IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

FREDERICK W. HOPKINS, M.D., M.P.H., *et al*.	)	
	)	
Plaintiffs,	)	Case No. 4:17-cv-00404-KGB
	)	
v.	)	
	)	
LARRY JEGLEY *et al*.,	)	
	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs[1] move for a temporary restraining order ("TRO") to immediately enjoin enforcement of the challenged laws, preserve the status quo, and prevent irreparable harm while this Court considers Plaintiffs' motion for a second preliminary injunction. The Eighth Circuit mandate will likely issue tomorrow, December 22, and this Court's prior preliminary injunction will be lifted. If this Court does not immediately enter a TRO, Plaintiffs will be forced to begin to turn away patients starting December 22, 2020, who otherwise would be obtaining their abortions. Specifically, if this Court does not block the challenged laws, Plaintiffs will be forced to turn away at least eight patients currently scheduled for abortion care on December 22 and/or December 23 who require an aspiration or D&E abortion. Decl. of Lori Williams, M.S.N, A.P.R.N., in Supp. of Pls.' Mot. for an Ex Parte TRO ("Williams

[1] Plaintiff Hopkins moved to amend the complaint on December 16, 2020 (Doc. 65) to add, *inter alia*, Little Rock Family Planning Services ("LRFP"), as a Plaintiff. Accordingly, this brief refers to "Plaintiffs" throughout.

TRO Decl.") ¶ 6 (attached as Ex. 2). In addition, Plaintiffs have another eight patients scheduled for their initial visit next week who would, if these laws are not in effect, be able to obtain their aspiration or D&E abortion on December 28-30. *Id*. ¶ 6. Plaintiffs will also be forced to turn away every additional caller seeking aspiration or D&E abortion care, as well as patients between the ages of 14 and 16, and/or patients who know the sex of their embryo or fetus, unless and until this Court enters injunctive relief. *Id*. ¶ 8. All of these patients will be denied their constitutional right to obtain an abortion while these laws are in effect, and their care will be delayed or denied, pushing patients further into their pregnancies, creating medical risks.

This Court can and should enter a TRO based on the factual findings and legal conclusions it made in granting Plaintiffs' prior preliminary injunction. The Eighth Circuit remanded this case to the district court with instructions to follow Chief Justice Roberts's concurrence in *June Medical Services, LLC. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment).[2] Under that concurrence, abortion restrictions impose an unconstitutional undue burden if they impose a substantial obstacle in the path of a person seeking a pre-viability abortion or are not reasonably related to a legitimate state purpose. *Id*. at 2138. And the key question in determining whether an abortion restriction imposes an unconstitutional substantial obstacle is the "law's effect on the availability of abortion." *Id.* at 2141 n.5. This Court already factually found and legally concluded that the four challenged laws will have the effect of severely restricting, if not outright eliminating, the availability of abortion in Arkansas. *Hopkins v.*

[2] In this motion, citations to *June Medical Services* are citations to the Chief Justice's concurrence unless otherwise noted.

Jegley, 267 F. Supp. 3d 1024, 1068, 1078, 1091, 1106 (E.D. Ark. 2017). This alone is sufficient to justify a TRO. Moreover, this Court's prior factual findings and legal conclusions likewise establish that, at a minimum, three of the challenged laws are not reasonably related to a legitimate state interest. *Id*. at 1076, 1089, 1105. Additionally, because *June Medical Services* considered only an undue burden claim, the concurrence does not affect this Court's ruling that Plaintiffs are likely to succeed on their claims that two of the laws (the Medical Records and Tissue Disposal Mandates) fail to give Plaintiffs fair notice of what is prohibited, and are therefore likely unconstitutionally vague. *Id*. at 1084, 1110.

In view of the above, and as discussed further below, Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims. Further, in view of the severe, ongoing, and irreparable harm Plaintiffs and their patients will face in the absence of immediate injunctive relief, this Court should grant Plaintiffs' motion for a TRO while the Court considers the motion for a second preliminary injunction. Plaintiffs contacted counsel for Defendants on the morning of December 17, 2020 to inform them that Plaintiffs would be seeking an *ex parte* TRO to block the challenged laws as soon as the prior injunction was lifted. *See* Decl. of Ruth E. Harlow in Supp. of Pls.' Mot. for an Ex Parte TRO ("Harlow Decl.") ¶ 5 (attached as Ex. 1). Plaintiffs' counsel further informed Defendants' counsel that Plaintiffs would move for a TRO on or before December 22, 2020, and that the motion would be based this Court's prior factual findings and legal conclusions from its 2017 Order. *Id*. ¶¶ 5, 7. This is more than sufficient to satisfy Plaintiffs' obligations to give notice and, given the threat of imminent and irreparable harm, no further notice should be required. *See* Fed. R. Civ. P. 65(b)(1)(B). If, however, this Court declines to grant

an *ex parte* TRO, Plaintiffs respectfully requests that this Court grant Defendants no more than 24 hours to respond to Plaintiffs' TRO request, given that (i) Defendants have had express notice of Plaintiffs' filing for more than three days, and (ii) Plaintiffs' TRO motion seeks relief that merely maintains the status quo for a short period of time while the Court rules on Plaintiffs concurrently filed preliminary injunction motion.

FACTUAL BACKGROUND

In 2017, the Arkansas Legislature passed four laws restricting abortion access: (1) a ban on the dilation and evacuation procedure (D&E Ban), which is the sole method of abortion that is provided throughout the second trimester in Arkansas; (2) a law that requires Plaintiffs to indefinitely delay providing abortion care while they unnecessarily undertake a sweeping search of patients' pregnancy-related medical records from other health care providers (Medical Records Mandate); (3) a law that requires Plaintiffs to report to local police the name of any patient between the ages of 14 and 16 who obtains an abortion, even when there is no evidence of abuse or criminality, and to provide that patient's fetal tissue, labeled with their name, to the police for indefinite retention in the state crime lab (Local Disclosure Mandate); (4) a law that imports an existing elaborate law about who controls decisions about disposition of human remains into the abortion context, which in practice includes requiring notification of the abortion to patients' sexual partners and, if they are minors, their parents and their partners' parents, to give those other individuals rights of control over disposal of tissue from an abortion (Tissue Disposal Mandate). *Hopkins*, 267 F. Supp. 3d at 1034.

Plaintiffs sought a preliminary injunction on all four laws, which this Court granted. *Id*. In so doing, this Court made detailed findings of fact based on largely undisputed evidence.

The Court's Factual Findings on the D&E Ban

This Court found that D&E accounts for 100% of second-trimester abortions currently performed in Arkansas. *Id*. at 1038, 1066. D&E is an extremely safe and common procedure. *Id*. at 1036-37, 1038. In a D&E, a physician dilates the patient's cervix then removes fetal tissue using instruments. *Id*. at 1037. Because the physician dilates the cervix only enough to allow for the safe passage of instruments, a D&E necessarily results in the separation of fetal tissue. *Id*. The D&E Ban prohibits separating fetal tissue with instruments, and thus prohibits D&E in Arkansas on pain of criminal penalties. *Id*. at 1038, 1051.

Defendants argued that Plaintiffs could circumvent this ban by performing additional, invasive medical procedures on the patient to induce fetal demise prior to removing fetal tissue, but the Court rejected this argument because there is no way for Plaintiffs to ensure fetal demise for every patient seeking a second-trimester abortion. *Id*. at 1058-64. This Court found that three procedures suggested by Defendants—injections of digoxin, injections of potassium chloride, and transection of the umbilical cord—are unreliable, risky, unstudied, and/or unavailable in Arkansas. *Id*. at 1039-41. As this Court found, digoxin is unstudied before 18 weeks in pregnancy, *id*. at 1040; it is medically inappropriate for some patients at any stage, *id*. at 1039; and it will fail five to ten percent of the time, *id*. This Court found that potassium chloride injections were unavailable in Arkansas, as providers have neither the training nor the equipment needed to safely inject

it, and a misplaced injection poses serious risks to the patient, including risk of death. *Id*. at 1040-41. This Court also found that cord transection has not been the subject of any rigorous study, *id*. at 1041; is completely unstudied before 16 weeks LMP, *id*.; and can pose risks to the patient, *id*. This Court found that Plaintiffs cannot rely on these procedures to guarantee fetal demise prior to using instruments when performing a D&E, and Plaintiffs cannot start a procedure that they do not know they will be able to complete safely and legally. *Id*. at 1059. Accordingly, this Court found "if the D&E [Ban] goes into effect, standard D&E abortions will no longer be performed in Arkansas." *Id*. at 1067.

This Court also found that requiring patients to undergo additional, invasive, and unreliable procedures prior to a D&E would impose a substantial obstacle on people seeking second-trimester abortion, including by exposing them to additional risks and pain and forcing them to make more trips to the clinic to undergo the added procedure. *Id*. at 1061, 1062-64. Many of Plaintiffs' patients have low-incomes and are already under tremendous stress and financial pressure; accordingly, this Court found it would impose a substantial obstacle to force them to try to take even more time off from work, arrange for transportation and lodging, and arrange for childcare for additional clinic visits. *Id.* at 1061.

This Court's Factual Findings on the Medical Records Mandate

This Court found that Plaintiffs provide abortion services to approximately 3,000 people per year, the majority of whom have had one or more prior pregnancies. *Id*. at 1075. Under the Medical Records Mandate, Plaintiffs would be required to request and attempt to collect from each patient's health care providers any medical records for the patient's "entire pregnancy history," over the history of any past pregnancies carried to

term, abortions, or miscarriages. *Id*. at 1069. For patients who have seen one or more health care providers for their current pregnancy, Plaintiffs would also need to request their medical records and work to gather them. This Court found that there is no medical reason for Plaintiffs to obtain medical records for the vast majority of abortion patients. *Id*. at 1042, 1073. But the law prevents Plaintiffs from providing an abortion until "reasonable time and effort" is spent to obtain these medical records, and the term "reasonable" is "undefined." *Id*. at 1069, 1080-81.

As this Court found, there is little to ensure that the Plaintiffs will receive these records in a timely manner; indeed, "[f]ederal law allows United States providers 30 days for the initial response to records requests; the actual medical records may follow latter." *Id*. at 1073. This delay would be compounded for patients who received pregnancy-related care outside of Arkansas, or outside of the United States, in which case the medical records may be in a different language. *Id*. Even if they are obtained, "[n]othing in the Medical Records Mandate explains what a doctor is to do with these records." *Id*. at 1077. Accordingly, requiring abortion providers to undertake this search will only delay abortion care, which will push patients further into their pregnancy, increasing the risks associated with it, and will push some past the point where abortion is permitted in Arkansas. *Id*. at 1041-42. Furthermore, there is also no exception in cases where a "serious health risk to the woman is present." *Id*. at 1074.

Moreover, this Court found that a request for medical records by Plaintiff LRFP necessarily alerts the patients' prior providers that she is seeking abortion, breaching her confidentiality. *Id*. at 1042. Patients, however, frequently impress upon Plaintiffs the importance of keeping their abortion confidential from other health care providers

because they fear hostility or harassment from the other providers. *Id*. For this reason, some patients have specifically asked Plaintiffs to refrain from seeking records from other health care providers; indeed, in one of the rare instances where LRFP requested records, the provider's wife contacted the patient to try to dissuade her from having an abortion. *Id*. at 1042-43.

This Court's Factual Findings on the Local Disclosure Mandate

As this Court recognized, the Local Disclosure Mandate requires Plaintiffs to notify law enforcement in 14- to 16-year-old patients' local jurisdiction when those patients obtain an abortion, and transmit fetal tissue to the police, even where there is no evidence of abuse or criminality. The information disclosed to local law enforcement includes the patient's name, date of birth, her and her parents' address, and the name and date of birth of the "suspect." *Id*. at 1086. The law also mandates that the tissue from the patient's abortion be indefinitely stored, with the patient's personal information, in a state crime lab. *Id*. at 1087. Accordingly, this Court found that the Local Disclosure Mandate requires Plaintiffs to reveal the "most intimate and personal aspects" of teenage patients' lives to the local police. *Id*. at 1095.

To compound the problem, local law enforcement offices can be very small, and some personnel can be anti-abortion. *Id*. at 1043. "[O]nce the information is known by local community members and written on required documents, there are risks to these young women's privacy, which can engender fear on the part of these young women." *Id*. at 1088. This Court found that the Local Disclosure Mandate would humiliate patients by disclosing these private facts and would make them fearful of the reaction by the local community—potentially dissuading them from obtaining care at all. *Id*. at 1092.

Furthermore, because there is no way for Plaintiffs to preserve and transmit tissue from a medication abortion to local law enforcement, the Mandate could effectively prohibit medication abortion for these teenagers. *Id*. at 1087-88.

This Court's Factual Findings on the Tissue Disposal Mandate

This Court found that requiring abortion providers to ensure tissue from an abortion is disposed of in accordance with the Final Disposition Rights Act (FDRA) would impose significant burdens, including potentially forcing Plaintiffs to cease providing abortion care. Transporting the FDRA's elaborate scheme to the abortion context, for which the FDRA was not intended, would require notice about a patient's abortion to her "sexual partner or, if the woman and her sexual partners are minors, the parent or parents of both"—individuals a woman has a constitutionally protected right *not* to involve in her abortion. *Id*. at 1099. Furthermore, this Court found that searching for and notifying these "interested parties" would cause significant delay "that would result in harm to women seeking abortion care," in the form of the other risks of delay discussed above. *Id*. at 1102. This Court also noted that the law establishes an "unclear . . . scope of [] obligations," *id.* at 1110—including because it is unclear whether medication abortion or treatment of miscarriage falls under the law, and it is unclear what constitutes "reasonable efforts to locate an absent parent or other members of the class of grandparents," *id.*—and Plaintiffs would face criminal penalties if they fails to follow the law, *id*. at 1103.

The Pertinent Facts Underlying this Court's 2017 Factual Findings Have Not Changed

None of the core facts that were the basis of this Court's factual findings have changed since this Court entered its preliminary injunction order.

- The D&E Ban still prohibits D&E procedures, which is the sole method of abortion that is provided throughout the second trimester in Arkansas. Even if the demise methods the State proposes were feasible workarounds to the D&E Ban, which they are not, the Ban would still impose a substantial obstacle on pre-viability abortion access by forcing patients to undergo riskier procedures and/or make additional, burdensome trips to the clinic. Decl. of Lori Williams, M.S.N., A.P.R.N., in Supp. of Pls.' Mot. for an Ex Parte TRO ("Williams TRO Decl.") (attached as Ex. 2) ¶ 6; Decl. of Mark D. Nichols, M.D., in Supp. of Pls.' Mot. for an Ex Parte TRO ("Nichols TRO Decl.") (attached as Ex. 3) Ex. A ¶¶ 20– 38.
    - The State's most recent Induced Abortion Report confirms that D&E is the only second-trimester abortion method reported in Arkansas.[3]
    - D&E is also the safest method of abortion throughout the second-trimester. Nichols TRO Decl. Ex. A ¶ 19.
    - And, just as three years ago, Plaintiffs cannot circumvent the ban on D&E using the State's so-called workarounds because there is no way for Plaintiffs to guarantee fetal demise prior to using instruments. Nichols TRO Decl. Ex. A ¶ 6.
- As to the Medical Records Mandate, abortion providers still face criminal liability if they do not spend an undefined period of time and effort to obtain medical records for each patient's entire pregnancy history, and they still do not know

[3] Induced Abortion Report, Center of Health Statistics, Arkansas Dep't of Health, at 8 (June 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/Induced_Abortion_final_2019.pdf.

what, if anything, they are supposed to do with the records if they obtain them. Williams TRO Decl. ¶ 7.

- As to the Local Disclosure Mandate, if the law takes effect, abortion providers will still be forced to reveal the most intimate details of a 14- to 16-year-old patient's life to local law enforcement, and the fetal tissue from the patient's abortion will be kept indefinitely in a crime lab labeled with the patient's name, even where there is no evidence of criminality or abuse. Williams TRO Decl. ¶ 8.
- As to the Tissue Disposal Mandate, it still imposes a new, unclear scheme of decision-making, under which a provider must attempt to notify patients' partners or parents about each patient's abortion, thereby breaching patient confidentiality, delaying critical care, and leaving Plaintiffs unclear on how to comply and avoid criminal penalties. Williams TRO Decl. ¶ 5.

ARGUMENT

This Court should issue a TRO "to preserve the *status quo* until the merits are determined." *Little Rock Family Planning Servs. v. Rutledge*, 398 F. Supp. 3d 330, 369 (E.D. Ark. 2019) (quotation omitted) (granting TRO and reserving ruling on request for preliminary injunction), *appeal argued*, No. 19-2690 (8th Cir. Sept. 23, 2020); *see also Tempur-Pedic Int'l, Inc. v. Waste to Charity, Inc.*, No. 07-2015, 2007 WL 535041 (W.D. Ark. Feb. 16, 2007) (same). *W. Plains, L.L.C. v. Retzlaff Grain Co.*, No. 8:13CV47, 2013 WL 541568, *5 (D. Neb. Feb. 12, 2013) (same). This Court applies the same standard for both preliminary injunction and temporary restraining order requests. *See Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-cv-00784-KGB, 2018 WL 3029104, at *8 (E.D. Ark. June 18, 2018). As this Court has held, in deciding a preliminary injunction

motion, it "considers four factors: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance of equities; and (4) the public interest." *See Hopkins*, 267 F. Supp. 3d at 1051 (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)).

I. Plaintiffs are Likely To Succeed On the Merits of Their Claims.

As discussed below, Plaintiffs are likely to succeed on the merits of their undue burden claims because, as this Court previously found, the challenged laws impose a substantial obstacle in the path of people seeking abortion, irrespective of any purported benefits. The Eighth Circuit did not disturb these findings or even suggest they are clearly erroneous; rather, with respect to the undue burden claims, the Eighth Circuit remanded to this Court solely to apply the test as articulated by Chief Justice Roberts in his *June Medical Services* concurrence.[4]

Under the Chief Justice's concurrence, abortion restrictions are unconstitutional if they are not "reasonably related" to a "legitimate purpose," or if they impose "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *June Med. Servs.*, 140 S. Ct. at 2138 (quotations omitted). Importantly, the concurrence did not alter what constitutes a "substantial obstacle." Instead, the Chief Justice affirmed that laws impose a "substantial obstacle" when they have the effect of "likely [] prevent[ing] a significant number of women from obtaining an abortion," *id.* at 2137 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 893 (1992)), as well as when they

[4] Plaintiffs preserve their argument, discussed in their petition for rehearing en banc, *Hopkins v. Jegley*, No. 17-2879, Entry ID 4947895 (8th Cir. Aug. 21, 2020), that Chief Justice Roberts's concurrence does not eliminate the requirement that courts must weigh the benefits of an abortion restriction with the law's burdens.

subject people seeking abortions to delay, increased travel, and/or increased medical risks, *id.* at 2140 (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016)). Applying this test, the Chief Justice joined the plurality to strike down the Louisiana law at issue in *June Medical Services* because it imposed a substantial obstacle by, *inter alia*, creating longer wait times for appointments, increasing travel distances, and increasing medical risks for patients. *Id*. at 2140. In particular, the Chief Justice recognized that these obstacles must be considered on top of the obstacles that people already faced accessing abortion in Louisiana, including affording or arranging childcare. *Id.* These are the very same burdens this Court found the challenged laws would impose here, as discussed *infra*. *See also Whole Woman's Health*, 136 S. Ct. at 2313, 2318.

Accordingly, based on this Court's previous findings that the laws impose a substantial obstacle in the path of people seeking abortion access, Plaintiffs are likely to succeed on the merits of their undue burden claims. As this Court has already found, and as discussed further below, the extensive record evidence demonstrates that each of the challenged laws imposes a substantial obstacle in the path of people seeking pre-viability abortions. *See, e.g.*, 267 F. Supp. 3d at 1068 (D&E Ban); *id.* at 1078 (Medical Records Mandate); *id.* at 1091 (Local Disclosure Mandate); *id* at 1106 (Tissue Mandate). In addition, for at least three of the four laws challenged this Court also found there was no reasonable relationship to any proffered state purpose. *See, e.g.*, *id*. at 1076 (Medical Records Mandate); *id*. at 1089 (Local Disclosure Mandate); *id*. at 1105 (Tissue Mandate). This Court's findings of fact and conclusions of law are thus more than sufficient to establish a likely substantive due process violation under Chief Justice Roberts's test.

On remand, the Eighth Circuit also instructed this Court to consider the holding in *Box v. Planned Parenthood of Indiana and Kentucky*, 139 S. Ct. 1780 (2019) (per curiam). *Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020). The *Box* Court emphasized that because the plaintiffs there had only brought the rational basis claim, "[t]his case . . . does not implicate our cases applying the undue burden test to abortion regulations," and "expresses no view on the merits of those challenges." 139 S. Ct. at 1782; *see also id.* at 1781 (the challengers in *Box* "never argued that Indiana's law creates an undue burden on a woman's right to obtain an abortion"). Because Plaintiffs have brought undue burden claims, not rational basis claims, *Box* is inapplicable here.

Finally, since *June Medical Services* involved only substantive due process privacy claims, and *Box* involved only a rational basis claim, the Eighth Circuit's remand does not impact the other grounds upon which this Court found Plaintiffs likely to succeed, including the unconstitutional vagueness of at least two of the challenged laws (for the Medical Records Mandate and Tissue Disposal Mandate). Plaintiffs are thus likely to succeed on the merits of these constitutional claims as well.

A. D&E Ban

Plaintiffs are likely to succeed on their claim that the D&E Ban imposes a substantial obstacle in the path of people seeking abortions. *June Med. Servs.*, 140 S. Ct. at 2138. As this Court held, even considering "*only the effect of the provisions*," Plaintiffs have shown they are "likely to prevail on the merits and to establish that the challenged D&E [Ban] creates an undue burden for a large fraction of women for whom the D&E [Ban] is an actual rather than irrelevant restriction." 267 F. Supp. 2d at 1064 (emphasis

added). Specifically, this Court found that the D&E Ban would impose a "substantial obstacle" in the path of women seeking second-trimester abortions. *Id*. at 1067, 1068.

To reach this conclusion, this Court relied on extensive record evidence to find that the law prohibited D&E— which is the sole method of abortion that is currently provided throughout the second trimester in Arkansas. The Court also found that the additional medical procedures that the State proposed as so-called "workarounds" were unreliable, untested, and/or available in Arkansas.[5] *See supra* at p.5. Indeed, every district court to consider this question has reached the conclusion that fetal demise through digoxin, potassium chloride, or cord transection is not a feasible or effective workaround for a law that bans D&E abortion, and every court of appeals that has reviewed those findings has affirmed them. *See, e.g.*, *Whole Woman's Health v. Paxton,* —F.3d—, 2020 WL 6218657, at *5-8 (5th Cir. Oct. 13, 2020), *modified* Oct. 22, 2020; *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 798-806 (6th Cir. 2020); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1322-24 (11th Cir. 2018); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 145-46 (3d Cir. 2000); *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935, 962 (S.D. Ind. 2019); *Planned Parenthood Sw. Ohio Region v. Yost,* 375 F. Supp. 3d 848, 869 (S.D. Ohio 2019); *Evans v. Kelley*, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997); *Hodes &*

[5] Although the Eighth Circuit noted that Chief Justice Roberts emphasized "the wide discretion" that courts must afford to legislatures in areas of medical uncertainty, *Hopkins*, 968 F.3d at 915, 916 (8th Cir. 2020) (quoting *June Med. Servs*., 140 S. Ct. at 2136 (Roberts, C.J., concurring in judgment)), this aspect of the Chief Justice's opinion is inapplicable here. As this Court previously found, the Arkansas legislature did not make *any* findings in passing the D&E Ban. 267 F. Supp. 3d at 1057. Moreover, it is the courts' duty, after considering evidence and argument, to resolve medical uncertainty, even where, unlike here, there are explicit legislative findings. *Whole Woman's Health*, 136 S. Ct. at 2310 (citing *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007)).

Nauser, MDs, P.A. v. Schmidt, 368 P.3d 667, 670-71, 677-78 (Kan. Ct. App. 2016), *aff'd,* 440 P.3d 461, 467-68 (Kan. 2019).

Based on this evidence, this Court correctly found "if the D&E [Ban] takes effect a large fraction of Arkansas women who select abortion throughout the second trimester would experience a substantial obstacle to abortion." *Id*. at 1068. That is because the D&E Ban would "end standard D&E practice," *id*. at 1060, and D&E is the only method of second-trimester abortion currently provided in Arkansas, *see supra* at pp.5-6. A law prohibiting the only method of second-trimester abortion indisputably imposes a substantial obstacle in the path of not just some, but all people seeking second-trimester abortions. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C.*, 960 F.3d at 1327; *W. Ala. Women's Ctr.*, 900 F.3d at 808. Indeed, as this Court found, even if patients could undergo additional medical procedures in an attempt to ensure fetal demise prior to starting the D&E procedure, requiring those procedures would impose a substantial obstacle, e.g., by requiring patients to make at least three trips to the clinic, and also by increasing medical risks. 267 F.3d at 1061; *see also EMW Women's Surgical Ctr., P.S.C.*, 960 F.3d at 798 (holding that "[a]dditional procedures, by nature, expose patients to additional risks and burdens"); *W. Ala. Women's Ctr.*, 900 F.3d at 1326 (finding no support for proposition that a state may "subject women to an increased degree of risk" by requiring demise procedures). This Court correctly found these additional trips imposed burdens—including, e.g., arranging for time off for work, childcare, and arranging and paying for transportation and lodging—that likewise constitute a substantial obstacle, particularly for the 30-40% of LRFP's patients who are low-income. *Id.* at 1061. As discussed above, this holding is entirely consistent with Chief Justice

Roberts's concurrence in *June Medical Services*, which recognized that these types of burdens amount to a substantial obstacle. *See supra* at p.13. It is also consistent with the Chief Justice's admonition to "treat like cases alike," and thus to find unconstitutional a ban on D&E, as the Supreme Court has in prior cases. *See, e.g.*, *Gonzales*, 550 U.S. at 153-54 (upholding ban on a rarely used procedure because "it does not prohibit" "the prototypical D&E procedure"); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000) (holding that "physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions . . . must fear prosecution, conviction, and imprisonment," "[t]he result is an undue burden upon a woman's right to make an abortion decision" and "[w]e must consequently find the statute unconstitutional"). Accordingly, Plaintiffs are likely to succeed on the merits of their undue burden claim against the D&E Ban.

B. Medical Records Mandate

This Court's conclusion that the Medical Records Mandate is likely unconstitutional also remains unchanged by Chief Justice Roberts's concurrence. That is because this Court found, when considering only the burdens imposed by the law, that "the Medical Records Mandate impermissibly delays or bars most abortions for which the law is relevant." 267 F. Supp. at 1072-73. It requires a sweeping search for records of patients' pregnancy histories without any discernible parameters, and without any instructions as to what the provider is to do with any records secured. *Id.* at 1075. It also requires Plaintiffs to wait an undefined period for medical records from the patients' prior providers. *Id*. at 1073. This Court found that this delay would impose a substantial obstacle in the path of people seeking access to abortion: a patient could be pushed past

her point in pregnancy when she could receive a medication abortion; she could be pushed from a one-day abortion procedure to a two-day one later in her second trimester; or she could be pushed past the point at which she could obtain an abortion at all. *Id*. at 1073-74; *see also id*. at 1078 (the Medical Records Mandate presents substantial obstacles to abortion care by, *inter alia*, "increasing health risks to women as gestational age advances, increasing costs associated with compliance"). The Medical Records Mandate would also impose a substantial obstacle by "violat[ing] the woman's confidentiality" and forcing disclosure of the woman's abortion decision to her other medical providers, thus "interfer[ing] with a woman's right to decide to end her pregnancy." *Id*. at 1075-76, 1078. In addition to finding that the law imposed "substantial burdens," this Court found that the law "appear[s] to serve no proper state purpose." *Id*. at 1076-77. In particular, it found, *inter alia*, that there is "no link" between the law and the State's asserted interest of enforcing the sex-selection abortion ban, especially because the law does not explain what a doctor is to do with the medical records upon receipt. *Id.* Nothing has changed since 2017 that would alter this Court's holdings. Thus, under either prong of the test advanced by the Chief Justice, these prior findings show that Plaintiffs are likely to succeed in their undue burden challenge to the Medical Records Mandate.

This Court's previous holding that the Medical Records Mandate "fails to provide fair notice and could potentially result in arbitrary enforcement," *id*. at 1082, and "contain[s] no objective criteria or clear guidelines," *id*. at 1084, is also unaffected by the Chief Justice's concurrence. The statutory language still requires an unbounded search for records, lacks defined terms, and lacks direction to providers about what to do with

any records once they are obtained. *See id*. at 1082 (concluding that the phrase "reasonable time and effort" is "subjective in nature and has no specified boundaries"). Thus, Plaintiffs are still likely to succeed on the merits of their vagueness challenge to the Medical Records Mandate.

C. Local Disclosure Mandate

The Court's prior rulings that the Local Disclosure Mandate unduly burdens access to pre-viability abortion care is similarly unaltered by *June Medical Services*. Plaintiffs challenged this provision for young people aged 14, 15, and 16, whose sexual activity indicates no potential sexual abuse or criminality and is therefore not covered by the reporting requirements under the Arkansas Child Maltreatment Act. *Id*. at 1087. The Local Disclosure Mandate still requires Plaintiffs to disclose *all* teenage patients' abortions to their local law enforcement, requires local law enforcement to come to the clinic to pick up *all* such patients' tissue as "evidence," and mandates retention of *all* such tissue indefinitely in a state crime laboratory. This Court already found, consistent with Chief Justice Roberts's concurrence, that these requirements would impose an unconstitutional substantial obstacle because they could prohibit medication abortion altogether, as there is no way to retain and transmit tissue from a medication abortion. *Id*. at 1091. And this Court found that, by requiring disclosure of minors' private reproductive decisions to local law enforcement, the Mandate could force minors to delay abortion care or deter them from abortions altogether. *Id*. at 1091-92; *see also id.* at 1094 (finding that teens who are not covered by the reporting requirements under the Arkansas Child Maltreatment Act (Non-CMA Teenagers), would be unduly burdened by the substantial obstacles created by the Local Disclosure Mandate"). As such, Plaintiffs are

still likely to succeed on the merits of their undue burden challenge to the Local Disclosure Mandate as applied to Non-CMA Teenagers.

Furthermore, this Court also considered (consistent with the Chief Justice's concurrence) whether the law is reasonably related to a legitimate state interest. This Court found the State's interest of protecting young people who are sexually abused is legitimate, but that the Local Disclosure Mandate "serves no valid state purpose as applied to" 14- to 16-year-old patients for whom there is no indication of abuse. *Id*. at 1086-89. Rather, for those minors, because "[t]here is no mandatory reporting required, [] there is no role for local law enforcement." *Id*. The same is true today. Accordingly, Plaintiffs remains likely to succeed on the merits of their constitutional challenge to the Local Disclosure Mandate as applied to Non-CMA Teenagers.

E. Tissue Disposal Mandate

This Court's holding that the Tissue Disposal Mandate is likely unconstitutional remains unchanged in light of *June Medical Services*. This law requires abortion providers, under criminal penalty, to comply with the FDRA, which gives family members the right to control the disposition of the remains of a deceased person. 267 F. Supp. 3d at 1097.

As an initial matter, this Court found that Plaintiffs are likely to succeed on the merits of their vagueness claim because it is unclear whether tissue from a medication abortion or following miscarriage care may be disposed of at home, what constitutes "reasonable efforts" to locate absent family members to inform them about their disposition rights, and how providers or their patients might otherwise comply with the FDRA in the abortion context, for which it was not designed. *Id*. at 1108-09. "Given the

potential liability for violating [the Tissue Disposal Mandate], plaintiff cannot make good faith efforts to comply and hope for the best." *Id*. at 1109. This holding is entirely unaffected by *June Medical Services*.

Plaintiffs are also still likely to succeed on the merits of their undue burden claim against the Tissue Disposal Mandate. As this Court previously held, the Tissue Disposal Mandate effectively requires notification of the abortion to minor patients' parents and the parents of her sexual partner, and for adult patients, notification to their sexual partners, so that those individuals can assert rights related to the tissue. *Id*. at 1099. As this Court held, these notification requirements amount to a substantial obstacle under Supreme Court precedent because they deprive each patient of her right to private medical decision-making. *id*. at 1099, 1101 (collecting cases); *see also e.g.*, *Casey*, 505 U.S. at 894 (rejecting spousal-notification requirement as substantial obstacle); *Bellotti v. Baird*, 443 U.S. 622, 639-40 (1979) (requiring confidential judicial bypass for parental notification requirement).

This Court also found that the Tissue Disposal Mandate would operate as a substantial obstacle for the additional reason that it would force Plaintiffs to cease providing D&E abortion procedures—the only form of abortion available after 10 weeks LMP. *See id.* at 1102, 1107-08. [6] This conclusion was based on the Court's findings that Plaintiffs would be unable to ensure tissue could be disposed in compliance with the Mandate before beginning an abortion procedure. *Id*. at 1102, 1107-08. Moreover, even if the Tissue Disposal Mandate did not prevent abortion procedures outright, the search-

[6] As noted above, this Court found that it was unclear whether at-home disposal of tissue following medication abortion or treatment of miscarriage is permitted under the Mandate. *Id*. at 1103.

and-notice requirements could delay abortion care, which increases the risks associated with the procedure, and could make it impossible for some to obtain an abortion in Arkansas. *Id*. at 1108. Thus, this Court concluded that Plaintiffs are "likely to prevail on [the] claim that in a large fraction of cases in which the Tissue Disposal Mandate is relevant" because "it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id*. at 1105.

Chief Justice Roberts's concurrence in *June Medical Services* confirms, rather than alters, this Court's undue burden holding. In fact, the Chief Justice expressly reiterated the key holdings from *Casey* that this Court relied upon in reaching its conclusion that the notification requirements likely imposed a substantial obstacle. 140 S. Ct. at 2137 ("Without a judicial bypass, parental consent laws impose a substantial obstacle to a minor's ability to obtain an abortion and therefore constitute an undue burden."); *id.* (spousal notification law unconstitutional because it would "'likely [] prevent a significant number of women from obtaining an abortion.'" (quoting *Casey*, 505 U.S. 893)). Accordingly, the Mandate's notification requirements alone render it a substantial obstacle under longstanding and recently reaffirmed precedent. The other substantial obstacles this Court found imposed by the Tissue Disposal Mandate—i.e., delaying abortion care or outright preventing Plaintiffs from performing abortion procedures—are similarly consistent with the Chief Justice's concurrence in *June Medical Services*. As discussed *supra* at p.13, these are the same types of obstacles the Chief Justice discussed when explaining why the Louisiana law at issue in *June Medical Services* should be struck down.

This Court's findings support the additional conclusion that the Mandate is likely unconstitutional under the Chief Justice's concurrence because it is not "reasonably related" to a legitimate state goal. *See* 140 S. Ct. at 2138. This Court previously held that, even if the State's interests in enacting the Mandate were legitimate, the Mandate did not "advance[]" any such interests: This Court was "not convinced that importing the FDRA's" requirements advances a health goal, nor did it think that the Mandate furthered the state's interest in potential life, given that the Mandate applies *after* an abortion or miscarriage occurs. 267 F. Supp. 3d. at 1105.

The Eighth Circuit's instruction that, on remand, this Court consider *Box* does not disturb this conclusion. First, as noted above, *see supra* at p.14, Plaintiffs here brought an undue burden claim against the Mandate, and the challengers in *Box* brought a rational basis claim. The undue burden test requires more than mere rational basis review. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2309-10 (holding that it "is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue" and doing so "does not match the standard that this Court laid out in *Casey*"). Accordingly, the Supreme Court's decision in *Box* is inapposite here. *See supra* at p.14. Second, the Tissue Disposal Mandate is qualitatively different than the law at issue in *Box*: Whereas the law in *Box* dictated the acceptable methods of tissue disposition after abortion, the Mandate here dictates who has rights to make disposition decisions, through an elaborate scheme that strikes at the heart of a person's ability to access confidential abortion care. *See* Ark. Code Ann. §§ 20-17-802(a), 20-17-102(d)(1) (describing the rank

order of those individuals given the "right to control the disposition of the remains"). Thus, the Supreme Court's analysis of what was "rational" in *Box* has no bearing here.

Accordingly, Plaintiffs remains likely to succeed on the merits on their claims against the Tissue Disposal Mandate.

II. Irreparable Harm

This Court concluded that if these laws took effect, they would impose irreparable harm on Plaintiffs and their patients. *Hopkins*, 267 F. Supp. 3d at 1069; *id*. at 1073-74, 1084-85; *id*. at 1093, 1095-96; *id*. at 1110. This remains as true today as it was when the Court issued its preliminary injunction order. As this Court held, "[i]t is well-settled that the inability to exercise a constitutional right constitutes irreparable harm." *Id*. at 1069, 1084, 1095, 1110. Moreover, combined, enforcement of the laws would wreak havoc on abortion access by banning, delaying, or discouraging abortion for the vast majority of people who seek access in Arkansas. *Id*. at 1069 (D&E Ban would prohibit the only method of second-trimester abortion); *id*. at 1073-74, 1084-85 (Medical Records Mandate would to lead to denial of abortion care or delayed abortion access); *id*. at 1093, 1095-96 (Local Disclosure Mandate would discourage minors from obtaining an abortion and unnecessarily disclose intensely private information to local police); *id*. at 1110 (Tissue Disposal Mandate would impose a substantial obstacle in the path of people seeking abortion). Additionally, because the Medical Records Mandate and the Tissue Disposal Mandate fail to give Plaintiffs notice as to how to comply with these laws and continue providing care, these laws are unconstitutionally vague. *Id*. at 1084-85, 1110.

III. Balancing of Harms

As this Court held, the balance of harm clearly tips in Plaintiffs' favor: if the laws take effect, the vast majority of abortions would be halted, while on the other hand, "likely unconstitutional law[s]" will not go into effect; indeed, the threatened harm to Plaintiffs and their patients "clearly outweighs" any potential harm a proposed injunction may cause the State. *Id*. at 1069, 1085, 1096, 1110. This is especially true where this Court has held that the three of the four laws do not serve the State's legitimate interests. *See supra* at pp.18, 20, 23. Furthermore, the challenged laws have been enjoined for three years, and Defendants can point to no harm to the State that has occurred in this time.

IV. Public Interest

This Court held in its preliminary injunction order that it is in the public interest is to "preserve the *status quo*." *Id*. at 1069, 1085, 1096, 1110. The same is true here: absent an immediate TRO, abortion access will be severely curtailed, and it is in the public interest to maintain the status quo until this Court can adjudicate Plaintiffs' motion for a preliminary injunction.

CONCLUSION

For all of the reasons above, this Court should grant Plaintiffs' motion for a TRO.

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Respectfully submitted,

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** Motion for admission pro hac vice granted*