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October 27, 2016

**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.<sup>1</sup> DSHS reissued the proposed amendments on September 30, making no substantive edits to the proposed regulatory changes it originally issued on July 1. Specifically, the proposed amendments would require facilities that provide abortion care and miscarriage management to cremate or bury the embryonic<sup>2</sup> 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 four 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 are unconstitutionally vague. Fourth, they further shame and stigmatize patients seeking reproductive health care in the state.

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<sup>1</sup> 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]").

<sup>2</sup> 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](http://www.dshs.texas.gov/chs/vstat/vs14/t36.aspx).

In addition, as in our comments on the proposed amendments issued July 1, we continue to 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.<sup>3</sup> The proposed amendments 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 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.”<sup>4</sup> DSHS is statutorily authorized to administer or provide health services, and to administer human services programs regarding public health.<sup>5</sup> 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* by ensuring that the disposition methods specified in the rules continue to be limited to methods that prevent the spread of disease.”<sup>6</sup>

Simply put, the proposed amendments exceed DSHS’ statutory authority by failing to confer additional health or safety protections on women seeking abortions, women seeking 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.

Lastly, 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

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<sup>3</sup> 136 S.Ct. 2292 (2016).

<sup>4</sup> Pub. Utility Comm’n of Tex. v. City Pub. Serv. Bd. of San Antonio, 53 S.W.3d 310, 315 (Tex. 2001) (citing Pub. Utility Comm’n of Tex. v. GTE–Southwest, Inc., 901 S.W.2d 401, 407 (Tex. 1995)); *see also* State v. Pub. 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.”).

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

<sup>6</sup> 41 Tex. Reg. 7660 (September 30, 2016) (emphasis added).

amendments advance public health or safety or prevent the spread of disease.<sup>7</sup> If the current approved methods for the treatment and disposal of tissue raise public health and safety concerns related to the spread of disease, DSHS should examine *all* disposition of human tissue. Anything short of that is constitutionally underinclusive because DSHS is targeting *only* 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.

### a. DSHS Failed to Produce Credible Medical Evidence to Justify this Abortion Restriction, as Required by the U.S. Constitution.

As stated above, we continue to 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. These proposed amendments violate that standard, which prohibits abortion restrictions when their burdens outweigh their benefits. *Whole Woman’s Health* further made clear that a state’s justification for an abortion restriction must be supported by credible medical evidence.<sup>8</sup> Here, the proposed amendments, which DSHS originally offered just four days after Texas lost the *Whole Woman’s Health* case, single out embryonic and fetal tissue from all other forms of tissue for more onerous disposal requirements. The proposed amendments eliminate the most common methods of disposal utilized by Texas abortion providers—all while presenting zero credible evidence that these changes will protect patient health or safety.

In the original version of the proposed amendments, DSHS stated the justification for their promulgation was “enhanced protection of the health and safety of the public.”<sup>9</sup> The September 30 version of the proposed amendments provides baffling new reasoning for how the proposed amendments will protect public health and safety, asserting that they will do so by “ensuring that the disposition methods specified in the rules *continue to be limited to methods that prevent the*

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<sup>7</sup> 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.

<sup>8</sup> 136 S.Ct. at 2310 (when weighing the asserted benefits against the burdens, a court must “consider[] the evidence in the record”); *id.* at 2309 (“the Court . . . has placed considerable weight upon evidence and argument presented in judicial proceedings”).

<sup>9</sup> 41 Tex. Reg. 4773 (July 1, 2016).

*spread of disease.*<sup>10</sup> This is illogical. The phrase “continue to be” clarifies that current disposition methods already prevent the spread of disease. If the current rules *already* prevent the spread of disease, DSHS’ claim that the proposed amendments are necessary to protect public health and safety is seriously undermined.

By providing this nonsensical elaboration, and nothing more, DSHS squandered an opportunity to present credible scientific or medical evidence supporting the justification for the proposed amendments, pursuant to the applicable constitutional standard. *Whole Woman’s Health* holds that “when determining the constitutionality of laws regulating abortion procedures,” courts must place “considerable weight upon evidence . . . presented[.]”<sup>11</sup> Here, DSHS fails to provide credible evidence supporting a single health or safety rationale for the proposed changes.

Moreover, DSHS actually contradicts other members of the Texas Executive Branch in its justification for the regulatory change. In July, Governor Abbott sent a fundraising email to his supporters asking for money based in part on amending these regulations. He stated, “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.”<sup>12</sup> 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.<sup>13</sup> As such, they are a sham, and they will not withstand constitutional review.

b. Offers From Religiously-Affiliated Cemeteries to Offset the Costs Associated with Compliance with the Proposed Amendments Do Not Alter the Constitutional Analysis.

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<sup>10</sup> 41 Tex. Reg. 7660 (September 30, 2016) (emphasis added).

<sup>11</sup> See *Whole Woman’s Health*, 136 S.Ct. at 2313.

<sup>12</sup> 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](https://static.texastribune.org/media/documents/abbott_letter_copy.pdf?preview).

<sup>13</sup> Indeed, the proposed regulations cite to numerous Texas statutes that provide protections for “unborn persons” as sources of statutory authority. 41 Tex. Reg. 7660-61 (citing, *inter alia*, TEX. PENAL CODE § 1.07(26); TEX. CIV. PRAC. AND REM. CODE, § 71.001(4); TEXAS EST. CODE, § 1054.007). These statutory provisions have nothing to do with public health or safety, further underscoring the true purpose of the regulations to confer personhood onto embryos and fetuses, something Texas may not constitutionally do. *Roe v. Wade*, 410 U.S. 133, 158 (1973) (“the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

In the cost analysis section of the most recent version of the proposed amendments, DSHS makes a stunning claim. While failing altogether to explain why cremation and burial of embryonic and fetal tissue—often expensive and time-consuming ceremonial rites—would not cost more than current practices of embryonic and fetal tissue disposal, DSHS states that *private parties* offered to facilitate compliance with the proposed amendments “without charge.”<sup>14</sup> In fact, pursuant to a Freedom of Information Act request, DSHS produced just one comment purporting to offer such services—but nowhere in this document do the commenters offer their services free of charge.<sup>15</sup> Indeed, their website indicates that the minimum fee for burial services is \$1,700.<sup>16</sup> We also note that the commenters, Our Lady of the Rosary Cemetery and Prayer Gardens, do not actually offer to provide cremation services, even for a fee—rather, they offer to “provide a reverent place of burial for the cremated remains of the little ones lost so soon.”<sup>17</sup> Therefore, licensed facilities which wish to avail themselves of this offer would still need to secure and pay for cremation services in order to comply with the proposed amendments. Additionally, its offer is explicitly sectarian, including regular prayer over the embryonic and fetal tissue.

Comments from one cemetery offering to facilitate partial compliance with these regulations in a sectarian manner does not alter the constitutional analysis of these proposed amendments. Indeed, compliance in this manner would make the constitutional problem worse: it would fail to respect the diversity of faith and secular traditions and beliefs Texans hold, and instead shoehorn them into the practices of one particular faith. It goes without saying that this violates the Constitution and our nation’s tradition of respect for pluralism. It is simply not relevant to the constitutional analysis that one religiously-affiliated cemetery offered a place of burial for cremated embryos or fetuses.

In sum, embryonic and fetal tissue is already disposed of—as the justification for these proposed amendments admits outright—in a safe and respectful manner. The proposed amendments fail to enhance the safety of this process, and will not pass constitutional muster under *Whole Woman’s Health*.

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<sup>14</sup> 41 Tex. Reg. 7660 (September 30, 2016).

<sup>15</sup> Our Lady of the Rosary Cemetery & Prayer Gardens, Comment on Proposed Amendments to 25 TEX. ADMIN. CODE §§ 1.132 – 1.137 (July 25, 2016).

<sup>16</sup> Our Lady of the Rosary Cemetery & Prayer Gardens, <http://olotr.com/services.html> (last visited Oct. 25, 2016).

<sup>17</sup> Our Lady of the Rosary Cemetery & Prayer Gardens, Comment on Proposed Amendments to 25 TEX. ADMIN. CODE §§ 1.132 – 1.137 (July 25, 2016).

### III. The Proposed Amendments Are Unconstitutionally Vague.

The Due Process Clause of the Fourteenth Amendment prohibits states from enacting vague laws.<sup>18</sup> A law is unconstitutionally vague if it fails to provide those targeted by the rule a reasonable opportunity to know what conduct is prohibited, or is so indefinite that it allows arbitrary and discriminatory enforcement.<sup>19</sup> The most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of a constitutionally protected right, and these proposed regulations undoubtedly do just that.<sup>20</sup>

The proposed regulation fails to provide the requisite clarity for two reasons. First, it does not state whether the myriad regulations applicable to the transport and ultimate disposition of a human body<sup>21</sup> also apply to the transport and disposition of embryonic and fetal remains. Furthermore, the proposed amendments do not provide definitions for “interment” or “cremation” adequate to determine whether these activities are required to be undertaken by entities duly established and licensed for the purpose of disposition of human remains, such as funeral directors or crematoriums.

Second, the proposed amendments fail to provide legally sufficient clarity as to whether they are intended to apply to disposition of tissue across state lines. It is not clear whether DSHS would deem a regulated facility in compliance with the proposed regulations if that facility disposed of embryonic or fetal tissue in another state, in compliance with the laws of that state, but not by means of interment or cremation.

Accordingly, the proposed amendments fail to provide regulated facilities with a reasonable opportunity to understand what conduct is permitted or prohibited, in violation of the U.S. Constitution. And, they invite arbitrary and discriminatory enforcement: one DSHS inspector could penalize a facility for the same conduct that another inspector upheld. Therefore, the proposed amendments are unconstitutionally void-for-vagueness.

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<sup>18</sup> See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>19</sup> See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *Women’s Medical Ctr. of Northwest Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001).

<sup>20</sup> See *Women’s Medical Ctr.*, 248 F.3d at 499; *Colautti*, 439 U.S. at 391.

<sup>21</sup> See generally TEX. HEALTH & SAFETY CODE §§ 711.001 – 716.351; TEX. OCC. CODE §§ 651.001 – 651.658; 22 TEX. ADMIN. CODE §§ 201.1 – 209.1; 25 TEX. ADMIN. CODE §§ 181.1 – 181.14.

#### **IV. 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 and shaming women who elect to end a pregnancy or experience 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.”<sup>22</sup>

In fact, the proposed amendments value DSHS’ ideology over women’s choices and religious beliefs: cremation and burial are non-medical, ceremonial, and often religious rituals that touch on deeply held personal beliefs. Yet DSHS is obliged by the Constitution to respect “the liberty of all” and may not “mandate [its] own moral code.”<sup>23</sup> 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.<sup>24</sup> 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.

#### **V. Conclusion**

The proposed amendments are an unwise course for DSHS. They exceed DSHS’ statutory authority and they fall short of the constitutional requirements the Supreme Court reaffirmed just months ago in *Whole Woman’s Health*. The proposed amendments will almost certainly trigger costly litigation for Texas<sup>25</sup>—litigation Texas taxpayers can scarcely afford. The state has

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<sup>22</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ).

<sup>23</sup> *Id.* at 851.

<sup>24</sup> See 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).

<sup>25</sup> A similar requirement was recently blocked by a federal court. See *Planned Parenthood of Ind. and Ky., Inc. v. Comm’r, Ind. State Dept. of Health*, No. 1:16-cv-00763-TWP-DML, 2016 WL 3556914, at \*1-2 (S.D. Ind., Indianapolis Div. June 30, 2016) (blocking a fetal tissue disposition requirement because “the State’s asserted

already spent over \$1 million defending the abortion restrictions struck down by the Supreme Court in *Whole Woman's Health*,<sup>26</sup> and the Center for Reproductive Rights just filed a request asking Texas to pay more than \$4.5 million to recoup legal fees accrued in challenging those restrictions.

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. Indeed, it is crystal clear 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.

## VI. Request for Response from DSHS

We reiterate our 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, and must interment occur in a cemetery pursuant to TEX. OCC. CODE § 651.353?

(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?

(4) What is the scientific and medical evidence that the proposed regulation will provide for "enhanced protection of the health and safety of the public" and prevent contagious disease in a manner not already provided for under current law?

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interest in treating fetal remains with the dignity of human remains is not legitimate given that the law does not recognize the fetus as a person." In addition, Louisiana enacted a similar law which the Center for Reproductive Rights immediately challenged; the defendants agreed not to enforce the law against licensed abortion clinics or their physicians while the litigation proceeds.

<sup>26</sup> 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/>.



(5) Will the proposed regulation require that embryonic or fetal tissue be treated as human remains under Texas law, including TEX. HEALTH & SAFETY CODE §§ 711.001 – 716.351; TEX. OCC. CODE §§ 651.001 – 651.658; 22 TEX. ADMIN. CODE §§ 201.1 – 209.1; and 25 TEX. ADMIN. CODE §§ 181.1 – 181.14?

(6) May a facility governed by 25 TEX. ADMIN. CODE §§ 1.132 *et seq.* lawfully send embryonic or fetal tissue out of state for disposition other than by cremation or interment, in compliance with that state's law?



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