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, in addition to those contained in prior briefs, may have an interest in the outcome of this case:

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REPLY BRIEF[1]

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

Plaintiffs argue at length that the LIFE Act's abortion restriction is a "ban" that "prohibits pre-viability abortion" and is, therefore, "categorically" unconstitutional. *See, e.g.*, Pl. Br. 14, 17. Their argument turns on a made-up distinction between abortion "bans" and "restrictions," *id.* at 18, which the Supreme Court has never applied, *see* State Br. 20-22. And because the district court applied this novel and unsupported standard, it wrongly excluded relevant discovery.

A. The Act's abortion restriction is not per se unconstitutional.

Like the district court, Plaintiffs contend that any abortion laws that can be characterized as "bans" are per se unconstitutional. They say the Supreme Court has created a

[1] Since this appeal was taken, several defendants were replaced as the result of elections or the expiration of their terms. Their successors were automatically substituted by rule. *See State's Notice of Automatic Substitution of Public Officers* (Feb. 5, 2021). Two of the successor district attorneys—Patsy Austin-Gatson and Shalena Cook Jones—are not represented by the Attorney General. This brief is filed on behalf of the defendants listed on the cover page.

"bright-line rule" under which "no circumstances" justify prohibiting even some previability abortions. Pl. Br. 14. Not so.

The Supreme Court has never distinguished between "bans" and "regulations." Although *Planned Parenthood of Southeastern Pennsylvania v. Casey* explained that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," 505 U.S. 833, 879 (1992), the Court also made clear that it "was not recognizing an absolute right," *id.* at 875. Instead, *Casey* adopted the undue-burden analysis as the framework for considering laws that allegedly infringed on the right to an abortion recognized in *Roe*. Later Supreme Court cases uniformly applied that framework without asking whether a given regulation could be characterized as a "ban." *See* State Br. 20-22.

Nor has this Court ever applied Plaintiffs' threshold "is it a ban?" test. State Br. 23-24. In both *Robinson v. Attorney General*, 957 F.3d 1171, 1179-82 (11th Cir. 2020) and *West Alabama Women's Center. v. Williamson*, 900 F.3d 1310, 1324 (11th Cir. 2018), the district court and this Court conducted the undue-burden analysis set forth in *Casey*. Plaintiffs try to distinguish those cases as involving "regulations," not "bans." Pl. Br. 20-21 & n.12. But that circular argument merely begs the question whether labeling a law a "regulation" rather than a "ban" matters

at all under Supreme Court precedent. Plaintiffs can point to no case from the Supreme Court or this Circuit suggesting that this distinction matters in assessing the constitutionality of a challenged law.[2]

Such a distinction would be irrational and unworkable, and this Court should not adopt it. There is no principled way to distinguish between a possibly valid "regulation" and a per-se-invalid "ban," because *every* "regulation" necessarily "bans" conduct that violates it. For example, the Supreme Court in *Casey* upheld a regulation banning pre-viability abortions without informed consent or before the end of a 24-hour waiting period. And the Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), upheld a regulation banning *all* partial-birth abortions, even pre-viability. Under Plaintiffs' (and the district court's) test, those regulations should have been per se unconstitutional because they "banned" some pre-viability abortions. The Supreme Court has never endorsed that approach to the law and this Court should not either.

[2] Plaintiffs cite several out-of-circuit cases to defend their categorical rule, *see* Pl. Br. 15-16, but those cases make the same analytical mistake the district court did.

Plaintiffs further reason that the undue-burden analysis is unnecessary because "the [Supreme] Court *already* carefully balanced" the interests in *Casey*. Pl. Br. 16. But that is not how legal precedent works. For example, Georgia's ballot-access requirements have "been repeatedly upheld by both the Eleventh Circuit and the Supreme Court," but this Court recently reversed a district court's finding that it was "bound by the clear rulings of both the Eleventh Circuit and the Supreme Court." *Cowen v. Raffensperger*, No. 1:17-CV-04660, at 9, 15 (N.D. Ga. Sept. 23, 2019), *vacated* 960 F.3d 1339 (11th Cir. 2020). Even though "Georgia's ballot-access requirements have been repeatedly challenged, both before and after the Supreme Court's decision in *Anderson*, and have been upheld each time," 960 F.3d at 1343, there is "no litmus-paper test for separating those restrictions that are valid from those that are invidious." *Storer v. Brown*, 415 U.S. 724, 730 (1974). District courts cannot just cite a case analyzing a similar law and call it a day—they must actually conduct the necessary constitutional analysis, especially when precedent requires a weighing of the interests on each side. *Cowen*, 960 F.3d at 1345-46; *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1282 (11th Cir. 2020) ("Despite previously upholding a more restrictive ballot-access regime in Florida, we still must consider

whether any changed circumstances require a different result" under the controlling framework).

Just so here. *Casey* addressed (and mostly upheld) a number of different regulations of abortion procedures but did not address a law limiting abortions after a certain point in pregnancy. Nor did it address the scientific or ethical considerations that support a heartbeat limitation. *Casey* also reminded the lower courts that the substantive due process doctrine is not "absolute" and that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue." *Casey*, 505 U.S. at 875-76. The district court erred by nonetheless construing *Casey* as requiring per se invalidation of certain types of laws.

Even if Plaintiffs were right that some abortion restrictions are per se unlawful, that rule would not apply here because the LIFE Act does not impose a flat "ban" on pre-viability abortions as Plaintiffs claim. Pl. Br. 17. Indeed, had the district court not shut down expert discovery, Dr. Skop would have testified 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. Far from banning or prohibiting abortions, the LIFE Act's heartbeat limitation simply ensures that women who choose elective abortions do so at an earlier point in pregnancy, while continuing

to allow all pre-heartbeat abortions and certain types of later-term abortions.[3]

Finally, this Court should decline Plaintiffs' invitation to conduct the undue-burden analysis for the first time on appeal, without the benefit of a developed record, full briefing, or a district court decision on the issue. Pl. Br. 21-23. This Court is "a court of review, not a court of first view." *Callahan v. United States Dep't of Health & Hum. Servs.*, 939 F.3d 1251, 1266 (11th Cir. 2019). When a district court fails to find facts and make legal holdings under the proper legal framework, this Court ordinarily vacates and remands. *See Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1308 (11th Cir. 2020); *Cowen*, 960 F.3d at 1346. That is what should happen here.

B. The district court erred by excluding evidence that is clearly relevant under the governing legal standard.

Plaintiffs acknowledge that the district court's relevance analysis turned on its view of the governing legal test. *See* Pl. Br. 25 ("Defendants' arguments on discovery are premised on the assumption that the undue burden test applies here."). And they

[3] Separate from their challenge to the heartbeat restriction in Section 4(a) of the LIFE Act, Plaintiffs argue that Section 3 now bans *all* abortions. That argument lacks merit for the reasons discussed below in Section II.A.

do not dispute that a "mistake of law" in resolving a discovery question warrants reversal. State Br. 26 (quoting *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1306 (11th Cir. 2011)). Instead, Plaintiffs mostly just repeat their arguments, already addressed above, that the district court need not have bothered with the undue-burden analysis because the LIFE Act's heartbeat restriction is per se invalid. Three further points bear attention.

First, Plaintiffs argue that this Court reverses discovery decisions only when they cause "substantial harm." Pl. Br. 24 (quoting *Josendis*, 662 F.3d at 1307). But that standard is met here because the district court excluded expert opinions and other potential discovery that would have been highly relevant to the defendants' case. *See Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 991 (11th Cir. 2016) (reversing exclusion of expert opinion because court mischaracterized testimony and found it nonpersuasive); *Burks v. Am. Cast Iron Pipe Co.*, 212 F.3d 1333, 1337-38 (11th Cir. 2000) (reversing denial of discovery when documents were highly relevant to party's case and might have been "necessary to oppose summary judgment"); State Br. 26-29.

Second, Plaintiffs contend that, even if the district court applied the undue-burden test, the State's evidence would have

been irrelevant because it could never "outweigh the burden H.B. 481 imposes." Pl. Br. 25. That is wrong not only because it smuggles the same absolute, categorical rule into the undue-burden analysis, but also because the State sought to introduce evidence that went to the *extent* of the burden imposed by the Act. Dr. Skop's would have testified that two-thirds of abortions occur within the first eight weeks of pregnancy and 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, 5. Regardless, courts cannot exclude expert reports simply because they find them unpersuasive. *See* State Br. 27-28.

Plaintiffs suggest in passing that the district court's exclusion order did not bar discovery about "anything other than the state's purported interests." Pl. Br. 24 n.14. But given the district court's holding in that same order that the LIFE Act's heartbeat restriction was per se unconstitutional, *see* Dkt. 115 at 2-4, it is clear that *any* discovery would have been foreclosed. Plaintiffs argued that the Skop and Curlin expert reports "illustrate the irrelevance of this discovery." Dkt. 113 at 5 n.2. Indeed, Plaintiffs expressly argued that this evidence was "*clearly irrelevant by any standard*." *Id.* at 5 (emphasis added). Neither Plaintiffs nor the

district court suggested that any portion of the proffered testimony by Drs. Skop or Curlin would have been admissible.

Third, Plaintiffs are wrong that evidence in support of arguments to modify existing precedent is irrelevant. Pl. Br. 26. The federal rules "expressly envision that parties may need to litigate in anticipation" of legal change, and so parties must be able to seek discovery relevant to those good faith challenges to existing law. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 281 (5th Cir. 2019) (Ho, J., concurring). Some of the most important cases of the twentieth century rest on just such a challenge. *See, e.g.*, *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 494, (1954) ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," the detrimental effect of segregation "is amply supported by modern authority.").

This Court should vacate the district court's grant of summary judgment on Plaintiffs' challenge to the LIFE Act's heartbeat restriction and remand with instructions to adjudicate this claim on the merits after the ordinary discovery process.

II. The "natural person" definition is constitutional.

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

Plaintiffs merely quote—but do not otherwise defend—the district court's reasoning that the "natural person" definition in Section 3(b) of the LIFE Act violates substantive due process because *Roe v. Wade* already "considered and rejected" that definition. Pl. Br. 14, 17. As Defendants explained, *Roe* rejected the argument that unborn children were "persons" under the Fourteenth Amendment to the U.S. Constitution but did not hold, or even suggest, that states could not adopt their own definitions of "persons" as a matter of state law. *See* State Br. 31.

In place of the district court's flawed analysis, Plaintiffs argue in passing that the new definition of natural person violates substantive due process because it "could be read to criminalize *all* abortion outright." Pl. Br. 17, 19 n.10. But the "natural person" definition does not, by itself, regulate *any* conduct, abortions or otherwise, so this is no basis for its invalidation. *See* State Br. 32.

Plaintiffs' suggestion that the new definition now criminalizes all abortions via its effect on other statutes is also deeply flawed. Plaintiffs point to nothing in the text or history of the LIFE Act that reveals such an intent, and any interpretation to that effect

would violate basic canons of construction. Georgia law requires courts "to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage." *Slakman v. Cont'l Cas. Co.*, 277 Ga. 189, 190 (2003). Section 4 of the LIFE Act includes a detailed regulatory scheme for abortion procedures that is centered on the presence or absence of a "detectable human heartbeat," with several carefully defined exceptions. Sections 7, 8, and 11 of the Act update Georgia's informed consent and reporting rules for abortions. Under Plaintiffs' view, however, all of those provisions are completely meaningless because the Act categorically bans all abortions, *sub silentio*, via its new definition of natural person. *See* Pl. Br. 19 n.10. That interpretation flouts basic principles of Georgia law and does not come close to showing that the "natural person" definition violates substantive due process.

B. The "natural person" definition is not unconstitutionally vague.

As for their vagueness challenge to the "natural person" definition, Plaintiffs do not identify *any* ambiguity about who qualifies as a "natural person" under the Act. Nor do they dispute that the vagueness doctrine ordinarily applies only to laws that

regulate primary conduct. *See* State Br. 34-35. An unambiguous definitional provision does not implicate vagueness concerns.

Plaintiffs nonetheless argue that the "natural person" definition must be enjoined, despite being clear on its own terms, because it amends "hundreds of criminal and civil provisions and in many instances materially altering the nature of the statutes at issue." Pl. Br. 26. In other words, they contend that the "natural person" definition renders *other* statutes vague. *Id.* at 28.

That line of argument does not support facial invalidation. Facial invalidation is appropriate only if the statute is invalid in all of its applications, and Plaintiffs do not dispute that the "natural person" definition has valid and perfectly constitutional applications. As for the three specific statutes that Plaintiffs discuss, none are vague, and they do not criminalize abortion either. Finally, this Court has repeatedly held that the mere potential for discriminatory enforcement cannot justify finding a statute unconstitutional in a pre-enforcement facial challenge.

1. The ordinary "no set of circumstances" test applies to Plaintiffs' facial vagueness challenge.

Plaintiffs first argue that the well-established standard for assessing facial vagueness challenges—the "no set of circumstances" test—does not apply when the challenged law

"reaches a substantial amount of constitutionally protected conduct." Pl. Br. 39. But that argument largely hinges on language from *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), that Plaintiffs cite out of context. In *Hoffman Estates*, the Supreme Court explained that "[a] law that does not reach constitutionally protected conduct *and therefore satisfies the overbreadth test* may nevertheless be challenged on its face as unduly vague" only if "the law is impermissibly vague in all of its applications." *Id.* (emphasis added). When read in its full context, this passage merely notes that a statute may be found unconstitutionally vague even if it does not violate the First Amendment's overbreadth doctrine. But *Hoffman Estates* does not hold—as Plaintiffs suggest—that vagueness claims implicating "constitutionally protected conduct" are somehow exempt from the ordinary standard that applies to all facial vagueness challenges.

In *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999), the Court made the same distinction: "the *overbreadth* doctrine permits the facial invalidation of laws that inhibit the *exercise of First Amendment rights* if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Id.* (citation omitted) (emphasis added).

And the Court then described that overbreadth-specific standard as requiring the challenged law to "reach a substantial amount of constitutionally protected conduct." *Id.*; *see also United States v. Stevens*, 559 U.S. 460, 472-73 (2010) ("To succeed in a typical facial attack, Stevens would have to establish that no set of circumstances exists under which [§ 48] would be valid[.] … In the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional.") (citations omitted).

This Court's precedent also forecloses Plaintiffs' attempt to evade the ordinary standard for adjudicating facial challenges. In *Indigo Room, Inc. v. City of Fort Myers*, this Court applied *Salerno*'s "no set of circumstances" test to a facial vagueness challenge, holding that "'the possibility of a valid application necessarily precludes facial invalidity.'" 710 F.3d 1294, 1302 (11th Cir. 2013) (quoting *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982)). Nothing in this Court's analysis of the standard for facial vagueness claims—set forth in the final paragraph of Section III of the opinion—suggests that the inquiry would differ based on the nature of the conduct. Earlier in its opinion, the Court explained that a plaintiff cannot bring a *pre-*

enforcement vagueness challenge unless the plaintiff alleges a chilling effect on "constitutionally protected conduct." *Id.* at 1301. But the Court did not even suggest that the standard for prevailing on a *facial challenge* might vary depending on the nature of the plaintiff's claim.

Similarly, in *Alabama Education Association v. State Superintendent of Education*, this Court stated unequivocally: "To succeed in their void for vagueness challenge, the Act's challengers 'must demonstrate that the law is impermissibly vague *in all of its applications*.'" 746 F.3d 1135, 1139 (11th Cir. 2014) (emphasis added). When a statute has at least some permissible applications, "[a] series of as applied challenges is a more appropriate forum for challenging other, potentially more vague applications of the Act." *Id.* at 1140 n.3.

Plaintiffs next contend that facial invalidation is warranted because the Supreme Court has "invalidate[d] a criminal statute on its face even when it could conceivably have had some valid application." Pl. Br. 40-41 (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 358 n.8 (1983)). But *Kolender* is an especially poor guidepost because it involved vagrancy laws, which are "in a class by themselves" for constitutional vagueness purposes. State Br. 42 (citation omitted). Plaintiffs have no response to the fact that the

Supreme Court has characterized vagrancy and loitering laws as *sui generis* for purposes of vagueness doctrine. *See id.*

Plaintiffs also argue that it would be "unworkable for Plaintiffs to address each affected law on a case-by-case basis as Defendants suggest." Pl. Br. 41. In other words, Plaintiffs believe that they should not have to actually challenge—or even *identify*—state statutes to have a federal court declare them unconstitutional and enjoin their operation. Here, for example, Plaintiffs contend that the Act's new definitions would apply to "hundreds" of other statutes, yet Plaintiffs cite just *five* of those statutes, *id.* at 31, and advance an actual vagueness argument about just *three*, *id.* at 31-36.

The remedy requested by Plaintiffs and imposed by the district court—facial invalidation of the "natural person" definition in every one of its applications throughout the Georgia Code—vastly exceeds the proper judicial role. The decision below enjoins countless applications of the definition that were not before the Court, were not alleged to harm Plaintiffs, and that Plaintiffs themselves have never claimed to be unconstitutionally vague. This is a classic example of a case that should have proceeded through as-applied challenges rather than a boundless facial attack. *See, e.g.*, *Gonzales*, 550 U.S. at 167.

Finally, Plaintiffs' suggestion that—under the State's approach—they must "wait to be prosecuted" in order to bring their vagueness claim, *see* Pl. Br. 42-43, conflates the doctrines of facial vs. as-applied challenges and pre-enforcement vs. post-enforcement challenges. From the start, the State has argued that Plaintiffs cannot succeed on a facial vagueness challenge and should instead be required to seek as-applied relief against any *specific* laws that they allege cause them *specific* injury. But the question of bringing an as-applied suit in a pre-enforcement posture was never at issue here, since Plaintiffs sought facial invalidation of the definition of "natural person" in every one of its applications.

If this Court rejects Plaintiffs' sweeping facial vagueness challenge, then Plaintiffs could try to meet the standard to bring a pre-enforcement challenge to specific applications of the LIFE Act's definitions. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of … a credible threat of prosecution.").[4]

[4] Given that Plaintiffs have never identified a single prosecutor or law enforcement official anywhere in Georgia who has suggested

2. The "natural person" definition is not unconstitutionally vague in any of the three statutes that the district court cited.

In any event, even if a handful of vague applications could render a statute facially invalid (*but see supra*) the three examples of purportedly vague statutes that Plaintiffs identify do not help them. Pl. Br. 31-36. At most, Plaintiffs have identified scenarios where the "natural person" definition could lead to disputes over statutory interpretation or novel questions of fact. But Plaintiffs' speculation about hypothetical applications that might create "close cases" does not make the definition unconstitutionally vague. *United States v. Williams*, 553 U.S. 285, 305 (2008).

a. Nothing about the LIFE Act's new definitions renders the child cruelty statute unconstitutionally vague. *See* State Br. 43-44. Plaintiffs—who bear the burden of proving unconstitutional vagueness—still have not explained how the "natural person" definition could render this statute vague despite the statute not containing the defined terms "person" or "natural person." Pl. Br. 35.

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that medically indicated care for a pregnant woman would constitute a crime, it is unclear how Plaintiffs could establish a "credible threat" of prosecution. But that is a question for a later as-applied challenge.

And the arguments Plaintiffs do make are misplaced. Their claimed confusion over whether a pregnant woman could "willfully" deprive an unborn child of sustenance is not a vagueness problem. Pl. Br. 34.[5] That is a question of application that courts will resolve on the facts before them—if such a case ever arises. *See, e.g.*, *Whitner v. State*, 492 S.E. 2d 777, 784-85 (S.C. 1997) (rejecting vagueness and fair notice challenges to criminal child neglect statute because it is "common knowledge that use of cocaine during pregnancy can harm the viable unborn child.").

Nor does the potential for disagreement over a question of statutory interpretation render a law unconstitutionally vague. To the contrary, "[a]pplying … principles of constitutional law and rules of statutory construction," will often "cure a law's vagueness." *High Ol' Times,* 673 F.2d at 1229.

For the same reasons, Plaintiffs are wrong that the child cruelty law is vague because "the District Court and Defendants read the same statute and reach opposite conclusions about what

[5] Also, the fact that the child cruelty statute contains a willfulness element itself undermines Plaintiffs' arguments, because the Supreme Court "has made clear that scienter requirements *alleviate* vagueness concerns." *Gonzales*, 550 U.S. at 149 (emphasis added).

the law means." Pl. Br. 34. That a given question of application requires statutory interpretation on which parties or courts could disagree is not a vagueness problem, and Plaintiffs cite no authority for the proposition that disagreement between a district court and the losing party somehow affects the vagueness analysis. If that were the law, no appeal in a vagueness case would ever succeed.

b. Plaintiffs' arguments about the mandatory child abuse reporting statute do not identify a vagueness problem either. Pl. Br. 34-36. Here, Plaintiffs focus on the word "endanger," which the mandatory reporting statute defines by cross-referencing four other statutes. *Id.* (citing O.C.G.A. § 19-7-5(b)(6.1)). Plaintiffs concede that three of those statutes have no possible application to the district court's hypothetical about a pregnant woman living with an abusive partner, eliminating any potential vagueness issue there. *Id.*

The sole cross-reference Plaintiffs claim to be vague is the child cruelty statute, discussed above. But, to reiterate, even if the definition of "natural person" is incorporated into the definition of

"child" in the child cruelty statute,[6] a pregnant woman would violate that statute only if she willfully harms a child. State Br. 44. And, if a person subject to a mandatory reporting obligation observes such conduct, he or she would need to report it as set forth in the statute. *Id.* at 45. Like any statutory scheme, there could be "close cases" at the margin about how to apply these laws, but that does not come close to establishing unconstitutional vagueness. *Williams*, 553 U.S. at 305.

c. Plaintiffs also argue that Georgia's reckless conduct statute is vague because it "lacks any objective standard by which to measure when it is reasonable for a medical provider to risk harming an embryo/fetus." Pl. Br. 33. They contend that the "reasonable person standard" does not provide an "objective measure" sufficient to save the law from vagueness. *Id.* at 32.

But the new definition of "natural person" in no way changed the "reasonable person" *standard* for reckless conduct that Plaintiffs now identify as a core feature of the purported

[6] Plaintiffs suggest that the mandatory reporting statute is vague because it is unclear whether the definition of "child" in the child cruelty statute incorporates the "natural person" definition. Pls. Br. 35-36. But if the natural person definition does not apply to the word "child," then the statute is even *narrower* than the district court suggested. It is unclear why Plaintiffs think this supports their vagueness challenge.

vagueness. If tying liability to a "reasonable person" standard causes vagueness, then Georgia's reckless conduct statute was unconstitutionally vague long before the "natural person" definition was enacted. But this kind of objective reasonableness standard is common in criminal statutes, and using such a standard does not render a law unconstitutionally vague. *See United States v. Ragen*, 314 U.S. 513, 523 (1942) ("The mere fact that a penal statute is so 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."); *Panther v. Hames*, 991 F.2d 576, 578 (9th Cir.1993) (upholding an Alaska statute against a vagueness challenge that defined criminal negligence as "a gross deviation from the standard of care that a reasonable person would observe in the situation"); *Einaugler*, *v. Supreme Ct. of State of N.Y.*, 109 F.3d 836, 842 (2d Cir. 1997) (rejecting vagueness challenge brought by doctor charged with reckless conduct in treating a patient).

Nor does the "natural person" definition somehow introduce vagueness when combined with this "objective standard." Pl. Br. 33. Plaintiffs worry that certain types of medical interventions for a pregnant woman "can cause harm to or endanger an embryo/fetus" and that "no clinician has simultaneously treated

both a pregnant person and an entirely new class of person whose interests may be at odds." *Id.* at 32-33.

That concern is misplaced. Plaintiffs themselves have stipulated that "[a]ll medical care entails the risk of unintentional harm to the patient," and that "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." Dkt. 125-2, Ex. B., ¶9. And clinicians have long viewed both the mother *and* the unborn child as patients. *See*, *e.g.*, Jack A. Pritchard & Paul C. MacDonald, *Williams Obstetrics vii* (16th ed. 1980) ("Happily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient."); Elizabeth Kukura, *Revisiting Roe to Advance Reproductive Justice for Childbearing Women*, 94 Notre Dame L. Rev. Online 20, 22 (2018) ("[S]ince the onset of technology that has enabled visualization and treatment of fetuses in utero, the field of obstetrics has wrestled with and ultimately accepted the idea of a two-patient model—where doctors understand themselves to be treating two separate patients.").

In sum, Plaintiffs are just wrong to suggest that physicians will have no idea how to care for "*two* individual patients," Pl. Br. 33 (citation and punctuation omitted), in an objectively reasonable

manner. And any risk of vagueness or a chilling of good-faith medical judgments is further diminished by the fact that the reckless conduct statute criminalizes only a *conscious* disregard of a *substantial* risk plus a *gross deviation* from how a reasonable person would have acted. *See State v. Boyer*, 270 Ga. 701, 702 (1999); *Gonzales*, 550 U.S. at 149 ("[S]cienter requirements alleviate vagueness concerns.").

Plaintiffs assert in a footnote that the post-amendment reckless conduct statute could also be construed to ban all abortions. Pl. Br. 32 n.19. But, as noted above, any such interpretation would violate basic canons of construction by rendering the LIFE Act's heartbeat restrictions and exceptions wholly meaningless. Moreover, an individual's behavior is deemed reckless conduct only if there is a conscious disregard of an "unjustifiable" risk of harm. O.C.G.A. § 16-5-60(b). Given that Georgia has not asserted a state interest in prohibiting pre-heartbeat abortions, any such conduct would unquestionably be deemed "justifiable." Plaintiffs' suggestion that they might risk prosecution for providing medically indicated treatments to pregnant women rest on nothing more than hyperbole and speculation.

C. Prosecutorial discretion does not render the "natural person" definition unconstitutionally vague.

Finally, Plaintiffs argue that the "natural person" definition is unconstitutionally vague because "those tasked with enforcing H.B. 481 have already expressed wildly different opinions about what the law means, its constitutionality, and their willingness to enforce (or not enforce) its provisions" Pl. Br. 37. That is a red herring. Although some of the district attorneys who were defendants in this case disagreed about the constitutionality of various provisions of the LIFE Act, Plaintiffs have not identified a single prosecutor anywhere in Georgia who has threatened to bring prosecutions based on the types of conduct that Plaintiffs claim will be chilled (*e.g.*, medically indicated care for pregnant women).

In all events, the potential for different prosecutorial "stances," Pl. Br. 37, does not make a law arbitrary or discriminatory. "The most clearly stated law against running red lights conceivably could be enforced discriminatorily by the police, if they so chose." *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 387 (11th Cir. 1991). Nor is the theoretical possibility of arbitrary enforcement at the outer periphery of a new law a reason to enjoin it. *United States v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963). Instead, a vagueness claim *based on*

a theory of arbitrary enforcement must wait until "enforcement has 'ripened into a prosecution.'" *Diversified Numismatics*, 949 F.2d at 387. It is a contradiction in terms for Plaintiffs to allege arbitrary enforcement of a law that, to date, has never actually gone into force, and the district court erred by ruling in Plaintiffs' favor on this ground. State Br. 39-42.

III. The challenged provisions are severable.

When a statute includes an express severability provision, Georgia law requires courts to presume that the unchallenged portions of the act are "separate[]" from the rest of the act, not an "inextricable part of the whole." *Union City Bd. of Zoning Appeals v. Just. Outdoor Displays, Inc.,* 266 Ga. 393, 404 (1996). Despite this presumption, the district court enjoined every single provision of the LIFE Act, including those that are unquestionably capable of operating independently. In defense, Plaintiffs offer only a conclusory argument from legislative purpose—grounded in Plaintiffs' unsupported speculation about the legislature's unstated motivations in passing the Act—and a misapplication of basic principles of severability.

A. The Act's purpose is to promote the dignity and well-being of unborn children.

Plaintiffs insist that "the purpose of H.B. 481 is to ban abortion." Pl. Br. 47. They provide no further support for this ipse dixit beyond summarizing the district court's equally conclusory reasoning. In fact, Plaintiffs do not cite a single case explaining how to discern legislative purpose under Georgia law—which is unsurprising because controlling Georgia precedent forecloses their position.

In Georgia, rather than look for "the unexpressed 'spirit" or 'reason" of the legislation," courts interpret and apply "the meaning of the statutes the legislature actually enacted, as determined from the text of those laws." *Gibson v. Gibson*, 301 Ga. 622, 631 (2017). "The General Assembly does not enact a general intention; it enacts statutes." *Moosa Co., LLC v. Comm'r of Georgia Dep't of Revenue*, 353 Ga. App. 429, 433 (2020) (quoting *Malphurs v. State*, 336 Ga. App. 867, 871 (2016) (Peterson, J.)). And courts "interpret and apply [those statutes], not some amorphous general intention." *Malphurs*, 336 Ga. App. at 871.

But "some amorphous general intention" is exactly what the district court invoked in finding the entire LIFE Act inseverable. *Id.* The district court pointed to citations to *Roe* and *Casey* in the Act's preamble as showing that the legislature's purpose was "to

ban or de facto ban abortion." Dkt. 149 at 60-61. Plaintiffs thus argue that without Sections 3 and 4 of the Act, "H.B. 481 cannot fulfill its purpose." Pl. Br. 48.

As explained in the State's opening brief, that view of the LIFE Act's purpose finds no support in the Act's text and structure. If the legislature's sole purpose were to ban abortion, it would not have enacted Sections 7, 8, and 11 of the Act—which update Georgia's informed consent, reporting, and information gathering requirements—since those provisions contemplate that pre-heartbeat abortions will *remain* legal in Georgia. Moreover, the Act's provisions regarding tax benefits, child support, and enhanced tort damages for unborn children (§§ 5, 6, 12) provide additional economic help for families during a difficult and expensive time. The notion that this meaningful economic assistance actually reflects a hidden purpose to ban abortion is outlandish. Countless federal and state programs seek to provide assistance to families during pregnancy, *see*, *e.g.*, Food & Nutrition Serv., U.S. Dep't of Agric., *Special Supplemental Nutrition Program for Women, Infants, and Children (WIC),* https://www.fns.usda.gov/wic, and the district court badly erred by finding that Georgia's efforts to advance similar goals in the LIFE Act were just a ruse to justify an abortion ban.

B. None of the other provisions in the Act "mutually depend" on Section 4 or the "natural person" definition.

Besides their faulty legislative purpose analysis, Plaintiffs also misunderstand the "mutually dependent" analysis. They first argue that "because almost every operative provision of H.B. 481 explicitly incorporates language from Section 3, these provisions 'are not complete code sections without ... Section 3.'" Pl. Br. 46 (quoting Dkt. 149 at 56). And they further argue that "many of the other provisions of H.B. 481 amend Georgia abortion laws so that they are consistent with, and serve to enforce, Section 4." *Id.* at 47.

This understanding of severability—that a court should take an eraser to the challenged provisions and then check to see whether the rest of the act still makes sense—is simply wrong.

"[F]ederal courts have no authority to erase a duly enacted law from the statute books." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018)); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006). Courts may issue a declaratory judgment finding a statute unconstitutional, but doing so "cannot make even an unconstitutional statute disappear." *Steffel v. Thompson*, 415 U.S. 452, 469 (1974). Rather, courts enjoin *enforcement* of unconstitutional statutes. *See Ex parte Young*, 209 U.S. 123, 155-

56 (1908). When courts assume that their "pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute," they commit the "writ-of-erasure fallacy." Mitchell, *The Writ-of-Erasure Fallacy*, *supra* at 937.

Yet that fallacy animates Plaintiffs' and district court's severability analysis. *See* Pl. Br. 51 ("[T]his Court cannot extract Section 3 from the remaining provisions without rewriting the statute."). Because courts enjoin unconstitutional acts instead of erase statutory provisions, an unchallenged statute should not be enjoined simply because it references a challenged provision. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) ("We have the negative power to disregard an unconstitutional enactment, but we cannot re-write Congress's work." (cleaned up)); *Jacobson*, 957 F.3d at 1209 ("The district court's decision rests on the flawed notion that by declaring the … statute unconstitutional, it eliminated the legal effect of the statute in all contexts."). Neither the district court nor Plaintiffs have explained why any of the Act's unchallenged provisions—all of which amend independent provisions of the Georgia Code—would cease functioning as the legislature intended if *enforcement* of Section 4 or the "natural person" definition is enjoined.

The only provision in Section 3 that Plaintiffs have ever specifically challenged as vague is the definition of "natural person" in Section 3(b). Indeed, in the seventeen pages of their brief discussing their vagueness claim, Plaintiffs do not even *mention* the definition of "detectable human heartbeat," much less claim that it is vague or unclear. Even if the definition of "natural person" were unconstitutionally vague when used in other statutes—which it is not—the only other provision of the LIFE Act that references that definition is Section 3(d), about population determinations. Plaintiffs have never argued that this use of the "natural person" definition is vague or unconstitutional. And there is no reference to "natural persons" at all in the Act's provisions regarding child support, tax benefits, tort damages, and informed consent (§§5, 6, 7, 8, 12). Plaintiffs do not explain how these provisions could be "mutually dependent" on a defined term that is not mentioned in those provisions.

It is particularly mistaken to claim, as Plaintiffs do, that the "unborn child" definition must be enjoined because it "has no meaning" without the "natural person" definition. Pl. Br. 45. The "natural person" definition does mention the term "unborn child," but the reverse is not true. The "unborn child" definition does not reference the "natural person" definition at all, so its meaning

would not change even if the "natural person" definition is enjoined. Nor would the legislature's purpose in defining "unborn child" be frustrated. *Contra* Pl. Br. 45-46. Multiple sections of the LIFE Act (§§ 5, 6, 7, 8, 10, and 12) do not reference "natural person[s]" but do use the defined terms "unborn child" or "detectable human heartbeat"—terms which, again, have never been found vague or unconstitutional. Thus, each of those statutes will continue to operate as the legislature intended, whether or not the "natural person" definition remains enforceable.

Plaintiffs also argue that Sections 7 and 8 of the Act cannot be severed because they "amend Georgia abortion laws so that they are consistent with, and serve to enforce, Section 4." Pl. Br. 47. This theory is even more puzzling. Those amended statutes—which Plaintiffs have never specifically claimed to be unconstitutional, *see* State Br. 54-55—require doctors to determine whether the unborn child has a heartbeat, O.C.G.A. § 31-9B-2, and inform the mother of what they find. Those sections of the Act do not even mention, much less *depend on* either the abortion limitation in Section 4 or the definition of natural person in Section 3(b). Nor would they change in meaning or operation if enforcement of Section 3(b) or Section 4 were enjoined. And the Act could not be clearer that the legislature intended for these

sections to go into effect even if Section 4's enforcement were enjoined—the severability clause in Section 14 eliminates all doubt on that point.

In short, Plaintiffs ask this Court to bless an unbounded theory of non-severability. They fret about "rewrit[ing]" the Act, Pl. Br. 38, but ask this Court to affirm a sweeping order enjoining numerous separate provisions for no reason other than that they were passed at the same time as the provisions to which Plaintiffs object. This Court should confirm that the federal courts' "constitutional mandate and institutional competence are limited," and that a court should never "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 321 (2006). Any provisions of the LIFE Act specifically found unconstitutional should be severed and the remaining provisions of the Act should be allowed to go into force.

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 6,480 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 March 30, 2021, 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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