No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Plaintiffs-Appellees,

vs.

HERBERT H. SLATERY III, Attorney General of Tennessee, in his official capacity, *et al*.
Defendants-Appellants.

On Appeal from the United States District Court
Middle District of Tennessee, Nashville Division
No. 3:20-cv-00501

BRIEF OF PLAINTIFFS-APPELLEES

Thomas H. Castelli
American Civil Liberties Union
Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel: (615) 320-7142

Attorney for Plaintiffs-Appellees

[Additional Counsel Below]

Jessica Sklarsky
Rabia Muqaddam
Jen Samantha D. Rasay
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3600

Attorneys for Plaintiffs-Appellees Memphis Center for Reproductive Health and Nikki Zite, M.D., M.P.H.

Susan Lambiase
Planned Parenthood Federation
of America
123 William St., 9th Floor
New York, NY 10038
Tel: (212) 261-4749
Fax: (212) 247-6811

Attorney for Plaintiffs-Appellees Planned Parenthood of Tennessee and North Mississippi and Kimberly Looney, M.D.

Brigitte Amiri
Andrew Beck
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2633

Attorneys for Plaintiffs-Appellees Knoxville Center for Reproductive Health and Femhealth USA, Inc.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Memphis Center for Reproductive Health, Planned Parenthood of Tennessee and North Mississippi, Knoxville Center for Reproductive Health, FemHealth USA, d/b/a carafem, Dr. Kimberly Looney, and Dr. Nikki Zite do not have parent corporations. No publicly held corporation owns ten percent or more of Plaintiffs-Appellees' stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees Memphis Center for Reproductive Health ("Choices"), Planned Parenthood of Tennessee and North Mississippi ("PPTNM"), Knoxville Center for Reproductive Health ("KCRH"), FemHealth USA, d/b/a carafem, Dr. Kimberly Looney, and Dr. Nikki Zite (collectively referred to as "Plaintiffs") request oral argument in this case due to the importance of the issues concerning the constitutionality of two sets of abortion bans in Tennessee House Bill 2263 / Senate Bill 2196 (the "Act"): one, which bans pre-viability abortion before most people know they are pregnant, and if that ban is invalidated, at a series of later points in pregnancy, and another, which bans pre-viability abortion based on a patient's reasons for seeking abortion care.

STATEMENT OF THE ISSUES

I. Did the district court properly hold, based on nearly five decades of settled precedent, that Plaintiffs are likely to succeed on the merits of their substantive due process claim against Tennessee's law that bans pre-viability abortion before most people know they are pregnant, and if that ban is invalidated, at a series of later points in pregnancy (the "Cascading Bans")?

II. Did the district court properly hold that Plaintiffs are likely to succeed on the merits of their vagueness claim against Tennessee's law that bans pre-viability abortion based on a patient's reasons for seeking abortion care (the "Reason

Bans") because they fail to give fair notice of what conduct is prohibited while subjecting Plaintiffs to arbitrary enforcement and steep criminal penalties?

III. Did the district court properly hold that Plaintiffs are likely to succeed on the merits of their vagueness and substantive due process claims that the Cascading Bans and Reason Bans (together, the "Bans") lack valid medical emergency provisions, which are required by this Court's and the Supreme Court's precedents?

IV. Did the district court properly hold that the other preliminary injunction factors weigh decidedly in Plaintiffs' favor because the harm to Plaintiffs and their patients—in the form of being denied constitutional rights and the ability to obtain an abortion—outweighs any harm to Defendants-Appellants ("Defendants") or the public interest?

STATEMENT OF THE CASE

In the early morning hours of June 19, 2020, behind doors closed to the public, the Tennessee legislature passed the Act, which includes the two sets of pre-viability abortion bans challenged here: (1) the Cascading Bans, Act §§ 39-15-216(c)(1)-(12), (h), and (2) the Reason Bans, *id.* §§ 39-15-217(b)-(d). The Bans' only function is to criminalize pre-viability abortion. Tennessee already prohibits post-viability abortion, Tenn. Code Ann. § 39-15-211(b)(1), and Plaintiffs do not challenge that prohibition.

The Bans had an immediate effective date, and Plaintiffs challenged the Bans the same day the Act passed. Shortly thereafter, Plaintiffs moved for a temporary restraining order ("TRO") and preliminary injunction ("PI"), arguing: 1) the Bans violated their patients' substantive due process rights by criminalizing pre-viability abortion care and failing to include valid medical emergency provisions, and 2) the Reason Bans violated Plaintiffs' procedural due process rights by being unconstitutionally vague. Mem. Supp. TRO/PI, R.7, PageID##115-120.

After considering Defendants' extensive submissions, the district court granted a preliminary injunction. PI Order, R.42, PageID#769. As to the Cascading Bans, the district court found that Plaintiffs had established a likelihood of success on their substantive due process claim based on "long-standing Supreme Court precedent" that it was "bound to follow." PI Order Mem., R.41, PageID#757. As to the Reason Bans, the district court found that Plaintiffs had established a likelihood of success on their vagueness claim. *Id.*, PageID#761. Further, the district court found that Plaintiffs were likely to succeed on their claim that the Bans violated their patients' substantive due process rights because they lack valid medical emergency provisions, finding them unconstitutionally vague under this Court's binding precedent. *Id.*, PageID##761-66. Finally, the district court determined that Plaintiffs had also shown irreparable harm, and, given the "time-sensitive nature"

of abortion, that Plaintiffs' harm outweighed any harm to the State or the public. *Id.*, PageID#766.

The goal of the Bans is clear—the Legislature intended them as a vehicle to "overturn[] *Roe v. Wade*" by giving the Supreme Court the "right formula . . . to go back and reverse."[1] Indeed, the Act passed after the President of the Family Action Council of Tennessee testified that the Act was "facially unconstitutional."[2] The district court recognized as much when preliminarily enjoining the Bans, and this Court should too.

A. The Challenged Pre-Viability Abortion Bans.

First, the Cascading Bans criminalize the provision of abortion care as soon as fetal cardiac activity[3] develops and then, upon the invalidation of that ban, at or

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[1] *Meeting on HB 2263 before the H. Subcomm. on Pub. Health*, 111th General Assembly (Tenn. May 27, 2020) (statement by Rep. Jerry Sexton, Chair, H. Subcomm. on Pub. Health), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=23005 (at 00:13:56).

[2] *See, e.g.*, *Meeting on HB 2263 before the H. Subcomm. on Pub. Health*, 111th General Assembly (Tenn. May 27, 2020) (statement by David Fowler) http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=23005 (at 00:15:00 and 00:34:44).

[3] Fetal cardiac activity typically occurs at around 6 weeks from the pregnant person's last menstrual period ("LMP"). Pregnancy is measured from the first day of a patient's LMP. All references to gestational age herein refer to LMP.

after 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 weeks—irrespective of fetal viability. Act §§ 39-15-216(c)(1)-(12), (h). ***Second***, the Reason Bans criminalize the provision of abortion care when the provider "knows" that an abortion is being sought "because of" the race or sex of the fetus, or "a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome." *Id.* §§ 39-15-217(b)-(d). The Bans have no exception for rape, incest, or if the fetus has a lethal fetal condition.

The only affirmative defense to the Bans is, if "in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision." Act §§ 39-15-216(e)(1), 217(e)(1). By definition, "medical emergency" includes only those conditions that, "in the physician's good faith medical judgment, based upon the facts known to the physician at the time, so complicate[] the [person]'s pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant [person] or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant [person] that delay in the performance or inducement of the abortion would create." Act §§ 39-15-216(a)(4), 217(a)(3) (incorporating Tenn. Code Ann. § 39-15-211(a)(3) by reference).

Violation of any of the Bans is a Class C felony, *id.* §§ 39-15-216(b)(2), 217(f), which carries a penalty of imprisonment up to 15 years and a fine as high as

$10,000. *See* Tenn. Code Ann. § 40-35-111(b)(3). Violation of the Bans likewise subjects physicians to licensure penalties, including revocation, *see* Tenn. Code Ann. §§ 63-6-101(a)(3), 63-6-214(b); Tenn. Comp. R. & Regs. 0880-02-.12(1), and subjects health centers licensed as ambulatory surgical treatment centers (ASTCs) to licensure penalties, Tenn. Code Ann. § 68-11-207(a)(3); Tenn. Comp. R. & Regs. 1200-08-10-.03(1)(d).

B. Scope of Care in Tennessee.

Tennessee has an existing ban on abortion post-viability. Tenn. Code Ann. § 39-15-211(b). Accordingly, no abortion care is offered in Tennessee after viability, except in limited medical emergencies. Pre-viability abortion, however, may be obtained at one of eight outpatient health centers or, under limited circumstances, in a hospital.[4] Terrell Decl. ¶ 10, R.8-5, PageID#250; Zite Decl. ¶¶ 8-10, R.8-3, PageID##206. None of the eight outpatient health centers in Tennessee provides

[4] Plaintiffs Choices, PPTNM, KCRH, and carafem represent seven of the eight outpatient health centers, and they provide the vast majority of abortions performed in Tennessee each year. *See* Grant Decl. ¶ 15, R.8-6, PageID#260; Looney Decl. ¶ 21, R.8-1, PageID#146; Rovetti Decl. ¶ 2, R.8-4, PageID#239; Terrell Decl. ¶ 9, R.8-5, PageID#250; Tenn. Dep't of Health, Div. of Vital Recs. & Stats., *Selected Induced Termination of Pregnancy (ITOP) Data, According to Age and Race of Woman, Tennessee and Department of Health Regions, Resident Data, 2018*, at 1 (2018), https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/itop/ITOP2018.pdf (indicating that 10,880 abortions were performed in Tennessee in 2018).

abortion care beyond 19 weeks, 6 days—a point in pregnancy at which it is undisputed that no fetus is viable. Pierucci Decl. ¶ 11, R.27-8, PageID#557; Grant Decl. ¶ 2, R.8-6, PageID#258; Looney Decl. ¶ 18, R.8-1, PageID#145; Rovetti Decl. ¶ 2, R.8-4, PageID#239; Terrell Decl. ¶ 8, R.8-5, PageID#250; *see* Norton Decl. ¶¶ 9, 20, R.8-2, PageID##170-71, 175. Only one provider—PPTNM—offers care beyond 16 weeks, and only in two locations. Looney Decl. ¶ 2, R.8-1, PageID#140-41.

After 19 weeks, 6 days, pre-viability abortion may be accessed only in a hospital in Tennessee. Plaintiff Dr. Nikki Zite provides such care at a hospital in Knoxville in two limited circumstances, pursuant to hospital policy, for significant fetal conditions and for maternal health conditions. Zite Decl. ¶¶ 8-11, 15, R.8-3, PageID#206-08. In either of these two circumstances, patients are offered termination after a physician determines that the fetus is not viable, Zite Decl. ¶ 16, R.8-3, PageID#208, which, after 20 weeks, is mandated by Tennessee law. Tenn. Code Ann. § 39-15-212; Defendants-Appellants' Brief (Defs.' Br.) at 5.

C. The Bans Criminalize Nearly All Abortion Care in Tennessee.

Because most patients receive an abortion after fetal cardiac activity develops, the Cascading Bans criminalize nearly all pre-viability abortion care in Tennessee. Grant Decl. ¶¶ 8-9, R.8-6, PageID#259; Looney Decl. ¶¶ 23-24, 38, R.8-1, PageID##146-47, 151; Rovetti Decl. ¶¶ 9-10, R.8-4, PageID#240; Terrell

Decl. ¶¶ 7, 14, R.8-5, PageID##249, 251; Zite Decl. ¶¶ 17, 21-22, R.8-3, PageID##208, 209-10.

Many people do not know they are pregnant at 6 weeks—particularly those who have irregular menstrual cycles, certain medical conditions, use contraception, or are breastfeeding. Looney Decl. ¶ 26-28, R.8-1, PageID#147-48; Rovetti Decl. ¶ 14, R.8-4, PageID#241. Given these challenges and existing Tennessee abortion restrictions, over 87% of abortions take place after 6 weeks. Defs.' Br. at 6 (citing Lefler Decl., R.27-9, PageID#575); Grant Decl. ¶ 16, R.8-6, PageID#260; Looney Decl. ¶¶ 21-22, R.8-1, PageID#146; Rovetti Decl. ¶ 13, R.8-4, PageID#241; Terrell Decl. ¶ 14, R.8-5, PageID#251.

Moreover, given the Cascading Bans' narrow medical emergency provisions, Dr. Zite will be unable to provide pre-viability abortion care even for maternal health indications when the threat to her patient's health is serious, and may worsen over time, if the condition has yet to become acute enough to "necessitate" an "immediate" abortion. Zite Decl. ¶¶ 17-22, R.8-3, PageID##208-10. For these patients, Dr. Zite will be forced to wait until the patient's health deteriorates to the point of crisis—contrary to the standard of care, placing the patient at serious and unnecessary risk. *Id.* ¶¶ 21-22, PageID##209-10.

The Reason Bans also prohibit pre-viability abortion. Precisely what is prohibited, however, is unclear. Plaintiffs are unable to understand from the

statute's language whether abortion is banned when a prohibited reason is the patient's only reason, the main reason, a significant reason, one among many potential reasons, or even just a factor that an individual considered. Act §§ 39-15-217(b)-(d); Grant Decl. ¶¶ 20-21, R.8-6, PageID#261-62; Looney Decl. ¶ 45, R.8-1, PageID#153; Rovetti Decl. ¶ 23, R.8-4, PageID#244; Terrell Decl. ¶ 19, R.8-5, PageID#252.

Individuals seek abortion for a multitude of deeply personal reasons. Looney Decl. ¶ 39, R.8-1, PageID##151-52; Rovetti Decl. ¶ 12, R.8-4, PageID#241; Terrell Decl. ¶¶ 16-17, R.8-5, PageID##251-52. Factors underlying a patient's decision to have an abortion are related to the individual's values, beliefs, culture, religion, health status, reproductive history, familial situation, resources, and economic stability. *See* Looney Decl. ¶¶ 39, 42-43, R.8-1, PageID##151-53; Rovetti Decl. ¶ 12, R.8-4, PageID#241; Terrell Decl. ¶¶ 16-18, R.8-5, PageID##251-52; Zite Decl. ¶¶ 13, 23, R.8-3, PageID##207, 210-11. As a result, it is often difficult, if not impossible, for a person to understand how various factors influence another's decision to seek an abortion. Looney Decl. ¶ 44, R.8-1, PageID#153; Terrell Decl. ¶ 16, R.8-5, PageID##251-52.

Consistent with Plaintiffs' missions and best medical practices, Plaintiffs do not require that patients disclose their reasons for seeking an abortion. Grant Decl. ¶ 22, R.8-6, PageID#262; Looney Decl. ¶ 41, R.8-1, PageID#152; Rovetti Decl. ¶

25, R.8-4, PageID#244; Terrell Decl. ¶ 17, R.8-5, PageID#252. However, during counseling prior to an abortion, some of Plaintiffs' patients disclose at least some information about the considerations that have informed their decisionmaking. Looney Decl. ¶ 41, R.8-1, PageID#152; Rovetti Decl. ¶¶ 23, 27, R.8-4, PageID##244-45; Terrell Decl. ¶¶ 17, 18, 20, R.8-5, PageID##252-53.

Plaintiffs have treated patients with a diagnosis of fetal Down syndrome, who have raised concerns over the possibility of such a diagnosis, or who have expressed concern about their own advanced age or fetal conditions as a result of that age—among many other feelings these patients may express. Grant Decl. ¶ 22, R.8-6, PageID#262; Looney Decl. ¶¶ 47-48, R.8-1, PageID#154; Rovetti Decl. ¶ 23, R.8-4, PageID#244; Terrell Decl. ¶¶ 21-22, R.8-5, PageID#253; Zite Decl. ¶ 12, R.8-3, PageID#207.

At times, Plaintiffs' patients have also raised concerns relating to the race or sex of the fetus. Grant Decl. ¶ 22, R.8-6, PageID#262; Looney Decl. ¶ 46, R.8-1, PageID##153-54. For example, Plaintiffs have treated patients experiencing racism from their families around an interracial relationship or who inquire about the sex of the fetus during an ultrasound. Grant Decl. ¶ 22, R.8-6, PageID#262; Looney Decl. ¶ 46, R. 8-1, PageID##153-54; Rovetti Decl. ¶ 23, R.8-4, PageID#244; Terrell Decl. ¶ 20, R.8-5, PageID##252-53.

Given the uncertainty and the Reason Bans' extreme criminal penalties (including up to 15 years in prison), Plaintiffs are unable to provide pre-viability abortion to any patient whenever a prohibited reason is referenced or implicated during a patient's care. Grant Decl. ¶¶ 19-20, 23, R.8-6, PageID##261-62; Looney Decl. ¶ 49, R.8-1, PageID#154; Rovetti Decl. ¶ 24, R.8-4, PageID#244; Terrell Decl. ¶¶ 23, R.8-5, PageID#253; Looney Supp. Decl. ¶ 2-5, R.34-1, PageID#612-13.

D. The Bans Will Chill the Provision of Abortion Care in Medical Emergencies.

The medical emergency defenses to the Bans are only available if, "in the physician's reasonable medical judgment, a medical emergency prevented compliance." Act §§ 39-15-216(e)(1), 39-15-217(e)(1). At the same time, "medical emergency" is defined in terms of the physician's "good faith medical judgment." *Id.* §§ 39-15-216(a)(4), 217(a)(3) (incorporating Tenn. Code Ann. § 39-15-211(a)(3) by reference). Additionally, the defenses lack any scienter element for medical emergency determinations—meaning a physician may be strictly liable (and subject to serious criminal penalties) whenever a factfinder disagrees with the physician's good faith judgment. Act §§ 39-15-216(b)(2), (e)(1) and 39-15-217(e)(1).

The uncertainty created by this standard, combined with the Bans' severe criminal penalties, will chill physicians from providing care, even when in good

faith they believe a "medical emergency" warrants it, subjecting patients to extreme health risks with potentially dire consequences. Zite Decl. ¶¶ 19-22, R.8-3, PageID##209-10; Looney Decl. ¶ 37, R.8-1, PageID##150-51.

E. The Bans' Devastating Impact on Plaintiffs and Their Patients.

Tennessee's Bans criminalize nearly all pre-viability abortion care in the state. Being denied an abortion in Tennessee will harm patients' health, their existing families, their financial and educational goals, and their ability to gain independence from abusive and unsafe circumstances. Looney Decl. ¶ 38, R.8-1, PageID#151; Rovetti Decl. ¶¶ 15-22, 29, R.8-4, PageID##242-44, 246; Terrell Decl. ¶¶ 24-26, R.8-5, PageID#253-54; Zite Decl. ¶¶ 23-24, R.8-3, PageID##210-11. Most of Plaintiffs' patients are poor or low-income—these are the patients most likely to be forced to continue their pregnancies against their will or to resort to unsafe means to terminate their pregnancies because they cannot travel out of state. Grant Decl. ¶¶ 8-9, 18-19, R.8-6, PageID##259-61; Looney Decl. ¶¶ 30-31, 38, R.8-1, PageID##148-49, 151; Rovetti Decl.¶¶ 15-22, R.8-4, PageID##242-44; Terrell Decl. ¶¶ 25-26, R.8-5, PageID#254; Zite Decl. ¶ 24, R.8-3, PageID#211. Under any of these scenarios, Plaintiffs' patients will be tremendously harmed. Grant Decl. ¶ 19, R.8-6, PageID#261; Looney Decl. ¶ 37, R.8-1, PageID##150-51; Rovetti Decl.¶¶ 15, 29, R.8-4, PageID##242, 245; Terrell Decl. ¶ 26, R.8-5, PageID#254.

Further, the vagueness that permeates the Reason Bans and both the Bans' medical emergency defenses also harms Plaintiffs' patients by further depriving them of abortion care, exposing them to grave risks.

F. Procedural History.

Almost a month after the preliminary injunction issued, Defendants appealed, Notice of Appeal, R.46, PageID ##793-96, and moved the district court to stay the injunction pending appeal, Defs.' Stay Mot., R.47, PageID##797-802, which the district court denied. Order Den. Stay Mot., R.58, PageID##892-93. Defendants then moved this Court to stay the district court's injunction with respect to the Reason Bans. Defs.' Partial Stay Mot., R.App.14. A split panel granted Defendants' motion, finding that Plaintiffs did not have a likelihood of success on its vagueness challenges. Stay Order, R.App.33-2 at 4-5. Plaintiffs filed a renewed motion for a TRO/PI against the Reason Bans based on their substantive due process claim. The district court denied this request, and, at this time, Plaintiffs have not appealed. Order Den. Renewed Mot. for TRO/PI, R.76, PageID#1020-21.

With the injunction on the Reason Bans lifted, Plaintiffs have been forced to stop providing abortion care whenever a prohibited reason is referenced through a patient disclosure, a medical file, a referring physician, or other surrounding circumstance.

SUMMARY OF THE ARGUMENT

The district court properly preliminarily enjoined the Bans based on decades of binding precedent from the Supreme Court and this Court. First, the Cascading Bans prohibit pre-viability abortion in blatant violation of nearly 50 years of unwavering Supreme Court precedent that holds that a state may never ban abortion prior to viability, regardless of the state interest. Indeed, this is why every court to consider a pre-viability ban has struck it down.

Second, the district court properly held that the Reason Bans are likely unconstitutionally vague: they do not provide sufficient notice as to what they prohibit so providers may conform their conduct to the law and this lack of clarity threatens arbitrary enforcement. This threat, combined with the Reason Bans' severe criminal penalties, deter the provision of pre-viability abortion care.

Third, the district court held that the Bans are likely unconstitutional because they lack valid medical emergency provisions, which fail for vagueness under this Court's holding in *Women's Medical Professional Corporation v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). Barring impermissible judicial legislation, there is no way to fix them. Without valid medical emergency provisions, the Bans again violate Plaintiffs' patients' substantive due process rights under decades of Supreme Court precedent.

Fourth, the equities clearly weigh in Plaintiffs' favor. Plaintiffs have shown violations to their own and their patients' constitutional rights, mandating a finding of irreparable harm. Denial of abortion inflicts extraordinary harms to patients, and if the Bans are allowed to take effect, people will be forced to carry their pregnancies to term or resort to unsafe methods. This harm simply cannot be outweighed by any alleged harm to the State or the public—particularly since there is no harm to the public from enjoining enforcement of unconstitutional laws.

Defendants' rhetorical gymnastics cannot avoid these clear results and their repeated requests for the Court to overrule binding precedent acknowledges this. *See* Defs.' Br. at 31 n.5 (asking the Court to "overrule *Voinovich*"); 44-45 n.9 (asking the Court to "reconsider" its application of the large-fraction test); 56 (suggesting the "*Casey* framework . . . be abandoned"). Under that precedent, this Court should uphold the preliminary injunction.

STANDARD OF REVIEW

In determining whether to grant a preliminary injunction, trial courts must consider the following factors: (1) whether the movant has shown a substantial likelihood of success on the merits; (2) whether the movant will suffer irreparable harm absent the injunction; (3) whether the injunction will cause others to suffer substantial harm; and (4) whether the public interest would be served by the preliminary injunction. *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 n.3 (6th Cir.

1991); *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1059 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997). The "plaintiff must show more than a mere possibility of success," but need not "prove his case in full." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007) (citations omitted).

This Court reviews the district court's decision granting or denying a preliminary injunction for an abuse of discretion, *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018) (citing *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011)), and should reverse only if it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id*. This Court nonetheless reviews legal questions, such as the Plaintiffs' likelihood of success on the merits, de novo. *Id.*

ARGUMENT

I. The District Court Correctly Held the Cascading Bans Likely Violate the Substantive Due Process Clause.

A. The Cascading Bans Are Unconstitutional Prohibitions on Pre-Viability Abortion.

The district court properly held that Plaintiffs are likely to succeed on the merits of their substantive due process challenge to the Cascading Bans because the Supreme Court "has established [that] a state may not prohibit abortions before viability." PI Order Mem., R.41, PageID#756. Indeed, the Court has unequivocally and continuously held for nearly fifty years that a state may never ban abortion

prior to viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 871 (1992); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); *accord Isaacson v. Horne*, 716 F.3d 1213, 1217, 1221 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014) (stating the Supreme Court has been "unalterably clear regarding one basic point": "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable").[5] This is true no matter the state interest asserted. *Casey*, 505 U.S. at 846.

The district court also properly recognized that the Supreme Court has defined viability as "'the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb.'" PI Order Mem., R.41, PageID#754 (quoting *Casey*, 505 U.S. at 870). Furthermore, the district court recognized that "[b]ecause viability may differ with each pregnancy, the [Supreme] Court has held

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[5] *See also June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring) ("*Casey* reaffirmed the most central principle of *Roe v. Wade*, a woman's right to terminate her pregnancy before viability" (internal citations and quotations omitted)); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (reaffirming that a law is invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("assum[ing]" the principle that, "[b]efore 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" the legal principles reaffirmed in *Casey* that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)).

that 'neither the legislature nor the courts may proclaim'" when viability occurs based on a single factor, such as gestational age.[6] *Id*. (quoting *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979)).

For these reasons, every federal court faced with a law prohibiting abortions before viability has ruled that it violates the Fourteenth Amendment. *Id*. at PageID#754-55 (citing *Isaacson*, 716 F.3d at 1213; *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772-73 (8th Cir. 2015); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020); *Sistersong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1343-44 (N.D. Ga. 2020); *Edwards v. Beck*, 786 F.3d 1113, 1116-17 (8th Cir. 2015)); *see also Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 273 (5th Cir. 2019); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117-18 (10th Cir. 1996); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368-69 (9th Cir. 1992).

As the district court recognized, "[g]iven that Tennessee law already prohibits post-viability abortions, the effect of [the Cascading Bans] is to ban pre-viability abortions after six weeks or the presence of a fetal heartbeat." PI Order

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[6] The parties' experts agree that, ultimately, whether any particular fetus is or ever will be viable depends on a physician's assessment of multiple factors beyond gestational age. Norton Decl. ¶ 11, R.8-2, PageID##171-72; Pierucci Decl. ¶ 12, R.27-8, PageID#557.

Mem., R.41, PageID#756-57. Defendants concede this point. Defs.' Br. at 2-3, 5, 8-9, 50. Therefore, the district court correctly held that "Plaintiffs have shown a likelihood of success on the merits of their claim that [the Cascading Bans] violate long-standing Supreme Court precedent prohibiting bans on pre-viability abortions that this Court is bound to follow." PI Order Mem., R.41, PageID#757.

Defendants protest that clear precedent "elevate[s]" the right to abortion over other constitutional rights. Defs.' Br. at 40, 50. It does not. It merely reflects that the Court already carefully balanced an individual's interests in autonomy and liberty against a state's interests. *See Roe*, 410 U.S. at 164-65; *see also Casey*, 505 U.S. at 852, 870-71. In this balance, the Court concluded that, although states have an interest in potential life, until the point of fetal viability, the decision to continue or end a pregnancy must be left to the individual because it involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Casey*, 505 U.S. at 853.

Ultimately acknowledging their arguments' fatal flaws, Defendants finally plead that the "*Casey* framework . . . be abandoned." Defs.' Br. at 55-56. But even if this Court disagrees with *Casey*'s holding, that decision is binding on this Court given that "vertical *stare decisis* is absolute." PI Order Mem., R.41, PageID#729 n.2 (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part)); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S.

477, 484 (1989) (the Supreme Court alone has "the prerogative of overruling its own decisions").

B. The Undue Burden Test Does Not Apply to the Cascading Bans.

Defendants next try to characterize the Cascading Bans as mere "timing" regulations, and therefore claim the undue burden standard applies. Defs.' Br. at 38-39, 50. But Defendants' contention that the Cascading Bans merely regulate *when* someone may obtain a pre-viability abortion, Defs.' Br. at 54, misconstrues the right. As *Casey* makes clear, "a woman has a right to choose to terminate her pregnancy at *any* point before viability—not just before [a certain pre-viability] gestational age." *Isaacson*, 716 F.3d at 1227 (emphasis added); *see also Casey*, 505 U.S. at 879 ("[A] state may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability") (emphasis added); *Edwards*, 786 F.3d at 1117. Thus, similar "timing" theories have been uniformly rejected. *Jackson Women's Health*, 945 F.3d at 273 (rejecting Mississippi's similar timing argument because the 15-week ban "undisputedly prevent[ed]" some pre-viability abortions), *petition for cert. filed*, No. 19-1392 (June 18, 2020); *Isaacson*, 716 F.3d at 1227 ("The availability of abortions earlier in pregnancy does not . . . alter the nature of the burden that [a 20-week ban] imposes on a woman once her pregnancy is at or after twenty weeks but prior to viability."); *Edwards*, 786 F.3d at 1116-17

(rejecting state's framing of 12-week ban as a regulation because abortion still available earlier in pregnancy).

Defendants also analogize the Cascading Bans to the abortion laws at issue in *Casey* and *Gonzales*. Defs.' Br. at 39-40, 50. But those laws—such as the 24-hour waiting period in *Casey*, or the ban on a rarely used method of second-trimester abortion in *Gonzales*—purport to regulate *how* a person obtains an abortion. The Cascading Bans outright *prohibit* pre-viability abortion at different stages of pregnancy. *See, e.g.*, Defs.' Br. at 8-9, 50.

Because the Cascading Bans are not regulations, *see supra* at 21, the undue burden standard has no application here. *See, e.g., EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 795 (6th Cir. 2020) (recognizing that "'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability'" but, "on the other hand," abortion regulations must be adjudicated under the undue burden test) (quoting and citing *Casey*, 505 U.S. at 877, 879), *petition for cert. filed*, No. 20-601 (Nov. 5, 2020); *Isaacson*, 716 F.3d at 1225; *Jackson Women's Health*, 945 F.3d at 273-75.

C. Plaintiffs Are Likely to Succeed Under the Undue Burden Standard Too.

Regardless, Plaintiffs are likely to prevail under the undue burden test. Currently in this Circuit, an abortion regulation is unconstitutional under this test if it imposes a substantial obstacle in the path of a person seeking abortion, or if it is

not reasonably related to a state's legitimate interest. *EMW Women's Surgical Center P.S.C. v. Friedlander*, 978 F.3d 418, 432 (6th Cir. 2020) (citing *June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring)). Because the Cascading Bans outright prohibit pre-viability abortion, Plaintiffs are likely to succeed under this standard too.

1. The Cascading Bans Impose a Substantial Obstacle in the Path of People Seeking Abortion Care.

Defendants admit that "[t]he [Cascading Bans] make it a crime to perform an abortion at certain stages of a [person's] pregnancy." Defs.' Br. at 50. Defendants' suggestion that this does not impose a substantial obstacle—because pregnant people may obtain abortions at 6 weeks or earlier (or at different intervals per the law's cutoffs), *id*., misconstrues the right, as described *supra* Sec. I.B. The correct analysis focuses on how each gestational age provision impacts those seeking pre-viability abortion after that gestational age. For these individuals, barring limited medical emergencies, the Cascading Bans will act as an absolute and insurmountable obstacle to the pre-viability abortion they seek. "The availability of abortions earlier in pregnancy does not . . . alter the nature of the burden." *Isaacson*, 716 F.3d at 1227. The Cascading Bans thus unquestionably

impose a substantial obstacle.[7]

2. The State's Interests Cannot Justify a Ban on Pre-Viability Abortion.

Under any test, if a law prohibits pre-viability abortion, courts need not parse the state's interests. The Supreme Court has held that "'[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 [pregnant person's] effective right to elect the procedure.'" *Casey*, 505 U.S. at 846. *Casey* made clear that even a statute that furthers a "valid state interest" cannot be a "permissible means of serving [the State's] legitimate ends" if it "has the effect of placing a substantial obstacle in the path of a [person's] choice." *Id.* at 877. Because the Cascading Bans impose a substantial obstacle to pre-viability abortion (they prohibit it), *see supra* Sec. I.C.1,

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[7] Defendants' arguments regarding the availability of abortion earlier in pregnancy also misapprehend this Court's precedent. Defs.' Br. at 44 (quoting *EMW*, 978 F.3d at 434 (quoting *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 370 (6th Cir. 2006)). In *Taft*, the Court struck down a law that only permitted minors a single petition for judicial bypass, recognizing that for those upon whom the law operated, it would deter them "from procuring an abortion as surely as if the [government] ha[d] outlawed abortion in all cases." 468 F.3d at 370 (quoting *Casey*, 505 U.S. at 894) (alteration in original). The fact that some minors obtained bypass via one petition did not change the analysis. So too here, that some may obtain abortion prior to 6 weeks (or any other gestational age in the ban) does not change the reality that the law is a total pre-viability ban for those upon whom each provision operates.

the state's interests cannot alter the conclusion that the Cascading Bans are unconstitutional.[8]

3. The Cascading Bans Are Facially Invalid Under the Large-Fraction Test.

Plaintiffs undeniably satisfy the large-fraction test. The Supreme Court has repeatedly held that the large-fraction test must focus on the population "for whom [the law] is an actual rather than an irrelevant restriction." *Casey*, 505 U.S. at 895.[9] For example, in considering the facial validity of the spousal notice requirement in *Casey*, the Court defined the denominator as "married women seeking abortions who do not wish to notify their husbands." *Id*. The Court defined the numerator as married women who cannot notify their husbands because it would result in

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[8] In any event, Plaintiffs do not concede that the Cascading Bans serve all of Defendants' purported interests. Plaintiffs submitted rebuttal declarations to address (and refute) Defendants' contentions, many of which are contrary to scientific evidence and medical consensus. *See* Ralston Rebuttal Decl., R.34-2, PageID##615-56; Norton Rebuttal Decl., R.34-4, PageID##694-708.

[9] *See also June Med. Servs.*, 140 S. Ct. at 2132-33 (plurality opinion) (In *Whole Woman's Health*, "[w]e made clear that the phrase refers to a large fraction of 'those women for whom the provision is an actual rather than an irrelevant restriction.'") (internal citations omitted); *id*. at 2318 (Roberts, C.J., concurring) (upholding district court's decision which applied the large-fraction test in same manner as *Whole Woman's Health*); *Whole Woman's Health*, 136 S. Ct. at 2320; *EMW*, 978 F.3d at 434 (quoting *Casey*, 505 U.S. at 895); *Taft*, 468 F.3d at 367-69 (rejecting *Salerno* standard and noting that it has been this Court's "repeated and continuous practice" to apply *Casey*'s large-fraction test with focus on cases in which the law is relevant).

adverse consequences, such as "physical and psychological abuse at the hands of their husbands." *Id*. at 893. Accordingly, the Court found that "in a large fraction of the cases in which [the spousal notice law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id*. at 895.

Here, the relevant population for analyzing the 8-week ban is pregnant people seeking pre-viability abortions at or after 8 weeks; for the 10-week ban, it is pregnant people seeking pre-viability abortions at or after 10 weeks; and so on. In each of these instances, the provision will deprive *every person affected* of their constitutional right to pre-viability abortion. With respect to pre-viability bans, "there is a one hundred percent correlation between those whom the [Bans] affect[] and [their] constitutional invalidity as applied to them." *Isaacson*, 716 F.3d at 1230.

Defendants urge this Court to defy this extensive precedent and *exclude* from its analysis those people "for whom the law is a restriction," rather than *focus* on them. *Casey*, 505 U.S. at 894. Conceding this, Defendants again ask this Court to step out of bounds and "reconsider" the application of the large fraction test "in an appropriate case." Defs.' Br. at 44-45, n.9. The Court should not deviate from settled precedent. *See supra* Sec. I.A.

II. The District Court Correctly Concluded the Reason Bans Likely Violate Plaintiff Physicians' Procedural Due Process Rights.

A. The Reason Bans Are Likely Unconstitutionally Vague.

It is well-settled that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "[W]hen criminal penalties are at stake, a relatively strict test is warranted." *Voinovich*, 130 F.3d at 197 (6th Cir. 1997) (citing *Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489, 499 (1982)). "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Hoffman Est.*, 455 U.S. at 499; *see also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 341 (6th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008).

The Reason Bans criminalize the provision of abortion care—threatening severe penalties, including up to 15 years in prison—if a physician "knows" that a patient seeks an abortion "because of" a prohibited reason. Act §§ 39-15-217(b)-(d). As described more fully *infra* Sec. II.A.2, the Reason Bans' lack of clarity inhibits patients' exercise of their constitutional right to pre-viability abortion. Thus, the analysis is far more stringent than that applied to civil statutes that do not implicate fundamental rights. *Cf. Hoffman Est.*, 455 U.S. at 497-98.

Considering these standards, the district court correctly concluded that the Reason Bans impermissibly "implicate[] both principles underlying the void-for-vagueness doctrine." PI Order Mem., R.41, PageID#759. They condition "potential [severe] criminal liability on confusing and ambiguous criteria," and therefore present "serious problems of notice [and] discriminatory application," producing a "chilling effect on the exercise of constitutional rights." *Colautti*, 439 U.S. at 394.

1. The Reason Bans Do Not Adequately Define What Conduct They Prohibit.

The Reason Bans do not define "the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357. As the district court found, the Reason Bans' vague terms leave "several pivotal questions" unanswered:

> Will the physician be subject to criminal sanction only where the patient explicitly states she seeks an abortion for a prohibited reason, or could the physician be arrested for providing an abortion where the patient's file or a referring physician includes a reference to a prohibited reason? Will the prohibition apply where the patient indicates a prohibited reason is the only reason she seeks an abortion, or does it apply where the prohibited reason is the motivating reason, a significant factor, or one of several reasons? Will the prohibition apply where the patient simply makes a reference to the sex of her fetus, the race of the father, or her age in one of her conversations with the physician?

PI Order Mem., R.41, PageID##759-60; Stay Order at 7 (Clay, J., dissenting) (noting similar concerns).

Defendants' varied attempts to clarify the statute's terms have underscored the law's inherent vagueness. *See, e.g.*, *People's Rts. Org. Inc. v. City of Columbus*, 152 F.3d 522, 534-35 (6th Cir. 1998) (rejecting government's "novel" introduction of a "knowingly reckless" scienter requirement and finding that the challenged law is "little more than a trap for the unwary"). At first, Defendants argued "because of" had its "ordinary meaning"—"by reason of" or "on account of"—because it was not qualified by the terms "solely" or "only." Defs.' Resp. Opp. TRO/PI, R.27, PageID#350. When Defendants sought stays of the injunction, they then argued that "because of" in the Reason Bans incorporates a "but-for" causation standard. *See, e.g.*, Defs.' Stay Mem., R.48, PageID#809; Defs.' Partial Stay Mot. at 10.

Despite Defendants' most recent assertion, Defs.' Br. at 25, it is not clear that "because of" means "but-for" causation. Defendants cite only one Tennessee case and statute. *See id*. (citing *Goree v. United Parcel Serv., Inc.*, 490 S.W.3d 413 (Tenn. Ct. App. 2015)). In *Goree*, the court did not say "but-for" causation is a foregone conclusion. Rather, the court indicated that the interpretation of Tennessee law is "[u]ltimately . . . influenced by the subject matter, the plain

language, the legislative intent, and history of the particular statute."[10] *Goree*, 490 S.W.3d at 439–40 (citation omitted). The *Goree* court found "but-for" causation because there was a "policy of interpreting the [Tennessee Human Rights Act]" "similarly, if not identically, to Title VII," which incorporates this standard. *Id.* at 439 (internal quotations omitted). All the other cases Defendants cite interpret "because of" in *federal* statutes.[11] *See* Defs.' Br. at 25.

Regardless, the district court considered Defendants' evolving definitions for the Reason Bans' vague terms and still found the law unconstitutional because they left "pivotal questions" unanswered. PI Order Mem., R.41, PageID##759-61. Even

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[10] Notably, members of the Tennessee General Assembly who passed this law submitted an amicus brief to this Court to "explain[] their actions and judgment." Leg. Am. Br. at 1. Nothing in this brief substantiates Defendants' explanations or provides any insight about what the legislature intended.

[11] Even though these cases interpreting federal statutes define similar terms to mean "but-for" causation, Defendants fail to mention the significant confusion and varied interpretations such language engendered before the Supreme Court spoke definitively. *See* Defs.' Br. at 25 (citing, for example, *Burrage vs. United States*, 571 U.S. 204 (2014) and *Bostock*, 140 S. Ct. at 1739 (interpreting Title VII)). For example, in *Krieger*, the Seventh Circuit noted that "[b]efore *Burrage*, it was unclear what level of causation was necessary and courts were imprecise with the language they used in finding causation." 842 F.3d at 502 (7th Cir. 2016). Similarly, prior to *University of Texas Southwestern Medical Center. v. Nassar*, 570 U.S. 338 (2013), which interpreted such language in the context of Title VII, a plurality of the Supreme Court declared in *Price Waterhouse v. Hopkins* their belief that "constru[ing] the words 'because of' [in Title VII] as colloquial shorthand for 'but-for' causation[] . . . is to misunderstand them." 490 U.S. 228, 240 (1989).

"common" understandings cannot cure vagueness if they do not make "clear what the ordinance as a whole prohibits." *Deja Vu of Cincinnati, LLC v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 798 (6th Cir. 2005).

None of Defendants' definitions for "because of"—including "but-for" causation—addresses or solves the Reason Bans' fatal flaw: the inherent subjectivity in assessing how various factors contributed to another's decision to terminate a pregnancy. *See* PI Order Mem., R.41, PageID#760. If anything, "but-for" causation renders the Reason Bans even more vague.[12] It requires a physician "to change one thing at a time and see if the outcome changes[,] . . . [if] it does," it is a but-for cause. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020).

Such a standard is particularly fraught here. Patients seek abortion for a multitude of deeply personal reasons that can be motivated by a combination of diverse and interrelated factors. *See supra* at 9-10. Therefore, it is often difficult—if not impossible—to tease apart how various factors contribute to a patient's ultimate decision to seek care. *Id*. Indeed, this Court has recognized the "but-for"

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[12] It also makes it unique. Nearly every other reason ban passed across the country requires the patient to seek the abortion either "solely because of" or "in whole or in part because of" the prohibited reason. *See, e.g.*, Ark. Code Ann. §§ 20-16-1904(a), 2103(a); Ind. Code §§ 16-34-4-4; Kan. Stat. Ann. § 65-6726; Ky. Rev. Stat. Ann. § 311.731; La. Stat. Ann. § 40:1061.1.2; Mo. Rev. Stat. §§ 188.038; N.D. Cent. Code §§ 14-02.1-04.1(1); Ohio Rev. Code Ann. §§ 2919.10, 101; Okla. Stat., tit. 63 § 1-731.2(B); 18 Pa. Cons. Stat. § 3204(c); Utah Code Ann. § 76-7-302.4.

standard "poses a thorny issue" when used to assess someone's motives for a particular action. *United States v. Miller*, 767 F.3d 585, 592, 600 (6th Cir. 2014).

The Reason Bans' inherent vagueness is highlighted by an example: A pregnant patient who is a student and mother of three experiencing financial hardship receives a fetal Down syndrome diagnosis. The patient decides to terminate the pregnancy. During counseling, the patient offers that she might not terminate the pregnancy but for the Down syndrome diagnosis, but she cannot be sure. She says she may feel differently if she were financially secure, did not have children, and had completed school, or if only one or two of these factors were different, but does not know. In any event, she decides—given all these factors—that termination is right for her and her family. A physician must then determine whether the Down syndrome diagnosis is a "but-for" cause of the patient's decision—a determination that is clearly uncertain and subject to debate.[13]

Statutes imposing criminal liability based on similarly uncertain and subjective judgments have been struck for vagueness, particularly within the

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[13] Beyond the contextual difficulty, the "but-for" standard itself is frequently misunderstood. Courts have lamented at "how confusing the concept of 'but-for' causation can be," given the "confusion surrounding the term and the difficulties in pinning it down." *Krieger v. United States*, 842 F.3d 490, 504 (7th Cir. 2016) (citing *United States v. Hatfield*, 591 F.3d 945, 947-48 (7th Cir. 2010)). This is true even for experienced jurists and attorneys—let alone physicians with no legal training. *Hatfield*, 591 F.3d at 948-49.

"controversial" context of abortion. *See, e.g.*, *Colautti*, 439 U.S. at 395-96 (finding statute void for vagueness in part because experts likely to disagree about viability determinations); *Voinovich*, 130 F.3d at 205 (finding statute void for vagueness in part because medical emergency determinations are fraught with uncertainty and susceptible to being subsequently disputed by others).

Defendants wrongly assert that determining "but-for" cause here is akin to the "true-or-false determinations" at issue in *United States v. Williams*, 553 U.S. 285, 306 (2008).[14] Defs.' Br. at 29. In *Williams*, the statute required "the defendant to hold, and make a statement that reflects, the belief that the material is child pornography . . . or to communicate in a manner intended to cause another so to believe." *Williams*, 553 U.S. at 306. Whether a criminal defendant "h[o]ld[s] a belief or ha[s] an intent," *id.*, is not similar to the Reason Bans' requirement that physicians parse through and make causal assessments regarding the but-for

[14] Defendants make a similar argument with respect to *United States v. Paull*, 551 F.3d 516 (6th Cir. 2009). Defs.' Br. at 29-30. There, the defendant did not even argue that he could not "read the statute and determine what [was] illegal." *Paull*, 551 F.3d at 525. Rather, he argued that the statute—which criminalized the knowing transmission of images, if the production of the image "involve[d] the use of a minor engaging in sexually explicit conduct" and the image depicted that conduct, 18 U.S.C. § 2252—was void for vagueness because he lacked the capacity to know whether the images depicted actual or virtual simulations of minors. *Id.* This Court rejected the defendant's claim because—while it may be difficult to assess whether images are actual or virtually-simulated—there is a clear objective answer to that question. *Id*. There is often no such clear-cut answer to why an individual decides to terminate a pregnancy.

motivations underlying *their patients'* decisions. Furthermore, as the district court aptly pointed out, statutes that impose liability based on a criminal defendant's own motivations are different because a "perpetrator knows what is in his or her own mind, and is presumably able to curb his behavior to avoid criminal sanction." PI Order Mem., R.41, PageID#761.

Defendants claim this feature is not problematic because knowledge of another's mental state is an element of many criminal offenses. Defs.' Br. at 28. But this argument ignores how this feature impermissibly interacts with the "but-for" causation standard, particularly in this context. Each statute Defendants and amici cite only requires individuals to make clear binary determinations about another's intent. Does the person intend to commit a particular crime? Consent to intercourse? Commit suicide? Defs.' Br. at 28; Alliance Defending Freedom Am. Br., R.App.30 at 8-13; States Am. Br., R.App.32 at 5-6. Not one similarly imposes criminal liability based on knowing if and how a particular factor contributed to another's ultimate intent. Plaintiffs are unaware of any remotely analogous law. If one existed, surely Defendants and amici would have presented it.

2. The Reason Bans Encourage Arbitrary Enforcement that Chills the Provision of Constitutionally Protected Abortion Care.

Just as Defendants cannot settle on what "because of" means, they also cannot decide what violates the Reason Bans. For example, Defendants previously stated that "oblique references to race, sex, or advanced maternal age . . . would be

insufficient" to support a conviction. Defs.' Resp. Opp. TRO/PI, R.27, PageID#351. To this Court, Defendants stated that some situations "would most likely support a conviction" while others most likely would not. Defs.' Reply Supp. Partial Stay Mot., R.App.18 at 4-5. In fact, Defendants have now repeatedly acknowledged that "'close cases can be envisioned'" under this statute.[15] *See* Defs.' Br. at 30 (quoting *Williams*, 553 U.S. at 305); Defs.' Reply Supp. Stay Mot., R.54, PageID#875. This indeterminacy—reflected in Defendants' changing submissions—evidences how susceptible the Reason Bans are to arbitrary enforcement.

Defendants' shifting narrative and continued inability to answer the district court's "pivotal questions" confirm that Plaintiffs correctly fear arbitrary enforcement—a threat that is particularly acute given the hostility toward abortion and abortion providers in Tennessee. *See* Looney Decl. ¶ 37, R.8-1, PageID#150-51; Zite Decl. ¶ 21, R.8-3, PageID#209-10; *Kolender*, 461 U.S. at 358 (vagueness "allows policemen, prosecutors, and juries to pursue their personal predilections")

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[15] The State attempts to write off this fatal imprecision through a misreading of *Williams*. There, the permissible "close cases" cited by the Supreme Court referred to the difficulty a prosecutor may experience proving what is a clear objective element of the crime—not from "close cases" about what constitutes a crime under the statute. 535 at 305-06. Here, as described more fully *supra* Sec. II.A.1., close cases stem from the subjective judgments required under the Reason Bans' vague "because of" language.

(internal quotation marks omitted); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (vagueness risks discriminatory enforcement "against particular groups deemed to merit [prosecuting officials'] displeasure").

Regardless, as the district court recognized, Defendants' "belief" about when the Reason Bans impose liability "is not supported by the imprecise language of the statute, nor does it guarantee individual prosecutors will agree with their interpretation." PI Order Mem., R.41, PageID#761. Plaintiffs cannot be forced to take refuge in Defendants' latest (failed) attempt to clarify the Reason Bans. Defs.' Br. at 30. Even an Attorney General's opinion may change at any time and cannot bind any individual prosecutor, let alone a jury. *See Northland*, 487 F.3d at 342. Defendants' representations during litigation are of even less value. *Id.* at 342-43 (citing *Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th Cir. 1988)).

The Reason Bans' threat of arbitrary enforcement chills the provision of constitutionally protected abortion care. Given the statute's ambiguity, myriad circumstances may implicate the Reason Bans and Plaintiffs cannot predict what circumstances may be used to establish the requisite causation under the statute. Grant Decl. ¶ 21, R.8-6, PageID#262; Looney Decl. ¶ 45, R.8-1, PageID#153; Rovetti Decl. ¶ 23, R.8-4, PageID#244; Terrell Decl. ¶ 19, R.8-5, PageID#252. No physician can be expected to continue to provide care "in order to explore the precise meaning and outer bounds of [the law], even if the risk is small[.]" *Hope*

Clinic v. Ryan, 195 F.3d 857, 889 (7th Cir. 1999) (Posner, C.J., dissenting); *cf. W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329 (11th Cir. 2018).

3. The Reason Bans' Knowledge Requirement Cannot Cure Their Vagueness.

Defendants' argue the Reason Bans' knowledge requirement alleviates any vagueness in the statute. Defs.' Br. at 26. Knowledge cannot cure vagueness where—as here—it modifies an inherently vague description of what activity is proscribed.[16] *See Colautti*, 439 U.S. at 395-97 & n.13 (quoting *Screws v. United States*, 325 U.S. 91, 101-02 (1945)); *see also R.I. Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 310-12 (D.R.I. 1999) (scienter requirement did not cure statute where it modified the "vague" "legal standard"), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

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[16] Defendants' "knowledge" argument ignores that criminal liability under this statute is premised on a subjective and ambiguous legal standard. Defs.' Br. at 26. Defendants' cites to *McFadden v. United States*, 576 U.S. 186 (2015), *Gonzales v. Carhart*, 550 U.S. 124 (2007) and *Planned Parenthood of Southwest Ohio v. DeWine*, 696 F.3d 490 (6th Cir. 2012) are inapposite. In *McFadden*, the Supreme Court found the statute at issue "unambiguous" and merely noted in dicta that scienter requirements tend to clarify statutes, discrediting the defendant's argument that the scienter requirement itself rendered the statute vague. 576 U.S. at 196–97. In *Gonzales*, the Supreme Court simply noted that the statute's scienter requirements provided additional protection against vagueness where criminal liability was premised on "relatively clear guidelines" and "objective criteria." 550 U.S. at 149. Finally, in *DeWine*, this Court held that an "Ohio Supreme Court's explicit interpretation" of the statute had already "resolved any facial vagueness concerns [the Court] might have had." 696 F.3d at 504.

Take the earlier example of the pregnant patient who is a student and mother experiencing financial hardship with a fetal Down syndrome diagnosis. Being aware of all the circumstances articulated *supra*, a physician—acting in good faith—may determine that the Down syndrome diagnosis was not a "but-for" cause for the patient's decision to terminate. But, a prosecutor, a judge, and a jury, considering the same circumstantial evidence the physician observed, may reasonably reach a different conclusion and find the physician "knew" the patient sought an abortion "because of" a prohibited reason because the physician was "aware . . . that the circumstances exist[ed]." Tenn. Code Ann. § 39-11-106(a)(20). Contrary to Defendants' claims, Defs.' Br. at 26, this would subject the physician to severe criminal penalties, even though he or she believed the care did not violate the law.

Further, scienter requirements typically alleviate vagueness concerns where, unlike here, they require criminal defendants to have some level of knowledge that their conduct is proscribed. *See Hoffman Estates*, 455 U.S. at 499 & n.14 (a scienter requirement "*may* mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (emphasis added); *Colautti*, 439 U.S. at 395, n.12, n.13; *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952); *Screws*, 325 U.S. at 101–03; *DeWine*, 696 F.3d at 505 (noting that any hypothetical vagueness was cured by requirement that

physician "knowingly violate[] one of the requirements," meaning physicians could not be convicted if "good-faith" belief they had complied or "accidentally" failed to comply). Under the Reason Bans, physicians may be convicted even if they do not know they are committing and have no intent of committing the criminalized conduct.

B. This Court Should Not Reach Plaintiffs' Substantive Due Process Challenge to the Reason Bans, But If It Does, It Should Find Plaintiffs Likely to Succeed on Their Claim.

Contrary to Defendants' assertion, Plaintiffs' substantive due process claim against the Reason Bans is not properly before the Court. Defs.' Br. at 36-37. Defendants appealed the district court's "preliminary injunction, including the legal conclusions and factual findings on which that Order is based." Notice of Appeal, R.46, PageID#794. But, as Defendants acknowledge, the district court found it "unnecessary" to rule on Plaintiffs' substantive due process claim against the Reason Bans. Defs.' Br. at 36. Accordingly, no party has asked this Court to rule on this claim, and this Court does not need to reach it to adjudicate Defendants' appeal. *Id.* at 36-37.

Moreover, the district court recently denied Plaintiffs' Renewed Motion for TRO/PI, considering for the first time Plaintiffs' substantive due process claim. Order Denying Renewed Motion for TRO/PI, R.76, PageID#1020-21. No party has appealed that order, and unless and until an appeal is noticed, this Court lacks

jurisdiction to review it. Fed. R. App. P. 3(a)(1); *see also Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) (indicating that courts may not waive the jurisdictional requirements of Rules 3 and 4).[17]

Even if, *arguendo*, this Court reaches this claim, it should conclude that Plaintiffs are likely to succeed on the merits. The Reasons Bans are likely unconstitutional for the same reasons as the Cascading Bans, discussed *supra* Sec. I.A, namely that they ban pre-viability abortions. And, as discussed *supra* Sec. I.C.2, laws that prohibit pre-viability abortions are unconstitutional irrespective of the state's interests. For this reason, every court to consider a reason ban has permanently or preliminarily enjoined it. *See Preterm-Cleveland v. Himes*, 940 F.3d 318, 323 (6th Cir. 2019), *reh'g en banc granted, opinion vacated,* 944 F.3d 630 (6th Cir. 2019), No. 18-3329 (argued March 11, 2020); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir.

[17] This Court should reject any suggestion by Defendants that the Court delay ruling on this appeal simply because a case challenging a similar Ohio law is pending in this Court *en banc*. Defs.' Br. at 37 n.7 (citing *Preterm-Cleveland v. Himes*, 940 F.3d 318 (6th Cir. 2019), *reh'g en banc granted, opinion vacated*, 944 F.3d 630 (2019), No. 18-3329 (argued March 11, 2020)). Not only is the law in *Preterm-Cleveland* not identical to the Reason Bans, that case does not present a vagueness challenge and it would be inappropriate for the Court to rule on Plaintiffs' potentially similar substantive due process challenge to the Reason Bans at this juncture. Furthermore, Plaintiffs urge a prompt ruling from this Court on their vagueness claim because the Reason Bans are currently in effect, causing Plaintiffs and their patients harm, *see infra* Sec. IV.

2018), *cert. denied in part and granted in part, judgment rev'd in part on other grounds sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (hereinafter "*PPINK*"); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 9047174 at *2-3 (W.D. Ky. Mar. 20, 2019); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1275 (E.D. Ark. 2019), *appeal argued*, No. 19-2690 (8th Cir. Sept. 23, 2020); *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 408 F. Supp. 3d 1049, 1053 (W.D. Mo. 2019), *appeal argued*, No. 19-3134 (8th Cir. Sept. 24, 2020).

Defendants propose "work-arounds" to salvage the Reason Bans, and based on these arguments, claim they are not bans but regulations subject to the undue burden test. Defs.' Br. at 45. Defendants' arguments are unpersuasive. First, Defendants argue that the Reason Bans are not bans because they only apply "when the provider *knows* the abortion is being sought *because of*" a prohibited reason, Defs.' Br. at 45, and patients can simply not disclose their reasons. *Id*. This is irrelevant to the constitutional analysis for the same reason it is irrelevant that individuals could theoretically obtain abortions prior to 6 weeks under the Cascading Bans. *See supra* Secs. I.B-C. Even if some may be able to skirt the Reason Bans by hiding their reasons, a law is constitutionally invalid if it prohibits *any* individual from having an abortion prior to viability. *Id*. The constitutional

analysis must focus on those whose physicians know that the patient is seeking abortion because of a prohibited reason.

Regardless, the Reason Bans deny some people care no matter what they disclose. Providers receive information in numerous ways. For example, the circumstances of a patient's visit, the patient's medical record, and physician referrals all may convey information regarding a patient's reason for seeking abortion care. Looney Decl. ¶ 41, R.8-1, PageID#152; Looney Supp. Decl. ¶¶ 2-4, R.34-1, PageID##612-13; Rovetti Decl. ¶¶ 23, 27, R.8-4, PageID##244-45; Terrell Decl. ¶¶ 17, 20, 22, R.8-5, PageID##252-53; Zite Decl. ¶¶ 11-13, R.8-3, PageID#207. Defendants argue that a medical chart noting that the patient's fetus has Down syndrome would not give rise to "knowledge" and trigger the Reason Bans. Defs.' Br. at 46. But this claim is farcical: no provider can risk the steep criminal penalties to provide this abortion and would be forced to turn away the patient.[18] Grant Decl. ¶¶ 19-20, 23, R.8-6, PageID##261-62; Looney Decl. ¶ 49, R.8-1, PageID#154; Rovetti Decl. ¶ 24, R.8-4, PageID#244; Terrell Decl. ¶¶ 23,R.8-5, PageID##253; Looney Supp. Decl. ¶ 2-5, R.34-1, PageID#612-13.

Second, the State speculates that the Reason Bans do not operate as bans because any patient prevented from receiving care at one provider can simply go to

[18] As discussed *supra* Sec. II.A.2, Plaintiffs cannot be forced to take refuge in Defendants' changing and self-serving assurances.

another, Defs.' Br. at 45. This ignores reality. For any patient terminating a pregnancy because of a prohibited reason after 16 weeks, PPTNM is the only outpatient provider in the state—there is no other provider for them to go to. Looney Decl. ¶ 2, R.8-1, PageID#140-41. This is particularly problematic for those seeking to terminate because of a Down syndrome diagnosis which cannot occur until 12 weeks and often occurs several weeks later. Phillips Rebuttal Decl. ¶¶ 20-21, R.34-3, PageID#662. Regardless, even for those for whom travel to another provider may be possible, they face delay, increased travel and/or increased medical risks. Grant Decl. ¶ 18, R.8-6, PageID##260-61; Looney Decl. ¶¶ 30-31, 38, R.8-1, PageID##148-49, 151; Rovetti Decl.¶ 17, R.8-4, PageID#242; Terrell Decl. ¶ 26, R.8-5, PageID#254. As Chief Justice Roberts recently reaffirmed in his concurrence in *June Medical Services*, laws impose a "substantial obstacle" when they create these burdens. 140 S. Ct. at 2139 (citing *Whole Woman's Health*, 136 S. Ct. at 2313). Indeed, patients turned away from one provider are unlikely to be able to get care. Grant Decl. ¶ 19, R.8-6, PageID#261.

Accordingly, even under the undue burden test, Defendants' interests cannot alter the conclusion that the Reason Bans are unconstitutional given that they impose a substantial obstacle in the path of people seeking abortion by prohibiting

people from accessing pre-viability abortion care.[19] Plaintiffs are therefore still likely to succeed on their substantive due process claim against the Reason Bans, and Plaintiffs meet the large-fraction test[20] for facial invalidity for the same reasons they meet the test for the Cascading Bans, *see supra* Sec. I.C.3.

Defendants' argument that the Reason Bans do not implicate the right to abortion, Defs.' Br. at 46-47, is even more outlandish, relying only on two dissenting opinions. In a case challenging an Indiana law similar to the Reason Bans here, the Seventh Circuit rejected the argument that the right to abortion only exists for those who are seeking to avoid pregnancy rather than those who intend to

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[19] Defendants' devote much of their Brief to the State's purported interest in preventing discrimination. Plaintiffs do not concede that the Reason Bans serve all of the State's purported interests. Although these alleged interests are not relevant (because the Reason Bans prohibit pre-viability abortion), *see supra* I.A and I.C.2, Plaintiffs have not filed submissions demonstrating that the Bans are not reasonably related to this alleged state interest. Plaintiffs, however, reserve their right to make this showing before the district court. At this time, Plaintiffs refer the Court to briefs that will be filed by amici in this case.

[20] Defendants state that the Reason Bans only apply "in one limited circumstance: when the abortion provider *knows* the abortion is being sought *because of*" a prohibited reason. Defs.' Br. at 45; *see also id.* at 34. Even so, the Reason Bans fail the large-fraction test: the "relevant population" for purposes of the large-fraction test is therefore individuals whose physicians *know* that they are seeking abortion *because of* a prohibited reason, and in each instance such individuals would face a constitutionally improper burden. *See supra* Sec. I.C.3.

become pregnant but seek abortion after receiving a fetal diagnosis.[21] *PPINK*, 888 F.3d at 306. The Seventh Circuit held that "no court, let alone the Supreme Court, has recognized such a limitation." *Id*. This Court should therefore reject Defendants' argument, as every other court has done.

III. The District Court Correctly Concluded the Bans Independently Violate Plaintiffs' Patients Substantive Due Process Rights Because They Lack Valid Medical Emergency Provisions.

The district court also properly held that the Bans are unconstitutional for the independent reason that their medical emergency provisions are unconstitutionally vague and, barring impermissible judicial legislation, there is no way to fix them. Without such provisions, the Bans violate the essential holding of *Roe*," which "forbids a State to interfere with a [person's] choice to undergo an abortion procedure if continuing [the] pregnancy would constitute a threat to [the person's] health." *Casey*, 505 U.S. at 880.

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[21] Defendants claim that *Roe* rejected the argument that a woman can make the decision to have an abortion "*for whatever reason* she alone chooses." Defs.' Br. at 47 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)). But *Roe* explains the context: Although the Court rejected the argument that the right to abortion is absolute, and held that states may regulate abortion, it also held that the state interest in potential life does not become sufficiently "compelling" to justify banning abortion until after viability. 410 U.S. at 163–64.

A. Under *Voinovich*, the Bans' Medical Emergency Provisions Are Unconstitutionally Vague.

Under this Court's binding decision in *Voinovich*, the Bans' medical emergency provisions are unconstitutionally vague. 130 F.3d 187 (6th Cir. 1997). In *Voinovich*, this Court held that a medical emergency exception was unconstitutionally vague because the statute "impos[ed] criminal liability without a mental culpability requirement," and contained both "subjective and objective elements in that a physician must believe that the abortion is necessary *and* his belief must be objectively reasonable to other physicians." *Id.* at 203-04 (emphasis in original). The Court determined that "physicians [could not] know the standard under which their conduct w[ould] ultimately be judged." *Id*. at 205. Moreover, the "uncertainty induced" by "[t]he objective standard combined with strict liability for even good faith determinations, 'could have a profound chilling effect on the willingness to perform abortions.'" *Id.* at 205 (quoting *Colautti*, 439 U.S. at 396). The Court further noted that the chilling effect could be particularly severe because a "determination of whether a medical emergency . . . exists . . . is fraught with uncertainty and susceptible to being subsequently disputed by others"—a fact that is "especially troublesome in the abortion context" "where there is such disagreement" that "it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably." *Voinovich*, 130 F.3d at 205.

Just as in *Voinovich*, the Bans' medical emergency defenses lack any scienter element for medical emergency determinations, holding physicians strictly liable for "unreasonable" determinations. *See* Act §§ 39-15-216(a)(4), 217(a)(3). Further, like the statute in *Voinovich*, the medical emergency defenses contain both subjective and objective elements. "Medical emergency" is defined in terms of the "physician's good faith medical judgment," *id.* (incorporating definition in Tenn. Code Ann. § 39-15-211(a)(3)), but physicians may assert the defenses only if "in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision," *id.* §§ 39-15-216(e)(1), 217(e)(1).

Under this standard, it is unclear how a physician's medical emergency determination will be judged by a factfinder. And, whether a physician is protected by one of the defenses may ultimately depend on another's interpretation of whether the medical emergency determination was reasonable. This is particularly problematic because medical emergency determinations are complex and may easily be challenged by another physician after the fact—a significant risk in Tennessee, where so many physicians are openly opposed to abortion. Looney Decl. ¶ 37, R.8-1, PageID##150-51; Zite Decl. ¶¶ 21-22, R.8-3, PageID##209-10.

Due to this infirm standard, the severe criminal penalties, the inherent uncertainty surrounding medical emergency determinations, and hostility to abortion in Tennessee, physicians will be chilled from providing abortion care

despite their good faith beliefs that such care is warranted. *See id*. These problems invite arbitrary enforcement of the law.

Defendants argue that *Voinovich* is distinguishable because the medical emergency provisions here are affirmative defenses and not exceptions, Defs.' Br. at 32, and therefore, they do not implicate the void-for-vagueness doctrine because they are "not part of the definition of the crime."[22] *Id.* If this is a relevant distinction, then the Bans lack medical emergency provisions altogether and are unconstitutional under decades of binding precedent. *See Casey*, 505 U.S. at 880; *Stenberg*, 530 U.S. at 931 (2000); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327 (2006); *Roe*, 410 U.S. at 164-64. Alternatively, if the affirmative defenses are indeed "part of the definition of the crime," the Constitution does not permit them to be vague. Tennessee cannot have laws that, on the one hand, fail to provide any exception for medical emergencies and, on the other hand, rely on vague affirmative defenses to be constitutional. If this were permissible, it would render *Casey*'s medical emergency requirement meaningless.

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[22] Defendants' latent suggestion that *Voinovich* be "overrule[d] in an appropriate case" belies their assertion that this case is distinguishable. Defs.' Br. at 31 n.5. Notably, only this Court sitting *en banc* or the Supreme Court may overrule *Voinovich*. *See* 6th Cir. R. 32.1(b); *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017).

Moreover, neither case Defendants cite supports their argument that affirmative defenses do not implicate the void-for-vagueness doctrine. In *United States v. Christie*, 825 F.3d 1048, 1065 (9th Cir. 2016), the Ninth Circuit found potential vagueness in a Religious Freedom and Restoration Act (RFRA) affirmative defense could not invalidate convictions under the Controlled Substances Act because RFRA was not a "penal statute or anything like one," and therefore did not implicate Fifth Amendment concerns. 825 F.3d at 1064. Here, the medical emergency affirmative defenses are quite clearly part of Tennessee's criminal code and this particular penal statute. Act §§ 39-15-216(e)(1), 217(e)(1). In *Sanders v. State*, the Supreme Court of Nevada only found that the affirmative defense was not void for vagueness because its terms could be easily understood, and it did not lend itself to arbitrary enforcement. 67 P.3d 323, 326-28 (Nev. 2003). It did not say that an affirmative defense could not render a statute unconstitutionally vague.

Regardless, the fact that the Bans' medical emergency provisions are affirmative defenses here only amplifies the vagueness concerns discussed in *Voinovich*. At least with an exception, the prosecution will bear the burden of proving beyond a reasonable doubt the absence of a medical emergency. With an affirmative defense, physicians remain open to prosecution and bear the burden to show by the preponderance of the evidence that the defense applies. *See* Tenn.

Code Ann. § 39-11-204(b), (e). Accordingly, not only does an affirmative defense increase the risk of arbitrary enforcement, it heightens the "profound chilling effect" the vague medical emergency provisions have "on the willingness of physicians to perform abortions" in medical emergencies. *Voinovich*, 130 F.3d at 206.

B. Tennessee's Doctrine of Elision Cannot Save the Bans.

Defendants alternatively argue that the district court should have issued a narrower injunction.[23] Citing the Act's severability clauses, Defendants argue that the district court should have elided "reasonable" or, at least with respect to the Reason Bans, done away with the affirmative defense altogether. Defs.' Br. at 33-36. Neither solution is permissible.

First, "[t]he doctrine of elision is not favored." *Gibson Cty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985) (citation omitted). It applies only "when a conclusion can be reached that the legislature would have enacted the act in question with the *unconstitutional portion* omitted." *Willeford v. Klepper*, 597 S.W.3d 454, 471 (Tenn. 2020) (emphasis added). Eliding "reasonable" does not strike the "unconstitutional portion" of the affirmative defenses. As articulated

[23] Defendants did not raise this argument in their preliminary injunction briefing below. Perhaps recognizing—as the district court did—the flaws in their earlier argument, PI Order Mem., R.41, PageID##765-66, Defendants have since pivoted to severance.

supra, what renders the affirmative defenses unconstitutional under *Voinovich* is the "*combination* of the objective and subjective standards without a scienter requirement," 130 F.3d at 205 (emphasis added), not the requirement for reasonableness on its own. Defendants themselves made this point below. Defs.' Resp. Opp. TRO/PI, R.27, PageID#351-52.

To only elide "reasonable" would require this Court to choose one among several ways to rid the affirmative defenses of this fatal combination. There is no way for this Court to make this choice "clear of doubt from the face of the statute." *Gibson Cty.*, 691 S.W.2d at 550 (internal quotations and citation omitted). This solution would also contravene the "important canon of statutory construction counsel[ing] that a statute . . . should be interpreted to preclude any part from being 'inoperative, superfluous, void, or insignificant.'" *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 423 (6th Cir. 2019) (quoting *Baker v. State*, 417 S.W.3d 428, 439 n.11 (Tenn. 2013)).[24] Eliding "reasonable" would be nothing short of "judicial legislation." *Gibson Cty.*, 691 S.W.2d at 550 (internal quotations and citation omitted); *see also Ayotte*, 546 U.S. at 329 (holding that courts may not, in an effort

[24] The Bans' severability clauses also do not speak in terms of "words," but instead ask that any "provision" or "application" found unconstitutional be severed. Tenn. Code. Ann. §§ 39-15-216(h), 217(i). The unconstitutional "provisions" are the entirety of the medical emergency affirmative defenses, which when struck, leave the Bans without any potential constitutional applications.

to save a state law, "rewrite [it] to conform it to constitutional requirements") (internal quotations and citation omitted).

Second, Defendants argue, for the first time, that the district court could have severed the entire defense from the Reason Bans. Even if this Court believed such an action would be consistent with legislative intent, Defendants' assertion that the Reason Bans can stand without *any* medical emergency provision is wrong.[25] Defs.' Br. at 33-34.

Defendants claim that the Reason Bans have no application in the context of medical emergencies because they only proscribe abortions if a prohibited reason is a "but-for" cause of the termination. *Id.* at 34. Defendants argue, if there is a medical emergency, it is an "independently sufficient cause" that precludes "but-for" causation. *Id.* While it is true that under a strict "but-for" analysis the existence of two "independently sufficient causes" prevents either from being a "but-for" cause, this strict analysis is not *always* employed. *Burrage*, 571 U.S at 214 (noting the "undoubted reality that courts have not *always* required strict but-for causality, even where criminal liability is at issue"). On the contrary, there is a "special rule" that permits findings of "but-for" causation when there are multiple "independently sufficient causes." *Id.* at 215; *Nassar*, 570 U.S. at 347 (citing

[25] Defendants do not even attempt to argue that the Cascading Bans could stand in the absence of medical emergency provisions.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, as one of the "default rules" Title VII "is presumed to have incorporated). Even in *Burrage*—the case Defendants cite to support their argument—the Supreme Court found a "but-for" causation standard, but specifically declined "to accept or reject the special rule developed" for cases involving multiple "independently sufficient causes."[26] 571 U.S. at 215. Importantly, Defendants do not question that a patient may terminate a pregnancy due to multiple "independently sufficient causes"—a prohibited reason and a medical emergency. *See, e.g.*, *supra* at 9-10; Zite Decl. ¶ 12, R.8-3, PageID#207 (noting circumstances in which terminations may be sought both for a prohibited reason and a medical emergency). Because the Reason Bans may apply in medical emergencies, they *must* have medical emergency provisions under decades of Supreme Court precedent. *Casey*, 505 U.S. at 880; *Stenberg*, 530 U.S. at 931; *Ayotte*, 546 U.S. at 327; *Roe*, 410 U.S. at 164-64.

IV. The Equities Weigh Strongly in Favor of Preliminary Relief.

The district court properly held that the balance of equities clearly weighs in Plaintiffs' favor. The district court has wide discretion in applying this standard—the "purpose" of which is "to underscore the flexibility" that has "traditionally . . .

[26] Defendants' assertion that the Reason Bans do not need medical emergency provisions merely highlights another vague feature of the Reason Bans' "because of" standard.

characterized the law of equity." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). Indeed, with the harms the Bans inflict on Plaintiffs and their patients, the district court had discretion to grant preliminary injunctive relief even if Plaintiffs only "show[ed] serious questions going to the merits." *Id.* (holding that preliminary relief appropriate in cases like this where the "irreparable harm . . . decidedly outweighs any potential harm to the defendant"); *see also Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 929 (6th Cir. 2020) (holding that any harm to the state and the public was "far outweighed by the harm" inflicted on individual Tennesseans seeking abortion care), *petition for cert. filed*, No. 20-482 (Oct. 14, 2020).

Given that the Bans violate both Plaintiffs' and their patients' constitutional rights, "a finding of irreparable injury is mandated." *Am. C.L. Union of Ky. v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005); *accord Mich. St. A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("[T]he loss of constitutional rights for even a minimal amount of time constitutes irreparable harm.").

Furthermore, as the district court and this Court have appropriately recognized, abortion is a uniquely "time-sensitive procedure." PI Order Mem., R.41, PageID#766-67; *Adams & Boyle*, 956 F.3d at 925. Because the decision to have an abortion "simply cannot be postponed, or it will be made by default with

far-reaching consequences," *Bellotti v. Baird*, 443 U.S. 622, 643 (1979), a presumption of irreparable harm applies with particular force here. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795-96 (7th Cir. 2013) (citing "the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually, illegal"). As *Roe* held, forcing individuals to carry unwanted pregnancies to term causes them immense harm, including by undermining their ability to control their futures and often by harming their existing families. 410 U.S. at 153; *see also supra* at 12-13.

Defendants' equities arguments rely on the specious assertion that the Bans are constitutional, based on a blatant misreading of decades of binding precedent. Defendants ignore that the Cascading Bans will deprive nearly all pregnant people in Tennessee of their constitutional right to pre-viability abortion, and, based on their latest tortured and unworkable reading of the statute, baselessly argue that the Reason Bans will not deprive *any* patients of their constitutional right to pre-viability abortion. Even worse, the Bans will deter the provision of care in medical emergencies, exposing patients to extreme danger. *See supra* at 12-13, Sec. III.A. Ultimately, no matter how many patients the Bans deprive of abortion, in every instance it will be unconstitutional.

Further, contrary to Defendants' claim, Defs.' Br. at 49, the inevitable harms from the Reason Bans are not self-imposed—they flow directly from the law's

unconstitutionality which forces providers to turn away patients. Without injunctive relief, the only option for Plaintiffs to avoid severe criminal penalty is to decline care whenever a prohibited reason is referenced or implicated.

In contrast, Defendants fail to show any harm to the State or the public. "Neither Defendants nor the public have a strong interest in enforcing an unconstitutional statute." PI Order Mem., R.41, PageID#767 (citing *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987)); *see also Chamber of Comm. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). It is indisputable that the harms to Plaintiffs and their patients far outweigh any alleged harm to Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court affirm the district court's order preliminarily enjoining the Bans.

Dated: December 15, 2020

Respectfully submitted,

/s/ *Jessica Sklarsky*

Thomas H. Castelli
American Civil Liberties Union Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel: (615) 320-7142

Attorney for Plaintiffs-Appellees

Jessica Sklarsky
Rabia Muqaddam
Jen Samantha D. Rasay
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Tel: (917) 637-3600

Attorneys for Plaintiffs-Appellees Memphis Center for Reproductive Health and Nikki Zite, M.D., M.P.H.

Susan Lambiase
Planned Parenthood Federation of America
123 William St., 9th Floor
New York, NY 10038
Tel: (212) 261-4749
Fax: (212) 247-6811

Attorney for Plaintiffs-Appellees Planned Parenthood of Tennessee and North Mississippi and Kimberly Looney, M.D.

Brigitte Amiri
Andrew Beck
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2633

Attorneys for Plaintiffs-Appellees Knoxville Center for Reproductive Health and Femhealth USA, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 12,993 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: December 15, 2020

/s/ *Jessica Sklarsky*

Jessica Sklarsky

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2020, 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 CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Jessica Sklarsky*

Jessica Sklarsky

ADDENDUM

DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic records:

Memphis Center for Reproductive Health, et al., v. Herbert H. Slatery III, et al.

3:20-cv-00501

Date Filed	R.No.; PageID#	Document Description
June 19, 2020	R.1; PageID##1-34	Complaint
June 22, 2020	R.6; PageID##87-94	Motion for Temporary Restraining Order and/or Preliminary Injunction
June 22, 2020	R.7; PageID##95-129	Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction
June 22, 2020	R.7-1; PageID##130-133	Proposed Order Granting Motion for Temporary Restraining Order
June 22, 2020	R.8; PageID##134-138	Notice of Filing Declarations in Support of Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction
June 22, 2020	R.8-1; PageID##139-166	Declaration of Kimberly Looney
June 22, 2020	R.8-2; PageID##167-202	Declaration of Mary Norton
June 22, 2020	R.8-3; PageID##203-237	Declaration of Nikki Zite
June 22, 2020	R.8-4; PageID##238-246	Declaration of Corinne Rovetti
June 22, 2020	R.8-5; PageID##247-256	Declaration of Rebecca Terrell

June 22, 2020	R.8-6; PageID##257-264	Declaration of Melissa Grant
July 6, 2020	R.27; PageID##323-358	Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction
July 6, 2020	R.27-1; PageID##359-378	House Bill No. 2263
July 6, 2020	R.27-2; PageID##379-425	Declaration of Farr A. Curlin
July 6, 2020	R.27-3; PageID##426-457	Declaration of Dennis M. Sullivan
July 6, 2020	R.27-4; PageID##458-490	Declaration of O. Carter Snead
July 6, 2020	R.27-5; PageID##491-495	Declaration of Amelia Platte
July 6, 2020	R.27-6; PageID##496-497	Declaration of Dana Bythewood
July 6, 2020	R.27-7; PageID##498-552	Declaration of Marureen L. Condic
July 6, 2020	R.27-8: PageID##553-570	Declaration of Robin Pierucci
July 6, 2020	R.27-9; PageID##571-578	Declaration of Vanessa A. Lefler
July 13, 2020	R.33; PageID##591-597	Temporary Restraining Order
July 13, 2020	R.34; PageID##598-610	Plaintiffs' Reply in Support of Their Motion for Temporary Restraining Order and/or Preliminary Injunction
July 13, 2020	R.34-1; PageID##611-614	Supplemental Declaration of Kimberly Looney
July 13, 2020	R.34-2; PageID##615-656	Rebuttal Declaration of Steven J. Ralston
July 13, 2020	R.34-3; PageID##657-693	Rebuttal Declaration of Owen Phillips
July 13, 2020	R.34-4; PageID##694-708	Rebuttal Declaration of Mary Norton

July 24, 2020	R.41; PageID##727-768	Memorandum Granting Motion for Preliminary Injunction
July 24, 2020	R.42; PageID#769	Preliminary Injunction Order Granting Motion for Preliminary Injunction
Aug. 21, 2020	R.46; PageID##793-796	Notice of Appeal
Aug. 21, 2020	R.47; PageID##797-802	Defendants' Motion for Stay Pending Appeal
Aug. 21, 2020	R.48; PageID##803-823	Memorandum in Support of Motion for Stay Pending Appeal
Sept. 4, 2020	R.51; PageID##830-846	Plaintiffs' Response to Defendants' Motion for Stay Pending Appeal
Sept. 11, 2020	R.54; PageID##873-880	Defendants' Reply in Support of Their Motion for Stay Pending Appeal
Sept. 29, 2020	R.58; PageID##892-893	Order Denying Motion for Stay Pending Appeal
Nov. 20, 2020	R.65; PageID##927-931	Plaintiffs' Renewed Motion for Temporary Restraining Order and/or Preliminary Injunction
Nov. 20, 2020	R.65-1; PageID##932-935	Proposed Order Granting Plaintiffs' Renewed Motion for Temporary Restraining Order and/or Preliminary Injunction
Dec. 11, 2020	R.76; PageID##1020-1021	Order Denying Renewed Motion for TRO/PI

Reproduction of HB 2263 / SB 2196
Cascading Bans – Act §§ 39-15-216

(a) As used in this section:

(1) "Abortion" has the same meaning as defined in § 39-15-211;

(2) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the heart of an unborn child;

(3) "Gestational age" or "gestation" has the same meaning as defined in § 39-15-211;

(4) "Medical emergency" has the same meaning as defined in § 39-15-211; provided, that a medical emergency does not include a claim or diagnosis related to the woman's mental health or a claim or diagnosis that the woman will engage in conduct which would result in her death or substantial and irreversible impairment of a major bodily function;

(5) "Unborn child" has the same meaning as defined in § 39-15-211; and

(6) "Viable" has the same meaning as defined in § 39-15-211.

(b) (1) Before performing or inducing, or attempting to perform or induce, an abortion, the physician shall determine the gestational age of the unborn child in accordance with generally accepted standards of medical practice.

(2) A violation of subdivision (b)(1) is a Class C felony.

(c) (1) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child has a fetal heartbeat. A violation of this subdivision (c)(1) is a Class C felony.

(2) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is six (6) weeks gestational age or older unless, prior to performing or inducing the abortion, or attempting to perform or induce the abortion, the physician affirmatively determines and records in the pregnant woman's medical record that, in the physician's good faith medical judgment, the unborn child does not have a fetal heartbeat at the time of the abortion. In making the good faith medical determination, the physician shall utilize generally accepted standards of medical practice using current medical technology and methodology applicable to the gestational age of the unborn child and reasonably calculated to

determine the existence or non-existence of a fetal heartbeat. A violation of this subdivision (c)(2) is a Class C felony.

(3) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is eight (8) weeks gestational age or older. A violation of this subdivision (c)(3) is a Class C felony.

(4) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is ten (10) weeks gestational age or older. A violation of this subdivision (c)(4) is a Class C felony.

(5) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is twelve (12) weeks gestational age or older. A violation of this subdivision (c)(5) is a Class C felony.

(6) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is fifteen (15) weeks gestational age or older. A violation of this subdivision (c)(6) is a Class C felony.

(7) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is eighteen (18) weeks gestational age or order. A violation of this subdivision (c)(7) is a Class C felony.

(8) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is twenty (20) weeks gestational age or older. A violation of this subdivision (c)(8) is a Class C felony.

(9) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is twenty-one (21) weeks gestational age or older. A violation of this subdivision (c)(9) is a Class C felony.

(10) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is twenty-two (22) weeks gestational age or older. A violation of this subdivision (c)(10) is a Class C felony.

(11) A person shall not perform or induce, or attempt to perform or induce,

an abortion upon a pregnant woman whose unborn child is twenty-three (23) weeks gestational age or older. A violation of this subdivision (c)(11) is a Class C felony.

(12) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is twenty-four (24) weeks gestational age or older. A violation of this subdivision (c)(12) is a Class C felony.

(d) (1) A person shall not be convicted of violating more than one (1) subdivision of subsection (c) for any one (1) abortion that the person performed, induced, or attempted to perform or induce.

(2) This section does not permit the abortion of a viable unborn child.

(e) (1) Subject to compliance with subdivision (e)(2), it is an affirmative defense to criminal prosecution for a violation of a provision of this section that, in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision.

(2) In order for the affirmative defense in subdivision (e)(1) to apply, a physician who performs or induces, or attempts to perform or induce, an abortion because of a medical emergency must comply with each of the following conditions unless the medical emergency also prevents compliance with the condition:

(A) The physician who performs or induces, or attempts to perform or induce, the abortion certifies in writing that, in the physician's good faith, reasonable medical judgment, based upon the facts known to the physician at the time, compliance with the provision was prevented by a medical emergency;

(B) The physician certifies in writing the available methods or techniques considered and the reasons for choosing the method or technique employed;

(C) If the unborn child is presumed to be viable under § 39-15-211 or determined to be viable under § 39-15-212, the physician performs or induces, or attempts to perform or induce, the abortion in a hospital. The hospital must have appropriate neonatal services for premature infants unless there is no hospital within thirty (30) miles with neonatal services and the physician who intends to perform or induce the abortion has admitting

privileges at the hospital where the abortion is to be performed or induced;

(D) If the unborn child is presumed viable under § 39-15-211 or determined to be viable under § 39-15-212, the physician who performs or induces, or attempts to perform or induce, the abortion terminates or attempts to terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive, unless that physician determines, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, that the termination of the pregnancy in that manner poses a significantly greater risk of the death of the pregnant woman or a significantly greater risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion; and

(E) If the unborn child is presumed viable under § 39-15-211 or determined to be viable under § 39-15-212, the physician who performs or induces, or attempts to perform or induce, the abortion has arranged for the attendance in the same room in which the abortion is to be performed or induced, or attempted to be performed or induced, at least one (1) other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's complete expulsion or extraction from the pregnant woman.

(f) A pregnant woman upon whom an abortion is performed or induced, or attempted to be performed or induced, in violation of any provision of this section is not guilty of violating, or of attempting to commit or conspiring to commit a violation of, this section.

(g) When a physician is criminally charged with a violation of this section, the physician shall report the charge to the board of medical examiners in writing within seven (7) calendar days of acquiring knowledge of the charge. The report must include the jurisdiction in which the charge is pending, if known, and must also be accompanied by a copy of the charging documents, if available. A district attorney general shall promptly notify the board of

medical examiners when a physician is charged with a violation of this section.

(h) If any provision or provisions of this section or the application thereof to any person, circumstance, or period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the remainder of the section shall remain effective. The general assembly hereby declares that it would have enacted this section and each of its provisions, even if any provision of this section or the application thereof to any person, circumstance, or period of gestational age was later found to be unenforceable, unconstitutional, or invalid.

(i) (1) It is the specific intent of the general assembly in this section to exercise to the greatest extent permitted by law the legitimate, substantial, and compelling state interest in protecting maternal health, and in preserving, promoting, and protecting life and potential life throughout pregnancy by enacting more protective requirements than provided for under this part as it existed prior to July 13, 2020.

(2) When this section is in direct conflict with this part as it existed prior to July 13, 2020, the more protective requirements of this section control over any less protective provision of this part. This section shall not be construed as a repeal, either express or implied, of any provision of this part as it existed prior to July 13, 2020.

(3) The general assembly specifically intends that this part as it existed prior to July 13, 2020, shall remain and be enforceable if, and for so long as, any provisions of this section, or any part or parts thereof, are enjoined or otherwise barred by a court of competent jurisdiction.

(4) This section does not repeal or modify in any way § 39-15-213, as enacted by chapter 351 of the Public Acts of 2019, which shall control upon becoming effective. This section shall remain and be enforceable if, and for so long as, any provisions of § 39-15-213, or any part or parts thereof, are enjoined or otherwise barred by a court of competent jurisdiction.

Reproduction of HB 2263 / SB 2196
Reason Bans – Act §§ 39-15-217

(a) As used in this section:

(1) "Abortion" has the same meaning as defined in § 39-15-211;

(2) "Down syndrome" means a chromosome disorder associated either with an extra chromosome twenty-one or an effective trisomy for chromosome twenty-one;

(3) "Medical emergency" has the same meaning as defined in § 39-15-211; provided, that it does not include a claim or diagnosis related to the woman's mental health or a claim or diagnosis that the woman will engage in conduct which would result in her death or substantial and irreversible impairment of a major bodily function; and

(4) "Unborn child" has the same meaning as defined in § 39-15-211.

(b) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman if the person knows that the woman is seeking the abortion because of the sex of the unborn child.

(c) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman if the person knows that the woman is seeking the abortion because of the race of the unborn child.

(d) A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman if the person knows that the woman is seeking the abortion because of a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome in the unborn child.

(e) (1) Subject to compliance with subdivision (e)(2), it is an affirmative defense to criminal prosecution for a violation of a provision of this section that, in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision.

(2) In order for the affirmative defense in subdivision (e)(1) to apply, a physician who performs or induces, or attempts to perform or induce, an abortion because of a medical emergency must comply with each of the following conditions unless the medical emergency also prevents compliance with the condition:

(A) The physician who performs or induces, or attempts to perform

or induce, the abortion certifies in writing that, in the physician's good faith, reasonable medical judgment, based upon the facts known to the physician at the time, compliance with the provision was prevented by a medical emergency;

(B) The physician certifies in writing the available methods or techniques considered and the reasons for choosing the method or technique employed;

(C) If the unborn child is presumed to be viable under § 39-15-211 or determined to be viable under § 39-15-212, the physician performs or induces, or attempts to perform or induce, the abortion in a hospital. The hospital must have appropriate neonatal services for premature infants unless there is no hospital within thirty (30) miles with neonatal services and the physician who intends to perform or induce the abortion has admitting privileges at the hospital where the abortion is to be performed or induced;

(D) If the unborn child is presumed viable under § 39-15-211 or determined to be viable under § 39-15-212, the physician who performs or induces, or attempts to perform or induce, the abortion terminates or attempts to terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive, unless that physician determines, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, that the termination of the pregnancy in that manner poses a significantly greater risk of the death of the pregnant woman or a significantly greater risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion; and

(E) If the unborn child is presumed viable under § 39-15-211 or determined to be viable under § 39-15-212, the physician who performs or induces, or attempts to perform or induce, the abortion has arranged for the attendance in the same room in which the abortion is to be performed or induced, or attempted to be performed or induced, at least one (1) other physician who

is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's complete expulsion or extraction from the pregnant woman.

(f) A violation of subsections (b)-(d) is a Class C felony.

(g) A pregnant woman upon whom an abortion is performed or induced, or attempted to be performed or induced, in violation of subsections (b)-(d), is not guilty of violating the subsections, or of attempting to commit or conspiring to commit a violation of the subsections.

(h) When a physician is criminally charged with a violation of this section, the physician shall report the charge to the board of medical examiners in writing within seven (7) calendar days of acquiring knowledge of the charge. The report must include the jurisdiction in which the charge is pending, if known, and must also be accompanied by a copy of the charging documents, if available. A district attorney general shall promptly notify the board of medical examiners when a physician is charged with a violation of this section.

(i) If any provision of this section or the application thereof to any person, circumstance, or period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the remainder of this section shall remain effective. The general assembly hereby declares that it would have enacted this section and each of its provisions, even if any provision of this section or the application thereof to any person, circumstance, or period of gestational age was later found to be unenforceable, unconstitutional, or invalid.

(j) (1) It is the specific intent of the general assembly in this section to exercise to the greatest extent permitted by law the legitimate, substantial, and compelling state interest in protecting maternal health, and in preserving, promoting, and protecting life and potential life throughout pregnancy by enacting more protective requirements than provided for under this part as it existed prior to July 13, 2020.

(2) When this section is in direct conflict with this part as it existed prior to July 13, 2020, the more protective requirements of this section control over any less protective provision in this part. This section

shall not be construed as a repeal, either express or implied, of any provision of this part as it existed prior to July 13, 2020.

(3) The general assembly specifically intends that this part as it existed prior to July 13, 2020, shall remain and be enforceable if, and for so long as, any provisions of this section, or any part or parts thereof, are enjoined or otherwise barred by a court of competent jurisdiction.

(4) This section does not repeal or modify in any way § 39-15-213, as enacted by chapter 351 of the Public Acts of 2019, which shall control upon becoming effective. This section shall remain and be enforceable if, and for so long as, any provisions of § 39-15-213, or any part or parts thereof, are enjoined or otherwise barred by a court of competent jurisdiction.