

All know that by a 5-3 vote, the U.S. Supreme Court in June struck down as “undue burdens” on the exercise of reproductive rights the State of Texas’s 2013 restrictions on abortion facilities. Those rules required facilities to meet illogical physical premises requirements and to have physicians with local hospital admitting privileges – privileges the Court deemed to play “no relevant credentialing function.” (*Whole Woman’s Health v. Hellerstedt*, 579 U.S. __ (2016).) The Court found that both requirements were constitutionally proscribed because they were medically unnecessary and placed “a substantial obstacle in the path of women seeking an abortion” by imposing costs that forced clinic closures.

Few know, however, that while Justice Breyer’s signature on the majority opinion was still drying, the losing State defendant/respondent was at it again, applying its Texas-sized imagination to devise new forms of pretextual regulation to make provision of abortion services difficult, expensive, and further stigmatized. This time, the bizarre vehicle of choice is environmental law: amendment of an obscure subchapter of the state’s administrative code on “special waste from health care-related facilities,” which governs the treatment and disposition of wastes from sources as varied as hospitals, tattoo parlors, pharmacies, and veterinary labs. (Texas Admin. Code, tit. 25, §§ 1.132-1.137.)

Prior to July 2016, Texas health care waste regulations included in the definition of “pathological waste” all human materials removed during surgery, labor, delivery, and autopsy, ranging from a diseased kidney to a healthy placenta to a fetus from spontaneous or induced abortion. Because of the possibility of infectious disease transmittal from biological waste, the regulations specified multiple “Approved Methods of Disposal and Treatment.” Their common feature was insuring disinfection (through chemical/steam/desiccation processes, or super-heating), followed by cremation, burial (“interment”), or disposal in a sanitary landfill.

As proposed on July 1, however, Texas’s regulations would be amended to treat “fetal tissue, regardless of the period of gestation” as a separate category of waste (distinct even from “placenta, umbilical cord and gestational sac”), and eliminate the option of landfill disposal. Instead, all fetal tissue would need to be either: (1) incinerated and then interred; (2) steam disinfected and then interred; (3) cremated; or (4) interred.

As a matter of politics, the requirement that fetal remains receive a funeral-like disposition is an ingenious means of simultaneously fortifying fetal personhood as a legal status and driving up costs for abortion providers. As a matter of environmental health, however, the regulations are stupefyingly indefensible: option (4) – simple interment, with no biological deactivation required — *increases* disease transmission risk as compared to existing

regulations. (Presumably this is why the proposed rule's cursory Regulatory Analysis states that the amendment "is not intended to protect the environment or reduce risks to human health from environmental exposure.")

The comment period on the proposed regulations has now closed. If they become final, litigation by pro-choice activists will likely be immediate. Calls to the environmental law bar for expert declarations and amicus briefs will not be far behind.