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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

INTRODUCTION

The Texas Legislature expressed its respect for unborn life by prohibiting healthcare facilities from putting embryonic and fetal remains in landfills and sewers, requiring them instead to inter or scatter the ashes of the remains. Plaintiffs have no evidence that they cannot comply with these laws because they refused to make any efforts to attempt to comply. Plaintiffs instead make arguments that the Supreme Court has already rejected, misstate facts, and criticize the witnesses who testified about their willingness to assist in disposing of fetal remains.

Plaintiffs further concoct a novel "freedom of belief" claim, which they assert renders unconstitutional any law regarding unborn life with which an unknown subset of women disagrees. Neither the Supreme Court nor this Court recognize such a claim, and in any event, Plaintiffs offer no supporting evidence. The district court's sweeping pronouncements of harm are entirely unsupported, as is its conclusion that the fetal-remains law violates the Equal Protection Clause. The Court should reverse the judgment of the district court.

ARGUMENT

I. Plaintiffs Agree They Bear the Burden of Proof.

Plaintiffs agree that they bear the ultimate burden of proving that the fetal-remains laws are unconstitutional. Appellees' Br. 29 n.5. But they do not dispute the district court wrongly assigned that burden to the State. They thus have conceded that, at a minimum, the district court's order must be reversed due to the court's reliance on an incorrect standard. *See, e.g.*, *Planned Parenthood of Greater Tex. Family*

Planning & Preventative Health Servs., Inc. v. Smith, No. 17-50282, 2019 WL 244829, at *13-14 (5th Cir. Jan. 17, 2019) (reversing when district court used wrong legal standard to make findings).

As explained in the State's opening brief, Appellant's Br. 20-22, the district court erroneously placed the burden of proof on the State. Because the court used the wrong legal standard, its factual findings are necessarily invalid: "[t]he clearly erroneous standard of review does not apply to factual findings made under an erroneous view of controlling legal principles." *Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV MV*, 199 F.3d 220, 223 (5th Cir. 1999). Such findings "are entitled to no deference." *United States v. Texas*, 601 F.3d 354, 366-67 (5th Cir. 2010) (quotation marks and citation omitted). But no matter what standard of review the Court applies to the district court's fact findings, they are not supported by the evidence in the case.

II. Plaintiffs Lack Standing To Assert Several Claims.

Plaintiffs do not dispute that they must demonstrate their standing, but they offer nothing to meet that affirmative burden. *See In re Deepwater Horizon*, 857 F.3d 246, 253 (5th Cir. 2017). Plaintiffs have not shown that they have third-party standing to assert a "freedom of belief" claim on behalf of their patients or that "Whole Woman's Health" has any patients at all.

A. Plaintiffs lack standing to assert their patients' beliefs because they do not know what those beliefs are. Appellant's Br. 23-25. Plaintiffs testified that they almost never discuss fetal-remains disposition with their patients. ROA.3987, 4156-57,

4343-44, 4387, 4483-84. Without knowing their patients' personal beliefs about fetal-remains disposition, Plaintiffs lack the requisite "close relationship" with their patients that would permit them to assert a freedom-of-belief claim on their patients' behalf. "The whole purpose behind this '"close relation" factor is to ensure that the [appellant] will act as an effective advocate for the' party whose interests it seeks to represent." *In re Deepwater Horizon*, 857 F.3d at 252-53 (quoting *Lepelletier v. F.D.I.C.*, 164 F.3d 37, 43 (D.C. Cir. 1999)). Plaintiffs cannot effectively advocate for the personal beliefs of their patients when they do not know what those beliefs are.

Plaintiffs respond that abortion providers are typically given third-party standing to assert patients' rights. Appellees' Br. 25-26 (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality op.); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014)). But those cases involved abortion *access*, something Plaintiffs' patients presumably want. The Court should not presume that Plaintiffs know what their patients *believe* about disposition, as abortion providers have not agreed on this point. Plaintiffs currently assert (on behalf of their patients) that patients want to be given choices for disposition. But other abortion providers have asserted (on behalf of their patients) that patients do not want to be given choices for disposition. *Margaret S. v. Edwards*, 794 F.2d 994, 997-98 (5th Cir. 1986). Rather than allow abortion providers to use their patients as proxies to further the providers' interests, the Court should require abortion providers to prove they know what their patients want before being allowed to assert patients' rights in court.

Plaintiffs' current legal position also conflicts with their own practices, which keep women in the dark about the disposal of fetal remains after an abortion. ROA.4061, 4155-56, 4343-44, 4483, 5751, 5829. Plaintiffs' lawsuit, therefore, is less about ensuring that women have choices and more about ensuring that Plaintiffs may keep their current practices of treating embryos and fetuses as medical waste without informing their patients.

Plaintiffs also assert, without explanation, that the State's standing argument really goes to the merits. Appellees' Br. 26. It does not. Evidence that Plaintiffs have a close relationship with their patients (by at least knowing what they believe) is a different question from whether Texas's fetal-remains law imposes an undue burden on Plaintiffs' patients' beliefs. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (recognizing that standing and merits are separate inquiries).[1] Absent evidence that Plaintiffs know their patients' beliefs about fetal-remains disposition, they should not be allowed to assert those beliefs in court. Third-party standing should be denied for Plaintiffs' "freedom of belief" claim.

B. Whole Woman's Health lacks standing for an additional, independent reason: it does not have patients. The district court should not have permitted Whole Woman's Health to tag along in the lawsuit simply because other plaintiffs had standing. ROA.3292 n.13.

[1] For the reasons described later in this brief, the Court should not recognize Plaintiffs' "freedom of belief" claim. *See infra* pp.18-23.

Amy Hagstrom Miller, President and CEO of Whole Woman's Health, testified that "Whole Woman's Health" is Whole Woman's Health, LLC, a management company, and that Whole Woman's Health, LLC, is a plaintiff in this suit. ROA.3964, 4054-55. She then testified that an unnamed holding company is the plaintiff in this lawsuit. ROA.4078-79. She did *not* testify, however, that Whole Woman's Health—whatever it is—has patients. Rather, she explained that the Whole Woman's Health abortion clinics are separate organizations, ROA.3964-65, none of which are parties to this suit.

Plaintiffs' inability to determine what "Whole Woman's Health" is and which entity is a plaintiff is irrelevant. Appellees' Br. 27. "Whole Woman's Health" does not have patients and cannot, therefore, represent abortion patients in court. Appellant's Br. 25-26. Neither is "Whole Woman's Health" a healthcare facility that must comply with the fetal-remains law, so it has no standing to bring an equal-protection claim. The Court should dismiss Whole Woman's Health for lack of standing.

III. The Fetal-Remains Law Is Not a Substantial Obstacle to Abortion for a Large Fraction of Women.

Plaintiffs have not identified evidence supporting the district court's sweeping pronouncements about the impact of the fetal-remains law. Nor have they identified Supreme Court or Fifth Circuit precedent that would support expanding the right to abortion to include their "freedom of belief" claim or the right to dictate the dispo-

sition of fetal remains. Plaintiffs' arguments are internally inconsistent and contradict Supreme Court precedent that permits States to enact laws respecting unborn life. The district court's ruling should be reversed.[2]

A. The substantial-obstacle test applies to Plaintiffs' claims about abortion access.

1. Under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[r]egulations which do 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." 505 U.S. 833, 877 (1992) (plurality op.);[3] *see also Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). This standard did not change in *Whole Woman's Health v. Hellerstedt*, as the majority in that case stated that it was following *Casey*, not altering it. 136 S. Ct. 2292, 2309-10 (2016). Consequently, *Casey*'s substantial-obstacle test governs.

As stated by *Casey*, not every obstacle rises to the level of a substantial obstacle. 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."), 887 ("A particular burden is not of necessity a substantial obstacle."). The fact that not all burdens amount to substantial obstacles is all that this Court in *June Medical Services*

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[2] Plaintiffs concede by their silence that the fetal-remains law was not passed with an improper purpose, so the State will not repeat its arguments on that point. Appellant's Br. 34-36.

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

L.L.C. v. Gee recognized. 905 F.3d 787, 803 (5th Cir. 2018). Thus, while *Whole Woman's Health* requires the Court to weigh the benefits and burdens, 136 S. Ct. at 2309, *Casey* requires the burden to amount to a substantial obstacle, 505 U.S. at 877.

For the reasons set out in the State's opening brief, Plaintiffs did not demonstrate a substantial obstacle: Plaintiffs waived any cost argument, Plaintiffs made no attempt to determine whether they could comply with the law, and the State introduced evidence of hundreds of entities qualified to assist with fetal-remains disposition. Balancing Plaintiffs' non-existent burden against the State's interest in respecting unborn life shows no substantial obstacle.

2. Plaintiffs' brief does not—indeed, cannot—defend the district court's contrary conclusion on the merits. Nor can Plaintiffs point to any evidence showing that they met their burden of establishing a substantial obstacle. So instead, Plaintiffs invent and seek to apply new legal rules to boost their claim.

a. Plaintiffs first attempt to erect a threshold test in which the State must initially prove that its law is a "permissible means" of furthering its interest in respecting unborn life. Appellees' Br. 32-34. Plaintiffs misread Supreme Court precedent by cherry-picking language from *Casey*. The entire quote reads: "And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877. In other words, whether a statute is a "permissible means" of serving the

State's interest is determined by whether it imposes a substantial obstacle—the ultimate question in any abortion case. It is not a separate threshold inquiry that the State has the burden to satisfy.

Relatedly and contrary to Plaintiffs' argument, it is not the State's burden to "prov[e]" the law is beneficial. Appellees' Br. 29-30 n.5. In *Casey*, the Court was willing to assume that the 24-hour waiting period was sufficiently beneficial, such that the increased costs, delays, and complications it caused did not outweigh the benefits. 505 U.S. at 885-87 (finding that "[i]n theory" the 24-waiting period served the State's interests). The Court in *Gonzales* also based its conclusions regarding the benefits of the law on reasonable inferences and assumptions. 550 U.S. at 159 (finding "no reliable data" to measure some benefits). *Whole Woman's Health* is not to the contrary. There, the plaintiffs put on evidence that the law was not beneficial, so the State had an evidentiary obligation to respond. 136 S. Ct. at 2311-13 (discussing Plaintiffs' evidence that laws conferred no health or safety benefit). But the burden was not the State's, and the Court should not so hold. Regardless, the State introduced evidence of benefit in this case.

b. Second, Plaintiffs erroneously assert that the undue-burden test applies to regulations impacting miscarriage-management procedures, relying on notions of personal autonomy and bodily integrity. Appellees' Br. 31. The Supreme Court has granted constitutional protection to a woman's choice to become and remain pregnant *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion). Miscarriage is no one's choice. Thus, the choice protected in the Supreme Court's abortion precedents is not present in

instances of miscarriage, and the constitutional protection of the undue-burden standard does not extend to those procedures. Consequently, miscarriage-management procedures should be treated as all other medical procedures which are not given heightened constitutional protection. *See, e.g., Abigail All. For Better Access to Dev. Drugs v. Eschenbach*, 495 F.3d 695, 712 (D.C. Cir. 2007) (en banc) (applying rational-basis test to claim regarding access to experimental drugs); Appellant's Br. 28 n.7.[4]

It is not necessary, however, for the Court to reach the legal question of constitutional protection for miscarriage management, as any such claim fails for the same reasons Plaintiffs' undue-burden claim regarding abortion fails.

B. The fetal-remains law will not pose a substantial obstacle to abortion access for a large fraction of women.

Plaintiffs made effectively no effort to introduce evidence that abortion access will be impacted by the fetal-remains law. They waived any arguments about costs, made no attempt to find a disposition vendor, and ignored much of the State's evidence that compliance was possible. Plaintiffs failed to identify any burden that would outweigh the State's interest in respecting the dignity of unborn life. The fetal-remains law presents no substantial obstacle and is constitutional.

[4] Claims of "personal autonomy" and "bodily integrity" do not support creating a constitutional right to dictate the disposition of fetal remains following any medical procedure. *See infra* p.21.

1. Abortion access will not be burdened.

Plaintiffs do not mount a substantial defense of the district court's findings on access. Rather, they simply parrot the lower court's statements without backing them up with evidence or seriously disputing the State's evidence that compliance with the fetal-remains law is possible.

a. Plaintiffs begin by arguing that they did not have to prove that compliance with the law was impossible. Appellees' Br. 40. But Plaintiffs affirmatively waived any argument about the cost of compliance. ROA.1960-61. So the only question left for purposes of abortion access is whether Plaintiffs can comply with the law (regardless of the costs).

Plaintiffs defend their refusal to determine whether they could comply with the fetal-remains law by claiming that they do not have to try to comply with unconstitutional laws. Appellees' Br. 41. But Plaintiffs came into court arguing that abortion access would be impacted by their inability to find a vendor. *See, e.g.*, ROA.1692, 1726, 3246, 3946-47. Making that claim requires, at a minimum, a reasonable inquiry that Plaintiffs' factual contentions have evidentiary support. Fed. R. Civ. P. 11(b). Succeeding on that claim requires evidence that clinics will shut down because they cannot comply with the fetal-remains law, depriving women of access to abortion. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2312, 2316 (describing clinic closures).

Plaintiffs' claim that clinics would close is based exclusively on testimony about closures caused by the inability to find disposition vendors. Appellees' Br. 20 (citing ROA.4036, 4335, 4367, 4393, 4489). Yet each Plaintiff testified that they had not tried to find a disposition vendor to comply with the new law. ROA.4067, 4069-70,

4153-54, 4392, 4493-94, 4489. Plaintiffs' inaction not only means that they cannot meet their burden of proof, it also severs any causal connection between the fetal-remains law and clinic closures, presenting an additional reason for reversal. *See June Med. Servs.*, 905 F.3d at 807.

b. Plaintiffs misstate various facts in their effort to make the fetal-remains law appear burdensome:

- Plaintiffs wrongly assert that the fetal-disposition law is more stringent than laws governing the disposition of human remains. Appellees' Br. 6.[5] That is untrue. For example, disposition of human remains is controlled by a close relative or someone identified by the decedent, paperwork regarding the decedent must be kept, and commingling remains without consent is prohibited. Tex. Health & Safety Code §§ 711.002, 711.003, 716.052, 716.153. Texas law does not, therefore, "equate" fetal remains with the remains of humans for whom a death certificate has issued. Appellees' Br. 37.
- Plaintiffs suggest that fetal remains must be disposed of through a licensed professional. Appellees' Br. 6. But the rules permit the healthcare facilities themselves to transport the remains to the burial site or treatment location, 25 Tex. Admin. Code § 138.6, and no professional is required to scatter ashes or store them in a niche.

[5] As in the State's opening brief, the State will use "human remains" solely to comply with the convention used at trial to distinguish fetal remains from the remains of humans for which a death certificate has been issued.

- Plaintiffs claim that funeral-service providers cannot dispose of the ashes of fetal remains but are required to give them back to the family. Appellees' Br. 18. But fetal remains are exempted from the laws governing crematories and funeral-service providers, including to whom they must give the ashes. Tex. Health & Safety Code §§ 697.003, 716.156; Tex. Occ. Code § 651.456.

Plaintiffs also misstate other facts. Plaintiffs incorrectly claim that the district court found Jennifer Carr Allmon lacked credibility. Appellees' Br. 24. To the contrary, the district court found only that she lacked credibility to testify about the *capacity* of the Catholic Church to bury remains (because she relied on others for that information). ROA.3310 n.22. The State did not cite that portion of her testimony, but only her testimony about the willingness of the Catholic bishops to inter fetal remains and obtain additional land, if necessary. Appellant's Br. 13.

Plaintiffs wrongly claim that James Shields testified inconsistently about the intentions of the cemetery he manages to inter fetal remains. Appellees' Br. 24. He did not. He agreed that the current rules of the cemetery require a grave maker with a symbol of Abraham. ROA.4519-21. But he also made clear that his cemetery was willing to make an exception for fetal remains. ROA.4512, 4520-21. His testimony demonstrated accommodation, not inconsistency.

c. Plaintiffs have no answer to the State's evidence that 1300 funeral providers, 164 crematories, medical-waste handlers, and the healthcare facility itself are possible options for transportation, treatment, or disposition of fetal remains. Appellant's Br. 39-43. They have no response to Mr. Shields' ability to inter 700-800 uncremated remains per month or 4000 cremated remains per month, ROA.4515, other

than to claim that their patients (who they have not talked to) are opposed to Catholic cemeteries. Appellees' Br. 19. And they have no evidence that the State of Texas has run out of room to inter fetal remains or scatter their ashes.

Instead, Plaintiffs cling to the fact that the two funeral-service providers who testified were presently unable to serve the entire State of Texas. Appellees' Br. 17-18 (citing testimony of Morgan Cook and Johnny Garcia). And Plaintiffs speculate that, because they had difficulty finding a medical-waste vendor, they will have difficulty finding a fetal-remains disposition vendor. Appellees' Br. 20. But, again, none of them have tried. At best, then, Plaintiffs assert that the fetal-remains law creates "operational uncertainty." Appellees' Br. 43. "[O]perational uncertainty," especially when Plaintiffs did nothing to obtain "certainty," does not deprive women of abortion access or support the district court's findings that the entire healthcare system for women will shut down as a result of the fetal-remains law.

d. Finally, Plaintiffs repeat the district court's improper reference to costs. First, Plaintiffs assert that the medical-waste industry will economically collapse if fetal-remains are no longer considered medical waste. Appellees' Br. 20. That hyperbolic claim is pure speculation (as the cited testimony made no such assertion). ROA.3312 n.24. It also ignores that Plaintiffs' medical-waste handler can continue to charge Plaintiffs the same amount for its services, and Plaintiffs waived any argument that this cost would be burdensome. Second, Plaintiffs argue that the new law might require clinics to "divert resources" to the detriment of their patients. Appellees' Br. 43. Plaintiffs' argument that they might lack sufficient resources to operate their clinics is a claim about costs and is waived. The Court should not entertain

Plaintiffs' new argument. If it does, it must remand the case so the State can conduct discovery of Plaintiffs' finances and Plaintiffs' cost expert to determine whether Plaintiffs will have to divert any resources. ROA.1960-61.

Plaintiffs do not have evidence that (1) Texas lacks room to inter fetal remains, (2) Texas lacks room to scatter the ashes of fetal remains, or (3) Texas lacks willing funeral providers, crematories, or incinerators to transport and treat fetal remains. The fetal-remains law does not impose a burden, substantial or otherwise, on women seeking abortion.

2. The fetal-remains law is beneficial because it furthers the State's interest in respecting the dignity of unborn life.

Disposing of fetal remains through interment or scattering of ashes is beneficial because it advances the State's interest in respecting unborn life—an interest repeatedly upheld by the Supreme Court. Plaintiffs' various legal arguments to the contrary are all contradicted by Supreme Court precedent.

a. Plaintiffs do not challenge the State's evidence that, as a matter of science, embryos and fetuses are distinct human organisms, many of which had arms, legs, faces, and beating hearts until they were aborted. ROA.4871-72; Appellant's Br. 14-16; Appellees' Br. 32, 36, 38, 42 (referring to embryos and fetuses as "developing human life"). Plaintiffs simply assert that not everyone agrees that these unique human organisms have value beyond that of medical waste. Appellees' Br. 37-38. But Plaintiffs offered nothing to contradict the science that embryos and fetuses are unlike medical waste, such as diseased tissue, tumors, or sharps. Texas's fetal-remains

law recognizes that fetal remains are not waste and should not be treated as such by disposition in landfills and sewers. Tex. Health & Safety Code §§ 697.001, .004.

b. Plaintiffs' argument that the State cannot elevate one set of beliefs (that unborn life is not medical waste) over another is directly contrary to Supreme Court precedent that permits States to enact laws respecting unborn life, even if some people disagree with that respect. *Gonzales*, 550 U.S. at 157; *Casey*, 505 U.S. at 872, 876; *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989). A State can encourage a woman to choose childbirth, prevent a physician from performing partial-birth abortions, deny Medicaid funding for elective abortions, or punish the murder of an unborn child—all of which enshrine the idea the embryos and fetuses are worth respecting. *Gonzales*, 550 U.S. at 132; *Casey*, 505 U.S. at 885-87; *Maher v. Roe*, 432 U.S. 464, 474 (1977); Tex. Penal Code §§ 1.07(a)(26), 19.01. That some unknown number of women may disagree with the fetal-remains law says nothing about the benefit of respecting unborn life.[6]

Plaintiffs' attempt to limit the State's authority to only "persuasive" means of respecting life is not supported by Supreme Court precedent. Appellees' Br. 33. Neither the partial-birth abortion ban nor the denial of Medicaid funding for elective

[6] Plaintiffs assert, without explanation, that the State's bioethics experts disagreed with each other. Appellees' Br. 25. They did not; rather, both concluded that the fetal-remains law was ethical. ROA.4176, 4239. Dr. Aasim Padela did not state that it was "ethically preferable" to allow women to treat fetal remains as medical waste. Appellees' Br. 15. Instead, he explained that, if he were writing the law, he would give all of those options to women "up front," ROA.4265-66, something Plaintiffs do not currently do.

abortions mandated "persuasive" statements, yet the Supreme Court upheld them. *Gonzales*, 550 U.S. at 132; *Maher*, 432 U.S. at 474. Respect for unborn life can also be shown by respect for the embryo or fetus itself—such as by not crushing or vacuuming out the skull of a mostly delivered fetus. *Gonzales*, 550 U.S. at 138-39, 157 (finding that the partial-birth abortion ban "expresses respect for the dignity of human life"). Plaintiffs try to distinguish *Gonzales* and other cases by arguing that unborn life can be respected only while that life still exists, prior to any abortion or miscarriage. Appellees' Br. 34-35.[7] But as testified by the State's experts, life (even unborn life) is often respected through the dignified treatment of remains, a respect that exists across cultures and religions. ROA.4178-79, 4195-96, 4244-45; *see also* Tex. Penal Code § 42.08 (criminalizing abuse of a corpse). Supreme Court precedent does not prohibit Texas from requiring the respectful treatment of fetal remains as long as it poses no substantial obstacle to abortion access. *Casey*, 505 U.S. at 877.[8]

c. Finally—and contrary to the premise of their entire lawsuit—Plaintiffs assert that Texas law does not actually further respect for unborn life and, therefore,

[7] An Arkansas district court used similar reasoning when considering Arkansas's fetal-remains law. *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1105 (E.D. Ark. 2017). But that was not necessary to its decision, as the Arkansas fetal-remains law violated the Supreme Court's holdings on parental and spousal notification. *Id.* at 1099.

[8] Even if Plaintiffs were correct that the State's interest in unborn life expires after the abortion is complete, their claim still fails, as the woman's right to obtain an abortion also expires after the abortion is complete, leaving her with no interest in the disposition of fetal remains.

provides no benefit. Appellees' Br. 44-45 (claiming law does not further respect because bones may be ground after cremation, ashes might be scattered in junkyards and parking lots, and women who miscarry or abort at home use the sanitary sewer system). But the Supreme Court has twice rejected this type of argument. First, to argue that the law is under-inclusive is to invoke strict scrutiny, which the Supreme Court explicitly rejected in *Casey*, 505 U.S. at 871. And second, *Gonzales* held that abortion providers cannot argue that a law does not sufficiently respect unborn life when those same providers would undoubtedly challenge any law showing greater respect. *See Gonzales*, 550 U.S. at 160; Appellant's Br. 33-34. Regardless, Texas's law does show respect for unborn life by ensuring that healthcare facilities do not treat fetal remains like medical waste by disposing of them in landfills and sewers.

3. Plaintiffs failed to prove a substantial obstacle to abortion for a large fraction of women.

Consideration of the burdens and benefits of the fetal-remains law does not demonstrate a substantial obstacle to abortion, much less an unconstitutional burden on a large fraction of women seeking abortion. Tellingly, Plaintiffs' first response to the State's large-fraction argument is to avoid it by arguing that they do not have to prove an actual large fraction. Appellees' Br. 47. Instead, they suggest that the large-fraction test simply determines how broad a remedy the district court will grant. Appellees' Br. 47. That is not true.

Plaintiffs brought a facial challenge, asking the Court to enjoin the fetal-remains laws "in all of their applications." ROA.1694-95. In *Gonzales*, the Supreme Court rejected the facial challenge on the merits because the women for whom the partial-

birth abortion ban was a substantial obstacle were not a "large fraction." 550 U.S. at 167. The same should hold here. Absent proof of a large fraction of women unconstitutionally burdened, Plaintiffs' case fails on the merits.

Plaintiffs also attempt to avoid the issue by arguing that the large-fraction test is conceptual, not mathematical. Appellees' Br. 48. But, again, they must still have some evidence of a large fraction (which *June Medical* has indicated could be close to all women). 905 F.3d at 814. Plaintiffs have not proven that a single clinic will close or that a single woman will be unable to access abortion and have admitted that they do not know how this law will impact their patients. ROA.4060-61, 4153. Thus, no matter what the denominator is, the numerator is zero. That is not a large fraction mathematically or conceptually.

In *Casey*, the burden caused by the 24-hour waiting period included delays, exposure to harassment, increased costs, and increased complications. 505 U.S. at 886. Those burdens, however, did not outweigh the benefit of respecting unborn life through a 24-hour waiting period. *Id.* at 886-87. The fetal-remains law imposes no burdens on women, Plaintiffs have waived any argument about costs, and there are willing and able disposition vendors in Texas. Any burden is minimal, outweighed by the benefit of respecting unborn life, and not a substantial obstacle. The district court's judgment should be reversed.

C. Plaintiffs' "freedom of belief" claim has no basis in law.

Given the complete lack of effort to prove an actual obstacle to abortion, the goal of Plaintiffs' lawsuit becomes clear—to expand *Roe* and *Casey* to prohibit any law that does not validate the beliefs of an unknown subset of women that embryos and

fetuses lack value. If the Court gives credence to Plaintiffs' "freedom of belief" claim, it can expect challenges to any law that respects unborn life on grounds that it "elevates one set of beliefs" and stigmatizes women.

But the right to an abortion is not the "personal liberty to act in accordance with one's own belief about developing human life." Appellees' Br. 1. The right to an abortion is simply the right of a woman to choose and obtain an abortion. Nevertheless, Plaintiffs attempt to elevate beliefs about abortion to a level of protection that is unavailable for enumerated First Amendment rights, all under the cover of an "undue burden" claim. The Court should not recognize this new right.

1. The right to an abortion recognized in *Roe* and *Casey* is only the right to abortion access—not the right to demand that every aspect of the process validate the woman's choice. As the Supreme Court has stated, the right to an abortion is not the right to an abortion "without interference from the State." *Casey*, 505 U.S. at 875 (internal citation and quotation marks omitted). To hold that a woman's beliefs about abortion limit the State's authority to respect life would undermine Supreme Court precedent that permits States to enact laws respecting life. *See, e.g.*, *Gonzales*, 550 U.S. at 157; *Casey*, 505 U.S. at 872, 876; *Webster*, 492 U.S. at 511.[9]

Neither the Supreme Court nor this Court have ever considered burdens on belief (grief, shame, and stigma) to be relevant in the abortion analysis, Appellees' Br.

[9] Plaintiffs incorrectly state that the State's experts agreed that a healthcare provider cannot impose moral values on a patient. Appellees' Br. 15. Rather, both experts explained that a patient's options are necessarily (and ethically) constrained in any healthcare setting. ROA.4181, 4249-50.

42, but rather have focused on access. *Casey* considered burdens of delay, costs, increased complications, and third-party notice. 505 U.S. at 886-87, 893-94. Its spousal-notification ruling was not, as argued by Plaintiffs, motivated by concerns about "paternalism," but rather the very real threat (supported by evidence) that the spousal-notification law would prohibit women from accessing abortion. *Id.* at 893-94; Appellees' Br. 41. The Court in *Whole Woman's Health* likewise repeatedly referred to "abortion access" as the right being denied. 136 S. Ct. at 2300, 2309, 2318.[10] Adding grief, shame, and stigma to the list of relevant burdens would break new legal ground.

2. Plaintiffs also proceed under the erroneous view that an individual's "belief" exempts her from complying with otherwise applicable laws. Appellees Br. 36-40. People have strong beliefs about a variety of subjects regulated by the government—marijuana, taxes, and guns, to name a few. But the Constitution does not give them a right to violate laws simply because of their beliefs or because they feel it infringes their "dignity" or "autonomy." Indeed, even religious beliefs, which have explicit constitutional protection, do not exempt individuals from compliance with neutral, generally applicable laws. *See, e.g.*, *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878-86 (1990). Plaintiffs would have the Court grant greater protection to beliefs about unborn life than that afforded to religion. There are no constitutional grounds for doing so.

[10] The reference in *Whole Woman's Health* to the lack of individualized attention and emotional support for women indicated a concern about "women's health" and "quality of care," not women's beliefs. 136 S. Ct. at 2318; Appellees' Br. 40-41.

As explained in the State's opening brief, Appellant's Br. 32, the cases that Plaintiffs cite to support their freedom-of-belief claim all concern the violation of an underlying constitutional right, not a violation of general belief. *See, e.g.*, *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); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (freedom of religion); *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). There is no such underlying constitutional right here.

3. As acknowledged by the district court, women do not have a right, constitutional or otherwise, to dictate the disposition of fetal remains from an abortion or miscarriage-management procedure. ROA.3316. Plaintiffs' bodily integrity and personal autonomy cases fall short of establishing this right. Appellees' Br. 37. The few Supreme Court precedents that consider "personal autonomy" and "bodily integrity" concern laws impacting the individual himself or herself—not the treatment of something (like an aborted embryo or fetus) entirely separate from that individual. *See, e.g.*, *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (warrantless blood draws); *Washington v. Glucksberg*, 521 U.S. 702, 724-27 (1997) (assisted suicide); *Casey*, 505 U.S. at 857 (pregnancy). A woman's bodily integrity is not impacted by the disposition of remains that are not part of her body, and there is no reason to extend the amorphous right to "personal autonomy" to include dictating the disposition of fetal remains at a healthcare facility.

4. Plaintiffs also have no evidence that the beliefs of a large fraction of women would somehow be unduly burdened by the fetal-remains law. Plaintiffs and their amici describe this law as if it imposes burdens on women to "do" something with the fetal remains. *See, e.g.*, Appellees' Br. 33, 42. It does not. Disposing of fetal remains after a medical procedure was not, and is not, an obligation or responsibility of the woman. It is the responsibility of the healthcare provider. Tex. Health & Safety Code § 697.004. And as Plaintiffs' testimony makes clear, Plaintiffs do not affirmatively raise this issue with their patients. ROA.4017, 4157, 4343-44, 4483. The fetal-remains law, then, does not impose any obligation on women, nor is it about a patient's choice. It is about what healthcare facilities do with fetal remains that are the result of the patient's choice.

Plaintiffs base their claim of stigmatic harm on (1) the testimony of Blake Norton, who was required by Seton, a private hospital, to choose an individual or common burial (a practice not required by the fetal-remains law), ROA.4086; (2) the testimony of Dr. Valerie Peterson, who had an abortion in Florida in 2015, prior to the adoption of any fetal-remains law in Texas, ROA.4289; (3) hearsay testimony from Dr. Karen Swenson that an unknown number of her patients disagreed with Seton's burial policy, ROA.4669; and (4) speculation from Dr. Bhavik Kumar about what women might do, despite the fact that he has never spoken to his patients about interment or cremation of fetal remains and admits that he "can't say for sure who [the law] will affect or how it will affect them", ROA.4134-35, 4158-60. Appellees' Br. 14-17. This fails to demonstrate a burden on a large fraction of women. If a patient

refuses to have an abortion because she disagrees with the law, that is her choice as an independent actor; it is not compelled by the State.

Plaintiffs also ask the Court to assume, without evidence, that if 99% of their patients do not ask (and are not told) about fetal-remains disposition, then those women prefer disposition in a landfill. Appellees' Br. 45. But if 99% of women do not even ask about fetal-remains disposition, it cannot be assumed that a large fraction of them would be so distraught about the fetal-remains law that it would somehow interfere with their ability to obtain an abortion. That is why evidence is necessary and why Plaintiffs' failure to present relevant evidence of women's beliefs requires reversal, even if the Court recognizes a "freedom of belief" claim.

IV. Plaintiffs Have Not Demonstrated an Equal-Protection Violation.

Finally, Plaintiffs present no coherent defense of the district court's equal-protection ruling. After spending dozens of pages arguing that the fetal-remains law is unduly burdensome, Plaintiffs now assert that the law did not go far enough—that pre-implantation embryos and laboratories should have been included. Appellees' Br. 51. But the Texas Legislature drew a constitutional, and rational, line.[11] *See Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (stating that the State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

[11] Plaintiffs do not contest the application of the rational-basis test, as opposed to a higher form of scrutiny. Appellees' Br. 50

Plaintiffs argue that, from an ethical standpoint, there is no rational basis to treat pre-implantation embryos differently from post-implantation embryos. Appellees' Br. 52. Plaintiffs, however, ignore the biological distinction that pre-implantation embryos cannot develop any further unless and until they implant. Choosing to offer respect to those embryos that are in the process of growing and developing, as opposed to those simply held in stasis, is rational.

Plaintiffs also bring up an argument that was rejected by the district court—that, unlike healthcare facilities, forensic and pathological laboratories do not have to comply with the fetal-remains law. Appellees' Br. 52 & n.13. This distinction is reasonable because it was demanded by Plaintiffs themselves: Plaintiffs' First Amended Complaint alleges that the fetal-remains law would be unconstitutional if it required healthcare facilities to ensure that tissue sent to laboratories was disposed of in compliance with the fetal-remains law. ROA.1689-90 (describing Plaintiffs' fear of liability if laboratory fails to comply). Allowing healthcare facilities freely to forward embryonic and fetal remains for health testing and cooperation with criminal investigations is a rational way to address this concern. And the evidence shows that remains are sent only rarely to these laboratories, so the exclusion has minimal impact. ROA.5319-21, 5324.

Even so, Plaintiffs' argument does not resemble a rational-basis argument, as it is simply a string of speculation (what "might" happen) and contains no evidentiary citations whatsoever. Appellees' Br. 52 n.13. Plaintiffs must negate every conceivable basis that might support the classification. *FCC v. Beach Commc'ns, Inc.*, 508 U.S.

307, 315 (1993). Hypotheticals do not meet this standard. The district court's equal-protection ruling should be reversed.

Conclusion

The Court should reverse the judgment of the district court.

Respectfully submitted.

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Certificate of Service

On January 24, 2019, 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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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6487 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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