

**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

**REPLY IN SUPPORT OF
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, submit this Reply in Support of their Motion for Summary Judgment (ECF No. 165).

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REPLY

Plaintiffs' Response confirms that Defendants are entitled to summary judgment. Plaintiffs concede that they understand the words the exceptions use. They concede that they use those words in their practice. And they concede that they (and many others) have performed dozens of abortions under the very exceptions they call vague. A statute that physicians apply repeatedly—across dozens of conditions, over nearly three years, without a single prosecution—is not one for which “no standard of conduct is specified at all.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

Beyond this evidence establishing a plain sweep, two things cannot be lost in the analysis. One, facial challenges are “hard to win.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). And two, that high bar means that the Court need not be able to resolve every edge case raised in this litigation or write a treatise on the precise scope of the 2023 Act's terms or their application to all pregnancies or hypothetical scenarios. Any hard cases can come—if they ever do—in an as-applied challenge. For now, the Act's plain sweep is sufficient for Defendants to prevail.

I. Plaintiffs refuse to apply the facial vagueness standard.

A. A law with a plain sweep or core is constitutional.

Plaintiffs accuse Defendants of identifying only “what a law needs to do to avoid unconstitutional vagueness,” rather than “how precisely it needs to do it.” ECF No. 173, at 10.¹ But Plaintiffs commit that very error in pressing their facial challenge. Everyone agrees that due process generally requires fair notice and standards sufficient to prevent arbitrary enforcement. *United States v. Williams*, 553 U.S. 285, 304 (2008). But Plaintiffs ignore the next step: how imprecision must be measured before a court may invalidate a law facially. And caselaw shows that measurement is whether a law lacks a plain sweep, such that “the law's unconstitutional

¹ Page numbers are to the ECF-generated number at the top of the page.

applications [more than] substantially outweigh its constitutional ones.” *Moody*, 603 U.S. at 724. (Assuming, of course, that “no set of circumstances” isn’t the test. *See* ECF No. 165, at 14 n.5.)

That conclusion does not depend on *Moody* alone. *Martin v. Lloyd* applied the plain sweep standard in a facial vagueness challenge involving criminal penalties. 700 F.3d 132, 134–37 (4th Cir. 2012). *Doe v. Cooper*, decided after *Johnson v. United States*, 576 U.S. 591 (2015), and citing both *Johnson* and *Martin*, similarly asked whether the challenged law had “a constitutional ‘core’” that “appl[ies] without question to certain activities.” 842 F.3d 833, 842 (4th Cir. 2016). Other courts have likewise used this core or plain sweep standard in vagueness cases. *See, e.g., Thayer v. City of Chicago*, 110 F.4th 1040, 1042–43 (7th Cir. 2024);² *Fabrizius v. Dep’t of Agric.*, 129 F.4th 1226, 1238 (10th Cir. 2025). And *Moody* confirms the broader principle that facial review must account for a law’s valid applications, not just its hardest ones.³ 603 U.S. at 723–24.

Johnson does not eliminate the constitutional-core inquiry. It said that one or more obvious applications cannot save a law that otherwise specifies no standard, 576 U.S. at 602–03, not that clear applications are irrelevant to determining whether a standard exists. Yet Plaintiffs attempt to convert *Johnson* into just such an evidentiary exclusion rule. In their view, Defendants cannot rely on abortions performed by Doe and Tarleton, dozens of statewide applications, or the Act’s express examples and exclusions because every clear application is merely another “thousand pounds of sugar” example. ECF No. 173, at 26–27, 34–35. But *Cooper* shows that approach is wrong. A provision that “specifies no standard” may fail despite an isolated obvious case, but a provision

² Plaintiffs say this case was about “First Amendment facial challenges.” ECF No. 173, at 40. That’s incorrect. It was a vagueness case, and “vague” or “vagueness” appear four times in that short opinion. “First Amendment,” on the other hand, appears only in a Westlaw headnote.

³ Plaintiffs try to cast aside *Moody* as a First Amendment case. ECF No. 173, at 39. True, *Moody* wasn’t a vagueness case, but the Court set up the First Amendment analysis by contrasting a First Amendment facial challenge with “other” facial challenges. 603 U.S. at 723.

that “appl[ies] without question to certain activities” has a constitutional “core.” 842 F.3d at 842.

Plaintiffs don’t hide their inversion. They say that the maternal health exception “lacks an ascertainable core of meaning because physicians are often unable to determine if a particular patient’s condition” qualifies. ECF No. 173, at 24. But even *if* physicians are “often” uncertain about some patients, that does not show whether the exception clearly governs others. Plaintiffs then dismiss clear cases on both sides—clear inclusions as “egregious,” *id.* at 27, and clear exclusions by insisting that “the question is not how often physicians are able to determine that the Health Exception indisputably does not apply,” but how often they “are unable to determine, or significantly struggle to determine,” whether it permits an abortion, *id.* at 26. That approach ignores that a constitutional core exists whenever a law “appl[ies] without question to certain activities,” *Cooper*, 842 F.3d at 842, and that an “ascertainable standard for *inclusion and exclusion*” necessarily considers both sides of the statutory line, *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (emphasis added). Thus, Plaintiffs cannot brush aside so-called “egregious” cases as irrelevant or ignore times when they easily determined that an exception did not permit an abortion. *See* ECF No. 173, at 26, 34, 35. And it’s why statutory exclusions for psychological conditions matter. S.C. Code Ann. § 44-41-640(A).

Once Plaintiffs remove every clear inclusion and exclusion, all that remains are cases closest to the statutory line. Beyond essentially turning a facial challenge into a hypothetical as-applied one, this would force the Court to decide which combinations of factors lie just inside or outside that line. That is margin probing. Because “close question[s]” always arise “in marginal situations,” *Cooper*, 842 F.3d at 842, a test confined to difficult applications would find every qualitative statute vague. Facial review asks whether the law supplies a standard at all, not whether a court can resolve every edge case in advance. *Cf. Greenville Women’s Clinic v. Comm’r, S.C.*

Dep't of Health & Env't Control, 317 F.3d 357, 367 (4th Cir. 2002) (“it is inappropriate to speculate regarding a worst-case scenario”). But even still, physicians agreed about many of the supposedly hard cases. *See, e.g.*, ECF No. 167, at 11–14, 16–19.

The correct legal framework explains Plaintiffs’ cases. *Coates* involved “no standard of conduct . . . at all” because liability depended on whether others felt annoyed, not any objective standard. 402 U.S. at 614. And *Carolina Youth Action Project v. Wilson* involved a law “[l]acking any meaningful standards” and an enforcement regime marked by thousands of referrals and disparate outcomes. 60 F.4th 770, 776, 784 (4th Cir. 2023). Neither decision turned on edge cases.

B. Plaintiffs overstate what due process requires when a law has criminal penalties.

Plaintiffs put great emphasis on the 2023 Act’s criminal penalties. *See* ECF No. 173, at 9–11. But Plaintiffs confuse relative stringency with an exacting facial test. It is still a “relatively low bar” for a criminal law to survive a facial challenge. *Martin*, 700 F.3d at 137. So even “the most exacting vagueness standard” is not *that* stringent. *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018). These challenges receive nothing like the strict scrutiny that Plaintiffs try to impose, and Plaintiffs still bear the burden of proving the law is unconstitutional. *Moody*, 603 U.S. at 723. As the Supreme Court said (in a case that Plaintiffs cite in their opening paragraph), “[c]lose cases can be imagined under virtually any statute,” and those cases are “addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.” *Williams*, 553 U.S. at 306.

II. The exceptions have a constitutional core.

A. Physicians can apply the exceptions.

The record confirms the required sweep or core for both exceptions. Many physicians (Plaintiffs included) can understand and apply them (and have done so). And Plaintiffs identify no material factual description as wrong or mischaracterized. *Cf.* ECF No. 173, at 9 n.1.

1. Maternal health exception.

i. This exception has an understandable core, and DPH's collection of physician-reported data prove as much. Plaintiffs say that the data involve only "the most egregious cases," ECF No. 173, at 27, but they don't explain how or why. Really, the data show that physicians have applied the maternal health exception to more than a dozen unique conditions *beyond* the exception's 11 presumed conditions. *See* Ex. 14. Those applications do not depend on litigation hypotheticals or either side's experts, but they demonstrate how regulated physicians have understood and applied the law. That's important because Plaintiffs readily admit "that the behavior of parties who are regulated by a law is highly relevant to its vagueness." ECF No. 169, at 9 (collecting cases). And that "highly relevant" behavior here demonstrates a constitutional core. Plaintiffs now call these "the most egregious cases," but that only shows the exceptions "apply without question" to certain conditions. *Cooper*, 842 F.3d at 842. And it shows that other physicians don't share Plaintiffs' supposed struggles.

Plaintiffs' own statements confirm the statewide data. Plaintiffs are the ones who said that all pregnancies carry health risks. ECF No. 165, at 29 (citing Plaintiffs' deposition testimony and expert reports). Plaintiffs are the ones who provided numerous examples of abortions they have performed under the maternal health exception. *Id.* at 30 (citing Plaintiffs' deposition testimony and discovery responses). And Plaintiffs were the ones who gave examples of when they determined that this exception did not permit an abortion. *Id.* at 30–31 (citing Plaintiffs' deposition testimony); ECF No. 167, at 11 (citing Doe's deposition testimony). In a facial challenge, the Court should recognize these candid concessions for what they are: outcome-determinative admissions.

ii. Nothing Plaintiffs offer in response undermines this conclusion. They begin by pointing once again to Doe's supposed 60–90 instances and Bingham's claimed 125 instances of being

unable to determine if the exception permitted an abortion. *See* ECF No. 173, at 24–25. They say that these instances are not “unexplained” because they “provided detailed and un rebutted examples of such incidents.” *Id.* at 24. That’s false for two reasons.

First, Plaintiffs didn’t provide details for almost all of those instances. That’s a big problem. Their response points only to the times when they provided *any* details, *id.* at 24–25, but as Defendants have explained, Doe provided details of only three instances, and Bingham four. ECF No. 165, at 32. That leaves most of these supposed instances without any context or explanation.

Second, these unexplained instances are unreliable. Take Doe’s pulmonary embolism example. Doe claimed that this was a case in which she could not determine whether the exception permitted an abortion. Ex. 1, at 8. But then, in her deposition, she admitted she and other doctors “determined that the maternal health exception likely did not apply since [they] could give her medication to reduce that risk” of pulmonary embolism. Ex. 2, at 198:18–23. Her later statement that she did not “reach confidence” that the exception applied, *id.* at 199:17–20, restates that conclusion in other words. Thus, one of Plaintiffs’ few detailed examples fell apart when tested.

On that “reach confidence” point, Plaintiffs repeatedly try to discount their concrete applications of the exception by focusing on the cautious language they use to describe their conclusions. For example, Plaintiffs say Tarleton did not identify severe renal disease and heart failure as permitting an abortion because she said only that she would feel “comfortable enough” providing an abortion for certain presentations of those conditions. ECF No. 173, at 27–28; Ex. 4, at 161:2–25. But the next page of testimony explains that terminology. Tarleton agreed that she describes legal applications not as “unequivocal[.]” determinations but in terms of whether the perceived legal risk is low enough for her to act. Ex. 4, at 162:1–12. She then explained that she would use the same relative-risk vocabulary for a “stubbed toe” case. *Id.* at 162:20–163:7; *see also*

Ex. 2, at 251:10–22 (similar). “Comfortable enough” thus reflects how Plaintiffs express their medical judgment. It does not mean they failed to exercise that judgment.

Plaintiffs also try to discount the evidence by saying they remained afraid that someone might later question their judgment even after they applied the exception. ECF No. 173, at 27. But subjective fear after acting on a statutory conclusion does not erase the conclusion. And Defendants aren’t “speculat[ing]” when they say these subjective fears may be unreasonable. *Id.* at 25. Plaintiffs claim to fear prosecution even for performing abortions for presumed conditions, Ex. 3, at 112:7–12, and when the exception was “clear,” Ex. 4, at 142:13. Those fears cannot support a vagueness claim because Plaintiffs have admitted that these abortions don’t violate the Act. Reasonable physicians can’t rely on unreasonable apprehension.

Plaintiffs’ final efforts to cast doubt on the exception’s constitutional core are minor pushbacks on the record, but those too fall short. ECF No. 173, at 34–35. On PPROM, Tarleton performed an abortion under the exception, even if some other doctor disagreed. So she understood it and exercised reasonable medical judgment. Ex. 4, at 38:7–39:22; *see also* ECF No. 167, at 14 (Defendants’ experts were consistent on PPROM). And Tarleton called other conditions “riskier” than PPROM, Ex. 4, at 160:19–161:1, so logically those conditions would permit an abortion too.

Plaintiffs offer two more late-breaking examples—breast cancer and hypertension—but never articulate the supposed disagreement. There isn’t any. The breast-cancer testimony consistently turns on stage, treatment availability, organ threat, gestational age, and whether termination would improve outcome. Ex. 12, at 307:6–309:19; Ex. 9, at 180:4–12, 184:19–185:11; Ex. 7, at 131:3–14. And the hypertension testimony uniformly distinguishes acutely treatable hypertension from uncontrolled hypertension or severe preeclampsia requiring delivery. Ex. 12, at 262:12–264:19; Ex. 10, at 142:5–143:23; Ex. 7, at 130:16–25.

2. Fatal fetal anomaly exception.

i. DPH's physician-reported data again prove that this exception has an understandable core. That data show that physicians have performed over 50 abortions under the fatal fetal anomaly exception involving more than a dozen conditions since August 2023. *See* Ex. 14.

And once again, Plaintiffs' own experience confirms this conclusion. Doe has performed ten to 15 abortions under this exception. Ex. 2, at 25:2–5. Tarleton has performed abortions under this exception too. Ex. 4, at 122:5–12. And Plaintiffs identified other circumstances in which they understood that the exception would permit them to perform an abortion. *See* ECF No. 165, at 36–37 (citing testimony from Plaintiffs and their experts). Along with these examples of “inclusion,” Plaintiffs identified cases in which the exception “exclud[es]” abortion. *Smith*, 415 U.S. at 578. Doe identified three to four cases each month in which she determined that a fetal anomaly did not meet the exception, compared to only about once a month when she was unable to decide. Ex. 1, at 6, 11–12. Thus, even crediting Doe's blanket estimate, she applied the exception to exclude diagnosed anomalies three or four times as often as she supposedly could not.

ii. As with the maternal health exception, Plaintiffs offer nothing compelling in response. They start by brushing aside clear cases. For instance, Plaintiffs try to discount Doe's three-to-four per month estimate by noting that Down syndrome was among the examples she identified. ECF No. 173, at 34–35. But Down syndrome, although not fatal, is a fetal anomaly. Determining that it does not meet the statutory definition is therefore a direct application of the exception.

On the inclusion side, Plaintiffs return to the argument that they can apply the exception “in only the most egregious cases.” *Id.* at 35. That admission, yet again, is outcome determinative. It recognizes that the exception has a core, “apply[ing] without question to certain activities.” *Cooper*, 842 F.3d at 842. Plaintiffs just don't like that the exception's core is narrow. But a policy

disagreement on the exception's scope doesn't make the exception unconstitutionally vague.

And though emphasizing disagreement over a few conditions is already impermissible margin probing, Defendants have demonstrated that their experts did not disagree. *See* ECF No. 167, at 16–19. The experts explained that Trisomy 18 often qualifies, distinguished treatable forms of HLHS from severe presentations accompanied by additional abnormalities, and distinguished amniotic-band syndrome's involvement of a limb from lethal involvement of the brain or chest. Those are applications of the statutory inquiry—whether that condition, with or without treatment, is incompatible with sustaining life after birth—not disagreements over what that inquiry means.

Plaintiffs add two Trisomy 13 citations but again identify no disagreement. *See* ECF No. 173, at 31. Austin testified that both Trisomy 13 and Trisomy 18 would qualify. Ex. 7, at 86:1–87:25. Draper likewise identified “trisomy 13” and “trisomy 18” as “cases where [she] would counsel that abortion is an option under the . . . fatal fetal anomaly exception.” Ex. 10, at 206:1–8. Buskmiller and Greig reached the same conclusion. Ex. 8, ¶ 41; Ex. 11, ¶ 55. Plaintiffs' new citations thus confirm agreement, not conflict.⁴

B. Plaintiffs' source-by-source objections fall flat.

1. Plaintiffs reject every way of demonstrating an ascertainable standard.

Plaintiffs' response reveals a consistent theme: “That's not specific enough.” Defendants first showed that the challenged words and phrases have ordinary meanings and appear throughout the law. Plaintiffs answered that the words must be considered together and in sequence. ECF No. 173, at 12–13. Defendants identified the same or materially similar phrases used together. But

⁴ Plaintiffs fare no better claiming Defendants' experts think “life-limiting” is easier to apply. ECF No. 173, at 33. Buskmiller explained that when she uses “life-limiting,” she means conditions historically described as “lethal” or “fatal,” distinguished that usage from broader quality-of-life definitions, and testified that she understands both “fatal fetal anomaly” and “incompatible with life.” Ex. 9, at 221:12–223:2.

Plaintiffs answered that the terms must be used in medicine. *Id.* at 13–14. Defendants then identified their use in medical sources, and Plaintiffs narrowed the required context to obstetrics. *Id.* at 15–17, 21–22, 31–32. Defendants pointed to more than 30 States that have used these terms in obstetrics for decades, and Plaintiffs nitpicked those too. *Id.* at 18–20. Defendants pointed to the presumed conditions as statutory examples, yet Plaintiffs proffered myriad reasons why those aren’t useful. *Id.* at 28–30. And when Defendants showed that Plaintiffs themselves use the same qualitative concepts in obstetric practice, Plaintiffs said that usage did not count because the Act carries criminal penalties. *See* ECF No. 173, at 18–20. No single source needs to be dispositive. But together they show the exceptions can be understood (and that’s not to mention the DPH data that demonstrate a constitutional core). Yet Plaintiffs keep demanding more.

Beyond this big-picture flaw in Plaintiffs’ response, their specific objections to each source fall flat. Take just four examples. *First*, there is Plaintiffs’ own use of the exceptions’ terms. They admit that they know what the exceptions’ terms mean “colloquially” and that they even use the terms “in colloquial conversations” with patients. ECF No. 173, at 16, 23–24. But, they claim, their use doesn’t give the 2023 Act any meaning because the Act has criminal penalties. *Id.* at 23–24. That argument fails. Criminal laws can (and regularly do) apply the ordinary meaning of the words as used “in conversation.” *Jones v. United States*, 529 U.S. 848, 855 (2000). What’s more, Plaintiffs’ own expert described terms “within the medical field” to include “language that is commonly used by clinicians in speaking about their work.” Ex. 5, at 187:16–20.

Second, there are other statutes, such as 42 U.S.C. § 12102’s use of “major bodily function.” Plaintiffs note that federal law defines that term, but the 2023 Act does not. ECF No. 173, at 22. Yet Defendants’ experts defined that term consistently with the U.S. Code. Both the experts and the U.S. Code include neurological, brain, respiratory, cardiovascular or circulatory,

bladder or kidney, endocrine, and reproductive systems. *Compare* 42 U.S.C. § 12102(2)(B), *with* ECF No. 167, at 6–7 (citing Defendants’ experts’ depositions). So even if the overlap isn’t identical, it’s substantial and shows the term has a core that physicians can (and do) understand.

Third, there are other States’ laws, which Plaintiffs say lack criminal penalties, have a subjective standard, or were challenged on other legal grounds.⁵ ECF No. 173, at 18–19. But penalties and state-of-mind protections do not change what the underlying words mean. Plaintiffs’ theory would mean the same words are intelligible when paired with a subjective standard but somehow become unconstitutionally vague if the legislature substitutes an objective one. That distinction concerns the governing standard, not what the words themselves mean. And tellingly, Plaintiffs do not point to any case holding that these words are incomprehensible.

Fourth, and significantly, there are the presumed conditions, which Plaintiffs say provide no help. *Id.* at 28–30. Multiple points rebut Plaintiffs’ claim. For starters, even if some presumed conditions aren’t considered “induced abortions,” Bingham admitted that these procedures are “billed and medically discussed as an abortion.” Ex. 3, at 112:8–9. Plus, including those on the list was necessary because, after *Dobbs*, some physicians speculated that new abortion laws might forbid treatment for things like ectopic pregnancy. *E.g., id.* at 112:7–16. And because all presumed conditions involve serious threats to a pregnant woman’s health, there’s no “navy blue” in this list. *See Johnson*, 576 U.S. at 603. At any rate, Plaintiffs only challenge a few conditions on this front, so their first point can do only a little work at best. The remaining, unchallenged presumed conditions constitute—or at minimum strongly support—a constitutional core.

Plaintiffs discount the whole list of conditions by saying that the 2023 Act does not

⁵ The Court’s earlier rulings (ECF Nos. 88, 110) took Plaintiffs’ allegations as true and held only that the claim could proceed, not that the Act was vague on a developed record.

explicitly say they can analogize to the presumed conditions and that Defendants’ assertion that they can is not enough. ECF No. 173, at 29. That flouts the text and common sense. The Act says that the list “is not intended to exclude or abrogate other conditions” that might permit an abortion. S.C. Code Ann. § 44-41-640(C)(2). So if some conditions are presumed to qualify—and the Act says other conditions qualify too—of course a doctor can analogize to similar conditions. To deny that would defy common sense because looking to a nonexhaustive list for guidance is a natural move to understand a statute. *See, e.g., URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 14 (1st Cir. 2011). Indeed, Plaintiffs’ own expert has explained that abortion laws should include presumed conditions for guidance. *See* ECF No. 165, at 26 (citing Buchbinder article).

Defendants’ discovery responses show this analogizing in action. Ex. 6, at 3–5; *see also* Ex. 7, at 142:17–143:25 (analogizing). But Plaintiffs say other physicians are incapable of doing this because “it is extremely difficult to predict if or when a particular patient will suffer a particular harm if she continues a pregnancy.” ECF No. 173, at 30. That again demands certainty that the 2023 Act doesn’t require. A physician does not have to predict that a patient “*will* suffer” a particular harm. As long as the physician can, in her reasonable medical judgment, conclude that the patient faces a serious risk of that harm, the exception permits an abortion.

2. Reasonable medical judgment helps physicians apply the exceptions.

Plaintiffs also contend that the reasonable medical judgment standard hurts, rather than helps, the exceptions. ECF No. 173, at 37–38. But once the exceptions have an ascertainable core, the use of an objective reasonableness standard rather than Plaintiffs’ preferred good-faith standard cannot erase it. ECF No. 167, at 25. And in any event, Plaintiffs’ arguments fail on their own terms.

Plaintiffs do not dispute that physicians may disagree while each exercises reasonable medical judgment. *See* ECF No. 173, at 37. Instead, they speculate that the State “*could* marshal

multiple experts to offer testimony that conflicts with the medical consensus on abortion.” *Id.* (emphasis added). That conjecture cannot justify presuming that State officials or factfinders will disregard the governing standard. *See United States v. Vuitch*, 402 U.S. 62, 72 n.7 (1971); ECF No. 167, at 37–38. More fundamentally, Plaintiffs’ phrasing reveals their mistake. The Act does not ask whether an abortion comports with some general “medical consensus on abortion.” It asks whether the physician reasonably applied the Act’s specified criteria to a particular patient.

The same conflation drives Plaintiffs’ argument that the Act “conflicts with evidence-based medicine,” making them unsure whether what “they view as reasonable medical judgment will count as reasonable medical judgment” under the Act. ECF No. 173, at 38. Plaintiffs’ own view does not supply the legal standard. The question is not whether Plaintiffs or ACOG regard an abortion as “reasonable,” but whether a reasonably prudent physician, knowledgeable about the patient and treatments, would conclude that the statutory criteria are met. S.C. Code Ann. § 44-41-610(13). Clinical evidence informs that judgment, but it does not replace the statutory threshold.

Finally, Plaintiffs say Defendants’ experts cannot assess the standard’s “breathing room” because they do not regularly perform abortions and do not share Plaintiffs’ fear of prosecution. ECF No. 173, at 38. But subjective fear does not determine the scope of an objective standard. Defendants’ experts treat the same maternal and fetal conditions and have counseled patients that abortion is an option. *See, e.g.*, Ex. 9, at 34:17–21; Ex. 10, at 31:8–32:5. And they explained that reasonable medical judgment allows physicians to consider all relevant circumstances and reach different conclusions within an objective range. *See* Ex. 7, at 195:25–196:8; Ex. 9, at 153:15–19; *accord* Ex. 13, at 26:12–25; *Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999). This argument reveals the real dispute: They say the Act is vague because it allegedly departs from their account of “evidence-based care.” But disagreement with the General Assembly’s policy choice does not

make that choice unintelligible. *See Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970).

III. The 2023 Act does not invite arbitrary enforcement.

Plaintiffs' only affirmative argument that the 2023 Act provides insufficient guidance to prosecutors is just a cross-reference to their summary judgment motion. ECF No. 173, at 36. Defendants have rebutted that argument already. *See* ECF No. 167, at 19–20, 35–37.

Plaintiffs try to cast aside the lack of prosecutions by insisting that history—or lack thereof—“is not an element of the vagueness inquiry.” ECF No. 173, at 36. But the Supreme Court has considered enforcement history relevant to the vagueness inquiry. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 150 (2007). So has the Fourth Circuit. As *Carolina Youth* explained, “this Court has rejected vagueness challenges where plaintiffs failed to provide evidentiary support that a law encouraged discriminatory enforcement.” 60 F.4th at 784 n.10. That’s why the court emphasized the “starkly disparate outcomes” stemming from the “3,735 referrals” plaintiffs had shown in assessing “[t]he risk of arbitrary enforcement” in that case. *Id.* at 776, 784. And it’s why a plaintiff in another case who “fail[ed] to cite *any* example of arbitrary or discriminatory enforcement . . . doom[ed] his claim.” *Green v. City of Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008).

Plaintiffs' lack of evidence on this point is insurmountable. They say that “the possibility of a physician being investigated or even prosecuted under the Abortion Ban is not remote.” ECF No. 173, at 37. That is both unsupported and unrealistic. The 2023 Act has been in effect for almost three years, and Plaintiffs cannot cite a single example of any prosecution, much less an arbitrary one. *See* Ex. 2, at 165:19–166:6; Ex. 3, at 204:18–205:11. What’s more, South Carolina law requires “[a]ny abortion performed in this State” to be reported. S.C. Code Ann. § 44-41-60. So prosecutors are aware of every abortion performed under the 2023 Act—and still, no prosecutions.

IV. Defendants are correct about the scope of any relief that Plaintiffs might obtain.

A. Plaintiffs essentially concede that injunctive relief must be limited to them. ECF No. 173, at 40–41. They offer no response to *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

B. Neither argument Plaintiffs make about severing the fatal fetal anomaly exception moves the needle. ECF No. 173, at 41–42. Even though the 2023 Act may not have a severability clause, the test under South Carolina law is ultimately whether the law remains “complete in itself” and whether the General Assembly would “presum[ably]” have passed the law without that provision. *Pinckney v. Peeler*, 862 S.E.2d 906, 915 (S.C. 2021); *see, e.g., Thayer v. S.C. Tax Comm’n*, 413 S.E.2d 810, 815 (S.C. 1992) (severing part of a law without a severability clause).

The 2023 Act’s “hallmark feature” is protecting unborn life once a fetal heartbeat is detected. *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 785 n.15 (S.C. 2023); 2023 Act, § 1. The fatal fetal anomaly exception is just that: an *exception* to this “hallmark feature.” Plaintiffs say because the legislature included it, the legislature wouldn’t have passed the Act without it. ECF No. 173, at 41. That argument swallows the severability doctrine. The real question is whether the legislature would prefer the heartbeat prohibition without the exception to the former 22-week regime. Plainly yes. Fatal-fetal-anomaly abortions account for less than 1% of abortions, ECF No. 165, at 39, while the former regime allowed about 1,000 abortions monthly, S.C. Dep’t of Public Health, *A Public Report Providing Statistics Compiled from All Abortions Reported to DPH, Jan. 1–Aug. 22, 2023*, Table 1, <https://tinyurl.com/5fthnkuv>. The “hallmark” feature remains intact.

CONCLUSION

The Court should grant Defendants’ Motion for Summary Judgment.

Respectfully submitted,

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August 4, 2026

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