

**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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The well-developed record in this case establishes that physicians and law enforcement officials do not know what the Health or Fatal Fetal Anomaly Exceptions mean. The record establishes that physicians are thus often unable to determine if or when a condition meets an Exception. To make matters worse, the Abortion Ban carries criminal penalties but lacks a scienter requirement. And there is no genuine dispute that its reasonable medical judgment standard only aggravates its vagueness. Plaintiffs are therefore entitled to summary judgment.¹

ARGUMENT

I. The Undisputed Evidence Establishes that the Health and Fatal Fetal Anomaly Exceptions are Unconstitutionally Vague.

A. Physicians Are Often Unable to Determine If or When a Condition Meets the Health Exception.

Defendants do not dispute that “serious risk” lacks any definition in medicine. *See* Defs.’ Resp. to Pls.’ Mot. Summ. J. 3–5, ECF No. 167 (“Defs.’ Resp. Br.”); Pls.’ Mem. in Supp. of Mot. Summ. J. 6, ECF No. 166-1 (“Pls.’ Br.”). Instead, they argue that this term is comprehensible to physicians in part because their experts have a “shared understanding” of its meaning. Defs.’ Resp. Br. 3–5. This argument fails for two reasons: (1) it disregards the concrete disagreements among Defendants’ experts on the meaning of “serious risk,” and (2) it ignores that even a “shared understanding” that a term is susceptible to numerous interpretations does not satisfy the Fourteenth Amendment’s requirements. *See* Pls.’ Br. 22–26; Pls.’ Mem. in Opp’n to Defs.’ Mot. Summ. J. 7–8, ECF No. 173 (“Pls.’ Resp. Br.”).

¹ This Court should reject Defendants’ conclusory request for a stay of any injunction pending appeal. *See* Defs.’ Resp. Br. 35 n.10. “[T]he party seeking a stay bears the burden of demonstrating the presence of the exacting standards for the granting of such relief.” *vonRosenberg v. Lawrence*, 429 F. Supp. 3d 175, 181 (D.S.C. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). In any event, Defendants would be unable to meet those exacting standards.

First, although Defendants attempt to minimize the clashes among their experts, the record reveals material disagreements on whether “serious risk” is qualitative or quantitative and the likelihood or severity of risk that it refers to.² *See* Pls.’ Br. 6–7. *Compare* Defs.’ Ex. 14 ¶ 22, *with* First App. 337–38;³ *compare* First App. 263–66, *with id.* 343, *and id.* 329–30. These are not trivial disagreements, but profound conflicts that illustrate physicians’ uncertainty about what “serious risk” means and how to assess whether a risk is “serious.”⁴ *See also* Pls.’ Resp. Br. 7–8.

Second, when Defendants’ experts allegedly “agree,” they merely restate the law and thus fail to shed light on its meaning. For example, Dr. Greig testified that a “serious” risk is one that is “significant” or “concerning.” Defs.’ Ex. 15, at 127:8–18. Likewise, Dr. Austin testified that a “serious risk” is a “significant” and “major” risk. Third App. 634. These supposed definitions replace “serious” with equally unclear synonyms that fail to identify the distinction between a lawful and unlawful abortion. *See also* First App. 358 (Dr. Greig testifying: “[W]hat’s serious to you may not be serious to me.”).

For similar reasons, the fact that Defendants’ experts all appear to recognize that risk assessment depends on the nature of a patient’s medical condition does not help show that the Health

² Defendants incorrectly argue that Dr. Greig’s testimony on “moderate risk” does not create a true disagreement. *See* Defs.’ Resp. Br. 5. To the contrary, this testimony meaningfully conflicts with Dr. Buskmiller’s testimony, which asserted that physicians are trained to recognize “low, moderate, or high” risks, and that “moderate risks” are “serious.” *Compare* First App. 263–66, *with id.* 343.

³ 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 Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment, ECF No. 173. Citations to “Third App.” refer to the exhibits filed with this brief.

⁴ Defendants cite Dr. Draper’s expert report, which states that “serious risk” does not refer to “statistical probability alone,” to support their argument that Dr. Draper recognizes the role of statistical probability in risk analysis. Defs.’ Resp. Br. 4 n.2. But during her deposition, Dr. Draper repeatedly minimized the role of “statistical probability” and explained that it is often difficult to obtain data on probabilities, “especially in emergency situations.” First App. 329–30.

Exception provides adequate notice to physicians. *See* Defs.’ Resp. Br. 4–5. That even a small risk of death may be “serious” while a minor affliction like a fever or rash is not, *see* First App. 337; Defs.’ Ex. 15, at 221:2–6, says nothing about how a physician determines whether or when a complex, evolving, and unpredictable condition like reduced kidney function or pre-existing heart disease reaches the point of a “serious risk,” *see, e.g.*, First App. 170–72; *see also* Pls.’ Br. 2, 9–11.

Likewise, Defendants fail to reconcile their experts’ understandings of “major bodily function.” *See* Defs.’ Resp. Br. 2–3; Pls.’ Br. 8. The existence of *some* overlapping organs and bodily systems in *some* of Defendants’ experts’ definitions does not make their definitions the same. *Compare* First App. 267–69, *with* First App. 381–82, *and* First App. 321. Faced with these conflicting interpretations, physicians are left to guess, for example, whether a condition affecting the limbs, spleen, or pancreas meets the Health Exception.⁵ Pls.’ Br. 8; First App. 37, 143, 402.

Defendants also fail to rebut the evidence that physicians cannot tell whether the Health Exception permits them to account for social determinants of health or their patients’ understanding of what risks are acceptable to them. *See* Pls.’ Br. 8–9; Defs.’ Resp. Br. 5–6. They ignore the fundamental disagreement between Dr. Greig and Dr. Buskmiller over whether the Health Exception allows physicians to consider a patient’s distance from an appropriate healthcare facility. *Compare* First App. 265–66, 281, *with id.* 363. And while Defendants suggest that the Health Exception clearly does not permit physicians to consider a patient’s understanding of what risks are acceptable to them, *see* Defs.’ Resp. Br. 6, physicians are uncertain on this point, *see, e.g.*, First App. 35–36, 168, 344–45; Pls.’ Br. 7; *see also* Defs.’ Ex. 11, at 133:6–19.

⁵ Defendants miss the point when they argue that Plaintiffs’ “concession” that they understand the definition of “irreversible” is “dispositive” to their claim. Defs.’ Resp. Br. 3. In fact, Plaintiffs have consistently conveyed that, while they understand the term “irreversible” in other contexts, they are often unable to determine whether a patient is at a risk of an “irreversible” impairment in the context of obstetrics. Pls.’ Br. 7–8; *see also* First App. 142–43, 253–54, 455–56.

Defendants wrongly accuse Plaintiffs of relying on “edge cases” when discussing physicians’ inability to apply the Health Exception to three specific conditions. Defs.’ Resp. Br. 7; *see* Pls.’ Br. 9–12. The undisputed evidence shows that physicians are often unable to determine whether a particular patient meets the Health Exception. Pls.’ Br. 5–6; Pls.’ Resp. Br. 17–18. The three conditions highlighted in Plaintiffs’ opening brief illustrate just a few of the many conditions that physicians cannot assess under the Health Exception. Pls.’ Br. 9–12.

Defendants all but ignore the experts’ stark disagreement about whether a patient with PPROM can obtain an abortion under the Health Exception if she is not displaying signs of infection.⁶ *See* Pls.’ Br. 10–11; Defs.’ Resp. Br. 10. Two of Defendants’ experts testified that the risk of infection accompanying PPROM does not satisfy the Health Exception, First App. 202, 353–57, while Dr. Doe and a group of MUSC physicians have come to the opposite conclusion, *id.* 303–04, 521. Not only does this disagreement leave physicians unable to determine when a patient with PPROM is eligible for an abortion, Pls.’ Br. 10–11, but it also illustrates the Health Exception’s failure to provide notice of the imminence or severity of risk required for *any* medical condition. It is undisputed that a patient with PPROM can progress from fairly stable to critical very quickly. Pls.’ Br. 10; First App. 132, 357. And most patients with PPROM eventually develop an infection, which can be dangerous or even fatal. First App. 132, 356–57, 521.

Moreover, Defendants’ experts seem to take an “I’ll know it when I see it” approach to the question of when a patient with lupus is eligible for an abortion. *See, e.g.*, First App. 274, 331,

⁶ Defendants’ argument that this is an “edge-case disagreement” is belied by both the facts and the law. Defs.’ Resp. Br. 29. First, as Defendants recognize, PPROM affects up to 4% of all pregnancies, *id.* at 10 n.7, and is therefore a relatively common complication. Second, to the extent that Defendants suggest that PPROM is uncommon because most pregnancies do not involve complications, pregnancies that physicians do not even seek to terminate under the Health Exception have no bearing on whether the Exception is unconstitutionally vague. *See* Pls.’ Resp. Br. 18–19.

349–51; Defs.’ Ex. 15, at 184:6–185:14. But such an approach only reinforces the Health Exception’s failure to provide standards for a physician to distinguish between a permissible and impermissible abortion. It is undisputed that lupus is unpredictable; pregnancy can exacerbate lupus; and deterioration of kidney and other organ functions can occur suddenly.⁷ First App. 39–40, 214–15, 331. Against this backdrop, Defendants’ experts’ insistence that a patient with lupus can obtain an abortion if her lupus is “worsening and not improving” or she is “going to die,” *see id.* 349–51; Defs.’ Ex. 15, at 185:10–14, provides no clarity on how a physician determines when a patient’s lupus is bad enough to warrant an abortion under the Health Exception, *see, e.g.*, First App. 39–41, 481; Pls.’ Br. 9–10.

Finally, Defendants, not Plaintiffs, misrepresent the record on pulmonary embolism. Dr. Doe clarified that she “ultimately . . . did not reach confidence that [a patient’s history of pulmonary embolism in a prior pregnancy] would meet the legal definition” of the Health Exception because of the Exception’s lack of clarity. Doe Dep. 198:18–199:20, ECF No. 161-2; *see* Pls.’ Resp. Br. 19; *see also* First App. 41–42; Bingham Dep. 268:17–269:3, ECF No. 160-2. In addition, Defendants’ experts disagree on whether a patient with an active pulmonary embolism qualifies for an abortion.⁸ *Compare* First App. 364, *with id.* 327–28, 332–33. Likewise, the fact that Defendants’ experts testified that a patient who had suffered a pulmonary embolism during a prior pregnancy “*might*” qualify for an abortion in some circumstances, *see* First App. 365 (emphasis added), does not address whether such a patient meets the Health Exception.

⁷ Defendants wrongly discount Dr. Doe’s struggles to determine whether her patients with lupus met the Health Exception. *See* Defs.’ Resp. Br. 10 n.6. Dr. Doe’s testimony demonstrates that the Health Exception’s failure to provide discernible standards has prevented her from determining whether or when a patient’s lupus is severe enough to qualify for an abortion. First App. 39–40.

⁸ Plaintiffs do not mischaracterize Dr. Draper’s testimony. *See* Defs.’ Resp. Br. 9 n.5. She twice conveyed that a patient with a pulmonary embolism would meet the Health Exception only if she “was going to die” due to a “massive saddle pulmonary embolus.” First App. 327–28, 332–33.

B. Physicians Are Often Unable to Determine If or When a Fetal Anomaly Meets the Fatal Fetal Anomaly Exception.

Defendants cannot escape the undisputed evidence on the incomprehensibility of the Fatal Fetal Anomaly Exception. *See* Defs.’ Resp. Br. 10–15. Defendants do not dispute that the terms in the Exception have no medical definition. *See id.*; Pls.’ Br. 12. And Defendants’ experts profoundly disagree on the scope and meaning of the Fatal Fetal Anomaly Exception.⁹ *Compare* First App. 205–06; 219–20, *with id.* 282, *and id.* 322–23. *See also* Pls.’ Br. 3, 13–16.

The three fetal anomalies that Plaintiffs highlight in their opening brief—Trisomy 18, Hypoplastic Left Heart Syndrome (“HLHS”), and Amniotic Band Syndrome—are not “margin[al]” situations. *See* Defs.’ Resp. Br. 12. The undisputed record reflects that South Carolina physicians are often unable to determine whether or when the Fatal Fetal Anomaly Exception permits an abortion for these and other anomalies. *See* Pls.’ Br. 12–16; Pls.’ Resp. Br. 27.

While Dr. Austin testified that Trisomy 18 is a “clear-cut” application of the Fatal Fetal Anomaly Exception, Defs.’ Ex. 9, at 175:9–12, Dr. Greig testified that not every doctor would agree that Trisomy 18 meets the Fatal Fetal Anomaly Exception, First App. 352–53; *see also id.* 164–65. And Dr. Draper unhelpfully testified that Trisomy 18 *may* meet the Exception depending on the “surrounding circumstances” and each patient’s diagnosis.¹⁰ *Id.* 334–35. Confusingly, Dr.

⁹ Defendants argue that Dr. Draper agrees with their other experts about the meaning of the Fatal Fetal Anomaly Exception because she testified that some anomalies may meet the Exception even if the infant could live over “a month.” Defs.’ Resp. Br. 11. While Dr. Draper acknowledged that some infants with life-limiting anomalies may live over a month, her only example was anencephalic infants, who she testified can live for “several months.” First App. 323. But it is undisputed that some life-limiting anomalies can result in life for several *years*. *See* Pls.’ Br. 13–14.

¹⁰ Defendants are wrong that Dr. Draper’s testimony that “[e]very patient is different” was not “in the context of Trisomy 18.” Defs.’ Resp. Br. 12. To the contrary, Dr. Draper was asked whether she believed that “every fact scenario is different” in the context of Trisomy 18, Trisomy 13, and anencephaly. First App. 334. Moreover, while Dr. Draper initially discussed counseling a patient with a Trisomy 18 diagnosis that abortion was an option, she later testified that she does not recall

Buskmiller testified that Trisomy 18 meets the Exception even though she believes that “incompatible with sustaining life after birth” generally refers to death within six months, and babies with Trisomy 18 can live for many years—including, in rare cases, up to 18 years. *See id.* 275–76, 278–80, 282, 287–88. Given this uncertainty, it is unsurprising that no physician in South Carolina has provided an abortion to a patient with a fetal diagnosis of Trisomy 18 that was not accompanied by other severe anomalies. *See id.* 47–48, 308, 426–27, 503–10; Pls.’ Br. 17.

Additionally, Defendants’ experts’ suggestion that HLHS *may* qualify for an abortion “depending on the severity” of the diagnosis, First App. 207–08, gives no guidance on, for example, how small a fetus’s left ventricle must be for a patient to obtain an abortion, *see id.* 383–85; *see also id.* 49–50, 181–82, 424, 473; Pls.’ Br. 15–16.¹¹ Likewise, that Amniotic Band Syndrome may qualify for an abortion if it is a “severe form,” First App. 386–87, provides no guidance for a physician to determine when the condition reaches that point, *see id.* 51, 483; *see also id.* 289–91; Pls.’ Br. 16. Dr. Doe describes being unable to determine whether the Fatal Fetal Anomaly Exception permitted an abortion for a patient with an Amniotic Band diagnosis, even though she believed the band was affecting the fetus’s spine and multiple limbs.¹² *See* First App. 51, 483; *see also id.* 289–91.

caring for a patient with Trisomy 18 since the Abortion Ban took effect. Third App. 639; *see* Defs.’ Resp. Br. 12.

¹¹ Contrary to Defendants’ argument, neither Dr. Doe nor Dr. Tarleton has determined that HLHS does not meet the Fatal Fetal Anomaly Exception. Defs.’ Resp. Br. 14. Dr. Doe testified that she was unable to determine whether a patient with an HLHS diagnosis met the Exception. First App. 49–50. Dr. Tarleton testified that she did not provide an abortion to a patient with an HLHS diagnosis because she feared that doing so could subject her to criminal penalties. First App. 181–82, 424.

¹² Defendants wrongly argue that patients’ concerns about their fetal anomaly diagnoses are clearly irrelevant under the Fatal Fetal Anomaly Exception. *See* Defs.’ Resp. Br. 11. However, the undisputed evidence shows that it is unclear whether the Exception permits physicians to account for such concerns. *See* Pls.’ Br. 13; First App. 17–18, 246, 425.

C. The Offices of the Attorney General and Certain Circuit Solicitors Do Not Know What the Health or Fatal Fetal Anomaly Exceptions Mean.

This Court should reject Defendants’ efforts to downplay the undisputed evidence that the Health and Fatal Fetal Anomaly Exceptions lack minimal standards to guide law enforcement. *See* Pls.’ Br. 17–19; Defs.’ Resp. Br. 15–16. First, although the Attorney General’s Office referred to its discovery response when asked about the Fatal Fetal Anomaly Exception, that response did not clarify the meaning of the Exception because it resorted to dictionary definitions devoid of context. *See* Defs.’ Ex. 7, at 6. Second, when asked about key elements of the Abortion Ban—including the “reasonable medical judgment” standard and burden of proof—the Attorney General’s Office repeatedly failed to provide clear answers and explicitly left open the possibility that a burden other than “reasonable doubt” applies to the Ban.¹³ First App. 435–38. Third, like the Attorney General’s Office, certain Circuit Solicitors’ Offices lack even a basic understanding of the Health and Fatal Fetal Anomaly Exceptions. Pls.’ Br. 17–19.

II. Criminal Statutes Such as the Abortion Ban Require Heightened Clarity.

Defendants concede that criminal statutes like the Abortion Ban require “heightened clarity.” Defs.’ Resp. Br. 20. But they repeatedly ignore why. *See, e.g.*, Defs.’ Resp. Br. 20, 23. The ramifications of not knowing whether treating a particular patient would violate the Ban may be nothing short of imprisonment and losing a livelihood that a physician has worked thirty years for. *See Manning for City of Roanoke v. Caldwell*, 930 F.3d 264, 272–73 (4th Cir. 2019); Pls.’ Br. 4.

Defendants erroneously cite *Martin v. Lloyd*, 700 F.3d 132, 134 (4th Cir. 2012), in support of the notion that requesting facial relief lowers the clarity required of criminal laws. *See* Defs.’ Resp. Br. 20. But all *Martin* shows is that criminal penalties are one (albeit important) factor in

¹³ Defendants ignore the Abortion Ban’s momentous penalties when they argue that the Attorney General’s confusion about the Ban can simply be corrected on appeal. *See* Defs.’ Br. 16.

the vagueness inquiry. 700 F.3d at 135. Unlike the Abortion Ban, the law in *Martin* did not threaten to destroy the plaintiffs' lives because the South Carolina Supreme Court had "provided significant clarity" on the meaning of the disputed phrase. *Id.* at 136.

Defendants' reliance on *United States v. Petrillo*, 332 U.S. 1 (1947), is equally misplaced for two reasons. *See* Defs.' Resp. Br. 20–21. First, unlike *Petrillo*, the present case does not involve "marginal cases." 332 U.S. at 7; *supra* at 4, 6. Second, *Petrillo* turned not on watering down the certainty required of criminal laws, but on the fact that Plaintiff "really seem[ed]" to be arguing that "no statutory language could meet the problem Congress had in mind." 332 U.S. at 7.

III. The Health and Fatal Fetal Anomaly Exceptions Fail to Notify Physicians of When They Can Provide an Abortion.¹⁴

Defendants attack a strawman in urging this Court to reject "Plaintiffs' proposed rule that medical regulations are vague" whenever they lack "hypertechnical, establishment-blessed terms" because that rule would ignore the State's "power to regulate medicine." Defs.' Resp. Br. 25, 27. But Plaintiffs do not challenge the State's ability to reasonably regulate certain aspects of medicine. Instead, they ask this Court to apply longstanding precedent requiring any such regulation to be comprehensible to the people it regulates in the context where they have to apply it. Pls.' Resp. Br. 8–10.

Additionally, Defendants are unable to distinguish cases that held that medical regulations were unconstitutionally vague in part because they lacked any medical meaning. *See* Defs.' Resp. Br. 25–26. *McCormack v. Herzog* held that an abortion restriction turned on "subjective view-

¹⁴ Defendants are flatly wrong that *United States v. Vuitch*, 402 U.S. 62 (1971), rejected a vagueness challenge to a health exception that was less precise than the Health Exception here. *See* Defs.' Resp. Br. 24. In *Vuitch*, the Court held that it was sufficiently clear that "health" included mental health because at least two other courts had held so based on how physicians practice medicine. 402 U.S. at 71–72.

points rather than objective facts,” Defs.’ Resp. Br. 26, because “[n]either [of its] term[s] [were] defined in the statute, *nor* [were] they terms of art with specific definitions in the medical context.” 788 F.3d 1017, 1031 (9th Cir. 2015) (emphasis added). This is also true of the Health Exception. S.C. Code Ann. § 44-41-640(B)(1)–(C); Pls.’ Resp. Br. 4–7. Likewise, *Forbes v. Woods* held that a prohibition against “experimentation” or “investigation” other than “routine pathological investigation” involving an embryo or fetus from an induced abortion lacked a constitutional core in part because “there is no single definition of ‘experimentation’ in the scientific and medical communities” and the “absence of a statutory definition of ‘routine pathological examination’ [wa]s not remedied by any ‘official’ standards in the medical community.” 71 F. Supp. 2d 1015, 1017–20 (D. Ariz. 1999) (citations omitted).

Defendants are also unable to distinguish cases that held that laws were unconstitutionally vague in part because experts significantly disagreed about the circumstances to which the laws applied. *See* Defs.’ Resp. Br. 26. The fact that *United States v. Forbes* involved as-applied rather than facial relief did not affect its conclusion that reasonably intelligent people “necessarily” had to “guess” whether a particular drug met a statutory definition because “where there is no scientific consensus, criminal culpability will turn solely on a ‘battle of the experts’ at trial.”¹⁵ 806 F. Supp. 232, 238 (D. Colo. 1992).

¹⁵ Notably, Defendants do not dispute that *Causeway Medical Suite v. Foster* held that a ban on particular abortions was unconstitutionally vague in part because there was “a great deal of disagreement among the experts . . . over which procedures are prohibited by the [ban].” 43 F. Supp. 2d 604, 617 (E.D. La. 1999); Defs.’ Resp. Br. 26. Defendants instead falsely insist that the experts in the present case do not disagree about “the law’s application.” Defs.’ Resp. Br. 26; *see supra* at 4–7. Defendants also incorrectly argue that *Foster* hinged on abortion being a constitutional right at the time. *See* Defs.’ Resp. Br. 26. Although this affected the clarity required of the ban, it did not affect the court’s treatment of expert disagreement as evidence of the ban’s unconstitutional vagueness. *Foster*, 43 F. Supp. 2d at 616–18.

IV. The Abortion Ban Lacks a Constitutional Core.

A. The Health Exception Lacks a Constitutional Core.

Contrary to Defendants' assertions, *see* Defs.' Resp. Br. 27–29, Plaintiffs have provided extensive, undisputed sworn testimony that the handful of physicians who are willing to provide abortions in South Carolina are regularly unable to determine if they can provide an abortion under the Health Exception, *supra* at 4; First App. 12, 45; Doe Dep. 122:17–25, ECF No. 161-2; Bingham Dep. 37:6–16, 241:2–5, ECF No. 160-2; Tarleton Dep. 36:12–24, 131:7–11, 142:10–23, ECF No. 162-2. Defendants' assertions that their experts understand the Health Exception are especially unpersuasive because two of their three South Carolina experts do not provide abortions at all, and the remaining expert has provided only two abortions under the Health Exception, both for pre-viable PPROM.¹⁶ First App. 324; Second App. 527; Third App. 638, 643–44; *see supra* at 2–5.

Defendants ignore the law and the record when they point to the relatively few abortions provided under the Health Exception as proof that it has a constitutional core. *See* Defs.' Resp. Br. 28; *compare* Defs.' Ex. 20, *with* Pls.' Resp. Br. 17–18. “[T]he Supreme Court recently rejected (twice!) the theory that a vague provision is constitutional merely because there is *some* conduct that clearly falls within the provision’s grasp.” *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 785 (4th Cir. 2023) (emphasis added) (citation omitted). In any event, neither Plaintiffs nor Dr. Tarleton have ever provided an abortion and believed that the patient clearly met the Health Exception. *See* First App. 255, 300, 311–13, 417. Dr. Bingham has never felt confident enough to provide an abortion under the Health Exception. Defs.' Ex. 5, at 2, ECF No. 165-5. And Dr. Doe

¹⁶ Defendants rely on inapposite cases to support their claim that the Health Exception has a constitutional core. *See* Defs.' Resp. Br. 17–18. Unlike the plaintiffs in those cases, Plaintiffs in the present case do not depend on hypothetical or marginal cases to establish that the challenged law lacks a core of meaning. Pls.' Resp. Br. 17–18; *see* Defs.' Resp. Br. 17–18.

has generally only felt confident enough to do so when a patient was suffering from multiple, debilitating medical conditions. Defs.' Ex. 1, at 3–4; Doe Dep. 185:1–187:1, ECF No. 161-2. Most of the relatively few abortions that other physicians have provided under the Health Exception have also involved comorbidities.¹⁷ Defs.' Ex. 20.

B. The Fatal Fetal Anomaly Exception Lacks a Constitutional Core.

As with the Health Exception, Plaintiffs have provided extensive, undisputed sworn testimony that the handful of physicians who are willing to provide abortions in South Carolina are regularly unable to determine if they can provide an abortion under the Fatal Fetal Anomaly Exception. *Supra* at 6; First App. 12, 45; Doe Dep. 25:15–26:3, 122:17–25, ECF No. 161-2; Tarleton Dep. 36:12–24, 131:7–11, 142:10–23, ECF No. 162-2. Defendants' assertion that their South Carolina experts understand the Fatal Fetal Anomaly Exception is again especially unpersuasive because those experts do not provide abortions for fetal anomalies and have never needed to apply the Exception to an actual patient. *See supra* at 6–7; Third App. 635–36, 640–41, 645.

Defendants again ignore the law and the record when they point to the abortions provided under the Fatal Fetal Anomaly Exception as proof that it has a constitutional core.¹⁸ *See* Defs.' Resp. Br. 30; *supra* at 11. As with the Health Exception, neither Plaintiffs nor Dr. Tarleton have ever provided an abortion and believed that the patient clearly met the Fatal Fetal Anomaly Exception.¹⁹ *See* First App. 53–54, 300, 428. Dr. Doe has generally only felt confident enough to do

¹⁷ Psychological conditions and other conditions for which physicians do not even seek to provide an abortion are irrelevant to whether the Exception has a constitutional core. *See* Pls.' Resp. Br. 18–19.

¹⁸ Defendants also contend that Plaintiffs have identified “many anomalies” that do not meet the Fatal Fetal Anomaly Exception, but they only cite testimony that is immaterial to the Exception. *See* Defs.' Resp. Br. 30.

¹⁹ Dr. Bingham does not recall personally treating a patient with a fetal anomaly diagnosis in South Carolina after the Abortion Ban took effect because such patients were typically referred to a maternal fetal medicine specialist where she worked. Defs.' Ex. 5, at 2, ECF No. 165-5.

so when a fetus has been diagnosed with multiple, severe anomalies. Defs.’ Ex. 1, at 5–6; First App. 488. Most of the abortions that other physicians have provided under the Exception have also involved comorbidities.²⁰ Defs.’ Ex. 20.

V. The Reasonable Medical Judgment Standard Exacerbates the Abortion Ban’s Vagueness.

Defendants cannot reframe *Colautti v. Franklin*, 439 U.S. 379 (1979), as favorable to themselves. *See* Defs.’ Resp. Br. 21–22. As in *Colautti*, the Abortion Ban “subjects the physician to potential criminal liability without regard to fault.”²¹ 439 U.S. at 394. And as in *Colautti*, “[t]he perils of strict criminal liability” are “particularly acute” because of the “uncertainty” of the determination at issue.²² *Id.* at 395; *see* Pls.’ Br. 9–16. Defendants themselves acknowledge “the complex constraints and circumstances that obstetrics sometimes presents.” Defs.’ Resp. Br. 23. As in *Colautti*, physicians must ultimately make an “either-or” decision—in this case, whether to provide a patient an abortion or refer the patient outside South Carolina. *Id.* at 22.

To be sure, Plaintiffs strive to exercise reasonable medical judgment and understand that physicians can reasonably disagree with one another. *See* Defs.’ Resp. Br. 22. But because the Ban itself and testimony by Defendants’ experts sometimes conflicts with the standard of care, Pls.’ Br. 17, 29, there is no assurance that Plaintiffs’ application of reasonable medical judgment to the facts of a particular patient will comport with what the prosecution’s experts in a criminal case

²⁰ Pregnancies that do not involve a fetal anomaly are irrelevant to whether the Exception has a constitutional core. Pls.’ Resp. Br. 27–28.

²¹ Defendants are flatly wrong that the Court’s holding in *Women’s Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), that an abortion statute was unconstitutionally vague because it lacked a scienter requirement turned on the then-constitutional right to abortion. *See* Defs.’ Resp. Br. 23. The court simply considered that the statute’s vagueness would chill abortions. *Voinovich*, 130 F.3d at 205.

²² Defendants again attack a strawman in accusing Plaintiffs of arguing that a statute that requires a jury to determine if particular conduct was reasonable, or makes it likely that prosecutions will involve expert testimony to that effect, is automatically vague. *See* Defs.’ Resp. Br. 21.

regard as reasonable medical judgment, *see State v. Zurawski*, 690 S.W.3d 644, 663–64 (Tex. 2024). This is not some “contested-issue rule.” *See* Defs.’ Resp. Br. 24. Rather, it is the recognition in *Voinovich* that it is “unlikely that the prosecution could not find a physician willing to testify that [an abortion provider] did not act reasonably.”²³ 130 F.3d at 205.

VI. The Abortion Ban Authorizes and Encourages Arbitrary and Discriminatory Enforcement.

Defendants’ contentions that the Abortion Ban provides sufficient guidelines for law enforcement boil down mostly to the falsehoods that the Exceptions define their terms, *see* S.C. Code Ann. § 44-41-610(5); *supra* at 10; physicians can apply the Exceptions, *see supra* at 4–7; and the reasonable medical judgment standard mitigates the Abortion Ban’s vagueness, *see supra* at 13–14.²⁴ Defendants’ reliance on the Thirteenth Circuit Solicitor’s testimony about the Health Exception is misplaced because it merely restates the Exception. *See* Defs.’ Resp. Br. 32.

Further, Defendants conflate a prosecutor consulting medical experts to help determine if a particular abortion violated the Abortion Ban with having to consult medical experts to determine what the Ban means. *See* Defs.’ Resp. Br. 32–33. The former is to be expected. The latter illustrates the Ban’s unconstitutional vagueness. “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *United States v. Williams*, 553 U.S. 285, 306 (2008). The undisputed evidence demonstrates that the Attorney General and certain

²³ Defendants’ efforts to compare this case to *Vuitch* fail. In *Vuitch*, the Court understandably dismissed the notion that juries “might convict doctors in any abortion case” given the “well-established methods defendants may use to protect themselves against such jury prejudice.” 402 U.S. at 72 n.7.

²⁴ These falsehoods are some of the reasons that Defendants are unable to distinguish *Carolina Youth Action*. *See* Defs.’ Resp. Br. 34–35. There, the Court held that the challenged law encouraged arbitrary or discriminatory enforcement because it “[l]ack[ed] any meaningful standards,” not because of the number of prosecutions under the law. *Carolina Youth Action*, 60 F.4th at 784.

Circuit Solicitors must consult medical experts to determine what the Ban means. Pls.’ Br. 17–19. Thus, Defendants’ examples of how medical experts are typically used in criminal cases are immaterial to Plaintiffs’ vagueness claim. *See* Defs.’ Resp. Br. 32–33.

Defendants maintain that physicians’ fears of prosecution are illegitimate solely because no physician has been prosecuted under the Abortion Ban yet. *See* Defs.’ Br. 28. But prosecution history is not an element of the vagueness inquiry, which examines whether a law’s standardlessness “authorizes or encourages” seriously discriminatory enforcement. *Williams*, 553 U.S. at 304.²⁵ Moreover, Defendants have not disclaimed that the Attorney General and Circuit Solicitors are authorized to prosecute any physician who they conclude violated the Abortion Ban. S.C. Code Ann. §§ 1-7-320, 1-7-350. Yet they lack standards to guide their enforcement.²⁶

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.²⁷

²⁵ Defendants overlook that *Gonzales v. Carhart*, 550 U.S. 124, 150 (2007), *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982), and *Green v. City of Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008), all affirm and apply this standard. *See* Defs.’ Resp. Br. 33–34.

²⁶ Defendants seem to have abandoned their flawed argument that the “no set of circumstances” standard applies to Plaintiffs’ vagueness claim. *See* Defs.’ Resp. Br. 19 (admitting that “one extreme example might not save an otherwise vague statute”). But Defendants continue to wrongly apply the overbreadth standard to Plaintiffs’ vagueness claim. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 52, 56 (1999); *Carolina Youth Action Project*, 60 F.4th at 786; *Manning*, 930 F.3d at 272; *Doe v. Cooper*, 842 F.3d 833, 842–45 (4th Cir. 2016); *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Env’t Control*, 317 F.3d 357, 366 (4th Cir. 2002).

²⁷ This Court could grant Plaintiffs as-applied relief if it were to determine that they are not entitled to facial relief. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010) (“[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.”); Fed. R. Civ. P. 54(c).

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Respectfully submitted,

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