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

WHOLE WOMAN'S HEALTH ALLIANCE, et al.,	§	
	§	
Plaintiffs,	§	Civil Action No. 1:18-cv-00500-LY
	§	
v.	§	
	§	
KEN PAXTON, et al.,	§	
	§	
Defendants.	§	
	§	

DEFENDANTS'[1] MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)

[1] Defendants Ken Paxton, Attorney General of Texas; Cecile Young, Acting Executive Commissioner of the Texas Health & Human Services Commission; John W. Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services; and Scott Freshour, Interim Executive Director of the Texas Medical Board, jointly file this Motion in their official capacities.

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INTRODUCTION

In a bold-faced, admitted attempt to skirt the democratic process and effect an "omnibus repeal"[2] through the courts rather than the people's representatives, Plaintiffs ask this Court to strike down dozens of lawfully enacted state laws and regulations that have been in effect for years—even laws like those upheld numerous times by the Supreme Court—simply because abortion providers like Plaintiff Whole Woman's Health Alliance (WWHA) and Dr. Bhavik Kumar have decided they no longer want to comply with common-sense regulations of abortion practice designed to protect women's health and serve the state's interest in protecting unborn life. But Plaintiffs' claims are ill-conceived, poorly pleaded, and fail to state claims on which relief can be granted. Aside from the obvious problems with the complaint, which is a prime example of "shotgun pleading" and fails to specify what the alleged harm is from each law or regulation for each Plaintiff, or even what allegations support their claims, Plaintiffs also lack standing to assert most of their claims. The Court should apply binding precedent and dismiss Plaintiffs' lawsuit in its entirety.

STATEMENT OF FACTS

WWHA, Kumar, Fund Texas Choice (FTC), Lilith Fund, Inc., North Texas Equal Access Fund (NTEAF), the Afiya Center, and West Fund (collectively, Plaintiffs) filed this lawsuit on June 14, 2018. Compl. 43, ECF No. 1. Plaintiffs assert claims under

[2] Sophie Novack, *New Lawsuit Challenges Dozens of Texas Anti-Abortion Restrictions*, *Texas Observer* (June 14, 2018), https://www.texasobserver.org/new-lawsuit-challenges-dozens-of-texas-anti-abortion-restrictions/ [https://perma.cc/86V9-QP5M].

42 U.S.C. § 1983 for alleged violations of their First and Fourteenth Amendment rights, and in some cases, on behalf of their patients or clients. Compl. ¶¶ 1, 198, 200, 202. WWHA claims to be a non-profit operating an abortion clinic in Austin, Texas. Compl. ¶ 9. Kumar is the Medical Director of that Austin clinic and performs abortions there and in other abortion facilities in Texas. Compl. ¶ 15. WWHA and Kumar (the "Provider Plaintiffs") bring this lawsuit on behalf of themselves and their patients. Compl. ¶¶ 9, 15. The remaining plaintiffs—FTC, Lilith Fund, NTEAF, the Afiya Center, and West Fund (the "Fund Plaintiffs")—are non-profit organizations that assist women in paying for abortions or related expenses. Compl. ¶¶ 10-14. They bring this lawsuit on behalf of themselves and their "clients." *Id.*

Plaintiffs challenge over 60 individual laws or regulations, an entire chapter of administrative regulations, and procedural rules of the Texas Supreme Court regarding judicial-bypass procedures for minors seeking abortions. Compl. ¶¶ 78, 91, 105, 107, 116, 145, 153. The challenged laws cover approximately 19 categories:

1. Physician-only abortion
2. Facility licensing requirements
3. Ambulatory surgical center requirement for abortions after 18 weeks LMP[3]
4. Reporting requirements
5. Medication abortion dosage and administration restrictions
6. Medication abortion physician examination requirement

[3] Weeks of gestation measure from the last menstrual period (LMP). Some state laws give the gestational age measured from fertilization, which is two weeks less than LMP. *See, e.g.*, Tex. Health & Safety Code §§ 171.004, 171.044.

7. Medication abortion manufacturer's label distribution requirement
8. Medication abortion follow-up visit requirement
9. Telemedicine ban
10. Informed consent information requirement
11. Informed consent state-printed materials requirement
12. Ultrasound requirement
13. 24-hour waiting period
14. Procedural requirements for informed consent
15. Parental notice requirement for minors
16. Parental consent requirement for minors
17. Identification requirement for verification of age
18. Judicial bypass procedures for minors
19. Criminal penalties for non-compliance

All of these laws are currently in effect, and abortion clinics throughout the State already comply with them—and in some cases, they have been for decades. For example, abortion facilities, among other specific types of medical or health facilities, have been required to meet State licensing requirements and report certain data to the State since 1985.[4]

[4] *See* Act of May 27, 1985, 69th Leg., R.S., ch. 931, art. 20, 1985 Tex. Gen. Laws 3121, 3173 (enacting former art. 4512.8 of the Revised Civil Statutes); Act of May 18, 1989, 71st Leg., R.S., ch. 678, § 1, sec. 245.001-.016 (enacting Health and Safety Code chapter 245), § 13 (repealing article 4512.8), 1989 Tex. Gen. Laws 2230, 2485, 3165.

These requirements are also legally uncontroversial. As noted by the Supreme Court in *Roe v. Wade*:

> Examples of permissible state regulation [of abortion] are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

410 U.S. 113, 163 (1973), *holding modified by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).[5]

Forty states require surgical abortions to be performed by physicians only[6] and the Supreme Court as far back as *Roe* has approved of that requirement. *Mazurek*, 520 U.S. at 974-75; *Roe*, 410 U.S. at 165. Requiring second-trimester abortions to be performed in ambulatory surgical centers was approved by the Supreme Court thirty-five years ago in *Simopoulos v. Virginia*, 462 U.S. 506 (1983), even under *Roe v. Wade*'s strict-scrutiny standard (which was later replaced with the less-stringent substantial-obstacle test in *Casey*).

Forty-four states have parental involvement requirements for abortion,[7] and parental notice and consent requirements with judicial-bypass procedures were approved by the Supreme Court decades ago. *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (*Akron II*); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *H. L. v.*

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[5] Unless otherwise noted, all references to *Casey* are to the plurality opinion.

[6] *See Mazurek v. Armstrong*, 520 U.S. 968, 969 n.1)1997) (per curiam); *see also* Ariz. Rev. Stat. § 36-2155.

[7] *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326 n.1 (2006).

Matheson, 450 U.S. 398 (1981); *accord Barnes v. State of Miss.*, 992 F.2d 1335 (5th Cir. 1993). Approximately 29 states have laws requiring a physician to provide certain information to a patient when obtaining informed consent to perform an abortion procedure.[8] And informed consent requirements have been upheld under both the Due Process Clause and the First Amendment. *Casey*, 505 U.S. 833; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012). All the challenged laws and regulations are reasonable, common-sense regulations of abortion practice.

I. The Court Lacks Subject-Matter Jurisdiction.

"For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998). Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. The doctrine of standing gives meaning to these constitutional limits by "'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "The law of Article III standing, which is built

[8] *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2153; Ark. Code § 20-16-1703; Fla. Stat. § 390.0111(3); Ga. Code § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. § 65-6709; Ky. Rev. Stat. § 311.725; La. Stat. § 40:1061.10; Mich. Comp. Laws § 333.17015; Minn. Stat. § 145.4242; Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327; N.C. Gen. Stat. § 90-21.82; N.D. Cent. Code § 14-02.1-02; Ohio Rev. Code § 2317.56; Okla. Stat. tit. 63, § 1-738.2; 18 Pa. Stat. and Cons. Stat. § 3205; S.C. Code § 44-41-330; S.D. Codified Laws § 34-23A-10.1; Tenn. Code § 39-15-202; Tex. Health & Safety Code § 171.012; Utah Code § 76-7-305; Va. Code § 18.2-76; W. Va. Code § 16-2I-2; Wis. Stat. § 253.10.

on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009)). Courts dismiss claims for lack of jurisdiction where the plaintiff does not have standing.

Dismissal for lack of subject-matter jurisdiction is also proper where the claim is "so insubstantial, implausible, foreclosed by prior decisions of th[e Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam) (citing *Barrera–Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

The group of Plaintiffs does not include any Texas women alleging that the longstanding laws at issue in this case have unduly burdened their right to an abortion or any enumerated constitutional right. Instead, the Plaintiff organizations and Dr. Kumar bring suit on behalf of patients or clients, as well as on their own behalf. But in many of these contexts, Plaintiffs lack standing themselves or on behalf of parties not before this Court, which deprives the Court of jurisdiction. Further, even if Plaintiffs have standing to bring some of these claims, many are foreclosed by Supreme Court or Fifth Circuit precedent, providing another basis for dismissal under

Federal Rule of Civil Procedure 12(b)(1), in addition to Rule 12(b)(6). *See infra* Part II.

A. Plaintiffs lack standing to bring a substantive due process claim.

While courts typically allow physicians to bring claims on behalf of their abortion patients under the doctrine of third-party standing, the unique and unprecedented nature of Plaintiffs' lawsuit warrants a closer examination of whether Plaintiffs have established third-party standing in this case. Plaintiffs have challenged almost every single abortion regulation in Texas, seeking to remove basic health-and-safety standards and informed-consent laws designed to protect patients, but have failed to plead how any of these laws specifically harm their patients. As explained below, it appears that Plaintiffs' desire to improve their own finances comes at the expense of their patients. Plaintiffs should not be granted standing to use their patients as proxies to further their own bottom lines.

"The party invoking federal jurisdiction bears the burden of establishing" standing, *Lujan*, 504 U.S. at 561, which means a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision," *id.* at 560-61 (internal quotation marks omitted). Plaintiffs here fail to satisfy these elements, both on behalf of themselves and on behalf of third parties not before the Court, so their claims must be dismissed.

Count I of the Complaint alleges that "the challenged laws—individually and collectively—impose an undue burden on access to previability abortion in Texas in violation of the Due Process Clause of the Fourteenth Amendment." Compl. ¶ 198. The

Complaint does not specify *whose* Fourteenth Amendment right is being violated. Since it is unclear, Defendants assume *arguendo* that this claim is asserted by all Plaintiffs: by the Provider Plaintiffs on behalf of themselves and their patients, and the Fund Plaintiffs, on behalf of themselves and their "clients." But Plaintiffs lack standing to bring this claim in each of these capacities.

1. The Provider Plaintiffs do not have standing to assert claims on behalf of their patients.

A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted). Litigants may assert the rights of third parties only when: (1) the litigant has "a close relationship" to the third party; and (2) some "hindrance" affects the third party's ability to protect his or her own interests. *See id*. at 130 (citations and quotation marks omitted).

In *Singleton v. Wulff*, 428 U.S. 106 (1976) (plurality op.), the plurality held that two physicians had standing to challenge a state law excluding non-medically necessary abortions from the state's Medicaid program on behalf of their patients. Because "the constitutionally protected abortion decision is one in which the physician is intimately involved," *id.* at 117, the plurality concluded that it "generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision," *id.* at 118; *but see id.* at 117 (acknowledging ways that patients can overcome hindrances to bringing their own suit, including proceeding under a pseudonym, assembling a class, or relying on the "capable of repetition yet evading review" exception to mootness). The plurality's conclusion was less

focused on whether the test for third-party standing was met, and more focused on the lack of harm in allowing such standing: "if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Id.* at 117-18.

Lax application of the third-party standing doctrine has been called into doubt in more recent cases. The Supreme Court questioned whether a close relationship that was only hypothetical, rather than existing, sufficed for third-party standing in *Kowalski*, 543 U.S. 125. There, the Court held that attorneys lacked third-party standing to bring claims on behalf of future clients who will request, but be denied, the appointment of appellate counsel under state law. *Id.* at 131. The Court concluded that the attorneys lacked the requisite "close relationship" with the clients: An "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here . . . . The attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all." *Id.* at 131.

Here, the Provider Plaintiffs do not allege that any of *their current patients* are being unconstitutionally denied access to an abortion by any of the challenged regulations. Count I of the Complaint does not even specify whose right is being "undu[ly] burden[ed]." Compl. ¶ 198. They focus their allegations more broadly, alleging variously that "individuals," Compl. ¶ 165, "people," Compl. ¶¶ 166, 175-76, "someone," Compl. ¶ 173, and certain groups of individuals, Compl. ¶ 182, are somehow burdened. They allege that the statutes and regulations "burden all people seeking abor-

tion care," Compl. ¶ 181, but may result in prohibitive burdens to "some people" seeking abortions, Compl. ¶¶ 179, 195. Under *Kowalski*, the Provider Plaintiffs do not have standing to assert claims on behalf of potential future patients with whom they do not currently have a physician-patient relationship, and they certainly do not have standing to assert claims on behalf of "some people" or certain whole ethnic or demographic groups, as they appear to be attempting here.

The Supreme Court has also more recently emphasized that the "close relationship" prong of the third-party standing test is not satisfied where there could be a conflict of interest between the party asserting the claim and the party whose rights are at stake. In *Elk Grove Unified School District v. Newdow*, the Supreme Court held that a father did not have standing to assert an Establishment Clause claim on behalf of his daughter because he lacked custody of her, and the evidence showed that her religious beliefs were different from his. 542 U.S. 1, 15 & n.7 (2004). Acknowledging *Singleton*, the Court stated that its case law on *jus tertii* required parallel interests. *Id.* at 15.

Here, the Provider Plaintiffs cannot demonstrate a "close relationship" with abortion patients because they are challenging almost every state law or regulation enacted to protect the well-being of those patients. This presents a conflict of interest between providers and patients, and third-party standing is forbidden if the interests of the litigant and the third-party-rights-holder are even "potentially in conflict." *Id.*; *see also Kowalski*, 543 U.S. at 135 (Thomas, J., concurring) (noting that third-party standing is disallowed when the litigants "may have very different interests from the individuals whose rights they are raising"); *Canfield Aviation, Inc. v. Nat'l Transp.*

Safety Bd., 854 F.2d 745, 748 (5th Cir. 1988) ("[C]ourts must be sure . . . that the litigant and the person whose rights he asserts have interests which are aligned." (citing *Singleton*, 428 U.S. at 114-15)).

There is also a lack of authority in the Fifth Circuit holding that abortion clinics like WWHA—as opposed to physicians—have standing to sue on behalf of their patients. The Fifth Circuit considered the question of third-party standing for abortion doctors bringing claims on behalf of their patients in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014), which involved challenges to state laws requiring abortion doctors have admitting privileges and regulating medication abortions. The Fifth Circuit acknowledged case law permitting abortion *physicians* to assert claims on behalf of their patients, but declined to analyze whether the *clinics* also had standing to assert claims on behalf of their patients. *Id.* at 589; *see also AIDS Healthcare Found., Inc. v. City of Baton Rouge/Par. of E. Baton Rouge*, No. CV 17-00229-BAJ-RLB, 2017 WL 2899689, at *3 (M.D. La. July 7, 2017) ("[C]ourts have previously held that *physicians* in abortion cases had standing to assert the rights of patients with regard to abortion regulation. This exception has not been extended to the clinics themselves.").

The Fifth Circuit in *Abbott* declined to adopt a presumption that clinics and physicians have standing to assert claims on behalf of patients, but instead examined whether abortion physicians satisfied the requirements of third-party standing. 748 F.3d at 589 (rejecting the district court's "perfunctor[y]" conclusion that abortion providers have never been denied standing to assert the rights of patients). The court also acknowledged that there may be a point at which an abortion doctor's interests

diverge from his patients: "[f]or example, the doctor's economic incentives regarding the performance of abortions may not always align with a woman's right to choose to have an abortion." *Id.* at 589 n.9. But the court stated that it was satisfied that was not true in that particular case. *Id.* ("We are convinced that such no such conflict exists *here*, however." (emphasis added)).

If there were ever a case which presented a conflict of interests between women seeking abortions and abortion doctors, it is this case. Plaintiffs here are challenging nearly every law or regulation specifically touching on abortion in the State of Texas, including regulations that Plaintiffs simply cannot dispute provide protection for patients. *See, e.g.,* Compl. ¶ 78(b) (challenging the entirety of chapter 139 of title 25 of the Texas Administrative Code). Their broad challenge includes, for example, requirements that abortion facilities implement and abide by infection control standards, such as handwashing, and the disinfection and sterilization of reusable medical devices. 25 Tex. Admin. Code § 139.49. Plaintiffs also challenge provisions explicitly designed to protect patients' rights at the facility, such as access to medical records and the opportunity to ask questions and be free from discrimination in their treatment. *Id.* § 139.51.

The Provider Plaintiffs admit that they are basing their allegation that the challenged laws threaten abortion access on the laws' supposed effect on "economic[] sustainab[ility]" of their practices. Compl. ¶ 196. Essentially, the Provider Plaintiffs believe that if they did not have to comply with the challenged laws and regulations, it would be cheaper for them to do business. While it might be better for business if Provider Plaintiffs do not have to ensure their instruments are sterilized or that their

patients' rights are protected, *that is not in the best interest of their patients*. The pecuniary interests of abortion doctors should not take precedence over women's safety and well-being. The circumstances presented here therefore provide an example of when the boundaries of the "close relationship" requirement for third-party standing are exceeded under current case law. The Provider Plaintiffs' interests conflict with their patients' interests in this case. Thus, the Provider Plaintiffs lack standing to bring claims on behalf of their patients.

2. The Fund Plaintiffs lack standing on behalf of their "clients."

While, as discussed above, there is authority for allowing an abortion doctor to challenge abortion laws on behalf of his patients in some circumstances, there is no legal authority for allowing an organization that helps women pay for abortions to sue on behalf of those women. Giving money to an unidentified person at some unidentified future date does not establish the requisite "close relationship" required under the third-party standing doctrine. *Kowalski*, 543 U.S. at 130. While courts have recognized in some circumstances a sufficiently "close relationship" between doctors and patients, *Singleton*, 428 U.S. at 117; attorneys and clients, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990); and family members, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); that is only provided their interests are the same and not potentially in conflict, *see Newdow*, 542 U.S. at 15 & n.7. But the Fund Plaintiffs, while terming the women they give funding to their "clients," *see* Compl. ¶¶ 10-14, have at best a transitory, non-professional, non-familial relationship with women

they give money to for an abortion. Compl. ¶¶ 10-14. Moreover, while trying to make abortions cheaper may serve the Fund Plaintiffs' interests in providing abortion funding for more women (if that is in fact the Fund Plaintiffs' interest, as they never identify what their harm is under Counts I, II, and III, a separate pleading flaw), a cheaper abortion as a result of less regulation is not necessarily in the woman's interests.[9] A party motivated solely by financial concerns cannot adequately represent the interests of a third party whose interests may be compromised by improving the financial status of litigating party.

Additionally, even if the Fund Plaintiffs had parallel interests to the women they give money to, like the Provider Plaintiffs, they have not alleged any burden on behalf of any current "clients," which makes their relationship too "hypothetical" to confer standing under *Kowalski*, 543 U.S. at 131-32. Because the Fund Plaintiffs' interests conflict with the interests of the women whose abortions they help pay for, and because their relationship with the parties they claim to represent is hypothetical, they lack the requisite "close relationship" for third-party standing.

3. Plaintiffs lack standing as abortion providers or abortion funders under the substantive due process clause.

Plaintiffs do not specify whether Count I, their claim that the challenged laws and regulations impose an undue burden on access to previability abortion under the Due Process Clause, is being asserted by the Provider Plaintiffs and Fund Plaintiffs themselves. Compl. ¶ 198. To the extent Plaintiffs are asserting that claim, they lack

[9] The familiar adage, "you get what you pay for," comes to mind.

standing because the right to an abortion under the Due Process Clause has never been interpreted to include a right for a physician to perform an abortion, and it certainly has never included a right for an organization to help pay for abortions. *See, e.g., Harris v. McRae*, 448 U.S. 297, 314 (1980) ("The doctrine of *Roe v. Wade*, the Court held in *Maher*, 'protects *the woman* from unduly burdensome interference with *her freedom* to decide whether to terminate her pregnancy,'" (emphasis added) (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)); *see also Casey*, 505 U.S. at 846 (*Roe*'s "essential holding" "is a recognition of *the right of the woman* to choose to have an abortion before viability,") (emphasis added); *id.* at 884 (in the context of abortion, the constitutional status of the doctor-patient relation is "*derivative of the woman's position*. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified.") (emphasis added). Plaintiffs bring their claim under 42 U.S.C. § 1983, which requires Plaintiffs to show that *their* constitutional rights have been violated. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Moody v. Farrell*, 868 F.3d 348, 351 (5th Cir. 2017). As Plaintiffs cannot show they have any right themselves under the woman's right to abortion in the Due Process Clause, they may not bring a section 1983 claim under that provision.

Additionally, the Fund Plaintiffs lack standing because they are in no way subject to any of the challenged laws and regulations, so at minimum, their due process claim should be dismissed for that reason. And merely having to allocate their funds in a way that is not their preference is not an injury giving rise to standing. "The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart

standing upon the organization. [The plaintiff organization]'s argument implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another." *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). The idea that a "self-styled advocacy group could assert standing to sue whenever it believed the rights of its targeted beneficiaries had been violated . . . is at odds with *Lujan*'s definition of injury in fact as the 'invasion of a legally-protected interest.'" *Id.* (quoting *Lujan*, 504 U.S. at 560). Importantly, if the Fund Plaintiffs' claims are based on how much abortions cost, no state law or official mandates that, and Plaintiffs do not allege that they do. The prices of abortion procedures are ultimately determined by clinics and physicians, such as WWHA and Kumar. That makes the Fund Plaintiffs' supposed injuries dependent on the actions of other parties, which is too attenuated to confer standing.

Because Plaintiffs lack standing on behalf of themselves and their patients or "clients" for their substantive due process claim, Count I should be dismissed for lack of jurisdiction.

4. Alternatively, Plaintiffs cannot satisfy the Article III requirements of injury-in-fact, traceability, and redressability, and lack standing for that additional reason.

Even if the Court finds that Plaintiffs can bring a substantive due process claim for abortion access on behalf of themselves or third parties, Plaintiffs cannot satisfy the Article III requirements for standing, and Count I should be dismissed on that alternative basis.

Laws regulating abortion are constitutional so long as they do not impose a "substantial obstacle to the woman's exercise of the right to choose." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Casey*, 505 U.S. at 877; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Plaintiffs do not allege that any of the challenged laws or regulations impose a substantial obstacle to abortion access. Thus, they have failed to allege any injury giving rise to a substantive due process claim, and Count I should be dismissed on that basis alone.

Further, Plaintiffs have not alleged that any woman has been unable to obtain an abortion because of the challenged laws and regulations. Plaintiffs have made only speculative, conclusory allegations as to any supposed harm, which is not enough to establish standing to seek prospective relief. Hypothetical injuries are insufficient to establish Article III jurisdiction. *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017). To obtain prospective relief, a plaintiff has the burden to establish standing by alleging that the "threatened injury is 'certainly impending'" or that there is a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 568 U.S. at 409, 414 n.5). The Supreme Court has "repeatedly reiterated" that "'[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore*, 495 U.S. at 158). And the Fifth Circuit recently upheld this Court's conclusion that plaintiffs alleging only speculative or conjectural harms lack standing. *Glass v. Paxton*, No. 17-50641, 2018 WL 3941526, at *4-6 (5th Cir. Aug. 16, 2018).

Plaintiffs allege that the challenged laws "decrease the availability of abortion care—unnecessarily limiting the number of abortion providers, the geographic distribution of abortion providers, and the practice settings in which abortion care is provided." Compl. ¶ 166. They have not identified any one of the many laws and regulations at issue that limit the number of abortion providers. They have not identified any one of the many laws and regulations at issue that limits the geographic distribution of abortion providers. And their allegation that but for the challenged laws and regulations, there would be more doctors willing to perform abortions, and greater geographic distribution of abortion providers, Compl. ¶ 196, is completely speculative.

"'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564. Here, Plaintiffs do not even include "some day" intentions: They do not allege that they even *want* to open any other clinics or hire other doctors, much less allege that there are doctors they would like to hire, but cannot, or that they would open new clinics, but cannot, because of the challenged laws and regulations. Plaintiffs also complain that "[t]he challenged laws" (again, not specifying which) make it "practically impossible to integrate abortion" into primary care practices, Compl. ¶ 193, but do not allege that any Plaintiff has a primary care practice they would like to integrate abortion services into, but cannot because of a specific law. In short, Plaintiffs fail to allege that the challenged laws and regulations are preventing them from doing anything they have a right to do. Thus, even assuming Plaintiffs adequately pleaded an injury-

in-fact, they have not demonstrated in the Complaint how their requested relief—a wholesale injunction against all of the challenged laws and regulations—would even redress their supposed harm. The Supreme Court recently "caution[ed]" that "'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

Plaintiffs' allegation that "long term burdens" imposed by the laws and regulations (they do not specify which) will result in a shortage of abortion providers, Compl. ¶ 195, is also speculative, and rests largely upon what they fear might be a result of the shrinking abortion rate, which they explicitly attribute to increasing access to contraceptives, Compl. ¶ 189. Allegations of injuries based on speculation are insufficient to confer standing. If fewer women desire abortions, and that makes abortion clinics less profitable, that is not an injury traceable to the challenged laws and regulations. And "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris*, 448 U.S. at 316. Plaintiffs certainly have no constitutional right to insist upon a profitable abortion business in whatever location they choose, and therefore lack an injury sufficient to confer standing.

5. Plaintiffs lack standing to challenge nearly all of Texas's abortion-related laws and regulations collectively.

Plaintiffs' challenge to the laws and regulations as a "collective[]" undue burden, Compl. ¶ 198, is not cognizable, as discussed below. *See infra* Part II.B.1. But Plain-

tiffs also lack standing to pursue such an overbroad, undefined claim for relief because it is a generalized grievance and is not redressable. The Constitution limits the ability of a plaintiff to skirt the democratic process and challenge large numbers of unrelated laws without specifying what the harm is from each or demonstrating that each is unconstitutional.

A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." *Lance v. Coffman*, 549 U.S. 437, 439, 441 (2007). Without any allegations as to how each law challenged has caused an injury to each Plaintiff challenging it, the injuries are insufficiently particularized to confer standing on the Plaintiffs. *See Lujan*, 504 U.S. at 560, 564. And Plaintiffs cannot receive the broad remedy they seek when it cannot remedy Plaintiffs' alleged injuries.

Just last term, the Supreme Court reaffirmed that plaintiffs have standing only to obtain a remedy that redresses his or her own injuries. In *Gill*, the Supreme Court held that plaintiffs alleging harm from partisan gerrymandering had standing only to remedy the composition of his or her own district, not redraw district boundaries for the entire state. 138 S. Ct. at 1930-31. "[A] plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact,'" so the only "proper and sufficient" remedy for a plaintiff claiming a dilution of his vote due to partisan gerrymandering would be the "revision of the boundaries of the individual's own district." *Id*. at 1930 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). By contrast, the Court noted, a "plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district,"—in other words, who has not alleged or proven a particularized

harm—"assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *Id.* (alteration in original) (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). Plaintiffs' cumulative claims simply boil down to a disagreement with the way Texas regulates abortion. They are properly classified as "generalized grievances" which this Court lacks jurisdiction to adjudicate.

As *Gill* indicates, Plaintiffs also cannot obtain broader relief than necessary to remedy their particular constitutional harm. If Plaintiffs have not pleaded with particularity how each challenged law and regulation violates their rights, they cannot receive a wholesale injunction against every challenged law or regulation as a remedy for their alleged injury. "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no (broader) than required by the precise facts to which the court's ruling would be applied.'" *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (quoting *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-22 (1974)). "As [the Supreme Court] ha[s] explained, '[t]he actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.'" *Cuno*, 547 U.S. at 353 (quoting *Lewis*, 518 U.S. at 357).

Plaintiffs would have this Court strike down over 60 unrelated laws, an entire chapter of the Administrative Code, and the Texas Supreme Court's procedural rules

for obtaining a judicial bypass with one stroke of the pen, without alleging and proving harm from each one. Indeed, it will be impossible for them to prove constitutional harm from each one, as their challenges to many of these laws individually are foreclosed as a matter of law based on binding precedent. *See* Part II *infra.*

The Supreme Court has previously rejected such sweeping claims for relief:

> Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication."

Lujan, 504 U.S. at 568 (quoting *Allen v. Wright*, 468 U.S. 737, 759-60 (1984)).

The lack of redressability and unsuitability of such a claim for federal-court adjudication is further illustrated by attempting to imagine what kind of remedy the Court could craft. If, as Plaintiffs hope, the Court were to find that all the challenged laws, regulations, and rules together amount to a collective undue burden on the right to choose abortion, despite any authority supporting such a sweeping claim, *see* Part II.B.1 *infra.*, the Court could not strike down laws that are not unconstitutional on their own. That would clearly exceed the boundaries of the Court's equitable powers, which are limited to remedying only the constitutional harm before it. *E.g. Gill*, 138 S. Ct. at 1930; *Cuno*, 547 U.S. at 353; *Warth*, 422 U.S. at 508.

Such a remedy would also be unworkable as a practical matter and would require the Court to move well beyond its proper role. With such an injunction in place, how would the State proceed in regulating abortion, something it is indisputably entitled to do? Would the State be permitted to reenact the laws covered by the injunction so long as they are not combined with other laws? What guidelines would the State use to determine what combinations of laws and regulations would be acceptable? Would the State simply be forced to guess and suffer repeated litigation every time a new law is enacted? Under Plaintiffs' theory, each new law would trigger a new review of all the laws, even if the new law is not unconstitutional itself. Would the Court retain jurisdiction and sit effectively as a super-Legislature, telling Texas which combinations of laws are acceptable and which, together, are an undue burden? Surely not, since "[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis*, 518 U.S. at 349.

The possibility of the Court crafting a remedy to strike down only certain laws which produce an undue burden in combination, and leave others intact, is also foreclosed because Plaintiffs failed to allege harms from particular combinations of laws—their claim is all-or-nothing. Plaintiffs' cumulative or collective challenge is not justiciable and must be dismissed.

B. Plaintiffs lack standing to bring their equal protection claim.

Count II of the Complaint alleges that "[e]ach of the challenged laws denies equal protection of the laws to individuals seeking and providing abortion care in violation

of the Equal Protection Clause of the Fourteenth Amendment." Compl. ¶ 200. Plaintiffs do not specify whether these "individuals seeking and providing abortion care" includes any Plaintiff. Plaintiffs also do not allege that any current patient of theirs is being denied equal protection of the laws. But assuming "individuals" encompasses Plaintiffs, and assuming Plaintiffs assert these claims on behalf of their patients or clients as well, Plaintiffs lack standing to assert this claim on behalf of their patients or clients for the reasons explained at Part I.A.1, 2 *supra*,[10] and the Fund Plaintiffs lack standing themselves because they are not subject to the challenged laws or regulations, *see* Part I.A.3 *supra*.

C. Plaintiffs' challenges to criminal, civil, and administrative penalty provisions are unripe.

Plaintiffs challenge the entirety of title 25, chapter 139 of the Texas Administrative Code. Compl. ¶ 78(b). This chapter includes provisions setting forth penalties for non-compliance with state licensing requirements for abortion facilities, including license denial, suspension or revocation, 25 Tex. Admin. Code § 139.32, and administrative, civil, and criminal penalties, *id.* § 139.33. Plaintiffs also challenge Texas Occupations Code section 165.151 (general criminal liability for physicians; penalty is a Class A misdemeanor where no specific penalty is mentioned), section 164.052(a)(19)-

[10] The Provider Plaintiffs also assert a First Amendment claim, but do not appear to do so on behalf of their patients. Compl. ¶ 202. The Provider Plaintiffs may have standing to assert that claim themselves, but it should also be dismissed under Federal Rule of Civil Procedure 12(b)(6) because it is foreclosed by *Lakey*, 667 F.3d 570. *See* Part II.D *infra*.

(20) (criminal liability for performing an abortion on a minor without parental consent or court order); and section 164.055 (providing for medical board discipline against physicians who violate Texas Health and Safety Code chapter 171, which includes abortion reporting requirements, informed consent procedures, medical abortion requirements, requirements for training on human trafficking, a prohibition of partial-birth abortion, and specifically does not assess criminal penalties for violations of Texas Health and Safety Code section 170.002, which prohibits third-trimester abortions). Compl. ¶ 153.[11]

It is not clear whether all Plaintiffs challenge these provisions and what constitutional claims they are making. But assuming all Plaintiffs challenge these provisions, it is clear the Fund Plaintiffs lack standing to challenge them because they are not subject to these provisions and fail to allege that they are. And the Provider Plaintiffs' challenge to these provisions is not ripe and must be dismissed for lack of jurisdiction under Rule 12(b)(1).

In *Choice Inc. of Texas v. Greenstein*, abortion clinics challenged Act 490, a Louisiana law that provided for abortion clinic license suspension, denial, or revocation if an investigation determined the clinic to be in violation of State licensing rules or other State or federal laws. 691 F.3d 710, 712 (5th Cir. 2012). The Fifth Circuit af-

[11] Plaintiffs state that they also challenge Texas Occupations Code section 164.0551 as a so-called "special criminal penalt[y]," Compl. ¶ 153, but that provision does not assess any penalty. It merely states: "A physician shall comply with Subchapter B, Chapter 171, Health and Safety Code." Tex. Occ. Code § 164.0551 (footnote omitted).

firmed the district court's dismissal of the claims for lack of subject-matter jurisdiction, finding that such a challenge would not be ripe unless action was actually taken by the State to suspend or revoke a clinic's license under the law. *Id.* at 717. What the Court noted there is true here:

> Act 490 imposes no new, affirmative obligation on [abortion clinics]; [abortion clinics] are required to comply with existing and applicable state or federal statutes or regulations regardless of Act 490's existence. There is no dilemma because an [abortion clinic] does not seek to continue to act in a manner *believed to be lawful* that would violate Act 490; actions violating Act 490 are already *unlawful*.

Id. at 716. Plaintiffs do not allege that they want to violate any of the State's laws but do not for fear of incurring a penalty. Instead, Plaintiffs speculatively assert, that the presence of criminal penalties "deters healthcare providers"—not Plaintiffs—"from providing abortions." Compl. ¶ 152. This alleged harm does not even accrue to the Plaintiffs themselves, making this argument even more speculative than the similar argument that the plaintiffs made—and the Court rejected—in *Greenstein*: the plaintiffs argued that they had "been forced to modify [their] behavior because Act 490's enactment has forced it to operate in a heightened state of vigilance, explaining that [t]he coercive impact of Act 490 is already imposing on plaintiffs the burden of attempting to adjust their business practices in response to being uniquely exposed to exceptionally severe penalties for even minor violations of any state or federal law or regulation." 691 F.3d at 716 (footnote omitted) (internal quotation marks and citation omitted). The Court swiftly rebuffed this argument: "[W]e note that Choice has not identified a single concrete example of how it has been forced to modify its behavior as a result of Act 490." *Id.* The same is true here.

Just as the district court concluded in *Greenstein* (which was affirmed by the Fifth Circuit), it is "pure speculation" that Plaintiffs here will someday be subject to any of the challenged penalties. *Id.* at 714. Plaintiffs' challenges to the penalty provisions are unripe and must be dismissed for lack of jurisdiction.

D. The Court lacks jurisdiction over Plaintiffs' vagueness and unconstitutional conditions claims against State Defendants.

Plaintiffs allege claims under the First and Fourteenth Amendments for unconstitutional conditions and vagueness, respectively, but Counts IV and V fail to indicate whose rights are being violated. Compl. ¶¶ 204, 206. Regardless, the focus of those claims appears to be the University of Texas System's alleged application of the General Appropriations Act, Compl. ¶¶ 204, 206, which Plaintiffs allege prevents students from receiving course credit for internships performed at Plaintiff Lilith Fund or other organizations that facilitate abortion access, Compl. ¶¶ 156-163. These claims therefore do not appear to be asserted against Defendants Paxton, Young, Hellerstedt, or Freshour. If Plaintiffs *are* asserting them against these Defendants, Plaintiffs have failed to plead any connection between the University's interpretation of the General Appropriations Act and any of these Defendants, so the Court lacks Article III jurisdiction over those claims. *Okpalobi v. Foster*, 244 F.3d 405, 426-29 (5th Cir. 2001) (en banc).

II. Plaintiffs Failed to State a Claim Against the State Defendants.

Plaintiffs' claims against the State Defendants should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to

relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal*, 495 F.3d at 205 (quoting *Twombly*, 550 U.S. at 555). Although a court accepts all well-pleaded facts as true, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)). For each of their claims against the State Defendants, Plaintiffs have failed to plead facts which, if true, would entitle them to relief.

A. Plaintiffs failed to state a claim against Defendant Hellerstedt

Defendant John Hellerstedt, M.D., is the Executive Director of the Texas Department of State Health Services (DSHS). Texas Government Code section 531.02011 transferred certain Department of State Health Services regulatory responsibilities, including regulation of abortion facilities, to the Texas Health and Human Services Commission on September 1, 2017 pursuant to the Health and Human Services Transition Plan required by Texas Government Code section 531.0204. *See* Act of May 28, 2015, 84th Leg., R.S., ch. 837, 2015 Tex. Gen. Laws 2489-2552 (consolidation of the Texas Health and Human Services system). Due to this reorganization, DSHS is no

longer responsible for the enforcement of the statutes and regulations challenged here, so Defendant Hellerstedt should be dismissed from the case.

B. Plaintiffs failed to state a substantive due process claim.

The overall theme of Plaintiffs' complaint is that Texas is constitutionally prohibited from requiring anything other than the absolute lowest standard of care possible for abortion patients (and in some cases, Plaintiffs believe even the accepted standard of care is too high a burden to bear). The State can demand better. Defendants regulate abortion providers and procedures for a variety of reasons: to ensure the health and safety of women, to regulate the practice of medicine, to ensure informed consent, to protect minors, and to recognize the State's interest in potential life. All of these reasons have been accepted by the Supreme Court or the Fifth Circuit. Those Courts have also found most of the laws challenged by Plaintiffs to be permissible regulations of the abortion industry that do not impose undue burdens on women. But as an initial matter, Plaintiffs make two overarching and related errors in their complaint, which are fatal to their claims. First, they grossly misinterpret *Hellerstedt*, and second, they fail to plead specific facts that demonstrate a substantial obstacle to abortion access.

The sheer breadth of Plaintiffs' complaint and their failure to recognize that existing Supreme Court and Fifth Circuit precedent bar many of their claims suggests that Plaintiffs believe *Hellerstedt* worked a sea change in abortion law. It did not. The constitutional standard by which abortion regulations are judged—the undue-burden test—remains unchanged after *Hellerstedt*: a court must ask whether a law's "purpose or effect is to place a substantial obstacle in the path of a woman" seeking a

previability abortion. *Casey*, 505 U.S. at 878. In short, a law is not an undue burden unless it is a substantial obstacle to abortion.

The Court did not overrule that decision in *Hellerstedt*. While the Court said the burdens of a law must be judged together with the benefits, *Hellerstedt*, 136 S. Ct. at 2309, at no point did the Court suggest that any burden that was less than a substantial obstacle to abortion would be sufficient to hold a law unconstitutional. Instead, the Court determined that the laws at issue constituted a "substantial obstacle" to abortion access by causing the closure of multiple abortion clinics. *Id.* at 2312 (finding the admitting-privileges requirement created a "substantial obstacle"), 2316 (finding the ambulatory-surgical-center requirement created a "substantial obstacle"). Far from overruling *Casey*, the Court explicitly applied the standard from *Casey*: "Each [provision] places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey*, [505 U.S.] at 878, 112 S. Ct. 2791, (plurality opinion), and each violates the Federal Constitution." *Hellerstedt*, 136 S. Ct. at 2299. Thus, the substantial-obstacle standard still applies, and unless the burdens alleged by Plaintiffs amount to a substantial obstacle to abortion, no imbalance between benefits and burdens will suffice to render the challenged laws unconstitutional.

Nothing in *Hellerstedt* suggests a sudden need to reweigh every abortion regulation on the books, especially those that are decades old. Regardless, Plaintiffs' complaint asks the Court to sit as an "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards" in Texas, a role the Su-

preme Court has rejected. *See Gonzales*, 550 U.S. at 163-64 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)). But the undue-burden standard, as used in *Hellerstedt*, does not authorize the Court to judge the wisdom of every individual regulation placed on abortion providers. It is only when those regulations present a substantial obstacle to abortion should the courts intervene.

Plaintiffs' misinterpretation of *Hellerstedt* leads to a basic deficiency in pleading. Rather than allege facts that would demonstrate a substantial obstacle to abortion, Plaintiffs simply assert legal conclusions that the burdens of the laws are not outweighed by their benefits. Although inconsistent with *Hellerstedt*, as explained above, Plaintiffs' conclusory pleading also fails the basic standards of Federal Rule of Civil Procedure 8.

Addressing Rule 8, the Supreme Court has held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Again, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 (demanding "more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). As will be shown below, Plaintiffs' complaint is nothing more than a recitation of (erroneous) legal standards unaccompanied by any

factual allegations that, if true, would demonstrate that Texas law imposes unconstitutional burdens or obstacles on abortion. This is a prime example of a "shotgun approach to pleadings," in which "the pleader heedlessly throws a little bit of everything into his complaint in the hopes that something will stick." *S. Leasing Partners, Ltd. v. McMullen*, 801 F.2d 783, 788 (5th Cir. 1986) (per curiam).

The Court should address this problem now. The Supreme Court has recognized that "basic [pleading] deficienc[ies] should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal citation and quotation marks omitted). The Eleventh Circuit has warned about what happens when shotgun-type pleadings are permitted to survive a motion to dismiss:

> [A]ll is lost—extended and largely aimless discovery will commence, and the trial court will soon be drowned in an uncharted sea of depositions, interrogatories, and affidavits. Given the massive record and loose pleadings before it, the trial court, whose time is constrained by the press of other business, is unable to squeeze the case down to its essentials; the case therefore proceeds to trial without proper delineation of issues, as happened here. An appeal ensues, and the court of appeals assumes the trial court's responsibility of sorting things out. The result is a massive waste of judicial and private resources; moreover, the litigants suffer, and society loses confidence in the courts' ability to administer justice.

Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc., 162 F.3d 1290, 1333 (11th Cir. 1998) (footnote, punctuation, internal citations omitted).

Plaintiffs have challenged dozens of statutes, regulations, and rules, including an entire chapter of the Texas Administrative Code. Yet they pleaded no facts demonstrating how these laws burden the right of a woman to seek an abortion, much less place a substantial obstacle in her path. Defendants should not be forced to litigate

such a massive lawsuit based solely on bare assertions of unconstitutionality. If Plaintiffs cannot even plead facts showing that the challenged laws are a burden, they should not be allowed to subject Defendants to onerous discovery and litigation. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) ("[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

1. "Collective" Undue Burden

In the Complaint, Plaintiffs advance a novel theory: that the myriad challenged laws and regulations are "collectively" an undue burden on the right to abortion. Compl. ¶ 198. Plaintiffs are attempting to assert a claim that even if all the challenged laws and regulations are not individually unconstitutional, they are unconstitutional as a whole. Aside from this claim's fundamental pleading deficiencies related to Article III discussed above, *see* Part I.A.5 *supra*, this is not a cognizable claim. Neither the Supreme Court, nor the Fifth Circuit, has ever struck down an abortion-related law that is not unconstitutional on its own, even though there have been cases involving challenges to more than one law.

Casey is a prime example. In that case, the plaintiffs challenged five abortion-related laws: an informed-consent requirement, which included a 24-hour waiting period, a parental-consent requirement, a spousal-notification requirement, the definition of "medical emergency" triggering some abortion-related requirements, and reporting requirements for abortion facilities. *Casey*, 505 U.S. at 844. The Court analyzed each law separately. *See id.* at 880 (upholding "medical emergency" definition);

881-85 (upholding informed-consent requirement); 885-87 (upholding 24-hour waiting period); 887-98 (striking down spousal-notification requirement); 899-900 (upholding parental-consent requirement); 900-01 (upholding reporting requirements).

As already discussed, *Hellerstedt* did not overrule *Casey*, and neither does it provide support for the "collective burden" claim Plaintiffs attempt to bring here. The *Hellerstedt* plaintiffs did not bring such a claim and did not challenge the constitutionality of almost every state law or regulation of abortion. Rather, they challenged two specific legal requirements—that abortion clinics be licensed as ambulatory surgical centers, and that abortion doctors have admitting privileges at a hospital within 30 miles of the clinic. *Hellerstedt*, 136 S. Ct. 2292. The Supreme Court analyzed *each* requirement to determine whether it was an undue burden, *id.* at 2310-18, and concluded that *each* was, *id.* at 2312 (admitting-privileges requirement), 2316 (ambulatory-surgical-center requirement); *see also id.* at 2299 ("*Each* [provision] places a substantial obstacle in the path of women seeking a previability abortion, *each* constitutes an undue burden on abortion access, . . . and *each* violates the Federal Constitution." (emphasis added)).

The Supreme Court has analyzed abortion regulations individually even over dissent. *See Akron II*, 497 U.S. at 527 (Blackmun, J., dissenting) (faulting the majority for "consider[ing] each provision in a piecemeal fashion, never acknowledging or assessing the degree of burden that the entire regime of abortion regulations places on the minor." (internal quotation marks and citation omitted)). The case law is clear: Plaintiffs have no precedential support for a claim challenging a myriad of abortion-related laws and regulations as a "collective" undue burden.

Given the jurisdictional issues raised by such a claim, *see* Part I.A.5 *supra*, it is no wonder that such a claim has never been contemplated. It should also be rejected because what is really being attempted by Plaintiffs is an end-run around the Supreme Court's requirements for facial challenges. Plaintiffs essentially seek to obtain the relief that would be granted for a successful facial challenge—an injunction against all challenged laws—without meeting the stringent requirements for obtaining that broad relief. "Broad challenges of this type impose 'a heavy burden' upon the parties maintaining the suit." *Gonzales*, 550 U.S. at 167 (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

United States v. Salerno, 481 U.S. 739, 745 (1987). Plaintiffs failed to plead facts which would allow the Court to conclude that the challenged laws and regulations are invalid under all circumstances or in a large fraction of cases.[12] Plaintiffs fail to

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[12] *Gonzales* recognized that the Court had not decided whether *Casey*'s "large fraction" test or the typical "no set of circumstances" test was the appropriate test for facial invalidity in the abortion context, but did not resolve the question. *Gonzales*, 550 U.S. at 167. The Fifth Circuit has applied the "no set of circumstances" test in the abortion context. *See Barnes v. State of Miss.*, 992 F.2d 1335, 1343 (5th Cir. 1993) ("[T]o sustain a facial challenge, the plaintiffs must show that under no circumstances could the law be constitutional." (citing *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992)). It has more recently acknowledged the uncertainty. *See Abbott,* 748 F.3d at 588. In *Hellerstedt*, the Court appeared to rely on the large-fraction test but did not directly address the issue. 136 S. Ct. at 2320.

even plead facts showing harm from each challenged law or regulation. Plaintiffs cannot obtain facial relief while skirting the stringent requirements by simply pleading a massively overbroad "collective undue burden" claim. The Court should dismiss this claim.

2. Regulation of Abortion Providers and Clinics

Plaintiffs assert that nearly every statute and regulation governing abortion clinics is unconstitutional, along with other regulations of the abortion procedure that have already been upheld by the Supreme Court. Not only are these laws undeniably constitutional under existing precedent, Plaintiffs have failed to allege any facts showing how these regulations, many of which have been in place for over 15 years, impose a substantial obstacle to abortion access. The Court should dismiss these claims and avoid wasting resources on discovery and trial for regulations that are constitutional and with which clinics are already complying.

a. Physician-Only Requirement

Texas requires that abortions (surgical and medical) be performed only by physicians. Tex. Health & Safety Code §§ 171.003, .063(a)(1), 245.010(b); 25 Tex. Admin. Code §§ 139.2(1), .53(a)(7). Plaintiffs assert that this requirement is unconstitutional, Compl. ¶ 78(a), but fail to disclose that physician-only requirements have been upheld by the Supreme Court. *Mazurek*, 520 U.S. at 972 (finding physician-only requirement constitutional); *see also Casey*, 505 U.S. at 885 ("Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*") (emphasis added).

In fact, the Court in *Mazurek* traced the constitutionality of a physician-only requirement back to *Roe* itself. 520 U.S. at 974 (quoting *Roe*, 410 U.S. at 165, "[t]he State may define the term 'physician,' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined"); *see also City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 447 (1983) (*Akron I*) (emphasizing that prior cases "left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions"); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam) ("[P]rosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference."). Texas's physician-only requirement is constitutional under decades of Supreme Court precedent.

Regardless, Plaintiffs have failed to adequately plead a constitutional violation. *See* Fed. R. Civ. P. 8(a). They have not even alleged the existence of non-physicians in Texas who are qualified to perform abortions and desire to do so. *Cf. Mazurek*, 520 U.S. at 969-70 (plaintiffs included a physician-assistant who desired to perform abortions). Nor have they alleged facts demonstrating any undue burdens imposed by the physician-only requirement or that such burdens would be lifted if the requirement were declared unconstitutional. Without these relevant facts, there is no basis for a claim that the physician-only requirement unconstitutionally burdens the right to abortion in Texas. The Court should dismiss Plaintiffs' claim regarding the physician-only requirement.

b. Facility-Licensure Requirements

Texas requires facilities that perform 50 or more abortions per year to be licensed as abortion facilities (unless they are already licensed as ambulatory surgical centers or hospitals) and requires them to meet certain standards. Tex. Health & Safety Code §§ 245.003, .004, .009, .010. Texas has required licensure for abortion clinics since 1985. *See* note 4 *supra.* Plaintiffs assert these requirements are unconstitutional and that the Constitution prohibits regulating abortion facilities any differently from doctors' offices. Compl. ¶¶ 78(b), 80. But abortion-facility-licensing requirements have been upheld by several courts, and Plaintiffs offer no factual allegations explaining why requiring clinics to meet basic health-and-safety standards is a burden on the right to abortion.

Starting with *Roe*, the Supreme Court made clear that it was permissible to regulate and license the facilities in which abortions are provided in order to "insure maximum safety for the patient." 410 U.S. at 150, 163 ("Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."). The Fifth Circuit has also held that it is constitutionally permissible to require that abortion providers be licensed. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001) (noting that "without violating the Constitution, the State could have required all abortion providers to be licensed").

The most in-depth consideration has come from the Fourth Circuit, which upheld South Carolina's abortion licensing laws against a challenge similar to this one. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 159, 160-62 (4th Cir. 2000) (requiring abortion clinics to be licensed and have certain policies, training, personnel, specific drugs and tools, laboratory tests, records, safety procedures, firefighting equipment, and design requirements). In reaching its conclusion that the regulations did not impose an undue burden, the Court noted that many of them were substantially similar to the standards proposed by the National Abortion Federation, the American College of Obstetricians and Gynecologists, and Planned Parenthood. *Id.* at 167-68. The court concluded that the regulations were "indisputably . . . a reasonable attempt to further the health of abortion patients." *Id.* at 169.

It is thus permissible to license and regulate abortion clinics. Defendants now turn to the specific laws that Plaintiffs challenge.

Requirement of a license – Plaintiffs assert that Texas Health & Safety Code sections 245.003 and .004, which generally require an abortion clinic to be licensed, are unconstitutional. Compl. ¶ 78(b). The requirement that an abortion clinic be licensed is not unconstitutional under *Roe*, *Bell*, and *Bryant*, foreclosing Plaintiffs' claim. And regardless, Plaintiffs' complaint does not include any facts explaining how the simple requirement of a license imposes an unconstitutional obstacle to abortion. Only if the licensing requirements themselves (discussed below) impose an undue burden on the right to an abortion does a constitutional question arise.[13] *See Bryant*,

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[13] A licensing scheme is not unique to abortion facilities, as Texas requires many different medical facilities to be licensed. *See, e.g.*, Tex. Health & Safety Code chs.

222 F.3d at 167 (noting that regulations may be invalidated only when they make abortion cost-prohibitive); *see also Casey*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.")

Inspections – Texas law provides for random, unannounced inspections of abortion clinics. Tex. Health & Safety Code § 245.006. A requirement that an abortion clinic be licensed does little to protect the health and safety of its patients unless the clinic can also be inspected to determine whether it complies with the law. And courts have previously upheld laws requiring inspections. *See Bryant*, 222 F.3d at 171 (finding no undue burden from annual inspections); *see also Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 78 (1976) (finding inspection of records constitutional). Moreover, Texas inspects a variety of licensed medical facilities. *See, e.g.*, Tex. Health & Safety Code §§ 241.051 (hospitals), 242.043 (nursing homes), 243.006 (ambulatory surgical centers), 244.006 (birthing centers), 247.027 (assisted living centers), 251.051 (end stage renal facilities). Inspections are not unusual, nor are they unconstitutional when performed at abortion clinics. Regardless, Plaintiffs alleged no facts explaining how inspections of abortion clinics burden the right to abortion.

241, 243, 244, 247, 248, 251, 252 (hospitals, ambulatory surgical centers, birthing centers, assisted living facilities, special care facilities, end stage renal disease facilities, and intermediate care facilities for individuals with intellectual disabilities).

Minimum Standards – The Texas Legislature has required HHSC to adopt "minimum standards to protect the health and safety" of abortion patients. *Id.* §§ 245.009, .010(a). HHSC has done so. 25 Tex. Admin. Code ch. 139. Plaintiffs have challenged each and every regulation as unconstitutional. Compl. ¶ 78(b). Yet many of the regulations are indisuputably innocuous, and all are reasonable medical standards. *See, e.g.*, 25 Tex. Admin Code §§ 139.44(b)(3)(B) (employees must understand sterilization and infection control policies), .46(2)(A) (medical consultant to be a physician and the administrator to be at least 18 years old), .47(b)(2) (refrain from discrimination in employment), .48(1)(A) (maintain a safe and sanitary environment).

Plaintiffs have not identified a single regulation in Chapter 139 that is contrary to current medical practice, much less that unconstitutionally burdens the right to abortion. *See Bryant*, 222 F.3d at 167-68 (considering many of the same regulations). And Plaintiffs must make their claims at that level of specificity. They cannot challenge an entire chapter of regulations without identifying which regulations are unconstitutional or why they are unconstitutional.[14] This claim should be dismissed.

License Number – Texas law requires abortion facilities to include their license number in advertisements, Tex. Health & Safety Code § 245.0105, which Plaintiffs claim is unconstitutional, Compl. ¶ 78(b). There are no factual allegations explaining

[14] This challenge is unlike the one in *Hellerstedt*, in which the Supreme Court declined to sever individual ambulatory-surgical-center regulations, holding instead that the ASC requirement fell as a whole. 136 S. Ct. at 2319. The regulations in *Hellerstedt* were originally created to govern a different type of medical facility—ambulatory surgical centers—and were newly applied to abortion clinics. Here, Plaintiffs are challenging an existing set of regulations which were developed specifically for abortion clinics and with which clinics have been complying for decades.

how including a license number in an advertisement burdens the right of a woman to have an abortion. Fed. R. Civ. P. 8(a). And, as will be explained below, the Supreme Court in *Casey* found laws requiring informed consent to be constitutional under the undue-burden standard. 505 U.S. at 883-84. This license-number requirement imposes a much smaller burden than the permissible informed-consent requirements, if it even imposes a burden at all. There are no legal or factual grounds to find it unconstitutional, and this claim should be dismissed.

Toll-Free Number – Texas law requires abortion facilities to provide patients, in writing, the toll-free telephone number that will permit them to contact DSHS and ask about recent inspections or fines levied against the clinic. Tex. Health & Safety Code § 245.023(d). Plaintiffs assert that providing a woman with this number unconstitutionally burdens her right to an abortion. Compl. ¶ 78(b). Plaintiffs make no factual allegations in their brief explaining why this requirement is unconstitutional. And, again, the Supreme Court has approved of much more significant informational requirements, *Casey*, 505 U.S. at 883-84, so there can be no argument that this law crosses the constitutional line by creating an obstacle to abortion.

* * *

In sum, Plaintiffs have alleged only legal conclusions regarding Texas's abortion-facility licensing scheme. There are no allegations that any of these requirements caused a clinic to close or have prevented a clinic from opening. *Cf. Hellerstedt*, 136 S. Ct. at 2301 (citing evidence that new law would require a large number of clinics to close); *see also* Compl. ¶ 190 (recognizing that rural areas lack a large patient base to support abortion clinics). Nor are there allegations that these requirements have

unduly burdened any woman's choice to have an abortion. *See Twombly*, 550 U.S. at 557-58 (stating that "something beyond the mere possibility of . . . causation must be alleged"). There is nothing in the *Hellerstedt* decision that indicates the Supreme Court intended to upend long-standing licensing statutes and regulations of abortion clinics, and Plaintiffs have alleged no facts demonstrating why these laws are suddenly unconstitutional. The Court should dismiss these claims.

c. ASC Requirement

For the past 15 years, Texas has required that abortions that occur after 16 weeks (18 weeks LMP) be performed in an ambulatory-surgical center (ASC). Tex. Health & Safety Code § 171.004. Plaintiffs assert this is unconstitutional. Compl. ¶ 78(c).

The Supreme Court in *Simopoulos*, 462 U.S. at 518-19, held that a Virginia requirement that all second trimester abortions be performed in an outpatient hospital (similar to an ASC) was constitutional under the strict-scrutiny regime of *Roe*. *See also id.* at 520 (O'Connor, J., concurring) (stating that ASC requirement was not an "undue burden"). *Simopoulos* has not been overturned. *See Hellerstedt*, 136 S. Ct. at 2320 (distinguishing *Simopoulos*, but not overturning it). If it is constitutional to require second-trimester abortions to be performed in an ASC, it is constitutional to require post 18-weeks LMP abortions to be performed in one. Indeed, Plaintiffs themselves allege that "the risk, complexity, [and] duration" of an abortion increases with gestational age, Compl. ¶ 38, confirming that a more advanced facility is appropriate

for later-term abortions. Plaintiffs also note that the "vast majority" or 87% of abortions in Texas occur in the first trimester, Compl. ¶¶ 39-40, suggesting that any impact of the ASC requirement is minimal.

Even so, Plaintiffs have not pleaded facts showing that women who desire abortions post-18 weeks LMP lack access to ambulatory surgical centers across the State. Thus, for this separate pleading deficiency, Plaintiffs' claim should be dismissed.

d. Reporting requirements

Texas law requires monthly reports by abortion providers that include basic information about the patient (who remains anonymous), such as age, number of previous abortions and live births, and information about the abortion, including age of the fetus, type of abortion, and the facility. Tex. Health & Safety Code § 245.011. If the patient is a minor, the report must also include information about parental notice/consent and judicial bypass. *Id.* § 171.006. The form used for all of this reporting is available online and comprises only a single page.[15] *Casey* held such reports constitutional, as "[t]he collection of information with respect to actual patients is a vital element of medical research." 505 U.S. at 900-01. The reporting required by Pennsylvania in *Casey* is substantially similar to section 245.011(a) in terms of frequency (monthly) and content. *Id.* at 900. Plaintiffs' challenge to section 245.011 fails as a

[15] *See Induced Abortion Report Form*, Texas Health & Human Services (Aug. 1, 2018), http://www.dshs.state.tx.us/vs/reqproc/forms.shtm#abortion%20and%20autopsy%20forms.

matter of law. *See also Danforth*, 428 U.S. at 80-81 (finding reporting requirement constitutional under *Roe*'s strict scrutiny standard).

For the same reason, the reporting required for abortions on minors is constitutional. As in *Casey* and *Danforth*, the information requested is minimal, but useful. Moreover, there are no allegations in Plaintiffs' complaint that filling out this form places an undue burden on a woman's right to an abortion. Fed. R. Civ P. 8(a). The Court should dismiss Plaintiffs' challenge to Texas's reporting requirements.

3. Medication Abortion

After describing the process of medication abortion through the administration of mifepristone, Compl. ¶¶ 85-89, Plaintiffs assert that Texas's regulation of medication abortion is unconstitutional, Compl. ¶ 91. But nothing in Plaintiffs' factual description indicates why Texas's regulations are unconstitutional. Most of Plaintiffs' challenges are barred by precedent, and some could result in harm to women. Plaintiffs' desire to provide medication abortion as cheaply and with as little effort as possible is not a reason to risk the health of their patients.

a. Dosage and administration restrictions

Texas law requires that medication abortions be performed by physicians and that they follow the FDA guidelines when dispensing the medications. Tex. Health & Safety Code § 171.063(a)-(b); 25 Tex. Admin. Code § 139.53(b)(3). Plaintiffs vaguely assert that this unconstitutionally prohibits "scientific advancement[]." Compl. ¶ 91(a). This challenge is barred by Fifth Circuit precedent. *Abbott*, 748 F.3d at 600-

05. And for the reasons described above, requiring a physician, rather than less-qualified medical personnel, to perform an abortion is constitutionally permissible. *See* Part II.B.2.a *supra*.

Moreover, this challenge is not ripe. Plaintiffs have not identified any "scientific advancement" that this law currently prohibits. Even if this Court were inclined to ignore or distinguish *Abbott*, the Court should still dismiss this claim unless and until there is an actual conflict between the law and the dosage that abortion providers wish to prescribe. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (claim is not ripe when it is "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all") (quotation marks omitted).

b. Physician examination requirement

Before prescribing drugs to induce an abortion, Texas law requires a physician to examine the patient. Tex. Health & Safety Code § 171.063(c). Texas law also requires that "the attending physician, advanced practice registered nurse, or physician assistant . . . obtain[] and document[] a pre-procedure history, physical exam, and laboratory studies, including verification of pregnancy." 25 Tex. Admin. Code § 139.53(b)(5). Plaintiffs claim that requiring a physical examination prior to a medication abortion is "redundant and medically unnecessary." Compl. ¶ 91(b). Yet Plaintiffs offer no allegations for why this is so.

Conveniently omitted by Plaintiffs is the universal acknowledgement that medication abortion should not be provided to women with ectopic pregnancies. *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 506 n.3 (6th Cir. 2006) (noting that one woman died from using mifepristone with an ectopic pregnancy). And the

FDA requires all physicians prescribing mifepristone (the most commonly used drug for medication abortion) to be able to diagnose ectopic pregnancies. *Planned Parenthood Sw. Ohio Region v. DeWine*, No. 1:04-CV-493, 2011 WL 9158009, at *1 (S.D. Ohio May 23, 2011).

A physical examination is necessary to ensure that a woman does not have an ectopic pregnancy and may safely be prescribed mifepristone. Plaintiffs offer no method for diagnosing an ectopic pregnancy other than through a physical examination. Plaintiffs' efforts to have that requirement declared unconstitutional endanger women in Texas and demonstrate that Plaintiffs' lawsuit is not about seeking what is best for their patients. The Court should dismiss Plaintiffs' claim regarding the necessity of a physical exam.[16]

c. Manufacturer's label distribution requirement

Texas law requires physicians to provide women with the manufacturer's label for mifepristone (or any other abortion-inducing drug) when prescribing it. Tex. Health & Safety Code § 171.063(d)(1). Plaintiffs claim this is unconstitutional because the label "may" contain "redundant," "confusing," or "inconsistent" information when compared to a patient's discharge instructions. Compl. ¶ 91(c). Such allegations do not state a constitutional violation. Regardless, Plaintiffs offer no specific factual

[16] To the extent Plaintiffs' complaint is not about the lack of necessity for a physical exam, but rather the requirement that it be performed by a physician, Texas's physician-only requirement is constitutional for the reasons described above. *See* Part II.B.2.a *supra*.

allegations of what their discharge instructions include, so their pleading is deficient. Fed. R. Civ. P. 8(a)(2).

Texas's label-distribution requirement is part of the informed-consent process. The Supreme Court has repeatedly affirmed that the decision to have an abortion, like any other medical procedure, must be well-informed. *Gonzales*, 550 U.S. at 159 ("The State has an interest in ensuring so grave a choice is well informed."); *Casey*, 505 U.S. at 884 (finding constitutional "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion"); *Danforth*, 428 U.S. at 67 (stating that "it is desirable and imperative that [the decision to abort] be made with full knowledge of its nature and consequences"). Plaintiffs have made no allegations that anything in the FDA label is false or inaccurate, nor have Plaintiffs explained how giving women the FDA label of the drug they have been prescribed will unconstitutionally prevent those women from obtaining abortions.

This law is not a burden, much less a substantial obstacle, to abortion. Rather, it gives the woman even more information about the choice she is making and the medication she is taking. The Court should dismiss Plaintiffs' claim regarding the FDA label.

d. Follow-up visit requirement

Texas requires physicians that prescribe abortion-inducing drugs to make a reasonable effort to ensure that a woman returns for a follow-up visit after a medication abortion. Tex. Health & Safety Code § 171.063(e)-(f); 25 Tex. Admin. Code 139.53(b)(4). Plaintiffs assert that this is unconstitutional, Compl. ¶ 91(d), apparently concluding (but not specifically alleging) that making a reasonable effort to ensure

follow up care will hinder some women from obtaining an abortion entirely. Plaintiffs' complaint includes no facts explaining this alleged burden. Fed. R. Civ. P. 8(a)(2).

It is undisputed that some medication abortions fail and that such failure often requires a subsequent surgical abortion. *Planned Parenthood Cincinnati Region*, 444 F.3d at 512; *Planned Parenthood Sw. Ohio Region*, 2011 WL 9158009, at *1. Absent a follow-up visit, a woman might not receive the treatment that she needs. Moreover, Texas law does not require a woman to return for a follow-up visit—so this law is no burden on her rights. It simply requires the physician to make a reasonable effort to provide an appropriate level of care. The Court should dismiss this claim.

e. Telemedicine and Telehealth Restriction

Texas does not permit physicians to prescribe abortion-inducing drugs via telemedicine. Tex. Occ. Code § 111.005(c). This is not a new requirement, yet Plaintiffs claim that continuing to comply with this long-standing ban on abortion via telemedicine has suddenly transformed into an undue burden. Compl.¶ 105.

The Supreme Court has held that the right to abortion is not a right to "abortion on demand." *Casey*, 505 U.S. at 887. Thus, a State may constitutionally mandate the types of permissible abortions, *Gonzales*, 550 U.S. at 132, or require that the procedure be performed by a physician, *Mazurek*, 520 U.S. at 971. And, as demonstrated above and below, the State can require the abortion be performed by a physician after a physical examination, *see* Part II.B.3.b *supra*, and can require the physician to perform a pre-abortion ultrasound, *see* Part II.B.4.c *infra*. Unless those two requirements are also declared unconstitutional, Texas's ban on telemedicine abortions is constitutional.

Again, though, Plaintiffs fail to allege specific facts demonstrating that this is an undue burden on women. There are no factual allegations about individuals or entities that desire to perform telemedicine abortions, how that process would work, or how it would make abortion more accessible while maintaining necessary health-and-safety standards, for example, explaining who would treat women who experience complications, or who would provide surgical abortions if the medication abortion failed. Plaintiffs are seeking policy change through a lawsuit, but the Constitution does not require the States to permit abortion via telemedicine. *Matheson*, 450 U.S. at 413 ("The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions."). The Court should dismiss this claim.

4. Information requirements

Plaintiffs act as if abortion is solely a medical procedure in which a woman's only consideration is possible complications from the procedure; therefore, they argue, only information regarding medical risks is relevant to her decision. The Supreme Court disagrees. Rather than cabin informed-consent requirements to a small set of medical facts, the Supreme Court's rulings encourage full and open discussion of abortion procedures and their effects to "ensure that a woman apprehend[s] the full consequences of her decision." *Casey*, 505 U.S. at 882. And that information includes the "impact on the fetus" which the Court described as "relevant, if not dispositive, to the decision." *Id.*

Even before *Casey*, a plurality of the Court had concluded that the decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment." *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (plurality op.).

"[T]hus the State legitimately may seek to ensure that [the abortion decision] has been made 'in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient.'" *Akron I*, 462 U.S. at 443 (quoting *Colautti v. Franklin*, 439 U.S. 379, 394 (1979)). And in *Gonzales*, the Court recognized that "some women come to regret their choice to abort the infant life they once created and sustained," finding that conclusion "unexceptionable," and stating that "[s]evere depression and loss of esteem can follow." 550 U.S. at 159. Texas's informed-consent laws seek to ensure a woman's decision is fully informed in order to prevent that regret.

a. State-mandated information

Turning first to the information a physician must convey to the patient, Plaintiffs challenge Texas Health and Safety Code section 171.012(a)(1)-(3). Compl. ¶ 116(a) (also listing related rules). Texas requires physicians who perform abortions to inform their patients of (1) the physician's name, (2) the risks of the abortion, (3) the probable gestational age of the unborn child, and (4) the medical risks associated with carrying the child to term. Tex. Health & Safety Code § 171.012(a)(1). These are the same informed-consent requirements found constitutional in *Casey*. 505 U.S. at 881, 884-85.[17] This claim is meritless as a matter of law and should be dismissed.

[17] Plaintiffs take issue with Texas's requirement that the physician inform the woman of "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer." Compl. ¶¶ 124-27; Tex. Health & Safety Code § 171.012(a)(1)(B)(iii). As will be discussed below, this statement is consistent with what the American Cancer Society has written. *See* Part II.D *infra*.

Texas requires physicians or their agents to inform a woman that (1) medical assistance benefits may be available, (2) child support may be available, and (3) public and private agencies provide pregnancy prevention counseling and medical referrals for birth control. Tex. Health & Safety Code § 171.012(a)(2). *Casey* also approved of informing women that information regarding medical assistance and child support was available. 505 U.S. at 881, 884-85. And Plaintiffs offer no allegations as to why requiring physicians to inform women of birth control options is unconstitutional. This claim also lacks merit and should be dismissed.

Finally, a physician or his agent must provide the woman with the state-printed materials and inform her that the materials are available on the internet, describe the unborn child, and list agencies that offer alternatives to abortion and sonogram services at no cost. Tex. Health & Safety Code § 171.012(a)(3). Again, this is very similar to what *Casey* required and upheld. 505 U.S. at 881 (requiring women be informed of list of agencies providing abortion alternatives).

Despite the similarity to the informed-consent requirements in *Casey*, Plaintiffs contend these informed-consent requirements are unconstitutional, calling the materials "irrelevant, medically inaccurate, and ideologically charged." Compl. ¶ 116(a). But, as described above, the Supreme Court has held that this information is relevant. The information is not medically inaccurate. *See* Part II.D *infra* (discussing breast cancer). And the information is not "ideologically charged": The Supreme Court has repeatedly affirmed the right of the State to encourage a woman to choose childbirth over abortion. *See Gonzales*, 550 U.S. at 157 (a State may use "its voice and its regulatory authority to show its profound respect for the life within the woman");

Casey, 505 U.S. at 872 (a State may "encourage [a woman] to know that there are philosophic and social arguments of great weight" in favor of continuing her pregnancy); *Webster*, 492 U.S. at 511 (a State may "express[] a preference for normal childbirth"). There are no grounds to find Texas's informed-consent requirements in section 171.012(a)(1)-(3) and the related rules unconstitutional.

The remainder of Plaintiffs' challenges are bizarre. Plaintiffs claim it is unconstitutional to (1) require an abortion facility to ensure that women "are ensured individual counseling concerning private medical information and to be given a private opportunity to ask questions," 25 Tex. Admin. Code § 139.51(4); (2) require an abortion facility to "prepare the patient for surgery in a manner that facilitates her safety and comfort," to "assist the patient in reaching a decision about the method of post-procedure birth control she will use, if any, and respect her choices," and to "ensure, when medically appropriate" that the patient is aware of the physician's obligation to maintain the life of a child born alive, *id.* § 139.52(a)(2)-(4); and (3) require that a woman who is having a medication abortion be informed that a surgical abortion may be required, *id.* § 139.53(b)(6)(C). There is nothing inaccurate, irrelevant, or misleading in any of this information. Indeed, the obligation to facilitate the patient's safety and comfort and allow her to have individual medical consultations can only further her health and safety. The Court should dismiss these claims.

b. State printed-materials requirement

Texas also requires that, prior to an abortion, a physician or his agent give the woman materials printed by HHSC that contain much of the information described above. Tex. Health & Safety Code §§ 171.013(a), .014. The physician or his agent may

mail the materials to the woman, *id.* § 171.013(a), and the physician or his agent does not have to provide the printed materials at all if the woman states in writing that she has viewed it on the internet, *id.* § 171.013(b). The physician and his agent may also disassociate themselves from the materials. *Id.* § 171.013(c). Plaintiffs claim this is unconstitutional. Compl. ¶ 116(b).

For the reasons described above, providing the information contained in the printed materials is not unconstitutional. Thus, section 171.013 and the associated rules are constitutional, and this claim should be dismissed.

The only additional regulation challenged in this section (other than those directly applying section 171.013) is 25 Texas Administrative Code section 139.51(9), which requires abortion clinics to allow the woman time to review the printed materials. Plaintiffs, therefore, assert that being required to allow women the time they want to review the printed materials is unconstitutional. Given the Supreme Court precedent on the importance of informed consent, *Casey*, 505 U.S. at 882; *Akron I*, 462 U.S. at 443, Plaintiffs' claim can be seen as nothing more than an attempt to keep women in the dark. The Court should reject this claim.

c. Ultrasound requirement

Plaintiffs challenge Texas's ultrasound requirement. Compl. ¶ 116(c). Prior to an abortion, a physician or a certified sonographer must perform an ultrasound on the woman, the physician must describe the images, and the heartbeat must be made audible. Tex. Health & Safety Code § 171.012(a)(4). The woman may choose not to view the images or hear the heartbeat. *Id.* § 171.0122(b), (c). The woman may also choose not to hear a description of the images if she is the victim of a sexual assault,

if she is a minor using judicial bypass, or if the fetus has an irreversible medical condition. *Id.* § 171.0122(d). The woman must then sign a form stating that she has received the required information or chosen not to view or hear it. *Id.* § 171.012(a)(5).

This law is constitutional under existing Supreme Court and Fifth Circuit precedent, as sonograms are routine measures that convey accurate and up-to-date scientific information about the fetus. The Supreme Court has repeatedly recognized the gravity of the abortion decision and the State's interest in ensuring it is fully informed: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Danforth*, 428 U.S. at 67. "[T]he provision of sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as 'medically necessary' for the mother and fetus." *Lakey*, 667 F.3d at 579.

It cannot be disputed that the information gleaned by the physician from an ultrasound is truthful and non-misleading. *Id.* at 577-78 ("[t]o belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information"). Nor can it be disputed that it is relevant to the woman's decision to have an abortion. *Casey*, 505 U.S. at 882 (stating that the "impact on the fetus" is "relevant, if not dispositive, to the decision"); *see also Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc) ("[B]iological information about the fetus is at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*.").

Reading *Casey* to prevent, rather than support, the right of States to supplement the knowledge a woman may be given when contemplating abortion with the latest scientific advancements is illogical, and "[d]enying her up to date medical information is more of an abuse to her ability to decide than providing the information." *Lakey*, 667 F.3d at 579. And the fact that an ultrasound may cause a woman to change her mind about having an abortion is not unconstitutional, but rather demonstrates the importance of that information to her decision. *See id.* at 577 n.4.

Current precedent supports the use of an ultrasound as part of the informed-consent process. And this law has been in effect for over six years. Yet, Plaintiffs have been unable to plead any facts demonstrating that the law causes an unconstitutional burden on a woman's ability to have an abortion. The Court should dismiss this claim.

d. Waiting period requirement

Texas law requires a woman to wait 24 hours after receiving the informed-consent information, including the ultrasound, before having her abortion, unless she lives more than 100 miles from the nearest clinic, in which case she must wait only 2 hours. Tex. Health & Safety Code §§ 171.012(a)(4)-(5), .013; 25 Tex. Admin. Code § 139.50(b). There is also an exception for a medical emergency. Tex. Health & Safety Code § 171.0124. Plaintiffs assert that this requirement is unconstitutional. Compl. ¶ 116(d). The Supreme Court has rejected this argument.

This same claim was made in *Casey*, in which Pennsylvania law required a woman to wait 24 hours after receiving informed consent before obtaining an abortion. 505 U.S. at 885. The Supreme Court found the waiting period to be a "reasonable

measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden." *Id.* The Court also rejected arguments that doubling the travel and exposure to harassment, as would happen when two visits are required, did not amount to a substantial obstacle to abortion. *Id.* at 886-87. Based on the ruling in *Casey*, the Fifth Circuit upheld Mississippi's 24-hour waiting period. *Barnes v. Moore*, 970 F.2d 12, 14-16 (5th Cir. 1992) (per curiam).

The same holds for Texas's law. Unlike Pennsylvania, Texas has an exception to the 24-hour requirement when a woman must travel more than 100 miles, making the law even less burdensome. The Court should dismiss this claim because it is barred by precedent.

e. Procedural requirements

Finally, Plaintiffs challenge a random selection of laws that they believe are related to the informed-consent requirements. Compl. ¶ 116(e). Most of these have been covered in the previous sections of this brief, but a few have not. None, however, impose unconstitutional requirements on abortion.

Plaintiffs challenge Texas law that prohibits abortion clinics from collecting payment for any service other than the ultrasound at the time the woman visits the clinic for her ultrasound. Tex. Health & Safety Code § 171.012(a-1). Texas also caps the amount that a clinic may charge for an ultrasound. *Id.* There are no factual allegations in Plaintiffs' pleadings explaining how limiting the amount of money a clinic may charge at the time of a sonogram unconstitutionally burdens a woman's right to an abortion. The Court should dismiss this claim.

Texas law prohibits the informed-consent requirements from being presented as an audio or video recording. *Id.* § 171.012(b). The Supreme Court in *Casey* held that it was permissible to require the physician to provide informed consent. 505 U.S. at 884-85. This requirement is not significantly different and allows the woman to ask questions at any point during the in-person informed-consent process. The Court should dismiss this claim.

Finally, Plaintiffs object to having to keep the signed informed-consent form in the woman's files for seven years. Compl. ¶ 116(e) (challenging Tex. Health & Safety Code § 171.0121). The Supreme Court has already found requirements like this to be constitutional. *Danforth*, 428 U.S. at 80-81. There are no conceivable factual allegations that would transform this requirement into an undue burden. The Court should dismiss this claim.

5. Parental Involvement Laws

Plaintiffs challenge various portions of Texas's parental notification and consent laws, which require that a parent of a minor be notified of and consent to the minor's abortion absent a judicial bypass. But Plaintiffs' complaint is devoid of factual allegations that minors are currently experiencing substantial obstacles to abortion as a result of Texas's parental-involvement laws. There are no facts alleged showing how many minors seek abortions, how many use the judicial-bypass process, what costs and delays are associated with the process, and how involvement of parents or judicial bypass presents an obstacle to abortion. Fed. R. Civ. P. 8(a)(2).

The underlying rule in Texas is that parents generally have control over their children's medical care and surgical treatment. Tex. Fam. Code § 151.001(a)(6). And

the Supreme Court has approved of requiring parental notification and consent for abortions, provided there is an adequate judicial-bypass procedure. *Casey*, 505 U.S. at 899-900; *Akron II*, 497 U.S. at 510-11. "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their 'strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'" *Ayotte*, 546 U.S. at 326 (quoting *Hodgson*, 497 U.S. at 444-445 (opinion of Stevens, J.)).

Plaintiffs do not challenge the substantive requirements of the judicial-bypass procedures, Tex. Fam. Code § 33.003(i) (regarding whether the minor is mature and notification/consent is not in her best interest). Instead, they challenge the procedural aspects. None of their claims, however, have merit.

a. Notice and waiting period

Texas law requires a physician to provide actual or constructive notice to a minor's parent, managing conservator, or guardian at least 48 hours before performing an abortion on the minor, unless there is a medical emergency. *Id.* § 33.002. Notice is not required if the minor obtains a judicial bypass. *Id.* § 33.002(a)(2). A parent, managing conservator, or guardian may also waive the 48-hour waiting period in writing. *Id.* § 33.002(c). Plaintiffs assert that the notice and waiting period requirement are unconstitutional. Compl. ¶ 145(a). The Supreme Court has held otherwise.

The Supreme Court has generally approved as constitutional requirements that parents be notified about a minor's abortion. *Akron II*, 497 U.S. at 510-11; *Matheson*,

450 U.S. at 413. And the Court has questioned whether a judicial bypass is even necessary for a notification requirement, as notice (as opposed to consent) does not allow for a parental veto. *Akron II*, 497 U.S. at 510-11. Regardless, Texas provides for judicial bypass of the notice requirement. Tex. Fam. Code § 33.003.

The waiting period is also not unconstitutional. As explained in *Casey*, "some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family." 505 U.S. at 899-900. And the Supreme Court has also noted that "[i]t seems unlikely that [the minor] will obtain adequate counsel and support from the attending physician at an abortion clinic." *Matheson*, 450 U.S. at 410. Even so, the parent can waive the 48-hour waiting period. Tex. Fam. Cod. § 33.002(c).

Plaintiffs have not pleaded any facts showing that the notification and waiting period operate as an undue burden on a minor's right to abortion. The Court should dismiss this claim as barred by precedent and for deficient pleading.

b. Identification

Texas law requires physicians to "use due diligence" to ascertain whether an abortion patient has reached the age of majority. *Id.* § 33.002(j). "Due diligence" includes requesting proof of identity and age. *Id.* § 33.002(k). "[T]he physician shall provide information on how to obtain proof of identity and age" to the patient if she does not have such proof. *Id.* § 33.002(*l*). But if the woman is ultimately unable to

obtain such proof, the physician may perform the abortion anyway, but must document the lack of proof and report it to the State. *Id.* Plaintiffs allege that this process is unconstitutional. Compl. ¶ 145(b). Plaintiffs' pleading contains no allegations of how frequently this is a problem, what type of delays are caused by this process (hours, days, or weeks), or how difficult it is to obtain proof of identity and age. Plaintiffs have pleaded no facts demonstrating a right to relief.

This process is not a burden on the right to an abortion as a matter of law, because it still allows the abortion to take place. Tex. Fam. Code § 33.002(*l*) It is simply a step in the process to determine whether a patient is a minor and, therefore, required to obtain parental consent or a judicial bypass.[18] The Court should dismiss this claim.

c. Consent

Texas law requires that physicians obtain the consent of at least one parent before performing an abortion on a minor, unless the minor obtains a judicial bypass. Tex. Fam. Code §§ 33.0021, .013. Plaintiffs claim this is unconstitutional. Compl. ¶ 145(c). But the Supreme Court has repeatedly upheld parental-consent procedures, as long as there is an adequate judicial-bypass procedure. *Casey*, 505 U.S. at 899-900; *Akron II*, 497 U.S. at 510-11. Plaintiffs do not challenge the substance of the judicial-bypass process, but only procedural elements, discussed below. As long as the judicial-bypass procedure is adequate, there is no constitutional problem with requiring

[18] Proof of identity or age can be a requirement for exercising constitutional rights. *See, e.g.*, *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181 (2008) (voting).

parental consent. And Plaintiffs have pleaded no facts demonstrating a constitutional violation. The Court should dismiss this claim.

d. Procedural Requirements

Plaintiffs allege that a number of procedural requirements that pertain to the judicial-bypass process are unconstitutional. Compl. ¶ 145(d). As an initial matter, Plaintiffs' challenges to the Texas Supreme Court Rules on Judicial Bypass should be dismissed because Defendants do not enforce Supreme Court rules. *Okpalobi*, 244 F.3d at 415 ("the defendant state official must have some enforcement connection with the challenged statute"). As a result, Plaintiffs cannot trace the alleged injury caused by the rules to the conduct of Defendants. *See, e.g.*, *Calzone v. Hawley*, 866 F.3d 866, 870 (8th Cir. 2017) (dismissing claims against governor and attorney general because they did not enforce statutes at issue). This is an essential element of standing and requires dismissal of the challenge to the Texas Supreme Court's rules.

Venue – An application for judicial bypass must be filed in (1) the minor's county of residence; (2) a contiguous county or the county in which the abortion will occur if the minor's parent, managing conservator, or guardian is a presiding judge of one of the courts or if the minor's county of residence has a population of less than 10,000; or (3) the county in which the abortion will occur if the minor is not a resident of Texas. Tex. Fam. Code § 33.003(b). Plaintiffs make no allegation as to why these options create a substantial obstacle to abortion access or create a constitutional flaw in the judicial-bypass procedure.

This line of argument is contrary to abortion providers' usual claims that Texas laws require women to drive too far to obtain an abortion. *See, e.g.*, *Hellerstedt*, 136

S. Ct. at 2313; *Abbott*, 748 F.3d at 597-98. Limiting venue to a location close to the minor's home or to the location in which she will have the abortion—the most relevant locations for purposes of venue—is not a substantial obstacle. *See Casey*, 505 U.S. at 899-900, 905 (approving a parental consent law in which venue was limited to the judicial district of the minor's home or the district in which the abortion was to occur). Plaintiffs have alleged no facts demonstrating an undue burden on minors who are not permitted to drive to distant counties to obtain a judicial bypass.

It also brings the law more in line with Texas's general venue provisions, which require some connection to the county in which suit is filed. Tex. Civ. Prac. & Rem. Code § 15.002(a). And limiting venue to counties with relevant contacts to the minor or the procedure also prevents entities like Plaintiffs from repeatedly seeking hearings before judges believed to be favorable to their position but have no connection with the minor or abortion clinic. *See In re Mann*, 229 F.3d 657, 658 (7th Cir. 2000) ("'Judge shopping' is not a practice that should be encouraged."). The Court should dismiss this claim.

In-person – Texas law prohibits a minor seeking a judicial bypass from appearing in court via videoconference, telephone conference, or other remote electronic means. Tex. Fam. Code § 33.003(g-1); Tex. Sup. Ct. R. for Judicial Bypass 1.5(d). Plaintiffs claim this requirement is unconstitutional, Compl. ¶ 145(d)(ii), but do not allege any facts demonstrating how this burdens minors seeking abortion. There are no facts describing how minors are unable to appear in court (especially if the minor is appearing in a court in her home county) but are able to appear by videoconference,

or that any minors have been unable to obtain judicial bypass for this reason. Thus, Plaintiffs' pleadings are deficient. Fed. R. Civ. P. 8(a)(2).

That said, there are no legal grounds for finding this law unconstitutional. Under Supreme Court precedent, a judge must make a determination about the minor's maturity and ability to choose to have an abortion. *Akron II*, 497 U.S. at 511. The judge must also attempt to ensure that the minor is making the choice to have an abortion of her own free will and not as the result of pressure from someone who may be sexually assaulting her. Tex. Fam. Code § 33.003(i-2)(3)-(4). That determination is best made in person, when the judge can view the minor's demeanor and ensure that she is not being pressured into covering up any sort of assault.

Absent any factual allegations or legal arguments by Plaintiffs demonstrating that appearing in-person for a judicial-bypass hearing creates a substantial obstacle to abortion, this claim should be dismissed.

Clear and convincing evidence – Plaintiffs assert that it is unconstitutional to require a minor in a judicial-bypass proceeding to satisfy the clear-and-convincing-evidence standard. Compl. ¶ 145(d)(iii) (challenging Tex. Fam. Code § 33.003(i-3); Tex. Sup. Ct. R. for Judicial Bypass 2.5(b)). This claim is foreclosed as a matter of law. The Supreme Court explicitly addressed and denied a claim that it was unconstitutional to use the "clear and convincing evidence" standard in judicial-bypass procedures. *Akron II*, 497 U.S. at 515-16.

Psychological Examination – Texas law permits a judge in a judicial-bypass proceeding to require the minor to be evaluated by a licensed mental health counselor. Tex. Fam. Code § 33.003(i-1)(4); Tex. Sup. Ct. R. for Judicial Bypass 2.5(c)(4).

Plaintiffs claim that granting a judge this authority is unconstitutional, Compl. ¶ 145(d)(iv), but do not plead any facts showing that any judge in Texas has ever required a minor to be evaluated by a licensed mental health counselor. Thus, there are no facts in the complaint that would demonstrate that granting this authority to trial courts has placed a substantial obstacle or burden in the path of a minor seeking an abortion.

Even so, underlying Texas law permits a court to require a party to litigation to submit to a mental examination if good cause is shown. Tex. R. Civ. P. 204.1. And, with respect to cases that arise under Titles II or V of the Texas Family Code, a court may, on its own initiative or that of a party, appoint a psychologist or psychiatrist to make an appropriate mental examination of the children who are the subject of the suit. *Id.* 204.4. The judicial-bypass procedure is located in Title II of the Texas Family Code.

Texas courts have the authority to order mental examinations generally, and Plaintiffs have pleaded no facts demonstrating that this authority has ever been used in a judicial-bypass proceeding. Absent any law or factual allegation that granting courts this authority unduly burdens the right to abortion, the Court should dismiss this claim.

Nonsuit – Texas law prohibits a minor from non-suiting her application for judicial bypass without permission of the court. Tex. Fam. Code § 33.003(o); Tex. Sup. Ct. R. for Judicial Bypass 2.1(c). Plaintiffs claim that this provision places an undue burden on a minor's right to an abortion, Compl. ¶ 145(d)(v), but fail to explain how.

The only possible reasons for non-suit are that (1) the minor no longer wants an abortion, (2) the minor has decided to tell her parents and they have consented, or (3) the minor wishes to refile her case in hopes of being assigned a different judge. The first two reasons do not involve an undue burden on abortion. And, as described above, Texas can choose to prohibit judge-shopping. *See supra* p. 63. The non-suit requirement does not impose a substantial obstacle on abortion.

Pocket veto – Texas law provides that a minor's application is deemed denied if the trial court or court of appeals fails to rule on it within 5 business days. Tex. Sup. Ct. R. for Judicial Bypass 2.2(g), 2.5(g), 3.2(c), 3.3(f). If the appeal is taken all the way to the Texas Supreme Court, that Court must rule. *Id.* 4.3. Plaintiffs assert that deeming applications to be denied is unconstitutional. Compl. ¶ 145(d)(vi). But they do not plead any facts showing how often this happens, in which courts this happens, or the consequences of a deemed denial on the ultimate ability of a minor to obtain an abortion. There are, therefore, no facts demonstrating that any minor has ever been burdened by these rules.

Regardless, the Supreme Court has approved of judicial-bypass statutes that contain no timeline for a decision at all. *Casey*, 505 U.S. at 899-900, 904-06. Texas law guarantees a decision by the trial court and court of appeals within 5 business days, even if that decision is to reject the application. Minors can then exercise their rights of appeal to seek the relief that has been denied. There is no constitutional violation with this procedural mechanism, and the claim should be dismissed.

e. Reporting requirements

As discussed above, the reporting requirements for physicians who perform abortions on minors are constitutional. *See* Part II.B.2.d *supra*.

6. Criminal Penalties

Plaintiffs assert that the existence of criminal penalties that could potentially be imposed on a physician for violating certain abortion statutes and regulations are an undue burden on a woman's right to abortion. Compl. ¶¶ 149-55 (citing Tex. Health & Safety Code §§ 171.018, 245.003(a); Tex. Occ. Code §§ 164.052(a)(19)-(20), .055, .0551, 165.151). Plaintiffs also claim that no other physicians are subjected to special criminal liability. Compl. ¶ 151. Plaintiffs' claims are incorrect as a matter of law and completely unsupported by any facts in the complaint.

Abortion-performing physicians are not the only medical personnel subjected to specific criminal penalties for violating Texas law. For example, operators of nursing homes face criminal penalties for violating a variety of laws. *See, e.g.*, Tex. Health & Safety Code §§ 242.041, .072, .074, .101, .313. And it is a crime for most licensed facilities, not just abortion facilities, to operate without a license. *See, e.g.*, *id.* §§ 241.057(b) (hospitals), 243.013 (ASCs), 244.013 (birthing facilities), 251.064(b) (end-stage renal facilities). Texas law makes it a crime for any physician to violate Subtitle B, of Title 3 of the Texas Occupations Code, which pertains to physicians, or any rule of the Texas Medical Board. Tex. Occ. Code § 165.151. The Texas Medical Board has adopted 41 chapters' worth of rules that physicians must follow. 22 Tex. Admin. Code chs. 160-200. In short, there are hundreds of statutes and rules in Texas that physicians must comply with or face possible criminal penalties.

Defendant has not found any precedent suggesting that imposing criminal penalties on abortion-performing physicians who break the law unduly burdens the right to abortion. Nor have Plaintiffs pleaded any facts demonstrating even the existence of physicians who would perform abortions in Texas but for the possibility of criminal penalties for violating the law.

Exempting abortion-performing physicians from criminal penalties—when all other physicians face such penalties—would send the message that the State does not hold abortion-performing physicians to the same standards as other physicians, but rather to lower standards. Texas can require abortion-performing physicians to follow the law by imposing criminal penalties for violations. The Court should dismiss Plaintiffs' challenge to any laws that impose criminal penalties on abortion-performing physicians.

C. Plaintiffs failed to state an equal-protection claim.

Having alleged that each of the above-discussed laws imposes an undue burden on abortion access, Plaintiffs then assert that every single one of the laws "denies equal protection of the laws to individuals seeking and providing abortion care" in violation of the Equal Protection Clause. Compl. ¶ 200. But Plaintiffs' complaint does not contain any allegations—conclusory or otherwise—that the challenged laws fail the rational-basis test or even a heightened standard of scrutiny. And, for the same reasons that none of the challenged laws imposes an undue burden, none of them violates the Equal Protection Clause, either, as each is rationally related to a legitimate state interest, be it health and safety, regulation of the medical profession, ensuring informed consent, protecting minors, or respecting unborn life.

The Supreme Court has recognized that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris*, 448 U.S. at 325. And when challenged under the Equal Protection Clause, the Supreme Court has applied only the rational-basis test to abortion regulations. Thus, for example, the decision to fund childbirth through Medicaid, but not elective abortion, was subject only to the rational-basis test. *Id.* at 326; *Maher*, 432 U.S. at 478. Both the Fourth and Fifth Circuits used the rational-basis test when considering equal-protection claims regarding abortion-licensing schemes. *Bell*, 248 F.3d at 419; *Bryant*, 222 F.3d at 173. Indeed, the existence of all of the abortion-specific precedent discussed in this motion demonstrates that abortion may be singled out for specific regulation.

Under the rational-basis test, a court must uphold the law if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *See Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993). The burden is on the plaintiff to negate every conceivable basis that might support the classification. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "When applying rational basis doctrine to a dismissal for failure to state a claim, a legislative classification must be treated as valid 'if a court is able to hypothesize a legitimate purpose to support the action.'" *Glass*, 2018 WL 3941526, at *8 (quoting *Mahone v. Addicks Util. Dist. of Harris Cty.*, 836 F.2d 921, 934 (5th Cir. 1988)). For all of the reasons stated above, the challenged laws are rationally related to the State's interests in, *inter alia*, potential life, regulation of the medical profession, informed consent, protecting minors, and women's health and safety.

To the extent Plaintiffs' refrain that the challenged laws "disproportionately impact poor people, people of color, immigrants, and others who are marginalized" is intended to state an equal-protection claim, Compl. ¶¶ 82, 94, 110, 132, 148, 155, 182, it fails as a matter of law. The Equal Protection Clause prohibits only intentional discrimination. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 238 (1976). Claims of disparate or disproportionate impact are not actionable as equal-protection claims. *Vill. of Arlington Heights*, 429 U.S. at 264-65; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

Plaintiffs claim dozens of statutes, regulations, and rules violate the Equal Protection Clause but do not even make conclusory legal allegations about irrationality or a heightened form of scrutiny. Nor do they allege facts showing a violation of the Equal Protection Clause. Defendants should not be subjected to discovery, nor should this case proceed to trial, unless and until Plaintiffs explain what their equal-protection claim actually is and plead facts supporting their claim. *See Twombly*, 550 U.S. at 558.

D. Plaintiffs failed to state a free-speech claim.

Plaintiffs assert that the ultrasound requirement, the state-mandated information requirement, and the state-printed-materials requirement violate the free speech rights of WWHA and Dr. Kumar. Compl. ¶ 202. Those claims have already been rejected by the Supreme Court and Fifth Circuit.

Plaintiffs' ultrasound claim is barred by Fifth Circuit precedent. In *Lakey*, the Fifth Circuit determined that Texas's ultrasound requirement did not violate the

First Amendment rights of physicians. 667 F.3d at 580. Instead, the Court held that "the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information," in keeping with *Casey*. *Id.* at 577-78. There has been no change to the statute requiring the ultrasound, nor has there been any intervening Supreme Court or Fifth Circuit precedent that would suggest the decision in *Lakey* no longer controls. The ultrasound requirement does not violate the First Amendment, and Plaintiffs' claim should be dismissed.

Plaintiffs' other First Amendment claims fare no better. *Casey* rejected the First Amendment claims of physicians regarding similar state-mandated information and printed-materials laws, recognizing that they were part of the reasonable licensing and regulation of the practice of medicine. 505 U.S. at 884. As described above, the laws at issue in this case are nearly identical in terms of the information that is required to be conveyed. *See* Part II.B.4 *supra*; *compare Casey*, 505 U.S. at 902-03 (quoting Pennsylvania informed-consent law) *with* Tex. Health & Safety Code § 171.012(a)(1)-(3). Moreover, unlike the Pennsylvania law at issue in *Casey*, Texas law explicitly states that the physician and his agent "may disassociate themselves from the materials and may choose to comment on the materials or to refrain from commenting." Tex. Health & Safety Code § 171.013(c). And the Supreme Court recently reaffirmed the authority of States to regulate in the area of informed consent without violating the First Amendment. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

The lone issue Plaintiffs specifically identify is the requirement that the physician inform the woman of "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer." Tex. Health & Safety Code § 171.012(a)(1)(B)(iii); Compl. ¶¶ 124-27. Plaintiffs assert that this claim has been debunked by the American Cancer Society, Compl. ¶ 127 (citing *Abortion and Breast Cancer Risk*, American Cancer Society (June 19, 2014), https://www.cancer.org/cancer/cancer-causes/medical-treatments/abortion-and-breast-cancer-risk.html). But that article actually confirms the information required to be conveyed to the woman.

First, the article states that "[s]ome case-control studies, however, have found an increase in risk" of breast cancer following an induced abortion and cites at least three studies finding a link. *Abortion and Breast Cancer Risk*, *supra*. While the article ultimately concludes that other studies that find no link are more reliable, Texas law is still accurate, as it refers only to the "*possibility* of increased risk" of breast cancer. Tex. Health & Safety Code § 171.012(a)(1)(B)(iii) (emphasis added).

Second, the article also states that "[t]he risk of breast cancer also goes down as the number of full-term pregnancies goes up." *Abortion and Breast Cancer Risk*, *supra*. This also matches Texas law, which refers to "the natural protective effect of a completed pregnancy in avoiding breast cancer." Tex. Health & Safety Code § 171.012(a)(1)(B)(iii).

The Eighth Circuit considered a similar claim regarding South Dakota's informed-consent requirement that included mention of an "increased risk of suicide ideation and suicide." *Planned Parenthood Minn., N.D., & S.D. v. Rounds*, 686 F.3d

889, 893-94 (8th Cir. 2012) (en banc). Although the causal link was heavily debated in the field, the Eighth Circuit found this disclosure to be truthful, non-misleading, and relevant. *Id.* at 905. Recognizing that "the Supreme Court 'has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,' including 'in the abortion context' *Gonzales*, 550 U.S. at 163-64," the Court upheld the requirement against a First Amendment challenge. *Id.* at 905-06. This Court should do the same and dismiss Plaintiffs' First Amendment challenge to state-mandated information and printed-materials requirements.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion and dismiss the Plaintiffs' case in its entirety.

Respectfully submitted.

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