May 5, 2024

Submitted via Online Portal and Email (Rule.165@tmb.state.tx.us)

Texas Medical Board
1801 Congress Avenue, Suite 9.200
Austin, TX 78701

Comments on: TMB Rules §§ 165.7-165.9, Exceptions to Abortion Ban

Dear Board Members,

Public Rights Project submits this comment on behalf of current and former local elected officials in Texas listed below. The comment makes suggestions for revisions to certain components of Texas Medical Board's Proposed Rule (§165.7 - Exceptions to Abortion Ban, §165.8 - Abortion Ban Exception Performance and Documentation, §165.9 - Complaints Regarding Abortions Performed). As described below, this group also opposes the proposed rule under §165.8.

§165.7. Exceptions to Abortion Ban.

We recommend several modifications to proposed §165.7. While we appreciate that the Board has clarified that removing an ectopic pregnancy is not an "abortion" as defined by the law, this section does no more than restate existing law. Medically, treatment of an ectopic pregnancy remains an abortion. As such, the definition section does not provide clarity on when physicians in Texas can provide medication or surgical abortion without facing legal challenges.

At oral argument in *Zurawski v. Texas*, the Attorney General suggested that individuals who are denied permissible care could sue their doctors for medical malpractice to obtain clarity after the fact. Transcript of Oral Argument, *State of Texas, et al. v. Amanda Zurawski, et al.*, 2023 WL 8360124 (No. 23-0629). It has never been the position or mission of the Board to require patients to understand their rights or for doctors to learn their obligations through medical malpractice litigation. By issuing guidance that goes beyond restating existing law, the Board could avoid such a need and ensure the delivery of medically appropriate care to individuals who face significant pregnancy complications. For example, the Board could clarify that "reasonable medical judgment" does not mean "every doctor would reach the same conclusion." *In re State of Texas*, No. 23-0994 (Tex. Dec. 11, 2023) (per curiam).

The Board also could go slightly further by amending the definition of "medical emergency" proposed in §165.7(4), to allow discretion for physicians to provide emergency care when they see fit. Currently, in fear of prosecution, doctors in Texas wait to provide necessary

abortion care until their patients are in extremely dangerous conditions to ensure they are in "serious" risk of "substantial" harm. Providers should have the discretion to determine what conditions satisfy those requirements on a case-by-case basis informed by national and well-established standards of care in provision of preventative medicine. By allowing physicians the discretion to determine when care is necessary, they can provide an abortion without waiting until life-threatening symptoms manifest.

More broadly speaking, it is not the responsibility of this Board to change the standard of care. The Board should also reiterate that in assessing complaints, no action will be taken if the national standard of care is followed.

§165.8. Abortion Ban Exception Performance and Documentation

We strongly object to proposed §165.8(b) because it is not within the authority of the Board to impose new documentation requirements; and it is not in line with the standard of care accepted by the medical community. We provide more detailed objections below.

First, the Texas Medical Board cannot impose new legal requirements without explicit authorization from the legislature. *See Texas Dep't of State Health Servs. v. Crown Distrib. LLC*, No. 03-20-00463-CV, 2021 WL 3411551 (Tex. App. Aug. 5, 2021). When a statute expressly authorizes an agency to regulate an industry, it provides the authority to promulgate rules and regulations necessary to accomplish that purpose. *Id*. at *7. Here, neither the Trigger Ban, Tex. Health & Safety Code §§ 170A.001-.007, nor SB 8, Tex. Health & Safety Code §§ 171.201-.212, expressly authorize the Board to impose new requirements. If § 165.8(b) is implemented, the Board will be acting outside the scope of its authority.

Second, § 165.8(b) creates new documentation requirements that conflict with existing requirements. SB 8 requires a physician who provides an emergency abortion to "make written notations in the pregnant woman's medical record of: (1) the physician's belief that a medical emergency necessitated the abortion; and (2) the medical condition of the pregnant woman that prevented compliance with this subchapter." Tex. Health & Safety Code § 171.205. Proposed § 165.8(b) goes beyond these requirements. If introduced, the proposed requirements will be invalid because they are inconsistent with existing law and impose burdens for providers in excess of the relevant statutory provisions. *See Hegar v. Ryan, LLC*, No. 03-13-00400-CV, 2015 WL 3393917, at *13 (Tex. App. May 20, 2015) (holding a regulatory agency's rules invalid when rules imposed additional burdens, conditions, or restrictions in excess of or inconsistent with statutory scheme).

Third, although §165.8(b) is meant to provide documentation requirements, physicians may read this section as a list of necessary preconditions to providing emergency abortion care.

Because of this ambiguity, physicians may attempt to meet these requirements which will delay emergency care and further jeopardize the health and safety of patients facing life-threatening conditions. Specifically, §165.8(b)(7) requires physicians to document "whether there was adequate time to transfer the patient, by any means available to a facility or physician with a higher level of care or expertise to avoid performing an abortion." This is an overly burdensome and dangerous requirement that does not comport with the standard of care or with the statutory requirements. Texas law does not require a person whose pregnancy threatens their life or major bodily functions to be transferred.

Fourth, this requirement undermines physicians' ability to exercise "reasonable medical judgment." The term "by any means available" suggests a high level of effort to transfer patients, perhaps beyond an ambulance transfer, and a heightened level of scrutiny for providers who do not transfer patients. And the term "higher level of care or expertise," is a vague standard. Physicians in more rural areas may believe they should transfer a patient in critical condition a far distance to a hospital with more resources even if they do not believe it is in the best interest of their patient. Physicians in big cities with many hospitals in proximity may believe they need to transfer a patient because there may always be a physician with a "higher level of care or expertise." Ultimately, this requirement creates greater barriers, and confusion for physicians to provide appropriate, life-saving abortion care rather than clarity.

Additional comments

We fear that the proposed rules do not offer the guidance physicians have been seeking, but rather create additional barriers that will prevent patients from receiving proper care. The Board is not the entity which will set a standard of care, merely an entity that ensures doctors comport with that standard.

State law permits a doctor in Texas to provide an abortion if the patient is "at risk of death or poses a serious risk of substantial impairment of a major bodily function." Tex. Health & Safety Code § 170A.002(b)(2). Many individuals and groups—doctors, hospitals, lawyers, reporters, state senators, and the Texas Medical Association—have asked for clarity on what that exception entails. Lawsuits have been filed by women who have suffered significant medical complications during pregnancy. Most recently, the Texas Supreme Court stated that the Board "can do more to provide guidance" for individuals denied life-saving and crucial care. *In re State of Texas*, No. 23-0994, 2023 Tex. LEXIS 1214, at *7 (Tex. Dec. 11, 2023) (per curiam). However, this request is misguided. The legislature is tasked with ensuring that all laws pass a constitutional test for vagueness. Restrictive abortions bans have failed this test as evidenced by requests for clarification and the Board's attempt and failure to provide such needed clarity.

Thank you for your consideration of these comments. Should you have any questions or need further clarification, please feel free to contact Eushrah Hossain of Public Rights Project at eushrah@publicrightsproject.org.

Sincerely,

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