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To the Texas Senate Committee on Health & Human Services:
Hon. Charles Schwertner, Chair
Hon. Carlos Uresti, Vice-Chair
Hon. Dawn Buckingham
Hon. Konni Burton
Hon. Lois Kolkhorst
Hon. Borris L. Miles
Hon. Charles Perry
Hon. Van Taylor
Hon. Kirk Watson

Re: Reproductive Rights Violations in Senate Bills 8, 258, and 415

The American Civil Liberties Union of Texas submits this testimony on behalf of our thousands of members across the state and the abortion providers we represent. Our mission is to secure and strengthen individual liberties protected in the Constitution, including the right to reproductive freedom for every Texan woman. All three of the bills under consideration today are antithetical to that liberty because they put politics above a woman's health.

The bills under consideration today would:

- Interfere in the practice of medicine by preventing a doctor from using the safest available medical procedures
- Pressure an abortion patient to reveal her personal contact information to anti-abortion religious groups
- Punish, as a felon, a medical researcher who pays to transport donated tissue used for lifesaving medical research

We can all agree that a woman's health, not politics, should drive important medical decisions. These proposals are the same type of interference with the practice of medicine that the U.S.

Supreme Court rejected last summer in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Committee should reject each of these bills.

Abortion is a Constitutional Right

Our Constitution guarantees each person the freedom to make profoundly personal decisions for herself, without interference from the government. That constitutional zone of privacy protects the most intimate human relationships, including how to raise your children[1] and structure your family,[2] whom to marry,[3] sexual intimacy,[4] and whether and when to become a parent.[5] This freedom includes the right to terminate a pregnancy.[6]

According the U.S. Supreme Court, the "central principle" of this right is the limitation on a state's ability to interfere: "[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[7] Courts have struck down restrictions posing a "substantial obstacle" to a woman seeking abortion care—along with any restrictions intended to do so.[8] These types of restrictions are an "undue burden" on a woman's fundamental right to abortion.[9]

Two of Texas's own abortion restrictions failed this standard before the Supreme Court last summer. The Court reiterated the undue burden standard, specifying that any burden imposed by an abortion restriction is unconstitutional when it outweighs corresponding benefits.[10] The Court also held that, no matter the benefits involved, "a statute which . . . 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."[11]

The three bills this Committee considers today violate constitutional limits on Texas's ability to regulate abortion.

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[1] *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (holding parents have a fundamental right to decide who their children interact with); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (right to direct children's education).
[2] *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (holding families have a fundamental right to choose which relatives may live in their household).
[3] *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (holding same-sex couples have a fundamental right to marry); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (prisoners); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (interracial couples).
[4] *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (holding same-sex couples have a fundamental right to form a sexual relationship).
[5] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding unmarried couples have a fundamental right to use contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (married couples); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding fundamental right against state-mandated sterilization).
[6] *Roe v. Wade*, 410 U.S. 113, 154 (1973).
[7] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871, 879 (1992).
[8] *Id.* at 877–87.
[9] *Id.*
[10] *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2300, 2309–10, 2318 (2016).
[11] *Id.* at 2309 (quoting *Casey*, 505 U.S. at 877).

S.B. 415 Unconstitutionally Bans Doctors from Using the Safest Available Procedure

S.B. 415 bans the most common and safest medical procedure for second-trimester abortion;[12] in fact, the Supreme Court has acknowledged that the procedure marks a significant advance in safety.[13]

S.B. 415 requires doctors to abandon that progress. As courts have held, bills like this one force doctors to choose between following the law and doing what is best for the patient according to medical judgment and ethics. Medical experts uniformly agree that in order to provide second-trimester abortions in compliance with these laws, a physician is required to perform alternative or additional procedures that increase health risks.[14] Specifically, providing a second-trimester abortion consistent with S.B. 415 would require abortion providers to perform an otherwise unnecessary injection through a woman's cervix or her abdomen, to pass instruments through her cervix to transect the umbilical cord, or to resort to the alternative procedure of inducing delivery of the fetus.[15] Each of these alternatives increases the duration and complexity of the standard procedure, and carries additional health risks for the woman, such as heavy blood loss, injury to the uterus, and infection.[16] There is so little research on some of these alternatives that they are essentially experimental.[17]

Forcing a woman to unnecessarily put her health at risk in this manner is an undue burden. The Supreme Court has repeatedly agreed, overturning bans such as S.B. 415 because of "the prevalence . . . of the [banned procedure] as an accepted medical procedure in this country," and because the ban "forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed."[18] In fact, the Court has already overturned a

[12] Brief for Am. Coll. of Obstetricians & Gynecologists as Amicus Curiae Supporting Plaintiffs-Appellees at 3, *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 15-114153-A (Kan. June 13, 2016) [hereinafter "Brief for Am. Coll. of Obstetricians & Gynecologists"], *available at* https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/2016-06-13%20KS%20D&E%20ACOG%20Amicus%20Brief.pdf (challenging similar method ban in Kansas).
[13] *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 435-36 (1983), *overruled in part on other grounds by Casey*, 505 U.S. 833.
[14] *W. Ala. Women's Ctr. v. Miller*, No. 2:15-CV-497-MHT, 2016 WL 6395904, *17–*24 (M.D. Ala. Oct. 27, 2016) (enjoining similar method ban in Alabama), *appeal docketed*, No. 16-17296 (11th Cir. Nov. 29, 2016); Brief for Am. Coll. of Obstetricians & Gynecologists at 6–10.
[15] *W. Ala. Women's Ctr.*, 2016 WL 6395904 at *17–*24; Brief for Am. Coll. of Obstetricians & Gynecologists at 6–10.
[16] *W. Ala. Women's Ctr.*, 2016 WL 6395904 at *17–*24; Brief for Am. Coll. of Obstetricians & Gynecologists at 6–10.
[17] *W. Ala. Women's Ctr.*, 2016 WL 6395904 at *18 (finding umbilical cord transection to be "essentially an experimental procedure"), *20 (finding Digoxin injections experimental before 18 weeks of pregnancy).
[18] *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976).

ban on the same procedure S.B. 415 would prohibit,[19] and the Fifth Circuit[20] and each court to consider the most recently enacted bans[21] has followed suit.

It is possible that, because providers in Texas are either untrained in these alternative procedures or unwilling to subject their patients to unnecessary health risks, S.B. 415 will function as an effective ban on second-trimester abortions. This was the result of a similar ban in Alabama: none of the state's abortion providers was able to continue performing second-trimester abortions consistent with their ethical obligations.[22]

Moreover, S.B. 415's exception for a "medical emergency" is insufficient. Even when states regulate abortion *post*-viability, they must allow for procedures that are "necessary, in appropriate medical judgment, for the preservation of the life *or health*" of the woman.[23] Doctors should not have to wait for a foreseeable medical emergency to develop before giving a woman the healthcare she needs.

The unnecessary health risk of complying with S.B. 415, combined with additional pain, complexity, cost, and duration of alternative procedures— which is likely to put the procedure out of reach for low-income women[24]—is unquestionably an undue burden on the right to a pre-viability abortion.

S.B. 258 Unconstitutionally Intrudes into Doctor/Patient Relationships and Threatens Abortion Patients with Harassment

S.B. 258 requires a woman to choose a method of disposition for tissue resulting from her abortion. Current health regulations require all health care facilities, including abortion providers, to dispose of tissue using one of seven[25] approved methods. S.B. 258 unnecessarily requires providers to instruct a woman to elect one of these disposal methods, with special attention drawn to burial or cremation, in order to proceed with an abortion. Requiring a doctor to confront a woman with this choice is a harmful intrusion into the doctor/patient relationship,

[19] *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000).
[20] *Causeway Med. Suite v. Foster*, 221 F.3d 811 (5th Cir. 2000).
[21] *W. Ala. Women's Ctr.*, 2016 WL 6395904 at *25 (enjoining similar ban); *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 114, 153, 368 P.3d 667, 679 (Kan. Ct. App. 2016) (same); Nova Health Systems v. Pruitt, No. CV-2015-1838 (Okla. Cty. Dist. Ct. Oct. 28, 2015), *available at* https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/2015-10-28%20OK%20Ban%20and%20Delay%20Order%20Granting%20in%20Part%20and%20Denying%20in%20Part%20Mtn%20for%20TI.pdf (same).
[22] *W. Ala. Women's Ctr.*, 2016 WL 6395904 at *16.
[23] *Casey*, 505 U.S. at 879 (emphasis added).
[24] Some alternatives, such as digoxin injection, require multiple visits to the doctor. *W. Ala. Women's Ctr.*, 2016 WL 6395904 at *22. Others, like induction of labor, require hospitalization. *Id.* at *16 & n.20; Brief for Am. Coll. of Obstetricians & Gynecologists at 8. Requiring medical procedures that span many hours or multiple days is likelier to pose a substantial obstacle to low-income women, who often need to arrange for time off work, travel, lodging, and childcare.
[25] Enforcement of recent regulations attempting to limit "fetal tissue" disposition methods has been enjoined. *Whole Woman's Health v. Hellerstedt*, No. A–16–CA–1300, 2017 WL 462400, *11 (W.D. Tex. Jan. 27, 2017).

intended to cause humiliation and emotional trauma.[26] Courts have held that such an intrusion is an unconstitutional burden.[27]

Moreover, the bill is unclear about whether it requires abortion providers to provide burial or cremation as a means of disposal. If the bill does impose such a requirement, it is an end run around ongoing federal litigation concerning a regulatory mandate that providers dispose of all "fetal tissue" by burial or cremation.[28] That mandate has been enjoined as unconstitutional for many reasons that would apply to S.B. 258: the "weak purported benefit" of requiring burial or cremation, if there is a benefit at all, is far outweighed by the burden on providers to secure and manage contracts for burial or cremation, which will "increase costs" and "create potentially devastating logistical challenges for abortion providers throughout Texas."[29]

The bill further requires that abortion providers inform a woman about the cost of burial and cremation, then provide her with the opportunity to ask for financial help by informing a nonprofit organization of her name, her personal contact information, and the fact that she had an abortion. This bill clearly exposes women to harassment.

Nonprofit organizations that offer to pay for tissue burial are likely to have the strong view that a previability fetus should be treated like a person. This bill does nothing to regulate who would receive this otherwise confidential, and in any case very sensitive, medical information.[30] More importantly, the bill does nothing to regulate how the recipients of this information could use it: under the bill as written, lists of women who received abortions could be published, sold, or distributed without limitation, and the recipients of this information would be free to contact a woman to harass her or proselytize.

The bill is so lacking in basic privacy protections that it will undoubtedly facilitate public humiliation by misleading a woman into waiving her privacy rights. It is troubling that the bill requires a woman to disclose her identity and communicate with these nonprofit organizations directly, rather than allowing providers to rely on nonprofit organizations for third-party reimbursement. Without some mechanism to avoid the significant harm that would result from

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[26] *Cf. Whole Woman's Health v. Hellerstedt*, 2017 WL 462400 at *9 (crediting evidence that required burial or cremation could "cause women grief and shame, possibly discouraging them from obtaining . . . abortions and miscarriage management"); *Planned Parenthood Se., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1289 (discussing humiliation and emotional trauma as substantial obstacles to abortion and citing *Casey*, 505 U.S. at 886).
[27] *E.g. Margaret S. v. Treen*, 597 F. Supp. 636, 668–671 (E.D. La. 1984) (holding that unconstitutional burden imposed by similar requirement that a woman choose the disposition method); *Leigh v. Olson*, 497 F. Supp. 1340, 1351–52 (D.N.D. 1980) (same); *Margaret S. v. Edwards*, 488 F. Supp. 181, 222–23 (E.D. La. 1980) (same).
[28] *Whole Woman's Health v. Hellerstedt*, 2017 WL 462400 at *2–*4.
[29] *Id.* at *10.
[30] *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 553 (9th Cir. 2004) (noting abortion patients' medical information is "obviously very sensitive"); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1357 (M.D. Ala. 2014) ("[I]n light of the pervasive anti-abortion sentiment among many in Alabama, such disclosures may present risks to women's employment and safety."); *Margaret S. v. Edwards*, 488 F. Supp. 181, 204 (E.D. La. 1980) ("One of the most personal matters that can be disclosed is the fact that a woman is seeking an abortion.")

misuse of a woman's medical records and personal contact information, this provision constitutes an undue burden.[31]

S.B. 8 Restricts Lifesaving Research Without Any Rational Basis

S.B. 8 makes it a felony for anyone—including medical researchers—to reimburse healthcare providers for certain tissue that could be used for potentially lifesaving medical research.[32] Specifically, the bill bans reimbursement for even a single cell of "human fetal tissue, placenta, or umbilical cord" from a licensed abortion facility, while permitting reimbursement to a hospital or ambulatory surgical center; and it bans reimbursement for tissue resulting from "elective abortions," while permitting reimbursement for tissue resulting from other abortions or miscarriages.[33]

This law punishes a woman who exercises her right to terminate her pregnancy, and it does so arbitrarily. This bill prevents medical professionals from respecting the wishes of a woman who seeks to donate tissue resulting from an abortion. There is no legitimate reason to prohibit reimbursement of costs for donation of tissue from abortions, or from miscarriages and non-"elective" abortions that occur in abortion facilities. A criminal law is already in place that prohibits profiting off of tissue donation, but permits reimbursement of expenses incidental to the donation.[34] There is no legitimate purpose for creating a special exception targeting abortions, and ratcheting the penalty up to a state jail felony. Moreover, without a definition for "elective" abortion, this law will unconstitutionally chill medical research, which is a protected First Amendment activity. Medical researchers will likely refrain from procuring and using tissue that would otherwise be permissible to use, just because they are unsure about exactly what tissue procurement is prohibited by law.

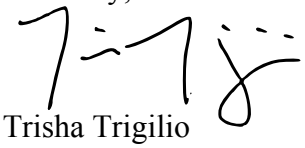
Conclusion

All Texans want their government to support a woman's health and well-being. Instead of passing laws that interfere with a woman's ability to access the medical care she needs, we urge the state to focus on making sure that each woman is supported and respected in her personal decisions about reproductive health care. And instead of enacting and defending still more

[31] *See Casey*, 505 U.S. at 886, 890 (noting harassment by antiabortion advocates, and confidentiality of patient records, as bearing on the burden of an abortion regulation); *Danforth*, 428 U.S. at 80 (upholding recordkeeping and reporting provisions in part because they "are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible").
[32] These tissues have been used to develop vaccines for polio, measles, and rubella; current research projects include a vaccine for Ebola and HIV. *See generally* Heather D. Boonstra, *Fetal Tissue Research: A Weapon and a Casualty in the War Against Abortion*, GUTTMACHER POLICY REVIEW (Feb. 9, 2016), https://www.guttmacher.org/gpr/2016/fetal-tissue-research-weapon-and-casualty-war-against-abortion ("Fetal tissue has also been used to develop vaccines that have saved and improved the lives of billions of people worldwide.").
[33] The bill does not define "elective abortion."
[34] Tex. Penal Code § 48.02(c).

constitutionally suspect regulations of abortion providers, we urge the state to heed the warning in *Whole Woman's Health:* laws with the purpose or effect of creating substantial obstacles to abortion access "cannot survive judicial inspection."[35]

Sincerely,



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[35] 136 S. Ct. at 2321 (Ginsburg, J., concurring).