusions or speculate about the future. *First*, Defendants' Exhibit 2 (*i.e.*, the Declaration of Carol Miaskoff) constitutes an improper opinion, an improper legal conclusion, and a speculative declaration because it attempts to opine—without foundation—what the Pregnant Workers Fairness Act was "intended to address;" it provides no foundation or personal knowledge for its speculative assertion that "[m]any of the accommodations that workers will seek under the PWFA will be simple, like additional bathroom breaks or the ability to carry water with them while working;" it speculates that "the EEOC expects [such accommodations] will be granted easily and quickly;" and it further speculates that "the PWFA may reduce litigation costs by bringing greater certainty and allowing parties to avoid costly discovery." *See* Ex. A at ¶¶ 5–6, 15. The speculative nature of these allegations becomes clear when Defendants' Exhibit 2 also declares that "there is relatively little data on how many pregnant workers will require an accommodation or what the cost of a particular accommodation may be." *See* Ex. A at ¶ 13. Thus, Defendants' Exhibit 2 should be excluded on the grounds that it constitutes an improper opinion.

Second, Defendants' Exhibit 3 and Defendants' Exhibit 15 contain improper legal conclusions, improper opinion, and speculative assertions. For instance, both Defendants' Exhibit 3 and Defendants' Exhibit 15 conclude that Texas's requested relief "would present unprecedented challenges and disruptions." Ex. G at ¶ 3; Ex. B at ¶ 3. Defendants' Exhibit 3 specifically concludes

that “a judicial order that has the effect of precluding implementation of the entire 2023 Act would present enormous challenges and complications;” that “[a]n order that has the effect of precluding enforcement of the entire 2023 Act would also require the Federal government to cease performance and payments on the thousands of obligations already made with funds from the 2023 Act that have not yet been expended;” and that “[s]uch an occurrence would have consequences for all of the parties to whom those funds have been obligated.” *See* Ex. B at ¶¶ 3, 11–13. Similarly, Defendants’ Exhibit 15 alleges that “[a]n injunction precluding enforcement of the entire 2023 Act would present unprecedented challenges and complications;” that “[i]t would result in an immediate lapse of all FY 2023 appropriations in the Act;” that “Federal agency operations would be forced to shut down absent immediate Congressional action;” that “[i]n the event of an injunction against the entire 2023 Act, agencies would generally have to cease performance and payments on the thousands of obligations that agencies have already entered into in reliance on the budget authority provided in the 2023 Act;” and that “[v]arious entities likely have taken significant actions in reliance on the 2023 Act.” *See* Ex. G at ¶¶ 23–25.

Importantly, however, all these allegations and conclusions in Defendants’ Exhibit 3 and Defendants’ Exhibit 15 are an attempt to engage in legal conclusions on the balance of the equity factors, and they merely speculate as to theoretical future possibilities without some indication that such possibilities have even played out in the past. After all, Defendants’ Exhibit 15 explicitly states that such a lapse “would be the first ever lapse in appropriations part-way through the implementation of an appropriations act that provided funding for the entire fiscal year.” *See* Ex. G at ¶ 23. And because “[p]redicting future . . . costs does require a specialized knowledge[] and is therefore impermissible lay testimony,” *Pendarvis v. Am. Bankers Ins. Co. of Fla.*, 354 F. App’x 866, 869 n.3 (5th Cir. 2009), this Court should exclude Defendants’ Exhibit 3 and Defendants’ Exhibit 15 as improper law opinion. Further, should Defendants attempt to offer Ms. Kinneen’s opinions as expert opinions, this Court should exclude it because there would be a total lack of disclosure as required by Fed. R. Civ. P. 26(b), and the declaration includes no valid methodology

that would support admissibility under Fed. R. Evid. 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993).

CONCLUSION

For these reasons, the Court should exclude Defendants' exhibits 2, 3, 4, 7, 8, 11, and 15 on the grounds that they are inadmissible under the Federal Rules of Evidence.

Dated November 20, 2023.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on November 20, 2023, this motion to exclude was filed through the Court's CM/ECF system, which served it upon all counsel of record.

/s/ Ethan Szumanski
ETHAN SZUMANSKI

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

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MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT A

DEFENDANTS'
EXHIBIT

DX-002

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as
Attorney General, *et al.*,

Defendants.

Case No. 5:23-cv-00034-H

DECLARATION OF CAROL R. MIASKOFF

Pursuant to 28 U.S.C. § 1746, I, Carol R. Miaskoff, declare the following to be a true and correct statement of facts:

1. I have been an employee of the U.S. Equal Employment Opportunity Commission (EEOC) continuously since November of 1992. In June of 2021, I was appointed by the EEOC Chair to serve as the Legal Counsel, heading the agency's Office of Legal Counsel, a position I previously held in an acting capacity beginning in February of 2021. From November 2017 until February 2021, I was an Associate Legal Counsel, and before that I served in a number of supervisory roles in the Office of Legal Counsel, including Acting Associate Legal Counsel; Assistant Legal Counsel for the Title VII, ADEA, and EPA Division; and Assistant Legal Counsel for the Coordination Division.¹
2. One of the responsibilities of the Office of Legal Counsel is to coordinate the process of promulgating agency regulations, a process that includes, among other things, drafting of proposed regulations, publication in the *Federal Register* of notices of proposed

¹ In my titles, "Title VII" refers to Title VII of the Civil Rights Act of 1964, "ADEA" refers to the Age Discrimination in Employment Act of 1967, and "EPA" refers to the Equal Pay Act of 1963.

rulemaking, and review and analysis of public comments in connection with formulating a final rule.

3. The Pregnant Workers Fairness Act (PWFA) was signed into law on December 29, 2022, and became effective on June 27, 2023. The PWFA specifically requires the EEOC to promulgate regulations to implement the Act.² In 2023, as Legal Counsel, I oversaw the drafting and publication of a notice of proposed rulemaking (NPRM) to implement the PWFA. The NPRM was published in the *Federal Register* on August 11, 2023.³
4. Among other provisions, the PWFA makes it unlawful for a covered entity to “not make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”⁴
5. The PWFA was intended to address gaps in the coverage of other federal statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978.⁵ Title VII protects employees from discrimination based on sex, including “pregnancy, childbirth, or related medical conditions,” and requires that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”⁶ Under Title VII, among other

² 42 U.S.C. § 2000gg-3(a).

³ Regulations To Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714, (proposed Aug. 11, 2023) (to be codified at 29 CFR pt. 1636) [hereinafter PWFA NPRM].

⁴ 42 U.S.C § 2000gg-1(1).

⁵ H.R. Rep. No. 117–27, pt.1, at 14–16 (2021) (describing court rulings under Title VII and the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015)).

⁶ 42 U.S.C. § 2000e(k).

protections, an employee affected by pregnancy, childbirth, or related medical conditions is entitled to accommodations under certain circumstances.⁷ The NPRM and other EEOC documents discuss how Title VII and the PWFA can overlap, or not, depending upon the circumstances.⁸

6. The NPRM also explains how the EEOC expects the process for a reasonable accommodation will work under the PWFA. First, under the proposed rule, a worker will make a request to their employer.⁹ Many of the accommodations that workers will seek under the PWFA will be simple, like additional bathroom breaks or the ability to carry water with them while working. If the accommodation is a simple one, the EEOC expects it will be granted easily and quickly. If the employer needs more information, the worker and the employer can engage in the “interactive process,” which is a term from the Americans with Disabilities Act.¹⁰ The interactive process is an informal exchange of information to help the worker and the employer figure out a reasonable accommodation.¹¹ The employer does not have to provide the accommodation if it would cause an undue hardship.¹²
7. To the extent a worker believes after engaging in the interactive process that the employer has failed to provide a reasonable accommodation, a worker may file a charge with the EEOC. Section 104¹³ sets out that the PWFA uses the same charge procedures as

⁷ See, e.g., *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015).

⁸ PWFA NPRM, 88 Fed. Reg. at 54,714-15; EEOC, *What You Should Know about the Pregnant Workers Fairness Act*, Q. 3 & 7, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>; EEOC, *Enforcement Guidance on Pregnancy Discrimination*, I(C) (June 25, 2015), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>.

⁹ PWFA NPRM, 88 Fed. Reg. at 54,722.

¹⁰ 42 U.S.C. § 2000gg(7); PWFA NPRM, 88 Fed. Reg. at 54,735.

¹¹ PWFA NPRM 88 Fed. Reg. at 54,735 (setting out possible steps for the interactive process under the PWFA).

¹² 42 U.S.C. § 2000gg-1(1).

¹³ 42 U.S.C. § 2000gg-2(a)(1).

Title VII. Thus, under the PWFA, a worker can file a charge with the EEOC, the EEOC will provide the employer notice of the charge being filed, and the EEOC will use the same steps it uses to process a Title VII charge.

8. As a result of the overlap between Title VII and the PWFA, a worker may file a charge under either or both statutes based on the same set of facts. Such charges would use the procedures set out in Title VII, which, as noted in paragraph 7 above, the PWFA incorporates by reference. Likewise, should a lawsuit be filed based upon one of these charges – under Title VII, the PWFA, or both statutes – the procedures in Title VII, as adopted by the PWFA,¹⁴ would apply there as well.
9. As stated in the NPRM, the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) determined that the rulemaking was significant for purposes of Executive Order (E.O.) 12866. Therefore, the EEOC completed and included in the NPRM an Initial Regulatory Impact Analysis (IRIA) as required by E.O. 12866 and E.O. 13563, as amended by E.O. 14094.¹⁵
10. In completing the IRIA, the EEOC adhered to the requirements of Executive Orders 12866 and 13563 and OMB Circular A-4,¹⁶ and followed OIRA’s published guidelines for completing a regulatory impact analysis.¹⁷

¹⁴ Section 706(f) of Title VII, 42 U.S.C. § 2000e-5(f), governs when a civil action may be filed by an aggrieved person, the EEOC, or the Attorney General, and section 104(a)(1) of the PWFA, 42 U.S.C. § 2000gg-2(a)(1), incorporates the powers, remedies, and procedures provided in various sections of Title VII, including section 706.

¹⁵ PWFA NPRM, 88 Fed. Reg. at 54,750.

¹⁶ Circular A-4, “Regulatory Analysis,” (September 17, 2003), available at: https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

¹⁷ Circular A-4, “Regulatory Impact Analysis: A Primer” (August 15, 2011), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

11. In light of Circular A-4's admonition that a good analysis is transparent and provides specific references to all sources of data,¹⁸ the EEOC's IRIA as included in the NPRM featured over one hundred footnotes providing citations to sources and further explanations of methodology.
12. The IRIA estimates the costs of employers providing accommodations, but also notes that these cost estimates may be overstated for a variety of reasons.¹⁹ For example, the analysis states that "[t]hese figures are almost certainly overestimates of the costs imposed by the rule, in part because some of the accommodations required by the proposed rule and underlying statute are already required under the ADA [Americans with Disabilities Act] and Title VII and some employers voluntarily provide accommodations. Due to a lack of data, however, the Commission was unable to account for this overlap in the above analysis."²⁰ The IRIA does not purport to estimate the "[t]he extent of the regulatory burden, if any, that the Pregnant Workers Fairness Act (PWFA) has imposed on Texas, such as costs Texas has incurred or actions Texas has taken in preparation for the PWFA becoming effective and being implemented."²¹
13. As the IRIA made clear, there is relatively little data on how many pregnant workers will require an accommodation or what the cost of a particular accommodation may be; for example, the NPRM states that "not all individuals who become pregnant will need a reasonable accommodation. Because there is very little research on the proportion of

¹⁸ Circular A-4, "Regulatory Analysis," p. 3.

¹⁹ PWFA NPRM, 88 Fed. Reg. at 54,763-64.

²⁰ *Id.* at 54,764.

²¹ Notice of Consolidation with Trial on the Merits at 2, *Texas v. Garland*, No. 5:23-CV-034-H, ECF No. 73 (Oct. 20, 2023).

pregnant workers who need workplace accommodations, the Commission has generated a ranged estimate.”²²

14. With respect to the cost of an accommodation, the NPRM notes that “[s]ome of these accommodations, especially additional rest or bathroom breaks and provision of a stool or chair, are expected to impose minimal or no additional costs on the employer. Certain other types of accommodations, such as allowing the employee to avoid heavy lifting or exposure to certain types of chemicals, may be easy to provide in some jobs but more difficult to provide in others, necessitating temporary restructuring of responsibilities or transfer to a different position.”²³ The NPRM further states that “[t]he Commission was unable to find any data on the average cost of reasonable accommodations related specifically to pregnancy, childbirth, or related medical conditions. The Commission has therefore relied on the available data on the cost of accommodations for individuals with disabilities for purposes of this analysis.”²⁴

15. Finally, the PWFA may reduce litigation costs by bringing greater certainty and allowing parties to avoid costly discovery. As the NPRM states, “by clarifying the rules regarding accommodations for pregnant workers, the PWFA and the proposed rule will decrease the need for litigation regarding accommodations under the PWFA. To the extent that litigation remains unavoidable in certain circumstances, the PWFA and the proposed rule are expected to eliminate the need to litigate whether the condition in question is a ‘disability’ under the ADA, and to limit discovery and litigation costs that arise under

²² PWFA NPRM, 88 Fed. Reg. at 54,758.

²³ *Id.* at 54,759.

²⁴ *Id.*

Title VII regarding determining if there are valid comparators, thus streamlining the issues requiring judicial attention.”²⁵

16. The IRIA is not the agency’s final assessment of the economic impact of the PWFA. The EEOC included a request for public comment on any aspect of the IRIA, as well as multiple specific requests for comments on a variety of topics, including requests for any existing data quantifying the proportion of pregnant workers who need workplace accommodations,²⁶ for any existing data quantifying the average cost of accommodations related to pregnancy, childbirth, or related medical conditions,²⁷ and whether the estimates of time needed for an employer to perform compliance activities to implement the PWFA’s requirements are accurate.²⁸

²⁵ *Id.* at 54,754

²⁶ *Id.* at 54,758.

²⁷ *Id.* at 54,760.

²⁸ *Id.*

17. In response to the NPRM, the EEOC received over 100,000 public comments, some of which addressed aspects of the IRIA. The EEOC is currently reviewing and analyzing the comments in anticipation of drafting a final rule, which will include an updated regulatory impact analysis informed by those comments. The rule will require a vote of the Commission before it becomes final.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 1st day of November, 2023.

Carol Miaskoff

CAROL R. MIASKOFF
Legal Counsel
Office of Legal Counsel
U.S. Equal Employment Opportunity Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DEFENDANTS'
EXHIBIT

DX-003

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as
Attorney General, *et al.*,

Defendants.

Case No. 5:23-cv-00034-H

SECOND DECLARATION OF KELLY KINNEEN

I, Kelly Kinneen, make the following declaration based upon my personal knowledge, upon information provided in my official capacity, and upon conclusions I reached based on that knowledge or information:

1. I am the Assistant Director for Budget of the Office of Management and Budget (OMB) in the Executive Office of the President (EOP), in Washington, D.C. I have served in this position since 2017, and have worked at OMB since 2006. In connection with this matter, I previously executed a declaration dated May 4, 2023. *See* Declaration of Kelly Kinneen (May 4, 2023) (“May 4 Decl.”), ECF No. 56.
2. I am the senior-most career official responsible for supporting the OMB Director in developing all aspects of the President’s Budget. Additionally, I advise OMB leadership and Federal agencies on questions relating to implementing laws that provide funding to the Federal government, including annual appropriations acts.
3. The purpose of this declaration is to provide information regarding why any ruling that has the effect of precluding implementation of the entire Consolidated Appropriations Act, 2023, Public Law 117-328 (the “Act” or the “2023 Act”), would present unprecedented challenges and disruptions, notwithstanding that Fiscal Year (FY) 2023 has ended. Although

FY 2023 ended on September 30, 2023, a significant number of the consequences described in my declaration of May 4, 2023 would still occur if the Federal government were precluded from implementing the entire Act. *See* May 4 Decl. ¶¶ 23-30.

4. The 2023 Act provided approximately \$3 trillion of budget authority for FY 2023. *See* May 4 Decl. ¶ 10. Approximately half of those funds—or approximately \$1.5 trillion—could be obligated only in FY 2023 (and thus could no longer be obligated after September 30, 2023), while the remaining half were “multi-year” or “no year” funds that remain available for obligation beyond FY 2023.
5. In addition to the funds appropriated for use beginning in FY 2023, the 2023 Act provided approximately \$680 billion in advance appropriations and indefinite budget authority that could not be obligated until FY 2024 or later. For example, the Department of Veterans Affairs received advance appropriations of \$128.1 billion for fiscal year 2024.
6. Thus, nearly \$2.2 trillion (\$1.5 trillion + \$680 billion) in budget authority appropriated by the Act did not expire on September 30, 2023. Depending on the terms of the particular appropriation, those funds will remain available for another year, for several years, or indefinitely.
7. Of the \$1.5 trillion in unexpired funds appropriated for use beginning in FY 2023 by the 2023 Act, \$500 billion was provided for grants to states for Medicaid in the Department of Health and Human Services. Approximately \$15 billion of that amount has not yet been expended, of which \$1.15 billion would be for the State of Texas.
8. Because OMB collects agency budget execution reporting by fiscal year and type of budget authority provided, rather than by individual appropriations acts, OMB does not have complete information on how much of the remaining approximately \$1 trillion in unexpired funds appropriated for use beginning in FY 2023 has been obligated. However, for \$168

billion of the unexpired funds, OMB is able to determine whether they have been obligated. Of these \$168 billion, approximately 30 percent has yet to be obligated. These unobligated funds include \$4.2 billion in the Department of Veterans Affairs' Cost of War Toxic Exposure Fund, \$5.1 billion for the State Department's Global Health Program, \$3.2 billion in the Department of Defense's Military Construction account for the Navy and Marine Corps, \$5.1 billion for Aircraft Procurement account for the Navy, and \$3.4 billion for Department of Housing and Urban Development Homeless Assistance Grants.

9. The vast majority of the \$680 billion in advance appropriations and indefinite budget authority that the 2023 Act appropriated for use in FY 2024 or later has not yet been obligated.
10. Even for funds that were available for obligation only in FY 2023 and thus have expired, a significant amount have not yet been expended (or "outlayed"), despite being obligated. Agencies have five years to outlay expired funds that were obligated—here, until September 30, 2028.
11. Given the above facts, notwithstanding that FY 2023 has ended, a judicial order that has the effect of precluding implementation of the entire 2023 Act would present enormous challenges and complications.
12. To the extent that agency operations and programs are being funded with money made available by the 2023 Act that has not expired, those operations would have to immediately cease if an order has the effect of precluding enforcement of the entire 2023 Act. The result would be a partial government shutdown, in which agencies would have to go program-by-program to determine which operations could continue and which must end.
13. An order that has the effect of precluding enforcement of the entire 2023 Act would also require the Federal government to cease performance and payments on the thousands of

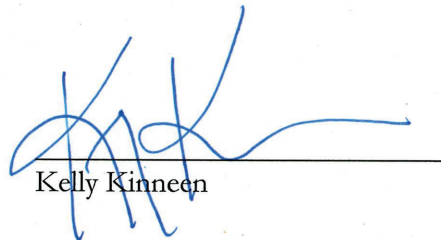
obligations already made with funds from the 2023 Act that have not yet been expended.

Such an occurrence would have consequences for all of the parties to whom those funds have been obligated, including in the private sector, state and local governments, and foreign governments. *See* May 4 Decl. ¶ 25.

14. Public and private entities within the State of Texas were also recipients of billions of dollars of funds provided by the 2023 Act. Of the examples listed in paragraphs 27-29 in my May 4 Declaration, the Act made approximately 91% of this funding available for obligation beyond the end of FY 2023. In other words, approximately \$9.6 billion of the more than \$10.5 billion appropriated to the Texas-based entities and programs described in these three paragraphs, *see* May 4 Decl. ¶¶ 27-29, were not required to be obligated by the end of FY 2023.

CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Washington, D.C., on the 1st day of November, 2023.



Kelly Kinneen

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DEFENDANTS'
EXHIBIT

DX-004

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as
Attorney General, *et al.*,

Defendants.

Case No. 5:23-cv-00034-H

DECLARATION OF PETER MINA

I, Peter Mina, pursuant to 28 U.S.C. § 1746 and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

1. I am the Deputy Officer for Programs & Compliance at the Office for Civil Rights and Civil Liberties (“CRCL”) for the U.S. Department of Homeland Security (“DHS” or “the Department”). I have been employed by CRCL in this position since 2019. I previously served as Chief of the Labor and Employment Law Division (“LELD”) in the Office of the Principal Legal Advisor for U.S. Immigration and Customs Enforcement (“ICE”) since February 2013. In connection with this matter, I previously prepared and signed a declaration dated May 3, 2023.

2. I am familiar with the development of the Alternatives to Detention Case Management Pilot Program (“CMPP”), the administration of the program, its requirements for enrollees, and the current status of its funding and enrollment. CMPP was created by the 2021 Appropriations Act to provide voluntary case management and other services to non-detained noncitizens enrolled in ICE’s Alternatives to Detention (“ATD”) program. CMPP is managed by a National Board and chaired by the Officer for Civil Rights and Civil Liberties. The National Board is responsible for awarding funds to eligible local governments and nonprofit organizations to

provide case management services. It is comprised of nonprofits with experience providing and evaluating case management programs for immigrants, asylees, and refugees.

Case Management Pilot Program Enrollment and Funding

3. To date, CMPP has enrolled 138 noncitizens in Texas. However, not all enrollees remain in Texas. At least two CMPP participants have left Texas, either moving to another state or returning to their country of citizenship. The number of active participants in CMPP in Texas is therefore less than 138.

4. CMPP is a voluntary program and there is no requirement to participate in CMPP. Further, there is no requirement for a noncitizen to remain in Texas once they enroll in CMPP. However, if an individual chooses to participate in CMPP and receives services through CMPP, he or she must reside in the geographic location served by the relevant nonprofit subrecipient. For example, to receive CMPP services from BakerRipley, the Houston CMPP service provider, the CMPP participant must reside in the Houston area. Similarly, to receive CMPP services from the International Rescue Committee, the New York CMPP service provider, the CMPP participant must reside in the New York area.

5. The National Board has not awarded any subgrants from the CMPP funding from the Consolidated Appropriations Act, 2022. CRCL expects the National Board to make awards on November 17, 2023, barring any unforeseen circumstances.

6. The National Board's subgrant awards to subrecipients do not automatically renew. Instead, to be awarded funds, nonprofit organizations and local governments must apply anew following each NOFO and the National Board's subsequent solicitation of applications. This affords different nonprofit organizations and local governments the opportunity to be considered for the program each time new CMPP funding is made available. Annually, the CMPP National Board engages in the funding process which includes, *inter alia*, the Board's review of applications

from sub-recipients throughout the United States. The National Board assesses each application on its merits. Subgrants to existing CMPP providers will not be automatically renewed. Also, the fact that nonprofit organizations in New York and Texas received funds from the 2021 Appropriations Act does not mean that nonprofit organizations in those states will necessarily receive subgrants in the future. There is no obligation to provide future funding from the 2022 or 2023 Appropriations Acts to past recipients.

7. CRCL has initiated drafting of the Notice of Funding Opportunity (“NOFO”) for the Fiscal Year 2023 funds with the expectation that it will be published by March 1, 2024. To date, the application process has not formally commenced. Accordingly, Fiscal Year 2023 funds have not been awarded to the National Board. Similarly, Fiscal Year 2023 funds have not been awarded by the National Board to any subrecipients.

Under penalty of perjury, pursuant to 28 U.S.C. § 1746, I declare the foregoing is true and correct to the best of my knowledge and belief.

Dated the 31st day of October 2023.



Peter Mina
Deputy Officer for Programs &
Compliance
Office for Civil Rights and Civil Liberties
2707 Martin Luther King, Jr. Avenue, SE
Washington, D.C. 20528

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

**DEFENDANTS'
EXHIBIT**

DX-007

STATE OF TEXAS,

Plaintiff,

v.

**MERRICK GARLAND, in his official capacity as
Attorney General, et al.,**

Defendants.

Case No. 5:23-cv-00034-H

DECLARATION OF SEAN C. DANDRIDGE

I, Sean C. Dandridge, declare the following under 28 U.S.C. § 1746, and state under the penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am currently employed by the U.S. Department of Homeland Security (“DHS”), U.S. Immigration and Customs Enforcement (“ICE”), Enforcement and Removal Operations (“ERO”), as the Acting Deputy Assistant Director of the Alternatives to Detention Unit in the Non-Detained Management Division. I make this declaration in my official capacity, based on my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I began my law enforcement career in 2009 as an Immigration Enforcement Agent with ICE in San Diego. Since then, I have held various positions within ICE, including Detention and Deportation Officer, Supervisory Detention and Deportation Officer, and Unit Chief.

3. ICE’s Alternatives to Detention (“ATD”) programs allow eligible non-detained noncitizens to remain in their communities pending the outcome of their immigration cases. These programs are flight-mitigation programs that use case management tools in combination with

monitoring (sometimes electronic) to ensure enrollees comply with their release conditions, such as attending immigration court or complying with removal orders.

4. ICE ERO currently oversees and manages two ATD programs: the Young Adult Case Management Program (“YACMP”) and the primary ATD program, the Intensive Supervision Appearance Program (“ISAP”). ICE ERO has sole and complete oversight over both YACMP and ISAP.

5. DHS’s Office for Civil Rights and Civil Liberties (“CRCL”) oversees and operates the Case Management Pilot Program (“CMPP”). Unlike the YACMP and ISAP, ICE ERO does not have any oversight over CMPP. ICE ERO’s involvement in CMPP is limited to providing CRCL with a list of potential participants from which CRCL draws to enroll individuals in the program. All individuals enrolled in ISAP are eligible to be included unless they affirmatively opt out of CMPP. Individuals in ICE ERO custody are not eligible for CMPP. To date, no individuals who have previously been in ICE ERO custody or enrolled in YACMP have participated in CMPP.

6. Although ICE ERO does not oversee CMPP, CMPP participants’ immigration cases remain under ICE ERO supervision. CMPP participants are still required to adhere to ICE check-in requirements like all other individuals on the non-detained docket.

7. No individuals are released from ICE ERO custody pursuant to CMPP. CMPP plays no role in ICE ERO’s decision to release an individual from its custody. Instead, ICE ERO detains, releases, and supervises individuals pursuant to its authority found in the Immigration and Nationality Act (“INA”) and applicable regulations. *See, e.g.*, INA §§ 212(d)(5), 235(b), 236(a), 236(c), 241(a), 8 C.F.R. §§ 212.5(b)(5), 236.1(c), 241(a)(3)(D).

Executed on this 3rd day of May 2023

A handwritten signature in black ink, appearing to read "Sean C. Dandridge", is written over a horizontal line.

Sean C. Dandridge
Acting Deputy Assistant Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement
500 12th St. SW, Washington, D.C. 20536
Department of Homeland Security

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as
Attorney General, *et al.*,

Defendants.

Case No. 5:23-cv-00034-H

DECLARATION OF ROBERT FARMER

I, Robert Farmer, state as follows:

1. I am the Deputy Assistant Administrator for the Office of Enterprise Grant Services within the Grant Programs Directorate (GPD) of the Federal Emergency Management Agency (FEMA), a component agency of the Department of Homeland Security (DHS). I have served in this capacity since July 3, 2022. I make this declaration in my official capacity, based on my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. Previously, I served as the acting head of GPD's Office of Enterprise Grant Services from January 13, 2022, until July 2, 2022. During that time, my title was Senior Policy Advisor. Prior to that, I served as the Acting Deputy Administrator of GPD from August 3, 2020, until January 12, 2022.

3. I am the head official in the Office of Enterprise Grant Services within GPD, which is responsible for providing FEMA grant programs with consistent policies and guidance; technical innovation through the consolidation and modernization of FEMA's disparate grant systems into the new FEMA Grants Outcomes (FEMA GO) grant management platform; and risk reduction through monitoring and compliance with applicable grant administration laws, regulations, policies, and internal controls.

**DEFENDANTS'
EXHIBIT**

DX-008

4. My staff and I are responsible for coordinating with DHS and other FEMA program offices regarding grant management documents and requirements, including annual updates of federal assistance listings; the development and issuance of Notices of Funding Opportunity (NOFOs); updates to the terms and conditions that are ultimately incorporated into the grant awards that FEMA issues; coordination of monitoring and compliance with grant administration laws, regulations, policies, and internal controls; as well as development or management of grant management systems, among other matters.

5. I am familiar with the development of the Alternatives to Detention Case Management Pilot Program (CMPP) and the program's current status. The Office of Enterprise Grant Services is the responsible entity within FEMA for coordinating with the DHS Office for Civil Rights and Civil Liberties (CRCL) to review and ensure the proper routing of NOFOs, including CMPP NOFOs. A NOFO serves as the official announcement of the availability of funding through a federal assistance program and contains information regarding eligibility criteria, funding priorities, required application materials and deadlines, the evaluation and scoring process, as well as certain terms and conditions a recipient agrees to when it accepts an award.

6. As part of the 2021 Consolidated Appropriations Act, Congress appropriated \$5,000,000 from the Department of Homeland Security's Office of the Secretary and Executive Management Federal Assistance funding to be transferred to FEMA for CMPP. The purpose of CMPP is to fund case management services for individuals enrolled in the U.S. Immigration and Customs Enforcement's (ICE) Alternatives to Detention program.

7. The 2021 Consolidated Appropriations Act specified that the funding must be administered by a National Board that is chaired by the Officer for CRCL at DHS. The 2022 and 2023 Consolidated Appropriations Acts also appropriated funding for this program and retained the

same program structure. Therefore, FEMA's primary role in CMPP is to administer the funds to the National Board.¹

8. After the 2021 Consolidated Appropriations Act was issued, FEMA worked with CRCL to develop the FY 2021 CMPP NOFO. This NOFO was issued by FEMA on June 28, 2022. *See* Exh. A. Consistent with the requirements of the 2021 Consolidated Appropriations Act that the National Board administer and award CMPP funds to subrecipients, the NOFO listed the Case Management Pilot Program National Board as the only eligible recipient.

9. The National Board submitted its application on August 17, 2022. FEMA awarded the National Board the full \$5,000,000 on August 31, 2022 (*see* Exh. B), and the National Board accepted the award on September 7, 2022.

10. FEMA was not involved in the National Board's selection of subrecipients for FY 2021 CMPP funding. The National Board ran its own application process and voted on which nonprofit organizations and/or local governments would receive funding and in what amount, in accordance with the 2021 Appropriations Act.

11. Congress appropriated an additional \$15,000,000 for CMPP in the 2022 Consolidated Appropriations Act. In the 2022 Appropriations Act, Congress specified that the funds must be awarded to the National Board by September 30, 2023. FEMA released a NOFO for the FY 2022 funding on April 26, 2023, which provided the National Board an application submission deadline of May 26, 2023. FEMA will not award funds for the FY 2022 CMPP until the National Board has applied and FEMA has reviewed and approved its application. FEMA will not be involved in the National Board's selection of subrecipients for FY 2022 CMPP funding.

¹ FEMA also ensures the proper routing of CMPP NOFOs, provides coordination of financial and programmatic monitoring for CMPP grants, assesses the effectiveness of internal controls for CMPP grants, and maintains the grant technology system CMPP uses.

12. Congress appropriated an additional \$20,000,000 for CMPP in the 2023 Consolidated Appropriations Act. In the 2023 Appropriations Act, Congress specified that the funds must be awarded to the National Board by September 30, 2024. FEMA has not yet issued a NOFO to award the FY 2023 funding. FEMA will not award funds for the FY 2023 CMPP until after the NOFO has been issued, the National Board has applied, and FEMA has reviewed and approved its application. FEMA will not be involved in the National Board's selection of subrecipients for FY 2023 CMPP funding.

13. To date, the \$5,000,000 from the 2021 Appropriations Act are the only CMPP funds FEMA has awarded to the National Board. Consequently, no nonprofit organization or local government subrecipient has received any funds from the 2022 or 2023 Appropriations Acts under CMPP.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 2023 in Washington, D.C.



Robert A. Farmer

Deputy Assistant Administrator, Office of Enterprise Grant Services

Grant Programs Directorate

Federal Emergency Management Agency

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as
Attorney General, *et al.*,

Defendants.

Case No. 5:23-cv-00034-H

DEFENDANTS'
EXHIBIT

DX-011

DECLARATION OF PETER MINA

I, Peter Mina, pursuant to 28 U.S.C. § 1746 and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

1. I am the Deputy Officer for Programs & Compliance at the Office for Civil Rights and Civil Liberties (“CRCL”) for the U.S. Department of Homeland Security (“DHS” or “the Department”). I have been employed by CRCL in this position since 2019. I previously served as Chief of the Labor and Employment Law Division (“LELD”) in the Office of the Principal Legal Advisor for U.S. Immigration and Customs Enforcement (“ICE”) since February 2013.

2. I am familiar with the development of the Alternatives to Detention Case Management Pilot Program (“CMPP”), the administration of the program, and its current status. CMPP was created in 2021 to provide voluntary case management and other services to non-detained noncitizens enrolled in ICE’s Alternatives to Detention (“ATD”) program. CMPP is managed by a National Board and chaired by the Officer for Civil Rights and Civil Liberties. The National Board is responsible for awarding funds to eligible local governments and nonprofit organizations to provide case management services. It is comprised of nonprofits with experience providing and evaluating case management programs for immigrants, asylees, and refugees.

Case Management Pilot Program

3. As part of the 2021 Consolidated Appropriations Act (the “2021 Appropriations Act”), Pub. L. No. 116-260, 134 Stat. 1182, 1449 (2020), Congress directed DHS to create CMPP and appropriated \$5 million in funding for the program. Under CMPP, grants are awarded to selected nonprofit organizations and local governments to provide voluntary case management services to noncitizens enrolled in ICE’s ATD program.

4. Under the 2021 Appropriations Act, the funds appropriated for CMPP are transferred to the Federal Emergency Management Agency (“FEMA”), but must be administered by the National Board. The National Board is composed of three nonprofit organizations – Church World Service, Catholic Charities USA, and Center for Migration Studies – and DHS’s Officer for Civil Rights and Civil Liberties, who is the chair of the National Board. From January 2022 through April 2023, I served as Senior Official Performing the Duties of the Officer for Civil Rights and Civil Liberties and as Chair of CMPP National Board.

5. Prior to awarding CMPP funds, FEMA issues a Notice of Funding Opportunity (“NOFO”) to which the National Board has 30 days to apply. Consistent with requirements of the 2021 Consolidated Appropriations Act that the National Board administer and award CMPP funds to subrecipients, *see* 134 Stat. at 1449, only the National Board is eligible to apply for the funds described in the NOFO.

6. Once the National Board is awarded CMPP funds from FEMA, the National Board posts a solicitation inviting subrecipients to apply. Potential subrecipients consist of nonprofit organizations and local governments. Subrecipient applicants must identify the geographic area where they will provide services in their application, and, if selected, the subrecipient must perform its services within that identified geographic area.

7. Upon receiving applications from potential subrecipients in response to its solicitation, the National Board considers the applications, votes on the nonprofit organizations or local governments to receive funding and the amount of the funding, and disburses the funding to the selected subrecipients. The funding to selected subrecipients is called a subgrant. Each Board member has one equal vote, and the designees for the three nonprofit organizations on the Board exercise their independent judgment when casting their votes. Decisions are made by majority vote. Therefore, if the three nonprofit organizations on the Board vote to award a subgrant to a certain subrecipient, the award will be made to that subrecipient.

8. The National Board's subgrant awards to subrecipients do not automatically renew, but instead must be applied for and awarded following each NOFO and the National Board's subsequent solicitation of applications. This affords different nonprofit organizations and local governments the opportunity to be considered for the program each time new CMPP funding issues. The National Board assesses each application on its merits.

9. The NOFO for the fiscal year 2021 CMPP funds was issued by FEMA on June 28, 2022. In July 2022, the National Board applied for the \$5 million allocated to CMPP for fiscal year 2021 and, on September 1, 2022, received the \$5 million grant. Thereafter, the National Board invited nonprofit organizations and local governments to apply for that 2021 grant money through a solicitation that posted on September 19, 2022. Exh. A. Applications were due October 19, 2022.

10. On November 30, 2022, the National Board selected BakerRipley, a nonprofit organization in Houston, Texas, to receive a subgrant of more than \$2 million of the funds allocated to CMPP for the fiscal year 2021. *See* Exh. B. Additionally, on the same date, the National Board also selected the International Rescue Committee New York ("IRC"), a nonprofit organization in New York, New York, to receive a subgrant of more than \$2 million. *See* Exh. C. As set forth above in paragraph 7, neither the subgrant to BakerRipley nor the subgrant to IRC will be

automatically renewed. Also, the fact that nonprofit organizations in Texas and New York received funds from the 2021 Appropriations Act does not mean that nonprofit organizations in those states will necessarily receive subgrants in the future.

11. Any individual enrolled in ATD is eligible to participate in CMPP. ICE provides the names of eligible participants to CRCL via an encrypted process solely for the purpose of the participants' enrollment in CMPP. CRCL randomizes the names and protects personal identifiable information before sending this information to the subrecipient program. Using the information CRCL provided, BakerRipley began contacting potential CMPP participants in April 2023, and IRC plans to do the same in May 2023.

12. Congress appropriated an additional \$15 million for CMPP in the Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 312 (2022), and an additional \$20 million for CMPP in the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4726 (2022). The National Board has not solicited applications for grants or awarded any grants of the money allocated to CMPP under the Consolidated Appropriations Act, 2022, or the Consolidated Appropriations Act, 2023.

13. CMPP provides needed case management services to noncitizens who qualify for participation in the program, including, but not limited to, trafficking screening, legal and cultural orientation, referrals to social services, mental health services, and for individuals who will be removed, reintegration services.

Under penalty of perjury, pursuant to 28 U.S.C. § 1746, I declare the foregoing is true and correct to the best of my knowledge and belief.

Dated the __3rd__ day of May 2023



Peter Mina
Deputy Officer for Programs &
Compliance
Office for Civil Rights and Civil Liberties
2707 Martin Luther King, Jr. Avenue, SE
Washington, D.C. 20528

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, *et al.*,

Defendants.

No. 5:23-cv-34-H

**TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8,
11, AND 15**

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DEFENDANTS'
EXHIBIT

DX-015

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as
Attorney General, *et al.*,

Defendants.

Case No. 5:23-cv-00034-H

DECLARATION OF KELLY KINNEEN

I, Kelly Kinneen, make the following declaration based upon my personal knowledge, upon information provided in my official capacity, and upon conclusions I reached based on that knowledge or information:

1. I am the Assistant Director for Budget of the Office of Management and Budget (OMB) in the Executive Office of the President (EOP), in Washington, D.C. I have served in this position since 2017, and have worked at OMB since 2006.
2. I am the senior-most career official responsible for supporting the OMB Director in developing all aspects of the President's Budget. Additionally, I advise OMB leadership and Federal agencies on questions relating to implementing laws that provide funding to the Federal government, including annual appropriations acts.
3. I have been asked to summarize the Consolidated Appropriations Act, 2023, Public Law 117-328 (the "Act" or the "2023 Act"), to describe the process by which funds appropriated under the Act are obligated and expended by Federal agencies, and to explain how a ruling enjoining the entire Act would present unprecedented challenges and disruptions. *See generally* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022) ("2023 Appropriations Act").

Summary of the Consolidated Appropriations Act, 2023

4. Congress passed the Act on December 23, 2022, and the President signed it into law on December 29, 2022. The Act is commonly known as an “omnibus” appropriations bill, because it includes all twelve of the regular annual appropriations bills (included as divisions A through L) that largely fund the operations of the three branches of the Federal government. The twelve regular annual appropriations bills included in the Act are:
 - a. Division A—Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Agriculture, including programs for farm production and conservation, and rural development. It also funds food and nutrition programs for socioeconomically disadvantaged populations, including the National School Lunch and School Breakfast programs, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the Supplemental Nutrition Assistance Program (SNAP). This division also funds the Food and Drug Administration.
 - b. Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Commerce, including the National Oceanic and Atmospheric Administration; and the Department of Justice, including the Bureau of Prisons, Federal Bureau of Investigation, and Drug Enforcement Administration. This division also funds the Equal Employment Opportunity Commission, National Aeronautics and Space Administration, and the National Science Foundation.
 - c. Division C—Department of Defense Appropriations Act, 2023: This division, among other things, provides funding for the Department of Defense, except for

military construction and the U.S. Army Corps of Engineers. This division includes funding for the pay of military personnel, operation and maintenance costs, and major procurements, including submarines, such as the Columbia Class Submarine, aircraft, and weapons systems.

d. Division D—Energy and Water Development and Related Agencies

Appropriations Act, 2023: This division, among other things, provides funding for the Department of Energy, National Nuclear Security Administration, Bureau of Reclamation, and the U.S. Army Corps of Engineers. This division includes funding for nuclear energy programs, the Strategic Petroleum Reserve, and nuclear weapons activities and non-proliferation.

e. Division E—Financial Services and General Government Appropriations Act,

2023: This division, among other things, provides funding for the Department of the Treasury, Executive Office of the President, the Judicial Branch, the District of Columbia, General Services Administration, Small Business Administration, and independent agencies such as the Federal Election Commission, Consumer Product Safety Commission, and Federal Trade Commission.

f. Division F—Department of Homeland Security Appropriations Act, 2023: This

division, among other things, provides funding for the Department of Homeland Security, including U.S. Customs and Border Protection, Immigration and Customs Enforcement, the Federal Emergency Management Agency, the Transportation Security Administration, and the Coast Guard.

g. Division G—Department of the Interior, Environment, and Related Agencies

Appropriations Act, 2023: This division, among other things, provides funding for the Department of the Interior (including the Bureau of Indian Affairs, Bureau of

Indian Education, and the Indian Health Service), Environmental Protection Agency, and the Forest Service.

- h. Division H—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Departments of Labor, Health and Human Services, and Education. This division includes funding for the Employment and Training Administration, Centers for Disease Control and Prevention, Centers for Medicare and Medicaid Services, National Institutes of Health, Substance Abuse and Mental Health Services Administration, Administration for Children and Families, Advanced Research Projects Agency for Health, and Office of Federal Student Aid.
- i. Division I—Legislative Branch Appropriations Act, 2023: This division provides funding for the Legislative Branch.
- j. Division J—Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Veterans Affairs and the military construction program of the Department of Defense.
- k. Division K—Department of State, Foreign Operations, and Related Programs Appropriations Act, 2023: This division, among other things, provides funding for the Department of State, United States Agency for International Development, and United States International Development Finance Corporation. This division includes funding for diplomacy abroad, contributions to international organizations, and economic assistance and military financing to foreign countries and other international partners.

1. Division L—Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Departments of Transportation and Housing and Urban Development. This division includes liquidating authority for the Department of Transportation’s airports, highways, and transit programs, and funding for highway infrastructure projects and the Federal Aviation Administration. This division also includes funding for tenant-based and project-based rental assistance programs, homeless assistance, and other housing programs.
5. In addition to the 12 annual appropriations bills, the 2023 Act also includes two supplemental appropriations bills focused on the conflict in Ukraine, including for the procurement of missiles and ammunition, and disaster relief (Divisions M and N), respectively.
6. As is typical with an annual omnibus bill, the Act also includes discrete acts making changes to permanent law, most of which are unrelated to the discretionary appropriations included in the Act. These divisions in the 2023 Act include, among other things, bipartisan revisions to the Electoral Count Act relevant to Presidential elections (Division P); legislation to provide protections to pregnant workers and nursing mothers (Divisions II and KK); healthcare measures, including an extension of the requirement that Medicare cover telemedicine and protections against future pandemics (Division FF); an act to provide countermeasures against ransomware and other cyber-related attacks by foreign actors (Division BB, Title V); and the Fairness for 9/11 Families Act (Division MM).
7. Annual appropriations included in the Act provide funding and authority for certain agency operations in Fiscal year (FY) 2023, which began on October 1, 2022, and runs through

September 30, 2023. The authorities and funding included in the Act cover the entire fiscal year.

The Process of Obligating and Expending Appropriated Funds

8. Upon the enactment of appropriations bills such as the 2023 Act, there is a multi-step process by which Federal agencies obligate and expend appropriated funds.
9. The 2023 Act provided “budget authority” to the various departments, agencies, and instrumentalities of the Federal government. OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, § 20.3 (Aug. 2022) (“OMB Circular A-11”), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf>, defines “budget authority” as “the authority provided by law to incur financial obligations that will result in outlays.”
10. According to the FY 2024 President’s Budget estimates, the total amount of budget authority enacted in the 2023 Act is \$1.7 trillion in discretionary appropriations and \$1.31 trillion in mandatory appropriations, for a total of approximately \$3 trillion. See Office of Mgmt. & Budget, *Budget of the U.S. Government, Fiscal Year 2024* at p. 170, available at https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf.
11. After Congress enacts legislation that provides budget authority, pursuant to 31 U.S.C. §§ 1512-13, the President must “apportion” the budget authority to the relevant Federal agencies before each agency may obligate its funds. The President has delegated this apportionment authority to the OMB Director. OMB apportions funds to Executive Branch agencies by time periods, specific activities or projects, or a combination thereof. 31 U.S.C. § 1512(b)(1); OMB Circular A-11 § 120.1.
12. As of December 29, 2022, OMB had apportioned all of the funds provided in the 2023 Act. See OMB Circular A-11, § 120.41.

13. Once funds are apportioned, agencies may “obligate” the funds. The Government Accountability Office (GAO) defines an obligation as “[a] definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States.” U.S. Gov’t Accountability Office, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP, at 70 (2005), *available at* <https://www.gao.gov/assets/gao-05-734sp.pdf>. An agency enters an obligation where, for example, it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. OMB Circular A-11 § 20.5(a).
14. Agencies must “record” obligations when they occur. 31 U.S.C. § 1501; OMB Circular A-11 § 20.5.
15. An “expenditure” or “outlay” occurs when an agency makes a payment to liquidate an obligation. OMB Circular A-11 § 20.6.
16. Through May 1, 2023, Executive Branch agencies had seven months of the current fiscal year to incur thousands of obligations made available by the 2023 Act, which include legal commitments to third parties through Federal contracts, grants, and loans (including loan guarantees), as well as the salaries of Federal employees and military personnel.
17. To date, OMB estimates that the Executive Branch has obligated and expended billions of dollars of the funds provided in the 2023 Act.

Lapses in Appropriations

18. The vast majority of the funding provided by the annual appropriations bills is time-limited. This means that, after a certain amount of time, the funding ceases to be available to

agencies to make new obligations. In most cases, the time-limit for obligating funds is one fiscal year, but there are some appropriations that are available for obligation for more than one fiscal year or have no time limit. When the time limit for obligations has been reached, the funding is colloquially said to have “lapsed.”

19. There have been several instances in which funding for government programs lapsed and Congress failed to pass new appropriations bills to provide funding for programs to operate. This is commonly referred to as a “government shutdown.”
20. Government shutdowns are highly disruptive to government programs. In the absence of appropriations, Federal agencies may not legally incur new obligations except in narrow circumstances. Agency personnel also generally may not support the continued performance of a contract or grant that has already been awarded, unless the contract or grant itself meets one of the narrow exceptions for continuation during a government shutdown.
21. During a government shutdown, hundreds of thousands of Federal employees are placed on furlough. Pursuant to 31 U.S.C. § 1341(c), Federal employees will receive retroactive pay after the lapse ends. When salaries and expenses for Federal employees are paid for out of annual appropriations, however, Federal employees receive no compensation during the period of the government shutdown, including the limited subset of employees who are legally permitted to work during the shutdown.
22. OMB and agencies prepare for the contingency that there might be a government shutdown whenever the end of a funding period nears, including by communicating with the Federal workforce, contractors, unions, and other stakeholders regarding the actions that they will and will not be permitted to take in the event of a lapse in appropriations. OMB Circular A-11 § 124.

Impact of an Injunction Against the 2023 Act

23. An injunction precluding enforcement of the entire 2023 Act would present unprecedented challenges and complications. It would result in an immediate lapse of all FY 2023 appropriations in the Act. With limited exceptions, Federal agency operations would be forced to shut down absent immediate Congressional action. To my knowledge, it would be the first ever lapse in appropriations part-way through the implementation of an appropriations act that provided funding for the entire fiscal year. All other lapses of which I am aware have occurred at the beginning of the fiscal year, or after expiration of a continuing resolution that provided funding for part of the fiscal year.
24. In the event of an injunction against the entire 2023 Act, agencies would generally have to cease performance and payments on the thousands of obligations that agencies have already entered into in reliance on the budget authority provided in the 2023 Act.
25. Various entities likely have taken significant actions in reliance on the 2023 Act. For instance:
 - a. Private Sector: A wide range of private sector actors likely have already taken actions in reliance on the funding in the 2023 Act, including contractors and grantees who have arranged their operations based on Federal obligations received, as well as small businesses and lenders that are relying or are expecting to rely on loan guarantees from the Small Business Administration or other government agencies.
 - b. State, local, and tribal governments: State, local, and tribal governments often use Federal funds to support authorized activities, including law enforcement, State-operated food inspections, and nutrition assistance for women and children. Many of these government entities may have already structured their budgets, operations,

and projects based on the Federal funds that they anticipate receiving under the 2023 Act.

- c. Foreign governments: My colleagues at OMB have informed me that foreign nations likely also have taken actions in reliance on foreign assistance appropriated in the 2023 Act. Foreign aid included in the Act includes assistance to Israel, Jordan, and Ukraine, among others, as well as to Central American nations to address the factors that contribute to irregular migrations to the United States. *See, e.g.*, 2023 Appropriations Act, div. K, tit. VII, §§ 7041(d)-(e) (assistance to Israel and Jordan), 7045(a) (assistance for activities in various Central American countries); div. M, tit. VII, “Bilateral Economic Assistance—Economic Support Fund” (assistance for Ukraine).
- d. Federal entities: Federal entities across all three branches of government have relied on funding from the 2023 Act in making personnel decisions. Executive Branch agencies have set their budgets and hired additional employees in reliance on the funding provided under the 2023 Act.

26. Adding to the challenge of an injunction against the entire 2023 Act would be that many of the Federal employees who would be responsible for sorting through the unprecedented issues surrounding existing obligations and expenditures would be furloughed for the duration of the lapse.

27. The 2023 Act includes appropriations for grants for which Texas-based entities will receive funding. The “Aid to State and Local Governments” chapter from the *Analytical Perspectives* volume of the 2024 President’s Budget provides estimates of the amounts each State is expected to receive in discretionary grant funding in FY 2023. The table below includes a subset of the funding that Texas is expected to receive. *See* Office of Mgmt. & Budget,

Budget of the U.S. Government, Fiscal Year 2024: Analytical Perspectives, ch. 8, “Aid to State and Local Governments” tbls. 8-7, 8-13, 8-21, 8-24, 8-31, 8-32, 8-39, *available at* <https://www.whitehouse.gov/omb/budget/>.¹ All of these grants would be suspended if the entire 2023 Act were enjoined:

Federal Agency	Program	Estimated FY 2023 obligations from new authority	Relevant Provisions of the 2023 Act
Education	Title I Grants to Local Educational Agencies	1,813,528,000	Division H, Title III
HHS	Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)	401,311,000	Division A, Title IV
HHS	Child Care Development Block Grant	869,050,000	Division H, Title II
HHS	Head Start	798,259,000	Division H, Title II
DHS	FEMA Preparedness Grants	64,388,000	Division F, Title III
HUD	Community Development Block Grant	124,502,000	Division L, Title II
DOT	Airport Infrastructure Grants	145,033,000	Division L, Title I

28. My colleagues at OMB have also informed me that Texas state and local law enforcement agencies will likely receive grants totaling hundreds of millions of dollars from the Department of Justice through funding provided in the 2023 Act. In FY 2022, the Department of Justice provided more than \$315 million in grants to state and local agencies or other entities in Texas, and the 2023 Act enacts even higher levels for Department of

¹ 31 U.S.C. § 1105(a)(7) requires the President’s Budget to include estimated appropriations and expenditures of the Government for the current year. OMB instructed agencies to include the FY 2023 enacted appropriations in the current year estimates in the FY 2024 Budget.

Justice grants. *See* 2023 Appropriations Act, div. B, tit. II, “State and Local Law Enforcement Activities.”

29. In addition, my colleagues have informed me that the Johnson Space Center in Houston, Texas, will likely receive billions of dollars in funding through the 2023 Act. For FY 2023, NASA expects the Johnson Space Center to receive approximately \$6 billion.
30. The above provides just a small number of examples of the impacts that would result if the entire 2023 Act were enjoined.

CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Washington, D.C., on the 4th day of May, 2023.



Kelly Kinneen

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2023, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/Courtney D. Enlow _____

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