IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

EMILY WALDORF; **THERESA VAN**; **CHELSEA STOVALL**; **ALLISON HOWLAND**; and **CHAD B. TAYLOR, M.D.**, on behalf of himself and his patients,

PLAINTIFFS

v. CASE NO. 60CV-26-1539

THE STATE OF ARKANSAS; **SARAH HUCKABEE SANDERS**, in her official capacity as Governor of the State of Arkansas; **TIM GRIFFIN**, in his official capacity as Attorney General of Arkansas; **BRANDON CARTER**, in his official capacity as Prosecuting Attorney of Washington and Madison Counties; **DANIEL SHUE**, in his official capacity as Prosecuting Attorney of Sebastian County; **WILL JONES**, in his official capacity as Prosecuting Attorney of Pulaski County; **EDWARD "WARD" GARDNER, M.D.**, in his official capacity as Chairman of the Arkansas State Medical Board; and **DON R. PHILLIPS, M.D.**, **CHRISTOPHER D. DAVIS, P.A.**, **BRAD A. THOMAS, M.D.**, **ELIZABETH ANDERSON**, **MICHAEL J. BIRRER, M.D.**, **SARAH C. BONE, M.D.**, **MARK CAMP**, **RODNEY GRIFFIN, M.D.**, **KENNETH B. JONES, M.D.**, **C. WESLEY KLUCK JR., M.D.**, **BRIAN L. MCGEE, M.D.**, **TIMOTHY C. PADE, M.D.**, and **JOSHUA E. ROLLER, M.D.**, in their official capacities as officers and members of the Arkansas State Medical Board,

DEFENDANTS.

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INTRODUCTION

Defendants' motion to dismiss ignores the detailed factual allegations in Plaintiffs' complaint, the plain text of the Arkansas Constitution, and the actual people who are plaintiffs in this case who have been and continue to be harmed by Arkansas's abortion bans every day they remain in effect. Emily Waldorf, Theresa Van, Chelsea Stovall, Allison Howland, and Dr. Chad Taylor have pled their allegations with both particularity and gut-wrenching detail; at this stage, those allegations must be accepted as true. Defendants are not free to simply ignore them. And while Defendants attempt to argue that the Arkansas Constitution can be overridden by policies or statutes, it is the other way around. The Arkansas Constitution is the supreme law of the State and within the Constitution, fundamental rights must be protected above all else. This case calls on the Court to do just that.

SUMMARY OF FACTUAL ALLEGATIONS

Emily Waldorf, Theresa Van, Chelsea Stovall, and Allison Howland (collectively, the "Patient Plaintiffs") and Dr. Chad Taylor filed this action on February 2, 2026 alleging that Arkansas's two identical abortion bans, Ark. Code §§ 5-61-304, 5-61-404, (collectively, "abortion bans") violate certain provisions of the Arkansas Constitution. The abortion bans prohibit "[a] person" from "perform[ing] or attempt[ing] to perform an abortion except to save the life of a pregnant woman in a medical emergency." The abortion bans do not criminalize obtaining an abortion when pregnant, but rather subject a physician to extreme penalties of a fine of up to $100,000, imprisonment for up to 10 years, and/or professional discipline, including loss of their medical license. Ark. Code §§ 5-61-304(b), 5-61-404(a), 17-95-409(a)(2)(A), (D), 17-95-303.

The sole exception to the abortion bans is for a "medical emergency," which the bans define as "a condition" "which, in reasonable medical judgment, complicates the medical condition of a pregnant woman to such an extent that termination of a pregnancy is necessary to preserve the life

of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Ark. Code §§ 5-61-303(3)(A), 5-61-403(3)(A), as amended by H.B. 1610, 95th Leg., Reg. Sess. (Ark. 2025). As the Plaintiffs allege, the language of this definition is impossible to utilize in practice as it has proved impossible for physicians to determine the legality of abortion in any number of medical emergencies. In fact, in both 2023 and 2024—the latest years for which data is available—the Arkansas Department of Health reported that zero abortions were performed in the State. Compl. ¶ 140.

Plaintiffs' complaint contains 63 pages of detailed allegations, including numerous examples of situations where both the Patient Plaintiffs themselves as well as Dr. Taylor's patients could not receive abortions due to the vagueness of the medical emergency exception. *See* Compl. ¶¶ 10-120. Accordingly, Plaintiffs allege that the abortion bans are unconstitutionally vague under physicians' right to due process under Article 2, Section 8 of the Arkansas Constitution and are chilling the provision of emergency abortion care. Plaintiffs' complaint also describes in detail how being denied abortion in Arkansas infringed the Patient Plaintiffs' fundamental rights to life, liberty, the pursuit of happiness, and equality under Article 2, Sections 2, 3, and 8 of the Arkansas Constitution and thus alleges that the abortion bans violate those provisions as well.

LEGAL STANDARD

In reviewing a motion to dismiss, the court must "treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed." *Ark. State Claims Comm'n v. Duit Constr. Co.*, 2014 Ark. 432, at 5–6, 445 S.W.3d 496, 501 (internal citation

omitted). Arkansas's rules "require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Id.*

ARGUMENT

At every turn, Defendants' arguments to dismiss Plaintiffs' complaint ignore Plaintiffs' detailed allegations and attempt to bootstrap their flawed merits arguments onto the pleading stage. But Plaintiffs have more than met their burden under Rules 12(b)(1) and 12(b)(6) to show that they have standing, this Court has subject matter jurisdiction, Defendants are not entitled to sovereign immunity, and Plaintiffs have stated a claim as to the Patient Plaintiffs' fundamental rights to life, liberty, equality, and the pursuit of happiness, and as to Dr. Taylor's claim that the abortion bans are void for vagueness. This Court should deny Defendants' motion and allow this case to proceed.

I. PLAINTIFFS HAVE ESTABLISHED STANDING AND SUBJECT MATTER JURISDICTION

Defendants' standing and jurisdictional arguments fail because they ignore both Plaintiffs' detailed allegations and the plain text of the Arkansas Constitution. If anything, Defendants' arguments underscore the various well-pled material facts that are contested in this case, and thus that dismissal at this early stage of proceedings would be an error.

A. Plaintiffs Clearly Have Standing to Assert Their Own Rights

Defendants argue that the Patient Plaintiffs lack standing to assert the rights of Dr. Taylor and vice versa, ignoring that each plaintiff is asserting their own legal rights in this case. Rather than engage with each Plaintiff's detailed allegations, however, Defendants' disjointed argument amounts to "heads I win, tails you lose." But neither the facts nor the law support this conclusion.

Primarily, the Patient Plaintiffs are asserting their own fundamental constitutional rights to life, liberty, the pursuit of happiness, and equality. Under Arkansas law, a plaintiff "must have suffered injury or belong to that class that is prejudiced in order to have standing to challenge the

constitutional validity of a law." *Martin v. Kohls*, 2014 Ark. 427, at 8–9, 444 S.W.3d 844, 849 (concluding a plaintiff "need[] only to prove that their rights were affected" by the law, meaning a plaintiff is "only required to demonstrate that they were among the class of persons affected by the legislation"); *see also Dep't of Human Servs. & Child Welfare Agency Rev. Bd. v. Howard*, 367 Ark. 55, 59, 444 S.W.3d 844, 849 (2006); *Magruder v. Ark. Game & Fish Comm'n*, 287 Ark. 343, 344, 444 S.W.3d 844, 849 (1985). Here, the Patient Plaintiffs suffered direct injury during pregnancy because of Arkansas's abortion bans, injury which is likely to repeat in their future pregnancies. For example, Ms. Waldorf was denied an abortion at 17 weeks of pregnancy under Arkansas law and forced to flee the State for life-saving care due to cervical insufficiency, a diagnosis which is likely to recur in subsequent pregnancies. Compl. ¶¶ 12, 14, 45.

Dr. Taylor is similarly asserting his own constitutional right to be free from an unconstitutionally vague law. Because Arkansas's abortion bans prohibit licensed physicians like Dr. Taylor from providing abortions on penalty of fines, prison time, and loss of his medical license, Dr. Taylor has standing to challenge those laws that directly regulate his behavior. "When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the 'entrapped innocent,' who has not received fair warning." *Ross v. State*, 347 Ark. 334, 336, 444 S.W.3d 844, 849 (2002); *see also Craig v. Boren*, 429 U.S. 190, 196–97 (1976) (explaining "the obvious claimant" and "the least awkward challenger" is the party upon whom the challenged statute imposes "legal duties and disabilities").

Plaintiffs' additional allegation—that Dr. Taylor has third-party standing to represent the interests of his patients—is also well supported. Under Arkansas law, third-party standing exists in cases where: (1) "the issue would not otherwise be susceptible of judicial review," and (2) "it appears that the third party is sufficiently interested in the outcome that the interest of the party

whose constitutional rights were allegedly deprived would be adequately represented." *Medlock v. Fort Smith Serv. Fin. Corp.*, 304 Ark. 652, 654, 803 S.W.2d 930, 931 (1991); *see also Arnold v. State*, 2011 Ark. 395, at 6–7, 384 S.W.3d 488, 494; *Kennedy v. Kelly*, 295 Ark. 678, 681, 751 S.W.2d 6, 8 (1988); *Cox v. Stayton*, 273 Ark. 298, 302, 619 S.W.2d 617, 619–20 (1981). When discussing third party standing, the Arkansas Supreme Court, like the federal courts, has repeatedly cited approvingly to physicians representing pregnant patients. *See Cox v. Stayton*, 273 Ark. at 302, 619 S.W.2d at 619 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)); *Kennedy*, 295 Ark. at 681, 751 S.W.2d at 8 (same); *Stokes v. Stokes*, 271 Ark. 300, 303, 613 S.W.2d 372, 375 (1981) (same). The fact that the Patient Plaintiffs are also representing their own interests does not undermine Dr. Taylor's right to also represent the interests of his patients.

B. The Arkansas Constitution Explicitly Gives This Court Jurisdiction

The Arkansas Constitution vests original jurisdiction for cases like this one with the circuit courts, and that jurisdiction cannot be stripped by a mere legislative act. While Act 975, cited by Defendants, purports to do just that, this Court is duty-bound to follow the Arkansas Constitution while litigation over the enforceability of that act continues. As the Arkansas Supreme Court explained during the Civil Rights era, when the legislature flouts the Constitution, "constitutional guarantees are superior to the legislative enactments." *Smith v. Faubus*, 230 Ark. 831, 837, 327 S.W.2d 562, 566 (1959) (concluding state statute that allowed state officials to perform searches and seizures without a warrant void).

Under Amendment 80, Section 6 of the Arkansas Constitution, "Circuit Courts" like this Court "are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution." The Constitution also dictates that it is the Arkansas Supreme Court, not any other court or branch of the Arkansas government, that "shall

prescribe the rules of pleading, practice and procedure for all courts." Ark. Const. Amend. 80, § 3. Accordingly, under long-standing separation of powers principles, the Arkansas Supreme Court and other courts have consistently concluded that the Constitution's rules of original jurisdiction cannot be changed by other branches of the government, including the legislature. *See Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 9–11, 308 S.W.3d 135, 141–42 (concluding that a statute proscribing procedural rules "offends the principle of separation of powers and the powers specifically prescribed to [the Arkansas Supreme Court] by amendment 80"). Indeed, the Arkansas Supreme Court, and that Court alone, has "inherent superintending control" over original jurisdiction. *Foster v. Hill*, 372 Ark. 263, 267, 275 S.W.3d 151, 155 (2008); *see also Cragar v. Thompson*, 212 Ark. 178, 180, 205 S.W.2d 180, 181 (1947); *Parmley v. Norris*, 586 F.3d 1066 (8th Cir. 2009); *Cohen v. State*, 732 So.2d 867 (Miss. 1998). Thus, a statute like Act 975 that is flagrantly inconsistent with or repugnant to the Constitution is void and cannot be enforced.

The ongoing litigation in *Norris v. Independence County* does not undermine these principles. While the circuit court in that case relied on Act 975 in dismissing the complaint at issue, that decision is on appeal and, in any event, is not binding on this Court. The Arkansas Supreme Court expedited the *Norris* appeal but elected not to decide the case immediately, meaning it will be months before the constitutional issues raised by the parties in *Norris* are resolved. As Justice Bronni observed in his dissent from that order, this means that other cases must necessarily proceed while the Court considers Act 975's constitutionality. *See Norris v. Independence County*, No. CV-26-116, 2026 Ark. 41, at 1, 2026 WL 555611, at *1 (Ark. Feb. 27, 2026) (Bronni, J., dissenting). In the meantime, this Court can and should follow the Constitution and exercise original jurisdiction to adjudicate the issues in this case.

In the event that, months from now, the Supreme Court concludes, notwithstanding the plain text of the Constitution, that Act 975 does divest the circuit courts of jurisdiction over cases involving the constitutionality of a state statute, the appropriate remedy at that time would be to remand this case to the court with appropriate jurisdiction, not dismiss.

II. DEFENDANTS ARE NOT ENTITLED TO SOVEREIGN IMMUNITY

The Arkansas Supreme Court has repeatedly recognized that sovereign immunity does not bar suits seeking only declaratory and injunctive relief that allege illegal, unconstitutional, or ultra vires action by state actors. *See Ark. State Claims Comm'n*, 2014 Ark. 432, at 7, 445 S.W.3d at 502. Plaintiffs' complaint alleges that Arkansas's abortion bans are unconstitutional, and that state actors are acting ultra vires by enforcing them in a way that denies the Patient Plaintiffs their rights to life, liberty, equality, and the pursuit of happiness, and Dr. Taylor's right to due process due to the bans' vagueness. Accordingly, sovereign immunity is inapplicable in this case. *See Monsanto Co. v. Ark. State Plant Bd.*, 2019 Ark. 194, 576 S.W.3d 8.

A. Defendants Improperly Collapse Sovereign Immunity into a Merits' Inquiry

Defendants' motion improperly turns the motion to dismiss standard on its head, contending that sovereign immunity applies because they believe that the abortion bans are constitutional and that Defendants' preferred construction of the medical emergency exception is correct. Yet at the pleading stage, plaintiffs are not required to prove constitutional violations; rather plaintiffs need only plead facts that, taken as true, plausibly allege ultra vires conduct for which prospective relief is available.

Arkansas's ultra vires exception to sovereign immunity permits suits seeking prospective relief for unconstitutional acts against government officers so long as the complaint complies with Arkansas's fact-pleading rules. *See Williams v. McCoy*, 2018 Ark. 17, at 3, 535 S.W.3d 266, 268. Plaintiffs plead such facts here. The complaint alleges: "Arkansas's abortion bans deny Arkansans

the reproductive autonomy to build their families in the ways and at the times that are right for them and denies pregnant Arkansans the ability to protect their lives, their fertility, and their overall physical, mental, social, and economic health. As such, Arkansas's abortion bans deny Arkansans their fundamental rights under Article 2, Section 2 of the Arkansas Constitution and are facially unconstitutional." Compl. ¶ 215. Further, Plaintiffs plead detailed facts that, taken as true at this stage, show unconstitutional, illegal, and ultra vires conduct. *See e.g.*, Compl. ¶¶ 3, 22–23, 125, 137.

Because Plaintiffs' complaint is limited to prospective declaratory and injunctive relief, sovereign immunity does not apply. *See Martin v. Haas*, 2018 Ark. 283, at 8, 556 S.W.3d 509, 515 (holding sovereign immunity did not apply because plaintiffs sought "declaratory and injunctive relief, not money damages"). Arkansas cases applying the exception to the defense of sovereign immunity confirm that the focus is whether the complaint adequately pleads that the challenged conduct is unconstitutional and seeks prospective relief—precisely what Plaintiffs have done. *See Thurston v. League of Women Voters of Ark.*, 2022 Ark. 32, at 4, 639 S.W.3d 319, 321.

B. Defendants Erroneously Rely on and Misapply *Ex parte Young*

Defendants attempt to adopt federal caselaw, instead of Arkansas law, and then incorrectly apply the relevant standards. Nonetheless, at the motion to dismiss stage, all that is required is a "straightforward inquiry" into who enforces the challenged law. Plaintiffs have done so here.

The federal standard originates in *Ex parte Young*, where the U.S. Supreme Court allowed a private party to sue state officials in their official capacities for prospective injunctive relief where the official had "some connection" to the challenged law's enforcement. *Ex parte Young*, 209 U.S. 123, 156–58 (1908); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Defendants invoke "some connection" federal cases as if they were controlling Arkansas sovereign-immunity doctrine and as if they categorically immunized officials other than

prosecutors—when even *Ex parte Young* itself makes clear that the requisite enforcement duty may arise from the officer's general authority, not necessarily from the challenged act alone. *Ex parte Young*, 209 U.S. at 156–58. [1]

Either way, Plaintiffs meet the standard, as they have alleged each Defendant's concrete role with respect to enforcement of the abortion bans, in addition to their direct involvement in Plaintiffs' denial of care in some cases. As they do throughout their motion, Defendants recast the Rule 12 inquiry into a premature merits' adjudication.

C. Each Defendant Is a Proper Official-Capacity Defendant Under the Ultra Vires Exception to Sovereign Immunity

Defendants' claims as to each Defendant's connection to enforcement of the abortion bans incorrectly ignore Plaintiffs' detailed allegations and attempts to recast them as conclusory.

The State. Defendants claim the Arkansas Constitution precludes suits against the State, yet Arkansas courts have recognized that when plaintiffs seek declaratory and injunctive relief for constitutional violations, such actions fall within the ultra vires exception and are not barred by sovereign immunity. *See Monsanto*, 2019 Ark. 194, 576 S.W.3d 8. And the Arkansas Supreme Court has never said that "the State" is an improper defendant, even when directly asked. *See State v. Good Day Farm Ark., LLC*, 2025 Ark. 207, at 4 n.2, 725 S.W.3d 1, 4 n.2 (noting "allegations of illegal state action remain an exception to sovereign immunity" and declining to perform a separate analysis for "the State" as a defendant).

[1] Defendants also cite to *Land v. BAS, LLC* which does not support their asserted "some connection" requirement under Arkansas law. The Arkansas Supreme Court in *Land* analyzed whether the plaintiff had adequately alleged an unconstitutional or illegal act sufficient to overcome sovereign immunity; but it did not conduct any separate "enforcement connection" inquiry. *See Land v. BAS, LLC*, 2025 Ark. 107, at 3, 713 S.W.3d 1, 5, *reh'g denied* (Sept. 4, 2025). In any event, *Land* is currently the subject of a petition for a writ of certiorari to the United States Supreme Court. *See BAS, LLC v. Land*, No. 25-931 (filed Feb. 2, 2026).

Governor. As alleged, the Governor not only maintains a long track record of implementing anti-abortion policies but was in fact directly involved in one Plaintiff's denial of care. Ms. Waldorf alleges that while she was being denied an emergency abortion, her loved ones contacted the Governor's office "begging for help," and the only advice given was to "get a lawyer." Compl. ¶ 2. The facts alleged in the complaint tie the Governor's office directly to the enforcement environment that created Plaintiffs' injuries and underscore the need for prospective relief to cure ongoing constitutional harms. *See* Compl. ¶¶ 22–24, 122–124.

Attorney General. Defendants ignore Plaintiffs' particularized allegations that the Attorney General is empowered to assist the Medical Board in investigating and revoking physicians' licenses based on "unprofessional conduct." Defendants' position also ignores the fact that the abortion bans were put into effect through the Attorney General's certification and underplays his past enforcement-related actions (including cease-and-desist letters and public statements reflecting an enforcement posture). *See* Compl. ¶¶ 125–127, 126 n.17. These allegations go beyond a generalized obligation to "defend" state law; they plead concrete enforcement involvement tied to Plaintiffs' injuries and to the relief sought.

Medical Board. Defendants similarly ignore the direct enforcement by the Arkansas Medical Board, which is responsible for licensing professionals, imposing licensing penalties under Arkansas law, and defines unprofessional conduct to include a "wrongful and criminal abortion." *See* Compl. ¶¶ 131, 137 (citing Ark. Code §§ 17-95-409(a)(2)(A), (D), 17-95-303). Plaintiffs further allege that licensed providers like Dr. Taylor face "professional discipline, including loss of their medical license" for such conduct. *Id*. Far from what Defendants characterize as an "empty vessel"—an injunction barring the Board from taking such enforcement actions would remove a powerful threat (loss of a physician's livelihood)—that independently

chills constitutionally protected conduct and medical care. Defendants' contention that the Board's authority arises under "separate laws" or may depend on other actors (e.g., prosecution decisions) does not defeat Plaintiffs' allegations. The relevant inquiry is whether Plaintiffs plausibly allege that the Board has a coercive enforcement tool that contributes to the challenged regime and causes injury. They do.

Prosecuting Attorneys. Finally, Plaintiffs' allegations are not merely that county prosecutors "enforce criminal laws," but that their ever-present credible threat of prosecutorial enforcement has already resulted in the denial of medical care. *See* Compl. ¶¶ 128–130. For example, Ms. Waldorf's medical care was denied because the hospital's counsel "cannot rule out the possibility of an overzealous prosecutor." *See* Compl. at 2; ¶¶ 28, 180. That is a classic pre-enforcement injury. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021).

D. Discovery Is Necessary to Resolve Any Remaining Immunity Questions

Even if and to the extent the Court were to be persuaded by Defendants' claim that detailed internal enforcement facts are required at this stage (*e.g.*, interagency coordination, investigatory referrals, licensing enforcement practices, or executive-branch involvement in guidance or enforcement priorities), that information is uniquely within Defendants' possession. Plaintiffs have plausibly alleged ongoing and imminent injury from the challenged enforcement regime and have identified specific enforcement tools wielded by the Defendants.

III. PLAINTIFFS' DETAILED ALLEGATIONS SUPPORT THEIR CLAIMS

A. The Patient Plaintiffs Have Stated a Claim Based on the Right to Life, Liberty, and the Pursuit of Happiness

i. *Plaintiffs Rely on the Plain Language of the Arkansas Constitution*

Plaintiffs' complaint adequately states a claim that Arkansans do not lose their fundamental constitutional rights to life, liberty, equality, and the pursuit of happiness simply because they are

pregnant. The plain language of Article 2, Section 2 is unequivocal, and the individual rights it promises are both more expansive and those relied upon by courts applying *Roe v. Wade* and amply supported by Arkansas case law as well as other state Supreme Courts interpreting similar language. Defendants miss the crux of the Patient Plaintiffs' allegations and instead seek to turn the constitutional analysis on its head by insisting that Plaintiffs seek only an independent "right to abortion." But while Defendants surely disagree on the merits of Plaintiffs' claims, their arguments cannot and do not justify dismissal at this early stage of litigation.

It is undisputed that the "inherent and inalienable" rights protected by Article 2, Section 2 of the Arkansas Constitution are more protective of individual Arkansans' rights than the federal Constitution. *See Jegley v. Picado*, 349 Ark. 600, 631, 80 S.W.3d 332, 349 (2002) ("We have recognized protection of individual rights greater than the federal floor in a number of cases."). Indeed, the Arkansas Supreme Court has characterized "life and liberty" as having "comprehensive scope" that "embraces 'all our liberties, civil, personal and political; in short all that makes life worth living' and that each of these rights 'carries with it, as its natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right.'" *Carroll v. Johnson*, 263 Ark. 280, 289, 565 S.W.2d 10, 15–16 (1978) (quoting *In re Flukes*, 157 Mo. 125, 57 S.W. 545 (1900)). As particularly relevant for Patient Plaintiffs, protection of life and liberty "encompasses many personal freedoms including the right to enjoy domestic relations and the privileges of family and home." *Id.*

Other state Supreme Courts interpreting similar inherent and inalienable language have concluded it protects pregnant people and that abortion bans violate those fundamental rights. The Kansas Supreme Court, for example, in interpreting their constitutional provision guaranteeing "life, liberty, and the pursuit of happiness," summarized the issue as follows: "We are now asked:

Is this declaration of rights more than an idealized aspiration? And, if so, do the substantive rights include a woman's right to make decisions about her body, including the decision whether to continue her pregnancy? We answer these questions, 'Yes.'" *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 613, 440 P.3d 461, 466 (2019). The court elaborated that this "right of personal autonomy" includes "the ability to control one's own body, to assert bodily integrity, [] to exercise self-determination," and "allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy." *Hodes & Nauser*, 309 Kan. at 614, 440 P.3d at 466. As a Justice of the Indiana Supreme Court explained, "[i]t cannot be that 'upon becoming pregnant, women relinquish virtually all rights'" otherwise guaranteed under the Constitution. *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood ("PPGNHI")*, 211 N.E.3d 957, 997 (Ind. 2023) (Goff, J., concurring in part and dissenting in part) (quoting *Hodes*, 309 Kan. at 650, 440 P.3d at 486). Supreme Courts have thus concluded that, at the very least, this language protects pregnant people when their health is at risk. *See Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1130 (Okla. 2023); *Wrigley v. Romanick*, 988 N.W.2d 231, 240–43 (N.D. 2023); *PPGNHI*, 211 N.E.3d at 976. Plaintiffs' allegations are thus more than sufficient to state a claim.

Amendment 68 of the Arkansas Constitution cannot and does not eliminate pregnant Arkansans' inherent rights. Amendment 68 was added to the Constitution in 1988 to prohibit public funding from being used to pay for abortion. The Amendment was passed in Arkansas and many other states across the country in response to policy debates about public funding of abortion that were happening across the United States in the 1980s. Section 1 of the amendment states "[n]o public funds will be used to pay for any abortion, except to save the mother's life." Ark. Const. amend. 68, § 1. Defendants rely not on that section but on Section 2 of the amendment which

contains a "policy statement." Yet when Amendment 68 was challenged, both the trial court and the Eighth Circuit determined that "Section 1's function of banning the great majority of public funding for abortions operates as the core provision—Section 2 is a general public policy statement and philosophical foundation for Section 1" and as such has "no practical working purposes" and "no function independent of the first section." *Little Rock Fam. Plan. Servs., P.A. v. Dalton*, 860 F. Supp. 609, 626 (E.D. Ark. 1994), *aff'd*, 60 F.3d 497, 503 (8th Cir. 1995) (concluding "the district court did not err in holding that section[] 2" has "no function independent of the first section and no practical working purposes"), *rev'd in part on other grounds by sub nom. Dalton v. Little Rock Fam. Plan. Servs.*, 516 U.S. 474 (1996). Indeed, the Arkansas Supreme Court has repeatedly found that where provisions "are so mutually connected with and dependent" on the operative provision, the provisions are not severable. *See Handy Dan Improvement Ctr., Inc. v. Adams*, 276 Ark. 268, 277, 633 S.W.2d 699, 704 (1982); *Allen v. Langston*, 216 Ark. 77, 85, 224 S.W.2d 377, 381 (1949).

If Amendment 68 was truly meant to override pregnant people's fundamental, constitutionally protected rights to life, liberty, and the pursuit of happiness, it needed to say so clearly. *See Richardson v. Martin*, 2014 Ark. 429, at 9, 444 S.W.3d 855, 861 (upholding ballot initiative where text clearly stated that "all laws which conflict with the amendment . . . are repealed to the extent that they conflict with the amendment"). This is a longstanding principle, reflecting the fundamental nature of individual rights. *See Hale v. Henkel*, 201 U.S. 43, 74 (1906) (recognizing that individuals retain constitutional protections against the State); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 272 (1947) (reflecting the principle that statutes should not be interpreted to divest individuals of established rights absent clear language); *Padelford, Fay & Co. v. Mayor of Savannah*, 14 Ga. 438, 440 (1854) (describing individual rights as "sacred" and of superior importance to government power).

Moreover, even to the extent Section 2 of Amendment 68 conflicts with Article 2, Section 2, the fundamental rights guaranteed in Article 2, Section 2 must prevail over any vague "policy" "to protect the life of every unborn child." In other words, the lives of Emily Waldorf, Theresa Van, Chelsea Stovall, and Allison Howland—real living, breathing Arkansans—cannot be overridden by a vague Arkansas "policy" to protect the fetuses growing inside them. Again, at this stage of litigation, Plaintiffs' allegations are more than sufficient to proceed.

ii. ***Defendants Also Misstate Arkansas's History and Traditions***

As discussed above, the relevant question is whether pregnant Arkansans are protected by the plain text of the Constitution. Because the Constitution clearly protects all Arkansans' fundamental rights to life, liberty, and the pursuit of happiness, the inquiry should end there. Yet even if this Court chose not to follow the other state Supreme Courts addressing similar rights, and instead applied the U.S. Supreme Court "history and tradition" test, Defendants' analysis is historically inaccurate. First, the Arkansas Constitution of 1874 was adopted to restrain government power and protect individual liberty. Second, Arkansas's earliest abortion statutes followed the common-law "quickening" distinction rather than imposing a blanket prohibition from conception. Third, those statutes historically targeted third parties who performed abortions, not pregnant individuals themselves. And finally, Defendants' narrative collapses materially different legal regimes into a single, misleading account unsupported by the caselaw they cite.

First, Defendants portray the 1874 Constitution as a vehicle for enforcing state-imposed moral policy, Defs.' Mot. at 1, but the historical record shows the opposite. Contemporary records of the 1874 Convention describe it as a comprehensive effort to curb governmental excess and restore constitutional limits on state power.[2] The resulting Constitution, including Article 2,

[2] *Arkansas Constitutional Convention (1874)*, *The Quill Project*, Pembroke College, Oxford, https://www.quillproject.net/negotiation/392/full-record (last visited Mar. 13, 2026).

Section 2, reflects that purpose. Interpreting Arkansas's constitutional guarantees of life and liberty to permit the State to force pregnant individuals to stay pregnant against their will or to deny physicians the ability to provide necessary care would invert that design. *Smith v. Cole*, cited by Defendants, Defs.' Mot. at 19, only reinforces this point. *See Smith v. Cole*, 187 Ark. 471, 475, 61 S.W.2d 55, 57 (1933) (interpreting the Constitution by reference to its text and structural limitations on governmental power).

Second, Arkansas's 1837 Revised Statutes did not, as Defendants claim, "protect fetal life from conception." Defs.' Mot. at 20. Rather, these laws allowed abortion throughout the weeks and months when most abortions today are performed, and only criminalized certain acts when directed at a "quick child"—that is, after the pregnant person experienced fetal movement. *See* Rev. Stat. of Ark. ch. 44, div. 3, art. 2, § 6 (1838). The historical significance of that distinction is substantial. Under both common law and early statutory regimes, pre-quickening abortion was not treated as homicide or as the destruction of a legal person. *See* James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 30 (1985).

Third, even to the extent Arkansas's early laws banned some abortions, they were targeted at protecting pregnant women who lost wanted pregnancies when injured by a third party, not women who wanted to end their pregnancies. For decades, Arkansas law classified as manslaughter "the willful killing of an unborn, quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother." *See* Ark. Stat. Ann. § 41-2223 (1964) (repealed 1975). The statute therefore targeted violence against pregnant persons and the resulting fetal death. *See Tiner v. State*, 239 Ark. 819, 826, 394 S.W.2d 608, 612 (1965) (discussing the statutory framework governing homicide and fetal death).

Finally, none of the cases Defendants cite addresses abortion or the historical development of abortion regulation in Arkansas. The Arkansas case law they cite does not establish a historical tradition of abortion regulation, much less the sweeping and continuous conception-based prohibition Defendants claim. *See, e.g.*, *Taylor v. Ferguson*, 2025 Ark. 180, at 9, 722 S.W.3d 498, 503 (reaffirming that courts interpret constitutional provisions according to their text and historical understanding); *Smith v. Cole*, 187 Ark. at 475, 61 S.W.2d at 57 (same); *Chesshir v. Copeland*, 182 Ark. 425, 428, 32 S.W.2d 301, 302 (1930) (same); *Carter v. Cain*, 179 Ark. 79, 85, 14 S.W.2d 250, 253 (1929) (same); *Ark. Dep't of Fin. & Admin. v. 2600 Holdings, LLC*, 2022 Ark. 140, at 5, 646 S.W.3d 99, 102 (applying ordinary rules of statutory interpretation). While Defendants cite historical Arkansas cases related to criminal liability and other municipal authorities, none concern the historical treatment of pregnancy under Arkansas law. Defs.' Mot. at 20-21. And the cases involving abortion they do cite are all from courts interpreting dissimilar constitutions. *E.g. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), *State v. Zurawski*, 690 S.W.3d 644 (Tex. 2024). As explained above, far more relevant to the language of Article 2, Section 2 are the state courts interpreting similar language.

B. The Patient Plaintiffs Have Stated a Claim Based on the Right to Equality

Plaintiffs' complaint also adequately states a claim that Arkansas's abortion bans discriminate against all pregnant Arkansans and specifically discriminate against women like Patient Plaintiffs in their exercise of constitutional rights. Defendants inaccurately describe Plaintiffs' equal protection claim as seeking a right to perform abortions, ignoring that it is patients like Plaintiffs who are denied healthcare under the abortion bans *because* they were pregnant women. Defendants go on to claim that pregnant women are not a suspect class but cite no Arkansas caselaw to support this position—because there is none. *See* Defs.' Mot. at 23-24. Again,

Defendants may disagree on the merits of Plaintiffs' claim, but Plaintiffs' allegations are more than sufficient at this early stage of litigation.

Under the Arkansas Constitution's equal protection clause, an equal protection challenge is warranted where a law either (1) creates a distinction on its face *or* (2) "has a discriminatory impact and a discriminatory purpose." *See Thurston v. League of Women Voters of Ark.*, 2024 Ark. 90, at 8, 687 S.W.3d 805, 812. Defendants ignore the latter, but Plaintiffs have, in fact, alleged both that pregnant Arkansans are treated differently under the bans and that the bans do not have "a similar effect on all persons similarly situated," *id.*—the core allegation in Plaintiffs' complaint is that Arkansans do not lose their fundamental rights just because they are pregnant. *See* Compl. ¶¶ 214-235. Yet that is exactly what happened to Ms. Waldorf, Ms. Van, Ms. Stovall, and Ms. Howland—they did not get the healthcare they needed *because* they were pregnant—and the same continues to happen to more of Dr. Taylor's patients the longer the laws remain in effect. *See* Compl. ¶¶ 10-120.

Defendants' only response is that non-binding federal case law decided under a distinct legal regime has come out differently. But just as many courts, if not more, have found equal protection violations under their state constitutions when state law discriminates against women and pregnant people. *See, e.g.*, *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 946 (Pa. 2024); *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 906 (Alaska 2001); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 851, 126 N.M. 788 (N.M. 1998); *Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983). The similarities and differences between this case and the law and facts at issue in these cases are, once again, questions for the merits stage of this case.

Finally, even assuming rational basis review would apply at the merits stage, Plaintiffs' allegations are more than adequate to move forward. Take Patient Plaintiff Theresa Van's allegations, for example. Compl. ¶¶ 47-65. Even assuming the State has independent interests in her pregnancy that can overcome her and her family's wishes, Defs.' Mot. at 25, which Plaintiffs dispute, what possible justification could the State have to force her to continue a pregnancy for seven weeks when everyone knew her baby would die? As Plaintiffs allege:

> On Tuesday of every week, Ms. Van would travel to her small local hospital for two appointments: the first, with her OB/GYN to check to see if her daughter's heart was still beating; the second, with a psychiatrist who tried to help her process the trauma. "Week after week that I went in, she was alive every time and had a strong heartbeat. So I had a false sense of hope. I thought, I'm really going to have to carry her to full term." For seven long weeks, Ms. Van also struggled to grieve a baby that was not going to make it, while still trying to be a good wife and mother. Every day, she would try to wait until Camille [her then 2-year-old] went down for her nap and then cry for at least an hour. Ms. Van tried to hide her pain, but it was impossible. "I wanted to shield Camille from the hurt I was going through. But she was still breastfeeding, so it wasn't like I could process that at nighttime either." There were even times she thought about suicide, feelings she suffered in isolation.

Compl. ¶¶ 53-54. While Defendants are entitled to argue on the merits that Ms. Van's pain and suffering was somehow justified, they have not shown that Plaintiffs fail to state a claim.

C. Plaintiffs Have Stated a Claim Based on Vagueness

Plaintiffs adequately allege that Arkansas's abortion bans are unconstitutionally vague in violation of Article 2, Section 8 of the Arkansas Constitution. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Where, as here, the law in question criminalizes conduct (*see* Compl. ¶ 136), the void-for-vagueness doctrine has particular force. As the Arkansas Supreme Court has explained, "A criminal statute which does not furnish a sufficiently ascertainable standard of guilt does not meet constitutional due process requirements." *Davis v. Smith*, 266 Ark. 112, 118, 583 S.W.2d 37, 41 (1979). Criminal laws cannot leave enforcement to

ad hoc, subjective judgments that invite arbitrary or discriminatory application. *Id.* Furthermore, "[a] law that is so vague and standardless that it leaves judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case fails to meet due process requirements." *Id.* Plaintiffs plausibly allege that the abortion bans, and particularly the "medical emergency" exception to the Bans, are unconstitutionally vague.

i. *Plaintiffs' Allegations of Vagueness Satisfy Arkansas's Fact-Pleading Standard*

Defendants characterize Plaintiffs' allegations of vagueness as conclusory by cherry-picking specific paragraphs of the complaint and ignoring the rest. Defs.' Mot. at 17. Plaintiffs' complaint both explains why the medical emergency exception is vague and illustrates the point with examples from each of the five plaintiffs. As Plaintiffs allege: "It is not now, nor has it ever been clear under Arkansas law: 1) *which* health conditions potentially pose sufficient risks to fall within the exception; and 2) *when* in the process of deteriorating health during pregnancy the patient becomes sick enough to be eligible for an abortion under Arkansas's exception." Compl. ¶ 170. Thus, "the consequences for any given physician relying on the exception turn on an after-the-fact assessment of whether the physician's determination was a 'reasonable medical judgment,'" even though determining what constitutes a medical necessity is "highly fact-specific, and inherently subject to disagreement." Compl. ¶ 144. This leaves Arkansas physicians with an agonizing choice: "either (1) provide the care that they believe in their best medical judgment to be necessary to preserve their patients' lives and risk arbitrary enforcement of the law by politically appointed regulators, elected prosecutors, and the whims of juries; or (2) refrain from providing the care and avoid the risk of prosecution while watching their patients sicken." *Id.*

The complaint supports these allegations with concrete examples. Defendants argue that one of Dr. Taylor's many cases—a patient he treated with previable PPROM and placenta previa

with risk of infection and hemorrhage—lacks specificity, yet the allegation provides ample explanation. As alleged, "Dr. Taylor was forced to tell the patient that it was unclear if he could intervene under Arkansas law because there is disagreement over whether her case qualified as a medical emergency." Compl. ¶ 113. Defendants complain that "Plaintiffs do not explain what th[e] disagreement is," Defs.' Mot. at 15, yet in the preceding paragraph Plaintiffs allege that although the standard of care would permit offering abortion, the law's ambiguity led him to withhold care unless infection developed or to advise the patient to seek care out of state. *Id.* ¶¶ 112–13. These detailed allegations readily satisfy Arkansas's liberal pleading standard. *See Ark. State Claims Comm'n*, 2014 Ark. 432, at 5–6, 445 S.W.3d at 501 ("In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed.").

ii. *Plaintiffs Have Met Their Burden of Alleging Facial Invalidity of the Abortions Bans*

Defendants' reliance on the "no set of circumstances" formulation of facial relief is misplaced. *See United States v. Salerno,* 481 U.S. 739, 745 (1987). That language describes the result of a successful facial challenge; it is not the governing test. *See Kohls*, 2014 Ark. 427, at 11, 444 S.W.3d at 850 (citing *Salerno* once, holding voter identification law unconstitutional, and granting facial relief without returning to "no set of circumstances"); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself.");[3] *Doe v City of Albuquerque*, 667

[3] The Supreme Courts of Utah and Pennsylvania have interpreted *Morales* as concluding *Salerno* is an inappropriate standard for state-law challenges. *Utah Pub. Emps. Ass'n v. State*, 131 P.3d 208, 214 (Utah 2006) ("When state courts interpret their own state law, the United States Supreme Court has not required adherence to *Salerno*. . . . The Court explained that because state courts are not bound by federal law when assessing the constitutionality of state law under state constitutions, they need not follow the narrow interpretation of facial challenges found in *Salerno*."); *Commonwealth v. Ickes*, 873 A.2d 698, 702;, 582 Pa. 561, 567 (Pa. 2005) ("The *Salerno* test, however, is based on

F.3d 1111, 1124 (10th Cir. 2012) ("The idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority."). That is because "[w]here a statute fails the relevant constitutional test (such as strict scrutiny . . . or reasonableness review), it can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Doe v. City of Albuquerque*, 667 F.3d at 1127.

In a facial challenge, courts instead ask whether the law is unconstitutional as applied to the relevant class for whom it actually prohibits conduct. *City of Los Angeles v. Patel*, 576 U.S. 409, 417–18 (2015) (reciting "no set of circumstances" and entering facial relief against statute authorizing warrantless searches after concluding statute violated Fourth Amendment, rejecting as irrelevant argument that exigent warrantless searches were circumstances saving statute). The Supreme Court has repeatedly invalidated vague statutes even where some applications are clear. *See Johnson v. United States*, 576 U.S. 591, 602–05 (2015) (collecting cases); *Coates v. Cincinnati,* 402 U.S. 611, 611, 616–17 (1971) (holding law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by" void for vagueness—even though spitting in someone's face would surely be annoying); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 94–96 (1921) (holding a law that prohibited grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging $1,000 for a pound of sugar would surely be unjust and unreasonable).

Arkansas courts follow the same approach, especially where criminal liability and fundamental rights are at stake. In *State v. Bryant*, for example, the Arkansas Supreme Court struck

dicta and is not controlling for state courts."). "[I]n state law cases in state courts, a more appropriate threshold for determining the validity of facial challenges may simply exist in establishing the substantive merits of the case—the unconstitutionality of the legislation." *Utah Pub. Emps. Ass'n*, 131 P.3d at 214.

down as void for vagueness a state criminal law that required certain signal devices on trucks but exempted "small farm vehicles" without defining that term. 219 Ark. 313, 315, 241 S.W.2d 473, 474 (1951). The Court explained, "A court and jury in one section of the State might determine a certain vehicle to be small, and, in another section of the State, a court and jury might find the same vehicle to be large. Assuming that a very large vehicle could be definitely classified as large and a very small vehicle could be definitely classified as small, no one would know where the dividing line would be." *Id.* The court found this uncertainty especially troubling because the law at issue was criminal. *See id.* ("Penal statutes ought not to be expressed in language so uncertain . . . . Every man should be able to know with certainty when he is committing a crime." (internal quotations omitted)); *see also Handy Dan Improvement Ctr., Inc.*, 276 Ark. at 273, 275, 633 S.W.2d at 701, 703 (finding criminal law unconstitutionally vague where it did not "satisfy the basic principle that no man shall be held criminally responsible for conduct which he could not reasonably understand to be prohibited" and noting that "[i]t is fundamental that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."); *see also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application."); *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (facial challenges are appropriate where "vagueness permeates the text" of a "criminal law that contains no *mens rea* requirement and infringes on constitutionally protected rights." (internal citations omitted)).

Even outside the penal code, Arkansas courts have struck down vague laws because fundamental rights were at stake. *See Davis v. Smith*, 266 Ark. 112, 118 (1979) (striking down a

state law that used the term "a proper home" in allowing termination of parental rights because the phrase was vague and the ability to parent is so fundamentally important that more specificity is required); *cf. Abraham v. Beck*, 2015 Ark. 80, at 13–14, 456 S.W.3d 744, 753 ("[I]f the challenged law infringes upon a fundamental right, such as liberty or free speech, a more stringent vagueness test is applied.").

Here, the abortion bans are both criminal laws and infringe upon fundamental rights—the liberty of the physician and the life of the patient—and therefore, the vagueness test must be applied more stringently. Plaintiffs have adequately pleaded that the medical emergency exception is not defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Anderson v. State*, 2017 Ark. 357, at 4–5, 533 S.W.3d 64, 67. As discussed above, the abortion bans fail to clarify "1) *which* health conditions potentially pose sufficient risks to fall within the exception; and 2) *when* in the process of deteriorating health during pregnancy the patient becomes sick enough to be eligible for an abortion under Arkansas's exception." Compl. ¶ 170. Plaintiffs have adequately alleged that providers have stopped offering otherwise standard care due to this uncertainty. Compl. ¶ 109. Because "the consequences for *any given physician relying on the exception* turn on an after-the-fact assessment of whether the physician's determination was a 'reasonable medical judgment,'" there are no circumstances in which it is clear when the medical emergency exception applies. Compl. ¶¶ 144, 170 (emphasis added). Tellingly, "in both 2023 and 2024−the latest years for which data is available−the Arkansas Department of Health reported that zero abortions were performed in the state." Compl. ¶ 140.

Defendants' purported counterexamples do not cure the defect. Even in scenarios Defendants claim are "clear," the complaint alleges delays and risk-averse practices driven by fear

of prosecution, including in diagnosing ectopic pregnancies. Compl. ¶ 174. The fact that some patients are treated only after becoming critically ill underscores, not resolves, the law's indeterminacy.

iii. *The "Reasonable Medical Judgment" and Purported Scienter Requirements in the Abortion Bans Do Not Cure Their Vagueness*

Defendants' additional arguments that any vagueness challenge "ends" because (1) the medical-emergency exception turns on an objective "reasonable medical judgment" standard and (2) the bans contain "multiple scienter requirements" (e.g., "purposely" and "with knowledge"), *see* Defs.' Mot. at 18, fail as well.

First, far from "ending" vagueness analysis, the "reasonable medical judgment" requirement highlights a major defect in the medical emergency exception. As the Sixth Circuit explained in *Women's Medical Professional Corp. v. Voinovich*, "[t]he determination of whether a medical emergency or necessity exists, like the determination of whether a fetus is viable, is fraught with uncertainty and susceptible to being subsequently disputed by others," and an objective reasonableness inquiry without a scienter requirement is "especially troublesome in the abortion context" because it permits liability "even if the physician believed he or she was acting reasonably" so long as others later decide the physician's actions were "nonetheless unreasonable." 130 F.3d 187, 205 (6th Cir. 1997). That is exactly the case here: criminal liability turns on an "after-the-fact assessment of whether the physician's determination was a 'reasonable medical judgment.'" Compl. ¶ 144. Defendants' position rests on the flawed premise that embedding an "objective" test in the medical emergency exception necessarily provides the requisite clarity. Not so. For instance, in *Colautti v. Franklin*, the U.S. Supreme Court held a criminal abortion statute void for vagueness, noting that an objective standard "portends not an inconsequential hazard for

the typical private practitioner[.]" *Colautti v. Franklin*, 439 U.S. 379, 391 (1979), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Second, the abortion bans are distinguishable from the laws upheld in the cases Defendants cite. Defendants rely on two cases where reasonable person standard and/or a scienter requirement limited the application of the statute to what "the regulated person believes[.]" Defs.' Mot. at 17; *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, at 10–11, 358 S.W.3d 890, 897 (citing *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 398 (2d Cir. 2004)). But neither court held that a reasonable person analysis saves an otherwise vague statute. Further, the abortion bans do not have such a scienter requirement. The "purposely" requirement in the abortion bans is directed to the physician's knowledge and intent that he is performing an abortion; there is no scienter requirement regarding the physician's belief that a medical emergency exists. *See Colautti*, 439 U.S. 379, at 394–95 (finding abortion law vague in part because while "the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus", the law did not require "that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable."). That omission is critical given the acknowledged uncertainty in making such determinations. In *Colautti*, the Court held unconstitutionally vague a law that imposed criminal liability on a physician who failed to abide by the standard of care when there was sufficient reason to believe that a fetus "may be viable." The Court explained that "[t]he perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself." *Id.* at 395. The combination of the fact that it was not unlikely that physicians would disagree on the viability determination "with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of

viability in the manner indicated by their best medical judgment." *Id.* at 396. Four years of experience under the abortion bans in Arkansas had demonstrated precisely such chilling around the medical emergency exception. *See, e.g.*, Compl. ¶¶ 109, 111, 140.

In sum, Plaintiffs plausibly allege that the bans fail to provide clear standards, invite arbitrary enforcement, and chill necessary medical care. That is sufficient to state a claim for unconstitutional vagueness.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss and allow this case to move expeditiously to trial.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 20, 2026, I electronically filed the foregoing document to the eFlex filing system, which notifies the eFlex participants.

/s/ Chris Burks
Chris Burks