No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH; PLANNED PARENTHOOD OF TENNESSEE AND NORTH MISSISSIPPI; KNOXVILLE CENTER FOR REPRODUCTIVE HEALTH; FEMHEALTH USA, INC.; DR. KIMBERLY LOONEY; DR. NIKKI ZITE,
Plaintiffs-Appellees

v.

HERBERT H. SLATERY III; MORGAN McDONALD, M.D.; RENE SAUNDERS, M.D.; HONORABLE AMY P. WEIRICH; GLENN R. FUNK; CHARME P. ALLEN; MELANIE BLAKE, M.D.; JASON LAWSON,
Defendants-Appellants

On Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:20-cv-00501)

EMERGENCY MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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EMERGENCY MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

The State respectfully requests that this Court fully stay the district court's preliminary injunction pending appeal so that the State can enforce both the Timing Provisions of Section 216 and the Antidiscrimination Provision of Section 217. The en banc Court has already stayed the preliminary injunction regarding Section 217. And *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, No. 19-1392 (June 24, 2022), now makes clear that Section 216 constitutionally prohibits the abortion of unborn children at 6 weeks gestational age when a fetal heartbeat is detected and of unborn children at 8 weeks gestational age or older.

Because any delay costs the lives of Tennessee children, **the State asks the Court to grant this emergency motion as soon as possible**. To that end, the State proposes that Plaintiffs, who publicly stated a month ago that they anticipated this motion, **file their response by 2:30 PM Eastern Time today**. If the Court does not act by 4 PM Eastern Time today, the State plans to file a reply.

INTRODUCTION

Today the U.S. Supreme Court held that the U.S. Constitution "does not prohibit the citizens of each State from regulating or prohibiting abortion." *Dobbs*, slip op. at 79. The Supreme Court expressly overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), returning the authority to regulate or prohibit abortion "to the people and their elected representatives." *Dobbs*, slip op. at 69. Rejecting *Casey*'s "undue burden" test, which "has proved to be unworkable," *id.* at 62, the Supreme Court applied rational-basis review and upheld Mississippi's prohibition of abortion of unborn children who have reached 15 weeks probable gestational age, *id.* at 78 (citing Miss. Code Ann. § 41-41-191).

In 2020, for many of the same reasons that justified Mississippi's law, the Tennessee legislature enacted Timing Provisions making it a crime to "perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman" at certain stages of an unborn child's development. Tenn. Code Ann. § 39-15-216(c)(1). When the unborn child's gestational age is 6 weeks or older, the physician must "affirmatively determine[] and record[] in the pregnant woman's medical record that, in the physician's good faith medical judgment, the unborn child does not have a fetal heartbeat at the time of the abortion." *Id.* § 39-15-216(c)(2).

Additional restrictions apply at 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 or more weeks. *Id.* § 39-15-216(c)(3)-(12).

The district court held that Section 216 violated *Casey* by "prohibit[ing] abortions based solely on gestational age rather than viability" and thus preliminarily enjoined the enforcement of the Timing Provisions. PI Opinion, R. 41, PageID# 756. After this Court granted rehearing en banc, the full Court granted the State's motion for a partial stay of the preliminary injunction pending appeal to the extent that it enjoined Section 217 (the Antidiscrimination Provision). En Banc Order, Dkt. No. 122-2. Because the Supreme Court has now expressly overruled *Roe* and *Casey*, the State is also likely to prevail on appeal regarding Section 216 (the Timing Provisions). Accordingly, this Court should fully stay the preliminary injunction pending appeal so that Tennessee can enforce both Section 216 and Section 217. As the Supreme Court recognized in *Dobbs*, the State has a valid interest in protecting the lives of unborn Tennesseans. Those lives are at risk each day the preliminary injunction remains in place, so this Court should grant the State's motion as soon as possible.

BACKGROUND

I. Statutory Background

The Tennessee legislature enacted the Timing Provisions based on extensive legislative findings that additional abortion restrictions were necessary to further the

State's interests. Among other things, the legislature determined that the "presence of a fetal heartbeat is medically significant because the heartbeat is a discernible sign of life at every stage of human existence," Tenn. Code Ann. § 39-15-214(a)(7); that a "growing body of medical evidence and literature supports the conclusion that an unborn child may feel pain from around eleven (11) to twelve (12) weeks gestational age, or even as early as five and a half (5 ½) weeks," *id.* § 39-15-214(a)(24); that advances in science and neonatal care have "lowered the gestational limits of survivability well into the second trimester," *id.* § 39-15-214(a)(36); that "[a]bortions performed later in pregnancy pose an even higher medical risk to the health and life of women, with the relative risk increasing exponentially at later gestational ages after eight (8) weeks gestational age," *id.* § 39-15-214(a)(44); that abortion has been used for discriminatory and eugenic purposes in Tennessee and elsewhere, *id.* § 39-15-214(a)(53)-(63); and that physician involvement in abortion undermines the integrity and public respect of the medical profession, *id.* § 39-15-214(a)(64)-(69). Section 216 was intended to address those harms and to further Tennessee's compelling interests. *See id.* § 39-15-214(a)(70)-(77).

Section 216 makes it a crime for a person to "perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman" at certain stages of an unborn child's development. *Id.* § 39-15-216(c)(1). When the gestational age of the unborn child is six weeks or older, the physician must "affirmatively determine[]

and record[] in the pregnant woman's medical record that, in the physician's good faith medical judgment, the unborn child does not have a fetal heartbeat at the time of the abortion." *Id.* § 39-15-216(c)(2). In making that determination, the physician "shall utilize generally accepted standards of medical practice using current medical technology and methodology applicable to the gestational age of the unborn child and reasonably calculated to determine the existence or non-existence of a fetal heartbeat." *Id.* Additional restrictions apply at 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 or more weeks. *Id.* § 39-15-216(c)(3)-(12).

It is an affirmative defense to prosecution under Section 216 "that, in the physician's reasonable medical judgment, a medical emergency prevented compliance with the provision." *Id.* § 39-15-216(e)(1). The term "medical emergency" is defined as "a condition that, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* § 39-15-211(a)(3); *see also id.* § 39-15-216(a)(4) ("'Medical emergency' has the same meaning as defined in § 39-15-211."). This is the same affirmative defense used in the Antidiscrimination Provision that this Court has allowed to go into effect while the appeal is pending. *See id.* § 39-15-217(e)(1).

II. Procedural Background

Plaintiffs—four abortion facilities and two physicians—immediately challenged the Timing Provisions in Section 216 and the Antidiscrimination Provision in Section 217 and sought a preliminary injunction. Compl., R. 1, PageID# 1-34; PI Mot., R. 6, PageID# 87-91; PI Mem., R. 7, PageID# 95-129. Plaintiffs alleged that both Section 216 and Section 217: (1) violate the abortion rights of their patients by "prohibiting pre-viability abortions," Compl. ¶¶ 121, 123, R. 1, PageID# 30-31; and (2) violate the void-for-vagueness doctrine because their medical-emergency affirmative defenses contain both objective and subjective standards, *id.* ¶ 127, PageID# 31-32.[1]

Once Sections 216 and 217 became law, the district court issued a temporary restraining order, TRO Order, R. 33, PageID# 591-97, followed by a preliminary injunction, PI Opinion, R. 41, PageID# 727-68; PI Order, R. 42, PageID# 769. The district court held that Plaintiffs have standing both "to assert the constitutional rights of their patients and to challenge a law that subjects [abortion providers] to potential criminal sanctions." PI Opinion, R. 41, PageID#752.

As relevant here, the district court then held that Plaintiffs were likely to succeed on their substantive due process challenge to Section 216 because "*Casey*

[1] Plaintiffs also alleged that the Antidiscrimination Provision violates the void-for-vagueness doctrine because it "fail[s] to give Plaintiffs fair notice of how to comply with [its] mandates." Compl. ¶ 125, R. 1, PageID# 31.

has established" that "a state may not prohibit abortions before viability." *Id.* at PageID#756. Because the court concluded that the Supreme Court had forbidden legislatures from "defin[ing] viability by gestational age alone," it did not consider the State's interests or determine to what extent the Timing Provisions burden a woman's ability to obtain a previability abortion. *Id.*

The district court further held the medical-emergency affirmative defense in Sections 216 and 217 unconstitutionally vague under *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997), because "a physician acting in 'good faith' may still be held criminally liable if, after the fact, other physicians disagree about the 'reasonableness' of his or her medical judgment." PI Opinion, R. 41, PageID# 763. But the court did not consider whether any vagueness in the affirmative defense could be cured by severing the term "reasonable" from that provision.[2]

With those rulings in hand, the district court determined that the "threatened harm" from enforcement of an unconstitutional statute outweighed any potential harm to the State or the public because they lack "a strong interest in enforcing an unconstitutional statute." *Id.* at PageID# 767.

[2] The district court also concluded that Section 217 is unconstitutionally vague because a physician "must determine what it means to 'know' that his or her patient is seeking an abortion 'because of'" the sex, race, or Down syndrome diagnosis of the unborn child." PI Opinion, R. 41, PageID# 759.

The State appealed and simultaneously asked the district court for a stay pending appeal, which the court denied. *See* Notice of Appeal, R. 46, PageID# 793-94; Mot. for Stay Pending Appeal, R. 47, PageID# 797-802; Mem. Mot. for Stay Pending Appeal, R. 48, PageID# 803-23; Order Denying Stay, R. 58, PageID# 893. The State then sought and received a partial stay from this Court allowing the State to enforce the Antidiscrimination Provision in Section 217. Mot. For Partial Stay, Dkt. 14; Stay Op., Dkt. 33-2. (The State asked the district court but not this Court to stay the district court's ruling on the Timing Provisions in Section 216.)

The Court's partial stay remained in effect until a divided panel of this Court affirmed the preliminary injunction on the merits. Panel Op., Dkt. 97-2; Judgment, 97-3. The Court granted the State's petition for rehearing en banc and then granted the State's renewed motion for partial stay of the preliminary injunction regarding the Antidiscrimination Provision. Order Granting Rehearing En Banc, Dkt. 110-2; Order Granting Renewed Mot. for Partial Stay, Dkt. 122-2.

The U.S. Supreme Court issued its opinion in *Dobbs* this morning. In that opinion, the Supreme Court upheld Mississippi's prohibition of abortion at 15 weeks probable gestational age and expressly overruled *Roe* and *Casey*.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy," *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (quoting *Munaf v. Geren*, 553 U.S. 674,

689 (2008)), that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Courts consider four factors in determining whether that heavy burden has been satisfied: "(1) whether the plaintiffs are likely to succeed on the merits, (2) whether the plaintiffs will suffer irreparable injury in the absence of an injunction, (3) whether granting the injunction will cause substantial harm to others, and (4) whether the issuance of the injunction is in the public interest." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997).

A plaintiff's failure to demonstrate a likelihood of success on the merits is fatal to his request for preliminary relief. *See id.*; *Daunt v. Benson*, 956 F.3d 396, 421 (6th Cir. 2020). And when, as here, the government is the defendant, "the public-interest factor 'merges' with the substantial-harm factor," and "neither of these factors can be satisfied when the challenged provisions are constitutional." *Daunt*, 956 F.3d at 422 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

This Court considers similar factors in deciding whether to grant a stay pending appeal: (1) "the likelihood that the party seeking the stay will prevail on the merits of appeal," (2) "the likelihood that the moving party will be irreparably harmed absent a stay," (3) "the prospect that others will be harmed if the court grants the stay," and (4) "the public interest in granting the stay." *Serv. Emps. Int'l Union Loc. 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (internal quotations omitted).

A party seeking reversal of a preliminary injunction must show that the district court's "ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting" relief is an abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (quotations omitted). A district court "necessarily abuses its discretion when it commits an error of law." *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 854 (6th Cir. 2017). And the court's determination as to likelihood of success is a legal conclusion that is reviewed de novo. *Fowler*, 924 F.3d at 256.

ARGUMENT

This Court should fully stay the preliminary injunction so that the State can enforce both Section 216 and Section 217 pending the en banc Court's review on the merits. Plaintiffs are unlikely to prevail on the merits of their constitutional challenges to Section 216 because the Supreme Court has expressly overruled *Roe* and *Casey* and returned the power to regulate or prohibit abortion back to the States. The equities also weigh strongly in favor of a stay because the State and the public are unquestionably harmed when a valid law is enjoined. That is particularly true here because the State has a profound interest in protecting the lives of unborn Tennesseans. Plaintiffs face no legally recognizable harm from a stay because, under *Dobbs*, they have no right to violate Section 216.

I. Defendants Are Likely to Succeed on Appeal.

The district court concluded that Plaintiffs are likely to prevail on their claims that Section 216 (1) violated *Casey* by prohibiting pre-viability abortions, and (2) included an unconstitutionally vague medical-emergency affirmative defense. Those conclusions are untenable because (1) the Supreme Court today overruled *Casey*, and (2) the en banc Court is likely to rule that the medical-emergency affirmative defense is *not* unconstitutionally vague for the same reasons that the full Court has allowed Section 217, which has the same affirmative defense, to come into effect pending resolution of the appeal. The State is likely to prevail on appeal.[3]

A. Section 216 satisfies rational-basis review.

For the past forty-nine years, the U.S. Supreme Court barred states from enforcing abortion laws that are squarely within their power to enact. *Cf. Roe*, 410 U.S. at 222 (White, J., dissenting) (labeling this "an exercise of raw judicial power"). That changed today. The district court had held that Plaintiffs were likely to succeed on their substantive due process challenge to Section 216 because "*Casey* has established" that "a state may not prohibit abortions before viability" such as by

[3] The State is also likely to prevail if the Plaintiff abortionists lacked third-party standing to bring their lawsuit on behalf of patients. *Dobbs* cast serious doubt on *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020): the *Dobbs* majority noted that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines," and listed *June Medical* as one of the cases that "ignored the Court's third-party standing doctrine." *Dobbs*, slip op. at 63 & n.61.

prohibiting abortions after with Timing Provisions based on "gestational age alone," PI Opinion, R. 41, PageID#756. But *Casey* is no more. Expressly rejecting *Casey*'s undue-burden standard, the Supreme Court has instructed lower courts to apply rational-basis review to state abortion laws and upheld Mississippi's prohibition of abortions after the child reaches 15 weeks gestational age. *Dobbs*, slip op. at 77-78.

The Timing Provisions of Section 216 easily satisfy rational-basis review. Rational-basis review is a "highly deferential" standard "designed to respect the constitutional prerogatives of democratically accountable legislatures." *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 483 (6th Cir. 2021) (en banc) (quotation marks omitted). "All that matters" under this standard "is whether the state conceivably had a rational basis to enact the legislation." *Id.* The State's rationales need not be supported with evidence and are not "subject to courtroom fact-finding." *Id.* at 484 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). "Courts may not second-guess a state's 'medical and scientific judgments.'" *Id.* at 483 (quoting *Preterm-Cleveland v. McCloud*, 994 F.3d 513, 525 (6th Cir. 2021) (en banc)). "And they must defer to a state's judgment that there is a problem that merits correction." *Id.*

The Timing Provisions of Section 216 advance Tennessee's compelling interests in protecting unborn children, protecting the physical and mental health of the mother, promoting human dignity, encouraging childbirth over abortion,

safeguarding unborn children from pain, resolving inconsistencies in the treatment of unborn children under Tennessee law, protecting the integrity and ethics of the medical profession, and preventing discrimination. *See* Tenn. Code Ann. § 39-15-214(a)(70)-(77).

Dobbs expressly held that many of the same reasons the Tennessee legislature provided for enacting Section 216 justified Mississippi's 15-week gestational age law. "[L]egitimate interests" for abortion regulations and prohibitions "include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Dobbs*, slip op. at 78 (citations omitted).

Plaintiffs no doubt might "argue that the factual record does not support Tennessee's rationale[s]. But that turns the rational basis standard on its head." *Bristol Reg'l Med. Ctr.*, 7 F.4th at 484. The State "has no obligation to produce evidence to sustain the rationality of its action." *Id.* (quoting *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty.*, 430 F.3d 783, 790 (6th Cir. 2005)). Under this highly deferential standard, the Tennessee General Assembly's legislative choice simply "is not subject to courtroom fact-finding." *Id.* at 483 (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 315). Plaintiffs cannot carry their burden "to negative every

conceivable basis which might support" Section 216, so their substantive due process challenge cannot succeed under rational-basis review. *Id.* at 484 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320-21 (1993)).

Even if some would prefer to ignore the Supreme Court's instructions in *Dobbs* and apply a unique, abortion-specific version of rational-basis review rather than the ordinary version that applies to "other health and welfare laws," *Dobbs*, slip op. at 77, the State has already provided ample evidence in this case that the Timing Provisions of Section 216 advance the State's interests. Each of the restrictions, from fetal heartbeat to 24 weeks, furthers the State's interests in protecting unborn life, the integrity of the medical profession, maternal health, and preventing discrimination.

As the legislature found, the "presence of a fetal heartbeat is medically significant" because it is a "discernible sign of life" and a "strong predictor of survivability to term." Tenn. Code Ann. § 39-15-214(a)(7), (15). Abortions performed at any gestational age are inconsistent with a physician's ethical obligation to heal rather than harm. *See* Curlin Decl. ¶ 11, R. 27-2, PageID#383. And abortions "pose a risk" to the mother's health at any gestational age, with the "relative risk increasing exponentially after" 8 weeks. Tenn. Code Ann. § 39-15-214(a)(43)-(44). While the Antidiscrimination Provision of Section 217 also helps the State further its interest in preventing discrimination, abortion has long served

eugenic ends even when an aborted child's mother does not have that intent. *See id.* § 39-15-214(a)(53)-(63) ("[T]he use of abortion to achieve eugenic goals is not merely hypothetical." (quoting *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring)).

Other evidence supports the State's prohibition of abortion at each time period. For fetal pain, an unborn child "develops neural circuitry capable of detecting and responding to pain" around 10 to 12 weeks, and additional development from 14 to 20 weeks supports a "conscious awareness of pain." Condic Decl. ¶ 8, R. 27-7, PageID#500. The brutal dilation and evacuation method of abortion commonly used after 15 weeks involves grabbing the child with forceps in the uterus, pulling it back through the cervix and vagina, tearing the child apart, and "evacuating" the dead child's body "piece by piece . . . until it has been completely removed." *Gonzales v. Carhart*, 550 U.S. 124, 135-36 (2007).

Some may disagree with Tennessee's policy judgment, but the Timing Provisions of Section 216 satisfy rational-basis review by a country mile.

B. The medical-emergency affirmative defense is not unconstitutionally vague.

The district court also enjoined Sections 216 and 217 based on its conclusion that the provisions' medical-emergency affirmative defense is unconstitutionally vague under *Voinovich*. But *Voinovich* was wrongly decided and should be overruled by the en banc Court. In any event, *Voinovich* provides no basis to

preliminarily enjoin the Timing Provisions of Section 216, just as this Court has allowed the Antidiscrimination Provision of Section 217 to come into effect with the same medical-emergency affirmative defense. *Dobbs* has only weakened Plaintiffs' odds of success on this claim.

In *Voinovich*, this Court held that the medical-emergency exception to an Ohio abortion law was unconstitutionally vague because it required physicians to determine "in good faith and in the exercise of reasonable medical judgment whether an emergency exists." 130 F.3d at 204 (quotations omitted). This Court concluded that the "combination of objective and subjective standards" in the exception "without a scienter requirement render[ed] the[] exception[] unconstitutionally vague, because physicians cannot know under which their conduct will ultimately be judged." *Id.* at 205.

Voinovich relied heavily on the Supreme Court's decision in *Colautti v. Franklin*, 439 U.S. 379 (1979). *Id.* at 204. *Colautti* held that a law requiring a physician to make a viability determination was unconstitutionally vague because it was "unclear whether the statute import[ed] a purely subjective standard" or instead a "mixed subjective and objective standard." 439 U.S. at 391. That the law lacked a scienter requirement and imposed strict liability for erroneous viability determinations "compounded" its vagueness. *Id.* at 394. *Voinovich* acknowledged that *Colautti* "did not consider whether a mixed standard would be unconstitutional,"

but nevertheless "f[ound] *Colautti* strongly indicative of the [Supreme] Court's view that in this area of the law, scienter requirements are particularly important." 130 F.3d at 204-05.

Voinovich has been rightly and roundly criticized. Judge Boggs called the panel's reliance on *Colautti* "misplaced" since the Supreme Court had "specifically declined" to consider whether a scienter requirement was constitutionally required. *Id.* at 216 (Boggs, J., dissenting). And he explained that there is "nothing vague, or even novel, about a statute prescribing a standard including components of good faith and reasonableness." *Id.* Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, similarly criticized *Voinovich* for imposing a "constitutional scienter requirement . . . under the guise of the void-for-vagueness doctrine" and found the challenged Ohio law, which "plainly impose[d] both a subjective and objective mental requirement," easily distinguishable from the "ambiguous" statute in *Colautti*. *Voinovich v. Women's Med. Pro. Corp.*, 523 U.S. 1036, 1348-49 (1998) (Thomas, J., dissenting from the denial of certiorari). The Seventh Circuit has expressly disagreed with *Voinovich*, refusing to read *Colautti* to require the invalidation of an abortion statute containing an objective standard but no scienter requirement. *Karlin v. Foust*, 188 F.3d 446, 462-63 (7th Cir. 1999); *see also Hope Clinic v. Ryan*, 195 F.3d 857, 866 (7th Cir. 1999) (en banc) (Easterbrook, J.).

Before the Supreme Court's decision in *Dobbs*, the en banc Court had ample reason to overrule *Voinovich*'s vagueness holding with respect to the medical-emergency exception. But even if the Court were reluctant to overrule *Voinovich* due to *Colautti*, the *Dobbs* majority now expressly disagrees with the portions of *Colautti* that *Voinovich* relied upon. *Dobbs*, slip op. at 54 (negatively citing *Colautti*, 439 U.S. at 390-97).

Further, regardless of whether this Court overrules *Voinovich*, that decision still provided no basis for the district court to facially enjoin the Timing Provisions on vagueness grounds for three reasons.

First, there is a material distinction between the medical-emergency provision at issue in *Voinovich* and the one here. The one at issue in *Voinovich* was an *exception* to the definition of the crime. *See* Ohio Rev. Code Ann. § 2919.17(A)(1) (2010). The medical-emergency provision at issue here, by contrast, is an *affirmative defense* that the defendant must prove by a preponderance of the evidence. *See* Tenn. Code Ann. § 39-11-204.

That distinction is significant in the context of the void-for-vagueness doctrine. The void-for-vagueness doctrine is concerned with whether a "penal statute defin[es] the criminal offense with sufficient definiteness." *United States v. Lopez*, 929 F.3d 783, 784 (6th Cir. 2019) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). An affirmative defense is not part of the definition of the crime,

so any vagueness in the medical-emergency affirmative defense does not implicate the void-for-vagueness doctrine. *See United States v. Christie*, 825 F.3d 1048, 1065 (9th Cir. 2016) (O'Scannlain, J.).

Second, this Court made clear in *Preterm-Cleveland* that "facial attacks are not the proper procedure for challenging the lack of a health exception." 994 F.3d at 529. If Plaintiffs are right that the medical-emergency affirmative defense is vague, they must rely on as-applied challenges to "'protect the health of the woman if it can be shown in discrete and well-defined instances' her health or life is at risk." *Id.* (quoting *Gonzales*, 550 U.S. at 167).

Third, at the very least, the district court should have "sever[ed] the problematic portions" of the medical-emergency affirmative defense for Sections 216 and 217 while leaving "the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). In Tennessee,[4] the "doctrine of elision allows a court, under appropriate circumstances when consistent with the expressed legislative intent, to elide an unconstitutional portion of a statute and find the remaining provision to be constitutional and effective." *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994). The Tennessee legislature undoubtedly would have preferred omission of the term "reasonable" from the affirmative defense to

[4] "Whether a portion of a state's statute is severable is determined by the law of that state." *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 626 (6th Cir. 2018) (internal quotations omitted).

complete invalidation of Sections 216 and 217. Both sections contain broad severability provisions, *see* Tenn. Code Ann. § 39-15-216(h); *id.* § 39-15-217(*i*), which "evidence an intent on the part of the legislature to have the valid parts of the statute[s] in force if some other portion of the statute has been declared unconstitutional," *Gibson Cnty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985).

Moreover, elision of the term "reasonable" would leave intact "a complete law capable of enforcement and fairly answering the object of its passage." *Id.* The definition of prohibited conduct would remain unchanged, and the affirmative defense would require only a good-faith determination of a medical emergency, which is the standard already employed in other Tennessee abortion regulations. *See* Tenn. Code Ann. § 39-15-202(f)(1) (defining "medical emergency" in abortion waiting-period law by reference to "the physician's good faith medical judgment"); *id.* § 39-15-211(a)(3) (same for law prohibiting post-viability abortions).

The district court never considered whether severance was appropriate. That failure was an abuse of discretion and is yet another reason that the State is likely to succeed on appeal. *See Leavitt v. Jane L.*, 518 U.S. 137, 143-46 (1996).

II. The Equities Weigh Strongly in Favor of a Stay.

The district court's erroneous conclusions about Plaintiffs' likelihood of success infected its weighing of the equities, leading it to conclude that enforcement

of the Timing Provisions would harm Plaintiffs and the public interest by violating the Constitution. *See* PI Opinion, R. 41, PageID # 766-67. But Section 216 is not unconstitutional, as *Dobbs* has made clear, so allowing the law to remain enjoined harms the State and the public interest by preventing the State "from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022) ("Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law.").

The reason for this emergency motion is clear: Each day this Court allows the injunction to remain in place is another day that the lives of unborn Tennesseans are at risk. The CEO and president of one Plaintiff has publicly stated that they "will continue to provide abortion care up to the very minute when we can no longer do so legally." Emily West, *Tennessee Planned Parenthood Reacts to Potential Overturn of Roe v. Wade*, NewsChannel5 Nashville (May 3, 2022), https://bit.ly/3HoiHb4. Plaintiffs will not suffer imminent harm from a stay because, under *Dobbs*, they have no right to violate Section 216. And Plaintiffs are not unfairly inconvenienced by the emergency nature of this motion; indeed, they publicly stated early last month that they anticipated this motion to stay the

injunction of Section 216. Nikki McGee, *What Happens to TN Planned Parenthood Locations if Roe v. Wade Overturned?*, WKRN (May 3, 2022), https://bit.ly/3O1SJg8 (quoting the previously mentioned Plaintiff's CEO and president as saying "we have a six-week ban also and the Sixth Circuit could lift that injunction immediately after the Supreme Court releases its final decision").

It is true that change is imminent. With the overruling of *Roe* and *Casey*, Tennessee has another law that will come into effect 30 days from now. *See* Tenn. Code Ann. § 39-15-213. But under Tennessee law, which specifically provides that there is no constitutional right to abortion, Tenn. Const. art. I, § 36, Section 216 is *already* supposed to prohibit abortion after the detection of an unborn child's heartbeat. The State requests that this Court allow Section 216 to come into effect pending resolution of the appeal so that the State may begin the important work of protecting the lives of the most vulnerable Tennesseans.

CONCLUSION

Defendants respectfully request that this Court fully stay the preliminary injunction so that the State can enforce both Section 216 and Section 217. *Dobbs* makes clear that Section 216 is constitutional. The State proposes that Plaintiffs, who publicly stated a month ago that they anticipated this motion, **file their response by 2:30 PM Eastern Time today**. Because any delay costs the lives of Tennessee children, **the State asks the Court to grant the motion as soon as possible**. If the Court does not act by 4 PM Eastern Time today, the State plans to file a reply to any response that Plaintiffs have filed.

Respectfully submitted,

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June 24, 2022

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 5,186 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Clark L. Hildabrand
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June 24, 2022

CERTIFICATE OF SERVICE

I, Clark L. Hildabrand, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on June 24, 2022, a copy of the Motion for Stay of Preliminary Injunction Pending Appeal was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Clark L. Hildabrand
CLARK L. HILDABRAND
Assistant Solicitor General