EXHIBIT K

DEPARTMENT OF HEALTH, CENTER FOR HEALTH PROTECTION

SUBJECT: Abortion Facilities in Arkansas – Fetal Tissue Disposal

DESCRIPTION: This clarifies that abortion facilities are not responsible for fetal remains expelled away from their facilities.

PUBLIC COMMENT: The Department had a public hearing on November 13, 2017, and the public comment period expired on that date. The Department received two written comments:

Bettina Brownstein, an attorney representing Little Rock Family Planning Services, stated the following in an October 23, 2017, letter regarding the proposed revisions to the Rules and Regulations for Abortion Facilities in Arkansas promulgated pursuant to Act 535 of 2015 and Act 603 of 2017:

> The enforcement of Act 603 was preliminarily enjoined by order of the Eastern District of Arkansas on February 28, 2017. The Court found that Act 603 was likely to be found unconstitutionally vague. This order has been appealed. However, only until such time and only if the February 28, 2017, order is reversed would Act 603 go into effect. Of course, the enforcement of any ADH rules and regulations implementing Act 603 is contingent on the federal court's decision, and no rule or regulation can go into effect absent a court order upholding its constitutionality.

Bettina Brownstein, as cooperating attorney for the ACLU of Arkansas, Susan Talcott Camp and Ruth Harlow, of the American Civil Liberties Union Foundation, and Hillary Schneller, from the Center for Reproductive Rights, all serving as attorneys for Little Rock Planning Services, sent a November 13, 2017, letter submitting comments in response to the Notice of Public Hearing. The comments to the 2017 proposed rules for abortion facilities regarding tissue disposal stated the following:

These proposed changes, as summarized in the Notice, alter a definition, "add[] requirements for proper disposition of dead fetuses and fetal remains, and specif[y] circumstances under which the requirements are inapplicable." The Notice acknowledges that it relies on Act 603 of 2017 (referred to herein as the "Tissue Disposal Mandate") as purposed authority for these changes.

Our comments raise three objections in opposition to the noticed rulemaking. First, no public hearing, public comment process, or other regulatory action, should be occurring at this time, because the Tissue Disposal Mandate has been enjoined. The Department of Health's proposed rule and solicitation of input only cause confusion for abortion facilities, their physicians and their patients, at a time when the law and rules that pre-date the Tissue Disposal Mandate continue to govern. Second, even if the Department could proceed with a rules change, the proposal—like the Tissue Disposal Mandate on which it is based—would impose unconstitutional burdens on women, is inconsistent with other legal obligations of abortion facilities, and is unworkable. Third, to the extent that the Department may wish to clarify the application of any of its rules to medication abortions, versus surgical abortions, it must do so separate and apart from any reliance on the enjoined Tissue Disposal Mandate. The currently-proposed Subsection 6(O)(1), which attempts to differentiate medical from surgical procedures and waive tissue disposal requirements from medication abortions, shares the same flaws as the larger proposed Section 6(O).

EXHIBIT K

1. State Action to Enforce the Tissue Disposal Mandate is Barred By a Preliminary Injunction

As you know, the United States District Court for the Eastern district of Arkansas in *Hopkins v. Jegley*, Case No. 4:17-cv-00404-KGB, has found Dr. Hopkins likely to succeed in striking down the Tissue Disposal Mandate as unconstitutional. That Court found that the Mandate likely imposes an unconstitutional undue burden on Arkansas abortion patients and is impermissibly vague. The Court entered a preliminary injunction enjoining enforcement of any of the Tissue Disposal Mandate's requirements on July 28, 2017. The Court ordered the direct defendant in the litigation, including the Prosecuting Attorney for Pulaski County and all members of the Arkansas State Medical Board, "to notify immediately all state officials responsible for enforcing [the Tissue Disposal Mandate] about the existence and requirements of the preliminary injunction," which remains in force today and prohibits enforcement of the Mandate. An appeal has been filed, and it will likely be years before the *Hopkins v. Jegley* litigation is finally resolved.

In light of the preliminary injunction, the Tissue Disposal Mandate, including as it sought to amend Ark. Code Ann. §§20-17-801 and -802, currently has no regulatory force or effect. The prior version of Sections 801 and 802 continue to govern the operation of abortion facilities and you Department's oversight of them. In particular, the pre-existing Subsections 801(a)(1)(A), 801(a)(3), and 802 (a), as provided in Act 535 of 2015, specify that physicians and facilities disposing of tissue after an abortion "shall ensure that the fetal remains and all parts are disposed of in a fashion similar to that in which other [human] tissue is disposed and in a respectful and proper manner," including by directly releasing the human tissue for incineration, cremation or other specified methods of tissue disposal.

It was only with the Tissue Disposal mandate enacted in 2017 that Arkansas attempted to require that tissue from an abortion be "disposed of in accordance with the provisions of Ark. Code Ann. §20-17-102[,]" the Final Disposition Rights Act ("FDRA"). The Department's proposed new Part O in Section 6 of the Rules and Regulations for Abortion Facilities attempts to impose such a requirement of ensuring compliance with the FDRA, but doing so now, by regulation, is contrary to the currently-governing version of Sections 801 and 802. Those statutes govern how facilities and physicians who provide abortions are to dispose of embryonic and fetal tissue (with patients having 48 hours in some instances to direct otherwise), and apply the general standards quoted in the previous paragraph. The FDRA, by contrast, describes an elaborate system of determining control over one's own eventual remains or over the dead bodies of next of kin, and is directed at funeral homes and crematoria, not health care providers.

Of course, a regulation cannot amend a statute by rulemaking, nor can a regulation specify requirements that are contrary to statute. *See Yamaha Motor Corp., U.S.A. v. Richard's Honda Yamaha*, 344 Ark. 44, 56, 38 S.W.3d 356, 363 (2001) ("an administrative regulation cannot be contrary to statute"); *State ex rel. Atty. Gen. v. Burnett*, 200 Ark. 655, 140 S.W.2d 673, 675 (1940) (striking as void a rule that attempted to amend the governing statute). The proposed new Section 6(O) should be withdrawn and considered no further, because there is no statutory authority for it. It contradicts the currently governing law in Section 801 and 802.[1]

2. Proposed Section 6(O) Is Not Only Contrary to Current Governing Law, But Suffers from the Same Defects as the Enjoined Mandate

As exhaustively shown in the *Hopkins v. Jegley* litigation, it is impossible for abortion physicians or facilities, in the context of that care, to ensure compliance with the FDRA and its rules for control over disposition of dead bodies. *See* 2017 WL 3220445 at *56-*68. For example, a woman's decision about whether to proceed with an abortion or continue her pregnancy is constitutionally protected as her own yet the FDRA introduces additional decision-makers into her abortion care, such as her sexual partner, or, if she and her sexual partner are minors, both her own parents and his parents. Attempting to comply with the FDRA would cause abortion facilities and their staffs not only to intrude upon their patient's autonomy, but also to breach physician-patient confidentiality. The FDRA, as another example, also includes cost-sharing and dispute-resolution mechanisms over which a physician or facility has no control, and that they cannot police to ensure compliance. Moreover, the FDRA was enacted to govern much different circumstances, and is repeatedly vague or inapposite as applied to physicians and health care facilities. As the District Court found, it fails to explain to either providers or enforcement authorities what exactly is required or forbidden. 2017 WL 3220445 at *67.

Proposed Section 6(O) has all the same failings, because it states only that, "Each facility shall ensure that each dead fetus or fetal remains are disposed of in accordance with the provisions of Ark. Code Ann. §20-17-102" – the FDRA – but adds no clarity or explanation as to how that might conceivably occur. The proposed regulation is therefore itself unconstitutionally vague, and threatens to impose the same undue burdens as the Tissue Disposal Mandate if it were ever allowed to become final and effective. The Department should, instead, withdraw the proposed regulation.

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[1] To the extent that the Department wishes to clarify the regulatory definition of "dead fetus" in Part F of Section 3 ("Definitions'), to become a definition of both "dead fetus and fetal remains," the Department has the statutory authority to do that under the currently governing versions of Sections 801 and 802, which came from Act 535 of 2015. Act 535 is also references in the Notice of Public Hearing for November 13, 2017. Such amendment of that definition, however, which tracks Section 801(b)(2)(A) and reflects the use of the phrase "fetal remains" elsewhere in Sections 801 and 802, will not affect how tissue disposal currently occurs.

3. Subsection (1) Also Rests on Flawed Authority; It Confuses Further with "Human Remains"

Subsection 6(O)(1) attempts to carve out medication abortions from the over-arching requirement of Section 6(O), and thus is attempting to limit the Departments' regulation and oversight of tissue disposal. But that sub-part is part of a larger regulatory section that conflicts with the Constitution and is without current statutory authority. See supra Points 1 & 2. In addition, the Department does not have sole regulatory and enforcement authority with regard to the requirements of the Tissue Disposal Mandate, should they ever take effect. Thus, the Department cannot, without a court's intervention or the participation of all other enforcement authorities, unilaterally adopt a limiting construction of the Mandate.

The subsection also adds to the confusion created by the proposed regulations, because it references "human remains" when the definition in the proposed regulatory changes uses the terms "dead fetus or fetal remains[.]" That definition encompasses either embryonic or fetal tissue, and under the current versions of the statutory Sections 801 and 802, such tissue also is included in the definition of "human tissue." Subsection 6 (O)(1)'s reference to "human remains," however, does not track any aspect of the currently-governing statutes that relate to tissue disposal after an abortion, and instead is a phrase used at time in the FDRA to reference an individual's body after death. Even this exclusion from Section 6(O)'s requirements, in light of its confusing content and lack of any proper statutory authority, cannot stand alone and should be abandoned.

If the Department sought to draft a new regulation specifying that its oversight of abortion facilities' proper disposition of embryonic and fetal tissue does not extend to tissue expelled or evacuated after a patient leaves the facility, as is the case in medication abortion, the Department could do so under the current governing statutes. The limitations in Section 801, for example, do not apply unless a physician or facility has acquired possession of the tissue, which would not occur when tissue passes outside the facility. Section 802's requirement is simply that "tissue be disposed of in a fashion similar to that in which other tissue is disposed," and that would encompass tissue, for example, passed through miscarriage at home and disposed there; the "same fashion" of disposal is permitted for tissue from a medication abortion. Thus, the objective of Subsection 6(O)(1) can be accomplished, but not pursuant to that subsection as proposed.

RESPONSE: The Department has no plans to enforce the controverted provisions until the matter is resolved.

The rule was filed under the emergency provisions of the Administrative Procedure Act on November 14, 2017, and will expire on March 14, 2018.

The proposed effective date for the final rule is March 15, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Health has the authority to make any and all necessary and reasonable rules and regulations of a general nature for the protection of the public health and safety. *See* Ark. Code Ann. §20-7-109(a)(1)(A).

The purpose of this proposed rule is to implement changes resulting from Act 603 of 2017, sponsored by Representative Kim Hammer, which requires "all dead fetuses be disposed of in accordance with the Arkansas Final Disposition Rights Act."

In addition to adding the requirements of Act 603, the Department states that the purpose is to clarify that abortion facilities are not responsible for the disposition of dead fetuses and fetal tissue when the evacuation occurs outside the presence of the inducing physician or away from the facility in which the physician administered the inducing medications. This proposed rule change also amends the current rules to include the legal definition of "dead fetus or fetal tissue" as defined by Ark. Code Ann. §20-17-801(b)(2)(A).

EXHIBIT K

QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS WITH THE ARKANSAS LEGISLATIVE COUNCIL AND JOINT INTERIM COMMITTEE

DEPARTMENT/AGENCY Department of Health

DIVISION Center for Health Protection/Health Facilities Section

DIVISION DIRECTOR Renee Mallory

CONTACT PERSON Robert Brech

ADDRESS 4815 West Markham, St., Slot 31, Little Rock, AR

PHONE NO. 501-661-2297 **FAX NO.** 501-661-2357 **E-MAIL** robert.brech@arkansas.gov

NAME OF PRESENTER AT COMMITTEE MEETING Robert Brech

PRESENTER E-MAIL robert.brech@arkansas.gov

INSTRUCTIONS

A. Please make copies of this form for future use.
B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.
C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Donna K. Davis
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

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1. What is the short title of this rule? Abortion Facilities in Arkansas

2. What is the subject of the proposed rule? Disposition of fetal tissue

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes ☐ No ☒
   If yes, please provide the federal rule, regulation, and/or statute citation. _____

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes ☒ No ☐
   If yes, what is the effective date of the emergency rule? 11-14-2017

   When does the emergency rule expire? 3-14-2018

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes ☒ No ☐

5. Is this a new rule? Yes ☐ No ☒
If yes, please provide a brief summary explaining the regulation. _____

Does this repeal an existing rule? Yes ☐ No ☒
If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does. _____

Is this an amendment to an existing rule? Yes ☒ No ☐
If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."**

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Act 603 of 2017

7. What is the purpose of this proposed rule? Why is it necessary? To clarify that abortion facilities are not responsible for fetal remains expelled away from their facilities.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).
http://www.healthy.arkansas.gov/aboutADH/Pages/RulesRegulations.aspx

9. Will a public hearing be held on this proposed rule? Yes ☒ No ☐
If yes, please complete the following:

Date: 11/13/2017
Time: 10:00
Place: Suite 801, 5800 West Tenth Street, Little Rock, Arkansas

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)
11/13/2017

11. What is the proposed effective date of this proposed rule? (Must provide a date.)
3/15/17

12. Do you expect this rule to be controversial? Yes ☐ No ☒
If yes, please explain. The Department is not aware of any significant controversy at this time regarding this rule.

13. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Department of Health
DIVISION Center for Health Protection/Health Facilities Section
PERSON COMPLETING THIS STATEMENT Robert Brech
TELEPHONE NO. 501-661-2297 **FAX NO.** 501-661-2357 **EMAIL:** robert.brech@arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Abortion Facilities in Arkansas

1. Does this proposed, amended, or repealed rule have a financial impact? Yes ☐ No ☒

2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes ☒ No ☐

3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes ☒ No ☐

   If an agency is proposing a more costly rule, please state the following:

   (a) How the additional benefits of the more costly rule justify its additional cost;
   N/A

   (b) The reason for adoption of the more costly rule;
   N/A

   (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;
   N/A

   (d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.
   N/A

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

   (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year		Next Fiscal Year	
General Revenue		General Revenue	
Federal Funds		Federal Funds	
Cash Funds		Cash Funds	
Special Revenue		Special Revenue	
Other (Identify)		Other (Identify)	

Total _____ Total _____

(b) What is the additional cost of the state rule?

Current Fiscal Year		Next Fiscal Year	
General Revenue	_____	General Revenue	_____
Federal Funds	_____	Federal Funds	_____
Cash Funds	_____	Cash Funds	_____
Special Revenue	_____	Special Revenue	_____
Other (Identify)	_____	Other (Identify)	_____
Total	_____	Total	_____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year	Next Fiscal Year
$ 0	$ 0

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6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year	Next Fiscal Year
$ 0	$ 0

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7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars ($100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes ☐ No ☒

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

(1) a statement of the rule's basis and purpose;

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

(3) a description of the factual evidence that:
    (a) justifies the agency's need for the proposed rule; and
    (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

(6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and

(7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
    (a) the rule is achieving the statutory objectives;
    (b) the benefits of the rule continue to justify its costs; and
    (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

PROPOSED REVISIONS TO
THE RULES AND REGULATIONS FOR ABORTION FACILITIES IN ARKANSAS

NOVEMBER 2017 EMERGENCY RULE

Act 603 of 2017 passed in the recent legislative session. The Act requires that all dead fetuses be disposed of in accordance with the Arkansas Final Disposition Rights Act and was to become effective on July 31, 2017. The Act is unclear if abortion facilities would be responsible for the disposition of dead fetuses and fetal tissue when the evacuation occurs outside the presence of the inducing physician or away from the facility in which the physician administered the inducing medications. This amendment makes it clear that the facility would not be responsible when that occurs.