IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, *et al.*,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	
v.	)	Case No. 1:16-CV-01300-DAE
	)	
JOHN HELLERSTEDT, M.D.,	)	
	)	
Defendant.	)	

PLAINTIFFS' SECOND MOTION FOR A PRELIMINARY INJUNCTION, OR IN THE ALTERNATIVE A TEMPORARY RESTRAINING ORDER, AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiffs, providers of women's reproductive healthcare, seek a preliminary injunction, or alternatively a temporary restraining order, to preserve the status quo and prevent irreparable harm to themselves and their patients from Defendant's enforcement of a newly-enacted statute, Chapter 697 of the Texas Health & Safety Code ("the Act"), scheduled to take effect February 1, 2018. By requiring all their patients' embryonic and fetal tissue to be disposed of by interment or cremation, the Act would infringe their patients' fundamental right to liberty. Further, its vague provisions threaten Plaintiffs with arbitrary enforcement. The Court previously issued a preliminary injunction against enforcement of regulations—now superseded by the Act—attempting to impose substantively identical requirements. *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218 (W.D. Tex. 2017) ("*Whole Woman's Health II*").

The Texas Health and Human Services Commission ("HHSC") was mandated by the Act to issue implementing regulations by December 1, 2017, but has not yet done so. Given the limited time remaining before the Act takes effect, Plaintiffs are filing the present motion before rulemaking is finalized. The motion is opposed. **Plaintiffs respectfully ask the Court to take action by the Act's effective date of February 1, 2018**.

BACKGROUND

Plaintiffs have provided a wide array of medical services—including abortion care, miscarriage management, and treatment of ectopic pregnancy—to Texas women for decades. *Whole Woman's Health II*, 231 F. Supp. 3d at 223; Tr. of Mot. Hr'g ("Tr.") Vol. 1, 10:4-11, 50:16-52:18, ECF 68; Decl. of Amy Hagstrom Miller ¶¶ 1-2 ("Hagstrom Miller Decl."), ECF 6-1; Decl. of Lendol L. ("Tad") Davis, M.D. ¶¶ 5-6 ("Davis Decl."), ECF 6-2. Their patients come from diverse backgrounds, representing a broad array of religious and cultural traditions. *See generally* Tr. Vol. 1, 17:18-18:4, 21:1-10 (Hagstrom Miller); Davis Decl. ¶ 22, ECF 6-2. Plaintiffs are committed to providing their patients with respectful and culturally sensitive care that respects

patients' dignity and autonomy. *See generally* Hagstrom Miller Decl. ¶ 1, ECF 6-1; Tr. Vol. 1, 87:19-21 (Davis). They have always accommodated patients who wish to have a burial or cremation following an abortion or miscarriage. Tr. Vol 1, 16:15-23, 17:18-18:8 (Hagstrom Miller); 55:20-56:12, 57:1-3 (Davis); Hagstrom Miller Decl. ¶ 16, ECF 6-1; Davis Decl. ¶¶ 23-24, ECF 6-2. They object, however, to forcing such ideologically tinged practices onto patients who would not choose them voluntarily. Tr. Vol 1, 13:2-14 (Hagstrom Miller), 56:22-57:3 (Davis); Hagstrom Miller Decl. ¶ 17, ECF 6-1; Davis Decl. ¶¶ 21-23, ECF 6-2.

I. THE AMENDMENTS

Until a year ago, Texas law had always permitted healthcare providers to treat embryonic and fetal tissue removed from a patient's body like all other human tissue for purposes of disposition. *See Whole Woman's Health II*, 231 F. Supp. 3d at 223. In healthcare, the most common method of disposition of human tissue, including embryonic or fetal tissue, is incineration followed by placement of the ash in a sanitary landfill. *Id.*; Tr. Vol. 1, at 15:9-15, 22:8-11 (Hagstrom Miller), 59:16-19 (Davis); Vol. 2, 12:9-14:7 (Swenson), ECF 69; Decl. of Diane Schecter, M.D. ¶¶ 12-13, ECF 6-3; Hagstrom Miller Decl. ¶ 5, ECF 6-1; Davis Decl. ¶ 14, ECF 6-2.

Four days after the Supreme Court struck down two provisions of House Bill 2 of 2013 ("HB 2"), which would have closed most of the state's abortion clinics, *see Whole Woman's Health v. Hellerstedt* ("*Whole Woman's Health I*"), 136 S. Ct. 2292 (2016), HHSC published proposed amendments to 25 Texas Administrative Code §§ 1.132-1.137 (the "Amendments"), limiting how healthcare providers may dispose of "fetal tissue." *Whole Woman's Health II*, 231 F. Supp. 3d at 222. The Amendments, published as final regulations on December 9, 2016, created "fetal tissue"

as a new sub-category of "pathological waste,"[1] and defined it in relevant part as "a fetus, body parts, organs or other tissue from a pregnancy." *Id*. at 223-24. In contrast to all other tissue, which may typically be disposed of by any of seven methods, the Amendments required "fetal tissue" to be disposed of only by "interment."[2] *Id*. "Interment" was defined in relevant part to include "cremation, entombment, burial, or placement in a niche;"[3] and "the process of cremation followed by placement of the ashes in a niche, grave, or scattering of ashes as authorized by law, unless prohibited [herein]." *Id*. (No such prohibitions were stated. *Id*. at 223-4, 226-27.) "Cremation" was defined to include "the process of incineration." *Id*. at 224.

The Texas Department of State Health Services ("DSHS"), charged with enforcing the Amendments,[4] interpreted them to prohibit disposition of ash in a sanitary landfill, even though no such prohibition appeared on the Amendments' face. *Id*. at 223-4, 226-27. Further, DSHS argued that additional, unspecified locations were also inappropriate for disposing of ash, but it could not cite any Texas law supporting its position. Hellerstedt's Advisory to the Ct. at 3, ECF 38; Tr. Vol. 2, 199:5-21. Although the Amendments stated cremation ash may be scattered "as authorized by law," *Whole Woman's Health II*, 231 F. Supp. 3d at 224, Defendant could not identify any law governing the scattering of such ash other than the Amendments themselves, *see id.* at 227 & n.2.

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[1] "Pathological waste" also includes all other "[h]uman materials removed during surgery, labor and delivery, autopsy, embalming, or biopsy;" "laboratory specimens;" and "[a]natomical remains." *See* 25 Tex. Admin. Code § 1.136(a)(4).

[2] "Steam disinfection" or "incineration" could be undertaken as an optional first step before "interment." *Whole Woman's Health II*, 231 F. Supp. 3d at 223-24.

[3] The parties have referred to "entombment, burial, or placement in a niche" by the shorthand of "burial." *See, e.g., Whole Woman's Health v. Hellerstedt*, No. 17-50154, Br. for Appellant at 23 (5th Cir. May 30, 2017).

[4] DSHS' Commissioner, Dr. John Hellerstedt, is the Defendant. He reports to the Executive Commissioner of HHSC. *See Health and Human Services Transition Plan, Report to the Transition Legislative Oversight Committee* at 5 (Aug. 2016), https://hhs.texas.gov/sites/default/files/documents/about-hhs/transformation/october-2017-addendum-and-august-2016-plan.pdf.

Notably, the Amendments expressly stated that Texas statutes governing the disposition of human remains did not apply to fetal tissue. *See* 25 Tex. Admin. Code § 1.134(a) ("This subchapter does not extend or modify requirements of Texas Health and Safety Code, Chapters 711 and 716 or Texas Occupations Code, Chapter 651 to disposition of fetal tissue.").

II. THE PRELIMINARY INJUNCTION

On January 27, 2017, after considering live and written testimony offered during a two-day hearing, as well as the parties briefs and arguments, *see Whole Woman's Health II*, 231 F. Supp. 3d at 221; *see also* Tr. Vol. 1, 9:23-24 (admitting all declarations into the record), the Court granted Plaintiffs' motion for a preliminary injunction, concluding that Plaintiffs had a substantial likelihood of success on the merits of their vagueness and substantive due process claims, and that the other requirements for issuance of a preliminary injunction were satisfied, *Whole Woman's Health II*, 231 F. Supp. 3d at 226-33.

As detailed in its opinion, the Court ruled that, by requiring healthcare providers to ensure that "fetal tissue" be disposed of in ways normally associated with human remains, "DSHS appears to be inferentially establishing the beginning of human life as conception," which "potentially undermin[es] the constitutional protection afforded to personal beliefs and central to the liberty protected by the Fourteenth Amendment." *Id*. (citing the "reserv[ation] to individuals [of] the right to define one's own concept of the mystery of human life" in *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). The Court also found that DSHS' haphazard promulgation of the Amendments and its failure to consider how they fit into Texas's statutory schemes governing the disposition of "pathological waste" and "human remains" were "evidence DSHS's stated interest is a pretext for its true purpose, restricting abortions." *Whole Woman's Health II*, 231 F. Supp. 3d at 229. The Court further ruled that the Amendments did not further the State's legitimate

interest in "protecting the potentiality of human life" because no potential life is present after an abortion or miscarriage. *Id*.

With respect to Plaintiffs' vagueness claim, the Court found the Amendments were so indefinite as to allow arbitrary and discriminatory enforcement, "especially in light of evidence of the State's eagerness to find health deficiencies in the wake of the Supreme Court's decision in *Whole Woman's Health* [*I*]," and did not provide healthcare providers with adequate notice regarding how to comply. *Whole Woman's Health II*, 231 F. Supp. 3d at 227. First, the Court found the Amendments unclear regarding whether "fetal tissue" must be disposed of as "pathological waste" by licensed medical waste services vendors, consistent with their plain text, or whether it could be accepted for interment or cremation by licensed funeral homes, as Defendant had argued. *Id*. Second, the Court found the Amendments were unclear regarding where ash from cremated fetal tissue could be disposed of, given that they did not state any restrictions, and yet DSHS argued variously that certain locations were prohibited. *Id*.; *see also* Tr. Vol. 2, 199:5-21. Third, the Court found DSHS' inability to define "other tissue" as used in the definition of "fetal tissue" was unconstitutionally ambiguous. *Whole Woman's Health II*, 231 F. Supp. 3d at 226.

Defendant appealed the preliminary injunction, and the Court stayed the proceedings pending appeal. On December 6, 2017, Defendant moved to voluntarily dismiss the appeal, and the Fifth Circuit granted the motion the next day. On December 15, 2017, this Court ordered the stay lifted, and on December 22, 2017, Plaintiffs filed an Amended Complaint.

III. THE ACT

On June 6, 2017, while Defendant's appeal was pending, the State enacted Senate Bill 8 ("SB 8"), attached hereto as Exhibit A. Chapter 697 of SB 8, challenged here as the Act, seeks to create the same basic requirement that DSHS attempted to impose through the Amendments:

interment or cremation of embryonic or fetal tissue. As originally drafted and debated, SB 8 was an unrelated abortion restriction, not containing embryonic or fetal tissue restrictions. *See* SB 8, Introduced Version, 85th Leg., Reg. Sess. (Tx. 2017), http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00008I.pdf#navpanes=0 *and also linked from* http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=85R&Bill=SB8 (click "introduced"). Those provisions, along with other abortion restrictions not passed as standalone legislation, were attached to SB 8 as amendments, without committee hearings or debate, and with limited floor debate. *See* Sen. Journal, 85th Leg., Reg. Sess. 534-36 (Tx. 2017), http://www.journals.senate.state.tx.us/sjrnl/85r/pdf/85RSJ03-15-F.PDF. As enacted, SB 8 contains numerous restrictions on pregnancy-related medical care, including a ban on the most common method of abortion after approximately fifteen weeks of pregnancy, which a court of this District struck down in November. *Whole Woman's Health v. Paxton*, No. A-17-CV-690-LY, 2017 WL 5641585, __ F. Supp. 3d __ (W.D. Tex. Nov. 22, 2017), *appeal pending*, No. 17-51060 (5th Cir.).

The Act creates a new, *sui generis* classification under Texas law: "embryonic and fetal tissue remains" ("EFTR"), defined as "an embryo, a fetus, body parts, or organs from a pregnancy." Tex. Health & Safety Code § 697.002(3). It permits only two methods of final disposition of EFTR: "interment"—defined as "the disposition of remains by entombment, burial, or placement in a niche"[5]—and "cremation"—defined as "the irreversible process of reducing

[5] As with the Amendments, the Act allows "steam disinfection" and "incineration" as optional first steps before "interment." Tex. Health & Safety Code § 697.004(a)(3), (4). But these are not possible in practice. Commercial incinerators and steam disinfection facilities dispose of treated waste in sanitary landfills. They do not have the ability to segregate Plaintiffs' materials. Safety risks and regulations prohibit employees from sorting through their customers' waste or separating wastes after processing. Therefore, there is no way, in practice, for to separate out the ash of

remains to bone fragments through direct flame, extreme heat, and evaporation." Tex. Health & Safety Code §§ 697.002, 697.004(a). Like the Amendments, the Act authorizes DSHS' enforcement through licensing actions and fines. Tex. Health & Safety Code §§ 697.007–.008.

The Act's regulatory scheme contains only minor changes from the Amendments. As relevant here, in contrast to the Amendments, the Act, establishes that EFTR is "not pathological waste under state law." Tex. Health & Safety Code § 697.003. Additionally, it eliminates the term "other tissue" from the definition of EFTR. *See* Tex. Health & Safety Code § 697.002. Finally, it adds language specifying that ash from incineration or cremation shall be disposed of as authorized by law "for human remains," and "may not be placed in a landfill." Tex. Health & Safety Code § 697.004(b). Although these changes address some of the ambiguities that the Court had identified in the Amendments, they fail to cure the scheme's fundamental vagueness. *See infra* 20-24.

Although SB 8 generally has an effective date of September 1, 2017, App. A § 22, the Act was given a later, February 1, 2018 effective date, *id*. § 19(d). SB 8 directed HHSC to adopt implementing regulations by December 1, 2017, *id*. § 18(a), but to date HHSC has not done so. SB 8 also directed DSHS to "develop a grant program that uses private donations to provide financial assistance for the costs associated with disposing of embryonic and fetal tissue remains," Tex. Health & Safety Code § 697.006, by October 1, 2017, App. A § 18(b)(2), but to date DSHS has not done so. Additionally, the Act provides for the "establish[ment] and maintain[ance of] a registry of participating funeral homes and cemeteries willing to provide free common burial or low-cost private burial [and] private nonprofit organizations that register with the department to provide financial assistance," and requires DSHS "to make the registry information available on

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Plaintiffs' treated EFTR in order to ensure that it is interred and not sent to a sanitary landfill. *See* Decl. of Anne Layne-Farrar, PhD ¶ 14, ECF 6-6; 41 Tex. Reg. 9711, ECF 1-1 at 4.

request to a physician, health care facility, or agent of a physician or health care facility," Tex. Health & Safety Code § 697.005, by December 1, 2017, App. A § 18(a). DSHS has to date neither established the registry nor made the registry information available on request.

LEGAL AUTHORITIES SUPPORTING THE MOTION

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS.

A. Standard of Review.

The Court should grant Plaintiffs' motion for a preliminary injunction upon a showing of the following elements: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Whole Woman's Health II*, 231 F. Supp. 3d at 226 (quoting *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014)); *accord Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)).

"In granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action." Fed. R. Civ. P. 52(a)(2); *see also* Fed. R. Civ. P. 65(d) ("Every order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."). "[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence." *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993). "Thus, the district court can accept evidence in the form of deposition transcripts and affidavits." *Id.*

Issues decided by the Court in connection with Plaintiffs' first motion for a preliminary injunction should be treated as law of the case. "The law-of-the-case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case." *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (internal quotation marks omitted). The doctrine favors judicial economy and orderly litigation; "when a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983); *accord McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 703 (5th Cir. 2014). Although not "an inexorable command," the doctrine should be followed "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967); *accord McKay*, 751 F.3d at 703.

B. The Act Invades the Personal Liberty Guaranteed by the Constitution.

Due Process protects "all fundamental rights comprised within the term liberty." *Casey*, 505 U.S. at 847 (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)). Among these rights are "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015), such as "choices concerning contraception, family relationships, procreation, . . . childrearing," *id*. at 2599, and "medical treatment," *Casey*, 505 U.S. at 857. Such choices "are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. *See also id*. (It is "the right of the *individual*, married or single, to be free of unwarranted governmental

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

The Supreme Court has further explained that its own "obligation is to define the liberty of all, not to mandate [its] own moral code," 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; *accord Lawrence v. Texas*, 539 U.S. 558, 571, 574 (2003). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, 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).

The Act, like the Amendments, violates these basic constitutional principles and infringes the rights of women by imposing burdensome requirements on miscarriage management, ectopic pregnancy treatment, and abortion, in an effort to impose the State's "own moral code" on women who seek pregnancy-related medical care. *See Casey*, 505 U.S. at 850; *Whole Woman's Health II*, 231 F. Supp. 3d at 229-30.

In evaluating the Act's constitutionality, the Court should apply the undue burden standard, under which 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." *Casey*, 505 U.S. at 877.[6] In *Whole Woman's Health I*, the Supreme Court clarified that the standard "requires

[6] The Act's reach extends to women who are obtaining pregnancy-related medical care other than abortion. The Constitution's limits on government power to interfere with women seeking treatment for miscarriage and ectopic pregnancy are at least as stringent as those regarding abortion. *See generally Casey*, 505 U.S. at 851. *See also Carey v. Population Servs., Int'l*, 431 U.S. 678, 687 (1977) ("[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."); *Eisenstadt*, 405 U.S. at 453.

that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. A court must "consider[] the evidence in the record," and "then weigh[] the asserted benefits against the burdens." *Id.* at 2310. Where a law fails to confer "benefits sufficient to justify the burdens," those burdens are "undue"—that is to say, unconstitutional. *Id.* at 2300.

1. The Act Serves No Valid State Interest.

The Act states that its purpose is "to express the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.001. Defendant asserted that the Amendments served a similar interest. *See Whole Woman's Health II*, 231 F. Supp. 3d at 229-30.[7] While precedent permits a state to enact laws that demonstrate respect for life by ensuring that a woman's decision to have an abortion is well-informed or encouraging her to choose childbirth over abortion, *see, e.g., Casey*, 505 U.S. at 876; *Roe v. Wade*, 410 U.S. 113, 162 (1973), the Act does not serve this purpose. Instead, it compels patients and healthcare providers to act in accordance with the State's view of when personhood begins even if that view conflicts with their own beliefs. The interest the Act seeks to further is therefore incompatible with the legitimate state interests recognized in Supreme Court caselaw.

Casey made clear that "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. Such means respect a woman's dignity by treating her as an autonomous moral agent. *See supra* 9-10. *Casey* explained that, when the state seeks to advance an interest in potential life through means that are

[7] The State initially relied on an interest in "protecting the public health and safety from contagious disease" in promulgating the Amendments, *Whole Woman's Health II*, 231 F. Supp. 3d at 224-25, but later conceded that they do not provide a public health benefit, *id.* at 230. The Act does not invoke public health as a rationale.

not calculated to inform a woman's decision, it acts with a "purpose [that] is invalid." 505 U.S. at 877. Accordingly, the State may seek to persuade women to adopt its views about personhood and abortion, but it may not compel them to adopt those views or act in accordance with them. *See id.* at 878 ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated *as long as their purpose is to persuade* the woman to choose childbirth over abortion.") (emphasis added).

This limitation on advancing the interest in potential life reflects *Casey*'s careful effort to reconcile "the State's interest with the woman's constitutionally protected liberty." *Id.* at 876. It also accords with bedrock constitutional principles concerning the impermissibility of government coercion in matters of personal belief and conscience. It is well settled that the State does not have a valid interest in taking sides in a religious debate, prescribing a moral code, or stigmatizing people whose beliefs differ from those of the majority. *See, e.g., Lawrence*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *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."); *Casey*, 505 U.S. at 851 ("At 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."); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) ("Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed

is the counterpart of his right to refrain from accepting the creed established by the majority."); *Barnette*, 319 U.S. at 642.

These precedents led the Court to conclude that, in adopting the Amendments, "DSHS appears to be inferentially establishing the beginning of human life as conception, potentially undermining the constitutional protection afforded to personal beliefs and central to the liberty protected by the Fourteenth Amendment." *Whole Woman's Health II*, 231 F. Supp. 3d at 229. The Court held that the State's "purported interest" in the Amendments was "weak" at best. *Id.* at 232. The same is true of the Act.

The Court also concluded that the Amendments "do not further . . . a legitimate state interest" in potential life because they "regulate activities after a miscarriage, ectopic pregnancy, or abortion—activities that occur when there is no potential life to protect." *Id*. at 229. Courts reviewing similar requirements have likewise concluded that they fail to serve a legitimate state interest. *E.g.*, *Hopkins v. Jegley*, No. 4:17-00404-KGB, 2017 WL 3220445, at *63 (E.D. Ark. July 28, 2017) ("N[o] . . . interest the State has in potential life [can] support the Tissue Disposal Mandate because it applies to tissue disposal after an abortion or miscarriage, when there is no 'potential life.'"), *appeal pending*, No. 17-2879 (8th Cir. Aug. 28, 2017); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 194 F. Supp. 3d 818, 834 (S.D. Ind. 2016) (finding "no legal support for the State's position that it has a legitimate state interest in 'promoting respect for human life by ensuring proper disposal of fetal remains,' or ensuring 'that fetal remains be treated with humane dignity'") (citations omitted), *appeal pending from final judgment*, No. 17-3163 (7th Cir. Sept. 22, 2017); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 635 F. Supp. 469, 471-72 (S.D. Ohio 1986); *Leigh v. Olson*, 497 F. Supp. 1340, 1351 (D.N.D. 1980) ("The state's legitimate interests in . . . the preservation of potential life are not furthered by the

["humane disposal"] requirement."); *Margaret S. v. Edwards*, 488 F. Supp. 181, 222 (E.D. La. 1980) (holding that the challenged statute "impermissibly raise[d] the status of a fetus to that of a human being by using language equating fetal remains with human remains," despite the Supreme Court's holding that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

2. The Act Burdens Women Seeking Pregnancy-Related Medical Care.

The Court previously concluded that the record "contains evidence indicating restricting disposal of fetal tissue to methods consistent with the disposal of human remains will impose burdens on abortion access." *Whole Woman's Health II*, 231 F. Supp. 3d at 230. The burdens imposed by the Act are no different than those imposed by the Amendments, including: forcing interment or cremation on unwilling women who have had an abortion, a miscarriage management procedure, or an ectopic pregnancy surgery; threatening women's health and safety by reducing their access to medical care; and threatening healthcare access by increasing costs and compelling providers to maintain precarious, medically-unnecessary third-party relationships with vendors.

a. The Act Burdens Women's Freedom of Belief.

By requiring the disposition of EFTR by means used for human remains, the Act enforces the viewpoint that embryos are people. Tr. Vol. 1, 17:20-18:4 (Hagstrom Miller), *id*. at 98:18-21, 105:12-22 (Haffner); Tr. Vol. 2, 65:22-25 (Bishop), 90:3-7 (Allmon); Decl. of Valerie Peterson, Ed.D. ("Peterson Decl.") ¶¶ 8-12, ECF 6-5; Decl. of the Rev. Dr. Debra W. Haffner, D. Min., M. Div., M.P.H. ("Haffner Decl.") ¶¶ 7, 10, ECF 6-4; *see also, e.g.*, 41 Tex. Reg. at 9720, ECF 1-1 at 13 (summarizing public comments that the Amendments "afford[] the same dignity and respect as any other human body" and "recognize fetal remains as human remains"). Under current law, women can, and occasionally do, choose burial or cremation for a lost pregnancy. Tr. Vol. 1, 16:15-23, 17:18-18:8 (Hagstrom Miller), 55:20-56:12, 57:1-3 (Davis); Hagstrom Miller Decl. ¶ 16, ECF

6-1; Davis Decl. ¶ 23, ECF 6-2. Thus, the Act, by definition, only forces interment or cremation onto women who would not otherwise choose them.

A woman's views about when a developing human embryo or fetus attains the status of a person may vary greatly based on her cultural and religious traditions, scientific understanding, and other personal beliefs. *See* Tr. Vol. 1, 20:13-21:10 (Hagstrom Miller), 95:18-21 (Haffner); Tr. Vol. 2, 56:23-57:1, 74:20-75:10 (Bishop), 89:11-17, 90:3-7 (Allmon); Haffner Decl. ¶¶ 7-8, ECF 6-4; Peterson Decl. ¶¶ 9, 12, ECF 6-5; *Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."); *Roe*, 410 U.S. at 159-62 (noting that "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" about "the difficult question of when life begins" and surveying different schools of thought). Likewise, views about the appropriate disposition of embryonic or fetal tissue vary based on the same factors. *See* Haffner Decl. ¶ 9, ECF 6-4; Peterson Decl. ¶¶ 8-12, ECF 6-5. *See also* Tr. Vol. 2, 22:17-21 (Swenson) (discussing a patient who delayed miscarriage treatment to speak with her imam after being informed the hospital where she sought treatment required cemetery burial). Witnesses for both sides agreed that "there's no one correct definition of the dignity that an embryo or fetus attains," and that people can disagree in good conscience about the value to be given to an embryo or fetus. Tr. Vol. 2, 74:18-24 (Bishop); *see also* Tr. Vol. 1, 95:18-21, 96:12-97:7 (Haffner). For example, the many Texas women who miscarry at home each year and dispose of the embryonic and fetal tissue by flushing it into a sanitary sewer generally do not view their conduct as an affront to human dignity, Tr. Vol. 1, 62:19-63:20 (Davis); Tr. Vol. 2, 20:6-21 (Swenson), but others hold a different opinion, Tr. Vol.

2, 62:9-15 (Bishop) ("My personal opinion would be yes [it is undignified], but that does not mean the woman does not have the right to do that.").

The Act, like the Amendments, fails to respect this diversity of views and beliefs. The State has made no attempt to accommodate women who do not view an embryo or fetus as a person, or whose personal beliefs are that interment or cremation for a non-person would be inappropriate or wrong. In fact, the Texas Legislature explicitly rejected a proposed amendment to the Act that would have created an exception for persons for whom "compliance would violate a sincerely held religious belief of the person." *See* Amendment 11, proposed by Rep. Alvarado, May. 19, 2017, 85th Leg., Reg. Sess. (Tx. 2017), http://www.capitol.state.tx.us/tlodocs/85R/amendments/pdf/SB00008H211.PDF, *and also linked from* http://www.capitol.state.tx.us/BillLookup/Amendments.aspx?LegSess=85R&Bill=SB8 (click "11").

The Act thus replaces the freedom of belief "at the heart of liberty" with a viewpoint "formed under compulsion of the State." *Casey*, 505 U.S. at 851. It compels women with different beliefs about the personhood of embryos, or the propriety of burial or cremation, to acquiesce to the State's view. Haffner Decl. ¶¶ 10-12, ECF 6-4; Peterson Decl. ¶¶ 11-12, ECF 6-5. This constitutes an unwelcome and unacceptable intrusion into the private lives of many women and their families. Tr. Vol. 1, 13:3-14 (Hagstrom Miller); Hagstrom Miller Decl. ¶ 17, ECF 6-1; Davis Decl. ¶ 22, ECF 6-2; Haffner Decl. ¶¶ 13-15, 17, ECF 6-4; Peterson Decl. ¶¶ 8-11, ECF 6-5. Further, DSHS has proposed turning over fetal tissue to religious institutions for religious disposition without patient consent. Tr. Vol. 1, 188:4-9 (Sims) ("Q: Now, is it your testimony that if the state's been proposing here today that all embryonic or fetal tissue is turned over en masse to the Catholic church for a mass burial or cremation, that patients of these healthcare facilities

wouldn't need to be told about that? A: That's correct."); *accord id*., 73:3-13 (Davis); *see also* Peterson Decl. ¶¶ 13-14, ECF 6-5 ("I would worry if strangers were making a memorial or holding a prayer service over the burial place, inserting their sense of concern where it did not belong, not knowing me, not knowing that it seems like it was God's will that the baby not be viable."); Haffner Decl. ¶¶ 17-18, ECF 6-4.

b. The Act Harms Women's Health and Safety.

The Act threatens women's health and safety by discouraging women from seeking pregnancy-related medical care in order to avoid the Act's mandates. As the Court noted, mandating interment or cremation may "discourag[e some women] from obtaining gynecological care, particularly abortions and miscarriage management, from a medical facility." *Whole Woman's Health II*, 231 F. Supp. 3d at 230-31; *see also* Davis Decl. ¶ 27, ECF 6-2 ("I am worried that many [patients], unable to get the medical care they seek, would instead take matters into their own hands."). For example, Dr. Swenson testified that she stopped scheduling miscarriage management procedures at a hospital requiring cemetery burial after one of her Muslim patients delayed her procedure to seek guidance from her imam about the policy. Tr. Vol. 2, 21:10-21, 23:13 (Swenson).

Moreover, the Act's requirements would impose emotional burdens on affected women. Like the Amendments, the Act would "enhance the stigma on women associated with miscarriage and abortion care" and "could cause women grief and shame." *Whole Woman's Health II*, 231 F. Supp. 3d at 230. *See also* Tr. Vol. 1, 99:15-21, 101:21-102:1 (Haffner); Hagstrom Miller Decl. ¶ 8, ECF 6-1; Davis Decl. ¶ 34, ECF 6-2; Haffner Decl. ¶¶ 10-11, 17-18, ECF 6-4; Peterson Decl. ¶¶ 12-15, ECF 6-5.

c. The Act Threatens Patients' Access to Medical Care.

The Act, like the Amendments, adopts the same tactics as the admitting-privileges requirement struck down in HB 2—compelling providers of reproductive healthcare to maintain a fragile, costly, medically-unnecessary third-party relationship. This will threaten the ability of healthcare providers to continue to provide care, and will increase cost barriers to accessing care.

Witnesses on both sides of the case testified that the costs of interment or cremation are likely to exceed healthcare providers' current costs significantly. For example, a funeral director called by Defendant testified that he would likely charge $350, plus $2,000 in transportation costs, for each transport of tissue from up to twenty-five patients from Plaintiff Reproductive Services' clinic in El Paso. Tr. Vol. 2, 170:2-171:9 (Carnes). This would amount to several hundred thousand dollars annually. Every funeral home and crematorium surveyed by Plaintiffs, save one, quoted minimum prices of several hundred dollars per patient—comparable to the cost of a first-trimester abortion. *See* Decl. of Anne Layne-Farrar, PhD ("Layne-Farrar Decl.") ¶¶ 15, 18 and Exh. B, ECF 6-6; Davis Decl. ¶ 24, ECF 6-2. These options are prohibitively expensive.

The Court thus concluded "it is undisputed the Amendments will increase costs for healthcare providers." *Whole Woman's Health II*, 231 F. Supp. 3d at 230. The Act is no different. Indeed, the Act's Fiscal Note[8] includes reports from two public hospitals: the first estimates burial costs in compliance with the Act would "range between $218,400-$655,200" annually; the second reports higher costs on a per-patient basis. App. A, Fiscal Note, at 2. By increasing the cost of providing healthcare, the Act will make healthcare more expensive, which could dissuade patients from seeking care or prevent them from doing so. Tr. Vol 1, 17:18-21 (Hagstrom Miller); Davis

[8] The Legislature includes a Fiscal Note regarding the "probable costs of each bill . . . requir[ing] the expenditure of . . . state funds" in the legislative history of all such bills other than general appropriations. Tex. Gov. Code § 314.001.

Decl. ¶ 27, ECF 6-2, Layne-Farrar Decl. ¶¶ 34-36, ECF 6-6. The Court also concluded that the only vendor willing to provide disposal services at reasonable cost in compliance with the Amendments would not be able to meet statewide demand. *Whole Woman's Health II*, 231 F. Supp. 3d at 222, 231 (finding that it "exhausts credulity" that one vendor could serve the entire state's need). The Act has not changed this.

Even if one vendor could theoretically meet demand, the Court found that "waste disposal is a particular vulnerability for abortion providers," and state-led investigations and the activities of anti-abortion activists aimed at vendors can cause them to refuse to do business with Plaintiffs. *Id*. at 231; *see also* Tr. Vol. 1, 116:7-118:25 (Layne-Farrar) (describing the efforts of "Project Weak Link" to close abortion clinics by targeting vendors); *id*. at 57:22-58:9 (Davis) (describing challenges of retaining vendors). As with the law struck down in *Whole Woman's Health I*, the Act here ties the continued existence of abortion clinics to their ability to maintain an ongoing relationship with a third party who may decide at any point that it is not in its interests to associate with abortion providers. The survival of clinics throughout the State would thus hang by a thin thread. *See* Tr. Vol. 1, 11:12-12:19 (Hagstrom Miller) ("My staff came to call those three years the age of uncertainty," describing the time HB 2 was in effect). This unstable business model will make it hard for clinics to obtain credit, and to hire or retain employees. Hagstrom Miller Decl. ¶¶ 25-31, ECF 6-1; Davis Decl. ¶ 30, ECF 6-2; Layne-Farrar Decl. ¶ 26, ECF 6-6.

3. The Act's Burdens Exceed Any Benefits It Provides.

After weighing the Amendments' purported benefits against the burdens they would impose, the Court concluded that "the burdens likely substantially outweigh any claimed benefit." *Whole Woman's Health II*, 231 F. Supp. 3d at 232. The same is true of the Act. Like the Amendments, the Act fails to further a legitimate state interest, *supra* 11-14, but imposes significant burdens on women seeking abortion, miscarriage management, or treatment of ectopic

pregnancy, *supra* 14-19. Once the Act's numerous burdens—including loss of liberty, risks to health and safety, and threatened loss of access—are weighed against its failure to even minimally further a permissible state interest, it becomes clear that the Act imposes an undue burden on women's liberty. *See Whole Woman's Health I*, 136 S. Ct. at 2318. Therefore, Plaintiffs are likely to succeed on their claim that the Act imposes unconstitutional burdens on the right to seek pregnancy-related medical care.

C. The Act is Unconstitutionally Vague

The Court has already addressed the applicable standard of constitutional review for vagueness. *Whole Woman's Health II*, 231 F. Supp. 3d at 226-27 (quoting *Women's Med. Ctr. of Nw. Hous. v. Bell,* 248 F.3d 411, 421 (5th Cir. 2001)). The Due Process Clause prohibits the deprivation of life, liberty, or property based on a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *accord Bell*, 248 F.3d at 421 (holding that plaintiffs were likely to succeed on the merits of their claim that abortion regulations were unconstitutionally vague). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

The Act requires the application of a "stringent vagueness test" for three reasons. First, it "threatens to inhibit the exercise of constitutionally protected rights" by burdening access to abortion services. *See id*. at 499; *Colautti v. Franklin*, 439 U.S. 379, 391, 394 (1979). Second, it imposes quasi-criminal penalties on abortion providers, in the form of licensing penalties and fines, and are thus held to a higher standard of clarity than other laws. *Vill. of Hoffman Estates*. 455 U.S. at 499-500; *Bell,* 248 F.3d at 421-22. Third, the risk of arbitrary enforcement is heightened "in the context of abortion, a constitutionally protected right that has been a traditional target of hostility."

Id. "[T]he more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement," without which officials may "pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (citation omitted).

The Court held that Plaintiffs were likely to succeed on their vagueness claim against the Amendments for the following reasons: the Amendments did not permit Plaintiffs to know whether to dispose of "fetal tissue" through a medical waste services vendor or a funeral home; they did not give Plaintiffs fair notice of where to dispose of ash; and the term "other tissue" in the definition of "fetal tissue" was unclear. *Whole Woman's Health II*, 231 F. Supp. 3d at 226-27. The Court further found that Defendant's constantly-shifting interpretation of the Amendments precisely evinced the arbitrary enforcement that the vagueness doctrine is intended to prohibit. *See id.*

Although the Act makes minor changes that appear intended to address the Court's vagueness ruling, for the reasons set forth below, these changes fail to cure the scheme's constitutional defects. First, like the Amendments, the Act fails to give fair notice of whether licensed funeral homes may accept EFTR for disposition. The Act's provision that EFTR is "not pathological waste under state law" supersedes the Amendment's classification of "fetal tissue" as "pathological waste," and thus Texas law no longer requires that EFTR be transported or disposed of by licensed medical waste vendors.[9] However, Texas law states that "[c]rematories shall be used for the sole purpose of cremation of human remains," with "[h]uman remains" defined as "the body of [a] decedent." 30 Tex. Admin. Code § 106.494(a)(2), (b)(2)(G). Further, the Act does not

[9] Under generally-applicable Texas law, transporting and disposing of "pathological waste" requires a license from the Texas Commission on Environmental Quality, and sometimes additionally from local government. *Whole Woman's Health II*, 231 F. Supp. 3d at 231 & n.4. By contrast, "human remains" are handled by funeral homes licensed by the Texas Funeral Services Commission. *Id*.; Declaration of Janice McCoy ¶¶ 1-5, ECF 38-1. *See also* Tr. Vol. 2, 139:2-3, 149:22-23 (Carnes) ("[O]ur crematory is not licensed to do biohazard. It's only licensed to do remains. . . . Q. And that license is from the Texas Funeral Commission? A. Yes, sir.").

classify EFTR as "human remains," and DSHS and the Texas Funeral Services Commission both take the position embryonic or fetal tissue is not "human remains." *See Whole Woman's Health II*, 231 F. Supp. 3d at 227 & n.2; *see also* Declaration of Janice McCoy ¶ 3, ECF 38-1; Tr. Vol 2, 151:11-16 (Carnes) ("Q. You have a license to handle human remains, you said earlier? A. Yes, I do. Q. And the funeral commission says here that these aren't human remains, are they? A. That's what that says. Yes, sir."). It thus appears that licensed funeral homes still cannot legally cremate EFTR. Further, Texas Commission on Environmental Quality regulations governing the transportation and handling of medical waste continue to adopt the Amendments by reference. *See, e.g.,* 30 Tex. Admin. Code § 326.3 (adopting the Amendments' definition of terms in regulations of the transportation and disposition of medical waste). With the Amendments superseded by the Act but not repealed or rescinded, the effect of this adoption by reference is now ambiguous.[10]

Second, the Act also fails to correct the Amendments' ambiguity regarding where ash may be disposed of. The Act recites that once EFTR is cremated, ash may be interred or scattered "as authorized by law for human remains" (even though it is not "human remains" under Texas law, *see supra* 21-22) and yet, like the Amendments, still does not state what this "author[izing] law" is. The phrase "as authorized by law" is one on which DSHS has offered contradictory opinions on over the course of this lawsuit. *See Whole Woman's Health II*, 231 F. Supp. 3d at 226-27. On one hand, DSHS has argued that the "authoriz[ing] law" is the list of places in which scattering of

[10] Due to ambiguities in how fetal tissue may be disposed of, Dr. Swenson testified that the pathology lab she most commonly sends patients' abnormal tissue to for testing would start returning tissue to her practice, rather than dispose of it, which is unprecedented in her experience. Tr. Vol. 2, 16:18-18:1 (Swenson). This would add to costs and increase the potential for handling errors. *Id*. at 17:9-11, 44:11-19. Dr. Swenson testified, "[w]e're hoping that there's . . . some kind of roadmap supplied by the state, since there is no roadmap." *Id*. at 16:22-24.

cremated human remains is permitted under Chapter 716 of the Texas Health & Safety Code.[11] *E.g.* 41 Tex. Reg. 9716, ECF 1-1 at 9 ("The scattering of ashes is permitted under certain circumstances, to be done at specified settings in other law (*see* Texas Health and Safety Code, Chapter 716)."). On the other, DSHS has argued that the list is narrower, and that locations satisfying the letter of Chapter 716 but which DSHS thinks "just do[]n't make sense" for scattering of ashes are also prohibited, Tr. Vol. 2, 199:12—although Defendant conceded there is no case law in support of that interpretation. Hellerstedt's Advisory to Ct. at 3, ECF 38. Most recently, DSHS has urged a third position—that the meaning of Chapter 716 is "unclear." *Whole Woman's Health v. Hellerstedt*, No. 17-50154, Br. for Appellant at 40 (5th Cir. May 30, 2017). And the Act itself, like the Amendments before it, still continues to explicitly disclaim adopting Chapter 716 by reference. Tex. Health & Safety Code § 697.003. Thus, the Act does not provide adequate guidance regarding where ash may be disposed of, and where disposal is prohibited.

Third, DSHS' failure to timely issue the Act's implementing regulations and associated registry and grant program compounds the Act's failure to give adequate notice as to what is required. The Texas Legislature intended to give healthcare facilities two full months to come into compliance. DSHS is aware that this process would entail making time-consuming and important business and medical decisions, such as finding new vendors, writing new protocols, implementing new procedures, and determining what if anything the State's registry and grant program have to offer patients. *See, e.g.,* 41 Tex. Reg. 9714-16, ECF 1-1 at 7-8 (responding to detailed comments in opposition to the Amendments by the Texas Medical Association and Texas Hospital

[11] "A person may scatter cremated remains over uninhabited public land, over a public waterway or sea, or on the private property of a consenting owner." Tex. Health & Safety Code § 716.304; *accord* Tex. Health & Safety Code § 716.302(e).

Association regarding compliance challenges). Without knowing the content of the regulations, Plaintiffs cannot even begin this process.

Finally, the Act, like the Amendments, lacks a scienter requirement that might mitigate its potential for arbitrary enforcement. *See Vill. of Hoffman Estates*, 455 U.S. at 499-50. *See also Colautti*, 439 U.S. at 395; *Screws v. United States*, 325 U.S. 91, 101-03 (1945) (plurality opinion).

The State's repeated failure, over a year and a half, to amend its laws governing embryonic and fetal tissue in a way that provides healthcare providers adequate notice of what is required, and accurately takes into account other Texas law regarding the disposition of human remains, exemplifies the arbitrary enforcement that constitutional vagueness doctrine is intended to prohibit. *See Kolender*, 461 U.S. at 357-58; *Bell*, 248 F.3d at 422. The Court held that the Amendment's ambiguities, including Defendant's failure to understand or anticipate their impact on regulated facilities, in the context of the State's frustrated attempt to enforce HB 2 in *Whole Woman's Health I*, were indicia of a purpose to target abortion providers. *See Whole Woman's Health II*, 212 F. Supp. 3d at 229. The Act's failure to remedy many of the Amendments' ambiguities continues to allow for this kind of arbitrary enforcement.

Due to the Act's ambiguities, the Court should find that Plaintiffs are substantially likely to succeed on the merits of their vagueness claim.

II. THE OTHER REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF ARE SATISFIED.

A. Plaintiffs and Their Patients Would Face a Substantial Threat of Irreparable Injury Absent a Preliminary Injunction.

It is well settled that a deprivation of constitutional rights constitutes irreparable injury *per se*. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) (holding that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("When an alleged

deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (citation omitted)); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (holding that threatened loss of abortion rights "mandates a finding of irreparable injury" because "once an infringement has occurred it cannot be undone by monetary relief."). Thus, in demonstrating a substantial likelihood of success on the merits of their constitutional claims, *see supra* 9-24, Plaintiffs have also demonstrated a substantial threat of irreparable injury to themselves and their patients.

In addition, the Act, like the Amendments, threatens to close abortion clinics and impede access to other kinds of gynecological care, *see supra* 17-19, which would also constitute irreparable injury to Plaintiffs and their patients. *Whole Woman's Health II*, 231 F. Supp. 3d at 232.

B. The Balance of Equities Weighs in Plaintiffs' Favor.

The threatened constitutional deprivation facing Plaintiffs and their patients outweighs any damage that entry of a preliminary injunction might cause Defendant. *See id.* at 232-33. Delayed implementation of the Act would not threaten public health or safety. *See id.* at 230 (noting that Defendant conceded that the Amendments do not benefit public health). Further, it would not prejudice Defendant's ability to enforce the Act in the future should he ultimately prevail.

Indeed, because Defendant would suffer no costs or compensable damages from the entry of a preliminary injunction, the Court need not require Plaintiffs to provide security as a condition of the injunction. *See* Fed. R. Civ. P. 65(c); *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 303 (5th Cir. 1978) ("The amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all."); *City of El Cenizo v. State*, 264 F. Supp. 3d 744 (W.D. Tex. 2017); *Whole Woman's Health II*, 231 F. Supp. 3d at 233; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016).

C. A Preliminary Injunction Would Not Disserve the Public Interest.

Finally, entry of a preliminary injunction would not disserve the public interest because it would protect Plaintiffs and their patients from enforcement of an unconstitutional law. *See Jackson Women's Health Org.*, 760 F.3d at 458 n.9 ("It is always in the public interest to prevent the violation of a party's constitutional rights.") (citation and internal punctuation omitted); *Whole Woman's Health II*, 231 F. Supp. 3d at 233.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully ask the Court to enter a preliminary injunction, without security, barring Defendant, his employees and agents, and their successors in office, from enforcing the Act, Tex. Health & Safety Code, Chapter 697, and any regulations issued thereunder, before final judgment has been entered in this case; and to grant such other and further relief as the Court deems just, proper, and equitable.

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Respectfully submitted,

/s/ David Brown

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CERTIFICATE OF SERVICE

I certify that, on the 3rd day of January, 2018, a copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record.

/S/ David Brown
David Brown