No. 17-50154

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., doing business as Brookside Women's Health Center and Austin Women's Health Center; LENDOL L. DAVIS, M.D.; ALAMO CITY SURGERY CENTER, P.L.L.C., doing business as Alamo Women's Reproductive Services; NOVA HEALTH SYSTEMS, INCORPORATED, doing business as Reproductive Services,

Plaintiffs-Appellees,

v.

DOCTOR JOHN HELLERSTEDT, M.D.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 16-cv-1300-SS

BRIEF OF *AMICI CURIAE* THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN PUBLIC HEALTH ASSOCIATION, AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

SUSAN J. KOHLMANN*
KATYA JESTIN
ALISON I. STEIN
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600
**Counsel of Record*

JENNA E. ROSS
JEREMY H. ERSHOW
JESSICA A. MARTINEZ
GRETCHEN O. STERTZ
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

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CERTIFICATE OF INTERESTED PERSONS

Amici curiae, the American College of Obstetricians and Gynecologists, the American Public Health Association, and the American Medical Association are non-profit organizations, with no parent corporations or publicly traded stock. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Counsel for parties and *amici* in this case are as follows:

Plaintiffs-Appellees	**Plaintiffs-Appellees' Counsel**
Whole Woman's Health Brookside Women's Medical Center P.A., d/b/a Brookside Women's Health Center and Austin Women's Health Center Dr. Lendol L. Davis; Alamo City Surgery Center P.L.L.C., d/b/a Alamo Women's Reproductive Services; Nova Health Systems, Inc., d/b/a Reproductive Services	Patrick J. O'Connell LAW OFFICES OF PATRICK J. O'CONNELL PLLC David P. Brown Molly Duane Caroline Sacerdote CENTER FOR REPRODUCTIVE RIGHTS Stephanie Toti LAW OFFICE OF STEPHANIE TOTI J. Alexander Lawrence MORRISON & FOERSTER, LLP Hon. Jan Soifer formerly of O'CONNELL & SOIFER LLP

Defendant-Appellant	**Defendant-Appellant's Counsel**
John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services	Ken Paxton, Attorney General of Texas Scott A. Keller, Solicitor Jeffrey C. Mateer, First Assistant Attorney General Brantley Starr, Deputy First Assistant Attorney General James E. Davis, Deputy Attorney General for Civil Litigation Nichole Bunker-Henderson, Chief, Administrative Law Division John S. Langley, Assistant Attorney General Craig M. Warner, Assistant Attorney General Beth Klusmann, Assistant Solicitor General

	Todd Lawrence Disher, Special Counsel for Civil Litigation OFFICE OF THE ATTORNEY GENERAL OF TEXAS

Amici Curiae	***Amici Curiae*'s Counsel**
American College of Obstetricians and Gynecologists American Public Health Association American Medical Association	Susan J. Kohlmann Katya Jestin Alison I. Stein Jenna E. Ross Jeremy H. Ershow Jessica A. Martinez Gretchen O. Stertz JENNER & BLOCK LLP

Other Interested Persons or Entities
Texas providers of reproductive health care

/s/ Susan J. Kohlmann

SUSAN J. KOHLMANN

Counsel for *Amici Curiae*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American College of Obstetricians and Gynecologists (the "College" or "ACOG"), the American Public Health Association ("APHA"), and the American Medical Association ("AMA") submit this *amicus curiae* brief in support of Plaintiffs-Appellees.[1]

Amicus curiae **ACOG** is a non-profit educational and professional organization founded in 1951. The College's objectives are to foster improvements in all aspects of women's health care; to establish and maintain the highest possible standards for education; to publish evidence-based practice guidelines; to promote high ethical standards; and to encourage contributions to medical and scientific literature. The College's companion organization, the American Congress of Obstetricians and Gynecologists (the "Congress"), is a professional organization dedicated to the advancement of women's health and the professional interests of its members. Sharing more than 58,000 members, the College and the Congress are the leading professional associations of physicians who specialize in women's health care.

[1] Pursuant to Federal Rule of Appellate Procedure 29, undersigned counsel for *amici* certify that no person or entity other than *amici* and their counsel authored this brief in whole or in part or made a monetary contribution to the preparation or submission thereof. *Amici* also certify that all parties consent to the filing of this brief.

The membership of the Texas District of the Congress includes 2,593 obstetrician-gynecologists who provide medical care to the women of Texas. The College and the Congress recognize that abortion is an essential health care service and oppose laws regulating medical care that are unsupported by scientific evidence and that are not necessary to achieve an important public health objective. For these reasons, ACOG has been concerned with the instant amendments to the Texas regulations concerning embryonic and fetal tissue disposal and submitted comments to the amendments during the rulemaking process. *See* ROA.40 (41 Tex. Reg. 9717).

Amicus curiae **APHA** is an organization whose mission is to champion the health of all people and all communities; strengthen the profession of public health; share the latest research and information; promote best practices; and advocate for public health issues and policies grounded in scientific research. APHA is the only organization that combines a 140-plus-year perspective, a broad-based member community, and the ability to influence federal policy to improve the public's health.

APHA has long recognized that access to the full range of reproductive health services, including abortion, is a fundamental right integral both to the health and well-being of individual women and to the broader public health. APHA opposes restrictions that deny, delay, or impede access to reproductive health services,

increasing women's risk of injury or death. APHA opposes legislation that makes these services unnecessarily difficult to obtain, imposes physical or mental health risks on women seeking these services without valid medical reason, and reduces the number of abortion providers and the availability of abortion services.

APHA has over 21,000 members, of whom 1,008 reside in Texas. It also maintains a connection to the public health community in Texas through its affiliate, the Texas Public Health Association, which has provided over 90 years of public health service and has 404 members.

Amicus curiae **AMA** is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in AMA's House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in AMA's policymaking process. AMA's objectives are to promote the science and art of medicine and the advancement of public health. AMA members practice in all fields of medical specialization and in every state, including Texas.

ACOG, APHA, and AMA have previously appeared as *amici curiae* in various courts throughout the country, including the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth Circuit. In addition, *amici*'s work has been cited frequently

by the Supreme Court and other federal courts seeking authoritative medical data relating to reproductive health.[2]

[2] *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 2315 (2016) (citing ACOG and AMA's *amicus* brief several times in striking down Texas abortion regulations, including citation to their *amicus* brief as among those that "set forth without dispute" that admitting privileges have common prerequisites unrelated to the ability to perform medical procedures); *Stenberg v. Carhart*, 530 U.S. 914, 924-25, 932-36 (2000) (quoting AMA reports and policies and ACOG's statement and *amicus* brief extensively, and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue, including in comparison with childbirth); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG's *amicus* brief in evaluating disputed parental notification requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG and APHA publications in discussing "accepted medical standards" for the provision of obstetric-gynecologic services, including abortions); *see also Gonzales v. Carhart*, 550 U.S. 124, 170-71, 175-78, 180 (2007) (Ginsburg, J., dissenting) (referring to ACOG as "experts" and repeatedly citing ACOG's *amicus* brief and ACOG and APHA's congressional submissions regarding abortion procedures); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 168 (4th Cir. 2000) (extensively discussing ACOG's guidelines and describing those guidelines as "commonly used and relied upon by obstetricians and gynecologists nationwide to determine the standard and the appropriate level of care for their patients").

SUMMARY OF ARGUMENT

The tissue disposal regulations at issue, contained in amendments to Title 25, §§ 1.132-1.137 of the Texas Administrative Code published on December 9, 2016 in the Texas Register, 41 Tex. Reg. 9732-41 (the "Amendments"), create a special requirement for the disposal of embryonic and fetal tissue from a health care facility. Instead of permitting the disposal of embryonic and fetal tissue in the same manner as all other human tissue removed during surgery, autopsy, or biopsy, the Amendments mandate that embryonic and fetal tissue be disposed of through interment or by cremation or steam disinfection followed by interment.

Contrary to Texas's initial rationale for proposing the Amendments, these disposal requirements provide no medical, public health, or safety benefits; in fact, they will increase the risk to public health. The Amendments depart from the standard of care long practiced by *amici*'s members in the disposal of embryonic and fetal tissue and have the potential to increase miscarriage-related complications and deny women the ability to engage in valuable pathological testing that could improve their future reproductive success after a miscarriage. The Amendments may also intrude on a woman's reproductive decision-making and undermine her bodily autonomy and the patient-physician relationship. Finally, the Amendments will impose heightened cost burdens on health care facilities disposing of embryonic and fetal tissue that will likely lead to reduced health care access for many Texas women.

Abortion clinics, in particular, may be forced to close as a result of the increased costs of compliance or their inability to find third-party providers who are willing to dispose of the embryonic and fetal tissue of their patients.

Texas continues to manufacture ways to restrict access to important reproductive health care under the guise of improving public health. The Amendments at issue were published four days after the U.S. Supreme Court struck down other Texas regulations restricting abortion access in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). By mandating certain methods for the disposal of embryonic and fetal tissue with no tangible health benefit, the Amendments impose an unnecessary action that may create needless trauma for women during an emotionally difficult period. *Amici* respectfully request that the Court affirm the decision below, preliminarily enjoining the Amendments from taking effect.

ARGUMENT

I. The Amendments Provide No Medical Benefit and Instead May Jeopardize Women's Health and Undermine Their Future Reproductive Success.

There is no medical or public health benefit to the embryonic and fetal tissue disposal requirements contained in the Amendments. Current law already obligates Texas obstetrician-gynecologists—like other medical professionals—to dispose of pathological waste in a sanitary manner. As they existed until now, the approved

disposal methods were nearly identical for various tissues and waste,[3] reflecting that disease risks from disposal do not materially differ based on the type of tissue involved.

In gynecologic and obstetrical practice, common events require disposal of human tissue, including biopsies and other excisions, organ removals like hysterectomies, and removal of tissue from failed and/or terminated pregnancies.[4] In such situations, *amici*'s members in Texas do what law and ethics require: they dispose of the tissue in a safe and sanitary manner.[5] For example, physicians typically direct that embryonic and fetal tissue be incinerated, then deposited in a sanitary landfill.[6] This is the most widely accepted method for disposal of

[3] *See* 25 Tex. Admin. Code § 1.136(a)(4) (1994); ROA.85-89 (showing the Amendments' changes in redline).

[4] Ten to twenty percent of known pregnancies in the United States end in spontaneous miscarriage before the twentieth week of gestation. *See* Mayo Clinic, *Miscarriage: Overview* (July 20, 2016), http://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/home/ovc-20213664. To limit complications from a miscarriage and to afford patients a shorter recovery time, doctors often employ surgical procedures to remove miscarried tissue from the uterus. *See* American College of Obstetricians and Gynecologists, *Frequently Asked Questions FAQ062: Dilation and Curettage (D&C)*, at 1 (Feb. 2016), http://www.acog.org/~/media/For%20Patients/faq062.pdf; American College of Obstetricians and Gynecologists, *Frequently Asked Questions FAQ090: Early Pregnancy Loss*, at 2 (Aug. 2015), https://www.acog.org/-/media/For-Patients/faq090.pdf.

[5] *See, e.g.*, ROA.40 (41 Tex. Reg. 9717) (describing ACOG's comments to the Amendments, including ACOG's position that "current laws and professional standards already require safe and respectful disposition of medical waste").

[6] *See, e.g.*, ROA.154-55 (Decl. of Lendol L. Davis, M.D. ¶ 14).

pathological waste, and the method of disposal recommended by the American College of Pathologists.[7]

If permitted to go into effect, the Amendments would depart from the current standard of care by eliminating the expert-preferred incineration-sanitary landfill method for the specific category of embryonic and fetal tissue. There is no medical or health basis for this change, as Texas has previously conceded.[8] The approved methods under the Amendments are not comparatively safer or better at preventing the spread of communicable disease than the approved methods under the old regulation.[9] In fact, the Amendments could have the opposite effect and heighten

[7] *See* ROA.216 (Decl. of Diane Schecter, M.D. ¶¶ 13-14); ROA.965-72 (testimony of ACOG member and OB-GYN expert Dr. Karen G. Swenson, discussing American College of Pathologists Guideline No. 77900, which advises doctors to incinerate all infectious waste, including embryonic and fetal tissue, before disposition in a landfill).

[8] *See* ROA.748-49. Texas does not dispute that the current rules are sufficient to satisfy the public health mission for which the regulatory scheme exists. Indeed, Texas acknowledged as much in the Public Benefit statement accompanying the Amendments, which states: "[T]he public benefit anticipated as a result of adopting and enforcing these rules will be the *continued* 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." ROA.55 (41 Tex. Reg. 9732) (emphasis added); *see also* 41 Tex. Reg. 7660 (The Amendments are "not intended to protect the environment or reduce risks to human health from environmental exposure."); ROA.32 (41 Tex. Reg. 9709) ("These rules provide a comparable level of protection to public health [as the previous rules].").

[9] ROA.975-76 (testimony of ACOG member and OB-GYN expert Dr. Swenson that the new Amendments do nothing to help prevent the spread of disease).

the risk of infection due to the deviation from the standard protocol used to dispose of pathological waste.[10]

In addition, "there is simply no public health reason to treat the disposition of fetal tissue any differently than any other tissue (or body parts) extracted from the human body in a medical setting."[11] To the contrary, any notion that embryonic or fetal tissue requires exceptional rules for safe disposition is belied by common sense and the reality of women's experiences. Women may spontaneously miscarry early in pregnancy and dispose of embryonic or fetal tissue at home in a sanitary sewer—a circumstance not covered by the Amendments—and unregulated disposal of other intrauterine matter like menstrual fluid is a routine part of life.

Not only is there is no public health benefit to the regulatory change, *see Hellerstedt*, 136 S. Ct. at 2315 (change in statutory facility requirements created undue burden where new requirements "d[id] not benefit patients and [were] not necessary"), but the Amendments may impede health care services for women who miscarry. Many women choose to have their miscarried tissue removed by an experienced physician at a health care facility after they learn of the miscarriage; for

[10] *See* ROA.1000 (testimony of ACOG member and OB-GYN expert Dr. Swenson that "[w]hen you deviate from a standard process, that's when you have increased incidents of mistakes and could potentially cause infection").

[11] ROA.217 (Decl. of Diane Schecter, M.D. ¶ 17); *see also* ROA.816 (testimony of Dr. Lendol L. Davis, OB-GYN, that there is no difference in infection risk between fetal tissue and all other human tissue).

women with high-risk miscarriages, surgery may be the only appropriate option.[12] Yet Texas policy puts women with failing pregnancies in the position of distancing themselves from their doctors—if they do not want their embryonic or fetal tissue to be subject to the Amendments—or bearing needless costs to offset the expense of cremation or burial, as explained in more detail below.[13]

Finally, the Amendments may create additional problems for women's health because they offer "no roadmap" as to how doctors and health care facilities are to comply with the law when multiple providers are involved.[14] For instance, the Amendments may deter health care facilities from sending miscarried embryonic and fetal tissue to pathology labs for testing, in fear that a pathology lab may not properly dispose of the tissue post-testing and thus open the facility to liability for violation of the Amendments. Women who have recurrent miscarriages often have

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[12] *See* American College of Obstetricians and Gynecologists, *Frequently Asked Questions FAQ090: Early Pregnancy Loss*, *supra* note 4, at 2 (recommending surgery if a woman has signs of an infection, heavy bleeding, or other medical conditions).

[13] For example, women may forgo the surgical removal of miscarried tissue and choose to miscarry at home, which could lead to heightened complications particularly at later stages of gestation. *See* ROA.230-31 (Decl. of Reverend Dr. Debra W. Haffner, D. Min., M. Div., M.P.H. ¶¶ 19-20) (explaining that, had the Amendments been in effect at the time of her second-trimester miscarriage, she would have chosen to miscarry at home, increasing her medical risks, "to avoid the mandated funeral ritual"); ROA.243-45 (Decl. of Valerie Peterson, Ed.D. ¶¶ 3-4, 10, 13-14) (noting that, had the Amendments been in effect at the time of her abortion, it would have caused her emotional and psychological pain and an additional financial burden at a time when she was grieving the loss of her baby who had a fatal brain defect).

[14] ROA.972-74 (testimony of ACOG member and OB-GYN expert Dr. Swenson). A pathology lab, hospital or ambulatory surgical center, and a doctor's office may all be involved in the handling of embryonic or fetal tissue from one patient's miscarriage.

embryonic and fetal tissue tested to determine the presence and type of any chromosomal abnormalities, which alone account for half of all early pregnancy losses.[15] Depriving women of this vital information, which can inform future fertility treatments and family planning options, undermines their independent medical decisions and may diminish their likelihood of future reproductive success.

II. The Amendments Infringe upon Women's Dignity and Autonomy and Interfere with the Patient-Physician Relationship.

By imposing significant emotional burdens, the Amendments may interfere with a woman's reproductive decision-making and intrude on her bodily autonomy. The Supreme Court has long recognized that a woman's liberty interest encompasses her right to bodily autonomy, dignity, and respect in her private decision-making about her reproductive health. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, 2599 (2015) (explaining that the liberty right "extend[s] to certain personal choices central to individual dignity and autonomy" including "choices concerning contraception, family relationships, procreation, and childrearing"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (noting that *Roe v. Wade* "may be seen not only as an exemplar of [the liberty right relating to reproductive

[15] *See* American College of Obstetricians and Gynecologists, *Practice Bulletin Number 150: Early Pregnancy Loss* (May 2015), http://www.acog.org/Resources-And-Publications/Practice-Bulletins/Committee-on-Practice-Bulletins-Gynecology/Early-Pregnancy-Loss. Early pregnancy loss is defined as "a nonviable, intrauterine pregnancy with either an empty gestational sac or a gestational sac containing an embryo or fetus without fetal heart activity within the first 12 6/7 weeks of gestation." *Id.*

decisions] but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection"). The loss of a pregnancy, whether spontaneous or induced, can be a challenging and painful time in a woman's life. A woman's reproductive decisions should be informed by her doctor's sound medical advice and her own lived experience; the private decisions she makes that are legal and safe should be respected.

The majority of women who miscarry do not seek burial or cremation and interment of the embryonic or fetal remains of their pregnancy.[16] Women have the option under current law to request the miscarried remains for burial, if they so desire.[17] By mandating that women choose a method required for the disposal of human bodies, however, the Amendments impose their own view of personhood, interfere with women's private decision-making, and add shame and distress to an already stigmatized and often emotional event.

For women seeking an abortion, the Amendments create an additional

[16] Most women handle miscarriages and medication abortions at home, where the tissue is disposed of in a sanitary sewer. *See* ROA.217 (Decl. of Diane Schecter, M.D. ¶ 18); ROA.157 (Decl. of Lendol L. Davis, M.D. ¶ 23) (noting that "of the thousands of patients" his health facilities treat each year, "less than a half dozen request burial or cremation"); ROA.962, ROA.977 (testimony of ACOG member and OB-GYN expert Dr. Swenson, explaining that she has never had a patient request a funeral after a miscarriage in her thirty-one years of practice).

[17] 25 Tex. Admin. Code § 1.136(a)(4)(A)(ii)(III), (a)(4)(B)(i)(IV) (1994); ROA.86-87 (showing the Amendments' changes in redline). Section 241.010 of the Texas Health & Safety Code permits hospitals to release fetal remains to parents for burial purposes.

emotional hurdle to overcome in deciding whether to terminate their pregnancies. Similarly, women experiencing spontaneous miscarriages or ectopic pregnancies[18]—who often have little or no discernable embryonic or fetal tissue—will be forced to use a predetermined method of disposal for whatever tissue is expelled, with no plausible benefit to their physical or mental health. This could spark a difficult conversation with their doctor, intruding on what should be a positive and trusting relationship.[19]

Moreover, doctors recognize the diversity of religious and philosophical perspectives among their patients concerning pregnancy and abortion. They are taught to be respectful of their patients' religious and spiritual differences. By treating the disposal of embryonic and fetal tissue in the same manner as human remains, the Amendments elevate certain religious beliefs over others and may add

[18] An ectopic pregnancy occurs when a fertilized egg grows outside of the uterus, typically attaching to the fallopian tube. Because ectopic pregnancies may be life-threatening, they require immediate medical treatment. *See* American College of Obstetricians and Gynecologists, *Frequently Asked Questions FAQ155: Ectopic Pregnancy* (Aug. 2011), http://www.acog.org/Patients/FAQs/Ectopic-Pregnancy.

[19] Regardless of whether there is any benefit to a woman in making the decision, it is still hers to make, and Texas's suggestion, in its response to public comments, that health care facilities should make the disposal determination without informing women of their options is paternalistic and incongruous with an open and consensual patient-physician relationship. *See* ROA.36 (41 Tex. Reg. 9713) ("The rules do not now, nor have they ever, imposed a requirement that a patient be informed of the method of disposition."). If women are not informed of the disposal methods, they may become distressed to learn that their embryonic or fetal tissue was disposed of in ways that conflict with their personal beliefs, such as in a burial by a private religious organization. *See* ROA.43 (41 Tex. Reg. 9720) (private entity Our Lady of the Rosary Cemetery and Prayer Gardens expressing its "willingness to provide a reverent place of burial for fetal tissue"); ROA.1039 (testimony of Jennifer Carr Allmon, Executive Director of the Texas Conference of Catholic Bishops, offering to accept embryonic and fetal tissue for group burial).

religious ritual to the disposal of embryonic and fetal tissue that is incompatible with patients' beliefs.[20] Patients should not have to bear such an imposition on their autonomy, privacy, religious expression, or physical and mental health.

III. The Amendments Impose a Significant Cost Burden on Reproductive Health Providers, Which Will Negatively Impact Women's Access to Health Care.

Despite providing no health benefits, Texas's embryonic and fetal tissue disposal requirement creates significant new costs associated with pregnancy termination services. While cost estimates for providing cremation and burial service to health care facilities vary, research has shown that the costs of compliance with the Amendments could impose a large burden on reproductive health providers, due to a shortage of cost-effective funeral services.[21] If only one or two vendors in all of Texas are willing to offer affordable services that comply with the Amendments, those entities may face capacity and transport issues.[22] Moreover,

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[20] ROA.977-79 (testimony of ACOG member and OB-GYN expert Dr. Swenson, explaining that she has stopped performing dilation and curettage at an Austin hospital because her patients find it distressing that they must consent to the burial of their fetal tissue at a Catholic cemetery).

[21] Cost estimates for fetal burial services span a wide range, from $1,000 per clinic per year on the low-end, based on the services of a single Dallas cemetery and crematorium for the entire state, to several hundred or thousand dollars per patient on the high-end, if health care providers engage local funeral homes for cremation and burial services. *See* ROA.256, ROA.258, ROA.261-63 (Decl. of Anne Layne-Farrar, Ph.D. ¶¶ 15, 18, 23-26). If health care providers turn to local funeral homes (because, for example, the Dallas cemetery is unable to service all health care facilities in Texas), the costs would likely be prohibitively expensive and would be imposed by funeral service providers who do not currently handle (and are not licensed to handle) medical waste. *See* ROA.868-69 (testimony of Dr. Layne-Farrar, economics expert); ROA.1105 (testimony of Jay Carnes, funeral director).

[22] *See* ROA.264 (Decl. of Anne Layne-Farrar, Ph.D. ¶ 28).

such entities may be vulnerable to attacks by activist groups whose objective is to pressure vendors to stop providing services to abortion clinics.

Though the Amendments themselves do not make clear who is expected to cover the increased costs once they take effect, the State's response to public comments suggests that health care providers will be expected to cover the costs.[23] But providers are likely to push at least some of the costs of compliance to their patients, whose out-of-pocket expenses will increase accordingly. Facilities that cannot pass on these costs may be forced to close.

Providers of abortion services, in particular, are expected to be heavily impacted. Most clinics currently operate on very narrow budgets, and even those that are for-profit often struggle to remain financially solvent.[24] The increased costs of compliance with the Amendments will affect these clinics' ability to continue their operations. Of additional concern, providers of burial and cremation services may be unwilling to work with abortion providers, or feel pressured by activist

[23] *See, e.g.*, ROA.41 (41 Tex. Reg. 9718) ("[T]he health care-related facilities are responsible for the costs of compliance.").

[24] Meaghan Winter, *Why It's So Hard to Run an Abortion Clinic—And Why So Many Are Closing*, Bloomberg Business Week (Feb. 24, 2016), https://www.bloomberg.com/features/2016-abortion-business.

groups to eliminate service; as a result, abortion clinics may shut down because they simply cannot comply with the embryonic and fetal tissue disposal requirements.[25]

A similar result occurred when Texas attempted to impose unnecessary and burdensome regulations on abortion providers via its 2013 bill known as "H.B.2." That attempt to restrict abortion access through targeted regulation of abortion providers led to twenty-one clinic closures in the period between the law's passage and the U.S. Supreme Court's decision striking down the law as an unconstitutional and undue burden on abortion access.[26] In about a year, the number of women of reproductive age who lived more than 200 miles from an abortion facility increased dramatically, from 10,000 to 290,000.[27] These clinic closures—due to the unwillingness of a third party to grant hospital admitting privileges to abortion providers[28]—also led to longer wait times for women seeking abortions and, as a result, a higher number of second-trimester abortions, which, although still safe,

[25] *See id.* (discussing how the stigma of abortion dissuades third parties, such as banks and contractors, from doing business with an abortion provider); ROA.811-13 (testimony of Dr. Davis, OB-GYN, discussing intimidation of disposal vendors by anti-choice groups).

[26] JC Sevcik, *Study: Texas women wait longer, self-induce abortions after HB-2 closes clinics*, UPI (July 24, 2014), http://www.upi.com/Top_News/US/2014/07/23/Study-Texas-women-wait-longer-self-induce-abortions-after-HB-2-closes-clinics/1451406139471; Texas Policy Evaluation Project, *Access to abortion care in the wake of HB2* (July 1, 2014), http://liberalarts.utexas.edu/txpep/_files/pdf/AbortionAccessafterHB2.pdf (noting that almost all of the 21 closures were a result of hospitals' refusals to grant admitting privileges to doctors who performed abortions, a requirement of H.B.2).

[27] Sevcik, *supra* note 26.

[28] Texas Policy Evaluation Project, *supra* note 26.

have higher risks than first-trimester terminations.[29] If the Amendments are permitted to go into effect, the clinic closures that are likely to result will curtail women's access to reproductive health care generally, including sexually transmitted infection testing and cancer screenings in addition to safe abortion services.

Alternatively, clinics that are unable to shoulder the cost burdens imposed by the Amendments may, as a result, be forced to pass on some of the expenses to their patients.[30] Women seeking abortions may face out-of-pocket fees for cremation and burial services because health insurance does not cover funeral expenses.[31] Low-income women, who already struggle to afford abortion services and pregnancy-related care,[32] will bear a disproportionate burden.[33] One estimate places the cost of

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[29] *See* Sevcik, *supra* note 26; Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 735 (2004).

[30] *See* ROA.267-68 (Decl. of Anne Layne-Farrar, Ph.D. ¶¶ 34-36).

[31] *See* ROA.157 (Decl. of Lendol L. Davis, M.D. ¶ 26).

[32] Twenty-three percent of women in Texas aged 15-49 lack health insurance. *See* Alina Salganicoff et al., Henry J. Kaiser Family Found., *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, 10 tbl.2 (Jan. 2016), http://files.kff.org/attachment/issue-brief-coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans. Many of these women do not have access to employer-sponsored programs and struggle to afford coverage on their own. As a result, they are often forced to pay the full out-of-pocket cost of an abortion and related care. *See* Heather D. Boonstra, Guttmacher Institute, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, Guttmacher Policy Review (July 14, 2016), https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters (discussing a study that found that the out-of-pocket costs of an abortion were equivalent to more than one-third of a woman's monthly personal income for over half of the 1,000 women studied). Because federal law restricts abortion coverage for women insured by Medicaid, low-income women, and, disproportionately, women of color, often have to delay an abortion to save money or forgo the procedure altogether. *Id.*

[33] *See* American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women, *Committee Opinion Number 613: Increasing Access to Abortion* (Nov.

an individual fetal interment at one week to two months' pay for a minimum wage worker.[34] This needless cost would effectively make abortion services inaccessible to some Texas women.

And while this alone is of serious concern to *amici*, increased costs will not be imposed solely on women who choose to terminate their pregnancies. Women with wanted pregnancies, such as those seeking miscarriage management and ectopic pregnancy treatment, will likely be charged more for these services to compensate for the additional costs in disposing of embryonic and fetal tissue in accordance with the Amendments.[35] In 2011, about 15% of Texas pregnancies resulted in miscarriages.[36] For women in this group, money spent on complying with the Amendments is money that cannot be put toward other medical expenses, including those related to genetic testing, fertility treatments, or other aspects of reproductive well-being.

2014), http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Increasing-Access-to-Abortion (explaining that under-served women experience the highest rates of unintended pregnancy and abortion); Boonstra, *supra* note 32 (finding that the unintended pregnancy rate among women with an income below the federal poverty level in 2011 was more than five times the rate among women with an income at or above 200% of poverty).

[34] *See* ROA.48 (41 Tex. Reg. 9725) (comment by the National Association of Social Workers).

[35] *See* ROA.36 (41 Tex. Reg. 9713) (acknowledging, in comments to the Amendments, that the Amendments would apply to health care facilities treating women who have spontaneous abortions).

[36] Guttmacher Institute, *State Facts About Abortion: Texas* (Jan. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-texas.

CONCLUSION

In summary, Texas's embryonic and fetal tissue disposal requirements depart from the accepted standard of care, intrude on a woman's bodily autonomy, and interfere with the patient-physician relationship, while providing no medical or public health benefits. The requirements will lead to an increase in the cost of pregnancy-related care and abortion services and may force the closure of abortion clinics, eliminating access to reproductive care for some Texas women. *Amici* remain committed to ensuring access to the highest quality reproductive health services for all women and therefore respectfully request that the Court uphold the preliminary injunction ordered by the District Court below.

Respectfully submitted,

/s/ Susan J. Kohlmann

SUSAN J. KOHLMANN
KATYA JESTIN
ALISON I. STEIN
JENNA E. ROSS
JEREMY H. ERSHOW
JESSICA A. MARTINEZ
GRETCHEN O. STERTZ
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600
Counsel for Amici Curiae

July 12, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5).

1. This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally-spaced Times New Roman font with 14-point type using Microsoft Word 2013, with the exception of the footnotes, which have been prepared in proportionally-spaced 12-point Times Roman font.

2. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the brief contains 4,925 words. As permitted by Federal Rule of Appellate Procedure 32(g)(1), I have relied upon the word count feature of Microsoft Word 2013 in preparing this certificate.

/s/ Susan J. Kohlmann

SUSAN J. KOHLMANN

Counsel for Amici Curiae

July 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I electronically filed the foregoing Brief of *Amici Curiae* the American College of Obstetricians and Gynecologists, the American Public Health Association, and the American Medical Association in Support of Plaintiffs-Appellees and in Support of Affirmance with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Counsel for all parties to the case and *amici curiae* are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Susan J. Kohlmann

SUSAN J. KOHLMANN

Counsel for Amici Curiae