No. 18-50730

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF FOR APPELLANT

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No. 18-50730

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

Defendant-Appellant:
Charles Smith, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity

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STATEMENT REGARDING ORAL ARGUMENT

This case warrants oral argument. Following a five-day trial, the district court held that a Texas law that prohibits healthcare facilities from disposing of fetal remains in landfills and sewers violated the United States Constitution. The court then permanently enjoined the law's application. Oral argument would permit a thorough discussion of the Supreme Court's abortion precedent and the evidence presented at trial.

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INTRODUCTION

Cultures around the world and throughout history have respected the bodies of their dead. Texas is no different. Multiple laws and regulations require that the bodies of those who have died be treated with respect and dignity. *See, e.g.*, Tex. Health & Safety Code §§ 716.302-.304 (disposition of cremated remains); Tex. Occ. Code §§ 651.456-57 (prohibiting unethical conduct regarding treatment of bodies); Tex. Penal Code § 42.08 (criminalizing treating a corpse in an offensive manner); 25 Tex. Admin Code § 181.3 (requiring preservation of bodies prior to disposition).

In 2017, the Texas Legislature extended similar dignity-affirming protections to the embryonic and fetal remains of the unborn. The law—Chapter 697 of the Texas Health and Safety Code—requires healthcare facilities to provide for the dignified disposition of embryonic and fetal remains through interment or scattering of ashes, forbidding them from grinding the remains and discharging them into the sewer system or incinerating them and placing the ashes in a landfill. Chapter 697 reflects the Legislature's common-sense belief that our society should treat the remains of the unborn with respect similar to that which we afford the remains of others who have died—not the way we treat garbage or pathological waste.

Plaintiffs promptly sued to enjoin Chapter 697. They presented two theories: first, that Chapter 697 imposed an undue burden on abortion; and second, that Chapter 697 violated their right to equal protection. They presented both theories as facial, rather than as-applied, challenges.

The district court convened a five-day trial to allow Plaintiffs the opportunity to present evidence supporting their theories. Plaintiffs offered effectively nothing. They made no attempt to determine whether they could comply with this law because, as they freely admitted in court, they preferred to bring a legal challenge instead. Plaintiffs also explicitly waived any argument that the cost of compliance with the law was an unconstitutional burden. And despite asserting that their patients are opposed to this law, Plaintiffs admitted that they almost never talk to their patients about the disposition of fetal remains.

The lack of evidence should have foreclosed relief. But the district court responded by flipping the burden of proof, requiring the State to prove that healthcare facilities in Texas could comply with the law. The State did so, offering conclusive evidence that compliance with the law would be no serious obstacle. Yet the district court resorted to hypotheticals and speculation (much of it contrary to the evidence in the case) to conclude that an unconstitutional burden on abortion access existed. The district court also ruled, contrary to Supreme Court precedent that allows States to enact laws respecting unborn life, that the State's decision to respect unborn life unconstitutionally burdened the beliefs of women who disagree.

Plaintiffs offered little more in support of their equal-protection claim. Yet the district court found that the Legislature acted irrationally by limiting Chapter 697 to fetal remains from a "pregnancy," excluding pre-implantation embryos used for in vitro fertilization. But that overlooks the Legislature's reasonable policy decision to

focus on dignifying the remains of embryos that had implanted and begun to grow, when the potential for life is more fully realized.

Chapter 697 and the related rules are lawful, and Plaintiffs put on no evidence sufficient to conclude otherwise. The Court should reverse the district court's judgment in its entirety.

Statement of Jurisdiction

Federal subject-matter jurisdiction exists under 28 U.S.C. § 1331 because Plaintiffs have brought an action under 42 U.S.C. § 1983 challenging the constitutionality of Texas's laws under the United States Constitution. ROA.1673-96. The Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment in Plaintiffs' favor on September 5, 2018. ROA.3330. The notice of appeal was timely filed that same day. ROA.3331-33.

Issues Presented

1. Did the district court err in rejecting Texas's arguments that Plaintiffs lacked standing for some claims?
2. Did the district court err in facially invalidating Texas's fetal-remains law as an undue burden when the law serves Texas's interest in respecting unborn life and Plaintiffs presented no evidence that the law would place any obstacle, substantial or otherwise, in the path of a woman seeking an abortion?
3. Did the district court err in ruling that Texas's fetal-remains law violated the Equal Protection Clause because it does not also require the respectful disposition of pre-implantation embryos?

STATEMENT OF THE CASE

I. Texas Prohibits Healthcare Facilities from Disposing of Fetal Remains in Landfills and the Sewer System.

Texas has long regulated the disposition of fetal remains by healthcare facilities. *See, e.g.*, 14 Tex. Reg. 1457, 1457-62 (1989) (adopting rules regulating disposition of fetal remains); ROA.3279. In 2017, the Texas Legislature enacted Chapter 697 of the Texas Health and Safety Code to express the State's respect for unborn life by requiring that healthcare facilities dispose of fetal remains through interment or the scattering of ashes. Act of May 28, 2017, 85th Leg., R.S., ch. 441, § 13, 2017 Tex. Gen. Laws 1164, 1169-71. Plaintiffs assert this law is facially unconstitutional.

A. Under prior law, healthcare facilities could dispose of fetal remains in landfills and the sewer system.

Prior to this litigation, Texas law classified fetal remains as pathological waste and required healthcare facilities to dispose of fetal remains through:

> (1) grinding and discharging to a sanitary sewer system;
>
> (2) incineration followed by deposition of the residue in a sanitary landfill;
>
> (3) steam disinfection followed by interment;
>
> (4) interment;
>
> (5) moist heat disinfection followed by deposition in a sanitary landfill;
>
> (6) chlorine disinfection/maceration followed by deposition in a sanitary landfill; or
>
> (7) an approved alternate treatment process followed by deposition in a sanitary landfill.

41 Tex. Reg. 7659, 7664 (2016). Healthcare facilities were, therefore, required to dispose of fetal remains in the sanitary sewer system, a sanitary landfill, or through interment.

Because fetal remains were considered pathological waste, they could be transported for disposition only by individuals with appropriate authority from the Texas Commission on Environmental Quality (TCEQ). 30 Tex. Admin. Code § 326.53. Disposition options were limited, as there are only nineteen landfills in Texas licensed to accept incinerated medical waste. ROA.4777-78.

B. The new law requires the respectful disposition of fetal remains through interment or scattering of ashes.

During the 2017 legislative session, the Texas Legislature enacted Chapter 697 of the Texas Health and Safety Code for the purpose of "express[ing] the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.001.

Chapter 697 defines "embryonic and fetal tissue remains" as

> an embryo, a fetus, body parts, or organs from a pregnancy that terminates in the death of the embryo or fetus and for which the issuance of a fetal death certificate is not required by state law. The term does not include the umbilical cord, placenta, gestational sac, blood, or body fluids.

Id. § 697.002(3). The law removes "embryonic and fetal tissue remains" from the definition of "pathological waste," *id.* § 697.003, and requires healthcare facilities to dispose of those remains through

(1) interment;

(2) cremation;

(3) incineration followed by interment; or

(4) steam disinfection followed by interment.

Id. § 697.004(a). The ashes resulting from the cremation or incineration of embryonic and fetal tissue remains may be "interred or scattered in any manner as authorized by law for human remains" but "may not be placed in a landfill." *Id.* § 697.004(b). The ashes of human remains may be scattered over uninhabited public land, over a public waterway or sea, or on the private property of a consenting owner. *Id.* §§ 716.302, .304. Thus, under Chapter 697, the methods of final disposition for fetal remains are interment and scattering of ashes.[1]

Chapter 697 also permits the associated products of conception—the umbilical cord, placenta, gestational sac, blood, and body fluids—to be disposed of in the same manner as the fetal remains. *Id.* § 697.004(d). Pursuant to the related rules adopted by the Texas Health and Human Services Commission, entities that may store, handle, or transport fetal remains for disposition include: any entity authorized by the Texas Funeral Service Commission to store, handle, or transport human remains; any entity authorized by the TCEQ to store, handle, or transport special waste; and the healthcare facility that generated the fetal remains. 25 Tex. Admin. Code § 138.6. In short, storage, handling, and transportation of fetal remains may now be done by

[1] For simplicity, this brief will refer to "embryonic and fetal tissue remains" as "fetal remains."

licensed funeral providers, licensed medical-waste handlers, and the facilities themselves.

Although requiring a respectful disposition, Chapter 697 exempts the disposition of fetal remains from many of the laws governing the disposition of "human remains."[2] Tex. Health & Safety Code § 697.003 (exempting, unless otherwise provided, compliance with Tex. Health & Safety Code ch. 711 (governing cemeteries, including right to control interment and removal of remains), Tex. Health & Safety Code ch. 716 (governing crematories, including simultaneous cremation and disposition of cremated remains), and Tex. Occ. Code. ch. 651 (governing funeral directors and embalmers, including transportation of remains and pricing of services)). Because of these exemptions, fetal remains may be commingled for purposes of cremation and interment. ROA.5722. No ceremony or "funeral" is required when the remains are interred or scattered.

Chapter 697 requires the Texas Health and Human Services Commission to establish and maintain a registry of funeral homes and cemeteries willing to provide free common burial or low-cost private burial for fetal remains. Tex. Health & Safety Code § 697.005(1). The Commission is also required to "develop a grant program that uses private donations to provide financial assistance for the costs associated

[2] Solely to adhere to the convention used at trial, this brief will use "human remains" to refer only to those dead human bodies for which a death certificate has been issued.

with disposing of embryonic and fetal tissue remains." *Id.* § 697.006. There are presently sixteen entities that have signed up on the registry. ROA.5615.

II. Trial-Court Proceedings

Plaintiffs are three abortion clinics, one women's health center, two physicians, and a healthcare management company. ROA.1675-77. Plaintiffs originally filed suit in 2016 when the Texas Department of State Health Services adopted rules that required the respectful disposition of fetal remains through interment or scattering of ashes. ROA.48-49. Plaintiffs obtained a preliminary injunction, ROA.1448-71, and the State appealed that ruling to this Court, ROA.1482-84. Before the Court could hear the case, however, the Texas Legislature enacted Chapter 697, which preempted the challenged rules. ROA.5136-62. When it appeared that the Court might not be able to resolve the appeal prior to the effective date of Chapter 697 (February 1, 2018), the State dismissed its appeal. ROA.1642.

On remand, Plaintiffs filed an amended complaint, challenging Chapter 697 and the related administrative rules, 25 Tex. Admin. Code ch. 138. ROA.1673-96. Plaintiffs obtained a preliminary injunction of the new law based on arguments regarding the cost to comply, the ability to find vendors, and the alleged shame imposed by the law. ROA.1925-39. Two months later, when the State sought discovery of Plaintiffs' financial records, Plaintiffs agreed to waive any argument that costs rendered the law unconstitutional in exchange for the State foregoing discovery of Plaintiffs' financial records. ROA.1960-61. The case proceeded to trial on two claims: undue burden and equal protection.

A. Plaintiffs did not attempt to comply with the law, and the State showed that compliance was possible.

Because Plaintiffs expressly waived any argument about the costs of complying with the law, ROA.1960-61, the main question at trial was whether vendors exist that would enable Plaintiffs to comply with the new law. But Plaintiffs made no attempt find vendors to determine whether they could comply with the law while the State presented evidence of ways Plaintiffs could comply.

1. The challenged laws require only a minimal change in Plaintiffs' practices.

Plaintiffs currently comply with the prior law by contracting with a medical-waste vendor. ROA.3994, 4331, 4478-79. Although Plaintiffs' clinics are located throughout Texas, all use the same medical-waste vendor—identified at trial as Vendor A—located in the Dallas/Fort Worth area. ROA.2976, 5804, 5817, 5834. Vendor A picks up medical waste, including fetal remains, every few weeks from each clinic, incinerates the waste, and places the ashes in a landfill. ROA.4059, 4331-32, 4479, 5793-94, 5808, 5839-40, 5853, 5874. Plaintiffs' witnesses were unaware how many medical-waste vendors there actually are in Texas, ROA.4053, 4496, but they asserted that Vendor A is the only medical-waste vendor in Texas that will work with them, ROA.4032, 4336, 4479.

Plaintiffs admitted that the challenged laws have no impact on the abortion procedure itself. ROA.4062-63, 4151-52, 4383, 4496. Following an abortion or miscarriage-management procedure, the fetal remains and associated products of conception are placed in a Ziploc bag, and then into a biohazard bag that is stored in a

freezer. ROA.4055-57, 4162-63, 4378-79, 4497-98, 5887-917. The freezer does not contain anything other than fetal remains and the associated products of conception. ROA.4057, 4378-79, 4498. Because Plaintiffs already segregate the fetal remains and associated products of conception from medical waste, no additional segregation will be required by the new laws before disposition. *See* Tex. Health & Safety Code § 697.004(d). Plaintiffs need only find a vendor that will comply with the new laws.

2. Plaintiffs made no attempts to find a vendor that would enable them to comply with the challenged laws.

Plaintiffs admit that they made no attempts to determine whether they could comply with Chapter 697 because they intended to file a lawsuit instead. Amy Hagstrom Miller, president of Plaintiffs Whole Woman's Health, LLC, and Whole Woman's Health Alliance stated that she declined to follow up with vendors who offered their services because "the law was not something I was interested in complying with," ROA.4040-41, and that "most of my resources have been put into challenging the law, instead of complying with the law," ROA.4066. Plaintiff Dr. Lendol Davis, the medical director for Plaintiffs Brookside Women's Medical Center and Austin Women's Medical Center, explained that he declined to ask Vendor A (his current vendor) if it could comply because he believed the law was unconstitutional. ROA.4370-71. And Dr. Alan Braid, medical director of Plaintiff Alamo City Surgery Center also declined to call vendors because he decided to challenge the law instead. ROA.4499.

Thus, Plaintiffs did not contact any potential vendors to see if they would work with Plaintiffs to transport, inter, cremate, incinerate, steam disinfect, or scatter the ashes of fetal remains. ROA.4067, 4069-70, 4153-54, 4392, 4494-95. Plaintiffs did not contact anyone on the registry. ROA.4495. Plaintiffs did not even ask Vendor A if it could comply. ROA.4066-67, 4370, 4493. And Ms. Hagstrom Miller admitted that she declined to follow up with a vendor that contacted her offering crematory and interment services. ROA.4040, 4074, 5774-75.

No Plaintiff has taken any steps internally, or even had specific discussions, about how they might comply with Chapter 697. ROA.4030, 4074, 4153, 4391, 4493. Thus, no Plaintiff testified, or could testify, what effect Chapter 697 would have on their provision of services. ROA.4160, 4371, 4391, 4490-91.

Plaintiffs did not present evidence of any non-party healthcare facility that would stop providing services to pregnant women if Chapter 697 took effect. Instead, the evidence showed that several hospitals are already interring fetal remains. ROA.4086, 4508-09.

3. The State presented multiple options for compliance.

The State demonstrated that there are hundreds, if not thousands, of providers in Texas that are qualified to help with the disposition of fetal remains. Transportation of the remains may be done by any of the over 1300 licensed funeral providers in Texas, as well as licensed medical-waste handlers (including Plaintiffs' current vendor) and Plaintiffs themselves. 25 Tex. Admin. Code § 138.6; ROA.4840, 4848, 5699-5717. The remains may be lawfully cremated at any of the 164 crematories in

Texas. ROA.4840, 4848-49, 5718-21. These funeral providers and crematories are located all across Texas, in both urban and rural areas. ROA.4841, 5699-5721.

Should healthcare facilities wish to inter remains in existing cemeteries, there are many to choose from, as Texas law authorizes perpetual care cemeteries, religiously affiliated cemeteries, public (city, county and state) cemeteries, and fraternal, family, and community cemeteries. ROA.4837-38; Tex. Health & Safety Code § 711.021. James Shields, the director of Our Lady of the Rosary Cemetery in Georgetown, testified that the cemetery was prepared to inter 700-800 un-cremated fetal remains per month or 4000 cremated fetal remains per month, ROA.4515, and was willing to do so without a religious service or marker, ROA.4512. That would more than cover all of Plaintiffs' abortion procedures in Texas.[3] Mr. Shields also showed the plans of the cemetery to expand its burial grounds, if necessary. ROA.4513-14. Mr. Shields testified that the cemetery was willing to enter into long-term contracts with abortion providers, but had not been contacted by any. ROA.4511-12, 4515, 4544.

Mr. Shields works with Morgan Cook, the managing director of a non-sectarian funeral home and crematory, to conduct quarterly burials for fetal remains from

[3] In 2017, Plaintiffs performed fewer than 8000 abortions and procedures to complete medical abortions. ROA.5793, 5807-08, 5851-52, 5873. The district court noted that there was no evidence of the number of miscarriage-management procedures in Texas. ROA.3278 n.3.

three local hospitals. ROA.4508-09, 4553. Mr. Cook also testified that his establishment was willing to assist in the interment and cremation of fetal remains and could purchase additional refrigeration units if necessary. ROA.4558, 4582. He was also willing to enter into agreements with abortion providers to cremate and assist with the disposition of fetal remains. ROA.4558.

Deacon Charles Stump of the Catholic diocese in Dallas testified to the diocese's willingness to enter into long-term contracts with abortion providers to inter fetal remains from abortion clinics. ROA.4639. He testified that there are three existing cemeteries controlled by the Dallas diocese that currently have space to inter fetal remains. ROA.4621-22; *see also* ROA.4623 (explaining that the Dallas diocese has filled only one cemetery to capacity in 130 years).

Jennifer Carr Allmon, Executive Director of the Texas Catholic Conference of Bishops (TCCB), testified that the Bishops announced their commitment to a fetal burial ministry in December 2016 to provide for the burial of every unborn fetus, including those who are aborted, in the State of Texas. ROA.4701, 4707, 4715. The fifteen Catholic dioceses in Texas cover every mile of the State, ROA.4696, and there are more than 100 official Catholic cemeteries in the State that are controlled by the Bishops. ROA.4716. The Bishops are also willing to obtain additional cemetery capacity if needed. ROA.4717, 4720-21.

Should Plaintiffs wish to scatter the ashes of incinerated or cremated remains, the ashes may be scattered on any uninhabited public land, public waterway, or the private property of a consenting owner. Tex. Health & Safety Code §§ 716.302, .304.

There was no evidence that Texas lacked sufficient space to scatter ashes in these locations.

B. The State demonstrated that the challenged laws further its legitimate interest in respecting unborn life.

The district court also heard testimony that the Texas Legislature permissibly concluded that Texas's legitimate interest in respecting unborn life would be furthered by the challenged laws. In short, embryos and fetuses are unique human organisms that can be respected through dignified disposition.

1. Science, bioethics, and personal experience support the respectful treatment of fetal remains.

As a matter of science, embryos and fetuses are human organisms. ROA.4172, 4218, 4316-17, 4870. The remains of embryos and fetuses are not partial pieces of a human organism that continues to live (such as a liver or tumor), but the entirety of an organism that has died. ROA.4177-78. Even several of Plaintiffs' experts admitted that a fetus is a "whole organism," "human entity," or a "subcategory of human beings." ROA.4316-17, 4452-53. And Austin Women's Health's medical-waste policy refers to "human anatomical remains." ROA.4378, 5834.

Dr. Mikeal Love's unrebutted testimony demonstrated that fetuses and embryos are organisms that are genetically and immunologically distinct from the pregnant woman. ROA.4870. A heartbeat is audible at 6 weeks from the woman's last menstrual period (LMP). ROA.4871. At 7 weeks LMP, arms and legs begin to form, as well as facial features such as ears and eyes. ROA.4872. By 10 weeks LMP, the fetus has fingers, toes, elbows, a nose, and a mouth. ROA.4875. And by 12 weeks LMP,

the fetus has all the features one would find in a newborn. ROA.4879; *see also* ROA.5665-98 (admitted for demonstrative purposes); Defendant's Exhibit 26 (sonogram video, admitted for demonstrative purposes). And Plaintiffs' abortion doctors admit that they look for fetal parts, such as the head, spine, and limbs, when examining the fetal remains following abortions after 10 weeks LMP. ROA.4147, 4376-77. Fetuses and embryos are, thus, biologically distinct from medical waste such as diseased organs, limbs, body fluids, and sharps.

The State's bioethics experts, Dr. Farr Curlin and Dr. Aasim Padela, explained that, from a bioethics perspective, fetuses are human organisms and have intrinsic value, as well as value for what they can do and what they can become. ROA.4176-77, 4242-43. Because treatment of the dead impacts treatment of the living, showing respect for fetal life does not terminate in the fetus's death, just as society respects the bodies of the dead. ROA.4178-79. Respectful treatment of the dead, even fetal deaths, is common across cultures and religions and is not specific to any single religion. ROA.4195-96, 4244-45. And the respectful treatment of fetal remains reflects the moral intuition of many societies and cultures. ROA.4255.

Plaintiffs' witnesses also bear this out. Whole Woman's Health's pathology procedure recognizes that "the visualization of the products of conception/fetal parts is a real challenge" for some, ROA.5755, and Ms. Hagstrom Miller explained that some individuals can have "an emotional reaction to the pregnancy tissue." ROA.4010. Thus, Whole Woman's Health's express policy is that staff members may pray over

fetal remains. ROA.5755. Two lay witnesses called by Plaintiffs spoke of their devastation upon losing their pregnancies, ROA.4082, 4288, one stating that she viewed her pregnancy as a "potential child," ROA.4105.

2. Plaintiffs are unaware of the beliefs of their patients regarding the disposition of fetal remains.

Plaintiffs uniformly testified that their abortion patients almost never ask about the disposition of fetal remains. ROA.3987 ("very rarely"), 4061, 4156-57 ("very rare"), 4387 ("very rare"), 4484 ("infrequently"). In fact, Ms. Hagstrom Miller could recall only ten times she was asked about disposition in the past twenty-nine years. ROA.4062. Instead, Plaintiffs testified that their patients are usually more concerned about other aspects of their procedures—safety, success, pain, and future pregnancies. ROA.4016-17, 4062, 4344. None of Plaintiffs' experts performed a study or survey or even read a study or survey of women's preferences regarding the disposition of fetal remains. ROA.4316, 4413, 4454, 4686. On the few occasions that Plaintiffs remember the issue being raised, it was often to request burial for a wanted pregnancy or testing at a forensic or pathological laboratory. ROA.3987, 4012-13, 4386-87, 4487-88.

Plaintiffs do not inform their patients as a matter of course that fetal remains will be incinerated and placed in a landfill. ROA.4017, 4157, 4343-44, 4483. The consent form used by Whole Woman's Health clinics and Plaintiff Dr. Bhavik Kumar, medical director for Whole Woman's Health clinics, ROA.4107, states only that "the fetal tissue removed during the abortion will be disposed of following legal and Texas

DSHS guidelines." ROA.5751. And the consent form used by Austin Women's Health Center and Dr. Davis states only that the woman "consent[s]" to the "disposal" of her pregnancy and related tissue. ROA.5829. This language would not have to change under Chapter 697, and no Plaintiff testified whether they intended to inform patients of the disposition of fetal remains should Chapter 697 take effect.

No Plaintiff has had a patient express a personal or religious preference for disposition in a landfill or sewer. ROA.4065, 4157. Nor have Plaintiffs' patients expressed religious objections to burial or cremation. ROA.4065-66, 4158-59, 4391, 4498. At most, Plaintiffs offered a few anecdotes of individuals who disagreed with Seton Hospital's burial policy—which, unlike Chapter 697, requires the woman to choose to bury the remains herself or consent to a common burial by the hospital—but who still went through with their procedures. ROA.4086, 4092, 4668-69. Ms. Hagstrom Miller conceded that she did not have any idea what proportion of patients would be offended by the challenged laws or whether the laws would prevent them from obtaining abortions. ROA.4060-61. And Dr. Kumar admitted the effect on his patients was "a big unknown." ROA.4160.

C. The district court found the fetal-remains law facially unconstitutional.

The district court heard four and a half days of testimony and issued a memorandum opinion incorporating findings of fact and conclusions of law. ROA.3277-329. The court rejected the State's arguments that Plaintiffs lacked third-party standing to assert claims based on the subjective beliefs of their patients. ROA.3291-

93. The court then declined to hold that the State's interest was "invalid," but deemed that question a "close call." ROA.3294-301. The court found the challenged laws only minimally beneficial. ROA.3302-05.

Turning to the burdens imposed, the district court found that the laws required Plaintiffs to rely on "unreliable and nonviable" disposition options, ROA.3305-14, and burdened women's beliefs by causing them to feel shame and stigma, ROA.3314-17. Conducting a balancing analysis, the court concluded that the laws would cripple the ability of abortion clinics to provide services and would "likely cause the shut-down of women's healthcare" generally. ROA.3317. The court found that this burden was not outweighed by the benefit of respecting unborn life. ROA.3318-19. The court concluded that a large fraction of women would be unable to access abortion or would feel shame, and that the laws were, therefore, unconstitutional. ROA.3319.

As for Plaintiffs' equal-protection challenge, the court first concluded that Plaintiffs brought the challenge only on their own behalf and that the rational-basis test applied. ROA.3323-24. The court rejected Plaintiffs' arguments that the laws were irrational because they failed to cover women who miscarry or medically abort at home or tissue sent to laboratories for testing. ROA.3325. The court did find, however, that the law's failure to cover pre-implantation embryos failed the rational-basis test. ROA.3326-27. The court enjoined the fetal-disposition provisions in Chapter 697 and its associated rules. ROA.3329. This appeal followed. ROA.3331-33.

SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly affirmed that States may enact laws expressing respect for unborn life as long as those laws do not pose a substantial obstacle to abortion. Pursuant to that precedent, Texas enacted a law respecting unborn life by prohibiting healthcare facilities from putting the remains of embryos and fetuses in landfills and sewers. The district court's conclusion that this modest form of respect is unconstitutional has no legal or factual support. Plaintiffs made no effort to comply with the law and put on no real evidence of constitutional infirmity. The State, by contrast, produced evidence and witnesses demonstrating that Plaintiffs would have little difficulty complying with Chapter 697. The district court erroneously placed the burden of proof on the State and relied on speculation to discount the State's evidence. The court also erroneously permitted Plaintiffs to rely on their patients' unknown beliefs to assert third-party standing and recognized a novel undue burden of "shame" that the Supreme Court has never acknowledged. Plaintiffs have no evidence that a single clinic will close or a single woman will be denied an abortion. The district court erred in holding Texas's law facially unconstitutional.

The district court also erred in holding that Texas's law violated the Equal Protection Clause because it did not cover pre-implantation embryos. The Texas Legislature drew the line at fetal remains from a pregnancy. That considered public-policy choice reflects legitimate interests not subject to judicial invalidation. The district court's judgment should be reversed.

STANDARD OF REVIEW

The decision to enjoin the challenged laws is reviewed for an abuse of discretion. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014). "[F]indings of fact are reviewed for clear error and legal issues are reviewed *de novo*." *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009) (citation omitted). A district court "by definition abuses its discretion when it applies an incorrect legal standard." *Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir. 2011). Reversal is also warranted under clear-error review if the court is "left with the definite and firm conviction that a mistake has been committed." *Jauch v. Nautical Servs., Inc.*, 470 F.3d 207, 213 (5th Cir. 2006) (per curiam) (citation omitted).[4]

ARGUMENT

I. The District Court Erred When It Did Not Place the Burden of Proof on Plaintiffs.

Laws are presumed to be constitutional. *INS v. Chadha*, 462 U.S. 919, 944 (1983). This Court has recognized that "[a]s in litigation generally, the burden of proving the unconstitutionality of abortion regulations falls squarely on the plaintiffs." *Planned Parenthood of Greater Tex.*, 748 F.3d at 597; *see also June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787, 807 (5th Cir. 2018) (scrutinizing whether "June Medical

[4] It is unclear why the district court stated that "Defendant does not dispute that the questions presented by this case are purely legal." ROA.3293. The State has disputed Plaintiffs' factual claims throughout this litigation.

has met its burden"). In a facial challenge, such as this case, the Supreme Court has called it "a heavy burden" that requires, at a minimum, a showing that the challenged law imposes an undue burden in a large fraction of cases. *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007).

The district court's opinion does not explicitly state on which party the court placed the burden of proof. But several portions of its analysis indicate that the court placed the burden on the State to prove that Plaintiffs (and other healthcare providers) could comply, rather than on Plaintiffs to prove that compliance was not possible. For example, the district court found "no evidence" that the licensed funeral providers, medical-waste handlers, and healthcare facilities in Texas "have the capacity or ability" to transport fetal remains. ROA.3309. But the question the court should have asked is whether Plaintiffs proved that those entities *did not* have such capacity. The court similarly faulted the Catholic Church (which was not even a party) for providing "no evidence" that it could bury fetal remains throughout Texas. ROA.3310. Again, though, the question the court should have been asking is whether Plaintiffs proved that there were *no* interment options in Texas. The district court's consistent reliance on hypothetical difficulties also suggests that it expected the State to affirmatively demonstrate that compliance was possible. *See, e.g.*, ROA.3288-89 (ophthalmologist might stop serving pregnant women), 3308 n.20 (a woman "might well be deterred"), 3309 (Catholic Church might withdraw its offer), 3311 (entities on the registry "could be fabricated"), 3312 n.24 ("[i]t is possible" the

entire medical-waste industry will collapse), 3318 (women "might well seek" an unlawful abortion).

This improper placement of the burden matches comments from the district court at trial, which indicated the court expected Texas to prove the means of compliance: "I have to have some evidence before me that this will work," ROA.4576, and "the bottom line is whether the state of Texas is . . . in a position to provide the resources to comply with SB 8," ROA.4815. The district court asked for evidence of "how many entities firmly agreed, either contracts in place or irrevocably agreed, to dispose of . . . embryonic and fetal remains," "how many secular cemeteries and crematories have committed to provide those services, how many remains that could be handled by those individuals or companies, and where are the disposal entities located geographically." ROA.4906-07. The court also faulted Texas for "not appropriat[ing] resources to ensure that [the] challenged laws operate as intended." ROA.4943.

This Court should hold Plaintiffs to their burden of proof. Under that standard, Plaintiffs' evidence falls woefully short of establishing a constitutional violation.

II. Plaintiffs Lack Standing To Assert Some of Their Claims.

Plaintiffs rely on third-party standing to assert an undue-burden claim on behalf of their patients and have broken up the alleged burden into two arguments: (1) abortion access, and (2) freedom of belief. ROA.3943. Courts have recognized that abortion doctors generally have standing to assert *abortion-access* claims on behalf of their

patients, *see, e.g.*, *Planned Parenthood of Greater Tex.*, 748 F.3d at 589, as it may reasonably be assumed that an abortion doctor's patients wish to access abortion clinics. But Plaintiffs take it a step too far when they assert their patients' unknown, personal, subjective *beliefs* unrelated to access. On the record before the Court, there is no way to know whether Plaintiffs' patients actually oppose the challenged laws.[5]

Regardless, there is no standing for Whole Woman's Health, LLC, as it is a management company that does not have any patients and does not handle fetal remains. It lacks a sufficient stake in this case to maintain standing.

A. Plaintiffs cannot base third-party standing on the unknown personal beliefs of their patients.

Third-party standing is an exception to the general rule that a party "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Third-party standing, however, requires a plaintiff to show a "close" relationship with the individuals whose rights he is asserting. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Plaintiffs have not shown this close relationship with respect to their freedom-of-belief claim because they have failed to demonstrate that they even know what their patients' personal, subjective beliefs regarding fetal-remains disposition are. And, as the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

[5] For the reasons discussed below, *see infra* pp.44-47, Plaintiffs' "freedom of belief" claim should not be recognized by the Court as part of the undue-burden analysis.

561 (1992); *In re Deepwater Horizon*, 857 F.3d 246, 253 (5th Cir. 2017) (holding that third-party plaintiff has burden to establish standing and that it may not be inferred by the Court).

The district court believed Plaintiffs satisfied their burden because there was evidence that they talk to their patients about abortion and its implications. ROA.3292. But each Plaintiff physician or representative testified that they almost never talk to their patients about the disposition of fetal remains. ROA.3987 ("[v]ery rarely"), 4156-57 ("very rare"), 4387 ("very rare"), 4484 ("infrequently"). No Plaintiff affirmatively tells patients how fetal remains are disposed of, ROA.4017, 4157, 4343-44, 4483, and no expert performed a study or even read a study about women's preferences regarding fetal-remains disposition, ROA.4316, 4413, 4424, 4686. Plaintiffs have no idea how this law will impact their patients. ROA.4060-61, 4160.

The district court also reasoned that Plaintiffs' patients have a diversity of beliefs, and Plaintiffs "contend" that some of those beliefs would be infringed. ROA.3292-93. But Plaintiffs have brought a facial challenge on behalf of all their patients. ROA.1694-95. The possibility that some unknown fraction of their patients might agree with Plaintiffs' lawsuit does not suffice to prove the requisite close relationship for third-party standing on behalf of all their patients. *See Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (plurality op.) (recognizing that individuals may not always wish to have their rights asserted by third parties). Indeed, on the record before the district court, it is possible that more women would prefer the respectful treat-

ment of their fetal remains: the few conversations Plaintiffs have had with their patients about disposition were often because the woman wanted a respectful disposition, such as burial. ROA.3987, 4012-13, 4386, 4487-88.

This lack of evidence is concerning because Plaintiffs' current assertion—that they want women to be able to choose the method of disposition—was not the case thirty years ago, when abortion providers argued that requiring a woman to choose the method of disposition of fetal remains was unconstitutional because of the burden it placed on her. *Margaret S. v. Edwards*, 794 F.2d 994, 997-98 (5th Cir. 1986). The Court should not permit abortion providers to use their patients as proxies to advance their own agendas without evidence of what their patients actually want.

On the record before the Court, it cannot be determined whether Plaintiffs' patients would prefer disposition in a landfill or something more dignified, such as interment or scattering of ashes. Nor is there any basis to assume that abortion doctors can speculate on those beliefs when they rarely discuss fetal-remains disposition with patients. Absent this information, Plaintiffs cannot prove a "close" relationship with their patients that permits them to raise their patients' beliefs in court. The Court should deny standing to Plaintiffs with respect to their freedom-of-belief claim.

B. Whole Woman's Health, LLC lacks standing because it is only a management company.

Whole Woman's Health, LLC cannot assert the rights of its patients because it has no patients. ROA.4055. Instead, it is a management company that contracts with

abortion clinics to provide non-medical services, such as accounting, human resources, and development of policies and protocols. ROA.3964-65, 4055. It, therefore, lacks a close relationship with any patient that would permit it to assert any rights on that patient's behalf. *See Singleton*, 428 U.S. at 115 (plurality op.) (referring to the confidential nature of the doctor-patient relationship as a ground to permit third-party standing); *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973) (finding nurses, clergy, social workers, and corporations "another step removed" from patients and declining to rule whether they had standing).

Moreover, because Whole Woman's Health, LLC is not a healthcare facility, but rather a management company, it cannot claim an equal-protection violation because the challenged laws do not apply to it in the first place. 25 Tex. Admin. Code § 138.2(13) (defining "health care facility"). Although the Court has overlooked questions of standing in the past, when at least one party has demonstrated standing, *see, e.g.*, *Planned Parenthood of Greater Tex.*, 748 F.3d at 589, it should not do so here. Whole Woman's Health, LLC's lack of standing is obviously deficient under existing precedent and a ruling will give lower courts guidance regarding the entities that have standing to challenge laws on behalf of patients. Whole Woman's Health, LLC should be dismissed from the lawsuit.

III. The District Court Erred in Ruling That Plaintiffs Proved a Substantial Obstacle to Abortion for a Large Fraction of Women.

The district court's conclusion that the fetal-remains law would pose a substantial obstacle to a large fraction of women was erroneous because the court (1) failed

to grant sufficient weight to the State's interest in respecting unborn life, (2) completely overlooked Plaintiffs' failure to attempt to comply, (3) wrongly rejected the State's evidence of disposition options, and (4) erroneously expanded the right to abortion to include freedom of belief. The Court should reverse the district court's ruling.

A. Plaintiffs must prove that the challenged laws pose a substantial obstacle to abortion access.

The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* set out the constitutional test—the undue-burden test—for abortion regulations: 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. 505 U.S. 833, 878 (1992) (plurality op.).[6] The parties disagreed below with how the court should apply that test in light of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In this case, however, it does not matter whether the Court uses the "substantial obstacle" standard from its recent opinion in *June Medical* or the pure balancing test urged by Plaintiffs. Because Plaintiffs utterly failed to prove any burden on abortion access, their claims fail under any interpretation of *Whole Woman's Health*.

Regardless, the Court should follow *June Medical* and require proof of a substantial obstacle to establish an undue burden, 905 F.3d at 803, as that is the standard the Supreme Court has identified for laws respecting fetal life: "[r]egulations which do

[6] All references to *Casey* are to the plurality opinion.

no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 877). Plaintiffs were, therefore, required to prove that the challenged laws impose a "substantial obstacle" to abortion access before any imbalance between burdens and benefits could justify a finding of unconstitutionality. *June Med. Servs.*, 905 F.3d at 803; *see also Whole Woman's Health*, 136 S. Ct. at 2312, 2316 (finding that laws created a "substantial obstacle"). But even under a pure balancing test, Plaintiffs failed to prove any burden, so a minimal benefit suffices to hold the law constitutional.[7]

B. The challenged laws are beneficial because they further the State's legitimate interest in respecting unborn life.

The conclusion that Texas has a legitimate interest in respecting unborn life, and that its interest is furthered by the challenged laws, should not have been difficult to reach. The Supreme Court has recognized the State's legitimate interest in respect-

[7] The undue-burden test does not extend to claims regarding access to medical procedures other than abortion, such as the miscarriage-management procedures discussed at trial. The Supreme Court has never held that there is a specific constitutional right to healthcare. *See Cooper Hosp. v. Burwell*, 179 F. Supp. 3d 31, 46 (D.D.C. 2016). Lower courts have used the rational-basis test for regulations touching on healthcare. *See, e.g.*, *Abigail All. for Better Access to Dev. Drugs v. Eschenbach*, 495 F.3d 695, 712 (D.C. Cir. 2007) (en banc); *Mitchell v. Clayton*, 995 F.2d 772, 775–76 (7th Cir. 1993).

ing unborn life, and the challenged laws further that interest by removing fetal remains from landfills and sewers. Yet, the district court found this a "close call," minimizing the State's interest by concluding it barely had one. ROA.3294-305.

1. Texas has a legitimate interest in respecting fetal remains.

The Supreme Court has recognized that States have "a substantial state interest in potential life throughout pregnancy." *Casey*, 505 U.S. at 876. Thus, a State may use "its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157. A State may constitutionally "encourage [a woman] to know that there are philosophic and social arguments of great weight" in favor of continuing her pregnancy. *Casey*, 505 U.S. at 872. And a State may "'express[] a preference for normal childbirth.'" *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (quoting *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (per curiam)). Such laws are not required to further a health interest. *Casey*, 505 U.S. at 886. Thus, Texas may respect unborn life through the dignified disposition of fetal remains.

Despite the district court's concern, the Supreme Court's decision in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (*Akron I*), is not to the contrary. ROA.3295-96. There, the Court found a law requiring the "humane" disposition of fetuses to be unconstitutionally vague. *Akron I*, 462 U.S. at 451. But the Court indicated that an intent to preclude the "mindless dumping of aborted fetuses on garbage piles" was permissible and that the City could redraw its statute

"to further its legitimate interest in proper disposal of fetal remains." *Id.* at 451-52 & n.45 (internal citation omitted).[8]

Nothing in this Court's precedent precludes respecting unborn life through the dignified disposition of fetal remains, either. ROA.3296-97. The Court's decision in *Margaret S.* concerned a Louisiana law that required a doctor to inform a woman of her disposition options (cremation, burial, or disposal as medical waste) and have the woman choose. 794 F.2d at 997. The Court struck down the requirement that the physician perform this task, but did not hold that Louisiana was unable to legislate regarding fetal-remains disposition. *Id.* at 997-98.

Just as the partial-birth abortion procedure at issue in *Gonzales* was "laden with the power to devalue human life," 550 U.S. at 158, so, too, is the treatment of fetal remains as refuse to be put in a landfill. Testimony from the State's experts confirmed this from both a bioethical view that it is appropriate to respect fetal life and that many cultures do so, and a scientific view that a fetus is a distinct human organism. *See supra* pp.14-15. Embryos and fetuses are fundamentally different from medical waste, such as needles, tumors, and organs. Texas law provides a modest form of respect based on what a fetus is—a separate human organism.

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[8] The district court concluded that *Akron I* did not offer a "clear indication" regarding the State's legitimate interest because it was overruled in part by *Casey*. ROA.3296. But the Supreme Court only strengthened the State's interest in life in *Casey*, finding that *Akron I* failed to show sufficient respect for the State's legitimate interest in the life of the fetus. 505 U.S. at 882.

Recognizing the humanity of the unborn by requiring that their remains not be placed in a sewer or landfill does not undermine the right to an abortion as described in *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey*. ROA.3299-300, 3315-16. The decision in *Roe* that a fetus is not a "person" under the Fourteenth Amendment simply prohibits States from banning elective abortion by relying on the Fourteenth Amendment's guarantee of life. 410 U.S. at 156-57. It is not a prohibition on laws that treat fetal life with respect or laws that recognize the humanity of unborn life. As subsequently recognized by the Supreme Court, there are a variety of beliefs regarding unborn life. *Casey*, 505 U.S. at 850. But that does not prevent the States from implementing laws suggesting that unborn life has value beyond that of medical waste. *See, e.g.*, *Gonzales*, 550 U.S. at 132 (banning partial-birth abortion); *Casey*, 505 U.S. at 886-87 (requiring 24-hour waiting period). Even so, prohibiting putting ashes in a landfill or remains in a sewer is not treating fetuses as constitutional persons.

For this reason, the Seventh Circuit's decision in *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, which found Indiana's fetal-disposition law unconstitutional, was incorrect—it erroneously held that treating fetal remains with respect violated *Roe*. 888 F.3d 300, 308 (7th Cir. 2018), *petition for cert. filed* (U.S. Oct. 12, 2018) (No. 18-483) (*PPINK*). This Court should not follow suit. Fetal-disposition laws confer constitutionally permissible respect, not constitutional personhood. The States can ban cruelty toward animals, even if they are not "persons" under the Constitution. *See, e.g.*, Tex. Penal Code

§ 42.092. They can require respect for embryos and fetuses which are, as a matter of scientific fact, human.

Finally, the State's decision that fetal life has value is not improperly taking sides in a moral debate, ROA.3299-300, to the extent such an argument is even relevant in the undue-burden analysis. States frequently make moral judgments by passing penal codes and prohibiting conduct like assisted suicide and recreational marijuana use, even if people disagree. *See Harper v. Lindsay*, 616 F.2d 849, 854 (5th Cir. 1980) ("[T]he state's police power encompasses the authority to pass legislation aimed at regulating the health, welfare and morals of the community . . . ."). The cases cited by the district court do not prohibit the State from making moral choices, but rather prohibit the State from otherwise violating the Constitution when doing so. ROA.3299-300; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723-24 (2018) (freedom of religion); *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (right to privacy); *Casey*, 505 U.S. at 833 (abortion); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (freedom of speech); *Reliable Consultants v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) (right to privacy).

The district court properly found that there is no constitutional right to mandate the disposition of fetal remains. ROA.3316. Therefore, Plaintiffs must prove the violation of an existing constitutional right before the State's judgment can be declared invalid. To hold otherwise would undermine the Supreme Court's undisputed statements that the State can use its voice and its laws to respect unborn life—which necessarily entails making a moral judgment.

2. Prohibiting the disposition of fetal remains in landfills and sewers furthers respect for unborn life.

Treating fetal remains with respect furthers the State's interest in respecting the dignity of unborn life. As explained by the State's bioethicists, respect for fetal life after death is consistent with cultural norms of paying respect to bodies after an individual has died. *See supra* p.15; *see also Labiche v. Certain Ins. Cos. or Underwriters at Lloyd's, London, Eng.*, 196 F. Supp. 102, 104-05 (E.D. La. 1961) ("Respect for the body of the dead is part of our culture . . . ."). Moreover, treatment of the dead impacts treatment of the living. ROA.4178-79; *see also Gonzales*, 550 U.S. at 158 (permitting regulation of the medical profession to promote respect for life). It is, thus, irrelevant whether the challenged laws "persuade" women not to have abortions. ROA.3304-05. The goal of respecting unborn life is met simply through a dignified disposition. Indeed, Plaintiffs' entire lawsuit is premised on the claim that the challenged laws show respect for fetal life that not everyone believes is warranted.

Nevertheless, despite lamenting the breadth of the fetal-remains laws, the district court simultaneously faulted the laws for not providing even more respect because (1) bones may be ground after cremation, (2) commingling is still permitted, (3) ashes might be scattered in a junkyard or parking lot, and (4) women who miscarry or medically abort at home are not required to comply. ROA.3302-03. This type of argument was flatly rejected in *Gonzales*.

In *Gonzales*, the plaintiffs argued that the partial-birth abortion ban did not go far enough to respect life because abortion through dismemberment, which was even more brutal, was still permitted. 550 U.S. at 160. The Court found it was rational to

ban only one of the procedures when plaintiffs would have argued that banning both procedures was unconstitutional. *Id.* Likewise here, the fact that fetal remains are not given all possible respect is not proof that the law fails to show respect, but rather a reasoned judgment of the Legislature to draw a constitutional line. The Court should reject the district court's reasoning that banning disposition in landfills and sewers is not sufficiently respectful of unborn life.[9]

3. There is no evidence that the challenged laws were enacted with an unlawful purpose.

The district court specifically refused to find that the challenged laws were enacted with an unconstitutional purpose, ROA.3312-13, but then proceeded to act as if it did, ROA.3327. This was error, as there was no evidence of an unconstitutional purpose.

Constitutional analysis of a regulation's purpose is highly deferential. *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (where "there [are] legitimate reasons" for a law, courts "will not infer a discriminatory purpose"). The Supreme Court has never found an abortion regulation unconstitutional solely because it had an improper purpose, and the Court has questioned whether it could. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). Moreover, courts "do not assume unconstitutional legislative intent even when statutes produce harmful results,

[9] The Seventh Circuit made the same error in *PPINK*, when it faulted Indiana's law both for treating fetal remains as human remains, 888 F.3d at 308, and for not treating fetal remains as human remains, *id.* at 309.

much less do[es] [the Court] assume it when the results are harmless." *Id.* (internal citation omitted).

Chapter 697 states the Legislature's purpose: "to express the state's profound respect for the life of the unborn." Tex. Health & Safety Code § 697.001. Plaintiffs presented no evidence, and the district court cited none, that any legislator had in mind a purpose to shut down abortion clinics. Rather, Chapter 697 applies to all healthcare facilities (not just abortion clinics) and creates a means for disposition vendors to notify healthcare facilities of their services (the registry). Tex. Health & Safety Code §§ 697.004, .005. Chapter 697 also removed or clarified the language that the district court found unconstitutionally vague in the 2016 rules that were the original subject of this lawsuit, indicating an intent to pass a constitutional law. ROA.1459-60.

The fact that Chapter 697 was part of Senate Bill 8, which included a ban on live dismemberment abortions that was found unconstitutional by a district court, is of no moment. ROA.3313.[10] SB 8 also included a ban on partial-birth abortion, limitations on the donation of human fetal tissue, and a ban on the sale of human fetal tissue, ROA.5136-62, none of which have been challenged in court, and all of which promote respect for fetal life. No ill intent can be inferred from such a bill. *See June Medical*, 905 F.3d at 810 n.60 (the existence of other abortion regulations unrelated

[10] The live-dismemberment-ban decision is currently on appeal. *See Whole Woman's Health v. Paxton*, No. 17-51060 (5th Cir. docketed Dec. 1, 2017).

to the challenged law "have no bearing on the constitutionality" of the challenged law).

Finally, the district court's suggestion that the related rules were not promptly adopted does not demonstrate unconstitutional intent. ROA.3313.[11] As a fundamental matter, the rules are not adopted by the Legislature, so they say nothing about legislative intent. Even so, Chapter 697 was signed by the Governor on June 6, 2017, and the fetal-remains provision did not become effective until February 1, 2018, ROA.5159, 5162, giving Plaintiffs more than adequate notice. The Commission filed the related rules with the Secretary of State on January 11, 2018, ROA.5123, but does not control when they are published. *See* Tex. Gov't Code § 2002.013. Finally, during this litigation, Plaintiffs identified a TCEQ rule that permitted crematories to cremate only "human remains." ROA.1729 (citing 30 Tex. Admin. Code § 106.494(b)(2)(G)). Upon learning of the possible inconsistency with Chapter 697, TCEQ amended its rule to make clear that crematories may also cremate fetal remains. ROA.4776, 4780, 5609-14. No one has suggested that TCEQ had an improper motive when ensuring that its rules complied with Chapter 697. Chapter 697 furthers the Legislature's lawful purpose—promoting respect for unborn life.

[11] Plaintiffs abandoned their challenge to the 2016 rules that prompted this litigation, so any reference to their timing is irrelevant to the current law. ROA.3313.

C. Plaintiffs failed to prove any burden from compliance with the challenged laws.

The district court found two burdens: (1) requiring use of "unreliable and non-viable waste disposal options" and (2) burdening the abortion "decision" by choosing one view of life. ROA.3305. As to the first, the district court erroneously found that "reliable and viable options for disposing of embryonic and fetal tissue remains in compliance with the challenged laws do not exist" and that the laws would "cause a near catastrophic failure of the healthcare system designed to serve women of childbearing age within the State of Texas." ROA.3307, 3328. There is no basis in the record for those findings. The district court's finding that the laws cause unconstitutional shame and stigma is also without evidentiary support and represents an expansion of the right to abortion under *Roe* and *Casey* to include a right to be free from opposing views on abortion.

1. Plaintiffs made no attempt to comply with the challenged laws.

As described above, no Plaintiff made any attempt to determine whether they could comply with the fetal-remains law. *See supra* pp.10-11. No plaintiff called any of the 1300 funeral homes to ask about transportation, any of the 164 crematories to ask about cremation, any cemetery in Texas, or even their own medical-waste vendor. ROA.4066-67, 4069-70, 4153-54, 4370, 4392, 4493-95. Ms. Hagstrom Miller admits receiving an offer for services which she rejected. ROA.4040, 4074, 5774-75. And no Plaintiff investigated the offer by the Catholic Church to provide interment or contacted any of the entities on the registry. Such inaction should have precluded any claim in this lawsuit regarding a lack of vendors. *See* Fed. R. Civ. P. 11(b).

There is no evidence that a single healthcare provider would stop providing services to women if the fetal-remains law goes into effect. When on the stand, no Plaintiff could say what impact this law would have on their clinics. ROA.4160, 4371, 4391, 4490-91. None of them testified that they would be forced to shut down. And the evidence showed that some hospitals are already disposing of fetal remains through interment. ROA.4086, 4508-09.

The district court concluded that, because Plaintiffs had difficulty securing their current medical-waste vendor, they would have difficulty securing any disposition vendor. ROA.3305-06. Any such finding is speculation as, again, Plaintiffs have made no attempts to find a vendor that can comply with Chapter 697, nor did they ask their current vendor. It is also contrary to the evidence at trial, which demonstrated the existence of funeral providers, crematories, and cemeteries willing to offer their services. ROA.4515, 4558, 4639, 4701, 5615. The district court's finding that the registry is unreliable is also unsupported by any evidence. ROA.3311-12. Rather, the district court faulted the State for not verifying registry applicants and simply speculated that some "could be fabricated." ROA.3311.

Plaintiffs' complete lack of effort not only means that they cannot meet their burden of proof, it also breaks any causal connection between Chapter 697 and any alleged harm. In *June Medical*, when the "vast majority [of doctors] largely sat on their hands," rather than seeking admitting privileges, the Court concluded that their inaction "sever[ed] the chain of causation." 905 F.3d at 807. As the Court explained, "[w]ere we not to require such causation, the independent choice of a single

physician could determine the constitutionality of a law." *Id.* Plaintiffs have not proven that Chapter 697 would force them to close—it is their own inaction that has caused that problem. The district court's finding that Chapter 697 would cause nearly all of women's healthcare in Texas to shut down is entirely unsupported and clearly erroneous.

2. The district court wrongly discounted State's evidence of compliance options.

The district court also clearly erred in concluding that existing entities in Texas, be they funeral providers, crematories, cemeteries, or others, will not be able to handle the disposition of fetal remains in accordance with Chapter 697. Plaintiffs failed to prove that existing industries will be unable to provide disposition services. Even though it was not Texas's burden, Texas demonstrated multiple options for transportation, treatment, and disposition of fetal remains. The district court wrongly discounted the State's evidence.

a. Beginning with transportation, the rules provide that any licensed funeral provder, licensed medical-waste handler, or the healthcare facility itself can transport fetal remains. 25 Tex. Admin. Code § 138.6. There are over 1300 licensed funeral establishments in Texas, all of which are legally permitted to transport fetal remains. ROA.4840, 4848. The district court heard testimony from two of them. Mr. Cook testified that he was willing to enter into long-term contracts with abortion providers and that, if necessary, the storage at his facility could be expanded. ROA.4558, 4582. He was also performing those services for three local hospitals.

ROA.4553. The other funeral service provider referred to by the district court had previously handled few fetal remains for individual cremation or interment. ROA.3307-08. The district court concluded that, because these two providers had limits on the number of remains they could handle, funeral providers, as a whole, were not viable options for transportation. ROA.3308. But there was no evidence that the other approximately 1300 funeral providers would be unable to provide services adequate to meet Plaintiffs' needs.[12]

Regardless, funeral providers are not the only option for transportation. Plaintiffs currently use a single medical-waste vendor to transport fetal remains from clinics across the State. ROA.5804, 5817, 5834. But no Plaintiff asked Vendor A if it could assist in transportation under the new law, even though Vendor A is qualified to do so.[13] ROA.4066-67, 4370, 4493. The district court's concern that medical-waste vendors may be economically unable to provide services if medical waste no longer includes fetal remains is entirely speculative and raises a cost argument that

[12] The district court's concern that Mr. Cook wanted some method of identifying remains, even if that information was held by the healthcare facility, is unwarranted. ROA.3308, 4583. The rules make clear that the challenged laws "may not be used to require or authorize disclosure of confidential information . . . not permitted to be disclosed by state or federal privacy or confidentiality laws." 25 Tex. Admin. Code § 138.4(a).

[13] The district court wrongly stated that Vendor A could not comply with Chapter 697. ROA.3312. No Plaintiff asked Vendor A if it could comply. ROA.4066-67, 4370, 4493. The portion of the transcript referred to by the district court is only Ms. Hagstrom Miller's statement that their current contract with Vendor A calls for incineration and a landfill. ROA.4038.

Plaintiffs have waived. ROA.3312 n.24. Finally, Plaintiffs themselves are permitted to transport remains to any location for treatment or disposition. No Plaintiff explained why it was unable to do so, nor did the district court address that option.

b. Moving next to the treatment (cremation, incineration, or steam disinfection) of fetal remains, the district court barely referenced any options. There are 164 crematories in Texas that are able to cremate fetal remains, which can be commingled for purposes of cremation. ROA.4840, 4848-49. And one of them (Mr. Cook) said his establishment was willing to enter into contracts with abortion providers. ROA.4558. Even though Mr. Cook does not have unlimited capacity, Plaintiffs could certainly purchase an additional refrigeration unit for his establishment to ensure sufficient storage, given that they waived any arguments about costs. The district court found cremation an untenable option because someone would then have to scatter the ashes. ROA.3308. The district court did not explain why this was an impossible hurdle to overcome, given that the crematory, Plaintiffs, or other authorized third party could scatter the ashes. And, again, Plaintiffs did not ask their current vendor about incineration, nor did they present evidence on the availability of steam disinfection.

c. Finally, the finding that Texas lacks sufficient space to inter fetal remains or scatter their ashes is entirely unexplained. The ashes of fetal remains can be scattered over uninhabited public land, public waterways, and private land with consent. Tex. Health & Safety Code §§ 716.302, .304. It stretches credulity to suggest that Texas

would run out of room, if this is the disposition method Plaintiffs chose. And the district court failed to discuss this option at all.

The district court also wrongly discounted the testimony from Mr. Shields, Deacon Stump, and Ms. Allmon, all of whom testified that the cemeteries within their control were willing to enter into long-term contracts with abortion providers. ROA.4515, 4639, 4701. The district court rejected that testimony—made under oath—concluding that the offers were not sufficiently binding and that those cemeteries could pull out at any time. ROA.3309. The district court based this speculation on the fact that Catholics are pro-life. ROA.3309. The district court offered no legally permissible rationale for its conclusion that members of pro-life groups could not be trusted to keep their word.

The district court also wrongly asserted that interment in a Catholic cemetery would require "individualized burials" because of the Church's opposition to commingling remains. ROA.3310-11. But as explained by Mr. Cook and Deacon Stump, the individual remains are kept in separate bags but are placed in a larger box for purposes of burial at Catholic cemeteries. ROA.4555, 4599-600. Individual burials are not necessary.[14]

[14] The district court expressed concern that Texas's reliance on Catholic cemeteries could violate the First Amendment, ROA.3309-10 n.21, but no healthcare facility is required to use a Catholic cemetery. They have simply offered their services. It would, however, violate the First Amendment if the State were to exclude Catholic cemeteries as interment options. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

Even so, Plaintiffs are not limited to Catholic cemeteries, and the interment of fetal remains does not require significant space. Mr. Cook testified that approximately 50 sets of fetal remains from a hospital can fit in a small 2-foot square (2x1x1) box. ROA.4555-56. Even if providers chose to inter all of their fetal remains without cremating them, ROA.5545, there is no evidence that Texas presently lacks the room to inter them.[15]

In short, anywhere permissible for interment of human remains or scattering of ashes of human remains is also permissible for the interment or scattering of ashes of fetal remains under the challenged laws. And Plaintiffs offered no evidence that Texas is running out of room to inter human remains or scatter ashes. The district court clearly erred in concluding that disposition options in Texas are limited and nonviable.

d. Confronted with Plaintiffs' lack of evidence and the State's evidence of entities willing to offer disposition services, the district court turned to speculation to find a constitutional violation. For example, the court posited an "unlikely" hypothetical in which an ophthalmologist would choose to stop treating pregnant women for fear that he might come into possession of her fetal remains through a spontaneous miscarriage during her appointment. ROA.3288-89. The court speculated about

[15] Since trial, the Texas Department of State Health Services Center for Health Statistics has published the 2016 data for abortions in Texas. The number of surgical abortions in Texas has dropped from approximately 50,000 in 2015, ROA.5545-46, to 42,000 in 2016, *see* https://www.dshs.texas.gov/chs/2016ITOP.aspx.

a woman who might be deterred from obtaining an abortion due to record-keeping. ROA.3308 n.20. And the court thought it "possible" that the entire medical-waste disposal system would collapse if fetal-remains were not treated as medical waste. ROA.3312 n.24.

It is not the Court's role to resolve constitutional questions "with respect to each potential situation that *might* develop." *Gonzales*, 550 U.S. at 168 (emphasis added); *see also A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) ("[I]t is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate."). Rather than require the Court to "consider every conceivable situation which might possibly arise," individual instances of unconstitutionality may be brought in as-applied challenges. *Gonzales*, 550 U.S. at 168.

The district court facially invalidated Texas's fetal-remains law on the basis that compliance would be an undue burden. Yet Plaintiffs made no attempt to comply or show that it is impossible to do so, and the State put forward evidence of multiple options to comply. The district court erred in concluding that Plaintiffs proved any burden to abortion access, much less a substantial obstacle.

D. Plaintiffs failed to prove that the challenged laws burden women's beliefs or that such a burden is legally relevant.

The other "burden" identified by the district court was one of shame and stigma imposed by the State's decision that fetal life deserves respect, which the court concluded burdens a patient's beliefs. ROA.3314-17. The Court should not reach this

question because of Plaintiffs' lack of standing. *See supra* pp.23-25. But if it believes there is standing or wishes to make an alternative holding, it should not recognize the "freedom of belief" claim articulated by Plaintiffs.

Plaintiffs' claims regarding the burdens of shame, stigma, and belief have never been recognized by the Supreme Court as unconstitutional undue burdens. Instead, the Court has looked solely to whether a law creates a substantial obstacle to abortion access. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2300 (finding an undue burden on "abortion access"); *id.* at 2309 (requiring courts to consider burdens on "abortion access"); *Casey*, 505 U.S. at 885-87. The right to abortion recognized in *Roe* and *Casey* is simply the right to choose to have an abortion. It is not the right to an abortion "'without interference from the State.'" *Casey*, 505 U.S. at 875 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976)). Thus, despite the range of beliefs about fetal life, the State can choose to respect it, as long as abortion is still accessible.

By characterizing the State's decision to respect life as "shaming" or "stigmatizing" those who do not agree, the district court's conclusion runs headlong into the Supreme Court's jurisprudence that States can enact laws that respect unborn life or express a preference for childbirth. *Gonzales*, 550 U.S. at 157; *Casey*, 505 U.S. at 872; *Webster*, 492 U.S. at 511. Under Plaintiffs' rationale and the district court's reasoning, any such laws would cause shame and stigma as they suggest fetuses have value—and yet laws respecting fetal life have received Supreme Court approval. *See, e.g.*, *Gonzales*, 550 U.S. at 132; *Casey*, 505 U.S. at 887. Should the Court recognize

this type of burden, the Court would undoubtedly see challenges to established Supreme Court precedent regarding 24-hour waiting periods, informed-consent laws, and the refusal to pay for elective abortions, as those decisions reflect the State's value of unborn life. *See* ROA.4026-27 (Ms. Hagstrom Miller expressing opinion that 24-hour waiting periods shame and stigmatize women).

Other circuits to address this issue have held that, if a fetal-remains law does not impact abortion access, then it is judged under the rational-basis test. *PPINK*, 888 F.3d at 307-08; *Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479, 486-87 (8th Cir. 1990); *see also Casey*, 505 U.S. at 878 ("a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal"). Thus, Plaintiffs' freedom-of-belief claim under the Due Process Clause—to the extent the claim exists—should be judged only under the rational-basis test.[16]

In any event, Plaintiffs failed to produce evidence that a large fraction of women would be burdened by the challenged laws. The district court cited the testimony of only two lay witnesses—one who disagreed with Seton Hospital's burial policy (which is different than Chapter 697), ROA.4086-87, and one who had no interaction with fetal-disposition laws whatsoever, as she had an abortion in Florida in 2015, ROA.4289. Instead, the evidence establishes that the vast majority of women do not ask about the disposition of fetal remains. ROA.3987, 4061, 4156-57, 4387, 4484. And Plaintiffs' bioethics expert had no opinion on whether stigma would stop women

[16] Plaintiffs have not brought a First Amendment claim, nor have they argued that the disposition of fetal remains is a First Amendment right.

from obtaining abortions. ROA.4459-60. There is no evidence that a large fraction of women, who typically do not inquire about fetal disposition, will suddenly become so offended by this law that they are unable to access abortion. Thus, the district court's conclusion that women who would feel such stigma would seek unlawful abortions is without evidentiary support and clearly erroneous. ROA.3318.

The district court's ruling expanded the right to an abortion found in *Roe* and *Casey* to include not just access, but a freedom from other viewpoints when making the abortion decision. That is directly contrary to Supreme Court precedent. *Casey*, 505 U.S. at 877 (stating that the right to abortion does not include "a right to be insulated from all others in doing so"). Plaintiffs have no evidence of a single woman, much less a large fraction of women, who will face a "substantial obstacle" to abortion as a result.

E. The State's legitimate interest in respecting unborn life outweighs Plaintiffs' unproven burdens.

As described above, *see supra* pp.27-28, no matter what interpretation of *Whole Woman's Health* the Court follows, Plaintiffs have failed to meet their burden of proof, because Plaintiffs have proven no burden whatsoever. They have not shown that they will be required to stop providing abortions as a result of Chapter 697, that any healthcare facility in Texas will stop providing healthcare services to pregnant women, or that any woman will be hindered from obtaining a lawful abortion because she disagrees with Chapter 697. Even under a pure balancing test, this lack of a burden means that a minimal benefit is sufficient to support Texas's law. And Texas

showed more than a minimal benefit—fetuses and embryos are human organisms, not medical waste, and it is appropriate to respect them through dignified disposition.

The Supreme Court has given some guidance in weighing burdens against the benefits of respecting unborn life. In *Casey*, the Supreme Court recognized that the 24-hour waiting period was enacted for the purpose of protecting unborn life. 505 U.S. at 885. The district court in *Casey* found that, because of the waiting period, women would experience a minimum of two trips, delays of 48 hours to two weeks, additional exposure to harassment, travel of one to three hours for many women, costs of overnight lodging, loss of wages, and increased complications, with significant impacts on the poor and the young. *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1351-52, 1378-79 (E.D. Pa. 1990). The Supreme Court determined this was insufficient to establish a substantial obstacle to abortion. *Casey*, 505 U.S. at 885-87. Plaintiffs' evidence comes nowhere close to meeting this standard—especially in the posture of a pre-enforcement facial challenge.

In terms of the large-fraction test, the numerator is zero—Plaintiffs have not identified a single woman who will be unable to obtain an abortion or face a substantial obstacle to obtaining an abortion if the challenged laws take effect. Thus, regardless of whether the Court conducts a simple balancing test or looks for a substantial obstacle in accordance with *June Medical*, Plaintiffs have not proven an undue burden on the right of any woman to have an abortion, much less a large fraction of

women. The district court erred in concluding otherwise. Its decision should be reversed.[17]

IV. The District Court Erred in Ruling That the Challenged Laws Violated the Equal Protection Clause.

Chapter 697 defines "embryonic and fetal tissue remains" as "an embryo, a fetus, body parts, or organs from a pregnancy . . . ." Tex. Health & Safety Code § 697.002(3). Thus, pre-implantation embryos stored at healthcare facilities for in vitro fertilization are not covered by the fetal-remains law. The district court erroneously held that this distinction failed rational-basis review and, thus, violated the Equal Protection Clause. ROA.3326-27. But the Texas Legislature's decision to focus on fetal remains from a pregnancy was reasonable.

A. The district court identified the correct level of review—rational basis.

The district court properly recognized that Plaintiffs' equal-protection challenge should be judged under the rational-basis test because Plaintiffs brought a challenge based only on their own rights. ROA.3323-24. Under the rational-basis test, a classification is constitutional if it is rationally related to a legitimate government interest. *Heller v. Doe*, 509 U.S. 312, 320 (1993). A court must uphold the law if "there is any reasonably conceivable state of facts that could provide a rational basis for the

[17] Should this Court choose to use the rational-basis test to consider miscarriage-management procedures or Plaintiffs' freedom of belief claim, Chapter 697 is rationally related to the State's legitimate interest in respecting fetal life, as it gives respect to the remains of the unborn.

classification." *Id.* (internal citation omitted). The burden is on Plaintiffs to negate every conceivable basis that might support the classification. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

B. The challenged laws are rationally related to the legitimate state interest of respecting unborn life.

The district court concluded that "the State chose to draw a line between in vitro tissue cultures (pre-implantation embryos) and post-implantation embryos and thus drew a line between the different types of facilities that handles these embryos." ROA.3326. But the State did not draw a line between facilities—it drew a line between pre- and post-implantation embryos.

For this reason, Plaintiffs have no equal-protection claim because Chapter 697 treats Plaintiffs exactly the same as any other healthcare facility. If that facility handles fetal remains from a pregnancy, it must comply with Chapter 697. If it does not handle fetal remains from a pregnancy, it does not have to comply. A hypothetical makes this clear: If an abortion clinic decides to also provide in vitro fertilization (IVF) treatments, the clinic would not have to dispose of pre-implantation embryos in accordance with Chapter 697. If a doctor's office that provides only IVF care treats a woman for a miscarriage at the office, it would have to comply with Chapter 697. The distinction is between pre- and post-implantation embryos, and Plaintiffs are not asserting the rights of embryos to equal treatment.

Regardless, it was rational for the Texas Legislature to draw the line between pre- and post-implantation embryos. The potential for life in a post-implantation embryo is more fully realized than in a pre-implantation embryo. ROA.3106. Unless and until an embryo successfully implants, it cannot grow into a fully-formed baby. As one of Plaintiffs' experts explained, some people do not consider a fertilized egg to be an embryo until it implants. ROA.4296.

While many people may consider pre-implantation embryos to be of equal value to post-implantation embryos, the Legislature reasonably drew the line at "pregnancy." Tex. Health & Safety Code § 697.002(3). Respecting fetal remains that have implanted and begun to grow and develop is rationally related to the State's interest in respecting unborn life. The district court's equal-protection ruling should be reversed.[18]

[18] The district court's allusion to animus against abortion clinics is both unwarranted for the reasons explained above, *see supra* pp.34-36, and irrelevant. ROA.3326-27. The district court cites no precedent that a law with a rational basis somehow becomes irrational based on the (unproven) subjective intentions of legislators. *See Beach Commc'ns*, 508 U.S. at 315 (finding the legislature's motivation largely irrelevant in rational-basis review).

Conclusion

The Court should reverse the judgment of the district court.

Respectfully submitted.

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On November 19, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,970 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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