

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

NATALIE DAWN BINGHAM, M.D.,
M.P.H., *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.

CASE NO. 2:25-cv-00163-RMG

**MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The undisputed evidence in this case establishes that the Abortion Ban 1) fails to notify physicians of whether or when they can provide an abortion under the Health or Fatal Fetal Anomaly Exceptions, and 2) lacks minimal guidelines for law enforcement, which encourages arbitrary and discriminatory enforcement against abortion providers. *See United States v. Williams*, 553 U.S. 285, 306 (2008). Specifically, the terms in the Exceptions lack any meaning in medicine. Consequently, physicians have disparate understandings of the terms, and Plaintiffs are regularly unable to apply the Exceptions to the complex, unpredictable, and high-stakes context of obstetrics. Every one of Defendants' opposing arguments falls flat.

Despite Defendants' attempts to obscure the issue, the Abortion Ban demands greater clarity than civil laws and is especially suspect because it lacks a scienter requirement. *See* Pls.' Memo ISO Mot. Summ. J. 20–21, 26–27, ECF No. 166-1 ("Pls.' Br."). Defendants are incorrect that the Health and Fatal Fetal Anomaly Exceptions provide this clarity simply because some of the terms in the Exceptions, or their synonyms, appear in various medical sources in a different sequence than the Exceptions. Nor can Defendants rely on the dictionary definitions of the terms or their appearance in meaningfully different contexts than the Abortion Ban. *See Smith v. Goguen*, 415 U.S. 566, 573–74 (1974).

Defendants' position that the Abortion Ban has a constitutional core relies on mischaracterizations of the unrebutted and detailed evidence in the record. Contrary to Defendants' assertions, Plaintiffs are often unable to determine if an abortion they seek to provide meets either Exception, and the few abortions they have provided under the Exceptions have been limited to the most egregious cases. Additionally, Defendants' only contention about arbitrary and discrimina-

tory enforcement fails because it incorrectly suggests that the vagueness inquiry requires evidence of actual prosecutions under the challenged statute. *See* Pls.’ Br. 33–35.

Defendants’ insistence that the “no set of circumstances” or First Amendment overbreadth standards apply to Plaintiffs’ vagueness challenge flies in the face of precedent. *Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999); *see Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). Finally, this Court cannot sever the Fatal Fetal Anomaly Exception from the rest of the Abortion Ban because it cannot be fairly presumed that the Legislature would have passed the Abortion Ban independent of the Fatal Fetal Anomaly Exception. *See Env’t Tech. Council v. Sierra Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996).

For these reasons, this Court should deny Defendants’ motion for summary judgment and grant Plaintiffs’ motion for summary judgment.¹

ARGUMENT

I. The Abortion Ban Demands Greater Clarity Than Civil Laws.

Laws that carry criminal or quasi-criminal penalties—the Abortion Ban imposes both—demand more clarity than civil laws because the “consequences of imprecision are qualitatively less severe” with civil penalties. *Manning v. Caldwell*, 930 F.3d 264, 272 (4th Cir. 2019) (citation omitted); *see Sessions v. Dimaya*, 584 U.S. 148, 156–57 (2018) (extending the “most exacting vagueness standard” for criminal laws to removal cases “in view of the grave nature of deportation” (citation omitted)); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 395 (1926) (“[U]nder other

¹ Local Civ. Rule 7.05(A)(4) (D.S.C.) requires a memorandum opposing a motion for summary judgment to contain a “concise statement of the material facts in dispute.” Here, however, Plaintiffs have also moved for summary judgment and maintain that there are no material facts in dispute.

conditions the term ‘locality’ might be definite enough, but not so in a statute such as that under review imposing criminal penalties.”); Pls.’ Br. 20–21.²

Defendants try in vain to minimize the greater clarity required of laws such as the Abortion Ban by advancing three meritless arguments. First, while they admit that there is a “‘stricter’ review for criminal statutes,” they define that review as the standard required of any law: “‘actual notice’” and protection from “‘arbitrary enforcement.’” Defs.’ Mot. Summ. J. 10, ECF No. 165 (“Defs.’ Br.”) (citation omitted). But this standard speaks to what a law needs to do to avoid unconstitutional vagueness, not how precisely it needs to do it.

Second, and untethered from Supreme Court precedent such as *Sessions*, Defendants try to downplay the clarity required of the Abortion Ban by comparing it to criminal laws that implicate a constitutional right in addition to freedom from unconstitutional vagueness. Defs.’ Br. 9–10. But the fact that some laws warrant even greater clarity because they implicate a constitutional right does not diminish the clarity required of the Abortion Ban. *See Smith*, 415 U.S. at 575, 582 & n.32.

Third, Defendants emphasize that physicians have not yet been prosecuted under the Abortion Ban. Defs.’ Br. 10–11. But this does not alter the level of precision the Constitution requires to guide Plaintiffs and to spare them from arbitrary or discriminatory enforcement. *See, e.g., Morales*, 527 U.S. at 56–59 (discussing the clarity demanded of criminal laws without regard to whether there is evidence of prosecution history); *Smith*, 415 U.S. at 575–76 (same); *Manning*, 930 F.3d at 273–75 (same); *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 781–82 (4th Cir. 2023) (same). In any event, Defendants are sorely mistaken that the prosecution history of the

² Throughout this brief, citations to “First App.” refer to the exhibits filed with Plaintiffs’ Motion for Summary Judgment, ECF No. 166. Citations to “Second App.” refer to the exhibits filed with this brief.

Abortion Ban indicates that Plaintiffs have nothing to fear from enforcement officials. *Infra* at 29–30.

II. The Abortion Ban Fails to Provide Fair Notice of When the Health Exception Permits an Abortion.

The Abortion Ban fails to provide fair notice of when the Health Exception permits an abortion because the Health Exception governs medical professionals yet lacks any definition in medicine. Pls.’ Br. 22–23. Consequently, Defendants’ own experts have discordant understandings of its terms. *Id.* at 23–24. And far from marginal or hypothetical instances, *see* Defs.’ Br. 5, the undisputed evidence shows that Plaintiffs and other physicians are often unable to determine if a particular patient’s condition meets the Health Exception, *see, e.g., infra* at 17–21.

That Defendants’ experts disagree about whether or when common health conditions that arise during pregnancy meet the Health Exception reinforces that the Exception lacks meaningful standards. *See, e.g.,* Pls.’ Br. 9–12 (addressing lupus, PPRM, and pulmonary embolism); Second App. 563–66 (addressing breast cancer); Second App. 538–45 (addressing breast cancer); Second App. 558–60 (addressing severe hypertension); Second App. 528 (addressing severe hypertension). Every one of Defendants’ opposing arguments is unavailing.

A. The Health Exception’s Terms Lack a Medical Meaning.

Plaintiffs have presented undisputed evidence that the Health Exception’s terms have no medical meaning. Pls.’ Br. 22. Defendants’ reference to a handful of documents containing a few of the same or similar terms in isolation or in a different order than the Health Exception does not establish that the Health Exception as a whole is understandable to physicians. *Infra* at 5–7. Defendants’ experts’ disparate understandings of the Health Exception reinforce rather than refute that its terms lack a medical meaning. *Infra* at 7–8.

1. When Determining the Meaning of a Statute, Both the Particular Words and Their Sequence Matter.

“[S]tatutes are not read as a collection of isolated phrases.” *SEC v. Pirate Inv. LLC*, 580 F.3d 233, 254 (4th Cir. 2009) (quoting *Abuelhawa v. United States*, 556 U.S. 816, 819 (2009)). “When interpreting a statute, rules of statutory construction require that [courts] give meaning to all statutory provisions and seek an interpretation that permits [courts] to read them with consistency.” *Barnes v. Holder*, 625 F.3d 801, 806 (4th Cir. 2010) (citation omitted). Defendants ignore these essential principles of statutory construction.

Defendants cannot manufacture a genuine dispute that the Health Exception’s terms are defined in medicine by citing an ACOG opinion about FDA-approved medical devices. *See* Defs.’ Br. 17–18. That opinion includes just two of the words in the Exception, and the words appear in a different sequence than they do in the Health Exception. *Compare* S.C. Code Ann. § 44-41-640(B)(1)–(C)(1) (“serious risk of a *substantial* and irreversible physical *impairment* of a major bodily function”) (emphasis added), *with* ACOG, Comm. Op., *Assessing and Adopting New Medical Devices for Obstetric and Gynecologic Care* (Apr. 2020), <https://tinyurl.com/pjtakt5c> (“A Class III device, defined as a medical device that supports or sustains human life, is of *substantial* importance in preventing *impairment* of human health” (emphasis added)). In the Health Exception, “substantial” qualifies “impairment” of an equally unclear term, “major bodily function.” S.C. Code Ann. § 44-41-640(B)(1)–(C)(1); *see* Pls.’ Br. 8. In the ACOG opinion, however, “substantial” qualifies “importance,” which is not part of the Health Exception, and “impairment” refers to the whole of “human health.” Defs.’ Br. 17–18. Thus, the ACOG opinion sheds no light on the meaning of the Health Exception. *See Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 436 (6th Cir. 2012) (describing how words in a statute are “[r]ead in context, . . . taking into consideration the natural placement of words and phrases in relation to one another”).

Likewise, Defendants fail to create a genuine dispute that the Health Exception’s terms lack a medical meaning by citing: 1) a CDC document that describes a symptom of chronic fatigue syndrome as “a *substantial* reduction or *impairment* in ability to engage in pre-illness levels of activity” where “pre-illness levels of activity” is comprehensible,³ and 2) alleged isolated appearances in a medical textbook of “serious,” “substantial,” “incompatible,” “major,” and “impair.” Defs.’ Br. 18–19 (emphasis added).

Worse yet, Defendants look to the DSM-5 for diagnosing mental disorders as a source of clarification by replacing “substantial . . . impairment” with “significant impairment.” Defs.’ Br. 18. But the particular words of a statute matter and bind citizens and courts alike. *See, e.g., Little Rock School Dist. v. Armstrong*, 359 F.3d 957, 960 (8th Cir. 2004) (“Congress easily could have substituted the word ‘case’ for the words ‘matter in controversy,’ but did not do so. This deliberate choice by Congress demonstrates an intent that the words ‘matter in controversy’ mean something other than what we commonly refer to as a ‘case.’”).

The fallacy that physicians can simply substitute the Abortion Ban’s terms with generalized synonyms and divorce those terms from the Abortion Ban’s other language and its sequence plagues Defendants’ summary judgment brief. *See, e.g.,* Defs.’ Br. 12, 17, 19.⁴ But the appearance of some isolated, out-of-order words from the Health Exception—even in some medical sources—does not prove that the Health Exception’s terms have a medical meaning. For instance, Defend-

³ Defendants also cite a 2008 medical book, as well as a 2009 ACOG document and a 2002 medical book that appear to be inaccessible. *See* Defs.’ Br. 18. In any event, none of them elucidate the Health Exception. The phrases in those texts contain just two of the Exception’s terms, and unlike the Health Exception, the phrases’ other terms are comprehensible. *Id.*

⁴ Defendants erroneously cite *Johnson v. United States* for the proposition that “substantial risk,” “grave risk,” and “unreasonable risk” are categorically interchangeable. Defs.’ Br. 12. But *Johnson* facially invalidated a clause that included “serious potential risk” because “serious potential risk” provided no guidance in the clause’s context of hypothetical crimes. 576 U.S. 591, 603–04 (2015).

ants contend that Plaintiffs know what “major bodily function” means because a medical textbook outlines what “major organs” are, Defs.’ Br. 19, but the undisputed evidence shows that “physicians have no way to determine if ‘major bodily function’ refers to ‘big organs,’ ‘small organs,’ mental activity, systems that contribute to digestion, touch, the hormonal system, movement, and/or the blood systems,” Pls.’ Br. 8 (citing App. 143, 402).⁵

2. Defendants’ Experts Have Disparate Understandings of the Health Exception’s Terms.

Nor can Defendants manufacture a genuine dispute that the Health Exception’s terms have a consistent medical meaning by referring to their own experts’ definitions of the Exception’s language. *See* Defs.’ Br. 14–15. Take “serious risk” as an example. Defendants’ experts have at least three distinct understandings of that term: a “clinically significant and actionable,” rather than “theoretical,” risk (Dr. Draper); a risk that “needs to be carefully addressed by the physician in an expedited fashion” (Dr. Greig); and a “moderate or high risk despite risk mitigation approaches” (Dr. Buskmiller). *Id.* (citations omitted). These are not “three articulations of the same concept.”⁶ *Id.* at 15. They convey different things. Dr. Draper’s definition conveys virtually no information about the nature of the risk—a symptom like a headache is “actionable.” Dr. Greig’s definition centers on the obligations that the risk imposes on physicians. And Dr. Buskmiller’s definition

⁵ Each of Defendants’ accusations that Plaintiffs secretly understand the Health Exception are unfounded. *Compare* Defs.’ Br. 19 (charging that “Bingham employed those terms on her own throughout her deposition”), *with* Defs.’ Ex. 6, 46:3–9, ECF No. 165-6 (Dr. Bingham detailing her fears of what a *prosecutor* could accuse her of); Defs.’ Ex. 6, 212:7–21 (Dr. Bingham testifying that most patients would not want their physician to wait until they reached a particular threshold of illness to intervene); Defs.’ Ex. 6, 83:23–84:3, 215:6–9 (Dr. Bingham testifying that the challenged exceptions are not “always extremely unclear”).

⁶ That “high” risks differ from “low” or “moderate” risks does not address which risks the Health Exception covers and what it means by those terms. *See* Defs.’ Br. 14; *see, e.g.*, First App. 343.

incorporates both percentages and risk factors, such as a “concerning . . . clinical exam.” *See* Pls.’ Br. 6–7 (citations omitted).

This leaves Plaintiffs and other physicians with no guidance as to whether what they regard as merely “actionable,” what they regard as requiring extra care and speed, and/or some combination of percentages and risk factors must be present to satisfy the “serious risk” prong of the Health Exception. Even when Defendants’ experts’ understandings of “serious risk” do not directly contradict one another, they illustrate that the Health Exception lacks any fixed definition in medicine. Defendants overlook that their experts also profoundly disagree about what constitutes a “major bodily function.” *See* Defs.’ Br. 20; Pls.’ Br. 8.

B. The Health Exception’s Terms Lack a Discernible Meaning in the Context of Obstetrics.

Defendants’ core argument is not that the Health Exception’s terms are defined in medicine, but rather that whether they are does not matter because some of the terms are common words. Defs.’ Br. 12–17, 19–20.⁷

In relying on dictionary definitions, Defs.’ Br. 12, Defendants ignore that courts consider the circumstances in which words must be used to determine if those words are unconstitutionally vague. *Id.* at 12–17. Indeed, “[i]n textual interpretation, context is everything” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 37 (Amy Gutmann ed., 1997).

⁷ For example, Defendants note that Planned Parenthood took “no issue” with “these words not having medical definitions” in a challenge limited to whether the Abortion Ban generally permits abortion until six versus nine weeks of gestation. Defs.’ Br. 12. Defendants neglect that Planned Parenthood does not need to apply the Health or Fatal Fetal Anomaly Exceptions because it only provides abortions up to six weeks of gestation. *See* Compl. for Decl. and Injunctive Relief, *Planned Parenthood S. Atl. v. South Carolina*, Case No. 2024CP4000762 (S.C. C.P., Feb. 5, 2024).

In *Smith v. Goguen*, for instance, the Supreme Court held that a state provision that prohibited treating the U.S. flag “contemptuously” was unconstitutionally vague. 415 U.S. at 573–82. This was not because “contemptuously” was incomprehensible on its own, but rather because the provision did not satisfy the Constitution’s fair notice standards “[g]iven today’s tendencies to treat the flag unceremoniously,” including everything from wearing the flag “for adornment” to using it as “a ploy to attract attention.” *Id.* at 574. In other words, the fact that an ordinary person would know what “contemptuous” means in the abstract could not save the provision because it failed to provide sufficient guidance of what usage of the flag would cross the line from acceptable to prohibited in an environment where “what is contemptuous to one man may be a work of art to another.” *Id.* at 573 (cleaned up).

Similarly, in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the Supreme Court facially invalidated an ordinance that prohibited a certain number of people from assembling on a sidewalk and “conduct[ing] themselves in a manner annoying to persons passing by.” *Id.* at 611–612, 614. The Supreme Court expressly rejected the Ohio Supreme Court’s holding that the statute was sufficiently clear because “[t]he word ‘annoying’ is a widely used and well understood word; it is not necessary to guess its meaning.” *Id.* at 612. The Supreme Court reasoned that “no standard of conduct [wa]s specified at all” in the statute because, in the context where it applied, “[c]onduct that annoy[ed] some people [would] not annoy others.” *Id.* at 614.

Here, Plaintiffs and other physicians obviously understand what “serious,” “substantial,” and “irreversible” mean colloquially. The critical problem is that these and the other terms in the

Health Exception give physicians no guidance on how to apply them to the complex and high-stakes context of obstetrics.⁸ See Pls.’ Br. 25–26; *Smith*, 415 U.S. at 573–74.

To illustrate, that “serious” can mean “having important or dangerous consequences,” Defs.’ Br. 12, does not notify a physician if her patient faces a “serious risk” when the physician cannot predict if or when a complication will occur; the patient’s condition is intermittently deteriorating and improving; the patient faces practical hurdles to accessing medical care but is currently stable; and/or any risk of death is unacceptable to the patient because she has children.⁹ See Pls.’ Br. 2, 7, 8–9; First App. 344–45; see also *Smith*, 415 U.S. at 573–74. Unfortunately, these complexities and uncertainties are common in obstetrics. Pls.’ Br. 2, 7, 8–9.

Likewise, that “substantial” can mean “important” or “essential,” Defs.’ Br. 16, offers “no principled standard” for determining if a feared complication is sufficiently “important” or “essential” under the Abortion Ban, *Doe v. Cooper*, 842 F.3d 833, 843 (4th Cir. 2016) (citation omitted); see, e.g., Pls.’ Br. 10–11; see *Coates*, 402 U.S. at 614.

By the same token, that “irreversible” means “not reversible,” Defs.’ Br. 16, fails to notify physicians of when a particular patient’s condition meets the Health Exception because it is often difficult to identify when a pregnant patient’s condition is approaching irreversibility. See Pls.’ Br. 2, 7–8; see also *Smith*, 415 U.S. at 573–74.

⁸ Defendants’ position that “major bodily function” has a common meaning strains credulity. Defs.’ Br. 16 (defining “major bodily function” as a “notable or conspicuous part of any of a group of related actions contributing to a larger action that the body undertakes” (cleaned up)); see Pls.’ Br. 8.

⁹ Defendants’ reliance on a dictionary definition of “serious,” Defs.’ Br. 12, is especially confounding because “substantial and irreversible impairment of a major bodily function” seems to concern how dangerous a feared outcome is, which would make “serious” superfluous. But “the rule against superfluities” holds that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (cleaned up).

C. Defendants' Reference to Some of the Health Exception's Terms in Materially Distinct Settings Fails to Establish That the Health Exception is Not Vague.

1. Defendants Mistakenly Cite Abortion Law Exceptions That Are Meaningfully Different from the Health Exception.

Defendants misguidedly cite materially different exceptions to other abortion laws whose vagueness has never been tested in court 1) as evidence that the Health Exception provides fair notice, and 2) to fearmonger that granting Plaintiffs relief will imperil a host of abortion bans.¹⁰ Defs.' Br. 21–23. This Court twice rejected this argument, first, when it denied Defendants' motion to dismiss Plaintiffs' vagueness claim, Order & Op. on Defs.' Mot. Dismiss 4–5, ECF No. 88, and again, when it denied Defendants' motion for partial judgment on the pleadings, Order & Op. on Defs.' Mot. for J. on Pleadings 4–5, ECF No. 110. This Court should do the same now, particularly because the undisputed evidence confirms that almost all the cited exceptions to other abortion laws are materially different from the Health Exception. *Id.* at 5 n.1.

Unlike the Health Exception to South Carolina's Abortion Ban, almost all the exceptions to the wide variety of abortion laws cited by Defendants 1) are exceptions to abortion laws that lack criminal penalties, 2) defer to the physician's good faith clinical judgment, and/or 3) are exceptions to abortion laws that were challenged in court, potentially making any vagueness in the exception moot.¹¹ *See* Exs. A & B, Pls.' Opp'n to Defs.' Mot. for J. on Pleadings, ECF No. 107.

¹⁰ One of these exceptions, Ohio Rev. Code Ann. § 2919.17(A)(1) (1995), is the medical emergency exception to a post-viability abortion ban that the Sixth Circuit invalidated as unconstitutionally vague in *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 204 (6th Cir. 1997), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹¹ 1993 Utah Laws Ch. 70, § 1 (S.B. 60) (waiting period requirement, no criminal penalties, good faith judgment); 1995 S.C. Acts No. 1, § 8 (information requirement, good faith judgment); Ala. Code § 26-22-2(6) (post-viability abortion ban, good faith judgment); Alaska Stat. Ann. § 18.16.060(d)(2) (information requirement, good faith judgment); Ariz. Rev. Stat. Ann. § 36-2151(9) (various abortion laws, good faith judgment); Ark. Code Ann. § 20-16-602(b)(3)(A)(ii) (information requirement, no criminal penalties); Colo. Rev. Stat. Ann. § 13-22-703(5) (parental

The major differences between these exceptions and the Health Exception make it improper to draw any conclusions from them about the clarity of the Health Exception. To begin, when a law imposes criminal or quasi-criminal penalties, governments must provide greater notice of when someone's conduct would violate it because the price of getting it wrong is one's personal freedom or livelihood. *See* Pls.' Br. 20–21; *supra* at 2–4. Moreover, unlike the reasonable medical judgment standard in the Abortion Ban, a good faith standard gives physicians solace that they will not be convicted of a crime or stripped of their hard-earned livelihood and reputation for an honest failure to understand an exception's terms. *See* Pls.' Br. 26–27. Like most others subject to criminal penalties, *id.*, physicians acting under a law that imposes a good-faith standard must act

notice requirement, no criminal penalties, good faith judgment, statute challenged); Del. Code Ann. tit. 24, § 1782(5) (parental notice, good faith judgment); Fla. Stat. Ann. § 390.0111(1)(a) (abortion ban); Idaho Code Ann. § 18-8801(5) (abortion ban); Ind. Code § 16-18-2-223.5 (various abortion laws, good faith judgment); Iowa Code Ann. § 146A.1(6)(a) (various abortion laws, no criminal penalties, does not limit to reasonable medical judgment); Kan. Stat. Ann. § 65-6701(g) (statute challenged); Ky. Rev. Stat. Ann. § 311.781(3) (11-week abortion ban, statute challenged); La. Stat. Ann. § 40:1061.1.5(A)(2)(a) (abortion ban, statute challenged); Mich. Comp. Laws Ann. § 722.902(b) (parental notice, good faith judgment); Miss. Code Ann. § 41-41-405(j) (abortion ban, good faith judgment); Mo. Ann. Stat. § 188.030(1) (does not limit to reasonable medical judgment); Mont. Code Ann. § 50-20-303(1) (information requirement, no criminal penalties, good faith judgment); Neb. Rev. Stat. Ann. § 71-6914(3)(a) (abortion ban, no criminal penalties, statute challenged); N.H. Rev. Stat. Ann. § 329:44(III) (various abortion laws, does not limit to reasonable medical judgment); N.C. Gen. Stat. Ann. § 90-21.86 (various abortion laws, no criminal penalties, “physician’s judgment”); N.D. Cent. Code Ann. § 14-02.1-02(10) (various abortion laws); Ohio Rev. Code Ann. § 2919.16(F) (good faith judgment, statute challenged); Okla. Stat. Ann. tit. 63, § 1-731.3(A) (superseded by an abortion ban limited to preserving the patient’s life as opposed to health); *see* Okla. Sess. Law Serv. Ch. 308.; 18 Pa. Stat. and Cons. Stat. Ann. § 3203 (various abortion laws, good faith judgment); S.D. Codified Laws § 34-23A-1(5) (good faith judgment, superseded by an abortion ban limited to preserving the patient’s life as opposed to health); *see* S.D. Codified Laws § 22-17-5.1; Tenn. Code Ann. § 39-15-202(f)(1) (information requirement, good faith judgment); Tex. Health & Safety Code Ann. § 170A.002(b)(2) (abortion ban, includes clarifying language missing from the Health Exception); Utah Code Ann. § 76-7-302(2)(b)(i)(B) (abortion ban, does not limit to reasonable medical judgment); Va. Code Ann. § 16.1-241 (parental consent, good faith judgment); W. Va. Code Ann. § 16-2I-1 (information requirement, no criminal penalties); Wis. Stat. Ann. § 253.10(2)(d) (information requirement, no criminal penalties); Ga. Code Ann. § 16-12-141(a)(3) (abortion ban, statute challenged).

willfully or recklessly in determining whether a provision permits particular conduct to suffer life-altering penalties, *see id.*

It is equally improper to draw any conclusions from South Carolina’s 2016 abortion statute about the clarity of the Health Exception. *See* Defs.’ Br. 22 (citing 2016 S.C. Acts No. 183, § 1). That statute allowed physicians to provide abortions until 20 weeks post-fertilization for any reason, and at any gestational age under health and fetal anomaly exceptions. S.C. Code Ann. §§ 44-41-430(5), 450(A). When the statute was in effect, patients with health conditions that complicated their pregnancies were generally able to decide if they wanted an abortion before 20 weeks post-fertilization, and most patients also learned of fetal anomaly diagnoses before that cut-off. *See* First App. 10; Bingham Dep. 88:15–18; 89: 1-7, ECF No. 160-2; Doe Dep. 80:11–82:2, ECF No. 161-2. As a result, unlike now, physicians did not have to regularly determine if a particular patient’s circumstances met the health or fetal anomaly exceptions. *Id.* In fact, neither Dr. Doe nor Dr. Bingham recalls ever providing an abortion under those exceptions. Doe Dep. 80:11–82:2, ECF No. 161-2; First App. 487–99.

For at least two reasons, EMTALA also fails to show that the Health Exception is intelligible. *See* Defs.’ Br. 23; Defs.’ Mot. for J. on Pleadings 12. One, the “emergency medical condition” provision that Defendants rely on in EMTALA is far more detailed than the Health Exception. 42 U.S.C. § 1395dd(e)(1)(A)(i)–(ii). Two, Defendants’ reliance on EMTALA is hard to square with *Moyle v. United States*, the crux of which was disagreement over whether “emergency medical condition” ever requires a facility to offer an abortion. 603 U.S. 324, 328 (2024) (Kagan, J., concurring) (“EMTALA requires hospitals to provide abortions that Idaho’s law prohibits.”); *id.* at 361 (Alito, J., dissenting) (“Far from requiring hospitals to perform abortions, EMTALA’s

text unambiguously demands that Medicare-funded hospitals protect the health of both a pregnant woman and her unborn child.” (cleaned up)).

2. Statutes That Contain Some of the Health Exception’s Terms but Regulate Conduct Within a Context That Lacks the Complexity and Stakes of Obstetrics Cannot Clarify the Health Exception.

Defendants’ reliance on statutes unrelated to pregnancy that contain the term “serious risk” is misplaced because there is nothing to suggest that those statutes govern behavior within a context as complex and high-stakes as obstetrics. *See* Defs.’ Br. 12. There is nothing to suggest, for example, that the commissioner entrusted with a decision by the public drinking water statute routinely struggles to determine if or when the public would suffer harm or must make decisions very quickly in a context where risks can rapidly wax and wane. S.C. Code Ann. § 44-55-60(A) (“An imminent hazard is considered to exist when in the judgment of the commissioner there is a condition which *may result* in a serious immediate risk to public health in a public water system.” (emphasis added)); *see supra* at 8–10. As a result, “serious risk” may very well be intelligible in this and other contexts, *see id.*, but that does not prove that it is comprehensible in the context of obstetrics.

To be sure, Defendants point to such statutes to show that “serious risk” is commonly found in the law. But Plaintiffs have never argued that “serious risk” is an esoteric term. They have argued and provided undisputed evidence that “serious risk,” along with the Health Exception’s other terms, offers no guidance on when physicians can provide an abortion to an ill pregnant woman, given the intricacies, uncertainties, and costs of getting it wrong. *See* Pls.’ Br. 2, 9–12.

Defendants’ references to statutes that contain any of the terms in “substantial and irreversible impairment of a major bodily function” suffer from the same flaws. Defs.’ Br. 16–17. The Louisiana surrogacy statute, La. Stat. Ann. § 9:2720.3(B)(5), applies to women who are not preg-

nant and thus not undergoing profound changes that can trigger unforeseen complications and require physicians to make decisions and act quickly. *See* Pls.’ Br. 2; First App. 231.

Importantly, the federal disability statute Defendants cite not only includes the term “major life activity,” but also *defines* “major bodily function.” 2 U.S.C. § 12102(1)(A), (2)(B).¹² By contrast, there is no definition of “major bodily function” in the Health Exception. *See* Pls.’ Br. 8.

Defendants are flatly wrong that statutes unrelated to pregnancy that do not contain *any* of the Health Exception’s terms support their argument that the Exception has minimal guidelines. *See* Defs.’ Br. 12–13, 16–17. Defendants again ignore that particular words, their sequence, and their relationship with one another matter when assessing the clarity of a law. *See supra* at 5–7. Apparently, Defendants would have physicians swap “major bodily function” for the “function of any bodily member,” Defs.’ Br. 17, or “substantial and irreversible impairment” for “substantial impairment,” *id.*, without concern for the Ban’s criminal and quasi-criminal penalties. Yet physicians have tried assiduously to follow the letter of the law, not substitute its terms for distinct language that may carry a distinct meaning. *See, e.g.*, First App. 300.

Put simply, Plaintiffs do not dispute that some isolated phrases in the Health Exception may not be unconstitutionally vague in fundamentally different contexts. In the context of obstetrics, however, the specific terms and their placement in the Health Exception fail to provide physicians fair notice of when they can terminate a pregnancy for health reasons. *Supra* at 8–10.

¹² Defendants wrongly state that *Anderson v. Diamondback Inv. Grp., LLC*, 117 F.4th 165 (4th Cir. 2024), applied the standard described in the federal statute. Defs.’ Br. 17. In reality, *Anderson* did not apply that standard and assumed without deciding that plaintiff was disabled. 117 F.4th at 176.

3. The Use of Some of the Health Exception's Terms in Judicial Opinions Cannot Clarify the Health Exception Because the Terms Have Different Roles and Expectations There.

Defendants again overlook that context affects the intelligibility of words when they contend that the Supreme Court's use of "serious risk" in opinions indicates that "serious risk" in the Health Exception notifies Plaintiffs of whether they can treat a potentially dangerous, rapidly evolving, and ultimately unpredictable condition. Defs.' Br. 13. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court used "serious risk" once, along with "inevitable" and "pervasive," to explain why it declined to invalidate a ban on expending corporate funds in federal election campaigns as to videos-on-demand, but not other mediums. *Id.* at 327. It is undoubtedly important for courts to explain their choices. But as *Citizens United* demonstrates, courts have entire opinions to do so, which means that, unlike in a statute, one phrase is seldom essential. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." (citation omitted)).

Defendants' reliance on an Eighth Amendment opinion is misplaced for the same reasons, and also because Defendants baselessly equate "serious risk of a substantial and irreversible impairment of a major bodily function" with "substantial risk of serious harm." *See* Defs.' Br. 13 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)); *supra* at 5–7. What is more, the Court in *Farmer* made clear that "[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it." 511 U.S. at 834 n.3.

Defendants' failure to grasp that words have different roles and expectations in different environments dooms their argument that Plaintiffs understand the Health Exception. *See* Defs.' SJ Br. 13–14. Plaintiffs sometimes use the word "serious" with patients and colleagues precisely be-

cause it is a colloquial term that sufficiently conveys that an ailment is worth paying attention to.¹³ *See* First App. 264; Defs.’ Ex. 17 ¶ 18, ECF No. 165-17; Defs.’ Ex. 3, 88:4–19, ECF No. 165-3. But, while it may have some benefits in colloquial conversation with patients, “serious” does not provide notice of the threshold of severity needed to avoid criminal and quasi-criminal penalties under the Health Exception. *Supra* at 8–10.

D. The Health Exception Lacks a Constitutional Core Because Physicians Are Often Unable to Determine if a Particular Patient’s Condition Meets the Exception.

The Health Exception lacks an ascertainable core of meaning because physicians are often unable to determine if a particular patient’s condition permits them to provide an abortion. Defendants concede that Dr. Doe provided sworn testimony that, as of January 16, 2026, she was unable to determine if a particular patient’s condition meets the Health Exception between 60 and 90 times. Defs.’ Br. 27; *see* Defs.’ Ex. 1, Pl. Doe’s Resps. to Defs.’ Second Set of Interrogs, at 6, 14, ECF No. 165-1. Defendants also concede that Dr. Bingham provided sworn testimony that, as of January 27, 2026, she was unable to determine if a particular patient’s condition meets the Health Exception about 125 times. Defs.’ Br. 27; *see* Defs.’ Ex. 5, Pl. Bingham’s Resp. to Defs.’ Second Set of Interrogs., at 4, 12, ECF No. 165-5.

But they erroneously urge this Court to ignore these figures because they are “unexplained.” Defs.’ Br. 27–28. In fact, Plaintiffs and their experts have provided detailed and un rebutted examples of such incidents. *See, e.g.*, Defs.’ Ex. 1, at 7–8, ECF No. 165-1 (Dr. Doe detailing

¹³ Defendants emphasize that Plaintiffs sometimes use qualitative terms, Defs.’ Br. 13–14, 19 n.7, but Plaintiffs do not take issue with the Health Exception because it contains qualitative language. They take issue with the Health Exception’s failure to convey whether it contains quantitative elements, qualitative elements, or both, and what those elements mean. *See* Pls.’ Br. 6–7. In any event, Defendants ignore that Plaintiffs defined “severe health risk” in their Prayer for Relief as, for example, “including . . . health conditions that . . . cause extended and debilitating symptoms during pregnancy.” First Am. Compl., ECF No. 10. By contrast, there is no definition of “serious risk” in the Health Exception.

cases of newly-diagnosed breast cancer, lupus, and a history of pulmonary embolism); First App. 40–43 (Dr. Doe detailing cases of sickle cell disease, heart disease, and heart attack); Defs.’ Ex. 5, at 6–9, ECF No. 165-5 (Dr. Bingham detailing cases of a potentially cancerous chest mass, a patient whose pregnancy prevented her from getting a necessary medical procedure, sickle cell disease, and severe hypertension); First App. 14 (Dr. Bingham detailing a case of breast cancer); First App. 171–172 (Dr. Tarleton detailing cases of preexisting hypertension and heart disease); *see also* First App. 43–44 (Dr. Doe detailing cases of severe hypertension and PPRM in which it took hours of consultation and deliberation by multiple physicians to determine that a particular patient met the Health Exception).

Defendants also improperly discount this sworn testimony based on raw speculation that the physicians were “just afraid” to provide an abortion “without any reasonable basis for that fear.” *See* Defs.’ Br. 28; *infra* at 29–31. Such conjecture cannot create a genuine dispute of material fact. *Phillips v. Campbell*, No. 6:20-cv-4447-DCC-KFM, 2021 WL 4994031, at *4 (D.S.C. Sep. 7, 2021) (“A [party] may not survive summary judgment merely relying on his unsubstantiated allegations in the face of sworn testimony to the contrary.” (citing *Pronin v. Johnson*, 628 F. App’x 160, 161 (4th Cir. 2015))).

Defendants are equally incorrect that circumstances in which physicians do not even seek to provide an abortion because the patient is undoubtedly ineligible for the Health Exception bear on whether it has a constitutional core. *See* Defs.’ Br. 24, 26 (pointing to healthy pregnancies and mental health conditions). Defendants rely on *Fusaro v. Howard*, 19 F.4th 357 (4th Cir. 2021), in which—unlike this case—a plaintiff engaged in some conduct that was clearly proscribed, but complained of the vagueness of the law as applied to the conduct of others, which is impermissible. *Id.* at 372, 374. Here, by contrast, Plaintiffs do not seek to provide abortions under the Health

Exception to healthy patients. *See* First App. 13–14, 34–35. As a result, such cases are irrelevant to whether the Health Exception is vague. *See Fusaro*, 19 F.4th at 372.

Under the vagueness standard, the question is not how often physicians are able to determine that the Health Exception indisputably does not apply, but rather, how often Plaintiffs are unable to determine, or significantly struggle to determine, if an abortion they seek to provide due to a patient’s illness meets the Health Exception. *See City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (“This ordinance is therefore vague ‘not in the sense that it requires a person to conform *his conduct* to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’” (emphasis added) (citation omitted)).

Further, even where Plaintiffs represented that they concluded that a particular patient’s illness did not meet the Health Exception, they clarified that they were actually uncertain because of the lack of clarity in the Health Exception. Defs.’ Ex. 3, 199:17–20, ECF No. 165-3 (Dr. Doe specifying that “the example that I just gave with the pulmonary embolism . . . was *difficult to apply* and ultimately I *did not reach confidence* that it would meet the legal definition” (emphasis added)); Defs.’ Ex. 6, 268:17–269:3 (Dr. Bingham testifying that patients who are stable “*wouldn’t necessarily*” meet the Health Exception “at that point in time” (emphasis added)); *see* Defs.’ Br. 25–26.¹⁴

Likewise, Defendants are wrong both that 1) the Health Exception is not unconstitutionally vague merely because it is possible to conclude that some circumstances meet it, and 2) the record reflects that it is possible to conclude that a non-negligible number of circumstances meet the Health Exception. *See* Pls.’ Br. 17, 21.

¹⁴ The only “circumstances” that Dr. Tarleton identifies “when she could clearly understand that the [E]xception did not apply,” Defs.’ Br. 26 (citation omitted), were “psychological or emotional conditions,” Defs.’ Ex. 8, 61:6–17, ECF No. 165-8.

“[A]lthough statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” *Johnson v. United States*, 576 U.S. 591, 602–03 (2025) (emphasis in original) (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) and *Coates*, 402 U.S. 611). “[W]here a statute specifies no standard, the fact that it has one or more clearly constitutional applications cannot save it.” *Doe*, 842 F.3d at 842.

Dr. Bingham has never been confident enough to provide an abortion under the Health Exception. First App. 494–95. Physicians who have been confident enough have done so only in the most egregious cases, which usually involve patients afflicted with comorbidities. Defs.’ Ex. 1, at 4, ECF No. 165-1; First App. 300, 311–13, 417; Defs.’ Ex. 19, ECF No. 165–19; *see* First App. 255. Defendants admit that this amounted to seven abortions for Dr. Doe and between three and five for Dr. Tarleton. Defs.’ Br. 25. And even in those cases, Dr. Doe and Dr. Tarleton feared that someone would question their judgment that the Health Exception permitted an abortion. First App. 300, 311–13, 417; *see id.* at 255.

Defendants incorrectly classify PPRM as a condition that clearly meets the Health Exception, which ignores Dr. Tarleton’s testimony that physicians disagree about whether it qualifies, Defs.’ Ex. 8, at 38:7–39:2, ECF No. 165-8, as well as their own experts’ disagreement with other physicians about whether it qualifies, *see* Pls.’ Br. 10–11. Similarly, Dr. Tarleton did not testify that maternal peripartum cardiomyopathy, heart failure, and renal failure satisfy the Health Exception. *See* Defs.’ Br. 25. She testified that these conditions can have “riskier” or “graver consequences” than PPRM. Defs.’ Ex. 8, 160:19–161:1, ECF No. 165-8. And she clarified that she would feel “comfortable enough” to provide an abortion for “end-stage renal disease with dialy-

sis,” and would “probably feel comfortable enough” to provide an abortion for “severe heart failure with like an ejection fraction of 20 or 30 percent.” Defs.’ Ex. 8, 161:2–25, ECF No. 165-8.

E. The “Presumed Conditions” Do Not Help Notify Physicians of Whether or When a Particular Patient’s Condition Meets the Health Exception.

There are four main reasons why the eleven conditions that the Abortion Ban “presume[s],” but does not guarantee, meet the Health Exception do not help notify physicians of whether or when a particular patient’s condition meets the Health Exception. *See* S.C. Code Ann. § 44-41-640(C)(2); Defs.’ Br. 20–21.

One, for nearly half of the conditions, terminating a pregnancy does not constitute an induced abortion.¹⁵ Those conditions include: molar pregnancy, partial molar pregnancy, blighted ovum, ectopic pregnancy, intrauterine fetal demise, and miscarriage. Tarleton Dep. 88:14–21, ECF No. 162-2; Second App. 529–30; *see* Bingham Dep. 111:12–18, ECF No. 160-2; Doe Dep. 107:4–8, ECF No. 161-2. What is more, HELLP Syndrome, another “presumed condition,” almost always occurs after viability, when physicians deliver the baby and it is not considered an abortion. Second App. 531. Thus, the Abortion Ban lacks a “lengthy but unexhaustive list of what does and doesn’t” fall within its ambit. *Cap. Assoc. Indus., Inc. v. Stein*, 922 F.3d 198, 210–11 (4th Cir. 2019) (holding that a definition of “practice law” was not unconstitutionally vague because it included such a list, a state statute “elaborate[d] on the definition further,” *and* state courts had “expounded on this definition at length”); *see* Defs.’ Br. 20.

Unlike the list of presumed conditions under the Health Exception, the definition in *Stein* spelled out specifically what “‘practice law’ does not encompass” and “does not include.” N.C.

¹⁵ Dr. Tarleton stressed this distinction during her deposition. Defs.’ Ex. 8, 89:10–14, ECF No. 165-8 (“I have treated patients with those conditions but would not have assumed that this statute applies to patients having a miscarriage, a fetal demise, ectopic pregnancy, blighted ovum, or molar pregnancy.”).

Gen. Stat. § 84-2.1(b), 84-2.2; *see Stein*, 922 F.3d at 210. In the same way, a statute that prohibited registered sex offenders from knowingly being at any place “intended primarily for the use, care, or supervision of minors” was not unconstitutionally vague partly because it provided “schools, children’s museums, child care centers, nurseries, and playgrounds” as examples. *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 statute in *Doe* did not qualify the examples with a word like “presumed,” much less include places that fail to provide any clarity because they are places where minors do not go. *Id.* By contrast, the list of “presumed conditions” in the Abortion Ban involves many conditions that are not treated by an abortion, which makes it in fact a “confusing list of examples.” *Johnson*, 576 U.S. at 603. “The phrase ‘shades of red,’ standing alone, does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red’ assuredly does so.” *Id.* (quoting *James v. United States*, 550 U.S. 192, 230 n.7 (Scalia, J., dissenting)).

Two, nothing in the Abortion Ban itself suggests that physicians should use the “harms that are typically associated with each of [the presumed] conditions” to analogize to other conditions that meet the Health Exception. Defs.’ Ex. 13, at 4–5, ECF No. 165-13; *see S.C. Code Ann. §§ 44-41-610–690*. That instruction comes from Defendants, not the statute. Defs.’ Ex. 13, at 4–5, ECF No. 165-13. But Plaintiffs cannot rely on Defendants’ representations in the face of the Abortion Ban’s silence. *See Reynolds v. United States*, 565 U.S. 432, 441 (2012) (refusing to “read [particular requirements] into [a] statute, silent on the point”).

Three, even if Plaintiffs could rely on Defendants’ representations, those representations do nothing to notify Plaintiffs of when they can provide an abortion under the Health Exception. Defendants claim that “the[] same harms to life and organs from other conditions should also sat-

isfy the [Health Exception].” Defs.’ Ex. 13, at 4–5, ECF No. 165-13. But this theory ignores the reality that it is extremely difficult to predict if or when a particular patient will suffer a particular harm if she continues a pregnancy. *See* Pls.’ Br. 2; *supra* at 9–10. To illustrate, both uterine rupture and PPROM carry a risk of hemorrhage. Defs.’ Ex. 13, at 4, ECF No. 165-13; Pls.’ Br. 10. This hardly notifies a physician of whether or when she can provide an abortion to a PPROM patient because it says nothing about how high or grave the risk of hemorrhage must be, *see* Pls.’ Br. 6–7, how imminent the hemorrhage must be, or how physicians can know when a patient is approaching that point, *see id.* at 7. Some PPROM patients do not become significantly sicker with expectant management, yet they can go from fairly stable to critical very quickly, when it may be too late to help them. *Id.* at 10; *see* First App. 249–50, 143–44. Defendants’ own experts disagree with other physicians in South Carolina about whether a PPROM patient without signs of infection would meet the Health Exception. *Id.* at 11.¹⁶

III. The Abortion Ban Fails to Provide Fair Notice of When the Fatal Fetal Anomaly Exception Permits an Abortion.

A. The Fatal Fetal Anomaly Exception’s Terms Lack a Medical Meaning.

The Abortion Ban fails to provide fair notice of when the Fatal Fetal Anomaly Exception permits an abortion because the Exception governs medical professionals yet lacks any definition in medicine. Pls.’ Br. 30. Because the Fatal Fetal Anomaly Exception has no medical meaning, Defendants’ own experts have discordant understandings of its terms. Pls.’ Br. 30–31. Defendants cannot manufacture a genuine dispute that the Fatal Fetal Anomaly Exception’s terms are defined

¹⁶ The challenges of obstetrics make it difficult for physicians to know even when they can provide an abortion under the Health Exception for the few “presumed conditions” for which terminating a pregnancy constitutes an induced abortion. To illustrate, a physician may suspect that a patient is suffering from abruptio placentae, *see* Ex. 13, at 4, ECF No. 165-13, but lack “complete evidence” that she is, and not have time to obtain an ultrasound to decide how to treat the patient. First App. 325.

in medicine based on a single reference to an uncited AMA report that omitted the word “sustaining.” *See* Defs.’ Br. 30; Pls.’ Br. 12–13 (explaining why “sustaining” lacks medical meaning and is virtually impossible to apply to actual patients). The particular words of a statute matter, and courts must give meaning to all the words in a statute. *Barnes*, 625 F.3d at 806; *Little Rock Sch. Dist.*, 359 F.3d at 960; *supra* at 5–7.

The undisputed evidence shows that Plaintiffs and other physicians are often unable to determine if a particular patient’s condition meets the Fatal Fetal Anomaly Exception. *See, e.g.*, Pls.’ Br. 13–16 (addressing Trisomy 18, Hypoplastic Left Heart Syndrome (“HLHS”), and Amniotic Band Syndrome); First App. 473 (addressing multiple cases of Trisomy 18); First App. 50 (addressing Trisomy 13); Defs.’ Ex. 1, at 9, ECF No. 165-1 (addressing conjoined twins); First App. 182 (addressing a congenital virus that worsened the fetus’s brain, heart, and liver function).

That Defendants’ experts disagree about whether or when such conditions meet the Fatal Fetal Anomaly Exception reinforces that the Exception lacks meaningful standards. *See, e.g.*, Pls.’ Br. 14–16 (addressing Trisomy 18, HLHS, and Amniotic Band Syndrome); First App. 203-4 (addressing Trisomy 13); First App. 334–35 (addressing Trisomy 13).

Every one of Defendants’ opposing arguments is unavailing.

B. The Fatal Fetal Anomaly Exception’s Terms Lack a Discernible Meaning in the Context of Obstetrics.

As with the Health Exception, Defendants’ core argument is not that the Fatal Fetal Anomaly Exception’s terms are in fact defined in medicine, but rather that whether they are does not matter because some of those terms are common words. *See* Defs.’ Br. 29. Yet as discussed above, courts consider the context in which words must be used to determine if those words are unconstitutionally vague. *See Smith*, 415 U.S. at 573–74; *Coates*, 402 U.S. at 614; *supra* at 1, 8–9. Plaintiffs and other physicians obviously understand what “incompatible” or “sustaining” mean in the ab-

tract. *See* Defs.’ Br. 29. But the vagueness inquiry is not about whether any of a statute’s terms can be understood colloquially. *See Coates*, 402 U.S. at 612. And the problem with the Fatal Fetal Anomaly Exception is that the entirety of the Exception gives physicians no guidance on how to apply it to the complex and high-stakes context of obstetrics. *See* Pls.’ Br. 13–16.

To illustrate, that “incompatible” means “incapable . . . of harmonious existence” or that “sustaining” means “to give support to,” Defs.’ Br. 29 (citation omitted), does not notify a physician of whether she can provide an abortion where diagnostic tools are inadequate; it is impossible to predict if the fetus will survive delivery and if so, how long the neonate will live; if the neonate will require extensive, costly, and possibly fatal medical interventions; and parents desperately want to shield their child from a life of suffering, Pls.’ Br. 13–16. Unfortunately, these are regular occurrences in obstetrics. *Id.*

C. Defendants’ Reference to Some of the Fatal Fetal Anomaly Exception’s Terms in Materially Distinct Settings Fails to Establish That the Fatal Fetal Anomaly Exception is Not Vague.

1. Defendants Mistakenly Cite a Few Abortion Law Exceptions That Are Meaningfully Different from the Fatal Fetal Anomaly Exception.

Defendants misguidedly cite a few materially different exceptions to other abortion laws as evidence that the Fatal Fetal Anomaly Exception provides fair notice. Defs.’ Br. 29–30. Unlike the Fatal Fetal Anomaly Exception, the Oklahoma exception that Defendants point to is an exception to an informed consent requirement for abortion patients, not a law that purports to identify the line between being able to provide and having to withhold abortion care. Okla. Stat. Ann. tit. 63, §§ 1-746.1(3), 1-746.2; *see* Defs.’ Br. 30. As a result, physicians can simply err on the side of caution under the Oklahoma requirement and provide the relevant information to any patients who have received fetal anomaly diagnoses. But when physicians err on the side of caution and withhold an abortion because they do not understand the Fatal Fetal Anomaly Exception, the conse-

quences are much graver. *See, e.g., Voinovich*, 130 F.3d at 203; *Colautti v. Franklin*, 439 U.S. 379, 396 (1979), *abrogated on other grounds by Dobbs*, 597 U.S. 215.

In addition, the Massachusetts exception that Defendants rely on, Defs.’ Br. 30 (citing Mass. Gen. Laws Ann. ch. 112, § 12N), is an exception to a statute that allows abortions until 24 weeks of gestation for any reason, by which time most patients have learned of any fetal anomaly diagnoses and can obtain an abortion without having to rely on an exception, *see supra* at 13. What is more, the Massachusetts statute lacks criminal penalties, *supra* at 11, and defers to the “best medical judgement of the physician,” *supra* at 12–13.

Lastly, Ga. Code Ann. § 31-9B-1(3) and Ga. Code Ann. § 16-12-141(a)(4), *see* Defs.’ Br. 29–30, are an exception to an abortion statute that was challenged in court, *see SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1325 (11th Cir. 2022). Physicians had no reason to challenge the fetal anomaly exceptions as unconstitutionally vague because the invalidation of the statute would have made the exceptions’ vagueness a moot matter. Thus, the exceptions that the Defendants rely on do not inform whether the Fatal Fetal Anomaly Exception is unconstitutionally vague.

Defendants’ own experts’ testimony demonstrates that “life-limiting conditions” is much easier for many physicians to understand and apply than the Fatal Fetal Anomaly Exception. Pls.’ Br. 4 n.2. Defendants mischaracterize Dr. King’s testimony about “life-limiting” in two ways. One, her testimony that some of the language in “life-limiting” is not fully defined and subject to different interpretations among physicians, *see* Defs.’ Br. 30, was in fact limited to “lethal fetal conditions,” which is just one term in the larger definition of “life-limiting.” King Dep., 137:12–138:18, ECF No. 163-2; Pls.’ Br. 4 n.2.

Two, Defendants insist without basis that Plaintiffs invoke “life-limiting” so they can provide more abortions than the Fatal Fetal Anomaly Exception allows. Defs.’ Br. 30. To the contrary, Drs. King, Doe, and Tarleton testified that “life-limiting” is more intelligible than the Fatal Fetal Anomaly Exception because it accounts for factors in obstetrics that the Fatal Fetal Anomaly Exception does not clearly account for. These factors include the changing nature of medicine, an anomaly’s different presentations, the uncertainty of anomaly prognoses, and how physicians typically integrate a patient’s understanding of quality of life in their counseling of patients. King Dep. 48:2–8, 90:6–7, 138:22–139:3, ECF No. 163-2; First App. 132–33, 179–80; Doe Dep. 128:2–8, 133:14–134:5, 137:1–12, ECF No. 161-2. Also, Defendants themselves later cite Dr. Tarleton’s testimony that “life-limiting” probably overlaps with the Fatal Fetal Anomaly Exception. Defs.’ Br. 32–33. This would make it impossible to provide more abortions under an exception using “life-limiting” than under the Fatal Fetal Anomaly Exception.

D. The Fatal Fetal Anomaly Exception Lacks a Constitutional Core Because Physicians Are Often Unable to Determine if a Particular Patient’s Condition Meets the Exception.

The Fatal Fetal Anomaly Exception lacks an ascertainable core of meaning because physicians are often unable to determine if a particular patient’s condition meets the Fatal Fetal Anomaly Exception. Defendants concede that Dr. Doe provided sworn testimony that she is unable to determine if a particular patient’s condition meets the Fatal Fetal Anomaly Exception about once a month. Defs.’ Br. 33; *see* Defs.’ Ex. 1, at 6, ECF No. 165-1.

As with the Health Exception, Defendants are plainly incorrect that circumstances in which physicians do not even seek to provide an abortion because the circumstances are undoubtedly ineligible for the Fatal Fetal Anomaly Exception bear on whether it has a constitutional core. *See* Defs.’ Br. 32 (pointing to healthy pregnancies, Down syndrome, and cleft lip); Defs.’ Ex. 1, at 11–12, ECF No. 165-1 (Dr. Doe explaining that the 3–4 instances a month that she believed that a

patient with a fetal anomaly diagnosis did not meet the Exception involved Down syndrome). Indeed, under Defendants' theory, no fetal anomaly exception could be vague because most pregnancies are not afflicted with fetal anomalies.

And as with the Health Exception, Defendants are wrong that 1) the Fatal Fetal Anomaly Exception is not unconstitutionally vague because it is possible to conclude that some circumstances meet it, *see Johnson*, 576 U.S. at 602–03, and 2) the record reflects that it is possible to conclude that a non-negligible number of circumstances meet the Fatal Fetal Anomaly Exception, *see Pls.' Br.* 17, 29–30.

Physicians who have been confident enough to provide an abortion under the Fatal Fetal Anomaly Exception have done so in only the most egregious cases. *Id.* at 17. For example, every instance in which a South Carolina physician, including Dr. Doe, has provided an abortion to a patient whose fetus was diagnosed with Trisomy 13 or Trisomy 18 involved a comorbidity. *See* Defs.' Ex. 19, at 7–9, ECF No. 165-19 (Trisomy 18 with cardiac and limb anomalies; Trisomy 18 with a fetal heart defect; Trisomy 18 with anomalies of the brain, bowel, and limbs; Trisomy 13 with Holoprosencephaly; and Trisomy 13 and Hydrops Fetalis); Defs.' Ex. 1, at 5–6, ECF No. 165-1 (Trisomy 18 with complex fetal cardiac defects and Trisomy 13 with HELLP syndrome); Defs.' Ex. 2, at 2, ECF No. 165-2 (Trisomy 18 with complex cardiac defects, fetal omphalocele, and cystic hygroma). Defendants admit that these egregious cases amounted to between 10 and 15 abortions. Defs.' Br. 31. Likewise, the undisputed evidence shows that Dr. Tarleton was unable to provide more than five abortions under the Fatal Fetal Anomaly Exception. Defs.' Ex. 8, 57:17–24, 122:5–12, ECF No. 165-8. And even in those cases, Dr. Doe and Dr. Tarleton feared that someone would question their judgment. First App. 53–54, 300, 428.

Defendants incorrectly accuse Plaintiffs of relying on hypothetical scenarios to prove the Health Exception is vague, *see* Defs.’ Br. 27 n.11, only to then rely on hypothetical scenarios to falsely assert that the Fatal Fetal Anomaly Exception provides adequate notice to physicians,¹⁷ Defs.’ Br. 32. But these hypothetical scenarios do not reflect the real instances in which Plaintiffs have encountered patients with fetal anomaly diagnoses and have been unable to determine whether the anomalies were “incompatible with sustaining life after birth.” *See* Pls.’ Br. 13–16.

IV. The Abortion Ban is So Standardless That It Authorizes and Encourages Arbitrary and Discriminatory Enforcement.

The Health and Fatal Fetal Anomaly Exceptions are also unconstitutionally vague because they fail to “establish minimal guidelines to govern law enforcement.” *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (citation omitted). The undisputed evidence shows that the Attorney General and certain Circuit Solicitors responsible for enforcing the Abortion Ban lack a clear and consistent understanding of the Health and Fatal Fetal Anomaly Exceptions. Pls.’ Br. 33.

Defendants’ only—and flawed—argument about the threat of arbitrary and discriminatory enforcement against Plaintiffs is that their fears lack credibility because no physicians have been prosecuted under the Abortion Ban to date. *See* Defs.’ Br. 11, 23. But the history of prosecution under a statute is not an element of the vagueness inquiry. *See* Pls.’ Br. 20–21. Courts instead look to whether a statute lacks “minimal guidelines to govern law enforcement” and therefore encourages arbitrary or discriminatory enforcement. *Lanning*, 723 F.3d at 482.

In any event, the Attorney General and Circuit Solicitors are responsible for enforcing state law. *See* S.C. Code Ann. §§ 1-7-10 to 1-7-1110. They are authorized to prosecute any doctor who

¹⁷ Contrary to Defendants’ description of her testimony, Dr. King clarified that she believes that some cases of anencephaly may not meet the Fatal Fetal Anomaly Exception. *See* Defs.’ Ex. 10, 270:10–17, ECF No. 165-10; First App. 400; *see* First App. 323 (“I know some anencephalic babies have lived for several months.”).

provides an abortion based on their uninformed and potentially distinct understandings of the Abortion Ban. *See id.* §§ 1-7-320, 1-7-350. In other words, the possibility of a physician being investigated or even prosecuted under the Abortion Ban is not remote.

Doe v. Rausch, 461 F. Supp. 3d 747, 776–77 (E.D. Tenn. 2020), is distinguishable from this case. There, “Plaintiff ha[d] not made any effort to elucidate how the statute ha[d] specifically compelled him to change his conduct, other than a broad, ill-defined fear of enforcement.” *Id.* Here, by contrast, Plaintiffs have offered undisputed evidence that the lack of notice in the Health and Fatal Fetal Anomaly Exceptions chills physicians from providing abortions for health and fetal anomaly reasons (and fills them with uncertainty when they do). Pls.’ Br. 29–30 This is also in part why there have been no prosecutions: In the face of life-altering criminal and quasi-criminal penalties, physicians err on the side of caution. *Id.* at 29; *see* Defs.’ Br. 11, 23.¹⁸

V. The “Reasonable Medical Judgment” Standard Exacerbates the Vagueness of the Health and Fatal Fetal Anomaly Exceptions.

The Abortion Ban’s lack of a scienter requirement, which exposes physicians to criminal and quasi-criminal penalties even if they act in good faith, contributes to the Health and Fatal Fetal Anomaly Exceptions’ vagueness. Pls.’ Br. 26–27.

Further, the fact that multiple physicians can disagree and all exercise reasonable medical judgment, Defs.’ Br. 15–16, does not address the undisputed evidence in this case that the state could marshal multiple experts to offer testimony that conflicts with the medical consensus on abortion, *id.* at 27. To make matters worse, the determination of whether a particular patient meets

¹⁸ The fear of physicians other than Plaintiffs and their experts that they will be prosecuted for treating a “presumed condition,” for example, illustrates the burdens borne by the few physicians who are willing to provide abortions in South Carolina. *See* Defs.’ Br. 24 n.10; 31; Defs.’ Ex. 8, 142:10–14, ECF No. 165-8. One of Defendants’ own experts testified that *recommending* that a patient terminate her pregnancy because of a particular medical condition could subject him to prosecution for violating the Abortion Ban. Second App. 557.

either Exception is especially “fraught with uncertainty and susceptible to being subsequently disputed by others” because of the extraordinary complexity, unpredictability, time constraints, and high stakes of obstetrics. *Voinovich*, 130 F.3d at 205; Pls.’ Br 2, 28. That the Abortion Ban often conflicts with evidence-based medicine also dispels the notion that physicians can avoid life-altering penalties by simply exercising their reasonable medical judgment. If the Ban itself departs from reasonable medical judgment, what assurance do Plaintiffs have that exercising what they view as reasonable medical judgment will count as reasonable medical judgment under the Abortion Ban? Pls.’ Br. 29. Defendants would have this Court believe that this is a matter of ideological opposition to abortion bans. *See* Defs.’ Br. 29. But Plaintiffs’ education, training, and the standard of care necessarily direct their practice of medicine. *See* Pls.’ Br. 29.

Finally, Defendants cannot create a genuine dispute as to whether the reasonable medical judgment standard gives abortion providers “breathing room” when their experts do not provide abortions and thus do not labor under the fear that caring for a patient will send them to prison. *See* Second App. 535, 537 (Dr. Buskmiller testifying that she does not provide any abortions because of her conscientious beliefs); *id.* 527 (Dr. Austin testifying that he is personally against abortion and hopes never to perform one); First App. 324 (Dr. Draper maintaining that abortion is not healthcare “unless it is to save the life of the mother”).

VI. The Appropriate Remedy in This Case is 1) a Declaratory Judgment That the Abortion Ban is Unconstitutionally Vague and 2) Injunctive Relief at Least as to Plaintiffs.

Defendants are flatly wrong that the “no set of circumstances” standard controls Plaintiffs’ challenge to the Abortion Ban. *See* Defs.’ Br. 6 (citing *United States v. Salerno*, 481 U.S. 739 (1987)). The Supreme Court expressly rejected such a position in *City of Chicago v. Morales*. Specifically, the Court held that a “facial challenge [was] appropriate” because, like the Abortion Ban, the challenged law imposed criminal penalties, lacked a scienter requirement, and “vagueness

permeate[d] [its] text.” 527 U.S. at 55 (citations omitted). The Court was unequivocal that, “[t]o the extent [it] ha[s] consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation.” *Id.* at 55 n.22.

Similarly, in a recent challenge to a South Carolina law, the Fourth Circuit rejected the Attorney General’s assertion that “laws [that] do not implicate a substantial amount of constitutionally protected conduct . . . may not be declared void for vagueness unless they are impermissibly vague in all their applications.” *Carolina Youth Action Project*, 60 F.4th at 781 (cleaned up). The Court made clear that “where a challenged statute ‘imposes criminal penalties . . . the statute can be invalidated on its face even where it could conceivably have some valid application.’” *Id.* (quoting *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (cleaned up)); see *Moody*, 603 U.S. at 763 (Thomas, J., dissenting) (identifying “vagueness doctrine” as the origin of facial invalidation). By contrast, *United States v. Rahimi*, 602 U.S. 680 (2024), which Defendants rely on, Defs.’ Br. 6, did not involve a vagueness question at all. 602 U.S. at 685–86 (determining the constitutionality of a firearm regulation under the Second Amendment).

Additionally, there is no basis for Defendants’ argument that the test set forth in *Moody*, a First Amendment case that involved no vagueness issues, 603 U.S. at 723, 731, applies to this vagueness case. Defs.’ Br. 6–7; see *United States v. Sineneng-Smith*, 590 U.S. 371, 385–86 (2020) (Thomas, J., concurring) (treating the vagueness doctrine and overbreadth doctrine as distinct doctrines). *Martin* is inapposite because its reference to the “plainly legitimate sweep” standard referred to circumstances involving constitutionally protected conduct rather than the law’s failure to provide adequate notice and meaningful enforcement standards. 700 F.3d at 135. *Diamond S.J. Enter., Inc. v. City of San Jose*, 100 F.4th 1059, 1068 (9th Cir. 2024), in fact recognized that vagueness and overbreadth are two separate doctrines. And *Thayer v. City of Chicago*, 110 F.4th 1040

(7th Cir. 2024), applied the constitutional “core” standard even as it discussed the standard for First Amendment facial challenges. *Id.* at 1042–43. Only *Fabrizius v. Dep’t of Agric.*, 129 F.4th 1226, 1238 (10th Cir. 2025), applied the overbreadth test to a vagueness claim, and it did so without explanation.

Even if this Court were to conclude that a single, out-of-circuit case is a sufficient basis to apply the “plainly legitimate sweep” standard for First Amendment facial challenges here, Plaintiffs have met that standard. Plaintiffs have presented undisputed evidence that 1) they are often unable to determine if a particular patient’s condition meets the Health or Fatal Fetal Anomaly Exception in the circumstances where they seek to provide an abortion, *supra* at 17, 24, 27, and 2) they are confident enough to provide abortions under the Exceptions in only the most egregious cases, which usually involve comorbidities, *supra* at 20, 28. And even when they provide abortions under the Exceptions, they are uncertain whether the law permitted them to do so and fear that someone could disagree with their judgment. *Supra* at 20, 28.

Because Plaintiffs have demonstrated that the Health and Fatal Fetal Anomaly Exceptions fail to notify physicians of when they can provide an abortion and expose them to arbitrary and discriminatory enforcement, they are entitled to a declaratory judgment that the Abortion Ban is unconstitutionally vague. *See, e.g., Voinovich*, 130 F.3d at 206 (“[W]e conclude that the medical emergency and medical necessity exceptions are unconstitutional. Accordingly, we hold unconstitutional the Act’s post-viability ban and regulations.”); *Does*, 148 F. Supp. 3d at 506 (“N.C. Gen. Stat. § 14-208.18(a)(3) is declared unconstitutionally vague on its face under the Due Process Clause of the Fourteenth Amendment.”). *Trump v. CASA, Inc.*, 606 U.S. 831, 837–38 (2025), does not disturb this conclusion because it concerned injunctive relief. *See Sanderson v. Hanaway*, 163 F.4th 1101, 1109 (8th Cir. 2026) (affirming a declaratory judgment but vacating a statewide in-

junction given the intervening decision in *CASA*); *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312, 1340 (Fed. Cir. 2025) (same). Additionally, *CASA* reiterated that courts have the power to afford “complete relief to the plaintiffs before the court.” 606 U.S. at 852 (emphasis omitted). At the very least, that standard requires that the Court enjoin Defendants from enforcing the Abortion Ban against Dr. Bingham and Dr. Doe.¹⁹ *Id.*

Lastly, Defendants are incorrect that this Court can sever the Fatal Fetal Anomaly Exception from the rest of the Abortion Ban. Severability is a matter of state law, and in South Carolina, “the test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution.” *Env’t Tech. Council*, 98 F.3d at 788 n.21 (cleaned up).

The rest of the Abortion Ban is not “wholly independent” of the Fatal Fetal Anomaly Exception, because, by including the Fatal Fetal Anomaly Exception, the Legislature clearly intended to allow abortions for some fetal anomalies. Yet striking down only the Fatal Fetal Anomaly Exception would prohibit abortions for all fetal anomalies. *See id.* (holding that unconstitutional exceptions for disposal of hazardous waste that favored in-state interests could not be severed from the general limits on hazardous waste because it could not be presumed that the Legislature would have passed the overall limit without favoring in-state interests). Indeed, every iteration of the Abortion Ban considered by the Legislature contained the Fatal Fetal Anomaly Exception.²⁰

¹⁹ In any event, very few physicians in South Carolina provide abortions. *See supra* at 30 n.18, 31.

²⁰ *See Fetal Heartbeat and Protection from Abortion Act*, South Carolina General Assembly, 125th Sess., 2023–2024, https://www.scstatehouse.gov/sess125_2023-2024/bills/474.htm (last visited July 14, 2026).

The Abortion Ban’s lack of a severability clause, S.C. Code Ann. §§ 44-41-610—44-41-740, is yet another reason that it cannot “fairly be presumed the legislature would have passed” the Abortion Ban “independent” of the Fatal Fetal Anomaly Exception, *see Pinckney v. Peeler*, 862 S.E.2d 906, 915 (S.C. 2021); *id.* at 915–16 (severing an unconstitutional provision from the rest of an act *because* there was a severability clause).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Defendants’ motion for summary judgment and to grant Plaintiffs’ motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2026, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon all counsel of record.

/s/ John L. Warren, III
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