No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

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

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

BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

The district court preliminarily enjoined the State of Tennessee from enforcing two abortion laws that the Tennessee legislature enacted with overwhelming support. That extraordinary remedy significantly infringes on Tennessee's sovereign authority and warrants careful review. Moreover, this interlocutory appeal presents important and novel issues of constitutional law. Oral argument will aid this Court's review of those issues.

STATEMENT OF JURISDICTION

The district court's subject matter jurisdiction rested on 28 U.S.C. § 1331. The district court issued its preliminary injunction order on July 24, 2020. PI Order, R. 42, PageID#769. Defendants filed a notice of appeal on August 21, 2020. Notice of Appeal, R. 46, PageID#793-96. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion by preliminarily enjoining, on vagueness grounds, the enforcement of a Tennessee law prohibiting individuals from performing abortions when they know the abortion is being sought because of the sex, race, or Down syndrome diagnosis of the unborn child.

II. Whether the district court abused its discretion by preliminarily enjoining, on substantive due process and vagueness grounds, the enforcement of a Tennessee law prohibiting individuals from performing abortions when the unborn child has a fetal heartbeat or when the gestational age of the unborn child is 8, 10, 12, 15, 18, 20, 21, 22, 23, or 24 or more weeks.

INTRODUCTION

The Supreme Court abandoned the "rigid trimester framework" of *Roe v. Wade*, 410 U.S. 113 (1973), because it had "undervalue[d] the State's interest in the potential life within the woman" and prevented States from enforcing "abortion

regulations which in no real sense deprived women of the ultimate decision" to have an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875, 878 (1992) (plurality opinion). In this lawsuit, a group of abortion providers argues that *Casey* requires the invalidation of any law that prohibits *some* previability abortions, regardless of the State's interests and regardless of the law's actual impact on a woman's ability to obtain a previability abortion. Far from requiring that approach, *Casey* forbids it. Under *Casey*, courts considering challenges to regulations of previability abortions must consider the State's legitimate interests and whether any burden is undue. *Id.* at 877.

The district court erroneously accepted Plaintiffs' approach. And on that basis, without applying the undue burden standard, the court preliminarily enjoined Tennessee from enforcing a law that prohibits abortions once the unborn child has a fetal heartbeat and at certain gestational ages. That injunction should be vacated. When the State's significant interests and the actual impact of the law are considered, as *Casey* requires, it is clear that Plaintiffs are not entitled to the broad facial relief they seek.

The district court also preliminarily enjoined Tennessee from enforcing a law that prohibits providers from performing an abortion that they know is being sought because of the sex, race, or Down syndrome diagnosis of the unborn child. The law is similar to the Ohio statute at issue in *Preterm-Cleveland v. Himes*, No. 18-3329

(6th Cir.) (en banc) (argued on Mar. 11, 2020). Given the pendency of *Preterm-Cleveland*, the district court declined to consider Plaintiffs' substantive due process claim. It instead enjoined the law on vagueness grounds after rejecting the State's reasonable construction of the law and misinterpreting it to require abortion providers to intuit their patients' motivations. The preliminary injunction should be vacated because the court's vagueness analysis was deeply flawed. And if this Court considers Plaintiffs' substantive due process claim in the first instance, it should hold that the claim is unlikely to succeed. The law directly furthers Tennessee's "compelling interest in preventing abortion from becoming a tool of modern-day eugenics" without unduly burdening a woman's ability to obtain a previability abortion. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (Thomas, J., concurring).

Finally, the district court held that the medical-emergency affirmative defenses that apply to both laws are unconstitutionally vague under *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), because they contain both subjective and objective standards. That holding was erroneous and, in any event, provides no basis for enjoining the laws because the purported defect is easily remedied through severance.

STATEMENT OF THE CASE

A. Abortion in Tennessee

Tennessee has long prohibited abortions after viability, except in medical emergencies. *See* Tenn. Code Ann. §§ 39-15-201(b)(1), -211(b), -212(a). A rebuttable presumption of viability attaches when the unborn child is 24 weeks' gestational age, *see id.* § 39-15-211(b)(5), as measured "from the first day of the last menstrual period of a pregnant woman," *id.* § 39-15-211(a)(2).[1] And a physician may not perform an abortion on an unborn child who is 20 weeks or older without "determin[ing], in the physician's good faith medical judgment, that the unborn child is not viable." *Id.* § 39-15-212(a).

Under this statutory framework, Tennessee residents obtained nearly 110,000 abortions from 2009 to 2018. Lefler Decl., R. 27-9, PageID#575. An overwhelming majority of those—roughly 96 percent—occurred before 15 weeks. *Id.* Nearly 13 percent occurred before 6 weeks. *Id.* The following chart shows the number and percentages of abortions performed at different gestational ages.

[1] Unless otherwise indicated, all references to the age of an unborn child are measured from the first day of the last menstrual period of the woman.

Tennessee Resident Abortions from 2009-2018

Gestation in Weeks	Number	Percentage	Cumulative Percentage
Under 6	13,834	12.62	12.62
6-7	40,055	36.53	49.15
8-9	26,447	24.12	73.27
10-11	13,977	12.75	86.01
12-14	10,984	10.02	96.03
15-17	2,289	2.09	98.12
18-19	282	0.26	98.38
20	81	0.08	98.46
21	71	0.07	98.53
22	37	0.03	98.56
23	15	0.01	98.58
24 or greater	31	0.03	98.60
Unknown	1,530	1.40	100

Source: Lefler Decl., R. 27-9, PageID#575

B. Plaintiffs' abortion policies

Plaintiffs are abortion providers. Four are abortion clinics: the Memphis Center for Reproductive Health, Planned Parenthood of Tennessee and North Mississippi, the Knoxville Center for Reproductive Health, and carafem. Compl. ¶¶ 14-17, R. 1, PageID#5-7. Two are doctors who provide abortions: Dr. Kimberly Looney, the Chief Medical Officer at Planned Parenthood, and Dr. Nikki Zite, an OB/GYN who practices at a Tennessee hospital. *Id.* ¶¶ 18-19, PageID#7.

All Plaintiffs except Dr. Zite provide medication abortions up to 11 weeks. Compl. ¶¶ 14-19, R. 1, PageID#5-7. All Plaintiffs perform surgical abortions, but their gestational-age cutoffs for providing such abortions vary. The earliest cutoff is 13 weeks, 6 days at carafem, followed by 15 weeks at the Knoxville Center for

Reproductive Health, 16 weeks at the Memphis Center for Reproductive Health, and 19 weeks, 6 days at Planned Parenthood, where Dr. Looney works. *Id.* ¶¶ 14-18, PageID#4-7. Dr. Zite performs abortions after 19 weeks, 6 days, but only when there are "significant fetal" or "maternal health indications." *Id.* ¶ 19, PageID#7.

Plaintiffs "do not require that patients disclose any or all of their reasons for seeking an abortion, and many patients do not do so." *Id.* ¶ 97, PageID#25. When their patients "do disclose reasons, they mention a host of reasons, including that it is simply not the right time for them to have a child or that it would negatively impact their career, school, finances, existing children, or other relationships." *Id.* ¶ 98, PageID#25. Plaintiffs' patients have "[a]t times . . . raised issues relating to the race or sex of the fetus" or "expressed concern over their own age and the pregnancy risks that go with that." *Id.* ¶ 99, PageID#25-26. But it is "not common" for providers to "hear patients identify the race, sex, or indication of Down syndrome as among their reasons for wanting to terminate their pregnancy." Rovetti Decl., R. 8-4, PageID#244.

Dr. Zite's "hospital practice does not permit abortions solely on the basis of a diagnosis of Down syndrome," but "abortion may be offered if there are significant additional findings noted on an ultrasound that compromise intact survival or that indicate that the fetus will never achieve viability." Compl. ¶ 100, R. 1, PageID#26.

C. Challenged laws

The Tennessee General Assembly passed H.B. 2263 in June 2020, and the Governor signed it into law in July 2020. *See* 2020 Tenn. Pub. Acts, ch. 764. The law established several new abortion regulations, only two of which are at issue here: (1) the Antidiscrimination Provision, Tenn. Code Ann. § 39-15-217, and (2) the Timing Provisions, *id.* § 39-15-216. A violation of either law is a Class C felony, *id.* §§ 39-15-216(c)(1)-(12), -217(f), and must be reported to Tennessee's board of medical examiners, *id.* §§ 39-15-216(g), -217(h).

1. Antidiscrimination Provision

The Antidiscrimination Provision makes it a crime for a person to "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," *id.* § 39-15-217(b); "because of the race of the unborn child," *id.* § 39-15-217(c); or "because of a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome in the unborn child," *id.* § 39-15-217(d).

2. Timing Provisions

The Timing Provisions make it a crime for a person to "perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman" at certain stages of a woman's pregnancy. *Id.* § 39-15-216(c)(1). The earliest restriction applies

when the "unborn child has a fetal heartbeat." *Id.* When the gestational age of the unborn child is six weeks or older, the physician must "affirmatively determine[] and record[] 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." *Id.* § 39-15-216(c)(2). In making that 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." *Id.* Additional restrictions apply at 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 or more weeks. *Id.* § 39-15-216(c)(3)-(12).

3. Medical-Emergency affirmative defenses

"[I]t is an affirmative defense to criminal prosecution for a violation of" the Antidiscrimination Provision or the Timing Provisions "that, in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision." *Id.* §§ 39-15-216(e)(1), -217(e)(1). The term "medical emergency" means "a condition that, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant

woman that delay in the performance or inducement of the abortion would create." *Id.* § 39-15-211(a)(3); *see also id.* § 39-15-216(a)(4) (providing that "'[m]edical emergency' has the same meaning as defined in § 39-15-211"); *id.* § 39-15-217(a)(3) (same). To invoke the affirmative defense, a physician must comply with certain conditions. *See id.* §§ 39-15-216(e)(2), -217(e)(2). Among other things, the physician must "certif[y] 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." *Id.* §§ 39-15-216(e)(2)(A), -217(e)(2)(A). The physician must prove the affirmative defense by a preponderance of the evidence. *See id.* § 39-11-204(e).

4. Severability provisions

Both the Antidiscrimination Provision and the Timing Provisions contain robust severability provisions. *See id.* §§ 39-15-216(h), -217(i). For both laws, the legislature provided that "[i]f 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." *Id.* The legislature made clear that "it would have enacted" the sections and each of their provisions "even if any provision . . . or the application

thereof to any person, circumstance, or period of gestational age was later found to be unenforceable, unconstitutional, or invalid." *Id.*

D. Legislative findings

The legislature enacted H.B. 2263 based on extensive findings that additional abortion restrictions were necessary to further the State's interests, including its interests in protecting unborn life, protecting maternal health, preventing fetal pain, preventing discrimination, protecting the integrity of the medical profession, and promoting human dignity. *See generally id.* § 39-15-214. As relevant here, those findings centered on the significance of the fetal heartbeat; an unborn child's ability to experience pain; the point of viability; the health risks of abortions; and discrimination.

Fetal heartbeat. The legislature found that the "presence of a fetal heartbeat is medically significant because the heartbeat is a discernible sign of life at every stage of human existence." *Id.* § 39-15-214(a)(7). The presence of a fetal heartbeat is a "strong predictor of survivability to term," with approximately 98 percent of pregnancies carrying to term when a heartbeat is detected between 8 and 12 weeks. *Id.* § 39-15-214(a)(15)-(16).

Fetal pain. The legislature described in detail the development of an unborn child's nervous system, *see id.* § 39-15-214(a)(17)-(29), and found a "growing body of medical evidence and literature support[ing] the conclusion that an unborn child

may feel pain from around eleven . . . to twelve . . . weeks gestational age, or even as early as five and a half . . . weeks." *Id.* § 39-15-214(a)(24). "[T]he fetal experience of pain may be even greater than that of term neonate or young children due to the immaturity of neurodevelopment that helps inhibit pain." *Id.* § 39-15-214(a)(29). The growing recognition of fetal pain among medical professionals has led to the "routine[] use [of] anesthesia and analgesia for unborn and premature infants undergoing surgery as young as" 18 weeks' gestational age. *Id.* § 39-15-214(a)(28). "Mothers considering abortion express concern over the medical information on fetal neurological development and an unborn child's ability to feel pain while in utero." *Id.* § 39-15-214(a)(30).

Point of viability. Advances in science and neonatal care have "lowered the gestational limits of survivability well into the second trimester." *Id.* § 39-15-214(a)(36). "The age at which a preterm infant can survive has decreased from" 28 weeks when *Roe* was decided to less than 22 weeks "with the provision of care and treatment." *Id.* § 39-15-214(a)(37)**.**

Health risks. "Abortions performed later in pregnancy pose an even higher medical risk to the health and life of women, with the relative risk increasing exponentially . . . after" 8 weeks. *Id.* § 39-15-214(a)(44). Compared to the risk of death for an abortion performed at 8 weeks or earlier, the risk of death for an abortion performed at 11 to 12 weeks is 3 to 4 times higher, while the risk of death for an

abortion performed after 21 weeks is greater than 75 times higher. *Id.* § 39-15-214(a)(45)-(48).

Discrimination. The legislature found that "[t]he historical development of abortion is undeniably tied to bias and discrimination by some organizations, leaders, and policies towards impoverished and minority communities, including the imposition of forced sterilization of the intellectually disabled, poor, minority and immigrant women." *Id.* § 39-15-214(a)(53). Planned Parenthood leaders openly advocated for the use of abortion to "prevent the birth of disabled children." *Id.* § 39-15-214(a)(57). "[E]vidence from across the globe and in the United States" confirms that even today children are aborted based on their immutable characteristics. *Id.* § 39-15-214(a)(60). The abortion rate in the United States for unborn children diagnosed with Down syndrome is 67 percent, while the rates in several European countries approach 100 percent. *Id.* "Widespread sex-selective abortions in Asia" have skewed the gender balance, and "sex-selective abortions of girls are common among certain populations in the United States" as well. *Id.* In Tennessee, the abortion rate for nonwhite women during the previous decade was nearly four times higher than the rate for white women. *Id.* § 39-15-214(a)(62). The legislature expressed concern that "the individualized nature of abortion" and the increasing use of "prenatal screening tests" create "a significant risk" that "children with unwanted characteristics" will be eliminated. *Id.* § 39-15-214(a)(59). And it

found that "[t]he integrity and public respect of the medical profession are significantly harmed by physician involvement in practices that . . . facilitate discrimination[] or otherwise create a disdain for life." *Id.* § 39-15-214(a)(69).

E. Procedural background

On June 19, 2020, before the Governor signed H.B. 2663 into law, Plaintiffs filed a complaint challenging the constitutionality of the Antidiscrimination Provision and Timing Provisions under the Due Process Clause of the Fourteenth Amendment. *See* Compl., R. 1, PageID#1-34. Plaintiffs alleged that (1) both laws violate the substantive due process rights of their patients "[b]y prohibiting pre-viability abortions" and "failing to include valid medical emergency exceptions," *id.* ¶¶ 121, 123, PageID#30-31; (2) the medical-emergency exceptions are invalid because they are unconstitutionally vague, *id.* ¶ 127, PageID#31; and (3) the Antidiscrimination Provision is unconstitutionally vague because it "fail[s] to give [them] fair notice of how to comply with [its] mandates." *id.* ¶ 125, PageID#31.

Plaintiffs sought a temporary restraining order and preliminary injunction to prohibit the State from enforcing the challenged laws. *See* Mot. for TRO/PI, R. 6, PageID#87-94; Mem. in Support of Mot. for TRO/PI, R. 7, PageID#95-129. The district court granted the temporary restraining order on July 13, 2020, the day the Governor signed the legislation. TRO Order, R. 33, PageID#591-97. It then granted a preliminary injunction eleven days later, prohibiting Defendants from enforcing

the Antidiscrimination Provision or the Timing Provisions in any circumstances. PI Opinion, R. 41, PageID#727-68; PI Order, R. 42, PageID#769.

The district court held that Plaintiffs have standing both "to assert the constitutional rights of their patients and to challenge a law that subjects [abortion providers] to potential criminal sanctions." PI Opinion, R. 41, PageID#752.[2]

Given the pendency of *Preterm-Cleveland*, the district court declined to consider Plaintiffs' claim that the Antidiscrimination Provision violates their patients' substantive due process rights. The court instead held that Plaintiffs were likely to succeed on their claim that the law is unconstitutionally vague. *Id.* at PageID#758-61. The district court reasoned that "it [was] impossible for a person of ordinary intelligence to know what conduct constitutes a crime" under the Antidiscrimination Provision because the statute does not define the terms "knows" and "because of." *Id.* at PageID#760.

Defendants interpreted the law to apply only when a physician has *actual knowledge* that an abortion would not have been sought but for the sex, race, or Down syndrome diagnosis of the unborn child. But the district court refused to

[2] Defendants argued below that Plaintiffs lack standing to assert the constitutional rights of their patients, but that "standing argument is now foreclosed by Supreme Court precedent." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, --- F.3d ---, 2020 WL 6111008, at *6 (6th Cir. Oct. 16, 2020) (citing *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118-20 (2020) (plurality opinion), and *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment)).

accept that construction an instead insisted that the Antidiscrimination Provision is problematic because it "requires one individual to know the motivations underlying the actions of another individual, and subjects the first individual to criminal sanctions if he or she reaches the 'wrong' conclusion." *Id.* at PageID#760. The district court also rejected Defendants' argument that the term "knows" is a scienter requirement that alleviates any vagueness concerns, surmising that there was no "guarantee [that] individual prosecutors w[ould] agree with [that] interpretation." *Id.* at PageID#761.

The district court further held that Plaintiffs will likely succeed on their vagueness challenges to the medical-emergency affirmative defenses. *Id.* at PageID#761-66. Relying on this Court's decision in *Voinovich*, 130 F.3d at 205, it concluded that the affirmative defenses are unconstitutionally vague because they include both an objective "reasonableness" standard and a subjective "good faith" standard. *Id.* at PageID#764. But the district court did not determine whether the objectionable parts of the affirmative defenses could be severed, nor did it determine whether the criminal prohibitions of the Antidiscrimination and Timing Provisions would be invalid in the absence of a valid medical-emergency affirmative defense, as Plaintiffs had alleged.

As for Plaintiffs' challenge to the Timing Provisions, the district court construed *Casey* as "establish[ing] [that] a state may not prohibit abortions before

viability" and on that basis held that Plaintiffs were likely to succeed on their claim that the law violates their patients' rights. *Id.* at PageID#756. The district court did not consider the State's interests or determine to what extent the Timing Provisions burden a woman's ability to obtain a previability abortion. The court acknowledged that Defendants had presented evidence that infants born as young as 21 to 23 weeks could survive, but it concluded that the Supreme Court had forbidden legislatures from "defin[ing] viability by gestational age alone." *Id.*

The district court was "persuaded" that Plaintiffs would suffer at least three forms of "immediate and irreparable injury" absent a preliminary injunction. *Id.* at PageID#766. First, the constitutional rights of Plaintiffs and their patients would be violated. *Id.* Second, enforcement of the challenged laws would "immediately impact most patients in Tennessee who seek pre-viability abortions." *Id.* Third, enforcement would "likely result in criminal sanctions and "licensing implications" for abortion providers." *Id.* at PageID# 767. The court reasoned that these threatened harms "outweigh[ed] any harm to Defendants or to the public interest" because the State lacks a "strong interest in enforcing an unconstitutional statute." *Id.*

Defendants appealed and sought a stay of the injunction pending their appeal. Notice of Appeal, R. 46, PageID#793-96; Stay Motion, R. 47, PageID#797-802; Stay Memorandum, R. 48, PageID#803-23. The district court denied the stay

motion. Order Denying Stay, R. 58, PageID#892-93. Defendants also sought a partial stay of the preliminary injunction from this Court; that motion remains pending.

SUMMARY OF ARGUMENT

The district court abused its discretion by preliminarily enjoining the Antidiscrimination and Timing Provisions. Plaintiffs are unlikely to succeed on their facial constitutional challenges, and the equities weigh strongly against preliminary relief.

I. The Antidiscrimination Provision is not unconstitutionally vague. It prohibits a person from performing an abortion when that person "knows"—i.e., is actually aware—that the abortion is being sought "because of"—i.e., would not have been sought but for—the sex, race, or Down syndrome diagnosis of the unborn child. The law does not require an abortion provider to inquire or speculate about a woman's reasons for seeking an abortion. To the extent it is difficult to truly know a woman's motivations for seeking an abortion, that problem is addressed by the requirement that the government prove knowledge beyond a reasonable doubt.

The Antidiscrimination Provision's medical-emergency affirmative defense provides no basis to enjoin the law either. *Voinovich* is not controlling because it involved vagueness in an exception to a criminal prohibition, not an affirmative defense. Because an affirmative defense is not part of the definition of the crime, it

does not implicate the vagueness doctrine. Even if the affirmative defense were vague, the proper remedy would be to elide the term "reasonable" from the defense so that it would contain only a subjective standard, not to enjoin the Antidiscrimination Provision in its entirety. And because Plaintiffs have not shown that application of the Antidiscrimination Provision poses a significant health risk, the lack of a valid medical-emergency provision would not render the Antidiscrimination Provision invalid in any event.

The decision whether to address Plaintiffs' substantive due process challenge to the Antidiscrimination Provision lies within this Court's discretion. If this Court decides to remand for the district court to consider that claim in the first instance, it should vacate the injunction before remanding. If this Court considers the claim, it should hold that Plaintiffs are unlikely to succeed. Plaintiffs are wrong that *Casey* requires automatic invalidation of the Antidiscrimination Provision without even considering the State's interests or the actual burden imposed by the law. Rather, the Antidiscrimination Provision is subject to the undue burden standard and easily satisfies that test. By prohibiting physicians from knowingly participating in eugenic abortions, the law directly furthers the State's interests in protecting unborn life, promoting human dignity, safeguarding the integrity of the medical profession, and preventing discrimination. And the law does not pose a substantial obstacle to obtaining a previability abortion because a woman need not disclose her reasons for

seeking an abortion. In the alternative, this Court should hold that, because the Antidiscrimination Provision does not even implicate the right recognized in *Roe* and *Casey*, it is subject to and survives rational basis review.

The equities favor the State because enjoining a constitutional law irreparably harms the State and the public interest. Plaintiffs would suffer no irreparable harm without an injunction. They cannot show a certain and immediate threat that they will be prosecuted under the Antidiscrimination Provision. To the contrary, they acknowledge that they do not require their patients to disclose their reasons and that many do not. And Plaintiffs cannot manufacture harm to their patients by allowing their unreasonable fears about the reach of the Antidiscrimination Provision to chill their provision of abortions.

II. The Timing Provisions do not violate Plaintiffs' substantive due process rights. Once again, *Casey* does not require automatic invalidation of the law. Rather, this Court is required to consider whether the law furthers legitimate state interests, and, if so, whether it places a substantial obstacle in the path of a woman seeking a previability abortion. All the Timing Provisions—from fetal heartbeat to the latest restriction at 24 weeks—further the State's interests in protecting unborn life, protecting the integrity of the medical profession, and protecting maternal health. The restrictions after approximately 10 weeks—and particularly after 15 weeks, when dilation and evacuation abortions are performed—

also further the State's important interest in preventing fetal pain. The Timing Provisions do not amount to a substantial obstacle in a "large fraction" of cases, *Casey*, 505 U.S. at 895, because many women already obtain abortions before the fetal heartbeat can be detected. And even if one or more of the Timing Provisions were unduly burdensome in some circumstances, the proper remedy would be as-applied relief, not the broad facial injunction the district court granted.

The medical-emergency affirmative defense that applies to the Timing Provisions is not unconstitutionally vague under *Voinovich*. Even if it were, any vagueness can be cured under Tennessee's doctrine of elision without affecting the validity of the Timing Provisions' criminal prohibitions.

The equities again weigh against preliminary relief. The State and the public interest are irreparably harmed whenever the State is prohibited from enforcing a valid law. But Plaintiffs will not be irreparably harmed because they do not even perform abortions at many of the gestational ages to which the Timing Provisions apply. And the proper remedy for any harm caused by individual applications of the Timing Provisions is as-applied relief.

STANDARD OF REVIEW

A "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Enchant Christmas Light Maze & Market Ltd. v. Glowco, LLC*, 958

F.3d 532, 539 (6th Cir. 2020) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 535-36 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012)). "'A finding that there is simply no likelihood of success on the merits is usually fatal' to a plaintiff's quest for a preliminary injunction." *Id.* at 539 (alteration omitted) (quoting *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2020)). When the government is the defendant, the equities and the public interest "merge," and "neither of these factors can be satisfied when the challenged provisions are constitutional." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

This Court reviews a district court's decision to grant a preliminary injunction for abuse of discretion. *Id.* at 406. But the conclusions of law "that undergird the district court's decision," such as whether the plaintiff is likely to succeed on the merits, are reviewed de novo. *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019).

"A preliminary injunction must be no more burdensome than necessary to provide a plaintiff complete relief, and a district court abuses its discretion in ordering an overly broad injunction." *Sony/ATV Pub'g, LLC v. Marcos*, 651 Fed.

Appx. 482, 487 (6th Cir. 2016); *cf. Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015).

ARGUMENT

I. The District Court Abused Its Discretion by Preliminarily Enjoining the Antidiscrimination Provision.

A. The Antidiscrimination Provision is not unconstitutionally vague.

A law "criminalizing certain abortion procedures will not be unconstitutionally vague if it 'provides doctors of ordinary intelligence a reasonable opportunity to know what is prohibited, sets forth relatively clear guidelines as to prohibited conduct, and provides objective criteria to evaluate whether a doctor has performed a prohibited procedure.'" *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 503 (6th Cir. 2012) (cleaned up) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007)). "Given the constraints of the English language, a law need not contain 'meticulous specificity' to avoid constitutional infirmity." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)).

"In evaluating a facial challenge to a state law," moreover, "a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982)). And under the canon of constitutional avoidance, a court may not strike down a law on vagueness grounds if there is a reasonable construction of the statute that would

eliminate any vagueness concerns. *See Gonzales*, 550 U.S. at 153 ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (alteration in original) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))). These principles apply fully in challenges to abortion regulations. *See id.* at 154 (concluding that "*Casey* put . . . to rest" the Court's previous approach of avoiding permissible readings of abortion statutes "at all costs" (quotation marks omitted)).

Under a correct application of these standards, the Antidiscrimination Provision is not unconstitutionally vague.

1. The Antidiscrimination Provision provides fair notice of the conduct it prohibits.

The Antidiscrimination Provision prohibits a person from performing an abortion "if the person knows that the woman is seeking the abortion because of" the sex, race, or Down syndrome diagnosis of the unborn child. Tenn. Code Ann. § 39-15-217(b)-(d). The Antidiscrimination Provision does not define the term "knows," but the legislature has provided a definition of "knowing" that applies throughout Title 39. *See id.* § 39-11-106(a), (a)(22). A person acts "knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is *aware* of the nature of the conduct or that the circumstances exist." *Id.* § 39-11-106(a)(22) (emphasis added). Proof of "*actual knowledge*," not merely constructive

knowledge, is required. *State v. Pendergrass*, 13 S.W.3d 389, 394 (Tenn. Crim. App. 1999), *perm. app. denied* (Tenn. Feb. 7, 2000).

The Antidiscrimination Provision does not define the phrase "because of" either, but it is well settled that "because of" incorporates the "simple and traditional standard of but-for causation." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (quotation marks omitted); *see also Burrage v. United States*, 571 U.S. 204, 213 (2014) (noting the Court's "insistence" on interpreting "because of" and similar language to mean "but-for causality"); *United States v. Miller*, 767 F.3d 585, 592 (6th Cir. 2014) (noting that this Court "has said the same thing"); *Goree v. United Parcel Serv., Inc.*, 490 S.W.3d 413, 439 (Tenn. Ct. App. 2015) (construing "because of" in the Tennessee Human Rights Act to "require but for causation"), *perm. app. denied* (Tenn. Mar. 23, 2016). "That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739.

The Antidiscrimination Provision is not vague. It prohibits a physician from performing an abortion when the physician "knows"—i.e., is actually aware—that the abortion is being sought "because of"—i.e., would not have been sought but for—the unborn child's sex, race or Down syndrome diagnosis. The statutory language gives "ordinary people fair notice of the criminalized conduct" and

provides sufficient standards to prevent "arbitrary enforcement." *United States v. Parrish*, 942 F.3d 289, 295 (6th Cir. 2019) (quotation marks omitted).

The term "knows," moreover, is a scienter requirement that "alleviates vagueness concerns, narrows the scope of [a statute's] prohibition, and limits prosecutorial discretion." *McFadden v. United States*, 576 U.S. 186, 197 (2015) (cleaned up) (quoting *Gonzales*, 550 U.S. at 149); *see also Planned Parenthood Sw. Ohio Region*, 696 F.3d at 505 (noting that any "risk of uncertainty" was "cured by the scienter provisions"). A physician who does not *actually know* that a woman is seeking an abortion because of the unborn child's sex, race, or Down syndrome diagnosis cannot be convicted of violating the Antidiscrimination Provision.

The district court's reasons for deeming the Antidiscrimination Provision unconstitutionally vague were deeply flawed. The court faulted the legislature for failing to define the terms "knows" and "because of." PI Opinion, R. 41, PageID#760-61. But there was no need for the legislature to define those terms. The legislature had *already* defined the term "knowing" for the entire criminal code. *See* Tenn. Code Ann. § 39-11-106(a), (a)(22). In any event, those terms are "commonly used in both legal and common parlance" and therefore did not require statutory definitions. *Platt v. Bd. of Comm'rs on Grievances and Discipline of Ohio Supreme Court*, 894 F.3d 235, 247 (6th Cir. 2018) (quotation marks omitted). "When the common meaning of a word provides adequate notice of the prohibited

conduct, the statute's failure to define the term will not render the statute void for vagueness." *United States v. Namey*, 364 F.3d 843, 844-45 (6th Cir. 2004). To the contrary, terms with well accepted meanings usually are "sufficiently clear so that a reasonable person can understand [their] meaning," even if the statute does not define them. *Platt*, 894 F.3d at 247 (quoting *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 411 F.3d 777, 798 (6th Cir. 2005) (en banc)).

The district court also improperly refused to accept the State's reasonable interpretation of those terms, in contravention of longstanding federal principles and canons of statutory construction. *See Vill. of Hoffman Estates*, 455 U.S. at 494 n.5; *Gonzales*, 550 U.S. at 153. Defendants argued that, properly construed, the Antidiscrimination Provision requires proof of *actual knowledge* that an abortion would not have been sought *but for* the unborn child's sex, race, or Down syndrome diagnosis. But rather than accept this reasonable interpretation, the district court insisted that the law forces a provider to "make judgments about the state of mind of a patient" and leaves unclear whether a prohibited reason must be "the only reason, . . . the motivating reason, a significant factor, or one of several reasons" the abortion is being sought. PI Opinion, R. 41, PageID#760-61. That "antagonistic" approach to statutory construction is indefensible. *Gonzales*, 550 U.S. at 153.[3]

[3] If the district court were truly in doubt about the meaning of the statute, it should have sought the Tennessee Supreme Court's authoritative interpretation of that statute. *See* Tenn. Sup. Ct. R. 23; *see also Planned Parenthood Sw. Ohio Region*,

The district court found it problematic that the Antidiscrimination Provision requires the government to prove knowledge of another's mental state. *See* PI Opinion, R. 41, PageID#761. But many criminal laws share that feature. For example, federal conspiracy laws require proof of a "meeting of the minds." *Amadasu v. Christ Hosp.*, 514 F.3d 504, 507 (6th Cir. 2008) (quotation marks omitted). In Tennessee, the offense of facilitation of a felony requires proof that a defendant acted with "know[ledge] that another intends to commit a specific felony," Tenn. Code Ann. § 39-11-403(a); rape may require proof that "the defendant knows or has reason to know at the time of the penetration that the victim did not consent," *id*. § 39-13-503(a)(2); and assisted suicide requires proof of "[a]ctual knowledge that the other person intends to bring about such person's own death," *id.* § 39-13-216(a)(3)(A). Neither the Supreme Court nor this Court has ever invalidated a statute on vagueness grounds because of this feature.

To be sure, in some cases it might be difficult to determine what a person knew about the mental state of another, but that problem is addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States v. Williams*, 553 U.S. 285, 306 (2008). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the

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696 F.3d at 499, 504 (rejecting vagueness challenge to state law after certifying statutory interpretation questions to state court).

incriminating fact it establishes has been proved[,] but rather the indeterminacy of precisely what that fact is." *Id.* Whether a defendant had a certain mental state "is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.'" *Id.* And it is hardly "impermissibl[e]" to allow "courts or juries" to decide that question. PI Opinion, R. 41, PageID#760. "[C]ourts and juries every day pass upon knowledge, belief and intent . . . ." *Williams*, 553 U.S. at 306 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 411 (1950)); *see also State v. Pruitt*, 415 S.W.3d 180, 205 (Tenn. 2013) ("Whether a person acted 'knowingly' is a question of fact for the jury.").[4]

United States v. Paull, 551 F.3d 516 (6th Cir. 2009), is instructive. The defendant argued that a child pornography statute was unconstitutionally vague because "he lack[ed] the capacity to know whether the charged items contain[ed] actual minors or virtual images of simulated child pornography protected" by the First Amendment. 551 F.3d at 525 (quotation marks omitted). Relying on *Williams*, this Court rejected that argument. *Id.* at 525-26. The defendant's "refuge from illegal prosecution [wa]s not the constitution but putting the government to its burden to prove that he possessed child pornography." *Id.* at 526. So too here.

[4] Plaintiffs complain that the law is vague because knowledge can be established through circumstantial evidence, *see* Stay Response at 9, but actual knowledge is almost always "proven by circumstantial evidence." *United States v. Ross*, 502 F.3d 521, 530 (6th Cir. 2007). If accepted, Plaintiffs' argument would render unconstitutionally vague virtually any statute requiring proof of knowledge.

Plaintiffs' refuge, should they need one, is "putting the government to its burden" to prove that they knew the abortion was sought for a prohibited reason. *Id.*

The district court seemed to think that, if it could come up with enough hypothetical factual scenarios that may or may not be covered by the Antidiscrimination Provision, that was proof that the statute is vague. *See* PI Opinion, R. 41, PageID#760. But "the mere fact that close cases can be envisioned" under a statute does not establish vagueness. *Williams*, 553 U.S. at 305. "Close cases can be imagined under virtually any statute." *Id.* at 306. In any event, the hypotheticals the district court conjured up are not even close cases. Plaintiffs need not be concerned that they will be prosecuted if a "patient simply makes a reference to the sex of her fetus, the race of the father, or her age." PI Opinion, R. 41, PageID#760. That sort of stray reference, without more, would not give a doctor knowledge that the abortion was being sought *because of* the unborn child's sex, race, or Down syndrome diagnosis.

Finally, the Antidiscrimination Provision does not, as the district court wrongly concluded, implicate arbitrary-enforcement concerns. PI Opinion, R. 41, PageID#759. In this pre-enforcement challenge, "no evidence has been, or could be, introduced to indicate whether the [law] has been enforced in a discriminatory manner." *Vill. of Hoffman Estates*, 455 U.S. at 503. And "the speculative danger of arbitrary enforcement does not render" a law void for vagueness. *Id.*

2. The medical-emergency affirmative defense is not unconstitutionally vague.

The district court held that "[u]nless and until [this Court] overturns its decision in *Voinovich*," it was "bound to follow it[] and hold [that] the medical-emergency affirmative defense is unconstitutionally vague." PI Opinion, R. 41, PageID#766. That holding was erroneous because *Voinovich* is distinguishable.

In *Voinovich*, a divided panel of this Court held that the medical-emergency exception to an Ohio abortion regulation was unconstitutionally vague because it required physicians to determine "in good faith and in the exercise of reasonable medical judgment whether an emergency exists." 130 F.3d at 204 (quotation marks omitted). This Court reasoned that "the combination of the objective and subjective standards without a scienter requirement render[ed] the[] exception[] unconstitutionally vague, because physicians cannot know the standard under which their conduct will ultimately be judged." *Id.* at 205.[5] A physician "may act in good

[5] *Voinovich* relied on the Supreme Court's decision in *Colautti v. Franklin*, 439 U.S. 379, 391-94 (1979), but the statute at issue in *Colautti* was vague 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." *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1038 (1998) (Thomas, J., dissenting from the denial of certiorari). As Judge Boggs explained in his *Voinovich* dissent, *Colautti* did not hold that "the absence of a scienter requirement will 'create' vagueness where it does not otherwise exist." 130 F.3d at 216 (Boggs, J., dissenting). And "there is [nothing] vague, or even novel, about a statute prescribing a standard including components of good faith and reasonableness." *Id.* This Court should overrule *Voinovich* in an appropriate case.

faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable." *Id.*

The district court deemed *Voinovich* controlling, but in doing so it overlooked a crucial distinction. The medical-emergency provision at issue in *Voinovich* was part of the *definition* of the criminal offense. *See* Ohio Rev. Code Ann. § 2919.17(A)(1) (2010). The provision here, by contrast, is an *affirmative defense* to liability that the defendant must prove by a preponderance of the evidence. *See* Tenn. Code Ann. § 39-11-204(e).

That distinction is significant in the context of the void-for-vagueness doctrine. That doctrine is concerned with whether a "penal statute *defin[es]* the criminal offense with sufficient definiteness." *United States v. Lopez*, 929 F.3d 783, 785 (6th Cir. 2019) (emphasis added) (quoting *Kolender*, 461 U.S. at 357). An affirmative defense is not part of the definition of the crime. So any vagueness in the affirmative defense does not implicate the void-for-vagueness doctrine. *See United States v. Christie*, 825 F.3d 1048, 1065 (9th Cir. 2016) (O'Scannlain, J.) (rejecting vagueness challenge to affirmative defense because there was "no authority for the proposition that the Fifth Amendment can be used to invalidate a prosecution under a clear criminal law, simply because the law is subject to an affirmative defense that is 'vague'"); *Sanders v. State*, 67 P.3d 323, 326 (Nev. 2003)

("[V]agueness challenges are not generally raised when a statutory affirmative defense is at issue, given that such provisions do not delineate the boundaries of unlawful conduct, nor do they generally encourage arbitrary enforcement."). *Voinovich* does not control here, and the district court erred in concluding otherwise.

3. If the medical-emergency affirmative defense is vague, the appropriate remedy is severance, not facial injunctive relief.

The district court held that Plaintiffs were likely to succeed on their vagueness challenge to the medical-emergency affirmative defense but did not expressly consider what remedy that alleged constitutional flaw warranted. That failure was itself an abuse of discretion, because a court must "limit the solution to the problem" by either "enjoin[ing] only the unconstitutional applications of a statute while leaving its other applications in force" or "sever[ing] its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). For several reasons, any vagueness in the medical-emergency affirmative defense would *not* warrant enjoining the Antidiscrimination Provision.

First, the Supreme Court and this Court have rejected the notion that "an abortion statute is per se unconstitutional without a health or life exception." *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 509 (6th Cir. 2006); *see also Gonzales*, 550 U.S. at 161. An exception is necessary only when "substantial medical authority" shows that the statute "poses a *significant* health

risk." *Planned Parenthood Cincinnati Region*, 444 F.3d at 511; *see also Gonzales*, 550 U.S. at 161.

Plaintiffs have offered no authority that the Antidiscrimination Provision poses any health risks, let alone a significant one. Nor could they. The Antidiscrimination Provision prohibits abortions only when the provider knows the abortion is being sought "because of"—i.e., would not have been sought but for—the sex, race, or Down syndrome diagnosis of the unborn child. If the abortion is necessary to preserve the life or health of the mother, the law would not prohibit that abortion in the first place. *See Burrage*, 571 U.S. at 214-15 (distinguishing a "but-for cause" from an "independently sufficient cause"). The constitutionality of the Antidiscrimination Provision's criminal prohibition thus does not depend on whether the medical-emergency affirmative defense is valid. So even if *Voinovich* controls and the affirmative defense is vague, that is no reason to enjoin the rest of the Antidiscrimination Provision.

Second, any vagueness in the medical-emergency affirmative defense is easily cured by severing the term "reasonable" from Tenn. Code Ann. § 39-15-217(e)(1) and -217(e)(2)(A). With "reasonable" omitted, the affirmative defense would contain only a subjective "good faith" requirement, eliminating any vagueness problem under *Voinovich*.

In Tennessee,[6] the "doctrine of elision allows a court, under appropriate circumstances when consistent with the expressed legislative intent, to elide an unconstitutional portion of a statute and find the remaining provision to be constitutional and effective." *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994). The Tennessee legislature undoubtedly would have preferred omission of the term "reasonable" from the affirmative defense to complete invalidation of the Antidiscrimination Provision. The law contains a broad severability provision, *see* Tenn. Code Ann. § 39-15-217(i), which "evidence[s] an intent on the part of the legislature to have the valid parts of the statute in force if some other portion of the statute has been declared unconstitutional." *Gibson Cnty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985). Moreover, elision of the term "reasonable" would leave intact "a complete law capable of enforcement and fairly answering the object of its passage." *Id.* (quotation marks omitted). The definition of prohibited conduct would remain unchanged, and the affirmative defense would require only a good-faith determination of a medical emergency, which is the standard already employed in other Tennessee abortion regulations. *See* Tenn. Code Ann. § 39-15-202(f)(1) (defining "medical emergency" in abortion waiting-period law by reference to "the physician's good faith medical judgment"); *id.* § 39-15-

[6] "Whether a portion of a state's statute is severable is determined by the law of that state." *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 626 (6th Cir. 2018) (quotation marks omitted).

211(a)(3) (same for laws prohibiting post-viability abortions and requiring viability determinations after 20 weeks).

The district court did not even consider whether severance was appropriate. That failure is yet another reason to vacate the injunction of the Antidiscrimination Provision. *See Leavitt v. Jane L.*, 518 U.S. 137, 143-46 (1996) (per curiam) (summarily reversing Tenth Circuit decision invalidating Utah abortion statute based on flawed severability analysis).

B. The Antidiscrimination Provision does not violate substantive due process.

Given its vagueness holding, the district court found it "unnecessary" to address Plaintiffs' claim that the Antidiscrimination Provision violates their patients' substantive due process right to obtain a previability abortion. PI Opinion, R. 41, PageID#32-33. Plaintiffs do not ask this Court to affirm the preliminary injunction on that alternative ground, maintaining instead that "it would be error for the Court to reach Plaintiffs' due process claim when the district court has not ruled on it." Stay Response at 15.

It would not be "error" for this Court to consider Plaintiffs' substantive due process claim in the first instance. Rather, [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also, e.g., Lowe v. United States*,

920 F.3d 414, 416 (6th Cir. 2019) (exercising discretion to address an issue the district court had declined to reach). This Court could certainly decide, in its discretion, to allow the district court to consider Plaintiffs' substantive due process claim on remand. But if it does so, it must vacate the preliminary injunction of the Antidiscrimination Provision before remanding. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, --- F.3d ---, No. 18-6161, 2020 WL 6111008, at *20 (6th Cir. Oct. 16, 2020) (vacating injunction before instructing the district court to "consider on remand the plaintiffs' remaining claims for relief"); *Prime Media, Inc. v. City of Franklin*, 181 Fed. Appx. 536, 542 (6th Cir. 2006) (vacating injunction before remanding for consideration of "unadjudicated claims"); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998) (similar).

If this Court decides to address Plaintiffs' substantive due process claim in this appeal,[7] it should hold that Plaintiffs are unlikely to succeed on that claim. *First*, the Antidiscrimination Provision is not an undue burden on the right to abortion. *Second*, in the alternative, the Antidiscrimination Provision does not implicate the abortion right recognized in *Roe* and *Casey* and is therefore subject to, and survives, rational basis review.

[7] Because *Preterm-Cleveland* presents a similar issue, whichever court considers Plaintiffs' substantive due process claim may wish to delay its consideration until the en banc Court issues its opinion in *Preterm-Cleveland*.

1. The Antidiscrimination Provision is not an undue burden.

Plaintiffs urge this Court to view the Antidiscrimination Provision as a "prohibition[] on pre-viability abortion" and to invalidate it on that basis alone, without considering the State's interests or applying the undue burden standard. Stay Response at 16. This Court should reject that argument and hold that Plaintiffs are unlikely to prevail under the undue burden standard.

a. Laws that prohibit some previability abortions are not automatically invalid.

This Court should reject Plaintiffs' proposed rule of automatic invalidity for at least two reasons.

First, Plaintiffs' proposed rule lacks any precedential support. Neither the Supreme Court nor this Court has ever held that a law is automatically invalid simply because it may prohibit *some* previability abortions. To the contrary, the Supreme Court has rejected the view that a woman's right to abortion "is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe*, 410 U.S. at 153; *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973) ("[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand."). The State instead has "legitimate interests from the outset of the pregnancy" that justify regulations of

abortion even before viability. *Casey*, 505 U.S. at 846.[8] And those regulations must be upheld unless they unduly burden a woman's ability to obtain a previability abortion. *See id.* (recognizing the "right of the woman . . . to obtain [a previability abortion] without undue interference from the State").

The Supreme Court's decisions confirm that regulations of previability abortions are subject to the undue burden standard, even if they may prohibit a subset of women from obtaining an abortion. *Casey* itself involved laws that could be characterized as prohibiting abortions in certain circumstances: a 24-hour waiting period; a spousal notification requirement; and a parental consent requirement with a judicial bypass. 505 U.S. at 844. *Casey* evaluated all of them under the undue burden standard. *See id.* at 885-87, 895, 899-900. Even more relevant, *Gonzales* involved a federal law that banned a particular method of abortion both before and after viability. 550 U.S. at 141-42, 156. Rather than invalidate the law outright as a prohibition on previability abortion, the Court upheld it under the undue burden

[8] Although the interests at issue in *Casey* were "protecting the health of the woman and the life of the fetus that may become a child," 505 U.S. at 846, the Supreme Court and this Court have since acknowledged other important interests that justify regulation of previability abortion. *See, e.g.*, *Gonzales*, 550 U.S. at 157 (preventing the coarsening of society to the humanity of newborns); *id.* (protecting the integrity and ethics of the medical profession); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 795 (6th Cir. 2020) (preventing fetal pain); *see also Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (cautioning that it would be "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion").

standard. *Id.* at 156-167. And the Court validated Congress's authority to "conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." *Id.* at 158.

In short, "[c]ontrolling precedent requires that [this Court] review" the Antidiscrimination Provision "under an undue-burden analysis" instead of the per se rule urged by Plaintiffs. *Preterm-Cleveland v. Himes*, 940 F.3d 318, 326 (6th Cir. 2019) (Batchelder, J., dissenting), *vacated for reh'g en banc*, 944 F.3d 630 (6th Cir. 2019).

Second, Plaintiffs' proposed rule, which would automatically invalidate abortion regulations irrespective of the State's regulatory interests, would be anomalous in federal constitutional law. Even enumerated constitutional rights may be limited when necessary to further a compelling interest. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) ("A State may restrict the speech of a judicial candidate . . . if the restriction is narrowly tailored to serve a compelling interest."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (quotation marks omitted)).

Plaintiffs' rule would elevate the right to obtain a previability abortion above other constitutional rights, in contravention of *Roe* and *Casey*. Casey abandoned

Roe's "rigid" trimester framework, under which "almost no regulation at all [was] permitted during the first trimester of pregnancy," because it "undervalue[d]" the State's interests. *Casey*, 505 U.S. at 872-73 (plurality opinion). And it criticized post-*Roe* cases that had applied strict scrutiny to abortion regulations as being inconsistent with "the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her." *Id.* at 871. Far from being required by *Casey*, a rule that would automatically invalidate certain abortion regulations without so much as considering the State's interests would be wholly inconsistent with that precedent.

The Court should reject Plaintiffs' request for a per se rule and instead apply the undue burden standard. Under that standard, the Antidiscrimination Provision is constitutional.

b. The Antidiscrimination Provision is reasonably related to Tennessee's legitimate interests.

The Chief Justice's concurring opinion in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), "provides the governing standard" for the undue burden analysis. *EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *10 (quotation marks omitted). Under that standard, a law is valid "if it satisfies two requirements." *Id.* First, the law must be "reasonably related to a legitimate state interest." *Id.* (cleaned up) (quoting *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment)). Second, it must not "have the effect of placing a substantial

obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (cleaned up) (quoting *June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment)).

The Antidiscrimination Provision easily satisfies both requirements. The Tennessee legislature enacted that provision based on findings that abortion is being used as a tool of eugenics to eliminate children with unwanted characteristics, *see* Tenn. Code Ann. § 39-15-214(a)(53)-(63), and that this eugenic use of abortion harms the integrity and reputation of the medical profession, creates disdain for human life and human dignity, and contravenes equal protection principles. *Id.* § 39-15-214(a)(63), (68), (69). Those findings are entitled to deference. *See EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *10, *14. And the legislature could reasonably conclude, based on those findings, that prohibiting physicians from knowingly participating in certain eugenic abortions would further the State's legitimate and compelling interests in safeguarding the integrity of the medical profession, protecting and promoting human life and dignity, and preventing discrimination. *See Gonzales*, 550 U.S. at 158 (holding that ban on method of abortion furthered the government's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn"); *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (condemning "irrational disability discrimination"); *Bob Jones Univ.*, 461 U.S. at 604 (affirming government's

compelling interest in "eradicating racial discrimination"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (affirming government's "compelling interest in eradicating discrimination against its female citizens").

As numerous respected jurists and scholars have recognized, the problem the Antidiscrimination Provision was intended to address is a serious one that implicates unique "ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158. Abortion has long been used to "achieve eugenic goals." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). "Technological advances" such as noninvasive prenatal genetic screening "have only heightened the eugenic potential for abortion." *Id.* at 1784; *see also* Sullivan Decl. ¶ 4, R. 27-3, PageID# 429 ("Frequently, prenatal testing is used as a justification for induced abortion if certain genetic abnormalities are found, such as Down syndrome."). In European countries where such screening is widely available, the abortion rate for unborn children diagnosed with Down syndrome approaches 100 percent. *See* Sullivan Decl. ¶ 9, R. 27-3, PageID#430. There is empirical and anecdotal evidence that medical professionals either overtly or subtly pressure women who receive a prenatal diagnosis of Down syndrome to have an abortion. *See id.* ¶¶ 14-15, PageID#431-32; Platte Decl. ¶¶ 3-6, 10-13, R. 27-5, PageID#492-95; Bythewood Decl. ¶¶ 7-12, R. 27-6, PageID#496-97. Whether medical professionals actively encourage such abortions or not, their knowing involvement in eugenic abortions runs counter to core principles of medical ethics

and bioethics, *see* Sullivan Decl. ¶¶ 17-21, R. 27-3, PageID#432-34; Snead Decl. ¶¶ 22-31, R. 27-4, PageID#465-67, and "coarsen[s] . . . professional attitudes toward the vulnerable." Curlin Decl. ¶ 554, R.27-2, PageID#401. It also "perpetuates the odious view that some lives are worth more than others," eroding the dignity of those living and thriving with Down syndrome and other disabilities. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 315 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part), *rev'd in part*, *Box*, 139 S. Ct. 1780. The Antidiscrimination Provision undoubtedly satisfies the first part of the undue burden test.

c. The Antidiscrimination Provision does not pose a substantial obstacle.

Under this Court's precedents, "a woman faces a substantial obstacle when she is 'deterred from procuring an abortion as surely as if the [government] has outlawed abortion in all cases.'" *EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *10 (alteration in original) (quoting *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 370 (6th Cir. 2006)). Plaintiffs cannot show that the Antidiscrimination Provision will deter *any* woman from obtaining a previability abortion, let alone the "large fraction" of women that would be necessary to prevail on their facial challenge. *EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *10.[9]

[9] Ordinarily, to succeed on a facial constitutional challenge, a plaintiff must show that "no set of circumstances exists under which the [statute] would be valid."

The Antidiscrimination Provision prohibits abortions in one limited circumstance: when the abortion provider *knows* the abortion is being sought *because of* the unborn child's sex, race, or Down syndrome diagnosis. It does not prohibit abortions that would have been sought regardless of the unborn child's sex, race, or Down syndrome diagnosis. Nor does it prohibit abortions that are sought for one of those reasons, so long as the abortion provider is unaware of them. A woman who seeks an abortion because of a prohibited reason may still obtain one simply by not disclosing her reason. And even if a woman discloses her reasons to one physician who then declines to provide the abortion, nothing prevents her from obtaining an abortion from a different provider who is unaware of her reasons. *Cf. Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006) (holding that "the fact that . . . women may have to travel farther to obtain an abortion does not constitute a substantial obstacle"). As was the case in *Gonzales*, "[a]lternatives are available to the prohibited procedure," 550 U.S. at 164, and that strongly supports a finding that the law does not impose an undue burden.

United States v. Salerno, 481 U.S. 739, 745 (1987). Whether a plaintiff bears that burden in a challenge to an abortion statute "has been a subject of some question." *Gonzales*, 550 U.S. at 167; *compare Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (applying *Salerno* standard), with *Casey*, 505 U.S. at 895 (applying "large fraction" standard). Although this Court has held that the large fraction test applies, it should reconsider that holding in an appropriate case.

Plaintiffs have presented no evidence that would warrant a contrary conclusion. Plaintiffs acknowledge that they "do not require that patients disclose any or all of their reasons for seeking an abortion," that "many patients do not do so," and that those who do disclose reasons "mention a host of reasons" unrelated to the unborn child's sex, race, or Down syndrome diagnosis. Compl. ¶¶ 97-98, R. 1, PageID#25. Plaintiffs speculate that a physician may learn of a prohibited reason from a patient's medical records even if the patient does not disclose it. Stay Response at 18. But the sort of information they identify—a document indicating that the unborn child has been diagnosed with Down syndrome or a notation that "the patient asked the sex of the fetus during the ultrasound," Looney Decl. ¶¶ 3-4, R. 34-1, PageID#613—would not, without more, give a physician knowledge that the abortion was being sought *because of* a prohibited reason. There is simply no basis to conclude that a woman who wants to obtain an abortion for a prohibited reason would be unable to get one.

2. The Antidiscrimination Provision does not implicate the abortion right recognized in *Roe* and *Casey*.

In the alternative, the Antidiscrimination Provision is constitutional because it does not implicate the substantive due process right that was at issue in *Roe* and *Casey*. *Roe*'s "essential holding," which was reaffirmed in *Casey*, was that a woman has "the right . . . to choose to have an abortion before viability." *Casey*, 505 U.S. at 845; *see also Roe*, 410 U.S. at 153 (recognizing a woman's right to decide

"whether or not to terminate her pregnancy"). But neither *Roe* nor *Casey* held that "the Constitution requires States to allow *eugenic* abortions." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring) (emphasis added). To the contrary, *Roe* emphatically rejected the view that a woman "is entitled to terminate her pregnancy . . . for whatever *reason* she alone chooses." 410 U.S. at 153 (emphasis added).

The Antidiscrimination Provision does not implicate a woman's right to decide whether to have an abortion. As Judge Easterbrook has explained, "there is a difference between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc). A woman who chooses to end a pregnancy because of the unborn child's sex, race, or Down syndrome diagnosis is not exercising her right to decide "whether to bear or beget a child." *Casey*, 505 U.S. at 851 (quotation marks omitted). She is deciding only that she does not want a particular *kind* of child. But that decision—to have an abortion for a *discriminatory reason*—is not protected by the Due Process Clause.

Because the Antidiscrimination Provision does not implicate any fundamental right, it is subject only to rational basis review and easily satisfies that deferential standard. *See* pp. 41-44, *supra*.

C. The equities weigh strongly against preliminary relief.

The district court's conclusion that enforcement of the Antidiscrimination Provision would harm Plaintiffs and the public interest rested entirely on its erroneous holding that the law is unconstitutionally vague. *See* PI Opinion, R. 41, PageID#766-67. The Antidiscrimination Provision is constitutional, so the preliminary injunction "clearly inflicts irreparable harm on the State" and the public interest, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), by preventing the enforcement of a statute "enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

Plaintiffs and their patients, by contrast, will suffer no irreparable harm in the absence of preliminary relief. The only potential harm that Plaintiffs themselves face is prosecution for violating the Antidiscrimination Provision. For the threat of prosecution to justify the "extraordinary remedy" of a preliminary injunction, however, the threat must be "certain and immediate," not "speculative or theoretical." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) (quotation marks omitted). Plaintiffs cannot show any "certain and immediate" threat. Although Plaintiffs vaguely allege that they "wish to continue providing" abortions to patients "regardless of their reasons," Compl. ¶ 119, R. 1, PageID#30,

they do not allege that their patients are likely to disclose a reason that would trigger the Antidiscrimination Provision. To the contrary, Plaintiffs' evidence suggests that it is "not common" for providers to "hear patients identify the race, sex, or indication of Down syndrome as among their reasons for wanting to terminate their pregnancy." Rovetti Decl., R. 8-4, PageID#244. Plaintiffs' fear that they will be prosecuted for providing abortions to patients who merely "reference[]" the unborn child's sex, race, or Down syndrome diagnosis, Compl. ¶ 102, R.1, PageID#26-27, is even more speculative because the Antidiscrimination Provision would not even apply in those circumstances.

Plaintiffs' patients will not be irreparably harmed either. As explained above, *see* pp. 44-46, *supra*, the Antidiscrimination Provision will not prohibit any woman from obtaining an abortion. And Plaintiffs cannot manufacture harm to their patients by refusing to provide abortions based on speculative and unreasonable fears about the potential reach of the law. *See* Compl. ¶¶ 102, 118, R.1, PageID#26, 30. It is well settled that "a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted." 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2948.1 (3d ed. Oct. 2020 update); *cf. Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

II. The District Court Abused Its Discretion by Preliminarily Enjoining the Timing Provisions.

The preliminary injunction of the Timing Provisions was also an abuse of discretion. Plaintiffs' constitutional challenges are unlikely to succeed, and the equities again weigh strongly against preliminary relief.

A. The Timing Provisions do not violate substantive due process.

The Timing Provisions make it a crime to perform an abortion at certain stages of a woman's pregnancy. *See* Tenn. Code Ann. § 39-15-216(c)(1)-(12). The earliest restriction applies when the unborn child has a "fetal heartbeat," *id.* § 39-15-216(c)(1), and additional restrictions apply at and after 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 weeks, *id.* § 39-15-216(c)(3)-(12). Each of the restrictions is severable from the others. *Id.* § 39-15-216(h).

Without applying the undue burden standard, the district court concluded that Plaintiffs are likely to succeed on their substantive due process claim because *Casey* "established" that "a state may not prohibit abortions before viability." PI Opinion, R. 41, PageID#756. The flawed analysis resulted in an erroneous conclusion. As explained above, *see* pp. 38-41, *supra*, neither the Supreme Court nor this Court has held that laws prohibiting a subset of previability abortions are automatically invalid. Rather, binding precedent requires that laws regulating previability abortions—even to the point of prohibiting some of them—must be evaluated under the undue burden standard. *See Gonzales*, 550 U.S. at 150-67 (applying undue burden standard to law

prohibiting a particular method of abortion). The Timing Provisions satisfy that standard because they are reasonably related to legitimate state interests and do not impose an undue burden. *See EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *10.

1. The Timing Provisions are reasonably related to Tennessee's legitimate interests.

Each of the Timing Provisions is reasonably related to legitimate state interests that increase dramatically in strength as an unborn child's development progresses. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part) (finding it "obvious" that "the State's interest in the protection of an embryo . . . increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day" (quotation marks omitted)). Each of the restrictions, from fetal heartbeat to 24 weeks, furthers the State's interests in protecting unborn life, the integrity of the medical profession, and maternal health. As the legislature found, the "presence of a fetal heartbeat is medically significant" because it is a "discernible sign of life" and a "strong predictor of survivability to term." Tenn. Code Ann. § 39-15-214(a)(7), (15). Abortions performed at any gestational age are inconsistent with a physician's ethical obligation to heal rather than harm. *See* Curlin Decl. ¶ 11, R. 27-2, PageID#383. And abortions "pose a risk" to the mother's health at any gestational age, with the

"relative risk increasing exponentially after" 8 weeks. Tenn. Code Ann. § 39-15-214(a)(43)-(44).

The restrictions that apply after 10 weeks further an additional state interest—preventing fetal pain—that is "part and parcel" of the State's interest in promoting human dignity. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 795 (6th Cir. 2020). As neurobiologist Dr. Maureen Condic explained, "[t]he scientific evidence regarding the development of human brain structures is entirely uncontested in the literature and unambiguously indicates that by" 10 to 12 weeks "a human fetus develops neural circuitry capable of detecting and responding to pain." Condic Decl. ¶ 8, R. 27-7, PageID#500. "During the period from" 14 to 20 weeks, additional development occurs that supports a "conscious awareness of pain." *Id.* A recent article authored by two individuals with "very different views on the morality of abortion" concluded that current evidence "points toward an immediate and unreflective pain experience . . . from as early as 12 weeks." Stuart W.G. Derbyshire & John C. Bockman, *Reconsidering Fetal Pain*, 46 J. Med. Ethics 3-6 (2020), https://jme.bmj.com/content/medethics/46/1/3.full.pdf.

The State's interest in preventing fetal pain becomes especially strong after 15 weeks because physicians performing abortions after that point generally use the dilation and evacuation method. Compl. ¶ 47, R.1, PageID#15. That method requires a physician to "grab the fetus" with forceps in the uterus and "pull[] it back

through the cervix and vagina." *Gonzales*, 550 U.S. at 135. The friction from the cervix "causes the fetus to tear apart," and the physician "evacuat[es] the fetus piece by piece . . . until it has been completely removed." *Id.* at 135-36. The State undoubtedly has a legitimate interest in preventing pain-capable unborn children from being subjected to this inhumane procedure. The "brutal" nature of this procedure also uniquely implicates the State's interests in safeguarding the integrity of the medical profession and promoting human dignity. *Cf. id.* at 157, 160 (concluding that these interests were served by a ban on partial-birth abortion).

The Timing Provisions that apply later in pregnancy—particularly at the "edge of viability" around 21 to 22 weeks—Pierucci Decl. ¶ 11, R. 27-8, PageID#557—further all these interests to an even greater degree. The State could rationally conclude that allowing physicians to abort unborn children who are clearly pain capable and any day could become capable of sustaining life on their own is inconsistent with a physician's ethical obligations and demeaning of human dignity. Moreover, the State has especially "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *14 (quotation marks omitted). The point of viability is certainly one such area. Pierucci Decl. ¶¶ 11-14, R. 27-8, PageID#557-58.

2. The Timing Provisions do not pose a substantial obstacle.

The Timing Provisions do not pose a "substantial obstacle" to women seeking previability abortions because they do not "deter[] [them] from procuring an abortion as surely as if" the State had "outlawed abortion in *all cases*." *EMW Women's Surgical Ctr.*, 2020 WL 6111008, at *10 (emphasis added) (quotation marks omitted). Nearly 13 percent of Tennessee residents who obtained abortions in the past decade did so before 6 weeks. *See* Lefler Decl., R. 27-9, PageID#575. The Timing Provisions do not prohibit those abortions. At this pre-enforcement stage, Plaintiffs cannot make the required "clear showing," *Enchant Christmas*, 958 F.3d at 539 (emphasis and quotation marks omitted), that women will be unable to obtain a previability abortion through this alternative avenue.

Plaintiffs assert that "the great majority of abortion patients are simply not able to confirm a pregnancy and schedule and obtain an abortion before fetal cardiac activity develops at approximately 6 weeks." Compl. ¶ 71, R.1, PageID#20. But even if that were true, it would provide no basis for invalidating the later Timing Provisions. Nearly half of abortion patients already obtain abortions before 8 weeks, and a great majority—73 percent—already obtain them before 10 weeks. Lefler Decl., R. 27-9, PageID#575. Plaintiffs cannot show that the Timing Provisions that apply at 8 weeks and beyond pose a substantial obstacle for a "large fraction" of women, as required to obtain facial relief. *EMW Women's Surgical Ctr.*, 2020 WL

6111008, at *10 (quotation marks omitted). And if any true obstacles arise once the Timing Provisions go into effect, the proper means of adjudicating those claims would be through as-applied challenges. *Gonzales*, 550 U.S. at 167.

* * *

The Timing Provisions directly further interests that the Supreme Court and this Court have deemed legitimate and, in some instances, compelling. And they accomplish those goals without depriving a woman of her "ultimate decision" to have an abortion. *Casey*, 505 U.S. at 875 (plurality opinion). If this Court nevertheless concludes that the Timing Provisions are invalid under *Casey*'s viability framework, that is a sure sign that the framework needs to be revisited. That framework has "proven unsatisfactory because it gives too little consideration to the 'substantial state interest in potential life throughout pregnancy'" and other important state interests. *MKB Mg't Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (quoting *Casey*, 505 U.S. at 876 (plurality opinion)). And it has left States impotent to respond to "advances in medical and scientific technology," *id.* (quotation marks omitted), and factual developments that alter the "balance *Roe* struck between the choice of a mother and the life of her unborn child." *McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring). It is now clear that the *Casey* framework suffers from the same flaws as the trimester framework it

abandoned. *See* 505 U.S. at 872-75 (plurality opinion). The *Casey* framework should be abandoned too.

B. The medical-emergency affirmative defense is not vague.

The medical-emergency affirmative defense for the Timing Provisions is identical to the defense for the Antidiscrimination Provision. As explained above, *see* pp. 31-33, *supra*, the affirmative defense is not unconstitutionally vague under *Voinovich* because it is not part of the definition of the crime. And even if it is vague, the proper remedy would be severance of the term "reasonable" from Tenn. Code Ann. § 39-15-216(e)(1) and -216(e)(2)(A) under Tennessee's elision doctrine, not a preliminary injunction prohibiting enforcement of the Timing Provisions in their entirety. *See* pp. 33-36, *supra*.

C. The equities weigh strongly against preliminary relief.

As was the case with the Antidiscrimination Provision, the district court's weighing of the equities was infected by its erroneous view that the Timing Provisions are unconstitutional. Because they are not, the preliminary injunction irreparably harms the State and the public interest by preventing the enforcement of a valid law. *See, e.g.*, *Abbott*, 138 S. Ct. at 2324 n.17.

Plaintiffs, on the other hand, face no "certain and immediate" harm that would warrant facial preliminary relief. *Sumner Cnty. Schs.*, 942 F.3d at 327 (quotation marks omitted). With the exception of Dr. Zite, Plaintiffs do not even provide

abortions at all of the gestational ages to which the Timing Provisions apply, so they cannot possibly show a threat of prosecution with respect to those applications. Nor will Plaintiffs' patients be irreparably harmed, since many patients will be able to obtain an abortion at an earlier stage. And those who are unable to do so may seek as-applied relief.

CONCLUSION

Defendants respectfully request that this Court reverse the district court's order and vacate the preliminary injunction barring enforcement of the Antidiscrimination Provision and the Timing Provisions.

Respectfully submitted,

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November 9, 2020

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,991 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
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November 9, 2020

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on November 9, 2020, a copy of the Brief of Defendants-Appellants was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Associate Solicitor General

ADDENDUM

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DESIGNATION OF COURT DOCUMENTS

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Tenn. Code Ann. § 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 o[l]der. 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 the effective date of this act.

(2) When this section is in direct conflict with this part as it existed prior to the effective date of this act, 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 the effective date of this act.

(3) The general assembly specifically intends that this part as it existed prior to the effective date of this act 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 Public Chapter 351 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.

Tenn. Code Ann. § 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 the effective date of this act.

(2) When this section is in direct conflict with this part as it existed prior to the effective date of this act, 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 the effective date of this act.

(3) The general assembly specifically intends that this part as it existed prior to the effective date of this act 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 Public Chapter 351 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 parts thereof, are enjoined or otherwise barred by a court of competent jurisdiction.