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

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' THIRD MOTION FOR PARTIAL DISMISSAL
RE: H.B. 1081/ACT 264 AND COUNT XI

INTRODUCTION

Defendants seek dismissal of Plaintiffs' claims against H.B. 1081, which, in violation of directly applicable Supreme Court precedent, bans one of the safest and most common methods of abortion in the second trimester. Count XI of the First Amended Complaint asserts that the seven 2016 Restrictions cumulatively violate Plaintiffs' patients' due process rights. Plaintiffs' First Amended Complaint states justiciable claims for relief as to both H.B. 1081 and the cumulative undue burden claim. Defendants' motion to dismiss should be denied.

BACKGROUND

In 2016, the Louisiana legislature enacted seven additional restrictions on abortion. Plaintiffs have challenged each of those restrictions individually, and have also alleged that their cumulative effect is to impermissibly burden access to abortion.

In the current motion, Defendants seek dismissal of Plaintiffs' claims against H.B. 1081, which prohibits the performance on a living fetus of an abortion procedure described in the act as "dismemberment abortion." Although "dismemberment abortion" is not a medical term, the bill's definition makes clear that it encompasses Dilation and Evacuation or D & E abortion procedures. First Am. Compl. for Declaratory and Injunctive Relief ("Am. Compl.") ¶ 44, Dec. 16, 2016, ECF No. 22. D & E procedures are one of the safest and most common methods for performing second trimester abortions and the only procedure available on an out-patient basis. Am. Compl. ¶¶ 5, 55. H.B. 1081 denies women access to this procedure in Louisiana, or alternatively forces them to undergo an unnecessary procedure to ensure fetal demise that subjects women to pain and additional medical risks, as a condition of obtaining abortion care. Am. Compl. ¶¶ 51-54, 57. No other Louisiana law forces any person to undergo a medically unnecessary procedure in order to obtain health care. Am. Compl. ¶¶ 60-61. Plaintiffs assert that H.B. 1081 violates their patients' due process and equal protection rights, and their own equal protection rights. Am. Compl. ¶¶ 166-71.

Defendants also seek dismissal of Plaintiffs' claim that the 2016 Restrictions cumulatively violate Plaintiffs' patients' due process rights because, together, they "impose greater burdens on abortion in Louisiana than does each taken alone." Am. Compl. ¶¶ 112, 158-65, 191. For example, H.B. 1081 and H.B. 815 (requiring disposition of embryonic and fetal tissue by burial or cremation) together ban the methods of abortion chosen by a significant percentage of women in Louisiana, Am. Compl. ¶ 117; H.B. 386 (increasing the mandatory delay to 72 hours) and H.B. 1081 collectively compound the burdens on women seeking abortion after 15 weeks, Am. Compl. ¶ 118; and H.B. 386, H.B. 488 (requiring board certification for physicians performing abortions), and H.B. 1019 (prohibiting the performance of abortion unless preceded by the distribution of a

non-existent document) interact to exacerbate the physician shortage in Louisiana, Am. Compl. ¶ 119-29. One senator who voted in favor of each of the 2016 Restrictions aptly summed up the Legislature's intent during debate on one of the bills, saying "we've had about five decisive votes on stopping abortion." Am. Compl. ¶ 115.

Accordingly, Plaintiffs have pled that:

> The 2016 Restrictions' collective burden on women seeking abortion is to impose numerous, medically unnecessary restrictions on abortion methods and practices which will prevent many from obtaining abortion services altogether, reduce the number of procedure options available to them, impose lengthy and costly delays in obtaining abortion care, and increase health risks, suffering, and anxiety.

Am. Compl. ¶ 164.

I. Plaintiffs Have Pled Justiciable Claims Against H.B. 1081.

A. Plaintiffs Have Stated a Claim That H.B. 1081 Violates the Substantive Due Process Rights of Their Patients.

Plaintiffs assert that H.B. 1081 bans D & E procedures, "thus effectively denying women access to abortion in Louisiana after 15 weeks from their last menstrual period ("LMP"). Am. Compl. ¶ 5; *see also id.* at ¶ 31 (D & E procedures "are the most commonly used second-trimester method of abortion"); *id.* at ¶ 56 (Dr. Doe 3 risks violating H.B. 1081 for all procedures he performs beginning at around 15 weeks). In spite of these and other well-pled allegations, *see generally, id.* at ¶¶ 51-61, Defendants assert that Plaintiffs have failed to allege a valid claim under Federal Rule of Civil Procedure 12(b)(6) that H.B. 1081 "is facially invalid." This argument fails in light of applicable Supreme Court precedent prohibiting the state from banning the most common method of second-trimester abortion, and specifically, the D & E procedure.

In *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976), the Court held that a law banning the most commonly-used method of second-trimester abortion was unconstitutional. The Court struck down a prohibition on the use of saline amniocentesis, the most

frequently-used method of abortion at that time, where alternative methods were significantly more invasive or not yet widely-used. *Id.* at 75-76.

Following *Danforth*, in *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000), the Court struck down a Nebraska statute purporting to ban so-called partial-birth abortions. The asserted target of that law was the D & X procedure, a distinct variant of D & E used by a minority of physicians. *Id.* at 927-29. The *Stenberg* Court found that the statute as drafted encompassed D & E procedures, *id.* at 938-39, and therefore held the prohibition unconstitutional. *Id.* at 945-46.

Most recently, in *Gonzales v. Carhart*, 550 U.S. 124, 153-54 (2007), the Supreme Court affirmed that the state may not ban the D & E procedure. The Court in *Gonzales* interpreted a federal ban on so-called "partial-birth abortion" to reach *only* D & X procedures, not the standard D & E procedure, and held that the constitutionality of the federal ban rested on the continued availability of the "prototypical" D & E. *Id.* at 153, 164-67.

The *Gonzales* Court both distinguished and affirmed the continued vitality of *Danforth*. The statute at issue in *Danforth* was unconstitutional, the Court explained, because it banned the then-dominant second-trimester abortion method. By contrast, the ban at issue in *Gonzales* did not impose a substantial obstacle on a woman seeking abortion because it allowed for the continued availability of the "commonly used and generally accepted [D & E] method." *Id.* at 165. The Court likewise both distinguished and affirmed *Stenberg*, explaining that the statute at issue in that case was unconstitutional because it banned both D & X and D & E, whereas the law at issue in *Gonzales* did not ban standard D & E. *Id.* at 165-66; *see also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 336-37 (6th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008) (recognizing that "*Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy").

Since *Stenberg*, courts have without exception struck down laws banning the D & E procedure. *See, e.g.*, *Northland Family Planning Clinic*, 487 F.3d at 339; *Hope Clinic v. Ryan*, 249 F.3d 603, 604-605 (7th Cir. 2001) (per curiam); *Causeway Med. Suite v. Foster*, 221 F.3d 811, 812 (5th Cir. 2000); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 145-46 (3d Cir. 2000); *A Choice for Women v. Butterworth*, No. 00-182-0CIV-LENARD, 00-182-0CIV-TURNOFF, 2000 WL 34403086 at *5 (S.D. Fla. 2000) (permanently enjoining law prohibiting D&E); *Daniel v. Underwood*, 102 F. Supp.2d 680, 686 (S.D. W. Va. 2000) (same); *W. Ala. Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1348 (M.D. Ala. 2016) (preliminarily enjoining law prohibiting D&E), appeal docketed, No. 16-17296; *Hodes v. Schmidt*, 368 P.3d 667, 677-79 (Kan. Ct. App. 2016) (six-judge opinion affirming preliminary injunction against a similar D & E ban, relying on *Stenberg* and *Gonzales*) (petition for review granted by the Kansas Supreme Court April 11, 2016); *Nova Health Sys. v. Pruitt, et al.*, No. CV-2015-1838 (Okla. Cty. Dist. Ct. Oct. 28, 2015, *available at* www.oscn.net/dockets/GetDocument.aspx?ct=oklahoma&bc=1031376872&cn=CV-2015-1838&fmt=pdf) (granting a temporary injunction against a similar D & E ban, explaining: "The U.S. Supreme Court has previously balanced the competing interests" and found that a ban on D & E unconstitutional). In none of these cases did the courts question the plaintiffs' ability to state a claim.

The Supreme Court's recent decision in *Whole Woman's Health* reinforces prior precedent, making clear that even if the state can show that H.B. 1081 serves a valid state interest, for an abortion restriction to be constitutional, its benefits must outweigh its burdens. *See Whole Woman's Health v. Hellerstedt ("WWH")*, 136 S. Ct. 2292, 2309 (2016). *See also June Med. Servs., LLC v. Kliebert*, No. 14-CV-00525-JWD-RLB, __ F. Supp. 3d __, 2017 WL 1505596, at *56 (M.D. La. April 26, 2017) (quoting same) *appeal docketed*, 17-30397 (5th Cir. May 12, 2017).

A court must "consider[] the evidence in the record," and "then weigh[] the asserted benefits against the burdens." *WWH*, 136 S. Ct. 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. Consistent with that mandate, in *Stenberg*, the Court balanced the state's interest in potential life against a woman's right to pre-viability abortion and held that a ban on the most common method of second-trimester abortion, and specifically a ban on D & E, fails the undue burden test. 530 U.S. at 945-46.

Although seemingly right on point and controlling as to *the merits* of Plaintiffs' substantive due process claim against H.B. 1081, Defendants attempt to distinguish *Stenberg* on the grounds that, the State of Nebraska conceded that if the statute at issue banned D & E procedures it was unconstitutional, while the Louisiana "makes no similar concession here." Mem. in Supp. of Defs.' Third Mot. for Partial Dismissal 5 n. 4, May 31, 2017, ECF No. 58-1 (hereinafter "Defs.' Mem."). This assertion is both incorrect and irrelevant. In *Stenberg*, the Court acknowledged the state's concession but did not rely on it to conclude that where, as a result of the ban, "[a]ll those who perform abortion procedures using [the D & E] method must fear prosecution, conviction and imprisonment," "[t]he result is an undue burden upon a woman's right to make an abortion decision." 530 U.S. at 945-46.

In any event, the fact that Defendants are unwilling to concede, in spite of *Stenberg*, that a ban on D & E abortions is unconstitutional, is irrelevant to this Court's determination of whether Plaintiffs have adequately pled a due process claim against H.B. 1081. The State's view on the ultimate merits cannot overcome the fact that Plaintiffs' well-pled factual allegations that H.B. 1081 bans D & E procedures present more than a "plausible" claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 669-70 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007).

Likewise, Defendants' assertion that H.B. 1081 "unquestionably serves a valid state interest," Defs.' Mem. 3, is irrelevant to the question of whether Plaintiffs have adequately pled a claim. Defendants' suggestion here as to how it will defend the act on the merits does not in any way undermine Plaintiffs' assertions, which on their face adequately plead that H.B. 1081 imposes an undue burden on women seeking second-trimester abortions in Louisiana.[1]

In further support of their motion, Defendants incorrectly assert that the fact that H.B. 1081 contains an exception permitting abortions when "necessary to prevent serious health risks,"[2] combined with "the availability of other abortion procedures that are considered safe alternatives," are enough to defeat Plaintiffs' claim. Defs.' Mem. 4-5. Again, Defendants proffered defenses on the merits do not overcome Plaintiffs' well-pled facts that H.B. 1081 bans D & E procedures.

First, Plaintiffs are not asserting that the Act fails for a lack of an adequate health exception, nor is it necessary for them to do so in order to plead an undue burden claim. Rather, they have claimed that a ban on one of the safest and most commonly used methods for performing second trimester abortion imposes an undue burden on their patients. As *Stenberg* makes clear, a law may impose an undue burden regardless of whether it has a legally sufficient exception for the life or health of the mother that prevents the imposition of significant health risks. 530 U.S. at 930, 945-46. In *Stenberg*, the Court held the ban unconstitutional for two independent reasons: first that the law lacked an exception for the preservation of the health of the mother, and second that it imposed

[1] At the merits stage, it will be up to this Court, based on the evidence presented, and applying the analysis employed by the Supreme Court in *Whole Woman's Health*, to determine if in fact H.B. 1081's ban on one of the safest and most common methods of abortion in the second trimester, which has already been deemed unconstitutional by the Supreme Court, does in fact "unquestionably serve a valid state interest," and, if it does, whether or not that interest outweighs the burdens imposed on women by H.B. 1081.

[2] H.B. 1081's prohibition does not apply in the narrow circumstances when a D & E is "necessary to prevent serious health risk[s]," which are defined as "a condition that so complicates [a woman's] medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function . . . ." H.B 1081, creating La. Rev. Stat. § 40:1-61.1.1B(6); C(1).

an undue burden on a woman's ability to choose a D & E abortion. *Id.* at 930. Similarly, the *Gonzales* Court addressed whether the ban at issue would impose significant health risks in response to claims that the challenged provisions lacked adequate health exceptions. *Gonzales*, 550 U.S. at 161-67. Defendants' reliance on the narrow exception does not therefore bear on whether Plaintiffs have adequately alleged an undue burden claim based on the fact that H.B. 1081 bans D & E procedures.

Second, Defendants' assertion that Plaintiffs have failed to plead a claim because "safe alternatives" are available, mischaracterizes the facts alleged in the Amended Complaint. Plaintiffs plainly assert that H.B. 1081 bans D & E procedures. Am. Compl. ¶¶ 5, 44. And far from alleging that there are "safe alternatives," Plaintiffs assert that forcing physicians to ensure fetal demise in every case subjects women to potentially unnecessary and unstudied medical risks. Am. Compl. ¶¶ 51-58. In direct contradiction to Defendants' assertion, Defs.' Mem. 5, Plaintiffs allege that compliance with H.B. 1081 through fetal demise would *not* be within the standard of care. Am. Compl. ¶ 57. While Defendants make the cavalier suggestion that induction is an acceptable alternative, Plaintiffs allege that induction of labor, "is not the standard of care for abortions and accounts for only about 2% of second trimester abortion procedures," must be performed in a hospital, may take up to three days, and is largely unavailable. Am. Compl. ¶ 55. Moreover, courts reaching the merits of claims against similar bans on D & E abortions have rejected the argument that Defendants make here—that there are acceptable alternative procedures to the D & E banned by H.B. 1081. *See W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1342 ("digoxin injections are not a feasible method of causing fetal demise"); *Hodes*, 368 P.3d at 678 (six-judge opinion) ("Given the additional risk, inconvenience, discomfort, and potential pain associated with these alternatives, some of which are virtually untested, we conclude that banning the standard D & E, a safe method

used in about 95% of second-trimester abortions, is an undue burden on the right to abortion."); *Nova Health Sys.*, No. CV-2015-1838 at 6 ("the alternatives proposed by Defendants are not reasonable").

Finally, Defendants assert that Plaintiffs' claim should be dismissed because the Amended Complaint does not allege adequate facts to state a facial challenge. Defs.' Mem. 5-6. As Plaintiffs have previously explained, this "argument improperly conflates whether Plaintiffs have alleged a claim that satisfies Rule 12(b)(6) with the remedy that will be appropriate should the court find a constitutional violation." Pls.' Mem. of Law in Opp. to Defs.' Second Mot. for Partial Dismissal 18, Apr. 21, 2017, ECF No. 47. *See also* Pls.' Mem. of Law in Opp. to Defs.' First Mot. for Partial Dismissal 7-8, March 22, 2017, ECF No. 38. To the extent Defendants are suggesting that Plaintiffs face a higher burden in challenging H.B. 1081 because the State seeks to justify the restriction on "respect for unborn life," Defs.' Mem. 5, this argument also goes to the merits, and not the sufficiency of Plaintiffs' pleading, and moreover, is incorrect as a matter of law. *See* Pls.' Surreply in Further Opp. to Defs.' Second Mot. for Partial Dismissal 3-5, May 15, 2017, ECF No. 57. In addition, while Defendants cite *Gonzales* to suggest that Plaintiffs are limited to an as-applied challenge, that reliance is misplaced. The Court's statement regarding facial challenges in *Gonzales* came in the context of its rejection of the claim that the law was facially invalid for lack of a health exception, 550 U.S. at 167, which, as noted, Plaintiffs do not raise in this case. Courts invalidating D & E bans on the grounds that they impose an undue burden for prohibiting the most common method of abortion have uniformly granted facial relief. *See Stenberg*, 530 U.S. at 945-46; *W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1348; *Hodes*, 368 P.3d at 678 (six-judge opinion).

For all of these reasons, Defendants' motion to dismiss Plaintiffs' claim that H.B. 1081 violates the due process rights of Plaintiffs' patients should be denied.

B. Plaintiffs Have Stated a Claim That H.B. 1081 Violates Equal Protection.

Plaintiffs allege that "by compelling women seeking abortions, but no other medical patients, to undergo an invasive, unnecessary medical procedure," H.B. 1081 violates the equal protection rights of their patients. Am. Compl. ¶ 170. In addition, by compelling Plaintiffs "to perform an invasive, unnecessary medical procedure, against their medical judgement, on pregnant women seeking abortions, but on no other patients," H.B. 1081 violates their own equal protection rights. Am. Compl. ¶ 171.

Given that the classification as to Plaintiffs' patients burdens the fundamental right to abortion, it should be subject to heightened scrutiny. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (explaining that the principles of rational basis scrutiny do not apply in cases involving "a protected liberty"). But, given the physical burdens and denial of medical care that H.B. 1081 imposes only on women seeking second-trimester abortions and those that provide that care, the classifications created by H.B. 1081 fail under any level of scrutiny. *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained."). The Amended Complaint sufficiently alleges for purposes of Rule 12(b)(6) that Plaintiffs and their patients have been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Gibson v. Texas Dept. of Ins.*, 700 F.3d 227, 238 (5th Cir. 2012) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

In seeking to dismiss these claims, Defendants argue that the State may single out abortion "for special regulation not applicable to other procedures," and therefore Plaintiffs' equal protection claims fail. Defs.' Mem. 6. The *Gonzales* case, cited by Defendants in support of this

alarming assertion, which seemingly suggests that no Plaintiff could ever successfully plead, much less succeed on an equal protection challenge to an abortion restriction, does not support this argument. The Court in *Gonzales*, considering a substantive due process claim, concluded, based on legislative findings (not present here) that the challenged ban on so-called partial-birth abortions furthered the government's asserted objectives. 550 U.S. at 158. Defendants seek to extrapolate that holding far beyond its limited context. Even if such a sweeping extension of *Gonzales* were warranted, which it is not, Defendants cannot defeat Plaintiffs' equal protection claims at this stage by asserting a defense that goes to the merits.

Two other cases relied on by Defendants (Defs.' Mem. 7), *Poelker v. Doe*, 432 U.S. 519, 521 (1977), and *Cntr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 198 (2002), are readily distinguishable. In *Poelker*, the Court found no equal protection violation, based on indigence, in the denial of public funding for non-therapeutic abortions. 432 U.S. at 520-21. And in *Bush*, the court reaffirmed that the government may express its preference for childbirth over abortion through the discriminatory distribution of public funds. 304 F.3d at 198. None of the cases cited by Defendants for the general proposition that the State can use its "voice," to favor childbirth over abortion support or even suggest that the State may go so far as to impose unnecessary medical procedures on women seeking abortions to further its goals. In this way, H.B. 1081 creates unique classifications, plausibly pled by Plaintiffs, and subject to equal protection review.

II. Plaintiffs Have Pled a Justiciable Claim Regarding the Cumulative Effect of the 2016 Acts.

In 2016, Louisiana, a state that already has one of the most restrictive schemes of abortion restrictions in the nation, passed seven new abortion restrictions aimed at virtually every conceivable point of obstruction to abortion care delivery, targeting everything from how abortion is performed and what qualifications a physician must have, to how embryonic and fetal tissue

from abortion can be disposed and who can enter contracts with abortion clinics. The intentional and predictable result of the cumulative impact of the 2016 Restrictions is that access to legal abortion in Louisiana will become increasingly unavailable.

Defendants make three arguments against Plaintiffs' cumulative undue burden claim. First, they assert that that they "are unaware of any authority" allowing parties to challenge abortion restrictions collectively. Defs.' Mem. 7. Second, they argue that the claim is flawed because it relies in part on existing restrictions that are not challenged in this case. Defs.' Mem. 8. Third, Defendants argue that Plaintiffs cannot have standing to maintain a cumulative claim when they do not have standing as to each of the individually challenged statutes. *Id.* As described below, none of these arguments warrant dismissal of Plaintiffs' claim under Rule 12(b)(6).

A. Plaintiffs Have Adequately Pled that the 2016 Restrictions Cumulatively Impose an Unconstitutional Undue Burden.

Plaintiffs assert that the 2016 Restrictions cumulatively impose an undue burden because they interact with each other to compound their individual burdens, making the whole burden greater than the sum of its parts. While Defendants are "unaware of any authority allowing parties to challenge abortion regulations collectively rather than individually," Defs.' Mem. 7, such cumulative analysis is commonplace in constitutional law.

In the context of the right to vote, courts often review the cumulative burden of separate restrictions. Such cases are, in fact, strikingly similar to abortion cases, as they both involve complex state regulatory schemes restricting a fundamental right where the court must engage in an analysis of the benefits of the laws as compared to the burdens. *See Clingman v. Beaver*, 544 U.S. 581, 607-608 (2005) (O'Connor, J., concurring) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld

if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.").

In *Lee v. Keith*, for example, the Seventh Circuit considered a challenge to the "combined effects" of two laws restricting ballot access for independent candidates—one of which had been upheld in an earlier, stand-alone challenge. 463 F.3d 763, 769-72 (7th Cir. 2006). The court struck both down because they "combine to severely burden [plaintiff's] First and Fourteenth Amendment rights." *Id.*; *see also N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 231, 233 (4th Cir. 2016) (explaining that the court should not analyze "each piece of evidence in a vacuum" but rather should "engag[e] in the totality of the circumstances analysis," and finding that "cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law's provisions individually"), *cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) ("By inspecting the different parts of [the law] as if they existed in a vacuum, the district court failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box."), *cert. denied*, 135 S. Ct. 1735 (2015).

In a recent case involving a voter identification law, the Fifth Circuit explained that in many areas of the law, "we frequently employ multi-factor, totality-of-the-circumstances analyses that are highly fact bound," and "[j]ust because a test is fact driven and multi-factored does not make it dangerously limitless in application." *Veasey v. Abbott*, 830 F.3d 216, 246-47 (5th Cir. 2016) (en banc) (citing caselaw ranging from prejudice to defendants during the guilty plea process, to application of the ministerial exception and hostile work environment claims), *cert. denied*, 137 S. Ct. 612 (2017). Moreover, the Fifth Circuit refused to uphold the law in *Veasey* "simply because the State expressed legitimate justifications for passing [it]." *Id.* at 248-49.

In the context of the First Amendment, courts look to the "cumulative effect" of different restrictions. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (discussing the "cumulative effect" of numerous local ordinances restricting house-to-house solicitation on itinerant Jehovah's Witnesses). And, under the Eighth Amendment, prison conditions that do not alone violate the Eighth Amendment may do so "in combination . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

Courts have also employed a cumulative burden analysis for substantive due process claims other than abortion: "[A]n investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements." *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998) (considering whether cumulative conditions of confinement violated detainee's substantive due process right); *see also Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 116 (D.D.C. 2011) (considering whether the "cumulative impact" of the alleged conduct related to the conditions of confinement "support a substantive due process claim"), *rev'd on other grounds*, 683 F.3d 390 (D.C. Cir. 2012).

This type of cumulative analysis is equally applicable in the abortion context. In *Whole Woman's Health*, the Court invalidated two abortion restrictions, a physician admitting privileges requirement and a requirement that abortion clinics meet the standards for ambulatory surgical centers ("ASC"), holding that each individually constituted an undue burden. 136 S. Ct. at 2310-18. While it accordingly did not need to reach the question of whether the laws also cumulatively imposed an undue burden, the Court acknowledged the laws' interactions with each other, suggesting the viability of such a claim. *See, e.g.*, *WWH*, 136 S. Ct. at 2306-2307 (noting that "the two provisions will leave Texas with seven or eight clinics"); *id.* at 2316-17 (concluding that as a

result of the ASC requirement, the remaining clinics would have to increase their capacity five-fold, and expressing doubt with the dissent's argument that this demand could be met by hiring more physicians, because "the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests").

Further, throughout its opinion, the Supreme Court approvingly cited the district court, which had explicitly considered the cumulative effect of the two laws. The district court concluded that "the cumulative results of House Bill 2 are that, at most, eight providers would have to handle the abortion demand of the entire state," *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom. Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and ultimately held that the "ambulatory-surgical-center requirement, combined with the already in-effect admitting-privileges requirement, creates a brutally effective system of abortion regulation that reduces access to abortion clinics thereby creating a statewide burden for substantial numbers of Texas women." *Id.* at 684. The Supreme Court's approval of the district court's cumulative analysis is unsurprising, as it is the court's role to review the combined effect of laws to determine whether they infringe upon a fundamental right.

Even if the Court concludes that Plaintiffs' cumulative undue burden claim involves untested or novel legal theories, it should not dismiss the claim on that basis. Such theories ought to be assessed after factual development, not before. *See, e.g.*, *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) ("[T]he fact that [Plaintiff's] claim does not fall within the four corners of our prior case law does not justify dismissal under Rule 12(b)(6). . . . As we have previously observed, '"[t]he court should be especially reluctant to dismiss on the basis of the

pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions."'); *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) ("It is no accident that most cases under section 2 [of the Voting Rights Act] have been decided on summary judgment or after a verdict, and not on a motion to dismiss." As the law "firm[s] up, it may be more feasible to dismiss weaker cases on the pleadings, but in the case before us we think that the plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved."); *Baker v. Cuomo*, 58 F.3d 814, 818-19 (2d Cir. 1995) (Rule 12(b)(6) dismissals "are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development"), *cert. denied sub nom., Pataki v. Baker*, 516 U.S. 980 (1995), *vacated in part on other grounds*, 85 F.3d 919 (2d Cir. 1996) (en banc); *see also Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (same, quoting *McGary v. City of Portland* and *Metts v. Murphy*).

Accordingly, there is ample authority supporting Plaintiffs' challenge to the cumulative impact of the 2016 Restrictions. Because Plaintiffs have alleged sufficient facts to state a claim for cumulative undue burden from the 2016 Restrictions, Defendants' motion to dismiss this claim should be denied.

B. Plaintiffs' Reference to Existing Louisiana Regulations Does Not Undermine Their Cumulative Undue Burden Claim.

Defendants mistakenly fault Plaintiffs for including "the general 'regulatory environment' for abortion providers in the State" in their allegations regarding the cumulative impact of the 2016 Restrictions, suggesting that existing regulations must either be challenged or ignored. Defs.' Mem. at 8. Despite Defendants' suggestion to the contrary, the Amended Complaint makes clear that Plaintiffs are not challenging the constitutionality of every abortion restriction in Louisiana. Am. Compl. ¶ 114. Rather, they are asserting that the 2016 Restrictions, both

individually, and cumulatively, impose unconstitutional undue burdens on the right to abortion. As is true in any challenge to a law's constitutionality, the court should not simply examine the laws' effects in a vacuum, but rather must examine them within the context of their practical, real-world effects. In referencing the current regulations affecting abortion, Plaintiffs are doing nothing more than providing background information relevant to Plaintiffs' evidence on the cumulative impact of the 2016 Restrictions. Defendants are certainly not entitled to dismissal for failure to state a claim on the basis that Plaintiffs have provided too much information.

Moreover, the evidence that Defendants assert undermines Plaintiffs' claim is in fact an established part of the undue burden inquiry. The Supreme Court in *Whole Woman's Health*, 136 S. Ct. at 2302, cited with approval findings of the district court considering the "practical concerns unique to every woman . . . includ[ing] lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles," and "operat[ing] in conjunction with Texas's other regulations on abortion," including mandatory waiting period laws. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d at 681-83. The Supreme Court thus acknowledged that the undue burden analysis addresses a law's actual impact, including the regulatory context, and there is no support for the view that a court should ignore existing regulations and their effects on providers and women.

This Court recently examined Louisiana's own physician admitting privileges law post *Whole Woman's Health*, and emphasized that "[t]he Supreme Court has now clarified that these facts [of real-world burdens] should be considered when evaluating whether an abortion restriction is constitutional." *June Med. Servs. LLC*, 2017 WL 1505596, at *1. The Court went on

to consider the law "in the real-world context of abortion patients' poverty and transportation challenges, providers' fear of anti-abortion violence, *pre-existing regulations*, and other obstacles to abortion access." *Id.* (emphasis added).

Other courts have similarly acknowledged that existing laws are relevant to the undue burden analysis. For example, in *McCormack v. Hiedeman*, the Ninth Circuit affirmed injunctive relief against a law imposing criminal liability on patients for their abortion providers' lack of qualifications, because it "heaps yet another substantial obstacle in the already overburdened path that . . . pregnant women . . . face when deciding whether to obtain an abortion," including expense, travel distance, employment and childcare challenges, mandatory waiting periods, protesters, and the weightiness of the decision itself. 694 F.3d 1004, 1016-17 (9th Cir. 2012); *see also Planned Parenthood Se., Inc. v. Strange*, 172 F. Supp. 3d 1275, 1289 (M.D. Ala. 2016) (reviewing burdens imposed by Alabama's admitting privileges law, in light of those imposed by other abortion restrictions such as the State's ban on abortions after twenty-two weeks lmp); *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (striking down a restriction on medication abortion, holding that the undue burden analysis requires "consider[ing] the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors, and other abortion regulations"), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013) (affirming a preliminary injunction blocking an admitting privileges requirement and noting that "[w]hen one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered"), *cert. denied*, 134 S. Ct. 2841 (2014).

Accordingly, while it is inappropriate for Defendants to raise what amounts to an evidentiary objection at this stage of litigation, Plaintiffs' allegations regarding the interaction of

the 2016 Restrictions with Louisiana's existing abortion restrictions, far from being "unmoored from any justiciable standard," Defs.' Mem. 8, will be critical to this Court's merits analysis of whether the 2016 Restrictions, individually and collectively, impose an unconstitutional undue burden.

C. Plaintiffs Have Standing for Their Cumulative Undue Burden Claim.

Finally, as described in Plaintiffs' memoranda of law in opposition to Defendants' First, Second, and current Third motions to dismiss, Plaintiffs have standing as to each of the 2016 Restrictions, and each claim is ripe and supported by sufficient facts to state a claim. Because Plaintiffs have alleged standing, ripeness, and sufficient facts for their individual claims, they similarly survive a motion to dismiss on these grounds for their cumulative claim.

But even if this Court ultimately dismissed some (or all) of the individual claims, Plaintiffs have still alleged sufficient facts to survive Defendants' Rule 12(b)(1) motion to dismiss their cumulative claim. Plaintiffs' standing and ripeness for purposes of this claim is based on the cumulative impact of all of the 2016 Restrictions, which Plaintiffs have pled is greater than the sum of the burdens of each individual law. Am. Comp. ¶¶ 112-31, 158-65. Thus, even if this Court concludes that Plaintiffs cannot maintain individual claims, Plaintiffs have pled that the collective, compounded injuries from the 2016 Restrictions are "concrete," "imminent," and appropriate for judicial review. *See Planned Parenthood Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 485-86 (5th Cir. 2016).

CONCLUSION

For the foregoing reasons, the Motion to Dismiss Plaintiffs' claims against H.B. 1081 and Count XI (cumulative undue burden), should be denied.

Respectfully submitted, June 21, 2017.

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CERTIFICATE OF SERVICE

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

/s/ Janet Crepps
Janet Crepps