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Re: Proposed amendments to 25 Tex. Admin. Code §§ 1.132 – 1.137

VIA ELECTRONIC MAIL

We write to comment on the Department of State Health Services' (DSHS) proposed amendments to 25 Tex. Admin. Code §§ 1.132 – 1.137, concerning the definition, treatment, and disposition of special waste from health care-related facilities.¹ Specifically, the proposed amendments would require facilities that provide abortion care and miscarriage management to cremate or inter the embryonic² or fetal tissue that results from an abortion or miscarriage. The Center for Reproductive Rights is a legal advocacy organization dedicated to protecting the rights of women to access safe and legal abortion and other reproductive health care. For more than 20 years, we have successfully challenged restrictions on abortion throughout the United States, including very recently in Texas. We write to share three primary concerns with the proposed amendments. First, DSHS lacks the statutory authority to promulgate the proposed amendments. Second, the proposed amendments would unduly burden patients seeking abortion care while providing no health or safety benefit. Third, they further shame and stigmatize patients seeking reproductive health care in the state.

In addition, we urge you to review the decision recently issued by the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*—a challenge we brought on behalf of abortion providers in Texas.³ The proposed amendments, issued just days after the Supreme Court struck down two onerous abortion restrictions Texas enacted in 2013, are in plain violation of the undue burden standard, as clarified in *Whole Woman's Health*. Like the restrictions at issue in that case, the

¹ This includes private doctor's offices, where women seeking miscarriage management will also be subject to the requirements in the proposed amendments. 25 TEX. ADMIN. CODE § 1.134(5) (treatment and disposition requirements apply to, *inter alia*, "the offices of physicians," and "clinics, including but not limited to medical [clinics]").

² According to your data, 79% of abortions reported in Texas occur before nine weeks post-fertilization, which is the embryonic stage of pregnancy. Texas Department of State Health Services, *2014 Texas Vital Statistics*, Table 36, available at www.dshs.texas.gov/chs/vstat/vs14/t36.aspx.

³ 2016 WL 3461560 (U.S. June 27, 2016).

proposed amendments impose heavy burdens on women seeking abortion care and do not offer a proportional benefit, as required by the U.S. Constitution.

I. DSHS Lacks the Statutory Authority to Promulgate the Proposed Amendments.

It is axiomatic that “a state administrative agency has only those powers that the Legislature expressly confers upon it.”⁴ DSHS is statutorily authorized to administer or provide health services, and to administer human services programs regarding public health.⁵ Accordingly, DSHS’ statutory mandate is limited to promulgating and enforcing regulations related to public health. Indeed, consistent with this mandate, the preamble to the proposed amendments states that “the public benefit anticipated as a result of adopting and enforcing these rules will be *enhanced protection of the health and safety of the public.*”⁶

Simply put, the proposed amendments exceed DSHS’ statutory authority by failing to confer additional health or safety protections on women seeking abortions or treatment for miscarriages or to the general public. Requiring embryonic or fetal tissue that results from an abortion or miscarriage to be cremated or interred provides no cognizable health benefit for patients or the public at large. The proposed amendments are therefore beyond the scope of DSHS’ statutory authority.

The fact that the proposed amendments target only treatment and disposal methods for “[t]he products of spontaneous or induced human abortion” and not other types of human tissue governed by 25 Tex. Admin. Code § 1.136(a)(4) belies any argument that the proposed amendments are needed to advance public health or safety.⁷ If the current approved methods for the treatment and disposal of tissue raise public health and safety concerns, DSHS should examine *all* disposition of human tissue. Anything short of that is constitutionally underinclusive

⁴ Public Utility Comm’n of Tex. v. City Public Serv. Bd. of San Antonio, 53 S.W.3d 310, 315 (Tex. 2001) (citing Public Utility Comm’n of Tex. v. GTE–Southwest, Inc., 901 S.W.2d 401, 407 (Tex. 1995)); *see also* State v. Public Utility Comm’n of Tex., 883 S.W.2d 190, 194 (Tex. 1994) (“[A]n administrative agency is a creation of the legislature and, as such, has only those powers expressly conferred and those necessary to accomplish its duties.”).

⁵ TEX. HEALTH & SAFETY CODE § 1001.071 (DSHS’ “primary responsibility” is to “administer or provide health services” and is also “responsible for administering human services programs regarding the public health.”).

⁶ 41 Tex. Reg. 4773 (July 1, 2016) (emphasis added).

⁷ Indeed, the approved methods for the treatment and disposal of “human materials removed during surgery, labor and delivery, autopsy, embalming, or biopsy” remain unchanged by the proposed amendments. Such human materials include “body parts,” non-fetal or embryonic “tissues,” organs, and “bulk human blood and bulk human body fluids removed during surgery, labor and delivery, autopsy, embalming, or biopsy.” 25 TEX. ADMIN. CODE § 1.136(a)(4)(A). The only changes to human tissue disposal methods DSHS deemed necessary for “enhanced protection of the health and safety of the public” were for embryonic and fetal tissue resulting from abortions or miscarriages.

because DSHS is targeting *only* patients for abortion care and miscarriage management for more burdensome requirements.

II. The Proposed Amendments Fail to Provide Health and Safety Benefits While Unduly Burdening Abortion Access.

Mandating onerous fetal tissue disposal requirements is burdensome for both abortion care and miscarriage management. As stated above, we urge you to review the Supreme Court’s decision in *Whole Woman’s Health v. Hellerstedt*, which clarifies the legal standard for laws and regulations that restrict access to abortion.⁸ These proposed amendments are plainly in violation of that standard, which prohibits abortion restrictions when their burdens outweigh their benefits. Here, the proposed amendments inexplicably single out embryonic and fetal tissue from all other forms of tissue for more onerous disposal requirements, while apparently eliminating the most common methods of disposal utilized by Texas abortion providers—all while doing nothing to protect patient health or safety.

DSHS states in the proposed amendments that the justification for their promulgation is “enhanced protection of the health and safety of the public.”⁹ However, DSHS fails to provide a single health or safety rationale for the proposed changes. In fact, Governor Abbott recently sent a fundraising email to his supporters asking for money based in part on these very regulations. Governor Abbott, however, gave a very different reason than DSHS for the proposed amendments. He states, “I believe it is imperative to establish higher standards that reflect our respect for the sanctity of life. This is why Texas will require clinics and hospitals to bury or cremate human and fetal remains.”¹⁰ Clearly, DSHS’ stated reason of “enhanced protection” of public health and safety is utterly and demonstrably false. These proposed amendments have nothing to do with health and safety, and everything to do with Texas’ crusade against abortion. As such, they are a sham, and they will not withstand constitutional review.

III. The Proposed Amendments Are Designed to Further Stigmatize and Disempower Patients Seeking Abortion Care and Treatment for Miscarriage.

The proposed amendments will burden abortion access and miscarriage management in a number of ways, including by stigmatizing women who elect to end a pregnancy or experience

⁸ See 2016 WL 3461560, at *19-20.

⁹ 41 Tex. Reg. 4773 (July 1, 2016).

¹⁰ Alexa Ura, *Abbott Fundraising Off Rule to Bury or Cremate Fetal Remains*, THE TEX. TRIBUNE (July 21, 2016), <https://www.texastribune.org/2016/07/21/abbott-stakes-claim-rule-bury-or-cremate-fetal-rem/>. The article provides a link to the fundraising email, available at https://static.texastribune.org/media/documents/abbott_letter_copy.pdf?preview.

pregnancy loss. Women in these circumstances have the right to make decisions about their health care that reflect what is best for themselves and their families in the context of their own values, cultural norms, and religious tenets. By attempting to pass medically unnecessary regulations that burden access to abortion and miscarriage management, Texas undermines the dignity and autonomy of women to make their own choices about reproductive health care and to define their own “concept of existence, of meaning, of the universe, and of the mystery of human life.”¹¹

In fact, the proposed amendments value DSHS’ ideology over women’s choices and religious identities: cremation and burial are non-medical, ceremonial, and often religious rituals that touch on deeply held personal beliefs. Yet DSHS, like the courts, must respect “the liberty of all” and may not “mandate [its] own moral code.”¹² In so doing, DSHS is out of step with the majority of Americans, who respect women’s choices and believe that a woman seeking an abortion should be treated with dignity—they want her experience to be informed by medically accurate information, nonjudgmental, comfortable, without added burdens, affordable, and without pressure.¹³ Because the proposed amendments would override women’s personal choices in order to sanctify embryonic and fetal tissue for reasons completely unrelated to health and safety, they impose unjustified burdens on women’s constitutionally-protected liberty.

IV. Conclusion

The proposed amendments are an unwise course for DSHS. They exceed DSHS’ statutory authority and they fall short of the constitutional requirements reaffirmed just weeks ago in *Whole Woman’s Health*. The proposed amendments will almost certainly trigger costly litigation for Texas—litigation state taxpayers can scarcely afford, after the state spent over \$1 million, exclusive of attorneys’ fees, which will amount to millions more, defending the abortion restrictions struck down by the Supreme Court in *Whole Woman’s Health*.¹⁴ The proposed amendments should be rescinded in full as unnecessary burdens on abortion access that will have zero impact on the health and safety of Texans.

It did not escape our attention that the proposed amendments were published four days after Texas’s latest abortion restrictions were conclusively struck down by the Supreme Court, and

¹¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ).

¹² *Casey*, 505 U.S. at 851.

¹³ Sarah Kliff, *What Americans Think of Abortion*, VOX (April 8, 2015), <http://www.vox.com/a/abortion-decision-statistics-opinions> (citing a poll done by Vox and Perry Udem that asked Americans what they wanted a woman’s abortion experience to be like).

¹⁴ Alexa Ura, *Abortion Legal Fight Cost Texas More Than \$1 Million*, THE TEX. TRIBUNE (June 29, 2016), <https://www.texastribune.org/2016/06/29/abortion-legal-fight-cost-texas-more-1-million/>.

immediately preceding a holiday weekend. These circumstances strongly suggest that Texas intended to make these changes to the regulations surreptitiously, and without an opportunity for meaningful study, review, or comment. The timing and tenor of the proposed amendments, as well as Governor Abbott's fundraising email, further indicate that these amendments are not about public health and safety, but are an effort to seek political advantage by undermining women's rights. It is high time for Texas to stop hiding behind purported "health and safety" justifications that are clearly nothing but a sham.

V. Request For Response from DSHS

We request that DSHS respond to the following questions:

- (1) What, in DSHS' view, is the difference between "cremation" under 25 Tex. Admin. Code §1.132(18) (as amended) and "incineration" under § 1.132(32) (as amended), and more specifically, must "cremation" occur in a crematorium licensed pursuant to TEX. OCC. CODE § 651.656?
- (2) In what ways will a healthcare provider who is currently treating and disposing of the types of pathological waste that the proposed amendments define as "fetal tissue" pursuant to 25 Tex. Admin. Code § 1.136(a)(4)(B)(1)(II) (incineration followed by deposition of the residue in a sanitary landfill) have to change their practices and procedures to comply with the proposed amendments?
- (3) What steps has the Department taken to assess how these changes will impact the cost and availability of miscarriage management and abortion in Texas?