

BresnenAssociates

January 16, 2024

Mr. Brint Carlton, Executive Director
Texas Medical Board
1801 Congress, Suite 9.200
Austin, Texas 78701

Via email: Brint.Carlton@tmb.state.tx.us

Re: Petition for rulemaking to ensure critical care to pregnant females and implement medical emergency exceptions to laws that otherwise punish those who perform abortions.

Dear Mr. Carlton:

This is a petition for rulemaking authorized by §2001.021(a), Government Code. We are interested persons within the meaning of §2001.021(d), Government Code. We have attached to this petition the rules we propose for Texas Medical Board adoption.

Brief Summary of the Proposed Rules

The proposed rules address "medical emergency exceptions" to statutes that otherwise ban abortions and provide clear guidance to physicians and pregnant females by:

- Clarifying when a medical emergency exception authorizes a physician to perform an abortion that would otherwise be prohibited.
- Codifying five elements of a recent Texas Supreme Court opinion construing a medical emergency exception to a statute making it a felony to perform an abortion.¹
- Identifying many of the conditions that may constitute medical emergency exceptions.²
- Identifying steps physicians may take to ensure their medical judgments are within the "reasonable medical judgment" required by a statutory exception.³
- Banning harassment and frivolous actions by prohibiting vague and unsubstantiated claims against physicians and requiring detailed complaints supported by legally sufficient evidence that an abortion was not protected by a medical emergency exception.⁴

The proposed rules do not authorize the performance of an abortion that is not permitted by a medical emergency exception or narrow a physician's authority to perform an abortion.⁵

¹ §190.19(a)-(c) in the proposed rules attached.

² §190.21 in the proposed rules attached.

³ §190.19 in the proposed rules attached.

⁴ §190.22 in the proposed rules attached.

⁵ §190.18(b) in the proposed rules attached.

Authority to Adopt Rules

The authority for the Texas Medical Board (the "TMB") to adopt the rule we propose is provided by §§152.001(a) and 153.001, Occupations Code. See *In re State of Texas, et al., Case No. 23-0994, Texas Supreme Court, December 11, 2023, footnote 5 (hereinafter "the Cox" case)*. Using rulemaking, the TMB is authorized to *interpret* statutes applicable to the practice of medicine. See the definition of "rule" in §2001.003(6)(A)(i), *Government Code*. In addition, 22 T.A.C. §190.1(b) provides: "Pursuant to §§164.001 through 164.003, [Occupations Code], the board may adopt rules relating to the disciplinary authority to take action against a licensee."

We request the TMB publish for notice and comment the attached proposed rules and finally adopt the rule in the manner provided by the Administrative Procedures Act. See *Subchapter B, Chapter 2001, Government Code*.

Justification for the Proposed Rules

The statutory "medical emergency exceptions" (hereinafter, the "exceptions") to our State's near total ban on abortions are regarded by people on both sides of the abortion divide as leaving zero doubt that justice and public safety demand TMB rulemaking under the circumstances.

Pregnant females in life-threatening situations and the health care providers otherwise willing to save their lives simply cannot be required to stand idly in the void when the TMB has the authority to act and the duty to regulate medicine in this state *in the public interest*.

Calls for change: The Texas Supreme Court expressly called for TMB action in *Cox*,⁶ in which the Court *partially* construed a medical emergency exception to a felony abortion prohibition.⁷ Senator Bryan Hughes, Senate sponsor of a medical emergency exception, called for TMB action in a letter to the TMB dated August 4, 2022. Prior to the 2023 regular legislative session, Governor Greg Abbott was quoted by *Spectrum News* calling for the need to clarify the exception; HB 3058,

⁶ "The courts cannot go further by entering into the medical-judgment arena. The Texas Medical Board, however, can do more to provide guidance in response to any confusion that currently prevails.⁵ Each of the three branches of government has a distinct role, and while the judiciary cannot compel executive branch entities to do their part, it is obvious that the legal process works more smoothly when they do."

⁷ Health and Safety Code: §170A.002(a), prohibits abortions; §170A.002(b)(2) is the central element of the exception; §170A.004 imposes felony punishment for prohibited abortion.

88th Legislature, Regular Session, only provided a partial answer to a medical situation within the statutory definition of "abortion."

TMB's recent response is insufficient: Against these leaders' calls for clarity, TMB Chairman Dr. Sherif Zaafran was quoted by the *Texas Tribune* on December 21, 2023, as saying: "It wouldn't be appropriate for us to start making any kind of movement or decisions *while all that is out there still being adjudicated.*" *In fact, regulatory delay in providing brighter lines is exacerbating litigation.*

The Texas Supreme Court made clear its negative opinion of that approach in the *Cox* case. Delay in favor of litigation is at least as unacceptable to many pregnant females and their physicians. The flood of litigation threatened by the so-called "private" enforcement provisions of Subchapter H, Chapter 171, Health and Safety Code, also makes further delay unacceptable as litigation is sure to be ongoing. In short, clarification through litigation is the least efficient, most costly and slowest path to good health care decision-making.

Binding interpretation requires rulemaking: In footnote 5 of the *Cox* opinion, the Supreme Court cited the TMB's "guidance" to physicians in its FAQs regarding COVID 19 during the pandemic. In that "guidance," the agency notified its licensees of various waivers from TMB's adopted administrative rules, i.e., that it would *not* exercise its authority under its otherwise valid rules at that time. The *legal* authority to grant such waivers was provided by Chapter 418, Government Code, based on the Governor's COVID 19 Disaster Declaration. The FAQs were not just mere guidance; they had legal effect derived from Chapter 418.

For the TMB to lawfully enforce, and patients and health care providers to rely on, the agency's "guidance" and to interpret the substantive matters presented by the medical emergency exceptions requires rulemaking under the Texas Administrative Procedures Act.

Reducing barriers to practice: The rules we propose would also *further* the policies of Chapter 57, Occupations Code. By providing clear rules for patients and licensees, the rule would reduce barriers to the provision of a medical service authorized by statute (medical emergency abortions) and increase the number of participating physicians willing to provide those critical services. Given the obvious extreme downside risks to physicians being second-guessed by the agency, prosecutors and private litigants--*even when authorized by a medical emergency exception*--addressing the language of those exceptions by rule will reduce the extraordinary personal and financial costs incurred by females forced to leave the state to obtain those services in the absence of willing health care providers.

Refinement through public comment: Finally, publishing the proposed rule will give notice and opportunity for comment by Texas women and their stakeholder families, medical professionals and their associations, attorneys and other interested persons to ensure a complete listing of conditions, clear terminology, appropriate applicability, proper coverage of affected licensees, and enforceability. We welcome improvements that further the purpose of our proposed rules.

Placement of the Proposed Rules

Chapter 164, Occupations Code, is part of the Medical Practice Act. *See §151.001 et seq., Occupations Code.* Section 164.052(a)(16) of that chapter prohibits a physician or applicant for a physician's license from performing, procuring, aiding, abetting, or attempting to perform, procure, aid or abet a "criminal abortion." Section 164.051(a)(2)(A) of the chapter bars a person who commits a felony from licensure as a physician. (Chapters 170A and 171, Health and Safety Code, define what constitutes "criminal abortions;" §164.052(a)(16) refers and classifies them as felonies.) In addition, §164.051(a)(8) allows the agency to discipline a physician for so-called private enforcement lawsuits regarding abortion under Subchapter H, Chapter 171, Health and Safety Code, which contains a medical emergency exception to liability. *See §§171.002(3) and 171.205(a), Health and Safety Code.*

22 T.A.C. §190.1(a)(3) provides that the purpose of Chapter 190 is: "... (3) provide guidance as to the types of conduct that constitute violations of *the Medical Practice Act...or board rules.*" Section 190.8 of that chapter contains "violation guidelines." Those violations include the felonies referred to above in the Medical Practice Act and "other statutes regulating or pertaining to the practice of medicine." *See Board Rule §190.8(2)(R)(iii); with regard to so-called private enforcement of abortion prohibitions, see Board Rule §190.8(5).*

Given the statutes and rules cited above, it is appropriate to place the proposed rule in 22 T.A.C. Chapter 190. The proposed rule would enact a new Subchapter E to accomplish that placement.

Requests

(1) We request that the TMB initiate the rulemaking process as provided by law. The TMB has both the authority and the duty to the public and Texas physicians to address these life-threatening issues. Adoption of the rules we propose would fulfill the TMB's responsibilities assigned by the Legislature.

(2) We request the TMB to cause in-depth discussions of proposed rules regarding statutory exceptions of otherwise prohibited abortions, including:

- Using the informal conference and consultation processes described by §2001.031(a), Government; and
- Providing for a public hearing on such proposed rules as provided by §2001.029(b), Government Code, either at the agency's initiation or by request of an association described by that section, which we can provide.

(3) Should the agency decline to initiate rulemaking in response to this petition, we request a complete and detailed explanation for its reasoning. *See §2001.021(c)(1), Government Code.* The Legislature has enacted exceptions; the Legislature has given the TMB the power to adopt rules

1.16.24

regarding those exceptions; and, the Supreme Court has asked the TMB to use that power. If the TMB fails to do so, it should clearly explain to the Legislature and the public-- in specific terms -- what there is about the statutory exceptions that are making them practically unworkable standing alone.

Please do not continue to allow an untenable void in the policies of the State of Texas regarding the medical emergency exceptions to otherwise prohibited abortions.

Sincerely,



Amy Bresnen
Attorney at Law



Steve Bresnen
Attorney at Law

Cc: Mr. Scott Freshour, General Counsel, Texas Medical Board
Via email: Scott.Freshour@tmb.state.tx.us

**PROPOSED RULE:
RELATING TO MEDICAL EMERGENCY EXCEPTIONS TO OTHERWISE PROHIBITED ABORTIONS**

Chapter 190 of Part 9 of Title 22, Texas Administrative Code, is amended to add a new SUBCHAPTER E. CERTAIN EXCEPTIONS REGARDING ABORTION to read as follows:

SUBCHAPTER E. CERTAIN EXCEPTIONS REGARDING ABORTIONS

RULES

§190.17. PURPOSE; AUTHORITY TO PROVIDE ABORTION. (a) The purpose of this rule is to regulate the practice of medicine authorized by law as described by Subsection (b) and implement those statutes that provide a medical emergency exception to prohibitions related to performing, inducing or attempting abortions.

(b) A physician may perform an abortion when, in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.

(c) Subsection (b) does not affect the duty of a physician who performs an abortion authorized by that subsection to comply with §170A.002(b)(3), Health and Safety Code.

§190.18. APPLICABILITY. (a) This rule implements the board's authority pursuant to §§152.001, 153.001, and 164.001 - 164.003, of the Act, and §190.1(a)(3) and (b) of this chapter (relating to providing guidance through rulemaking), by interpreting statutory terms, as described by §2001.003(6)(A)(i), Government Code, to implement legislative intent and provide guidance to licensees, the public and the courts regarding the authorization described by §190.17(b) of this chapter.

1 (b) This subchapter may not be construed to:

2 (1) restrict a physician's authority to practice medicine related to an abortion conferred
3 by an applicable medical emergency exception; or

4 (2) authorize the performance of an abortion that is not authorized by an applicable
5 medical emergency exception.

6 (c) This subchapter applies to:

7 (1) the practice of medicine as authorized by a statutory exception to otherwise
8 prohibited abortions that is described by §190.17(b) of this chapter and statutes that are the
9 substantive equivalent of the authority described by §190.17(b) of this chapter, despite
10 differences in language that do not affect the practical application of the exception for purposes
11 of this subchapter, including:

12 (A) §170.002(b)(2), Health and Safety Code;

13 (B) §170A.002(b), Health and Safety Code; and

14 (C) §§171.002(3) and 171.205, Health and Safety Code;

15 (2) §164.051(a)(2)(A), Occupations Code (addressing felony conduct)

16 (3) §164.052(a)(16), Occupations Code (prohibiting certain acts related to "criminal
17 abortions");

18 (4) the following provisions of Chapter 190, Part 9, Title 22, Texas Administrative Code:

19 (A) §190.8(2)(R)(i) (felonies);

20 (B) §190.8(2)(R)(iii) (criminal violations of the Act or other statutes regulating practice);

21 (C) §190.8(2)(R)(iv) (other criminal violations); and

22 (D) §190.8(6) (discipline for criminal convictions).

1 (d) This subchapter does not affect the standard of care applicable to the provision of
2 medical care.

3 §190.19. REASONABLE MEDICAL JUDGMENT. (a) A medical judgment described by
4 §190.17(b) of this chapter must be objectively reasonable.

5 (b) The authorization described by §190.17(b) of this chapter does not require that:

6 (1) the death of the pregnant female, or the impairment of a major bodily function of the
7 pregnant female, be imminent absent an abortion;

8 (2) any adverse effects of the condition be immediate, fully manifest or practically
9 irreversible before an abortion may be performed;

10 (3) the physician's judgment regarding the condition conform to a standard of medical
11 certainty; or

12 (4) the physician consult with, or agree with, another health care provider's judgment
13 before performing an abortion.

14 (c) A medical judgment described by §190.17(b) of this chapter is not unreasonable solely
15 because the judgment:

16 (1) anticipates the development of a life-threatening physical condition aggravated by,
17 caused by, or arising from a pregnancy that would place the female at risk of death; or

18 (2) estimates the extent to which that condition will pose a serious risk of substantial
19 impairment of a major bodily function.

20 (d) A condition may be determined to be aggravated by a pregnancy if:

21 (1) the pregnancy directly affects the condition; or

1 (2) withholding or altering treatment of the condition because of the effect of the
2 treatment on the fetus will leave the condition insufficiently treated.

3 (e) Criteria that are relevant in determining whether a medical judgment described by
4 §190.17(b) of this chapter was objectively reasonable include, but are not limited to:

5 (1) the judgment is:

6 (A) within the physician's competence based on the physician's education, experience,
7 and training; or

8 (B) supplemented by consultation with one or more other health care providers whose
9 judgment is within the consulting providers' competence based on the consulting providers'
10 education, experience and training;

11 (2) to the extent required by law under the circumstances, whether informed consent is
12 obtained from the patient or the patient's legal representative;

13 (3) whether the patient and the patient's available medical records were examined in a
14 manner that was indicated under the circumstances;

15 (4) as warranted under the circumstances, whether indicated diagnostic methods were
16 performed and the results considered in making the judgment, such as:

17 (A) laboratory tests;

18 (B) ultrasounds;

19 (C) computer tomography scans;

20 (D) X-rays, including angiograms;

21 (E) echocardiograms;

22 (F) magnetic resonance imaging;

1 (G) positron emission tomography scans;

2 (H) electroencephalograms; or

3 (I) magnetoencephalography;

4 (5) whether the physician consulted other appropriate materials, including medical
5 journals subject to peer review and publications by medical professional associations, in making
6 the judgment;

7 (6) whether the presence of urgent, emergent or exigent circumstances may have affected
8 an activity or judgment described by this subsection; and

9 (7) whether other activities were taken and information considered that a reasonable
10 physician would take or consider under the same or similar circumstances of the case.

11 (f) This section does not limit the exercise of professional judgment authorized by
12 §190.17(b) of this chapter.

13 §190.20. MAJOR BODILY FUNCTIONS. The term "major bodily function" includes functions
14 of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain,
15 respiratory, circulatory, endocrine or reproductive system.

16 §190.21. CONDITIONS COVERED BY AN EXCEPTION. (a) Subsection (b) constitutes a non-
17 exhaustive list of conditions that may be within the meaning of §190.17(b) of this chapter if:

18 (1) the condition standing alone would meet the requirements of that subsection; or

19 (2) the requirements of that subsection would be met by a listed condition in combination
20 with one or more other conditions, whether listed or not.

21 (b) Conditions described by Subsection (a) may include, without limitation:

22 (1) preterm premature rupture of membranes;

- 1 (2) pre-eclampsia;
- 2 (3) eclampsia;
- 3 (4) sepsis or infection;
- 4 (5) ectopic pregnancy at any location;
- 5 (6) hemorrhaging;
- 6 (7) heart and cardiovascular conditions;
- 7 (8) pulmonary disease;
- 8 (9) liver disease or dysfunction;
- 9 (10) mirror syndrome;
- 10 (11) peripartum cardiomyopathy;
- 11 (12) cancer;
- 12 (13) hypertension and any other potential cause of stroke;
- 13 (14) embolism, whether pulmonary, amniotic or brain;
- 14 (15) uterine rupture;
- 15 (16) molar pregnancy; and
- 16 (17) stroke.

17 §190.22. COMPLAINTS. (a) In addition to the requirements of Chapter 178 of this title, a
18 complainant who alleges that an exception described by §190.17(b) of this chapter was
19 inapplicable to an abortion shall state in the complaint whether the complainant alleges:

- 20 (1) the pregnant female's condition:
- 21 (A) did not place the pregnant female at risk of death unless the abortion was performed
22 or induced;

1 (B) was not aggravated by or caused by, or did not arise from, the pregnancy; or

2 (C) with respect to a major bodily function:

3 (i) there was no risk of impairment or the risk of impairment was not serious; or

4 (ii) any impairment of a major bodily function would not have been substantial; or

5 (2) any other reason the medical judgment of the physician to perform or induce the

6 abortion was not reasonable as required by Subsection 190.17(b) of this chapter.

7 (b) For a complaint to be jurisdictional:

8 (1) the complainant shall provide with the complaint and state with particularity:

9 (A) the specific basis for each element described by Subsection (a) that is alleged by the
10 complainant; and

11 (B) provide evidence in support of each such element that would be admissible in a judicial
12 proceeding; and

13 (2) if the complaint relies on expert opinion as proof of one of more elements of the
14 allegations, the complainant shall, with the complaint, disclose the expert's identity and the
15 credentials that qualify the person as an expert.

16 (c) Hearsay is not sufficient to comply with the jurisdictional requirements of Subsection

17 (b) absent an applicable hearsay exception in the rules of evidence.

18 (d) Expert testimony submitted by the claimant in support of an allegation that does not
19 comply with the rules of evidence regarding expert qualifications and the admissibility of expert
20 testimony in a judicial proceeding shall be deemed inadmissible for purposes of Subsection (b).

21 (e) A complaint that does not satisfy the jurisdictional requirements of this section shall
22 be dismissed in the manner provided by §178.7 of this title.

1.16.24

- 1 (f) A complaint under this section does not render the exception described by Subsection
- 2 190.17(b) of this chapter inapplicable solely because another physician would have made a
- 3 different judgment under the circumstances presented by the case.