



Comments of Susan B. Anthony Pro-Life America re: TRD-202401262, Proposed Rules concerning Exception to Abortion Ban, Abortion Ban Exception Performance and Documentation, and Complaints Regarding Abortions Performed (TAC 22 § 165.7-9)

Date: May 1, 2024 [Submitted Via Email]

To: Texas Medical Board
The State of Texas

This comment is submitted in response to the Texas Medical Board's (TMB) Proposed Rule intended to clarify how the Board will evaluate complaints it receives related to Texas' abortion laws. While the TMB's primary focus is licensure and regulation of physicians and other medical professionals, it also plays an important role in educating professionals and the public as to the practice of medicine in Texas.¹

The Proposed Rule is limited to the TMB's evaluation of complaints against physicians, but the Final Rule ought to provide additional clarity regarding which laws are effective post-Dobbs.

The Proposed Rule states that an abortion may only be performed if it is done so in compliance with Chapters 170, 170A, and 171 of the Texas Health and Safety Code, "in addition to any other applicable federal and state statutes, rules, and court opinions."² It would greatly benefit Texas medical professionals, patients, and the press if the TMB created a landing page, similar to that for COVID-19, housing information about the relevant laws and regulations, as well as updates to relevant litigation.

Texas Health and Human Services already houses some of this information, but it is on a page titled "Abortion Facilities," which would easily confuse the vast majority of medical professionals who do not perform abortions into thinking that this page is not relevant to them.³ Critically, HHS' page has links for the Medical Emergency Abortion Incident Report⁴ and the Abortion Complications Report,⁵ both of which should have been completed by the treating physician for care provided outside an abortion facility even before HSPA took effect. Yet it is likely many physicians are not familiar with these important tools for Texas to understand the frequency and severity of post-abortion complications or medical emergencies requiring the exceptions be exercised because they have been located on one of several websites. The TMB could alleviate physician confusion and increase compliance by establishing a one-stop shop. At a minimum, the Final Rule should point professionals and facilities to these important, and legally required,

¹ For example, TMB issued guidance and information alongside formal rules to address COVID-19.

See <https://www.tmb.state.tx.us/page/coronavirus>

² Proposed Rule § 165.8(a)

³ <https://www.hhs.texas.gov/providers/health-care-facilities-regulation/abortion-facilities>

⁴ https://txhhs.my.site.com/c/itop_reporting.app?view=form&formType=meair

⁵ https://txhhs.my.site.com/c/itop_reporting.app?view=form&formType=acr

reporting forms, rather than limiting § 165.8 of the Proposed Rule to documenting in the patient’s medical record the information the TMB would use to evaluate a complaint, should one even be filed.

Most importantly, the Final Rule or its accompanying materials should provide background on the “reasonable medical judgment” standard applied in several areas of Texas law, which is defined at § 165.7(a)(3) of the Proposed Rule. In February 2024, our colleagues at the Charlotte Lozier Institute joined the Alliance for Hippocratic Medicine to file an amicus brief on this topic in *Texas v. Zurawski*.⁶ The brief outlines the use of “reasonable medical judgment” as an objective standard applied in various contexts in federal and Texas law, demonstrating that it’s a standard that Texas healthcare professionals ought to understand based on decades of use. To the extent that some now claim confusion, the Final Rule provides an opportunity to explain and ensure that newer members of the profession understand this commonly applied standard which they are likely to encounter across their career, regardless of whether they work in an area of medicine that touches women’s health, emergency care, or abortion.

While it is the responsibility of individual practitioners and hospitals to understand the laws and regulations that govern their profession, the TMB could assist busy doctors in that endeavor in two major ways.

First, by encouraging hospitals to review and recirculate their internal protocols regarding induced abortion and handling post-abortion complications that are treated in the emergency department, including reporting to state and federal public health agencies. And second, by providing information regarding medical best practices and how they fit with Texas’s current laws through the TMB’s website and publications. Our colleague Dr. Ingrid Skop has spoken publicly about the benefits of working at a hospital that proactively reviewed its protocols and ensured that its employees and associated physicians knew that changes to Texas law did not change the day-to-day operations of the emergency department. One of these benefits is the clarity it provided to practitioners, who were assured that they could continue practicing good medicine without delay or confusion.

Additionally, the TMB could provide advice on how to approach the laws to ensure compliance and prevent complaints from being filed. The documentation listed in § 165.8 of the Proposed Rules is a starting point, but the TMB might also provide guidance on decision-making. Some suggestions for a physician desiring clarity are to converse with the hospital’s ethics committee or a more experienced colleague.

There are existing resources TMB can share with the profession and the public, including guidance from major national medical groups like the American College of Obstetricians and Gynecologists (ACOG)⁷ and the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG).⁸

⁶ <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=b2b9a4b9-fc3f-46c6-83fc-01b858e5d031&coa=cossup&DT=BRIEFS&MediaID=a5b4ef70-6e8f-40df-b4b2-423bdca02714>; <https://lozierinstitute.org/pled-brief-zurawski-v-texas-and-reasonable-medical-judgment/>

⁷ <https://www.acog.org/topics/obstetric-labor>

⁸ <https://aaplog.org/resources/practice-guidelines/>

Having this information handy *before* a patient presents to the emergency department will improve patient outcomes for Texas women and their children.

As discussed during the public hearing, the Final Rule should be accompanied by FAQs. Below are our recommendations for questions to include in the accompanying materials.

1. What is an abortion under Texas law? What is not?

An abortion intentionally causes the death of an unborn child known to be living at the time the action is taken. This is starkly different from treatment following a miscarriage (spontaneous abortion), where the unborn child has died naturally. Perhaps some confusion has arisen from the fact that the treatment options for miscarriage care overlap with the methods of abortion – vacuum aspiration, dilation and curettage, or prescribing misoprostol. But the intention of the action, to cause the death of a living, developing unborn child (illegal) versus to remove any remaining tissue from the uterus to prevent infection after an unborn child naturally died (legal), is what is key under Texas law.

As Proposed Rule § 165.7 states, Texas law defines abortion as "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant." The definition has several key exclusions, which help further clarify the distinction in permitted versus prohibited activity.⁹

1. Prescribing birth control devices or oral contraceptives is not an abortion. (1)
2. Inducing labor to save the life or preserve the health of an unborn child is not an abortion. (1)(A)
3. Treating a miscarriage (spontaneous abortion) is not an abortion. (1)(B)
4. Treating an ectopic pregnancy is not an abortion. (1)(C)

Utilizing this definition as guidance, medical professionals who are not intentionally ending the life of an unborn child need not worry about whether their actions fall within the scope of state abortion laws—they do not.

2. Texas law does not prevent women from obtaining care in the emergency department.

Texas’s abortion laws have consistently ensured that the full range of medical care is available. The HLPAs are no different, stating that the prohibition on abortion does not apply if a physician exercising his or her reasonable medical judgment finds that it is necessary to treat a life-threatening physical condition.¹⁰ Furthermore, the civil enforcement mechanism in Subchapter H of Tex. Health & Safety Code § 171 (known as the Texas Heartbeat Act or SB 8) does not apply “if a physician believes a medical emergency exists that prevents compliance.”¹¹

⁹ Tex. Health & Safety Code § 245.002(1); see also Tex. Health & Safety Code § 170A.001(1) (“abortion” is assigned the meaning under Section 245.002)

¹⁰ Tex. Health & Safety Code § 170A.002

¹¹ Tex. Health & Safety Code § 171.205

In 2023, there were 56 abortions performed in Texas hospitals due to a medical emergency or to preserve the mother’s health.¹² This data demonstrates that the exceptions are operating as anticipated and that in those rare cases where an abortion is necessary, physicians may perform them, provided it is done in compliance with Texas law. To our knowledge, there has been no criminal or civil action taken against any medical professional in any of these cases.

Induced Terminations of Pregnancy due to Medical Emergency or Woman's Health ¹²														TX Procedures for TX Residents
Break-out by Month - TX Procedures Performed for TX Residents														
Emergency/Health of Woman	January	February	March	April	May	June	July	August	September	October	November	December	Unknown Month	
Due to Medical Emergency	0	0	0	0	0	0	0	0	0	0	0	0	-	0
To Preserve Health of Woman	0	0	0	0	0	0	0	1	1	0	0	-	-	2
Both Emergency and Health	6	1	9	4	7	0	8	4	8	4	3	-	-	54
Neither Reason	0	0	0	0	0	0	0	0	0	0	0	-	-	0
Total	6	1	9	4	7	0	8	5	9	4	3			56

3. Texas law does not require immediacy for a physician to lawfully act.

Neither the HPLA nor the Heartbeat Act require immediacy for the medical emergency exception to apply. A physician may perform an abortion if it is necessary to treat an *objectively foreseeable* threat, but need not wait until the condition escalates. The Induced Termination of Pregnancy (ITOP) reports for 2023 indicate that physicians performing abortions under the exception understand this, as the vast majority of reported abortions were performed using pharmaceuticals. Though the ITOP data does not state which medications were administered or how they were administered, if any of the 42 abortions performed via “Medical (Non Surg.)” followed the typical timeline of the FDA’s two-drug regimen of mifepristone and misoprostol to address a medical emergency or preserve the mother’s health, it is a multi-day process. Were the condition so elevated as to be “on the verge of death,” as opponents of Texas’s laws sometimes erroneously claim is required, these women certainly would NOT have been given two different medications over several days, with the possibility that at least some of that time was spent at home. They would have needed immediate surgical intervention. To our knowledge, there has been no criminal or civil action taken against any medical professional in any of these cases.

Induced Terminations of Pregnancy by Type of Procedure														TX Procedures for TX Residents
Break-out by Month - TX Procedures Performed for TX Residents														
Type of Procedure	January	February	March	April	May	June	July	August	September	October	November	December	Unknown Month	
Suction Curettage	0	0	1	0	1	0	2	2	0	0	0	0	-	6
Medical (Non Surg.)	6	1	7	4	4	0	5	2	9	4	0	-	-	42
Dilation and Evacuation	0	0	0	0	2	0	0	1	0	0	1	-	-	4
Intra-Uterine Instillation	0	0	0	0	0	0	0	0	0	0	0	-	-	0
Sharp Curettage (D&C)	0	0	1	0	0	0	0	0	0	0	0	-	-	1
Hysterotomy/Hysterectomy	0	0	0	0	0	0	1	0	0	0	1	-	-	2
Other	0	0	0	0	0	0	0	0	0	0	1	-	-	1
Not Stated	0	0	0	0	0	0	0	0	0	0	0	-	-	0
Total	6	1	9	4	7	0	8	5	9	4	3			56

¹² Of the 56 reported abortions, 2 were to preserve the mother’s health and 54 were to both treat a medical emergency and preserve the mother’s health. See <https://www.hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics>

4. Texas law does not allow an abortion to be performed on the basis of an unborn child's disability diagnosis.

Texas's laws do not allow an abortion to be performed solely because the child has received a challenging diagnosis. This was an intentional policy decision made in 2017 and again in 2021, when neither the HPLA nor the Heartbeat Act carved out abortions for unborn children with disabilities. As long as the child is living, his or her life cannot be intentionally ended unless it is necessary to prevent a threat to the mother's life or during a medical emergency. Instead, physicians and facilities may share information with these families regarding perinatal hospice and palliative care,¹³ or assist them in connecting with researchers whose outcomes are better than a typical hospital because they specifically focus on treating that condition.¹⁴ While this question remains before the Texas Supreme Court in *Texas v. Zurawski*,¹⁵ the Court refused to open that door *in re Cox* in 2023, a case where the physician unsuccessfully sought a court-created exemption from state laws because she knew she would be civilly or criminally liable if she performed the desired abortion in state.¹⁶ The TMB could help physicians and families in these sensitive situations by adding information about perinatal hospice and palliative care to its resources bank or by offering its members a CME or other education on this topic.

5. There is no conflict between Texas law, specifically the HPLA, and a physician's existing obligations under EMTALA.

Although a similar question remains pending before the U.S. Supreme Court, the Fifth Circuit Court of Appeals held in January 2024 that there is no direct conflict between the Texas HPLA and the federal Emergency Medical Treatment and Active Labor Act (EMTALA).¹⁷ Both laws recognize that a pregnant woman and her unborn child are separate but interconnected individuals each deserving of medical treatment.

Importantly, EMTALA does not establish any specific standard of care, but rather imposes a "dual requirement" that decisions regarding treatment and stabilization be made with consideration for both the "health or safety of the woman or the unborn child." These standards have been in effect since the 1980's, and there is no change regarding EMTALA's obligations for emergency department care pre- and post-HPLA.

From the Fifth Circuit: "Texas's HPLA law does not directly conflict with EMTALA. ***EMTALA imposes obligations on physicians with respect to both the pregnant woman and her unborn child. This is a dual requirement.*** The Texas HPLA provides for abortion care where there is a life-threatening condition that places the female at risk of death or substantial impairment of a

¹³ <https://www.perinatalhospice.org/list-of-programs>; <https://aaplog.org/wp-content/uploads/2021/12/PG-1-Perinatal-Palliative-Care-1.pdf>

¹⁴ For example, the University of Michigan has significantly improved outcomes for children diagnosed with Trisomy 18. See <https://www.michiganmedicine.org/health-lab/doctors-discover-novel-way-treat-gastrointestinal-complication-child-trisomy-18>; <https://www.freep.com/story/news/local/michigan/2023/12/27/trisomy-18-texas-abortion-case-kate-cox-michigan/71967797007/>

¹⁵ <https://search.txcourts.gov/Case.aspx?cn=23-0629&coa=cossup>

¹⁶ <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=d3e049fc-ad55-4817-adbc-d9120cec0b56&coa=cossup&DT=OPINION&MediaID=690d3adc-120e-4595-b97c-7f3b7f90498d>

¹⁷ *Texas v. Becerra*, No. 23-10246 (2024). See <https://www.ca5.uscourts.gov/opinions/pub/23/23-10246-CV0.pdf>

major bodily function and the physician provides the best opportunity for the unborn child to survive unless that would create a greater risk for the pregnant female's death or a serious risk of substantial impairment of a major bodily function of the pregnant female. EMTALA's void is answered by Texas state law...[T]he purpose of EMTALA is to prevent patient dumping for both a pregnant woman and her unborn child. Texas's law does not undermine that purpose; it does not compel the rejection of patients. Congressional history is telling. Specifically, Congress amended EMTALA in 1989 by adding unborn child into the statutory definition of emergency medical condition and its discussion of when transfer is appropriate. Texas law does not stand in the way of providing stabilizing treatment for a pregnant woman or the unborn child (cleaned up and emphasis added)."¹⁸

We are hopeful that the U.S. Supreme Court will resolve *Moyle v. United States* favorably to Idaho, applying the reasoning of the Fifth Circuit that two life-affirming laws are in concert, not conflict, with one another.

6. What are the penalties for performing an unlawful abortion?

It is a felony to perform an unlawful abortion under the HLPA.¹⁹ A person who violates the statute may also be subject to civil penalties²⁰ and the revocation of their professional licenses.²¹ Performing an unlawful abortion, or aiding and abetting someone who performs an unlawful abortion, exposes a person to civil liability in Texas state courts.²² It is not a violation of the HLPA if the child is accidentally or unintentionally injured in the course of medical treatment,²³ nor is it a violation to perform an abortion if the physician determines that it is necessary to prevent the risk of death or substantial impairment of a major bodily function due to a life-threatening medical condition.²⁴ It should be performed in the manner that gives the child the highest chance of survival unless that would increase the risks to the mother.²⁵

7. What are my obligations to report public health data if I perform an abortion under the exception?

In addition to documentation required in the patient's medical record as required in § 165.8 of the Proposed Rule, a physician or facility is required to submit a Medical Emergency Abortion Incident Report.²⁶

¹⁸ *Id.* at 21

¹⁹ "An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense." Tex. Health & Safety Code § 170A.004

²⁰ Tex. Health & Safety Code § 170A.005

²¹ Tex. Health & Safety Code § 170A.007

²² Tex. Health & Safety Code § 171.205-212

²³ Tex. Health & Safety Code § 170A.002(d)

²⁴ Tex. Health & Safety Code § 170A.002(b)

²⁵ Tex. Health & Safety Code § 170A.002(b)(3)

²⁶ https://txhhs.my.site.com/c/itop_reporting.app?view=form&formType=meair

8. What are my obligations to report public health data if I treat post-abortion complications?

A physician or facility that treats a patient's post-abortion complication is required to submit an Abortion Complications Report.²⁷ Failure to report can result in a \$500 fine per incident and repeated failure to report may result in a healthcare professional or facility losing their license.²⁸

In conclusion, we appreciate the TMB's commitment to improving the practice of medicine for Texas' women and children, and we welcome the opportunity to participate in crafting the Final Rule and its accompanying materials as a stakeholder.

Submitted on behalf of Susan B. Anthony Pro-Life America.

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Susan B. Anthony Pro-Life America is a network of more than one million pro-life Americans nationwide, dedicated to ending abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

²⁷ https://txhhs.my.site.com/c/itop_reporting.app?view=form&formType=acr

²⁸ Tex. Health & Safety Code § 171.006(j)-(k)