No. 18-50730

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., doing business as Brookside Women's Health Center and Austin Women's Health Center; LENDOL L. DAVIS, M.D.; ALAMO CITY SURGERY CENTER, P.L.L.C., doing business as Alamo Women's Reproductive Services; WHOLE WOMAN'S HEALTH ALLIANCE; DR. BHAVIK KUMAR,

Plaintiffs - Appellees

v.

CHARLES SMITH, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity

Defendant - Appellant

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
Case No. 1:16-CV-1300-DAE-AWA

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5TH CIR. R. 28.2.1 CERTIFICATE OF INTERESTED PERSONS

(1) No. 18-50730, *WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., doing business as Brookside Women's Health Center and Austin Women's Health Center; LENDOL L. DAVIS, M.D.; ALAMO CITY SURGERY CENTER, P.L.L.C., doing business as Alamo Women's Reproductive Services; WHOLE WOMAN'S HEALTH ALLIANCE; DR. BHAVIK KUMAR; Plaintiffs – Appellees, v. CHARLES SMITH, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity, Defendant – Appellant*.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs/Appellees
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Whole Woman's Health Alliance
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Alamo City Surgery Center PLLC, d/b/a Alamo Women's Reproductive Services
Dr. Lendol L. Davis
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None of the corporate plaintiffs has a parent corporation or has any stock owned by any public corporation.

Defendant/Appellant
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STATEMENT REGARDING ORAL ARGUMENT

The parties agree oral argument is appropriate. This case concerns important questions about constitutional limitations on the State's authority to impose burdens on women seeking abortion and miscarriage treatment, which would benefit from fulsome discussion.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs challenge a set of Texas laws that require women's embryonic and fetal tissue from certain abortion and miscarriage management procedures to be disposed of like human remains—by interment or scattering of ashes—regardless of individual women's beliefs. This imposition violates the Constitution's guarantee of personal liberty to act in accordance with one's own beliefs about developing human life. It also violates decades of Supreme Court precedent forbidding a State from using compulsory, rather than persuasive, means of advancing its interest in potential life.

The District Court correctly found, after a trial on the merits in which it heard from expert and lay witnesses on both sides, that the Challenged Laws will deprive women of dignity by failing to treat them like autonomous moral agents—and in doing so will cause grief, stigma, shame, and distress. Likewise, the District Court correctly found that the Challenged Laws pose a grave threat to women's constitutionally protected access to abortion and miscarriage care because they destabilize healthcare facilities' currently functional waste-disposal system, replacing it with no system at all, threatening Plaintiffs' ability to continue to provide miscarriage and abortion care to their patients.

Further, the District Court correctly held that the Challenged Laws violate the Equal Protection Clause by arbitrarily treating embryonic and fetal tissue differently

depending on the kind of care given to a patient and the kind of facility in possession of the tissue.

For all these reasons, the judgment of the District Court should be affirmed in its entirety.

JURISDICTIONAL STATEMENT

The parties agree that the District Court had subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it arises under 42 U.S.C. § 1983 as a constitutional challenge to state laws; and, further, that this Court has appellate jurisdiction under 28 U.S.C. § 1291 over an appeal from a final judgment of a United States District Court, entered September 5, 2018. The notice of appeal, ROA.636-638, filed the same day, was timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly held that the Challenged Laws, which require burial or scattering of ashes of embryonic and fetal tissue following certain abortions and miscarriages, impose an undue burden on women's liberty in violation of the Fourteenth Amendment's Due Process Clause?

2. Whether the District Court correctly held that the Challenged Laws' arbitrary classifications of embryonic and fetal tissue violate the Fourteenth Amendment's Equal Protection Clause?

STATEMENT OF THE CASE

I. THE CHALLENGED LAWS

Plaintiffs challenge the constitutionality of certain provisions of Chapter 697 of the Texas Health & Safety Code, codified at Tex. Health & Safety Code §§ 697.001-697.004, 697.007-697.009 (the "Act"), and of implementing regulations promulgated thereunder, codified at 25 Tex. Admin. Code §§ 138.1-138.7 (collectively, the "Challenged Laws"). The Challenged Laws' stated purpose "is to express the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.001. In practice, they prevent women who have abortions or miscarriages from disposing of the resulting tissue in accordance with their own religious beliefs and cultural traditions.

A. Scope of the Challenged Laws

The Challenged Laws prescribe methods of treatment and disposition, following certain abortions and miscarriages, of "embryonic and fetal tissue remains" ("EFTR"), defined as "an embryo, a fetus, body parts, or organs from a pregnancy that terminates in the death of the embryo or fetus and for which the issuance of a fetal death certificate is not required by state law." Tex. Health & Safety Code § 697.002(3). EFTR "does not include the umbilical cord, placenta, gestational sac, blood, or bodily fluids." *Id*.

The Challenged Laws only apply to EFTR resulting from an abortion, ectopic

pregnancy, or miscarriage where tissue is passed or removed in a healthcare facility. 25 Tex. Admin. Code § 138.2(13). The Challenged Laws therefore exempt:

- preimplantation embryos, such as those created for possible use in in vitro fertilization, ROA.4795:16-21, 4807:5-17, 5544;
- EFTR passed in connection with a medication abortion or miscarriage occurring outside of a healthcare facility, such as at a woman's home, 25 Tex. Admin. Code § 138.3(c)(5); and,
- EFTR sent to pathology, crime, and research laboratories, ROA.2972.

A healthcare facility that violates the Challenged Laws is subject to suspension or revocation of its license. Tex. Health & Safety Code § 697.007. Any person who violates the Challenged Laws is liable for a civil penalty of $1,000 for each violation. Tex. Health & Safety Code § 697.008.

B. The Challenged Laws Create Two Systems for Medical Waste Disposal

Under Texas law, the treatment and disposition of tissue removed from human bodies during medical care, as well as other medical waste products, such as needles and scalpels, is generally governed by rules for the "treatment[] and disposition of special waste from health care-related facilities." 25 Tex. Admin. Code §§ 1.131-1.137 (the "Special Waste Rules"). Prior to enactment of the Challenged Laws, EFTR was treated by law as special waste. ROA.5067-5068.

The standard practice for treatment and disposition of special waste—in Texas

and nationwide—is incineration followed by deposition in a sanitary landfill. *See* ROA.3994:10-15, 3995:1-4, 4122:7-18, 4332:17-19, 4655:15-20, 4659:9-24. The primary purpose of treating special waste before disposal is decontamination, i.e., to prevent the spread of disease. ROA.4035:22-25, 4659:9-14. To this end, the Special Waste Rules permitted several methods of EFTR treatment, including: incineration; interment (defined to include burial and cremation); grinding; steam disinfection; moist heat disinfection; and chlorine disinfection/maceration. *See* 25 Tex. Admin. Code §§ 1.132(31), 1.136(4). Following treatment, the Special Waste Rules permitted several methods of disposition, including deposition into a sanitary landfill; discharge into a sanitary sewer system; entombment, burial, or placement in a niche; or scattering of ashes. 25 Tex. Admin. Code §§ 1.132(33), 1.136(4). In contrast, the Challenged Laws permit treatment by only three methods—cremation, incineration, and steam disinfection, Tex. Health & Safety Code § 697.004(a); 25 Tex. Admin. Code § 138.5(a)—and disposition by only two: interment, defined as "entombment, burial, or placement in a niche," Tex. Health & Safety Code § 697.002(6); 25 Tex. Admin. Code § 138.2(15); and scattering of ashes, Tex. Health & Safety Code 697.004(a)-(b); 25 Tex. Admin. Code § 138.5(a), (c).

Under the Special Waste Rules, healthcare providers offering abortion and pregnancy-related care could dispose of all their special waste—including EFTR—through a licensed vendor authorized to pick up, transport, treat, and dispose of such

waste. ROA.3305. "A healthcare facility's medical waste vendor collects special waste—both tissue and non-tissue—on a regular basis, incinerates the waste, and disposes of the ash in a sanitary landfill." ROA.3305-06. Providers of abortion and pregnancy-related care must dispose of their EFTR "weekly or every few weeks depending on the facility." ROA.3307.

The Challenged Laws "create a *sui generis* waste category" by carving out EFTR from the Special Waste Rules and "apply[ing] some of the restrictions governing human remains" to EFTR. ROA.3306-07 (citing Tex. Health & Safety Code § 697.003). Thus, to comply with the Challenged Laws, healthcare providers must "separate their medical waste into two streams—special medical waste and [EFTR]," ROA.3312 n.24, and dispose of each under its own set of rules.

The Challenged Laws impose more stringent requirements on disposition of EFTR than are applicable to the disposition of human remains: while Texas law governs how funeral directors, cemeteries, and crematories may dispose of human remains, *see generally* Tex. Health & Safety Code Chs. 711, 716; Tex. Occ. Code Ch. 651, it does not require healthcare providers (or any other person) to dispose of human remains through such licensed professionals or facilities.[1] Moreover, the

[1] Defendant's assertion that the Challenged Laws "exempt[EFTR] from many of the laws governing the disposition of 'human remains,'" App. Br. at 7, is incongruous. Defendant's own witness testified that these laws do not apply to the general public, such as next-of-kin, or healthcare providers. *See* ROA.4854:11-23.

stated purpose of the statutes governing disposition of human remains is to "regulate the disposal, transportation, interment, and disinterment of dead bodies to the extent reasonable and necessary to protect public health and safety"; it nowhere mentions "respect for life." Tex. Health & Safety Code § 694.001; *contra* Tex. Health & Safety Code § 697.001.

C. The Registry and Grant Program

Chapter 697 of the Texas Health & Safety Code directs Defendant to establish and maintain a registry of funeral homes, cemeteries, and nonprofit organizations willing to provide free or low-cost cremation or burial of EFTR or to assist with the cost of burying or cremating EFTR (the "Registry"). Tex. Health & Safety Code § 697.005(1); *see also* 25 Tex. Admin. Code § 138.8. To enroll on the Registry, an entity need only complete a one-page application that requests contact information and asks the applicant to indicate whether it is willing to provide "Free/low cost transportation, burial, or cremation services," "Financial assistance," or "Other." *See, e.g.*, ROA.5423. Defendant's agency, the Health and Human Service Commission ("HHSC") compiles this information into the Registry without verifying it or contacting the enrollees. ROA.3311. Registry information may only be provided to "a physician, a health care facility, or the agent of a physician or health care facility" who requests it using a prescribed form, not to the general public or women who have had abortions or miscarriages. *See* 25 Tex. Admin. Code §

138.8(7).

Chapter 697 further directs Defendant to "develop a grant program that uses private donations to provide financial assistance for the costs associated with disposing of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.006. The grant program is intended to serve healthcare facilities, not individuals, *see* ROA.5439-5444. It has no funding and has not provided any grants. ROA.4833:8-19.

Plaintiffs do not challenge the statutes and regulations concerning the Registry and grant program, which do not impose any legal obligations on Plaintiffs or their patients.

II. PROCEDURAL HISTORY

A. Initial Regulations and Appeal

The State originally attempted to prohibit standard medical disposition of EFTR through rulemaking. Four days after the Supreme Court struck down two Texas abortion restrictions in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Texas Department of State Health Services, now a part of HHSC, published proposed regulations (the "Amendments") aimed at doing so. ROA.5063-5076. Once the Amendments were finalized, Plaintiffs filed this lawsuit challenging their constitutionality. ROA.48-66. The District Court (Sparks, J.) granted a temporary restraining order and, after an evidentiary hearing, a preliminarily

injunction. ROA.1448-1471. Defendant appealed. ROA.1482-1484. While the appeal was pending, Texas passed the Act, which superseded the Amendments; this Court then dismissed the appeal. ROA.1638-1640.

B. Enactment of Challenged Laws and Trial

Plaintiffs filed an Amended Complaint, ROA.1673-1696, and moved for a second preliminary injunction, against enforcement of the Challenged Laws, ROA.1703-1736. The District Court (Ezra, J.) granted the preliminary injunction. ROA.1925-1939.

HHSC published rules implementing the Act, ROA.5115-5123, and later repealed the Amendments, ROA.5124-5128.

The parties agreed to an expedited discovery schedule. ROA.1944-1948. The District Court held a five-day bench trial and heard testimony from nineteen witnesses. ROA.3277, 3917, 4144, 4402, 4616, 4862.

C. The District Court's Decision

The District Court issued a memorandum opinion finding the Challenged Laws violate the Due Process and Equal Protection clauses of the Fourteenth Amendment and permanently enjoining Defendant from enforcing the Challenged Laws. ROA.3328. In reaching its findings of fact and conclusions of law, the District Court carefully considered "the trial testimony and its credibility, the exhibits, arguments by counsel, post-trial briefing, the governing law, and the file as a whole."

ROA.3277-3278. The District Court concluded that the Challenged Laws "endors[e] one view of the status and respect to be accorded [EFTR]" and threaten healthcare facilities' ability to provide pregnancy-related care, but offer "minimal" benefits. ROA.3328-3329. It further concluded that they irrationally distinguish between pre-implantation and post-implantation embryos and the facilities that handle them. ROA.3328. Defendant appeals from this permanent injunction. ROA.3331-3333.

III. KEY RECORD EVIDENCE

A. Abortion and Miscarriage Care

In Texas, an abortion must be provided at a licensed healthcare facility. Tex. Health & Safety Code §§ 171.004, 245.003, 245.004. An abortion may be either a "medication abortion," in which a physician gives the patient medication in the facility and additional medication to take at home later to complete the abortion, or a "surgical abortion," which is generally performed as an outpatient procedure at the facility. ROA.3278. *See also* ROA.3978:24-3979:16, 4127:19-4130:8.

A miscarriage, or spontaneous abortion, is the spontaneous loss of a pregnancy before viability, and may also require treatment in a healthcare facility, ROA.3278, often with a procedure called dilation and curettage ("D&C"), *see* ROA.4665:2-5.

The District Court found that, "[e]ach year, there are approximately 80,000 miscarriages and 55,000 induced abortions in Texas," ROA.3278, and that "[t]he

vast majority of abortions and miscarriages occur in the embryonic stage of pregnancy, which runs from fertilization to approximately eight to ten weeks into the pregnancy." ROA.3279. At approximately eleven weeks since a woman's last menstrual period, an embryo becomes a fetus. *Id.*

B. People Hold Diverse Beliefs About the Status of Developing Human Life and the Dignified Disposition of EFTR

The District Court found that "people hold diverse beliefs about the status of developing human life," including "the point at which an embryo or fetus takes on a special status." ROA.3314. *See also* ROA.4087:10-22, 4297:21-24, 4434:7-22. These views shape people's perspectives about abortion and pregnancy loss and, in turn, how to dispose of tissue. ROA.3315.

The District Court found that individuals' diverse views about the status of embryos and fetuses are informed by many factors, including "religion, science, culture, and personal experience." ROA.3314. *See also* ROA.4297:9-20. "For some people, the point at which an embryo or fetus takes on a special status depends on physical benchmarks, such as fertilization, quickening, viability, or birth." ROA.3314-3315. *See also* ROA.4218:6-4219:18, 4243:1-15, 4434:10-22. "Others point to spiritual benchmarks, such as ensoulment." ROA.3314. *See also* ROA.4266:19-4267:7, 4268:5-12, 4298:6-4300:6, 4434:7-22. These benchmarks vary both among and within religious traditions. ROA.3315. *See also* ROA.4256:14-25, 4299:21-4300:16, 4302:6-18.

The District Court also found these views differ "depending on . . . whether the pregnancy is viable or nonviable, wanted or unwanted, intended or unintended," ROA.3315. *See also, e.g.*, ROA.4281:8-4282:5, 4339:15-21, 4663:7-19. Many people's beliefs about developing human life are also shaped by personal experiences, including with past miscarriages, abortions, or sexual assaults. ROA. 4304:2-12, 4307:10-18. *See also* ROA.4087:10-4088:14; 4281:8-4282:5.

It is uncontested that these diverse beliefs, integral to people's identities, shape individuals' decisions about abortion and pregnancy loss. *See* ROA.4304:2-12, 4307:10-19. The District Court found that these differing perspectives "shape attitudes and beliefs about how [EFTR] should be treated and disposed"—a finding supported, among other evidence, by "the parties present[ing] substantially contradicting testimony that predictably reached opposing conclusions regarding the nature of embryos and fetuses as well as the meaning of abortion and pregnancy loss. . . ." ROA.3314-3315. *See also, e.g.*, ROA.4087:10-4088:16, 4263:11-13, 4266:19-4267:7, 4268:5-12, 4310:14-4311:13, 4313:1-12, 4434:23-4435:10, 4441:11-4442:16.

The record shows that some people who have abortions or miscarriages act on a belief that their embryonic or fetal tissue should be treated in a manner typically associated with human remains—i.e., burial or cremation. ROA.3987:2-3988:8, 4000:11-20, 4122:25-4123:4, 4310:21-24, 4356:22-4357:11, 4482:5-9, 4660:2-8,

5319-5321, 5324, 5336. This is rare and most often occurs when the pregnancy ends at an advanced stage. ROA.3987:2-3988:8, 4000:11-20; 4663:4-19. Uncontested evidence shows that most people miscarrying or passing tissue from a medication abortion at home choose to dispose of EFTR in a sanitary sewer. ROA.4356:3-7, 4660:9-24. They do not consider this disrespectful. ROA.4356:3-14, 4660:25-4661:9.

Uncontested evidence also shows that patient questions about EFTR disposition are rare and patients generally assume their EFTR will be handled in accordance with standard medical practices, which they do not view as disrespectful or undignified. *See* ROA.4091:10-17, 4282:2-5, 4483:19-4484:11. This does not mean, however, that patients are indifferent to disposition methods. Dr. Swenson, a Texas OB/GYN, testified that although most of her patients "don't ask about" EFTR disposition, ROA.4662:3-5, many objected to a hospital policy requiring burial of EFTR when they learned about it, ROA.4664:15-24. Ms. Norton, who sought treatment for a miscarriage at that hospital, testified that she had not asked about EFTR disposition in advance because she assumed "it would be handled like other postsurgical tissue." ROA.4091:15-17. Upon learning that it would be interred, she was "shocked and upset and confused." ROA.4086:22.

C. The Challenged Laws Harm Individuals Whose Beliefs Differ from the State's

Prior Texas law "allowed healthcare providers to accommodate patients who

expressed a desire for a particular disposition so long as [it] complied with the State's public health and safety rules." ROA. 3315.

In contrast, the District Court found that the Challenged Laws "endorse[] the viewpoint that embryonic and fetal tissue remains should be afforded special status from the moment of conception and should be handled in a manner similar to human remains." ROA.3314 (citing ROA.4311:9-13). *See also* ROA.4441:11-4442:16. It explained that "[s]uch a viewpoint communicates strong implications about when life begins and the meaning of a miscarriage or abortion." ROA.3315. The District Court properly concluded, based on the entire record, that this "impose[s] intrusive and heavy burdens on women whose beliefs about the status of embryonic and fetal tissue and the meaning of abortion or miscarriage diverge from the viewpoint endorsed by the State." ROA.3314.

The District Court further found that women who do not believe that EFTR constitutes human remains—or has special status—will nevertheless "be required to accept the State's prescribed methods of disposition as a condition of obtaining pregnancy-related health care." ROA.3316. This undermines their autonomy and capacity to make moral decisions for themselves. ROA.4089:12-17, 4422:3-16, 4445:10-17, 4678:24-4679:3. *See also* ROA.4311:9-13, 4313:4-12. It also denies women the dignity and respect due to them as individuals capable of making and acting on moral choices. ROA.4419:22-4420:22, 4441:11-4442:16, 4444:21-

4445:17, 4674:20-25; *see also* ROA.4089:21-4090:21 ("this idea that my pregnancy loss was needing to be treated as a separate and distinct fully formed human being, and that the hospital's definition of what was allowed to happen . . . was dictating what the limited options were. . . . [I]t didn't really leave me with a whole lot of free will at that point.").

This treatment of women is a departure from healthcare norms. Both sides' experts agreed that prevailing norms of medical ethics permit healthcare providers to circumscribe patients' decision-making abilities for valid medical reasons but not to impose their own or someone else's moral values. ROA.4252:1-6, 4444:21-17. Defendant's own expert thus testified that allowing disposition of EFTR as medical waste is ethically preferable to forbidding it. ROA.4266:9-13.

By depriving patients of their moral agency, the Challenged Laws violate patients' dignity, and shame and stigmatize them. ROA.4090:8-15. The District Court found "that when a woman disagrees with how her embryonic and fetal tissue remains will be disposed, she experiences a greater amount of grief, stigma, shame and distress." ROA.3316. *Accord* ROA.4416:13-21 (depriving patients of moral agency is likely to cause "grief, confusion, moral anxiety, [and] moral distress.").

The District Court's finding is supported by testimony in the record. For example, Ms. Norton testified that when the hospital required her to inter EFTR after her miscarriage procedure over her objection, she felt shamed and stigmatized for

her beliefs, like "I was doing something that they believed to be wrong and that somebody needed to correct me." ROA.4090:14-15; *accord* ROA.4090:24-4091:7. She described how this worsened her grieving and interfered with her healing process. ROA.4089:8-17, 4090:8-21.[2] Likewise, Dr. Swenson testified that her patients objected "frequently enough" to a hospital policy requiring interment of EFTR, *see* ROA.4664:15-24, that her practice group moved its miscarriage management procedures to a different hospital, ROA.4670:8-13.

The District Court found that the Challenged Laws create "dangerous" disincentives for women to seek miscarriage management or abortion care in Texas. *See* ROA.3318. *See also, e.g.*, ROA.4092:14-17, 4104:12-13, 4135:3-18, 4288:13-18 (describing leaving Texas to seek abortion care due to burdensome in-state restrictions), 4670:11-13. The record shows that some women may be dissuaded from choosing surgical abortion even if that is the best method of abortion for them, or they may refrain from returning to a clinic to treat medication abortion complications. ROA.4130:15-4131:5, 4131:16-4133:17. Some women may face

[2] Ms. Norton also testified that "part of how I was coming to terms with it through conversations with my doctor, . . . was through this understanding that . . . whatever brief life had existed in me was not compatible with life outside of my womb, and that it had never had the full potential to become a life beyond those short weeks;" and that "it felt like a pregnancy, not a separate and distinct person." ROA.4087:10-22. She testified that this "incongruen[ce]" between her beliefs and the disposal policy disrupted her ability to cope with the grief she experienced as a result of her miscarriage. ROA.4089:12-17.

delays and increased risks from seeking care out-of-state. ROA.4137:9-11, 4138:5-12. And some women may take matters into their own hands. ROA.3318 ("Women . . . who do not believe [EFTR] should be afforded special status from the moment of conception might well seek an abortion outside of healthcare facilities and the doctor-patient relationship.") (citing ROA.4135:3-18).

D. The Challenged Laws Threaten the Availability of Abortion and Miscarriage Care

1. The Challenged Laws destabilize healthcare facilities' currently functional waste-disposal system

The District Court found that "[c]urrently, women's healthcare providers in Texas have a functional system for disposing of their special medical waste through a licensed medical waste vendor." ROA.3305. *See also* ROA.4034:22-4035:8, 4365:9-18, 4496:15-16, 4655:7-4656:2. The District Court also found that this system will not be replaced by "a new industry or waste disposal mechanism . . . to accommodate the disposal of [EFTR] as required by the challenged laws," and further that the funeral industry is not "prepared to accommodate disposal of the *sui generis* category of [EFTR]," as funeral homes "provid[e] individualized care and cater[] to grieving families" and are not designed to serve thousands of healthcare facility patients. ROA.3307-3308; *accord* ROA.3309, 3312. *See also* ROA.2790:16:5-16:7, 2799:49:21-50:25, 2801.59:13-59:15, 4567:24-4568:2, 4634:21-4635:1, 4635:13-16. Funeral homes are also unable to satisfy the

Challenged Laws' required *disposition* methods, as they do not scatter ashes or inter remains. ROA.3308; Tex. Health & Safety Code § 697.004(b)(1). Rather, they only offer *treatment* options. ROA.3308. *See also* ROA.2809.92:1-6, 4576:20-4577:1. Indeed, funeral homes "don't dispose of ashes[; t]hey're required by law to give them back to the family." ROA.4850:14-15; *accord* ROA.2797:42:22-43:3. Funeral homes, crematoriums, and cemeteries are generally not licensed to handle special waste in compliance with the Special Waste Rules, *e.g.*, ROA.2791:17:4-17:9, 2791:17:20-18:1, 2801:58:9-58:25, 4783:13-19, so they cannot replace healthcare providers' existing medical waste vendors, *see supra* at 6. The District Court concluded that "reliable and viable options for disposing of [EFTR] in compliance with the challenged laws do not exist." ROA.3307.

2. Neither the Registry nor the state's Catholic cemeteries are an adequate substitute for medical waste vendors

The District Court also found that the Registry does not mitigate the practical burdens imposed by the Challenged Laws. It determined the Registry "provides no reliable information" about registrants' ability or capacity to satisfy the Challenged Laws' requirements. ROA.3311. HHSC does not require that enrolled entities provide services that permit compliance with the Challenged Laws, nor services of any minimum quantity; nor has it undertaken any efforts to vet Registry applicants or verify the accuracy of the information provided in their applications. ROA.3311; *see also* ROA. 4518:2-4519:24, 4566:7-4567:2, 4809:5-4810:12, 4811:2-8, 5423.

Additionally, the District Court found every cemetery on the Registry is Catholic, ROA.3311, and opposed to abortion, ROA.3309.[3] The District Court further found that forcing women to accept prescribed methods of disposal they disagree with "as a condition of obtaining pregnancy-related health care" increases "grief, stigma, shame, and distress." ROA.3316. Patients who do not share these cemeteries' beliefs regarding the status of EFTR would object to having their EFTR interred in accordance with them. *See* ROA.3316-3318. *See also* ROA.4088:15-4089.17. The District Court also found that the State's "reliance on Catholic-affiliated Cemeteries . . . is problematic because it raises the specter of Establishment and Freedom of Religion Clause concerns." ROA.3309 n.21. The District Court also found that there is evidence that burial sites at the Registry cemeteries "will be marked with Catholic religious symbols and will be visited by religious services." ROA. 3309-10 n.21. The District Court thus found that reliance on Registry cemeteries "is not a viable option because of dependability and feasibility concerns." ROA.3311.

3. The disruption and uncertainty created by the Challenged Laws threaten healthcare facilities' ability to continue to provide care

The District Court found that the Challenged Laws' prohibition on the use of

[3] Further, there are only twelve cemeteries on the Registry. Large parts of Texas, including McAllen and Fort Worth, where Plaintiffs operate clinics, do not have a Registry cemetery nearby. ROA.4812:14-18, 5615.

standard disposal methods for EFTR, *see supra* at 5, threatens the continued availability of reproductive healthcare. ROA.3313-3314, 3328-3329. *See also* ROA.4036:17-19, 4335:24-25, 4367:10-11, 4393:4-16, 4489:9-16. In the recent past, laws requiring abortion facilities to work with third parties have caused clinic closures when the required relationships could not be maintained. ROA.3305 n.18. *See also* ROA.4031:12-19 (H.B. 2's admitting-privileges requirement "serve[d] as a way to shutter the clinic facility"), 4325:23-4326:6.[4] At minimum, the time and effort required of healthcare facilities to maintain two waste disposal systems is time and effort diverted from patient care, which will reduce clinics' capacity to serve patients. *See* ROA.4031:4-11, 4371:11-13, 4489:1-16; *see also* ROA.4424:18-4425:10. The Challenged Laws also threaten the system for disposal of special waste from women's healthcare providers because vendors "may be unwilling or economically unable to provide disposal services for a reduced volume of special waste," ROA.3312 n.24; and increase the potential for error and complication,

[4] Plaintiffs all share a single medical waste vendor, which they identified after a months-long, trial-and-error process as the only one willing and able to work with Texas abortion providers. ROA.3306. *See also* ROA.4032:8-23, 4035:14-19, 4036:10-4037:5, 4044:17-4045:8, 4052:16-4053:5, 4336:1-4, 4366:4-5, 4371:11-13, 4479:14-17. In the District Court's words, "third-party relationships feature a particular vulnerability for healthcare facilities that offer abortion services," and their relationships with waste disposal vendors are already "precarious at best." ROA.3305-3306. During the time Plaintiffs were seeking this vendor, several of their clinics came close to suspending services due to the inability to dispose of special waste. ROA.3306. *See also* ROA.4036:17-19, 4334:6-4335:25.

ROA.4673:10-20—all with no offsetting benefit.

In sum, the evidentiary record "overwhelmingly demonstrate[s]" that the Challenged Laws "would likely cause a near catastrophic failure of the healthcare system designed to serve women of childbearing age within the State of Texas." ROA.3328. This would "further constrain access to abortion in a state where access . . . has already been dramatically curtailed." ROA.3314.

SUMMARY OF ARGUMENT

The District Court's conclusion that Plaintiffs have standing is well supported by controlling precedent.

The District Court correctly concluded that the Challenged Laws violate the Fourteenth Amendment's Due Process Clause. An individual's "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" forbids the State from imposing its own beliefs about unborn life on her. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992). Infringements of this right are subject to review under the undue burden standard. *See infra* at 29. A law fails this standard if it fails to advance a legitimate state interest by permissible means. *See infra* at 29. Likewise, a law fails the undue burden standard if it imposes burdens on liberty that exceed its benefits. *See id.*

The Challenged Laws fail the undue burden test in both ways. First, they fail to advance a valid state interest through legitimate means. *See infra* at 33-34.

Although the State has a valid interest in promoting potential life, it does not have a valid interest in elevating one set of beliefs about developing human life over others. *See infra* at 36-40. Second, the Challenged Laws impose burdens that exceed their benefits. On one hand, they burden women's freedom of belief; impose grief, stigma, shame, and distress on abortion and miscarriage patients whose beliefs differ from the State's; and threaten loss of access to abortion and miscarriage care. *See infra* at 42-44. On the other, the Challenged Laws provide minimal, if any, benefit because they are substantially underinclusive; embody an arbitrary concept of dignity; and fail to provide information or resources to women. *See infra* at 44-47.

In addition, the District Court correctly concluded that the Challenged Laws violate the Fourteenth Amendment's Equal Protection Clause. *See infra* at 50-53. Defying that provision's command to treat similarly situated persons alike, the Challenged Laws arbitrarily burden only a subset of people with EFTR requiring disposition: they exempt pre-implantation embryos, such as embryos created in connection with *in vitro* fertilization; and EFTR sent to laboratories, such as pathology, crime, and research laboratories. As a result, the Challenged Laws apply only to women who have surgical abortions or miscarriage management procedures and are not eligible to send their EFTR to a laboratory, and only to healthcare providers who treat such women, while exempting others needing to dispose of EFTR after medical care. *See infra* at 51.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews decisions to grant a permanent injunction for abuse of discretion. *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 248 (5th Cir. 2018). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *In re Deepwater Horizon*, 907 F.3d 232, 234 (5th Cir. 2018). "[T]his court reviews conclusions of law *de novo* and findings of fact for clear error." *Ransom v. M. Patel Enters., Inc*., 734 F.3d 377, 381 (5th Cir. 2013).

"[I]t is not proper for this court to retry factual issues where there is evidence to sustain the findings below." *Hallberg v. Hilburn*, 434 F.2d 90, 91 (5th Cir. 1970). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). "The clearly erroneous standard of review following a bench trial requires even 'greater deference to the trial court's findings when they are based upon determinations of credibility.'" *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015) (quoting *Anderson*, 470 U.S. at 574, and citing Fed. R. Civ. P. 52(a)(6)). The "trial judge's credibility determinations are due this extra deference because only he can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of

and belief in what is said." *Id.* "When reviewing a district court's factual findings [in a bench trial], this court may not second-guess the district court's resolution of conflicting testimony or its choice of which experts to believe." *Grilletta v. Lexington Ins. Co.*, 558 F.3d 359, 365 (5th Cir. 2009).

As reviewed in detail *supra* at 9-21, the District Court's factual findings are based on a detailed review of the evidence, heavily cited to the record. Disregarding the proper standard of review, Defendant seeks reversal of every factual finding by the District Court in this case regarding the burdens imposed by the Challenged Laws. *See, e.g.*, Br. for Appellant ("App. Br.") at 33, 37. Defendant's brief reveals why clear error review applies and why his request is improper. For example, Defendant asks this Court to adopt the testimony of one of his witnesses, Ms. Allmon, as fact. App. Br. 13. However, Defendant fails to mention that the District Court found that she lacked credibility. ROA.3310. Similarly, although the District Court credited "evidence that the burial sites [at Catholic cemeteries] will be marked with Catholic religious symbols and will be visited by religious services," ROA.3310 n.21, Defendant asks this Court to credit contrary witness testimony, App. Br. at 12, without mentioning that it was riddled with inconsistencies, *see* ROA.3310-11 n.21; *see also* ROA.4510:11-25, 4512:9-4513:6, 4519:24-4520:24, 5458-59. Likewise, the District Court cited witnesses from both sides to conclude that "dignity" is too subjective a value to be achieved through the Challenged Laws'

fiat, ROA.3302-3304, but Defendant requests reversal of this finding based solely on the testimony of "[t]he State's bioethics experts," App. Br. at 15, without mentioning the witnesses' "substantially contradicting testimony,"—including the State's experts' disagreements with each other, *see supra* at 12, 15.

The Court may disturb a District Court's factual findings only if the appellant demonstrates that they are clearly erroneous. Appellant has not met that standard, and his request should be denied.

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS HAVE STANDING

The District Court correctly held that Plaintiffs satisfy the requirements for standing. ROA.3291.

Defendant's contention that Plaintiffs fail to satisfy the prudential requirements for third-party standing to assert the rights of their patients ignores decades of controlling precedent. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality opinion); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014), *abrogated on other grounds*, *Whole Woman's Health*, 136 S. Ct. 2292 (2016). In *Abbott*, this Court held that physicians had third-party standing to challenge, on behalf of their abortion patients, a requirement that abortion providers maintain hospital admitting privileges. *See* 748 F.3d at 589. It explained that:

> [T]he requirements for third-party standing are met in relation to the claims asserted by the physician-plaintiffs on behalf of their patients because (1) the physicians face potential administrative and criminal penalties for failing to comply with H.B. 2, (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 now bringing a lawsuit to fruition.

Id. (footnotes omitted).

The physician Plaintiffs here have standing to assert claims on behalf of their patients for the same reasons: (1) Plaintiffs face potential liability for failing to comply with the Challenged Laws; (2) doctors who perform abortions and miscarriage management procedures share a sufficiently close relationship with their patients; and (3) pregnant women face obvious hindrances to bringing their own lawsuits against the Challenged Laws, including the short timeframe available for obtaining abortion or miscarriage management care and the desire to maintain the confidentiality of their pregnancy status and medical history. *See* Tex. Health & Safety Code §§ 697.007–697.008; *see also Singleton*, 428 U.S. at 117-18; *Abbott*, 748 F.3d at 589; ROA.3291-3292. Defendant's erroneous assertion that there is a "lack of evidence" concerning the burdens that the Challenged Laws impose on women seeking abortion and miscarriage management care, App. Br. at 25, goes to the merits of Plaintiffs' undue burden claims, not their standing to bring the claims.

Although the Plaintiff healthcare facilities also satisfy the requirements for third-party standing, the Court need not consider their standing because their claims

are congruent with the claims asserted by the physician Plaintiffs. It is well settled that, where one plaintiff has standing to assert a claim for relief, a federal court need not consider the standing of other plaintiffs asserting the same claim. *See, e.g.*, *Carey v. Population Servs., Int'l*, 431 U.S. 678, 682 (1977) ("We conclude that appellee Population Planning Associates, Inc. (PPA) has the requisite standing and therefore have no occasion to decide the standing of the other appellees."); *Abbott*, 748 F.3d at 589 ("Because 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.") (footnotes omitted).

Nevertheless, Defendant's contention that "Whole Woman's Health, LLC," lacks standing, App. Br. at 25-26, is inapposite because "Whole Woman's Health, LLC," is not a named Plaintiff in this case. Rather, "Whole Woman's Health" is the named Plaintiff. The record establishes that Plaintiff Whole Woman's Health is a consortium of limited liability companies, owned by a common holding company, that specializes in providing reproductive healthcare. ROA.133, 3963:23-3964:19, 4078:22-4079:7. The companies in the consortium include Whole Woman's Health of Fort Worth, LLC, and Whole Woman's Health of McAllen, LLC, both of which operate licensed abortion facilities that provide medical care directly to patients. *See* ROA.133, 3963:24-3964:6, 3965:12-18, 4111:17-4112:2, 4113:14-17.

Accordingly, Defendant's standing arguments provide no basis for reversing the District Court's judgment.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CHALLENGED LAWS VIOLATE THE DUE PROCESS CLAUSE

A. The Right to Abortion is Part of a Broader Right to Act in Accordance with One's Personal Beliefs about Developing Human Life

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. The Due Process Clause of the Fourteenth Amendment protects that personal liberty from encroachment by the states. *See id.* at 846-47.

In an unbroken line of precedent spanning nearly five decades, the Supreme Court has held that a woman's right to end a pregnancy is a fundamental component of the liberty protected by the Due Process Clause. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2309-10; *Lawrence v. Texas*, 539 U.S. 558, 565, 573-74 (2003); *Casey*, 505 U.S. at 851-53; *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). The liberty interests at stake encompass not merely the right to obtain an abortion procedure, 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." *Casey*, 505 U.S. at 851. The Supreme Court has explained that "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.*

B. The Challenged Laws Are Subject to the Undue Burden Standard

Laws that infringe on this right are subject to the undue burden standard set forth in *Casey*. Pursuant to that standard, a law is unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The Supreme Court recently clarified in *Whole Woman's Health* that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309.

The undue burden standard requires a court to determine whether a law serves a valid state interest through permissible means. *See Casey*, 505 U.S. at 877; ROA.3294 ("[A] law that does not further a legitimate or valid state interest fails the undue burden test."). If it does, the court must "weigh the asserted benefits against the burdens" the law imposes to determine whether the burdens are undue. *Whole Woman's Health*, 136 S. Ct. at 2310; *see also* ROA.3291.[5]

[5] The undue burden standard is a form of heightened scrutiny, not rational basis scrutiny. *See Whole Woman's Health*, 136 S. Ct. at 2309-10. Accordingly, while Plaintiffs have the ultimate burden of proving a law's unconstitutionality, the State bears the burden of proving that the Challenged Laws actually advance a valid state interest through permissible means. *See Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1056-57 (E.D. Ark. 2017) ("Generally, the state has the burden of demonstrating a link between the legislation it enacts and what it contends are the state's interests."), *amended by*, No. 4:17-cv-404-KGB, 2017 WL 6946638 (E.D. Ark. Aug. 2, 2017), *appeal filed*, No. 17-2879 (8th Cir. Aug. 28, 2017); *see also Whole Woman's Health*, 136 S. Ct. at 2311 ("We have found nothing in Texas' record evidence that shows

Defendant erroneously argues that this Court's recent decision in *June Medical Services L.L.C. v. Gee*, 905 F.3d 787, 803 (5th Cir. 2018) adds an extra step to the analysis, requiring a court first to apply a "substantial obstacle" test independent of any consideration of a law's benefits and then, only if that test is satisfied, to apply a separate balancing test.[6] That approach was explicitly rejected in *Whole Woman's Health*, which clarified that *Casey*'s substantial obstacle test *itself* requires that courts "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *See* 136 S. Ct. at 2309; *accord June Medical*, 905 F.3d at 803 ("Thus, we must weigh the benefits and burdens of [the challenged law] to determine whether it places a substantial obstacle in the path of a large fraction of women seeking abortions in Louisiana."). *Casey* equates the term "undue burden" with the term "substantial obstacle"; it does not establish two tests. 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

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that, compared to prior law . . . the new law advanced Texas' legitimate interest in protecting women's health.").

[6] Defendant's reliance on *June Medical* is premature because the mandate has not yet issued. The plaintiffs filed a petition for rehearing *en banc*, *Pet. for Reh'g En Banc, June Medical Services L.L.C. v. Gee*, No. 17-30397, Dkt. No. 00514671595 (5th Cir. Oct. 5, 2018), and this Court ordered a response, *Appellant Dr. Rebekah Gee's Resp. to Pet. for Reh'g En Banc, June Medical Services L.L.C. v. Gee*, No. 17-30397, Dkt. No. 00514711070 (5th Cir. Nov. 5, 2018). The petition remains pending.

the path of a woman seeking an abortion of a nonviable fetus."). *June Medical* simply held that a "minimal" burden on a woman's liberty is insufficient to invalidate a law that serves a valid state interest through permissible means. 905 F.3d at 803 ("A minimal burden . . . does not undermine the right to abortion.").

Defendant also misapprehends the scope of the undue burden standard, arguing it does not apply to women seeking miscarriage treatment. App. Br. 28 n.7. The Due Process Clause limits a state's power to burden women seeking treatment for miscarriage to at least the same degree as it limits a state's power to burden women seeking abortion. *See Casey*, 505 U.S. at 857 ("*Roe* . . . may be seen . . . as 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. . ."); *see also id.* at 851 ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."); *id*. at 898 (noting the same considerations limiting the State's power to regulate abortion also apply to contraception, surgery on reproductive organs, and limitations on pregnant women's conduct). The cases cited by Defendant are inapposite. One declines to recognize a general right to health, *see Cooper Hosp. / Univ. Med. Ctr. v. Burwell*, 179 F. Supp. 3d 31, 46-47 (D.D.C. 2016), *aff'd sub nom. Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App'x 11 (D.C. Cir. 2017), and the others decline to recognize a right to

access experimental treatments or alternative providers, *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 697, 711 (D.C. Cir. 2007) (*en banc*); *Mitchell v. Clayton*, 995 F.2d 772, 775-76 (7th Cir. 1993). In the miscarriage context, where considerations of personal liberty and bodily integrity are present but no countervailing interest in potential life is implicated, government intrusions on care should be subject to review at least as searching as the undue burden standard.

C. The Challenged Laws Impose an Undue Burden

Because the Challenged Laws fail to use permissible means to advance the state's potential life interest, and ultimately fail to advance any valid interest at all, they are unconstitutional. Although the State has a valid interest in promoting potential life, it does not have a valid interest in imposing one set of beliefs about developing human life over all others, as the Challenged Laws do. Alternatively, even if the Challenged Laws do serve a valid state interest through permissible means, they fail to do so to an extent sufficient to justify the burdens that they impose.

1. The Challenged Laws use impermissible means to serve the State's interest in potential life

The Supreme Court has held that "there is a substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876; *accord Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007). That interest permits, within limits,

"regulating the medical profession in order to promote respect for life, including life of the unborn." *Id.* at 158. Notably, *Casey* held that "the means chosen by the State to further the interest in potential life *must be calculated to inform* the woman's free choice." 505 U.S. at 877 (emphasis added). It further explained that, "[t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated *as long as their purpose is to persuade* the woman to choose childbirth over abortion." *Id.* at 878 (emphasis added).

Thus, the State may advance its interest in potential life through means that seek to inform or persuade a woman, but not through means that coerce or hinder her. *See id*. at 877. The former respect a woman's dignity by treating her as an autonomous moral agent; the latter undermine it by denying her the ability to act in accordance with her own beliefs. This limitation is central to the undue burden standard, which the Supreme Court developed as a "means of reconciling the State's interest with the woman's constitutionally protected liberty." *Casey*, 505 U.S. at 876. In so doing, it struck a careful balance, seeking to ensure, on one hand, that "[not] all governmental attempts to influence a woman's decision on behalf of the potential life within her [are treated] as unwarranted," *id.*, and on the other, that "[t]he destiny of the woman [is] shaped to a large extent on her own conception of her spiritual imperatives and her place in society," *id.* at 852. *See generally*, *Gonzales*, 550 U.S.

at 146 ("*Casey*, in short, struck a balance.").

The Challenged Laws have no informational or persuasive component, as the District Court found. ROA.3304. They do not present a woman with options for EFTR disposition, nor with information that might persuade her to choose burial or cremation instead of a medical disposition. Indeed, Defendant stipulated that the Challenged Laws do not require healthcare facilities to make any disclosures to patients about EFTR disposition. ROA.2972. The Challenged Laws do not even authorize Defendant to share the Registry with patients. *See supra* at 7-8. The Challenged Laws simply require that EFTR be disposed of in a manner associated with human remains, regardless of a patient's beliefs or preferences.

Because the Challenged Laws have no informational or persuasive component, they do not advance the State's interest in potential life through permissible means.

2. The Challenged Laws fail to actually advance the State's interest in potential life

The Challenged Laws are not rationally related to the State's interest in potential life because they regulate conduct that occurs only after potential life has been extinguished. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State*

Dep't of Health, 888 F.3d 300, 308 (7th Cir. 2018) ("*PPINK*");[7] *Hopkins*, 267 F. Supp. 3d at 1105; ROA.1463.[8]

Gonzales made clear that the State's interest in promoting respect for life derives from its broader interest in protecting potential life. There, as here, the purpose of the challenged statute was to "express[] respect for the dignity of human life." 550 U.S. at 157; *accord* Tex. Health & Safety Code § 697.001. The Court described the interests it served as "show[ing] [the government's] profound respect for the *life within the woman*," *Gonzales*, 550 U.S. at 157 (emphasis added), and "protecting the life of the fetus *that may become a child*," *id*. at 158 (emphasis added). Thus, the State is correct that its "interest in respect for life" derives from its

[7] The *PPINK* plaintiffs sought only rational basis review of a law similar to the Challenged Laws. 888 F.3d at 307. In an opinion concurring in the vacatur of an order granting rehearing *en banc*, three judges of the Seventh Circuit criticized the plaintiffs' "strategic litigation choice," asserting that it "was probably incorrect." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 17-3163, 2018 WL 3655854 at *2 (7th Cir., Jun. 25, 2018). In their view, the "case involve[d] a fundamental right: the woman's right to decide whether to carry a child (or, put negatively, whether to have an abortion)." *Id.* Nevertheless, even under this deferential standard, the Court of Appeals struck down the law. *PPINK*, 888 F.3d at 309-310.

[8] The parties agree that *City of Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 451-52 (1983), striking down a statute requiring "humane and sanitary" disposition as unconstitutionally vague, does not control here. However, Defendant mischaracterizes *Akron*'s dicta. *Akron* did not "indicate" that regulation of EFTR to further an interest in respect for unborn life is "permissible." *Contra* App. Br. at 29. It acknowledged only that regulation of EFTR may serve a legitimate state interest in public health. *See Akron*, 462 U.S. at 451 & n.45.

"interest in potential life *throughout pregnancy*." App. Br. at 29 (quoting *Gonzales*, 550 U.S. at 157, *and Casey*, 505 U.S. at 876) (emphasis added). The State's interest in expressing respect for embryonic and fetal life cannot be divorced from its interest in protecting potential life. *See Roe*, 410 U.S. at 150 ("[A]s long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."). Because the Challenged Laws apply only once the potential for life is extinguished, they fail to advance the State's interest in potential life.[9]

3. The State does not have a valid interest in elevating one set of beliefs about developing human life over others

The District Court correctly held that "a state does not have a valid interest in taking sides in a religious debate or prescribing a moral code." ROA.3299 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."); *Lawrence*, 539 U.S. at 577; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); and *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008)). *See also, e.g.*, *Casey*, 505 U.S. at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code."); *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional

[9] Defendant's extensive discussion of *Gonzales* ignores that it concerned a law banning a method for aborting a "living fetus," which had no application after fetal demise. 550 U.S. at 164.

constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) ("[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.").

Witnesses on both sides agreed that individuals hold widely divergent beliefs about the status of developing human life that are informed by religion, science, culture, and personal experience. *See supra* at 11-12; *accord Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."); *Roe*, 410 U.S. at 159 ("[T]hose trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" on "the difficult question of when life begins."). Yet the Challenged Laws endorse the belief that EFTR has a special status that should prevent it from being disposed of as medical tissue. ROA.3315. *Accord PPINK*, 888 F.3d at 308 ("Such a position inherently requires a recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs."). *See also* ROA.4311:5-13. Defendant admits that the Challenged Laws equate the remains of an embryo or fetus after a miscarriage or abortion with a dead person. *E.g.*, App. Br. at 33 ("[R]espect for fetal life after death is consistent with cultural norms of paying

respect to bodies after an individual has died."). The Challenged Laws thus impermissibly elevate one set of beliefs about the status of developing of human life over all others. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("The Colorado court's [reasoning] elevates one view of what is offensive over another and . . . sends a signal of official disapproval of [the plaintiff's] religious beliefs.").

The District Court correctly concluded that the State has no legitimate interest in privileging one set of beliefs about developing human life over others. ROA.3299. Thus, the Challenged Laws do not further any legitimate interest by endorsing the State's view. *See PPINK*, 888 F.3d at 308 ("[T]he State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate."); *Margaret S. v. Edwards*, 488 F. Supp. 181, 222 (E.D. La. 1980) (holding that the challenged statute "impermissibly raise[d] the status of a fetus to that of a human being by using language equating fetal remains with human remains," despite the Supreme Court's holding that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). *Cf. Roe*, 410 U.S. at 162 ("[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant women that are at stake."); *Feminist Women's Health Ctr., Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1089-92 (Cal. Ct. App. 1984) (holding

that a government official's transfer of fetal tissue to a Catholic organization for burial served no secular purpose).[10]

The State urges that the Challenged Laws are permissible morals regulations. *See* App. Br. at 31-32. But the Supreme Court has made clear that the police power to enforce morality does not extend to imposing the State's beliefs about "the attributes of personhood," *Casey*, 505 U.S. at 851; *see also Roe*, 410 U.S. at 159; nor to "the decision whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *see also Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). Likewise, it does not justify infringing on other aspects of the personal liberty protected by the Due Process Clause. *See, e.g.*, *Lawrence*, 539 U.S. at 571 (rejecting the argument that individuals' "profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives" permits "the majority [to] use the power of the State to enforce these views on the whole society"); *id.*, at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient

[10] *Planned Parenthood of Minn. v. Minn.*, 910 F.2d 479, 488 (8th Cir. 1990) and *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1098 (E.D. Ark. 2017) are not to the contrary. In the former, the plaintiffs conceded that the disposition statute at issue served a legitimate state interest, so the question was not before the court. *Planned Parenthood of Minn.*, 910 F.2d at 488. In the latter, the court assumed without deciding that the disposition statute served a legitimate state interest. *Hopkins*, 267 F. Supp. 3d at 1098.

reason for upholding a law prohibiting the practice . . . .") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Earle*, 517 F.3d at 745 ("the government [may not] burden consensual private intimate conduct simply by deeming it morally offensive"). The State may not impose an answer to a question that the Constitution reserves to the individual and her conscience.[11]

4. Alternatively, the Challenged Laws fail to advance the State's interest to an extent sufficient to justify the burdens they impose

Even if the Challenged Laws serve a valid state interest through permissible means, they fail to advance that interest to an extent sufficient to justify the burdens they impose on women.

a. Plaintiffs need not prove that compliance with the Challenged Laws is impossible

Defendant misstates the law when arguing that "undue burden" is synonymous with "forc[ing clinics] to shut down." App. Br. at 37; *accord id*. at 39; *see also id.* at 47 (arguing burden should be measured by women "unable to access abortion"). The Supreme Court has explicitly recognized that all burdens, not just the absolute loss of abortion access, must be considered—including the loss "of individualized attention, serious conversation, and emotional support" from an

[11] The District Court ultimately declined to decide whether the Challenged Laws further a valid state interest; instead it "assum[ed]" that they do. ROA.3302. Nevertheless, Plaintiffs have demonstrated that the Challenged Laws fail to further a valid state interest, which provides an alternate basis for affirming the District Court's judgment.

abortion provider who is not overtaxed, *Whole Woman's Health*, 136 S. Ct. at 2318; health risks, *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000); and—as here—paternalism, *Casey*, 505 U.S. at 895 (striking down requirement that husbands be notified of their wives' abortions, because empowering husbands to make personal choices for their wives exceeds states' authority and thus constitutes an undue burden).

Defendant also erroneously asserts that Plaintiffs must attempt compliance with the Challenged Laws before challenging their constitutionality. App. Br. at 38. No Supreme Court abortion case has so held; to the contrary, the Court has struck down abortion restrictions without reference to plaintiffs' ability to comply. *See, e.g.*, *Casey*, 505 U.S. at 895 (striking down the spousal notification requirement). As the District Court emphasized, "[t]o require healthcare providers to attempt to comply with the challenged laws without knowing whether the challenged laws are valid would require healthcare providers to suffer considerable uncertainty and expense." ROA.3294.

b. The Challenged Laws impose significant burdens

The Challenged Laws impose significant burdens on women who seek abortion or miscarriage management procedures.

First, the Challenged Laws "intrude on the diverse personal beliefs women (and men) hold about the status of an embryo or fetus and the moral and spiritual

implications surrounding an abortion or miscarriage." ROA.3318. They therefore deprive women of the liberty to act in accordance with their personal beliefs about developing human life. *See supra* at 14-16. As the District Court found, "by endorsing one view of the status and respect to be accorded to embryonic and fetal tissue remains, the State imposes intrusive and heavy burdens upon personal decisions concerning procreation and, in particular, upon a woman's right to choose to have an abortion." ROA.3317. "Women who do not believe embryonic and fetal tissue has a special status will be required to accept the State's prescribed methods of disposition as a condition of obtaining pregnancy-related health care." ROA.3316. This burdens a woman's liberty and leads those whose views differ from the State's to suffer increased "grief, stigma, shame, and distress." *Id*. *Cf. Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 799 F. Supp. 2d 1048, 1060 (D.S.D. 2011) (requiring an abortion patient to meet with a counselor opposed to abortion "humiliates and degrades her as a human being").

That such burdens are "mental and emotional," ROA.3316 n.25, makes them no less real or cognizable. *See, e.g., Whole Woman's Health*, 136 S. Ct. at 2318 (considering the loss of "individualized attention, serious conversation, and emotional support," among the challenged law's burdens); *United States v. Windsor*, 570 U.S. 744, 770 (2013) (recognizing stigmatic harms caused by the challenged law); *Casey*, 505 U.S. at 882 (holding that "misleading" abortion patients and

providing them with "[un]truthful" information would be an undue burden); *De Leon v. Perry*, 975 F. Supp. 2d 632, 645-46 (W.D. Tex. 2014) (considering the challenged laws' stigmatic harms) *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015).

Second, the Challenged Laws will serve to discourage some women from seeking abortion or miscarriage management care in a Texas healthcare facility, which has "dangerous" implications for women. *See supra* at 16-17.

Third, the Challenged Laws threaten to reduce the availability of pregnancy-related healthcare in Texas. *See supra* at 20-21. Far from being "speculation," *see* App. Br. at 38, the District Court's conclusion that "reliable and viable options for disposing of [EFTR] in compliance with the challenged laws do not exist," ROA.3307, is fully supported by the record. *See supra* at 17-18. The Challenged Laws impose burdens on healthcare providers and introduce an unprecedented level of operational uncertainty, including the need to obtain and work with multiple vendors not designed to work with healthcare facilities. *Supra* at 17-21. The Registry and the State's Catholic cemeteries cannot prevent or mitigate these burdens. *See supra* at 18-20. At best, healthcare providers would have to divert resources from patient care to address these significant challenges, reducing their capacity to provide abortions or miscarriage management procedures. *See supra* at 20-21. At worst, "unable to cobble together a patchwork of funeral homes, crematoriums, and

cemeteries to meet their disposal needs," they would be forced to shut down. ROA.3316. *See also supra* at 20-21.

c. The burdens imposed by the Challenged Laws are not justified by proportional benefits

Because the burdens imposed by the Challenged Laws are not justified by proportional benefits, they create a substantial obstacle to abortion access. The Challenged Laws provide no benefits to women who have abortions or miscarriages. They do not serve to inform women about disposition methods; they do not give women more disposition options than they had previously; and they do not provide women with financial assistance to effectuate their disposition preferences.

The Challenged Laws are not effective in advancing their stated interest in "express[ing] . . . profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains," Tex. Health & Safety Code § 697.001, because they embody an arbitrary concept of dignity. Dignity is not inherent in any form of disposition of human remains or EFTR; rather, it is a function of the values that people attach to a particular form of disposition. ROA.4434:23-4435:10, 4440:11-4442:16. For example, the State has repeatedly cited the desire to eliminate "grinding" of EFTR as a motivating factor for the Challenged Laws because, in its view, grinding is not dignified.[12] Yet cremation, permitted by the

[12] There is no evidence in the record that grinding is currently used. *See, e.g.*, ROA.3999:6-7.

Challenged Laws, entails grinding. Mr. Cook, a funeral director, testified that cremation entails the application of heat to human remains followed by a "secondary grinding process," ROA.3303, in which the remains are processed in a machine akin to a large "blender." ROA.4551:9-4552:8, 4559:20-4560:20; *see also* Tex. Health & Safety Code § 716.001(5) (defining "cremation" to include "pulverization"—"the process of reducing identifiable bone fragments after cremation and processing granulated particles by manual or mechanical means"). The Challenged Laws permit scattering of ashes, a disposition method that the Catholic Church views as undignified. *See* ROA.4644:6-15, 4758:24-25. But they prohibit disposition of EFTR in a sanitary sewer, a method elected by tens of thousands of women who miscarry at home each year without expressing any disrespect. *See supra* at 13. Likewise, the Challenged Laws prohibit disposition of EFTR in a sanitary landfill, a method of disposition that, the District Court found, many people deem medically appropriate and therefore dignified, ROA.3303, but permit disposition in locations many would not consider dignified, such as "a parking lot" or "a junkyard," *see* ROA.3304. Additionally, the Challenged Laws create a regulatory scheme for EFTR that is much more restrictive than Texas's limited scheme for human bodies. *See supra* at 6-7 & n.1. In deeming certain disposition methods dignified and others not, the State engages in arbitrary classification based on subjective values and personal beliefs. These classifications fail to advance the State's asserted interest and

therefore provide no benefit.

Furthermore, any respect for embryonic and fetal life that the Challenged Laws may express is offset by the disrespect that they express for women's dignity. The State could have pursued its interest through means that respect women's dignity and autonomy by furthering or informed her ability to act according to her beliefs—such as by publishing materials that seek to persuade women to choose burial or cremation of EFTR over standard medical disposition, or by offering financial assistance directly to women who would prefer burial or cremation but cannot afford it. Such measures could have provided a net benefit. The Challenged Laws, however, do not. A State may not advance its interest in potential life at the expense of women's dignity. *See supra* at 33-34. But in overriding women's autonomy to act in accordance with their own belief systems, the Challenged Laws do precisely that.

Finally, the Challenged Laws' underinclusiveness indicates that they do not advance the State's asserted interest to a significant degree and therefore provide little, if any, benefit. They exempt a vast amount of EFTR, including pre-implantation embryos created for use in IVF; in vitro tissue cultures; EFTR sent to research, pathology, or crime laboratories; and EFTR passed at home in connection with a medication abortion or miscarriage. *See supra* at 4. In fact, the Challenged Laws apply only to EFTR resulting from an abortion or miscarriage management

procedure performed in a healthcare facility and not subsequently sent to a laboratory.

The District Court correctly concluded that the "challenged laws do not confer benefits sufficient to justify the heavy burdens on pregnancy-related medical care, particularly abortion care, that they impose." ROA.3319. Accordingly, the Challenged Laws impose an undue burden and are unconstitutional. *Id*.

d. The District Court's remedy is proper because the Challenged Laws impose an undue burden on a large fraction of women for whom they are relevant

Contrary to Defendant's assertions, the large fraction test is not an element of the undue burden standard. Rather, it should inform a court's determination about how broad a remedy to craft after a constitutional violation has been established. *See Casey*, 505 U.S. at 894-95; ROA.3318. If the large fraction test is satisfied, a court should invalidate an abortion restriction in all of its applications. *See Casey*, 505 U.S. at 894-95. Other factors may also weigh in favor of facial invalidation. *See Ayotte v. Planned Parenthood N. New England*, 546 U.S. 320, 329-30 (2006) (facial invalidation is proper where partial invalidation would invade the legislative domain or be inconsistent with legislative intent).

Here, the District Court correctly held that the large fraction test is satisfied. ROA.3318-3319. Accordingly, the appropriate remedy is facial relief blocking enforcement of the Challenged Laws. Defendant's argument that the fraction of

patients impacted is "unknown" both applies the wrong legal test and relies upon an incomplete and incorrect view of the facts. App. Br. at 24, 46-47.

The large fraction analysis is conceptual, not mathematical. *E.g., Whole Woman's Health*, 136 S. Ct. at 2320; *Casey*, 505 U.S. at 895; *see also Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2573 (2018); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006). As the Supreme Court has explained, a court should invalidate an abortion restriction on its face if, in "a large fraction of cases in which [the provision at issue] is *relevant*," it imposes an undue burden. *Whole Woman's Health*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 894-95) (emphasis in original); *see also id.* ("the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction'") (quoting *Casey*, 505 U.S. at 895). This determination involves a "class narrower than 'all women,' 'pregnant women,' or even 'the class of *women seeking abortions* identified by the State.'" *Whole Woman's Health*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 894-95); ROA.3318-3319 (District Court quoting same). In *Casey*, for example, although the Supreme Court found that the spousal notification requirement would have a practical impact on only one percent of women seeking an abortion, it nevertheless invalidated the law on its face after concluding that it would unduly burden a large fraction of women within that group. *Casey*, 505 U.S. at 894.

Here, the proper denominator is neither all women subject to the Challenged Laws, nor those who would be prevented from accessing pregnancy-related medical care. Rather, it is all women who are actually impacted by the Challenged Laws; that is the group for whom the law is "relevant." *See* 505 U.S. at 895. The District Court correctly concluded that, for at least a large fraction of these women, the burdens the Challenged Laws impose are undue. *See* ROA.3319 ("[T]he Challenged Laws . . . operate as a substantial obstacle to all women who do not consider [EFTR] to have a special status and object to interring or scattering the ashes.").

While this Court need not determine the precise fraction of women unduly burdened by the law, every potential fraction is necessarily large. All women impacted by the law are deprived of the Constitution's guarantee of personal liberty to act in accordance with their own beliefs about developing human life, and all are threatened with reduced access to healthcare. *See supra* at 14-21. Those who object to interment or scattering of ashes will additionally be burdened by having their EFTR disposed of by a method they would not choose for themselves. *See* ROA.3319. The record shows that this is a large fraction of women seeking abortion care, as approximately 99% of abortion patients have not chosen disposition by burial or scattering of ashes in the absence of the Challenged Laws. ROA.4357, 4487-88. *See also* ROA.3399, 4483, 5324, 5319-21, 5852-53, 5873. Thus, the fraction burdened here is "large"—in other words, comparable to the proportion of

women affected by the spousal-notification requirement in *Casey*. *See* 505 U.S. at 895.

IV. THE DISTRICT COURT CORRECTLY RULED THE CHALLENGED LAWS VIOLATE THE EQUAL PROTECTION GUARANTEE

For purposes of this appeal, Plaintiffs do not contest the District Court's application of rational basis scrutiny to their equal protection claims. The District Court's conclusion that the Challenged Laws fail this standard is correct and should be affirmed.

The Equal Protection Clause of the Fourteenth Amendment directs that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). At a minimum, it requires that legislative classifications serve a legitimate state interest through rational means. *See 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." *Id.* To survive review under rational basis scrutiny, a law must be "narrow enough in scope and grounded in a sufficient factual context for [courts] to ascertain some relation between the classification and the purpose it serve[s]." *Id.* at 632-33. "By requiring that the classification bear a rational relationship to an independent and legitimate

legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.*

Although the rational basis standard is deferential, it is not a mere rubberstamp; the Supreme Court has consistently invalidated laws that fail to meet its requirements. *See, e.g.*, *Romer*, 517 U.S. at 624 (invalidating law excluding gay people from eligibility for anti-discrimination protections); *City of Cleburne*, 473 U.S. at 447 (invalidating law requiring group homes for people with mental disabilities to obtain a special zoning permit while exempting other types of multiple-occupancy dwellings); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 529 (1973) (invalidating law excluding households with one or more unrelated members from participation in the food stamp program).

Here, the Challenged Laws do not apply to all EFTR. Notably, they exempt pre-implantation embryos, such as embryos created in connection with *in vitro* fertilization, and EFTR sent to laboratories, such as pathology, crime, and research laboratories. *See supra* at 4. As a result, the Challenged Laws burden (1) women who have surgical abortions or miscarriage management procedures and are not eligible to send their EFTR to a laboratory; and (2) healthcare providers who treat such women. But they do not burden others who dispose of EFTR.

The District Court correctly held that the classifications embodied in the Challenged Laws fail the rational basis test. ROA.3326-3327. Defendant asserts that

they serve the "State's interest in respecting unborn life." App. Br. at 51. Assuming *arguendo* that this is a legitimate interest here, *contra supra* at 34-40, the Challenged Laws' differential treatment of EFTR based on its origin and current location is not rationally related to it. The State's own bioethics expert testified that there are no meaningful differences between pre-implantation embryos and post-implantation embryos that are relevant to that interest. ROA.4221:21-4222:10. He likewise testified that there are no relevant differences between EFTR at a healthcare facility and EFTR at a laboratory.[13] *Id.* If the disposition practices required by the Challenged Laws promote respect for unborn life at all—a proposition that Plaintiffs dispute—then they would promote respect for unborn life equally when applied to EFTR that results from an abortion or miscarriage management procedure and is in the possession of a healthcare facility as when applied to EFTR that results from *in vitro* fertilization or is in the possession of a laboratory.

[13] Although the District Court correctly held that the Challenged Laws fail rational basis scrutiny under the Equal Protection Clause, it erred in concluding that the laws' distinction between EFTR at healthcare facilities and EFTR at laboratories is rational. *See* ROA.3325. The Court reasoned that imposing burdensome disposition requirements on EFTR might discourage some laboratories from accepting EFTR for testing. *See id.* But it might also discourage some healthcare facilities from performing abortions or miscarriage management procedures. Similarly, it might discourage some women from seeking abortion or miscarriage management care at a healthcare facility and lead them instead to attempt self-managed care. The District Court's rationale does not embody a rational basis for distinguishing between healthcare facilities and laboratories for purposes EFTR disposition, and it is wholly unrelated to the State's asserted interest in promoting respect for unborn life.

To the extent that the State's classification seeks to privilege one set of beliefs about when meaningful human life begins over others—*see* App. Br. at 51 ("[S]ome people do not consider a fertilized egg to be an embryo until it implants[,] [w]hile many people many consider pre-implantation embryos to be of equal value to post-implantation embryos . . . ." (citations omitted))—it has an improper purpose, *see supra* at 36-40. Otherwise, it is wholly arbitrary.

There is no rational basis for treating EFTR that results from abortion and miscarriage management procedures and is in the possession of a healthcare facility differently than EFTR that results from IVF or is in the possession of a laboratory for disposition purposes. Accordingly, this Court should affirm the District Court's judgment with respect to Plaintiffs' equal protection claims.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to affirm the District Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that, on January 3, 2019, the foregoing was served on the following counsel of record via the court's CM/ECF system:

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