UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2879

FREDERICK W. HOPKINS,
Plaintiff-Appellee,
v.

LARRY JEGLEY, et al.,
Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Arkansas (Hon. Kristine Baker)

REPLY BRIEF OF APPELLANTS LARRY JEGLEY, et al.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The district court began its analysis below by proclaiming that, "[a]bortion . . . is safer than carrying a pregnancy to term." Add. 5. Fully embracing that theory, Appellee Frederick Hopkins argues that the people of Arkansas variously prohibited the barbaric practice of ripping an unborn child to pieces, barred sex selection, mandated the respectful treatment of human remains, and imposed reporting requirements where a girl's age indicates she is more likely to be a sexual assault victim—all simply to impede access to a procedure that is healthier than pregnancy. Res. Br. 5. Indeed, Hopkins argues that—like Arkansas's requirements that minors generally obtain parental consent for an abortion and that providers tell patients about abortion's risks at least 48 hours in advance—those regulations serve no purpose except "to obstruct . . . abortion access." Res. Br. 5 & n.2.

But as Hopkins's denunciation of commonsense and constitutional parental and informed consent provisions illustrates, he has no interest in discussing whether the challenged regulations impose substantially more burdens than benefits. Instead, Hopkins focuses on arguing that this Court's precedent is wrong, conjuring phantom burdens, and ludicrously claiming (Res. Br. 17) that Arkansas has given rapists a veto over their victims' decisions. Yet despite those efforts, Hopkins cannot obfuscate the fact that the district court applied the wrong legal standard, ignored undisputed evidence, and misconstrued clear statutory language.

ARGUMENT

I. The district court did not apply the undue burden standard.

An abortion regulation imposes an unconstitutional undue burden only if its moral, ethical, and health "benefits are substantially outweighed by the burdens it imposes on a large fraction of [relevant] women." *Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017) (emphasis added), *cert. petition filed*, No. 17-935. Hopkins concedes that the district court did not apply that standard. *See* Res. Br. 22-26; Add. 40. That admission should decide this appeal and be the end of the preliminary injunction.

Knowing that, Hopkins claims that this Court's precedent is wrong and that—as the district court erroneously concluded—abortion regulations are invalid anytime regulations fail to confer more benefits than burdens. Res. Br. 25.[1] Yet even if this Court were inclined to entertain Hopkins's claim on *en banc* review, it would still fail. *See United States v. Anwar*, 880 F.3d 958, 971 (8th Cir. 2018) ("[O]ne panel may not overrule an earlier decision by another."). As this Court has already explained, in weighing "'the burdens a law imposes on abortion access together with [its] benefits,'" the Supreme Court has invalidated only regulations that impose "numerous burdens substantially outweigh[ing]" any purported

[1] Hopkins alternatively suggests that this Court's standard is *dicta*, but courts have already rejected that notion. *See Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 2017 WL 5075915, *6 (W.D. Mo. Nov. 3, 2017) (applying standard to deny preliminary injunction).

benefits. *Jegley*, 864 F.3d at 958 (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)). Likewise, reflecting that case law, contrary to Hopkins's claim (Res. Br. 25), other circuits have similarly concluded that regulations are only unconstitutional where the burdens they impose "significantly exceed[] what is necessary to advance the state's interests." *Planned Parenthood of Wisconsin v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015); *accord Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014).

Hopkins also concedes this Court's analysis accurately describes the Supreme Court's precedent. *See* Res. Br. 25 (conceding approach reflects *Hellerstedt*'s facts and "outcome"). Indeed, his only argument to the contrary appears to be based on an erroneous (and unexplained) assumption that *Hellerstedt* applied a different approach in striking down the surgical center requirement in that case. *See Hellerstedt*, 136 S. Ct. at 2311-12, 2315-16, 2318 (holding both provisions imposed numerous burdens and would likely impair patient health). And Hopkins does not even attempt to argue that *Gonzales v. Carhart* applied a lesser standard in upholding the federal partial-birth abortion ban on the grounds that "medical uncertainty over whether [that] Act's prohibition create[d] significant health risks" did not overcome Congress's interest in prohibiting a form of abortion just as gruesome as dismemberment. 550 U.S. 124, 158-60, 164 (2007);

see Stenberg v. Carhart, 530 U.S. 914, 946-47 (2000) (Stevens, J., concurring) (procedures "equally gruesome").

Having conceded that the district court applied the wrong standard, Hopkins resorts to pleading that this error is harmless. Res. Br. 26. He grounds that claim on the district court's erroneous suggestion that it could simply examine "the effects of the [challenged] provisions" to find likelihood of success. Add. 56; *see* Res. Br. 26, 37. But that observation merely highlights that the district court did not conduct anything resembling balancing.

Moreover, as discussed elsewhere, the district court compounded that legal error by failing to weigh each regulation's moral and ethical benefits against any alleged burdens. *E.g.*, Br. 28-29. Far from "fully weigh[ing]" (Res. Br. 26) those interests, the district court merely noted that Arkansas had asserted those benefits, declared that it had "assume[d] [their] legitimacy," and then declined to weigh them against alleged burdens. Add. 43; *accord* Add. 116. Indeed, disregarding the principle that States may impose restrictions "even if those measures do not further a health interest," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 886 (1992), the district court focused on whether each regulation "advance[d] a public health goal." Add. 127 (fetal remains); *accord* Add. 46, 53, 55 (weighing health benefits of demise methodologies—not moral and ethical considerations—against alleged burdens); Add. 76 (focusing on sex-selection ban's

medical benefits). The district court's failure to apply controlling legal standards requires that the injunction be vacated.

II. Arkansas is entitled to bar the horrific practice of killing an unborn child by tearing its limbs off so that it bleeds to death.

This Court should likewise vacate the injunction against Arkansas's death-by-dismemberment ban because it rests on the district court's misinterpretation of the law and failure to acknowledge undisputed evidence.

A. Arkansas's ban advances significant governmental interests.

Hopkins does not dispute Arkansas's significant interest in barring a procedure where an unborn child's "limbs are ripped off," "[t]he contents of the abdomen and thorax are ripped open," and its skull is "crush[ed]" and "extract[ed]." Appx. 334 (Wyatt). Rather, in a transparent effort to avoid *any* discussion of Arkansas's interest, he—like the district court—emotionlessly describes the process of ripping a child to pieces as a procedure where "fetal tissue generally comes apart." Add. 35; Res. Br. 7. But he cannot hide the horrifying truth: Dismemberment "requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living" unborn child, rip it off, and continue ripping body parts off until finally the unborn child "dies just as a human adult or child would" by bleeding to death with only "a tray full of [tiny human] pieces" remaining. *Stenberg*, 530 U.S. at 958-59 (Kennedy, J., dissenting).

Arkansas's ban proscribes only this distinctly "gruesome and inhumane" practice. Appx. 334 (Wyatt); *see* Ark. Code Ann. 20-16-1802—1803. Had the district court acknowledged that fact, it could not have determined that any burdens outweigh—let alone substantially—Arkansas's interest in proscribing barbarity.[2] But rather than discuss or weigh that interest, the district court relegated it to a passing reference. *See* Add. 43.

Instead, in an error repeated in Hopkins's briefing, the district court focused on whether banning dismemberment provided health benefits. *See* Add. 46, 53, 55 (weighing medical benefits and burdens); Res. Br. 37 n.14 (declining discussion of moral and ethical benefits and focusing on health benefits and burdens). But even if the district court were entitled to do that, its analysis is flawed because it failed to acknowledge "that psychological well-being is a facet of health" and "that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive." *Casey*, 505 U.S. at 882. Rather than acknowledge that, the district court apparently focused on abortion provider Mark Nichols's testimony that having an abortion is "empower[ing]" (Appx. 449) and declared no connection

[2] Below, Appellants alternatively argued that the ban would survive rational basis review. And despite Appellants' focus on the balancing here, Hopkins opts to argue about whether rational basis review is appropriate. Res. Br. 25-26. But if Arkansas's ban survives the more demanding balancing inquiry (and it does), it would likewise survive rational basis review. Given that fact and—more importantly—the district court's *conceded failure* to determine whether the ban's benefits are substantially outweighed by its burdens, Appellants opted to focus on balancing.

between abortion and psychological distress. Add. 22. Yet Nichols's claim and the district court's assertions about abortion *in general* say nothing about whether undergoing a uniquely brutal procedure causes distress.

To the contrary, the only evidence on that point reinforced *Gonzales*'s conclusion that "a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event," that her unborn child was killed in a chillingly barbaric manner and "[s]evere depression and loss of esteem can follow." 550 U.S. at 159-60. In fact, underscoring that commonsense conclusion, a patient below testified that no one "explained to me that the limbs of my baby would be ripped apart and torn out" and that learning that information caused her "emotional and psychological" harm. Appx. 371; *see also* Appx. 360 (Parker) (describing "emotional trauma" patients suffer "from discovering that their babies were cut apart"); Appx. 370 ("horrific" procedure caused "emotional trauma and depression" and "substance abuse").

Furthermore, as Hopkins concedes, the district court ignored other health benefits. *See* Res. Br. 37 n.14. For instance, Hopkins does not deny that the district court ignored evidence that dismemberment can "desensitize[e] . . . medical personnel," cause them to "devalu[e] . . . human life," suffer severe emotional trauma, and provide subpar care. Appx. 177-79; *see* Appx. 171-75 (procedure's "emotional trauma" can impact quality).

Hopkins likewise does not deny that the district court ignored evidence that "[m]any clinicians" (Appx. 191) believe that demise lowers complication rates and facilitates removal. *See* Res. Br. 37 n.14. Instead, he argues that the district court could announce—based on what Hopkins baldly deems better studies—that "no evidence currently supports the use of induced fetal demise to increase the safety." Add. 55; *see* Res. Br. 37 n.14. But far from explaining how it determined that Hopkins's research was—as he claims—better, the district court erroneously declared that "no evidence" supported Appellants' argument. The district court's decision to ignore evidence requires that the injunction be vacated.

B. Arkansas's ban does not impose significant burdens.

The district court's burdens analysis is a house of cards built on the erroneous assumption that if *some* women cannot undergo a particular demise procedure, no woman can utilize that procedure. But contrary to that supposition, the record establishes that Hopkins can ensure demise in the *vast majority* of cases.

First, no one disputes that providers may use digoxin to induce fetal death. *See* Add. 12. In fact, Hopkins *already* uses digoxin to induce death beginning at 18 weeks. Add. 10. Nor does anyone dispute that digoxin is virtually always effective, failing just 5-10% of the time. Add. 11. Yet the district court inexplicably held that minor failure rate and the possibility that "[t]here are some women" with unique medical conditions "for whom an injection of digoxin may be

difficult or impossible" established that providers could *never* use digoxin. Add. 49-51. That conclusion apparently rests on Hopkins's suggestion that because he does not know in advance whether digoxin will work on any particular patient's unborn child, he could never use it. *See* Res. Br. 8, 32.

But that is utterly nonsensical. Far from establishing that Hopkins could never achieve demise, digoxin's tiny failure rate demonstrates that he *can* successfully use it (as he does now) in 90-95% of cases. It also demonstrates that in 5-10% of cases, an additional procedure might (as it is now) be required to ensure demise. And that would hardly amount, as Hopkins curiously claims, to experimentation or patient abandonment. *See* Res. Br. 10. Moreover, even if only digoxin were feasible (and that is not the case), the tiny failure rate would not warrant facial invalidation. *See infra* at pp. 14-16 (impact on some women does not justify facial relief). Furthermore, in the *unusual* case where a provider reasonably believes an abortion is (or has become) medically necessary, the provider may immediately undertake dismemberment without attempting another demise procedure. *See* Ark. Code Ann. 20-16-1803(a).

Hopkins's observation that the district court also concluded that digoxin is not currently used before 18 weeks and that "[t]here are virtually no reported studies" on its earlier use does not alter that analysis. Add. 48; *see* Res. Br. 32. Instead, that observation merely establishes that providers do not currently have an

incentive to use it earlier and that it is both well-studied and can be used (as Hopkins *does*) beginning at 18 weeks. It is entirely unclear how either demonstrates, as the district court concluded, that digoxin is *never* available.

Moreover, Hopkins's observation might, at most, establish some medical uncertainty before 18 weeks. But "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does [elsewhere]" and it certainly cannot justify pre-enforcement, facial relief. *Gonzales*, 550 U.S. at 164. It also ignores the "reasonable inference that" even though an abortion methodology is not currently used, "[t]he medical profession . . . may find different and less shocking methods to abort the fetus in the second trimester" to "accommodate[e] legislative demand." *Id.* at 160. Indeed, adopting the district court's approach would incentivize providers to sit still and proclaim medical uncertainty as to any alternative procedure.

Of course, this Court need not resolve that issue since undisputed testimony establishes digoxin is feasible before 18 weeks. In fact, Hopkins introduced direct evidence on this point in the form of a transcript of Dr. Joseph Biggio, Jr.'s testimony in *West Alabama Women's Center v. Miller*, 2017 WL 4843230 (M.D. Ala. Oct. 26, 2017), concerning Alabama's substantially identical ban. *See* Appx. 463 (trasncript attached to Hopkins's reply brief). That undisputed (yet cross-examined) testimony establishes that "from a physiologic standpoint, if a [digoxin]

dose is going to cause fetal demise at 18 or 19 or 20 weeks, that same dose would be likely to cause fetal demise and cessation of cardiac activity at 15, 16, 17 weeks" without "markedly different" side effects. Appx. 474-75. And despite Hopkins's concession (*see* Res. Br. 33) that Biggio's testimony is the *only* direct evidence concerning digoxin's safety and reliability before 18 weeks, the district court failed to acknowledge it. Instead, it just announced the opposite. Add. 48.

Knowing that a district court is not entitled to ignore undisputed evidence, Hopkins's appellate briefing disavows the transcript that *he introduced*. Indeed, in a *volte-face* that would make Talleyrand blush, Hopkins now argues that the evidence he introduced—from a case his brief repeatedly cites—"is irrelevant to this case and should be disregarded." Res. Br. 33 n.12; *see* Res. Br. 28-29, 31, 32, 35, 36 n.13, 37 (arguing *Miller* supports affirmance). But "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." *Canny v. Dr. Pepper/Seven-Up Bottling Group*, 439 F.3d 894, 904 (8th Cir. 2006). And highlighting his awareness of that principle, Hopkins attempts to sidestep it by misleadingly suggesting that Appellants introduced that transcript. *See* Res. Br. 33 & n.12 (citing portions of Appellants' brief discussing the *transcript* that Hopkins introduced and an *affidavit* that Appellants did introduce); *see also* Br. of Amicus Curiae New York et al., 23 n.11 (making similar misleading references). But even putting that aside, the fact remains that the district court did not reject Biggio's

digoxin testimony because it was irrelevant. Rather, the district court did the one thing it is not allowed to do (and that requires reversal): It just ignored it.[3]

Equally problematic is Hopkins's defense of the district court's conclusion that second digoxin injections are unfeasible. Conceding that the district court did not acknowledge evidence establishing that second injections have been safely administered, Hopkins suggests that this Court should ignore that error because—as he sees it—this Court is incapable of reviewing "medical journals without the interpretation of medical experts." Res. Br. 33 & n.11. But this Court regularly reviews evidence introduced below, even in abortion cases. *E.g.*, *Planned Parenthood Minn., North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 902-903 (8th Cir. 2012) (en banc); *see also* Wright et al., *supra*, at § 2949 (evidentiary rules are more relaxed in preliminary injunction proceedings).

Second, providers may ensure fetal demise by injecting the unborn child or umbilical cord with potassium chloride. *See* Add. 14. Given expense and training requirements, those injections are unlikely to be the primary method of ensuring

[3] Hopkins speculates that the district court could have given Biggio's testimony less weight than an *evidentiary void*. *See* Res. Br. 34. Yet even if that were true (and it is not), the district court did not do that. *Cf.* Add. 53 n.6 (giving less weight to Biggio's *transection* testimony but not mentioning digoxin testimony). Further, even if Hopkins could disclaim his evidence, courts routinely consider evidence that would not necessarily be admitted at trial during preliminary injunction proceedings. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *accord* 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE & PROCEDURE § 2949.

demise. *See* Add. 51-53. But neither that nor the fact that such injections may not be appropriate—as the district court concluded—for "some women" with unique conditions, demonstrates total unfeasibility. *Id.* Rather, the relevant question is whether such injections might be feasible for a subset of the "some" patients who cannot undergo another procedure—and the district court did not answer that question.

Instead of addressing that issue, Hopkins argues affirmance is required because "[a] misplaced potassium chloride injection can cause cardiac arrest and death." Res. Br. 34. But while that is true, speculation that a disreputable provider could place a needle "somewhere *completely different* than where" he was "aiming for" hardly warrants facial invalidation. Appx. 478 (Biggio) (emphasis added). To the contrary, in pre-enforcement facial challenges, courts do not generally "speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008); *accord Gonzales*, 550 U.S. at 166-68.

Third, "any physician who has completed an OB-GYN residency" can ensure death by transecting the umbilical cord. Appx. 335 (Wyatt). Yet like above, the district court entirely dismissed this methodology because it might not be appropriate for "some women." Add. 54. But again, that does not demonstrate total unavailability or that it could not be an option in the rare case where digoxin

fails. And rather than defend that analysis, Hopkins erroneously argues that the district court could ignore transection because it "is not well-studied" and a provider might accidentally violate the ban while trying to transect the cord. Res. Br. 35. Neither argument, however, holds any weight given that the *only* study cited below by anyone concludes that transection is "effective and safe" and "not associated with adverse outcomes" (Appx. 247) and that Arkansas's ban only applies where a provider sets out to kill by dismemberment. Ark. Code Ann. 20-16-1802(5); *see Gonzales*, 550 U.S. at 149-50, 155 (discussing importance of an "Act's intent requirements, which preclude liability from attaching to an accidental" violation after a permitted procedure begins).

C. Minor impacts for some patients do not justify facial relief or outweigh Arkansas's interest.

The district court's failure to determine whether Hopkins could safely accomplish demise in the vast majority of patients likewise means that it did not weigh any alleged burden against Arkansas's interest or determine whether a large fraction of patients were impacted. Indeed, the district court did not find that *anyone*—let alone a large fraction of relevant women—would be particularly impacted, let alone obliged to delay or forgo an abortion. Instead—as Hopkins does not dispute—the district court merely concluded that various demise methodologies are unavailable for "some" women and that others might face longer procedures and increased costs. *E.g.*, Add. 50, 53, 54; *cf.* Add. 56.

But financial and time impacts and the speculative possibility that some women might delay or forgo cannot possibly outweigh Arkansas's interests in expressing "profound respect for the life within the woman" and protecting medical ethics. *Gonzales*, 550 U.S. at 157-58. To the contrary, Arkansas may bar abortion methodologies that raise significant moral and ethical concerns and require providers to "substitute others" that do not impose significant risks for most women. *Id.* at 158; *cf. Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 79 (1976) ("[T]he outright legislative proscription of" the primary abortion methodology fails because it has "the effect of inhibiting[] the *vast* majority of abortions after the first 12 weeks." (emphasis added)).

Moreover, even if that calculation might be different in *some* circumstances, that cannot warrant facial invalidity. *See Richmond Med. Center for Women v. Herring*, 570 F.3d 165, 175 (4th Cir. 2009) (finding facial invalidity based on unique circumstances "is not appropriate under any standard for facial challenges"); *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) ("The *Casey* Court itself was not persuaded to invalidate Pennsylvania's parental-consent requirement by record evidence showing that the requirement would altogether prevent *some* women from obtaining an abortion." (emphasis added)); *Karlin v. Foust*, 188 F.3d 446, 486 (7th Cir. 1999) (evidence that "some" women could not obtain abortions does not warrant facial relief); *A Woman's*

Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 699 (7th Cir. 2002) (Coffey, J., concurring) ("[I]t is clear that a law which incidentally prevents 'some' women from obtaining abortions passes constitutional muster."). Instead, a statute is facially unconstitutional only where the plaintiff shows "that the Act would be unconstitutional in a *large fraction* of relevant cases." *Gonzales*, 550 U.S. at 167-68 (emphasis added); *accord Jegley*, 864 F.3d at 959-60; *Taft*, 468 F.3d at 374 (12% is not sufficient). And even in the unusual case, the broad exception for situations where a provider reasonably believes an abortion is or has become medically necessary ensures women do not face significant health risks. *See* Ark. Code Ann. 20-16-1803(a).

Lastly, Hopkins ultimately resorts to arguing that *Stenberg* requires courts to strike "any ban" impacting dilation and extraction (D&E) abortions. Res. Br. 30. But *Stenberg* does not establish such a broad proposition. Very much to the contrary, *Stenberg*'s entire discussion of D&E abortions proceeded from Nebraska's concession that, "*if* [the statute] applie[d] to the more commonly used D&E procedure as well as to [partial-birth abortion]," it would "impose[] an 'undue burden.'" 530 U.S. at 938 (emphasis in original). And that concession was not surprising given that provision imposed a total prohibition *without* a health exception. *See id.* at 931. By contrast, the question here is whether Arkansas's regulation—which prohibits only dismemberment without demise and contains a

health exception—imposes such a burden. Thus, Hopkins's attempt to distract from the district court's failure to apply the appropriate legal test should be rejected and the injunction vacated.

III. Arkansas's sex-selection abortion ban is clear and constitutional.

The Arkansas Sex Discrimination by Abortion Prohibition Act's requirement that providers obtain and review records relevant to determining whether a woman is seeking a sex-selective abortion does not impose an undue burden and is not vague. The district court only reached a contrary conclusion by reading that requirement in the least commonsensical way.

Hopkins does not dispute that Arkansas statutes must be construed as written, consistent with legislative intent and commonsense. *Minnesota Mining & Manufacturing v. Baker*, 989 S.W.2d 151, 154-55 (Ark. 1999). Nor does he dispute that intent is derived—not from isolated phrases but—from "considering the entire act." *Henderson v. Russell*, 589 S.W.2d 565, 568 (Ark. 1979). Hence, here, it was the district "court's duty to look to the whole act and, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and sensible." *Ragland v. Alpha Aviation, Inc.*, 686 S.W.2d 391, 392 (Ark. 1985); *accord Arkansas County v. Desha County*, 27 S.W.3d 379, 383 (Ark. 2000).

Applying that standard, it is clear that the records provision only requires

providers to request records: 1) when a woman knows her unborn child's sex; and 2) that are relevant to determining whether she has a history of only aborting children of her current unborn child's sex. Only that reading is consistent with the overall statutory scheme which revolves around the legislature's decision to prohibit sex-selective procedures without materially increasing the risks inherent in later abortions after the mother learns the child's sex. *See* Ark. Code Ann. 20-16-1904(a) (prohibiting sex-selection); *see also id.* at 20-16-1902(a)(2)(E) ("Because abortions performed solely based on the sex of a child are generally performed later in pregnancy, women undergoing these abortions are unnecessarily exposed to increased health risks."). Indeed, no one disputes that the records provision appears alongside *both* provisions intended to make the ban effective and legislative findings concerning sex-selection and later abortions where a patient is likely to know a child's sex. *See id.* at 20-16-1902; *id.* at 20-16-1904(b). And no one contends that it would make sense for the legislature to have slipped a requirement that providers obtain all pregnancy records for every patient in the middle of such legislation. *See* Add. 76 (in that case, provision would "serve no . . . purpose").

Moreover, Hopkins's argument that the district court's approach is consistent with the challenged provision's literal text fares no better. It ignores the statute's clear command that: "If the pregnant woman knows the sex of the unborn

child, the physician or other person who is performing the abortion shall inform the pregnant woman of the prohibition of abortion as a method of sex selection for children; ***and*** (2)(A) Request the medical records of the pregnant woman relating directly to the entire pregnancy history of the woman." Ark. Code Ann. 20-16-1904(b)(1)-(2) (emphasis added). In fact, rather than explain why "and" appears between what Hopkins says are two unrelated requirements, he simply ignores that word. But if the records provision was (as the district court concluded) "a second, independent requirement" (Add. 69), the "and" would be superfluous since the provider would *already* be required to request records.

Additionally, in concessions that should have dispelled any remaining doubt about the provision's meaning and reach, the district court found the above reading is what "the legislature intended" (Add. 70), that Hopkins's approach left a provision that "appear[ed] to serve no . . . purpose" (Add. 76), and that Hopkins's approach would impose limitless and vague requirements (Add. 78, 87-90). *See Gonzales*, 550 U.S. at 153-54 (courts do not read provisions to create constitutional problems); *Holbrook v. Healthport, Inc.*, 432 S.W.3d 593, 597 (Ark. 2014) (statutes should not be read in a manner that "leads to absurd consequences that are contrary to legislative intent").

Despite all that—and a further acknowledgement that it should consider what the legislature intended (Add. 70)—in determining whether the records

provision imposed an undue burden and was vague, the district court focused on Hopkins's strained reading. *See* Add. 70-72 (speculating blanket requirement would overwhelm providers and pointlessly jeopardize confidentiality); Add. 78 (if provision requires blanket request it becomes unclear "what a doctor is to do with these records"); Add. 87-90 (similar).

Recognizing that, Hopkins now resorts to claiming that the records provision imposes an undue burden because: 1) some women might forgo or delay out of fear their confidentiality might be violated; 2) some providers might take so long to obtain records that women will be denied an abortion that they need for health reasons; and 3) the sex-selection ban is unnecessary because such abortions do not occur. *See* Res. Br. 39-41. Yet Hopkins cites no basis for his claim that sex-selection abortions do not occur, and the health exception claim ignores the fact that a patient seeking a medically necessary abortion is clearly not seeking a sex-selective abortion. Hopkins's speculative confidentiality claim likewise hardly warrants pre-enforcement, facial relief or outweighs Arkansas's interest in preventing the barbaric practice of aborting children based on sex.

Lastly, Hopkins's vagueness arguments lack merit since—as explained—the challenged provision is clear from its context. *See* Br. 48-50. Likewise, Hopkins's made-for-litigation confessions of confusion conflict with the district court's findings that he understands what it means to spend "reasonable time and effort" to

obtain records. *See* Add. 71. Therefore, the injunction should be vacated.

IV. Treating human remains with dignity does not offend the Constitution.

Hopkins challenges Arkansas's elimination of a special exemption that allowed abortion providers to simply dispose of fetal remains as ordinary tissue. He concedes that challenge rests on his unsupported claim that eliminating that exemption and requiring abortion providers to abide by the Final Disposition Rights Act means that women must obtain a sexual partner's consent for an abortion. *See* Res. Br. 52. But like the district court, Hopkins does not point to any language imposing that requirement. *See* Add. 121 (acknowledging interpretation did not rest on text, but conclusion that "[t]here is no evidence in the record . . . to contradict Dr. Hopkins's assertions regarding compliance"). That alone requires reversal.

As previously discussed, the Final Disposition Act ensures human remains are treated with dignity by imposing a hierarchy allowing those closest to a decedent to determine disposition. *See* Ark. Code Ann. 20-17-102(e)(1)(B) (if those presumed to be closest do not act within five days of death, rights pass to next qualifying person); *cf. id.* at 20-17-102(e)(1)(D)(i)-(ii) (excluding those "estranged" or who lack "affection, trust, and regard for the decedent" from decision-making). As relevant here, that means that parents—or if the parents cannot, grandparents—may determine disposition of a child's remains. *See id.* at

20-17-102(d)(1). Generally, parents (or grandparents) are treated as equals with each having a say. *Id.* at 20-17-102(d)(1)(E), (G). But the Final Disposition Act also recognizes that disposition should be determined expeditiously, and consequently, it provides that one parent may determine disposition where: 1) the other is absent and "reasonable efforts have been unsuccessful in locating" the absent parent; 2) both parents receive notification of death and only one acts within two days; *or* 3) only one parent exercises disposition rights within five days. Ark. Code Ann. 20-17-102(d)(1)(E), (e)(1)(B). It likewise provides that one grandparent may determine disposition—regardless of absence, efforts to notify, or actual notice to anyone else—if only he or she acts within five days. *See* Ark. Code Ann. 20-17-102(d)(1)(G); *id.* at 20-17-102(d)(3); *id.* at 20-17-102(e)(1)(B).

Hopkins concedes that framework has long governed "disposition of a dead body or fetus." *Id.* at 20-17-102(a)(2)(C); *see* Res. Br. 16 n.6. And it is difficult to understand Hopkins's claim that framework is so "onerous," "complex," and vague that he cannot possibly ensure compliance. Res. Br. 16, 50, 56. To the contrary, in the vast majority of cases, compliance would simply require Hopkins to ascertain the mother's disposition wishes, wait five days, and act according to those wishes. Similarly, in the case of a minor obtaining an abortion with parental consent, Hopkins would need to determine the consenting grandparent's wishes, wait five days, and abide by those wishes. Indeed, only an abortion by judicial bypass

would seem to present a potentially complex situation, but the district court did *not* suggest that extremely rare situation could warrant facial invalidation. *See* Add. 19, 120-21. Nor could it have. *See Gonzales*, 550 U.S. at 167-68 (statute facially invalid only where it imposes substantial obstacle in large fraction of relevant cases); *Jegley*, 864 F.3d at 959-60; *Taft*, 468 F.3d at 373-74.

Given that, echoing the district court, Hopkins resorts to claiming that the Final Disposition Act requires women to notify and obtain consent from sexual partners before an abortion and requires providers to ensure that women have done that. Add. 129; Res. Br. 51-52. But he does not point to anything imposing such a requirement. Instead, to make that claim, like the district court, Hopkins ignores the five day provision and *rewrites* the statutory text to say that one parent or grandparent may determine disposition "'*[only]* if they have used reasonable efforts to notify'" the other parent or grandparents. Res. Br. 17 (purporting to quote Ark. Code Ann. 20-17-102(d)(3) but modifying statute with brackets) (emphasis added); *accord* Add. 133. And in a transparent attempt to distract from the actual statutory language, Hopkins ludicrously claims that provision requires a woman to consult her rapist before having an abortion. *See* Res. Br. 17; *accord* Add. 121

(announcing "no evidence" disproves claim).[4] Yet as Hopkins's rewriting of the statute reveals, no such requirement exists.

Finally, Hopkins falls back on declaring that Arkansas has no interest in ensuring that those closest to a decedent make decisions concerning disposition and claiming that the challenged provisions have no relationship to promoting respect for life. But courts have long recognized the undisputed, "legitimate interest of states and municipalities in regulating the disposal of fetal remains from abortions and miscarriages." *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479, 481 (8th Cir. 1990). Thus, the injunction should be vacated.

V. Arkansas is entitled to protect children who face an increased risk of sexual assault.

Arkansas has a compelling interest in protecting children from sexual assault and prosecuting predators. That interest dwarfs Hopkins's speculation that some 14-, 15-, and 16-year old girls might be deterred from seeking an abortion because providers refer to extracted tissue as "evidence" (Res. Br. 46).

To find an undue burden, the district court erroneously declared that Arkansas had no interest in requiring Hopkins to report and preserve tissue from surgical abortions performed on 14-, 15-, and 16-year olds that he would not

[4] Peculiarly, Hopkins simultaneously claims that criticizing the district court's errors is an "*ad hominem* attack[.]" Res. Br. i. He also ignores other provisions that preclude his rape claim. *E.g.*, Ark. Code Ann. 20-17-102(e)(1)(D)(i)-(ii); *id.* at 9-10-121(a).

otherwise report as sexual assault victims under other Arkansas laws. *See* Add. 95, 98-99. In fact, it announced that applying those requirements to girls who, Hopkins believes, became "pregnant through consensual sexual intercourse" would be pointless and might confuse them. *Id.* But as explained in Appellants' opening brief—and *not* disputed by Hopkins on appeal—the district court's analysis of Arkansas's interest ignores the fact that Hopkins will make mistakes. And the district court's failure to acknowledge that fact fatally undermines its analysis.

Moreover, the expansion of the reporting and preservation requirements from girls under 14 to include 14-, 15-, and 16-year olds corresponds with undisputed data demonstrating that: 1) "[t]he risk of being the victim of forcible rape increase[s] dramatically from age 10 to age 14, *where it peak[s]*"; 2) 15-year olds are as likely to be victims as the 13-year olds already subject to the requirement; and 3) 16-year olds' victimization risk remains disproportionately high. Appx. 392-93 (emphasis added). And while Hopkins labels that data "inadmissible information," he *never* disputes that 14-, 15-, and 16-year olds are at a disproportionately high risk of sexual assault.[5] Thus, as that undisputed data

[5] Hopkins's complaints are puzzling. *First*, his complaint about receiving the data the day before the preliminary injunction hearing is peculiar since he continued introducing new evidence *after* that hearing. *See* Appx. 443-516. *Second*, his complaint about "hearsay, lacking expert testimony" goes to weight, not admissibility. *See* Wright et al., *supra*, at § 2949 (hearsay routinely considered in preliminary injunction proceedings). *Third*, while Hopkins complains about the data's age, he does not cite conflicting data. His claim also ignores the fact that the

demonstrates, the expansion of those requirements narrowly targets girls at a disproportionately high risk of sexual assault.

Indeed, contrary to Hopkins's overbreadth claim (Res. Br. 44), the fact that the expansion correlates with undisputed data and does not apply more broadly (for example, to 17-year olds) demonstrates its *narrow* focus. Likewise, Hopkins's under-inclusiveness argument lacks merit, failing to account for obvious differences between, on the one hand, a provider's ability to retain tissue extracted during an abortion and, on the other, miscarriage, prenatal care, and medication abortion where "the patient passes the pregnancy tissue at home" and not with a provider. Add. 21.

The speculative burdens that Hopkins cites also do not outweigh Arkansas's compelling interests. In fact, the only things that the district court or Hopkins cite as countervailing interests are speculation that a girl might delay or forgo an abortion because providers use words like "evidence" and the curious claim that "disclosure to local police 'is itself' a serious harm that deters care." Res. Br. 46 (quoting Add. 97). Yet far from establishing the proposition that reporting a minor's abortion to law enforcement—which Hopkins does not dispute will keep

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admitted data is routinely cited in practical and academic circles. *E.g.*, Amer. Law Inst., *Victimization & Criminal-Justice Responses Today* (discussion draft concerning Model Penal Code—Sexual Assault & Related Offenses Sec. 213) (Apr. 28, 2015) (updated Oct. 2017); Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 228 n.125 (2017).

that information confidential—is a harm, Hopkins implausibly suggests that is comparable to requiring abused women to notify their spouses before an abortion. *See* Res. Br. 46 (citing *Casey*); *see also Casey*, 505 U.S. at 888-94 (discussing evidence concerning prevalence of spousal abuse in determining spousal notification provision imposed undue burden).

Lastly, the district court concluded that the challenged provision violated an unknown right to informational privacy. *See* Add. 105-110. Neither the district court nor Hopkins cite any case from this Court or the Supreme Court establishing such a right, and this Court should decline to invent it. Further, even if such a right existed, the cases cited below suggest that a violation would require a plaintiff to prove "a shocking degradation or an egregious humiliation . . . or a flagrant breech of a pledge of confidentiality." *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993); *accord Riley v. St. Louis County of Missouri*, 153 F.3d 627, 631 (8th Cir. 1998). But neither the district court nor Hopkins explain how reporting to law enforcement—which will keep that information confidential—could violate that standard. Therefore, the injunction should be vacated.

VI. The district court abused its discretion in applying the remaining *Dataphase* factors.

The district court abused its discretion in applying the remaining preliminary injunction factors. In particular, it disregarded society's interests in prohibiting the horrific practice of barbarically ripping an unborn child's limbs off so that it bleeds

to death, ensuring children are not aborted because they are of an undesirable sex, ensuring human remains are treated with dignity and respect, and protecting children from predators. Thus, the injunction should be vacated.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated.

Respectfully submitted,

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March 21, 2018

CERTIFICATE OF COMPLIANCE

Hopkins v. Jegley et al. (17-2879)

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately 6,495 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) and 8th Cir. R. 28A because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-Point Times New Roman.

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Nicholas J. Bronni

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that counsel for Appellee are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Nicholas J. Bronni*
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