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)

BRIEF OF APPELLANTS LARRY JEGLEY, et al.

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

After declaring that "abortion . . . is safer than carrying a pregnancy to term" (Add. 5), the district court concluded that four commonsense Arkansas abortion regulations are likely unconstitutional and enjoined their enforcement. Those regulations: 1) ban a distinctively inhumane and barbaric form of abortion where an unborn child—its heart still beating—is violently ripped apart limb-by-limb so that it bleeds to death; 2) ensure that unborn children are not aborted solely on the basis of their sex; 3) require that the remains of unborn children are treated with dignity and respect; and 4) protect young girls from sexual predators.

In addition to its groundless assertion that abortion is safer than pregnancy, the district court's opinion is riddled with error. It applies the wrong legal standards, confuses legal and factual conclusions, misconstrues statutory language, and fails to determine whether the challenged provisions would impose substantial obstacles on a large fraction of patients. And while the district court's opinion consumes 140 pages, it fails to acknowledge—let alone address—undisputed testimony and medical literature. Instead, it simply recasts Hopkins's unsupported factual allegations and erroneous legal assertions as findings of fact.

Therefore, Appellants believe that oral argument in the amount of 25 minutes per side is warranted.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The district court's subject matter jurisdiction rests on 28 U.S.C. 1331. On July 28, 2017, the district court granted Appellee's motion for a preliminary injunction. Add. 1-3.

On August 25, 2017, Appellants timely filed this interlocutory appeal of the district court's decision granting a preliminary injunction. Appx. 662. This Court has jurisdiction to review the district court's order pursuant to 28 U.S.C. 1292(a)(1).

STATEMENT OF ISSUES PRESENTED

The questions presented are:

1. An undue burden exists where an abortion regulation's moral, ethical, and health benefits are substantially outweighed by the burdens it imposes. Did the district court apply the wrong legal standard when it instead held that four commonsense abortion regulations likely imposed an undue burden because it believed that the health benefits they conferred did not outweigh the burdens they imposed?

> Apposite Authority: *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017).

2. States may bar barbaric abortion practices to promote respect for life and safeguard physician ethics so long as the substituted procedures do not impose significant health risks on a large fraction of patients. Did the district court err as a matter of law by declaring facial relief was warranted because alternative abortion methodologies might be unavailable for some, unspecified number of patients?

> Apposite Authority: *Gonzales*, 550 U.S. 124; *Casey*, 505 U.S. 833; *Jegley*, 864 F.3d 953.

3. Did the district court err as a matter of law by reading the challenged portions of Arkansas's sex-selection ban and fetal remains amendments in a

manner that made little sense, manufactured vagueness, and imposed burdens that did not exist on the face of those provisions?

Apposite Authority: *Arkansas County v. Desha County*, 27 S.W.3d 379 (Ark. 2000); *Minnesota Mining & Manufacturing v. Baker*, 989 S.W.2d 151 (Ark. 1999).

4. Did the district court err in holding that extending pre-existing abortion tissue preservation and reporting requirements to children at disproportionately high risk for sexual assault violated the Constitution?

Apposite Authority: *Alexander v. Peffer*, 993 F.2d 1348 (8th Cir. 1993).

5. Did the district court abuse its discretion in ignoring Arkansas's and the public's interests in promoting respect for life, protecting physician ethics, ensuring that unborn children are not aborted solely on the basis of their sex, ensuring human remains are treated with dignity and respect, and protecting children from sexual predators?

Apposite Authority: *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc).

STATEMENT OF THE CASE

The district court erroneously enjoined provisions prohibiting purposely killing an unborn child by dismemberment, banning sex-selective abortions, requiring the respectful treatment of human remains, and protecting young girls from sexual abuse. All those provisions except the last were scheduled to take effect on July 31, 2017; the last takes effect on January 1, 2018.

A. Statutory Background

1. Death-by-Dismemberment Prohibition

a. *Dismemberment abortion is uniquely barbaric.*

This case concerns a distinctively "gruesome and inhumane" second-trimester abortion practice where "a live baby is literally ripped apart" so that it bleeds to death. Appx. 334 (Wyatt). While dismemberment—or dilation and extraction (D&E)—is a common second-trimester abortion methodology, it is a horrifying practice that "requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living" unborn child and tear it "away from the remainder of the body." *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting); *cf. id.* at 946-47 (Stevens, J., concurring) (arguing partial-birth abortion is no more "gruesome" than dismemberment).[1] Indeed, as one physician below put it, during dismemberment, the unborn child's "limbs are

[1] Induction is also used during the second trimester. Appx. 73 (Nichols).

ripped off," "[t]he contents of the abdomen and thorax are ripped open," and the provider "crush[es] the [unborn child's] skull to be able to extract it." Appx. 334 (Wyatt). At the end of that process, "the abortionist is left with a tray full of pieces," *Stenberg*, 530 U.S. at 959 (Kennedy, J., dissenting) (citations omitted), including "cut up pieces of hands, arms, feet, or other recognizable body parts." Appx. 361 (Parker).

Yet even more chillingly, "mere dismemberment of a limb does not always cause death." *Stenberg*, 530 U.S. at 959 (Kennedy, J., dissenting) (discussing provider "who removed the arm of a fetus only to have the fetus go on to be born . . . with one arm" (citations omitted)). Instead, the unborn child can "survive for a time while its limbs are being torn off" until it finally "dies just as a human adult or child would" by bleeding to death. *Id.* at 958-59; *accord* Appx. 169 (provider testimony that "[s]ometimes you will get one leg and you can't get the other leg out" while the unborn child is still alive).

b. *Death-by-dismemberment uniquely devalues human life and harms medical professionals and patients.*

"No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life." *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); *see also* Appx. 179 (provider explaining that practice "devalu[es] human life" and "desensitiz[es] . . . medical personnel"). Nor is it disputed that ripping an unborn child to pieces inflicts "emotional trauma" on medical personnel, causes "serious

emotional reactions," "physiological symptoms, sleep disturbances, effects on interpersonal relationships, and moral anguish." Appx. 171; *accord* Appx. 177 (provider describing "[a]nxiety attacks, complete with nausea, palpitations and dizziness," poor sleep, and depression). Indeed, recognizing that violence may "eventually damage the physician psychologically" and impact "the quality of care the patients receive," providers resort to "psychological defenses . . . to handle the traumatic impact of the destructive part of the operation." Appx. 174-75.

Undergoing a dismemberment abortion also causes patients to "struggle[] with depression, self hatred, flashbacks, self destructive behavior, suicidal thoughts, drinking, anxiety, shame, lack of self-worth and regret." Appx. 368; *see also* Appx. 371 (patient's testimony that, no one "explained to me that the limbs of my baby would be ripped apart and torn out" or "the emotional and psychological" consequences). Moreover, while Hopkins's witnesses opined that having an abortion generally confers a sense of "empowerment" (Appx. 449 (Nichols)), patients describe dismemberment as "horrific" and maintain it causes "emotional trauma and depression." Appx. 370 (procedure led to "substance abuse and drinking"); *see also* Appx. 360 (Parker) (describing "emotional trauma" patients suffer after "discovering that their babies were cut apart and pulled piece by piece from their wombs").

c. *Arkansas law narrowly proscribes death-by-dismemberment.*

Like similar provisions elsewhere, the Arkansas Unborn Child Protection from Dismemberment Abortion Act prohibits "purposely dismember[ing] [a] living unborn child . . . through the use of clamps, grasping forceps, tongs, scissors, or similar instruments" for "the purpose of causing the death of an unborn child." Ark. Code Ann. 20-16-1802(3)(A)(i); *see id.* at 20-16-1803 ("A person shall not purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn child . . . ."). But while it proscribes the uniquely violent act of purposely killing an unborn child by tearing it apart, the statute neither prohibits induction abortions nor dismemberment abortions where a provider induces fetal demise before dismemberment. *See id.* at 20-16-1803; *id.* at 20-16-1803(a).

Illustrating that prohibition's narrow focus, testimony establishes that pre-dismemberment demise may be accomplished in three ways. *First*, a provider may use a digoxin injection 24 hours before dismemberment to induce death. Add. 12. That injection is virtually always effective, and Hopkins and other providers already use digoxin beginning at 18 weeks to comply with federal law. *See* Add. 11 (digoxin injection is 90-95% effective); Appx. 113 (Hopkins). And while current law only incentivizes providers to begin using digoxin at 18 weeks, there is no medical reason that they cannot use it earlier. *See* Appx. 474-75 (Biggio). Indeed, "from a physiologic standpoint, if a 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." *Id.*; *accord id.* at 475 (no reason "rate of effectiveness would be substantially different"). Moreover, while "there may be a slightly different side effect profile because of maternal blood volume and distribution" earlier, any side effects would not be "markedly different" from those after 18 weeks. *Id.*; *accord id.* ("That three-week window, I would not expect from a maternal physiology standpoint to have a major effect.").

Second, providers can ensure demise by injecting the unborn child or umbilical cord with potassium chloride. *See* Add. 14; Appx. 477, 479 (Biggio). That procedure might require specialized equipment and additional training. Appx. 479, 497-98.

Third, "any physician who has completed an OB-GYN residency" can ensure death by transecting the umbilical cord. Appx. 335 (Wyatt); *accord* Appx. 259-60 (Biggio). "[T]ypically," with that procedure, death occurs "in under 5 minutes." Appx. 258; *see* Add. 15.

While Arkansas law allows the patient and provider to choose the manner of demise, none of those options materially increase abortion's inherent risks. *See* Appx. 478 (Biggio) (potassium chloride "is not associated with any appreciable risk" unless provider placed "needle . . . somewhere completely different than where you would be aiming for"); *id.* at 485 (transection "does not add risk"

beyond that inherent in D&E); *id.* at 501-502 (locating cord "does not appreciably increase [D&E] risk"); *id.* at 506 ("because a D&E involves the administration of anesthesia, there is going to be some risk of nausea and vomiting" with or without digoxin); *id.* at 512-13 (risks are "not zero, but they're small"). "Many clinicians" also "believe that inducing fetal death prior to D&E results in softer macerated fetal tissues that may ease evacuation of the fetus and potentially decrease procedure time and risk of complications." Appx. 191; *accord id.* (demise "prevents the possibility of a live birth prior to the actual D&E procedure"); Appx. 242 ("pre-operative induction of fetal demise by intrafetal injection performed 24-48 h prior to the abortion" enhances safety by "produc[ing] fetal maceration, cervical softening, dilation, and effacement" and "minimiz[ing] both blood loss and procedure duration"); *see also Stenberg*, 530 U.S. at 925 (providers use digoxin or potassium chloride to facilitate fetal removal).

The statute also does not prohibit death-by-dismemberment where the procedure "is necessary to prevent a serious health risk to the pregnant woman." Ark. Code Ann. 20-16-1803(a). Such conditions include those "that, in a reasonable medical judgment, complicates the medical condition of a pregnant woman to such an extent that the abortion . . . is necessary to avert" death or "serious risk of substantial and irreversible physical impairment of a major bodily function." *Id.* at 20-16-1802(6)(A). Thus, for instance, in the *improbable* event

that a transection provider could not locate an umbilical cord after several attempts and bleeding occurred, a woman would be "at risk for irreversible harm" and a rational provider "would proceed with the D&E." Appx. 502 (Biggio). Providers accused of violating Arkansas law are entitled to "a hearing before the Arkansas State Medical Board" to determine necessity and may use that board's findings in his or her defense. Ark. Code Ann. 20-16-1803(b)(1)-(2).

2. Sex-Selection Abortion Ban

The Sex Discrimination by Abortion Prohibition Act prohibits "intentionally perform[ing] or attempt[ing] to perform an abortion with the knowledge that the pregnant woman is seeking the abortion solely on the basis of the [unborn child's] sex." Ark. Code Ann. 20-16-1904(a).[2] In enacting that ban, the Arkansas General Assembly concluded that: 1) "abortion is used" as a method of sex-selection; 2) sex-selection victims "are overwhelmingly female"; 3) "[w]omen are a vital part of our society and culture" and enjoy "the same fundamental human rights as men"; and 4) other countries have already "taken steps to end sex-selection abortions." *Id.* at 20-16-1902(a)(1).

To ensure providers do not perform sex-selection abortions, the ban requires that they "[a]sk the pregnant woman if she knows the sex of the unborn child." *Id.*

[2] In the original legislation, the sex-selection ban shared the same code designations as the death-by-dismemberment ban. Westlaw currently designates the sex-selection ban as Ark. Code Ann. 20-16-1901 *et seq*.

at 20-16-1904(b)(1)(A). If she does, the provider must "inform" her that sex-selective abortions are prohibited and "[r]equest the medical records of the pregnant woman relating directly to" her "entire pregnancy history." *Id.* at 20-16-1904(b)(1)(B), (2)(A). Where a woman's response indicates that she is seeking a sex-selective abortion or her records reveal a history of aborting only children of her current unborn child's sex and that she is seeking a sex-selective abortion, the provider may not perform the abortion. *See id.* at 20-16-1904(a).

Further, because later abortions are riskier, the ban only requires providers to potentially delay a procedure "until reasonable time and effort is spent to obtain" records. *Id.* at 20-16-1904(b)(2)(B); *see id.* at 20-16-1904(a)(2) (documenting risks and noting that abortions after patient knows sex are particularly risky); *see also id.* at 20-16-1902(b) (statute balances need to prevent sex-selection and "risks inherent in late-term abortions"). Thus, instead of requiring records always be obtained (or establishing a set waiting period), the law allows providers to consider a woman's situation and exercise reasonable medical judgment.

3. Fetal Remains Amendments

The Arkansas Final Disposition Rights Act of 2009 has long governed the "disposition of a dead body or fetus." Ark. Code Ann. 20-17-102(a)(2)(C). It establishes a hierarchy for determining who controls disposition with that right being forfeited and "passing to the next qualifying person" when, among other

things, a person "does not exercise his or her right of disposition within two (2) days of notification of the death of the decedent or within five (5) days of the decedent's death, whichever is earlier." *Id.* at 20-17-102(e)(1)(B); *see id.* at 20-17-102(d)(1) (vesting order). It also excludes those under eighteen, persons convicted of certain crimes, and individuals "estranged" or who lack "affection, trust, and regard for the decedent" from the decision-making process. *Id.* at 20-17-102(e)(1)(D)(i)-(ii); *see id.* at 20-17-102(b)(1)(A); *id.* at 20-17-102(e)(1)(A).

As relevant here, the Final Disposition Act generally vests parents with equal power to control disposition of a child's remains and provides that one parent is immediately vested with sole control when the other parent is absent and "reasonable efforts have been unsuccessful in locating" that parent. *Id.* at 20-17-102(d)(1)(E). Additionally, consistent with the above time limits, a single parent may exercise *sole* control where both parents receive notification of death and only one acts within two days of receiving notice or—regardless of whether both receive notification—only one parent exercises disposition rights within five days. *Id.* at 20-17-102(e)(1)(B); *see id.* at 20-17-102(d)(1)(E)(i).

Where both parents are minors, the right to determine disposition passes to grandparents equally. *Id.* at 20-17-102(d)(1)(G). But as above, one grandparent may exercise sole control where: 1) he or she "use[s] reasonable efforts to notify" other grandparents; 2) where all have received notice of death and only one acts

within two days; or 3) no effort was made to notify other grandparents and only one grandparent exercises his or her disposition rights within five days. *See id.* at 20-17-102(d)(3); *id.* at 20-17-102(e)(1)(B).

Until recently, Arkansas law contained a special exemption permitting abortion providers to simply dispose of fetal remains as ordinary tissue. *See* Ark. Code Ann. 20-17-802(a) (2016) (previous statute); *see also id.* at 20-17-801(b)(2)(C) (2016). The amendments at issue here eliminated that special exemption while carefully preserving provisions allowing pathologists and physicians to conduct medically indicated follow-up examinations. *See* H.B. 1566, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (striking exemption); Ark. Code Ann. 20-17-802(e)(1)-(2),(5). Consequently, abortion providers are now required to treat fetal remains in the same respectful manner as other human remains. *See id.* at 20-17-802(a).

4. Police Reporting and Evidence Preservation Amendments

The Arkansas Child Maltreatment Act has long required an abortion provider who performs a surgical abortion on a girl under 14 to preserve "fetal tissue extracted during the abortion" and to notify local law enforcement where the girl resides. Ark. Code Ann. 12-18-108(a) (2016).[3] That information is subject to

[3] While Hopkins argued below that the amendments banned medication abortion, an abortion provider does not "extract[]" tissue during a medication abortion. *See*

[footnote continued on next page]

the strictest confidentiality and may be used to open, continue, or supplement an existing investigation. *See* Appx. 332. Preserved tissue can prove critical to convicting sexual predators. *See* Appx. 350-51 (search warrant for tissue from a 15-year old's abortion to conduct DNA testing in prosecution of 21-year old acquaintance); Appx. 352-53 (similar); Appx. 356 (prosecutor's statement that, abortion tissue "can be a 'powerful piece of evidence,' especially in cases involving children"); Appx. 358 (preserved abortion tissue led to rapist's identification and conviction ten years later).

The amendments at issue extend those existing requirements to 14-, 15-, and 16-year old girls. *See* H.B. 2024, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Ark. Code Ann. 12-18-108(a). That extension corresponds with data demonstrating that "[t]he risk of being the victim of forcible rape increase[s] dramatically from age 10 to age 14, *where it peak[s]*." Appx. 392 (emphasis added). Indeed, data introduced below demonstrates that 14-year olds are at the greatest risk for victimization, that a 15-year old is as likely to be a victim of rape as a 13-year old, and that a 16-year old's risk of being a victim remains disproportionately high. Appx. 393.

B. Factual Background: Hopkins and LRFP

Hopkins is an abortion provider with a history of failing medical licensing examinations and who has made shifting claims about his history of malpractice.

Add. 21 ("In a medication abortion, the patient passes the pregnancy tissue at home over a period of hours or days.").

See Add. 3; Appx. 376, 381, 384-85, 453. He performs abortions at Little Rock Family Planning (LRFP) "through 21 weeks and six days." Add. 3, 60.

In the second trimester, Hopkins and the other LRFP providers perform D&E abortions. Add. 56, 60. For patients between 14 and 17.6 weeks, the procedure "typically" takes one day. Add. 9. For patients over 18 weeks—who must be dilated overnight—the abortion takes two days and requires patients to spend the night within 30 minutes of LRFP. *Id.* To comply with federal law, beginning at 18 weeks, Hopkins also injects "digoxin into the fetus" or, if that is not possible, "into the amniotic fluid" and waits 24 hours for fetal death to occur before performing an abortion. Appx. 113 (Hopkins).

C. Procedural History

1. Complaint

On June 20, 2017, Hopkins filed a complaint seeking a preliminary and permanent injunction against the above provisions. He challenges the facial validity of three provisions. First, he contends that Arkansas's death-by-dismemberment ban constitutes an undue burden because he will cease performing D&Es. Second, while not directly challenging the sex-selection ban, Hopkins contends the requirement that providers obtain pregnancy records is vague and an undue burden. Third, Hopkins claims that requiring abortion providers to comply with the same requirements as others possessing fetal remains constitutes an undue

burden because he alleges those provisions somehow require women to notify a sexual partner before an abortion.

Hopkins additionally purports to bring an as-applied challenge to the extension of existing police reporting and evidence preservation requirements to minors who he does not believe show signs of sexual abuse. He argues that extension constitutes an undue burden and violates a heretofore unestablished right to informational privacy.

2. Preliminary Injunction Proceedings

A month before most of those provisions took effect, Hopkins sought a preliminary injunction. In response, Appellants introduced testimony from Dr. Richard Wyatt, an Arkansas OB-GYN, and Dr. Joseph Biggio, Jr., an OB-GYN who serves as the Director of the Division of Maternal-Fetal Medicine at the University of Alabama and testified in defense of Alabama's similar death-by-dismemberment ban. Appx. 333 (Wyatt); Appx. 256 (Biggio). Both explained that abortion providers "can ensure fetal demise before dismemberment" without materially increasing abortion risks through "intrafetal or intramniotic injection of digoxin, intrafetal injection of potassium chloride, or transection of the umbilical cord." Appx. 257 (Biggio); *see* Appx. 334 (Wyatt). Appellants also introduced medical literature on pre-dismemberment demise's benefits and testimony concerning dismemberment's effect on patients. *See* Appx. 171-255, 360-72.

Hopkins did not respond to that evidence. Instead, he declared that because he did not believe he could guarantee pre-dismemberment demise in every case, Arkansas had banned D&Es. *See* Appx. 117 (Hopkins). In support, Hopkins and Oregon abortion provider Mark Nichols asserted that digoxin is not currently used before 18 weeks and occasionally fails. Appx. 115-17 (Hopkins); Appx. 77-78 (Nichols). Hopkins additionally asserted that if digoxin failed in a dilated patient, the patient would face "real and unacceptable" danger unless he immediately completed the abortion. Add. 47. Yet he added—without explanation—that he would not "feel comfortable asserting that" danger met the statutory exception for patient health. *Id*. Rather, Hopkins asserted that he would wait till the patient's health inevitably declined. Add. 14, 47.

Hopkins and Nichols further claimed that potassium chloride is not a practical option for ensuring demise because it is not (currently) regularly used to ensure fetal death. *See* Appx. 79 (Nichols); Appx. 114 (Hopkins). They also argued that cord transection is not an option because it may not be possible in some cases and in "try[ing] to locate and grasp the cord" a provider may "grasp fetal tissue" and accidentally violate the law. Appx. 80 (Nichols); *accord* Appx. 116 (Hopkins). Neither acknowledged the statute's scienter requirement or claimed that digoxin injections, potassium chloride injections, or transection (individually or collectively) could not be performed on a large fraction of patients. Appx. 70-

80, 447-48 (Nichols); Appx. 114-17 (Hopkins).

Appellants also introduced news stories demonstrating that fetal remains have been used to identify sexual predators and statistics establishing that 14-, 15-, and 16-year old girls are as likely to be the victim of rape as a 13-year old girl. *See* Appx. 350-59, 388-404. Rather than respond to that evidence, in support of his challenge to the reporting and tissue preservation amendments, Hopkins merely proclaimed he was better situated than law enforcement to determine whether a girl was a sexual assault victim. Appx. 121-22 (Hopkins). He also speculated that law enforcement might breach a girl's confidentiality. Appx. 120.

Lastly, Hopkins asserted that he did not understand the fetal remains amendments and pregnancy records requirement, offered strained legal readings of those provisions, and claimed that they would make providing abortions difficult.

3. District Court's Preliminary Injunction Decision

The district court began its analysis by proclaiming that one-third of women have abortions and that "[a]bortion . . . is safer than carrying a pregnancy to term." Add. 5. It then enjoined all four challenged provisions on the grounds that "the benefits [they] advance[]" do not "outweigh the burdens [they] impose[]." Add. 40; *see* Add. 5, 64, 76-79, 111, 137.

First, the district court concluded that Arkansas's death-by-dismemberment prohibition was likely facially unconstitutional. It declared that the statute banned

second-trimester abortions because Hopkins did not feel comfortable using digoxin, does not perform potassium chloride injections, and a provider might accidentally dismember an unborn child during transection. Add. 58. It declined to determine whether LRFP's other D&E providers would continue to perform D&Es or what fraction of women would forgo or delay an abortion because they could not afford or undergo any of the procedures available to ensure demise. Further, it declined to evaluate any access burdens in light of Arkansas's interest in promoting respect for life or safeguarding medical ethics. Instead, it simply noted that Arkansas had asserted those interests, that it had "assume[d] [their] legitimacy," and concluded the prohibition did not provide sufficient medical benefits. Add. 43; *see* Add. 55-56.

Second, the district court enjoined the provision requiring providers to obtain pregnancy records because it believed that provision *could* be construed as requiring providers to request every patient's records and that would "serve no proper state purpose." Add. 76. It did so despite acknowledging that provision could (and was intended) to be construed more narrowly. *See* Add. 70. It then additionally found that provision unconstitutionally vague. Add. 87-89.

Third, to justify enjoining the fetal remains amendments, the district court grafted a non-existent notification requirement onto the Final Disposition Act and reasoned that the amendments required "all women seeking abortions" to "notify

their sexual partner or, if both the woman and her sexual partner are minors . . . the parents of both." Add. 129. The district court did not cite any statutory language imposing such a requirement. Instead, confusing factual and legal conclusions, it announced that such a requirement existed because "[t]here is no evidence in the record before the Court to contradict Dr. Hopkins's assertions regarding compliance with the [amendments]." Add. 121; *see also* Add. 128 ("The record includes sufficient evidence from which Dr. Hopkins satisfies his burden to present evidence of causation that the [amendments'] requirements will lead to this effect.").

Fourth, the district court enjoined the extension of existing police reporting and evidence preservation requirements on the grounds that Arkansas's interest in protecting minors from predators did not outweigh potentially stigmatizing and deterring minors from seeking abortions. Add. 98-99. In so doing, the district court failed to acknowledge that 14-, 15-, and 16-year olds are more or as likely to be sexual assault victims as 13-year olds and assumed that Hopkins could always tell whether a minor had become "pregnant through consensual sexual intercourse with, for example, a teenager of the same age." Add. 98. It also held that the requirements likely violated a previously unknown right to informational privacy.

STANDARD OF REVIEW

Issuance of a preliminary injunction depends on: 1) "the threat of irreparable harm"; 2) the "balance between this harm and the injury that granting the injunction will inflict"; 3) "the probability that movant will succeed on the merits"; and 4) "the public interest." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). But where an injunction prevents "implementation of a duly enacted state statute," a movant must first establish a likelihood of success. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc).

In conducting its review, this Court reviews a "district court's factual findings for clear error, its legal conclusions de novo, and its exercise of equitable judgment for abuse of discretion." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). "An abuse of discretion occurs if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment." *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004). Reversal is also required where a court applies the wrong standard. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239 (2d Cir. 2012) ("As Judge Friendly explained, . . . a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law." (citations omitted)).

SUMMARY OF ARGUMENT

The commonsense abortion regulations at issue here serve significant governmental objectives and do not impose an undue burden. The district court only concluded the contrary by postulating that abortion is safer than pregnancy, applying the wrong legal standards, declining to acknowledge evidence, and finding curious ways to construe statutory language.

First, the district court failed to apply the undue burden standard and determine whether each challenged regulation's moral, ethical, and health benefits is substantially outweighed by the burdens it allegedly imposes. Instead, it held that the challenged provisions were likely unconstitutional because they did not confer more health benefits than burdens.

Second, in holding that Arkansas's death-by-dismemberment ban was likely unconstitutional, the district court did not assess alleged burdens in light of Arkansas's significant interest in promoting respect for life or safeguarding medical ethics. Nor did it determine—as required for facial relief—whether that provision would impose substantial obstacles for a large fraction of patients.

Third, the district court read the sex-selection ban's records requirement in a way that made little sense, manufactured vagueness, and imposed burdens that did not exist on that provision's face. Rather than conjure problems that did not exist, the district court was required to read that provision in the most commonsensical

and straightforward manner. Had it done so, it could not have concluded that provision imposed an undue burden and was unconstitutionally vague.

Fourth, the fetal remains amendments merely require that the remains of unborn children be treated with the same respect as other human remains. Yet in enjoining those amendments, the district court declared that they serve no valid state interest and—somehow concluded that as a factual matter—the statutory text would require women to notify sexual partners of an abortion. But that text contains no such requirement.

Fifth, the district court wrongly held that the expansion of existing police reporting and tissue preservation requirements to 14-, 15-, and 16-year olds that Hopkins believes became pregnant through consensual intercourse serves no state interest. Yet in reaching that conclusion, the district court failed to consider what commonsense tells us: Hopkins will inevitably make mistakes. It likewise failed to consider Arkansas's interest in imposing additional requirements where a girl's age puts her at disproportionate risk of being a sexual assault victim.

Sixth, the district court abused its discretion in applying the remaining injunction factors because it ignored Arkansas's and the public's interests in promoting respect for life, protecting physician ethics, ensuring that children are not aborted solely on the basis of their sex, ensuring human remains are treated with dignity and respect, and protecting children from sexual predators.

ARGUMENT

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

The district court erroneously concluded that all four challenged regulations were likely unconstitutional because it believed the benefits they conferred did not "outweigh the burdens [they] impose[d]." Add. 40; *accord* Add. 56, 76-77. But that is not the applicable standard. Instead, a law only imposes an undue burden where its benefits "are substantially outweighed by the burdens it imposes." *Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). That error alone requires the injunction be vacated.

A. Abortion regulations are constitutional unless the benefits they confer are substantially outweighed by the burdens they impose.

Unless it imposes an undue burden, an abortion regulation is constitutional. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992).[4] An undue burden exists where a law completely fails to advance a legitimate interest (or does so in such a trifling way that it lacks any rational connection with the governmental interest) and imposes exceptional and truly significant burdens. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292,

[4] While this Court is bound to apply *Casey*, that decision and its progeny have "no basis in the Constitution." *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring). To preserve that argument for review (and as an alternative to the argument below), Arkansas requests this Court hold that "[n]othing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy." *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting).

2313, 2318 (2016); *see also Jegley*, 864 F.3d at 958, 960 n.9. Under that standard, only rarely—where a legislature totally errs in assessing benefits and burdens—will a law constitute an undue burden. *See Gonzales*, 550 U.S. at 158, 165-66 (courts "retain[] an independent constitutional duty to review factual findings," but decisions on how best to balance risks "are within the legislative competence when the regulation is rational and in pursuit of legitimate ends"); *see also Jegley*, 864 F.3d at 958.

As relevant here, that standard is best illustrated by *Whole Woman's Health v. Hellerstedt* and *Gonzales v. Carhart*. In the first, the Court struck down a Texas provision requiring abortion providers to have admitting privileges within a 30-mile radius because that provision would not help "even one woman obtain better treatment" than existing law while closing numerous facilities and forcing women to obtain "abortions in crammed-to-capacity superfacilities" that could impair patient health. 136 S. Ct. at 2311-12, 2318. Consequently, *Hellerstedt* concluded that the challenged provision had such a feeble relationship to its purported purpose and imposed such tremendous burdens that it constituted an undue burden and could not stand. *See id.*; *see also Jegley*, 864 F.3d at 958.

By contrast, *Gonzales v. Carhart* upheld the federal partial-birth abortion ban on the grounds that the government's substantial interest in promoting respect for life and ensuring that providers do not engage in conduct with "disturbing

similarity to the killing of a newborn" could not possibly be overcome by requiring providers to use alternative methodologies. 550 U.S. at 158-60 (internal quotation marks omitted). Indeed, emphasizing the State's important "interest in protecting the life of the fetus that may become a child," *Gonzales* held that "[w]here [the State] has a rational basis to act," only requiring women to undergo significantly riskier procedures could possibly prevent it from "us[ing] its regulatory power to bar certain procedures and substitute others." *Id.* at 158; *see also Stenberg*, 530 U.S. at 931 (substituted procedure may not "impose[] significant health risks"); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 79 (1976) (saline ban unconstitutional because it required patients to undergo more dangerous procedure). Moreover, in determining risks, *Gonzales* stressed that, "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence" and lower courts are not to apply "[a] zero tolerance policy [that] would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription." *Id.* at 166.

To succeed here, then, Hopkins was required to show that the benefits—moral, ethical, and medical—conferred by each challenged provision "are substantially outweighed by the burdens [they] impose." *Jegley*, 864 F.3d at 960 n.9; *see also Gonzales*, 550 U.S. at 158-60. Additionally, Hopkins was not entitled

to merely cite "medical uncertainty" as a basis for refusing to follow the law. *Id.* at 164.

B. The district court conjured its own standard for determining whether an abortion regulation constitutes an undue burden.

The district court did not determine whether the benefits conferred by any of the challenged regulations are substantially outweighed by the burdens they impose. Instead, the district court created its own standard and held that all four were likely invalid because "the benefits [they] advance[]" do not "outweigh the burdens [they] impose[]." Add. 40; *accord* Add. 76-77, 128.

That application of an erroneous legal standard had three important consequences. First, it relieved Hopkins of any need to demonstrate the relative weight of each factor. Second, as detailed below, it allowed the district court to simply note Arkansas's interests in passing and then fail to weigh them against any purported burdens. *See infra* at Section I.C. And third, it inverted the standard and meant that the district court began by presuming unconstitutionality any time a provision imposed burdens. *See* Add. 40 ("The regulation will not be upheld *unless* the benefits it advances outweigh the burdens it imposes." (emphasis added)). Indeed, applying that approach, the district court concluded that burdens alone justified invalidating the challenged provisions. *E.g.*, Add. 56 ("[W]hether this Court weighs the asserted state interests against the effects of the provisions or examines only the effects of the provisions, Dr. Hopkins . . . is likely to prevail.").

Because that approach conflicts with controlling precedent and directly impacted the district court's analysis, the injunction must be vacated.

C. The district court disregarded the challenged regulations' moral and ethical benefits.

The district court's assessment of the benefits and burdens of the challenged regulations was likewise legally erroneous because it did not consider the burdens allegedly imposed in light of each regulation's moral and ethical benefits. Instead, the district court simply noted Arkansas had asserted those interests and declared that it had "assume[d] [their] legitimacy." Add. 43; *accord* Add. 116. But in analyzing benefits and burdens, the district court repeatedly held that the challenged provisions failed because they did not sufficiently "advance[] a public health goal." Add. 127 (fetal remains amendments "do not advance interests in women's health"); *see also* Add. 76 (focusing on sex-selection ban's medical benefits).

For instance, in discussing Arkansas's death-by-dismemberment ban, the district court did not consider whether that provision advanced Arkansas's significant interest in barring a procedure that "might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus." *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting). Rather, rendering that interest meaningless, the district court examined the burdens Hopkins alleged—not in light of those interests but—vis-à-vis pre-dismemberment

demise's medical benefits. *See, e.g.*, Add. 46 (asserting digoxin "confers no medical benefit"); Add. 53 (declaring that "[p]otassium chloride injections are an unnecessary and potentially harmful medical procedure with *no counterbalancing medical benefit* for the patient" (emphasis added)); Add. 55 (announcing transection "provides no medical benefits to the woman"); *id.* (arguing "no evidence currently supports the use of induced fetal demise to increase the safety of second-trimester [abortion]").[5] That exclusive focus on medical benefits violated the principle that the State's "interest in protecting the life of the fetus that may become a child[] cannot be set at naught," *Gonzales*, 550 U.S. at 158, and that States may impose restrictions "even if those measures do not further a health interest." *Casey*, 505 U.S. at 886. Therefore, the injunction should be vacated.

II. Arkansas is entitled to bar the horrific practice of killing an unborn child by tearing it limb-from-limb until it bleeds to death.

Arkansas's ban on the uniquely barbaric practice of ripping a living child to pieces advances important governmental interests while preserving access to reasonable, alternative abortion methodologies.

[5] The district court's conclusion on pre-dismemberment demise's medical benefits rests on its failure to acknowledge contrary evidence. *See infra* at II.B.

A. Arkansas's death-by-dismemberment ban advances substantial governmental interests.

Arkansas has a profound interest in barring the uniquely "gruesome and inhumane" (Appx. 334 (Wyatt)) practice of tearing an unborn child apart—its heart still beating—so that it "dies just as a human adult or child would" by slowly bleeding to death. *Stenberg*, 530 U.S. at 959 (Kennedy, J., dissenting). As the Supreme Court has repeatedly reaffirmed, States have an "important and legitimate interest in protecting the potentiality of human life" before birth, *Roe v. Wade*, 410 U.S. 113, 162 (1973), and may enact regulations expressing "profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157. Indeed, "[a] central premise of the [*Casey*] opinion was that the Court's precedents after *Roe* had [wrongfully] 'undervalue[d] the State's interest in potential life.'" *Id.* (quoting *Casey*, 505 U.S. at 873). Consistent with that premise, States may "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Casey*, 505 U.S. at 886; *see also id.* at 877.

Additionally, consistent with the State's traditional interest in safeguarding medical ethics, "[a] State may take measures to ensure the medical profession and its members are viewed as healers, sustained by compassionate and rigorous ethic and cognizant of the dignity and value of human life, even" unborn life. *Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting); *accord Gonzales*, 550 U.S. at 157-58 ("There can be no doubt the government 'has an interest in protecting the integrity

and ethics of the medical profession'" and that barring certain procedures is rationally related to that interest (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997))).

Applying those principles—and Congress's additional interest in protecting women from psychological harm, as discussed below—in a substantially similar case, *Gonzales* held that Congress could rationally determine that partial-birth abortion "implicate[d] additional ethical and moral concerns that justify a special prohibition" and require abortion providers to use less barbaric methodologies. 550 U.S. at 158. Indeed, stressing "that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child," *Gonzales* held that *Casey*'s requirement that States not impose substantial obstacles should not be interpreted so broadly that it invalidates those interests and "becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer." *Id.* To the contrary, "the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life." *Id.*

Those same concerns justify Arkansas's ban. Just like with partial-birth abortion, death-by-dismemberment is chillingly barbaric. It involves ripping an unborn child's limbs off so that it bleeds to death and can be extracted in tiny

human pieces. *See Stenberg*, 530 U.S. at 958-59 (Kennedy, J., dissenting); Appx. 334 (Wyatt); Appx. 169. Indeed, no one really disputes that death-by-dismemberment is just as "brutal" and "gruesome" as partial-birth abortion. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting); *accord Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting) ("Justice Stevens and Justice Ginsberg are forthright in declaring that [partial-birth and death-by-dismemberment] . . . are indistinguishable."). Moreover, to the extent there was any doubt, the Court's Eighth Amendment jurisprudence makes clear that the "inhuman and barbarous" practice of killing by dismemberment "obvious[ly]" violates basic decency standards. *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of certiorari).

Arkansas's death-by-dismemberment ban also furthers the State's interest in protecting medical ethics. For instance, like partial-birth abortion, causing an unborn child's death by ripping its arms and legs off—while its heart still beats—"might cause the medical profession or society as a whole to become insensitive, even disdainful, to life." *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting). In fact, undisputed record evidence establishes that the practice can "desensitize . . . medical personnel," "devalu[e] . . . human life," and adversely impact patient care. Appx. 177-79 (provider suffered from "[a]nxiety attacks, complete with nausea, palpitations and dizziness," poor sleep, and depression); *see* Appx. 171-75

(comprehensive study finding that killing by dismemberment inflicts, *inter alia*, "emotional trauma" and "physiological symptoms" that can impact patient care quality); *see also id.* (providers resort to "psychological defenses . . . to handle the traumatic impact of the destructive part of the operation" and some providers believe practice may "eventually damage the physician psychologically").

But as noted above, the district court did not assess the burdens that Hopkins alleged in light of those interests. Instead, in a few lines largely dedicated to criticizing the legislative process, it simply acknowledged that Arkansas had asserted those interests, declined to discuss their significance, and went on to consider pre-dismemberment demise's medical benefits. *E.g.*, Add. 43, 55-56.[6] That approach rendered Arkansas's legitimate interests a nullity and violated the fundamental principle that in determining whether an undue burden exists, courts are required to consider—not just health benefits—but whether a law like Arkansas's furthers the State's important interests in promoting respect for life and safeguarding medical ethics. *See, e.g.*, *Casey*, 505 U.S. at 886.

Yet even if the district court were entitled to focus exclusively on health benefits, the district court's analysis was legally erroneous because it did not acknowledge "that psychological well-being is a facet of health" and "that most

[6] Revealingly, the district court avoided describing how an unborn child is ripped apart during dismemberment and resorted to simply claiming that during the procedure "fetal tissue generally comes apart." Add. 35.

women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision" to have an abortion. *Id.* at 882. For example, the district court ignored evidence from "a randomized placebo-controlled trial of digoxin" establishing that an overwhelming majority of patients prefer pre-dismemberment demise for emotional reasons and that "[p]roviders express similar preferences, believing that induced fetal demise can help diminish emotional difficulty for the patients." Appx. 211-12; *accord* Appx. 186. Instead, it just announced that the most "well-designed and rigorous research concludes that there is no evidence that abortion causes mental health problems." Add. 22. But even if the district court were entitled to declare *ipse dixit* that some research is better (which it is not), its declaration about abortion *in general* says nothing about how a particularly brutal abortion procedure can impact patients. Rather, as *Gonzales* explained, it is "self-evident 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 brutal manner and "[s]evere depression and loss of esteem can follow." *Gonzales*, 550 U.S. at 159-60; *see also Rounds*, 530 F.3d at 734.

Moreover, here, that "unexceptional" conclusion, *Gonzales*, 550 U.S. at 159, was supported by patient testimony (not considered by the district court) affirming dismemberment causes "struggle[s] with depression, self hatred, flashbacks, self

destructive behavior, suicidal thoughts, drinking, anxiety, shame, lack of self-worth and regret." Appx. 368; *accord* Appx. 370 ("horrific" procedure caused "emotional trauma and depression" and turn to "substance abuse and drinking"); *see also* Appx. 360 (Parker) (describing "emotional trauma" patients suffer "from discovering that their babies were cut apart and pulled piece by piece from their wombs"). Indeed, echoing *Gonzales*'s conclusion that women might only later learn the truth about the procedure used to kill their unborn children, one patient 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. Like Congress, Arkansas has a strong interest in preventing that harm.

Additionally, the district court refused to consider other medical benefits of pre-dismemberment demise, simply announcing that "no evidence currently supports the use of induced fetal demise to increase the safety." Add. 55. But to the contrary, medical literature introduced below (and prior case law) establishes that "[m]any clinicians" believe that pre-dismemberment demise lowers abortion complications rates and facilitates removal. Appx. 191; *see also* Appx. 242; *Gonzales*, 550 U.S. at 136 (providers use digoxin and potassium chloride to induce demise because it makes fetal removal easier); *Stenberg*, 530 U.S. at 925 (similar).

Thus, the district court's legal errors and unexplained decision to ignore undisputed evidence requires reversal.

B. Arkansas's death-by-dismemberment ban does not impose significant burdens.

In contrast to the important interests underlying Arkansas's death-by-dismemberment ban, that provision imposes few, if any, burdens. To conclude the contrary, the district court simply declared Arkansas's statute a second-trimester abortion ban and grounded that conclusion entirely on Hopkins's representations that he would stop providing second-trimester abortions rather than comply with the law. *E.g.*, Add. 58. It did so despite acknowledging that Hopkins is not LRFP's only second-trimester abortion provider and failing to make any finding on whether those other providers shared Hopkins's aversion to following the law. *See* Add. 9, 56. While that failure alone undermines the district court's burdens analysis, that analysis is also legally erroneous because it failed to apply the standard governing facial challenges and disregarded—without explanation—undisputed evidence.

To start, Arkansas law does not ban second-trimester abortions. Rather, the challenged provision narrowly proscribes "purposely dismember[ing] [a] living unborn child . . . through the use of clamps, grasping forceps, tongs, scissors, or similar instruments" for "the purpose of causing" its death. Ark. Code Ann. 20-16-1802(3)(A)(i). Thus, while it bars purposely tearing an unborn child apart to kill it,

that provision neither prohibits second-trimester induction abortions nor D&E abortions where a provider induces pre-dismemberment demise. *See id.* at 20-16-1803; *id.* at 20-16-1803(a). And the record establishes there are at least three methods for safely ensuring fetal demise for the vast majority of patients.

First, providers may use a digoxin injection approximately 24 hours before dismemberment to induce fetal death. *See* Add. 12; Appx. 113 (Hopkins). In fact, the district court acknowledged that Hopkins already uses digoxin beginning at 18 weeks to induce demise and comply with federal law. Add. 13. That method is virtually always effective, failing just 5-10% of the time. *See* Add. 11. Yet the district court argued that Hopkins could not use digoxin to comply with Arkansas law because it does not work every time on every patient, "[t]here are some women" with unique medical conditions "for whom an injection of digoxin may be difficult or impossible," and injections might be "time and cost-prohibitive for some women." Add. 49-51. But while that may be true, it hardly means (as the district court concluded) that digoxin is *completely* unfeasible. Add. 48.

Rather, at most, it means that digoxin may not be practical—as the district court conceded—for *some* patients. Yet that does not answer the more relevant question of whether in the minute fraction of cases where digoxin is unavailable or fails (or a patient could not otherwise obtain an injection) demise could be safely

accomplished using another alternative methodology.[7] Indeed, the district court failed to determine whether any portion of those patients could undergo another procedure or—as discussed in greater detail below—whether those who could not constituted a large fraction warranting facial relief. *See infra* at I.D; *cf.* Add. 56 (declaring that because no alternative procedure is available to all patients, none is available and large fraction is impacted).

And while that failure alone warrants vacating the injunction, the district court's digoxin analysis also fails because it did not consider undisputed evidence that did not fit its conclusion. For instance, the district court suggested that digoxin was not a feasible method of ensuring demise (apparently at any point) because it is not currently used before 18 weeks and "[t]here are virtually no reported studies" on its use earlier. Add. 48. But in relying exclusively on the lack of studies, it failed to acknowledge—let alone address—*undisputed* expert testimony that "from a physiologic standpoint, if a 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 any "markedly different" side effects. Appx. 474-75. In fact, the district court just

[7] The district court found that a second digoxin injection would be experimental, but it did not decide whether other procedures might safely accomplish demise. *See* Add. 49-51; *cf.* Add. 47. The district court also declined to acknowledge evidence establishing that second injections have been safely administered. *See* Appx. 251 (noting "[d]igoxin injection[s] [were] repeated at the physician's discretion before D&E for persistent fetal cardiac activity").

announced the opposite. Add. 48 (claiming no "way to know" whether digoxin will be effective earlier or for providers to advise patients about its risks). Yet a court is not entitled to simply disregard undisputed evidence.

Indeed, at most, had it considered that undisputed evidence in combination with the lack of unpublished studies, the district court *might* have been entitled to find some medical uncertainty about digoxin. But as explained above, "[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 be the basis of across the board facial relief. *Gonzales*, 550 U.S. at 164.

Second, if digoxin fails or is not appropriate, abortion providers may ensure fetal demise by injecting the unborn child or umbilical cord with potassium chloride. *See* Add. 14; Appx. 478-79 (Biggio). The district court acknowledged the effectiveness of this methodology, but nevertheless argued that it was unfeasible because it can be expensive, Hopkins lacks the skills to perform injections, an injection in the hands of an incompetent provider could have severe health consequences, and it may not be appropriate for "some women" with unique medical conditions. Add. 51-53. Yet as above, the district court declined to determine whether those factors would impose a substantial obstacle to a large fraction of relevant patients. Instead, it merely speculated the costs and a potential lack of providers who could perform injections for every single patient (rather than

considering this option in combination with the others) could burden *some* women. *See* Add. 52 (no evidence an Arkansas facility could perform injections on "over 600 patients" a year). And like above, the district court declined to consider whether "some women" with unique conditions could obtain an alternative procedure, leaving others to consider this option.

Third, "any physician who has completed an OB-GYN residency" can ensure death by transecting the umbilical cord. Appx. 335 (Wyatt); Appx. 259-60 (Biggio). Like with digoxin, in dismissing this option, the district court simply failed to acknowledge evidence that did not fit its conclusion and just declared transection was untested. *See* Add. 55. In particular, while the district court acknowledged that only "one scientific study" had examined transection, it announced (without citing any research) that study "has limitations and does not support any conclusion about the safety of the procedure." Add. 54; *cf. id.* ("transection before 16.0 weeks . . . is completely unstudied"). But contrary to that announcement, that study examined a facility that routinely used transection to ensure demise and concluded that transection is "effective and safe" and "not associated with adverse outcomes." Appx. 247. Moreover, that conclusion was supported by testimony. *See* Appx. 485 (Biggio) (transection "does not add risk" beyond that inherent in D&E); Appx. 501-502 (locating cord "does not appreciably

increase [D&E] risk"). Thus, the district court was not entitled to simply disregard evidence that, at a minimum, demonstrated a medical disagreement.

The district court also rejected transection because it might not be appropriate for "some women," it could be difficult and risky where the "umbilical cord is blocked by the fetus," and a provider might accidentally grasp fetal tissue while transecting the cord. Add. 54; *see also* Add. 58. Like above, the first two condition arguments do not demonstrate unfeasibility for the vast majority of patients (as required for facial relief) or even for some subset of patients since alternative methods might be appropriate. The final argument fares little better because it ignores the death-by-dismemberment ban's scienter requirement which requires a violator to "purposely" kill an unborn child by dismemberment. Ark. Code Ann. 20-16-1803(a). In fact, far from imposing liability for dismemberment that happens to result in death, criminal liability only attaches where it is the provider's "conscious object" to kill an unborn child by dismemberment. Ark. Code Ann. 20-16-1802(5). Therefore, the district court's conclusion rested on an erroneous interpretation of law and the injunction should be vacated.

C. Any minor impacts on abortion access do not substantially outweigh Arkansas's interest in proscribing a uniquely barbaric practice.

Ultimately, the district court's burden analysis is little more than an assertion that not every methodology is suitable for every patient and any of the above options could impose additional costs and lengthen the abortion process. But

neither this Court nor the Supreme Court has ever held that mere time and financial impacts on some women outweigh—by a substantial margin—the State's interests in expressing "profound respect for the life within the woman" and protecting the integrity of the medical profession. *Gonzales*, 550 U.S. at 157-58. Indeed, such a finding would violate *Casey*'s holding that the State's "interest in protecting the life of the fetus that may become a child[] cannot be set at naught." *Gonzales*, 550 U.S. at 158.

Instead, where—like here—a State "use[s] its regulatory power to bar certain [abortion] procedures" that raise significant moral and ethical concerns and requires providers to "substitute others," that decision only constitutes an undue burden where those other procedures impose significant health risks. *Id*. at 146, 158; *see also Stenberg*, 530 U.S. at 931; *Danforth*, 428 U.S. at 79. As Hopkins has not demonstrated that he is likely to make that showing, the injunction should be vacated.

D. The district court failed to make the required findings necessary to support facial relief.

The injunction should likewise be vacated because the district court never determined whether Arkansas's death-by-dismemberment prohibition imposed an undue burden for a large fraction of the relevant patient population. To the contrary, as noted above, the district court simply concluded that the various methods for ensuring demise are unavailable for "some" women with unique

medical conditions and personal circumstances. *E.g.*, Add. 50, 53, 54; *cf.* Add. 56. Consequently, at best, the district court ultimately determined that Arkansas's death-by-dismemberment prohibition might cause *some* women to "delay obtaining an abortion or not have an abortion at all." Add. 50.

But as this Court recently held in vacating a preliminary injunction similarly based on a finding that a regulation would cause "some women" to delay or forgo an abortion, whether a regulation impacts some is not the relevant question on a facial challenge. *Jegley*, 864 F.3d at 959-60. Instead, to justify facial relief, Hopkins must demonstrate—and the district court must determine—"that the Act would be unconstitutional in a *large fraction* of relevant cases" and not just "potential situation[s] that might develop." *Gonzales*, 550 U.S. at 167-68 (emphasis added); *see also Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373-74 (6th Cir. 2006) ("[N]o circuit has found an abortion restriction to be unconstitutional under *Casey*'s large-fraction test simply because some small percentage of the women actually affected by the restriction were unable to obtain an abortion."). Far from making that determination, the district court merely alluded to "amorphous groups of women to reach its conclusion that the Act was facially unconstitutional." *Jegley*, 864 F.3d at 959; *see also A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 700 (7th Cir. 2002) (Coffey, J., concurring) (under large fraction test, "it is clear that a law which incidentally

prevents 'some' women from obtaining abortions passes constitutional muster"). Thus, the district court's failure to make required findings justifying facial relief requires that the injunction be vacated.

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

The sex-selection ban's requirement that providers request and review records related to a woman's pregnancy history is constitutional, and the district court only reached a conclusion by reading the statute in the least obvious way.

A. The district court misconstrued the pregnancy records provision.

Arkansas courts construe statutes by reading them as written and "giv[ing] effect to the intent of the legislature, making use of common sense." *Minnesota Mining & Manufacturing v. Baker*, 989 S.W.2d 151, 154-55 (Ark. 1999). Thus, the district court was required to construe the records provision "by looking to all laws on the subject, viewing them as a single system, and giving effect to the general purpose of the [statutory] system." *Arkansas County v. Desha County*, 27 S.W.3d 379, 383 (Ark. 2000); *accord Henderson v. Russell*, 589 S.W.2d 565, 568 (Ark. 1979) (courts employ "a common-sense construction" that considers an act's title and whole regulatory scheme (citations omitted)).

Applying that standard, the most logical reading of the records provision is that a provider only needs to request records when a woman knows her unborn child's sex and only needs to request records relevant to determining whether she

is seeking a sex-selective abortion. That reading is supported by the statute's structure which bars providers from "perform[ing] or attempt[ing] to perform an abortion with the knowledge that the pregnant woman is seeking the abortion solely on the basis of the sex" and imposes requirements designed to make that prohibition effective. Ark. Code Ann. 20-16-1904(a). Indeed, the language immediately following the prohibition requires providers to ask whether a woman "knows the sex of [her] unborn child" and then, if she does, "inform [her] of the prohibition of abortion as a method of sex selection for children; *and* . . . [r]equest the medical records of the pregnant woman relating directly to the entire pregnancy history." *Id.* at 20-16-1904(b) (emphasis added).

By contrast, Hopkins argued below that the records provision must be read in isolation to require providers to obtain any and all records related to every patient's pregnancy history. *See* Add. 68-79. But as the district court noted, that would render the records requirement largely pointless, out of place among provisions otherwise designed to prevent sex-selective abortions, and unduly vague. *See, e.g.*, Add. 76 (reading means provision would "appear to serve no proper state purpose"); Add. 78 (if the provision requires blanket record requests, then it becomes unclear "what a doctor is to do with these records"); Add. 87-90 (reading renders requirements vague and limitless). Thus, rather than adopt Hopkins's reading and "engage in statutory interpretations that defy common sense

and produce absurd results," the district court was required to adopt the most commonsensical and consistent statutory reading. *Clark v. Johnson Regional Med. Cntr.*, 362 S.W.3d 311, 316 (Ark. 2010). Moreover, even if the district court believed both readings had merit, as it suggested (Add. 70), the canon of constitutional avoidance required it to reject Hopkins's reading. *Gonzales*, 550 U.S. at 153-54.

Yet rather than do that, the district court—while professing to "consider both interpretations"—declined to apply the more straightforward, undoubtedly constitutional reading. Add. 70. To the contrary, in conducting its undue burden analysis, the district court fully embraced Hopkins's strained reading and held that requiring providers to request extensive documentation from every abortion patient with a prior pregnancy (or pregnancy symptoms) would impose tremendous burdens and serve no proper purpose. *E.g.*, Add. 70-72. Likewise, in holding that the records provision was likely unconstitutionally vague, the district court embraced the only reading that rendered the provision potentially ambiguous. *See* Add. 87-90. In so doing, the district court violated basic principles of statutory construction, and rested its analysis on a legally erroneous interpretation of the statute. That alone requires that the injunction be vacated.

B. The challenged provision does not impose an undue burden.

Had the district court read the challenged provision in the most logical way, it could not have determined its benefits were substantially outweighed by the burdens it imposes. Certainly, Arkansas has an important and legitimate interest in ensuring that unborn children—and particularly unborn girls who are far more often the victims of sex-selection—are not aborted solely on the basis of their sex. *See* Ark. Code Ann. 20-16-1902(a)(1). And by not challenging the underlying sex-selection ban, Hopkins does not dispute that interest.

Next, because the records provision only applies to women who know their unborn child's sex and only covers records relevant to determining whether the woman is seeking a sex-selection abortion, virtually all the burdens the district court alluded to disappear. *E.g.*, Add. 70-72 (discussing problems associated with requesting undefined universe of records for 3,000 patients a year with prior pregnancies). Indeed, ultimately, the district court's burdens analysis consists of little more than speculation that there might be increased costs and privacy concerns that could cause some unknown number of women to delay or forgo abortions. *See* Add. 70-73 (discussing items that could affect ill-defined groups of women); *cf.* Add. 79-81 (declaring large fraction would be affected if requirement required providers to request all pregnancy related records for all patients). Yet as above, that speculation about some, unknown number of women hardly warrants

facial relief or substantially outweighs Arkansas's interest. *See Gonzales*, 550 U.S. at 167-68; *Jegley*, 864 F.3d at 959-60.

Lastly, the district court speculated that the records provision's lack of a health exemption might harm patients. Add. 74. But that speculation is a red herring since a patient seeking an abortion for health reasons is, *by definition*, not seeking a sex-selective abortion and delaying an abortion in such circumstances to obtain records would not be reasonable.

C. The pregnancy records provision is not vague.

Like above, had the district court read the pregnancy records provision in the most straightforward way, it could not have concluded that Hopkins was likely to succeed on his vagueness challenge. An abortion regulation is not vague if it "provides doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Gonzales*, 550 U.S. at 149 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982) (vagueness judged from perspective of a "business person of ordinary intelligence"); *Precious Metals Associates, Inc. v. CFTC*, 620 F.2d 900, 907 (1st Cir. 1980) ("The appropriate measure for testing a statute directed at a class of persons possessed of specialized learning is whether the language sufficiently conveys a definite warning as to the

proscribed conduct, when measured by common understanding and commercial practice." (internal quotation marks omitted)).

The challenged provision meets that standard. When read properly, it is clear that providers are prohibited from performing (or attempting to perform) an abortion with the knowledge—based on a woman's response or medical records—that the woman is seeking a sex-selective abortion. Likewise, a provider of ordinary intelligence would understand that the phrase "records of the pregnant woman relating directly to the entire pregnancy history" means the records relevant to that determination. Ark. Code Ann. 20-16-1904(2)(A). Indeed, given the statutory purpose, no other reading would make sense.

Moreover, contrary to the district court's assertion, the phrase "reasonable time and effort" is not unconstitutionally vague. Add. 86-87. The Seventh Circuit, for instance, has long held that statutes requiring physicians to employ reasonable judgment are not unconstitutionally vague because that "is the same standard by which all" medical decisions are judged and clearly "provides physicians with more than 'fair warning' as to what conduct is expected of them in order to avoid the imposition of liability." *Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999). Likewise, other courts have warned that governments must be given some leeway in regulating medical practices since "medical care cannot be boiled down to a precise mathematical formula" but "must be grounded in what, from time to time,

other health professionals consider to be acceptable standards of health care." *Varandani v. Bowen*, 824 F.2d 307, 312 (4th Cir. 1987); *see also United States v. Collier*, 478 F.2d 268, 272 (5th Cir. 1973) ("[S]tatutes affecting medical practice need not delineate the precise circumstances constituting the bounds of permissible practice.").

And even more relevant here, Hopkins cannot make a vagueness claim because, contrary to his made-for-litigation confessions of confusion, the record demonstrates that he and his staff *fully* understand what it means to spend a "reasonable time and effort" to obtain medical records. *See* Add. 71 (discussing efforts Hopkins and his staff already make to obtain records, including "follow[ing]-up with a phone call . . . if necessary"); *id.* (concluding Hopkins and his staff already make determinations about whether it is reasonable to continue waiting for medical records).[8] Thus, Hopkins is not likely to prevail on this claim and the injunction should be vacated.

IV. Requiring abortion providers to treat human remains with dignity does not offend the Constitution.

The Arkansas Final Disposition Rights Act of 2009 has long governed the "disposition of a dead body or fetus" and requires that human remains be treated

[8] The district court's further unsupported assertion that the records provisions "could potentially" be "arbitrar[ily] enforce[d]" (Add. 87) does not support pre-enforcement relief. *See Gonzales*, 550 U.S. at 150.

with dignity and respect. Ark. Code Ann. 20-17-102(a)(2)(C).[9] Yet the district court determined that provision serves no valid purpose, imposes tremendous burdens, and is vague. It grounded that conclusion—not on an analysis of the statutory text but—its finding that, "[t]here is no evidence in the record before the Court to contradict Dr. Hopkins's assertions regarding compliance with [that] [provision]." Add. 121. The district court's reliance on such unsupported allegations (instead of the relevant statutory text) was legally erroneous and invalidates its entire analysis.

To begin with, however, the district court's benefits analysis—suggesting Arkansas lacks an interest in ensuring that fetal remains are treated with dignity and respect—conflicts with precedent "recogniz[ing] the 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). Moreover, contrary to the district court's conclusion, the amendments also further Arkansas's interests in promoting respect for life and

[9] Pursuant to a currently effective emergency administrative rule, the amendments do not apply to remains from medication abortion where "the evacuation" occurs outside abortion facility. *See* Arkansas Register, p. 6-3, *available at* http://170.94.37.152/REGS/007.05.17-001E-17575.pdf.

safeguarding medical ethics by ensuring that the human remains are respectfully disposed of in accordance with a parent's wishes.[10]

Weighed against those substantial interests, the district court cited burdens that do not exist. In particular, it argued that under the Final Disposition Act, "all women seeking abortions must notify their sexual partner or, if both the woman and her sexual partner are minors, the woman must notify the parent or parents of both." Add. 129; *accord* Add. 121. But the Final Disposition Act does not impose (and the district court did not point to any language imposing) such a requirement.

To the contrary, under the Final Disposition Act, while a patient may decide to notify a partner and ascertain his wishes regarding disposition, neither she nor anyone else is required to notify the partner. Instead, while it generally vests parents with equal power to control disposition of a child's remains, the Final Disposition Act provides that one parent may exercise sole control where: 1) one parent is absent and "reasonable efforts have been unsuccessful in locating" that parent; 2) both parents receive notification of death and only one acts within two days of receiving notice; *or* 3) only one parent exercises disposition rights within five days. Ark. Code Ann. 20-17-102(d)(1)(E), 20-17-102(e)(1)(B). Importantly, the last option allows a single parent to exercise sole control regardless of whether there is an absent parent, there is an effort to notify, or a second parent receives

[10] Relying on a purported quotation from *Hellerstedt*—that does not appear in that case—the district court found those interests do not apply after death. Add. 127.

notification of death. *See id.*; *id.* at 20-17-102(d)(1)(E)(i).

Below, Hopkins focused exclusively on the first two options and alleged that they would require patients (or providers) to locate, notify, and/or ascertain the wishes of a sexual partner to dispose of fetal remains. But neither Hopkins nor the district court acknowledged the third provision which plainly does not require notification (or an attempt to notify anyone) and allows abortion providers to dispose of an unborn child's remains consistent with one parent's wishes after five days. Likewise, in the case of a minor seeking an abortion with parental consent, the grandparent giving that consent—regardless of absence, efforts to notify, or actual notice to anyone else—may exercise sole control 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).[11]

Thus, contrary to the district court's erroneous legal conclusion, when read properly, the challenged provision would, at most, require abortion providers to wait five days before disposing of fetal remains. And while that might potentially impose marginally higher costs, the district court did not determine (nor could it

[11] The district court did not make any findings about the use of judicial bypass by 17-year olds, but it concluded that all but one of 69 LRFP patients under 17 had an abortion with parental consent. Add. 19. In that single case, the bypass granting court could arguably have granted disposition rights, but even if it could not have, one patient—out of more than 3,800 total patients or 69 under 17—hardly constitutes a large fraction warranting facial relief. *See* Add. 75; *Cincinnati Women's*, 468 F.3d at 373-74 (12 out of 100 patients is not a large fraction).

have) that such marginal costs would constitute a significant burden, let alone one that would substantially outweigh Arkansas's interests. *See* Add. 133 (noting potential increased costs).

Finally, given that neither patients nor providers are required to notify anyone of an abortion, Hopkins's vagueness claims with respect to the first and second provisions discussed above simply do not warrant preliminary relief.

V. Arkansas was entitled to expand existing police reporting and tissue preservation requirements to reach minors at increased risk of sexual assault.

The Arkansas Child Maltreatment Act has long required surgical abortion providers to preserve "fetal tissue extracted during [an] abortion" performed on a girl under 14 and to inform local law enforcement of the abortion. Ark. Code Ann. 12-18-108(a) (2016). The amendments at issue expanded that requirement to cover 14-, 15-, and 16-year olds. *See* H.B. 2024, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Ark. Code Ann. 12-18-108(a). That expansion neither imposes an undue burden nor violates a heretofore undiscovered right to informational privacy.

With respect to the undue burden analysis, neither Hopkins—nor the district court—disputed that the pre-existing requirements serve an important purpose. *See* Add. 93-94 (Hopkins does not challenge existing requirements or Arkansas's interest in "protecting children from sexual abuse" and prosecuting predators). Nor could they since Arkansas clearly has an interest in protecting minors from

abuse, and the record demonstrates that tissue from underage abortions can—and has—been used to identify predators. *See* Appx. 350-51 (search warrant for tissue from a 15-year old's abortion to conduct DNA testing in connection with prosecution of 21-year old acquaintance); Appx. 352-53 (similar); Appx. 356 (abortion tissue "can be a 'powerful piece of evidence,' especially in cases involving children"); Appx. 358 (tissue from minor's abortion led to rapist's conviction ten years later).

Instead, the district court concluded that Arkansas had no interest in requiring Hopkins to report and preserve tissue from abortions performed on 14-, 15- and 16-year olds that he would not be required to report as victims of sexual assault under other Arkansas laws because he believes they became "pregnant through consensual sexual intercourse with, for example a teenager of the same age." Add. 95, 98-99. But that argument ignores what commonsense tells us: Hopkins's assessment will not always be correct. Nor does it acknowledge Arkansas's interest in imposing additional requirements where an abortion is performed on a girl whose age demonstrates that she is at a disproportionately high risk of being a sexual assault victim. *See* Appx. 392-93. Indeed, the district court only reached a contrary conclusion by assuming that Hopkins's assessment is *always* right and ignoring undisputed data demonstrating that "[t]he risk of being the victim of forcible rape" peaks at age 14 and remains disproportionately high

through age 16. *See id.*

Furthermore, had the district court acknowledged that data, it could not have concluded Arkansas's interests were outweighed—let alone substantially—by the speculative possibility that girls might be confused or stigmatized by those requirements. *See* Add. 96-98. In fact, the only thing the district court cited in support of that proposition is a bald assertion that, "providing information to local law enforcement is itself a harm" because law enforcement might breach confidentiality. Add. 97. But as the district court conceded, law enforcement is required to treat that information confidentially and there is no reason to assume that they will not do so. *See id.*; *see also* Appx. 332. Indeed, while providers currently report abortions performed on girls under 14, neither Hopkins nor the district court cited *any* incident of law enforcement breaching confidentiality.

Lastly, the district court also concluded that the challenged provision violated a newly discovered right to informational privacy. *See* Add. 105-110. Yet while it found that such a right exists, it did not cite a single case from this Court or the Supreme Court establishing such a right. *See id.* Moreover, even if such a right existed, the cases cited by the district court suggest that to constitute a violation, a disclosure would have to involve "either a shocking degradation or an egregious humiliation . . . or a flagrant breech of a pledge of confidentiality which was instrumental in obtaining the personal information." *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 the district court never explained how reporting to law enforcement could possibly meet that standard. *See* Add. 105-10 (discussing case law but never applying that standard). Nor could it have given Arkansas's interest in protecting minors and law enforcement's duty to maintain confidentiality. Therefore, even if there is a constitutional right to informational privacy, Hopkins has not demonstrated that he is likely to prevail on such a claim.

VI. The district court abused its discretion in finding a likelihood of irreparable harm, in balancing the equities, and in determining that the public interest did not weigh against an injunction.

The district court's analysis of the remaining preliminary injunction factors was likewise erroneous. Its irreparable harm analysis was flawed because the challenged provisions do not impose significant obstacles. To the contrary, as explained, the cited obstacles largely do not exist and do not adversely affect a large fraction of patients.

The district court similarly erred in concluding that the balance of the equities favored an injunction and concluding that Arkansas had no interest in seeing its laws enforced. For instance, in deciding whether to enjoin the death-by-dismemberment ban, the district court disregarded Arkansas's and the public's interests in promoting respect for life, safeguarding ethics, and protecting patients and simply announced that unspecified "harm to Dr. Hopkins and [his patients] . . .

clearly outweighs whatever damage or harm a proposed injunction may cause the State of Arkansas." Add. 64. It applied a similar approach in deciding that the public interest and balance of the equities favored enjoining the sex-selection ban, the fetal burial amendments, and the police reporting and tissue preservation requirements. But again, in so doing, it simply ignored Arkansas's and the public's interests in ensuring that children are not aborted solely on the basis of their sex, ensuring human remains are treated with dignity and respect, and protecting children from predators. And by failing to consider those interests, the district court abused its discretion. Thus, the injunction should be vacated.

CONCLUSION

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

Respectfully submitted,

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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. 35(b)(2)(A) because it contains approximately 12,996 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(c) 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

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I hereby certify that on December 1, 2017, 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.

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