NO. 17-2879

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK W. HOPKINS — Plaintiff-Appellee

v.

LARRY JEGLEY, et al. — Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

THE HONORABLE KRISTINE BAKER
UNITED STATES DISTRICT COURT JUDGE

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF RE *BOX v. PLANNED PARENTHOOD OF INDIANA & KENTUCKY, INC.*

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INTRODUCTION AND SUMMARY OF ARGUMENT

On May 30, 2019, this Court asked the parties to submit supplemental briefing on the effect, if any, of *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019) (per curiam), on this case.

There is no effect. First, *Box* involved a challenge to an Indiana embryonic and fetal tissue disposal law that bears no resemblance to the Arkansas Tissue Disposal Mandate challenged here. Second, the plaintiff in *Box* challenged that dissimilar law under only rational basis review. Accordingly, the per curiam opinion in *Box* held that it "expresses no view on the merits" of challenges to tissue-related laws under the undue burden standard, such as the challenge Plaintiff-Appellee Dr. Hopkins brings here. *Id.* at 1782. In short, because Dr. Hopkins challenges a law that governs *who* decides the method of tissue disposal—not the method of tissue disposal—and does so under the undue burden standard, *Box* has no impact on this Court's review of the preliminarily injunction of Arkansas's Tissue Disposal Mandate.

Box also left undisturbed the Seventh Circuit's holding that Indiana's ban on pre-viability abortion sought for certain reasons was unconstitutional. *Id.* Dr. Hopkins challenges no similar Arkansas law here. Instead, he challenges the Medical Records Mandate, which requires a physician to make unspecified reasonable efforts to obtain each patient's entire pregnancy-related history. The

State's discussion of Justice Thomas's concurrence in the denial of review in *Box* is simply a distraction from the issues and the law at hand here.

ARGUMENT

I. Arkansas's Tissue Disposal Law Bears No Resemblance to the Law in *Box*, and *Box* Expressed No View About Challenges Under the Undue Burden Standard.

A. The Arkansas and Indiana Laws are Dissimilar.

The Arkansas and Indiana laws bear no resemblance to one another. While the Indiana law mandates disposal of tissue from abortion and miscarriage by certain methods—burial or cremation—the Arkansas law mandates no specific method of disposal, and does not change the methods that are permissible. *See* Ark. Code Ann. § 20-17-102(i) (disposal may be in any manner "consistent with existing laws, rules, and practices"). Instead, the Arkansas law mandates *who* makes decisions about the method of disposal. It does this by requiring a physician, on threat of criminal prosecution, to "ensure" that tissue from a miscarriage or abortion is disposed of in compliance with Arkansas's Final Disposal Rights Act (FDRA), which ordinarily governs who holds the "right to control the disposition of the remains of a deceased person[.]" *Id*. 20-17-102(d)(1). The State agrees that the Tissue Disposal Mandate does not specify the method of disposal and instead mandates the involvement of a "hierarchy" of third party decision-makers in determining the method of disposal of tissue from a woman's pregnancy. *See*

Suppl. Br. of Appellants at 6, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. June 21, 2019) ("App. Supp. Br.").

Also unlike the Indiana law in *Box*, the Tissue Disposal Mandate operates *before* an abortion procedure. Importing the FDRA's complex scheme into the abortion and miscarriage context means that, in practice, a clinician must ensure that various third parties—such as a woman's sexual partner, her parents, and/or her partner's parents—are, at a minimum, notified about her abortion so they can act on their equal right to control the method of disposal. Doing so would not only involve individuals a woman has a constitutionally-protected right *not* to involve in her pregnancy-related decisions, but also complicate and delay care (if it can proceed at all) and create an "unclear. . . scope of obligations" for providers who would not be able to begin a procedure without knowing they can lawfully dispose of tissue afterward. *See* Add. 116-26, 136.

Oddly, the State dismisses these factual differences by stating that Arkansas is taking an incremental approach to regulating tissue disposal. *See* App. Supp. Br. at 6. But the State already regulates tissue disposal by requiring that tissue from abortion or miscarriage be disposed of in a "respectful and proper manner." Ark. Code Ann. §§ 20-17-801(a)(1)(A), (b)(2)(C)-(D); *see also id*. 20-17-802(a) (amended July 30, 2017) (tissue from abortion must be disposed "in a fashion similar to that in which other tissue is disposed"). The State presented no evidence

as to why its new regulation improves upon that pre-existing law. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016) (striking down provision based in part on lack of evidence of a "problem that the new law helped to cure"). In any event, the State cannot circumvent constitutional review by arguing that it might regulate differently or more comprehensively at some hypothetical, future time. The question before the Court is whether the district court erred in preliminarily enjoining *this* law. Because the Tissue Disposal Mandate regulates tissue disposal in a way wholly dissimilar to the law at issue in *Box*, *Box* does not affect the outcome here.

B. *Box* Explicitly Disavowed Any Application to Challenges Such as Dr. Hopkins's Brought Under the Undue Burden Standard.

The legal standard under which the Supreme Court evaluated the tissue disposal law in *Box* also does not apply here, and was never at issue in this case.

Unlike Dr. Hopkins, the challengers in *Box* "never argued that Indiana's law creates an undue burden on a woman's right to obtain an abortion." *Box*, 139 S. Ct. at 1781; *see also id*. at 1782 (the challengers "never argued that Indiana's law imposes an undue burden on a woman's right to obtain an abortion"). Neither the district court nor the court of appeals assessed the law under that standard. *Id*. at 1782. The *Box* challengers argued only that the law failed "rational basis review." *Id*. at 1781. The Seventh Circuit held Indiana's law "invalid . . . under this deferential test." *Id*. at 1782. Applying that test, it reasoned that Indiana's interest

—ensuring that disposal of embryonic and fetal tissue was "dignified"—was "not… legitimate." *Id*. (quoting *Planned Parenthood of Ind. and Ky. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 309 (7th Cir. 2018)). Moreover, the Seventh Circuit held, even if the interest was legitimate, the law bore no rational relationship to that interest because it allows a woman to dispose of the tissue "however she wishes and allows for simultaneous cremation." *Id*.

The Supreme Court reversed, stating that, under deferential rationality review, Indiana had stated a legitimate interest in "proper disposal." *Box*, 139 S. Ct. at 1782 (quoting *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 n.45 (1983)). The Supreme Court then held Indiana's law was rationally related to this interest, "even if it is not perfectly tailored to that end." *Id.*

The Supreme Court took great pains to emphasize that its rational basis ruling had no relevance in cases, like this one, in which the plaintiff brought, and the district court applied, the undue burden standard. Because the challengers in *Box* raised no undue burden claim, the Court emphasized that "[t]his case . . . does not implicate our cases applying the undue burden test to abortion regulations." *Id*. Accordingly, the Supreme Court explained, "[o]ther courts have analyzed challenges to . . . disposition laws under the undue burden standard," and noted that its "opinion expresses no view on the merits of those challenges." *Id.*

The State mischaracterizes *Box* by ignoring the Court's clear pronouncement about its limits. First, the State turns *Box* on its head, arguing that *Box* "strongly suggests" that tissue disposal regulations "are only subject to rational-basis review." *See* App. Supp. Br. at 7. *Box* does no such thing. Instead, it plainly states that it was reviewing only the claim before it—a rational basis claim—because that is the only claim that the challengers brought. *See Box*, 139 S. Ct. at 1782.

Second, the Supreme Court was clear that *Box* has no relevance in cases like this one where the challenger has asserted that a law related to tissue disposal imposes an undue burden on a woman's right to abortion. *See id*. at 1781-82. As the Supreme Court clarified just three years ago, the undue burden standard is a form of heightened scrutiny, and it is "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review" of rational basis scrutiny. *Whole Woman's Health*, 136 S. Ct. at 2309 . Unlike rational basis review, the undue burden standard requires courts to consider the burdens a law imposes together with the benefits, if any, that it confers. *Id*. Additionally, while rational basis review is deferential to the State, the undue burden standard requires the State to demonstrate that the challenged law furthers its interest. *See id*. at 2309-10 (noting that "uncritical deference" to the government "is inappropriate" and emphasizing that "[c]ourt[s] retain[] an

independent constitutional duty to review factual findings where constitutional rights are at stake" (quoting *Gonzales v. Carhart*, 550 U.S. 124, 166 (2007)).

Applying this standard, the district court correctly held that Arkansas's Tissue Disposal Mandate imposes an undue burden, and nothing in *Box* undermines the district court's ruling. As an initial matter, contrary to the State's assertions, the district court did *not* ignore the State's interest. *See* App. Supp. Br. at 3. While the district court questioned whether an interest in potential life could support the Mandate, *see* Add. 127, it nonetheless "assume[d] the legitimacy of [the state's] interests," Add. 116, and continued its undue burden analysis.

The State presented *no evidence* to demonstrate how importing the FDRA's complex requirements into the abortion and miscarriage context *actually* furthers its claimed interest. The State's assertions about its interest—which would barely suffice under the rational basis review applied in *Box*—fall far short of the showing required under the undue burden standard. *See Whole Woman's Health*, 136 S. Ct. at 2309-10. Accordingly, the district court correctly held that the Tissue Disposal Mandate furthered the State's interest in at most a "marginal way." *See* Add. 128. Further, even assuming the Tissue Disposal Mandate furthered the State's interest, the district court held that the burdens it imposed—including by delaying a woman's abortion care and inserting third parties into her private decision-making about abortion and miscarriage care—were far too great in relation to those

benefits to pass the undue burden test. *See* Add. 116-34. In short, even giving the State the benefit of the doubt throughout the undue burden analysis, the Tissue Disposal Mandate's burdens compelled the district court to find Dr. Hopkins likely to succeed on his undue burden claim. *See* Add. 128.

For all of these reasons, *Box* is comparable to *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990)—and neither of those two cases determines the outcome here. *See* Appellee's Answering Br. at 53 n.21, No. 17-2879 (8th Cir. Feb. 21, 2018) (distinguishing *Planned Parenthood of Minnesota*). Like the Indiana law, the Minnesota regulation required certain methods of disposal—cremation, burial, or "a manner directed by the commissioner of health"— *Planned Parenthood of Minnesota*, 910 F.2d at 483, and was upheld under a pre-*Casey* and pre-*Whole Woman's Health* standard echoing rational basis review. *Id*. at 487-88.[1]

The Indiana law at issue in *Box* is factually distinct from Arkansas's Tissue Disposal Mandate and was evaluated under a different legal test than the one applicable here, and this Court is bound by the Supreme Court's direction not to rely on it in cases such as this one.

[1] The Minnesota law was also upheld based on the challenger's concession about the state interest in "protecting public sensibilities." *Id*. at 488.

II. *Box* Has No Effect on the Challenged Medical Records Mandate.

Box also left undisturbed the Seventh Circuit's ruling striking down Indiana's law banning pre-viability abortions sought for certain reasons, noting that "[o]nly the Seventh Circuit ha[d] thus far addressed this kind of law." 139 S. Ct. at 1782. Dr. Hopkins did not challenge Arkansas's "sex-selection" ban; no law similar to Indiana's ban based on a woman's reason for seeking an abortion is at issue here; and this Court's ruling will not alter the fact that only one circuit court of appeals has addressed such a ban based on a woman's reasons.

Rather, under the challenged Medical Records Mandate, a physician may not perform an abortion for any woman "until reasonable time and effort" is spent to obtain "the medical records of the pregnant woman relating directly to [her] entire pregnancy history." Ark. Code Ann. § 20-16-1904(b)(2). The district court held that, as written, the Medical Records Mandate applies to all patients seeking abortion care—not only those patients who report knowing the sex of the embryo or fetus. *See* Add. 68-70. And, it burdens all of them, by imposing delays—potentially of unlimited duration—and breaching confidentiality, and does so with no exception for patient health. *See* Add. 70-75. As the district court further held, it imposes these significant burdens without furthering any legitimate interest because there was no record evidence indicating that the Mandate would improve patient care or aid compliance with the State's ban on abortions sought based on

the sex of the embryo or fetus. *See* Add. 76-79. The outcome is the same even accepting the State's argument—contrary to the Mandate's text—that it applies only to patients who know the sex of the embryo or fetus. *See* Add. 70-79. In that case, the Mandate would impose an undue burden on a large fraction of those patients, and would remain facially unconstitutional.

Justice Thomas's concurrence in the denial of the review has no precedential effect and the State's attempt to rely on it is without merit. The State's bare assertions notwithstanding, it pointed to no evidence that the Medical Records Mandate strengthens Arkansas's unchallenged "sex-selection" ban, which is in effect, and no evidence that the Mandate addresses any problem in Arkansas, as the undue burden standard requires. *See Whole Woman's Health*, 136 S. Ct. at 2311 (striking down provision where "there was no significant . . . problem that the new law helped to cure"); *id*. at 2314-15 (striking down provision in absence of evidence that it advanced state's interest any more than existing provisions). *Box* therefore has no impact on the district court's ruling correctly entering a preliminary injunction against the Medical Records Mandate.

CONCLUSION

For the foregoing reasons, and the reasons in Dr. Hopkins's merits brief, this Court should affirm preliminary injunction.

July 12, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 2387 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s / Susan Talcott Camp
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I certify that on July 12, 2019, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which sends notification of this filing to all CM/ECF participants.

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