IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES LLC, d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff, et al., Plaintiffs, v. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health, et al., Defendants.	Case No. 3:16-CV-444-BAJ-RLB

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR PARTIAL DISMISSAL RE: S.B. 33/ACT 196; H.B. 815/ACT 593; AND H.B. 386/ACT 97

INTRODUCTION

Defendants seek dismissal of Plaintiffs' claims against three of the seven laws restricting abortion enacted by the Louisiana legislature in 2016. Because Plaintiffs' First Amended Complaint establishes both injury in fact and imminent harm as to each of these claims, Defendants have failed to meet their heavy burden under Rule 12 and the motion to dismiss should be denied.[1]

BACKGROUND

Under House Bill 815, physicians performing abortions must ensure that fetal tissue is buried or cremated, unless one of the limited exceptions in the Act for pathological, diagnostic, or law enforcement purposes, is applicable. On its face, H.B. 815 bans medication abortion because

[1] Defendants assert that they move to dismiss these claims under Rule 12(b)(1) "or alternatively" under Rule 12(b)(6), Defs.' Mem. at 2, without identifying in their subsequent arguments which provision they are relying on. In any event, "[A] motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A motion under Rule 12(b)(6) should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief." *Id.* (citations omitted).

in that process embryonic and fetal tissue is expelled at home and therefore the physician cannot ensure that it will be buried or cremated. Am. Compl. ¶¶ 6, 76. Following enactment of H.B. 815, the Louisiana Department of Health ("LDH") promulgated emergency regulations, amending LAC 48:I.4431 and creating LAC 51:XXVI.102, both of which state that the interment or cremation requirement does not apply when tissue is expelled outside of the presence of the physician or at a location other than the licensed abortion facility. These regulations were scheduled to take effect on December 2, 2016. On March 14, 2017, LDH issued another emergency regulation, identical to the previous regulation amending LAC 48:I.4431, which took effect on April 3, 2017, just over 120 days after the first regulation was issued. The regulations also create additional requirements by (1) extending the Act's requirements to licensed abortion clinics; (2) requiring that physicians inform each woman, orally and in writing, of the option to make arrangements herself or have the physician or facility arrange for the disposition of embryonic and fetal tissue; and (3) requiring that each woman sign a consent form indicating which option she has chosen. LAC 48:I.4431.

Senate Bill 33 makes it a crime to "knowingly and for money . . . [b]uy, sell, receive, or otherwise transfer or acquire a fetal organ or body part resulting from an induced abortion." The bill prohibits reimbursement of any expenses associated with donation of tissue from an abortion, but not following a miscarriage or stillbirth. S.B. 33 also contains exceptions for pathology or law enforcement purposes. The penalty for violating S.B. 33 is "a term of imprisonment at hard labor for not less than ten nor more than fifty years."

House Bill 386 requires women to wait at least 72 hours after being given all of the information necessary to provide informed consent for an abortion, tripling the current mandatory

delay of 24 hours for all but women who live more than 150 miles from an abortion provider, who may continue to adhere to the current delay of 24 hours.[2]

I. Plaintiffs Have Pled Justiciable Claims Regarding H.B. 815.

The Amended Complaint pleads facts establishing both injury in fact and imminent harm, because the requirement for disposition by internment or cremation effectively bans medication abortions. Am. Compl. ¶¶ 6, 76. In addition, H.B. 815 stigmatizes women seeking abortion (discussed *infra*), treats women seeking abortions differently than women experiencing miscarriage, and forces women seeking abortions to accept the State's view as to fetal personhood. Am. Compl. ¶¶ 82, 84, 87.

The emergency regulations do not cure these defects. While the current emergency regulations exempt medication abortion where the embryonic or fetal tissue is passed away from the clinic, they are time limited, and therefore leave Plaintiffs with inadequate protection. The emergency regulations also compound the burdens imposed by H.B. 815 by adopting additional requirements that the physician discuss disposition options with every woman and obtain her consent for disposition.

Moreover, while H.B. 815 provides exceptions to the burial or cremation requirement for pathological, diagnostic, or law enforcement purposes, the emergency regulations do not. Thus, while Plaintiffs believe their current practices for disposal of embryonic and fetal tissue from surgical abortions performed in the clinic fit within the exceptions to H.B. 815's requirement of burial or cremation, the effect of the prohibition on medication abortion, the mandate that women

[2] This exception has been incorporated into the regulations governing abortion at LAC 48:1 4431, which reduces the delay from 72 to 24 hours for women who certify in writing that they "currently live[] 150 miles or more from the nearest licensed abortion facility that is willing and able" to provide the services the woman seeks.

be advised of and consent to disposition, the absence of the exceptions from the emergency regulations, and the stigmatic injuries, addressed *infra*, confer standing.

A. H.B. 815 Effectively Bans Medication Abortion.

Defendants assert that Plaintiffs' challenge to H.B. 815's ban of medication abortion fails because the emergency regulations exempt medication abortions from the law's requirements. LDH's emergency rulemaking cannot, however, cure the constitutional defects in H.B. 815.

Even with regulations in place, Plaintiffs have standing to challenge both H.B. 815 and the regulations because they threaten Plaintiffs and their patients with imminent injury. The regulations require physicians to present women with the option to either make arrangements herself for the disposition of the fetal remains by internment or cremation, or to have the physician or clinic make those arrangements, which constitutes an impermissible imposition of the state's view and burdens the right to abortion. Given this immediate impact of the law and regulations on Plaintiffs, the Court need not wait for any further factual development or some other triggering event; in fact, such a delay would injure Plaintiffs and prejudice their ability to obtain relief. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987) (explaining that in assessing ripeness courts take into account "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," and that a case is generally ripe if any remaining questions are "purely legal ones") (internal quotes and citations omitted). In addition, the regulation does not refer at all to the other means of disposition contained in the Act, leaving the Plaintiffs in doubt about how to comply with both the statute and the regulation. Plaintiffs will therefore suffer additional hardship if they are forced to wait until the statute and regulations directly apply to an individual to bring claims against a statutory and regulatory scheme that is both burdensome and unclear. *Id.*

Moreover, under Louisiana's Administrative Procedure Act, emergency regulations expire after 120 days. *See* La. Rev. Stat. § 49:954(B)(2) ("[A]ny emergency rule so published shall not be effective for a period longer than one hundred twenty days, but the adoption of an identical rule . . . is not precluded."). Presumably, this is why LDH re-issued the emergency regulation amending LAC 48:I.4431. The regulation, creating LAC 51:XXVI.102, expired and was not reissued, leaving the relationship between the regulations and the statute unclear. Accordingly, the emergency regulations do not undermine Plaintiffs' standing to challenge H.B. 815.

B. Plaintiffs Can Maintain a Facial Challenge to H.B. 815.

Defendants argue that *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), and subsequent cases recognizing that a state may adopt legislation intended to further its interest in potential life, preclude Plaintiffs from pursuing a facial challenge to H.B. 815, based on its requirements that embryos are to be treated as people for purposes of disposition, and to the emergency regulations requirement that physicians inform women seeking abortion of their options for burial or cremation. Defendants both misunderstand the relevant caselaw and misrepresent Plaintiffs' claims as based on a "right to choose how fetal remains are to be disposed of," ignoring that H.B. 815 directly infringes on a woman's constitutional rights to abortion and equal protection. *See* Mem. in Supp. of Defs.' Second Mot. for Partial Dismissal at 14, March 31, 2017, ECF No. 40-1 ("Defs.' Mem.").

Defendants are wrong to insist that the state can utilize public laws to force a particular view of personhood on women seeking abortions. The Supreme Court has recognized that laws mandating adherence to certain moral values can impermissibly burden liberty interests. "If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *see also id*. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ." (internal quotation marks omitted)). Similarly, *Casey* acknowledged that the state cannot "resolve . . . philosophic questions [about abortion] in such a definitive way that a woman lacks all choice," as "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey*, 505 U.S. at 850-51. In prescribing what methods of disposition are appropriate—regardless of women's individual moral, religious, and cultural beliefs—Defendants are effectively doing just that. *See Margaret S. v. Edwards*, 488 F. Supp. 181, 221-22 (E.D. La. 1980) (holding unconstitutional an earlier version of the statute amended by H.B. 815, which required that fetal remains be "disposed of in a manner consistent with the disposal of other human remains," "because it requires that fetal remains be treated with the same dignity as the remains of a person and, thereby, unduly burdens the right of a woman to obtain an abortion").

Defendants incorrectly assert that the Supreme Court's recognition of a state interest in potential life, demonstrably furthered in some contexts, *see, e.g.*, *Casey*, 505 U.S. at 885 (upholding a 24-hour delay following receipt of information intended to persuade a woman to choose childbirth over abortion), precludes facial challenges in all cases in which the state asserts an interest in potential life. Rather, in each case the courts must balance any actual benefits conferred by the restriction against the burdens it imposes. *See Whole Woman's Health v.*

Hellerstedt, ___ U.S. ___, 136 S. Ct. 2292, 2309-10 (2016); *see also infra* Section IV (discussing *Whole Woman's Health*).

Similarly, Defendants' argument that *Casey* "forecloses" Plaintiffs' ability to challenge the requirement that physicians inform women seeking an abortion of their options for burial or cremation, *see* Defs.' Mem. at 13, is without merit. The fact that specific laws have been upheld under the undue burden test has no bearing on the availability of facial relief in challenges to other abortion restrictions with different factual circumstances. The law upheld in *Casey*—requiring that physicians orally disclose the medical risks of abortion and childbirth to their patients—bears little resemblance to regulations that force a physician to dictate the state's view of personhood to his or her patients. As with H.B. 815, *Casey* has no bearing on the justiciability of a facial challenge to the emergency regulations. *See Casey*, 505 U.S. at 883-84.

Defendants also argue that Plaintiffs are advocating for "some undefined right to choose how fetal remains are to be disposed of," Defs.' Mem. at 14, ignoring that Plaintiffs have clearly pled equal protection and right to abortion claims. Am. Compl. ¶¶ 176, 178-79. Far from being "undefined," Plaintiffs allege that H.B. 815 directly burdens women's views about the "attributes of personhood" protected by *Casey* under the right to abortion, 505 U.S. at 851, and infringes on the equal protection rights of women seeking abortion to make the same choices as women making other reproductive decisions. Defendants' only support for this argument is a pre-*Casey* case from another circuit, regulating the disposal of tissue following both abortion and miscarriage, that itself was decided under the right to abortion and did not question justiciability. *Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479 (8th Cir. 1990).[3]

[3] The law challenged in *Planned Parenthood of Minnesota* is also distinct from H.B. 815 in that it permitted disposition by cremation, interment, or "in a manner directed by the commissioner of health," which included a broad range of disposal methods. *Planned Parenthood of Minn.*, 910 F.2d at 483. Further, the plaintiffs in that case conceded that the state has "a legitimate interest in protecting public sensibilities." *Id.* at 488. Plaintiffs here make no such concession.

Finally, as in their first motion to dismiss, Defendants ignore the fact that facial versus as applied relief is a question of remedy, not justiciability. *See infra* Section IV. As with any constitutional challenge to an abortion restriction, only if it concludes that the law imposes an undue burden (the burdens of a law outweigh its benefits) will a court consider what relief is appropriate. Indeed, in *Whole Woman's Health*, the Supreme Court soundly rejected Texas's arguments that facial relief was inapplicable, and did so at the remedy stage. *Id.* at 2318-19.

II. Stigma Is a Cognizable Injury for the Purposes of Article III Standing.

Plaintiffs have pled that H.B. 815, as well as S.B. 33, addressed *infra*, stigmatize the provision of abortion care. The stigma associated with discriminatory treatment is a well-established injury for the purposes of Article III standing. As in their first motion to dismiss, Defendants' argument that "purely stigmatic injuries, without more, do not establish standing," Defs.' Mem. at 7-8, is incorrect.

"[T]he stigmatizing injury often caused by . . . discrimination . . . is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." *Allen v. Wright*, 468 U.S. 737, 755 (1984). Indeed, the Supreme Court has "repeatedly emphasized [that], discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984); *see also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991) ("The Supreme Court recognizes that illegitimate unequal treatment is an injury unto itself . . . ."). The harm to Plaintiffs

in this case is similar: the restrictions subject women seeking abortions to unequal treatment and discriminatory stigmatization.

The *Allen* Court also explained that parties asserting stigmatic injuries must have suffered violations of their personal rights. This requirement prohibits generalized claims, but does not abrogate the rules of third party standing. While courts have held that plaintiffs who did not personally suffer discrimination lacked standing, those cases do not suggest that abortion patients who have personally suffered discrimination cannot be represented by their physicians.[4] *See Allen*, 486 U.S. at 754 (the requirement that personal rights be violated is intended to prevent plaintiffs from basing standing only on "the abstract injury in nonobservance of the Constitution" (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974))).

Defendants also cite *Paul v. Davis* and its progeny, where the Supreme Court held that defamation of a person's reputation by a public official, without more, does not infringe upon procedural due process rights. *See* 424 U.S. 693, 710 (1976); *see also Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). The *Paul* case, however, was limited to claims involving defamation, and did not announce a universal test for standing under the Due Process Clause, let alone other constitutional rights. Accordingly, these cases are irrelevant when assessing Plaintiffs' substantive due process and equal protection claims, as the requirements for standing "often turn[] on the nature and source of the claim asserted." *Moore v. Bryant*, No. 16-60616, ___ F.3d ___, 2017 WL 1207595, at *3 (5th Cir. Mar. 31, 2017) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

[4] As discussed in Plaintiffs' response to Defendants' first motion to dismiss, abortion providers unequivocally have third-party standing to assert the rights of their patients. Pls.'s Mem. of Law in Opp'n to Defs.' First Mot. for Partial Dismissal at 3 n.1, March 22, 2017, ECF No. 38.

Imposing the state's version of personhood and stigmatizing the exercise of a fundamental constitutional right are hardly analogous to the type of stigma that arises in the context of defamation. Individuals do not have a constitutionally-protected right to their reputations. Conversely, substantive due process rights, like the right to abortion, are just that: Substantive. The Supreme Court has consistently emphasized that the right to abortion is "fundamental," and that "concept[s] of existence, of meaning, of the universe, and of the mystery of human life[,] . . . . [and] the attributes of personhood" may not be compelled by the state. *Casey*, 505 U.S. at 850-51. As a recent Fifth Circuit case makes clear, "the gravamen of an equal protection claim is differential governmental treatment." *Moore*, 2017 WL 1207595, at *2-3 (distinguishing differential treatment, which is sufficient to plead injury, from "exposure to a discriminatory message, without a corresponding denial of equal treatment, [which] is insufficient to plead injury in an equal protection case"); *accord Hassan v. City of New York*, 804 F.3d 277, 291 (3d Cir. 2015) ("Our Nation's history teaches the uncomfortable lesson that those not on discrimination's receiving end can all too easily gloss over the 'badge of inferiority' inflicted by unequal treatment itself.").

Contrary to Defendants' arguments, H.B. 815 and S.B. 33 involve much more than sending a government "message" about abortion: They require that women seeking abortions, and physicians providing that care, be treated differently from similarly situated patients and providers. *Compare Moore*, 2017 WL 1207595, *with* H.B. 815, *and* S.B. 33; *see also infra* Section III. These laws directly stigmatize women who choose abortion and the physicians who provide that care by eliminating women's choices for embryonic and fetal tissue disposal, treating them differently from women who experience miscarriage, and exposing physicians to the harshest legal penalties—decades of imprisonment at hard labor—for violations. Am. Compl. ¶¶ 143-44. This is

the kind of differential governmental treatment contemplated by *Allen* and which gives rise to Plaintiffs' standing to challenge H.B. 815, S.B. 33, and the emergency regulations.

III. Plaintiffs Have Pled Justiciable Claims Regarding S.B. 33.

Defendants assert that Plaintiffs have failed to plead injury sufficient for standing on their claims against S.B. 33 because Plaintiffs have no desire to "traffic" in embryonic or fetal tissue, and because there is no constitutional right to buy and sell embryonic and fetal tissue. Defendants misunderstand Plaintiffs' claims, mischaracterize the effect of S.B. 33, advocate an overly-narrow reading of standing requirements, and again improperly focus on the appropriateness of facial relief. S.B. 33 singles out abortion for unique restrictions and penalties, in effect precluding women who have abortions from donating embryonic and fetal tissue, and subjecting anyone who engages in a donation process involving reimbursement for expenses to harsh criminal penalties. As such, it does more than express the state's preference for childbirth over abortion; it imposes stigma that burdens a fundamental right and therefore confers standing. *Heckler*, 465 U.S. at 739; *Peyote Way Church of God, Inc.*, 922 F.2d at 1214 n.2.

Defendants first argue that Plaintiffs cannot establish standing or ripeness because they do not assert a desire to "traffic" in embryonic or fetal tissue or outline what conduct would be prohibited by S.B. 33. This line of argument reveals a misreading of S.B. 33, and more importantly, fails to appreciate that the discriminatory treatment and stigma imposed by S.B. 33 are themselves cognizable injuries that are ripe for review.

As an initial matter, Defendants' claims that S.B. 33 does nothing more than existing state and federal law is incorrect, because they fail to acknowledge key exceptions in those laws that permit donation in a way that S.B. 33 does not. Both federal and state law prohibit transactions wherein money is exchanged for human tissue, but permit reimbursement of expenses associated

with donation. *See* 42 U.S.C. § 289g-2(a) and (e)(3) (making it illegal to "knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration," but defining "valuable consideration" to exclude "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue"); La. Rev. Stat. § 17:2354.4(A) and (B) (making it illegal to "knowingly purchase[] or sell[] a part for transplantation or therapy, if removal of the part is intended to occur after the death of the person," for valuable consideration, but allowing "[a] person [to] charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part").

S.B. 33 contains no such protection for transactions attendant to donation, and in fact goes to lengths to define the prohibited conduct expansively. Under S.B. 33, the exchange of "money" that is prohibited includes "but [is] not limited to fees for storage or handling, any payments for reimbursement, repayments, or compensation, or any other consideration." La Rev. Stat. § 14:87.3(A). Because it has no carve-out to protect donations, S.B. 33 singles out and prohibits donation of fetal and embryonic tissue from abortions only. Defendants' arguments related to traceability, redressability, and ripeness that proceed from their misunderstanding of the effect and scope of S.B. 33 are therefore unpersuasive.

S.B. 33 is also unique in its distinction between tissue resulting from abortion, versus tissue resulting from miscarriage or stillbirth. Under S.B. 33, an employee at an organ procurement organization that retrieves a donation of tissue from an abortion facility and reimburses that facility for the costs of storing the tissue, for example, would be subject to imprisonment at hard labor. The same exchange at another type of medical facility, like an obstetrician's office, where a woman had a procedure similar to abortion for miscarriage management, is not prohibited. The text of

S.B. 33 itself makes this disparate treatment plain, stating that "[n]othing in this Section shall be construed to prohibit the donation of bodily remains from a human embryo or fetus whose death was caused by a natural miscarriage or stillbirth, in accordance with the guidelines and prohibitions provided in applicable state and federal law." § 87.3(C)(2).

As outlined in Section II, *supra*, this differential treatment, and the discriminatory and stigmatizing effect on women seeking abortion and abortion providers, confer standing. Singling out abortion for unequal treatment is invidious and injurious. In the equal protection context, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The "injury in fact" is "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*

The legislative findings included in H.B. 815 address donation and other issues relevant to S.B. 33, as Defendants note. *See* Defs.' Mem. at 10 (citing findings). These legislative findings confirm that S.B. 33 is intended to impose differential, rather than equal, treatment. They state that allowing women who opt for abortion to donate fetal tissue "constitutes unethical undue influence and coercion, and amounts to incentive to actively participate in the killing of a living human being," and that allowing such donation is "a gross violation of ethical norms," distinct from such donation in the context of miscarriage, which the bill implies may be "ethical and proper." H.B. 815, creating La. Rev. Stat. § 40:1061.25B(3)-(4). These legislative statements confirm that, under H.B. 815, women seeking abortions, unlike women experiencing a miscarriage, are unworthy of the full range of options regarding the disposition of fetal remains, or are incapable

of giving informed consent to donation. They also establish that the restrictions on women's choices are based on the state's belief that a fetus is a human being, similarly situated to a person in the legal framework for donation, and subject to a set of ethical principles developed in that context. Because imposing this viewpoint on women through the criminalization of donation, together with the stigma that places on abortion care, amounts to a burden on the right to abortion, Plaintiffs have adequately alleged that S.B. 33, on its face, unduly burdens the right to abortion. These injuries are sufficient to establish justiciability of Plaintiffs' substantive due process claim.

Defendants' argument that Plaintiffs' claims are unripe should be rejected for similar reasons: there is nothing speculative or uncertain about the stigmatic harms S.B. 33 would impose upon taking effect, because the harms derive from the Act's singling out of abortion care for unique, harsh treatment based on the view that women who choose abortion cannot and should not have the option to donate fetal and embryonic tissue under law. "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). Central to the question of ripeness is "the fitness of the issues for judicial decision" as well as "the hardship to the parties of withholding court consideration." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (internal quotation marks omitted). Because the harms would be immediate, and cause hardship to Plaintiffs and their patients, no further fact development is required and the claims are fit for review.

Finally, Defendants' arguments that Plaintiffs must establish a constitutional right to "buy, sell, or otherwise transfer organs or tissues of aborted human fetuses for money" are without merit. As outlined, Plaintiffs' claims against S.B. 33 are premised on the substantive due process right to abortion and the guarantee of equal protection. Defendants' assertion that the abortion right does

not extend to treatment of embryonic and fetal tissue post-abortion misconstrues Plaintiffs' claims and the nature of the constitutional protection for abortion established in *Roe*, *Casey*, and *Whole Woman's Health*. Plaintiffs can maintain a facial challenge against S.B. 33 based on the claim that it unlawfully singles out abortion for disparate treatment and stigmatizes abortion care. Plaintiffs have pled sufficient facts regarding the injurious effects of this unequal treatment and the stigmatization of abortion to state a claim; this Court should address at the merits stage of the litigation whether the burdens outweigh the benefits. *See infra (next section).*

IV. Plaintiffs Have Pled a Justiciable Claim Regarding H.B. 386.

Defendants seek dismissal of the claim against H.B. 386 arguing that because the Court in *Casey*, 505 U.S. 833, upheld a 24-hour waiting period, delay laws are immune from facial challenge. This is a misreading of *Casey*, and any argument to the contrary is foreclosed by the Court's clarification of the undue burden standard in *Whole Woman Health v. Hellerstedt*, 136 S. Ct. 2292, which requires courts in each instance to balance a law's benefits against its burdens.

A regulation imposes an undue burden 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." *Casey*, 505 U.S. at 877. "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." *Id.* The *Casey* Court's analysis of the restrictions at issue makes clear that the undue burden test is case-specific and reliant on the record evidence. *See id.* at 885-87 (reviewing district court's findings regarding mandated 24-hour delay) and 888-95 (reviewing evidence related to domestic violence in considering a spousal-notification requirement). Only after a thorough examination of the record did the Court hold that while the district court's findings regarding travel distance and delay were "troubling in some respects," they did not establish that the 24-hour delay imposed an undue burden. *Id.* at 886.

Shortly after *Casey* was decided, two Justices made clear that the decision did not preclude facial challenges to other laws mandating a 24-hour delay. *See Planned Parenthood of Se. Pa. v. Casey*, 114 S. Ct. 909 (1994) (Souter, J., Circuit Justice) ("litigants are free to challenge similar restrictions [to those reviewed in *Casey*] in other jurisdictions"); *Fargo Women's Health Org. v. Schaffer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of application for stay) (although the Court declined to issue a stay pending appeal to enjoin, among other provisions, a 24-hour delay, the lower courts should examine the record in analyzing whether the law imposes an undue burden). Courts since *Casey* have routinely entertained pre-enforcement facial challenges to laws imposing delays. *See, e.g.*, *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994) (assuming the application of the undue burden test in facial challenges and reviewing record evidence to assess whether a 24-hour delay imposed an undue burden); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 453 (W.D. Ky. 2000) (*Casey* does not "preordain" the outcome of a challenge to a 24-hour delay; "The Supreme Court left open the possibility that future plaintiffs could prove that a similar regulation might be unconstitutional." (citation omitted)). Defendants are clearly incorrect in asserting that *Casey* precludes Plaintiffs' facial challenge.

If there were any room for doubt, the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, puts to rest Defendants' assertion that Plaintiffs have failed to state a claim against H.B. 386. That case clarifies that restrictions on access to abortion before viability are subject to meaningful judicial scrutiny and that rational basis review is not enough. *Id*. at 2309. In addition, an abortion restriction is constitutional and not "undue" only if its benefits outweigh its burdens, *see id*. at 2309-10, and in evaluating the restriction's benefits and burdens, courts must not simply defer to a state's assertions regarding the law's benefits. *See id.* *Whole Woman's Health* explained that the district court "applied the correct legal standard" when

it gave "significant weight to evidence in the judicial record," taking into account expert evidence and testimony, in weighing "the asserted benefits against the burdens." *See also id.* at 2310 ("[T]he Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon the evidence and argument presented in judicial proceedings."). The Court also explained that no single factor is determinative as to whether a restriction imposes an undue burden. *Id.* at 2313.

Whole Woman's Health makes plain that Defendants are incorrect in arguing that H.B. 386 is immune from facial challenge. Plaintiffs' allegations against H.B. 386 and the implementing regulation include that they will "expose women to greater health risks," and increase travel and expense by forcing women, who under current law can travel to a clinic and stay one night before the procedure, to either stay multiple nights away from home, or make two trips. Am. Compl. ¶¶ 93, 96-97. These increased burdens are precisely the kinds of facts that the *Whole Woman's Health* Court looked to in the district court record to assess whether the challenged provisions imposed an undue burden. *Whole Woman's Health*, 136 S. Ct. at 2313, 2318. Plaintiffs have therefore pled facts that would entitle them to relief, precluding dismissal under Rule 12(b)(6).

Defendants offer no evidentiary support for how the 72-hour delay will advance its asserted interests beyond current law. Where, as here, Plaintiffs have alleged concrete burdens that will result from the extended delay, Defendants must come forward with evidence that will allow the court to weigh these burdens against any established benefits. Dismissal at this stage would improperly relieve Defendants of their burden to do so. *See Whole Woman's Health*, 136 S. Ct. at 2311-12 (noting that the record failed to establish how the new restriction, "compared to prior law," advanced the state's asserted interests); *see also Planned Parenthood of Ind. & Ky., Inc. v. Commissioner*, No. 1:16-CV-01807-TWP-DML, __ F. Supp. 3d __, 2017 WL 1197308, *15

(S.D. Ind. March 31, 2017) (issuing a preliminary injunction after comparing a requirement that women be offered the opportunity to see an ultrasound image at least 18 hours prior to an abortion with previous law that required the offer without the mandatory delay, finding a "near absence of evidence" that the law advances the state's asserted interests).

Defendants place heavy reliance on the exception in H.B. 386 for women who do not live within 150 miles of an abortion facility, arguing that an increased driving distance of less than 150 miles is categorically *not* an undue burden. Defs.' Mem. at 18. The Court in *Whole Woman's Health*, 136 S. Ct. at 2313, explained however that "increased driving distances" "are but one additional burden, which, when taken together with others" can lead to the conclusion that a restriction imposes an undue burden.[5] It would be improper, as Defendants suggest, for the court to prejudge any one factor, including driving distance, without considering other burdens, and benefits, if any.[6] *See also Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (explaining that the undue burden analysis must be based on "the entire record and factual context in which the law operates," including strength of state's interest), *cert. denied* 136 S. Ct. 2536 (2016).

Defendants are also incorrect in arguing that Plaintiffs' claim against H.B. 386 should be dismissed for failing to adequately allege that the law will burden a large fraction of women seeking abortions because that argument improperly conflates whether Plaintiffs have alleged a claim that satisfies Rule 12(b)(6) with the remedy that will be appropriate should the court find a

[5] Defendants' reliance on *Planned Parenthood of Greater Texas v. Abbott*, 748 F. 3d 583 (5th Cir. 2014), is misplaced after *Whole Woman's Health.* The articulation of the undue burden test used in *Abbott* was subsequently found to be "incorrect" by the Supreme Court. *Compare Abbott*, 748 F. 3d at 594-95 (articulating a "rational basis" test as part of the undue burden analysis), *with Whole Woman's Health*, 136 S. Ct. at 2309 (the Fifth Circuit erred in equating review of restrictions on abortion with the rational basis scrutiny applicable to economic legislation).

[6] Because Defendants are incorrect that driving distances of less than 150 miles cannot amount to an undue burden, the fact that the emergency regulations exempt women when there is no clinic "willing and able" to provide services, does not affect the analysis.

constitutional violation. As the Supreme Court has explained, whether a plaintiff can prevail in a facial challenge is not a question of justiciability to be assessed at the outset, but a question of remedy to be assessed at the conclusion. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (the distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-31 (2006) (remanding case for reconsideration of remedy after holding plaintiff failed to meet standard for facial relief).

In any event, Plaintiffs have made sufficient allegations to support their facial challenge. The restrictions prohibit all women seeking abortions that do not live within 150 miles of an available provider from giving informed consent for 72 hours after they have received the information necessary to do so. The unnecessary delay exposes some women to greater health risks, anxiety, and expense, and may force some women to undergo more complex or costly procedures or be pushed into the second trimester. Am. Compl. ¶¶ 93, 96. Thus, even if Defendants were correct that the Court should consider, in the context of a Rule 12(b)(6) motion, whether Plaintiffs have alleged adequate facts to obtain a particular remedy, Plaintiffs have pled facts that, if established, would support facial invalidation. *Whole Woman's Health*, 136 S. Ct. at 2320 ("the relevant denominator" in the large fraction analysis is "those women for whom the provision is an actual rather than irrelevant restriction") (citing *Casey*, 505 U.S. at 895).

CONCLUSION

For the foregoing reasons, the Motion to Dismiss Plaintiffs' claims against H.B. 815, S.B. 33, H.B. 386, and the relevant implementing regulations, should be denied. [7]

[7] As in their first motion, Defendants move to dismiss the cumulative undue burden claim (Count XI). Defs.' Mem. at 20, which under the Scheduling Order, will be included in the third motion to dismiss. In any event, the burdens associated with each of the 2016 Acts must be assessed in considering Plaintiffs' cumulative undue burden claim, both

Respectfully submitted, April 21, 2017.

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in terms of standing and the merits. In addition, if the Court rules for Defendants under Rule 12(b)(6) as to any claim, Plaintiffs request an opportunity to amend their complaint. *See, e.g., U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270-71 (5th Cir. 2010).

CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 2017, I electronically filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Janet Crepps
Janet Crepps