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

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

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION

In this case, a physician practicing at the only clinic in Arkansas that provides surgical abortions, along with other reproductive health care, challenges four new statutes that infringe on his patients' constitutional rights and his own due process rights. The Defendants charged with enforcing the four new statutes have moved to dismiss the Complaint, asking this Court to forego receiving any evidence, to weigh the impact of these laws based only on counsel's assertions, and to reject Plaintiff's request that the Court proceed to test the claims' ultimate merits after this initial, pleading stage. Because Plaintiff's causes of action are well supported by governing appellate case law and each alleges substantial, concrete burdens unjustifiably imposed by the new Arkansas statutes – not speculative "minor burdens" as Defendants characterize them[1] – all of the counts in the Complaint should survive this motion to dismiss. Neither Federal Rule of Civil Procedure 12(b)(1) nor Rule 12(b)(6) provides a valid ground for the Complaint's dismissal.

THE FACTS AS ALLEGED IN THE COMPLAINT

A. The Parties

Plaintiff Frederick W. Hopkins, M.D., M.P.H., is an experienced, highly credentialed and board-certified obstetrician-gynecologist, and an abortion provider at Little Rock Family Planning Services ("LRFP"). Compl. ¶ 13. LRFP is the only clinic offering outpatient, second-trimester abortion care in Arkansas. *Id.; see also* Compl. ¶¶ 63-64. The services that Dr. Hopkins provides at LRFP include, but are not limited to, D&E procedures and medication abortions. Compl. ¶ 13. He offers abortion and miscarriage care to patients throughout their reproductive years. *Id.*

[1] *See* Defs.' Br. in Supp. of Mot. to Dismiss, ECF No. 22 ("Mot. Dismiss Br.") 1.

Dr. Hopkins is therefore personally subject to the provisions and penalties of each of the four challenged statutes. Compl. ¶¶ 4-9, 13, 16-19, 23-27, 30-36, 44-45. By the explicit terms of the challenged laws, Dr. Hopkins must comply with the D&E Ban, the Medical Records Mandate, the Local Disclosure Mandate and the Tissue Disposal Mandate, and if he fails to do so he faces criminal penalties and/or findings of "unprofessional conduct" that jeopardize his Arkansas medical license. *Id.* These statutes, if allowed to take effect, will also "deny and burden Plaintiff's patients' constitutionally protected rights to decide to end a pre-viability pregnancy, to make independent decisions related to their pregnancy care, and to protect their private medical information." Compl. ¶¶ 9, 120-26. Dr. Hopkins thus sues both to protect his patients from these constitutional violations and to protect his own rights. Compl. ¶¶ 9, 125-26.

Defendant Larry Jegley is the Prosecuting Attorney for Pulaski County, Arkansas, which includes Little Rock. Compl. ¶ 14. Under Arkansas law, prosecuting attorneys "shall commence and prosecute all criminal actions in which the state or any county in his district may be concerned." Ark. Code Ann. §16-21-103. Defendant Jegley is responsible for criminal enforcement of the D&E Ban, the Medical Records Mandate, and the Tissue Disposal Mandate in the county where Plaintiff provides care. Compl. ¶ 14. Defendant Jegley and his agents and successors are sued in their official capacities. *Id.*

Plaintiff also sues the Chair of the Arkansas State Medical Board and each member of that Board. Compl. ¶ 15. The Medical Board is responsible for licensing medical professionals who practice in Arkansas. Ark. Code Ann. § 17-95-410; Compl. ¶ 15. The Board and its members are responsible for imposing the specific licensing penalties in the Medical Records Mandate and the Local Disclosure Mandate, and for imposing licensing penalties for other "unprofessional conduct," which includes criminal conviction under the other challenged

statutes. Ark. Code Ann. §§ 17-95-409(a)(2)(A), (D); Compl. ¶ 15. The Medical Board Defendants and their successors in office are sued in their official capacity. Compl. ¶ 15.

B. The Challenged Laws and Their Alleged Impact on Plaintiff and His Patients

For each of the four challenged statutes, the Complaint sets forth the relevant provisions of the statute and describes in factual detail the harmful impact it will impose on Plaintiff and his patients. First, the D&E Ban (H.B. 1032), by criminalizing for physicians what it calls "dismemberment abortion," "prohibits a procedure referred to in the medical profession as dilation and evacuation or 'D&E.' D&E is the safest and most commonly used method of abortion in the second trimester, and the only method used in outpatient facilities throughout the second trimester." Compl. ¶¶ 16-19. The only other medically-proven abortion method available throughout the second trimester is induction abortion, which must be performed in a hospital or similar facility, takes anywhere from five hours to three days, and entails much more expense and pain for the patient; no induction abortions were reported in Arkansas in 2015. Compl. ¶¶ 67-69.

Although the D&E Ban does not apply if fetal demise has already occurred, it ends the availability of D&E in Arkansas.[2] That is because "[b]efore 18 weeks LMP, there is no safe, studied procedure" for physicians even to attempt to cause fetal demise prior to the separation or disarticulation of tissue, Compl. ¶ 71, and from 18 weeks LMP, physicians cannot know before starting a D&E "if an additional fetal demise procedure will be successful" or impossible and thus cannot start any such procedures, given the prohibition and penalties in the statute, Compl. ¶¶ 70, 79. The Complaint describes current medical practice and its limitations to explain

[2] The single, very narrow medical exception allows a D&E only to avert a woman's death or "serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman[.]" H.B. 1032, § 20-16-1802(6)(A); Compl. ¶ 18.

factually how the D&E Ban imposes its prohibition. Compl. ¶¶ 70-80. With D&E banned, H.B. 1032 effectively "ban[s] abortions in Arkansas beginning at 14 weeks LMP for [all] women, including Plaintiff's patients." Compl. ¶ 121.

Second, the Medical Records Mandate (H.B. 1434) forbids abortions until a physician "[r]equest[s] the medical records of the pregnant woman relating directly to [her] entire pregnancy history," and then spends "reasonable time and effort . . . to obtain" such records. Compl. ¶ 23. This mandate lacks any provision allowing the physician to proceed based on health risks to the woman, no matter how serious. Compl. ¶ 25. A physician who knowingly performs an abortion without complying with the mandate is guilty of a crime; likewise, a physician who performs an abortion without fulfilling the Medical Records Mandate engages in "unprofessional conduct" for which his license shall be revoked or suspended. Compl. ¶¶ 26-27. As the Complaint's factual allegations explain, there is no medical justification for this sweeping records-request requirement; records can take 30 days or more to arrive; the statute provides no definition of "relating directly to [the woman's] entire pregnancy history" or "reasonable time and effort"; and the mandate's unclear requirements do not specify what, if any, action a physician should take if and when records arrive. Compl. ¶¶ 24, 81-85. This indefinite, mandatory process of requesting voluminous records ties the hands of physicians, forbidding abortions before its vague standard is satisfied, and "significantly delays or outright bars abortion care for all patients who have had a prior pregnancy or have received medical care from another provider related to their current pregnancy[,]" the great majority of patients in Arkansas. Compl. ¶¶ 86-88, 122. In addition, the process involuntarily "discloses the fact of the patient's pregnancy and abortion decision to her other health care providers." Compl. ¶ 89.

Third, Plaintiff challenges the Local Disclosure Mandate (H.B. 2024) as applied to 14-year-old to 16-year-old patients for whom there is no Child Maltreatment Act ("CMA") reporting (the "Non-CMA Teenage Patients"). Compl. ¶¶ 91-93. The vast majority of 14-year-old to 16-year-old patients "fall into that category of no required [CMA] reporting: They are typically young women who have engaged in consensual intercourse with a boyfriend who is close in age; Arkansas criminalizes neither the young woman's conduct nor her partner's[;]" and there is no indication of sexual abuse to trigger the state's mandatory reporting requirements, with which Plaintiff and LRFP strictly adhere. Compl. ¶¶ 38-39, 91-94.

For these Non-CMA Teenage Patients, the Local Disclosure Mandate requires physicians performing abortions to inform the local police in the jurisdiction where the minor resides of her abortion, and to preserve the tissue from her abortion as "evidence" for transmission to the police and eventually to the state crime laboratory, despite the fact that there is no indication of sexual misconduct. Compl. ¶¶ 31-33. The patient's tissue must be transmitted with a form that identifies not only the patient, but also her parent or guardian, her address, and the name of her sexual partner. Compl. ¶ 33 & Ex. C4. If a physician fails to comply, he has committed "unprofessional conduct" and is subject to licensing discipline by the Arkansas State Medical Board. Compl. ¶ 36. As applied to the Non-CMA Teenage Patients, the Local Disclosure Mandate not only forces disclosure of the patient's private facts of sexual activity and abortion to her local police, and imposes tissue preservation requirements without justification, but also can be read to bar medication abortion for these patients, because tissue preservation as "evidence" is not possible in medication abortion, where a woman passes tissue outside the clinic, usually at home. Compl. ¶¶ 94-97, 123.

The last challenged statute is the Tissue Disposal Mandate (H.B. 1566). The Complaint provides facts about how Arkansas health care providers, including but not limited to abortion providers, currently dispose of embryonic and fetal tissue. Compl. ¶¶ 40-43. It then explains how the Tissue Disposal Mandate changes that law, removing "fetal tissue" from the general definition of "human tissue," requiring for the first time that a "dead fetus" be disposed of in accordance with the Arkansas Final Disposition Rights Act of 2009 ("FDRA"), and requiring physicians who perform abortions to ensure that embryonic or fetal tissue disposition occurs in accordance with the FDRA. Compl. ¶¶ 44-54. The Tissue Disposal Mandate imposes criminal penalties if a physician fails to ensure that result. Compl. ¶ 46. The Complaint goes on to detail numerous ways in which the FDRA's elaborate notice and disposition-control requirements, when transposed from the context of deceased relatives and funeral home regulation to this context, would delay or interfere with abortion and miscarriage care; would require disclosure of the patient's abortion to third parties, such as her sexual partner, or her parents and her partner's parents; and would bar medication abortion and miscarriage management. Compl. ¶¶ 98-118, 124.

Dr. Hopkins sues prior to each law's effective date, Compl. ¶¶ 2-3, because – should it take effect – each law "threaten[s] Plaintiff with … penalties and den[ies] and burden[s] Plaintiff's patients' constitutionally protected rights to decide to end a pre-viability pregnancy, to make independent decisions related to their pregnancy care, and to protect their private medical information." Compl. ¶¶ 9, 120-26, 152. The Complaint describes how enforcement of these laws' restrictions on Plaintiff, as a physician, imposes irreparable harm on patients, by delaying or denying them care and breaching the confidentiality of the physician-patient relationship.

Compl. ¶¶ 120-25. Plaintiff pleads twelve federal constitutional causes of action based on these facts. Compl. ¶¶ 127-50. As established below, each is properly and sufficiently pled.

ARGUMENT

I. Plaintiff Has Standing and Faces No Sovereign Immunity Bar

The first eleven pages of argument in Defendants' motion to dismiss brief repeat verbatim the same unfounded assertions against Plaintiff's standing, his suit for third-party rights under 42 U.S.C. §1983, his ability to bring a pre-enforcement challenge, and the scope of requested injunctive relief that Defendants made in their Opposition to the Motion for a Preliminary Injunction. *See* Mot. Dismiss. Br. 7-18; Defs.' Resp. in Opp. to Mot. for Prelim. Inj., ECF No. 23 ("Opp. Br.") 15-26. As Plaintiff has shown in his Reply Brief in Support of the Motion for a Preliminary Injunction, Defendants' arguments are contrary to decades of Supreme Court and other precedent, ignore the specifics of Plaintiff's threatened harms – and the closely-related threats to his patients – from these new laws as alleged in the Complaint, and do not show any flaws in Plaintiff's standing to seek the relief that he requests. *See* Pl.'s Reply Br. in Supp. of Mot. for Prelim. Inj., ECF No. 32 ("Pl. Reply Br.") 2-14. Plaintiff incorporates those previous responses by reference. For the same reasons that Plaintiff's request for a preliminary injunction had no standing defects, there are none that could support dismissal of the Complaint.

Similarly, Defendants erroneously contend that they "are entitled to sovereign immunity and Hopkins's complaint should be dismissed in its entirety for lack of jurisdiction" on that basis. Mot. Dismiss Br. 18-19. But as Plaintiff has already shown, this is a suit for prospective relief against the state officials charged with enforcing unconstitutional statutes that are about to take effect, and falls squarely within the long-established *Ex parte Young*, 209 U.S. 123 (1908), exception to sovereign immunity. *See* Pl.'s Reply Br. 15-17. Plaintiff's prior briefing of the

sovereign immunity issue is incorporated here by reference. Thus, Defendants have no basis for dismissal under Rule 12(b)(1).

II. Plaintiff Adequately Pleads Each Alleged Constitutional Violation

A. The Pleading Standard Under Rule 8(a) and Rule 12(b)(6)

As Defendants acknowledge, Rule 8(a) "does not require 'detailed factual allegations[.]'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Federal notice pleading requires only that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). On a motion to dismiss,

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

Whitney v. Guys, Inc., 700 F.3d 1118, 1129 (8th Cir. 2012).

At the pleading stage, the court does not sit in judgment of the ultimate facts. *See id.* at 1130. The first principle in applying Rules 8(a) and 12(b)(6) is that "the court must take the plaintiff's factual allegations as true." *Braden*, 588 F.3d at 594.[3] In addition, "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.* "Ultimately, evaluation of a complaint upon a motion to dismiss is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679). If a plaintiff's allegations '"nudge [its] claims across the line from conceivable to plausible,'" those claims survive a motion to dismiss.

[3] *See generally Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016) ("a court at this stage . . . is not engaged in an effort to determine the true facts. . . . If the complaint is found to be sufficient to state a legal claim, the opposing party will then have ample opportunity to contest the truth of the plaintiff's allegations and to offer its own version" in subsequent stages).

J.D. Fields & Co., Inc. v. Nucor-Yamato Steel, 976 F. Supp. 2d 1051, 1059 (E.D. Ark. 2013) (Baker, J.) (quoting *Twombly*, 550 U.S. at 570). A complaint with facts noticing a cognizable claim "may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Id.* at 1058 (citations omitted). Each of the twelve claims in Dr. Hopkins's Complaint more than sufficiently meets this standard.

B. Plaintiff States Four Claims of Undue Burden on His Patients' Privacy and Liberty

Restrictions on abortion are unconstitutional when they impose an "undue burden." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)). "[T]here 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Id.* at 2300 (quoting *Casey*, 505 U.S. at 878) (emphasis omitted). The undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id*. at 2309 (citing *Casey*, 505 U.S. at 887-898). Not only must there be "a constitutionally acceptable" justification for regulating abortion, but the regulation must also actually advance that goal in a permissible way. *Id*. at 2309-10. Under this standard, a regulation may be upheld only if the benefits it advances outweigh the burdens it imposes. *Id.* at 2310.

As Plaintiff has extensively briefed in his preliminary injunction papers, there is a single constitutional standard, this undue burden test, that applies to protect a woman's liberty and privacy right under the Due Process Clause in any claim of impermissible restrictions on abortion. *See* Pl.'s Reply Br. 24-27. Contrary to Defendants' assertions, *see* Mot. Dimiss. Br.

24-25, the constitutional test does not vary based on the state's asserted interest. *See* Pl.'s Br. in Supp. of Mot. for Prelim. Inj., ECF No. 3 ("Pl.'s PI Br.") 26-30; Pl.'s Reply Br. 24-27.[4] Nor does the proper constitutional review entail merely an assessment of whether a particular abortion restriction "promote[s] a legitimate state interest[.]" *Compare* Mot. Dismiss Br. 20, 25 *with* Pl.'s Reply Br. 24-27. It is for the courts – after the pleading stage – to ultimately consider the evidence in the judicial record, including expert evidence, and "weigh[] the asserted benefits against the burdens" to determine the restriction's constitutionality. *See Whole Woman's Health*, 136 S. Ct. at 2310. Defendants erroneously imply that, to enforce this important constitutional protection for liberty and privacy rights, a court should defer to a state's legislative actions, Mot. Dismiss Br. 25, 30, and *not* proceed to engage in the "independent constitutional duty" of judicial fact-finding, *Whole Woman's Health*, 136 S. Ct. at 2310 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)). The Supreme Court last year explicitly rejected this approach. *Id.* (affirming that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake," and explaining that the "statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law") (internal quotation marks and citation omitted).[5]

[4] Plaintiff refers to his preliminary injunction briefs here to provide the Court with additional case-law support for the legal protections and standards governing Plaintiff's claims, without burdening the Court with a repetition of those lengthy, very recent submissions. Plaintiff is not relying on those for any facts outside the Complaint, but rather to emphasize the well-established legal framework that, when combined with the facts in the Complaint, shows that each of his claims present legally-viable and plausible causes of action, more than satisfying Rule 8(a).

[5] Defendants also inappropriately cite *United States v. Salerno*, 481 U.S. 739 (1987), Mot. Dismiss Br. 27, when both the Eighth Circuit and this Court have explained that no especially stringent standard for facial challenges applies in the abortion context and instead made clear that *Casey*'s approach, now reiterated by *Whole Woman's Health*, governs. *See Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-CV-00784-KGB, 2016 WL 6211310 at *11 (E.D. Ark. Mar. 14, 2016). "Further, the distinctions between facial and as-applied challenges have more to do

1. Count I States an Undue Burden Claim Against the D&E Ban

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the D&E Ban, *see* Compl. ¶¶ 16-22, 62-80, 120-21, Count I pleads that: "By banning the safest and most common method of second-trimester abortion—and thereby banning second-trimester outpatient abortion in Arkansas[,]" the D&E Ban imposes an undue burden on Plaintiff's patients' right to liberty and privacy. Compl. Count I. As Plaintiff has previously shown the Court, the legal basis for this claim rests on "[f]our decades of unwavering U.S. Supreme Court precedent [that] squarely hold that it is unconstitutional to ban the most common second-trimester abortion method. *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976)." Pl.'s PI Br. 27-31; *see also* Pl.'s Reply Br. 28-31, 37-43.

Defendants fail to undercut these decades of Supreme Court case law, and lower court decisions similarly on point, *see* Pl.'s PI Br. 27-31, Pl.'s Reply Br. 28-31, 37-43, with their attempts to find some non-existent legal flaw in this undue burden claim. *See, e.g.*, Mot. Dismiss Br. 19 n.4 ("The State believes *Casey* and its progeny are incorrect."), 20 ("[c]onspicuously absent from Hopkins's complaint is an allegation that [the D&E Ban] fails to promote a legitimate state interest"); 27 n.7 ("Hopkins has not adequately pled that [the D&E Ban] lacks a health and safety benefit"). There is none. Plaintiff has plainly alleged a cognizable legal claim: that this ban on the most common form of second-trimester abortion imposes an undue burden on a woman's protected reproductive liberty. *See Whole Woman's Health*, 136 S. Ct. at 2309-

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with [remedy], rather than the sufficiency of the plaintiff's initial pleadings." *Id*. at *12. The *Jegley* opinion includes a close analysis of the proper *Casey*, undue burden inquiry, *id.* at *10-*15, *26, *31, that Defendants have not followed in this case.

10; *Gonzales*, 550 U.S. at 165; *Stenberg*, 530 U.S. at 945-56; *Casey*, 505 U.S. at 878, 887; *Danforth*, 428 U.S. at 77-79; Pl.'s PI Br. 27-31, Pl.'s Reply Br. 28-31, 37-43 (exhaustively setting forth governing case law).

In addition, Defendants refuse to accept Plaintiff's factual allegations as true and to draw all inferences in Plaintiff's favor, as must occur at the pleading stage. Instead, Defendants contest Plaintiff's facts at length, relying extensively on their counsel's own bald assertions; they improperly ask the Court to find facts, weigh "critically important" state interests and purportedly "minor burdens" on patients, Mot. Dismiss Br. 1, and reach judicial conclusions at the pleading stage. *Id.* 20-31. The Court cannot credit the Defendants' assertions that D&E is not banned, that this statute leaves "three legal D&E abortion methods unaffected[,]" that "of course where the digoxin does not work, the physician can always attempt other methods . . ., which will quickly and effectively" cause demise, or that "the ubiquitous use of ultrasound technology" somehow lessens the D&E Ban, *id.* 21-24, when all these assertions are contrary to the specific factual allegations in the Complaint, Compl. ¶¶ 62-80.

Indeed, in impermissibly arguing the facts, Defendants also mischaracterize the Complaint. For example, Defendants state, "Hopkins claims that the use of potassium chloride requires specialized training and 'hospital-grade' equipment. . . . But the complaint *says nothing about* whether Hopkins or his colleagues (or any physician that Little Rock Family Planning Services might be able to contract with) have or could acquire the specialized training or equipment" and "says nothing" about the feasibility of such a procedure or the costs. Mot. Dismiss Br. 29 (emphasis added). In fact, the Complaint makes clear that Plaintiff and the other doctors at LRFP provide D&E care in an outpatient clinic, Compl. ¶¶ 13, 67-69 ("Arkansas hospitals perform abortions only in extremely rare circumstances, and such services are not

available to most women"), and further alleges that an injection of KCl (potassium chloride) is *not* a "reliable, safe, and available method[]" of attempting to cause fetal demise "in the outpatient setting." Compl. ¶ 78.

Likewise, Defendants misleadingly claim that Dr. Hopkins simply makes the "vacuous claim" that umbilical cord transaction "involves risks," because as Defendants state, "*every* medical procedure involves risks." Mot. Dismiss. Br. 30. But, as the Complaint explains, umbilical cord transaction *adds* additional medical risk to a standard D&E procedure and involves grasping that causes exactly what the D&E Ban forbids:

> Umbilical cord transection, where a clinician attempts to grasp and divide the umbilical cord to cause demise, exposes the patient to increased risk of uterine perforation, cervical injury, and bleeding, and would prolong a D&E, also increasing risk. Additionally, because in many cases it is difficult, if not impossible, to grasp the cord without also grasping fetal tissue, attempts at cord transection would violate, rather than circumvent, the D&E Ban.

Compl. ¶ 78. These are but two examples of Defendants' misplaced efforts to litigate the ultimate facts and merits of the case now, and to dissect isolated allegations, while ignoring that Plaintiff's undue burden claim challenging the D&E Ban more than adequately pleads a cause of action. *See Braden*, 588 F.3d at 594 ("the court must take the plaintiff's factual allegations as true" and "the complaint should be read as a whole, not parsed piece by piece").

2. Count III States an Undue Burden Claim Against the Medical Records Mandate

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Medical Records Mandate, *see* Compl. ¶¶ 23-29, 81-90, 122, Count III pleads that: "By indefinitely delaying abortion care, requiring involuntary disclosure of a woman's abortion decision to other health care providers, and imposing insurmountable administrative obstacles for abortion providers, the Medical Records Mandate" imposes an undue burden on Plaintiff's patients' right to liberty and privacy. Compl. Count III.

As above, Plaintiff has described the well-established legal basis for this claim in his earlier briefs. Pl.'s PI Br. 34-37; Pl.'s Reply Br. 44-49. The plain language of the challenged statute requires wide-reaching medical records requests, with unclear parameters, and imposes indefinite delays in the context of *any* abortion, not solely those where a woman knows the sex of the embryo or fetus. Compl. ¶¶ 23-25, 81-90; *compare id. with* Mot. Dismiss Br. 33-36 (asserting, without support in the statute's language, that the Medical Records Mandate applies only to those women who tell their doctor they know the sex). But for whatever class of women is affected, Plaintiff's allegations of impact make clear that the mandate substantially interferes with abortion access without any medical justification or other state interest that might outweigh its harmful impact. Compl. ¶¶ 81-89, 122, 132. Defendants cannot defeat this well-pled claim with their contentions that the magnitude of the harms Plaintiff alleges is simply "insufficient" to outweigh various assertions of Defendants' counsel on behalf of the Medical Records Mandate, such as that "a patient is always more likely to receive better care when her physician has greater knowledge of her health history[,]" Mot. Dismiss Br. 36. Dr. Hopkins alleges that "[t]here is no medical reason to obtain these records prior to providing an abortion[,]" Compl. ¶ 82, and has set forth specific facts that explain why that is the case. Compl. ¶¶ 81-90, 122. The Complaint's facts must be accepted as true, and they more than adequately support this undue burden cause of action.

3. Count VI States an Undue Burden Claim Against the Local Disclosure Mandate

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Local Disclosure Mandate, *see* Compl. ¶¶ 30-39, 91-97, 123, Count VI pleads that: "By requiring a physician to collect and transmit to local law enforcement all products of conception, along with identifying information, and by thereby

apparently removing medication abortion as a treatment option, for 14- to 16-year-old patients for whom no child maltreatment reporting is appropriate," the Local Disclosure Mandate imposes an undue burden on Non-CMA Teenage Patients' right to liberty and privacy. Compl. Count VI.

Plaintiff has previously shown how the Local Disclosure Mandate – by its terms – punishes Non-CMA Teenage Patients' choice of abortion without any countervailing state interest. Compl. ¶¶ 91-97, Pl.'s PI Br. 38-41; Pl.'s Reply Br. 53-56.[6] Furthermore, because of its tissue collection requirements (which can be read to create a ban on medication abortion) and the harmful disclosure to local police that comes as a condition of abortion for these patients, the Local Disclosure Mandate limits abortion access. Compl. ¶¶ 91-97, Pl.'s PI Br. 38-41; Pl.'s Reply Br. 53-56. After falsely arguing that Plaintiff concedes the constitutionality of the earlier form of this statute, which Plaintiff does not, *see* Pl.'s Reply Br. 53-56, Defendants rest their motion to dismiss on counsel's own arguments about a "worthwhile purpose" for the law and that "it is difficult to imagine that" any Non-CMA Teenager would be harmed by it. Mot. Dismiss Br. 50-51. But Plaintiff has alleged concrete and specific harms, including breach of these women's physician-patient confidentiality, that the law requires, Compl. ¶¶ 31-39, 92-97, 123, and he sufficiently pleads his as-applied claim that this statute unduly burdens abortion for Non-CMA Teenage Patients. Defendants will have ample opportunity to defend the Local Disclosure Mandate's punitive burdens at a later stage of the case (and doing so will require more than arguments in a brief that are contrary to Arkansas's over-arching CMA approach to addressing abuse, *see* Pl.'s Reply Br. 54-56, 58-60).

[6] The group of Non-CMA Teenage Patients is defined by Arkansas' Child Maltreatment Act itself, because that act specifies each instance when teenage sexual activity constitutes reportable sexual abuse and sexual exploitation. Ark. Code Ann. §§ 12-18-103, 402. *See* Pl.'s Reply Br. 53-55.

4. Count X States an Undue Burden Claim Against the Tissue Disposal Mandate

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Tissue Disposal Mandate, *see* Compl. ¶¶ 40-54, 98-119, 124, Count X pleads that: "By mandating notice and consent of third parties to every woman's abortion, delaying and blocking access to abortion, and apparently banning medication abortion," the Tissue Disposal Mandate imposes an undue burden on Plaintiff's patients' right to liberty and privacy. Compl. Count X. The Complaint specifies the many ways in which the FDRA's elaborate notice and disposition-control requirements, when transposed to the abortion and miscarriage context by the Tissue Disposal Mandate, would interfere with care, require disclosure of the patient's abortion to her sexual partner, or her parents and her partner's parents, and bar medication abortion and miscarriage care. Compl. ¶¶ 98-118, 124. And Plaintiff's earlier briefs, like the Complaint, describe how the mandate's requirement that an abortion physician himself ensure compliance with the FDRA, H.B. 1566 § 3, will necessarily incapacitate physicians, mandate third-party notice about a patient's abortion care that is directly contrary to governing Supreme Court precedent, and prove wholly unworkable. Compl. ¶¶ 98-118, 124; Pl.'s PI Br. 45-53; Pl.'s Reply Br. 61-69.

Merely reading the lengthy, multi-layered FDRA illuminates the disjuncture between that statute and time-sensitive, constitutionally-protected women's health care, and the serious threat to women's liberty and privacy that importing its requirements imposes. *See* Ark. Code. Ann. § 20-17-102. To contend otherwise, Defendants misstate the FDRA's requirements, erroneously portray the terms of the Tissue Disposal Mandate as having virtually no impact at all, and argue as if Plaintiff were asserting a new constitutional right "to the treatment of post-abortion fetal remains[,]" Mot. Dismiss Br. 56, rather than the clearly-established liberty and privacy right of

his patients in making pregnancy decisions. *See id.* 55-60. Defendants' readings of the Tissue Disposal Mandate and the FDRA cannot be reconciled with those statutes' actual provisions. *See* Pl.'s Reply Br. 61-69. Because Plaintiff's description of those statutes in the Complaint and his specific factual allegations of their impact adequately state an undue burden claim, any attempt by Defendants to justify this infringement with evidence that the Tissue Disposal Mandate advances some significant state purpose must come after the pleading stage.

C. Plaintiff States Three Claims of Violation of His Patients' Right to Bodily Integrity

In addition to the right of Plaintiff's patients to liberty and privacy in their abortion care, the Complaint also alleges claims that rest on the closely-related right of patients' bodily integrity. The Supreme Court has never sanctioned a state's attempt to condition the exercise of a constitutional right upon submitting first to an additional, invasive procedure that imposes risks but no medical benefits. *See, e.g.*, *Danforth*, 428 U.S. at 79; *A Woman's Choice-East Side Women's Clinic v. Newman*, 980 F. Supp. 962, 970 (S.D. Ind. 1997), *aff'd in part, rev'd in part on other grounds*, 305 F.3d 684 (7th Cir. 2002); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 612 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000). Instead, the Supreme Court has long recognized that the right to be free from unwarranted governmental invasions of bodily integrity is central to the right to terminate a pregnancy. As the Court explained in *Casey*, the right to abortion is a "rule of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing *limits on governmental power to mandate medical treatment* or to bar its rejection." *Casey*, 505 U.S. at 857 (emphasis added) (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905)).

The right to bodily integrity is protected by the liberty guaranteed in the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Rochin*, 342 U.S. at 165). Indeed, "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the [Supreme] Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." *Cruzan*, 497 U.S. at 287 (1990) (O'Connor, J., concurring) (collecting cases). The Supreme Court has found that, for example, the nonconsensual surgical removal of potential evidence from an individual's body is an unconstitutional intrusion. *Winston v. Lee*, 470 U.S. 753 (1985). The Eighth Circuit in *Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir. 1998), summarized that:

> "It is settled now that the constitution places limits on the State's right to interfere with a person's most basic decisions about bodily integrity." *Glucksberg*, [521 U.S. at 778], 117 S.Ct. at 2288–89 (Souter, J., concurring) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 849, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). The right has been employed to protect against nonconsensual intrusion into one's body, *see Rochin*, and has been seen to permit the right of a competent person to refuse unwanted medical treatment, *see Cruzan*, 497 U.S. at 278–79, 287–88, 110 S.Ct. 2841; *Vacco v. Quill*, 521 U.S. 793, [807], 117 S.Ct. 2293, 2301, 138 L.Ed.2d 834 (1997) (discussing *Cruzan*).

Id. at 795.

Defendants concede the existence of this right. Mot. Dismiss Br. at 31-33. They further concede that the bodily integrity claims here are entitled to, at least, the same level of scrutiny as *Casey* affords. *Id.* ("the standard for reviewing Hopkins's bodily-integrity claim is identical to that under which his undue-burden claim is analyzed," citing *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 507 (6th Cir. 2012) ("By making a bodily-integrity claim part and parcel with a right-to-privacy claim, *Casey* and its progeny serve as the proper cases for examining bodily-integrity claims in the abortion context.")); *see also* Mot. Dismiss Br. 53, 61. Plaintiff's three bodily integrity claims therefore receive at least the same level of constitutional

protection and same legal analysis as the undue burden claims, *see* Mot. Dismiss Br. 33, 53, 61,[7] and each succeeds in stating a claim, based on the Complaint's same alleged harms.

1. *Count II States a Bodily Integrity Claim Against the D&E Ban*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the D&E Ban, *see* Compl. ¶¶ 16-22, 62-80, 120-21, Count II pleads that: "By forcing women to undergo additional or different procedures, or to continue a pregnancy involuntarily, the D&E Ban violates Plaintiff's patients' right to bodily integrity[.]" Compl. Count II. As the Complaint describes, the D&E Ban's terms operate to essentially end abortion in Arkansas at 14 weeks LMP. Compl. ¶¶ 62-80, 121. Its requirements force women who have decided to terminate a pregnancy that is at or after 14 weeks LMP to continue that pregnancy against their will, a grievous invasion of their right to bodily self-determination. Moreover, according to Defendants' arguments about inadequate "work-arounds," patients otherwise would be subject to experimental treatment, outside the bounds of studied and accepted medical care, and/or required to submit to additional procedures that add significant medical risk, beyond the risk of a standard D&E, Compl. ¶¶ 62-80 – which is what these patients seek, but the D&E Ban denies to them. Count II more than adequately alleges a claim that the D&E Ban infringes on patients' bodily integrity and impermissibly limits their ability to choose a medically accepted and standard abortion method, instead forcing them to remain pregnant or undergo unwanted procedures. *See also supra* Part II.B.1.

[7] Other case law suggests that even higher, strict scrutiny may apply to test infringements on a patient's right to bodily integrity. *See Glucksberg*, 521 U.S. at 719-20 (identifying bodily integrity as fundamental right under the Due Process Clause); *cf. Sell v. United States*, 539 U.S. 166, 180 (2003) (emphasizing that forced medication of incarcerated defendant, even in that context of reduced rights, requires that "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests").

2. *Count VII States a Bodily Integrity Claim Against the Local Disclosure Mandate*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Local Disclosure Mandate, *see* Compl. ¶¶ 30-39, 91-97, 123, Count VII pleads that: "By requiring a physician to collect and transmit to local law enforcement all products of conception, and thereby apparently removing medication abortion as a treatment option, for 14- to 16-year-old patients for whom no sexual abuse reporting is appropriate, forcing those young women to undergo clinical procedures or continue a pregnancy involuntarily," the Local Disclosure Mandate violates the right to bodily integrity for Non-CMA Teenage Patients. Compl. Count VII. Again, Defendants concede that the review of this claim should be identical to the review of Plaintiff's undue burden claim against the Local Disclosure Mandate, *see* Mot. Dismiss Br. 53, and for the same reasons that Count VI states a claim, Count VII does as well: This law significantly interferes with (and punishes) abortion decision-making and access, with no sufficient, countervailing grounds for limiting patients' rights.

Contrary to Defendants' contentions, the Local Disclosure Mandate *does* cause "physical intrusion into the body," Mot. Dismiss Br. 53, because, as currently interpreted through its implementing Rules, it forecloses medication abortion – instead forcing patients to undergo a clinical procedure – when medication abortion may be medically indicated or otherwise more appropriate for patients. Compl. ¶¶ 64-65, 95-97. Moreover, eliminating a medically-standard abortion procedure, and requiring other more invasive care for women, if they can access abortion care at all, particularly where a permissible state interest is absent or questionable, at best, supports a Due Process claim. *See generally Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916-18 (9th Cir. 2014) (discussing Arizona limits on medication abortions, the harms from usurping providers' medical judgments, and likelihood of plaintiffs' success under

undue burden analysis); *Jegley*, 2016 WL 6211310 at *30-*31, *33 (discussing impact of limits on medication abortion in Arkansas and finding likelihood of success in establishing undue burden in that case). Based on his Complaint allegations describing that type of claim, Plaintiff is entitled to proceed beyond his initial pleading of Count VII.[8]

3. *Count XII States a Bodily Integrity Claim Against the Tissue Disposal Mandate*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Tissue Disposal Mandate, *see* Compl. ¶¶ 40-54, 98-119, 124, Count XII pleads that: "By apparently banning medication abortion, and thus forcing women to undergo a clinical procedure or continue a pregnancy, H.B. 1566 violates Plaintiff's patients' right to bodily integrity[.]" Compl. Count XII. This cause of action rests on the same types of harms discussed above with regard to Counts VII and X, and challenges the Tissue Disposal Mandate, which, as the Complaint's alleged facts describe, will debilitate abortion care in the state, Compl. ¶¶ 113-14, 124.

Because this law deprives women not only of access to medication abortion, but also to miscarriage management and, indeed, blocks access to abortion care more broadly – the Tissue Disposal Mandate imposes on the right to bodily integrity without any sufficient, countervailing state purpose. Compl. ¶¶ 40-54, 98-119, 124, Count XII; *see also* Pl.'s Reply Br. 61-69 (quoting Tissue Disposal Mandate and FDRA to show the baseless nature of Defendants' readings that attempt to discount the challenged law's impact); Pl.'s PI Br. 45-53 (showing that for all women

[8] And even if this Court were to enter a substantive decree remedying the medication abortion bar, the Local Disclosure Law's unjustified self-determination harms extend well beyond that one, to include forced tissue collection and preservation, indefinitely held for potential DNA analysis, and labelled with the patient's name, as well as punitive disclosure to the local police of not only the young women's abortion but also her prior sexual activity. Compl. ¶¶ 31-35, 61, 94. These ongoing threats imposed as a condition of abortion by the Local Disclosure Law interfere with a patient's independent decision-making and control over her body.

seeking abortions, the Tissue Disposal Mandate, *inter alia*, requires third-party notice that plainly violates Supreme Court precedent and takes away women's abilities to make independent decisions about pregnancy care). Defendants repeat verbatim the short argument against Plaintiff's pleading of this claim that they argue in response to Count VII, above. *See* Mot. Dismiss. Br. 52-53, 61-62. That argument fails here, just as it did for Count VII, because the Complaint's specific facts about the Tissue Disposal Mandate's devastating, unjustified impact and the conceded legal foundation of the right to bodily integrity require that the cause of action proceed. Defendants have not shown any proper reason for dismissing these claims at the pleading stage.

D. Plaintiff States Three Claims of Vagueness in These Restrictions on Physicians

Under the Due Process Clause, "an enactment is void for vagueness if its prohibitions are not clearly defined." *D.C. v. City of St. Louis*, 795 F.2d 652, 653 (8th Cir. 1986) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Due process requires that laws provide fair notice by giving a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* Due process also demands explicit standards to prevent arbitrary or discriminatory actions by those charged with enforcement. *Id.* If a law "threatens to inhibit the exercise of constitutionally protected rights[,]" the Constitution demands an especially high level of clarity. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Likewise, when violation of a law carries criminal penalties, "a strict test of specificity" applies. *D.C.*, 795 F.2d at 654. Even if a law "nominally imposes only civil penalties[,]" if those are "prohibitory and stigmatizing[,]" courts still undertake a close review for vagueness. *Hoffman Estates*, 455 U.S. at 499. Such punitive statutes, particularly those that touch upon constitutionally protected activity, as here, must

closely specify their coverage, because vagueness may permit "a standardless sweep [that] allows" prosecutors or other enforcers "to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357-58, 362 (1983) (striking down requirement that individuals be able to produce identification "carrying reasonable assurance" that it was authentic) (citation omitted).

1. *Count IV States a Claim that the Medical Records Mandate Is Vague*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and specific alleged vagueness of the Medical Records Mandate, *see* Compl. ¶¶ 23-28, 81-88, 90, 122, Count IV pleads that: "By failing to give notice of how to comply with its terms, and imposing criminal and serious civil penalties, the Medical Records Mandate violates Plaintiff's right to due process[.]" Compl. Count IV. The mandate forbids abortions until the physician "[r]equest[s] the medical records of the pregnant woman relating directly to [her] entire pregnancy history," and then spends "reasonable time and effort . . . to obtain" such records. Ark. Code Ann. § 20-16-1804(b)(2). The statute fails to define what constitutes "reasonable time and effort"; fails to define or in any way limit the scope of "medical records relating directly to the entire pregnancy history" of the patient; and fails to specify what actions, if any, the physician is to take upon receiving any records. Compl. ¶ 24. The steps providers must take "[b]efore performing an abortion[,]"Ark. Code Ann. § 20-16-1804(b), are without ascertainable standards informing Plaintiff when he can proceed with an abortion, or when he must refrain on pain of criminal and licensing penalties. Compl. ¶¶ 23-27. Moreover, this debilitating and delaying lack of clarity affects all abortions to which the Medical Records Mandate applies. Compl. ¶¶ 81-90.

Contrary to Defendants' repeated assertion, there is no provision in the Medical Records Mandate that makes its requirements an "objective test," Mot. Dismiss Br. 37-38. No vantage

point, whether subjective or objective, for "reasonable time and effort" is specified, nor are any parameters upon which to judge "reasonableness" set forth. Also contrary to Defendants' assertion, Mot. Dismiss Br. 38-39, the case law does not establish a *per se* rule as to whether a standard incorporating the word "reasonable" is or is not unconstitutionally vague. The constitutional vagueness inquiry looks at the particular statutory provision at issue, and Due Process standards are not "mechanically applied[,]" but rather take into account the specific context of the regulation and whether that diminishes or exacerbates any problem of indeterminateness. *Hoffman Estates*, 455 U.S. at 498. The core problem with the Medical Records Mandate is that it takes physicians and their staff far beyond any medical needs or judgments, and imposes a new, *sui generis* requirement, without any markers or established practices for determining what constitutes "reasonable time and effort" in pursuit of a woman's "entire pregnancy history" and toward an unspecified goal – though one apparently related (as Defendants argue) to ferreting out patients' prior knowledge and actions. *See Cline v. Frink Dairy Co.*, 274 U.S. 445, 454-60 (1927) (contrasting novel, unconstitutionally vague criminal statute that turned on whether profits were "reasonable" with phrases in other statutes that might be sufficiently clarified by widely established technical, common law, or historical meaning). Here, Plaintiff has adequately pled a claim that the Medical Records Mandate violates Due Process and leaves its standards unconstitutionally vague.

2. *Count IX States a Claim That the Local Disclosure Mandate Is Vague*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and specific alleged vagueness of the Local Disclosure Mandate, *see* Compl. ¶¶ 30-39, 95-97, 123, Count IX pleads that: "By failing to give Plaintiff fair notice of when tissue preservation and local disclosure are required under the statute, and in particular whether the

statute applies to medication abortions," the Local Disclosure Mandate violates Plaintiff's right to due process. Compl. Count IX. As the Complaint sets forth, the Local Disclosure Mandate can be read to bar the use of medication abortion.

> That is because in medication abortion, the patient passes the products of conception outside the medical facility, across a multi-day period, making it impossible for the physician to collect and preserve those products, as Section 12-18-108 and its implementing Rules appear to require.
>
> Although Section 12-18-108's single reference to "fetal tissue extracted" seems to exclude medication abortion, the definition of abortion in both the Child Maltreatment Act and the Rules implementing 12-18-108 explicitly includes abortions accomplished with a "medicine, drug, or any other substance," and under the Rules, simply "[a]ll products of conception should be preserved." As this language appears to encompass all methods, in order to protect himself from a finding of "unprofessional conduct," Plaintiff will be forced to stop performing medication abortions for the group of patients it covers if the statute takes effect.

Compl. ¶¶ 95-96. This state-created confusion and vagueness on medication abortion leaves Plaintiff (and all other Arkansas providers) at risk of losing his license to practice medicine if he guesses wrongly at the Local Disclosure Law's meaning. He therefore adequately pleads a claim that this aspect of the Local Disclosure Mandate violates Due Process – for it is this type of fundamental lack of clarity and opportunity for arbitrary punishment that the Constitution forbids. To the extent that the Court can ameliorate this vagueness with a limiting reading, that would come in a ruling on the merits of the claim. *See* Pl.'s Reply Br. 53-54.

3. *Count XI States a Claim that the Tissue Disposal Mandate Is Vague*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged vagueness of the Tissue Disposal Mandate, *see* Compl. ¶¶ 40-54, 98-119, 124, Count XI pleads that: "By failing to give Plaintiff fair notice of how to comply with the mandates of the FDRA in the context of abortion and miscarriage care, and failing to give fair notice of whether medication abortion comes within H.B. 1566's requirements and

therefore is banned, H.B. 1566 violates Plaintiff's right to due process[.]" Compl. Count XI. The Tissue Disposal Mandate's unclear requirements will incapacitate Plaintiff and other physicians in providing abortion and miscarriage care, and deprive their patients of that medical care. Compl. ¶¶ 98-119, 124.

The Tissue Disposal Mandate's lack of clarity is even broader and more complex than the vagueness of the provisions discussed above, and is highlighted by Defendants' own struggle to describe its effects and requirements. *Compare* Mot. Dismiss Br. 55-61 *with* Pl.'s Reply Br. 61-65, 69-70 (identifying inaccuracies in and unclear applications of Defendants' own description of the Tissue Disposal Mandate and the FDRA). Indeed, Defendants attempt to argue that its requirements "are clearly set forth" in a "human tissue" provision that the Tissue Disposal Mandate amends, to explicitly *exclude* embryonic or fetal tissue – and thus that cannot possibly "set forth" the requirements for that tissue. Mot. Dismiss Br. 61; *compare id. with* Pl.'s Reply Br. 65. In the Complaint, Plaintiff describes in concrete detail why he cannot begin to understand how to satisfy the Tissue Disposal Mandate, yet he risks criminal prosecution if he does not do so; because of this extreme lack of clarity, Plaintiff will be forced to stop providing abortions or miscarriage care if the statute is allowed to take effect. Compl. ¶¶ 40-54, 98-119, 124. Plaintiff has more than adequately pled a claim that the Tissue Disclosure Mandate violates Due Process, with its meaning and application unconstitutionally vague for physicians, patients, and those charged with enforcing it.

E. Plaintiff States Two Claims of Violation of His Patients' Informational Privacy

The Fourteenth Amendment "safeguard[s] individuals from unwarranted governmental intrusions into their personal lives." *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (citing *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977)). This right not only protects against undue

burdens on private decisions, but also shields the confidentiality of "highly personal matters" in "the most intimate aspects of human affairs." *Id*. (quoting *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988)). The Eighth Circuit has described this constitutional right as applying to information where disclosure would be "a shocking degradation or an egregious humiliation," or "a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." *Id*. (quoting *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993)). The Court of Appeals has also stressed that "[w]hen the information is inherently private, it is entitled to protection." *Id*. (quoting *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 812 F.2d 105, 116 (3d Cir. 1987)).

Here, Defendants never contest that a young woman's sexual activity and decision to have an abortion are extremely private facts about which she has a high and legitimate expectation of privacy. Given the inherently private nature of that information, the Court must weigh whether the forced disclosure at issue is or is not justified by closely targeted, countervailing and sufficiently strong state interests. The test for invasions of informational privacy is a context-specific balancing test that requires targeted, and not indiscriminate, invasions of privacy to directly serve substantial government needs. *See, e.g., O'Connor v. Pierson*, 426 F.3d 187, 202-03 (2d Cir. 2005) ("When legislation burdens constitutionally protected privacy rights, we will … uphold the statute only if a substantial government interest outweighs the burdened privacy right."); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (to uphold an intrusion requires "finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case" and "engaging in the delicate task of weighing competing interests"); *Senior Exec. Ass'n v. United States*, No. 8:12-cv-02297-AW, 2013 WL 1316333 at *10 (D. Md. Mar. 27, 2013) ("[O]ne cannot gainsay the

Government's interest in deterring corruption and conflicts of interests" but "[h]owever compelling, these interests fail to outweigh Plaintiffs' privacy and security interests[.]"); *see also Margaret S. v. Edwards*, 488 F. Supp. 181, 204 (E.D. La. 1980) (observing "[o]ne of the most personal matters that can be disclosed is the fact that a woman is seeking an abortion" in discussing importance of shielding, and finding violation of minors' informational privacy rights in statute forcing, disclosure of abortion to parent). The government violates this right when it forces the disclosure of an individual's private information without advancing a sufficiently strong government need; the impermissible disclosure may be to government actors or in service of a government program, and need not be disclosure to the public. *See* Pl.'s PI Br. 43, Pl.'s Reply Br. 56-60.

1. *Count V States a Claim That the Medical Records Mandate Violates the Right to Informational Privacy*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Medical Records Mandate, *see* Compl. ¶¶ 23-29, 61, 81-90, 122, Count V pleads that: "By requiring involuntary disclosure of Plaintiff's patients' private medical decisions to other health care providers, [the] Medical Records Mandate violates Plaintiff's patients' right" to informational privacy. Compl. Count V. Despite women's extremely strong desire to maintain the confidentiality of abortion care, and to control any disclosure of the fact of their abortion, the Medical Records Mandate requires their abortion provider, before he can proceed with an abortion, to disclose it to any and all previous health care providers in any prior or the current pregnancy for no medical reason. Compl. ¶¶ 61, 81-90. This significant breach of doctor-patient confidentiality harms women by conditioning abortion care on the involuntary disclosure of their reproductive choice to all prior providers and is not

supported by any valid state justification. It violates patients' liberty and privacy protections. *See* Pl.'s PI Br. 40-44 (summarizing informational privacy law); Pl.'s Reply Br. 56-60 (same).

Defendants' response to this cause of action is an erroneous argument that the right to informational privacy does not exist. Mot. Dismiss Br. 40-44. As Plaintiff has shown, however, that right exists to protect his patients. Pl.'s PI Br. 40-44; Pl.'s Reply Br. 56-60. Defendants then try to assert that "any privacy concerns are allayed by the fact that health care providers themselves are obliged" to keep the information confidential. Mot. Dismiss Br. 47. But this ignores that the immediate harm here is that, as a condition of having an abortion, this intimate fact must be disclosed to past or other health care providers – the harm occurs as soon as the information reaches other providers, who will then know private information about Plaintiff's patients that the patients do not want known and that those patients realistically fear may cause judgment by or other repercussions from the other health care providers. As Plaintiff pleads, the state has no sufficient justification to impose that harm. Compl. ¶¶ 81-90, 122, Count V. This is exactly the type of government-mandated rupture in the highly confidential relationship between Plaintiff and his patients, mandated as a precondition to their exercise of a constitutional right – though unnecessary for that medical care – that violates the right to informational privacy.

2. *Count VIII States a Claim That the Local Disclosure Mandate Violates the Right to Informational Privacy*

Based on all the factual allegations set forth earlier in the Complaint, including the provisions and detailed alleged impact of the Local Disclosure Mandate, *see* Compl. ¶¶ 30-39, 91-97, 123, Count VIII pleads that: "By mandating disclosure of private information to local police departments and preservation of tissue labeled with identifying information that is not evidence of any crime or child maltreatment, [the Local Disclosure Mandate] and its Rules, as applied to 14- to 16-year-old patients for whom no child maltreatment reporting is appropriate

[(the Non-CMA Teenage Patients)], violate those patients' rights" to informational privacy. Compl. Count VIII. On this claim, the government itself takes the Non-CMA Teenage Patients' exceedingly private information, requires as a condition of abortion care that their sexual intercourse and abortion be disclosed to their hometown police department, and requires that tissue from the abortion be indefinitely kept on file with the state, along with identifying information, in circumstances where there is no indication of any abuse or other permissible state justification. Compl. ¶¶ 31-39, 61, 92-94, 123; Pl.'s PI Br. 43-45; Pl.'s Reply Br. 53-60.

As above, Defendants' response to this claim is to erroneously argue that no constitutional right to informational privacy exists. But Plaintiff has provided the Court with the Eighth Circuit and other case law that protects this right and that emphasizes the constitutional injury in indiscriminate disclosure rules that involve the government in patients' private matters. Pl.'s PI Br. 41-45; Pl.'s Reply Br. 53-60. Here, this abortion-only targeting of minors, including those whose circumstances provide no indication of abuse, is the opposite of appropriately tailored, *cf.* Mot. Dismiss Br. 54, which exposes its role simply as a punishment for abortion, *see* Pl.'s Reply Br. 53-56. Plaintiff's Reply Brief explains at length the lack of connection between the Local Disclosure Mandate's provisions, as challenged for the Non-CMA Teenage Patients, and any proper state interest, and shows the fallacy of Defendants' one-sentence attempt in the motion to dismiss brief to support this enactment. *Compare* Mot. Dismiss Br. 54 *with* Pl.'s Reply Br. 53-56. Because Plaintiff has adequately pled that the Local Disclosure Mandate violates his Non-CMA Teenage Patients' right to informational privacy, the Court should allow Count VIII to proceed beyond the pleading stage to consideration of its merits, rather than summarily dismissing this claim, as Defendants suggest.

CONCLUSION

Neither the Constitution nor federal procedural rules allow Defendants to defeat well-pled constitutional challenges to new state statutes through assertions on the merits in a motion to dismiss brief. Instead, each of the claims that Plaintiff brings in Counts I through XII clearly satisfies all jurisdictional and pleading requirements, and each should be resolved in a subsequent stage of the litigation. For all the reasons provided above and in the legal arguments of Plaintiff's previous briefing, Defendants' motion to dismiss should be denied.

Dated: July 25, 2017

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CERTIFICATE OF SERVICE

I, Ruth E. Harlow, hereby certify that on July 25, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notice to all counsel of record.

/s/ Ruth E. Harlow
Ruth E. Harlow