The Texas abortion ban has a medical exception. But some doctors worry it's too narrow to use.

A woman with an ectopic pregnancy was turned away, abortion advocates say

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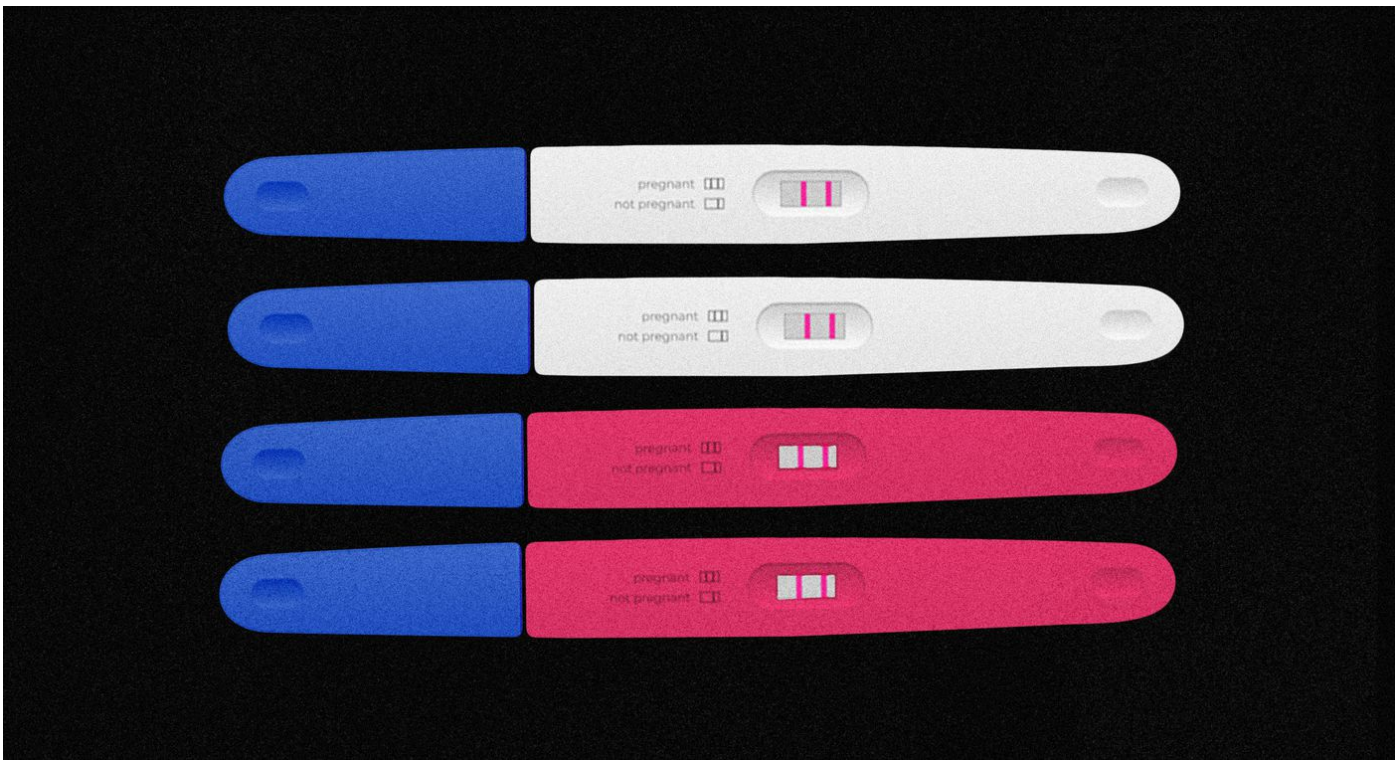

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Since Sept. 1, abortion has been illegal in Texas after six weeks gestation, with one exception: If a doctor determines that a patient will face a "medical emergency" if the pregnancy continues, they can perform an abortion later on without breaking the law.

But Texas's medical exception is narrower, and less defined, than others found in gestational bans across the country, said Elizabeth Sepper, a law professor at the University of Texas at Austin School of Law who specializes

in reproductive rights. The language of the exception has created confusion and fear for some doctors in the state, who say it is unclear how at risk a patient has to be before they can step in. Many patients considered at high risk — with preexisting conditions that can make pregnancy more dangerous — may not qualify as "medical emergencies."

Doctors may be reluctant to intervene even in situations that clearly qualify as emergencies. Alan Braid, the San Antonio-based abortion provider who explained his decision to violate the Texas law in a Sept. 18 Washington Post op-ed, criticized the medical exception in a September interview with The Lily. He gave the example of an ectopic pregnancy, a life-threatening condition where a fetus grows in the fallopian tube, outside of the uterus, where it could never reach full term. Once the fallopian tube ruptures, a doctor must end the pregnancy immediately to save the patient's life.

"Normally most physicians want to intervene as soon as they diagnose an ectopic pregnancy, before it ruptures," Braid said. But S.B. 8 leaves doctors wondering when they can legally take action, he said: "Do you have to wait until it's about to rupture? Until it has?"

"How do you make that decision under this law? No one wants to get sued," said Braid, who has been sued at least three times since he wrote the op-ed.

In early September, the National Abortion Federation (NAF) hotline, which coordinates abortion care, received a call from a patient with an ectopic pregnancy in a rural part of South Texas. Rachel Lachenauer, the hotline director, said the woman had no idea what to do: She had been turned away by her regular doctor, she said, who told her that S.B. 8 prevented them from terminating the pregnancy. The woman told Lachenauer the doctor was "nervous" about getting sued, Lachenauer recalled.

Lachenauer and another NAF staff member, who worked on her case and confirmed the story, told the patient to go to the closest emergency room right away. Shortly after that, Lachenauer said, the patient called back: When

she called the hospital, she told NAF, they said she would have to seek care in another state.

"We're pretty flabbergasted at this point," Lachenauer said. "We are a remote call center. We can't go and pick her up." The whole time, Lachenauer said, she was consulting with NAF's medical team, who said the patient was in immediate danger.

The patient ended up driving between 12 and 15 hours to a hospital in New Mexico, Lachenauer said, where she was able to terminate her pregnancy.

That kind of delay could cost patients their lives, said Alan Peaceman, a maternal fetal medicine professor at Northwestern University's Feinberg School of Medicine who specializes in high-risk cases and fetal anomalies.

"If a patient shows up with signs of an ectopic pregnancy, the patient should be in the operating room in less than 12 hours," he said. "You do not have time to send her to another hospital, much less out of state."

[Alan Braid is known for defying the Texas abortion law. He's spent years challenging antiabortion laws.]

Existing U.S. Supreme Court doctrine requires all gestational bans to include some kind of exception for the life and health of the pregnant person, Sepper said. The nature of those exceptions varies state to state. Some legislatures are ultra-specific, she said, only allowing an exception when the patient would otherwise experience "substantial and irreversible impairment of a major bodily function" or death. Others use broader language that encompasses a wider array of high-risk conditions.

The Texas law does not define "medical emergency," Sepper said, leaving doctors — and, potentially, their lawyers — to use their best judgment to determine what it means. If a doctor who granted a medical exception is sued, lawyers may look to the definition offered in the Emergency Medical

Treatment and Labor Act (EMTLA), Sepper said, which outlines when doctors must treat patients in emergency rooms. Under EMTLA, your symptoms have to be severe enough that your health would be in "serious jeopardy" unless you receive "immediate medical attention," Sepper said, a definition that leaves out many urgent medical conditions.

"Even if you have a condition that will put your health in serious jeopardy in the next three days, you don't require 'immediate medical attention,'" she said.

Some antiabortion advocates say the sense of confusion around the exception is "overblown." Ingrid Skop, an OB/GYN in San Antonio and a member of the American Association of Pro-Life Obstetricians and Gynecologists, said she has heard from doctors who are not sure whether S.B. 8 allows them to terminate even the most high-risk pregnancies.

They shouldn't be concerned, she said: A doctor who performs an abortion because of genuine medical concerns should not encounter any legal trouble.

"There is no doubt in my mind that [the law] will give the benefit of the doubt to a doctor that is doing the right thing for a woman," Skop said.

Doctors at larger hospitals in big cities might feel differently than those at smaller community hospitals, said Peaceman, the Northwestern professor. If doctors have access to a team of lawyers, as they probably would at a major medical center, Peaceman said, they might feel more confident in their legal right to perform an abortion.

[Abortion care is a 'calling' for this Texas doctor. Now he faces a dilemma: Risk lawsuits, or quit.]

Blair Cushing, an abortion provider in McAllen, Tex., said she has seen several patients with ectopic pregnancies since S.B. 8 took effect. Because Cushing can't treat those kinds of high-risk cases at the clinic, she sent them

to a nearby hospital, where a doctor was able to terminate their pregnancies.

Those patients were able to access the treatment they needed because the clinic has a "strong relationship" with a doctor at this particular hospital, Cushing said. The doctor will either perform the abortions herself or connect the patient with someone who is willing to do the procedure. But that doctor might be leaving the hospital soon, Cushing said. Without her, Cushing worries it might become harder for patients to access the care they need.

"It's always dependent on the individual doctor," Cushing said. "Having a champion in-house makes a really big difference."

While most doctors would classify an ectopic pregnancy as a medical emergency, Peaceman said, there is another class of high-risk pregnancies where the potential dangers are less clear. Occasionally, Peaceman said, a patient will have a preexisting condition, such as pulmonary hypertension or certain heart conditions, where their pregnancy brings "some level of risk" to their health, situations unlikely to be covered by the Texas medical exception. Some of these patients would have chosen to continue their pregnancies and assume the risk, regardless of S.B. 8, Peaceman said. Others would have chosen to terminate.

Patients with these types of preexisting conditions often make it through their pregnancies safely, Peaceman said, especially when they have access to specialists and regular, high-quality medical care. He worries about low-income patients in more rural areas, he said, who will not be monitored as closely as they should be.

"There is a significant potential for some of these women to have major complications and potentially die who might otherwise have terminated their pregnancy," he said.

At the McAllen clinic, where the vast majority of patients are low-income, Cushing said, she regularly sees patients with high-risk conditions. Many are

uninsured and don't have a primary care doctor or an OB/GYN, she said.

No one will know the full impact of S.B. 8 until next summer, when people who got pregnant right before the law — and who would have otherwise terminated — start to deliver their babies, Cushing said.

"That's when we'll see how many more complications will occur at the time of delivery," she said.

Some patients with high-risk pregnancies have been able to access abortion out of state, an option often out of reach for low-income patients who can't afford to pay for hotels, transportation and child care. At Trust Women, a network of abortion clinics with locations in Oklahoma and Kansas, doctors have treated many patients from Texas with high-risk conditions or fetal anomalies since the ban took effect, said Christina Bourne, the network's medical director who also performs abortions.

"Traveling is pretty grueling on the body," she said. "And the folks we're seeing, a lot of the time, they have more complex comorbidities." They shouldn't be sitting in a car for hours and hours, Bourne said.

As she treats more of these high-risk patients from Texas, she said, she gets "more and more and more nervous."