No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

vs.

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

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

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' RENEWED MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

This case concerns a series of bans on pre-viability abortion enacted through Tennessee House Bill 2263/Senate Bill 2196 (the "Act")—the "Cascading Bans" and the "Reason Bans." The Reason Bans—the only bans at issue in the instant motion—were properly enjoined by the district court because they are unconstitutionally vague. July 24, 2020 PI Order Memorandum ("PI Order Mem."), R.41. A panel of this Court agreed. Sept. 10, 2021 Opinion, Dkt. 97-2 ("Op."). The Court has granted Defendants-Appellants' (the "State" or "Tennessee") petition for rehearing en banc and vacated the panel opinion. Dkt. 110-2. The State now moves to reinstate a partial stay of the preliminary injunction only as to the Act's Reason Bans.[1]

A stay is not warranted. The Reason Bans violate binding precedent prohibiting unconstitutionally vague laws, as detailed in two prior opinions in this case, because they impose liability based on a physician's knowledge of something fundamentally indeterminate, *United States v. Williams*, 553 U.S. 285, 306 (2008)—a patient's but-for motivations for seeking an abortion. Tennessee has been unable

[1] After the district court issued its July 24, 2020 Preliminary Injunction Order ("PI Order"), R.42, the State sought a stay of the injunction from the district court on all of the bans pending appeal, Motion to Stay Pending Appeal, R.47, which was denied, Order Denying Stay, R.58, PageID#892. The State then filed a motion for a partial stay on the preliminary injunction for the Reason Bans only, Defs.' Partial Stay Mot., Dkt. 14, which a motions panel granted pending appeal. Stay Order, Dkt. 33-2.

to articulate how the law applies in common circumstances, such as when a patient has multiple reasons, and what conduct the law actually prohibits.

BACKGROUND

The Reason Bans prohibit Plaintiffs from providing 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."[2] Act §§ 39-15-217(b)-(d). Physicians who violate the Reason Bans are subject to severe criminal penalties that include imprisonment of three to 15 years and/or a fine not to exceed $10,000, *id.* § 39-15-217(f); Tenn. Code Ann. § 40-35-111(b)(3), and place their medical licenses at risk, Tenn. Code Ann. §§ 63-6-101(a)(3); 63-6-214(b).

After considering the parties' extensive submissions on Plaintiffs' motion for preliminary relief, the district court granted a preliminary injunction blocking the Reason Bans. PI Order, R.42, PageID#769; PI Order Mem., R.41, PageID#767. The district court found that Plaintiffs had established a likelihood of success on their claim that the Reason Bans are unconstitutionally vague, PI Order Mem., R.41, PageID#761, and the panel affirmed this holding, Op. 30.

The district court made findings of fact, none of which the panel found to be clearly erroneous, articulating the effects of the Reason Bans and the many recurring

[2] This factual summary is limited to those facts most relevant to the Reason Bans.

scenarios in which the application of the Reason Bans is unclear. PI Order Mem., R.41, PageID##735-742, 750; Op. 24.

The district court credited Plaintiffs' testimony that individuals seek abortion for a multitude of deeply personal reasons. PI Order Mem, R.41, PageID##735, 737, 739-41; Looney Decl. ¶ 39, R.8-1, PageID#151; Rovetti Decl. ¶ 12, R.8-4, PageID#241; Terrell Decl. ¶¶ 16-17, R.8-5, PageID##251-252. For this reason, it is often difficult, if not impossible, for another person to know why any individual seeks an abortion. PI Order Mem, R.41, PageID#740; Looney Decl. ¶ 44, R.8-1, PageID#153; Terrell Decl. ¶ 16, R.8-5, PageID##251-252.

Some of Plaintiffs' patients disclose information about the considerations that have informed their decisionmaking. PI Order Mem, R.41, PageID##735, 737, 739-41; Looney Decl. ¶ 41, R.8-1, PageID#152; Rovetti Decl. ¶¶ 23, 27, R.8-4, PageID##244-245; Terrell Decl. ¶ 17, R.8-5, PageID#252. Patients tell Plaintiffs of a fetal diagnosis they received from another health care provider. PI Order Mem., R.41, PageID##735, 739; Op. 9; Looney Decl. ¶ 43, R.8-1, PageID#152. Additionally, patients of advanced maternal age have expressed concerns about genetic conditions, including Down syndrome. PI Order Mem., R.41, PageID##735, 739-42, 760; Op. 8, 26; Looney Decl. ¶ 47, R.8-1, PageID#154; Terrell Decl. ¶ 21, R.8-5, PageID#253; Grant Decl. ¶ 22, R.8-6, PageID#262. Patients sometimes mention the race or sex of the fetus during counseling with Plaintiffs. PI Order Mem.,

R.41, PageID##735, 739-42, 760; Looney Decl. ¶ 46, R.8-1, PageID#153. Patients sometimes ask about the sex during an ultrasound. PI Order Mem., R.41, PageID#735, 740, 750; Op. 13, 24, 26; Looney ¶ 46, R.8-1, PageID#153; Looney Supp. Decl. ¶ 4, R.34-1, PageID#613; Rovetti Decl. ¶ 23, R.8-4, PageID#244; Grant Decl. ¶ 22, R.8-6, PageID#262; Terrell Decl. ¶ 20, R.8-5, PageID#252-53.

Patients with a fetal diagnosis are also referred to Plaintiffs. For many of those patients, when deciding to have an abortion, they do so not just because of the diagnosis, but also because they feel they lack necessary resources—financial, medical, educational, or emotional—to parent a child with disabilities, especially while raising other children. PI Order Mem., R.41, PageID##735, 740; Op. 6, 9, 26; Looney Decl. ¶ 43, R.8-1, PageID#152-53.

Geneticists directly refer to Plaintiffs patients with a fetal diagnosis or early screenings indicating a possible fetal diagnosis, including patients with a fetal diagnosis of Down syndrome or the potential for such a diagnosis. PI Order Mem., R.41, PageID##735, 740, 759-60; Looney Decl. ¶¶ 43, 48, R.8-1, PageID##152, 154; Looney Second Supp. Decl. ¶ 3, R.71-1, PageID##973-74; Terrell Decl. ¶ 22, R.8-5, PageID#253; Terrell Supp. Del. ¶ 7, R.71-2, PageID#979. Plaintiffs sometimes receive patient medical records that indicate a fetal diagnosis or potential diagnosis. PI Order Mem., R.41, PageID##740, 750, 759-60; Op. 13, 24; Looney Decl. 43, R.8-1, PageID##152-53; Looney Supp. Decl. ¶ 3, R.34-1, PageID#613;

Looney Second Supp. Decl. ¶ 4, R.71-1, PageID#974; Terrell Decl. ¶ 22, R.8-5, PageID#253.

Plaintiffs can sometimes see an indication of a potential fetal diagnosis of Down syndrome on an ultrasound prior to an abortion. PI Order Mem., R.41, PageID#750; Looney Second Supp. Decl. ¶ 6; R.71-1, PageID#974.

Pursuant to her hospital's policy, Dr. Zite provides abortion care to patients who have a confirmed diagnosis of Down syndrome when it is accompanied by another severe fetal condition. PI Order Mem., R.41, PageID##736-38; Op. 6, 8; Zite Decl. ¶ 12, R.8-3, PageID#207; Zite Supp. Decl. ¶ 5, R.71-3, PageID#982-83.

The district court concluded that it is unclear whether the Reason Bans prohibit abortion in these situations. PI Order Mem., R.41, PageID##760-61.

Following the district court decision, the State appealed and sought a partial stay with respect to the Reason Bans. Defs.' Partial Stay Mot., Dkt. 14. A split motions panel granted Defendants' motion, finding that Plaintiffs did not have a likelihood of success on their vagueness challenges. Stay Order, Dkt. 33-2 at 4-5. The panel disagreed with the motions panel and agreed with the district court. *Id.*

The State has argued that the term "knows" operates as a clarifying scienter requirement and that the term "because of" imports a standard of but-for causation. PI Order Mem., R.41, PageID##760-61; Op. at 25. But the panel and the district court both concluded that these attempts to clarify the statute "left many questions

unanswered" as to how the statute would operate in the above-described circumstances. Op. 24-25 (citing PI Order Mem., R.41, PageID##760-61). Given this lack of clarity, the panel and the district court held that Plaintiffs justifiably fear arbitrary enforcement whenever a prohibited reason is referenced or implicated during a patient's care. PI Order Mem., R.41, PageID#761; Op. 25.

The district court also held that the Reason Bans were separately unconstitutional for lack of a valid medical emergency exception because the Act's medical emergency affirmative defenses include flaws identical to those in the statute invalided by the Sixth Circuit in *Women's Medical Professional Corporation v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997). *Id.*, R.41, PageID##761-766.[3] The panel did not reach this issue. Op. 33.

ARGUMENT

"'A stay is an intrusion into the ordinary processes of administration and judicial review.'" *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). "'[A] stay is not a matter of right,'" and the party requesting a stay bears a "heavy burden" of "showing that the circumstances justify an exercise of that discretion." *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014) (alterations omitted)

[3] The district court also enjoined the Cascading Bans. PI Order Mem., R.41, PageID##753-757.

(quoting *Nken*, 556 U.S. at 433-434). In evaluating a motion to stay pending appeal, this Court balances four factors: "(1) whether the [movant] has a strong or substantial likelihood of success on the merits; (2) whether the [movant] will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). "The first two factors . . . are the most critical." *Dodds*, 845 F.3d at 221 (internal citation and quotation marks omitted). At a minimum, a movant "must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Family Trust Found. of Ky. v. Ky. Jud. Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004) (citation omitted). The State has not met this heavy burden.

I. Tennessee Fails to Show a Likelihood of Success on Appeal.

a. The District Court, Affirmed by a Panel of this Court, Correctly Held that the Reason Bans are Likely Unconstitutionally Vague under Well-Settled Law.

As the district court concluded and a panel of this Court affirmed in response to the same arguments the State raises again here, the Reason Bans do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); Order, R.41, PageID##759-60; Op. 27. The Reason Bans also threaten

"arbitrary and discriminatory enforcement" because they "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-109; Order, R.41, PageID##759-60; Op. 27-28. As a result, the Reason Bans are unconstitutionally vague.

Although this standard does not demand "meticulous specificity," and commonly used terms may not require statutory definitions, Defendants' Renewed Motion ("Defs.' Ren. Mot.") at 10, 12, such common understandings only cure vagueness if it is ultimately "clear what the ordinance as a whole prohibits." *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 798 (6th Cir. 2005).

The State offers arguments purporting to clarify two terms in the statute in isolation—"knows" and "because of." Even if these arguments clarified the terms individually, which they do not, these arguments are also irrelevant because the Reason Bans are unconstitutionally vague due to the imprecision of these terms *in combination* with the fact that the statute assigns liability based on a person's subjective knowledge of another person's reasons for acting, as the district court and the panel correctly concluded. Order, R.41, PageID##759-60; Op. 27. The State's arguments thus do not clarify what the Reason Bans "as a whole" prohibit, *Deja Vu*, 411 F.3d at 798, as evidenced by the innumerable, common-sense questions the court below raised as to what conduct is prohibited:

> 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?[4]

PI Order Mem., R.41, PageID##759-60. It is "these questions—left unanswered by [the Reason Bans]"—that demonstrate the statute's vagueness. *Id.*, R.41, PageID#760. After considering the State's piecemeal arguments, the district court properly concluded that the State's proposed definitions were not "reasonable constructions" capable of curing the statute's vagueness. *Id.*, R.41, PageID#760.

First, the State argues that the term "knows" in the Reason Bans is easily defined because it requires "actual" and not constructive knowledge, and it requires some awareness of the prohibited conduct. Defs.' Ren. Mot. at 10-11. But the State's admission that knowledge can be proven by *circumstantial evidence*, Defendants' Response ("Defs.' Resp."), R.27, PageID##351-352, establishes that knowledge might be inferred and indeed not actual. This was central to the district court's conclusion that the statute fails to advise providers of, for example, what kind of

[4] The State portrays the key questions left unanswered by the Reason Bans, Op. 24, as mere "hypothetical[s]," Defs.' Ren. Mot. at 1-2. But, as set forth above, *see supra* at 2-6, these are not imaginary situations—these are recurring factual circumstances, detailed in Plaintiffs' evidence and credited by the district court, where it is not clear whether providing an abortion would be legal.

advance information in a patient chart could be used to establish that a provider had knowledge.[5] PI Order Mem., R.41, PageID##759-60. The panel agreed, concluding that circumstances unknown to the doctor could be used by a prosecutor to bring criminal charges against a physician acting in good faith. Op. 24.

Second, the State purports to define the phrase "because of," pointing to contexts in which courts have held that the term "because of" refers to "but-for causation." Defs.' Ren. Mot. at 11. But, as the district court recognized, even if but-for causation applies here, it still would not clarify the Reason Bans' application. PI Order Mem, R.41, PageID##759-60. In fact, if anything, but-for causation worsens the vagueness in the statute. Op. 27, 29. As the Supreme Court has explained, but-for causation "can be a sweeping standard" because "[o]ften, events have multiple but-for causes." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020). And, as

[5] The State argues that "knows" adds a clarifying scienter requirement into the statute that precludes a finding of vagueness. Defs.' Ren. Mot. at 15. The cases they cite are unavailing because they do not, as here, Order, R.41, PageID##759-760, present instances where there was any ambiguity about what a defendant needed to know to violate the statute. In *McFadden v. United States*, the Court held that a statute was "unambiguous" and, therefore, not vague, but noted as a general matter, a scienter requirement adds clarity. 576 U.S. 186, 197 (2015). Similarly, in *Planned Parenthood Sw. Ohio Region v. DeWine*, the Sixth Circuit held that an "Ohio Supreme Court's explicit interpretation" of the statute had already "resolved any facial vagueness concerns [the court] might have had," making it clear "what a physician must do to comply with the Act." 696 F.3d 490, 504-5 (6th Cir. 2012). The Sixth Circuit merely noted that "[a]ny risk of uncertainty" associated with "other supposedly vague terms" might be cured by a knowing scienter requirement. *Id.* at 505.

this Court has made clear, assessing another's "but for" motivations poses a "thorny" question with an answer that is "far from obvious," particularly when—as here—there may be "multiple motives at play." *United States v. Miller*, 767 F.3d 585, 592, 600 (6th Cir. 2014).

Third, the State points to a handful of criminal statutes that require a defendant to know certain mental states of others. *See* Defs.' Ren. Mot. at 13-14. But the State fails to grapple with what makes this statute unique—the fact that "the statute requires one individual to know the *motivations* underlying the actions of another individual," and, under the State's construction, their but-for motivations.[6] PI Order Mem., R.41, PageID#760 (emphasis added). For the same reason, the State's citations to *United States v. Williams*, 553 U.S. 285, 306 (2008), and *United States v. Paull*, 551 F.3d 516, 525 (6th Cir. 2009), Defs.' Ren. Mot. at 14, are misplaced because the statutes at issue in both cases reflected no "indeterminacy" because they posed "clear questions of fact," which required a "true-or-false determination" about the defendant's belief and not a "subjective judgment." *Williams*, 553 U.S. at 306.

[6] No other reason bans incorporate but-for causation, and most include qualifiers, such as "in whole or in part." *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.

All of the State's examples require a binary determination only, Defs.' Ren. Mot. at 13-14—i.e., does the person intend to commit a crime or not? Does a person consent or not? The Reason Bans, in contrast, do not impose such a binary inquiry, despite the State's conclusory statements to the contrary; they impose criminal liability based on physicians' subjective assessments of their patients' motivations—not *whether* the patient intends to have an abortion, but *why* they have made that decision, and, still further, whether a particular motivation was a "but for" cause. *Id.* at 17; Op. 27 ("None of the State's—or the dissent's—examples of other criminal laws that require knowledge of another person's state of mind—rape, federal conspiracy, assisted suicide—necessitate the additional analysis of 'but-for' causation of a third party in the way that section 217 requires.").

Finally, Plaintiffs need not wait for arbitrary enforcement to sue. As the district court held, the Reason Bans "threaten[] criminal sanctions," and include "vague provisions." PI Order Mem., R.41, PageID#761. Given the "imprecise language of the statute," the Reason Bans subject Plaintiffs to varied potential interpretations by "individual prosecutors," *Id.* The risk of arbitrary enforcement is thus real and immediate. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Further, Plaintiffs are chilled in providing constitutionally protected abortion care, an outcome foreclosed by precedent. PI Order Mem., R.41, PageID##760-61; Op. 29 (citing *Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489, 498-99

(1982)).

b. The District Court Correctly Held that the Medical Emergency Affirmative Defense Is Likely Unconstitutionally Vague.

The district court properly held that the Reason Bans' medical emergency affirmative defense has the same deficiencies as the provision held unconstitutionally vague in *Voinovich*, 130 F.3d 187, because the statute has both subjective and objective elements with no scienter requirement and a clarifying scienter could not be incorporated. PI Order Mem., R.41, PageID#764-766 (citing *Voinovich*, 130 F.3d at 205). The term "medical emergency" is defined subjectively in terms of the "physician's good faith medical judgment," Act §§ 39-15-217(a)(3) (incorporating definition in *id.* § 39-15-211(a)(3)), but a physician may assert this affirmative defense only if "in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision," *id.* §§ 39-15-217(e)(1). As a result, the district court concluded that, just as in *Voinovich*, and "as Plaintiffs' Declarations reflect, application of the medical-emergency defense is 'fraught with uncertainty and susceptible to being subsequently disputed by others.'" PI Order Mem., R.41, PageID#764 (citing *Voinovich*, 130 F.3d at 205).

The State argues that *Voinovich* is distinguishable because the medical emergency provision here is an affirmative defense and not an exception, citing cases from other contexts where an affirmative defense does not call into question the constitutionality of the provision itself. *See* Defs.' Ren. Mot. at 18-19. But, unlike

the contexts Defendants cite, a law restricting abortion may not "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992). Under this binding precedent, the Reason Bans *must include* a valid provision for medical emergencies, which is not dependent on any particular characterization of the underlying statute. PI Order Mem., R.41, PageID##761-66. Whether such a provision is called an exception or an affirmative defense is irrelevant.[7]

The State further argues that, even if *Voinovich* is directly on point, the district court should have stricken the word "reasonable" from the statute under Tennessee's doctrine of elision or by issuing a narrower preliminary injunction. Defs.' Ren. Mot. at 19-20. Neither of these remedies is workable or warranted.

"The 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 "if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable, . . . provided, of course, there

[7] The State's reliance on *United States v. Christie*, 825 F.3d 1048 (9th Cir. 2016), is misplaced. *See* Defs.' Ren. Mot. at 2, 19. Plaintiffs there did not challenge the underlying criminal statute that formed the basis for prosecution. Here, the medical emergency affirmative defense is quite clearly part of Tennessee's criminal code and this particular penal statute. Act § 39-15-217(e)(1).

is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage." *Id.* (internal citation and quotation marks omitted). "Otherwise, [the doctrine's] decree may be judicial legislation." *Id.* (internal citation and quotation marks omitted).

Similarly, a court's ability to craft an injunction directed only at certain applications of a statute turns on the legislature's intent. The "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (internal citation and quotation marks omitted); *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 515-16 (6th Cir. 2006) (citing *Ayotte*, 546 U.S. at 330) ("[A] narrow injunction prohibiting only unconstitutional applications of the statute should be employed where such an approach is *not contrary to legislative intent*.") (emphasis added).

Here, the Court cannot infer from the face of the statute that the legislature would have enacted the affirmative defense without the word "reasonable." Rather, legislative intent more likely counsels *against* striking the term. "[A]n important canon of statutory construction counsels 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)). To the extent we can infer legislative intent

here, inclusion of the term "reasonable" appears to be precisely what the legislature meant. Other than in the Act, Tennessee's abortion code never conditions the application of a medical emergency defense or exception on the physician's reasonableness. *See, e.g.*, Tenn. Code Ann. § 39-15-202(f). This is the first and *only time* the legislature has inserted this term. To assume the legislature did not intend to include it is to ignore the legislature's clear words. Far from granting narrow relief, accepting the State's argument would require the Court to improperly "rewrite state law to conform it to constitutional requirements" in an effort to save it. *Ayotte*, 546 U.S. at 329 (internal citation and quotation marks omitted).

The State then argues that under *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 529 (6th Cir. 2021) (en banc), even if the medical emergency affirmative defense is vague, Plaintiffs must bring as-applied challenges to vindicate the rights of patients experiencing medical emergencies, Defs.' Ren. Mot. at 19. The Court in *Preterm* merely noted that an as-applied substantive due process challenge may be more appropriate than a facial challenge where a statute lacks a "health exception," and threats to health can "be shown . . . in discrete and well-defined instances." 994 F.3d at 529. Neither *Preterm* nor *Gonzales v. Carhart*, 550 U.S. 124, 166-67 (2007), upon which *Preterm* relies, can be read to imply that as-applied relief is appropriate here. Under Tennessee law, a "medical emergency" is a condition that "necessitate[s] the *immediate* performance or inducement of an abortion 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." *See* Tenn. Code Ann. §§ 39-15-211(a)(3); Act § 39-15-217(a)(3) (emphasis added). In such situations, requiring patients to seek as-applied relief, in the middle of medical emergency, is inherently unreasonable.

The State further argues that a partial stay is warranted because the en banc court is likely to overrule *Voinovich*. But the State relies on no case law from this Circuit to support such a bold prediction except the dissent from *Voinovich* itself. Defs.' Ren. Mot. at 17-18. Such speculation does not warrant a conclusion that the State is likely to be successful on appeal in arguing that *Voinovich* should be overruled and should have no part in this Court's ruling on a partial stay.

In any event, the criticisms of *Voinovich* the State points to, Defs.' Ren. Mot. at 17-18, do not extend to the fact pattern in this case. The medical emergency affirmative defense here imposes an ambiguous dual objective-subjective standard and have no scienter requirement that might otherwise clarify the statute—a conclusion that follows directly from *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). For this reason, even overruling *Voinovich* would not undermine Plaintiffs' argument that the medical emergency affirmative defenses are unconstitutionally vague. There is no real dispute that *Voinovich* reasonably interpreted *Colautti* when it held that a law is ambiguous where there is a "combination of the objective and

subjective standards without a scienter requirement." 130 F.3d at 205; *Voinovich v. Women's Med. Prof'l. Corp.*, 118 S. Ct. 1347, 1348 (1998) (Thomas, J., dissenting) ("The statutory language in *Colautti* was ambiguous because it could be read as imposing either a purely subjective or a mixed subjective and objective mental requirement, thereby leaving physicians uncertain of the relevant legal standard."). The portion of *Voinovich* subject to some disagreement is whether a medical emergency exception that is not otherwise vague requires a scienter requirement to be constitutional. *Voinovich*, 130 F.3d at 216 (Boggs, J., dissenting); *Karlin v. Foust*, 188 F.3d 446, 462 (7th Cir. 1999). Indeed, the Seventh Circuit concluded that because the standard at issue in *Voinovich* "was a dual objective-subjective standard," its conclusion as to scienter requirements in the context of unambiguous standards is dicta. *Karlin*, 188 F.3d at 463.

c. The Court Should Reject the State's Invitation to Rule on a Claim the District Court Did Not Address.

The district court did not reach Plaintiffs' substantive due process claim against the Reason Bans. The State nevertheless argues that if this Court finds that the State is likely to succeed in its appeal on the vagueness ruling, "it should stay the injunction of [the Reason Bans] because there is no alternative holding that would support issuance of that remedy." Defs.' Ren. Mot. at 20-21. In other words, the State is arguing that this Court should, against precedent in this Circuit, foreclose the district court's consideration of Plaintiffs' substantive due process claim in the

first instance. *Jackson v. City of Cleveland*, 925 F.3d 793, 812 (6th Cir. 2019) (declining to pass on an issue not addressed by the district court because it was not "presented with sufficient clarity and completeness" for its review) (internal citation and quotation marks omitted). Indeed, it would be error for the Court to reach Plaintiffs' due process claim when the district court has not ruled on it. *See, e.g.*, *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 814 (5th Cir. 1989).

Further, this Court has made clear that a law that prohibits previability abortion is unconstitutional—that is a "a different case" from the law at issue in *Preterm*, which the Court concluded would not prohibit any patients from receiving an abortion. 994 F.3d at 522. The Court has held that the record-intensive undue burden standard should apply to similar laws. *Id.* at 524-25. Pursuant to this holding, Plaintiffs intend to make an evidentiary presentation to the district court regarding the effects of the Reason Bans to demonstrate that they impose an undue burden.

The application of the Reason Bans here is also likely to be distinct from that of the law in *Preterm*, because the text of the bill is distinct. That law included the phrase "in whole or in part." *See* Op. 23. Tennessee's Reason Bans do not include such a qualifier, and the State's interpretation of the law here as importing "but for" causation renders the Reason Bans unique even among all other reason bans. *See supra* at 11 n.6. The State ignores these differences, Defs.' Ren. Mot. at 21-22, and has never been able to identify an analogous law. Plaintiffs are aware of none. The

State's attempt to foreclose these arguments before the district court reached them are unavailing and do not give reason for this Court to grant the partial stay the State requests.

II. The State Suffers No Harm from the Preliminary Injunction.

The State has no valid interest in enforcing a clearly unconstitutionally vague law, and thus Tennessee will suffer no harm, much less harm that is irreparable, from maintaining the preliminary injunction of the Reason Bans. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987).

III. Plaintiffs, their Patients, and the Public Interest Will Be Harmed By A Stay.

Unlike the State, Plaintiffs' patients will be tremendously harmed by a stay. As described *supra* at 2-6, the patients who will be denied care if the Reason Bans go into effect are not speculative or hypothetical. Being denied an abortion harms patients' health, their existing families, their goals, and their ability to gain independence from violence. PI Order Mem., R.41, PageID##766-67; Looney Decl. ¶ 38, R.8-1, PageID#151; Rovetti Decl. ¶¶ 15, 21-22, 29, R.8-4, PageID##242-45; Terrell Decl. ¶ 26, R.8-5, PageID#254; Zite Decl. ¶¶ 23-24, R.8-3, PageID##210-11. The State has not met its burden of showing "irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Family Trust Found. of Ky.*, 388 F.3d at 227 (citation omitted). Rather, the balance of harms weighs decisively in Plaintiffs' favor, as the district court correctly found. PI Order

Mem., R.41, PageID##766-67.

Given that "it is always in the public interest to prevent violation of a party's constitutional rights," denying a stay also serves the public interest. *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir. 2015) (internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, the State's Renewed Motion should be denied.

Dated: December 13, 2021

Respectfully submitted,

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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 5160 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 13, 2021

/s/ *Jessica Sklarsky*
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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2021, 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*
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