No. 20-13024

In the

United States Court of Appeals

for the Eleventh Circuit

SisterSong Women of Color Reproductive Justice Collective, et al.,
Plaintiffs-Appellees,

v.

Brian Kemp, Governor of the State of Georgia, in his official capacity, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia.
No. 19-cv-02973 — Steve C. Jones, *Judge*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

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/s/ *Andrew A. Pinson*
Andrew A. Pinson

STATEMENT REGARDING ORAL ARGUMENT

The state officials request oral argument in this case. The district court enjoined an act of Georgia's legislature in its entirety, an extraordinary remedy which alone warrants full and careful review. Moreover, the court based its injunction on multiple novel legal theories, including application of a new rule that any pre-viability abortion restriction is per se unconstitutional regardless of any evidence the State could proffer in defense of its law. The court also invalidated a number of provisions of the challenged law that have nothing to do with abortion and that were never specifically challenged by the plaintiffs or found unconstitutional. Oral argument will aid the Court's review of these and other important legal issues.

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JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C.A. § 1331 because plaintiffs argued that Georgia's Living Infants Fairness and Equality Act ("LIFE Act") infringed rights guaranteed by the United States Constitution.

This court has appellate jurisdiction under 28 U.S.C.A. § 1291. The district court entered final judgment after granting plaintiffs' motion for summary judgment.

This appeal is timely because the district court entered final judgment on July 13, 2020, and defendants-appellants filed a notice of appeal less than 30 days later, on August 11, 2020.

STATEMENT OF ISSUES

1. Whether a state law that restricts elective abortions of unborn children after a heartbeat is detected is per se unconstitutional without consideration of the state interests that support the law or any opportunity for the State to build a record to defend the law.

2. Whether a state law that defines "natural person" to mean "any human being, including an unborn child" violates the substantive due process doctrine or is unconstitutionally vague on its face.

3. Whether any unconstitutional provisions of the LIFE Act are severable from the rest of the Act, which contains an express severability clause and seeks to promote the well-being of the unborn through several other provisions that have nothing to do with abortion.

INTRODUCTION

Georgia's Living Infants Fairness and Equality Act (the "LIFE Act") is a comprehensive measure to protect the life of the unborn and promote the wellbeing of unborn children. The Act restricts elective abortions after an unborn child possesses a detectable heartbeat. But many other provisions of the Act—including its expansion of tax benefits and enhanced child support for pregnant women—promote the well-being of the unborn in ways that have nothing to do with abortion.

Plaintiffs, though, sued Georgia's governor, attorney general, public health commissioner, members of the Georgia Composite Medical Board, and six district attorneys to enjoin enforcement of the *entire* LIFE Act, including provisions they have never alleged to be unconstitutional. The district court preliminarily enjoined the Act and later entered final judgment declaring the Act unconstitutional in its entirety.

The district court's invalidation of the entire LIFE Act exceeded its proper judicial role and should be reversed. The court invalidated the Act's abortion limitation on the theory that it was an abortion "ban" that was per se unconstitutional—a novel rule of decision that has no basis in Supreme Court precedent—and invoked that same rule to bar the State from building a record to

defend its enactment. The court concluded that defining "natural persons" to include unborn children violated substantive due process because Supreme Court decisions rejected that interpretation of "person" as used in the Fourteenth Amendment—ignoring that the LIFE Act defines "natural persons" only for purposes of *state* law. The court found that same definition unconstitutionally vague on its face without applying the proper standard for facial challenges or even explaining how the definition's language was vague. And the court enjoined every single provision of the Act—including many that have nothing to do with abortion—overriding the Act's express severability clause, Georgia law's strong presumption in favor of severability, and the legislature's broader purpose to promote the well-being of unborn children.

At bottom, the district court's sweeping injunction flouts the Supreme Court's instruction that federal courts considering constitutional challenges should not "nullify more of a legislature's work than is necessary." For these reasons and more, the decision below should be reversed.

STATEMENT OF THE CASE

A. The LIFE Act

Georgia General Assembly passed the LIFE Act on May 7, 2019. 2019 Georgia Laws Act 234 (H.B. 481). In doing so, the legislature found that "[m]odern medical science, not available decades ago, demonstrates that unborn children are a class of living, distinct persons," that the State of Georgia "recognizes the benefits of providing full legal recognition to an unborn child above the minimum requirements of federal law," and that it is "the policy of the State of Georgia to recognize unborn children as natural persons." *Id.* § 2(2)–(6).

In keeping with these findings, the LIFE Act promotes the dignity and well-being of unborn children in a number of ways. This begins with Section 3 of the Act, which amends the Georgia Code's definition of "persons" to include "natural persons," defined as "any human being, including an unborn child." *Id.* § 3(b). That section defines an "unborn child" as "a member of the species Homo sapiens at any stage of development who is carried in the womb." *Id.* § 3(e)(2). And Section 3 further provides that unborn children with detectable human heartbeats count as persons "in population based determinations." *Id.* § 3(d).

Section 4 of the LIFE Act limits certain elective abortions. It prohibits "using, prescribing, or administering any instrument, substance, device, or other means with the purpose to terminate a pregnancy with knowledge that termination will, with reasonable likelihood, cause the death of an unborn child" who possesses a "detectable human heartbeat." *Id.* § 4(a)(1), (b).[1] There are several exceptions to this restriction: a procedure is not considered an abortion at all if it is performed with the purpose of "[r]emoving a dead unborn child caused by spontaneous abortion" (i.e., miscarriage) or "[r]emoving an ectopic pregnancy." *Id.* § 4(a)(1)(A)–(B). A post-heartbeat abortion is also allowed if the mother has a "medical emergency," *id.* § 4(a)(3), (b)(1)[2]; if her pregnancy resulted from rape or incest documented by a police report and the unborn child is less than 20 weeks old, *id.* § 4(b)(2); or if her pregnancy is "medically futile," *id.* § 4(b)(3).[3] And the Act

[1] A "detectable human heartbeat" means "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac." *Id.* § 4(a)(2).

[2] A "medical emergency" occurs when "[a] physician determines, in reasonable medical judgment," that "an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman." *Id.* § 4(a)(3), (b)(1).

[3] A pregnancy is "medically futile" when "in reasonable medical judgment, an unborn child has a profound and irremediable

creates affirmative defenses both for a medical provider who "provides medical treatment to a pregnant woman which results in the accidental or unintentional injury to or death of an unborn child," and for any woman who "reasonably believed that an abortion was the only way to prevent a medical emergency." *Id.* § 4(h)(1)–(5).

The rest of the LIFE Act promotes the dignity and well-being of unborn children through a number of provisions that operate independently of Section 4's limitations on post-heartbeat abortions:

- Section 5 expands the child-support obligations of absent fathers to include the "direct medical and pregnancy related expenses" of the mother of an "unborn child with a detectable human heartbeat."
- Section 6 allows parents to recover in tort actions the full value of the life of an unborn child, starting at the point of a detectable heartbeat, in cases of fetal homicide.
- Section 12 provides important tax benefits for expectant parents by allowing them to claim an unborn child with a

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congenital or chromosomal anomaly that is incompatible with sustaining life after birth." *Id.* § 4(a)(4).

detectable heartbeat as a dependent for purposes of state income taxes.

- Sections 7, 8, 10, and 11 update Georgia's informed consent laws and documentation requirements. Section 7 requires abortion practitioners to inform patients seeking an abortion whether the child has a detectable heartbeat. Section 8 directs the Georgia Department of Public Health to prepare information about the gestational development of unborn children, including the age at which a heartbeat is usually detectable. Section 10 requires abortion practitioners to record whether the unborn child has a detectable heartbeat before performing an abortion. And Section 11 directs abortion practitioners to report that information to the Department of Public Health after they perform or attempt to perform an abortion.

Finally, Section 14 of the Act is a severability clause: "All provisions of this Act shall be severable." *Id.* § 14.

Governor Kemp signed the LIFE Act into law on May 7, 2019, and it was set to take effect on January 1, 2020.

B. Proceedings Below

Plaintiffs—various advocacy organizations, abortion providers, and abortion practitioners—sued the Georgia Governor, attorney general, public health commissioner, members of the Georgia Composite Medical Board, and six district attorneys on June 28, 2019. Dkt. 1. They alleged that the LIFE Act's abortion restrictions violated their substantive due process rights, *id.* at ¶¶72–74, and that the LIFE Act's definition of "natural persons" is unconstitutionally vague when that definition is used in *other* Georgia statutes, *id.* at ¶¶ 75–79. Plaintiffs did not specifically allege that Sections 5 through 12 of the Act were unconstitutional. They nonetheless sought a declaration that the LIFE Act is facially unconstitutional and a permanent injunction against enforcement of the entire Act.

A month after filing their complaint, plaintiffs moved for a preliminary injunction. Dkt. 24. The district court granted the motion, concluding that the LIFE Act's restrictions on abortion likely violated substantive due process and the definition of "natural person" was likely unconstitutionally vague. Dkt. 97 at 30–40. Although the court's merits analysis was limited to those two provisions, the court issued a preliminary injunction against enforcement of the entire Act. *Id.* at 42–47.

Recognizing that "discovery is appropriate" in this case, the court placed the case on its standard four-month discovery track. *Id.* at 46. Once discovery began, defendants retained two nationally prominent experts whose testimony would have bolstered the State's defense of the Act's constitutionality. Dr. Farr Curlin, a professor at Duke University School of Medicine and expert in bioethics, would have testified that the Act's limitations on elective abortion aligned with principles of bioethics; that the heartbeat is a reasonable point at which to limit elective abortion; that the Act would protect women from the health and safety risks of later-term abortions; and that the Act would help preserve the integrity of the medical profession. Dkt. 125-1 at 13 n.2 (citing Dkt. 113-1 (Expert Report of Dr. Farr. A. Curlin)). Dr. Ingrid Skop, a practicing obstetrician-gynecologist with more than 20 years of experience, would have testified about the feasibility of detecting pregnancy and obtaining elective abortions within the limits imposed by the Act; the health and safety risks of later-term abortions; women's ability to control their reproductive choices through birth control or emergency contraception; and the efficacy of the statutory exceptions in the Act. *Id.* (citing Dkt. 113-2 (Expert Report of Ingrid Skop, M.D., F.A.C.O.G.)).

More than two months into the four-month discovery period, plaintiffs moved to severely limit expert discovery. Dkt. 104. Plaintiffs asked the court to exclude all of Defendants' (not yet propounded) expert-witness testimony as "irrelevant" under Fed. R. Civ. P. 26(b)(1) because, in their view, no facts could establish a valid state interest supporting the LIFE Act's restrictions on abortion. *Id.* at 2–4. Plaintiffs further contended that any discovery about the State's reasons for passing the law would be "per se improper" because the case "can and should … be resolved as a matter of law." *Id.* at 2, 4. The district court granted the motion, reasoning that "[t]he Supreme Court has repeatedly and unequivocally held that under no circumstances whatsoever may a state prohibit or ban abortions prior to viability, no matter what interests the state asserts to support it." Dkt. 115 at 2–3.[4]

Plaintiffs and defendants (except Defendants Boston and Howard) each moved for summary judgment. Dkt. 124, 125. After

[4] Notably, even after plaintiffs succeeded in excluding defendants' expert testimony, they continued to insist on propounding *their own* expert witnesses. After weeks of negotiations, plaintiffs agreed to withdraw their proffered expert testimony in exchange for a series of factual stipulations, which defendants entered into while reserving their rights to challenge the district court's discovery order excluding their expert testimony. *See* Dkt. No. 125-2 at 31–33 (Stipulation Regarding Preclusion of Expert Testimony and Stipulations of Fact).

a hearing, the district court granted plaintiffs' motion for summary judgment and denied defendants' motion. Dkt. 149. The court first concluded that all plaintiffs had standing to challenge the LIFE Act. *Id.* at 16–21. Next, the court ruled that the Act's abortion restriction violated substantive due process because it was a "ban" on pre-viability abortion and thus "inherently unconstitutional—no matter what interests a state asserts to support it." *Id.* at 26–28. The court further concluded that the Act's state-law definition of "natural person" violated substantive due process because the Supreme Court held in *Roe v. Wade* that the word "person" as used in the Fourteenth Amendment did not include unborn children. *Id.* at 31.

The court also held that the LIFE Act's definition of "natural person" was facially void for vagueness because it "applies throughout the entire Georgia Code" and the State would have "prosecutorial discretion" to decide whether these new applications would warrant criminal charges. *Id.* at 33–40. The court did not find that the definition *itself* was unconstitutionally vague but instead deemed it vague based on speculation about how it might apply to a handful of *other* provisions of Georgia law. *Id.*

Finally, although the court only specifically addressed challenges to the LIFE Act's abortion restriction and its definition of "natural person," it permanently enjoined enforcement of the entire Act, including provisions unrelated to abortion such as those offering new tax deductions and child-support benefits for pregnant women. The court reasoned that these provisions were not severable from the rest of the Act because (1) they were "mutually dependent" on Section 3 of the Act even though they did not use the definition of "natural person"; and (2) the Act's purpose "was to ban or *de facto* ban abortion," so the rest of the Act could not remain in effect without the abortion restriction. *Id.* at 55–56, 60–61. For the latter conclusion, the court did not rely on any particular evidence from the Act's text or legislative history.

STANDARD OF REVIEW

The district court's order granting summary judgment to plaintiffs is reviewed *de novo*. *Gogel v. Kia Motors Mfg. of Georgia, Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020). Discovery rulings are reviewed for abuse of discretion. *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1306–07 (11th Cir. 2011). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

SUMMARY OF ARGUMENT

I. The district court erred by holding that the LIFE Act's restrictions on post-heartbeat abortions were per se unconstitutional. In 50 years of abortion jurisprudence, the Supreme Court has *never* found an abortion restriction to be categorically unconstitutional without considering the State's interests in passing the law.

The district court believed the heartbeat restriction was per se unconstitutional because it "prohibited" certain pre-viability abortions. But that is plainly not the rule. The laws at issue in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), prohibited abortions (including pre-viability ones) unless the informed-consent and 24-hour waiting period rules were satisfied. The laws at issue in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020), prohibited abortions (including pre-viability ones) unless the doctor had qualifying hospital admitting privileges. And the law at issue in *Gonzales v. Carhart*, 550 U.S. 124 (2007), prohibited partial-birth abortions (including pre-viability ones) in all nearly circumstances. Yet none of those cases applied a rule of per se unconstitutionality. Instead, the Court in each case

analyzed the challenged restrictions on abortion *in light of the interests asserted by the government*.

The district court's baseless per se rule led it to commit another error by barring the State from building a record in defense of its law. The State retained two nationally prominent experts who would have testified about critical matters, including why the heartbeat was a reasonable line to draw as a matter of science and bioethics, how Georgia's law would promote maternal health, and why Georgia's law leaves women ample opportunities to obtain elective abortions early in pregnancy. This evidence was critical to the State's defense of its law, but the district court found all of it to be irrelevant and excluded it at the starting gate. This Court should reverse the district court's ruling of categorical unconstitutionality and remand to allow the State to build a record to defend its law against plaintiffs' substantive due process claim.

II. The district court also erred by granting judgment for plaintiffs on their challenge to the Act's provision that defines "natural person" to mean "any human being, including an unborn child." LIFE Act, § 3(b). The court held in passing that the new definition violates substantive due process because, in *Roe v. Wade*, the Supreme Court rejected a similar interpretation of the

word "person" in the Fourteenth Amendment. But the fact that the *federal* Constitution does not include unborn children as "persons" hardly means that Georgia is constitutionally barred from defining that word differently as a matter of *state* law.

The district court further erred by finding the new definition of "natural person" to be unconstitutionally vague. Plaintiffs brought only a *facial* challenge to the new definition, and a facial vagueness challenge must fail unless the plaintiff can show that the statute is vague in all of its applications. Plaintiffs did not come close to making that showing. The new definition of "natural person" unquestionably has applications that are clear, precise, and lawful, and a law cannot be facially invalidated based on mere speculation about a handful of hypothetical applications. At most, plaintiffs' asserted vague applications of the "natural person" definition must be litigated through as-applied challenges rather than declaring the provision facially unconstitutional.

In all events, the three hypothetical situations that the district court cited in support of its vagueness holding cannot bear the weight the court attached to them. First, Georgia's child cruelty statute does not even use the term "person" in defining "child," and so it is entirely unaffected by the LIFE Act. Further, the statute is limited to *willful* misconduct, and the district court's

suggestion that a pregnant woman with an eating disorder would be prosecutable under the statute is baseless. Second, Georgia's child abuse reporting statute may now require healthcare providers or others to report to social services if a pregnant woman is living with an abusive partner, but the court never explained why this straightforward, lawful application of the statute rendered it unconstitutionally vague, nor why this common-sense application of the law was problematic, much less unconstitutional. Third, Georgia's reckless conduct statute is limited to situations in which a person *grossly deviates* from the standard of care that a reasonable person would exercise, and it is inconceivable that a physician would be prosecuted under that law for providing medically indicated care to a pregnant woman. Nor will doctors be unable to navigate a standard of care that requires consideration of both the pregnant woman and her unborn child—doctors have always been required to do that while weighing the risks and benefits of any course of treatment.

III. Finally, even if plaintiffs prevail on their constitutional challenge to the Act's abortion restriction or its new definition of "natural person," those provisions can easily be severed from the rest of the Act. Georgia law always favors severability, especially for acts that contain an express severability clause, as the LIFE

Act does. And the Supreme Court has instructed federal courts considering abortion cases to invalidate no more of a legislature's work than necessary to remedy any constitutional violations. Plaintiffs have failed to carry their heavy burden of showing that the Court should enjoin a number of provisions (never challenged here) that relate to child support, tax benefits, population determinations, and other matters unrelated to abortion.

The district court erred by permanently enjoining these common-sense provisions designed to promote fetal well-being that have not been found, or even alleged, to be unconstitutional. The court found that the *sole* purpose of the Act was to ban abortion, dismissing the other provisions as window dressing. But the court cited zero evidence for that suggestion, and the court's reasoning conflicts with the statute's express purpose of promoting the well-being of the unborn generally. The district court erred again by suggesting that the other provisions were "mutually dependent" on the provisions it found unconstitutional. Sections 5 through 12 of the Act neither prohibit any abortions nor employ the new definition of "natural person" that the court found to be vague. Those provisions are perfectly capable of operating on their own and advancing the statutory purposes, even if enforcement of the Act's natural person definition or abortion

restrictions were enjoined. Federal courts considering abortion cases have repeatedly severed other provisions not expressly found unconstitutional, and the district court erred by failing to do the same here.

ARGUMENT

I. The district court erred in granting summary judgment on plaintiffs' claim that the LIFE Act's abortion restriction violates substantive due process.

In concluding that the LIFE Act violated plaintiffs' substantive due process rights, the district court reasoned that any kind of abortion restriction before viability is "inherently unconstitutional," and that because the LIFE Act restricts certain pre-viability abortions, it is per se invalid. Dkt. 149 at 27–28, 28 n.12. Although the court purported to do nothing more than apply precedent, the court's per se rule has no grounding in the Supreme Court's abortion jurisprudence. And this legal error then led the district court to exclude highly relevant expert evidence that was critical to the State's ability to defend its enactment. Both errors require reversal.

A. The district court erred by declaring the LIFE Act's abortion restriction per se unconstitutional without considering the State's interests.

The Supreme Court's abortion jurisprudence is no model of clarity, but one common thread is plain enough: in assessing challenges to state laws restricting abortion, the Court has always weighed the state interests that support the laws in question. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2310–18 (maternal health and safety); *Casey*, 505 U.S. at 840–41, 881–84 (informing a pregnant woman's free choice to have an abortion and expressing the State's respect for human life); *Beal v. Doe*, 432 U.S. 438, 445-46 (1977) (same); *Gonzales*, 550 U.S. at 156-66 (preserving ethical integrity of the medical profession); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 482–86 (1983) (saving unborn lives from death).[5]

The district court, however, expressly declined to consider or even admit evidence about Georgia's interests that support the

[5] The Court has not provided an exhaustive list of "valid state interest[s]." *Casey*, 505 U.S. at 877; *see also Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (acknowledging open question over whether a State may seek to ban discrimination by "prohibit[ing] the knowing provision of sex-, race-, and disability-selective abortions").

LIFE Act.[6] Instead, the court reasoned that Section 4 of the Act is a "ban" that "prohibits" some abortions before viability, and so it "is *inherently unconstitutional*—no matter what interests a state asserts to support it." Dkt. 149 at 27 (emphasis added).

That sweeping per se rule has no basis in Supreme Court precedent. Indeed, the Court has upheld restrictions on abortion—*even pre-viability ones*—when they are properly tailored to the State's asserted interests. As the Court explained, "the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child." *Gonzales*, 550 U.S. at 158; *see also Casey*, 505 U.S. at 870 ("[T]he State has a legitimate interest in promoting the life or potential life of the unborn."); *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("The privacy right … cannot be said to be absolute."). Courts must consider this interest and related state interests even

[6] The LIFE Act's restrictions on post-heartbeat abortions advance several important interests. The Act promotes fetal life and reflects the State's respect for human life by providing legal protection for the unborn using the same marker—the heartbeat—whose absence is typically used to mark the end of life. The Act promotes maternal health and safety by ensuring that women who choose to have elective abortions do so early in pregnancy, when the health risks are much lower. And it prevents the medical profession from departing from its healing mission by performing elective later-term abortions.

if the state law applies to some pre-viability abortions. *See Gonzales*, 550 U.S. at 156–57; *Casey*, 505 U.S. at 873 (rejecting a "rigid prohibition on all previability regulation aimed at the protection of fetal life.").

The district court grounded its per se rule on *Casey*'s statement that "'[a] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" Dkt. 149 at 27 (quoting *Casey*, 505 U.S. at 879). But the district court's holding rests on an interpretation of the word "prohibit" that the Supreme Court has never endorsed. *Casey* did not apply the district court's per se rule even though the laws challenged there *prohibited* women from obtaining abortions (including pre-viability ones) without waiting 24 hours and *prohibited* minors from obtaining abortions without securing parental consent or a judicial bypass. 505 U.S. at 879–901. *Gonzales* did not apply a per se rule even though the challenged law *prohibited* nearly all partial-birth abortions, even before viability. 550 U.S. at 156. And, earlier this year, the Court did not apply a per se rule in *June Medical* even though the challenged state law *prohibited* abortions (even pre-viability ones) performed by doctors without qualifying admitting privileges. 140 S. Ct. at 2130; *see also Whole Woman's Health*, 136 S. Ct. at 2292 (same).

The notion that any law that might "prohibit" certain pre-viability abortions is per se unconstitutional has no grounding in the Supreme Court's jurisprudence.[7]

As an original matter, the proper standard of review for the LIFE Act's abortion restrictions should be rational basis review. *See*, *e.g.*, *Casey*, 505 U.S. at 966 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that "States may regulate abortion procedures in ways rationally related to a legitimate state interest" and that "the Constitution does not subject state abortion regulations to heightened scrutiny"). And, because plaintiffs have brought a *facial* challenge to the Act's abortion restrictions, the law should be upheld unless plaintiffs "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also June Medical*, 140 S. Ct. at 2175 (Gorsuch, J., dissenting) (facial

[7] In all events, even under the district court's expansive interpretation of *Casey*'s dictum, the LIFE Act does not "prohibit" or "ban" pre-viability abortions. The Act *allows* elective abortions for any reason until the presence of a detectable human heartbeat. And, even after that point, the Act contains several exceptions that permit post-heartbeat abortions in the event of a medical emergency, a medically futile pregnancy, or a pregnancy that resulted from rape or incest. LIFE Act, §§ 4(a)(1), (a)(3), (b)(1), (b)(2), (b)(3).

challenge should fail unless plaintiffs show that statute "cannot be constitutionally applied against *anyone* in *any* situation").

But even if this Court concludes that Supreme Court or prior circuit precedent forecloses application of those standards, at a minimum, the district court should have applied the "undue burden" standard rather than its per se rule. Even before viability, the Supreme Court has held that States may impose abortion restrictions that (1) are reasonably related to a legitimate state interest and (2) do not pose a substantial obstacle to abortion. *Casey*, 505 U.S. at 877–78. The Court has applied that standard in every abortion case it has considered since *Casey*, even when the challenged laws prohibit certain pre-viability abortions. *Id.* at 876-901 (applying undue-burden test to medical-emergency exception, informed-consent requirement, mandatory waiting period, spousal notification, parental consent, and recordkeeping and reporting requirements); *June Medical*, 140 S. Ct. at 2133 (same for hospital admitting privilege requirement); *Gonzales*, 550 U.S. at 156 (same for ban on partial-birth abortions). And this Court, too, has analyzed abortion restrictions under the undue-burden test rather than applying any per se or categorical rules. *See Robinson v. Attorney Gen.*, 957 F.3d 1171, 1179–82 (11th Cir. 2020) (applying undue burden test to COVID-19 emergency order postponing

nonemergency procedures, including abortions, even where the postponement would operate as a complete prohibition on abortion for some women); *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310, 1321 (11th Cir. 2018), *cert. denied sub nom. Harris v. W. Alabama Women's Ctr.*, 139 S. Ct. 2606 (2019) (same for a ban on dismemberment abortions).

In short, nothing in Supreme Court precedent or this Court's precedent supports the district court's holding that the LIFE Act's abortion restrictions are per se unconstitutional. At a minimum, as in cases like *Casey*, *Gonzales*, *Whole Woman's Health*, and *June Medical*, the district court should not have found those restrictions unconstitutional without proof that they violated the undue-burden standard.

B. The district court erred by preemptively excluding evidence critical to the State's defense of the Act.

The district court's mistaken belief that the LIFE Act's restriction on post-heartbeat abortions was per se unconstitutional led it to commit a second error: it preemptively excluded the state officials from introducing evidence that was highly relevant to the Act's constitutionality.

After the district court placed this case on its standard, four-month discovery track, the state officials began preparing an

evidentiary case to defend the constitutionality of the LIFE Act's abortion restriction. For instance, to establish the supporting state interests, Dr. Farr Curlin, a professor at Duke University School of Medicine and expert in bioethics, would have testified that the Act's limitations on elective abortion aligned with principles of bioethics; that the heartbeat is a reasonable point at which to limit elective abortion; that the Act would protect women from the health and safety risks of later-term abortions; and that the Act would help preserve the integrity of the medical profession. *See* Dkt. 113-1 (Expert Report of Dr. Farr. A. Curlin). Dr. Ingrid Skop, a practicing obstetrician-gynecologist with more than 20 years of experience, would have further testified about the health and safety risks of later-term abortions; the feasibility of detecting pregnancy and obtaining elective abortions within the limits established by the LIFE Act; and the efficacy of the Act's "medically futile pregnancy" and "medical emergency" exceptions. *See* Dkt. 113-2 (Expert Report of Ingrid Skop, M.D., F.A.C.O.G.). Based on Dr. Skop's "clinical experience treating thousands of pregnant women," she would have testified that "there is no doubt that the vast majority of women have sufficient time to obtain an abortion prior to the point of a detectable heartbeat." Dkt. 113-2 at 3; *see also id.* at 4 (detailing the "many … signs" that signal to a

pregnant woman, before a heartbeat is detectable, that a pregnancy has begun).

Given the liberal standard for relevance, this evidence was unquestionably relevant to the state officials' defense of the LIFE Act. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (The "standard of relevance … is a liberal one."). Yet the district court excluded it as irrelevant based solely on the same legal error discussed above: its mistaken conclusion that a law that "prohibits" some abortions before viability is per se unconstitutional, "no matter what interests the state asserts to support it." Dkt. 115 at 2–3; *see also id.* at 4. Because the district court's discovery ruling was grounded in this same mistake of law, that ruling was an abuse of the court's discretion. *Josendis*, 662 F.3d at 1306 (discovery ruling "influenced by any mistake of law" warrants reversal).

This discovery ruling would warrant reversal even if the district court believed evidence of the kind proffered by the state officials would not be enough to uphold the LIFE Act under the undue-burden test. In a footnote, the district court wondered how,

even if the Act's abortion restriction "could appropriately be characterized as a pre-viability abortion restriction, … any discovery regarding its underlying state interests is relevant under the governing, 'undue burden' standard." Dkt. 115 at 3 n.3. But that reasoning is flawed for at least two reasons.

First, "[d]iscovery is not to be denied because it relates to a claim or defense that is being challenged as insufficient." 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2008 (3d ed.); *Alexander v. F.B.I.*, 194 F.R.D. 316, 326 (D.D.C. 2000) (rejecting argument that evidence was irrelevant because it might be challenged as insufficient). A court cannot exclude expert testimony as irrelevant merely because it believes the party testifying will not ultimately prevail on the issue. *See Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 990 (11th Cir. 2016) ("[A] court may not exclude [an expert] opinion simply because it believes that the opinion is not—in its view—particularly strong or persuasive."); *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (explaining that a district court considering the admissibility of expert testimony acts as a "gatekeeper," not as a fact-finder making "ultimate conclusions"). Yet that is exactly what the district court did when it suggested that evidence of state

interests would not be relevant even to the undue-burden analysis. Dkt. 115 at 3 n.3. Doubts about the ultimate sufficiency of the expert testimony do not make it irrelevant.

Moreover, the excluded evidence was highly relevant to any arguments to modify existing law on appeal. *See Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 281 (5th Cir. 2019), *pet. for cert. pending* No. 19-1392 (Ho, J., concurring) ("[N]othing in the Federal Rules of Civil Procedure forecloses discovery based on a good faith expectation of legal change. To the contrary, the Rules expressly envision that parties may need to litigate in anticipation of such change."); Fed. R. Civ. Pro. 26(g)(1)(B)(i) (permitting discovery requests that are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law"); *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 425 (9th Cir. 2012) ("Federal Rule of Civil Procedure 26(g)(1)(B) requires parties seeking discovery to act … consistently with the rules of existing law or with good reason to change the law"). Here, for instance, advances in medical science bolster potential state interests in protecting unborn children that are overwhelmingly likely to survive to birth. *See* Dkt. 113-2 (Expert Report of Dr. Skop) at 20–22 (explaining that "97-98%" of unborn children survive to birth, absent abortion,

once a heartbeat is detected); Dkt. 74 at 15–17 (explaining that the LIFE Act's focus on the fetal heartbeat is a scientifically and logically rigorous way to advance the state interests in promoting the dignity of unborn children and protecting human life); David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 140 (2013) (collecting post-*Casey* medical research).

The district court never explained why evidence of state interests was not relevant to arguments like those, which the state officials raised as early as the preliminary-injunction stage. Instead, the court suggested that the State could merely rely on "legislative facts" to defend the LIFE Act. Dkt. 149 at 30 n.13 (citing *MKB Mgmt. Corp. v. Burdick*, No. 1:13-CV-071, 2013 WL 6147204, at *4 (D.N.D. Nov. 15, 2013)). But nothing in the Federal Rules of Civil Procedure justifies excluding plainly relevant expert testimony on the ground that the court might consider other types of evidence from outside the record. To the contrary, if facts supporting the State's interests would merit consideration as legislative facts, they would also be relevant during discovery.

* * *

In sum, the district court erred by failing to recognize that the LIFE Act's abortion restriction, just like any other regulation of abortion procedures, is not per se unconstitutional and should, at a minimum, have been upheld if it did not impose an undue burden on abortion access. That legal error led the court to exclude highly relevant evidence and shut down the state officials' expert discovery efforts. This Court should therefore vacate the district court's grant of summary judgment on the plaintiffs' substantive due process claim and remand with instructions to allow the State to prepare a comprehensive factual record in defense of the challenged law.[8]

II. Defining "natural persons" to include "unborn children" as a matter of state law does not violate substantive due process or the void-for-vagueness doctrine.

Separate from the LIFE Act's abortion restriction, plaintiffs challenged the Act's new definition of "natural person," which defines that term under state law as "any human being including an unborn child." LIFE Act, § 3(b). The district court declared that

[8] For the reasons set forth above, Appellants believe that they should prevail on the substantive due process claim even under existing law. If this Court concludes that Supreme Court or prior circuit precedent controls this case, Appellants reserve the right to seek further review of that precedent as appropriate.

this state-law definition violated both substantive and procedural due process—the former under *Roe*, and the latter because it was, in the court's view, facially vague. Both rulings were erroneous.

A. The "natural person" definition does not violate substantive due process.

The district court concluded (in a single paragraph) that the LIFE Act's definition of "natural person" violates substantive due process because it was "considered and rejected by the Supreme Court" in *Roe*. Dkt. 149 at 31 ("In *Roe*, the Court considered whether a 'person,' as used in the Fourteenth Amendment, includes an unborn child" and found that it did not.). But *Roe* considered only whether an unborn child is a "person" as that term is used in the Fourteenth Amendment of the United States Constitution. 410 U.S. at 158. The LIFE Act does not purport to define "person" as used in the federal Constitution, and it certainly does not declare that "an embryo/fetus is entitled to Fourteenth Amendment protection," as the district court suggested. Dkt. 149 at 31. Instead, the Act defines "natural person" only under Georgia law. Neither *Roe* nor any of the Court's later abortion precedents even hints that the Constitution prohibits States from including the unborn in their own definitions of "persons" for purposes of state law.

The district court's holding on this point is especially baffling because the "natural person" definition does not, by itself, regulate *any* conduct, abortions or otherwise. The LIFE Act's only restriction on abortion is in Section 4 (amending O.C.G.A. § 16-12-141), not Section 3 (amending O.C.G.A. § 1-2-1), and Section 4 does not even use the defined term "person" or "natural person." In short, the LIFE Act's "natural person" definition by itself does not affect a woman's ability to obtain an abortion, and the district court erred in concluding that this definition somehow violated substantive due process.

B. The "natural person" definition is not facially void for vagueness.

The district court also erred in concluding that the "natural person" definition is facially vague in violation of the Due Process Clause of the Fourteenth Amendment.

The vagueness doctrine gives expression to the "fundamental principle in our legal system" that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Such a law can be unconstitutionally vague for one of two reasons: either it (1) "fails to provide a person of ordinary intelligence fair notice of what is prohibited," or it is (2) "so

standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* Each of these grounds for a vagueness challenge must be rooted in a problem with the "actual text" of the law. *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1302 (11th Cir. 2013).

A vagueness challenge is especially hard to win where, as here, the plaintiffs bring a *facial* challenge, which requires them to show that the law is vague in "all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982); *see Salerno*, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully … ."). Facial vagueness occurs only "'when a statute is utterly devoid of a standard of conduct so that it simply has no core and cannot be validly applied to any conduct.'" *Indigo Room,* 710 F.3d at 1302 (quoting *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982)).

The district court erred in concluding that the natural person definition was unconstitutionally vague on its face.

1. Plaintiffs do not, and cannot, argue that the "natural person" definition itself is vague or unclear.

"'To state a void-for-vagueness claim, the language of the ordinance itself must be vague.'" *Indigo Room*, 710 F.3d at 1302 (quoting *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 387 (11th Cir. 1991)). But the language of the "natural person" definition is crystal clear. This provision precisely defines "natural person" as "any human being, including an unborn child." LIFE Act § 3(b). It then further defines "unborn child" as a "member of the species Homo sapiens at any stage of development who is carried in the womb." *Id.* § 3(e)(2). These definitions leave no ambiguity about who qualifies as a "natural person," and neither the district court nor the plaintiffs have argued otherwise. *See Indigo Room*, 710 F.3d at 1302 (rejecting vagueness challenge where plaintiffs failed to assert any tenable argument that the "actual text of the Ordinance" was vague).

Any challenge to the natural person definition would also fail because this definition does not, by itself, "regulate the public" by prohibiting or requiring particular conduct. *Beckles v. United States*, 137 S. Ct. 886, 894–95 (2017); *see also Fox Television Stations, Inc.*, 567 U.S. at 253 (describing vagueness doctrine as governing "laws which regulate persons or entities"); *Connally v.*

Gen. Constr. Co., 269 U.S. 385, 391 (1926) (describing vagueness doctrine as governing laws that "forbid[] or require[] the doing of an act"); *United States v. Matchett*, 837 F.3d 1118, 1122 (11th Cir. 2016) (W. Pryor, J., respecting denial of rehearing en banc) ("[T]he vagueness doctrine applies only to laws that regulate private conduct … ."); *United States v. Brierton*, 165 F.3d 1133, 1139 (7th Cir. 1999); *United States v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990). The LIFE Act's natural person definition does not directly regulate *any* conduct but is instead purely definitional: the provision says what the phrase "natural person" means, not what anyone may or may not do. LIFE Act, § 3(b). And no other provision of the Act—including the abortion restriction in Section 4—incorporates that defined term in a way that regulates private conduct. Because the "natural person" definition is clear on its face and regulates no private conduct, any vagueness challenge to that provision is a non-starter.

2. Speculation about how the definition of "natural person" might apply to other statutes beyond the LIFE Act does not render that definition facially unconstitutional.

The district court nonetheless found the LIFE Act's definition of "natural person" to be unconstitutionally vague—not based on some ambiguity in its own text, but based on speculation about

how the definition might apply to *other* statutes in the Georgia Code. Dkt. 149 at 36–40. The court's speculation about hypothetical scenarios involving other statutes beyond the LIFE Act—none of which plaintiffs have been accused of violating—does not come close to showing that the "natural person" definition is unconstitutionally vague on its face.

a. Plaintiffs cannot establish facial invalidity by claiming that a handful of hypothetical applications are vague.

To succeed on their facial challenge, plaintiffs had to establish that the "natural person" definition is vague in "all of its applications," *Vill. of Hoffman Estates*, 455 U.S. at 494–95, or, put another way, "that no set of circumstances exists under which the [provision] would be valid." *Indigo Room*, 710 F.3d at 1302 (quoting *Salerno*, 481 U.S. at 745).

i. The cursory vagueness arguments plaintiffs raised below fell well short of supporting their facial challenge. They argued that the "natural person" definition applies to "hundreds of civil and criminal code provisions that include the term 'person' or 'human being,'" and so "it is unsurprising that the Personhood Definition renders numerous criminal and civil provisions of the Code unclear." Dkt. 124-1 at 15. But, notwithstanding this

allusion to "hundreds" of other statutes, plaintiffs cited just *five* other Georgia statutes that had purportedly become vague, *see id.* at 15–16, and they offered an actual argument about just *one* of those other statutes (reckless conduct), *id.* at 16; *see also* Dkt. 127 at 11–12. Even if all five laws plaintiffs cited were rendered vague by including unborn children as "persons" (*but see infra*), plaintiffs are—by their own count—hundreds of statutes short of establishing facial invalidity. *See Vill. of Hoffman Estates*, 455 U.S. at 494–95.

This Court has made clear that the "possibility of a valid application necessarily precludes facial invalidity." *Indigo Room*, 710 F.3d at 1302. If there could be any non-vague applications of the statute, a "series of as applied challenges is a more appropriate forum for challenging [its] other, potentially more vague applications … ." *Alabama Educ. Ass'n v. State Superintendent of Educ.*, 746 F.3d 1135, 1140 & n.3 (11th Cir. 2014).

Here, clear and non-vague applications of the "natural person" definition are manifest. Within the LIFE Act itself, Section 3(d) provides that "[u]nless otherwise provided by law, any natural person, including an unborn child with a detectable human heartbeat, shall be included in population based

determinations." There is no ambiguity in this provision: unborn children with detectable human heartbeats are now to be included in population determinations under Georgia law.

There are also countless non-vague applications of the new definition to other provisions of the Georgia Code. For instance, Georgia law makes manufacturers of personal property liable to "any natural person who may use, consume, or reasonably be affected by the property" and suffers injury. O.C.G.A. § 51-1-11(b)(1). Applying the LIFE Act's definition of "natural person" simply expands the potential liability for manufacturers to unborn children who may reasonably be affected by the property and suffer injury. Similarly, a Georgia law that extends express or implied warranties to third-party "natural persons" "if it is reasonable to expect that such person may use, consume, or be affected by the goods" would now extend those warranties to unborn children "affected by the goods." O.C.G.A. § 11-2-318. There is nothing vague—and certainly nothing *unconstitutionally* vague—about these clear and straightforward applications of the LIFE Act's natural person definition. And further examples abound. *See, e.g.*, *id.* § 51-1-29.2 (providing immunity for individuals acting in time of emergency for the good of other "natural persons," even if their good-faith actions result in injury);

id. § 11-2A-216 (extending express and implied warranties in leasing contracts to "any natural person who is in the family or household of the lessee").

Even the "possibility" of these "valid application[s]" of the "natural person" definition should have been enough to defeat plaintiffs' facial challenge. *Indigo Room*, 710 F.3d at 1302. If plaintiffs had concerns about a handful of possible applications of the new definition to other Georgia laws, the proper avenue to raise those challenges should have been a "series of as applied challenges," not a facial challenge asking to invalidate every conceivable application of the definition. *Alabama Educ. Ass'n*, 746 F.3d at 1140 n.3.

ii. The district court's theory of why the "natural person" definition is unconstitutionally vague is different but no less flawed. The court reasoned that the definition "amends every appearance of the word "person" or "human being," yet "[i]t remains entirely unclear to this Court how the amendments will be effectuated or enforced." Dkt. 149 at 35–36. The court then gave examples of "lawful applications of existing criminal statutes," and explained that "[t]he only undefined variable is prosecutorial discretion: under which of these amended statutes will the State decide to bring charges?" *Id.* at 37. In the court's

view, "such uncertainty" amounted to a risk of arbitrary or discriminatory enforcement that could support a vagueness claim. *Id.* But the court was mistaken, for two related reasons.

First, a risk of arbitrary or discriminatory enforcement alone cannot establish that a statute is unconstitutionally vague. "The most clearly stated law against running red lights conceivably could be enforced discriminatorily by the police, if they so chose." *Diversified Numismatics, Inc.*, 949 F.2d at 387. A risk of discriminatory enforcement shows that a law is unconstitutionally vague only if "the language of the [law] itself" *creates* that risk by failing to supply standards to guide enforcement. *Id.* But the district court identified no language in the "natural person" definition that creates such a risk. To the contrary, the court described its examples of affected criminal statutes as "lawful applications" and noted that "prosecutorial discretion" was "the only undefined variable." Dkt. 149 at 37. The mere existence of prosecutorial discretion—a basic feature of the criminal justice system—does not pose a constitutional vagueness problem without some accompanying vagueness in the text of the challenged law. *See Diversified Numismatics*, 949 F.2d at 387 (rejecting the argument that the statute was being enforced

discriminatorily because "the language of the ordinance itself must be vague").

Second, "regardless of the risk of discriminatory enforcement, a court may not hold that this risk invalidates the statute in a pre-enforcement facial attack." *High Ol' Times*, 673 F.2d at 1231. The reason is that such challenges necessarily cannot include any "evidence … to indicate whether the Act has been enforced in a discriminatory manner or with the aim of inhibiting constitutionally protected conduct." *Gonzales*, 550 U.S. at 150. And the "speculative danger of arbitrary enforcement" is not enough to make a law unconstitutionally vague on its face. *Vill. of Hoffman Estates*, 455 U.S. at 503. Any argument that the "natural person" definition is facially vague based on a risk of discriminatory enforcement must be made "*only* in a post-enforcement proceeding when the possibility of selective enforcement has 'ripened into a prosecution.'" *Diversified Numismatics*, 949 F.2d at 387 (emphasis added) (quoting *Fla. Businessmen for Free Enter. v. City of Hollywood*, 673 F.2d 1213, 1220 (11th Cir. 1982)).

The cases the district court cited do not support its vagueness holding. Dkt. 149 at 34–35. Three of the cited cases—*Vill. of Hoffman Estates*, 455 U.S. 489, *Grayned v. City of Rockford*, 408

U.S. 104 (1972), and *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340 (11th Cir. 2011)—*rejected* the plaintiffs' vagueness arguments. And *Kolender v. Lawson*, 461 U.S. 352 (1983), is entirely inapposite. *Kolender* involved an anti-loitering law that required any person questioned by a police officer to provide a "credible and reliable" identification. The statute was *inherently* vague on its face because it gave police officers total discretion to determine who was "credible"—and thus who had broken the law. The Supreme Court has characterized vagrancy and loitering laws as being "in a class by themselves" for purposes of the constitutional analysis, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 166 (1972), and the district court erred by relying on such a case in finding the LIFE Act's natural person definition unconstitutionally vague.

b. The handful of applications of the "natural person" definition cited by the district court do not show that the definition is unconstitutionally vague.

In all events, none of the three specific statutes the district court relied on—a child-cruelty law, a child-abuse-reporting statute, and Georgia's reckless-conduct law, Dkt. 149 at 36–40—shows that the new "natural person" definition is unconstitutionally vague. Even if a handful of hypothetical

applications of the "natural person" definition to other Georgia statutes could potentially establish unconstitutional vagueness (*but see supra*), the examples cited by the district court fall short of that showing.

i. The district court first asserted that the new "natural person" definition would mean "a pregnant woman with an eating disorder would be guilty of child cruelty" under O.C.G.A. § 16-5-70. Dkt. 149 at 36. Not so. At the outset, the child cruelty statute does not even use the words "person" or "natural person" in defining a "child" for purposes of criminalizing cruelty to children. O.C.G.A. § 16-5-70 (defining "cruelty to children" to include various actions or inaction with respect to a "child"); O.C.G.A. § 16-5-73 (defining "child" as "any individual who is under the age of 18 years"). The district court made no attempt to explain how a statute could be rendered vague by a new definition of a term not actually used in that statute.

But even accepting the district court's assumption that unborn children are now protected under the child-cruelty statute, the court did not identify a *vagueness* problem with that law. In fact, the district court explained that its hypothetical about a pregnant woman with an eating disorder would be a "lawful

application" of the statute, *see* Dkt. 149 at 36–37, not that it was *unclear* whether the statute would apply.

The district court's analysis of the child-cruelty statute is also wrong on its own terms: a pregnant woman struggling with an eating disorder would not be guilty of child cruelty because she would not be "*willfully* depriv[ing] the [unborn] child of necessary sustenance." *Id.* (emphasis added); *see also Kennedy v. State*, 277 Ga. 588, 590 (2004) (child-cruelty statute requires "the presence of an actual intent to cause the particular harm, or the wanton and wilful doing of an act with an awareness of a plain and strong likelihood that such harm might result" (cleaned up)); *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770, at *19 (11th Cir. Sept. 11, 2020) (en banc) (explaining that scienter requirements often resolve potential vagueness problems).[9]

ii. The district court's discussion of the child-abuse-reporting statute, O.C.G.A. § 19-7-5, likewise does not reflect an unconstitutional vagueness problem. The court suggested that healthcare providers would violate § 19-7-5 if they failed to "report a pregnant patient living with an abusive partner." Dkt. 149 at 36

[9] At no point in the briefing below did plaintiffs rely on the "eating disorder" hypothetical to support their vagueness argument, so the State did not previously have a chance to respond to this flawed argument.

(citing O.C.G.A. § 19-7-5(b)(6.1), (c)(2)). Here, the court is not wrong: if a healthcare provider knows that a woman is pregnant and has "reasonable cause to believe" the unborn child has been "endangered" (as that term is defined in § 19-7-5(b)(6.1)), they would have to report it as suspected child abuse. But, once again, that is not a *vagueness* problem: it is a clear and straightforward application of the statute to unborn children, as the district court acknowledged, Dkt. 149 at 36.

The district court implied that this application of the child-abuse-reporting statute was somehow problematic, but it is hard to see why requiring healthcare providers to report suspected abuse of pregnant women would be a bad thing (much less unconstitutional). The express purpose of the reporting law is to "provide for the protection of children" whose health and welfare are adversely affected and further threatened by the conduct of those responsible for their care and protection. O.C.G.A. § 19-7-5(a). Mandatory reporting of a situation in which a pregnant woman is living with an abusive partner would unquestionably advance that statutory purpose—and the LIFE Act's purpose of protecting the well-being of the unborn.

iii. Finally, the district court concluded that Georgia's reckless-conduct statute, O.C.G.A. § 16-5-60(b), had become vague

because of the LIFE Act's new definitions. Plaintiffs argued below that the "natural person" definition makes it "unclear whether and when" clinicians providing medical care to a pregnant woman could be prosecuted under Georgia's reckless conduct statute if that care leads to unintentional harm to the unborn child. Dkt. 124-1 at 16. The district court agreed, reasoning that the new definition makes it "unclear what the governing standard of care would be." Dkt. 149 at 40. But the "natural person" definition does not introduce any such ambiguity, and the notion that it somehow criminalizes standard medical care provided to pregnant women is baseless.

First, the operation of the reckless-conduct statute remains clear even under the expanded definition of "person." The statute makes it a misdemeanor to "consciously disregard[] a substantial and unjustifiable risk that [the defendant's] act or omission will cause harm or endanger the safety of the other person." § 16-5-60(b). These terms impose a standard of care that will necessarily depend on the circumstances, but that does not make the statute unconstitutionally vague. *State v. Boyer*, 270 Ga. 701, 703 (1999) ("[T]he fact that application of the [reckless-conduct] statute's standards sometimes requires an assessment of the surrounding

circumstances to determine if the statute is violated does not render it unconstitutional.").

The statute also provides "explicit standards for enforcement": medical care for a pregnant patient can be reckless conduct only if the provider acts in "gross deviation from the standard of care [which] a reasonable person would exercise in the situation." *Id.* at 702. So a doctor treating a medical condition in a pregnant woman would not engage in reckless conduct, even if the treatment unintentionally harms the unborn child, as long as that medical care was not a *gross deviation* from what a reasonable doctor would have done under the circumstances. This scienter requirement in the statute "alleviate[s] vagueness concerns." *Jones*, 2020 WL 5493770 at 19 (citing *Gonzales*, 550 U.S. at 149).

The district court worried that doctors would be unable to navigate a standard of care involving "two patients"—the pregnant woman and the unborn child. Dkt. 149 at 40. Yet again, this is not a vagueness problem. "[A law] is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *Fox Television Stations*, 567 U.S. at 253.

Here, the reckless-conduct statute is not unclear about the fact that conscious disregard of a substantial and unjustifiable

risk to an unborn child would amount to reckless conduct. That it could be difficult sometimes to determine the appropriate balance of risks to the pregnant woman and her unborn child does not make the statute vague. *See, e.g.*, *United States v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963) ("[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language").

Indeed, courts have repeatedly rejected similar vagueness challenges to criminal statutes that depend on concepts like "reasonableness" or "gross deviations" from the standard of care. *See Boyer*, 270 Ga. at 702–03 (rejecting vagueness challenge to Georgia's reckless conduct law). The mere fact that a law is "framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942); *see also Panther v. Hames*, 991 F.2d 576, 579 (9th Cir. 1993) (rejecting vagueness challenge to the terms "substantial risk" and "gross deviation" in a criminally negligent homicide statute, holding that those terms are "sufficiently certain to meet constitutional requirements").

In any event, the district court's concern about the scope of the reckless-conduct law is misplaced. Doctors have always been required to balance care for pregnant women with the risk of unintentional harm to their unborn children. *See* Joint Stipulations, Dkt. 125-2, Ex. B at ¶9 ("All medical care entails the risk of unintentional harm to the patient; clinicians, including clinicians treating patients who are pregnant, might be pregnant, or might become pregnant, accept that risk and weigh that risk against the benefits of treatment."). Simply put, doctors have always been required to make difficult decisions and tradeoffs when caring for pregnant women, and they will not be grossly deviating from the established standard of care when they continue to do so. Plaintiffs' and the district court's suggestion that doctors might be prosecuted for providing medically indicated care to pregnant women is farfetched and based on nothing more than speculation and hyperbole.

Finally, it is worth repeating that even if the district court were right about the reckless-conduct statute, a showing that the "natural person" definition could be vague as applied in some hypothetical circumstances falls far short of establishing *facial* invalidity. Instead, if the hypothetical scenario becomes a reality, any such arguments could be raised in an as-applied challenge.

See Alabama Educ. Ass'n, 746 F.3d at 1140 n.3. Because plaintiffs have only raised only a facial challenge to the "natural person" definition, the district court's concerns about the application of that definition to a handful of other laws are ultimately immaterial. The district court's holding that the LIFE Act's definition of natural person is unconstitutionally vague on its face should be reversed.

III. The LIFE Act's abortion restriction and "natural person" definition are severable from the rest of the Act.

The district court declared only two provisions of the LIFE Act unconstitutional: its restriction on post-heartbeat abortions and its new definition of "natural person." Yet the court permanently enjoined enforcement of the *entire* Act because it believed that the two challenged provisions could not be severed from the rest of the Act. That was error.

State law governs severability, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988), and Georgia law has "long favored" severability, *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 403 (1996). Georgia courts will sever an offending provision as long as the remaining parts of the act would still (1) further the legislature's purpose for

the enactment and (2) function independently of the severed provisions. *See Covenant Christian Ministries, Inc. v. City of Marietta, Georgia*, 654 F.3d 1231, 1240 (11th Cir. 2011) ("Under Georgia law, provisions of a statute or ordinance can be severed if those provisions are not mutually dependent on the remaining provisions and legislative intent is not compromised."); *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 275–76 (2008). In applying this test, an express severability clause in the challenged statute—such as the one in Section 14 of the LIFE Act—creates a presumption of severability. *Union City*, 266 Ga. at 404.

The Supreme Court has also specifically emphasized in abortion cases that a reviewing court must "prefer … to sever [any] problematic portions while leaving the remainder intact." *Ayotte*, 546 U.S. at 328–32; *see Leavitt v. Jane L.*, 518 U.S. 137, 139–44 (1996). That is, a federal court must "try not to nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 329.

Applying those principles, federal courts that have found abortion restrictions unconstitutional have routinely severed those provisions from the rest of the legislation at issue. *See*, *e.g.*, *Edwards v. Beck*, 8 F. Supp. 3d 1091, 1101 (E.D. Ark. 2014) (upholding "testing and disclosure requirements" after

invalidating heartbeat restriction on abortion); *Falls Church Med. Ctr., LLC v. Oliver*, 412 F. Supp. 3d 668, 685–86, 705 (E.D. Va. 2019) (invalidating certain abortion regulations but upholding "the remainder of the regulations at issue … which were not shown to be otherwise unduly burdensome"); *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1293–94 (M.D. Ala. 2017) (severing invalid provisions where doing so "will not cause the statute to be meaningless"). The district court erred by refusing to do the same here. The non-challenged provisions of the LIFE Act still further its express legislative purpose, and these provisions can easily continue to operate independently of the abortion restriction or "natural person" definition.

A. The unchallenged provisions of the LIFE Act still further its express legislative purpose.

The district court enjoined the entire LIFE Act on the ground that the Act's sole purpose was "to ban or *de facto ban* abortion." Dkt. 149 at 61. On that view, the LIFE Act's many provisions that have nothing to do with abortion are mere window dressing for an abortion "ban." *Id.* at 56 & n.25, 60. This cynical view of the LIFE Act's purpose and the General Assembly's motives finds no support in the Act's text, which reflects a much broader legislative

purpose: promoting the dignity and well-being of all unborn children, including those who will be carried to term.

i. The LIFE Act's purpose to promote the dignity and well-being of unborn children is made clear by the statutory text, which is where Georgia courts look to discern legislative intent. *City of Coll. Park v. Martin*, 304 Ga. 488, 489 (2018) ("We 'look to the text of the provision in question and its context within the larger legal framework to discern the intent of the legislature in enacting it.'" (quoting *Scott v. State*, 299 Ga. 568, 571 (2016)). The codified preamble explains that "[m]odern medical science … demonstrates that unborn children are a class of living, distinct persons"; that "[t]he State of Georgia … recognizes the benefits of providing full legal recognition to an unborn child above the minimum requirements of federal law"; that the Georgia Constitution requires due process and equal protection for all persons; and, therefore, that "[i]t shall be the policy of the State of Georgia to recognize unborn children as natural persons." LIFE Act, § 2(3)–(6). In short, the explicit purpose of the LIFE Act is to promote the dignity of unborn children *in general*, not merely to justify a restriction on abortion.

Consistent with this broader purpose, the LIFE Act includes a wide range of substantive provisions that promote the dignity and

welfare of unborn children with no reference to abortion. First, the LIFE Act promotes the dignity of unborn children directly by formally recognizing them as "natural persons" under state law and treating them accordingly. *Id.* §3(b). The Act directs that unborn children be counted as part of the population for population based determinations. *Id.* § 3(d). And, through a variety of provisions, it places unborn children on equal economic footing with other children: unborn children are covered by child-support obligations, *id.* § 5; parents of an unborn child may recover for the full value of an unborn child's life in cases of homicide, *id.* § 6; and unborn children are now "dependent minors" for tax purposes, thereby granting their families valuable tax benefits, *id.* § 12.

Moreover, the Act's informational, reporting, and informed-consent provisions, *see id.* §§ 7, 8, 9—such as its requirement that the physician inform the patient about the presence of a detectable human heartbeat before performing an abortion—promote respect for the unborn by ensuring that the decision to have an abortion is fully informed. Plaintiffs have not challenged those provisions as unconstitutional, and the Supreme Court has upheld similar measures for decades. *See*, *e.g.*, *Casey*, 505 U.S. at 872 (even in "the earliest stages of pregnancy," states may enact

laws to ensure that abortion decisions are "thoughtful and informed").

ii. The district court's conclusion that the LIFE Act is mere pretext for an "abortion ban" rests on no more than speculation and baseless accusations about the General Assembly's motives. Dkt. 149 at 61. Because the Act's preamble mentioned *Roe* and *Casey*, *id.* at 60, and the LIFE Act "give[s] personhood to the unborn," *id.* at 61, the district court suggested that the legislature's treatment of unborn children as persons was a mere gambit meant to evade the Supreme Court's abortion jurisprudence.

This theory blinks reality. The only language the district court cites from *Roe* is the Court's conclusion "that the word 'person,' as used *in the Fourteenth Amendment*, does not include the unborn." 410 U.S. at 158 (emphasis added). But the General Assembly did not purport to change the scope of the Fourteenth Amendment to include unborn children—it just defined them as persons under *state law*. So the idea that recognizing and treating unborn children as persons under Georgia law is intended to circumvent *Roe* makes little sense.

The district court's theory is further undercut by the Act's provisions that are unrelated to abortion. These provisions offer

concrete and substantial real-world benefits to mothers and families of unborn children by, for example, ensuring that pregnant women have additional monetary support through things like tax deductions and child-support payments. *See* §§ 3(d), 5, 6, 12. The district court cited not a whit of evidence suggesting that these tangible benefits are just scaffolding built to prop up the Act's abortion restriction.[10] Without such evidence, federal courts must take the state legislature at its word: these provisions and the LIFE Act as a whole serve the broader purpose of promoting the dignity and well-being of *all* unborn children, including those who are being carried to term.

In short, the only conclusion supported by the text of the Act and the record is that the legislature passed the LIFE Act to promote the dignity and well-being of unborn children. The Act will continue to advance this purpose with or without either of the two provisions the district court declared unconstitutional. The

[10] There were about 126,000 live births in Georgia in 2018, around 45% of which were to unmarried women. *See* CDC, *FastStats State and Territorial Data*, https://bit.ly/3k9sNjr; CDC, *FastStats Georgia Data,* https://bit.ly/348Gmu5. The LIFE Act's tax-deduction and child-support provisions would thus provide concrete benefits for tens of thousands of pregnant women and their unborn children. The notion that these broadly applicable provisions are merely designed to provide cover for the abortion restrictions strains credulity.

district court's purpose-based argument therefore fails as a basis for refusing to sever those provisions.

B. The remaining provisions of the LIFE Act can still function independently of the abortion restriction and "natural person" definition.

The other prong of severability analysis—whether the remaining provisions can operate independently of the offending ones—also unquestionably favors severance. The remaining provisions of the LIFE Act will keep functioning as intended even without either the abortion restriction in Section 4 or the "natural person" definition in Section 3(b). Nor do the remaining provisions of the Act—e.g., the enhanced child support, tax benefits, and tort damages, or the informational, reporting, and informed-consent provisions—depend on enforcement of the abortion restriction. And no one has argued that the Act's remaining provisions depend on the definition of the term "person" or "natural person"—indeed, that term does not show up in a meaningful way in the rest of the Act. In short, no other provision of the Act depends on the two provisions the district court declared unconstitutional.

The district court thought the remaining provisions of the Act could not survive without the "natural person" definition because several sections of the Act "contain language that references one

or more of the definitions" from Section 3. Dkt. 149 at 55. The court asserted that, "[i]f Section 3 is subject to the injunction, Sections 5, 6, 7, 10, 11, and 12 are not complete code sections without the operative definitional language of Section 3." *Id.* at 56. So the court held that the "balance of the legislation is incapable of functioning independently." *Id.* (citation omitted). This reasoning badly misconstrues the Act, defies basic principles of severability, and exceeds the remedial power of a federal court.

The court's first mistake was concluding that, because the "natural person" definition was unconstitutional, all of Section 3 was, too. But the *only* definition the district court specifically found unconstitutional was the definition of "natural person." Dkt. 149 at 33–41 (discussing only the Act's "new definition of 'natural person'" in adjudicating vagueness claim). The term "natural person" does not appear even once in Sections 5, 6, 7, 8, 9, 10, 11, and 12. Some of those sections do reference a "detectable human heartbeat," but the district court never found the definition of *that* term to be vague or unconstitutional.

The district court noted that plaintiffs' complaint includes boilerplate references to "the entirety of Section 3" being unlawful. Dkt. 149 at 52. But it is unclear why that is relevant to the severability analysis, given that the district court itself found only

the definition of "natural person"—not any of the other definitions in Section 3—to be unconstitutionally vague.

Finally, the district court's holding runs headlong into basic principles of federalism and the properly limited role of the courts: federal courts should nullify no more of a state legislature's work than is necessary. *Ayotte*, 546 U.S. at 328; *see also Union City*, 266 Ga. at 403-04 (Georgia has "long favored" upholding statutes "in part" whenever possible). That rule applies with even stronger force when the enactment includes a severability clause, *id.* at 404, which expresses the legislature's intent to keep as much of the law intact as possible, *see City Council of Augusta v. Mangelly*, 243 Ga. 358, 363 (1979) ("[T]he presence of a severability clause in an act reverses the usual presumption that the legislature intends the act to be an entirety, and creates an opposite presumption of separability." (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936)).

The district court effectively inverted the severability analysis. Under the proper approach, the court should have looked at each non-challenged provision of the LIFE Act to determine whether it could operate independently without the *specific* provisions that were found unconstitutional. Here, however, the district court reasoned that because one statutory definition was

found unconstitutional, then *all* the definitions had somehow become tainted, and thus any provision of the Act that incorporates any of its definitions must fall as well. That reasoning makes little sense on its own terms and far exceeds the proper role of a federal court in reviewing the constitutionality of duly enacted state legislation.

* * *

In sum, the district court's remedy far exceeded its proper scope. Under a straightforward severability analysis, the LIFE Act's abortion restriction and "natural person" definition are each severable from the rest of the Act, because those two provisions are not necessary to the continued operation of the rest of the Act, and the remaining provisions would continue to advance the legislature's purpose for it: promoting the dignity and well-being of unborn children in Georgia.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 11,856 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2020, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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