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.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, NO. 4:17-CV-00404-KGB, HON. KRISTINE G. BAKER

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: December 11, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") files this brief with the consent of the parties.[1] Founded in 1981 by Phyllis Schlafly, EFELDF is a nonprofit corporation headquartered in Saint Louis. For more than thirty-five years, EFELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, EFELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Following on the Supreme Court's rejection of unrelated Texas requirements in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), one of the abortion doctors at Little Rock Family Planning ("LRFP") sued members of the Arkansas State Medical Board and the prosecuting attorney for Pulaski County (collectively, "Arkansas") to enjoin four discrete provisions of four different Arkansas laws: (1) a

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no party's counsel authored this brief in any respect; and no person or entity – other than *amicus* and its counsel – contributed monetarily to this brief's preparation or submission.

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bar of death-by-dismemberment – also known as pre-demise dilation and extraction ("D&E") – abortions; (2) criteria for detecting and restricting sex-selected abortions; (3) criteria for the disposition of fetal remains under the Arkansas Final Disposition Rights Act; and (4) expansion from girls aged 13 to girls aged 16 of the threshold for police-reporting and tissue-preservation requirements. EFELDF adopts the facts (at 4-20) and merits arguments (at 24-57) as stated in Arkansas's brief and offers in this *amicus* brief additional jurisdictional and merits arguments why this Court should vacate and reverse the district court's preliminary injunction.

Constitutional Background

Although "the several States [historically] have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matters of local concern," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotations and alterations omitted), the Supreme Court has found in the Fourteenth Amendment a woman's right to abort a non-viable fetus, first as an implicit right to privacy and subsequently as a substantive due-process right to liberty. *Roe v. Wade*, 410 U.S. 113 (1974); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). Under *Casey*, states retain the right to regulate abortions, provided that they do not impose an "undue burden" – which is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial* obstacle in the path of a woman seeking an abortion of a

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nonviable fetus," 505 U.S. at 877 (emphasis added) – on pregnant women's *Roe-Casey* rights. *Id.* at 878; *accord Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017) ("*Jegley I*"). Nothing in *Hellerstedt* changed the *Casey* test regarding the substantiality of the burden.

Within those bounds, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community," *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), because federal courts are not "'the country's *ex officio* medical board.'" *Id.* at 164 (*quoting Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)). In particular, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," which "provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Id.* at 164 (emphasis added). That said, mere legislative findings alone – while viewed deferentially – do not warrant "dispositive weight." *Hellerstedt*, 136 S.Ct. at 2310 (*citing Gonzales*, 550 U.S. at 165). In sum, all that *Hellerstedt* accomplished was to reject the exclusive use of the rational-basis test, without weighing an abortion provision's benefits and burdens.

Factual Background

EFELDF adopts the facts as stated in Arkansas's brief. *See* Ark. Br. 4-20.

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STANDARD OF REVIEW

"[A] party seeking a preliminary injunction of the implementation of a state statute must demonstrate … that the movant is likely to prevail on the merits." *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008) (*en banc*) (internal quotations omitted). "If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other *Dataphase* factors." *Rounds*, 530 F.3d at 732 (*citing Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) (*en banc*)). Those additional factors are "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; … and [3] the public interest." *Dataphase*, 640 F.2d at 113.

Appellate courts review the grant or denial of preliminary relief for abuse of discretion, *Rounds*, 530 F.3d at 733, but a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Similarly, appellate courts review jurisdictional issues *de novo*, *Laclede Gas Co. v. St. Charles Cty.*, 713 F.3d 413, 417 (8th Cir. 2013), and indeed "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). Finally, "subject matter jurisdiction cannot be waived or conferred by consent,"

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Middle South Energy, Inc. v. Arkansas Public Service Comm'n, 772 F.2d 404, 410 (8th Cir. 1985), so that "if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and dismiss the action. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

SUMMARY OF ARGUMENT

Jurisdictionally, Hopkins lacks the close relationship with his *future* patients required for third-party standing to assert women's *Roe-Casey* rights (Section I.A). Further, neither Hopkins nor the district court has demonstrated a clear enough risk of future enforcement to enjoin Arkansas laws that chill only Hopkins under his subjective reading – which Arkansas disavows – of the challenged laws (Section I.B). Alternatively, Hopkins lacks a ripe challenge under his subjective interpretations because he has not and cannot demonstrate that future enforcement would proceed as he envisions it or even at all (Section I.C).

On the merits, the district court's failure to consider Arkansas's evidence in support of the challenged laws misapplies *Hellerstedt* (Section II.A). Arkansas's ban on death-by-dismemberment abortions includes both ethics- and health-related benefits to balance against its minor burdens, thus satisfying *Hellerstedt* (Section II.B.1). Further Hopkins' subjective fear that accidentally dismembering a fetus while attempting to transect the umbilical cord would violate the ban is inconsistent with the ban's scienter requirement (Section II.B.2). Under the *Casey* large-fraction

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test, the portion of impacted women seeking second-trimester abortions affected by the ban would be less than a tenth from digoxin alone, making a facial challenge unsustainable here (Section II.B.3). The challenges to the sex-selection and tissue-disposal criteria hinge on interpretations of Arkansas law that Arkansas disputes, making the hypothetical enforcement here either insufficiently imminent for Article III or too hypothetical for irreparable harm (Section II.C). The challenge to raising the threshold age for police-reporting and tissue-preservation requirements rests on a contrived class of "age-mates" who avoid statutory rape by meeting the affirmative defense of being similarly aged, but that ignores both the flexible reality of the probable-cause analysis and that affirmative defenses do not vitiate probable cause (Section II.D).

On the non-merits *Dataphase* factors, Hopkins has no suffered irreparable harm, both because he lacks *Roe-Casey* rights and because of the hypothetical nature of his injuries (Sections I.B, III). With no irreparable injury, the balance of the equities necessarily favors Arkansas – which the district court has enjoined from using its sovereign police power to protect public health – when compared with Hopkins' lack of irreparable harm (Section III). The public-interest factor collapses into the merits, especially for litigation that could impair governmental functions and the public interest (Section III).

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ARGUMENT

I. SEVERAL ASPECTS OF THIS LITIGATION DO NOT PRESENT A CASE OR CONTROVERSY APPROPRIATE FOR JUDICIAL RESOLUTION.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). In addition to that constitutional baseline, standing doctrine also includes prudential elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

Several aspects of Hopkins' case do not satisfy constitutional or prudential limits on federal-court jurisdiction, making judicial intervention here inappropriate:

> All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the

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> powers of an unelected, unrepresentative judiciary in our kind of government.

Allen v. Wright, 468 U.S. 737, 750 (1984) (internal quotations omitted). These limitations "assume[] particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations and internal quotations omitted). Under these limitations, the preliminary injunction must be vacated.

A. Notwithstanding *Hellerstedt*, Hopkins lacks third-party standing to raise the *Roe-Casey* rights of prospective patients.

As a threshold matter, litigants generally must protect their own rights, not the rights of absent third parties. *Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880-82 (8th Cir. 2015); *Kowalski*, 543 U.S. at 128-30. Here, this Court should hold that Hopkins lacks third-party standing to assert *future* patients' *Roe-Casey* rights and thus must sue under his own rights, which implicate a lower standard of review. Nothing in *Hellerstedt* authorizes abortion doctors to assert the *Roe-Casey* rights of prospective patients.[2] Instead, Supreme Court and Circuit precedent make clear that Hopkins lacks standing to assert future patients' *Roe-Casey* rights.

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[2] Although a *Hellerstedt* dissent raised third-party standing, 136 S.Ct. at 2321-23 (Thomas, J., dissenting), the majority was silent on standing. Accordingly, *Hellerstedt* is non-precedential on the issue: "drive-by jurisdictional rulings of this sort … have no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998).

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1. Current third-party standing law does not support Hopkins' right to raise future patients' *Roe-Casey* rights.

While EFELDF does not dispute that physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Hopkins and *future* abortion patients. An "*existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski*, 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Hopkins lacks third-party standing to assert *Roe-Casey* rights.

Further, the instances where federal courts have found standing for abortion doctors involve laws that apply equally to *all abortions* and to *all abortion doctors*, so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Hopkins presses his idiosyncratic and subjective views.

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For example, although abortion patients overwhelmingly prefer pre-dismemberment demise of the fetus and many abortion providers concur, not only to diminish emotional anguish by patients, but also to lower complications and facilitate removal of the fetus, Appx. 186, 191, 211-12, 242, Hopkins will not consider transecting umbilical cords to cause pre-dismemberment demise because he subjectively believes that – notwithstanding the law's scienter requirement – the accidental dismemberment of a fetus while attempting to transect the umbilical cord could trigger liability. Section II.B.2, *infra*. Here, then, all abortion doctors do not share the same interests as future abortion patients, and Hopkins does not share the same interests as all abortion doctors. Without an identity of interests between Hopkins and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.[3]

2. Whether or not Arkansas's failure to raise third-party standing constitutes waiver, this Court can raise the issue *sua sponte*.

Like Texas in *Hellerstedt*, Arkansas has not questioned Hopkins' third-party

[3] The abortion industry sometimes cites Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321 (2000) to support third-party standing. To the contrary, the law review article recognizes that its exceptions to third-party standing arise in First Amendment "overbreadth" cases and instances when *state-court appeals* reach the U.S. Supreme Court. *Id.* at 1359-60 & n.196; *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Those circumstances are obviously not present in an abortion case initiated in federal court.

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standing on appeal. The circuits are split on whether prudential limits on justiciability – such as third-party standing – are waivable, *compare Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) *with Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994), and it is not clear that *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386-88 (2014), resolved that split. *Lexmark* concerned the jurisdictional versus prudential status of the zone-of-interest test applied to whether a party had a statutory cause of action, *id.*, but that does not answer the question whether third-party (or *jus tertii*) standing is jurisdictional and thus non-waivable.

Even if waiver applied to *the parties*, however, that would not limit *this Court's* authority to raise prudential limits *sua sponte*: "even in a case raising only prudential concerns, the question … may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003). On questions of *judicial* restraint, the parties obviously cannot bind the judiciary: "To the extent that questions … involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). *Amicus* EFELDF respectfully submits that this Court both can and should evaluate Hopkins' right to assert third-party rights.

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3. Hopkins cannot assert *Roe-Casey* rights, even if Hopkins has economic standing to challenge Arkansas's regulation of Hopkins' business.

When a party – like Hopkins here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, the party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, [Metropolitan Housing Development Corporation] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 438 (1983) ("lines drawn … must be reasonable"). For example, this Circuit has held that economic and aesthetic injuries do not authorize nonresidents to raise the equal-protection and due-process rights of residents to vote for a trolley district. *Glickert*, 792 F.3d at 880-82. Like the development corporation in *Arlington Heights* and the nonresidents in *Glickert*, Hopkins would need to proceed under the rational-

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basis test (*i.e.*, without the elevated scrutiny afforded to third-party rights holders), if he were to proceed with this litigation. Thus, depending on the resolution of the third-party standing issue, this Court might not need to apply *Hellerstedt* at all.

B. Hopkins lacks the credible threat of future enforcement required to support Article III jurisdiction and thus *a fortiori* lacks the irreparable harm required for injunctive relief.

In several instances, the preliminary injunction rests on Hopkins's subjective fears of prosecution under his own flawed reading of the relevant Arkansas statutes.[4] Because standing requires a "credible threat" of enforcement, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), Hopkins's subjective fears would not qualify here unless objectively reasonable.

Under Circuit law, the "mere possibility of being named a defendant … does not constitute the actual controversy which is required." *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir. 1996); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) (dismissing a claim for lack of ripeness, holding that "if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged"). In *Gopher Oil*, the plaintiff brought its lawsuit "in expectation that it would be named a defendant" in another lawsuit, which this Court held did not meet

[4] *See* Sections II.B.2, II.C, *infra*.

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Article III's minimum jurisdictional requirements.

But even if Hopkins' subjective fears of future prosecution somehow satisfied Article III, they would not meet the higher standard of irreparable injury required for preliminary injunctions. Although the irreparable-harm and standing inquiries overlap, *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995), plaintiffs must show even more to establish irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010) (Article III injuries can nonetheless fail to qualify under the higher bar for irreparable harm). Even if Hopkins had standing, he could not establish irreparable injury from the hypothetical injury that it poses here.

"In suits such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury." *Morales v. TWA*, 504 U.S. 374, 382 (1992). Mere "conjectural injury cannot warrant equitable relief," *id.*, so "the injunction must be vacated insofar as it restrains the operation of state laws with respect to … matters" that Arkansas has not "threatened to enforce." *Id.* at 383. Federal courts cannot address mere hypotheticals:

> Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to *determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable*.

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Id. at 382-83 (emphasis added). And yet that it precisely what the district court did.

C. Alternatively, Hopkins' challenge is not ripe.

As an alternative to finding that Hopkins lacks standing, this Court could find his claims unripe for review: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted); *accord KCCP Tr. v. City of N. Kan. City*, 432 F.3d 897, 899 (8th Cir. 2005). The ripeness doctrine seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977). Especially where Arkansas disputes Hopkins' interpretations of the underlying Arkansas statutes, it may be premature to litigate Hopkins' subjective fears and interpretations.

II. HOPKINS HAS NOT ESTABLISHED A LIKELIHOOD OF PREVAILING ON THE MERITS.

A plaintiff's likelihood of prevailing on the merits is the most important issue for a preliminary injunction, *Rounds*, 530 F.3d at 731-32, and plaintiffs bear the burden of proof. *Id.* at 735-36. Hopkins has not met that burden.

A. The district court fundamentally misunderstood and misapplied *Hellerstedt*.

Before addressing the four specific Arkansas statutory programs at issue here, it is worth considering the *Hellerstedt* holding and the standards that courts must use

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to analyze governmental regulation of *Roe-Casey* rights. Simply put, the district court misunderstood *Hellerstedt* and thus misapplied that precedent by refusing to consider Arkansas's evidence under the undue-burden test. *Hellerstedt* amended the *Casey* undue-burden analysis to include a balancing test, *Hellerstedt*, 136 S.Ct. at 2309, but did not otherwise significantly alter *Roe-Casey* rights. Under Circuit precedent, "[t]he question … is whether [an abortion] requirement's benefits are substantially outweighed by the burdens it imposes on … women seeking [an] abortion." *Jegley I*, 864 F.3d at 960 n.9. Before applying this standard to the abortion provisions at issue here, this subsection analyzes both the undue-burden test and *Hellerstedt*.

1. *Hellerstedt* merely amended *Casey* to require balancing in undue-burden analyses.

Under *Casey* as modified by *Hellerstedt*, "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S.Ct. at 2309. That minor change did not entitle the district court to ignore Arkansas's evidence or shift the burden of proof from Hopkins to Arkansas.

2. *Hellerstedt* did not narrow the undue-burden analysis to consider only women's health benefits and did not switch the burden of proof to government defendants.

As indicated, *Hellerstedt* merely required that the undue-burden analysis weigh a law's benefits versus its burden on women's *Roe-Casey* rights. *Hellerstedt*, 136 S.Ct. at 2309. *Hellerstedt* did not narrow that weighing analysis to consider only

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women's health benefits or switch the burden of proof to governmental defendants.

Before considering Arkansas's plight here, it is worth considering how fate conspired against Texas in *Hellerstedt*. In *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F. 3d 583 (5th Cir. 2014), the Fifth Circuit rejected the very balancing that *Hellerstedt* later required: "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Whole Woman's Health v. Lakey*, 769 F.3d 285, 297 (5th Cir. 2014) (*citing Abbott*, 748 F.3d at 593-94, 597). Indeed, in *Abbott*, it was Texas that submitted evidence "that the admitting-privileges requirement will reduce the delay in treatment and decrease health risk for abortion patients with critical complications" and the abortion industry that "had not provided sufficient evidence that abortion practitioners will likely be unable to comply with the privileges requirement." *Hellerstedt*, 136 S.Ct. at 2301 (interior quotations omitted). In the follow-on *Hellerstedt* litigation over the same Texas law, however, it was Texas that failed to submit undue-burden evidence that *Abbott* had already found irrelevant.[5]

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[5] *Hellerstedt* repeatedly finds that Texas failed to submit evidence on key issues under the undue-burden test as modified by *Hellerstedt*. 136 S.Ct. at 2311-12 ("We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health," and "when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case"); *id.* at 2313 ("dissent's speculation that perhaps other evidence, not presented at trial

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The failure by Texas to submit evidence in *Hellerstedt* – for whatever reason – cannot possibly have a preclusive effect on a different state in this separate litigation, involving different regulations. Indeed, in extricating the abortion industry from the preclusive effects of *Abbott*, the *Hellerstedt* majority issued a paean to due process. *See* 136 S.Ct. at 2304-09. Under due process, "[i]n no event … can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998). *Hellerstedt* itself acknowledged the weakness of *stare decisis* for holdings reached by a party's waiver of an issue, 136 S.Ct. at 2320, and "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Unlike in *Hellerstedt*, the courts here must contend with the evidence that Arkansas proffers to support its laws.

Significantly, *Hellerstedt* concerned maternal health in the form of abortion facilities' proximity to a hospital and the standards for their physical plant. 136 S.Ct. at 2300 (discussing Texas admitting-privilege and ambulatory-surgical-center laws). Consequently, the only evidentiary issues weighed in *Hellerstedt* concerned

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or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue"); *id.* at 2316 (the "upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion").

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women's health, because women's health was the only factual dispute. Accordingly, the Court weighed the health-related pluses and minuses of the two maternal-health provisions at issue in *Hellerstedt* for Texas women's *Roe-Casey* rights.

That narrow focus on health in *Hellerstedt* does not translate over to all other abortion-related litigation under the undue-burden test. Put another way, an Arkansas fetus torn apart or adolescent whose abusing guardian escapes detection does not care about the facility in which those injuries occur or its proximity to a hospital. The relevant state and public interests – in fetal life or law enforcement – are distinct from an abortion patient's health-related interest in safe access to abortions, but nothing in *Hellerstedt* prohibits courts from including non-health benefits in the *Hellerstedt* balancing. Indeed, removing those other important state and public interests from the analysis would *sub silentio* have overruled *Casey* and *Gonzales*, *see Casey*, 505 U.S. at 886 ("under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest"), which would be preposterous for a decision that took the Fifth Circuit to task for not following *Casey*.

B. Barring death-by-dismemberment abortions does not impose an undue burden on *Roe-Casey* rights.

When this Court properly evaluates Arkansas's death-by-dismemberment ban by weighing the ban's various benefits against its burdens on *Roe-Casey* rights and disregards Hopkins' idiosyncratic objections, the ban clearly survives Hopkins'

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facial challenge. Quite simply, the ban's benefits are not "*substantially* outweighed by the burdens it imposes." *Jegley I*, 864 F.3d at 960 n.9 (emphasis added). Indeed, as explained below, it is not even clear that the ban's benefits are outweighed *at all*. In any event, Hopkins has not met his burden of proving the substantiality of the burden that Arkansas has imposed vis-à-vis the benefits.

1. Several permissible and sufficient benefits arise from Arkansas' barring death-by-dismemberment abortions.

Although the district court considered only the ban's health-related benefits to pregnant women, Add. 43, 55-56, the *Casey* analysis upheld in *Hellerstedt* allows states to press *non-health* interests: "under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, *even if those measures do not further a health interest*." *Casey*, 505 U.S. at 886 (emphasis added). As demonstrated by *Gonzales* with respect to partial-birth abortions, there is ample room within the undue-burden test for restrictions like Arkansas's ban. But in addition to those ethical concerns, there is also a health-based case for ensuring pre-dismemberment demise of the fetus, both for the pregnant woman's emotional well-being and for the ease of removal of the fetus. These two strands of benefits suffice to meet the *Casey-Jegley I* test.

First, in upholding the federal ban on partial-birth abortions, the Supreme Court has already used the same analysis to uphold a procedure that is "indistinguishable" in its brutality. *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000)

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(Kennedy, J., dissenting); *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting). While that alone would suffice for the reasons pressed by Arkansas, *see* Ark. Br. 29-41, it bears emphasis that the ban does not *bar* second-trimester abortions: it merely requires the doctor to ensure the fetus's pre-dismemberment demise, as opposed to tearing the living fetus apart.

Second, in addition to those ethical issues, ensuring pre-dismemberment demise is overwhelmingly preferred by abortion patients, with many providers' concurring not only for patients' emotional benefit, but also because pre-dismemberment demise lowers complications and facilitates removal of the fetus. Appx. 186, 191, 211-12, 242; *cf. Gonzales*, 550 U.S. at 159-60 (describing a "self-evident … struggle with grief more anguished and sorrow more profound" from appreciating, after the fact, the particulars of partial-birth abortion). The health-based benefits of pre-dismemberment demise alone justify Arkansas's ban.

Finally, because the undue-burden test requires balancing, it bears emphasis that the burdens imposed are slight. *See* Ark. Br. 37-41. As such, the burdens do not rise to the substantial level required by *Casey* and *Jegley I*.

2. Hopkins' subjective views cannot narrow the issues properly before the Court.

Arkansas's death-by-dismemberment ban includes a scienter requirement that applies only where the doctor *purposely* kills a fetus by dismemberment. *See* ARK. CODE ANN. 20-16-1803(a). For that reason, federal courts should not credit Hopkins'

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unfounded, subjective concern that he might accidentally pinch the fetus when trying to transect an umbilical cord. Add. 54, 58. Given the simplicity and speed of the transection process, Appx. 258-60, 335, as well as its safety, *id.* 247, 485, 501-502, the district court should not have credited the legal analysis of a non-lawyer (Hopkins) on the issue of whether accidental dismemberment while attempting transection violates Arkansas's ban. *See Gonzales*, 550 U.S. at 149-50 ("scienter requirements alleviate vagueness concerns … [and] narrow the scope of the Act's prohibition and limit prosecutorial discretion"); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 535 (8th Cir. 1994) ("strict scienter requirement … adequately notifies physicians that certain conduct is prohibited"). Hopkins' self-serving concerns are neither credible nor creditable.

3. Hopkins has not made the showing required in a facial challenge.

Hellerstedt relied on the *Casey* large-fraction test over the *Salerno* no-set-of-circumstances test to determine the viability of a facial challenge. *Hellerstedt*, 136 S.Ct. at 2320; *compare Casey,* 505 U.S. at 895 *with U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Under that test, the "relevant denominator is those women for whom the provision is an actual rather than an irrelevant restriction," and the facial challenge can proceed where the resulting fraction is sufficiently large. *Hellerstedt*, 136 S.Ct. at 2320 (alterations and internal quotations omitted). Here, the fraction is quite small,

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probably less than *one tenth* from digoxin alone.[6] Accordingly, even if this Court accepts Hopkins' idiosyncratic concerns about the transecting umbilical cords, there is no basis for Hopkins to prevail in a facial challenge.

C. Neither Hopkins nor the district court can make a constitutional case out of Hopkins' idiosyncratic interpretation of Arkansas's sex-selection or tissue-disposal requirements.

The district court enjoined enforcement of both Arkansas's sex-selection and tissue-disposal laws based on Hopkins' interpretation of the legal requirements, notwithstanding the lack of enforcement and Arkansas's disagreement with Hopkins and the district court over the requirements at issue. *See* Ark. Br. 44-46 (Hopkins and the district court find injury under a less-obvious reading of sex-selection law); 52-53 (Hopkins and the district court ignore the statutory option allowing one parent to exercise disposition rights). These two claims are precisely the kind of "first strike" claims for which mere "conjectural injury cannot warrant equitable relief." *TWA*, 504 U.S. at 382; *see* Section I.B, *supra*. "Any other rule … would require federal courts to determine the constitutionality of state laws *in hypothetical*

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[6] Hopkins is not the only doctor who performs second-trimester abortions, Add. 9, many other doctors consider pre-dismemberment demise preferable for both the pregnant woman's emotional health and the ease of removal of the fetus, Appx. 186, 191, 211-12, 242, it is unknown whether the other doctors share Hopkins' idiosyncratic concerns about transecting umbilical cords, digoxin had an efficacy of 90-95 percent, *id.* 113, and any physician with an OB-GYN residency can cause pre-dismemberment demise by transecting the umbilical cord, typically within five minutes. *Id.* 258-60, 335.

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situations where it is not even clear the State itself would consider its law applicable." *Id.* at 382-83 (emphasis added). The district court should not have entertained these claims, and this Court cannot affirm the injunctive relief on them.

D. Extending the Arkansas Child Maltreatment Act's police-reporting and tissue-preservation requirements up to age 16 does not pose an undue burden on *Roe-Casey* rights or violate privacy rights.

Relying on both *Hellerstedt* and constitutional privacy rights, the district court also enjoined the Arkansas Child Maltreatment Act's police-reporting and tissue-preservation requirements up to age 16. ARK. CODE ANN. §12-18-108. Accepting Doctor Hopkins' infallibility in the field of criminal investigation, the district court fancifully constructed a class of "Non-CMA Teenage Patients" consisting of "those 14 to 16 year old women who become pregnant through consensual sexual intercourse with, for example, a teenager of the same age" for whom the law "serves no valid state purpose." Add. 98. *Amicus* EFEDLF fully supports Arkansas's defense of its laws, Ark. Br. 54-57, and further defends Arkansas law under the substantive criminal laws implicated here, the criminal-law concepts of probable cause and affirmative defenses, and common sense.

In Arkansas, rape includes intercourse not only with someone under fourteen, ARK. CODE ANN. §5-14-103(a)(3)(A), but also – where a guardian or family member is involved – with any minor. *Id.* §5-14-103(a)(4)(A). In both situations, consent is not a defense, *id.* §5-14-103(b), although being within three years of the victim's age

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is an affirmative defense. *Id.* §5-14-103(a)(3)(B), 5-14-103(a)(4)(B). The consensual nature of intercourse is thus obviously irrelevant to the crime, but – for purposes of probable cause – so too is the district court's presumption about the similarity in age.

Two facets of probable cause are relevant when a minor is pregnant. First, the concept of probable cause is liberally construed for *possibilities*, not certainties:

> "Reasonable or probable cause exists where there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that a crime has been committed…. In assessing the existence of reasonable or probable cause, our review is liberal and is guided by the rule that probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction.

Jones v. State, 348 Ark. 619, 631, 74 S.W.3d 663, 671 (Ark. 2002) (citations omitted); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause means "a fair probability that … evidence of a crime will be found in a particular place"). "In dealing with probable cause … as the very name implies, we deal with probabilities." *U.S. v. Reed*, 733 F.2d 492, 502 (8th Cir. 1984) (*quoting Brinegar v. U.S.*, 338 U.S. 160, 175 (1949)). "These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* (same). Law enforcement may proceed to investigate possible crimes without certainty.

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Second, the existence of an *affirmative defense* is wholly irrelevant to the existence of probable cause: "It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses." *U.S. v. Sisson*, 399 U.S. 267, 287-88 (1970), *superseded in part on other grounds by* PUB. L. NO. 91-644, 84 Stat. 1890 (1971); *accord Foucha v. Louisiana*, 504 U.S. 71, 103 (1992) ("an affirmative defense … does not negate the State's proof, but merely exempts the defendant from criminal responsibility") (interior quotations and alterations omitted). Thus, as a mere affirmative defense, Hopkins' beliefs about same-age sex – however sound – simply do not negate probable cause.

Amicus EFELDF respectfully submits that law enforcement has every right *at least to suspect* any parent or guardian that seeks to hide underage pregnancy and abortion from law enforcement. Rather than create a fanciful class of those for whom probable cause exists but who are nonetheless somehow *known* to be innocent, it would be better to divide parents or guardians of pregnant girls under 17 into those who voluntarily cooperate with law enforcement and those who do not. With the second group, there can be no right of privacy with probable cause of a crime.

III. THE OTHER *DATAPHASE* FACTORS FAVOR ARKANSAS.

Although this Court need not pursue the *Dataphase* analysis beyond Hopkins' unlikelihood of prevailing on the merits, the remaining three factors point strongly against a preliminary injunction.

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First, Hopkins cannot establish standing, much less irreparable harm's higher showing. *See* Section I.B, *supra*. That alone requires vacating the injunction. *Dataphase*, 640 F.2d at 114, n.9 ("the absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction"); *Mid-America Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 972 (8th Cir. 2005) (a preliminary injunction "must be dissolved if the district court's findings of fact do not support the conclusion that there is a threat of irreparable harm").

Second, the balance of equities favors Arkansas because the district court failed to analyze the merits properly, Section II, *supra*, and thus failed to consider the injunction's intrusion upon legitimate governmental authority.

Third, and similarly, in litigation challenging government action, the public-interest criterion collapses into the merits. 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2948.4 (2d ed. 1995 & Supp.). "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief affecting competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Accordingly, the public-interest criterion can deny

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preliminary relief in government-action cases, even when that relief otherwise might issue in purely private litigation.

CONCLUSION

This Court should vacate the injunction.

Dated: December 11, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,500 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

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Dated: December 11, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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Dated: December 11, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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I hereby certify that, on December 11, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit via the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: December 11, 2017 Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund