No. 20-5969

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH; PLANNED PARENTHOOD OF TENNESSEE AND NORTH MISSISSIPPI; KNOXVILLE CENTER FOR REPRODUCTIVE HEALTH; FEMHEALTH USA, INC.; DR. KIMBERLY LOONEY; DR. NIKKI ZITE,

Plaintiffs-Appellees,

v.

HERBERT H. SLATERY III; LISA PIERCEY, M.D.; RENE SAUNDERS, M.D.; W. REEVES JOHNSON, JR., M.D.; HONORABLE AMY P. WEIRICH; GLENN R. FUNK; CHARME P. ALLEN; TOM P. THOMPSON, JR.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee
(No. 3:20-cv-00501)

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are scholars with expertise in constitutional law, including the law with respect to when government regulation impermissibly burdens a woman's constitutionally-protected right to choose to terminate a pregnancy. As such, they have a shared interest in identifying the proper standards applicable to abortion regulations. This brief sets forth *amici*'s considered understanding of the legal framework governing abortion regulation, as established by the decisions of the U.S. Supreme Court.

Amici include the following scholars:[2]

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[1] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to its filing. Pursuant to Rule 29(a)(4)(E), undersigned counsel certify that this brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief.

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SUMMARY OF ARGUMENT

For more than 45 years, the Supreme Court has recognized that the right to privacy, rooted in the Fourteenth Amendment, "encompass[es] a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). The central tenet of *Roe* and its progeny is that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion). This is because "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 846. The Supreme Court has never wavered from this essential holding. *See, e.g.*, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

Notwithstanding this unbroken line of unambiguous precedent, Tennessee enacted two sets of pre-viability abortion bans in House Bill 2263 / Senate Bill 2196 (the "Act"), which prohibits abortions (except in cases of medical emergency) (1) that are performed after fetal cardiac activity is detected and at a series of later points in the pregnancy (the "Cascading Bans") or (2) where the physician "knows" the woman is seeking an abortion "because of" the fetus's purported sex, race, or "a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for

Down syndrome" (the "Reason Bans"). Act §§ 39-15-216(c), (h), 39-15-217(b)–(d)) It is undisputed that both the Cascading Bans and the Reason Bans prohibit abortions prior to viability. Under controlling Supreme Court precedent, that is unlawful, and the end of the matter.

This result is not only required by the Supreme Court's controlling precedents concerning a woman's right to choose to terminate her pregnancy, but also consistent with its decisions in other contexts holding that categorical bans that eviscerate the core of a constitutional right are impermissible. Although it has determined that the right of a woman to terminate her pregnancy, like other fundamental rights, is not unfettered, the Supreme Court has consistently held that categorical bans are flatly unconstitutional because of the underlying values that a fundamental right protects. Under the Court's extant precedents, no State interest can justify a pre-viability ban.

Further, the Court should also affirm the district court's conclusion that the State's medical emergency affirmative defenses, contained within both the Cascading Bans and the Reason Bans, are unconstitutionally vague. The position the State takes—that the void-for-vagueness doctrine does not apply to non-penal statutes—has been expressly rejected by the Supreme Court, and is also irrelevant in this circumstance, where the affirmative defenses are written into the statutory text of the Cascading and Reason Bans. The State's argument conflicts with the constitutional principles underlying the void-for-vagueness doctrine, and the Court

should reject it.

For these reasons, explained in more detail below, the district court properly held that the Cascading Bans and the Reason Bans are unconstitutional. This Court should affirm.

ARGUMENT

I. The Right of Women to Make the Ultimate Decision About Whether to Have an Abortion Before Fetal Viability Is Clearly Established by Supreme Court Precedent and Is the Core of the Abortion Right.

Supreme Court precedent could not be clearer: During the period prior to fetal viability, a woman has the right to make the ultimate decision about whether to continue a pregnancy. The Supreme Court has described this right as "the most central principle of *Roe v. Wade*." *Casey*, 505 U.S. at 871; *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring) (noting *Casey*'s reaffirmation of this "central principle"); *Hellerstedt*, 136 S. Ct. at 2320 ("[W]e now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health."); *Gonzales v. Carhart*, 550 U.S. at 146 ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" (quoting *Casey*, 505 U.S. at 879)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" holding that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)); *Roe*, 410 U.S. at 163

(explaining that, prior to viability, doctors and patients are "free to determine, without regulation by the State" that abortion is the appropriate course of action). As it must, the State has acknowledged the validity of this "essential holding" of *Roe*. *See* Appellants' Br. 46–47.

Although states may regulate abortion, they may impose only those restrictions that do not unduly burden a woman seeking one, and may not impose any restriction that amounts to a ban on that right prior to viability. Even where a state enacts a restriction on abortion after viability, it cannot ban abortions entirely—it must provide exceptions for a woman's life or health. *See Casey*, 505 U.S. at 846 (confirming "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"); *see also EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 795, 811–12 (6th Cir. 2020) (permanently enjoining Kentucky's ban on D&E abortions, noting that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability" (internal citation and quotations omitted)).

In other words, prior to the time when the fetus is viable, the Supreme Court has already determined that any type of ban imposes an "undue burden," and it has held that *no* state interest could justify such a ban. *See Casey*, 505 U.S. at 846

("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."); *see also Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) ("[A] ban [on abortions prior to viability] is unconstitutional under Supreme Court precedent without resort to the undue burden balancing test."). During that time period, the State cannot justify taking away women's choice to terminate a pregnancy, one of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. The ability to make the ultimate decision to terminate a pregnancy before viability implicates the "liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Id.* at 860.[3] For this reason, a "woman's right to terminate her pregnancy before viability . . . is a rule of law and a component of liberty" that the Supreme Court—and this Court—"cannot renounce." *Id.* at 871.

Tennessee's Cascading Bans criminalize the provision of abortion care as

[3] *See also Casey*, 505 U.S. at 852 ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role[.] . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

soon as fetal cardiac activity develops and after 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 weeks of pregnancy. Act §§ 39-15-216(c)(1)–(12), (h). The Reason Bans criminalize the provision of abortion care when the provider "knows" that an abortion is being sought "because of" the race, sex, or Down syndrome diagnosis of the fetus. *Id.* §§ 39-15-217(b)–(d). There is no dispute that both of these state statutory provisions unlawfully ban pre-viability abortions. *See* Appellants' Br. 2-3, 5, 8–9, 50.[4] Under established Supreme Court precedents, this case is over. Given the obligation of lower courts to follow Supreme Court rulings, this Court has no alternative but to affirm the district court's decision invalidating the challenged bans. *See* U.S. Const., art. VI, cl. 2; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (holding that lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); *United States v. Burris*, 912 F.3d 386, 401 (6th Cir. 2019) (stating that because "we are a lower court, [] we must follow" Supreme Court jurisprudence); *Levine v. Heffernan*, 864 F.2d 457, 459 (7th Cir. 1988) ("At the risk of restating the obvious, we note that a lower court must follow a relevant Supreme Court decision.").[5]

[4] Tennessee law currently creates a rebuttal presumption of viability at 24 weeks of gestation and prohibits abortion after viability. Tenn. Code Ann. § 39-15-211(b).

[5] Absent the most unusual of circumstances, even the Supreme Court itself is obliged to follow its own precedents under the doctrine of *stare decisis*. *See Casey*, 505 U.S. at 854–61 ("Within the bounds of normal *stare decisis* analysis

II. The "Cascading Bans" Are a Pre-Viability Ban on Abortion and Therefore Unconstitutional Under an Unbroken Line of Supreme Court Precedent.

In banning abortions as early as fetal cardiac activity is detected—a point in pregnancy that unquestionably precedes viability—the Cascading Bans fall squarely within the ambit of the Supreme Court's extant decisions. "Viability is the critical point," and a state may not "proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." *Colautti v. Franklin*, 439 U.S. 379, 389 (1979).

It is inconsequential that the Cascading Bans do not prohibit *all* pre-viability abortions. By banning abortions at the detection of fetal cardiac activity and various weeks' gestation, the Cascading Bans prohibit women from making the ultimate decision to terminate a pregnancy at many points before viability. The Supreme Court has clearly and repeatedly ruled that *any* pre-viability restrictions that in practice unduly burden access to abortion, even short of outright bans, are unconstitutional. *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2300 (concluding that two Texas laws—which required physicians performing abortions to have admitting privileges at a hospital not more than 30 miles from the location at which the abortion

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. . . the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.").

is performed, and which required abortion facilities to meet the minimum standards set for ambulatory surgical centers—were unconstitutional because they "place[d] a substantial obstacle in the path of women seeking a previability abortion," "constitute[d] an undue burden on abortion access," and thus "violated the Federal Constitution"); *Casey*, 505 U.S. at 895 (invalidating state law requiring married women seeking abortions to sign statement indicating that they had notified their husbands). That principle precludes any ban on abortions, whether the bans start as soon as fetal cardiac activity is detectable or at any period thereafter, if the fetus is not viable.

The State argues that the Court should apply the "undue burden" test because the Cascading Bans are *not* a ban on abortions, but simply a law "regulating previability abortions." Appellants' Br. 50. The State is wrong to equate *regulation* of pre-viability abortions with *bans* on pre-viability abortions. While the State is correct that both *Casey* and *Gonzales* permitted certain pre-viability restrictions, *see* Appellants' Br. 39, 50, these decisions make clear that restrictions could be permissible only if they do not unduly burden a woman's right to choose. *Compare Gonzales*, 550 U.S. at 140, 158 (allowing regulation of *one method* of abortion because it did "not impose an undue burden," relying on the fact that other methods of abortion remained available to women seeking pre-viability abortions), *with Hellerstedt*, 136 S. Ct. at 2310–18 (invalidating admitting-privileges and surgical-

center requirements for abortion facilities because they unduly burdened a woman's right to choose), *and Casey*, 505 U.S. at 879–901 (invalidating state law requiring married women seeking abortions to certify that they had notified their husbands, while approving other regulations that did not unduly burden the right). These decisions, which invalidated some *regulations* on the provision of pre-viability abortions, simply cannot be read to allow a State to *ban* abortions at some points prior to viability and thereby prohibit a woman from making the decision about whether to continue her pre-viability pregnancy. *See Dobbs,* 951 F.3d at 248 (rejecting the assertion that a fetal heartbeat ban is a "law prohibiting certain methods of abortion," not a ban); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (rejecting the assertion that a 12-week ban is a "regulation, not a ban"); *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 542 (S.D. Miss. 2018) ("*Gonzales* upheld the ban of a particular type of abortion procedure when other avenues for pre-viability abortions still existed.").

The State argues that the Cascading Provisions are "reasonably related to Tennessee's legitimate interests." Appellants' Br. 51. But recognizing the importance of a woman's right to choose to have a pre-viability abortion, the Supreme Court has identified—and repeatedly reaffirmed—viability as the critical temporal marker in determining when a State may proscribe abortion. *See supra* Part I. Prior to that point, no government interest can justify a restriction that

amounts to a ban. In stark contrast to the binding precedent that establishes this rule, the Cascading Bans make all methods of pre-viability abortions unavailable to women who do not fall within the Act's very limited exception. This total ban on pre-viability abortions after the detection of cardiac activity and various weeks' gestation is unlawful. The State's attempt to conflate regulations and bans should be rejected as inept, and more importantly unconstitutional, sleight of hand.

III. The "Reason Bans" Are Likewise a Pre-Viability Ban on Abortion and Therefore Unconstitutional Under Established Supreme Court Precedent.

The district court enjoined enforcement of Tennessee's "Reason Bans," *see* Act §§ 39-15-217(b)–(d), because it concluded that those statutory provisions were unconstitutionally vague. This conclusion should be upheld. The Act impermissibly delegates "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Physicians cannot be sure what constitutes "knowledge" of a woman's reasons for seeking an abortion, nor what it means to seek an abortion "because of" a fetus's purported sex, race, or diagnosis, and as a result enforcement will be left to the subjective judgment of individual law enforcement officers. Similarly, because physicians will have no way of knowing how or in what way "knowledge" could be imputed to them, it will inevitably lead them to deny care to any woman whose care conceivably relates to those categories, even in the absence of any clear statement

by the woman herself. These are the hallmarks of an unconstitutionally vague law. *See United States v. Caseer*, 399 F.3d 828, 835 (6th Cir. 2005) ("Vague laws are subject to particular scrutiny when criminal sanctions are threatened or constitutional rights are at risk."); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997) ("[T]he combination of the objective and subjective standards without a scienter requirement renders these exceptions unconstitutionally vague, because physicians cannot know the standard under which their conduct will ultimately be judged.")

More fundamentally, the Reason Bans constitute a categorical prohibition on pre-viability abortions, which is prohibited by *Roe*, *Casey*, and decades of established Supreme Court precedent. *See supra* Part I. It is well established that states cannot ban abortions prior to viability, even when such bans affect only a small number of women or apply only in limited circumstances. *See Isaacson v. Horne*, 716 F.3d 1213, 1217, 1221 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014) (Supreme Court has been "unalterably clear regarding one basic point" that "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable"). Any such pre-viability ban is constitutionally prohibited.

The State has not and cannot present any viable constitutional theory that is consistent with Supreme Court precedent or mainstream constitutional scholarship. If the Court were to hold the Reason Bans constitutionally valid, that ruling would

amount to nothing less than a fundamental reworking of both abortion and discrimination law that directly contradicts established precedent it is obliged to follow.

The State suggests that the Court should ignore this unbroken line of precedent. The State is wrong. The State contends that *Roe*, *Casey*, and its line of cases do not prohibit categorical bans of pre-viability abortions, but in support of that flawed position the State cites, unsurprisingly, only cases *not involving categorical bans*. *See* Appellants' Br. 39. The State could not cite anything different because the Supreme Court has never upheld a categorical ban on pre-viability abortions.[6]

The State also asserts a grab bag of purported interests that it argues justify the Reason Bans. But again, the constitutional precedent is clear: a "[s]tate's interests are not strong enough to support" a pre-viability ban on abortion. *Casey*, 505 U.S. at 846. The State suggests that *Roe* and *Casey* never addressed

[6] For example, the State cites *Gonzales v. Carhart*, 550 U.S. at 149, in support of its proposition. Appellants' Br. 29. But *Gonzales* merely prohibited a particular manner of abortion while expressly recognizing that women would have other options available—no woman was ever prevented from accessing abortion care writ large. 550 U.S. at 140, 158. That is not the case here, where an abortion provider is simply prohibited from providing an abortion at any time for certain women. *Gonzales* reaffirmed the fundamental legal concept that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Id.* (quoting *Casey*, 505 U.S. at 879).

circumstances like those in the Reason Bans. Appellants' Br. 46–47. But they did. *Roe* emphatically rejected the State's view, holding that a woman "is entitled to terminate her pregnancy . . . *for whatever reason she alone chooses*" 410 U.S. at 153 (emphasis added) in the early stage of pregnancy, which *Casey* has further defined to mean the pre-viability period. 505 U.S. at 879. The State's position cannot be reconciled with *Roe*. Further, the State's arguments are wrenched out of context from the viability standard; whatever a state's interests, it is only "[a]t some point in pregnancy[that] these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* at 154. And that point in pregnancy is viability, as fifty years of precedent has consistently held. The State cites no cases that upend this reasoning, and the opinions they do cite are merely concurrences or dissents. *See, e.g.*, Appellants' Br. 44 (citing *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 315 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part)). The State cannot rely only on non-precedential writings by individual judges because the controlling precedent on this issue is decidedly against their position.

The State's proffered interests do nothing to merit revisiting *Casey*'s holding. The State asserts, for example, that it has a legitimate state interest in preventing discrimination. But it is a foundational tenet of Supreme Court jurisprudence,

stretching back to *Roe*, that a fetus is not a person under the Fourteenth Amendment. *See Roe*, 410 U.S. at 158. ("All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."). The State presents no theory of what exactly its interest are, other than gesturing broadly to the concept of "discrimination," let alone explaining why invoking it would alter the constitutional structure of *Casey*.

The State cannot evade the fact that the Reason Bans operate as a categorical ban on pre-viability abortion by pointing to the fact that the Reason Bans only impose penalties on abortion providers that "knowingly" provide abortion care to women seeking an abortion "because of" race, sex, or a Down syndrome diagnosis, Act §§ 39-15-217(b)–(d), and suggesting that women can always access an abortion by simply not telling her doctor her reasons for the abortion, or by traveling to a different provider. The State's argument relies on the predicate that the only way an abortion provider can "know" a woman is seeking an abortion because of one of the prohibited categories is because the woman *tells* the provider. But the State's proposition directly interferes with the doctor-patient relationship. Even women seeking treatment for reasons unrelated to the Reason Bans will inevitably find their physicians afraid to ask too many questions for fear of inadvertently learning the

wrong thing, and the women themselves will have to dance around the issue for fear of accidentally giving their physician the wrong impression about why they are seeking an abortion.

The State's position is also incorrect as a factual matter, since doctors can gain knowledge by any number of ways, as Appellees' evidentiary submissions by providers have established. *See, e.g.*, Pl.'s Reply in Support of PI Ex. 1 (Looney Supp. Decl.) ¶¶ 2–4; Pl.'s Mem. in Support of Mot. for PI Ex. 3 (Zite Decl.) ¶¶ 11–13, and the State has acknowledged that "knowledge" may be proven with circumstantial evidence. Def.'s Opp. to PI. 29. The State's argument that a woman in this situation simply goes to another provider is similarly flawed. Appellants' Br. 45. Even if it were possible to travel to another provider—and in many circumstances, such as when only one provider offers abortions for a woman at a particular stage of pregnancy, it will not be—that would simply add an additional, impermissible burden to the existing ban. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2140 (2020) (Roberts, C.J., concurring) (acknowledging that travel to other clinic can constitute burden).

But even putting that issue aside, the State's argument is irrelevant, because for the group of women who tell their provider their reasons for an abortion, the Reason Bans *still* operate as a categorical ban on those women. *See Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is

a restriction, not the group for whom the law is irrelevant."). Women who do not tell their physician their reasons for an abortion are irrelevant for this analysis. For the group of women whose provider does know she seeks an abortion for one of the proscribed reasons, the Reason Bans "prohibit [those women] from making the ultimate decision to terminate [their] pregnancy before viability." *Id.* at 879. The constitutional analysis should focus on that category of women. And in that case, the prohibitions operate as a complete ban. The State's efforts to recast the Reason Bans do not alter the fundamental fact that, as a result of them, certain women will be prohibited from accessing pre-viability abortions, which as demonstrated above is constitutionally impermissible under Supreme Court precedent. The Court is obligated to reject the State's arguments, and follow the binding precedent.

IV. Categorical Bans That Eviscerate the Core of a Constitutional Right Are Impermissible in Other Contexts.

The unbroken line of Supreme Court precedent establishing categorical protection for a woman's right to terminate her pregnancy prior to viability compels the invalidation of Tennessee's "Cascading Bans" and "Reason Bans." The State nevertheless argues that the categorical approach would "be anomalous in federal constitutional law" and "elevates the right to obtain a previability abortion above other constitutional rights." Appellants' Br. 40.

Such claims are hyperbolic and wrong. A categorical approach is not unique to abortions. The Supreme Court has, in other contexts, invalidated categorical bans

that eviscerate the core of a constitutional right. For example, under the Second Amendment, the Court struck down a prohibition of handguns held and used for self-defense in the home, noting that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Similarly, the Supreme Court struck down bans on certain categories of speech after finding that no government interests are sufficient to justify such bans on speech. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating prohibition on flag-burning); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down a ban on pharmacist advertising of prescription drug prices); *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down certain bans on above-ceiling campaign expenditures); *see also, e.g.*, *Brister v. Faulkner*, 214 F.3d 675, 685 (5th Cir. 2000) (invalidating ban on non-students' distribution of leaflets outside university building); *United States v. Dickinson*, 465 F.2d 496, 500 (5th Cir. 1972) (invalidating blanket ban on publication of court proceedings).

Many constitutional rights under the Fourteenth Amendment likewise prohibit categorical bans. For example, in the context of the constitutional right to marriage, the Supreme Court invalidated categorical bans on interracial marriages, prisoner marriages, and same-sex marriages. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating bans on interracial marriage because there is "patently no legitimate

overriding purpose independent of invidious racial discrimination which justifies [racial] classification"); *Turner v. Safley*, 482 U.S. 78, 99 (1987) (invalidating bans on prisoner marriages because the "almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives"); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (invalidating same-sex marriage ban after determining that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character"). The Court also struck down a Texas statute prohibiting consensual same-sex intercourse, holding that no legitimate state interest could justify the statute's intrusion into individuals' "vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 564, 578 (2003).

Consistent with these precedents, and recognizing the importance of a woman's right to choose to have a pre-viability abortion, the Supreme Court has decided that no government interest can justify a restriction on that right that amounts to a ban. *See supra* Part I. The prohibition on pre-viability bans, like the categorical prohibitions on bans on interracial marriages, prisoner marriages, same-sex marriages, and same-sex sexual intercourse, is a bright-line rule that lower courts are compelled to follow.

Distinguishing between bans and regulations, and applying a categorical rule

to bans, in no way "elevate[s]" the right to obtain a pre-viability abortion above other constitutional rights. *See* Appellants' Br. 40. Although the State may regulate that right if the regulation does not impose an undue burden, a ban on pre-viability abortions plainly exceeds the proper bounds of permitted regulation and is *per se* unconstitutional under unambiguous Supreme Court precedent. Many other constitutional protections are subject to the same rule: while states may regulate rights, they cannot do so in a manner that flatly prohibits the exercise of those rights. For example, in *Virginia State Pharmacy Board.*, 425 U.S. at 771, the Court struck down Virginia's ban on prescription drug price advertising under the First Amendment because the ban "plainly exceeded" "the proper bounds of time, place, and manner restriction on commercial speech." Similarly, in *Turner*, the Court prohibited prison officials from imposing bans on an inmate's decision to marry, even as it noted that prison officials "may regulate the time and circumstances under which the marriage ceremony itself takes place." 482 U.S. at 99. And in *Heller*, the Court indicated that while the Constitution allows the State to impose measures regulating handguns to combat gun violence, it cannot countenance an absolute ban on the possession of handguns held and used for self-defense in the home. 554 U.S. at 636.

Tennessee's "Cascading Bans" and "Reason Bans" unquestionably cross the line of government regulation and impose outright proscriptions that strike at the

core of a woman's pre-viability abortion right. Accordingly, these bans must be struck down.

V. The "Medical Emergency Affirmative Defenses" Are Unconstitutionally Vague.

Both the Cascading Bans and the Reason Bans contain an identical affirmative defense where "in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision." Act §§ 39-15-216(e)(1), 217(e)(1). The district court concluded that this provisions were unconstitutionally vague, applying the Court's decision in *Voinovich*, 130 F.3d 187 (6th Cir. 1997), which struck down a similar exception.

The State argues that *Voinovich* is distinguishable because the provisions at issue here are affirmative defenses, whereas in *Voinovich* the carve-out was an "exception" to the crime's elements. The State maintains that an affirmative defense can never be void for vagueness, arguing that the void-for-vagueness doctrine implicates only "penal statute[s]." Appellants' Br. 32 (internal quotations omitted). The State cites only one federal case, the Ninth Circuit's decision in *United States v. Christie*, 825 F.3d 1048, 1065 (9th Cir. 2016), that it says supports this proposition. Appellants' Br. 32.

The Supreme Court has expressly rejected the argument the State makes here. The void-for-vagueness doctrine, the Supreme Court held, is not limited to statutes defining elements of a crime. *Johnson v. United States*, 576 U.S. 591, 596 (2015)

(applying vagueness doctrine to sentencing provision). Nor does the doctrine implicate only "penal" statutes. As Justice Thomas notes in his concurrence in *Johnson*, the Supreme Court has "struck down laws whether they are penal or not." *Id.* at 612 (internal citations omitted).

This is not surprising. The Supreme Court has never applied the kind of formalistic view of the vagueness doctrine that the State calls for here; it instead has recognized that when vagueness permeates the text of a law "infring[ing] on constitutionally protected rights," then it is "subject to facial attack." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Nor does the State's effort comport with the constitutional reasoning behind the void-for-vagueness doctrine, which is to ensure that individuals' constitutional due process rights are protected by "giv[ing] ordinary people fair notice of the conduct it punishes" and avoiding "arbitrary punishment." *Johnson*, 576 U.S. at 595. Constitutional concerns with fair notice and arbitrary enforcement of a statute do not evaporate because of tricks of draftsmanship or by labeling something an affirmative defense instead of an "exception," as the State does here. All statutes are subservient to the Constitution's protections, regardless of where the statute happens to lie in a particular code.

The sole federal case the State cites says nothing different. In *Christie*, the Ninth Circuit addressed a theory that suggested a provision of the Religious Freedom Restoration Act that amended the full U.S. Code and cut across the nation's criminal

statutes was unconstitutionally vague, rendering "every federal criminal law potentially void for vagueness." *Christie*, 825 F.3d at 1065 n.6. Whatever the merits of that argument—no other circuit appears to have adopted its reasoning—the applicability of *Christie* in circumstances beyond those jeopardizing the enforcement of all criminal laws nationwide is questionable. Even if it does apply more broadly, however, it would not apply here; *Christie* itself recognized that the Supreme Court had voided non-penal codes for vagueness where the statute at issue was analogous to a penal statute and "raised due process concerns just like an ordinary penal law." *Id.* *Christie*'s own carve-out applies here, where, as the district court recognized and the State acknowledges, the law is materially the same as another law already ruled unconstitutionally vague in *Voinovich*. In short, to accredit the State's argument here, the Court would be required to adopt a position already rejected by the Supreme Court and to decline to follow the Court's own precedent in *Voinovich*. It should not—indeed cannot—do so.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the attached brief complies with the type-volume limitations in Federal Rule of Appellate Procedure 29(d) because this brief contains 5,376 words, less than half the amount allowed for a party's principal brief under Federal Rule of Appellate Procedure 32(a)(7)(B)(i), excluding the parts of the brief exempted by Rule 32(f).

Undersigned counsel further certifies that this brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 29 and 32 and Sixth Circuit Rule 32, because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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