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

FREDERICK W. HOPKINS,

PLAINTIFF,

v. **No. 4:17-CV-00404-KGB**

LARRY JEGLEY, et al.,

DEFENDANTS.

DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

Almost three-and-a-half years ago, this Court preliminarily enjoined four commonsense abortion regulations. Those laws: bar killing an unborn child by slicing its limbs off so that it slowly bleeds to death; require the respectful treatment of human remains; ban the disgraceful practice of killing unborn children (practically speaking, almost always unborn girls) solely on the basis of their sex; and protect young girls, whom undisputed evidence shows are most at risk for sexual assault, from sexual predators. The State immediately appealed.

In the three years since Arkansas appealed, Frederick Hopkins has done absolutely nothing in this Court. *Cf.* Doc. 66 at 2 n.1 (noting that only the preliminary injunction was the subject of Arkansas's appeal). Nevertheless, around 6:30 PM on the Friday before Christmas, Hopkins sought expedited leave to amend his complaint. Doc. 65. Then, at 8:00 AM the next business day (today), without any communication with Defendants, this Court ordered them to respond to Hopkins's motion for leave to amend six hours later, by 2:00 PM that same day. Doc. 67. And although the Eighth Circuit's mandate vacating this Court's 2017 preliminary injunction has not yet issued, *see Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020), *reh'g en banc den.*, 968 F.3d at 912 n.* (Dec. 15, 2020), this Court set a hearing for the Tuesday before Christmas, apparently based on Hopkins's representation that he would seek a temporary restraining order,

which he delayed filing until 9:50 AM this morning—after this Court had already scheduled a hearing. *See* Doc. 70.

Hopkins offers no excuse for his three-and-half-year delay in seeking to bring this case to a final resolution. Nor does he explain why defendants should be required to respond—within hours—to a complaint that was apparently drafted over years by him and a team of lawyers from O'Melveny & Meyers (a firm of 750 lawyers[1]), the ACLU, the Center for Reproductive Rights, and two Little Rock law firms. Indeed, he does not claim that any mother will be denied an abortion if this Court does not immediately grant him leave to amend. Perhaps worst of all, he nowhere explains how his request for leave to amend is consistent with the limited nature of the Eighth Circuit's mandate in this case: to reconsider the current preliminary-injunction record in light of *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), and *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019). Faced with similar attempts by litigants like Hopkins "to circumvent a binding, unfavorable opinion," the Eighth Circuit has not hesitated to exercise its mandamus jurisdiction "to enforce" the terms of its "prior mandate to prevent evasion." *In re MidAm. Energy Co.*, 286 F.3d 483, 486, 488 (8th Cir. 2002) (quotation marks omitted).

The supposed emergency justifying expedited amendment here is entirely of Hopkins's own creation and amounts to the same sort of "procedurally suspect" maneuvering that the Eighth Circuit criticized in a separate case involving Hopkins's employer, Little Rock Family Planning Services, which he seeks to add as a plaintiff here. *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020). Indeed, like Hopkins's employer's actions there, his latest filings here appear to be part of a troubling pattern of seeking emergency relief near important religious occasions. *See*

[1] https://www.omm.com/omm_distribution/about_us/2020_omelveny_facts.pdf

Decl. of Leah Godesky, *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-CV-00449-KGB (E.D. Ark. Apr. 13, 2020), Doc. 134-18 (attesting to LRFP's demand—sent at 4:15 PM on Easter Sunday—that Arkansas suspend health-and-safety regulations combatting COVID-19), *writ of mandamus issued, TRO dissolved*, *In re Rutledge*, 956 F.3d at 1033; *see also Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-CV-00784-KGB (E.D. Ark. Dec. 28, 2015), Doc. 2 at 1 (seeking emergency TRO around Christmas 2015), *preliminary injunction vacated*, *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 961 (8th Cir. 2017). This Court should deny his current expedited request for leave to amend.

ARGUMENT

The Eighth Circuit authorized this Court only to apply *June Medical* and *Box* to the existing preliminary-injunction record—not to conduct any other proceedings.

Unanimously vacating this Court's 2017 preliminary injunction, the Eighth Circuit remanded this case for a limited purpose: to "reconsider[]" the injunction "in light of Chief Justice Roberts's separate opinion in *June Medical*, which is controlling, as well as the Supreme Court's decision in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, — U.S. —, 139 S. Ct. 1780 (2019) (per curiam)." *Hopkins*, 968 F.3d at 916. That limited mandate does not authorize this Court to reopen the 2017 preliminary-injunction record. This Court should not allow Hopkins to introduce new evidence or seek any new relief—let alone allow him leave to amend, which would dramatically change his complaint to fill obvious standing and evidentiary gaps. Conducting any proceedings beyond simply applying *June Medical* and *Box* to the record as it currently stands would "amount[] to a judicial usurpation of power, or a clear abuse of discretion." *In re Rutledge*, 956 F.3d at 1025 (quotation marks omitted); *see In re MidAm. Energy Co.*, 286 F.3d at 486 ("A federal court's power to utilize mandamus to enforce its prior mandate is firmly estab-

lished."); *see also* Wright & Miller, *Federal Practice & Procedure* sec. 4478.3 n.11 & accompanying text (2d ed., Oct. 2020 update) (collecting authority to show that enforcing an appellate court's mandate "is one of the most nearly routine uses of this 'extraordinary writ'").

"On remand, a district court is bound to obey strictly an appellate mandate." *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *see Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948) ("[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court."). That includes strictly obeying any limits the appellate court places on the district court's power to conduct further proceedings, a principle the Eighth Circuit has often announced in cases involving a remand for resentencing. *See United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995) ("When an appellate court remands a case to the district court, . . . the district court on remand must 'adhere to any limitations imposed on its function at resentencing by the appellate court.'" (quoting *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992))). But the principle of strict obedience to the limitations in the Eighth Circuit's mandate applies in all cases, not just ones about resentencing. *Compare, e.g.*, *Duncan Energy Co. v. U.S. Forest Serv.*, 109 F.3d 497, 500 (8th Cir. 1997) (vacating summary judgment entered pursuant to prior Eighth Circuit mandate because district court strayed from strict obedience), *with, e.g.*, *Children's Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 870 (8th Cir. 2004) (holding that, where Eighth Circuit remanded "for a 'new trial limited to damages,'" district court correctly refused to consider "willfulness and maliciousness" on remand, despite the relevance of these considerations to whether plaintiffs were entitled to double damages).

Here, that means this Court must strictly obey the Eighth Circuit's mandate "for reconsideration" of "the district court's preliminary injunction"—*i.e.*, the 2017 injunction—in light of *June Medical* and *Box*. *Hopkins*, 968 F.3d at 916. The Eighth Circuit gave this Court "explicit

. . . instructions to hold further proceedings" but also explicitly limited those proceedings to re-consideration of the 2017 injunction. *Bethea*, 916 F.2d at 456. This Court, therefore, "was merely directed to execute the Eighth Circuit's mandate": apply two new, controlling decisions to the existing record. *Id.* at 457. Conducting any other proceedings could justify an "extraordinary remedy." *In re MidAm. Energy Co.*, 286 F.3d at 486.

MidAmerican Energy demonstrates the Eighth Circuit's commitment to its "duty to enforce [its] prior mandate to prevent evasion"—in particular by reshaping the case through an amended complaint. *Id.* (quotation marks omitted). That case arose from a dispute between a public power district and an energy company. *Id.* at 484. In a federal lawsuit, the district court held that an agreement between the two required the company to pay the district. *Id.* at 485. On appeal, the Eighth Circuit reversed and remanded for the sole purpose of conducting a trial on one counterclaim brought by the energy company. *Id.* Despite that narrow mandate, the district court on remand allowed the public power district to file an amended complaint. *Id.* at 486. The energy company filed a petition for a writ of mandamus, seeking to avoid litigating the claims in the district's amended complaint. *Id.* Because those claims "should[] have been raised earlier," the Eighth Circuit held that it was "inappropriate to consider them on remand." *Id.* at 488.

Hopkins, like the power district in *MidAmerican Energy*, may wish to "retrofit [his] complaint to circumvent a binding, unfavorable opinion." *Id.* But this Court should not allow him to do so. It must strictly obey the Eighth Circuit's mandate by applying *June Medical* and *Box* to the record underlying the 2017 injunction. Anything else would be error. *See Bethea*, 916 F.2d at 457 ("Therefore, the district court erred in holding further proceedings and deviating from the mandate of the Eighth Circuit.").

CONCLUSION

This Court should deny Hopkins's motion for leave to file a first amended complaint.

Dated: December 21, 2020

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI (2016097)
Arkansas Solicitor General
VINCENT M. WAGNER (2019071)
Deputy Solicitor General
MICHAEL A. CANTRELL (2012287)
Assistant Solicitor General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
vincent.wagner@arkansasag.gov

Counsel for Defendants