

Office of Governor Greg Abbott  
State Insurance Building  
1100 San Jacinto  
Austin, Texas 78701

Dear Governor Abbott,

The Center for Reproductive Rights urges you to veto Senate Bill 8, which contains unconstitutional provisions and will unduly burden patients seeking abortion care.

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 nearly 25 years, we have successfully challenged restrictions on abortion throughout the United States, including four times in the last six years in Texas. Indeed, just last June, we won the landmark case *Whole Woman's Health v. Hellerstedt*, in which the U.S. Supreme Court struck down two Texas laws burdening access to abortion and reaffirmed the Constitution's robust protections for a woman's decision to have an abortion. The State of Texas is now facing a \$4.8 million bill for attorneys' fees in federal district court on top of the more than \$1 million in expenses the state itself incurred unsuccessfully defending these restrictions since 2013.

Though Senate Bill 8 contains numerous unwarranted restrictions on abortion access, this letter focuses on two burdensome and unconstitutional provisions in particular. First, the bill bans the most common method of abortion care in the second trimester. Second, it requires embryonic or fetal tissue that results from an abortion or miscarriage to be buried or cremated—a requirement nearly identical to regulations that the Center successfully challenged in December and that are preliminarily enjoined by a federal court. This letter sets forth the constitutional flaws with each requirement in turn.

**I. Banning the Most Common Method of Abortion in the Second Trimester is Unconstitutional.**

Senate Bill 8 bans the standard dilation and extraction (D&E) abortion procedure with an extremely limited medical emergency exception. D&E is a safe, medically proven method of second trimester abortion, and accounts for approximately 95% of all second trimester

procedures nationally.<sup>1</sup> In order to obtain care if this provision takes effect, women would be forced to undergo an additional, invasive, and unnecessary medical procedure even against the medical judgment of their physician.

The U.S. Supreme Court has repeatedly declared that a ban on the most common method of abortion is unconstitutional.<sup>2</sup> In *Stenberg v. Carhart*, the Court held specifically that a ban on the D&E procedure is unconstitutional.<sup>3</sup> Moreover, the most recent Supreme Court case addressing an abortion ban, *Gonzales v. Carhart*, ruled that a ban on another second-trimester procedure, D&X, was constitutional only because of the *continued availability* of D&E, the most commonly used method of second trimester abortion.<sup>4</sup> The same reasoning applies here. Under Supreme Court precedent, this bill is plainly unconstitutional as an undue burden on the right to abortion.<sup>5</sup>

Additionally, the Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt* provides a strong reaffirmation of prior Supreme Court decisions affording strong constitutional protection to women's right to end a pregnancy.<sup>6</sup> That decision makes clear that the undue burden standard requires courts to meaningfully scrutinize pre-viability abortion restrictions.<sup>7</sup> In addition, in *Whole Woman's Health*, the Court made clear that even if an abortion restriction serves a valid state interest, its benefits must outweigh its burdens in order to pass constitutional muster.<sup>8</sup> Senate Bill 8 is divorced from any health-related state interest, with no evidence to

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<sup>1</sup> Karen Pazol *et al*, CENTERS FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE - UNITED STATES, 2009, 61(SS08); 1-44 (November 23, 2012), *available at* <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm>.

<sup>2</sup> *See Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976).

<sup>3</sup> *See Stenberg*, 530 U.S. at 945-46.

<sup>4</sup> *See Gonzales v. Carhart*, 550 U.S. 124, 147, 164-65 (2007).

<sup>5</sup> "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus... [and]... a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992); *accord Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309-10 (2016).

<sup>6</sup> *Whole Woman's Health*, 136 S.Ct. at 2309-10.

<sup>7</sup> *Id.* at 2310 ("[W]hen determining the constitutionality of laws regulating abortion procedures," courts must place "considerable weight upon evidence . . . presented[.]"); *id.* (courts cannot give "uncritical deference" to the facts supporting the government's position).

<sup>8</sup> *See id.*

support that the use of additional, medically unnecessary procedures increase the safety of the standard D&E procedure. In contrast, the law imposes significant burdens on patients by forcing them to accept unnecessary, and in some instances, untested, medical procedures in order to obtain an otherwise common and safe procedure. Regardless of the state interest asserted, no court has ever held that government-mandated imposition of a medically unnecessary, untested, and invasive procedure, or a more complicated and risky medical procedure with no proven medical benefits, is a permissible means of regulating pre-viability abortion. Such extreme burdens on women, violating both their physical and decisional autonomy, unquestionably impose an unconstitutional burden on access to abortion.

Accordingly, courts have blocked D&E bans each time they are challenged. A handful of states have enacted D&E bans<sup>9</sup> and they have been challenged in Kansas, Louisiana, Oklahoma, and Alabama. None of the challenged laws are currently enforced.<sup>10</sup> In Kansas, a plurality of the state Court of Appeals concluded “that banning the standard D&E, a safe method used in about 95% of second trimester abortions, is an undue burden on the right to abortion.”<sup>11</sup> A federal court that found Alabama’s D&E ban likely unconstitutional determined that the potential alternative procedures were not feasible for abortion providers in the state and thus would create a substantial, “even insurmountable,” obstacle for women seeking abortion.<sup>12</sup> That court also found that there were “ethical concerns” with “subject[ing] patients to potentially harmful procedures without any medical benefit,” and was “troubled” that Alabama argued that women should be required to undergo an “inadequately studied, potentially risky procedure.”<sup>13</sup> These court decisions foreshadow the likely outcome should Senate Bill 8 become law: it too would face a court challenge, and Supreme Court precedent would clearly require striking down this legislation as unconstitutional.

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<sup>9</sup> Seven states have passed D&E bans: Alabama, Arkansas, Kansas, Louisiana, Oklahoma, West Virginia, and Mississippi. Arkansas’ ban is scheduled to take effect later this year.

<sup>10</sup> *Hodes & Nauser v. Schmidt*, No. 114,153, 2016 WL 275297, at \*13-14 (Kan. Ct. App. Jan. 22, 2016); *Nova Health Systems v. Pruitt et al.*, Case No. CV-2015-1838, at \*5-6, (Okla. Cty. Dist. Ct. Oct. 28, 2015); *West Alabama Women’s Center v. Miller*, Case No. 2:15cv497-MHT, at \*2-3 (M.D. N. Div. Ala. July 13, 2016). The defendants in the Louisiana challenge agreed not to enforce the law against licensed abortion clinics or their physicians while the litigation proceeds.

<sup>11</sup> *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 114,153, 2016 WL 275297, at \*14 (Kan. Ct. App. Jan. 22, 2016).

<sup>12</sup> *W. Alabama Women’s Ctr. v. Miller*, No. 2:15CV497-MHT, 2016 WL 6395904 at \*24 (M.D. Ala. Oct. 27, 2016).

<sup>13</sup> *Id.* at \*19.

## II. Requiring a Funeral-Like Ritual for Embryos and Fetuses is Unconstitutional.

On December 9, 2016, the Texas Register published new regulations eliminating current rules governing the proper disposal of medical waste from health care facilities.<sup>14</sup> The regulations would have required health care facilities to dispose of embryonic and fetal tissue (and *only* this type of tissue) using methods typically used to dispose of human bodies—by burial or scattering ashes.<sup>15</sup> On December 12, 2016, the Center filed a lawsuit in federal court, challenging the regulations as unconstitutional (hereinafter *Whole Woman’s Health II*). On January 27, 2017, the court issued a preliminary injunction enjoining the regulations.<sup>16</sup> Senate Bill 8 codifies this unconstitutional requirement by mandating that health care facilities that treat pregnant women dispose of embryonic and fetal tissue delivered at the facility by burial or cremation followed by scattering of ashes. The bill explicitly eliminates the standard, most widely-accepted medical method of embryonic and fetal tissue disposition.

Senate Bill 8 unconstitutionally burdens women seeking pregnancy-related medical care by imposing a funeral ritual on women who have a miscarriage management procedure, ectopic pregnancy surgery, or an abortion. The U.S. Supreme Court has long held that in order to pass constitutional muster, an abortion restriction must further a valid state interest *and* cannot amount to an undue burden.<sup>17</sup> Just last year, in *Whole Woman’s Health*, the Court made clear that the undue burden standard requires courts to weigh an abortion restriction’s burdens against its benefits; if the burdens outweigh the benefits, the law is unconstitutional.<sup>18</sup>

Senate Bill 8 is plainly in violation of these constitutional principles. First, the legislature’s stated interest is “to express the state’s profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains.”<sup>19</sup> But the Texas federal court in *Whole Woman’s Health II* rejected this interest in the context of tissue disposal, noting that the challenged rules “regulate activities after a miscarriage, ectopic pregnancy, or abortion—activities that occur where there is no potential life to protect.”<sup>20</sup> Further, the court expressed

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<sup>14</sup> 41 Tex. Reg. 9732-41.

<sup>15</sup> *See id.*

<sup>16</sup> *Whole Woman’s Health v. Hellerstedt*, 2017 WL 462400 (W.D. Tex. Jan. 27, 2017).

<sup>17</sup> *Planned Parenthood v. Casey*, 505 U.S. at 877; *accord Whole Woman’s Health*, 136 S.Ct. at 2309.

<sup>18</sup> 136 S.Ct. at 2300.

<sup>19</sup> S.B. 8, 85th Leg., Reg. Sess., § 3 (Tex. 2017) (to be codified at Tex. Health & Safety Code § 697.001).

<sup>20</sup> *Whole Woman’s Health II*, 2017 WL 462400 at \*7 (preliminary injunction order).

skepticism that the state’s proffered interest was genuine, finding that the state interest likely “is a pretext for . . . restricting abortion [access].”<sup>21</sup> The embryonic and fetal tissue disposal provisions in Senate Bill 8 would likely fail constitutional scrutiny based on an invalid state interest alone.<sup>22</sup>

Even more damning, the *Whole Woman’s Health II* court found that even if it were a legitimate interest, the burdens imposed by the proposed requirements “substantially outweigh the benefits” in violation of *Whole Woman’s Health*.<sup>23</sup> As the court found when reviewing Texas’ nearly-identical regulations:

On one side of the equation [the health department] has placed its weak purported benefit of protecting the dignity of the unborn, and on the other side Plaintiffs have placed evidence the [challenged regulations] increase costs for healthcare providers, enhance the stigma on women associated with miscarriage and abortion care, and create potentially devastating logistical challenges for abortion providers throughout Texas.<sup>24</sup>

A court would almost certainly conclude again that “the burdens likely substantially outweigh any claimed benefit” associated with the nearly identical requirement in Senate Bill 8.<sup>25</sup> Indeed, in addition to the *Whole Woman’s Health II* court, in the last year alone an Indiana federal court blocked a nearly identical requirement from taking effect, and Louisiana’s funeral-like requirement has never taken effect due to litigation.<sup>26</sup>

Senate Bill 8 clearly falls short of the robust constitutional standard set forth just last year by the U.S. Supreme Court in *Whole Woman’s Health*. It will force ongoing litigation in federal court

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<sup>21</sup> *Id.* at \*8.

<sup>22</sup> *See id.* (“On [the state interest] ground alone, the Court could find Plaintiffs meet their burden of likely success on the merits.”).

<sup>23</sup> *Id.* (“even assuming [the health department] is acting upon a legitimate interest, the record contains evidence the burdens on abortion access substantially outweigh the benefits.”).

<sup>24</sup> *Id.* at \*10.

<sup>25</sup> *Id.*

<sup>26</sup> *PPINK v. Commissioner*, 194 F. Supp. 3d 818 (S.D. Ind. June 30, 2016). Abortion providers challenged a similar law in Louisiana; the defendants agreed not to enforce the law against licensed abortion clinics or their physicians while the litigation proceeds. *See also* *Margaret S. v. Edwards*, 488 F. Supp. 181, 221-22 (E.D. La. 1980) (“[T]his Court holds that [the challenged statute] is an unconstitutional exercise of the State’s police power because it requires that fetal remains be treated with the same dignity as the remains of a person and, thereby, unduly burdens the right of a woman to obtain an abortion.”).

on this matter to continue—litigation that state taxpayers can scarcely afford, after the state spent over \$1 million, exclusive of attorneys’ fees, defending the abortion restrictions struck down by the Supreme Court in *Whole Woman’s Health*.<sup>27</sup> We urge you to veto Senate Bill 8 as an unnecessary, unconstitutional burden on abortion access that will have zero positive impact on the health and safety of Texans.

### **III. Conclusion**

Senate Bill 8 is unconstitutional, medically unsound, and presents an unwarranted interference into private medical decisions. For the foregoing reasons, we urge you to veto this measure. Please do not hesitate to contact us with any questions or for additional information.

Sincerely,



Amanda Allen\*  
Senior State Legislative Counsel

*\*admitted in New York*

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<sup>27</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/>.