No. 20-13024

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SisterSong Women of Color Reproductive Justice Collective,
on behalf of itself and its members, *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 Case No. 1:19-cv-02973-SCJ

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Appellees hereby certify that SisterSong Women of Color Reproductive Justice Collective; Feminist Women's Health Center; Planned Parenthood Southeast, Inc.; Atlanta Comprehensive Wellness Clinic; FemHealth USA d/b/a carafem; Columbus Women's Health Organization, P.C.; Summit Medical Associates, P.C.; Carrie Cwiak, M.D., M.P.H.; Lisa Haddad, M.D., M.S., M.P.H.; and Eva Lathrop, M.D., M.P.H. do not have a parent corporation, and that no publicly held corporation owns ten percent or more of SisterSong Women of Color Reproductive Justice Collective; Feminist Women's Health Center; Planned Parenthood Southeast, Inc.; Atlanta Comprehensive Wellness Clinic; FemHealth USA d/b/a carafem; Columbus Women's Health Organization, P.C.; Summit Medical Associates, P.C.; Carrie Cwiak, M.D., M.P.H.; Lisa Haddad, M.D., M.S., M.P.H.; or Eva Lathrop, M.D., M.P.H. Humedco Corp is a corporate parent to Plaintiff-Appellee Atlanta Women's Medical Center.

Further, the following individuals/entities have an interest in this litigation. To the best of Appellees' knowledge, none of the following individuals/entities is a corporation that issues shares to the public, and no publicly traded company or corporation has an interest in the outcome of this appeal.

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

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STATEMENT REGARDING ORAL ARGUMENT

Because the challenged law violates due process rights both by defying decades of binding precedent that holds that a state may not ban pre-viability abortion and by rendering the Georgia Code unconstitutionally vague, the District Court properly declared H.B. 481 unconstitutional. After reaching this conclusion, the court properly applied Georgia severability law, found that H.B. 481 is not severable, and enjoined H.B. 481 in its entirety. Plaintiffs-Appellees believe that oral argument would assist the Court in addressing the important questions of law raised in this case.

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STATEMENT OF THE ISSUES

1. Decades of Supreme Court precedent holds that a state may not ban abortion before viability. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). The challenged law, H.B. 481, prohibits abortion both by banning abortion after approximately six weeks of pregnancy and by declaring all embryos/fetuses to be persons for the purposes of Georgia law. Did the District Court correctly hold that this prohibition on pre-viability abortion is unconstitutional?

2. The challenged law amends the entire Georgia Code by redefining the term "person" to include embryos/fetuses. Did the District Court correctly hold that this amendment to the Georgia Code violates Plaintiffs' and Plaintiffs' patients' right to due process by rendering the Georgia Code unconstitutionally vague?

3. Did the District Court correctly determine that the challenged law is not severable under Georgia law?

INTRODUCTION[1]

H.B. 481 ("the Act") prohibits abortion as early as six weeks in pregnancy, and redefines the term "person" across the entire Georgia Code to include embryos/fetuses. In doing so, it is undisputed that the Act bans pre-viability abortion. For nearly half a century, the Supreme Court has been clear that due process as guaranteed by the Fourteenth Amendment prohibits such a law. H.B. 481 thus "directly conflicts with binding Supreme Court precedent" and, as the District Court properly found, this "alone [is] sufficient to render it unconstitutional." Dkt. 149 at 32–33.

The Act is also unlawful because it renders the Georgia Code unconstitutionally vague. By redefining the term "natural person" to encompass embryos/fetuses, and then applying that definition throughout the Georgia Code, H.B. 481 amends hundreds of Georgia laws without any consideration of their context. The Act leaves "entirely unclear . . . how the[se] amendments will be effectuated or enforced" and thus "forc[es Plaintiffs] to hypothesize about ways in which their conduct might violate statutes amended by" the Act. *Id.* at 36. In doing so, the Act chills not only abortion care, but also other critical medical care that pregnant patients need.

[1] Unless otherwise indicated, all emphasis is added and quotations and citations are omitted.

The impact of H.B. 481 is severe: it endangers—and, in the case of abortion, outright bans—reproductive health care. To protect the rights of Plaintiffs-Appellees and of all Georgians, H.B. 481 must be enjoined.

STATEMENT OF THE CASE

I. Statutory Framework and Operation of H.B. 481

H.B. 481 criminalizes the vast majority of abortion care and threatens all medical care that could harm an embryo/fetus.[2]

First, Section 4 says "[n]o abortion is authorized or shall be performed if an" embryo/fetus has "a detectable human heartbeat," defined as "embryonic fetal cardiac activity" ("the Ban"). H.B. 481 §§ 4(a)(2), (b). It is undisputed that fetal cardiac activity is detectable as early as six weeks in pregnancy. Dkt. 125-2, Ex. B ¶ 4; H.B. 481 § 8 ("*As early as six weeks' gestation*, an unborn child may have a detectable human heartbeat.").[3] Thus, because the vast majority—approximately 87%—of all abortions currently performed in Georgia take place at or after six weeks

[2] The language in H.B. 481 explicitly speaks of women, but people of all gender identities, including transgender men and gender-diverse individuals, may also become pregnant and seek abortion services and other care while pregnant, and would thus also suffer harm under H.B. 481.

[3] Under Section 4, abortions after cardiac activity are allowed only in the narrow circumstances in which: (1) abortion is necessary to prevent death or "substantial and irreversible physical impairment of a major bodily function"; (2) the pregnancy is the result of rape or incest that has been reported to the police; or (3) there is a "profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth." H.B. 481 §§ 4(a), (b).

of pregnancy, Section 4 would ban the vast majority of abortions in the state. Dkt. 125-2, Ex. B ¶ 5. The consequences of violating Section 4 include imprisonment of one to ten years, O.C.G.A. §16-12-140(B),[4] physician licensing penalties up to and including license revocation, H.B. 481 § 10(b); O.C.G.A. §§ 43-34-8(a)(7), (8), and civil actions against doctors, H.B. 481 § 4(g).

Second, Section 3 of H.B. 481 amends Title I of the Georgia Code by establishing definitions of "Persons and their Rights" that apply throughout the state's entire civil and criminal Code. Section 3 redefines "natural person" to include "an unborn child," and defines "unborn child" as an embryo/fetus "at any stage of development" in utero ("Personhood Definition"). H.B. 481 §§ 3(b), (e)(2). It is uncontested that, in redefining "natural person" throughout the Georgia Code, Section 3 amends hundreds of provisions that contain the term "person" or "human being." *See* Br. of State Defs.-Appellants ("State Br.") 30. As a result of this amendment to the Code, providers face threat of criminal prosecution for providing a wide range of health care that may harm or end a pregnancy—and thus could now

[4] Section 4's affirmative defenses to prosecution allow an accused "woman [who] sought an abortion" to prove that "she reasonably believed that an abortion was the only way to prevent a medical emergency," and allows an accused physician, nurse, physician assistant, or pharmacist to prove that care provided to a pregnant patient "result[ed] in the accidental or unintentional injury or death of an" embryo/fetus. *Id.* § 4(h)(5). Thus, under Section 4, medical professionals can be charged for providing care that harms an embryo/fetus, even if that harm was accidental or incidental to other treatment, and would be forced to prove in court that the harm was in fact accidental or incidental. *Id.* § 4(h).

run afoul of laws that criminalize harming another "person" as defined by H.B. 481—including abortion care, miscarriage care, gynecological care, cancer screening and treatment, hormone therapies, and a variety of other care. *See* Dkt. 125-2, Ex. B ¶¶ 7–8; Dkt. 149 at 39 n.17.

II. Medical Background

In a typically developing embryo, cells that eventually form the basis for development of the heart produce cardiac activity that is generally detectable via vaginal ultrasound at approximately 6.0 weeks from the first day of the patient's last menstrual period ("lmp").[5] Dkt. 125-2, Ex. B ¶ 4. By contrast, viability—the point at which a healthy singleton fetus has a reasonable likelihood of sustained survival outside the uterus with or without artificial aid, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992)—does not occur until months after cardiac activity is detected. Dkt. 125-2, Ex. B ¶ 6.[6]

[5] Almost uniformly, clinicians measure pregnancy from the first day of the patient's last menstrual period ("lmp"). Dkt. 125-2, Ex. B ¶ 2. Clinicians also date pregnancy (i.e., indicate how far along a pregnancy has advanced) with the weeks before the decimal point and the days after, for example: "6.2 weeks lmp" means 6 weeks and 2 days lmp. A full-term pregnancy is approximately 40 weeks lmp. *Id.*

[6] Defendants' position is that cardiac activity is detectable by approximately 6–7 weeks lmp and that viability is as early as 20 weeks lmp. *Id.* ¶¶ 5–6. This dispute is irrelevant as both parties agree that cardiac activity is detectable well before viability. *See* Dkt. 149 at 27–28.

Prior to and after 6.0 weeks lmp, many pregnant people do not know they are pregnant. For people with highly regular four-week cycles, 6.0 weeks lmp is only two weeks after their first missed period. *Id.* ¶¶ 3–4. However, people with cycles of different lengths or those with irregular cycles may not realize they have missed a period before 6.0 weeks lmp. *See id.* ¶ 3.

III. Impact of H.B. 481 on Access to Reproductive Health Care

Pregnant Georgians need access to a wide variety of medical care, including abortion care. Plaintiffs-Appellees are committed to preserving access to this care for all Georgians. Plaintiff-Appellee SisterSong Women of Color Reproductive Justice Collective ("SisterSong") is a non-profit membership organization based in Georgia that fosters a coalition to address policies, systems, and cultural practices that limit the reproductive lives of marginalized people. The other ten Plaintiffs-Appellees are Georgia clinics and physicians that provide reproductive health care services, including abortion, to Georgians. Dkt. 1 ¶¶ 10–21.

H.B. 481 will decimate access to abortion care if it takes effect. The vast majority of abortions in Georgia—approximately 87%—occur at or after cardiac activity is detectable, that is at or after 6.0 weeks lmp, and thus would be banned under Section 4 of H.B. 481. Dkt. 125-2, Ex. B ¶ 5. Nationally, one in four women will have an abortion by the age of forty-five. *Id.* ¶ 1. A majority of women having

abortions (61%) already have at least one child, while most (66%) also plan to have a child or additional children in the future. *Id.*

H.B. 481 will also impact medically appropriate miscarriage care. In some cases of miscarriage before viability, cardiac activity persists while the patient passes embryonic or fetal tissue or where cervical dilation makes pregnancy loss inevitable. *Id.* ¶ 7. In those cases, some physicians determine that it is medically appropriate to offer the patient treatment to empty her uterus. *Id.* This type of care to complete a miscarriage would be banned under Section 4 of H.B. 481.

In addition to abortion care and miscarriage care, pregnant patients may need gynecological care, cancer screening and treatment, hormone therapies, and a variety of other care that might harm or end a pregnancy and, as such, would be threatened under Section 3 of H.B. 481. Dkt. 125-2 ¶¶ 7–8; Dkt. 149 at 39 n.17.

IV. Proceedings Below

On June 28, 2019, Plaintiffs-Appellees (collectively, the "Plaintiffs" or "Appellees") commenced this action against Brian Kemp, Christopher M. Carr, Kathleen Toomey, LaSharn Hughes, Paul L. Howard, Jr., Sherry Boston, Julia Slater, Joyette M. Holmes,[7] Danny Porter, and Meg Heap (all sued in their official

[7] On August 28, 2019, the District Court granted Defendants' unopposed motion to substitute Joyette M. Holmes, the current District Attorney for Cobb County, as a party. Dkt. 83.

capacities), and Members of the Georgia Composite Medical Board in their official capacities (collectively, the "Defendants" or "Appellants").[8]

Plaintiffs moved to preliminarily enjoin enforcement of H.B. 481 on July 23, 2019, in advance of the Act's scheduled effective date of January 1, 2020. *See* Dkt. 97 at 4. Plaintiffs argued that H.B. 481 is unconstitutional in two ways: first, it violates the substantive due process rights to privacy and liberty under the Fourteenth Amendment because it bans abortion before viability; and second, it is unconstitutionally vague in violation of the Fourteenth Amendment's guarantee of due process. *Id.* Plaintiffs also argued that H.B. 481 is not severable and thus sought to enjoin the entire Act. *Id.* at 45. After holding a hearing on that motion on September 23, 2019, the District Court preliminarily enjoined the Act in its entirety on October 1, 2019. *Id.* at 46–47.

The case was put on a four-month discovery track. *Id.* at 46. On December 4, 2019, the District Court granted Plaintiffs' October 29, 2019 motion to preclude discovery on the State's purported interest in banning pre-viability abortion, holding that any such facts would be immaterial and therefore irrelevant to the summary judgment inquiry. Dkt. 115 at 2–3 (noting that the "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

[8] Defendants Boston and Howard do not join the other Defendants in this appeal.

it"). The District Court found that any discovery, including expert discovery, "regarding the purported state interests underlying H.B. 481 is irrelevant under the Supreme Court's viability framework." *Id.* at 3; *see also id.* at 4 (noting the "substantial costs and other burdens of the irrelevant expert discovery").

After Plaintiffs' motion to preclude discovery on state interests was granted, discovery continued and the Parties entered into joint stipulations that, among other things, made clear that neither party disputes that H.B. 481 prohibits abortion prior to viability. Dkt. 125-2, Ex. B.

On February 20, 2020, Plaintiffs and Defendants filed cross motions for summary judgment. Dkts. 124, 125. On July 13, 2020, after holding a hearing on those motions, the District Court granted Plaintiffs' motion, denied Defendants' motion, and permanently enjoined enforcement of H.B. 481 in its entirety. Dkt. 149.

First, the District Court found that "it is undisputable that Section 4 [of H.B. 481] prohibits abortions at a pre-viability point in pregnancy," *id.* at 28, and thus that it is plainly unconstitutional, *id.* at 27. The District Court held that H.B. 481 conflicts with binding Supreme Court precedent that has "repeatedly and unequivocally held that under no circumstances whatsoever may a state prohibit or ban abortions at any point prior to viability." *Id.*; *see also id.* at 32 ("As this ban directly conflicts with binding Supreme Court precedent (i.e., the core holdings in *Roe*, *Casey*, and their progeny) and thereby infringes upon a woman's constitutional right to obtain an

abortion prior to viability, the Court is left with no other choice but to declare it unconstitutional.").

The District Court also held that Section 3's redefinition of "natural person" to include an embryo/fetus "at any stage of development" in utero violates substantive due process. *Id.* at 33. The District Court explained that this "precise definition has been considered and rejected by the Supreme Court" because Fourteenth Amendment protections extend only to "person[s]," which do not include embryos/fetuses. *Id.* at 31. The District Court noted that this finding "is alone sufficient to render [Section 3] unconstitutional." *Id.* at 33.

The District Court further held that Section 3's Personhood Definition is unconstitutionally vague. The District Court held that H.B. 481 fails to meet the notice and fair warning requirements that the Due Process Clause demands. First, it held that H.B. 481 fails to give "fair notice," *id.* at 40, of what it requires because "people of common intelligence will be forced to guess at the core meaning of Section 3's Personhood Definition," *id.* at 38. The Court also held that H.B. 481's lack of clarity "provides precisely the kind of opportunity" for arbitrary and discriminatory enforcement that the Due Process Clause prohibits. *Id.* at 36–37.

After determining that Sections 3 and 4 are unconstitutional, the District Court applied Georgia law to hold that H.B. 481 is not severable. The District Court found that almost all sections of H.B. 481 are "mutually dependent" on Section 3. *Id.* at 56.

The District Court also held the legislative purpose of H.B. 481 "was to ban or *de facto* ban abortion" and that, without Sections 3 and 4, "effect cannot be given to the legislative intent." *Id.* at 61. Consequently, the Court enjoined H.B. 481 in its entirety.

This appeal followed.

STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo*. *Ft. Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1239–40 (11th Cir. 2018). Discovery decisions are reviewed for abuse of discretion. *Joesendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1306–07 (11th Cir. 2011).

SUMMARY OF ARGUMENT

Nearly fifty years of Supreme Court precedent, beginning with *Roe v. Wade*, 410 U.S. 133 (1973), holds that a state may not ban abortion prior to viability. Contrary to Defendants' claims, the District Court correctly applied this categorical rule. The Supreme Court has already balanced an individual's liberty interest against governmental interests, and concluded that no state interest is strong enough to justify a pre-viability abortion ban. *See Roe*, 410 U.S. at 164–65; *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852, 870–71 (1992).

Seeking to evade this clear precedent, Defendants erroneously argue that *Casey*'s "undue burden" test applies. However, *Casey*'s test is reserved to evaluate

abortion *restrictions* and does not apply to abortion *bans*. And, even if that test did apply, it would not change the outcome here. A ban that would prohibit 87% of pre-viability abortions in Georgia clearly imposes an undue burden on people seeking abortion. Under either *Roe* or *Casey*, the State's purported interests are not strong enough to justify banning abortion, and the District Court properly excluded evidence on this score.

Additionally, the District Court properly held H.B. 481 invalid because it renders the Georgia Code unconstitutionally vague. It is undisputed that the Act redefines the terms "person" and "human being" throughout the entire Code to include embryos/fetuses, thereby amending hundreds of civil and criminal statutes. As a result, a number of amended statutes now appear to restrict or prohibit medical care to pregnant patients and/or to criminalize conduct by pregnant people, because that care or conduct could harm an embryo/fetus. Defendants attempt to minimize the impact of H.B. 481's new "Personhood Definition," but even Defendants themselves cannot articulate what these newly amended laws prohibit or require for medical providers and pregnant people. H.B. 481 therefore violates the Fourteenth Amendment's guarantee of due process because it fails to put Plaintiffs on notice as to what conduct is prohibited or required, and leaves them subject to arbitrary or discriminatory enforcement. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108, 112 (1972). Where a vague law implicates constitutionally protected conduct

or carries criminal penalties, facial invalidation of the offending statute is the only appropriate remedy. Likewise, Defendants' claim that Plaintiffs must wait for H.B. 481 to take effect and risk penalties prior to mounting a vagueness challenge is contrary to well-settled precedent. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Accordingly, as the District Court correctly held, H.B. 481 is void for vagueness.

Finally, the District Court properly enjoined H.B. 481 in its entirety because it cannot be severed. Under Georgia law, a law is not severable if the remaining provisions are "mutually dependent" upon the invalidated provisions, *City Council of Augusta v. Mangelly*, 254 S.E.2d 315, 320 (Ga. 1979), or if the invalid provision is "so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent[,]" *Daimler Chrysler Corp. v. Ferrante*, 637 S.E.2d 659, 661–62 (Ga. 2006). The District Court examined H.B. 481's text and properly concluded that H.B. 481's provisions are mutually dependent on the invalid provisions. H.B. 481 also cannot fulfill its purpose without the unconstitutional provisions. Therefore, under Georgia law, the entire Act must fall.

For all of these reasons, and for the reasons discussed below, this Court should affirm the District Court's decision.

ARGUMENT

I. The District Court Correctly Found that H.B. 481 Is an Unconstitutional Abortion Ban.

A. Supreme Court Precedent Categorically Prohibits Pre-viability Abortion Bans Like H.B. 481.

As the District Court correctly held, "the undisputed material facts in this case lead to one[] indisputable conclusion: that Section 4 [], by prohibiting a woman from terminating her pregnancy upon the detection of a fetal heartbeat, constitutes a pre-viability abortion ban." Dkt. 149 at 32. Because such a ban "directly conflicts with binding Supreme Court precedent," it is clearly unconstitutional. *Id*. Moreover, because Section 3 attempts an end-run around *Roe* by codifying a definition of person that the Supreme Court explicitly rejected and thereby also effectively bans pre-viability abortion, "it too is unconstitutional." *Id.*

For nearly half a century, "[t]he Supreme Court has repeatedly and unequivocally" applied the same bright-line rule: "under no circumstances whatsoever may a state prohibit or ban abortions at any point prior to viability." *Id.* at 27 (citing *Casey*, 505 U.S. at 879; *Roe*, 410 U.S at 153–54); *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (plurality decision)[9] ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,' 'a woman's right to terminate

[9] Unless otherwise noted, all citations to *June Medical Services* refer to the plurality opinion.

her pregnancy before viability.'" (quoting *Casey*, 505 U.S. at 871)); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (reaffirming that a law is invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" *Casey*'s reaffirmation that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)).

Courts around the country have faithfully applied this binding Supreme Court precedent to uniformly reject attempts to ban abortion prior to viability. *See Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 689–90 (8th Cir. 2021) (affirming preliminary injunction against 18-week ban); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) ("*Dobbs II*") (affirming preliminarily injunction of six-week ban based on detectable cardiac activity); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 276–77 (5th Cir. 2019) ("*Dobbs I*") (striking fifteen-week ban), *petition for cert. filed*, No. 19-1392 (U.S. June 15, 2020); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (striking six-week ban based on detectable cardiac activity), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117–19 (8th Cir. 2015) (striking twelve-week ban), *cert. denied*, 577 U.S. 1102 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (striking twenty-week ban), *cert. denied*, 571 U.S. 1127 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir.

1996) (striking twenty-two-week ban), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T v. Edwards*, 974 F.2d 27, 30–31 (5th Cir. 1992) (striking total ban), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371–74 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 629–31 (M.D.N.C. 2019) (striking twenty-week ban), *appeal docketed*, No. 19-1685 (4th Cir. June 26, 2019); *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1057, 1059 (M.D. Ala. 2019) (preliminarily enjoining total ban); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 800–04 (S.D. Ohio 2019) (preliminarily enjoining six-week ban based on detectable cardiac activity); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575, at *1–2 (W.D. Ky. Mar. 15, 2019) (entering temporary restraining order against six-week ban based on detectable cardiac activity); *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631, 636–37 (W.D. Mo. 2019) (preliminarily enjoining bans at 8, 14, 18 and 20 weeks), *appeal pending* No. 19-2882 (8th Cir. 2019).

Defendants argue that the Supreme Court's bright-line rule of prohibiting pre-viability abortion bans fails to consider the State's interests. State Br. 19–20. To the contrary, the Court *already* carefully balanced an individual's interests in autonomy and liberty against states' interests in *Casey* and found that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the

imposition of a substantial obstacle to the [pregnant person's] effective right to elect the procedure." *Casey*, 505 U.S. at 846. Here, the Ban indisputably prohibits pre-viability abortion, and therefore the State's interests cannot alter the conclusion that the Ban is unconstitutional.

Section 3's Personhood Definition is unconstitutional under the same line of binding precedent. Indeed, as amended by Section 3, any law that prohibits harming a person would equally apply to an embryo/fetus, thereby allowing the State to prosecute any action that harms an embryo/fetus, including abortion. Thus, Section 3 could be read to criminalize *all* abortion outright. Defendants argue that it is within the State's purview to amend its law in this manner. State Br. 30–31. But, it is axiomatic that a State cannot amend its laws to deny federal rights, and this attempt to circumvent Supreme Court precedent clearly cannot stand. *See, e.g.*, *Kansas v. Carr*, 577 U.S. 108, 129 (2016) ("The Federal Constitution guarantees . . . a *minimum* slate of protections[.]"). As the District Court properly found, "this precise [personhood] definition has been considered and rejected by the Supreme Court," Dkt. 149 at 31, "[o]therwise, allowing *any* abortion . . . would be 'out of line with the [Fourteenth] Amendment's command,'" *id.* at 31–32 n.14 (quoting *Roe*, 410 U.S. at 157 n.54).

Because Sections 3 and 4 "directly conflict[] with binding Supreme Court precedent," the District Court had "no other choice but to declare [them]

unconstitutional." Dkt. 149 at 32. This Court should do the same. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[i]f a precedent of th[e Supreme] Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls"); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329–30 (11th Cir. 2018) ("In our judicial system, there is only one Supreme Court, and we are not it. As one of the inferior Courts, we follow its decisions.").

B. The Undue Burden Test Cannot Save An Unconstitutional Abortion Ban.

Defendants acknowledge that H.B. 481 would prohibit the vast majority of abortions in Georgia. Dkt. 125-2, Ex. B ¶ 5. Yet, they still insist that the Act is not really a ban, but rather a mere "restriction" or "regulation," such that the Act's legality should be determined by the "undue burden" test. State Br. 22–23. Defendants are wrong on both counts. First, the Act imposes a ban on abortion, rather than a mere restriction, rendering application of the undue burden test unnecessary. Second, even if the undue burden standard applied, the Act would still be patently unconstitutional because H.B. 481 imposes an absolute obstacle to the vast majority of patients seeking pre-viability abortion. *See Casey*, 505 U.S. at 877 (an undue burden exists if an abortion restriction imposes "a substantial obstacle in the path of a woman seeking an abortion").

1. The Undue Burden Test Is Inapplicable Here.

Defendants argue that the Act is a "restriction" rather than ban, based on the misguided theory that patients can simply obtain their abortions before six weeks lmp. State Br. 22 & n.7.[10] On the contrary, the Act is a ban. As courts have made clear, "a[n individual] has a right to choose to terminate [a] pregnancy *at any point* before viability—not just before [a certain pre-viability] gestational age." *Isaacson*, 716 F.3d at 1227 (emphasis in original); *see also Beck*, 786 F.3d at 1117 ("By banning abortions after 12 weeks' gestation, the [a]ct prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability."). The Act strikes at the heart of the abortion right because, "[d]uring the period between [the week the prohibition begins] and viability, the pregnant woman 'lacks all choice in the matter' of whether to carry her pregnancy to term." *Isaacson*, 716 F.3d at 1226 (quoting *Casey*, 505 U.S. at 850). It is this lack of "all choice" that makes H.B. 481 a ban and not a restriction.

Defendants also claim that the Act is not a ban because of its three narrow exceptions,[11] State Br. 22 n.7, a position that fares no better. *Casey* makes clear that

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[10] Defendants' argument is not only fatally flawed as a legal matter, but it also is factually incorrect. As detailed, *supra* pp. 6, 7, the vast majority of patients in Georgia, and nationwide, do not and cannot access abortion before six weeks. Furthermore, the plain language of Section 3 indicates that it operates to ban *all* abortions, without exception, from the point of conception, *see supra* pp. 17–18.

[11] *See supra* n.3 (discussing exceptions).

"*regardless of whether exceptions are made for particular circumstances*, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," 505 U.S. at 879; *see also, e.g.*, *Isaacson*, 716 F.3d at 1227 (exceptions "do[] not transform . . . a ban into a limitation"); *Beck*, 786 F.3d at 1117 (citing *Casey* and striking 12-week ban despite medical emergency, incest, and rape exceptions).

Finally, the cases Defendants rely upon to support their argument that the undue burden test applies, State Br. 23–24, are inapposite: they address laws that *regulate*, rather than *prohibit*, pre-viability abortion. For example, *Williamson* applied the undue burden test in striking down a law that *regulated* abortion by requiring use of more burdensome abortion methods. 900 F.3d at 1326–27. The statutes at issue in *Whole Woman's Health* and *June* imposed requirements on clinics and providers that governed the conditions under which abortions could be provided—requirements that rose to the level of an undue burden—but that were not outright prohibitions on abortion. *See Whole Woman's Health*, 136 S. Ct. at 2318; *June*, 140 S. Ct. at 2132. Indeed, the Eighth Circuit recently rejected an argument nearly identical to Defendants', and noted that the very cases cited by Defendants

here, such as *Casey* and *Gonzales*, did not involve challenges to "complete bans on pre-viability abortions." *Rutledge,* 984 F.3d at 689.[12]

Accordingly, because H.B. 481 outright prohibits pre-viability abortion, it is clearly "unconstitutional under Supreme Court precedent without resort to the undue burden balancing test." *Dobbs II*, 951 F.3d at 248; *see also Dobbs I*, 945 F.3d at 273 ("if the Act is a ban, . . . the undue-burden balancing test has no place"); *Isaacson*, 716 F.3d at 1225 (the undue burden test "has no place where, as here, the state is *forbidding* certain women from choosing pre-viability abortions rather than specifying the conditions under which such abortions are to be allowed"). The District Court's decision is in accord with this long line of unbroken precedent, and this Court should reject Defendants' contrary argument.

2. Even If the Undue Burden Test Applied, Plaintiffs Would Prevail.

Even if the undue burden test did apply, which it does not, Plaintiffs would prevail because prohibiting abortion starting at six weeks imposes a substantial obstacle to all patients affected by the Ban. When "a state regulation has the purpose

[12] Defendants mischaracterize *Robinson v. Att'y Gen.*, 957 F.3d 1171 (11th Cir. 2020). In that case, this Court held that the district court did not err in holding that to the extent the COVID-19 emergency order "operates as a *prohibition* on a woman's right to obtain an abortion before viability," it is likely categorically unconstitutional on that basis. *Id.* at 1181; *see also Robinson v. Marshall*, 454 F. Supp. 3d 1188, 1199–200 (M.D. Ala. 2020) (explaining distinction between abortion prohibitions and regulations and applicable tests).

or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus[,]" it imposes an undue burden. *Casey*, 505 U.S. at 877. H.B. 481 imposes not just a substantial obstacle to abortion, but an absolute one. *See Dobbs I*, 945 F.3d at 276 (15-week ban imposes an "insurmountable, not merely substantial" obstacle); *Bangerter*, 102 F.3d at 1116 n.4 (prohibiting abortion "goes beyond creating a hindrance"). Thus, were this Court to engage in "weigh[ing]" the state interests against the obstacles imposed by the Act, State Br. 19, no countervailing state interest could justify that absolute burden on abortion access. *Isaacson*, 716 F.3d at 1226. As such, it is clear that H.B. 481 imposes an undue burden on the right to abortion. *See id.*; *Bangerter*, 102 F.3d at 1116 n.4 (a ban "is clearly invalid under *Casey* as having both the purpose and effect of placing a substantial burden on a woman's decision to choose a previability abortion"); *Ada*, 962 F.2d at 1373 ("[S]urely an outright criminalization of abortion places an 'undue burden' on the exercise of the woman's right."); *Stenehjem*, 795 F.3d at 771 (ban that "prohibits pre-viability abortions in a very significant percentage of cases in North Dakota . . . impose[s] an undue burden on women seeking to obtain an abortion"); *Sojourner T*, 974 F.2d at 31 (ban is "plainly unconstitutional under *Casey*

because the statute imposes an undue burden on women seeking an abortion before viability").

Finally, in the face of an insurmountable obstacle such as an abortion ban, there can be no doubt that facial relief is warranted. It is well-settled that, when evaluating abortion restrictions, facial relief is appropriate where a law imposes a substantial obstacle for a large fraction of those patients to whom it is relevant. *Casey*, 505 U.S. at 888–95, *see also June*, 140 S. Ct. at 2132; *Whole Woman's Health*, 136 S. Ct. at 2320; *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 368 (6th Cir. 2006) (collecting circuit court cases applying large fraction test).[13]

Applying the large fraction test here is straightforward. The Ban is relevant for every person seeking abortion after embryonic cardiac activity is detectable—starting at six weeks of pregnancy. For every person in that group, the Ban poses an absolute and insurmountable obstacle to pre-viability abortion. Thus, H.B. 481 is facially invalid because it imposes an absolute obstacle to abortion for one hundred percent of patients for whom it is relevant. Therefore, even if the undue burden test applied, the Ban is facially invalid.

[13] Given this precedent, this Court should reject Defendants' assertion, State Br. 22, that the "no set of circumstances" test from *United States v. Salerno*, 481 U.S. 739, 745 (1987), applies to abortion restrictions.

II. The District Court Did Not Abuse Its Discretion in Excluding Irrelevant Evidence.

Defendants argue, State Br. 24–30, that the District Court abused its discretion by excluding evidence on "the state's interest in banning abortion prior to viability, along with the strength of those interests and the extent to which H.B. 481 is closely tied to serving those interests," Dkt. 115 at 1–2, 5.[14] This Court, however, "leave[s] undisturbed a district court's [discovery] ruling unless [it] find[s] that the district court has made a clear error of judgment, or has applied the wrong legal standard" and "it is shown that [the ruling] resulted in substantial harm to the appellant's case." *Joesendis*, 662 F.3d at 1306–07. Defendants' arguments fall far short of meeting that high bar.

Defendants ask the Court to overturn the District Court's ruling because it applied *Casey*'s bright-line rule prohibiting abortion bans. State Br. 24. As explained above, that argument is meritless. Decades of Supreme Court precedent make clear that the District Court was bound by that rule, *see supra* Argument I.A., and thus evidence on state interests, which cannot change the outcome of the case, is irrelevant. Fed. R. Civ. P. 26(b)(1) (discovery must, at a minimum, be "relevant"); Fed. R. Evid. 401(b) (discovery is relevant only if it is "of consequence in

[14] To the extent Defendants suggest that evidence about anything other than the state's purported interests was excluded, State Br. 25–26, they misrepresent the District Court's ruling. Dkt. 115 at 1–2, 5.

determining the action"). As such, the District Court, like other courts that have considered the same question, did not abuse its discretion by precluding discovery on state interests. *See, e.g.*, *Dobbs I*, 945 F.3d at 275 (rejecting argument that the lower court abused its discretion in limiting discovery to viability in 15-week ban case); *Stenehjem*, 795 F.3d at 772–73 & n.4 (affirming summary judgment and permanently enjoining six-week ban based on detectable cardiac activity where district court had allowed only extremely limited discovery).

Defendants' arguments on discovery are premised on the assumption that the undue burden test applies here. State Br. 26–28. As discussed *supra* Argument I.B.1., that test does not apply. However, as the District Court recognized, even if the undue burden test did apply, there is no state interest that could outweigh the burden H.B. 481 imposes. Dkt. 115 at 3 n.3. Thus, evidence on state interests would not have changed the outcome of the case even under that standard. *See id*.[15]

[15] Defendants mischaracterize the District Court's statements on this point. The Court did not say that evidence on state interests would be "*insufficient*" under the undue burden test, State Br. 27–28; rather, it said such evidence would be "*irrelevant*" under the undue burden test, Dkt. 115 at 3. Moreover, even if the evidence were relevant under the undue burden test, Defendants cannot show that the Court's discovery decision resulted in substantial harm to their case. *See Harrison v. Culliver*, 746 F.3d 1288, 1297 (11th Cir. 2014) (even if evidence "may have been relevant to [the party's] claim," "[this Court] will not disturb a court's exercise of discretion to deny discovery" absent a showing of substantial harm).

Finally, Defendants argue that the District Court abused its discretion by excluding evidence that is clearly irrelevant under the governing standard based on their theory that the Supreme Court might create a new legal standard for pre-viability abortion bans in the future. State Br. 28–29. This argument has no support in the law.[16] While Defendants may dislike the governing Supreme Court standard, there can be no doubt that the District Court was bound by it. *See supra* Argument I.A.

Because no evidence on state interests could change the outcome of this case, the District Court did not abuse its discretion in excluding that evidence as irrelevant.

III. Section 3 of H.B. 481 Is Unconstitutionally Vague.

Section 3 of H.B. 481 creates a definition of "natural person" that applies throughout the Georgia Code, amending hundreds of criminal and civil provisions and in many instances materially altering the nature of the statutes at issue. The text of the Georgia Code as amended by the Personhood Definition lacks the requisite

[16] Even Defendants' citations show that evidence proffered under these circumstances, is, at best, *permissible*, State Br. 28, but "just because one judge permitted a discovery request does not mean another judge was obligated to do so." *Alliant Tax Credit 31, Inc. v. Murphy*, 924 F.3d 1134, 1145 (11th Cir. 2019). It is "a basic principle of appellate review" that "[t]wo district judges can reach two different determinations of what discovery to permit, and under an abuse-of-discretion review, [this Court is] required to affirm both decisions unless one judge has made a clear error of judgment or applied the wrong legal standard." *Id.* Thus, Defendants' cited cases (one of which is a non-binding concurrence) are inapposite.

clarity to pass constitutional muster. Accordingly, as the District Court correctly held, H.B. 481 violates the void-for-vagueness doctrine, and the District Court's permanent injunction should be upheld.

A. Section 3 of H.B. 481 Materially Alters Numerous Provisions of the Georgia Code.

Section 3 of H.B. 481 does not operate in a vacuum. Rather, it amends Title I of the Georgia Code, which sets forth definitions of "Persons and their Rights" that apply throughout all of the State's civil and criminal provisions. Specifically, Section 3 redefines the term "natural person" to include "any human being including an unborn child," and defines "unborn child" as "a member of the species Homo sapiens at any stage of development" in utero. H.B. 481 §§ 3(b), (e)(2).

Because this Personhood Definition applies throughout the entire Georgia Code, it amends hundreds of civil and criminal code provisions that include the term "person" or "human being," which, under H.B. 481, must be read to encompass in-utero embryos/fetuses at any stage of development. *See* Dkt. 97 at 38 (Defendants conceding this point). Therefore, the impact of the Personhood Definition throughout the Georgia Code is not mere "*speculation* about how the definition of 'natural person' *might* apply to other statutes," as Defendants suggest. State Br. 35 (emphasis added). Instead, as detailed *infra* Argument III.B., the Personhood

Definition materially alters *actual* civil and criminal provisions of the Code *on their face* and, in doing so, renders them vague.[17]

Thus, the Personhood Definition cannot be evaluated in isolation, as Defendants urge. State Br. 34. Defendants cite *Indigo Room Inc., v. City of Fort Myers*, 710 F.3d 1294, 1302 (11th. Cir. 2013), as purported support for this proposition, State Br. 34, but that case is inapposite. In *Indigo*, all of the relevant restrictions and definitions at issue were contained in the challenged ordinance itself. *Id.* at 1302 (upholding ordinance prohibiting under-age persons from entering alcoholic beverage establishments because, *inter alia*, the ordinance's exception was sufficiently clear). It was thus unremarkable that this Court evaluated only the terms of the new ordinance to determine whether it was unlawfully vague.[18] *Diversified*

[17] For the same reason, Defendants' argument that the Personhood Definition does not "prohibit[] or requir[e] particular conduct," State Br. 34, fails. As Defendants concede, the Personhood Definition amends statutes that prohibit or require particular conduct. *See* Dkt. 74 at 21 (Defendants effectively conceding that the Personhood Definition could operate to ban abortion after cardiac activity); State Br. 45 (Defendants admitting the Personhood Definition would require a medical provider to report a pregnant woman with an abusive partner). In doing so, it renders statutes vague.

[18] *Indigo* is distinguishable for additional reasons. First, the regulated parties in *Indigo* did not dispute that the statutory text was clear. The regulated parties knew the rule (no under-age persons allowed in an alcoholic beverage establishment) and the exceptions to it (that restaurants that derived at least 51% of their gross revenue from food and nonalcoholic beverages were not considered alcoholic beverage establishments). *Id.* at 1298 & n.1. The plaintiff's only claim was that under-age patrons were unable to determine whether the specific restaurant they patronized met the exception (i.e., whether it derived 51% of its revenue from food sales). *Id.* at

Numismatics, Inc. v. City of Orlando, Fla., 949 F.2d 382, 387 (11th. Cir. 1991), also relied on by Defendants, State Br. 34, presents the same problem. The precious metal ordinance at issue in *Numismatics* also contained all of the challenged language, so it was reasonable for the court to limit its vagueness review to the text of the ordinance alone.

By contrast, the Personhood Definition's sole function is to alter *other* provisions of the Georgia Code. Thus, its language "cannot be construed in a vacuum"; instead it "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

1302. By contrast, here, the text of the Georgia Code, as amended by H.B. 481, lacks any standard. Plaintiffs do not know what the amended code prohibits or requires of them when, for example, treating a pregnant patient. *See infra* Argument III.B. Second, as discussed *infra* Argument III.C., *Indigo* is also distinguishable because, unlike here, the law at issue did "not reach constitutionally protected conduct," *id.* at 1299–300, and thus a stricter vagueness standard applied.

B. Section 3 of H.B. 481 Fails Both Requirements of the Vagueness Standard.

When read in context—as it must be—the Personhood Definition amends large swaths of the Georgia Code in a manner that renders many provisions unconstitutionally vague.

Due process encompasses the concepts of notice and fair warning, and ensures "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1349 (11th Cir. 2011). Thus, the void-for-vagueness doctrine requires a statute to satisfy "two connected but discrete due process concerns." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). First, the law must provide "fair notice" by giving "[a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108, 112; *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Second, the law must provide "explicit standards for those who apply them" to avoid "arbitrary and discriminatory enforcement." *Grayned*, 408 U.S. at 108; *see also Papachristou*, 405 U.S. at 170; *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Otherwise, "a criminal statute may permit 'policemen, prosecutors, and juries to pursue their personal predilections." Dkt. 149 at 35 (*citing Kolender*, 461 U.S. at 358). As Defendants recognize, a law is unconstitutional if it violates *either* requirement. State Br. 32 (citing *Fox Television Stations*, 567 U.S. at 253). Section

3 of H.B. 481 fails on both fronts. Accordingly, the District Court's order enjoining Section 3 in its entirety must be affirmed.

1. H.B. 481 Does Not Provide Fair Notice of What Conduct it Forbids.

The Personhood Definition would amend a number of Georgia Code provisions to restrict or prohibit medical care that is otherwise regularly provided to pregnant patients, and/or would criminalize conduct by pregnant people. *See, e.g.*, O.C.G.A. §§ 16-5-60 (reckless conduct), 16-5-70 (cruelty to children), 16-5-21 (aggravated assault), 16-12-171 (sale or distribution to, or possession by, minors of cigarettes and tobacco related objects), 19-7-5 (mandatory reporting of child abuse by, *inter alia*, physicians, carrying criminal penalties). By amending the entire Georgia Code to require that embryos/fetuses be treated as persons for the purposes of every applicable criminal and civil provision without distinction, and by doing so in a manner that lacks any workable standards as to how those changes would operate in practice, H.B. 481 fails to give "fair notice" of what the law requires.

One example of how the Personhood Definition would operate in practice is Georgia's reckless conduct statute. "Reckless conduct" occurs when a person "causes bodily harm to or endangers the bodily safety of *another person* by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of *the other person*." O.C.G.A. § 16-5-60. H.B. 481's amendments render the reckless conduct provision unclear as to whether

clinicians could be criminally prosecuted for treating a pregnant patient if that treatment could "harm" or "endanger" an embryo/fetus (now considered "a person"), regardless of whether the treatment was necessary to protect the patient's health. H.B. 481 §§ 3(b), (e)(2). For example, it is undisputed that certain gynecological care, family planning, abortion, miscarriage management, hormone therapy, and cancer screening and treatment, can cause harm to or endanger an embryo/fetus. Dkt. 97 at 39; *see also* Dkt. 125-2, Ex. B ¶ 8.[19]

Defendants do not dispute that Georgia's reckless conduct law is materially altered by the Personhood Definition, but insist that the law's scienter requirement cures any ambiguity because "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." State Br. 46–47. This misses the point. As both the U.S Supreme Court and the Georgia Supreme Court have recognized, a reasonable person standard must be grounded in an objective measure by which people are put on notice of what conduct is forbidden or required. *See Kolender*, 461 U.S. at 358–59 (striking law as vague because it failed to provide an objective standard for determining what identification "carr[ied] reasonable assurance" of authenticity); *Hall v. State*, 485 S.E.2d 755, 759 (Ga. 1997) (reckless

[19] Indeed, reckless conduct is one of many statutes in the Georgia code that, as amended by Section 3, could arguably operate as a complete abortion ban, including for abortions before cardiac activity is detectable. *See supra* pp. 17–18.

conduct statute lacked standard sufficient to determine whether leaving a twelve-year-old home alone with three young children was objectively reasonable).

The reckless conduct statute as amended by H.B. 481 similarly lacks any objective standard by which to measure when it is reasonable for a medical provider to risk harming an embryo/fetus (now deemed to be a "person" under H.B. 481) when caring for a pregnant patient. To be sure, "doctors have always been required to balance care for pregnant women with the risk of unintentional harm" to patients, including risks to patients' pregnancies. *See* State Br. 49. But, currently, the standard of care under those circumstances is based on treatment for one person—the pregnant patient—and consideration of risk to an embryo/fetus inherent in that care is an ancillary focus. Under H.B. 481, as the District Court explained, implementation of the Personhood Definition would upend the existing standard of care because "medical professions would be charged with the care of *two* individual patients, whose medical needs might be in direct conflict with one another—necessitating an entirely new standard of care." Dkt. 149 at 40 (emphasis in original). Defendants do not—and cannot—cite a single statutory provision or any case law that defines what could be deemed an "unjustifiable" risk to an embryo/fetus for the purposes of the amended reckless conduct statute. This is unsurprising, since no clinician has simultaneously treated both a pregnant person and an entirely new class of person whose interests may be at odds.

Defendants' arguments about the child cruelty provision (O.C.G.A. § 16-5-70) as amended by H.B. 481 fare no better. For example, Defendants insist that a pregnant person with an eating disorder would not meet the crime's requisite element of "*willfully* depriving" their "child" of necessary sustenance. State Br. 44. But, that conclusion is not apparent from the statutory text. On the contrary, as Defendants themselves acknowledge, willfulness under the child cruelty provision encompasses "doing of an act with an awareness of a plain and strong likelihood that such harm might result." *Id.* (quoting *Kennedy v. State*, 592 S.E.2d 830, 832 (Ga. 2004)). At best, that language is ambiguous as to whether depriving oneself of food—not to mention myriad other conduct by a pregnant person—is an act that a pregnant person would know has a "plain and strong likelihood" of harming an embryo/fetus. In any case, that the District Court and Defendants read the same statute and reach opposite conclusions about what the law means only further illustrates the law's vagueness. *See* Dkt. 149 at 40 ("[t]hat these highly sophisticated parties are currently litigating the meaning" of the Personhood Definition in this case further "underscores that persons of common intelligence would be forced to guess what conduct might leave them open to criminal penalty").

Finally, Defendants' arguments about the mandatory reporting of child abuse provision (O.C.G.A. § 19-7-5) only further reinforce the vagueness imposed by H.B. 481. Defendants concede that the amended statute would require a health care

provider who knows that a pregnant woman is living with an abusive partner "and has 'reasonable cause to believe' the unborn child has been 'endangered,' [] to report it as suspected child abuse." State Br. 45. But their explanation provides no insight into what it means to "endanger" an embryo/fetus, thereby triggering this obligation. While Defendants note that the term "endangered" is defined by the statute, *id.*, they fail to acknowledge that this definition merely cross-references other provisions of the Georgia Code, *see* O.C.G.A. § 19-7-5(b)(6.1).[20] And, in the case of Defendants' hypothetical—where a pregnant person lives with an abusive partner—the only cross-reference that could conceivably apply is "cruelty to children," *id.* § 16-5-70,[21] the very statute that Defendants *also* explicitly argue could *not* be used to criminalize pregnant people. *Compare id. with* State Br. 43–44. If Defendants are arguing that the child cruelty statute as amended by the Personhood Definition both does *and*

[20] Section 19-7-5(b)(6.1) reads in its entirety: "'Endangering a child' means: (A) Any act described by subsection (d) of Code Section 16-5-70; (B) Any act described by Code Section 16-5-73; (C) Any act described by subsection (l) of Code Section 40-6-391; or (D) Prenatal abuse as such term is defined in Code Section 15-11-2."

[21] Subsection A incorporates the Code's "cruelty to children" provision. The other cross-referenced provisions include: (B) "caus[ing] or permit[ting] a child to be present where any person is manufacturing methamphetamine" or intends to do so; (C)"transporting in a motor vehicle a child" while "under the influence of alcohol or drugs"; and (D) "prenatal abuse," which is defined to cover exclusively "expos[ing an embryo/fetus] to chronic or sever use of alcohol or the unlawful use of any controlled substance," which results in withdrawal or the presence of a controlled substance in a newborn, or medically diagnosed affects in a newborn's appearance or functioning.

does not criminalize certain conduct,[22] how can Plaintiffs and law enforcement possibly be expected to find clarity in such a statute?

Accordingly, the District Court aptly found that "the State Defendants have been unable to articulate what [the Personhood Definition] will mean for Plaintiffs and Georgians more generally." Dkt. 149 at 38. Because H.B. 481 amends the Georgia Code in a manner that deprives Plaintiffs of fair notice about what conduct is forbidden or required, it is unconstitutionally vague and must be invalidated.[23]

2. H.B. 481 Puts Plaintiffs at Risk of Arbitrary or Discriminatory Enforcement.

To avoid unconstitutional vagueness, a law must also provide guidance for law enforcement so that they "do not act in an arbitrary or discriminatory way." *Fox Television Stations*, 567 U.S. at 253. This Court should reject Defendants' attempt to conflate prosecutorial discretion with the risk of arbitrary and discriminatory

[22] Defendants also argue that the child cruelty statute is unaffected by the Personhood Definition because it uses the term "child" as a proxy for a person under the age of eighteen. State Br. 43. Defendants' position that this distinction provides clarity is perplexing at best. Indeed, Defendants later read that same child cruelty provision to encompass an embryo/fetus for at least some purposes (i.e., child abuse reporting). This confusion is unsurprising, given that the Personhood Definition itself expressly defines a person to include an "unborn child." And Defendants' inconsistency on this point only further exemplifies the feebleness of their position that the statute is clear.

[23] Even assuming *arguendo* that any of the statutory provisions discussed in this section were found to be sufficiently clear, Section 3 would still be facially unlawful because it need not render every provision of the code it amends unconstitutionally vague to be facially unlawful. *See infra* Argument III.C.1.

enforcement, which the vagueness doctrine prohibits. State Br. 40. The problem with H.B. 481 is not that prosecutors have discretion to interpret H.B. 481, it is that the law provides no clarity as to how prosecutors would or could exercise their discretion to enforce the many Code provisions Section 3 amends.

That 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 illustrates this problem. *Compare* Dkt. 71 *and* Dkt. 74, *with* Dkt. 75 (materially disparate responses by various Defendants to Plaintiffs' Motion for a Preliminary Injunction, including Defendant Boston noting the "ambiguity" of the law). The District Court thus correctly concluded "that different prosecutors might take very different stances regarding enforcement of criminal laws implicated by Section 3's personhood definition." Dkt. 97 at 40 n.12.

The risk of arbitrary and discriminatory enforcement is therefore a direct result of the law's vagueness, and subjects Plaintiffs and their patients to severe penalties. As discussed *supra* Statement of the Case Part III., Plaintiff clinicians provide medical care that may put the interests of a pregnant person at odds with the interests of an embryo/fetus. Without any guidance in the law about how to balance the interest of these two "persons," some prosecutors may bring criminal charges against Plaintiffs for providing pregnancy-related care. *See supra* pp. 31–34 & n.19.

Pregnant people would similarly face risk of prosecution for otherwise lawful conduct if a prosecutor decided that their conduct negatively impacted their pregnancy. *See supra* pp. 31–36 & nn.19, 22. This clearly puts Plaintiffs and their patients at risk of arbitrary or discriminatory enforcement, in violation of the void-for-vagueness doctrine.

C. The District Court Properly Facially Invalidated Section 3 Under the Correct Standard.

Unable to seriously dispute that the Personhood Definition is unworkable in multiple applications throughout the Georgia Code, Defendants try to resist facial invalidity by arguing that: (1) the Personhood Definition could have some potentially non-vague applications; and (2) Plaintiffs must wait for arbitrary enforcement before challenging the statute. Both arguments fail as a matter of law. The District Court correctly facially invalidated Section 3 of H.B. 481, and this Court should affirm.

1. Section 3 of H.B. 481 is Facially Unlawful.

Defendants insist that—even if Section 3 renders the Georgia Code unconstitutionally vague—this Court should rewrite H.B. 481 so that it can be limited to "non-vague applications." State Br. 37–39. This fails for two reasons: (1) courts cannot rewrite statutes to cure constitutional defects; and (2) a vague statute must be facially invalidated when constitutionally-protected conduct is implicated or criminal penalties are at issue.

First, as the District Court correctly noted, Section 3's Personhood Definition "*by its own terms* [] applies throughout the entire Georgia Code." Dkt. 149 at 38. Thus, Defendants' request for the Court to limit its application (i.e., to some Code provisions, but not others) effectively asks the Court to rewrite Section 3 so that it reads: "an 'unborn child [is] a member of the species Homo sapiens at any stage of development . . . *except under some provisions of the Code*." This the Court cannot do. It is well-settled that courts must avoid the "quintessentially legislative work" of "rewrit[ing] state law to conform to constitutional requirements." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *see also Hill v. Wallace*, 259 U.S. 44, 70 (1922) ("[D]issect[ing] an unconstitutional measure and refram[ing] a valid one out of it by inserting limitations it does not contain. . . . is legislative work beyond the power and function of the court.").

Second, the Supreme Court and this Court have been clear that where, as here, a vague law reaches constitutionally protected conduct or imposes criminal penalties, it must be facially invalidated. The Supreme Court explicitly "permit[s] a facial challenge [to an unconstitutionally vague law] if a law reaches a substantial amount of constitutionally protected conduct." *Kolender*, 461 U.S. at 358 n.8. Indeed, in *Village of Hoffman Estates. v. Flipside, Hoffman Estates., Inc.*, 455 U.S. 489 (1982), the very case on which Defendants rely to argue otherwise, the Supreme Court makes clear that the more stringent standard for relief Defendants suggest

applies *only* when the vague law at issue "*implicates no constitutionally protected conduct*." *Hoffman Ests.*, 455 U.S. at 494–95; *see also Ala. Educ. Ass'n v. State Superintendent of Educ.*, 746 F.3d 1135, 1138 (11th Cir. 2014) (same); *Indigo*, 710 F.3d at 1301 (applying lesser standard because "the Ordinance does not chill constitutionally protected conduct"). Here, Plaintiffs have identified multiple ways that the Personhood Definition in H.B. 481 renders the Georgia Code vague in a manner that chills constitutionally protected conduct, namely the provision of abortion. *See supra* pp. 31–34 & n.19; *see also* Dkt. 97 at 38–39 (noting Defendants have not denied that Section 3 permits prosecution for post-cardiac activity pre-viability abortions). For this reason alone, H.B. 481 is facially invalid.

Moreover, "where a statute imposes criminal penalties, the standard of certainty is higher"; accordingly, the Supreme Court has "invalidate[d] a criminal statute *on its face*, even when it could conceivably have had some valid application." *Kolender*, 461 U.S. at 358 n.8 (citing cases); *see also Johnson v. United States*, 576 U.S. 591, 595 (2015) ("The prohibition of vagueness in criminal statutes is . . . well-recognized."). The Supreme Court has made clear that in the abortion context, just as elsewhere, facial relief is appropriate when a vague law would impose criminal penalties. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 451 (1983) (striking down abortion provision that "fail[ed] to give a physician fair notice that his contemplated conduct is forbidden"), *overruled on*

other grounds by Casey, 505 U.S. 833 (1992); *Colautti v. Franklin*, 439 U.S. 379, 396 (1979). Here "th[e] level of uncertainty" Section 3's amendment creates in the applicable criminal statutes "is fatal." *Akron*, 462 U.S. at 451. Facial invalidation is therefore the only proper remedy.

Finally, the Personhood Definition's broad impact on hundreds of Georgia Code provisions, coupled with its uncertain meaning in those myriad contexts, would make it unworkable for Plaintiffs to address each affected law on a case-by-case basis as Defendants suggest. *See* State Br. 37.[24] As the District Court explained, "[c]learly, [the Personhood Definition] would render unlawful at least some actions that are currently lawful, but even the litigants in this case are forced to guess which." Dkt. 149 at 38. This guessing game about the law's requirements is the opposite of the fair notice that the void-for-vagueness doctrine demands. *Grayned*, 408 U.S. at 108, 112. As this Court has recognized, "much will be lost if we permit the contours of regulation to be hammered out case by case in a series of enforcement proceedings

[24] Defendants repeatedly rely on *Alabama Education Association v. State Superintendent of Education* to argue that Plaintiffs must bring a series of as-applied challenges, but fail to explain that this case presents a vastly different situation. In that case, this Court found that the challenged provision was not vague as to the plaintiffs' identified conduct and suggested that plaintiffs bring as-applied challenges to "other, potentially more vague applications." 746 F.3d at 1140 & n.3. Here, Plaintiffs have proven that the law is unconstitutionally vague, so there is no need for as-applied challenges. Furthermore, that case did not involve constitutionally protected conduct and therefore utilizes an entirely different (and stricter) test for vagueness, rather than the test that applies here.

. . . . While the hammering out continues so do the vices of vagueness; the [plaintiffs'] uncertainty about the reach of the ordinance will force them to continue to restrict their activities." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010). Accordingly, and particularly given the constitutional rights at stake and the harsh penalties threatened here, the Personhood Definition must be facially invalidated.

2. Plaintiffs Do Not Need to Wait to Be Charged Under a Vague Statute to Challenge It.

Defendants' suggestion that Plaintiffs must wait for enforcement before challenging H.B. 481, State Br. 41, is without merit. The Supreme Court and this Circuit have consistently held that a pre-enforcement vagueness challenge is appropriate where the litigant would otherwise be chilled from engaging in constitutionally protected activity or when the litigant faces criminal penalties. *See Kolender*, 461 U.S. at 358; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Indigo*, 710 F.3d at 1301; *Bankshot Billiards*, 634 F.3d at 1349–50.

Here, Defendants have made clear that statutory provisions amended by H.B. 481 will be enforced against Plaintiffs. *See* Dkt. 74 at 20–21; *see also* Dkt. 97 at 24–25 (noting Defendants' refusal to deny that Section 3 itself also effectively bans abortion after six weeks). Plaintiff clinicians have no way of knowing if they will be prosecuted for the routine obstetrical and gynecological care they provide. Supreme Court precedent does not require that they "expose [themselves] to actual arrest or prosecution to be entitled to challenge." *Steffel*, 415 U.S. at 459. Thus, the District

Court correctly rejected Defendants' suggestion that Plaintiffs be required to "'wait and see' how law enforcement officials will decide to enforce the Personhood Definition throughout the Code." Dkt. 149 at 37. Particularly "[g]iven the severity of the potential penalties," *id.* at 38, requiring Plaintiffs to wait to be prosecuted under an unclear statute would turn principles of due process on their head.

Accordingly, Section 3 of H.B. 481 is unconstitutionally vague and facially invalid and, thus, was properly enjoined by the District Court.

IV. The District Court Properly Enjoined H.B. 481 in Its Entirety.

After finding Sections 3 and 4 unconstitutional, the District Court correctly held that H.B. 481 was not severable under Georgia law and enjoined it in its entirety. Defendants' argument that each provision of H.B. 481 should be evaluated as if it were passed independently of and without reference to its invalid provisions is contrary to state and federal law. For the reasons discussed below, this Court should reject Defendants' arguments, and affirm the District Court's decision enjoining H.B. 481 in its entirety.

A. H.B. 481 Is Not Severable Under Georgia Law.

Severability is a matter of state law. *Artistic Ent., Inc. v. City of Warner Robins*, 331 F.3d 1196, 1204 (11th Cir. 2003); *see also Leavitt v. Jane L.*, 518 U.S.

137, 139 (1996). In Georgia, even with a severability clause,[25] a law is not severable if the remaining provisions are "mutually dependent" upon the invalidated provisions, *Mangelly*, 254 S.E.2d at 320, or if the invalid provision is "so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent[,]" *Ferrante*, 637 S.E.2d at 661–62. Under either analysis, neither Section 3 nor H.B. 481 as a whole is severable. Thus, the District Court correctly enjoined H.B. 481 in its entirety.

1. Section 3 Must Be Enjoined in Its Entirety.

Defendants' severability argument rests on the premise that the District Court erred in invalidating Section 3 in its entirety. State Br. 57–59. Defendants argue that even if Plaintiffs prevail on their vagueness claim, their claim can be redressed by simply enjoining Section 3(b)—which says that a "'natural person' means any human being including an unborn child"—while leaving the rest of Section 3 in place. This is incorrect both because Section 3's subsections are mutually dependent

[25] As the District Court recognized, a " severability clause such as the one in H.B. 481 'is only an aid to construction, and is not an absolute command. It merely creates a presumption in favor of separability, and does not authorize the court to give the statute an effect altogether different from that sought by it when considered as a whole.'" Dkt. 149 at 52–53 (quoting *Mangelly*, 254 S.E.2d at 320); *see also Whole Woman's Health*, 136 S. Ct. at 2319.

upon one another, and because the purpose of Section 3 would be frustrated without subsection (b).[26]

First, it is obvious from the text of H.B. 481 that Sections 3(b) and 3(e) are mutually dependent upon one another. Subsection (e)—which reads "'unborn child' means a member of the species Homo sapiens at any stage of development who is carried in the womb"—provides the very definition of "unborn child" that is expressly incorporated into subsection (b). Accordingly, without subsection (e), subsection (b) is incomplete. *See United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993). And, without subsection (b), subsection (e) has no meaning. *See Ferrante*, 637 S.E.2d at 662 (provisions that are ancillary to the invalidated provisions are not severable). Thus, the sections are mutually dependent upon and, as such, are not severable from each other.[27]

Second, Section 3's purpose cannot be fulfilled without subsection (b). Defendants admit that the purpose of Section 3 is to "defin[e] 'natural persons' to include 'unborn children' as a matter of state law." State Br. 30. Subsections (b) and

[26] Section 3 amends Code Section 1-2-1 by adding three new subsections: (b) (redefining person), (d) (including embryos/fetuses in the population count), and (e) (defining "unborn child"). Subsections (a) and (c) of Code Section 1-2-1 were not amended by H.B. 481.

[27] As Defendants concede, State Br. 37–38, subsection (d) is an application of the redefinition of person enacted by subsections (b) and (e). Thus, subsection (d) is mutually dependent on these invalid subsections and not severable.

(e) work together to create that definition, with (b) defining "person" and (e) defining "unborn child." Moreover, even if subsection (e) were able to fulfill the purpose of Section 3 without subsection (b), subsection (e) still must be enjoined because, as explained, *supra* Argument Part III., amending the Georgia Code in this way violates due process.[28]

Because it is clear that under either a mutually dependent or a purpose analysis Section 3 is not severable, the District Court was correct to enjoin Section 3 in its entirety.

2. H.B. 481's Other Provisions Are Mutually Dependent on the Invalid Provisions.

Because both Section 3 and Section 4 were correctly enjoined in their entirety and the remaining provisions are mutually dependent on these unconstitutional provisions, H.B. 481 is not severable.

As the District Court correctly found, 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." Dkt. 149 at 56. Indeed, all but three sections of H.B. 481 "contain language that references one or more of the definitions . . . Section 3 of H.B. 481 amends." *Id.* at 55–56. Accordingly,

[28] Applying Defendants' proposed solution of only enjoining Section 3(b) would only intensify H.B. 481's vagueness. Adding Section 3(e)'s definition of "unborn child" to the foundational section of the Georgia Code, at best, makes it unclear whether embryos/fetuses should be considered "persons" under state law.

the balance of the statute is mutually dependent on Section 3, and thus is not severable. *Romero-Fernandez*, 983 F.2d at 196.

Moreover, 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. For example, the informational and informed consent provisions of H.B. 481 require Plaintiffs to tell patients about the Ban. *See* H.B. 481 §§ 7, 8. H.B. 481's reporting provisions instruct providers on how to report abortions consistent with the Ban. *See id.* § 11; *see also id.* § 9 (amending penalties for violating abortion laws). Because these ancillary provisions are mutually dependent on the Ban, they are not severable. *See Ferrante*, 637 S.E.2d 659 at 662; *Ga. Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1118 (N.D. Ga. 1990).[29]

3. Without the Invalid Provisions, H.B. 481 Cannot Fulfill Its Purpose.

H.B. 481 is also inseverable for the independent reason that without Sections 3 and 4, H.B. 481 cannot fulfill its purpose.

As the District Court correctly held, the purpose of H.B. 481 is to ban abortion. In reaching this conclusion, the District Court considered "H.B. 481 as a whole, the title, the caption, the prior legislation, the legislative scheme, the old law, the evil,

[29] As the District Court correctly noted, the provisions that do not explicitly incorporate the unconstitutional sections were properly enjoined because "the balance of the legislation [is] incapable of functioning independently." Dkt. 149 at 56 & n.24; *see also Ferrante*, 637 S.E.2d at 662; *Harris*, 749 F. Supp. at 1118.

and the remedy" and determined that the evidence supported the conclusion that "the purpose of H.B. 481 was to ban or *de facto* ban abortion." Dkt. 149 at 60–61. As such, "severance is not proper as the objectional parts of H.B. 481, i.e., Sections 3 and 4, are so connected with the general scope of the statute, that now that they have been invalidated, effect cannot be given to the legislative intent." *Id.* at 61. Defendants' implication that H.B. 481 only incidentally banned abortion in two different sections defies common sense. To the contrary, the District Court's analysis confirms what is apparent: the intention of H.B. 481 is to ban abortion either explicitly through Section 4 or implicitly through Section 3. Without these two provisions, H.B. 481 cannot fulfill its purpose and thus, under Georgia law, it is inseverable. *State v. Jackson*, 496 S.E.2d 912, 916–17 (Ga. 1998).

Defendants argue that the purpose of H.B. 481 is to promote the dignity and well-being of embryos/fetuses. State Br. 53. However, the District Court correctly rejected this argument as contrary to the Act's text and history. Dkt. 149 at 60. In any event, even if this Court accepts Defendants' theory of H.B. 481's purpose, the outcome remains unchanged. Defendants equate promoting the dignity and well-being of embryos/fetuses with legal recognition of embryos/fetuses. Indeed, every provision that Defendants cite to support their argument refers to recognizing embryos/fetuses, practically and legally, as persons. State Br. 53. This conception of H.B. 481's purpose is frustrated without the Act's invalid provisions. Thus, even as

presented by Defendants, H.B. 481's purported purpose cannot be realized without Section 3.

Moreover, Defendants' purported purpose is not just frustrated, but the purpose itself is also unconstitutional. As the District Court held, "Section 3's Personhood Definition violates substantive due process. An embryo/fetus cannot be a 'person,' as that designation would effectively ban all abortions, even pre-viability." Dkt. 149 at 56 n.25; *see also supra* pp. 17–18. Thus, the District Court recognized that it "would be contradicting itself" if it were to strike down Section 3 but uphold the remaining provisions that incorporate Section 3. Dkt. 149 at 56 n.25. This is because Section 3 and the remaining provisions operate together to advance the same impermissible purpose. Section 3 requires embryos/fetuses to be treated as persons for all purposes under the law. The provisions incorporating Section 3 implement this unconstitutional purpose by codifying rules that say, for example, embryos/fetuses can be claimed as children on taxes (Section 12), are considered in assessing child support (Section 5), and their "parents" should be able to recover in the event of their death (Section 6). *See id*. at 13.

Because any conception of H.B. 481's purpose would be frustrated without the invalid provisions, H.B. 481 is not severable, and the District Court correctly enjoined it in its entirety.

B. This Court Should Reject Defendants' Remaining Severability Arguments.

In an attempt to avoid the conclusion that H.B. 481 is not severable, Defendants invite this Court to adopt a new theory of severability whereby this Court treats every provision of H.B. 481 as if it were passed independently of the others and has free reign to rewrite H.B. 481 without regard for the Georgia General Assembly's intent. State Br. 59. Because Defendants' severability theory contradicts both state and federal law, this Court should reject Defendants' arguments.

First, Georgia severability law requires that a statute be treated as a whole, not as unrelated individual provisions, and it is clear that the State cannot pursue what may be a constitutionally permissible end through an unconstitutional statute. *See Mangelly*, 254 S.E.2d at 320; *Harris*, 749 F. Supp. at 1118; *Jackson*, 496 S.E.2d at 917. For example, in *Mangelly*, the Georgia Supreme Court invalidated a law that allowed counties to tax county residents and share the revenue with municipalities in its entirety because the revenue sharing scheme was unconstitutional. That the challenged law contained a severability clause and the imposition of the tax itself was constitutionally allowable did not change the analysis. Because, without the unconstitutional revenue sharing scheme, "the purpose of the legislature would thus be completely thwarted[,]" the law, including the constitutional provision that allowed the imposition of the tax, "must fall in its entirety." 254 S.E.2d at 364; *see also Harris*, 749 F.3d at 1118 (holding that while some applicants for state positions

could be drug tested consistent with the federal Constitution, no such testing could be done pursuant to a law that unconstitutionally required drug testing of all applicants for state positions); *Jackson*, 496 S.E.2d at 917 ("a laudable purpose cannot override fundamental constitutional protections"). The same is true here: if provisions that would otherwise be constitutional were passed independently of H.B. 481, they might be permissible, but that is not the case. *See* Dkt. 149 at 56 n.25.

Defendants also attempt to rely on Supreme Court precedent to support their severability theory, State Br. 59, but the cited case, *Ayotte*, offers more support to Plaintiffs than it does to Defendants.[30] Indeed, Defendants ask this Court to violate two key principles of *Ayotte:* engaging in judicial rewriting of the statute and circumventing the intent of the legislature. 546 U.S. at 329–30. Because Section 3 is incorporated into almost every operative provision of H.B. 481, this Court cannot extract Section 3 from the remaining provisions without rewriting the statute. *See id.*; *Harris*¸ 749 F. Supp. at 1116 (law was inseverable where court could not make the law consistent with the federal Constitution "without completely re-writing the Act and usurping the authority of the Georgia General Assembly"). Moreover, by

[30] Defendants continue to rely on "non-binding opinions issued by other out-of-state district courts that appear to provide analysis/application of *Ayotte* and other Supreme Court authority," which the District Court correctly "decline[d] to consider" because such opinions are "non-binding and not the law of Georgia or from the United States Supreme Court." Dkt. 149 at 54 n.22 (citing *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004)). In keeping with precedent, this Court should also decline to consider such non-binding authority.

criminalizing abortion and declaring all embryos/fetuses to be persons for the purposes of the entire Georgia Code, then asking the Court to determine how to implement the law in a constitutional fashion, Defendants have cast a large net and asked the court "to step inside [and] announce to whom the statute may be applied." *Ayotte*, 546 U.S. at 329–30. The Supreme Court has explicitly warned against rewriting a statute under such circumstances. *Id.*

Under both federal and state law, the District Court reached the correct conclusion: H.B. 481 is not severable and must be enjoined in its entirety.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I served this brief by electronically filing it with this Court's ECF system, which constitutes services on all attorneys who have appeared in this case and are registered to use the ECF system.

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