

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

NATALIE DAWN BINGHAM, *et al.*,

Plaintiffs,

v.

ALAN MCCRORY WILSON, in his official
capacity as Attorney General of South
Carolina, *et al.*,

Defendants,

and

HENRY DARGAN McMASTER, in his official
capacity as Governor of the State of South
Carolina,

Intervenor–Defendant.

Civil Action No.: 2:25-cv-163-RMG

MOTION FOR SUMMARY JUDGMENT

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina; Alan Wilson, in his official capacity as Attorney General of the State of South Carolina; David Pascoe, in his official capacity as Solicitor for South Carolina’s First Judicial Circuit; Bill Weeks, in his official capacity as Solicitor for South Carolina’s Second Judicial Circuit; Mike Burch, in his official capacity as Solicitor for South Carolina’s Fourth Judicial Circuit; Randy E. Newman, Jr., in his official capacity as Solicitor for South Carolina’s Sixth Judicial Circuit; Barry Barnette, in his official capacity as Solicitor for South Carolina’s Seventh Judicial Circuit; David Stumbo, in his official capacity as Solicitor for South Carolina’s Eighth Judicial Circuit; Micah Black, in his official capacity as Solicitor for South Carolina’s Tenth Judicial Circuit; Rick Hubbard, in his official capacity as Solicitor for South Carolina’s Eleventh Judicial Circuit; Edgar L. Clements, III, in his official capacity as Solicitor for South Carolina’s Twelfth Judicial Circuit;

Cindy Crick, in her official capacity as Solicitor for South Carolina's Thirteenth Judicial Circuit; Jimmy Arthur Richardson, II, in his official capacity as Solicitor for South Carolina's Fifteenth Judicial Circuit; and Kevin S. Brackett, in his official capacity as Solicitor for South Carolina's Sixteenth Judicial Circuit, move for summary judgment under Rule 56.¹

¹ Under Local Civil Rule 7.04 (D.S.C.), a full explanation of the motion is provided in this document, so a separate memorandum would serve no useful purpose.

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² Two clarifying notes about exhibits: First, Exhibits 1, 3, and 4 have been redacted to comply with the order allowing Doe to proceed under a pseudonym and to avoid a motion to reconsider that decision at this stage. Plaintiffs agreed that the “confidential” header on Doe’s transcript does not preclude it from being filed publicly. *See* ECF No. 67. Second, deposition exhibits are excerpts. If the Court would like additional pages or full transcripts, Defendants will provide them. And full copies of the transcripts of Plaintiffs’ experts are attached to the *Daubert* motions.

INTRODUCTION

South Carolina’s 2023 Fetal Heartbeat and Protection from Abortion Act generally prohibits abortions after six weeks, but the Act provides exceptions for maternal health and fatal fetal anomalies. Plaintiffs ask this Court to strike down the entire Act because, they say, those two exceptions are vague. The Court should decline that invitation.

For starters, this is a facial challenge. To prevail, a plaintiff must show “no set of circumstances exists under which the [challenged law] would be valid.” *United States v. Rahimi*, 602 U.S. 680, 693 (2024). And Plaintiffs here cannot make that showing. Indeed, Plaintiffs have admitted that they themselves have applied both challenged exceptions.

At the very least, prevailing on a facial challenge requires Plaintiffs to show the exceptions lack a plainly legitimate sweep. A law lacks that sweep only if its vague applications *more than* “substantially outweigh” its nonvague applications. *Moody v. NetChoice, LLC*, 603 U.S. 707, 723–24 (2024). That is a “very high bar.” *Id.* So long as the law has a “constitutional ‘core,’ in the sense that [it] appl[ies] without question to certain activities,” it will survive a facial vagueness challenge. *Doe v. Cooper*, 842 F.3d 833, 842 (4th Cir. 2016) (internal quotation mark omitted).

Plaintiffs cannot show that the exceptions lack this core. Even putting aside the typical pregnancies in which everyone agrees the exceptions do not permit an abortion, discovery has revealed repeated applications of both exceptions. Data from the Department of Public Health shows physicians performing dozens of abortions under dozens of unique circumstances. Plaintiffs admit to performing abortions under both exceptions too. On the flip side, Plaintiffs have also identified other circumstances in which they have determined (or could determine) the exceptions don’t apply. That’s not to mention the other clarifying aspects in the maternal health exception, such as 11 presumed conditions and the exclusion of psychological conditions.

All in all, the evidence proves that the exceptions provide an “ascertainable standard for inclusion and exclusion.” *Smith v. Goguen*, 415 U.S. 566, 578 (1974). And it makes sense why the exceptions would provide such a standard: Plaintiffs acknowledge that they understand the exceptions’ words, even using some of them in “every day practice.” Ex. 3, at 255:3–6.

The fact the 2023 Act carries criminal penalties doesn’t erase the core of cases the exceptions encompass. After all, “the law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.” *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J.). And “[i]f his judgment is wrong,” he may “incur a fine or a short imprisonment”—or even greater punishment. *Id.*

Plaintiffs have every right to dislike the 2023 Act as a matter of policy. But they—like other physicians—can understand and apply it in core instances. Some “close question” “in marginal situations” cannot change that. *Cooper*, 842 F.3d at 842. Plaintiffs therefore cannot prevail on their facial vagueness challenge, and Defendants are entitled to summary judgment.

FACTUAL BACKGROUND

A. The 2023 Fetal Heartbeat and Protection from Abortion Act

The General Assembly made three findings in passing the 2023 Act. First, a “fetal heartbeat is a key medical predictor that an unborn child will reach live birth.” 2023 S.C. Acts No. 70, § 1(1). Second, “[c]ardiac activity begins at a biologically identifiable moment in time.” *Id.* § 1(2). Third, the State “has a compelling interest from the outset of a woman’s pregnancy in protecting the health of the woman and the life of the unborn child.” *Id.* § 1(3).

On a most basic level, the 2023 Act generally prohibits abortions after a fetal heartbeat is detected, and in no circumstance may an abortion be performed without a woman’s consent. S.C. Code Ann. § 44-41-620. Before any abortion, the physician must perform an ultrasound, display the

images to the pregnant woman if she wants to see them, and record a written medical description of the ultrasound (noting the presence of a fetal heartbeat, if one exists). *Id.* § 44-41-630(A).

If a fetal heartbeat is detected, “no person shall perform or induce an abortion” unless an exception applies. *Id.* § 44-41-630(B). Violating this prohibition is a felony, punishable by up to two years in prison and a \$10,000 fine. *Id.* § 44-41-630(B). A physician who violates the Act may also lose her license, “after due process according to the [Board of Medical Examiners’] rules and procedures.” *Id.* § 44-41-690. And the Act provides a private right of action for actual, statutory, and punitive damages against a person who performs an abortion that violates the Act. *Id.* § 44-41-680.

The Act has three exceptions, two of which are important here. The first exception is for maternal health. An abortion may be performed for a “medical emergency” or “to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman,” based on the physician’s “reasonable medical judgment.” *Id.* § 44-41-640(C)(1); *see also id.* § 44-41-610(9) (defining “medical emergency”). The 2023 Act includes a nonexhaustive list of conditions that are “presumed” to satisfy this exception, including (as a few examples) ectopic pregnancy, severe preeclampsia, and uterine rupture. *Id.* § 44-41-640(C)(2). If performing an abortion under this exception, a physician must try to save the unborn child’s life during such a procedure, if doing so wouldn’t harm the mother. *Id.* § 44-41-640(B)(3).

A physician who performs an abortion based on this exception must document in the woman’s medical record the physician’s belief that the emergency existed, what the medical condition was, and the “medical rationale” that supported the physician’s conclusion that the exception applied. *Id.* § 44-41-640(B)(2). The physician must keep these records for seven years. *Id.* § 44-41-640(B)(4)(a). Violating this provision is a felony punishable by up to two years in prison

and a fine. *Id.* § 44-41-640(B)(4)(b)–(c).

The second exception is for fatal fetal anomalies. *Id.* § 44-41-660(A). Such an anomaly is one that, “in reasonable medical judgment,” means “the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth.” *Id.* § 44-41-610(5).

Like the exception for maternal health, a physician who performs an abortion under this exception must document the “presence” of the anomaly, the “nature” of the anomaly, and the “medical rationale” that supported the physician’s conclusion that the exception applied. *Id.* § 44-41-660(B)(1). These records must be kept for seven years. *Id.* § 44-41-660(B)(2). Violating this provision is a felony punishable by up to two years in prison and a fine. *Id.* § 44-41-660(C)–(D).

B. Plaintiffs file this lawsuit

Plaintiffs were five OB-GYN doctors. ECF No. 10, ¶¶ 15, 20, 25, 29, 32. But only two—Bingham and Doe—now remain. ECF Nos. 118, 131.

Plaintiffs sued a litany of state officials, including the Attorney General, the solicitors, and the members of the medical and nursing boards. They claim that the 2023 Act’s maternal health and fatal fetal anomaly exceptions are unconstitutionally vague on their face and that the 2023 Act violates their religious exercise. *See generally* ECF No. 10. The Court has dismissed the Free Exercise claim, *see* ECF No. 88, so only the vagueness claim remains.

The parties then engaged in discovery, deposing 12 people (fact and expert witnesses), exchanging written discovery, and receiving documents in response to subpoenas. The evidence relevant to this motion is discussed below.³

³ Defendants are moving to exclude various parts of Plaintiffs’ expert testimony, and citing any of that testimony here does not concede the arguments in those *Daubert* motions.

LEGAL STANDARD

Summary judgment must be granted whenever, with the evidence and reasonable inferences in the nonmoving party's favor, *United States v. Stover*, 131 F.4th 199, 202 (4th Cir. 2025), "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a).

ARGUMENT

I. Plaintiffs must clear a high bar to win their facial challenge.

Plaintiffs bring a facial, preenforcement challenge to two exceptions in the 2023 Act. The nature of their claim is critical.

A. Due process requires that a law be generally understandable.

For starters, due process requires that a law define what conduct is prohibited "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 680 (2023) (cleaned up). Of course, any statute may raise "a close question" "in marginal situations." *Cooper*, 842 F.3d at 842 (citing *Parker v. Levy*, 417 U.S. 733, 755–56 (1974)). That's because we are "[c]ondemned to the use of words," so "we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). But "[t]hat some smidgen of ambiguity remains is no reason to find a statute unconstitutionally vague." *Recht v. Morrissey*, 32 F.4th 398, 415 (4th Cir. 2022). As the Supreme Court has "h[e]ld many times," "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963).

There's nothing radical about the idea that constitutional laws may raise hard cases at the

margin. Almost a century ago, Justice Holmes pointed out that “[w]herever the law draws a line there will be cases very near each other on opposite sides.” *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). So “due process demands a measure of clarity, not exactitude.” *Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cnty.*, 854 F. App’x 521, 528 (4th Cir. 2021).

B. Facial vagueness challenges require *at least* that a plaintiff show that the law lacks a plainly legitimate sweep.

Next, the question is what standard a plaintiff bringing a facial challenge must meet. The Supreme Court recently confirmed that a plaintiff must meet the no-set-of-circumstances standard to prevail on a facial challenge.

1. A facial challenge is “the ‘most difficult challenge to mount successfully,’ because it requires a defendant to ‘establish that no set of circumstances exists under which the Act would be valid.’” *Rahimi*, 602 U.S. at 693 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). *Rahimi* involved a facial challenge to § 922(g)(8), a federal criminal law implicating a constitutional right. And still, the Court held, as long as the law “is constitutional in some of its applications,” the plaintiff must lose. *Id.* To determine whether there are some constitutional applications, courts “consider the circumstances in which [the challenged law] was most likely to be constitutional,” rather than “focus[ing] on hypothetical scenarios where [the law] might raise constitutional concerns.” *Id.* at 701.

The no-set-of-circumstances standard makes sense. Even assuming facial challenges don’t exceed courts’ Article III power by asking them to rule on controversies not before them, *see Moody*, 603 U.S. at 752–66 (Thomas, J., concurring in the judgment), these claims still ask courts “to enjoin every application of a [law],” *id.* at 756. That’s a dramatic exercise of a power that should be exercised cautiously. Hence the Court has required that a law be “unconstitutional in all of its applications” for a facial challenge to prevail. *Wash. State Grange v. Wash. State Republican Party*,

552 U.S. 442, 449 (2008).

And on this standard, this case is easy: Plaintiffs have applied the exceptions themselves. Both Doe and Bingham have applied the maternal health exception, and Doe has applied the fatal fetal anomaly exception. *See, e.g.*, Ex. 1, at 4–6 (listing examples of abortions that Doe performed under both challenged exceptions). In fact, doctors across South Carolina have performed dozens of abortions under these exceptions. *See* Ex. 19 (chart of data reported to DPH).

Or to come at the point from a different angle, Plaintiffs’ facial vagueness challenge fails because the 2023 Act “clearly proscribe[s]” some of their intended conduct. *Fusaro v. Howard*, 19 F.4th 357, 374 (4th Cir. 2021); *accord United States v. Hasson*, 26 F.4th 610, 615 (4th Cir. 2022). A plaintiff cannot pursue a facial vagueness challenge when a statute clearly prohibits her intended conduct for at least two reasons. First, when the intended conduct is clearly prohibited, the “rationales” of the “vagueness doctrine”—fair notice and threat of discriminatory enforcement—are simply not implicated. *Hasson*, 26 F.4th at 619. Second, this rule recognizes “the limited nature of judicial power.” *Id.* Plaintiffs know they can perform or not perform abortions in certain instances, *see, e.g.*, Ex. 1, at 4–6; Ex. 3, at 79:6–12, so this challenge can only be about cases at the margins. That’s not the stuff of a facial challenge. *See, e.g., United States v. Hudson*, 986 F.3d 1206, 1215 (9th Cir. 2021). After all, there’s *some* set of circumstances here where the Act clearly applies.

2. If somehow the Supreme Court’s recent application of the no-set-of-circumstances test doesn’t control, “all agree that a facial challenge must fail where the statute has a ‘plainly legitimate sweep.’” *Wash. State Grange*, 552 U.S. at 449.

Except Plaintiffs, that is. They insisted that even “plainly legitimate sweep” is not the standard for facial vagueness claims. *See* ECF No. 81, at 18 (ECF-generated page number). Plaintiffs were wrong then, and they are still wrong now. The courts that don’t apply the no-set-of-

circumstances test apply the “plainly legitimate sweep” standard on facial vagueness challenges. *E.g., Fabrizius v. Dep’t of Agric.*, 129 F.4th 1226, 1238 (10th Cir. 2025); *Thayer v. City of Chicago, Ill.*, 110 F.4th 1040, 1042 (7th Cir. 2024); *Diamond S.J. Enter., Inc. v. City of San Jose*, 100 F.4th 1059, 1068 (9th Cir. 2024). And pre-*Rahimi*, the Fourth Circuit applied the plainly-legitimate-sweep test in facial vagueness challenges. *See, e.g., Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012). Finally, if all of that isn’t enough, the Supreme Court used this standard just two years ago to describe the bar a plaintiff must meet for facial challenges in cases “other” than facial First Amendment ones (while also citing the no-set-of-circumstances language). *Moody*, 603 U.S. at 723.

The plain-sweep standard still sets the bar “very high” for plaintiffs. *Id.* But rather than needing to “conjur[e] up *a single valid application* of the law” to defeat a facial challenge, *City of Chicago v. Morales*, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting), the plain-sweep standard just asks whether “the law’s unconstitutional applications” more than “substantially outweigh its constitutional ones.” *Moody*, 603 U.S. at 724.

Like the no-set-of-circumstances standard, courts applying the plain-sweep standard should not focus on the “inevitabl[e] . . . many uncertainties at the margins.” *Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 605 (7th Cir. 2021). “[I]t is inappropriate” therefore “to speculate regarding a worst-case scenario.” *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Env’t Control*, 317 F.3d 357, 367 (4th Cir. 2002). To survive a facial vagueness challenge, a court need only determine whether there is a “constitutional ‘core.’” *Cooper*, 842 F.3d at 842. That means a statute won’t be void for vagueness merely “because it is unclear in *some* of its applications to the conduct of . . . other hypothetical parties.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

To determine whether a law has this core and thus a plainly legitimate sweep, “courts must

assess the state law’s scope by asking what activities, by what actors, do the laws prohibit or otherwise regulate?” *NetChoice, LLC v. Bonta*, 170 F.4th 744, 754 (9th Cir. 2026).⁴ Then, courts must “decide which of the law’s applications violate [due process], and measure them against the rest.” *Id.* at 754–55 (alterations omitted). As long as there is an “ascertainable standard for inclusion and exclusion,” *Smith*, 415 U.S. at 578, so that a court can determine “certain activities” that unquestionably fall inside and outside the law, that law has a “constitutional ‘core,’” so a facial challenge must fail, *Cooper*, 842 F.3d at 842.

* * *

If all this makes it seem that Plaintiffs face an uphill struggle, that’s because they do. The Supreme Court has said so: “[F]acial challenges” are “hard to win.” *Moody*, 603 U.S. at 723. And for good reason. For one, “courts usually handle constitutional claims case by case, not en masse.” *Id.* For another, facial challenges “threaten to short circuit the democratic process” because they “prevent[] duly enacted laws from being implemented in constitutional ways.” *Id.* No wonder then that these claims are “disfavored.”⁵ *Wash. State Grange*, 552 U.S. at 450.

C. This bar is still high, even with the 2023 Act’s criminal penalties.

To be sure, “if criminal penalties may be imposed for violations of a law, a stricter standard is applied in reviewing the statute for vagueness.” *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272–73 (4th Cir. 2019) (en banc). Yet this “stricter” standard is only “moderately stringent” where the statute “is not claimed to inhibit the exercise of constitutional rights.” *Copeland*

⁴ This Ninth Circuit case was a First Amendment challenge, so the standard that the plaintiff there had to meet was lower. *See Moody*, 603 U.S. at 723. But the framework for the analysis is the same.

⁵ In Parts II and III, Defendants analyze the exceptions that Plaintiffs challenge under the plain-sweep standard. This is *not* to concede that is the proper test. As explained, the no-set-of-circumstances test controls. Defendants, however, employ the plain-sweep test to show that, even under this standard that’s more favorable to Plaintiffs, Defendants still win.

v. Vance, 893 F.3d 101, 114 (2d Cir. 2018). Far from implicating any constitutional rights, the 2023 Act only implicates the regulation of medicine. And “it is well established that the practice of professions like medicine is subject to reasonable . . . regulation by the State.” *360 Virtual Drone Serv. LLC v. Ritter*, 102 F.4th 263, 271 (4th Cir. 2024).

This “stricter” review for criminal statutes simply ensures citizens have “actual notice” of the law and won’t be subject to “arbitrary enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). And the “more important aspect of vagueness doctrine is not actual notice.” *Id.* at 358. Rather, it’s “that a legislature establish minimal guidelines to govern law enforcement.” *Id.* Effectively, legislatures need only avoid “abdicat[ing] their responsibilities for setting the standards of the criminal law.” *Smith*, 415 U.S. at 575.

Significant to Plaintiffs’ claim, “simply because a criminal statute uses qualitative language to articulate a liability standard does not mean that the statute is impermissibly vague.” *United States v. Cook*, 970 F.3d 866, 875 (7th Cir. 2020). That’s “especially” the case “when the statute under scrutiny calls upon the court to apply that standard to a concrete set of facts.” *Id.* After all, courts have never required “perfect clarity and precise guidance” even under heightened vagueness review because “there is little doubt that imagination can conjure up hypothetical cases in which the meaning of terms will be in nice question.” *Platt v. Mansfield*, 162 F.4th 430, 445 (4th Cir. 2025). “Hypotheticals are,” of course, “a favorite tool of those bringing vagueness challenges,” yet “obvious[ly],” “almost any criminal . . . prohibition is susceptible to clever hypotheticals testing its reach.” *Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Ct.*, 894 F.3d 235, 251 (6th Cir. 2018).

Plaintiffs’ “criminal penalties” retort therefore only goes so far. And it’s even less forceful because their “arguments concerning arbitrary enforcement” of those penalties “are somewhat

speculative.” *Gonzales v. Carhart*, 550 U.S. 124, 150 (2007). Really, not even “somewhat.” Unlike a preenforcement challenge, “where no evidence has been, or could be, introduced to indicate whether the Act has been enforced in a discriminatory manner,” *id.* (cleaned up), there *is* a record here. And it’s devastating for Plaintiffs: They cannot point to a single investigation or prosecution for the many abortions performed under the exceptions. Ex. 3, at 165:19–166:6; Ex. 6, at 204:18–205:11. That’s because there haven’t been any. Plaintiffs’ “broad, ill-defined fear of enforcement” is “not enough to sustain [a] vagueness challenge” to a criminal statute. *Doe v. Rausch*, 461 F. Supp. 3d 747, 776–77 (E.D. Tenn. 2020).

At most, the existence of criminal penalties in the challenged law may put a slight thumb on a scale *already heavily tilted against Plaintiffs*. But a warning sign isn’t a burden shifter. Courts will review these cases with a careful eye, but proving a law is facially void-for-vagueness—even a criminal one—is still a “very high bar.” *Moody*, 603 U.S. at 723. As Justice Holmes explained, “the law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.” *Nash*, 229 U.S. at 377. And “[i]f his judgment is wrong,” he may “incur a fine or a short imprisonment” or even greater punishment. *Id.*

II. The maternal health exception is not vague.

Plaintiffs’ challenge to the maternal health exception focuses on two phrases: “serious risk” and “substantial and irreversible impairment of a major bodily function.” ECF No. 10, ¶ 111. Neither phrase is vague.

A. The exception has an understandable core.

As a starting point, the phrases that Plaintiffs challenge are understandable on their face, both from their ordinary meaning and their frequent use in the law and in medicine.

1. “Serious risk” can be understood.

i. “Serious” is a common word meaning “having important or dangerous consequences.” Merriam-Webster’s (2026), <https://tinyurl.com/d3nty86t>. Presumably Plaintiffs aren’t really claiming they don’t know what “risk” means, but if they are, it means a “possibility of loss or injury.” Merriam-Webster’s (2026), <https://tinyurl.com/yc6ahn66>; *cf. Planned Parenthood S. Atl. v. State*, 916 S.E.2d 299, 310 (S.C. 2025) (looking to the “ordinary understanding” of words in the 2023 Act and taking no issue with these words not having medical definitions).

ii. Not only are these common words, but they also form a common phrase in the law. South Carolina’s General Assembly has used “serious risk” (sometimes with minor variations) in statutes as varied as those addressing hazards in drinking water, S.C. Code Ann. § 44-55-60(A), use of SLED’s “blue alert” system for dangerous suspects, *id.* § 23-3-1400(D)(2)(a), and exceptions in the Tort Claims Act, *id.* § 15-78-60(36). Congress often uses “serious risk” too. *See, e.g.*, 12 U.S.C. § 1467a(g)(5)(A) (regulation of holding companies for savings companies); 18 U.S.C. § 3142(f)(2) (pretrial detention); 21 U.S.C. § 353c(e)(1) (disclosures in television ads for drugs).

Switch “serious” to the synonym “substantial,” and the examples abound. *Cf. Johnson v. United States*, 576 U.S. 591, 603 (2015) (treating criminal laws using “terms like ‘substantial risk,’ ‘grave risk,’ and ‘unreasonable risk’” interchangeably for purposes of vagueness). South Carolina uses that term in definitions for assault and battery. S.C. Code Ann. § 16-3-600(A)(1). It employs it in regulating eminent domain procedures. *Id.* § 28-2-100(B). It has adopted that term in property insurance regulation. *Id.* § 37-4-301(1)(a). The list goes on. *E.g., id.* § 43-35-10(6) (defining terms related to abuse of vulnerable adults). And on. *E.g., id.* § 44-52-50(1) (procedure for emergency admission for a chemically dependent adult). Once again, Congress uses “substantial risk” all the time too. *See, e.g.*, 15 U.S.C. § 1274(c) (remedies regarding hazardous substances); 46 U.S.C.

§ 4311(b)(3)(A) (penalties for wrongly operating a recreational vessel).

Given the frequent use of “serious risk” and similar terms, it’s no surprise that “[t]he Court’s” vagueness jurisprudence “cast[s] no doubt on” the validity of “many laws that ‘require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion.’” *Welch v. United States*, 578 U.S. 120, 124 (2016) (emphasis omitted) (quoting *Johnson*, 576 U.S. at 603). “Many perfectly constitutional statutes use imprecise terms”—including “serious.” *Sessions v. Dimaya*, 584 U.S. 148, 159 (2018); accord *United States v. Miselis*, 972 F.3d 518, 545 (4th Cir. 2020) (“tests found in many perfectly constitutional statutes” include “serious potential risk” and “substantial risk”). Indeed, the Court has already rejected a vagueness challenge to the phrase “serious risk.” See *Schall v. Martin*, 467 U.S. 253, 278 (1984) (rejecting vagueness challenge to statute allowing pretrial detention of juveniles deemed a “serious risk” of committing a crime before next court appearance).

In addition to courts approving statutory uses of “serious risk,” courts have used this language in their analysis too. For instance, in resolving a First Amendment claim, the Supreme Court considered whether its decision would create a “*serious risk* of chilling protected speech.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 327 (2010) (emphasis added). In the same way, for Eighth Amendment deliberate-indifference claims, the Court requires an inmate to “show that he is incarcerated under conditions posing a *substantial risk* of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (emphasis added). If terms like “serious risk” fail to give fair notice, it’s hard to fathom that the Supreme Court would employ those terms in their own analysis that is meant to guide lower courts.

iii. Beyond these legal uses, “serious risk” appears regularly in medicine. Plaintiffs’ own testimony confirms as much. Doe admitted that she “used the term serious and high risk and

significant in [her] every day practice.” Ex. 3, at 255:3–6; *see also id.* at 83:6–11 (Doe: “Serious is certainly a word that I use in conversation and even when I’m discussing with colleagues or patients”); *id.* at 87:10–12 (Doe: “I’ve already said that I do use the word serious or serious risk in conversation with patients and colleagues.”). Given this admission, it’s no wonder that Doe would also acknowledge she and “other doctors use qualitative terms in medicine to communicate with patients and each other,” including “high risk or serious.” *Id.* at 109:21–24. And Doe had no trouble connecting specific conditions to qualitative terms. *E.g., id.* at 122:6–11 (Doe calling PPRM a “severe health condition”); Ex. 4, ¶ 31 (Doe calling cancer a “high risk”). Bingham also understands and uses qualitative terms. She acknowledged that she uses “serious” with patients.⁶ Ex. 6, at 175:13–16. Meanwhile, Plaintiffs can even “distinguish[]” between degrees of risk, like “low,” “moderate,” and “high.” Ex. 8, at 159:6–12; *accord* Ex. 6, at 117:9–11.

Even Plaintiffs’ Prayer for Relief shows that they understand this term. As an alternative to the maternal health exception’s “serious risk,” they ask the Court to enjoin Defendants from enforcing the law when “an abortion is necessary to prevent a *severe* health risk,” including for health conditions that “may not *seriously* threaten the patient’s health until or after delivery.” ECF No. 10, at 48 (emphasis added). Do Plaintiffs really claim that they can understand “severe” but not “serious” when Bingham testified that those words are “synonymous” and can be used “interchangeably,” and when they use “seriously” in their prayer for relief? Ex. 6, at 174:16–21.

Of course, all that tracks with Defendants’ experts (who include the only maternal fetal medicine specialists here). They explained that “serious risk” is common in medicine. Draper, for

⁶ As an illustration of the point that people understand qualitative terms, Tarleton (another of Plaintiffs’ experts and a former Plaintiff) was asked to define what she meant by “very unlikely” in her expert report. She replied that “it is difficult to—to define that term because I think we all know what those two words mean.” Ex. 8, at 111:1–3.

instance, explained that this term “denotes a probability of harm that is clinically significant and actionable, not merely theoretical.” Ex. 14, ¶ 22. Greig similarly described this term as “convey[ing] a clinical situation that is not normal and needs to be carefully addressed by the physician in an expedited fashion.” Ex. 15, ¶ 30. And Buskmiller defined it as a “moderate or high risk despite risk mitigation approaches such as an appropriate level of care by the appropriate team members, using medications or procedures as needed, or planning a delivery.” Ex. 17, ¶ 18; *see also id.* ¶ 11 (“physicians are trained to risk-stratify patients”). That’s three articulations of the same concept.

Doe put her cards on the table when she admitted that she is “not saying [serious] has no meaning” but claimed it “has insufficient specificity” when she is “potentially at risk of being prosecuted for a felony.” Ex. 3, at 88:11–17. That gives away the game: She concedes that “serious risk” has an understandable meaning. Indeed, Plaintiffs are generally comfortable using qualitative terms like “serious” in the medical context. Qualitative terms appear more than 200 times across their expert reports in that context. *See generally* Exs. 4, 7, 9, 11, 12. The only explanation for why qualitative terms are okay for their reports and practice yet “vague” in the Act is that the Act comes with criminal penalties. *E.g.*, Ex. 3, at 88:13–17. But attaching a criminal penalty to a qualitative term like “serious risk”—a term Plaintiffs employ daily—does not make it unconstitutionally vague. Again, “the law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.” *Nash*, 229 U.S. at 377.

Plus, the maternal health exception gives physicians space to exercise their “reasonable medical judgment.” S.C. Code Ann. § 44-41-640(C)(1). “In any given medical situation there is likely to be a number of reasonable medical options and disagreement between doctors over the appropriate course of action does not, of course, render one option reasonable and another unreasonable.” *Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999). But tying that determination to a

doctor’s “reasonable medical judgment” is not a flaw in the exception. It’s a feature. Draper explained that this standard gives doctors the “flexibility” to address individual situations. Ex. 14, ¶ 16. Or as Greig put it, it allows doctors to handle “the unique facts of the situation.” Ex. 15, ¶ 61; *see also* Ex. 18, ¶¶ 10–11. The 2023 Act gives physicians the breathing room to exercise their reasonable judgment—something they should be doing already. In fact, Doe testified that when she performs abortions under the Act’s exceptions, she does so using reasonable medical judgment. Ex. 3, at 165:9–13.

2. “Substantial and irreversible impairment of a major bodily function” can be understood.

i. “Substantial” is a common word that means “important” or “essential.” Merriam-Webster’s (2026), <https://tinyurl.com/3ps4peb5>. “Irreversible” is even easier: “not reversible.” *Id.*, <https://tinyurl.com/mry8u2em>. “Impairment” is defined as “diminishment or loss of function or ability.” *Id.*, <https://tinyurl.com/bdfj2h44>. And a “major bodily function” is a “notable or conspicuous” part, *id.*, <https://tinyurl.com/yeerycbk>, of “any of a group of related actions contributing to a larger action,” *id.*, <https://tinyurl.com/ms8yvfzu>, that the body undertakes. So perhaps the statute does not use Plaintiffs’ favored technical “medical phrase,” but it does not have to. *Cf. 360 Virtual Drone Serv. LLC*, 102 F.4th at 271 (noting the State’s “well established” right to regulate medical practice). By using language that anyone can understand, the statute satisfies due process’s demand.

ii. Much like “serious risk,” “substantial and irreversible impairment of a major bodily function” are also terms that appear frequently in legislative acts beyond abortion. For instance, Louisiana uses this exact language when establishing procedures for judicial approval of surrogacy contracts. *See* La. Stat. Ann. § 9:2720.3(B)(5). Texas has adopted “serious impairment to bodily functions” as part of its definition of “emergency medical care” for its general medical liability

statute. Tex. Civ. Prac. & Rem. Code Ann. § 74.001(7). Maine defines a “serious bodily injury” in its criminal code to include “substantial impairment of the function of any bodily member or organ.” Me. Rev. Stat. Ann. tit. 17-A, § 2(23). And Michigan uses “serious impairment of body function” in a statute about tort liability for noneconomic damages caused by a vehicle, Mich. Comp. Laws Ann. § 500.3135(2)(a)—a standard that the Michigan Supreme Court agreed was “sufficient for legal interpretation” because it consisted of “commonly used or understood words of the English language.” *In re Requests of Governor & Senate on Constitutionality of Act No. 294 of Pub. Acts of 1972*, 208 N.W.2d 469, 482 (Mich. 1973).

Congress also uses these terms. The Americans with Disabilities Act uses “substantially limits” and “major bodily function” in defining the statute’s key terms. 42 U.S.C. § 12102(1)(A), (2)(B); *see also Anderson v. Diamondback Inv. Grp., LLC*, 117 F.4th 165, 176 (4th Cir. 2024) (applying this standard). Federal law defines “emergency medical condition” as including a condition that would cause “serious impairment to bodily functions” when establishing when money may be sent to the States for medical care for illegal aliens. 42 U.S.C. § 1396b(v)(3)(B). And the Federal Food, Drug, and Cosmetic Act, when regulating devices, defines a “serious injury” as one that “results in permanent impairment of a body function.” 21 U.S.C. § 360i(a)(2)(B).

iii. And it’s not as if these are just terms that the law imposed on medicine. To the contrary, medical publications use them too. So Plaintiffs are wrong when they claim that this phrase “has no inherent meaning in medicine.” ECF No. 10, ¶ 115.

Look no further than the American College of Obstetricians and Gynecologists (one of the nation’s leading pro-abortion groups and a frequent authority that Plaintiffs cited in discovery). In describing class III devices under the FDA’s regulatory structure, ACOG says these devices are “of *substantial* importance in preventing *impairment* of human health.” ACOG, Committee Op. No.

801, *Assessing and Adopting New Medical Devices for Obstetric and Gynecologic Care* (Apr. 2020), <https://tinyurl.com/pjtakt5c> (emphasis added). ACOG even uses such terms in clinical publications. For instance, in a 2009 clinical update on delirium, ACOG described how “symptoms may vary over hours from near-normal mental status to *substantial impairment* of orientation.” ACOG, *Care of Aging Women*, 8 Clinical Updates in Women’s Health Care, at 23 (Oct. 2009), <https://tinyurl.com/m3zje558> (emphasis added).

Other medical professionals use this language too. For instance, the CDC uses similar language for diagnosing chronic fatigue syndrome. *See* CDC, *IOM 2015 Diagnostic Criteria* (May 10, 2024), <https://tinyurl.com/bdeb7nsh> (one symptom is a “substantial reduction or impairment in ability to engage in pre-illness levels of activity”). And the similar phrase “significant impairment” appears throughout the DSM-5 for diagnosing mental disorders. *See, e.g.*, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 36, 57 (5th ed. text rev. 2022). Other examples abound. *See, e.g.*, Craig S. Kitchens, Barbara M. Alving & Craig M. Kessler, *Consultative Hemostasis and Thrombosis* 475 (2002), <https://tinyurl.com/yj3xzmca> (“Agents that may substantially impair coagulation are aspirin and NSAIDs, particularly ketorolac in the postoperative period.”); Kutluk Oktay & Murat Sonmezer, *Fertility Issues and Options in Young Women with Cancer*, in *Cancer and Pregnancy* 203, 203 (Schlag et al. eds. 2008), <https://tinyurl.com/6z7z6hum> (“These include but are not limited to growth disorders, cardiovascular problems, neurocognitive abnormalities, second malignant tumors, and reproductive failure, all of which substantially impair the quality of life of the cancer survivor.”).

Perhaps the most significant medical source is *Williams Obstetrics*. King (one of Plaintiffs’ experts) agreed it was a “common or authoritative book” in the field. Ex. 10, at 93:5–16. That book uses “serious” more than 100 times, “substantial” or “substantially” more than 50 times,

“incompatible” or “incompatibility” more than ten times, “major” more than 250 times, and “impair” (or a variation) more than 150 times. *See id.* at 238:4–240:6.⁷

Given this frequent use in medicine, it’s no surprise that Plaintiffs acknowledged that they understand these words. Throughout their depositions, Doe and Bingham used the word “substantial” in answering questions. *E.g.*, Ex. 3, at 118:7–10, 121:19, 194:19, 237:21; Ex. 6, at 253:4–22. Doe acknowledged that she “understand[s] the word irreversible,” considering she used it the “same” way in her report as it’s used in the exception. Ex. 3, at 231:1–10. And she said that “[i]mpairment is a term that has some meaning in medicine though not specificity.” *Id.* at 155:14–15. So she “ha[s] a general understanding of the word impairment.” *Id.* at 231:22–23; *see also* Ex. 6, at 168:20–24 (using “injury” to mean “impairment”); Ex. 8, at 123:1–3 (referring to children that could “survive with severe impairment”).

Plaintiffs and their experts understand “major bodily function” too. Bingham, for instance, used “organ system” interchangeably with “major bodily function” throughout her deposition. *E.g.*, Ex. 6, at 168:23–24, 185:24–25, 197:20–21. And *Williams Obstetrics*, King explained, outlines what “the major organs” are. Ex. 10, at 98:20–25.

Doe and Bingham also consistently put this whole phrase into practice. Bingham employed those terms on her own throughout her deposition. *See, e.g.*, Ex. 6, at 46:3–9, 83:24–84:3, 212:19–21. And she succinctly said “yes” when asked if “loss of an organ system” would be a “substantial impairment to major bodily function.” *Id.* at 215:6–9. Doe demonstrated the same understanding by explaining in her report that “[c]ancer itself presents a high risk of irreversible bodily impairment.”

⁷ When asked why she consistently used qualitative terms in her expert report to describe medical phenomena, King said she’s “not giving you a textbook” in the report but is “using appropriate language for what [she’s] trying to convey to the Court.” Ex. 10, at 174:2–6. But as this discussion shows, King’s preferred textbook is filled with these terms she insists are vague.

Ex. 4, ¶ 31.

As with “serious risk,” all this tracks with what Defendants’ experts consistently said about these words. Draper noted that “‘major bodily function’ corresponds directly to organ systems routinely monitored in obstetrics, including cardiovascular, neurologic, renal, hepatic, respiratory, hematologic, and reproductive functions.” Ex. 14, ¶ 23; *see also* Ex. 15, ¶ 49; Ex. 17, ¶ 19; Ex. 18, ¶ 25. And, as Greig put it, a “‘substantial and irreversible impairment’ means a significant and permanent reduction or loss of function affecting the major bodily function at issue.” Ex. 15, ¶ 49; *see also* Ex. 18, ¶ 25. This language “reflects longstanding clinical frameworks, physiologic principles, and medicolegal standards.” Ex. 14, ¶ 26.

3. Multiple other interpretive rules defeat Plaintiffs’ challenge to the maternal health exception.

i. The presumed conditions provide clarity.

The 2023 Act identifies 11 conditions that are “presumed” to satisfy this exception. S.C. Code Ann. § 44-41-640(C)(2). On the face of the statute, then, the exception “appl[ies] without question” to many cases. *Cooper*, 842 F.3d at 842. A “statutory definition [that] provides a lengthy but unexhaustive list of what does and doesn’t” fall within its ambit gives “a person of ordinary intelligence . . . fair notice of what” the statute prohibits. *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 210–11 (4th Cir. 2019). For instance, a North Carolina sex-offender-registry statute prohibited registrants from knowingly being at four types of locations. *See* N.C. Gen. Stat. Ann. § 14-208.18(a)(1)–(4). Registrants challenged this law. The district court held that the two subsections with illustrative (but not exhaustive) examples were not unconstitutionally vague, a decision that the registrants didn’t even challenge on appeal. *See Does v. Cooper*, 148 F. Supp. 3d 477, 487–94 (M.D.N.C. 2015), *aff’d sub nom. Cooper*, 842 F.3d 833.

The 2023 Act provides just these types of examples to bring any needed clarity. The 11

conditions that are presumed to satisfy this exception are (relatively speaking) “common” ones. Ex. 15, ¶ 51. Austin, another of Defendants’ experts, called them “heartland examples of maternal health emergencies.” Ex. 18, ¶ 27. Tarleton (a former Plaintiff and still an expert for Plaintiffs) performed “50-ish or more” abortions under the presumed conditions. Ex. 8, at 89:20–24. They thus provide a “common-sense core” for this statute, giving it a plainly legitimate sweep that covers typical health emergencies in pregnancy. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994). Plus, these conditions illustrate what types of harms satisfy the maternal health exception and can be an analogy for other conditions. *See* Ex. 13, at 4–5 (Defendants’ discovery responses providing examples of this reasoning); *cf.* Ex. 3, at 252:20–24 (Doe testifying that previous cases can inform whether the exception applies in future cases); Ex. 8, at 160:19–161:1 (Tarleton comparing conditions to PPRM). So, for instance, if HELLP syndrome (a presumed condition) can lead to acute liver failure and severe preeclampsia (another presumed condition) can cause neurological damage or respiratory failure, a different condition that causes those harms would also permit an abortion.

Not only does the list of presumed conditions provide clarity and a clear core, but Plaintiffs’ own expert also suggested that a model statute that could survive a vagueness challenge would include such a list. As her forthcoming paper explains, an ideal medical exception “would also provide a non-exclusive list of conditions that would satisfy the standard in order to ensure physicians have no worries about protecting pregnant patients’ lives and health in this range of cases.” Mara Buchbinder, et al., *The Inevitable Vagueness of Medical Exceptions to Abortion Bans*, 16 U.C. Irvine L. Rev. (forthcoming 2026) (manuscript at 51), <https://tinyurl.com/2kems5zs>.

ii. This exception’s terms have been commonly used for 30 years.

“[R]un-of-the-mill statutory phrases” do not pose vagueness problems. *Recht v. Morrissey*, 32 F.4th 398, 415 (4th Cir. 2022). So when a law “has been on the books and readily comprehensible

to those in the [] industry (much less the general population) for over a quarter-century,” courts “find no merit” in a “vagueness argument.” *United States v. Saunders*, 828 F.3d 198, 207 (4th Cir. 2016); *see also Beaufort Cnty. v. S.C. State Election Comm’n*, 718 S.E.2d 432, 438 n.4 (S.C. 2011) (the frequent use of terms in legislation informs the meaning of those terms).

The 2023 Act’s maternal health exception uses language found across the country for more than three decades. Therefore, accepting Plaintiffs’ vagueness argument would mean at least two things. First, it would mean that physicians acquiesced in practicing under vague language for decades, despite constant challenges by physicians to abortion laws. And second, it would call into question dozens of States’ longstanding abortion regulations. Both would be remarkable conclusions.

As for age, these terms first came into South Carolina law 31 years ago in the Women’s Right to Know Act. *See* 1995 S.C. Acts No. 1, § 8. And they appeared again in the 2016 Pain-Capable Unborn Child Act’s maternal health exception (this time even with an objective reasonableness standard). *See* 2016 S.C. Acts No. 183, § 1. Other States also began using these terms in the 1990s. *See, e.g.*, 1993 Utah Laws Ch. 70, § 1 (S.B. 60); Ohio Rev. Code Ann. § 2919.17(A)(1) (1996).

As for prevalence, many States continue using these phrases. At least 31 States use “serious risk” (or a close variation) in a maternal health provision.⁸ And 31 States also use “substantial and

⁸ Ala. Code § 26-22-2(6); Alaska Stat. Ann. § 18.16.060(d)(2); Ariz. Rev. Stat. Ann. § 36-2151(9); Ark. Code Ann. § 20-16-602(b)(3)(A)(ii); Colo. Rev. Stat. Ann. § 13-22-703(5); Del. Code Ann. tit. 24, § 1782(5); Fla. Stat. Ann. § 390.0111(1)(a); Idaho Code Ann. § 18-8801(5); Ind. Code § 16-18-2-223.5; Iowa Code Ann. § 146A.1(6)(a); Kan. Stat. Ann. § 65-6701(g); Ky. Rev. Stat. Ann. § 311.781(3); La. Stat. Ann. § 40:1061.1.5(A)(2)(a); Mich. Comp. Laws Ann. § 722.902(b); Miss. Code Ann. § 41-41-405(j); Mo. Ann. Stat. § 188.030(1); Mont. Code Ann. § 50-20-303(1); Neb. Rev. Stat. Ann. § 71-6914(3)(a); N.H. Rev. Stat. Ann. § 329:44(III); N.C. Gen. Stat. Ann. § 90-21.86; N.D. Cent. Code Ann. § 14-02.1-02(10); Ohio Rev. Code Ann. § 2919.16(F); Okla. Stat. Ann. tit. 63, § 1-731.3(A); 18 Pa. Stat. and Cons. Stat. Ann. § 3203; S.D. Codified Laws § 34-23A-1(5); Tenn. Code Ann. § 39-15-202(f)(1); Tex. Health & Safety Code Ann. § 170A.002(b)(2); Utah Code Ann. § 76-7-302(2)(b)(i)(B); Va. Code Ann. § 16.1-241; W. Va. Code Ann. § 16-2I-1; Wis. Stat.

irreversible impairment of a major bodily function” (or a close variation).⁹

Congress has used similar language too. Under EMTALA, a hospital emergency department must provide certain care for a pregnant woman who faces “serious jeopardy” to her health or “serious impairment to bodily function.” 42 U.S.C. § 1395dd(e)(1)(A)(i)–(ii). The Supreme Court understands this statute and “serious risk”: Both Justice Kagan and Justice Alito recently used “serious risk” while describing how EMTALA works. *See Moyle v. United States*, 603 U.S. 324, 328 (2024) (Kagan, J., concurring); *id.* at 361 (Alito, J., dissenting).

All these statutes mean that if Plaintiffs are right, there should have been doctors being prosecuted across these States through arbitrary enforcement. “Yet, to date, there has not been a single reported case where a physician has been prosecuted for performing an abortion that was allegedly to save the life of the mother.” Maura K. Quinlan & Paul Benjamin Linton, *Medically Necessary Abortions After Dobbs*, 39 Notre Dame J.L. Ethics & Pub. Pol’y 87, 135–36 (2025). Indeed, Plaintiffs couldn’t identify such a case or even an investigation in South Carolina. Ex. 3, at 165:19–166:6; Ex. 6, at 204:18–205:11. So it’s not that Plaintiffs’ arguments about “arbitrary enforcement” are merely “speculative.” *Gonzales*, 550 U.S. at 150. Rather, there are years of

Ann. § 253.10(2)(d).

⁹ Ala. Code § 26-22-2; Alaska Stat. Ann. § 18.16.060(d)(2); Ariz. Rev. Stat. Ann. § 36-2151(9); Ark. Code Ann. § 20-16-602(b)(3)(A)(ii); Colo. Rev. Stat. Ann. § 13-22-703(5); Del. Code Ann. tit. 24, § 1782(5); Fla. Stat. Ann. § 390.0111(1)(a); Ga. Code Ann. § 16-12-141(a)(3); Idaho Code Ann. § 18-8801(5); Ind. Code § 16-18-2-223.5; Iowa Code Ann. § 146A.1(6)(a); Kan. Stat. Ann. § 65-6701(g); Ky. Rev. Stat. Ann. § 311.781(3); La. Stat. Ann. § 40:1061.1.5(A)(2)(a); Mich. Comp. Laws Ann. § 722.902(b); Miss. Code Ann. § 41-41-405(j); Mo. Ann. Stat. § 188.030(1); Mont. Code Ann. § 50-20-303(1); Neb. Rev. Stat. Ann. § 71-6914(3)(a); N.H. Rev. Stat. Ann. § 329:44(III); N.C. Gen. Stat. Ann. § 90-21.86; Ohio Rev. Code Ann. § 2919.16(F); Okla. Stat. Ann. tit. 63, § 1-731.3(A); 18 Pa. Stat. and Cons. Stat. Ann. § 3203; S.D. Codified Laws § 34-23A-1(5); Tenn. Code Ann. § 39-15-202(f)(1); Tex. Health & Safety Code Ann. § 170A.002(b)(2); Utah Code Ann. § 76-7-302(2)(b)(i)(B); Va. Code Ann. § 16.1-241; W. Va. Code Ann. § 16-2I-1; Wis. Stat. Ann. § 253.10(2)(d).

evidence confirming that there's no arbitrary enforcement.¹⁰

B. The exception has a plainly legitimate sweep.

Not only are the exception's terms ordinarily understandable, but the exception also has a plainly legitimate sweep in practice. Recall the hurdle that Plaintiffs must clear. In First Amendment cases, a plaintiff must show that a "law's unconstitutional applications *substantially outweigh* its constitutional ones" to prevail on a facial challenge. *Moody*, 603 U.S. at 724 (emphasis added). That's a "lower[]" standard than the "very high bar" that applies to cases "other" than First Amendment ones, like this vagueness challenge. *Id.* at 723. So to prevail here, Plaintiffs must show something *more than* the unconstitutional applications (the vague ones) "substantially outweigh" the constitutional ones (the nonvague ones). *Id.* at 724. They cannot do so.

1. Most applications do not violate due process. Start with most pregnancies. As one of Plaintiffs' experts testified, "all pregnancies result in some level of harm." Ex. 10, at 243:19–20; *accord* Ex. 9, ¶ 21. Or as Bingham implicitly agreed, "all pregnancies" have a "baseline level of risk." Ex. 6, at 85:19–86:1. But whatever risks come with pregnancy generally, the maternal health exception only permits an abortion in a "clinical situation that is not normal." Ex. 15, ¶ 30; *accord* Ex. 3, at 194:9–21 (Doe acknowledging that "healthy pregnancies" would not allow an abortion under the exception); Ex. 6, at 85:19–86:1 (Bingham noting that the exception does not apply to pregnancies with only "the baseline level of risk associated with all pregnancies"). Such pregnancies are rare (thus the designation "not normal"). Doe reported that 1%, "possibly less," of all her patients

¹⁰ Further undermining concerns about arbitrary enforcement are some of Plaintiffs' claims about what they (or other unnamed doctors) fear. Bingham, for instance, said that abortions for ectopic pregnancy generate fear, despite that being a presumed condition. Ex. 6, at 112:7–12. And Tarleton claimed that some doctors "were unwilling to provide abortions even in cases when the law[]s exceptions might be clear because they're afraid of legal consequences." Ex. 8, at 142:11–14. Putting aside the hearsay in Tarleton's statement, there's no basis for any of that fear.

obtain abortions under this exception. Ex. 3, at 46:8–11. So out of the starting gate, Plaintiffs have a problem because in most pregnancies, physicians know the exception does not permit an abortion.

But even in pregnancies in which physicians must analyze more closely whether the exception applies, there are still ample instances in which the exception can be applied to determine whether it permits an abortion. Data from the Department of Public Health includes more than 30 abortions under the maternal health exception. *See* Ex. 19. That data includes more than a dozen unique conditions *beyond* the exception’s 11 presumed conditions. So physicians are applying the exception across a wide range of circumstances. *See id.*

The same goes for Plaintiffs. Doe recalled performing at least seven abortions under this exception for conditions other than the presumed conditions. Ex. 1, at 4; Ex. 3, at 185:22–186:2. And Tarleton recalled performing another “three to five.” Ex. 8, at 57:17–24. Those cases included PPRM, a “relatively common” condition that Doe and her colleagues “had confidence . . . me[an]s the exception.” Ex. 3, at 117:13–17. Tarleton likewise concluded that PPRM can satisfy the exception, Ex. 8, at 38:17–39:2, as did a case of leukemia and another of heart disease, *id.* at 80:6–22, 79:5–8. Bingham testified that the exception is not “always extremely unclear” because there are some situations when “it’s very evident that someone is on death’s door, or [is] having irreversible and substantial loss of an organ system.” Ex. 6, at 83:24–84:3. And Tarleton catalogued even more conditions—such as maternal peripartum cardiomyopathy, heart failure, and renal failure—that satisfy the exception. Ex. 8, at 160:19–161:1. That tracks with Defendants’ discovery responses, which identified additional conditions beyond the presumed ones to which the exception may apply. Ex. 13, at 5.

Just as Doe and Bingham could determine that certain conditions permitted an abortion, they could also conclude that other conditions did not. For instance, “a pulmonary embolism in a prior

pregnancy” that Doe treated did not meet the exception’s standard to permit an abortion. Ex. 3, at 198:18–23. Tarleton also testified that there were “circumstances” (plural) when she “could clearly understand that the exception did not apply.” Ex. 8, at 61:6–10. And Bingham discussed how she could discern when a “stable” patient was not facing a serious risk that satisfied the exception. Ex. 6, at 268:17–269:3. She recalled “frequent[]” conversations with residents and medical students where they determined the exception was “certainly not met.” *Id.* at 168:3–7, 15–18. “[O]ftentimes,” Bingham explained, patients “were . . . not sick enough to have met the criteria for an imminent risk of loss of life or irreversible and substantial injury to an organ system.” *Id.* at 168:21–24; *see also id.* at 137:7–10 (similar testimony).

This evidence proves that the exception’s language provides “an ascertainable standard for inclusion and exclusion,” *Smith*, 415 U.S. at 578, and “appl[ies] without question to certain” cases, *Cooper*, 842 F.3d at 842. Physicians across the State—including Plaintiffs—have been able to decide many cases that do and don’t meet the exception and permit an abortion.

That’s not to mention the other parts of the statute that *expressly* identify specific cases that fall inside and outside the exception. Psychological or emotional conditions, for example, are “generally common maternal health concerns in pregnancy.” Ex. 10, at 70:13–16; *see also* Ex. 7, at 4 (Bingham: these conditions are “one of the most common underlying causes of maternal mortality nationwide”). But there’s no doubt whether these maternal health conditions meet the exception: They are statutorily excluded. *See* S.C. Code Ann. § 44-41-640(A). That’s another large number of times when the exception can be understood and applied.

And then there are the presumed conditions. Physicians should have no doubt that the exception applies to those common conditions. Tarleton testified that she performed “50-ish or more” abortions under the presumed conditions. Ex. 8, at 89:20–24. That list includes things like

ectopic pregnancies, which Bingham said “happen very frequently.” Ex. 6, at 170:24–25. The presumed conditions, in other words, are far from the extreme “thousand dollars for a pound of sugar” example from *Johnson* that is not enough to save a statute. 576 U.S. at 602. They are instead common examples that provide a clear core for the exception.

2. On the other side of the ledger, Plaintiffs offered few examples of when the exception could not be applied because of its allegedly vague terms. In discovery, Plaintiffs were asked to identify every time that they were unable to determine whether an abortion could be performed under the maternal health exception. Doe provided only three instances. *See* Ex. 1, at 7–8. And Bingham just four.¹¹ *See* Ex. 5, at 6–7. Those numbers pale in comparison to the times when physicians could determine whether the exception permitted an abortion.

Beyond that, Plaintiffs offered only unsubstantiated *estimates* of how many more instances there were. Doe claimed it happened two or three times a month. *See* Ex. 1, at 6. With the 2023 Act having been in effect for 30 months when she answered that interrogatory, that’s 60 to 90 instances. Bingham called her inability to determine whether the exception applied “a daily occurrence” when she worked on labor and delivery once a week (about 125 times, if once per day on labor and delivery over two-and-a-half years). *See* Ex. 5, at 4.

Two points blunt this self-serving speculation. First, Plaintiffs bear the burden here. *See Moody*, 603 U.S. at 723. They cannot create a genuine dispute from unnamed, unexplained estimates.

¹¹ Of course, a plaintiff cannot win facial challenges based on hypotheticals. *See Rahimi*, 602 U.S. at 701; *Oklahoma v. United States*, 163 F.4th 294, 316 (6th Cir. 2025) (“[L]itigation by hypothetical is a one-way street when it comes to facial challenges to a statute. A reviewing court may reject a challenge based on potential applications of the statute that avoid constitutional shoals. But it may not invalidate a statute based on hypothetical applications that have yet to occur.”). Thus, all the testimony from Plaintiffs and their experts about hypothetical scenarios cannot count as instances in which they could not determine whether the exception applies. *E.g.*, Ex. 8, at 63:14–25 (admitting a paragraph in an expert report was “a hypothetical situation”).

Defendants have no way to test this bald assertion. Were these cases when a doctor really couldn't apply the exception? Or was someone just afraid to do so without any reasonable basis for that fear? *See supra* n.10. As it stands, their *ipse dixit* estimates do not allow a reasonable factfinder to conclude that these were instances when physicians could not determine whether the exception applied.

Second, even if the Court were to conclude that it could consider the estimates, Plaintiffs' estimates do not carry their burden. At best for Plaintiffs, they have offered about 225 or so instances when they couldn't determine whether the exception applied. But that isn't as often as the times that they have been able to conclude whether the exception applies. Between the abortions they have provided and the instances when they determined the exception would not permit an abortion with the "thousands of people" they have seen, Ex. 6, at 119:5, there are more cases when Plaintiffs have been able to apply the exception than cases when they have been unable to do so.

3. Measuring the times when the exception has been applied against those instances when it could not be, Plaintiffs have not shown the unconstitutional applications more than "substantially outweigh" the constitutional ones. *Moody*, 603 U.S. at 724. There are ample cases in which the exception could or could not be applied. And this evidence shows that the exceptions have a "constitutional 'core.'" *Cooper*, 842 F.3d at 842.

Really, their argument hinges on hypotheticals—and often "unrealistic" ones. Ex. 16, at 240:20 (Greig commenting on one such hypothetical). But relying on "hypothetical scenarios" in a facial challenge is "error[]." *Rahimi*, 602 U.S. at 701. Plaintiffs cannot rely on "edge questions." *Marion Cnty. Prosecutor*, 7 F.4th at 605. And even on these hypotheticals, the hard cases "on the margins" are not, as one of Plaintiffs' experts acknowledged, "most cases." Ex. 10, at 271:17–20. The admissible evidence confirms that the exception has a plainly legitimate sweep.

* * *

Half a century ago, a federal court rejected a challenge to Ohio’s maternal health exception, explaining that the claimed vagueness came only from those plaintiffs’ “own strained construction.” *Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970). That exception had, “over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden.” *Id.* Ultimately, “[t]he problem of the plaintiffs,” the court explained, was “not that they d[id] not understand, but that basically they d[id] not accept, its proscription.” *Id.*

And so here. *See* Ex. 3, at 170:10–13 (Doe); Ex. 6, at 185:21–186:3 (Bingham). Plaintiffs’ insist that decades’ old language is so standardless as to be incomprehensible fails. They may disagree with South Carolina’s law, but they can understand it. “[P]olicy disagreements should be addressed to elected policymakers at the ballot box, not to unelected judges in the courthouse.” *John & Jane Parents I v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 626 (4th Cir. 2023).

III. The fatal fetal anomaly exception is not vague.

While virtually every abortion regulation includes a maternal health exception, fatal fetal anomaly exceptions are far less common. South Carolina is one of the few States with this exception, and it is just as understandable as its maternal health exception.

A. The exception has an understandable core.

1. The words that Plaintiffs challenge—“incompatible” and “sustaining life”—can be understood. ECF No. 10, ¶ 136. “Incompatible” means “unsuitable for use together” or “incapable of association or harmonious existence.” Merriam-Webster’s (2026), <https://tinyurl.com/3rdnnsnj>. And “sustaining” means “to give support to” or “supply with.” *Id.* <https://tinyurl.com/4mrtnks>. So if the physician determines in her reasonable medical judgment that an anomaly is present that would be unsuitable or incapable of giving support to a child’s life, this exception applies.

2. These terms are not unique to South Carolina. Georgia uses them. Ga. Code Ann. § 31-

9B-1(3); *id.* § 16-12-141(a)(4). And Oklahoma. Okla. Stat. Ann. tit. 63, § 1-746.1(3). Louisiana employs them in defining “medically futile.” La. Stat. Ann. § 14:87.1(19)(a). Even Massachusetts—which, in King’s view, “does a decent job of” “craft[ing] restrictions on abortion with appropriate flexibility,” Ex. 10, at 235:6–16—uses “incompatible” and “sustained life” to regulate abortion, Mass. Gen. Laws Ann. ch. 112, § 12N (applies after 24 weeks).

Nor are these terms novel in this context. In *Stenberg v. Carhart*, which dealt with Nebraska’s partial-birth abortion law, the Supreme Court surveyed the evidence introduced in the district court. *See* 530 U.S. 914, 929 (2000). In doing so, the Court quoted an “AMA Report” that discussed “anomalies incompatible with life outside the womb.” *Id.* If the terms that Plaintiffs challenge are vague, why would the American Medical Association have used them two decades ago?

3. Plaintiffs’ proposed alternative illustrates the weakness of their claim. They ask the Court to enjoin the law and allow a physician to perform an abortion under ACOG’s “life limiting” standard for fetal anomalies. ECF No. 10, at 48 (Prayer (D)). But one of their experts testified that even “if [ACOG’s standards] were” the law, “it would still be unduly vague.” Ex. 10, at 46:13–16. “[L]ife limiting,” in King’s words, is “[n]ot fully defined,” and there could be “variety” in how physicians define it. *Id.* at 138:3–7. But she insisted that ACOG’s term was better because it gave more “flexibility” to physicians.¹² *Id.* at 138:22. In other words, “life limiting” is no clearer; it’s just broader such that Plaintiffs could provide more abortions. *See* Ex. 3, at 240:24–241:2.

Preferring broader terms has nothing to do with whether the exception’s terms can be understood. It’s just a nod to the 2023 Act’s criminal penalties. Yet criminal laws have long required

¹² ACOG’s “life limiting” definition also includes “severe morbidity” and “extremely poor quality of life.” ECF No. 10, at 27 n.10. Tarleton admitted “severe morbidity” is “an imprecise term” and “extremely poor quality of life” is “not objective” because it looks to “the subjective values of a patient.” Ex. 8, at 125:14–126:13.

people to “estimat[e] rightly” because these laws have often used qualitative terms. *Nash*, 229 U.S. at 377. By asking this Court to judicially impose ACOG’s life-limiting standard, Plaintiffs acknowledge they can understand and apply qualitative terms. They just want new ones.

B. The exception has a plainly legitimate sweep.

1. Start again with the number of pregnancies to which this exception does not apply. Doe testified that “maybe 2 percent” of her patients obtain an abortion under this exception. Ex. 3, at 46:12–18. That means that in about 98% of pregnancies, Doe has no trouble applying this exception. Same with Bingham, who said “[m]ost fetuses would not fall under the fatal fetal anomaly exception.” Ex. 6, at 157:24–25; *see also* Ex. 10, at 248:5–12 (King: a “majority” of unborn children “do not have a fetal anomaly”); Ex. 8, at 137:18–21 (Tarleton: “most pregnancies are not affected by fetal anomalies”). Those admissions doom Plaintiffs’ facial challenge.

But if more were needed, specific cases point to the same result. DPH data shows that physicians have applied the fatal fetal anomaly exception over 50 times since the 2023 Act’s enactment (again, without anyone ever being prosecuted). Ex. 19. And importantly, physicians have been able to apply the exception to over a dozen unique conditions. *See id.* That is far more than “some obvious[.]” examples. *Johnson*, 576 U.S. at 603. That is a plain sweep, or a “core,” of cases where the exception applies to survive a facial vagueness challenge. *Cooper*, 842 F.3d at 842.

Even Plaintiffs and their experts have performed many abortions under the exception. And they identify many more conditions that would allow an abortion. Doe recalled at least a dozen abortions that she performed under this exception. Ex. 1, at 5; Ex. 2, at 2; *see also* Ex. 3, at 25:2–5 (Doe estimating she performed ten to 15 abortions under this exception); Ex. 8, at 122:5–12 (Tarleton has performed abortions under this exception). Bingham testified that a pregnant woman could obtain an abortion under this exception if her unborn child had no kidneys or brain. Ex. 6, at 155:19–

25; *see also* Ex. 10, at 270:18–24 (King making a similar assertion). Bingham also reported that unborn children with Trisomy 13 or Trisomy 18 have “extremely low survival rates” that “very possibly” would permit an abortion. Ex. 6, at 155:25–156:2; Ex. 7, ¶ 38; *see also* Ex. 8, at 184:5–8 (Tarleton agreeing on Trisomy 13). And where “a fetus or infant was expected to die immediately after birth,” that would “most clearly” satisfy this exception. Ex. 8, at 140:16–19. King and Tarleton said that other conditions would also satisfy this exception, such as anencephaly, Ex. 10, at 270:10–17; Ex. 8, at 183:15–18, or fetal acrania, Ex. 8, at 184:9–11. King added that she “could imagine either a cardiac compromise or renal compromise” where physicians would know the exception applies. Ex. 10, at 270:19–22. And while some pregnancies present hard cases, Doe has been able to determine that the exception would allow an abortion for a pregnant woman whose unborn child was diagnosed with Trisomy 18 and had other structural abnormalities. Ex. 3, at 135:13–22; *see also* Ex. 19 (six abortions performed involving Trisomy 18).

This evidence confirms an “ascertainable standard for inclusion” of what conditions permit an abortion under this exception. *Smith*, 415 U.S. at 578. And in addition to 98% of unborn children who obviously don’t have a fatal fetal anomaly, that record further shows that the exception provides an “ascertainable standard for . . . exclusion” too. *Id.* Indeed, Doe “recall[ed] determining, in collaboration with colleagues, that the fatal fetal anomaly exception did not apply to approximately 3-4 patients a month.” Ex. 1, at 11. Most favorably to Plaintiffs, that is another 90 times Doe successfully applied the law. Beyond that, Doe testified that a pregnant woman whose unborn child had Trisomy 21 (Down syndrome) would not satisfy the exception. Ex. 3, at 79:6–12. And for “some structural abnormalities such as cleft lip,” Doe said that “it is possible for [her] to determine that it does not apply.” *Id.* at 201:22–24. As for the “life limiting” definition Plaintiffs find more understandable, Tarleton agreed that “if the ‘life-limiting’ definition didn’t apply to a fetal anomaly,

neither would the South Carolina law.” Ex. 8, at 182:24–183:2.

2. Contrast that with Doe’s claim that “she is unable to determine whether the fatal fetal anomaly exception applies” “approximately once a month.” Ex. 1, at 6. Looking again at the 30-month window that the 2023 Act had been in effect when Doe provided this answer, that’s at most 30 instances of not being able to determine whether this exception permitted an abortion. So on Doe’s own admission, she’s been able to apply the exception *over three times as often as* she hasn’t. Given all the circumstances in which the exception has been applied (or admittedly can be applied), this falls short of the “very high bar” of showing something more than the unconstitutional applications “substantially outweigh” the constitutional ones. *Moody*, 603 U.S. at 723–24. And that’s even putting aside the question of whether these unidentified instances are sufficient to create a genuine dispute of material fact.

C. The exception is severable.

Plaintiffs (rightfully) never assert that the Constitution requires South Carolina to include a fatal fetal anomaly exception. Thus, were the Court to agree with them that this exception is somehow unintelligible, the exception would be severable from the 2023 Act.

Severability is a question of state law. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 238–39 (4th Cir. 2016). In South Carolina, a provision is severable if “the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected” and if the remaining part of the statute “is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution.” *Pinckney v. Peeler*, 862 S.E.2d 906, 915 (S.C. 2021).

Both conditions are met here. First, the 2023 Act is “complete in itself” without the fatal fetal anomaly exception. It still protects life once “the unborn child’s fetal heartbeat has been detected.”

S.C. Code Ann. § 44-41-630(B). It still provides a maternal health exception. *See id.* § 44-41-640. It still requires the same recordkeeping. *See, e.g., id.* § 44-41-630(A)(3). It still mandates that a pregnant woman be given information about her unborn child before any abortion is performed. *See id.* § 44-41-330(A). It still gives a woman on whom an unlawful abortion was performed a private right of action. *See id.* § 44-41-680. And it still protects from prosecution a woman on whom an unlawful abortion was performed. *See id.* § 44-41-670.

Second, it may be “fairly presumed” that the General Assembly would have enacted the 2023 Act without this provision. The “hallmark feature” of a fetal heartbeat law “is to restrict abortion post-six weeks.” *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 785 n.15 (S.C. 2023). And when the S.C. Supreme Court struck down the 2021 Act under state law, the General Assembly promptly passed the 2023 Act—with this same feature. *See Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121, 125 (S.C. 2023). South Carolina was eager to protect unborn life, and it’s inconceivable that the General Assembly would have passed no abortion law rather than demanding that a law include an exception that accounted for fewer than 25 of the 3,025—or less than 1%—of the total abortions in 2024 in South Carolina (the most recent year for which data is available). *See* S.C. Dep’t of Public Health, *A Public Report Providing Statistics Compiled from All Abortions Reported to DPH, 2024*, Tables 1, 4, 5, <https://tinyurl.com/ebdce7yk>.

IV. Plaintiffs seek relief the Court cannot grant.

Even if Plaintiffs’ claims had merit, they still demand relief they cannot obtain. They seek variations on injunctions against Defendants from enforcing the 2023 Act *against anyone*—not just Plaintiffs themselves. *See* ECF No. 10, at 48.

The Court cannot grant that relief. Courts can’t issue injunctions that “are broader than necessary to provide complete relief to each plaintiff with standing to sue.” *Trump v. CASA, Inc.*,

606 U.S. 831, 861 (2025). Courts must “tailor equitable relief ‘to each plaintiff.’” *United States v. Lierman*, 151 F.4th 530, 543 (4th Cir. 2025) (quoting *CASA*, 606 U.S. at 861). So courts cannot grant a “universal injunction” that provides relief to nonplaintiffs. *CASA*, 606 U.S. at 851.

Yet a universal, statewide injunction is what Plaintiffs demand. There are almost 1,500 OB-GYNs in South Carolina. *See* LLR, Medical License Lookup, <https://tinyurl.com/mpfsa62a> (search for “OBG” under *Specialty* and “SC” for *State Code*). Plaintiffs have put forward, at best, three South Carolina OB-GYNs (Bingham, Doe, and Tarleton). Just as many South Carolina OB-GYNs testified that they understood the law (Austin, Draper, and Greig). Testimony from 0.2% of the OB-GYNs in the State cannot justify an injunction as it relates to all OB-GYNs when those other physicians are neither plaintiffs here nor part of a class.

* * *

Perhaps there might be a hard case involving an exception, and perhaps Plaintiffs could face a credible threat of prosecution if they performed the abortion. Perhaps. If that day ever comes, Plaintiffs could bring an as-applied challenge. But that’s a case for another day (if ever). For now, Plaintiffs have only their facial challenge—and that challenge fails because vagueness does not ask whether every application is easy. It simply asks whether the law is clear enough that people can generally understand it and officials can enforce it evenhandedly. *See Sackett*, 598 U.S. at 680.

CONCLUSION

The Court should grant the Motion for Summary Judgment.

Respectfully submitted,

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