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

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

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

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Controlling Supreme Court precedent permits states to express respect for potential life—provided that they do so in ways that respect women's dignity. In particular, the Supreme Court has held that states may use means that inform or persuade women, but not means that coerce or hinder them. *See Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 877-78 (1992). Chapter 697 of the Texas Health & Safety Code (the "Act") fails to abide this distinction, compelling women who obtain abortion, miscarriage treatment, or ectopic pregnancy surgery to dispose of the resulting tissue in a manner that accords with the State's view of potential life rather than their own. In opposing Plaintiffs' motion for a preliminary injunction, Defendant argues that this Court should ignore the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, __ U.S. __, 136 S. Ct. 2292 (2016) ("*Whole Woman's Health I*"), and proposes instead a version of the undue burden test that was expressly rejected in that case. As detailed below, this fails to respect Supreme Court precedent. Further, Defendant's arguments that the Act does not create an undue burden are unavailing: the Act imposes burdens on women seeking pregnancy-related medical care, while failing to provide permissible benefits.

Defendant also states that a preliminary injunction here should not include the "registry" of entities offering burial, cremation, or financial assistance, Tex. Health & Safety Code § 697.005; nor the "grant program" to provide financial assistance, Tex. Health & Safety Code § 697.006. Plaintiffs seek an injunction to the extent it imposes obligations on their patients. Plaintiffs have not been able to ascertain whether and to what extent the registry and grant program would do so because Defendant has not yet created the grant program, *see* Resp. to Pls.' Sec. Mot. for a Prelim. Inj. ("Def.'s Br.") at 26, ECF No. 108, nor produced a copy of the registry, despite multiple requests from Plaintiffs, *contra* Tex. Health & Safety Code § 697.005(2) ("The department shall . . . make the registry information available on request . . . .").

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR SUBSTANTIVE DUE PROCESS CLAIM.

A. The Undue Burden Standard Does Not Vary with the State's Interest.

In granting Plaintiffs' first motion for a preliminary injunction, the Court already considered and rejected Defendant's argument that the undue burden standard varies based on the State's asserted interest in enforcing an abortion restriction. *See Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 228 (W.D. Tex. 2017) ("*Whole Woman's Health II*") ("DSHS's argument a different test applies when the State expresses respect for the life of the unborn is a work of fiction, completely unsupported by reading the sections of Supreme Court opinions DSHS cites in context."). This decision merits the deference accorded to the law of the case. *See* Pls.' Sec. Mot. for a Prelim. Inj. ("Pls.' Br.") at 9, ECF No. 96.

Defendant again contends that the Supreme Court created two distinct undue burden standards—a "balancing test" that applies when a state claims to be advancing an interest in patient health, and a "substantial obstacle" test that applies when a state claims to be advancing an interest in potential life. Def.'s Br. at 15, ECF No. 108. Both the language and the logic of the Supreme Court's undue burden opinions contradict this claim. *Whole Woman's Health I* did not create a balancing test that is distinct from the substantial obstacle test applied in *Casey*, 505 U.S. 833 and *Gonzales v. Carhart*, 550 U.S. 124 (2007). To the contrary, it explained that the substantial obstacle test applied in those cases requires courts to engage in a balancing analysis. *See Whole Woman's Health I*, 136 S. Ct. at 2309-10.

Casey equated the term "undue burden" with the term "substantial obstacle." 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). Resolving a circuit split over the meaning of those terms, *Whole*

Woman's Health I clarified that they denote relative measures, not absolute ones: Whether an obstacle is substantial—and a burden therefore undue—must be judged in relation to the benefit the law provides. *See* 136 S. Ct. at 2309. As a sister court in this District recently ruled, "where a law's burdens exceed its benefits, those burdens are by definition undue, and the obstacles they embody are by definition substantial." *Whole Woman's Health v. Paxton*, __ F. Supp. 3d __, No. 17-CV-0690-LY, 2017 WL 5641585, at *4 (W.D. Tex. Nov. 22, 2017) ("The court construes 'substantial' to mean no more and no less than 'of substance.'") (citing *Whole Woman's Health I*, 136 S. Ct. at 2300, 2309-10, 2312, 2318), *appeal docketed*, No. 17-51060 (5th Cir. Dec. 1, 2017). Accordingly, the "balancing test" described in *Whole Woman's Health I* and the "substantial obstacle" test described in *Casey* are one and the same. *See also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, __ F. Supp. 3d __, No. 1:16-CV-01807-TWP-DML, 2017 WL 1197308, *5 (S.D. Ind. Mar. 31, 2017) ("Given that the Supreme Court made clear in *Whole Woman's Health* that it was applying *Casey*, it inexorably follows that there are not two distinct undue burden tests applied in *Casey* and *Whole Woman's Health*."), *appeal docketed*, No. 17-1883 (7th Cir. Apr. 27, 2017), *argued* (Nov. 6, 2017).

The Supreme Court has never distinguished between a state's interests in patient health and potential life when discussing the undue burden standard. *Casey* announced a unitary standard that applies regardless of the state's asserted interest. 505 U.S. at 877 ("[A] statute which, while furthering the interest in potential life or *some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.") (emphasis added). *Casey* applied this standard in a uniform manner to all of the restrictions under review, including the spousal and parental notification requirements, which were related to the State's interest in potential life, *id.* at 887-

898, and the recordkeeping and reporting requirements, which were related to the State's interest in patient health, *id.* at 900-01. Although *Whole Woman's Health I* concerned laws related to the interest in patient health, the Supreme Court relied on *Casey*'s analysis of laws related to the interest in potential life when explaining the nature of the balancing required by the undue burden standard. *See Whole Woman's Health I*, 136 S. Ct. at 2309 (discussing *Casey*'s analysis of spousal notification and parental consent requirements).

Contrary to Defendant's assertion, the Supreme Court in *Whole Woman's Health I* did not rely exclusively on *Casey*'s use of the phrase "unnecessary health regulations" in concluding that the undue burden standard requires courts to assess the burdens a law imposes on the abortion right in relation to the benefits the law provides. *Contra* Def.'s Br. at 15, ECF No. 108. Rather, the Supreme Court broadly examined its prior decisions in *Casey* and *Gonzales* and clarified the undue burden standard by adopting an interpretation that harmonized them. *See Whole Woman's Health I*, 136 S. Ct. at 2309-10. Although *Casey* did not use the term "unnecessary" in characterizing the limitation that the undue burden standard places on laws related to a state's interest in potential life, it did use the term "unwarranted," which means the same thing. *See Casey*, 505 U.S. at 875-76. Explaining its rationale for adopting the undue burden standard to replace the trimester framework set forth in *Roe*, the Supreme Court indicated that "the right recognized by *Roe* is a right 'to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Casey*, 505 U.S. at 875 (emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S 438, 453 (1972)). The Court then explained that the existence of a legitimate state interest in potential life means that "not all [abortion] regulations must be deemed unwarranted." *Id.* at 876. It concluded that the undue burden standard is the appropriate means of distinguishing unwarranted

regulations from warranted ones, which entails "reconciling the State's interest [in potential life] with the woman's constitutionally protected liberty." *See id.* Thus, the undue burden standard is—and was always meant to be—a balancing test, regardless of the State's asserted interest.[1]

B. The Balancing Test Required by *Whole Woman's Health I* Provides a Workable Framework for Evaluating the Act's Constitutionality.

Defendant's assertion that the balancing test set forth in *Whole Woman's Health I* is not "an objective method" for assessing whether the Act imposes an undue burden on patients' fundamental liberty, Def.'s Br. at 16, ECF No. 108, reflects an ideological objection to the Supreme Court's abortion jurisprudence and does not relieve this Court of its obligation to apply the test.[2] The undue burden standard was not designed to yield results with mathematical precision. When it adopted the standard, the Supreme Court explained: "Even when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard." *Casey*, 505 U.S. at 878; *accord id.* at 869 ("[C]riticism . . . always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for

[1] Defendant's contention that the Supreme Court did not apply a balancing analysis in *Casey* or *Gonzales*, Def.'s Br. at 15-16, ECF No. 108, is merely a rehashing of arguments that it made, and the Court rejected, in *Whole Woman's Health I*. *See* Br. for Resp't at 21-24, *Whole Woman's Health I*, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 344496, *21-24 (Jan. 27, 2016).

[2] Defendant mischaracterizes Plaintiffs' position in asserting that Plaintiffs "argue that their patients' beliefs must always trump state regulations respecting life." Def.'s Br. at 16, ECF No. 108. Plaintiffs instead argue—consistent with the Supreme Court's controlling precedent—that the State must advance its interest in respect for life through means designed to inform or persuade a woman to act in accordance with the State's view, rather than through means that coerce her to do so. *See* Pls.' Br. at 11-12, ECF No. 96; *infra* at 6-7.

want of a line that is clear.").

As in other areas of constitutional law, in evaluating this metric, a court may consider the degree to which the restriction is over-inclusive or under-inclusive, and the availability of less burdensome alternatives to achieve the state's goal. *See, e.g., Whole Woman's Health I,* 136 S. Ct. at 2311 (noting that prior law was sufficient to serve the state's asserted interest); *id.* at 2314 ("The record contains nothing to suggest that H.B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers . . . from criminal behavior."); *id.* at 2315 (discussing the underinclusive scope of the provision at issue) ("These facts indicate the surgical-center provision imposes 'a requirement that simply is not based on differences' between abortion and other surgical procedures 'that are reasonably related to' preserving women's health, the asserted 'purpos[e] of the Act in which it is found.'"). Thus, when the state's asserted interest is potential life, the measure of the law's benefits does not depend on an individual judge's personal view concerning the value of such life, as Defendant suggests. The extent to which the law furthers a valid state interest through permissible means is the measure of its benefit. *See generally Whole Woman's Health I,* 136 S. Ct. at 2309-10; *Casey*, 505 U.S. at 877.

C. The Act Fails to Further a Legitimate State Interest in a Permissible Way.

Here, the Act fails constitutional muster, as the State has used compulsory, rather than persuasive, means to further its purported interest. *See* Pls.' Br. at 11-13, ECF No. 96. The Supreme Court's jurisprudence makes clear that a state may persuade, but may not compel, women to adopt its views regarding childbirth or the personhood of an embryo. *See id*. at 11-12; *supra* at 5-6. For example, the State could permissibly advance its interest in potential life by launching a public awareness campaign; making funds available for all patients to be able to choose burial or cremation, regardless of wealth or income; or maintaining a freely-accessible

website containing truthful, accurate, and non-misleading information about burial and cremation options. The State's use of coercive measures rather than persuasive ones constitutes an impermissible means of serving an interest in potential life. *See Casey*, 505 U.S. at 877-78.

Likewise, the means that the State has chosen to advance its stated interest are substantially underinclusive. As the Court observed regarding the Amendments, the Act does not apply to in-vitro fertilization, 25 Tex. Admin. Code. § 138.3(c)(2), nor to women in non-healthcare settings. *Whole Woman's Health II*, 231 F. Supp. 3d at 230. "Such inconsistency reduces the strength of the asserted benefit." *Id*.

Defendant's argument that the Act furthers the State's interest in "respect" or "dignity," *see* Def.'s Br. at 15, 17, ECF No. 108, is contradicted by the record. First, Defendant's own expert testified that dignity is an abstract concept given "specificity" through particular cultural and religious traditions. Tr. of Mot. Hr'g. ("Tr.") Vol. 2, 69:10-15 (Bishop) ("Each one of those will have different ways that that dignity is articulated."). The record demonstrates that individuals in good conscience disagree about whether an embryo or fetus is a person and what constitutes dignity in the disposition of embryonic or fetal tissue. *See* Pls.' Br. at 15, ECF No. 96; *see also Casey*, 505 U.S. at 850. Second, the Act outlines EFTR disposition practices that many people would consider inconsistent with dignity. For example, DSHS' representative testified that (under wording in the Amendments identical to the Act) scattering ashes in a "scrap yard" or "parking lot" is allowed. Tr. Vol. 1 at 187:2-6; 187:10-15 (Sims). The Department's other witnesses testified that scattering ashes in a scrapyard or parking lot would be undignified. Tr. Vol. 2 at 66:19-23 (Bishop), 172:7-174:8 (Carnes). The Department also proposed that healthcare facilities could store co-mingled tissue from thousands of abortions or miscarriages in a freezer together for up to a year, and then incinerate it and deposit the ashes jointly in a mass

grave—a practice that would also strike many people as undignified. *See* Tr. Vol 1 at 189:23-190:9, 193:1-8 (Sims); Resp. to Pls.' Mot. for a Temp. Restr. Order at 5, ECF No. 17 ("facilities [can] cooperate to conduct a single mass disposal"); *see also* Tr. Vol. 2 at 121:9-122:3 (Allmon).

Witnesses for both sides also testified that, when allowed to exercise moral agency, most women do not choose to have a burial or cremation after a miscarriage or abortion. Tr. Vol. 1 at 55:17-56:12 (Davis); Tr. Vol. 2 at 20:6-16, 21:7-9 (Swenson); Decl. of Lendol L. ("Tad") Davis, M.D. ("Davis Decl.") ¶ 23, ECF No. 6-2; *see also* Tr. Vol. 2 at 131:9-11, 146:9-14 (Carnes) (testifying that he rarely handles embryonic or fetal tissue), although a few occasionally do, Tr. Vol. 1 at 16:15-18:8 (Hagstrom Miller), 56:22-57:3 (Davis); Davis Decl. ¶ 16, ECF No. 6-2; Suppl. Decl. of Lendol L. ("Tad") Davis, M.D. ("Davis Suppl. Decl.") ¶ 3 (attached hereto as Appendix A). The record demonstrates that depriving women of moral agency with respect to decisions about embryonic and fetal tissue disposition is an affront to women's dignity. *See, e.g.*, Decl. of Valerie Peterson ("Peterson Decl.") ¶ 15, ECF No. 6-5 ("This law would have made me feel less human. It will make Texas women less human."); Tr. Vol. 1 at 21:3-10 (Hagstrom Miller) ("I believe that it is my duty to serve people according to their belief systems. . . . [and] that it is important for me to keep the woman at the center of all of her decisionmaking and to listen to what is most important to her as she approaches her reproductive healthcare decisions."); Davis Suppl. Decl. ¶ 7.[3]

D. The Act's Burdens Outweigh Its Benefits.

Defendant's argument that the Act imposes "no tangible burden," Def.'s Br. at 19, ECF No. 108, is both meaningless and incorrect. Burdens such as the loss of constitutional rights,

[3] Because the State may not compel its view of personhood, its argument analogizing the Act to the regulation of human remains, *see* Def.'s Br. at 17, ECF No. 108, is irrelevant—but it is also misleading, as the Act does not apply Texas laws regarding human remains to EFTR. Furthermore, the sole stated purpose of Texas statutes regarding "disposition of the body" is "to protect public health and safety." Tex. Health & Safety Code § 694.001.

emotional burdens, and stigma—whether or not they may be characterized as "tangible"—are all cognizable and can be the basis for injunctive relief, as the Court has already found. *See Whole Woman's Health II*, 231 F. Supp. 3d at 232 (considering "enhanc[ing] the stigma on women associated with miscarriage and abortion care" as among the Amendments' burdens). *See also Whole Woman's Health I*, 136 S. Ct. at 2138 (considering the loss of "individualized attention, serious conversation, and emotional support," among the challenged law's burdens). As explained in Plaintiffs' opening brief, the Act would burden women seeking pregnancy-related medical care by failing to respect their freedom of belief regarding personhood and reproduction; discourage some from seeking treatment;[4] impose grief, stigma, and shame; increase cost; and threaten the continued availability of abortion services. *See* Pls.' Br. at 14-19, ECF No. 96.

In light of the Act's burdens, and its failure to further a legitimate state interest in a permissible manner, the Act is unconstitutional, and Plaintiffs are likely to prevail on their claim that it imposes an undue burden on access to pregnancy-related healthcare.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR VAGUENESS CLAIM ABSENT A STIPULATION REGARDING THE ACT'S EFFECT ON TEXAS REGULATIONS.

Defendant has now increased the Act's ambiguity by issuing new implementing regulations, which do not repeal the Amendments. ECF No. 108-1 (creating 25 Tex. Admin Code, Ch. 138). The former state only that they supersede the latter "to the extent [of a] conflict[]," 25 Tex. Admin Code §138.3(b), leaving Plaintiffs to guess in each instance whether Defendant will determine that Plaintiffs need to follow both sets of regulations, or that a

[4] Defendant argues that the State is nevertheless permitted to force women to comply with laws "with which women may disagree." Def.'s Br. at 20, ECF No. 108. But that argument again misses the point: it is well-settled that a court must consider the dissuasive effects of a law as part of its undue burden analysis. *See Casey*, 505 U.S. at 894 ("We must not blind ourselves to the fact that [a] significant number of women . . . *are likely to be deterred from procuring an abortion* . . . .") (emphasis added).

"conflict" exists. *See* Pls.' Br. at 22, ECF No. 96. Moreover, Defendant asserts that the Act has effectively repealed regulations issued by other state agencies (including the Texas Funeral Services Commission and the Texas Commission on Environmental Quality) that make compliance with the Act ambiguous or impossible, *see* Pls' Br. at 21-22, ECF No. 96; Def.'s Br. at 23, ECF No. 108—notwithstanding (i) the absence of such language in the Act and (ii) that as a matter of law, Defendant cannot issue binding interpretations of other agencies' regulations. *See generally Flores v. Emps. Ret. Syst.*, 74 S.W.3d 532, 545 (Tex. Ct. App. 2002) (deference is owed to agency interpretations of "statute[s]which the agency is charged with enforcing"); *cf. Stenberg v. Carhart*, 530 U.S. 914, 940-41 (2000) (holding that a court need not accept a state official's interpretation of law when the official has no authority to bind state courts or other state officials).

The parties are currently engaged in negotiations concerning stipulations that would provide clarity regarding enforcement of the Amendments, the Act's implementing regulations, and the applicable regulations of the agencies at issue. *See* Pls.' Br. at 21-23, ECF No. 96. If the parties are able to reach agreement, Plaintiffs would withdraw their vagueness claim. In the absence of an agreement, Plaintiffs are likely to prevail on the merits of that claim.

III. THE COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. Plaintiffs Have Third-Party Standing to Vindicate their Patients' Rights.

It is well-settled that abortion providers have standing to vindicate their patients' constitutional rights. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976) (plurality opinion) ("Aside from the woman herself, . . . the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision."). The Fifth Circuit applied this rule most recently in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014). The *Abbott* plaintiffs were

abortion providers who challenged a statutory requirement on several grounds, including that it violated their patients' substantive due process rights. *Id.* at 587. Applying controlling Supreme Court precedent, the Fifth Circuit concluded that "the requirements for third-party standing [we]re met" for three reasons: "(1) the physicians face potential administrative and criminal penalties . . . (2) "doctors who perform abortions share a sufficiently close relationship with their patients, and (3) a pregnant woman seeking to assert her right to abortion faces obvious hindrances in timely . . . bringing a lawsuit to fruition." *Id.* at 589 (footnotes omitted). The same factors apply here: Plaintiffs are doctors and medical practices seeking to vindicate their patients' rights, *see* Pls.' Br. at 1-2, ECF No. 96; they face potential liability for violating the Act, *see* Tex. Health & Safety Code §§ 697.007 – 697.008; and their patients face obstacles to maintaining their own lawsuits, including the desire to maintain the confidentiality of their pregnancy status and medical histories, *see Abbott*, 748 F.3d at 589 n.8 (citing *Singleton*, 428 U.S. at 117-18).[5]

In arguing that Plaintiffs' standing in this case would be "a novel extension" of the law, Def.'s Br. at 12, ECF No. 108, Defendant conflates his objections to Plaintiffs' position on the merits with Plaintiffs' standing. *Cf. OCA—Greater Hous. v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) ("[The State's] argument conflates the merits of the suit with the plaintiff's standing to bring it."). The right protected by *Casey* encompasses not merely the right to obtain an abortion but also, more broadly, "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Casey*, 505 U.S. at 851 (citation omitted); *accord Lawrence v. Texas*, 539 U.S. 558, 565

[5] Although the Fifth Circuit's holding dealt specifically with physician plaintiffs, the court explained that, "[b]ecause the physician-plaintiffs have third-party standing to assert the rights of their patients in this litigation, as well as standing to assert their own rights, we need not consider the issue of standing as it relates to the remaining plaintiffs." *Abbott*, 748 F.3d at 589.

(2003). *See* Pls.' Br. at 9-11, ECF No. 96. Defendant asks the Court to adopt a narrower interpretation of the abortion right, implying that Plaintiffs' contentions about their patients' freedom of belief are somehow distinct from their claim that the Act imposes an undue burden on the abortion right. *See* Def.'s Br. at 12, ECF No. 108. But Plaintiffs' claim is unitary; as explained in Plaintiffs' opening brief, the burdens on that freedom are one aspect of what makes the Act an undue burden. *See* Pls.' Br. at 11-12, 14-17, ECF No. 96; *see also supra* at 6-9.[6]

Further, contrary to Defendant's assertions, there is no conflict of interests between Plaintiffs and their patients. Ample evidence demonstrates that some patients would be opposed to the disposition methods required by the Act. *See, e.g.*, Tr. Vol. I, 21:2-5 (Hagstrom Miller) ("I understand that not all of my patients share the same belief system that I have. I believe that it is my duty to serve people according to their belief systems."); Tr. Vol. I, 56:16-57:3 (Davis) ("[Our patients] didn't request it. They know that we dispose of tissue according to laws and regulation and standard of care. . . . It would make them feel very bad about everything. It would add one more burden onto them that I think[i]s very unjust. And it would impose someone else's beliefs onto them. And they have the availability of asking about burial if they wished, and we always comply with their wishes."); Peterson Decl. ¶ 12, ECF No. 6-5 ("I do not want a burial or a cremation for my lost pregnancy. I do not want people whose spiritual views are different from mine to control this very intimate part of me."); Tr. Vol. 2, 21:10-23:1 (Swenson) (discussing a Muslim patient who delayed a miscarriage management procedure after learning of Catholic

[6] Defendant's argument is also unavailing because third-party standing is based not on nature of the right at issue, but rather on the relationship between the parties. *See e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484-85 (1982) ("The requirement of standing 'focuses on the party seeking to get his complaint before a federal court, and not on the issues he wishes to have adjudicated.' . . . [W]e know of no principled basis on which to create a hierarchy of constitutional values . . . .") (citation omitted); *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (holding plaintiff's nexus with its members was sufficient for third-party standing).

hospital's policy requiring fetal burial). Plaintiffs seek to ensure that all patients are able to act in accordance with their own beliefs about personhood and dignity—whatever those might be.

B. Plaintiffs' Substantive Due Process Claim Is Ripe.

Plaintiffs' substantive due process claim is ripe because the Act will impose an undue burden on their patients as soon as it takes effect. As Plaintiffs have explained, the Act fails to advance a valid state interest in a permissible way; and if it takes effect would immediately burden patients' freedom of belief regarding personhood and reproduction; discourage some patients from obtaining healthcare; and impose stigma, grief, and shame. Pls.' Br. at 11-17, ECF No. 96. The Act would also immediately require Plaintiffs to alter their EFTR disposal practices in ways that threaten the sustainability of their medical practices, *id.* at 18-19, and failure to comply would result in the immediate imposition of penalties, Tex. Health & Safety Code §§ 697.007 – 697.008. Thus, the impact of the law on Plaintiffs and their patients is neither "hypothetical" nor "contingent [on] future events that may not occur as anticipated." *Contra* Def.'s Br. at 11, ECF No. 108.

C. Plaintiffs' Challenge to the Amendments Will Become Moot Only If Defendant Stipulates that They Are Permanently Unenforceable.

As explained *supra* at 10, the parties are engaged in negotiations concerning stipulations to narrow the issues in the case. If Defendant stipulates that the Amendments are permanently unenforceable regardless of the status of the Act, then Plaintiffs will withdraw their claims against the Amendments. Absent such a stipulation, however, the Amendments could be enforceable to the extent that they do not "conflict" with the Act's implementing regulations—possibly to their full extent if the Act is enjoined, and therefore there may be no "conflict" at all. Accordingly, unless and until Defendant stipulates that the Amendments are permanently unenforceable, Plaintiffs' claims against the Amendments are not moot.

Dated: January 24, 2018

Respectfully submitted,

/s/ David Brown

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CERTIFICATE OF SERVICE

I certify that, on the 24th day of January, 2018, a copy of the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ David Brown
David Brown