IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FREDERICK W. HOPKINS, M.D., M.P.H.,	)	
	)	
Plaintiff,	)	Case No. 4:17-CV-00404-KGB
	)	
v.	)	
	)	
LARRY JEGLEY et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE A TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

INTRODUCTION

Plaintiff challenges four restrictions that, if allowed to take effect, would impose significant, and indeed, insurmountable obstacles to abortion care in Arkansas.

Plaintiff seeks a preliminary injunction, or in the alterative, a temporary restraining order, against enforcement of H.B. 1032 (the D&E Ban); a provision of H.B. 1434 (the Medical Records Mandate); H.B. 2024 as to certain of Plaintiff's patients (the Local Disclosure Mandate); and H.B. 1566 (the Tissue Disposal Mandate). Plaintiff moved on only Counts I, III, IV, VI, VIII, X and XI of the Complaint: his undue burden claims against all four restrictions; his vagueness claims against H.B. 1434 and H.B. 1566; and his informational privacy claim against H.B. 2024. *See* Pl.'s Mot. for Prelim. Inj. or Alt, TRO 1, June 20, 2017, ECF No. 2; Pl.'s Br. in Supp. of Mot. for Prelim. Inj. or Alt. TRO ("Pl.'s Br.") 1, June 20, 2017, ECF No. 3. Defendants filed an opposition to the motion for a preliminary injunction and, on the same day, a motion to dismiss.[1]

Defendants advance erroneous arguments on standing, sovereign immunity, and remedy that have repeatedly and consistently been rejected by the courts. Neither these jurisdictional/procedural arguments nor Defendants' unfounded insistence that the laws permissibly serve important state interests counter Plaintiff's motion: he has fully satisfied the

[1] The former largely incorporates the latter, and addresses even those Counts on which Plaintiff does not move for a preliminary injunction. *See* Defs.' Resp. in Opp. to Mot. for Prelim. Inj. ("Opp. Br.") 15-76, July 11, 2017, ECF No. 23; Defs.' Br. in Supp. of Mot. to Dismiss ("Mot. Dismiss Br.") 7-62, July 11, 2017, ECF No. 22. Plaintiff does not address here the merits of the claims on which he did not move: the bodily integrity claims (Counts II, VII, and XII); the informational privacy claim against the Medical Records Mandate (Count V); and the vagueness claim against the Local Disclosure Mandate (Count IX). Plaintiff will address those claims in his shortly-forthcoming opposition to the motion to dismiss. However, Plaintiff does show here that Defendants' arguments as to standing, remedy, sovereign immunity and pleading, most of which are repeated in both motions, do not create any obstacle for the preliminary injunction requested. *See infra* Points I, II.

Dataphase factors, entitling him and his patients to a preliminary injunction to maintain the status quo.

ARGUMENT

I. Plaintiff Has Standing to Bring the Claims and Seek the Relief at Issue.

Defendants' assertion that Plaintiff lacks standing to bring this § 1983 action on behalf of his patients ignores decades of well-settled precedent. Defendants argue that (1) Plaintiff does not satisfy the requirements to establish third-party standing to assert claims on behalf of his patients, Opp. Br. 15-18, Mot. Dismiss Br. 7-10; (2) Plaintiff cannot raise the rights of his patients under 42 U.S.C. § 1983, Opp. Br. 18-21, Mot. Dismiss Br. 10-13; and (3) the alleged injuries to Plaintiff are speculative, Opp. Br. 23-25, Mot. Dismiss Br. 15-17. But these arguments have been raised—and rejected—in numerous prior abortion cases brought by physician plaintiffs, including before this Court. *See, e.g.*, *Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-CV-00784-KGB, 2016 WL 6211310, at *10-11 (E.D. Ark. Mar. 14, 2016) (rejecting arguments that physician and clinic lacked third-party standing and could not raise rights of patients under § 1983 in challenge to medication abortion restriction), *appeal docketed*, No. 16-2234 (8th Cir. May 18, 2016); *Edwards v. Beck*, No. 4:13CV00224 SWW, 2013 WL 12141422, at *3-4 (E.D. Ark. May 15, 2013) (denying motion to dismiss and rejecting arguments that physicians did not demonstrate threat of imminent injury and did not have third-party standing to assert patients' rights in challenge to statute banning abortion at twelve weeks).

A. Under Decades of Controlling Precedent, Plaintiff Has Third-Party Standing to Assert the Claims of His Patients.

Defendants' argument that a physician cannot assert the rights of his patients clearly fails: Under a long-established rule, it is "appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Singleton v.*

Wulff, 428 U.S. 106, 118 (1976).[2] If Defendants were correct, then *every* case in which abortion providers sought injunctive and declaratory relief on behalf of their patients under 42 U.S.C. § 1983 over the past four decades was wrongly decided by the Supreme Court, and by the numerous lower courts following its precedent. Unsurprisingly, Defendants cannot cite a single case in support of this argument.

For more than forty years, physicians have been "routinely recognized as having standing to . . . challenge[] abortion statutes" and to have "*jus tertii* standing to assert their patients' due process rights" in doing so. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 917 (9th Cir. 2004); *see also Singleton*, 428 U.S. at 118 (allowing physicians to raise patients' rights in challenge to abortion reimbursement restriction).[3] *Singleton* explained the reasons. First, the close physician-patient relationship between abortion providers and their patients means that, "[a]side from the woman herself, the physician is uniquely qualified . . . to litigate the constitutionality of the State's interference with, or discrimination against, that decision." 428 U.S. at 117. Second, obstacles may prevent women from bringing their own claims, including concerns about anonymity and the potential mootness of the claims. *Id.* at 117-18; *see also id.* at 116 n.6 (recognizing that such obstacles do not necessarily make patients' assertion of their own

[2] While appearing to acknowledge that *Singleton v. Wulff* is controlling, Defendants treat it as a "but see" cite, and instead point to Justice Thomas's criticism of *Singleton*—made in his *dissent* in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), decided just one year ago, where the Court implicitly reaffirmed, once again, the principle for which *Singleton* stands. *See* Opp. Br. 16. Ideological opposition to controlling precedent does not constitute argument.

[3] *See also, e.g., Whole Woman's Health*, 136 S. Ct. at 2313, 2318 (adjudicating physicians' and clinics' § 1983 action against abortion restrictions on behalf of themselves and their patients); *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) (same); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (holding that "the physician-appellants clearly have standing" to challenge abortion restrictions); *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016); *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008); *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794 (8th Cir. 1999).

rights "in all practicable terms impossible," but holding that this is not the standard (internal quotation marks and citation omitted)).[4]

In the face of controlling law, Defendants nonetheless argue that Dr. Hopkins lacks a sufficiently close relationship with his patients because (a) they are "hypothetical"; (b) their interests allegedly diverge from his; and (c) he has purportedly shown no "hindrance" to their asserting their own rights. Defendants are wrong on all counts: Plaintiff is in the same position as plaintiff abortion providers in decades of challenges to abortion restrictions, and appropriately asserts his patients' rights.[5]

First, Defendants attempt to rely on *Kowalski v. Tesmer*, 543 U.S. 125 (2004)—which held that attorneys did not have third-party standing to assert rights of future clients—to argue that Plaintiff does not have a close relationship with "hypothetical future patients." Opp. Br. 15-16; Mot. Dismiss Br. 7-8. But *Kowalski* itself relies on *Doe v. Bolton*, 410 U.S. 319 (1973)—which held doctors had third-party standing to challenge an abortion restriction on behalf of their

[4] Further, third-party standing is appropriate "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)). This case presents precisely that situation: the challenged restrictions impose criminal and licensure penalties on physicians who provide abortion or miscarriage care in violation of the law, thereby violating their patients' right to obtain that care.

[5] Not one court—including this one—before which Defendants' argument has been raised in recent years thought it merited any serious treatment, for the simple reason that decades of binding case law holds to the contrary. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 793-94 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014); *id.* at 799 (Manion, J., concurring in part and in the judgment) ("I also agree with the court about third-party standing. There is no need for the parties to dwell on this issue."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) (argument raised in Br. of Defs-Appellants, 2013 WL 6228857, at *40-47); *Jegley*, 2016 WL 6211310, at *10 (rejecting argument Defendants make here); *Edwards*, 2013 WL 12141422, at *3-4 (same); *Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075, 1092-93 (D. Ariz. 2016) (rejecting similar attempts to "argue that this case is distinguishable from the litany").

patients—as an illustration of the *proper* application of third-party standing. Indeed, at the very outset of *Kowalski*, the Court affirms third-party standing in the abortion context and distinguishes it from the facts of that case. 543 U.S. at 130 (citing, *inter alia*, *Doe v. Bolton* and stating "[b]eyond these examples—*none of which is implicated here*—we have not looked favorably upon third-party standing") (emphasis added). Nothing in *Kowalski* undermines the ability of abortion providers to assert the constitutional rights of their patients.

Second, Defendants assert that when a state enacts regulations to protect patient health and to promote potential life—the only two recognized constitutionally permissible interests in this context—"the interests of physicians and patients diverge." Opp. Br. 17; Mot. Dismiss Br. 9. As noted above, this argument has been made and rejected repeatedly in abortion cases, including by this Court. *Jegley*, 2016 WL 6211310, at *10; *see also, e.g.*, *Abbott*, 748 F.3d at 589 n.9 (rejecting divergent interest argument because court was "convinced no [] conflict exists" between physician and patient interests); *Charles v. Carey*, 627 F.2d 772, 779-80 n.10 (7th Cir. 1980) (rejecting defendants' argument that medical providers lack standing to challenge law designed to "protect women from abusive medical practices"); *Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075, 1093 (D. Ariz. 2016) (rejecting similar argument as "spurious and amount[ing] to nothing but a poorly veiled attempt to litigate the merits in reverse").

As this Court has recognized, Defendants' argument would necessarily mean that third-party standing would *never* be appropriate in a challenge to any abortion restriction.[6] *Jegley*,

[6] Defendants' statement that abortion patients must have "autonomy to decide whether to invoke their constitutional rights against laws that were enacted for their benefit," Opp. Br. 17, is irrelevant to the third-party standing analysis. Moreover, *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978), which Defendants cite for this point, refers to *Singleton* as an example of proper third-party standing, *id*. at 80. In any event, Defendants' point is not

2016 WL 6211310, at *10 (observing that "this claim could be made with respect to any abortion regulation that purports to advance a valid state interest, but courts have repeatedly allowed abortion providers to challenge such laws"). So too for Defendants' argument that Plaintiff lacks standing because abortion providers will "oppose any law that limits their freedom to practice their trade." Opp. Br. 17; Mot. Dismiss Br. 9.[7] As decades of Supreme Court precedent make clear, the Court has never adopted that view of the provider-patient relationship and of third-party standing in challenges to abortion restrictions.

Third, Defendants assert that Plaintiff has not alleged that there is some "hindrance" that would "prevent" patients from protecting their own interests. Opp. Br. 18; Mot. Dismiss Br. 10. But *Singleton* makes plain that the hindrance prong is satisfied in abortion cases. 428 U.S. at 117. There, the Court explained this prong was met irrespective of whether, for example, "[s]uit may be brought under a pseudonym," because an obstacle need not be "insurmountable" to make third-party standing appropriate. *Id*.; *see also Edwards*, 2013 WL 12141422, at *3.

B. Under Well-Established Precedent, Plaintiff Can Assert the Third-Party Rights of His Patients Under Section 1983.

Again in the face of decades of precedent to the contrary, Defendants contend that 42 U.S.C. § 1983 affords Plaintiff no statutory cause of action to assert his patients' rights. Again, this Court has seen and rejected this argument before. *Jegley*, 2016 WL 6211310, at *11.

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new—the relationship between physicians and their abortion patients has always been thus, and has not barred third-party standing.

[7] Defendants' analogy to the merchant-consumer relationship is also simply wrong: a vendor *may* assert the constitutional rights of consumers. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683-84 & n.4 (1977) (allowing corporation to challenge prohibition on distribution and advertising of contraceptives on behalf itself and potential consumers); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (allowing vendors to challenge restriction on sale of beer to males on behalf of male customers).

The Supreme Court has repeatedly allowed abortion providers to raise the rights of their patients in cases brought under § 1983,[8] including in those cases discussed above in which the Court expressly affirmed that abortion providers have third-party standing. Indeed, *Singleton* itself was brought under § 1983. *See Wulff v. State Bd. of Registration for Healing Arts*, 380 F. Supp. 1137, 1139 (E.D. Mo. 1974), *reversed by Singleton*, 428 U.S. 106.

Defendants effectively claim that these cases were wrongly decided and that the plain meaning of § 1983 precludes Plaintiff from raising his patients' rights. As this Court has said, "[t]here is no language in the statute that supports this argument." *Jegley*, 2016 WL 6211310, at *11. Section 1983 states in relevant part: "Every person who . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be *liable to the party injured* . . . ." 42 U.S.C. § 1983 (emphasis added). The statute does not limit who may bring suit, but only describes to whom defendants may be liable. In most cases, that will be the same party. In cases like this, however, where courts permit third-party standing, Plaintiff may bring a claim under § 1983 on behalf of his patients, who are the "injured" parties to whom defendants "shall be liable." There is nothing in § 1983 that precludes plaintiffs, in the limited cases in which third-party standing is permitted, from bringing those claims under § 1983.

Defendants fail to cite one case in which a plaintiff established third-party standing but was denied a cause of action under § 1983. Instead, Defendants seek to support their novel theory—that all § 1983 actions brought by abortion providers against abortion restrictions were wrongly decided—with statements made in inapposite decisions and taken out of context. *See*

[8] *See e.g., Whole Woman's Health*, 136 S. Ct. 2292; *Gonzales*, 550 U.S. 124; *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 324-25 (2006) (noting that plaintiffs raised patients' claims in suit under 42 U.S.C. § 1983); *Bellotti v. Baird*, 428 U.S. 132, 136 (1976) (same).

Opp. Br. 19-20. *Andrews v. Neer*, 253 F.3d 1052, 1056-58 (8th Cir. 2001), which concerned the survival of § 1983 claims following the death of the claim holder, is plainly irrelevant here.[9] Neither *Rizzo v. Goode*[10] nor *Advantage Media, L.LC. v. City of Eden Prairie*[11] addresses whether a party can assert third-party rights under § 1983. And *Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998), addressed the availability of § 1983 for collateral injuries, such as emotional distress suffered by family members who witnessed the violation of the victim's constitutional rights—a claim Plaintiff, who seeks to vindicate *direct* injuries to his patients' constitutional rights, does not make here.

None of the cases Defendants cite comes close to suggesting relief is unavailable under § 1983 where plaintiffs assert third-party standing. The contrary is true. *See, e.g.*, *Edwards v. Beck*, 786 F.3d 1113, 1116 (8th Cir. 2015) (adjudicating claims of "[t]wo Arkansas physicians, on behalf of themselves and their patients, [who] challenged the constitutionality of the [12-week abortion ban]" under § 1983), *cert. denied*, 136 S. Ct. 895 (2016); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 794 (2013) (third-party claims of abortion providers on behalf of patients are "litigable under 42 U.S.C. § 1983"), *cert. denied*, 134 S. Ct. 2841 (2014); *Jegley*, 2016 WL 6211310, at *11 (agreeing with *Van Hollen* and rejecting argument Defendants make here).

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[9] Even if it were relevant, *Andrews* looked to state law and determined that plaintiff *could* bring her deceased father's § 1983 claim. 253 F.3d at 1058.

[10] *Rizzo v. Goode*, 423 U.S. 362 (1976) (involving no assertion of third-party standing and holding individual plaintiffs lacked connection to constitutional violations alleged).

[11] *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 801-02 (8th Cir. 2006) (not addressing third-party standing and rejecting First Amendment overbreadth challenge because plaintiff failed to meet requirements for constitutional standing). Moreover, Defendants' cite to the statement in *Advantage* involves the availability of § 1983 *damages* in the context of a First Amendment overbreadth challenge, Opp. Br. 20, which is plainly not the case Plaintiff presses here.

C. The Private Rights of Action Do Not Interfere With Plaintiff's Claims.

Defendants' assertion that Plaintiff "lacks standing to challenge the Acts' private rights of action," Opp. Br. 21-23; Mot. Dismiss Br. 13-15, is similarly a red herring. While it is true that two of the challenged laws—H.B. 1032's D&E Ban and H.B. 1434's Medical Records Mandate—create such private rights of action, each of the four laws provides for criminal prosecution and/or civil licensing enforcement by Defendants. Compl. ¶¶ 19, 26-27, 36, 45, June 20, 2017, ECF No. 1. There is thus no relevance to Defendants' claim that they are "immune from suit challenging the constitutionality of an act when it provided for enforcement *only* th[r]ough private actions for damages," and that in such a suit, "a federal court lacks jurisdiction to declare it unconstitutional or to provide any other relief." Opp. Br. 21 (emphasis added). That Plaintiff included the private causes of action in his description of the two laws that contain them is unremarkable. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-88 (1992) (noting, as to spousal notification law the Court struck down, that "[a] physician who performs an abortion" for a married woman without spousal notice "will have his or her license revoked, and is liable to the husband for damages"). Defendants have not cited, because they cannot, a single case indicating that this Court lacks jurisdiction to enjoin Defendants from enforcing the two relevant laws and to declare those laws unconstitutional.

D. Plaintiff Faces Concrete, Imminent Injuries from Enforcement of the Challenged Restrictions.

Defendants argue that Plaintiff has not alleged injury sufficient for Article III standing because there is neither "threatened or imminent prosecution" nor any "certainly impending" "enforcement action by the Arkansas State Medical Board." Opp. Br. 23-24; Mot. Dismiss Br. 15-17. Instead, Defendants suggest, Plaintiff's claims against H.B. 1434, H.B. 2024, and H.B. 1566 "should be raised, if at all, after enforcement action causes a concrete and particularized

injury to Hopkins." Opp. Br. 25. Once again, Defendants' argument simply ignores black-letter law to the contrary. Indeed, this Court has rejected nearly identical arguments that the injury was "speculative and conjectural" because the challenged abortion restriction had not yet been enforced against the plaintiff physician, including by any licensure action. *Edwards*, 2013 WL 12141422, at *3.

That is because, under long-established Supreme Court precedent, "it is not necessary that petitioner first expose himself to actual . . . prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). To require him to wait until defendants actually begin enforcement would "place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a [punitive] proceeding." *Id.* at 462. Thus, "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . . ." *MedImmune, Inc. v. Genentech*, 549 U.S. 118, 128-29 (2007).

For decades, federal courts have reached exactly the same conclusion in the abortion context. *See, e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) ("The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." (internal quotation marks and citation omitted)); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (same); *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1038-39 (D. Neb. 2010) (holding plaintiff physician and clinic had injury sufficient for pre-enforcement vagueness and undue burden challenges). Thus, far from conditioning standing on an abortion provider's

alleging an intent to violate a law, precedent instead requires that Plaintiff—who is subject to criminal and significant civil penalties under the challenged laws—provide abortion and miscarriage care and will thereby be subject to the unconstitutional requirements. The Complaint unquestionably satisfies this requirement, and is thus plainly sufficient to demonstrate imminent injury. *See* Compl. ¶¶ 9, 13, 120-125. Dr. Hopkins's declaration shows the impact and threat of these laws for Plaintiff in even greater detail. Decl. of Frederick W. Hopkins, M.D., M.P.H. in Supp. of Pl.'s Mot. for Prelim. Inj. or Alt. TRO ("Hopkins Decl.") ¶¶ 23-62, June 20, 2017, ECF No. 5.

Defendants' suggestion to the contrary notwithstanding, *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013), did not *sub silentio* overrule decades of precedent. There, the Court addressed a claim made by plaintiffs not directly targeted by the challenged law, who argued for standing based on what the Court characterized as a "highly attenuated chain of possibilities" and thus too speculative to satisfy the Article III injury requirement. *See id*. at 1144-48. *Clapper* is irrelevant here, where Plaintiff is unquestionably regulated by the challenged laws. Indeed, *Clapper*, 133 S. Ct. at 1150 n.5, reaffirms the Court's earlier holding in *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979), that"[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). Speculative injuries have never been sufficient to support standing, but the injuries the challenged restrictions impose—through criminal and significant civil penalties—are anything but speculative.

In short, Defendants' arguments are foreclosed by binding precedent and the language of the challenged restrictions themselves.

E. The Court Should Tailor the Relief to the Constitutional Violation and Enter a Preliminary Injunction Enjoining Defendants from Enforcing the Challenged Restrictions.

Defendants assert that, because this case is not a class action, this Court should limit its preliminary injunction so as to protect only Dr. Hopkins "and, if appropriate, his patients." Opp. Br. 25-26; Mot. Dismiss Br. 17-18. Such an injunction would not, however, provide adequate relief in this case; rather, this Court should issue an order simply enjoining Defendants from enforcing the challenged statutes. Indeed, this Court, among other courts in this Circuit, has entered and the Eighth Circuit has routinely affirmed the relief Plaintiff requests here. *E.g.*, *Edwards*, 786 F.3d at 1113 (affirming injunction permanently enjoining defendants from enforcing provisions of challenged act); *Jegley*, 2016 WL 6211310, at *34 (preliminarily enjoining defendants from enforcing challenged provisions of act); *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1050 (preliminarily enjoining defendants from enforcing certain sections of challenged bill).

Even in the absence of a class action, an injunction may "extend[] benefit or protection" to persons other than the plaintiffs "if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis omitted); *accord Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996). As the Supreme Court has stated, "[i]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interest the injunction may affect." *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939).

In the instant case, as in *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963), "[t]he very nature of the rights appellants seek to vindicate requires that the decree run to the benefit

not only of appellants but also for all persons similarly situated." In *Bailey*, the plaintiffs sued to desegregate the common carriers in the City of Jackson and the State of Mississippi. Noting that "[b]y the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination," the Fifth Circuit held the government should be enjoined from enforcing any of the challenged segregation laws in general, and not just against the named plaintiffs. *Id.* at 206-07.

Here, Dr. Hopkins has brought a pre-enforcement facial challenge to the Arkansas Acts, and he has moved for a preliminary injunction on the grounds that the Acts, or parts of them, impose an undue burden on a woman's right to access abortion in Arkansas, are unconstitutionally vague, and violate Arkansas women's right to informational privacy. This is the paradigm case in which the nature of the relief sought—a declaration that the challenged Acts are unconstitutional and an injunction against their enforcement—must, by definition, protect others beyond the individual plaintiff. *See, e.g., Soto-Lopez v. N.Y. Civil Serv. Comm'n*, 840 F.2d 162, 168 (2d Cir. 1988) (noting that "[w]hen a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute"); *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir.1973) ("[I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs."). Accordingly, courts have held that an order enjoining defendants from enforcing the challenged laws is "no 'more burdensome than necessary'" to ensure complete relief to the plaintiffs, *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1226-27 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), and thus have issued preliminary injunctions in pre-enforcement facial challenges to

state statutes. *See, e.g.*, *id.* at 1226-27, 1229; *Jegley*, 2016 WL 6211310 at *34 (preliminarily enjoining in general terms two county prosecuting attorneys "and all those acting in concert with them . . . from enforcing [the challenged provisions]" in facial challenge to abortion restrictions).

In suggesting otherwise, Defendants rely on cases presenting factual scenarios that are entirely different from this case. *See* Opp. Br. 25-26. In *Zepeda v. United States, INS*, 753 F.2d 719 (9th Cir. 1983), the individual plaintiffs requested prospective injunctions based on past conduct by INS officers alleged to have violated their constitutional rights. They sought to enjoin that conduct but did not seek facial invalidation of any statute or rule. *Id.* at 722-23. Because a class had not yet been certified, the court held that an order protecting individuals who were similarly situated to the plaintiffs but not before the court would be inappropriate. *Id.* at 727-28. Similarly, in *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part and vacated in part on other grounds*, 645 F.2d 592 (8th Cir. 1981)—a suit claiming that a state law conflicted with a federal education law and seeking to force the state to comply with federal law—the plaintiffs were individuals who needed varying forms of preliminary relief. They sought different educational placements and appointment of a hearing officer to determine appropriate placements for them. *Id.* at 1088-90. The relief requested in *Monahan* was thus a far cry from the facial invalidation sought by Dr. Hopkins here.[12]

[12] The other cases Defendants cite are similarly inapposite. *Planned Parenthood Ark. & E. Okla., et al. v. Gillespie*, 4:15-cv-00566-KGB slip op. 11 (E.D. Ark. Oct. 5, 2015), involved individual Medicaid patients challenging reimbursement for non-abortion care on purely statutory grounds. *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984), involved an executive official's interpretation of a law, not a pre-enforcement facial constitutional challenge to a statute. In *Hollon v. Mathis Indep. School Dist.*, 491 F.2d 92 (5th Cir. 1974), a married high school student sued to enjoin a school district rule forbidding married students from participating in sports and certain other extracurricular activities. At the time of the Fifth Circuit decision, the plaintiff had graduated, and both the court and plaintiff's counsel agreed that the case was moot.

II. Defendants' Motion to Dismiss Does Not Affect the Success of This Motion.

As discussed above, Defendants' separate motion to dismiss largely sets forth the very same arguments as their opposition to this motion. To the extent that the motion to dismiss includes additional arguments, they are relevant to neither this Court's jurisdiction nor this Court's authority to issue the requested preliminary injunction. Plaintiff will fully respond with an opposition to the motion to dismiss by Tuesday, July 25, but also demonstrates below the irrelevance of those additional arguments to the propriety of a preliminary injunction in this case.

A. Sovereign Immunity Does Not Interfere with Plaintiff's Entitlement to Injunctive Relief.

In his motion papers, Plaintiff has shown that he and his patients face immediate constitutional harms if these four new Arkansas abortion restrictions are not enjoined before their impending effective dates. To secure the necessary, prospective injunctive relief, Plaintiff has sued the state officials charged with direct enforcement: the local prosecuting attorney, who is responsible for enforcing the criminal penalties contained in three of the four laws, *see* Ark. Code Ann. § 16-21-103; Compl. ¶ 14, and members of the Arkansas State Medical Board, which imposes licensing repercussions for physicians' "unprofessional conduct," the penalties imposed under the fourth law, as well as the three others, *see* Ark. Code Ann. § 17-95-410; Compl. ¶ 15. Under *Ex Parte Young*, 209 U.S. 123 (1908), and its decades of progeny, this is exactly the way that a plaintiff must sue to enjoin state laws from interfering with constitutional rights, notwithstanding Defendants' contrary arguments, Mot. Dismiss Br. 18-19.

"A State's Eleventh Amendment immunity 'does not bar a suit against a state official to enjoin enforcement of an allegedly unconstitutional statute, provided that such officer [has] some

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Id. at 93. And *Berger v. Heckler*, 771 F.2d 1556, 1567 (2d Cir. 1985), actually upheld a consent decree that protected parties other than the named plaintiffs.

connection with the enforcement of the act.'" *Mo. Protection & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (alteration in original) (quoting *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005)); *see also 281 Care Committee v. Arneson*, 638 F.3d 621, 632-33 (8th Cir. 2011) ("[A] private party can sue a state officer in this official capacity to enjoin a prospective action that would violate federal law."). State officials charged with criminal law enforcement, such as Defendant Jegley, are precisely the category of defendants that a plaintiff must sue to avoid any intrusion on sovereign immunity and enjoin the effectiveness of a new law imposing criminal penalties. *See, e.g.*, *Nixon*, 428 F.3d at 1142-45 (affirming preliminary injunction entered by federal court against local prosecutors while state court construed new abortion statute); *Summit Med. Assoc. P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999) (affirming injunction against local prosecutor and attorney general to prevent enforcement of new abortion statute's criminal penalties, and rejecting arguments similar to those Defendants make here).

Likewise, state licensing boards are the proper defendants for prospective relief when a plaintiff challenges the constitutionality of a new enactment that governs licensing and professional conduct. *See, e.g.*, *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1039, 1041-42 (officials charged with nurse licensing enforcement were proper defendants and possessed no Eleventh Amendment immunity in suit to enjoin new restrictions); *Planned Parenthood Ariz., Inc.*, 172 F. Supp. 3d at 1093-95 (members of state medical board were proper defendants, in pre-enforcement challenge to enjoin new abortion restriction, because of their enforcement authority).

The Eleventh Amendment and sovereign immunity thus provide no bar to this action. Instead, if Plaintiff prevails on his substantive arguments for a preliminary injunction, including

likelihood of success on the merits of his constitutional claims and irreparable harm, he has also shown that he falls squarely within the *Ex Parte Young* exception to sovereign immunity.

B. The Dismissal Motion Does Not Show Any Jurisdictional or Pleading Flaws.

Defendants bring their separate motion to dismiss under Federal Civil Procedure Rules 12(b)(1) and 12(b)(6), but the arguments advanced there are almost identical to the arguments offered in opposition to the present injunction motion. *See* Mot. to Dismiss, 1-2, July 11, 2017, ECF No. 21; Mot. Dismiss Br. 7-62. The motion to dismiss does not raise any purported jurisdictional obstacles to this Court hearing this case other than the standing and sovereign immunity arguments already shown above to be incorrect. *See* Mot. Dismiss Br. 7-19.

In addition, while Defendants' motion to dismiss brief initially claims to be based on pleading standards and to address whether Plaintiff has adequately set forth his claims, *see* Mot. Dismiss Br. 6-7, the brief proceeds to argue not against the pleading, but against the merits of Plaintiff's claims; to substantively contest Plaintiff's factual allegations; and to erroneously attempt to create inferences in Defendants' favor—rather than drawing all inferences in Plaintiff's favor and taking all factual allegations as true, as is required at the pleading stage. On a motion to dismiss,

> the question is whether [plaintiff] has adequately asserted facts (as contrasted with naked legal conclusions) to support his claims. Evidence is not required . . . [and] "inferences are to be drawn in favor of the non-moving party. [*Bell Atlantic Corp. v.] Twombly*[, 550 U.S. 544 (2007)] and [*Ashcroft v.*] *Iqbal*[, 556 U.S. 662 (2009)] did not change this fundamental tenet . . . ." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009).

Whitney v. Guys, Inc. 700 F.3d 1118, 1129 (8th Cir. 2012). Thus, for example, Defendants must take as true the four pages of detailed factual allegations in the Complaint that explain how H.B. 1032 imposes a ban on D&E, *see* Compl. ¶¶ 16-17, 62-80, and may not reject those facts as "speculative" on a motion to dismiss, *cf.* Mot. Dismiss Br. 22-24. Nor may Defendants argue

contrary inferences and attempt to pick apart Plaintiff's factual allegations without reference to the clearly well-pled claims of the Complaint as a whole. *See Braden*, 588 F.3d at 594 ("[T]the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."); *see also id*. (adding that complaint should be evaluated in light of "judicial experience and common sense" (quoting *Iqbal*, 556 U.S. at 679)); *cf.*, *e.g.*, Mot. Dismiss Br. 28-29.

The "liberal" federal pleading standards require "only 'a short and plain statement of the claim that the pleader is entitled to relief.'" *J.D. Fields & Co., Inc. v. Nucor-Yamato Steel*, 976 F. Supp. 2d 1051, 1058 (E.D. Ark. 2013) (Baker, J.) (quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not required; the complaint must simply give the defendant fair notice of what the claim is" and allege facts that allow a "reasonable inference that the defendant is liable[.]" *See id.* (internal quotation marks, punctuation, and citations omitted). As Plaintiff will establish in more detail in his forthcoming opposition to the motion to dismiss, there can be no doubt that the Complaint satisfies this notice pleading standard. Moreover, because Defendants' arguments on the motion to dismiss are the same arguments—about the *substance* of the constitutional law and of Plaintiff's facts—that Defendants offer in opposition to the Motion for Preliminary Injunction, the merits of this motion will defeat those asserted grounds for dismissal as well: If Plaintiff convinces the Court that he is likely to succeed on the merits of his claims and that the facts he presented support a preliminary injunction, he will have shown *far* more than what is necessary to survive a motion to dismiss: merely that his Complaint adequately states such claims—based on that same constitutional law and those same asserted facts.[13] In supporting the injunction,

[13] That is because the injunction standard is much more stringent than the pleading standard, which does not require a probability of success. A complaint "may proceed even if it strikes a

Plaintiff shows that the claims at issue not only provide well-pled, plausible notice of constitutional violations, but are likely to succeed on their ultimate constitutional merits.

III. Nearly All Defendants' Exhibits are Not Probative.

Almost none of the exhibits to Defendants' brief are properly before the Court. More important, these same exhibits are not probative.

*First***,** the Court should not review, give weight to, or credit Defendants' reliance on any of the sixteen medical journal articles (Exs. 2-14, 20-21, 28), one "prescribing information" document (Ex. 16), and two statistical compilations (Exs. 26, 32) that Defendants filed as exhibits to their opposition brief. *See* Opp. Br. Exs., ECF Nos. 23-2 to 23-14, 25-1, 25-5, 25-6, 25-11, 25-13, and 30-1. These highly specialized documents are each inadmissible hearsay, and do not fall within the hearsay exception for learned treatises. Fed. R. Evid. 801(c), 802, 803(18).[14] These items never properly serve as stand-alone documents that can be invoked simply by lawyers attaching them to briefs.

While formal evidentiary limits can, in the Court's discretion, be relaxed somewhat in the context of a preliminary injunction motion, the Court in this instance should respect the foundation and import of this evidentiary rule. It rests on the recognition that courts "are hard-pressed to ascribe significance to [scientific or statistical] studies without an appropriately credentialed expert to vet" and interpret them. *Lebron v. Sec'y of Fla. Dep't of Children &*

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savvy judge that actual proof of the facts alleged is improbable, and that recovery is very remote and unlikely." *J.D. Fields & Co., Inc.*, 976 F. Supp. at 1058 (internal quotation marks and citation omitted).

[14] That exception allows only the admission of statements "contained in a treatise, periodical, or pamphlet" when "the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination" and "the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice"; even if admitted as evidence, statements from such sources may be read into evidence by the expert witness, but not received in full as an exhibit. Fed. R. Evid. 803(18).

Families, 772 F.3d 1352, 1371 (11th Cir. 2014); *see also id*. at 1369-71 (refusing to admit or take judicial notice of such studies, without an expert to establish their authoritative nature and meaning); *see also Dartez v. Fibreboard Corp.*, 765 F.2d 456, 465 (5th Cir. 1985) (explaining that restrictions on use of learned treatises exist to avoid possibility that fact finders "will misunderstand and misapply the technical language within such an article if they are allowed to consider the publication itself instead of receiving the information through the testimony of an expert in the field"); *Barraford v. T & N Ltd.*, 988 F. Supp. 2d 81, 87 (D. Mass. 2013) (striking three articles from medical journals that plaintiff attached as exhibits to opposition brief). When an expert purports to rely upon or interpret a medical study, that expert can express his views on its "methodological soundness [and] reliability," as well as its "applicability to the case at hand," and he can ultimately be cross-examined on those topics. *See Lebron*, 772 F.2d at 1370.[15] It is inappropriate for counsel, however, to cite to and attempt to use as exhibits professional medical journal articles, statistical reports, and technical prescribing information, without any interpretation of and reliance on those materials by an appropriate expert, as Defendants do throughout their brief.[16] This Court, therefore, should give no weight to these exhibits, or to Defendants' purported conclusions from or citations to them, in ruling on this motion.

*Second***,** Defendants attempt to rely on the declaration of Dr. Biggio, submitted in 2016 in a different court. Decl. of Joseph R. Biggio, Jr., M.D., Opp. Br. Ex. 15 ("Biggio Decl."), July

[15] Defendants' expert, Dr. Wyatt, neither discusses nor references any of these materials. *See* Decl. of Richard A. Wyatt, M.D. ("Wyatt Decl.") Opp. Br. Ex. 19, July 11, 2017, ECF No. 25-4. An expert in a *different* case, Dr. Biggio, lists *some* of these articles as items that he reviewed before his 2016 declaration in that other case, but that declaration does not discuss, rely on, or quote from any of the articles. *See* Decl. of Joseph R. Biggio, Jr., M.D. Ex. B., Opp. Br. Ex. 15, July 11, 2017, ECF No. 23-15.

[16] *See, e.g.*, Opp. Br. 4, n.3 (contesting Plaintiff's expert claim of abortion safety as "false," with counsel's discussion of Exs. 20-21); Opp. Br. 32-34 (arguing as to meaning of Exs. 4-11, 14); Opp. Br. 36-37 (counsel discussing Exs. 12-13).

11, 2017, ECF No. 23-15 (declaration submitted in *W. Ala. Women's Ctr, et al. v. Miller*, 217 F. Supp. 3d 1313 (M.D. Ala. 2016), *appeal docketed*, (11th Cir. Nov. 26, 2016)). That declaration explicitly addresses Dr. Biggio's views as they relate to Alabama Act No. 2016-397, not any of the laws at issue here. There is no indication that Defendants have retained—or even spoken to—Dr. Biggio. Moreover, Defendants fail to inform the Court that, since his initial declaration in 2016, Dr. Biggio gave live testimony in the Alabama matter in which he makes clear that he agrees in important respects with Dr. Hopkins and Dr. Nichols, in their expert declarations here.[17] For both of these reasons, this Court should disregard the Biggio Declaration. *See Tuosto v. Phillip Morris USA Inc.*, No. 05-cv-9384(PKL), 2007 WL 2398507 at *13 (S.D.N.Y. Aug. 21, 2007) (refusing to consider expert affidavit from another matter and reasoning "[a]n affidavit 'headed with the caption of a different case, with a different plaintiff and a different docket number . . . cannot be considered evidence.'" (quoting *Burley–Sullivan v. Philadelphia,* No. Civ.A. 00–2413, 2001 WL 1175127, *4 (E.D. Pa. 2001)); *cf. First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 879 (8th Cir. 1998) (affirming district court's exclusion of expert repot "prepared in conjunction with an unrelated lawsuit" where expert had been retained by party in present litigation).

Third, Defendants, without offering any authority for doing so, obtained and submitted to the Court an un-redacted copy of Dr. Hopkins's Arkansas State Medical Board file as an exhibit. *See* Opp. Br. Ex. 18. For several reasons, the Court should attach no weight this exhibit. As an

[17] To the extent the Court decides to review and consider the Biggio Declaration, Plaintiff provides the direct and cross examinations of Dr. Biggio from that Alabama case for completeness, *see* Testimony of Joseph R. Biggio, Jr., M.D., Tr. of Mot. Hearing, Vol. II, *W. Ala. Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313 (M.D. Ala. 2016) (No. 2:15-cv-497-MHT), filed Oct. 24, 2016, ECF No. 111 (attached hereto as Ex. 3), and requests that the Court also consider the portions of that testimony cited by Plaintiff, *infra* Point IV.A.

initial matter, Defendants' access to and submission of the file appears unauthorized: the Arkansas State Medical Board may not release information to third parties except as authorized by Dr. Hopkins and by state law. Rebuttal Decl. of Frederick W. Hopkins, M.D., M.P.H., in Supp. of Pl.'s Mot. for Prelim. Inj. or Alt. TRO ("Hopkins Reb. Decl.") Ex. B (attached hereto as Ex. 2). Dr. Hopkins did not authorize Defendants access to or use of his file, *id*. ¶ 4, nor do Defendants cite any authority for their use of it. Further, the exhibit submitted to the Court was incomplete, and yet Defendants used it to assert that Dr. Hopkins had been sued for malpractice, Opp. Br. 2, when documents in his licensure file make clear this assertion is untrue. *See* Hopkins Reb. Decl. ¶¶ 6-7; *see also id.* Exs. B, C. In addition, while Defendants subsequently redacted certain information—including Dr. Hopkins's social security number, date of birth, and private contact information, which are protected from disclosure under Arkansas's Freedom of Information Act, Ark. Code Ann. § 25-19-105(b)(12)—documents marked "Confidential" and patient identifying information remain in the exhibit. Hopkins Reb. Decl. ¶ 5; *see* Opp. Br. Ex.18. As with Defendants' other improper exhibits, in misusing Dr. Hopkins's licensure file, Defendants proffer unreliable information and take the Court far from the issues at hand. For all these reasons, the Court should disregard Defendants' Exhibit 18. Moreover, Plaintiff requests that the Court order Exhibit 18 sealed, to restore the licensing file's confidentiality.

*Fourth***,** Defendants have submitted three declarations from women who state they had D&E procedures and a declaration from an untrained layperson who hosts support groups for women who have had abortions. Opp. Br. Exs. 27, 29, 30, 31. While Plaintiff respects and seeks to protect the decision-making of each individual pregnant woman, and likewise respects any feelings she may have about her pregnancy care decisions, Hopkins Reb. Decl. ¶ 1, these anecdotal submissions neither address nor are probative of the issues before the Court. It is

unclear, for example, when fetal demise occurred in these three historical D&E procedures.[18] As explained *infra* Point IV, this case calls for the Court to consider the purported benefits of each challenged statute and the burdens that each would impose on the universe of affected women; these declarations are not probative in that constitutional inquiry.

Finally, what is conspicuously missing from Defendants' opposition is anything approaching a rebuttal to the factual proofs Plaintiff submitted. Other than the improperly cited scientific articles, *see supra*, Defendants submitted only the Biggio Declaration from Alabama, *see supra*, and the scant declaration of Dr. Wyatt, which names not a single study or medical source and is light on facts and analysis. Opp. Br. Ex. 19. The Alabama declaration and Dr. Wyatt address solely the D&E Ban. Hence, while the "proofs" Defendants rely on to oppose the motion as to the D&E Ban are markedly lacking, their proofs on the other three laws are non-existent. Defendants' opposition is thus a series of wholly unsupported assertions, for which Defendants do not offer even nominal citations, simply the assertions of defense counsel, such as:

- "In the context of a later-term abortion . . . , a delay of a few days" caused by the Medical Records Mandate "does not rise to a substantial obstacle either in terms of time or money." Opp. Br. 51.
- "[I]t is difficult to imagine that any child would be obstructed from obtaining an abortion by regulations governing the post-abortion transmission of the child's name to local law enforcement or the preservation of the fetal remains." *Id*. at 39.

Such bald statements by attorneys, who are not witnesses and have no expertise in the relevant subject areas, are no answer to the factual statements in the declarations of the careful, content-knowledgeable witnesses on which Plaintiff relies.

[18] Moreover, Arkansas law has for some time mandated that, before an abortion, each patient receive a booklet with details about the nature of her procedure. *See* Ark. Code Ann. §§ 20-16-1703(4)(A), (6)(A); *id*. § 20-16-1704; Ark. Dep't of Health, A Woman's Right to Know, http://www.healthy.arkansas.gov/programsServices/healthStatistics/Documents/abortion/abortiondecisionbook.PDF ("ADH Decision Booklet").

IV. Defendants' Arguments Do Not Undermine Plaintiff's Likelihood of Success.

Introduction: Defendants Erroneously Contest the Single Undue Burden Test

As an initial matter, and contrary to Defendants' assertions, *see, e.g.*, Opp. Br. 37, the undue burden standard, under which Plaintiff seeks a preliminary injunction against each of the four laws, does not vary based on the state interest an abortion restriction purportedly serves. As Plaintiff argues in his opening brief at 25-27, abortion restrictions are unconstitutional when they impose an "undue burden," under which test a law is unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Casey*, 505 U.S. at 877-78). Last year, the Supreme Court clarified that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* When the burdens outweigh the benefits, the burden is undue and the law is unconstitutional. *See id*. at 2309-10.

Recycling many of the arguments the Supreme Court rejected last year, Defendants ask this Court to ignore the controlling decision in *Whole Woman's Health*. Defendants contend that the Supreme Court created two distinct undue burden tests: the balancing test used in *Whole Woman's Health* when "the state's interest is in . . . a patient's health or safety" and a different test "when a state regulates to promote respect for unborn life." Opp. Br. 37. Under that different test, Defendants assert, the Court must determine merely whether the state "has a rational basis to act, and it does not impose an undue burden," which exists when a regulation places "a substantial obstacle in the path of a woman seeking an abortion before . . . viability." *Id.* 37-38 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007) (internal quotation marks and citation omitted)).

Both the language and logic of the Supreme Court's undue burden cases foreclose this argument.[19] The terms "undue burden" and "substantial obstacle" in *Casey* are equivalent. 505 U.S. at 877 ("A finding of an undue is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). Where a law's burdens exceed its benefits, those burdens are undue, and the obstacles they impose are, by definition, substantial. *See Whole Woman's Health*, 136 S. Ct.. at 2300, 2309-10, 2312, 2318. In short, the test described in *Whole Woman's Health* is the same as the "substantial obstacle" test, and Defendants' argument that, in some cases, the undue burden standard is a variant of rational basis review must fail. *See* 136 S. Ct. at 2309 ("[It] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.").

Neither *Casey* nor *Whole Woman's Health* distinguishes between a state's interest in patient health versus potential life when discussing the undue burden standard. Indeed, *Casey* describes one standard that applies regardless of the state's asserted interest. *See* 505 U.S. at 877 ("[A] statute which, while furthering the interest in potential life or *some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be

[19] Defendants' attempt to apply their two proposed tests only undermines their argument. Defendants seek to justify some of the challenged restrictions as advancing both the state's interests in potential life and patient health and safety, *see, e.g.*, Opp. Br. 6-9, 32 n.9, 39 n.10 (as to the D&E ban); *id*. at 50 (as to the Medical Records Mandate), or as advancing only the state's interests in patient health and safety, *see id.* at 63-65, 67 (as to Local Disclosure Mandate). Defendants argue that two tests apply, but muddle through the apparent distinct applications. *See, e.g.*, *id*. at 50 (defending the Medical Records Mandate as advancing patient health and safety, and not imposing a "substantial obstacle"—part of the test Defendants assert applies to potential life laws); *id.* at 65 (similar treatment of Local Disclosure Mandate, justified as a health and safety measure); *id.* at 67 (asserting the Local Disclosure Mandate "*rationally* promotes the health and safety of young women" (emphasis added)).

considered a permissible means of serving its legitimate ends." (emphasis added)). Thus, as Defendants acknowledge, this Court must "[a]nalyz[e] the issues under the principles set forth in *Casey*," Opp. Br. 38, and clarified in *Whole Woman's Health*. *Casey* itself applied a unitary undue burden standard to all the restrictions it reviewed, including the spousal notification law (which related to the state's interest in potential life, and which the Court struck down, 505 U.S. at 887-89) and the record and reporting requirements (which related to the state's interest in women's health, and which the Court upheld, *id*. at 900-01). Likewise, *Whole Woman's Health* relies on *Gonzales*, which, too, applied the close scrutiny required by the undue burden standard. *See Whole Woman's Health*, 136 S. Ct. at 2310 ("*Gonzales* went on to point out that the 'Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.'" (emphasis omitted) (quoting 550 U.S. at 165)); *Gonzales*, 550 U.S. at 146 (The State "may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (quoting *Casey*, 505 U.S. at 878)).

Defendants' suggestion at the preliminary injunction hearing that it is impractical to apply the balancing test to certain abortion restrictions is unavailing. As *Casey* explained, since *Roe*, the Court has "required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence." 505 U.S. at 855. As in other areas of constitutional law, when evaluating a law under this test, a court may take into account the degree to which the restriction is over-inclusive or under inclusive, *see, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2315 (discussing over- and under-inclusive scope of the provision); and the existence of alternative, less burdensome means

to achieve the state's goal, including whether the law more effectively advances its stated interest compared to the prior law, *see, e.g.*, *id.* at 2311 (noting that prior state law was sufficient to serve asserted interest); *id.* at 2314 ("The record contains nothing to suggest that [the challenged provisions] would be more effective than pre-existing [state] law at deterring wrongdoers . . . from criminal behavior.").

Indeed, since *Whole Woman's Health*, *every* federal court applying the undue burden standard to abortion restrictions, including laws justified based on the state's asserted interest in potential life, has used the test confirmed in that case. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, No. 1:16-CV-01807-TWP-DML, 2017 WL 1197308 (S.D. Ind. March 31, 2017) (applying undue burden balancing test to requirement that women delay abortion by 18 hours after obtaining an ultrasound premised in part on state's interest in promoting potential life), *appeal docketed*, No. 17-1883 (7th Cir. Apr. 27, 2017); *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, 2017 WL 462400, at *7-8 (W.D. Tex. Jan. 27, 2017) (applying undue burden test to tissue disposal regulations justified in part on state's interest in expressing respect for potential life), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 1, 2017); *W. Ala. Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1346-47 (M.D. Ala. 2016) (balancing benefits and burdens in assessing D&E ban justified as advancing state's interest in respect for life), *appeal docketed*, (11th Cir. Nov. 26, 2016). As the Indiana district court put it: "Given that the Supreme Court made clear in *Whole Woman's Health* that it was applying *Casey*, it inexorably follows that there are not two distinct undue burden tests applied in *Casey* and *Whole Woman's Health*." *Planned Parenthood of Ind. & Ky., Inc.*, 2017 WL 1197308, at *5. This Court is likewise bound to apply the undue burden standard as clarified in *Whole Woman's Health*.

A. The D&E Ban Imposes an Undue Burden.

Applying the undue burden standard and Supreme Court case law, Plaintiff is likely to prevail on the merits of his challenge to the D&E Ban. As a matter of Supreme Court precedent, the State cannot criminalize the performance of the most common method of abortion (and indeed the only method in Arkansas) in the second-trimester, pre-viability stage of pregnancy. *See Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000); *accord Gonzales*, 550 U.S. at 150; *Danforth*, 428 U.S. at 77-79. This is exactly what the D&E Ban does, and it is unconstitutional.

1. A Ban on the Most Common Second-Trimester Abortion Method Is Unconstitutional as a Matter of Law.

In more than twenty pages of briefing on the D&E Ban, Defendants all but refuse to acknowledge—much less contend with—the straightforward constitutional rule that decides this case. Decades of settled law holds that it is *per se* unconstitutional for the State to criminalize "the . . . dominant second-trimester abortion method." *Gonzales*, 550 U.S. at 165; *see also id.* at 150-54; *Danforth*, 428 U.S. at 77-79. As the Court explained in *Stenberg*, when a state prohibits D&E procedures, "the most commonly used method for performing previability second trimester abortions," the "result is an undue burden upon a woman's right to make an abortion decision." 530 U.S. at 945-46.

Although Defendants attempt to obscure this fact, the Supreme Court reaffirmed this principle and its specific application to D&E in *Gonzales*. Like *Stenberg*, *Gonzales* addressed a statute directed at prohibiting an uncommon abortion method, dilation and extraction (or "D&X"). 550 U.S. at 136–37. But unlike *Stenberg*, the Court held that the statute in *Gonzales* was "more specific concerning the instances to which it applie[d]," *id.* at 133, because it restricted only the uncommon procedure, while preserving access to standard D&E, "the *usual* abortion method in [the second] trimester," *id.* at 135 (emphasis added); *see also id.* at 154. The

Court upheld the restriction because and only because it did not apply to standard D&E. *Id.* at 150–54. Reemphasizing the rule that a ban on the predominant method of second-trimester abortion is invalid, the Court reaffirmed its earlier precedent on this exact basis. It noted that the challenges to the ban upheld in *Gonzales* were

> different from [*Danforth*], in which the Court invalidated a ban on . . . the then-dominant second-trimester abortion method . . . . Here the Act allows, among other means, a commonly used and generally accepted method, [standard D&E,] *so* it does not construct a substantial obstacle to the abortion right.

Id. at 164–65 (emphasis added). In more than four decades of abortion jurisprudence, the Supreme Court has upheld just one method ban; that ban reached only one uncommon method; and the Court upheld it only by confirming that the usual second-trimester abortion method was available, and reaffirming the longstanding rule that a ban on the dominant second-trimester abortion method is invalid. *Id.*

Simply put, "*Gonzales* did not disrupt *Stenberg*'s holding that prohibition of D & E would amount to an unconstitutional undue burden." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 331 (6th Cir. 2007). Thus, Defendants simply err in asserting that "under the framework established by the Supreme Court, states are permitted to prohibit specific abortion procedures that threaten to erode respect for" potential life. Opp. Br. 27. Under the framework that *Danforth* established and both *Gonzales* and *Stenberg* confirmed, when an abortion restriction prohibits the "usual" or "dominant" second-trimester abortion method, *Gonzales*, 550 U.S. at 135, 165, it "imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad," *id.* at 150; *see also id.* at 164–65; *Stenberg*, 530 U.S. at 930; *Danforth*, 428 U.S. at 77-79; *Northland Family Planning Clinic, Inc.*, 487 F.3d at 330-31 (a ban on D&E is "simply barred"). Unlike any abortion restriction ever upheld by the Supreme Court or any other federal court, H.B. 1032 bans what is undisputedly the

dominant second-trimester abortion method, and the only method that can be provided in clinics throughout the second trimester. Decl. Mark D. Nichols, M.D. in Supp. of Pl.'s Mot. Prelim. Inj. or Alt. TRO ("Nichols Decl.") ¶¶ 14-17, June 20, 2017, ECF No. 4 (attached hereto as Exhibit 1). Such a restriction is invalid as a matter of law.

Defendants invite the Court to ignore this dispositive principle, asserting that physicians could try to work around the Ban by attempting to induce fetal demise prior to performing a D&E. Opp. Br. 31-32. But that assertion is not only factually inaccurate (because there is no way to guarantee fetal demise in any given patient, *see infra* Point IV.A.2), it is also legally irrelevant. In *Stenberg*, the statute criminalized the performance of a D&E on "a *living* unborn child," but did not apply if fetal demise had already occurred, 530 U.S. at 922 (emphasis added) (citation omitted). Moreover, the Court was well aware of fetal demise procedures. *Id.* at 925 (discussing injections of digoxin and potassium chloride). If the availability of methods to cause fetal demise prior to a D&E were constitutionally sufficient to uphold a ban, it would have been sufficient to uphold the ban in *Stenberg*. It was not then and it is not now. *See id.* at 945-46. Just as a state cannot ban the most common second-trimester abortion procedure by pointing to purported alternatives that are not actually available, *Danforth*, 428 U.S. at 77-79,[20] Arkansas cannot ban D&E by pointing to similarly unavailable proposed work-arounds.

[20] Defendants' expert Dr. Wyatt does just this, stating that because induction abortion is still legal under the Ban, there is no undue burden on a woman's abortion decision, Wyatt Decl. ¶ 9, and Defendants likewise mention this argument, Opp. Br. 32 n.9. Because induction abortion poses its own risks and is not, to Plaintiff's knowledge, available anywhere in Arkansas or remotely affordable, its continued legality does not save the Ban. *See* Nichols Decl. ¶¶ 14-16, 38; Hopkins Decl. ¶ 12. As the Arkansas Department of Health itself states, "Generally, labor induction requires a longer stay and is not performed in a clinic setting. . . . Labor induction abortion carries the highest risk" of "complications." ADH Decision Booklet, *supra* note 18.

Indeed, when confronted with the suggestion that mandatory fetal demise interventions could save a D&E ban from invalidation, courts have consistently held otherwise, concluding that mandating the "attempt[] to ensure fetal demise . . . would operate as an additional undue burden." *Evans v. Kelley*, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997); *see also Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 145 (3d Cir. 2000) ("The increased risk of injury or death to the woman by attempting to ensure fetal demise in utero . . . clearly constitutes an undue burden."); *W. Ala. Women's Ctr.* 217 F. Supp. 3d at 1347; *Evans*, 977 F. Supp. at 1318 (forcing physicians to "attempt[] to ensure fetal demise before commencing a D & E procedure does not eliminate the undue burden placed by the . . . statute upon women seeking second trimester abortions"); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 368 P.3d 667, 678 (Kan. Ct. App. 2016) (demise interventions did not render D&E ban constitutional), *review granted*, No. 114,153 (Kan. Apr. 11, 2016); *cf. Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 612 (E.D. La. 1999), *aff'd* 221 F.3d 811 (5th Cir. 2000) (abortion restriction that does "not apply to a surgical abortion if fetal demise is first induced" imposes an undue burden because it "may force women seeking abortions to accept riskier or costlier abortion procedures").

In sum, a statute like the D&E Ban that prohibits the most common second-trimester abortion method is unconstitutional as a matter of law, irrespective of any purported demise work-arounds or state interests Defendants may assert. The Court need go no further to conclude that Plaintiff is likely to prevail on the merits of his claim.

2. There Are No Safe, Reliable Means of Guaranteeing Fetal Demise Throughout the Second Trimester.

Defendants argue that the existence of procedures to attempt to cause fetal demise preserves the availability of D&E, and saves the Ban. Defendants are wrong on both counts. The undisputed evidence makes plain that these attempts cannot safely and reliably guarantee

fetal demise.[21] These purported work-arounds are unavailable or ineffective for a significant number of patients, and are unstudied and/or unsafe to attempt in the manner Defendants urge. For that reason, a physician cannot safely begin any D&E.

First, Potassium Chloride (KCl): There is no dispute that injections of potassium chloride (KCl) directly into the fetal heart are rare; would be unsafe absent extensive, sub-specialty training and hospital grade equipment; and are unavailable in outpatient clinics such as Little Rock Family Planning Services. Testimony of Joseph R. Biggio, Jr., M.D., Tr. of Mot. Hearing, Vol. II, *W. Ala. Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313 (M.D. Ala. 2016) (No. 2:15-cv-497-MHT), filed Oct. 24, 2016, 111, 140-41 (attached hereto as Ex. 3);[22] Nichols Decl. ¶ 31; Hopkins Decl. ¶ 22; Hopkins Reb. Decl. ¶ 3. Defendants submitted the Alabama declaration of Dr. Biggio, who is trained to perform and trains other physicians to perform such highly-specialized procedures, Biggio Cross, 134, 139-41; Defendants' expert Dr. Wyatt professes no expertise in this area at all. *See* Wyatt Decl. ¶ 1. Dr. Wyatt's assertion that such injections are "no more difficult than amniocentesis," Wyatt Decl. ¶ 6, is non-credible, unsupported, and contradicts Plaintiff's expert, the cross examination of Dr. Biggio, and every court to have ruled on the question, *see, e.g., W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1345-46.

Contrary to Defendants' suggestion, nothing in *Gonzales* indicates that Arkansas may require Dr. Hopkins to undertake years of training in the sub-specialty of maternal fetal medicine to perform abortions. *See* Opp. Br. 43 (citing *Gonzales*, 550 U.S. at 163). No interest would justify the burden of so limiting the pool of abortion providers, and Defendants ignore the

[21] Defendants also suggest, without support, that physicians may rely on suction to cause demise and so avoid liability in the second trimester. Opp. Br. 31. That is false. Nichols Reb. Decl. ¶ 5.

[22] Hereinafter, citations to the cross examination of Dr. Biggio in *W. Ala. Women's Ctr. v. Miller* will be to "Biggio Cross" and citations to his direct examination will be to "Biggio Direct."

conclusion of that case: that the state could ban a specific second-trimester method only if D&E, the "usual" method of second-trimester abortion, remained available. *Gonzales*, 550 U.S. at 135. Because KCl injection is not available at the single facility providing D&E in Arkansas, Hopkins Reb. Decl. ¶ 3, D&E does not, in fact, remain available under the Ban. *W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1346.[23]

*Second, Digoxin***:** Digoxin injections to attempt to cause fetal demise do not save the Ban, either at 14-17 weeks or at and after 18 weeks. The parties agree that at 14-17 weeks—when two-thirds of D&Es take place—such injections are virtually unstudied. Biggio Cross, 143-44; Nichols Decl. ¶ 26; Hopkins Decl. ¶ 24. That virtually no such studies exist makes it unremarkable that, as Defendants note, Dr. "Hopkins has not presented any evidence that digoxin cannot be used effectively to" attempt to cause fetal demise "before 18 weeks," Opp. Br. 43. Hence, requiring digoxin injections for every patient starting at 14 weeks would be requiring a physician to experiment on his patient, without any way to know or counsel her on the effectiveness or safety of the experiment. Rebuttal Decl. of Mark D. Nichols, M.D., in Supp. of Pl.'s Mot. for Prelim. Inj. or Alt. TRO ("Nichols Reb. Decl.") ¶ 9; Hopkins Decl. ¶ 24.[24]

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[23] Defendants' suggestion that D&E could remain available because the over 600 patients seeking this care in Arkansas each year could go to a hospital for a KCl injection is absurd. *See* Opp. Br. 43; Hopkins Decl. ¶ 15 (number of D&E patients). Defendants cite no support for the notion that any Arkansas hospital would welcome more than twelve patients per week to terminate their second-trimester pregnancies using their most technologically advanced equipment and most highly trained sub-specialists, at low or no cost to the patient.

Nor do Defendants cite any support for the notion that the state can require the clinic to obtain, or that it could obtain, such equipment, without unduly burdening their patients. *See* Opp. Br. 43. The cost would be prohibitive for patients. *See Causeway*, 43 F. Supp. 2d at 612-13 (a ban on "surgical abortion" unless "fetal demise is first induced" imposes an undue burden because it "may force women seeking abortions to accept riskier or costlier abortion procedures").

[24] If, as Defendants assert, "[b]oth pre- and post-18-weeks' use of digoxin is off label—and therefore, not medically 'acceptable' for use in *any* abortion," Opp. Br. 42 (citation omitted), it is

Defendants also simply fail to counter Plaintiff's argument that requiring these injections starting at 14 weeks would impose another 24-hour delay and additional trip on patients. Defendants' inaccurate assertion notwithstanding, *see* Opp. Br. 41, Plaintiff does not impose delay on his patients to use digoxin: he uses it for patients for whom overnight dilation is medically indicated, which is not the case for patients before 18 weeks. *See* Nichols Decl. ¶ 17; Hopkins Decl. ¶¶ 16, 25f. Moreover, Defendants mischaracterize such a 24-hour procedure, were H.B. 1032 to mandate it starting at 14 weeks, as a "waiting period." *See* Opp. Br. 41. Arkansas already requires a woman to delay 48 hours after receiving state-mandated information in person, before she may consent to abortion care, requiring an additional trip to the physician. Ark. Code Ann. § 20-16-1703(b). Mandating yet another delay and another trip, for a 24-hour procedure, would be entirely different, Nichols Decl. ¶ 26; Hopkins Decl. ¶ 24, and entirely unjustified by any case law.

Even at 18 weeks, the existence of digoxin injections would not allow physicians to begin any D&E. First, it is undisputed that injections may be contraindicated, difficult, or impossible to perform in patients due to their anatomy. Nichols Decl. ¶ 27; Hopkins Decl. ¶ 25a; Biggio Cross, 143; Wyatt Decl. ¶ 6. Second, even in the majority of patients, for whom the injection is possible, digoxin fails to cause demise in 5-10% of cases, as confirmed by the physicians *all parties* cite. Biggio Cross, 142; Nichols Decl. ¶ 28. It is no "speculative suggestion that the digoxin might not work in a small number of cases," as Defendants state, Opp. Br. 41-42.

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unclear why Defendants urge digoxin as a purported work-around to the Ban. *See id.* at 34. Regardless, the assertion conflates two separate concepts: off-label use, which is extremely common, does not make a medical practice unacceptable. Nichols Reb. Decl. ¶ 8. Indeed, for the second-trimester induction abortions that Defendants rely on to suggest that H.B. 1032 leaves at least that second-trimester method available, Opp. Br. 32 n.9, the studied, standard-of-care induction agent is misoprostol, which was approved to treat stomach ulcers. *Id.* Digoxin before 18 weeks is, by contrast, unstudied and unacceptable.

Rather, for every twenty patients at 18+ weeks for whom a physician is able to inject digoxin, the drug will fail to cause fetal demise for one to two patients. *See* Hopkins Decl. ¶ 25b. While Plaintiff has no way to know in advance for which patients it will fail, he knows that those patients' care would then be banned, although they would already be dilated, and therefore at risk without that care. *See id.* Thus, physicians must stop providing D&Es, at 18 weeks as well as earlier.[25]

Third, Umbilical Cord Transection: Cord transection, which has been the subject of only one published study, does not save the Ban. Contrary to Defendants' claim, Plaintiff's expert Dr. Nichols does not state that he performs this procedure, *compare* Opp. Br. 43-44 *with* Nichols Decl. ¶¶ 32-35; Nichols Reb. Decl. ¶¶ 11-15. He does, however, opine that this procedure cannot safely be performed in every patient, Nichols Decl. ¶ 32, a fact confirmed in the Biggio declaration Defendants' cite, and in Defendants' opposition brief. Biggio Decl. ¶ 12; Opp. Br. 44. Moreover, there is no study that proves that umbilical cord transection is either safe or unsafe: Plaintiff's expert Dr. Nichols and Dr. Biggio agree that there has been only one scientific study on the use of cord transection to cause fetal demise, Nichols Reb. Decl. ¶¶ 11; Biggio Cross, 146; moreover, it has serious limitations and does not support any conclusion about the safety of the procedure, Nichols Reb. Decl. ¶ 13.[26] It thus cannot be used to conclude what level

[25] In addition, the articles on which Defendants rely to imply that some patients may have a preference for fetal demise, Opp. Br. 32—which would not, in any event, justify the Ban—have been called into question. Patients' responses to the questions in one article were often based on misinformation, Nichols Reb. Decl. ¶ 6. In any case, no study includes patients at 14-17 weeks, and Defendants cannot point to any support for the notion that any patient at that stage of pregnancy would prefer a digoxin injection, knowing that it is experimental and would add a day of delay.

[26] It is a *retrospective* study of pre-existing medical records, and thus has only a moderate level of evidence: the records were not compiled with any research in mind, and the data from the records was then collected with the sole purpose of determining the time it takes from cord

of risks cord transection imposes on patients: as the physicians all parties cite agree, the longer a D&E takes and the more instrument passes into the woman's uterus occur, the higher the risks of uterine perforation and other complications. *Id.*; Biggio Decl. ¶ 8; Biggio Cross, 144-45; Nichols Decl. ¶¶ 32-34; Hopkins Decl. ¶ 25d; *see also* Wyatt Decl. ¶ 6. This is why no physician to which either party cites would require cord transection in their respective practices. Biggio Cross, 144; Hopkins Decl. ¶ 25d; *see also* Nichols Decl. ¶ 34.

Moreover, as this sole study included *no patients before 16 weeks* (and of the patients in the study, most were at 18 weeks or later), there is no merit to Defendants' claim that this procedure is available throughout pregnancy, Opp. Br. 36. Attempting cord transection before this point is completely unstudied, and, like injections, these procedures are more difficult to do the earlier in pregnancy the patient seeks care. Nichols Reb. Decl. ¶¶ 14-15. Successfully identifying and transecting the cord at early gestations would take additional time and, likely, multiple passes with forceps, which, all cited physicians agree, increases the risk of uterine perforation and other complications. Nichols Reb. Decl. ¶ 15; Biggio Cross, 144-45.[27]

* * *

transection to fetal demise. Unlike prospective studies, retrospective studies can miss some complications and adverse impacts of the intervention studied. The purpose of this study was not to assess the safety or risks of cord transection and could not have done so, since there is no control group. Nichols Reb. Decl. ¶¶ 12-13.

[27] Defendants' claims about the availability of umbilical cord transection are based solely on this one study: neither Dr. Wyatt nor Dr. Biggio has any practical experience with cord transection in the outpatient setting, and whatever contrary conclusions they draw cannot be supported by the sole study that exists. Plaintiff and his expert, however, draw on practical experience. *W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1339 n.24 ("[Dr. Biggio] had significantly less expertise" than practitioners and his testimony on cord transection "was largely theoretical and not based on experience.").

Physicians cited by all parties agree that requiring any one of these procedures in addition to D&E would only increase risks to women seeking abortion in the second trimester.[28] Nichols Decl. ¶¶ 24, 27-28, 3, 33-34; Hopkins Decl. ¶¶ 25a, d-e.; Biggio Cross, 143, 145. In his Alabama testimony, Dr. Biggio agrees it is unreasonable to require every woman having an abortion to face additional risks beyond what is inherent in the D&E procedure. Biggio Cross, 148-49. The impact of these purported work-arounds is manifest, and indeed, they are not work-arounds at all.

Nonetheless, Defendants cite *Gonzales* in contending that this Court is barred from evaluating the medical evidence concerning both the feasibility and safety of their proposed demise work-arounds, saying that any medical uncertainty over the impact of a ban on even the dominant abortion method is for resolution by the legislature alone. Opp. Br. 38, 45-46. This argument fails. As an initial matter, the Court in *Gonzales* reached its discussion of medical uncertainty only *after* confirming that the usual second-trimester abortion method (which was undisputedly safe and reliable) was unaffected by the restriction on a rarely used abortion method. *Gonzales*, 550 U.S. at 150-54. The Court certainly did not hold that states have leeway to ban procedures, irrespective of the weight of the medical evidence, when the "usual" or "dominant" abortion method is at stake. *Id.* at 135, 165.

No less fundamentally, the Supreme Court's decision in *Whole Woman's Health* directly refutes Defendants' assertion that its prohibition of the usual second-trimester abortion procedure

[28] Defendants imply that digoxin use might make abortion easier and thus, Defendants' claim, safer. Opp. Br. 36. No medical evidence or expert testimony supports this claim. Only one article actually claims to have "observed" this phenomenon, and more recent, rigorous, and well-designed studies prove that this assertion is not true. Nichols Reb. Decl. ¶ 10. In any case, the purpose and effect of this statute is not to require digoxin because of some misguided belief that it makes abortion safer, it is to ban D&E. *See* Opp. Br. 37-39 (arguing *Whole Woman's Health* does not apply because the D&E Ban does not "regulate[] for health and safety").

is insulated from judicial examination of the evidence. In that case, the State of Texas cited the same cherry-picked phrases from *Gonzales* that Defendants invoke here and argued—identically to Defendants—that any medical uncertainty insulated the restriction from all meaningful judicial review. *Compare, e.g.*, Opp. Br. 14, 38 *with* Br. for Resp't, *Whole Woman's Health*, 136 S. Ct. at 2292 (No. 15-274), 2016 WL 344496, *21-26. The Supreme Court flatly rejected that argument, holding that the "statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with this Court's case law."[29] *Whole Woman's Health*, 136 S. Ct. at 2310. That case law requires careful scrutiny, which this law cannot survive.

3. None of Defendants' Remaining Arguments Saves the Ban.

Defendants' remaining arguments in defense of the Ban are meritless.

a. The D&E Ban's Scienter Requirement Does Not Save It.

Defendants' argument that the Ban's scienter requirement preserves access to D&E, and converts the faulty work-arounds to cure-alls, is without merit. *First*, Defendants intimate that a physician could proceed when digoxin fails, *see* Opp. Br. 41-42,[30] but then suggest that in such a

[29] This principle is true in all cases evaluating the constitutionality of abortion restrictions, where, as the Court noted, it has "placed considerable weight upon evidence . . . presented in judicial proceedings." *Whole Woman's Health*, 136 S. Ct. at 2310. It has even more force where—as here and in *Whole Woman's Health* but "[u]nlike in *Gonzales*"—the "statute . . . does not set forth any legislative findings." *Id.* As the Supreme Court held, "[f]or a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law." *Id.* Indeed, the Court held that by "consider[ing] the evidence in the record—including expert . . . testimony" regarding safety and medical matters—and "weigh[ing] the asserted benefits against the burdens . . . the District Court applied the correct legal standard." *Id.*

[30] In doing so, Defendants inaccurately analogize the scienter requirement of H.B. 1032 to that of "partial-birth abortion" bans, asserting that the mere "use of digoxin helps demonstrate a lack of the *mens rea* necessary to violate" both laws. Opp. Br. 9 n.4. But Defendants leave out critical parts of the "partial-birth abortion" ban that require that the physician intend to deliver the fetus, living, until it is largely outside the woman, *for the purpose of* performing a separate procedure *he knows will cause demise* when it is largely outside the woman. *Compare id. with* 18 U.S.C. §

scenario, the physician would have to "employ other methods for ensuring fetal demise, including cutting the umbilical cord," Opp. Br. 42. The latter assertion is consistent with the fact that in the case of digoxin failure, the physician cannot in fact proceed to provide the care his patient seeks because he would be fully aware that demise has not occurred.

Second, Defendants' reliance on scienter in the context of cord transection is no more convincing. Defendants assert that the scienter requirement allows for separation of fetal tissue if the physician is using forceps to try to grasp and transect the cord. Opp. Br. 44-45. But this ignores the fact that experts on both sides agree that a physician knows that in attempting to reach for the cord, he is likely to grasp fetal tissue instead of or in addition to the cord. Nichols Decl. ¶ 35; Hopkins Decl. ¶ 25e; *see also* Biggio Direct, 125 ("I definitely think that in an attempt to grab the cord, certainly a fetal extremity can be grasped at the same time.").[31]

Having this knowledge, a physician cannot proceed to perform a D&E, and credibly say that he did not purposely violate H.B. 1032. That law bans "an abortion performed with the purpose of causing the death of" the fetus "that purposely dismembers the living" fetus using a grasping instrument. H.B. 1032, § 20-16-1802(3)(A)(i). The law's definition of "purposely" states that "[i]f the element involves the attendant circumstances, the actor is aware of the existence of such circumstances." *Id.* § 20-16-1802(5)(B). It is undisputed that the physician

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1531(b)(1)(A)-(B). Thus, a physician intending to do a standard D&E may use digoxin to demonstrate lack of the necessary intent to violate the "partial-birth abortion" ban, knowing that he is, in any event, overwhelmingly likely to do a standard D&E, which that law does not ban. In the case of H.B. 1032, by contrast, a physician intending to do a standard D&E who realizes that a digoxin injection has failed cannot then blithely proceed to use forceps to perform a standard D&E, knowing perfectly well that demise has not yet occurred—the very acts H.B. 1032 bans. H.B. 1032 lacks any intent language that would allow a physician to proceed in this scenario.

[31] He would also know that the earlier in pregnancy the woman seeks care, the more likely this is to happen, as the earlier in pregnancy, the smaller the cord is, and the more difficult to differentiate from fetal tissue, including with ultrasound. *See* Nichols Reb. Decl. ¶ 15.

would be aware that—in grasping for the cord with forceps, making the exact same motion he makes when not seeking the cord—he is quite likely to grasp fetal tissue.

Defendants' assertion is thus contrary to facts and law. It posits that a doctor can do the very thing H.B. 1032 bans (cause tissue separation before demise), but avoid prosecution by asserting that he intended to separate the cord alone, even though *he knew* the cord transection procedure was *in fact* likely to result in fetal tissue separation. That is, a doctor should count on avoiding prosecution under a theory of willful blindness—blindness to the natural and probable consequences of his actions. However, willful blindness is never a defense to prosecution. "It is axiomatic that one is presumed to intend the natural and probable consequences of his actions," *Leaks v. State*, 45 S.W. 3d 363, 366 (Ark. 2001), and when one is aware of the natural and probable consequences of a given act, engaging in that act is evidence of a "conscious objective" to engage in the conduct resulting in those consequences. *Walker v. State*, 918 S.W. 2d 172, 173 (Ark. 1996). Given the clear likelihood that attempting to grasp and transect the cord will lead to separation of fetal tissue prior to demise, it is implausible to conclude that attempting to transect the cord would allow physicians to circumvent the D&E ban imposed by HB 1032.

Finally, Defendants show the true colors of their argument about the scienter requirement in clarifying that what it actually does is protect a physician who proceeds with a D&E *not realizing* that an attempted demise had failed. Opp. Br. 42 ("[T]he Act's scienter requirements ensure that even if" an attempt to cause demise "were to fail and a continuing heartbeat *were to go undetected*, the physician still would not be liable under Act 45 for inadvertently dismembering a living" fetus.) (emphasis added). That is entirely irrelevant to actual physicians: as Defendants put it, the "ubiquitous use of ultrasound . . . ensures that a physician will know

whether an attempt" to cause demise has failed. *Id.* The Ban's scienter requirement would thus in no way allow D&E practice to continue.

b. The Ban Affects a Large Fraction of Women.

Defendants err on both the facts and the law when they assert that the Ban passes constitutional muster because it "affects only a small fraction of abortions." Opp. Br. 29. As to the facts, contrary to Defendants' contention, the Ban affects all D&Es. Defendants have simply misread Dr. Hopkins's declaration, and erroneously assert that it "indicates that abortions coming within" the Ban's "scienter requirement would begin only 'starting at 18 to 20 weeks'" *Id.* at 30 (citing Hopkins Decl. ¶ 16).[32] Dr. Hopkins made clear that the procedures at 14-17 weeks and at 18 or more weeks are identical with respect to the Ban's scienter language. *See* Hopkins Decl. ¶¶ 14, 16 ("[D]uring the early weeks of the second trimester, . . . [b]ecause the fetus is larger than the opening of the cervix, the fetal tissue generally comes apart as the physician removes it through the cervix. . . . [A]t 18 to 20 weeks, the physician proceeds as in earlier D&Es, removing the fetus, generally in pieces because it is larger than the cervical opening.").

But even the Ban affected a narrower category of women,[33] that would not change the outcome. That is because as a legal matter, the analysis of the facial validity of an abortion restriction does not end with the universe of women to whom it applies. It starts there, as the Supreme Court explained in striking down a spousal notice mandate on its face—even though the state there asserted that because "the statute affects fewer than one percent of women seeking abortions," it "cannot be invalid on its face." *Casey*, 505 U.S. at 894. As the Court explained,

[32] Defendants' argument here is perplexing, inasmuch as they intimate elsewhere that the digoxin injections Plaintiff attempts for most patients starting at 18 weeks somehow make the Ban not apply. *See, e.g.*, Opp. Br. 31.

[33] *See, e.g.*, Hopkins Decl. Ex. B (Arkansas Dep't of Health statistics showing of 3,771 abortions reported in Arkansas in 2015, 232 (6%) took place at or after 18 weeks LMP (16 weeks "PPF").

"The analysis does not end with the one percent of women upon whom the statute operates; it begins there. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. . . . [I]n a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." *Id.* at 894-95. So here, no matter the universe of women affected, the effect of H.B. 1032 is to impose an undue burden, and the law is facially invalid.

c. The Narrow Medical Exception Does Not Save the Ban.

Nor does the Ban's exceedingly narrow exception save it. Defendants claim that "women who need [a D&E] for medical reasons" would still be able to get one. Opp. Br. 45. It is unclear what Defendants are referring to. To the extent that they are referencing the health exception, it is far too narrow to justify their assertion. That exception allows otherwise banned conduct only when "necessary to avert either the death . . . or the serious risk of substantial and irreversible physical impairment of major bodily function of the pregnant woman." H.B. 1032, § 20-16-1802(6)(A). A woman who is already dilated and for whom digoxin has failed needs an abortion "for medical reasons," but that care is not yet "necessary to avert" her "death" or "serious risk of substantial and irreversible" physical harm. *See* Hopkins Decl. ¶ 25f. Under this Ban, such a patient would be denied an abortion until her condition substantially and inevitably deteriorated. *See id.* Similarly, there is, for example, no exception to this Ban for a woman for whom injections are difficult or impossible because of anatomy or medical contraindication.[34]

[34] Defendants argue that such cases do not prove that the D&E Ban imposes an unconstitutional burden to all or a substantial fraction of women. However, as explained *supra* Point IV.A.3.b, the undue burden analysis begins with patients who are affected by the Ban.

d. The Ban Advances No Valid State Interest in a Permissible Way

Finally, Defendants rest on a state interest in promoting respect for potential life by targeting a method that, they say, is "uniquely" objectionable. Opp. Br. 27-28. *First*, what Defendants are plainly arguing is that the legislature may ban any method it finds objectionable—and not uniquely so: As Defendants' opposition brief makes plain, the State objects to *all* methods, *see* Opp. Br. 14 n.5; *see also* Ark. Code Ann. § 20-16-1202 (ban on little-used variant of D&E).

Second, Defendants' reliance here on *Gonzales v. Carhart*, 550 U.S. 124 (2007), turns that case's holding on its head. *Gonzales* credited the asserted state interest in banning a little-used variant of D&E specifically *because* that variant "differs from a standard D&E." 550 U.S. at 160. According to the Court, Congress could conclude that "partial-birth abortion, *more than standard D & E*, undermines the public's perception of the appropriate role of a physician . . . ." *Id.* (emphases added) (quotation marks omitted). It does not follow that Arkansas may, simply by asserting that same state interest, ban standard D&E, the dominant second-trimester method.

Third, and most important, as *Danforth*, *Stenberg* and *Gonzales* make clear, *whatever* state interest Defendants may assert cannot justify a ban on D&E, the safe, proven method that accounts for almost all second-trimester abortion care in the nation and 100% of reported abortions starting at 14 weeks in Arkansas. *See supra* Point IV.A.1. As the Court explained in *Stenberg*, the ban struck down there "impose[d] an undue burden on a woman's ability to choose a D & E abortion, *thereby unduly burdening the right to choose abortion itself*." *Stenberg*, 530 U.S. at 930 (emphasis added) (quotation marks and citations omitted).

Hence, Defendants' opposition in no way undercuts Plaintiff's showing that he is likely to succeed on the merits of his challenge to the D&E Ban.

B. Neither Defendants' Purported Reading of, Nor Their Asserted Justifications for, the Medical Records Mandate Negates The Law's Undue Burden and Unconstitutional Vagueness.

1. The Plain Meaning of Section 20-16-1804(b)(2) Applies to All Abortions.

Defendants contend that the Medical Records Mandate applies only in "situations where the woman knows the sex" of the embryo or fetus. Opp. Br. 48-49. That assertion, however, ignores the plain meaning of the provision's unambiguous language. Indeed, Defendants' erroneous summary, *see id.*, leaves out the first part of § 20-16-1804(b) and ignores the punctuation and numbering of the provision. When the provision is read as enacted, however, it is clear that the Medical Records Mandate is a second, independent requirement from the required colloquy about abortions based solely on the sex of the embryo or fetus. Section 20-16-1804(b), unequivocally delineating that requirements (1) and (2) must *each* precede any abortion, states:

> (b) Before performing an abortion, the physician or other person who is performing the abortion shall:
>
> (1)(A) Ask the pregnant woman if she knows the sex of the unborn child.
>
> (B) If the pregnant woman knows the sex of the unborn child, the physician … shall inform the pregnant woman of the prohibition of abortion as a method of sex selection for children; and
>
> (2)(A) Request the medical records of the pregnant woman relating directly to the entire pregnancy history of the woman.
>
> (B) An abortion shall not be performed until reasonable time and effort is spent to obtain the medical records of the pregnant woman as described in subdivision (b)(2)(A) of this section.

The Court is to strictly construe an Arkansas statute, particularly one with criminal penalties, "just as it reads." *Short v. State*, 79 S.W.3d 313, 315 (Ark. 2002). Moreover, Arkansas' rules of statutory construction forbid the attempted use of either a statutory title or the

legislature's purpose to establish a statute's meaning, if by its plain language its meaning is unambiguous, as it is here. *See Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135, 139 (Ark. 2009) ("Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used[;] . . . we construe it just as it reads, giving the words their ordinary and usually accepted meaning"); *Stucco Plus, Inc. v. Rose*, 938 S.W.2d 556, 560 (Ark. 1997) ("When a statute is plain and unambiguous, there is no need to resort to rules of statutory construction."); *Henderson v. Russell*, 589 S.W.2d 565, 568 (Ark. 1979) ("We have often held that the title of an act is not controlling in its construction"; the title or the title's language may play a part only in explaining ambiguities or shedding light on legislative intent in the context of ambiguities). Defendants here cannot change the meaning of § 20-16-1804(b) by referencing its caption or one of the general purposes behind the whole of H.B. 1434. *See* Opp. Br. 48-49. Nor can Defendants, a prosecutor and the members of the Arkansas State Medical Board, revise the statute and impose a narrower rule simply by their presently-stated litigation position, when the legislature has clearly written 1804(b) more broadly. *See Stenberg*, 530 U.S. at 940-41, 944 (emphasizing that state litigating party's views are not binding and prosecutors' interpretation of criminal statutes are not entitled to deference).

Thus, any limiting construction of the Medical Records Mandate would have to be decreed by this Court and the unambiguous language of the statute provides no basis for doing so. In addition, even if § 20-16-1804(b) were limited to situations where a woman told her medical providers that she knew the sex of the embryo or fetus (which it is not), it would still be unconstitutional as an undue burden on those women's access to abortion and as an unconstitutionally vague criminal offense for her physician. *See infra* Point IV.B.3. The analysis of whether an abortion restriction violates constitutional requirements starts with the

universe of affected women, and a statute's impact on only a subset of all women who seek abortions does not support its validity. *See supra* Point IV.A.3.b (citing *Casey*); *contra* Opp. Br. 48-49.

2. The Medical Records Mandate Imposes an Undue Burden Through Its Indefinite Delay, Lack of Any Health Exception, and the Wide Sweep of Its Required Inquiries.

Defendants' arguments with regard to the Medical Records Mandate fail to address the evidence provided in the declarations of Frederick W. Hopkins, M.D., M.P.H., and Lori Williams, M.S.N., A.P.R.N., and the constitutional flaws that Plaintiff identifies. It is beside the point, for example, that a woman's health needs would allow a physician to proceed in the face of § 20-16-1804(a)—part (a) is not the provision challenged here. *See* Opp. Br. 50. Defendants do not and cannot contest that there is no health exception that allows a physician to proceed before he complies with § 20-16-1804(b), the challenged provision, which unequivocally requires medical records requests for the patient's "entire pregnancy history" and the indefinite delay of "reasonable time and effort to obtain the medical records" before any abortion can be performed. H.B. 1434, § 20-16-1804(b).[35]

Likewise, Defendants misleadingly argue as if there is nothing in the record to "suggest what the likely time period is before such records could be obtained." *See* Opp. Br. 50-51. Defendants also ignore the well-documented, significant health risks imposed on women by indeterminate delays, particularly where such delays occur when a woman seeks care close to or during her second trimester. *See id*. The declarations of Dr. Hopkins and Ms. Williams, the Clinical Director at Little Rock Family Planning Services, explain that it can take "days or

[35] This prohibition applies whether the physician proceeds "knowingly," *see* H.B. 1434 §§ 20-16-1805, 20-16-1806(a)(1), or otherwise, *see* H.B. 1434 § 20-16-1806(c).

weeks" for providers to send even recent medical records "if they send them at all," and that "older records and paper records take longer to retrieve and transmit." Hopkins Decl. ¶¶ 39-41; Decl. of Lori Williams, M.S.N., A.P.R.N., in Supp. of Pl.'s Mot. for Prelim. Inj. or Alt. TRO ("Williams Decl.") ¶¶ 25-26, June 20, 2017, ECF No. 6. Under the Medical Records Mandate, those time periods would start running *after* the patient has signed a records request for each medical provider from whom she has received care "directly related" to any past or the current pregnancy, and the clinic has initially attempted to reach her providers, wherever they may be, with those forms. Williams Decl. ¶¶ 30-33; Hopkins Decl. ¶¶ 38, 41.

This kind of legally mandated, indefinite delay before an abortion—including periods far longer than the State's 48-hour mandatory delay—has never been upheld, including because it poses "unacceptable" health risks that "increase as pregnancy advances." *See* Hopkins Decl. ¶¶ 28, 39, 42; Williams Decl. ¶ 34; Pl.'s Br. 35-36 (collecting cases).[36] Thus, far from being of less concern as pregnancy advances, as Defendants' assert, Opp. Br. 51, indefinite delays of days or weeks later in pregnancy can greatly increase health risks or completely deprive the patient of her right to abortion. *See* Hopkins Decl. ¶¶ 28, 39, 42; Williams Decl. ¶ 34; Pl.'s Br. 35-36*; see also* H.B. 1434, § 20-16-1802(2)(A). By imposing indeterminate delay, purportedly in some incremental aid of enforcing the separate ban on abortions sought solely on the basis of sex,[37] the

[36] Contrary to Defendants' summary, Opp. Br. 51, *Casey*, 505 U.S. at 885-87, upheld a 24-hour mandatory delay because there was no undue burden shown "on the record" before the Court, emphasizing the necessary case-specific undue burden test.

[37] Despite Defendants' assertions, Opp. Br. 49-50, there is nothing in the record that connects the Medical Records Mandate with "protecting women's health[.]" As the legislature itself documented in H.B. 1434, it "is undisputed that abortion risks to maternal health increase as gestation increases," § 20-16-1802(a)(2), and as Dr. Hopkins and Ms. Williams explain, blanket medical record requests for a woman's entire history related to any and all pregnancies are not a part of standard abortion care, Hopkins Decl. ¶¶ 31-42, Williams Decl. ¶¶ 24-34. The Medical Records Mandate harms, not protects, women's health. *Id.* That Defendants' lawyers disagree,

Medical Records Mandate imposes an undue burden on a woman's liberty and privacy. *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 918, 920 (7th Cir. 2015) (striking down restrictions that imposed delays and thereby burdened women's health without sufficient countervailing benefit, where "[s]ome women would have to forgo first-trimester abortions and instead get second-trimester ones, which are more expensive and present greater health risks. Other women would be unable to obtain any abortion[.]"), *cert. denied*, 136 S. Ct. 2545 (2016).

In addition to its delay and its harms to health and access, which are alone enough to establish an unconstitutional undue burden, the Medical Records Mandate further burdens those rights by adding crushing administrative burdens and costs, and by forcing patients to give up the confidentiality of their abortion care. Under this enactment, Dr. Hopkins and his colleagues at the clinic *must* request records from all previous pregnancy-related medical providers for each of the clinic's over 3000 patients per year, *see* H.B. 1434 § 20-16-1804(b)(2)(a); the only aspect subject to the vague "reasonable time and effort" provision is the process of following up "to obtain the medical records" after those mandatory requests, § 20-16-1804(b)(2)(b). As Dr. Hopkins and Ms. Williams have shown, these are "insurmountable" undertakings, Williams Decl. ¶ 32, that would also severely burden their patients by spreading the fact of a woman's abortion decision far and wide, to an array of past and present medical providers, including those to whom the patient explicitly does *not* want to disclose her decision. Hopkins Decl. ¶¶ 37-38, 40, 42; Williams Decl. ¶¶ 24-34.

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without any evidentiary support, Opp. Br. 49-50, is entitled to no weight. Moreover, the ban on abortions sought based solely on sex, with its enforcement tool of § 20-16-1804(a), stands on its own, and any purported marginal aid that the Medical Records Mandate might provide has not been established, much less shown to outweigh the burdens that § 20-16-1804(b) imposes.

Moreover, the indefinite delays and breach of confidentiality required by the Medical Records Mandate, if it could be implemented at all from an administrative and cost standpoint, would affect all patients with any previous pregnancy-related medical care from any other provider in their lifetimes.[38] Its unconstitutional harms are not dependent on unusual, as-applied circumstances, as Defendants contend, Opp. Br. 51, but rather occur broadly under the sweeping terms of this enactment. For all these reasons, as well as those set forth in his opening brief, Plaintiff is likely to succeed in showing that this law imposes an undue burden.

3. The Medical Records Mandate Is Unconstitutionally Vague.

The Medical Records Mandate also violates constitutional protections for a second reason: its requirements of (a) requests for all "medical records of the pregnant woman relating directly to the entire pregnancy history of the woman" and (b) "reasonable time and effort . . . spent to obtain" those medical records are impermissibly vague, not telling physicians with adequate clarity when abortions are *or* are not permitted. Instead, the steps providers must take "[b]efore performing an abortion" are without ascertainable standards informing a physician when he can proceed with care, or when he must refrain on pain of criminal and licensing penalties. *See* H.B. 1434, § 20-16-1804.

Defendants' own arguments highlight the Medical Records Mandate's vagueness. Defendants apparently read the reference in § 20-16-1804(b)(2)(A) to a woman's "entire pregnancy history" to apply only to "past pregnancies," Opp. Br. 54, yet no language in the statute specifies that limitation. Instead, the language is "entire pregnancy history," and that

[38] This breach of confidentiality is one aspect of the multiple harms to patients' liberty right to choose abortion, because disclosures hamper free choice, *see* Pl.'s Br. 39-40, separate and apart from the right to informational privacy. Plaintiff does not rely on the Medical Records Mandate's infringement of informational privacy for purposes of this preliminary injunction motion. *See supra* Introduction.

language as used in (b)(2)(A) could be read to include only the current "pregnancy history" or, to give more meaning to "entire," to encompass both past pregnancies *and* the women's current "pregnancy history." Defendants arbitrarily assume that the reference only applies to past pregnancies, however, and pick one of three possible readings of this unclear statutory language. Similarly, Defendants can only reference the statute's phrase "directly relate to" and offer no clarity as to the universe of medical records that might "directly relate to" a woman's "entire pregnancy history." Opp. Br. 54. They offer no answers to the broad uncertainty identified in Plaintiff's opening brief: Does this require requests to general practitioners, to hospitals, or solely to specialists? Does this require requests to laboratories for pregnancy tests, or to ultrasound centers to try to establish that a woman may know the sex of this or a prior pregnancy? Defendants' arguments leave unclear and undefined the universe of prior health care providers from whom records *must* be requested to remove § 20-16-1804(b)(2)(A)'s prohibition on proceeding with an abortion.

Similarly, for § 20-16-1804(b)(2)(B)'s requirement of "reasonable time and effort" to obtain the medical records after (2)(A)'s requests, Defendants try to import a notion of "objective reasonableness" that is nowhere referenced in the law, and offer no concrete description of what "reasonable time and effort" in this context might be. Opp. Br. 52-53. Instead, Defendants refer to cases concerning different standards in other contexts or to professionals' medical judgments. *Id.* Their arguments wholly fail to clarify what Arkansas means by "reasonable time and effort" in the context of § 20-16-1804(b)(2)'s non-medically indicated, blanket searches for entire medical histories, or what physicians are to do with records if and when they arrive.

Contrary to Defendants' arguments, moreover, the case law does not establish a *per se* rule as to whether a standard incorporating the word "reasonable" is or is not unconstitutionally vague. *Cf.* Opp. Br. 52. The constitutional vagueness inquiry looks at the particular statutory provision at issue. Due Process standards are not "mechanically applied," but rather take into account the specific context of the regulation and whether that diminishes or exacerbates any problem of indeterminateness. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Criminal statutes, particularly those that touch upon constitutionally protected activity, as here, must closely specify their coverage, because vagueness "may permit 'a standardless sweep [that] allows" prosecutors or other enforcers "to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 357-58, 362 (1983) (striking down requirement that individuals be able to produce identification "carrying reasonable assurance" that it was authentic); *see also Colautti v. Franklin*, 439 U.S. 379, 391-94 (1979) (striking down abortion restriction that referenced, *inter alia*, the vague phrase "sufficient reason to believe that the fetus may be viable").

Thus, Defendants cannot answer the impermissible vagueness that the phrase "reasonable time and effort" engenders within § 20-16-1804(b) by merely pointing to other uses of similar words in other laws, nor will any result here affect other statutes.[39] The core problem with the

[39] Moreover, many of Defendants' cited cases do not concern vagueness claims with regard to "reasonableness" issues at all. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551 (2016) (striking down as unconstitutionally vague a provision about "serious potential risk of physical injury to another"); *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587 (1875) (rejecting effort to rescind a contract). Defendants appear to be citing cases far afield to avoid the necessary focus on the particular statute at hand. Given Defendants' inapposite citations, however, it bears noting that the Supreme Court has struck down as unconstitutionally vague criminal liability provisions that were triggered by whether or not profits or rates were "reasonable," *see, e.g., Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *United States. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), and the phrases "reasonable investigative techniques" and "reasonable efforts" have each been

Medical Records Mandate is that it takes physicians and their staff far beyond any medical needs or judgments, and imposes a new, *sui generis* requirement, without any markers or established practices for determining what constitutes "reasonable time and effort" in pursuit of a woman's "entire pregnancy history" and toward an unspecified goal – though one apparently related (as Defendants argue) to ferreting out patients' prior knowledge and actions. *See Cline v. Frink Dairy Co.*, 274 U.S. 445, 454-60 (1927) (contrasting novel, unconstitutionally vague criminal statute that turned on whether profits were "reasonable" with phrases in other statutes that might be sufficiently clarified by widely established technical, common law, or historical meaning).

Defendants' argument reduces to the faulty assertion that "physicians and their staff . . . know what fees are reasonable and how long one may reasonably wait to receive records." Opp. Br. 53. If physicians and their staff could rely on what they "know" from their own experience, however, they would not undertake any such massive records requests, and would not request any records against a patient's will. Hopkins Decl. ¶¶ 31-42; Williams Decl. ¶¶ 24-34. They cannot know what expense and delay is "reasonable" in this newly mandated realm and in the face of the statute's silence, Hopkins Decl. ¶¶ 35-37, Williams Decl. ¶ 29, nor are those enforcing the law given any ascertainable standard.

Plaintiff is likely to prevail on his claim that Due Process forbids the Medical Records Mandate's novel basis for criminal and quasi-criminal liability, especially because this statute's lack of clarity prevents him from providing women with constitutionally-protected abortion care.

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found to lack sufficient specificity under Due Process principles in particular contexts, *see Matter of Metro-East Mfg. Co.*, 655 F.2d 805 (7th Cir. 1981)*; Northland Family Planning Clinic, Inc. v. Cox*, 394 F. Supp. 2d 978, 988-89 (E.D. Mich. 2005), *aff'd* 487 F.3d 323 (6th Cir. 2007).

C. The Local Disclosure Mandate Unconstitutionally Punishes Non-CMA Teenage Patients.

1. The Local Disclosure Mandate Punishes Abortion and Imposes An Undue Burden.

Defendants misstate the posture of Plaintiff's challenge to the Local Disclosure Mandate in several important respects. *First*, Plaintiff's as-applied challenge to H.B. 2024 does *not* somehow "concede" that the narrower 2013 statute (enacted several years before Plaintiff began practicing in Arkansas) "does not prohibit medication abortion or constitute a substantial obstacle to an abortion when applied to" patients under fourteen, or that it is consistent with all constitutional requirements. Rather, Plaintiff brings particular, as-applied claims challenging the new, expanded version of the law, without conceding any of the above.

Second, as explained in Plaintiff's opening brief, Pl.'s Br. 17 n.8, the reference to HIPAA in one section of the statute does not "help[] to ensure confidentiality of" a teenager's information, *cf.* Opp. Br. 66, because HIPAA contains an exception for law enforcement, and the specifics of both H.B. 2024 and its implementing rules *require* disclosure of the teenage patient's abortion to police in her home jurisdiction, indefinite storage of tissue labeled with her name on it, and use of a Fetal Tissue Transmission Form, which includes not only her name, but her parent's name, her home address, and the name of the so-called "suspect," her sexual partner. Pl.'s Br. 16-17. These required disclosures evade HIPAA constraints.

Third, to the extent that Defendants are correct that neither Ark. Code Ann. § 12-18-108 nor H.B. 2024 applies to medication abortion, *see* Opp. Br. 64, the statute's implementing Rules can be read otherwise—given their definition of abortion that includes the act of prescribing drugs and their requirement that "all products of conception should be preserved." To avoid the specific constitutional issues created by this apparent application to medication abortions,

including not only an undue burden but this vagueness, the Court would have to explicitly clarify and decree that the verb "extracted" limits the statute's scope to surgical abortions, as argued by Defendants. *See Johnson*, 308 S.W.3d at 139 (if the language of the statute allows it, Court may construe to avoid an unconstitutional aspect). As noted above, Defendants themselves cannot clarify the law and limit future enforcement merely by assertions in their brief. *See supra* Point IV.B.1. Moreover, the other serious constitutional harms shown here would still remain.

Fourth, the Child Maltreatment Act contains very detailed definitions of sexual abuse, and sexual exploitation, and enlists mandatory reporters such as Plaintiff and the staff of the clinic to report to the specialized state Child Abuse Hotline whenever there is an indication that a child may be the victim of such maltreatment. Thus, contrary to Defendants' portrayal, *see* Opp. Br. 65, these determinations are not made based on Dr. Hopkins's personal definitions, but follow the terms of Arkansas law and are part of the important role that the state already vests in mandatory reporters, including physicians. The Child Maltreatment Act itself defines when reporting is required and who the "Non-CMA Teenage Patients" are, for purposes of this as-applied claim.

Similarly, Arkansas state law has already determined that the central repository for any suspicions of child maltreatment is the *state* Hotline, which is run by a specially trained unit of the State Police, along with the Department of Human Services. Local law enforcement personnel are themselves mandatory reporters to that Hotline, and if they have "information sufficient to raise suspicions of illegal sexual activity" with children, as Defendants hypothesize, Opp. Br. 65, those local law enforcement officers must raise their suspicions with the Hotline, which coordinates any investigation and response. Ark. Code Ann. § 12-18-402(a)(1)(A) & (b)(13). Thus, contrary to Defendants' portrayal, local police do not keep such suspicions to

themselves, and wait for "tips" to their local department, but rather work with the Hotline as the central point of contact, as they are required to do by the explicit terms of state law.[40]

Most important, Defendants err in their assertion that "[n]otifying law enforcement of abortions performed on children puts them on notice that the girls may be victims of sexual abuse or exploitation." Opp. Br. 63. There is nothing about 14- to 16-year-old teenagers receiving abortion care that indicates those teenagers "may be victims of sexual abuse or exploitation"—their sexual intercourse and ensuing abortion are not facts that create a suspicion of abuse. For the Non-CMA Teenage Patients, moreover, there are no other facts indicating abuse, there is no required reporting under Arkansas' CMA, and thus for them the Local Disclosure Mandate separately intervenes to require disclosure to local police in the teenager's hometown, of those purely private facts of an abortion and earlier sexual activity.

Defendants' error—in claiming supposed notice of possible abuse from a teenager's abortion alone—exposes the lack of justification for the Local Disclosure Mandate, and its role simply as a punishment and deterrent for abortion. In terms of revealed sexual activity, there is no difference between teenagers seeking abortion care and those seeking care for miscarriage, sexually transmitted infections, contraception *or* prenatal care, yet only abortion patients are

[40] In addition, state and local law enforcement have numerous tools at their disposal and are obviously well-equipped to gather tissue evidence if there are facts indicating that abuse has occurred. The out-of-state newspaper articles that Defendants advance, again offering hearsay, Opp. Br. Exs. 22-25, each report a situation where facts existed prior to any abortion that caused suspicion of a rape. In most, the articles state that law enforcement established probable cause and sought a search warrant to collect tissue evidence at the time of the abortion. In one case, law enforcement started the investigation and collected tissue at that time, but then took ten years to secure a final guilty plea. The Local Disclosure Law is irrelevant to ensuring that law enforcement in Arkansas will continue to have the full cooperation of Dr. Hopkins and his colleagues at the clinic in collecting tissue evidence in situations like these, where there are facts indicating rape (of a patient of any age) or other sexual abuse. *See* Hopkins Decl. ¶ 43; Williams Decl. ¶¶ 35, 39.

targeted by this Local Disclosure Law, including when—as is true in the vast majority of cases and for all the Non-CMA Teenage Patients at issue—there is no indication at all of actual abuse. *See Whole Woman's Health*, 136 S. Ct. at 2315 (discussing under-inclusive scope of the provision). The required disclosure to local police, the collection of tissue as "evidence," and the indefinite life of that evidence (because there are no grounds for any investigation or DNA testing) combine to impose an undue burden on the Non-CMA Teenage Patients' access to abortion, confusing them, humiliating them, and making them fearful of the reaction by police in their home jurisdiction if they go ahead with the care they seek and their abortion is therefore disclosed. The local disclosure of a teenager's identity, her address, her sexual partner, and the tissue from her abortion bears no resemblance to the *anonymous* reporting and record-keeping about abortion upheld in *Casey*, 505 U.S. at 900, *cf.* Opp. Br. 67, and typical in various states, including Arkansas, to serve public health purposes. Here, Plaintiff is likely to succeed in showing that no sufficient and proper state interest for this abortion-only disclosure law outweighs the serious harms it imposes, that it instead serves only to interfere with abortion care, and that therefore the law imposes an undue burden.

2. The Local Disclosure Mandate Violates Non-CMA Teenagers' Informational Privacy.

The Local Disclosure Mandate not only interferes with these teenagers' protected liberty rights to choose an abortion, but also violates their right to informational privacy. Defendants' main contention on informational privacy is the erroneous argument that no such constitutional right exists. Opp. Br. 54-58, 68. But the Eighth Circuit, in *Alexander v. Peffer*, 993 F.2d 1348, 1349-50 (8th Cir. 1993), *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996), and *Cooksey v. Boyer*, 289 F.3d 513, 515-16 (8th Cir. 2002), among other cases, has repeatedly recognized that one aspect of the constitutional right to privacy protects individuals against the involuntary

disclosure of highly personal matters. Comments by the Court of Appeals that the "exact boundaries" of the right are unclear, *see, e.g.*, *Eagle*, 88 F.3d at 625, only reinforce that it has repeatedly found there *is* such a right, in its holdings and not in *dicta*, as Defendants' claim. In *Cooksey*, for example, the Court ruled against the constitutional claim only after weighing the specific justifications offered, and finding that strong government interests justified limited disclosures involving one individual, a police chief. But the Court was careful to emphasize that it was not endorsing a wholesale rejection of constitutional informational privacy protection. *See* 289 F.3d at 516-17 ("Our holding is limited to the facts of this case and we certainly do not imply" that forced disclosure of all mental health information is constitutionally permitted.).

The Eighth Circuit has said that "to violate [a person's] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." *Peffer*, 993 F.2d at 1350. Reiterating that language in *Eagle*, the court noted further: "When the information is inherently private, it is entitled to protection." 88 F.3d at 625 (quoting *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 812 F.2d 105, 116 (3d Cir.1987)). The *Eagle* decision contrasted medical records and other inherently private information typically found protected by the constitutional right, with the materially different, criminal conviction history at issue in that case. *See id*. at 625-26.

Here, Defendants never contest that a young woman's sexual activity and decision to have an abortion are extremely private facts about which she has a high and legitimate expectation of privacy. Given the inherently private nature of that information, the Court must weigh whether the forced disclosure at issue is or is not justified by closely targeted, countervailing and sufficiently strong state interests. The test for invasions of informational

privacy is a context-specific balancing test that requires targeted, and not indiscriminate, invasions of privacy to directly serve substantial government needs. *See, e.g., O'Connor v. Pierson*, 426 F.3d 187, 202-03 (2d Cir. 2005) ("When legislation burdens constitutionally protected privacy rights, we will … uphold the statute only if a substantial government interest outweighs the burdened privacy right."); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980) (to uphold an intrusion requires a "finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case"; "we must engage in the delicate task of weighing competing interests"); *Senior Exec. Ass'n v. United States*, No. 8:12-cv-02297-AW, 2013 WL 1316333 at *7 (D. Md. Mar. 27, 2013) ("[O]ne cannot gainsay the Government's interest in deterring corruption and conflicts of interests" but "[h]owever compelling, these interests fail to outweigh Plaintiffs' privacy and security interests[.]"); *see also Margaret S. v. Edwards*, 488 F. Supp. 181, 204 (E.D. La. 1980) (observing "[o]ne of the most personal matters that can be disclosed is the fact that a woman is seeking an abortion" in discussing importance of shielding, and finding violation of minors' informational privacy rights in statute forcing, disclosure of abortion to parent).[41]

The Local Disclosure Mandate fails this required constitutional scrutiny because it forces blanket disclosure for all the Non-CMA Teenage Patients without any factual basis to tie

[41] Defendants erroneously suggest that "the State's lack of any need for the disclosure" would not be enough to justify striking down a statute's invasion of constitutionally protected privacy interests. Opp. Br. 59. There, however, Defendants quote and rely on part I of *Whalen v. Roe*, 429 U.S. 589, 598 (1977), which discusses *Lochner v. New York*, 198 U.S. 45 (1905), and the standards that might apply in any ordinary commercial context. When *Whalen*, in part II, considers constitutional zones of privacy, however, it is clear that the Supreme Court there employs a context-specific balancing test to assess whether important state interests are sufficiently served by forced disclosures of private information to therefore satisfy the Constitution; when private, constitutionally-shielded information is at issue, the lack of any state need for the disclosure is sufficient to show its invalidity, as discussed directly below.

disclosures of their purely personal information to the state's general goal of preventing sexual abuse. This is exactly the kind of indiscriminate invasion that violates constitutionally-protected individual privacy interests. The state is collecting private information and tissue for all Non-CMA Teenage Patients, disclosing it to their local police, and doing so without any factual basis for any police involvement in their lives. This collection by the state and disclosure to one category of state actors is fully sufficient for a violation; there need not be any "public" disclosure to support a valid constitutional claim, because the harm here comes from the disclosure to government actors who have no need or basis for having that information.

In *Carter v. Broadlawns Medical Center*, 667 F. Supp. 1269 (S.D. Iowa 1987), for example, another district court in the Eighth Circuit struck down a policy that allowed government-paid chaplains to have access to patients' medical records:

> The Court also concludes that the policy of chaplains having open access to patient medical records is constitutionally infirm under the Fourteenth Amendment. Patients at BMC have a right of privacy founded on the Fourteenth Amendment's concept of personal liberty. . . . In allowing chaplains free access to medical records, BMC is not properly respecting a patient's confidentiality and privacy. The Court concludes that patient medical records can only be accessed by a chaplain upon prior express approval of the individual patient or his guardian.

Id. at 1282. *See also Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 2002) (the constitutional interest in informational privacy "applies *both* when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public") (emphasis added).

Similarly, in *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979), the Court ruled that a police department's inquiries of job applicants in certain areas violated their right to privacy, by the mere fact of the government requiring an answer to the inquiry. The Court held that in "a constitutionally protected 'zone-of-privacy', compelled disclosure in and of itself may

be an invasion of that zone, and therefore, a violation of protected rights. Absent a strong countervailing state interest, disclosure of private matters should not be compelled." *Id.* at 458. The Court went on to conclude that an individual's "private sexual activities" are within the "zone of privacy" protected from unwarranted government intrusion and that "there are many areas of a police officer's private life and sexual behavior which are simply beyond the scope of any reasonable investigation by the Department . . . . In the absence of a showing that a policeman's private, off-duty personal activities have an impact upon his on-the-job performance, we believe that inquiry into those activities violates the constitutionally protected right of privacy." *Id.* at 459. It struck down a policy that set no limits on such employment-related inquiries to tailor those inquiries to the government's legitimate needs. *Id.* at 461.

Here, the indiscriminate forced disclosure of the Non-CMA Teenage Patients' abortions to local police, the branding of them as "victims," and the accompanying transmittal of tissue to a crime laboratory without any investigative need, are similarly unconstitutional. Contrary to Defendants' bald assertion, there is no narrow tailoring in this law, Opp. Br. 69, and its abortion-only focus cannot be meshed with any legitimate, much less any substantial, law enforcement need for this highly private information. *See supra* Point IV.C.1. The Constitution ensures that Arkansans do not live in a police state, with such invasive statutes requiring citizens to reveal extremely personal information to their local police, to be filed away and maintained by them indefinitely, despite no current or even reasonably-projected need for that information. Plaintiff, therefore, is likely to succeed in his challenge to the Medical Records Mandate.

D. The Tissue Disposal Mandate Unconstitutionally Blocks and Burdens Pregnancy-Related Care.

1. Defendants Proffer Unsupported Readings of H.B. 1566, Which Imports the FDRA Scheme to Pregnancy-Related Care.

Defendants' invented readings of current law, the Final Disposition Rights Act ("FDRA"), and the changes effected by H.B. 1566 are unsupported and puzzling. But Defendants' attempts to downplay the confusion and burdens caused by importing the FDRA scheme of disposition rights into the context of abortion and miscarriage care cannot obscure the larger point: among the many other burdens it imposes, the third-party notice scheme H.B. 1566 enacts violates decades of Supreme Court precedent and is clearly unconstitutional.

First, Defendants bizarrely claim that H.B. 1566 requires abortion providers to "mak[e] the same arrangements that all other healthcare providers are required to make for human remains." Opp. Br. 72. But the FDRA itself imposes no obligations on health care providers; it is H.B. 1566—for the first time and only in the context of abortion and miscarriage—that imposes such obligations on health care providers, and on pain of criminal penalties. H.B. 1566, § 3 (requiring a "physician or facility that performs an abortion" to "*ensure* that the fetal remains and all parts are disposed of in accordance with § 20-17-801 and the Arkansas Final Disposition Rights Act of 2009, § 20-17-102," and providing criminal penalties (emphasis added)). Outside this context, the FDRA sets out rules for the orderly disposition of human remains for individuals and their family members and establishes protections for funeral homes and crematoria when they rely on information regarding disposition provided by family members. *See, e.g.*, Ark. Code Ann. §§ 20-17-102(d)(1), (f)(2).

Second, Defendants point to several FDRA provisions in support of their assertion that no notice to a woman's sexual partner is required. It is unclear, however, why Defendants state that

no notice is required: the woman alone is vested with the right to disposition only after reasonable efforts have been unsuccessful in locating the "father." Opp. Br. 72-73; *see* Ark. Code Ann. § 20-17-102(d)(1)(E)(ii). Defendants appear to suggest that perhaps efforts could be made merely to *locate* the other "parent," but nothing more is necessary, such that, if found, he need not be notified of his disposition right. Under this reading, a physician or his patient must engage in a search of undefined time, but for no ultimate purpose. That cannot be correct.

Defendants also point out that, under the FDRA, an individual forfeits disposition rights if he does not exercise them in five days. Opp. Br. 73; *see* Ark. Code Ann. § 20-17-102(e)(1)(B). It is unclear what Defendants mean to suggest here, other than that a physician could somehow satisfy the requirements of the FDRA by evading them. For example, do Defendants mean that a physician could attempt to locate and notify a woman's sexual partner of his right to disposition, and then request a promise that he would not attempt to exercise his control rights within five days of demise? Consistent with Plaintiff's argument, this impermissibly discloses a woman's private abortion decision and imposes delay. Or, do Defendants suggest that a physician may make no effort to locate a patient's sexual partner, provide care, and store tissue for five days to wait out expiration of disposition rights? Under this reading, Defendants suggest that H.B. 1566 essentially serves no purpose, and Defendants fail to explain how mandatory five-day tissue storage would serve any interest in potential life.

Third, Defendants point to various provisions of the FDRA that, they contend, "cause the right to vest solely in the mother even sooner" than five days. Opp. Br. 73. Again, Defendants present unmoored and unsupportable readings of the FDRA that fail to account for the practical impact H.B. 1566 has in requiring a physician to "ensure" tissue is disposed in accordance with the FDRA. Defendants state, for instance, that if a woman's sexual partner is unwilling to

assume the cost of disposition, he has no disposition right; but to convey an unwillingness to assume the cost of disposition, one would have to be notified of the right in the first place. Defendants also point to a provision of the FDRA that denies disposition rights to a person who is "estranged" from the "decedent." Ark. Code Ann. § 20-17-102(e)(1)(D)(ii).[42] Defendants do not explain how a physician would know whether a woman's sexual partner was "estranged" from the "decedent"—here, the tissue from a woman's abortion or miscarriage.[43] To the extent Defendants mean to suggest the physician could merely rely on his patient's statement that the other "parent" is "estranged" from the "decedent," or that he is unwilling to assume the costs of disposition, Defendants point to no such safe harbor for a physician.[44]

Fourth, Defendants assert that a minor would not have to involve her parents (and her sexual partner's parents), regardless of whether she obtained a judicial bypass, because the

[42] The FDRA defines "estranged" as the "physical and emotional separation from the decedent at the time of death which has existed for a period of time that clearly demonstrates an absence of due affection, trust, and regard for the decedent." Ark. Code Ann. § 20-17-102(e)(1)(D)(ii). It is simply not clear what Defendants mean, or how physicians are to discern who is estranged from tissue (if that is ever possible): A man who was supportive of his partner's decision and helped her access abortion or miscarriage care? A man who did not know she was pregnant? A man who knew, and asked her not to have an abortion?

[43] At the hearing on the preliminary injunction, Defendants' counsel advanced the unsupported conclusion that a rapist would be considered "estranged" under the FDRA because he does not have "affection" for the victim and the "child" (the tissue). Defendants' counsel also attempted to craft an exception to H.B. 1566's notice requirement in the context of rape based on Ark. Code Ann. § 9-10-121, which provides that "upon conviction of rape in which the child was conceived," the parental rights of a putative father terminate. But this statute applies only to a man *convicted* of *rape*—accordingly, under the scheme enacted by H.B. 1566, a woman and her sexual assailant would have equal disposition rights to the tissue, except, perhaps, in the unlikely scenario that the assailant had been prosecuted and convicted of rape before she sought an abortion or miscarriage care.

[44] The FDRA provides that a "funeral establishment, cemetery, or crematory shall have the right to rely on" a signed funeral service contract or authorization, and "shall have the authority to carry out the instructions of the person or persons whom the funeral home, cemetery, or crematory reasonably believes holds the right of disposition." Ark. Code Ann. § 20-17-102(f)(2). Needless to say, this provision does not protect physicians.

FDRA "provides that, in the 'absence" of any person qualified under the statute to exercise the disposition right, 'any other person' who is willing to act may exercise the right—including a minor who has obtained a judicial bypass." Opp. Br. 73 (quoting Ark. Code Ann. § 20-17-102(d)(2)).[45] As an initial matter, Defendants are incorrect because *no one* under age 18 has the right to control under the FDRA. *See* Ark. Code Ann. § 20-17-102(d)(1). Further, the provision to which Defendants point applies only *after* no one else is willing to exercise a disposition right. Defendants appear to assume, without support, that the parents of a minor (and her partner's parents) would be unwilling to exercise their right to dispose of tissue from their minor daughter's abortion or miscarriage. Indeed, the provision to which Defendants point mandates that a person exercising a right under (d)(2) must "attest[] in writing that a good faith effort has been made to no avail to contact the individuals under this subsection." Ark. Code Ann. § 20-17-102(d)(2)).

Finally, Defendants' claims as to H.B. 1566's effect on tissue disposal after both pathology testing and medication treatment for abortion and miscarriage are equally mystifying. Defendants assert that it is "incorrect and implausible" to read H.B. 1566 as applying when products of conception are disposed of at home, as in the case of medication abortion, because H.B. 1566 "applies only to a 'physician or facility that performs an abortion.'" Opp. Br. 75. But under Arkansas law, abortion, including medication abortion, *must* be performed by a physician. *See* Ark. Code Ann. § 5-61-101 (crime for anyone other than licensed physician to perform abortion); Ark. Code Ann. § 20-16-603(b)(1) (physician-only law for medication abortion).[46]

[45] Defendants cite Ark. Code Ann. § 20-17-102(b)(2), relating to individuals who die while serving in the military, but the correct cite is Ark. Code Ann. § 20-17-102(d)(2).

[46] Even if H.B. 1566 could be read to exclude medication abortions and the use of medication in miscarriage management, the Court would have to decree that limitation. *See supra* Part IV.C.1.

continued...

Likewise, Defendants summarily conclude that Plaintiff's argument as to pathology is "implausible" because "a fetal tissue sample sent to a pathology lab would fall under the definition of 'human tissue' in Ark. Code Ann. § 20-17-801(b)(2)(C), and can be disposed in a 'respectful and proper manner' under the statute." Opp. Br. 75. But H.B. 1566 also amended Ark. Code Ann. § 20-17-801(b)(2)(C), to *remove* "fetal tissue" from the definition of "human tissue," H.B. 1566, § 2, making that means of disposal impermissible.

In short, none of Defendants' tendered readings are plausible. And, even if they were, these characterizations of H.B. 1566 would seriously undermine whatever argument Defendants maintain in support of a purported state interest, for they defy logic and seem designed to show that the Tissue Disposal Mandate has no impact.

2. The Tissue Disposal Mandate Imposes an Undue Burden.

When read as written, of course, the Tissue Disposal Mandate creates impossible demands on physicians and stands in the way of their patients' abortion and miscarriage care. In the face of this disabling scheme, Defendants begin by weakly asserting that this regulation of

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Further, as Defendants' filing today with the Court documents, the Arkansas Department of Health issued an "emergency rule" for abortion facilities, which acknowledges that, under H.B. 1566, it "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." Defs.' Not. of Suppl. Auth. Ex. A, 35, July 20, 2017, ECF No. 31-1. The emergency rule instructs abortion facilities that embryonic or fetal tissue from medication abortions need not be disposed of in accordance with the FDRA, provided the evacuation of tissue occurs outside the facility. The rule, however, cites no part of H.B. 1566 as authority for its issuance; does not appear to apply to miscarriage care; and, critically, applies only to abortion facilities, and thereby does not shield Plaintiff—a physician—from the criminal penalties imposed by H.B. 1566 for failure to ensure tissue disposal in full compliance with the FDRA. Moreover, the effort to carve out medication abortion from H.B. 1566 only undermines any state interest purportedly served by the Tissue Disposal Mandate.

tissue from an abortion "would not seem" to implicate the abortion right at all. Opp. Br. 71.[47] In support, Defendants rely only on a pre-*Casey*, pre-*Whole Woman's Health* decision, *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), which upheld a tissue disposal regulation requiring disposal of tissue by burial, cremation, or other means specified by the health commissioner. *Id.* at 483, 488.[48] Defendants' argument misapprehends both Plaintiff's claim and the law. Plaintiff does not claim a constitutional right to decide the disposition of fetal remains; rather, Plaintiff claims that H.B. 1566 violates his patients' rights to pregnancy-related care, including abortion. Compl. ¶¶ 98-116, 145-46; *see also Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, 2017 WL 462400, at *6 (W.D. Tex. Jan. 27, 2017) (applying undue burden standard to tissue disposal regulation because "[a]lthough a state may regulate a woman's right to an abortion in a manner consistent with that state's interest in protecting potential life and the health of the mother, it may not impose an undue burden on that right." (internal quotation marks, punctuation, and citations omitted)), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 1, 2017). Further, *Casey* makes plain that the right to abortion encompasses more than the cramped version Defendants advance. 505 U.S. at 851 (describing right to make the abortion decision is central to a woman's autonomy and dignity, and encompasses the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" free from "compulsion of the State"). Thus, because the

[47] Without explanation, Defendants assert that Plaintiff's argument would imply invalidation of 42 U.S.C. § 289g-2, which prohibits transactions where money is exchanged for human tissue, but permits reimbursement of expenses associated with donation. Opp. Br. 71. Plaintiff makes no such claim, nor does Defendant explain why this law would fail the undue burden standard.

[48] Moreover, *Casey* rejected *Planned Parenthood of Minnesota*'s distinction among regulations that "touch[] on abortion," and those that "interfere[] with or burden[] a woman's right to choose to have an abortion," 910 F.2d at 487. *Casey* holds that all abortion regulations are subject to the undue burden standard. 505 U.S. at 874 (making clear that all abortion regulations are evaluated under the undue burden standard).

Tissue Disposal Mandate affects Plaintiff's patients' right to abortion, it is subject to the undue burden standard.[49]

The Tissue Disposal Mandate fails the balancing test set out in *Casey*, and applied by *Casey* and its progeny, including most recently by the Supreme Court in *Whole Woman's Health*. *See supra* Point IV. As Plaintiff argues in his opening brief, the scheme enacted by H.B. 1566 mandates notice to third parties that violates decades of Supreme Court precedent; imposes insurmountable hurdles on Plaintiff on pain of criminal penalties, thereby blocking his patients' access to abortion and miscarriage treatment; and, more specifically, deprives Plaintiff's patients of access to pathology testing and medication treatment for abortion and miscarraige. Pl.'s Br. 45-52. The notice requirements alone directly contravene Supreme Court precedent. *See, e.g.*, *Casey*, 505 U.S. at 898. The delay and other threats to patient health, including the deprivation of the best abortion method for some patients, impose additional burdens. *See, e.g.*, *Jegley*, 2016 WL 6211310, at *29. As noted above, Defendants' poor attempts to rewrite or suggest alternate readings of H.B. 1566 and the FDRA, as transported to the abortion and miscarriage context, are unavailing and eliminate none of these burdens.

Because Defendants apply the wrong legal standard, moreover, they do not attempt to justify the Tissue Disposal Mandate as anything more than "rationally further[ing]" an interest in potential life without imposing a substantial obstacle in a woman's path to abortion. Opp. Br. 75. Defendants also appear to suggest—incorrectly—that any abortion regulation is permissible simply when the state justifies it as "us[ing] its voice and its regulatory authority to show its

[49] The law challenged in *Planned Parenthood of Minnesota* is also distinct from H.B. 1566 in that it permitted disposition by cremation, interment, or "in a manner directed by the commissioner of health," 910 F.2d at 483, while H.B. 1566 establishes a complex control scheme, including notice to third parties that directly violates Supreme Court precedent.

profound respect for the life within the woman." Opp. Br. 74 (quoting *Gonzales*, 550 U.S. at 157 and citing *Casey*, 505 U.S. at 877).

But no interest in potential life can support H.B. 1566 because there is no "potential life" in tissue disposed of after an abortion or miscarriage. *See* Pl.'s Br. 52; *Whole Woman's Health*, 2017 WL 462400, at *2; *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 194 F. Supp. 3d 818, 833 (S.D. Ind. 2016).[50] Moreover, Defendants misread the Supreme Court's recognition of the state's legitimate interest in potential life as a blank check to restrict abortion. *See* Opp. Br. 74-75. The Supreme Court made plain in *Casey*, however, that while the state has that valid interest, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." 505 U.S. at 877.[51] Accordingly, the State's interest in potential life permits it to take measures to persuade individuals to adopt its views, but not to compel them to adopt those views or act in accordance with them. *See id.* at 878. *Gonzales* did not depart from this holding, nor did it announce, as Defendants suggest, a government interest in potential life that justifies limitless burdens.[52]

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[50] In *Planned Parenthood of Ind. & Ky., Inc.*, the Indiana district court held that the tissue disposal law failed rational basis scrutiny (plaintiff there did not advance an undue burden claim). *See* 194 F. Supp. 3d at 831-32.

[51] Defendants' reliance on *Planned Parenthood of Minnesota* as support for the proposition that the state can advance its view that "fetal remains are the equivalent of human remains," Opp. Br. 74, through H.B. 1566 is again inapposite. As *Casey* holds, while a state may enact laws that demonstrate respect for life, it can do so only through permissible means— means calculated to "inform" a woman's choice, not hinder it. 505 U.S. at 877. H.B. 1566 is no such permissible means.

[52] *Compare* Opp. Br. 74 (stating "the State may 'use its voice and its regulatory authority to show its profound respect for the life within the woman'" (quoting *Gonzales*, 550 U.S. at 157)), *with Gonzales*, 550 U.S. at 146 (""regulations . . . may express profound respect for the life of the unborn . . . if they are not a substantial obstacle to a woman's exercise of the right to choose." (quoting *Casey*, 505 U.S. at 877).

Erecting an invasive and burdensome notice scheme, mandating that Plaintiff ensure compliance with complex provisions of the FDRA, and effectively banning pathology testing and medication treatment for abortion and miscarriage serves no informative or persuasive goal. Instead, the Tissue Disposal Mandate compels the State's view that a woman obtaining abortion or miscarriage care is the "parent" of embryonic and fetal tissue which must be treated as if it were a deceased relative—regardless of the woman's view. It thus contravenes *Casey*'s mandate that the right "at the heart of liberty" not be "formed under compulsion of the State," 505 U.S. at 851.

Balancing the significant burdens of unconstitutional notice requirements, delay, and deprivation of access to essential medical care, against H.B. 1566's failure to advance any valid interest in a permissible way, makes clear that H.B. 1566 imposes an undue burden. *Whole Woman's Health*, 136 S. Ct. at 2310. Plaintiff has thus demonstrated that he is likely to succeed on the merits of his claim that H.B. 1566 violates his patients' right to receive pregnancy-related medical care.

3. The Tissue Disposal Mandate is Unconstitutionally Vague.

Defendants' opposition to Plaintiff's vagueness claim inexplicably asserts that H.B. 1566's mandate—that Plaintiff ensure tissue from an abortion or miscarriage is disposed of in accordance with the FDRA—is not vague because "the requirements for the disposition of 'human tissue' are clearly set forth in a portion of the statute that he does not challenge, Ark. Code Ann. § 20-17-801." Opp. Br. 75. But H.B. 1566 *amends* Ark. Code Ann. § 20-17-801 to remove "fetal tissue" from the definition of "human tissue," making that section inapplicable to the disposition of embryonic and fetal tissue. In addition, Plaintiff *has* challenged H.B. 1566's amendment of both sections 801 and 802 (the latter of which applies specifically to disposal of

tissue from abortion). *See, e.g.*, Compl. ¶ 98. Finally, contrary to Defendants' assertion, Plaintiff's Complaint and brief clearly explain how H.B. 1566's application of the provisions of the FDRA to abortion and miscarriage is unconstitutionally vague. *E.g.*, Compl. ¶¶ 40, 54, 104; Pl.'s Br. 53-55. Defendants' own confused and contradictory readings of the FDRA, Opp. Br. 72-75, only underscore Plaintiff's point that it is vague as transported by H.B. 1566 to the pregnancy care context.

Plaintiff remains without clarity or notice of what conduct is "forbidden or required" by H.B. 1566. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Accordingly, Plaintiff has demonstrated a likelihood of success on the merits of his claim that H.B. 1566 cannot survive the stringent vagueness test demanded of it, given its imposition of criminal penalties and interference with fundamental rights.

V. Plaintiff Has Demonstrated That He and His Patients Will Suffer Irreparable Harm From Enforcement of Each of the Challenged Laws.

Plaintiff has demonstrated that absent a preliminary injunction, he and his patients will suffer irreparable injury. *See* Pl.'s Br. 56-58. In response, Defendants neither dispute that deprivation of constitutional rights constitutes irreparable harm, nor contest the other harms Plaintiff describes. Instead, Defendants simply restate their incorrect assertions about the requirements and impacts of the challenged restrictions. Opp. Br. 77-78. But as Plaintiff has explained, Pl.'s Br. 56-57, H.B. 1032, the D&E ban, would virtually end second-trimester abortion. The Medical Records Mandate in H.B. 1343 imposes on Plaintiff vague standards under threat of criminal and other serious penalties, and would delay and deny access to abortion. The Local Disclosure Mandate breaches the confidentiality of care and impermissibly

dissuades patients from accessing abortion.[53] The Tissue Disposal Mandate in H.B. 1566 likewise imposes vague standards on pain of criminal penalties while erecting an unconstitutional notice and delay scheme that would burden and deny Plaintiff's patients' access to abortion and miscarriage treatment.

VI. Plaintiff Has Demonstrated That the Balance of Equities and the Public Interest Favor Entry of a Preliminary Injunction.

Defendants' argument that maintaining the status quo and guarding against constitutional harms would hurt the people of Arkansas, Opp. Br. 78, has it backwards: the public interest will be advanced by preventing constitutional infringements, and ensuring that laws invading individual rights and punishing physicians do not take effect without full judicial scrutiny. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (stating that court acknowledges the obvious in stating that "enforcement of an unconstitutional law is always contrary to the public interest") (citing *Llewlyn v. Oakland Cnty. Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest.")). Where a plaintiff has shown likelihood of success in striking down an enactment as unconstitutional, courts therefore find that the public interest favors a preliminary injunction. *Edwards*, 946 F. Supp. 2d at 850 (explaining that whether "the grant of a preliminary injunction furthers the public interest . . . is largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest" (citing *Phelps–Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007)). The State's general interest in the

[53] Defendants' assertion that Plaintiff can demonstrate no irreparable harm from the expansion of the Local Disclosure Mandate to all young women under age 17 because the requirement has existed for (and Plaintiff does not challenge its application to) young women under age 14 is without merit. It simply ignores Plaintiff's arguments as to the Local Disclosure Mandate's imposition of unconstitutional burdens with no countervailing state interest on this new group of Non-CMA Teenage Patients.

enforcement of its laws does not justify allowing constitutionally-flawed ones to escape review before they impose harms on Arkansas women.

CONCLUSION

For the reasons set forth above and in his opening brief, Plaintiff respectfully requests that the Court grant his motion and enjoin Defendants and successors in office from enforcing any provision of the challenged laws during the pendency of this litigation.

Dated: July 20, 2017

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CERTIFICATE OF SERVICE

I, Susan Talcott Camp, hereby certify that on July 20, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notice to all counsel of record.

/s/ Susan Talcott Camp
Susan Talcott Camp