**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE**
**20TH JUDICIAL DISTRICT, DAVIDSON COUNTY**

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| **NICOLE BLACKMON; ALLYSON PHILLIPS; KAITLYN DULONG; HEATHER MAUNE, M.D., on behalf of herself and her patients; and LAURA ANDRESON, D.O., on behalf of herself and her patients,** | ) | **Case No. 23-1196-I** |
| **Plaintiffs,** | ) | **THREE JUDGE PANEL**<br>**Chancellor Moskal**<br>**Judge Donaghy**<br>**Chancellor Culbreath** |
| **v.** | ) | |
| **STATE OF TENNESSEE; JONATHAN SKRMETTI, in his official capacity as Attorney General of Tennessee; TENNESSEE BOARD OF MEDICAL EXAMINERS; and MELANIE BLAKE, M.D., in her official capacity as President of the Tennessee Board of Medical Examiners,** | ) | |
| **Defendants.** | ) | |

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS THE COMPLAINT**

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Defendants have moved to dismiss the Complaint under Tenn. R. Civ. P. 12.02(1) and 12.02(6), and submit this memorandum of law in support of their motion.

## INTRODUCTION

Tennessee's abortion statute lawfully balances the State's interest in protecting the lives of unborn babies with the health of their mothers. It does so by generally prohibiting the abortion of a child unless continuing a pregnancy would risk a mother's life or cause substantial, long-term harm to her health. Tennessee has protected fetal and maternal health in similar fashion since at least 1883.

Still, some—including the national abortion-advocacy group driving this lawsuit—wish the State's lawmakers would have weighed things differently. They would prefer that physicians have the

choice to provide more abortions in a "wide range" of scenarios (or that the U.S. Supreme Court had not "relegated the availability of abortion" back to "anti-abortion state lawmakers"[1] in the first place). Compl. ¶¶ 128, 154. But lawmakers understandably declined to leave abortion decision-making up to doctors who provide abortions for a living, or to start drawing lines about which unborn lives are worth protecting. So now, rather than try to change Tennessee's abortion policy through legislation, Plaintiffs pursue litigation. The relief they request is a new abortion statute of their own liking imposed by court order, not enacted by elected representatives.

This Court should reject Plaintiffs' invitation to engage in judicial policymaking and dismiss Plaintiffs' Complaint, which fails both for jurisdictional reasons and on the merits. *First*, Plaintiffs' claims are not justiciable. Plaintiffs cannot overcome the State's sovereign immunity and lack a permissible cause of action to sue the named defendants. Nor do Plaintiffs have standing to press their claims based on future health or enforcement harms. Any such injuries turn on the occurrence of a series of contingent events too speculative for standing. And while the Complaint features stories of pregnant patients' past health harms, it does not support that the challenged law caused these harms, rather than other factors like doctors' independent choices not to provide permissible abortions. At a minimum, Plaintiffs lack standing to sue the State, the Attorney General, and Board President Blake, as none can enforce the challenged laws or redress Plaintiffs' alleged harms.

*Second*, the Complaint fails to state a valid constitutional claim. The law provides a medical exception for abortions that are required to save the life of the mother or prevent serious harm to one of her major bodily functions. Tenn. Code Ann. § 39-15-213(c)(1). A provision *allowing* life-saving abortions by definition does not violate pregnant mothers' due process right to "life." Plaintiffs'

[1] Ctr. for Reprod. Rights, #*The Forward Fight*, https://tinyurl.com/4v2h3zaa (last visited Nov. 1, 2023).

broader claim that they have a substantive due process right to abort in circumstances outside the medical exception runs headlong into the Tennessee Constitution's text, longstanding abortion-regulation history, and core limits on the judicial creation of new constitutional rights. And the abortion laws pass constitutional muster regardless given the State's long-recognized interest in protecting fetal life.

Nor does the Complaint assert a valid equal-protection claim. Plaintiffs' exclusive theory is that the law limits the medical treatments "pregnant persons" can receive as compared to "non pregnant people." But this limitation appropriately reflects that treating "pregnant persons" also has the potential to harm unborn lives—an issue not implicated when treating "non pregnant persons." Equal-protection limits do not mandate the same treatment of differently situated people, particularly where the difference implicates the State's compelling interest in protecting fetal life.

Further, the medical exception is not so unclear as to be void for vagueness. In this pre-enforcement context, Plaintiffs must show that the exception is vague in all of its applications—a burden they cannot meet given the many clear ways the law can constitutionally apply. And Plaintiffs' vagueness challenge fails on its own terms because the medical exception is sufficiently clear. Indeed, similar formulations recur in countless other state and federal laws covering abortion, professional regulation, and much more. Plaintiffs' proposed vagueness rule would render swaths of the U.S. and Tennessee Code unconstitutional—and their approach more difficult to administer, to boot.

Finally, the Court should decline Plaintiffs' invitation to craft a new statute by judicial order. This Court lacks power to blue pencil lawmakers' work by amending the abortion law's substantive standards, or to enjoin criminal enforcement. That Plaintiffs seek this extra-judicial relief confirms their suit's grounding in policy disagreement, not proper legal principles. This Court should dismiss.

## BACKGROUND

### I. Legal and Statutory Background

#### A. Tennessee Has Long Pursued Policies that Balance Fetal and Maternal Protection.

Tennesseans have repeatedly affirmed the importance of safeguarding fetal life through the democratic process. This pro-life policy has a substantial pedigree dating back centuries. *See, e.g.*, 1883 Tenn. Pub. Acts, Ch. 140, pp. 188-89 (generally criminalizing abortions). And Tennessee voters have recently and repeatedly affirmed their commitment to protecting the lives of unborn babies, including in a 2014 amendment to the Tennessee Constitution. This amendment overrode a prior judicial decision establishing a state-law substantive due process right to abortion by specifying that "[n]othing in this Constitution secures or protects a right to abortion" and further reserving the people's "right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion," including "when necessary to save the life of the mother." Tenn. Const. art. I, § 36 (abrogating *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000)).

Even during the reign of *Roe v. Wade*, 410 U.S. 113 (1973)—which recognized a federal constitutional right to terminate pregnancies prior to viability—Tennesseans continued to prioritize laws "celebrating, cherishing, and defending life at every stage."[2] Among others, the General Assembly established a 48-hour waiting period for abortions, required parental consent to perform abortions on minors, and criminalized partial-birth abortions as well as abortions based on protected characteristics like race, sex, or disability. *See* Tenn. Code Ann. §§ 39-15-202, -209, -217; *id.* § 37-10-303. The General Assembly justified its abortion regulations by citing its "legitimate, substantial, and

[2] Tenn. Off. of the Governor, *Gov. Bill Lee Introduces Comprehensive Pro-Life Legislation* (Jan. 23, 2020), https://tinyurl.com/28xesk9h. At the motion to dismiss stage, this Court may consider references to public and judicially noticeable documents. *See State ex rel. Harman v. Trinity Indus.*, No. M2022-00167-COA-R3-CV, 2023 WL 3959887, at *19 (Tenn. Ct. App. June 13, 2023).

compelling interest[s] in valuing and protecting unborn children," "promoting human dignity," and "protecting the integrity and ethics of the medical profession." *Id.* § 39-15-214(70), (72), (77).

At the same time, Tennessee law has long protected maternal health and safety. The 1883 law, for its part, criminalized performing abortions unless "done with a view to preserve the life of the mother." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2295 (2022) (quoting 1883 Tenn. Pub. Acts pp. 188-89). Provisions passed in response to *Roe* likewise permitted post-viability abortions "necessary to preserve the life or health of the mother." Tenn. Code Ann. § 39-301(e)(3) (1975). Other Tennessee abortion restrictions passed before *Dobbs* were of a piece. *See, e.g.*, *id.* § 39-15-202(a), (f)(1); *id.* § 39-15-209(c). Tennessee's longstanding protections for maternal life tracks historical practice among many States. *See generally Dobbs*, 142 S. Ct. at 2285-2300 (appendix).

**B. *Dobbs* Triggers Tennessee's Current Abortion Prohibitions.**

In June 2022, the U.S. Supreme Court held that the federal constitution does not establish a right to have an abortion, meaning States may adopt abortion prohibitions to further their interest in the "preservation of prenatal life at all stages of development." *Dobbs*, 142 S. Ct. at 2284. Tennessee had prepared for this event by passing the Human Life Protection Act of 2019 ("2019 Act"), which took effect 30 days after the *Dobbs* judgment. Compl. ¶ 132. The Act makes it a Class C felony to "perform or attempt[] to perform an abortion" following fertilization. Tenn. Code Ann. § 39-15-213(b). The 2019 Act thus applies only to those performing abortions, not women receiving them; to reiterate that point, the law specifies that it "does not subject the pregnant woman upon whom an abortion is performed or attempted to criminal conviction or penalty." *Id.* § 39-15-213(e). Power to enforce this criminal prohibition resides exclusively with local district attorneys general. *See id.* § 8-7-

103(1); Compl. ¶ 15. With this law, Tennessee joined over a dozen other States that now prohibit abortions.[3]

As adopted, the 2019 Act provided physicians an "affirmative defense" in any prosecution for performing an abortion. 2019 Tenn. Pub. Acts, Ch. 351, § 2(c). Under it, a physician could escape liability by showing that he determined, using "good faith medical judgment," that an abortion was necessary to prevent a pregnant woman's "death" or "serious risk of substantial and irreversible impairment of a major bodily function." *Id.*

**C. Lawmakers Broaden the Abortion Restriction's Medical Exception.**

Calls to amend Tennessee's abortion restrictions came shortly after they took effect. In an October 2022 letter, abortion doctors and other medical professionals—led by Plaintiff Dr. Heather Maune—opposed what they deemed lawmakers' "intrusion" in Tennesseans' "right to make personal health care decisions" about whether to have an abortion. *See* Med. Pro. Open Ltr. (cited at Compl. ¶ 135). Among other things, the letter critiqued the 2019 Act for allowing no exception "to protect the mother's life" or to treat pregnant "women experiencing miscarriages, tubal pregnancies, or even serious infections." *Id.* Prominent pro-life group Tennessee Right to Life opposed changing the law, stating that its "most preferential position" was to keep the original version."[4]

In the legislative session that followed, the General Assembly weighed these concerns and passed a series of responsive amendments. As amended, the law clarifies that "abortion" expressly excludes termination of "an ectopic or molar pregnancy." *See* 2023 Tenn. Pub. Acts, Ch. 313, § 1 (amending Tenn. Code Ann. § 39-15-213(a)(1)). The "medical exception" also changed in key ways.

[3] Ctr. for Reprod. Rights, *After* Roe *Fell: Abortion Laws by State*, https://tinyurl.com/2f4x4mz2 (last visited Oct. 30, 2023).
[4] Hr'g on HB 0883 Before the H. Subcomm. on Population Health, 2023-24 Leg., 113th Gen. Assembly (Tenn. 2023) (statement of Will Brewer, Legal Counsel, Tenn. Right to Life) (Feb. 14, 2023), https://tinyurl.com/uc39fnfe (36:55-58).

For one, lawmakers abandoned the "affirmative defense" approach. The law now provides that those performing an abortion under the medical exception "do[] not commit the offense of criminal abortion"—thus shielding them from prosecution entirely. *Id.* § 2; *see* Compl. ¶ 137.

Most relevant here, lawmakers also altered the standard for assessing whether a physician appropriately provided an abortion. The law abandoned the prior, subjective standard—which turned on "good faith medical judgment" about an abortion's necessity—and replaced it with an objective standard—which turns instead on use of "reasonable medical judgment." Tenn. Code Ann. § 39-15-213(c)(1)(A)-(B). The change aligned Tennessee's medical exception with other state and federal provisions. *See infra* p. 25. This includes the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. In post-*Dobbs* guidance, the federal government told States that, to comply with EMTALA, abortion restrictions must maintain physicians' leeway to "follow their *reasonable medical judgment* in caring for pregnancy-related emergencies."[5] Democratic lawmakers and medical-community members praised the General Assembly's amendments as a positive step.[6]

The current medical exception permits abortions necessary to prevent two categories of medical emergencies: (1) "the death of the pregnant woman" or (2) a "serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman." Tenn. Code Ann. § 39-15-213(c)(1)(A). Like its predecessor, the 2023 statute clarifies that the medical exception does not

[5] Dep't of Health & Hum. Servs., HHS Sec'y Xavier Becerra Statement on EMTALA Enforcement (May 1, 2023), https://tinyurl.com/ytw75yfc (emphasis added); *see* Gregory Raucoules, *Anti-abortion Group Signals Support for Change to Tennessee Abortion Law*, ABC6 (Mar. 13, 2023), https://tinyurl.com/22dakwxw ("objective standard … assuages EMTALA concerns" (quoting statement of Tenn. Right to Life)).

[6] *See* Associated Press, *Tennessee Advances Bill to Narrowly Loosen Abortion Ban* (Feb. 15, 2023), https://tinyurl.com/89b6a9a4; Sam Stockard & Adam Friedman, *House Committee Moves Forward a Bill to Allow Narrow Exceptions to Tennessee's Abortion Law*, WKMS (Mar. 16, 2023), https://tinyurl.com/3un4p283; Tenn. Med. Ass'n, *TMA Update: Tennessee's Abortion "Trigger" Law*, https://tinyurl.com/y535s7pb (last visited Nov. 1, 2023).

apply when a woman is threatening self-harm or "for any reason relating to the pregnant woman's mental health." *Id.* § 39-15-213(c)(2). Draft bills to expand abortion access have routinely failed.[7]

## II. Plaintiffs' Allegations

The Complaint presses claims by five Tennessee residents—three "patient" plaintiffs and two "physician" plaintiffs—who assert that "abortion is essential health care" and oppose "governmental interference into the patient-physician relationship." Compl. at 28 & ¶ 103. Filed the same day by the same advocacy group as complaints in Idaho and Oklahoma, Plaintiffs' suit "expand[s] on" a nationwide litigation strategy undertaken "since the U.S. Supreme Court eliminated the constitutional right to abortion."[8] The Complaint presses state substantive due process, equal protection, and vagueness claims against (1) the State, for "enact[ing] the abortion ban and its Medical Condition Exception," (2) Attorney General Skrmetti, on the theory he might ask the Supreme Court to appoint different district attorneys general to more strictly enforce the abortion ban in Plaintiffs' counties, and (3) the Tennessee Board of Medical Examiners ("the Board") and its president, Dr. Melanie Blake, based on the Board's disciplinary authority over certain doctors. *Id.* ¶¶ 14-17. The Complaint cites no state action taken with respect to the challenged statutes in general or against Plaintiffs in particular.

Plaintiffs do not expressly address their standing to sue. Instead, the Complaint recounts the patient plaintiffs' prior experiences with rare pregnancy complications and fetal diagnoses. Plaintiff Blackmon suffers from physical ailments as well as major depressive disorder and PTSD, which made her July 2022 pregnancy "high-risk." Compl. ¶¶ 23-34. Later, she was told her fetus had "limb-body-wall complex," making it "very unlikely to survive to birth." *Id.* ¶ 34. Although she "would have

[7] *See generally* Tenn. Gen. Assembly, Legislation Filed Under: Abortion, https://tinyurl.com/ycxtyy4d (collecting bills).
[8] Ctr. for Reprod. Rights, *Center Expands Work on Behalf of Patients Denied Abortion Care Despite Grave Pregnancy Complications* (Sept. 12, 2023), https://tinyurl.com/5yse96xh.

preferred to have an abortion," she could not afford out-of-state travel and "felt like her only option was to take a chance and continue the pregnancy." *Id.* ¶ 35. After a "painful" pregnancy, Plaintiff Blackmon prematurely delivered a still-born baby. *Id.* ¶¶ 40, 44. She underwent "a tubal ligation" to avoid "becom[ing] pregnant again," and now sues so "no one else" will suffer. *Id.* ¶¶ 46-47.

Plaintiff Phillips was enjoying a normal second pregnancy until an 18-week anatomy scan showed her baby had "semi-lobar holoprosencephaly," a 1-in-8,000 condition that meant her baby was "unlikely" (*i.e.*, a 3% chance or less) "to survive to birth." *Id.* ¶¶ 52-53.[9] The doctor advised Plaintiff Phillips that continuing the pregnancy would "pose[] serious risks to [her] physical and mental health." *Id.* ¶ 53. With the help of donations, Plaintiff Phillips thus traveled to New York to obtain an abortion. *Id.* ¶¶ 57-58. By the time she arrived, the baby had died in utero, which New York doctors addressed with a medical procedure. *Id.* Plaintiff Phillips "wants to prevent any other person" from sharing her experience, *id.* ¶ 60, and is now running for state office to change the abortion laws.[10]

Partway through her pregnancy, Plaintiff Dulong reported cramping and spotting to her doctor, who dismissed these as "growing pain" symptoms. Compl. ¶¶ 62-64. Only when her bleeding grew did doctors send Plaintiff Dulong to the emergency room, but she was "not comfortable" sitting among people "waiting for COVID testing" and left. *Id.* ¶ 65. A next-day ultrasound revealed Plaintiff Dulong had "cervical insufficiency," and doctors explored procedures to prevent a preterm birth. *Id.* ¶ 66. By then, though, the "fetus's feet" already were in the "cervical canal," rendering any intervention futile. *Id.* ¶ 67. Doctors stated she likely would "deliver" within 48 hours but allegedly declined giving medication to progress labor "because of Tennessee's abortion ban." *Id.* ¶ 68. A week

[9] Am. J. of Neuroradiology, Semilobar Holoprosencephaly, https://tinyurl.com/y2shh9fv (last visited Nov. 1, 2023).
[10] *See* Charlotte Alter, *She Sued Tennessee for Denying Her an Abortion. Now She's Running for Office*, Time (Nov. 1, 2023), https://tinyurl.com/mr2pxvyx.

later, Plaintiff Dulong returned to her doctor with infection symptoms. Doctors spent hours calling "various legal and ethics personnel … to seek support" to provide an induction abortion, and later did so. *Id.* ¶¶ 70-71. Though Plaintiff Dulong is pregnant again and "expects to give birth in November," she sues to help "other people in Tennessee." *Id.* ¶¶ 74-75.

It is undisputed that pregnant women are not subject to prosecution for receiving a prohibited abortion. Yet the Complaint asserts that the challenged medical exception inflicts injury by reducing doctors' willingness to perform abortions, "even when such care likely would fall within the exception" for medical emergencies. *Id.* ¶ 149. Part of the problem, Plaintiffs acknowledge, is that doctors fearful of liability are "over-complying with the laws." *Id.*

Physician plaintiffs Heather Maune, M.D., and Laura Andreson, D.O., bring claims "on behalf of [their] patients," *id.* ¶¶ 12-13, as well as to address the law's alleged risk to "their liberty and ability to practice medicine," *id.* ¶ 7. But the Complaint acknowledges that the "only officials responsible for criminal enforcement of the abortion prohibition"—the District Attorneys of Davidson and Williamson Counties—have "declined to enforce the criminal abortion ban" either generally (Davidson) or in emergency situations (Williamson). *Id.* ¶ 15. The Complaint also notes that the Board may discipline certain physicians violating the 2023 abortion ban, yet does not cite any past, present, or threatened future action by the Board on that score. *Id.* ¶ 16. Nor does the Complaint explain how Plaintiff Andreson—a D.O., or Doctor of Osteopathic Medicine—falls within the Board's jurisdiction—which covers only M.D.s, or Doctors of Medicine.[11]

[11] Medical Doctors and Osteopathic Doctors are licensed, supervised, and disciplined by wholly separate boards in Tennessee. *Compare* Tenn. Code Ann. § 63-6-101, -204(a)(3) & Tenn. Comp. R. & Regs. 0880-02-.01(10), 0880-02-.12, *with* Tenn. Code Ann. § 63-9-101 & Tenn. Comp. R. & Regs. 1050-02-.01(17), 1050-02-.09(4).

Plaintiffs' requested relief would expand the medical exception so that it covers any number of additional emergent conditions. *See* Compl. Prayer for Relief (A). Plaintiffs say it would be "impossible" to list the "wide range" of qualifying conditions, but would at least include: (1) conditions posing a "risk of infection, bleeding, or [which otherwise make] continuing a pregnancy unsafe for the pregnant person"; (2) any condition that is "exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires recurrent invasive intervention"; and (3) a "fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth." *Id.*; *see id.* ¶¶ 112, 128.

## LEGAL STANDARD

To state a claim, a plaintiff must adequately allege "the facts upon which a claim for relief is founded." *Runyon v. Zacharias*, 556 S.W.3d 732, 736 (Tenn. Ct. App. 2018). Although courts must accept a plaintiff's facts as true and draw "all reasonable inferences" in a plaintiff's favor, "[t]he facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.*; *Ellithorpe v. Weismark*, 479 S.W.3d 818, 824 (Tenn. 2015). Courts are not required to accept as true assertions that are merely legal arguments or "legal conclusions" couched as facts. *Mynatt v. Nat'l Treasury Emps. Union, Chapter 39*, 669 S.W.3d 741, 753 (Tenn. 2023) (citation omitted). A complaint "must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Dibrell v. State*, No. E-2021-00405-COA-R3-CV, 2022 WL 484563, at *8 (Tenn. Ct. App. Feb. 17, 2022).

## ARGUMENT

This Court should dismiss the Complaint because Plaintiffs' constitutional claims cannot permissibly proceed against the named defendants and also fail on the merits.

## I. The Complaint Does Not Present a Justiciable Controversy.

Tennessee's judiciary has long applied rules reflecting its "understanding of the intrinsic role of judicial power, as well as its respect for the separation of powers." *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 202-03 (Tenn. 2009). Relevant here, courts may only hear cases if a plaintiff carries the burden of showing jurisdiction and standing are present. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013). Plaintiffs have not shown jurisdiction because they cannot overcome sovereign immunity, lack standing, and have alleged no permissible cause of action.

### A. Sovereign Immunity Bars Plaintiffs' Claims.

The doctrine of sovereign immunity generally bars courts from hearing claims against the State—including "state agencies and state officers acting in their official capacity"—without the State's consent. *See* Tenn. Const. art. I, § 17; *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 849 (Tenn. 2008). Because no consent or exception to this rule applies, Plaintiffs' claims cannot proceed.

1. Claims Against the State and Board. Both the State and the Board enjoy immunity from suit absent an express waiver "in plain, clear, and unmistakable terms." *Mullins v. State*, 320 S.W.3d 273, 283 (Tenn. 2010) (quoting *Northland Ins. Co. v. State*, 33 S.W. 727, 731 (Tenn. 2000)). No such waiver exists. The three-judge-panel statute "does not waive the defense of sovereign immunity." Tenn. Code Ann. § 20-18-103. Nor does the Declaratory Judgment Act, *id.* § 29-14-101 *et seq.*, waive sovereign immunity from claims brought against the State or state agencies. *See Colonial Pipeline*, 263 S.W.3d at 853; *see, e.g.*, *Young Bok Song v. Tennessee Dep't of Children's Servs.*, No. M2010-01198-COA-R3CV, 2011 WL 2176488, at *3-4 (Tenn. Ct. App. June 1, 2011) (applying immunity).[12] The State and Board therefore must be dismissed as defendants on sovereign immunity grounds.

[12] Although Defendants have no duty to address non-pled jurisdictional theories, for completeness, Tenn. Code Ann. § 1-3-121 or § 4-5-225 also would not permit Plaintiffs' claims. The first statute—§ 1-3-121—requires both a demonstrated

2. Claims Against the Attorney General and Board President. Official-capacity defendants like the Attorney General and Dr. Blake share the State's sovereign immunity. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015). The only exception is in injunctive actions challenging officials' "authority to impose laws violative of the constitution." *Colonial Pipeline Co*, 263 S.W.3d at 853; *see Stockton v. Morris & Pierce*, 110 S.W.2d 480, 483 (Tenn. 1937). This Tennessee rule tracks the U.S. Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), and reflects the legal fiction that "an officer acting pursuant to a statute that is unconstitutional and void does not act as an agent of the State." *Colonial Pipeline*, 263 S.W.3d at 853 (citations omitted).

This "narrow" exception to sovereign immunity is doubly inapplicable here. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). *First*, the exception only reaches officials "responsible for enforcing" an allegedly unconstitutional statute, *Colonial Pipeline*, 263 S.W.3d at 852-53 (citation omitted), not those "who lack a 'special relation to the particular statute' and '[are] not expressly directed to see to its enforcement,'" *Russell*, 784 F.3d at 1047 (quotation omitted); *accord Stockton*, 110 S.W.2d at 482 ("an officer *while executing* an unconstitutional act, is not acting by authority of the State" (citation omitted) (emphasis added)). But neither the Attorney General nor Dr. Blake has the authority to charge or prosecute any individual under the challenged law. *See* Tenn. Code Ann. § 8-6-109. *Second*, the exception does not apply absent at least a "realistic possibility" of enforcement of the allegedly unconstitutional law "against the plaintiff's interests." *EMW Women's Surgical Ctr., P.S.C. v. Beshear*,

"particularized injury" sufficient to support standing, *see Grant v. Anderson*, 2018 WL 2324359, at *9 (Tenn. Ct. App. May 22, 2018), as well as a discrete "governmental action" taken by a defendant *against a plaintiff*, *cf. McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, 645 S.W.3d 160, 169 (Tenn. 2022) (permitting § 1-3-121 claim where plaintiff "challenged the legality of the TBI's action" in refusing to expunge his records). Plaintiffs have neither. *See infra* pp. 15-19. And Plaintiffs plead themselves out of the second—§ 4-5-225—by purporting to bring as-applied claims, thus triggering the statute's administrative exhaustion requirements. *See Colonial Pipeline*, 263 S.W.3d at 846. Nor would the statute apply anyway; like the Declaratory Judgment Act, this provision is a "procedural device" that requires an underlying cause of action. *Nunn v. Tennessee Dep't of Corr.*, 547 S.W.3d 163, 175 (Tenn. Ct. App. 2017).

920 F.3d 421, 445 (6th Cir. 2019) (quoting *Russell*, 784 F.3d at 1048).[13] Yet here, Plaintiffs have not identified *any* prior or credible future threat of enforcement on the part of the named officials. As such, they fail to demonstrate any realistic possibility that these officials will take action against Plaintiffs' interests. The officials thus fall outside of *Colonial Pipeline*/*Ex Parte Young* and enjoy sovereign immunity.[14]

**B. Plaintiffs Lack Standing to Pursue Their Claims.**

Standing doctrine promotes the "proper—and properly limited—role of the courts in a democratic society" by requiring that plaintiffs have "three indispensable elements" to sustain court actions. *Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 619-20 (Tenn. 2006).

*First*, plaintiffs must have an injury that is both "distinct and palpable," rather than "conjectural or hypothetical." *Id.* Courts cannot hear cases to "render advisory opinions or to allay fears as to what may occur in the future." *Super Flea Market of Chattanooga, Inc. v. Olsen*, 677 S.W.2d 449, 451 (Tenn. 1984) (citation omitted); *see West v. Schofield*, 460 S.W.3d 113, 130 (Tenn. 2015) (collecting cases applying this limit to declaratory actions). Any future injury must be more than "reasonably likely to occur—the 'threatened injury must be certainly impending.'" *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)); *see also Crawford v. Dep't of Treasury*, 868 F.3d 438, 454-55 (6th Cir. 2017) (pre-enforcement challenger must

[13] *See, e.g.*, *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) (sovereign immunity barred claim against Attorney General due to lack of enforcement authority); *Texas Democratic Party v. Abbott*, 978 F.3d 168, 180-81 (5th Cir. 2020) (same, for Attorney General and Governor).

[14] Section 29-14-107(b) of the Declaratory Judgment Act requires only that the Attorney General be "served with a copy of the proceeding and entitled to be heard" in certain constitutional cases—*i.e.*, receive notice. It does not, contrary to a handful of cases, *see, e.g.*, *Shelby Cnty. Bd. of Comm'rs v. Shelby Cnty. Q. Ct.*, 392 S.W.2d 935, 940 (Tenn. 1965), abrogate traditional sovereign immunity and standing principles to convert the Attorney General to a *party* in any case challenging a statute's constitutionality. *See* Tenn. R. Civ. P. 24.04 (requiring notification to Attorney General when "the State or an officer or agency *is not a party*" (emphasis added)). The Supreme Court has likewise indicated the statute requires only notice. *See In re Adoption of E.N.R.*, 42 S.W.3d 26, 33 (Tenn. 2001); *State v. Chastain*, 871 S.W.2d 661, 665-66 (Tenn. 1994).

show "a certain threat of prosecution"). *Second*, a plaintiff must show a "causal connection between the claimed injury and the challenged conduct." *Darnell*, 195 S.W.3d at 620. The injury cannot stem from "the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Third*, a plaintiff must demonstrate that "the alleged injury is capable of being redressed by a favorable decision of the court." *Darnell*, 195 S.W.3d at 620 (quoting *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002)).

The Complaint asks only for declaratory and injunctive relief—meaning Plaintiffs exclusively seek to stop *future* applications of Tennessee's medical exception. To secure this forward-looking relief, Plaintiffs must demonstrate that they personally face a "real and immediate threat" of "future injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). For several independent reasons, each group of Plaintiffs lacks standing to proceed in light of this and other textbook standing rules.

**1. Patient Plaintiffs Lack Standing to Sue for Others or Based on Future Pregnancies.**

The patient plaintiffs plead themselves out of standing at the outset by claiming to seek relief on behalf of other persons, not themselves. Plaintiff Blackmon can no longer become pregnant due to a "tubal ligation" procedure, yet seeks to sue so "no one else" will suffer. Compl. ¶¶ 46-47. Plaintiff Phillips similarly sues because she "wants to prevent any other person" from experiencing pregnancy-related complications without broader abortion access. *Id.* ¶ 60. Plaintiff Dulong "became pregnant again" and thankfully has progressed without any allegations of complications and "now expects to give birth in November." *Id.* ¶ 75. Still, she sues to help "other people in Tennessee." *Id.* But "[o]rdinarily, one may not claim standing" to "vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). The patient plaintiffs allege no reason why this rule does not bar their claims brought on behalf of other, unnamed women in Tennessee.

Nor, to the extent they intend to, could patient plaintiffs pursue claims personally. That is because any of their direct, future injuries depend on a series of hypothetical and speculative events—*first*, a future pregnancy, *then*, a rare reoccurrence of health conditions serious enough to cause them to pursue abortions. Each link in this chain is itself too tenuous to support standing—much less can Plaintiffs show an adequate prospect of all contingencies occurring. *See West*, 40 S.W.3d at 131. Start with step one: The only way the challenged medical exception could injure patient plaintiffs in the future would be if the plaintiffs were to become pregnant again. But as the U.S. Supreme Court and others have held, claimed injury based on a future pregnancy is too uncertain to support standing. *See Roe v. Wade*, 410 U.S. 113, 128 (1973) (plaintiffs lacked standing based on claim "that sometime in the future [plaintiff] might become pregnant … and at that time in the future she might want an abortion that might then be illegal"); *accord Doe v. Broady*, No. A23A1607, 2023 WL 6818946, at *1 (Ga. Ct. App. Oct. 17, 2023); *Crossen v. Breckenridge*, 446 F.2d 883, 839-40 (6th Cir. 1971).

Step two adds another layer of conjecture. Recall that Plaintiffs' requested relief applies only in the context of emergent conditions or terminal fetal diagnoses; Plaintiffs do not allege a desire to generally abort all future pregnancies. *See* Compl. Prayer for Relief. Yet Plaintiffs have put forward no allegations to suggest that the rare prior conditions and diagnoses they experienced are likely to recur. If anything, the allegations—including Plaintiff Dulong's current, healthy pregnancy, *see id.* ¶ 75—confirm that the patient plaintiffs may not encounter similar health scenarios in future pregnancies. Any alleged injury in the future from the challenged aspects of the medical exception is therefore not "certainly impending," as standing requires. *Buchholz*, 946 F.3d at 865 (citation omitted).

The patient plaintiffs moreover encounter a causation problem. In particular, the Complaint does not support that any asserted injuries—past or present—would be fairly traceable to the

challenged medical exception, rather than the independent decisions of third-party doctors. Plaintiffs' theory of harm depends on "being denied, or delayed in receiving," the abortions they claim are protected. *See* Compl. ¶ 89. Meanwhile, Plaintiffs allege that doctors are "over-complying" with abortion-restriction laws out of fear of liability, "even when" such abortions "likely would fall within the exemption" for emergencies. *Id.* ¶ 149. Defendants are not to blame—and cannot be sued—for doctors' independent choice not to rely on the medical exception when it applies. After all, it is Plaintiffs who stress (*see id.* ¶¶ 123, 127, 150 & p. 45) that doctors must have "discretion" to practice how they see fit. Nor have Plaintiffs alleged that their proposed relief—a regime turning on far more complicated conditions and an after-the-fact assessment of physicians' good faith—would meaningfully alter doctors' tendency to "over-comply" with abortion restrictions. That Plaintiffs' claimed injuries so heavily depend on "the independent action of some third part[ies] not before the court" thus precludes both causation and redressability, which "often go hand in hand." *See United States v. Carroll*, 667 F.3d 742, 745-46 (6th Cir. 2012) (no causation or redressability).

**2. Physician Plaintiffs' Hypothetical Future Punishment Does Not Confer Standing.**

The physician plaintiffs press claims on behalf of themselves and their patients. The on-behalf-of-patient claims fail for the reasons just given—namely, the asserted future pregnancy complications are too speculative to constitute a concrete injury. *Supra* p. 16. And properly understood, standing principles should not permit physicians to advance claims on behalf of their patients. *See June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2143-45 (2020) (Thomas, J., dissenting); *cf. Florida v. Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863, 867 (1st Dist. Ct. App. Fla. 2022).

Nor do the physician plaintiffs have personal standing based on risk of future enforcement. The Complaint expressly alleges that the only two officials responsible for criminal enforcement of

the medical exception have disclaimed any intention to do so. *See* Compl. ¶ 15. A clearer-cut case against "a certain threat of prosecution" is hard to imagine. *Crawford*, 868 F.3d at 455. Pivoting, Plaintiffs point to Defendant Attorney General Skrmetti's power to seek appointment of new district attorneys general when an elected district attorney states an intention to not enforce a law. But the Attorney General may only petition the Tennessee Supreme Court, which in turn decides whether to appoint an attorney general pro tempore, who in turn decides whether to prosecute. *See* Tenn. Code Ann. § 8-7-106. This multi-step leap fails to create a sufficiently imminent risk of future enforcement. *See Universal Life Church Monastery v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022) (holding same).

Risk of civil or disciplinary action by the Board also does not carry the physician plaintiffs' standing burden. The Board's power includes pursing disciplinary proceedings, but only against certain medical professionals. This limit excludes Plaintiff Andreson, who, as a D.O. rather than M.D., does not fall within the Board's jurisdiction. *See supra* n.11. Regardless, the physician plaintiffs have not put forward any allegations showing that the Board has enforced, is enforcing, or has threatened to enforce the challenged medical exception in cases involving the emergent medical conditions Plaintiffs' suit implicates. The Complaint thus does not support *any* risk of relevant future enforcement, let alone "certain" risk. *Crawford*, 868 F.3d at 455.

**3. Plaintiffs Lack Standing to Sue the State, General Skrmetti, and Dr. Blake.**

Plaintiffs further lack standing to sue the State, General Skrmetti, and Board President Blake because any alleged injury cannot be traced to or redressed by these parties. The State has not taken any imminent enforcement step against Plaintiffs. Nor could it: The State is not an actor, but a sovereign organization of the people of Tennessee. It does not enforce the relevant statutes itself, but only through designated individual officials. Nor can courts generally enjoin "the laws themselves,"

but instead may issue limited relief only against those with power to enforce a challenged law. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (*per curiam*). As just discussed, Defendant Attorney General Skrmetti lacks any power to unilaterally enforce the abortion laws—full stop. Nor can Board President Blake take unilateral steps to pursue civil enforcement. At most, she can act as one member of the multi-member Board, who may only punish doctors within their jurisdiction by majority vote. *See* Tenn. Comp. R. & Regs. 0880-02-.11(8). For these reasons, the State, General Skrmetti, and Board President Blake are not proper parties to the action and should be dismissed.

### C. Plaintiffs Allege No Cause of Action Permitting Their Claims.

Plaintiffs must establish that this Court has subject matter jurisdiction under either "the Tennessee Constitution or legislative act." *Word v. Metro Air Servs., Inc.*, 377 S.W.3d 671, 674 (Tenn. 2012). This question "depends on the nature of the cause of action and the relief sought." *Id.* Plaintiffs plead no cause of action vesting this Court with jurisdiction. The first provision Plaintiffs cite (at Compl. ¶¶ 18-20)—the three-judge panel statute—specifies that it "does not create a cause of action independent of existing Tennessee or federal law and does not waive the defense of sovereign immunity." Tenn. Code Ann. § 20-18-103. Nor does the only other cited statute—the Declaratory Judgment Act—confer an independent basis for jurisdiction. *Cf.* Compl. ¶¶ 175-76 (citing § 29-14-101 *et seq.*). Rather, the Act conveys the power to construe a statute "*provided that the case is within the court's jurisdiction*." *Colonial Pipeline*, 263 S.W.3d at 837 (emphasis added); *see also* Tenn. Code Ann. § 29-14-102(a). Dismissal is warranted for this additional reason.

## II. The Medical Exception Does Not Violate the "Right to Life of Pregnant People" Under the Tennessee Constitution.

The Complaint first asserts that the medical exception violates the Tennessee Constitution by prohibiting pregnant persons from obtaining abortions that would "prevent or alleviate a risk of death

or risk to their health (including their fertility)." Compl. ¶ 183 (citing Tenn. Const. art. I, § 8). This allegation does not state a valid claim.

### A. Tennessee's Abortion Statute Provides Robust Life-and-Health Protections.

The Tennessee Constitution provides that "no man shall … be in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Tenn. Const. art. I, § 8. Plaintiffs claim the medical exception violates this "fundamental right to life" by blocking abortions performed to treat emergent conditions posing "a risk to pregnant people's lives." Compl. ¶ 180. By denying abortions "'even where the mother's life is in jeopardy,'" the Complaint says, the law unconstitutionally "forces pregnant people with emergent medical conditions to surrender their lives." *Id.* ¶ 158 (quoting *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting)).

This characterization bears no resemblance to longstanding reality and the present-day statute. Since "at least 1883" Tennessee's abortion prohibitions have maintained exceptions allowing abortions "to preserve the 'life' of the pregnant woman." *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 6 (citing 1883 Tenn. Pub. Acts, Ch. 140 (codified at Tenn. Code §§ 5371 & 5372 (1884))). During *Roe*'s reign, Tennessee's post-viability abortion restrictions likewise permitted an exception for abortions "necessary to preserve the life or health of the mother." Tenn. Code § 39-301(e)(3) (1975).

Now, after *Dobbs*, lawmakers have continued the longstanding tradition of protecting maternal life. The medical exception plainly allows abortions that are "necessary to prevent the death of the pregnant woman." Tenn. Code Ann. § 39-15-213(c)(1)(A) (2023). So too, physicians may perform abortions "to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman." *See id.* And the definition of abortion itself, Plaintiffs acknowledge, expressly excludes "ectopic or molar pregnanc[ies]." Compl. ¶ 138 (citing Tenn. Code Ann. § 39-15-213(a)(1)).

The plain text of these provisions grants clear permission to abort when doing so would protect the life or major bodily functions of pregnant women. This statutory reality forecloses Plaintiffs' claimed need to "sacrifice" their lives or major bodily functions (like those affecting "fertility"). *E.g.*, *id.* ¶ 155. The existing law's exceptions also cover many of the proffered examples—like life-threatening hemorrhaging, *id.* ¶ 72, "kidney failure," *id.* ¶ 92, or "ectopic pregnancy," *id.*—Plaintiffs cite as a basis for their claims. To the extent Plaintiffs assert that doctors will nonetheless ignore the exception's language and decline to perform statutorily permitted abortions, that dynamic is not traceable to the medical exception but to independent, third-party choices. *See supra* p. 17.

**B. The Constitution Does Not Protect the Broader Abortion Rights Plaintiffs Assert.**

Beyond arguing that the medical exception deprives pregnant persons of "life," Plaintiffs assert a broad state substantive due process right to abortions for any "emergent condition" posing a "risk" to a pregnant person's "health." Compl. ¶ 160; *see id.* ¶¶ 171, 180. This argument also fails.

1. Plaintiffs seek to ground their proposed abortion right in Tenn. Const. art. I, § 8. Like its federal due process counterpart, this provision—though framed as a procedural right—has been interpreted to confer certain "substantive protections" using a doctrine known as "substantive due process." *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006). Abortion used to be an example of one such right read into Tennessee's Constitution by the judiciary. *See Planned Parenthood of Middle Tenn.*, 38 S.W.3d 1. But in 2014, voters rejected that reading by ratifying a constitutional amendment clarifying that "[n]othing in this Constitution secures or protects a right to abortion" and preserving voters' right, through their "elected state representatives and state senators," to pass laws regulating abortion—including "when necessary to save the life of the mother." Tenn. Const. art. I, § 39.

This provision not only forecloses Plaintiffs' ability to mount a direct challenge to Tennessee's abortion prohibition. It also supports limiting any constitutionally required abortion right to the medical exception mentioned—namely, abortions "necessary to save the life of the mother," which the challenged statute protects. *Id.* Faced with a recent-in-time provision that specifically addresses abortion and the issue of medical exceptions, this Court should be especially wary of adopting Plaintiffs' view that the general doctrine of substantive due process supports finding a broader right to abort in additional circumstances "not mentioned in the constitution." *Dobbs*, 142 S. Ct. at 2247; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 183 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails.").

2. Even absent the Constitution's no-abortion-right rule, Plaintiffs would not have a substantive due process right to abort along the lines they assert. In assessing whether to protect a new right using substantive due process, courts must "guard against the natural human tendency to confuse what [the Constitution] protects" with their "own views about the liberty that Americans should enjoy." *Dobbs*, 142 S. Ct. at 2248. To place guardrails on free-wheeling rights discovery, federal and Tennessee courts ask whether an asserted right is "deeply rooted in history and tradition" and whether it is "implicit in the concept of ordered liberty." *Id.*; *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 409 (Tenn. 2013) (citation omitted). This is, "[t]o say the least, . . . a tough test," *Chambers v. Sanders*, 63 F.4th 1092, 1096 (6th Cir. 2023) (quotations omitted), requiring "careful respect for the teachings of history and solid recognition of the basic values that underlie our society," *Mansell*, 417 S.W.3d at 409 (citation omitted). This history-focused approach "is the only way to prevent life-tenured federal judges from seeing every heart-felt policy dispute as an emerging

constitutional right." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 477 (6th Cir. 2023). The "reasoning of federal constitutional cases" is also probative. *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993).

These principles require rejecting Plaintiffs' substantive due process argument. As discussed, the medical exception expressly provides that abortion is allowed to save a mother's life or prevent serious risk of substantial, irreparable harm to a major bodily function. Plaintiffs' core contention is that these exceptions are too narrow. In their view, the Tennessee Constitution should protect a more permissive abortion regime to address additional scenarios where a doctor determines a mother faces "emergent condition" risks falling outside of the medical exception's scope.

Because Plaintiffs say defining their proposed list of protected "emergent conditions" is "impossible," Compl. ¶ 117, just how far their constitutional position reaches is anyone's guess. But Plaintiffs make clear that, at the very least, there are a "wide range" of scenarios that implicate their proposed abortion right, *id.* ¶ 128, ranging from hypertension, to sickle cell disease, to certain psychiatric conditions, to "[a]ccidents and intentional acts of violence, such as car crashes, gunshots, intimate partner violence, and substance use disorder," *see id.* ¶¶ 117-123. Nor do Plaintiffs disclaim that even low levels of health risk would permit abortion. *Cf. id.* ¶¶ 116, 128 (referring to medical conditions that "*could* endanger the health of a pregnant person" or "can lead" to life-threatening conditions (emphasis added)). So long as an abortion provider concludes that abortion would be the "most appropriate" treatment, the Tennessee Constitution (in Plaintiffs' telling) requires protecting that abortion. *Id.* ¶ 128; *see also id.* ¶ 150 (doctors need "wide discretion to determine" when to abort).

History and tradition refute Plaintiffs' position. As for history, there was no general right to an abortion at common law and no noted life-or-health exceptions. *See* 1 William Blackstone, Commentaries on the Laws of England 129-130 (6th ed. 1775) (deeming abortion a "heinous

misdemeanor"); *Dobbs*, 142 S. Ct. at 2249-51 (collecting common law sources). For most of its abortion-regulation history, Tennessee has limited the medical exception to abortions "done with a view to preserve the life of the mother." *Id.* at 2295 (quoting 1883 Tenn. Acts). Other States have historically employed substantially similar exceptions. *Id.* at 2285-2300 (appendix).

*Roe* upended state regulation by permitting only post-viability abortion bans except when "necessary to preserve the life or health of the mother." 410 U.S. at 164. To comport with *Roe*, Tennessee lawmakers adopted a post-viability abortion prohibition that excepted abortions necessary to preserve a mother's "life or health," Tenn. Code Ann. § 39-301(e)(3) (1975). Plaintiffs have not identified any historical evidence to show that this provision was understood to grant the broader abortion rights Plaintiffs assert. To the contrary, courts interpreting similar medical exceptions have concluded that only sufficiently "serious" or "substantial" health dangers qualify. *E.g.*, *Casey*, 505 U.S. at 979 (Rehnquist, J., concurring in the judgment in part and dissenting in part) ("significant threat to life or health"); *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000) ("significant health risks"); *accord Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 511 (6th Cir. 2006). Plaintiffs also offer no deeply rooted evidence supporting their asserted right to abort fetuses deemed unlikely to survive at birth.

To the extent it is relevant, contemporary practice also aligns with Tennessee's requirement that a mother's health risk be sufficiently serious before permitting an abortion under the medical exception. The Supreme Court's decision in *Casey* upheld a statute using the same language—"serious risk of substantial and irreversible impairment of a major bodily function"—against constitutional challenge. *See Casey*, 505 U.S. at 979 (Rehnquist, J., concurring in the judgment in part and dissenting

in part). Today, over 20 States use this *same* language in medical-exception provisions.[15] Many others use different language, but still require a significant risk threshold to be satisfied.[16] All of this cuts against recognizing Plaintiffs' newly proposed right to obtain abortions (or provide abortions, in physicians' case) to address a multifarious list of emergent conditions. *Dobbs*, 142 S. Ct. at 2248.

**C. Lawmakers Permissibly Limited Abortion to Protect Fetal Life.**

Because Plaintiffs lack a substantive due process right to a broader category of abortions than the medical exception covers, this Court need not perform any further due-process analysis. If it did proceed, rational-basis review would apply. A statute has a rational basis if it "is reasonably related to a legitimate legislative purpose." *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997) (citation omitted). This standard requires upholding a statute so long a court is "able to conceive" of a rational justification, and does not permit judicial second-guessing of the legislature's wisdom. *Sutphin v. Platt*, 720 S.W.2d 455, 457 (Tenn. 1986) (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 456 U.S. 950 (1982)). "A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Dobbs*, 142 S. Ct. at 2284 (citation omitted).

Here, the General Assembly's approach to the issue of medical exceptions is replete with rational bases. *See generally* Tenn. Code Ann. § 39-15-214(70)-(77) (2020). To name a few, lawmakers can permissibly limit abortions to further their "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). They can limit abortion because

[15] *See* Ala. Code § 26-22-3(b)(1); Alaska Stat. § 18.16.010(g)(1)(B); Ariz. Rev. Stat. § 36-2151(9); Colo. Rev. Stat. § 13-22-703(5); Fla. Stat. § 390.0111(1); Ga. Code Ann. § 16-12-141(3); Iowa Code § 146B.1(6); Kan. Stat. Ann. § 65-6724(a); Mo. Rev. Stat. § 188.015(7); Neb. Rev. Stat. Ann. § 71-6914; N.H. Rev. Stat. § 329:44-III; N.J. Stat. Ann. § 9:17A-1.3; N.C. Gen. Stat. § 90-21.81(5); N.D. Cent. Code § 12.1-19.1-01(5); Ohio Rev. Code Ann. § 2919.195(B); 18 Pa. Stat. and Cons. Stat. § 3211 (b)(1); S.C. Code Ann. § 44-41-610(9); Tex. Health & Safety Code Sec. 170A.002(b)(2); Utah Code Ann. § 76-7a-201(1)(a)(ii); W. Va. Code § 16-2R-2; Wis. Stat. § 253.10.

[16] *See, e.g.*, Ark. Code Ann. § 5-61-303 ("life is endangered by a physical disorder, physical illness, or physical injury"); Ky. Rev. Stat. § 311.772(4)(a) ("serious, permanent impairment of a life sustaining organ of a pregnant woman"); La. Stat. § 40:1061-F(same); Wyo. Stat. § 35-6-124(a)(i) (same).

they "undoubtedly ha[ve] an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). They can limit abortion—even when a fetus faces a serious fetal diagnosis—to protect against the risk of misdiagnosis and against sending a problematic message that certain lives are not worth protecting. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792-93 (2019) (Thomas, J., concurring). And they can limit abortion out of concern with granting physicians who generally oppose abortion restrictions the "'unfettered discretion'" to choose when to abort. *Taft*, 444 F.3d at 511 (citation omitted). A broader rule like Plaintiffs' risks allowing the medical exception to swallow the rule against abortion, as all pregnancies present at least some risk to mothers' physical health. This is true in spades for Plaintiffs' unknowable list of emergent conditions, which sweeps far beyond physical health risks. *See* Compl. ¶ 176. In short, Tennessee's commonplace medical exception reflects common sense concerns, and would survive any arguably applicable standard of due process scrutiny.

## III. The Medical Exception Does Not Violate the "Right to Equal Protection of Pregnant People" Under the Tennessee Constitution.

Plaintiffs next contend that Tennessee's abortion prohibition and its medical exception violate equal protection by treating "pregnant person[s]" differently than "non-pregnant people and people unable to get pregnant" when it comes to providing emergency medical treatments. Compl. ¶¶ 186-191; *see* Tenn. Const. art. I, § 8 & art. XI, § 8. But Plaintiffs cannot show that "pregnant persons" receive differential treatment, a threshold requirement for this claim. Rational-basis review thus applies, and the exception's approach to protecting all fetal life more than passes constitutional muster.

1. As with federal law, Tennessee equal-protection rules apply when the government has intentionally "treated the plaintiff disparately as compared to similarly situated persons." *Reform Am. v. City of Detroit*, 37 F.4th 1138, 1152 (6th Cir. 2022) (internal citations omitted); *see Tenn. Small Sch.*

*Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). As this language suggests, in a claim alleging a violation due to different treatment of two classes of persons, the "threshold inquiry is whether the classees of persons at issue are similarly situated; if not, then there is no basis for finding a violation of the right to equal protection." *City of Memphis v. Hargett*, 414 S.W.3d 88, 110 (Tenn. 2013) (internal citations omitted).

The Complaint equates "pregnant persons" seeking abortions for medical reasons to all other persons seeking access to medical treatments. *See* Compl. ¶ 187. But the flaw with this comparison is glaring: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). Because no other medical treatment presents fatal threats to fetal life, no other persons are similarly situated to women seeking abortions for medical reasons. No equal-protection rule bars lawmakers from acting on that difference to protect unborn babies.

2. Regardless, the medical exception satisfies rational-basis review. Rational basis—rather than strict or intermediate scrutiny—applies when a regulation does not infringe a fundamental right or discriminate against a suspect class. *Sutphin*, 720 S.W.2d at 457. The medical exception falls into this category because abortion is not a protected constitutional right, *see supra* p. 22; Tenn. Const. art. I, § 36, and Plaintiffs—who press claims on behalf of "pregnant persons" of all sexes, *e.g.*, Compl. ¶ 187—do not assert that the law discriminates against women (an argument that *Dobbs* forecloses in all events, *see* 142 S. Ct. at 2245-46). Thus, the exception must survive so long as "some reasonable basis can be found" for the challenged classification, or if any state of facts "may reasonably be conceived to justify it." *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). As discussed, *see supra* p. 26, the medical exception amply clears this bar by reasonably pursuing the State's interest

in the "respect for and preservation of prenatal life at all stages of development," *Dobbs*, 142 S. Ct. at 2284, while providing exceptions for women facing serious health risks.

## IV. The Medical Exception Is Not Void for Vagueness Under the Tennessee Constitution.

The Complaint lastly challenges the medical exception on the basis that it fails to provide sufficient clarity about when physicians may provide abortions. Unconstitutionally vague laws "fail[] either to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited or to provide sufficient standards for enforcement." *Moncier v. Board of Prof'l Responsibility*, 406 S.W.3d 139, 152 (Tenn. 2013) (internal citations omitted). This standard "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision…." *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn.1990). Instead, it applies only if a law is so opaque that persons "of common intelligence must necessarily guess at its meaning," *State v. Crank*, 468 S.W.3d 15, 22 (Tenn. 2015) (quoting *State v. Pickett*, 211 S.W.3d 696, 704 (Tenn. 2007)), or "delegates basic policy matters" to regulators for "resolution on an *ad hoc* and subjective basis," *id.* at 23 (quoting *Davis–Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn.1993)). Because statutes are presumed to be constitutional, courts assessing vagueness must "indulge every presumption and resolve every doubt in favor of" upholding challenged language. *State v. Allison*, 618 S.W.3d 24, 45 (Tenn. 2021).

For two reasons, this Court should reject Plaintiffs' vagueness challenge. *First*, the physician plaintiffs cannot carry their legal burden to show that the medical exception is unconstitutional in all of its applications. There are many scenarios in which the medical exception would lawfully apply, which alone forecloses physician plaintiffs' claim. *Second*, physician plaintiffs' challenge fails because the medical exception is sufficiently clear—as a mountain of caselaw and similar regulations confirms.

### A. Plaintiffs' Vagueness Challenge Fails Because the Medical Exception Has Many Constitutional Applications.

Facial vagueness attacks are among "the most difficult challenge[s] to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid." *Crank*, 468 S.W.3d at 24 (Tenn. 2015) (quoting *Davis-Kidd Booksellers, Inc.*, 866 S.W.3d at 525). Addressing them "involves questions of law only." *In re Adoption of J.K.W.*, No. E2006-00906-COA-R3-PT, 2007 WL 161048, at *3 (Tenn. Ct. App. Jan. 23, 2007) (quoting *Lynch*, 205 S.W.3d at 390); *accord Planned Parenthood Great Nw. v. Idaho*, 522 P.3d 1132, 1201-02 (Idaho 2023) (pre-enforcement vagueness challenge was "purely a question of law"). Plaintiffs' failure to satisfy this demanding standard requires dismissal at the outset.

As an initial matter, though the Complaint invokes as-applied terms, *e.g.*, ¶¶ 46, 60, 149, it is the facial vagueness standard that governs here. As-applied challenges involve assessing a statute "as construed and applied in actual practice against the plaintiff under the facts and circumstances of the particular case, not under some set of hypothetical circumstance." *Fisher v. Hargett*, 604 S.W.3d 381, 397 (Tenn. 2020) (citing *City of Memphis*, 414 S.W.3d at 107). But because the physician plaintiffs have not been subject to enforcement, they are in "no position to assert an as-applied challenge to the constitutionality of the statute on the basis of vagueness." *Crank*, 468 S.W.3d at 24. Beyond that, the Complaint centers on the exception's reasonableness standard—which applies in *all* cases "beyond [Plaintiffs'] circumstances." *Fisher*, 604 S.W.3d at 397. Plaintiffs moreover seek a wholesale *amendment* of the medical exception to depend on physicians' subjective good-faith. Compl. ¶ 176. Neither argument turns on *applying* the exception to certain facts, but instead asserts that medical exception, "as written, fail[s] to clearly delineate the nature of the prohibited conduct." *Crank*, 468 S.W.3d at 24. This is a facial-vagueness theory, as the Idaho Supreme Court recently concluded when rejecting a

materially identical challenge to that State's "reasonable medical judgment" exception. *See Planned Parenthood Great Nw.*, 522 P.3d at 1201-02, 1207-08.

Physician plaintiffs cannot satisfy their "especially heavy legal burden," *Fisher*, 604 S.W.3d at 398, which in the vagueness context requires showing that the medical exception's meaning cannot be ascertained in any scenario, *Crank*, 468 S.W.3d at 27. There are countless "core circumstances" that would clearly fall either within the medical exception (because the physician aborted when a woman clearly faced a life-threatening emergency) or outside of it (because the physician aborted without any remote risk to a woman's health). *Planned Parenthood Great Nw.*, 522 P.3d at 1207. And indeed, reasonableness standards are commonly used throughout medical and professional regulation. *Infra* p. 32. The medical exception's clear application to many circumstances alone forecloses the vagueness claim. *Cf. Women's Med. Pro. Corp. v. Taft*, 353 F.3d 436, 449 (6th Cir. 2003) ("reasonable medical judgment" standard "clearly exclude[s] negligible risks, trivial complications, and circumstances having nothing to do with the health of the particular patient").

**B. Plaintiffs' Vagueness Challenge Fails Because the Exception's Commonly Used Standard Is Sufficiently Clear.**

Plaintiffs' challenge also fails because the provisions they cite are not unconstitutionally vague.

1. Plaintiffs principally take issue with the medical exception's use of an objective reasonableness standard, which they say permits unlawful "second guessing" of physicians' conduct by regulators, prosecutors, and juries. Compl. ¶¶ 128, 150, 161. But uniform law holds that "[a] statute is not unconstitutionally vague merely because it is based upon a 'reasonableness' standard." *State v. Harton*, 108 S.W.3d 253, 259 (Tenn. Crim. App. 2002) (quoting *United States v. Ragen*, 314 U.S. 513, 523 (1942) ("reasonable allowance" for compensation not unconstitutionally vague)). Applying this rule, Tennessee courts have time and again rejected vagueness challenges based on references to

reasonableness. *Id.* (collecting statutes) (upholding criminal prohibition against following another motor vehicle "more closely than is reasonable and prudent").[17] Federal and state courts across the country have ruled similarly.[18] Indeed, the constitutional vagueness standard *itself* turns on an objective assessment: whether a statute gives "*reasonable* notice of what conduct is prohibited." Compl. ¶ 170 (emphasis added); *see also Crank*, 468 S.W.3d at 22. The U.S. Supreme Court has thus cited the presence of "'*objective criteria*' to evaluate whether a doctor has performed a prohibited procedure" as a reason to *reject* a vagueness challenge to abortion regulation. *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (emphasis added); *accord Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 503 (6th Cir. 2012). These "prior judicial interpretations" belie Plaintiffs' present contentions. *Crank*, 468 S.W.3d at 23.

Accepting Plaintiffs' invitation to break from uniform authority upholding reasonableness-based regulation would impugn countless other statutes and regulations. "[T]he adjective 'reasonable' is, of course, ubiquitous in the law." *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 41 (D.D.C. 2016); *see also Harton*, 108 S.W.3d at 259 ("criminal statutes are replete with the use of the 'reasonable' standard").[19] Professional regulation often incorporates *objective* industry standards. The *Strickland* standard is just one example, hinging critical constitutional rights (and professional liability) on whether a lawyer exercised "reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Under Plaintiffs' view, this rule has been unconstitutional all along. So, apparently,

[17] *See also, e.g.*, *State v. Cox*, No. E2020-00018-CCA-R3-CD, 2021 WL 2981511, at *5-6 (Tenn. Crim. App. July 15, 2021) (no vagueness even though law "relie[d] upon a reasonableness standard without further statutory elucidation"); *State v. Vandenburg*, No. M2017-01882-CCA-R3-CD, 2019 WL 3720892, at *64 (Tenn. Crim. App. Aug. 8, 2019) (fact that statute did not define "reasonable expectation of privacy" did not make the phrase unconstitutionally vague).

[18] *See e.g.*, *Ragen*, 314 U.S. at 523 (incorporation of a reasonableness standard does not render a penal statute void for vagueness); *State v. Thirteenth Jud. Dist. Ct.*, 208 P.3d 408, 413 (Mont. 2009) ("[W]e have refused to hold statutes unconstitutionally vague simply because they rely on the reasonable person standard.").

[19] *See, e.g.*, Tenn. Code Ann. § 53-10-112(c) (pharmacists must "make every reasonable effort to prevent abuse of drugs" dispensed); Tenn. Sup. Ct. R. 8, RPC 1.15 (attorneys must "exercise reasonable judgment" when managing accounts).

have myriad regulations—governing lawyers,[20] doctors,[21] and more—with similar language. The unprecedented upshot of Plaintiffs' vagueness argument is another clue it lacks a sound legal basis.

2. Zooming out to the phrase "reasonable medical judgment" does not help Plaintiffs. Plaintiffs assert this language is vague because it cabins physicians' practice. Compl. ¶ 138. But objective medical standards are "no less ascertainable than any other legal doctrine that relies on objective reasonableness." *Womancare of Orlando, Inc. v. Agwunobi*, 448 F. Supp. 2d 1309, 1324 (N.D. Fla. 2006). Moreover, "reasonable medical judgment" is "merely a standard for *minimum* competency that physicians are routinely expected to satisfy." *Planned Parenthood Great Nw.*, 522 P.3d at 1208 (emphasis in original) (citing *United States v. Vuitch*, 402 U.S. 62, 72 (1971)). It is "the *same* standard by which *all* of [physicians'] medical decisions are judged under traditional theories of tort law," *Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999) (rejecting vagueness challenge), and abounds in codebooks:

- The Tennessee Abortion-Inducing Drug Risk Protocol Act of 2023 references "[r]easonable medical judgment." Tenn. Code Ann. § 63-6-1102(14).
- A state hospital statute bars referral restrictions unless "[t]he restriction does not, in the reasonable medical judgment of the physician, adversely affect the health or welfare of the patient." Tenn. Code Ann. § 63-6-204(f)(1)(B)(ii).
- "Reasonable medical judgment" is used in the Federal Food, Drug, and Cosmetics Act. 21 U.S.C. § 364(5)(B).
- Federal child-abuse law defines "withholding of medically indicated treatment" by asking whether a physician used "reasonable medical judgment." 42 U.S.C. § 5106g(a)(5).

It is no surprise, then, that Courts have rejected vagueness challenges to "reasonable medical judgment" standards. *See Planned Parenthood South Atlantic v. South Carolina*, 892 S.E.2d 121, 130 n.8

[20] *See generally* Tenn. Rules of Prof. Conduct (often referencing "reasonableness" of attorney conduct).
[21] *See infra* pp. 34-35; West's Ann. Cal. Health & Safety Code § 127633 (referencing "reasonable professional judgment of the provider" in medical law); N.Y. Pub. Health Law § 273 ¶ 3(a) (McKinney) (requiring physicians to make determination regarding patients' need for certain drugs "in her reasonable professional judgment").

(S.C. 2023); *Planned Parenthood Great Nw.*, 522 P.3d at 1209. The Sixth Circuit upheld an abortion statute's "reasonable medical judgment" exception as appropriately "tethered to the developing state of medical knowledge, giving it the flexibility needed to tolerate responsible differences of medical opinion." *Taft*, 353 F.3d at 450. And the Seventh Circuit rejected Plaintiffs' exact argument in upholding an abortion law: "[W]hile physicians may feel more secure" knowing medical judgments "need only satisfy a subjective good faith standard," the court wrote, an "objective standard alone does not render the medical emergency provision impermissibly vague." *Karlin*, 188 F.3d at 465. Even *Casey* upheld an exception referencing "appropriate medical judgment." *Casey*, 505 U.S. at 880.

Lawmakers' use of a single, objective standard avoids the statutory defect at issue in *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). There, the vagueness problem stemmed from (1) the law's incorporation of *both* a subjective "in good faith" *and* objective "in exercise of reasonable medical judgment" provision, which created an "unclear … dual standard," and (2) lack of a scienter requirement. *Id.* at 204. This exception does not present either issue. *See* § 39-11-301(b)-(c) (establishing *mens rea* rules). Thus, whatever the continued validity of *Voinovich*—which rested heavily on the then-constitutionally protected status of abortion—its analysis does not apply here.

Plaintiffs' claim boils down to their belief that the statute "should be read" to allow abortions whenever physicians feel, in good faith, that a woman satisfies an expansive list of "emergent conditions." *E.g.*, Compl. ¶¶ 150, 176. But this is a policy argument that the statute's standard of conduct should be *different*—not a legal argument that the statute is so unclear as to be *void*. And this argument is particularly dubious given the statutory history. The General Assembly's law, recall, originally did reference good faith. Yet after the federal government sued to challenge a similar Idaho abortion statute, Tennessee lawmakers amended the wording to mirror EMTALA—which defines

"emergency medical condition" for women in labor by referencing reasonableness. *See* 42 U.S.C. § 1395dd(1)(A); *supra* p. 7. The Complaint mentions none of this. All the while, the same group spearheading this suit is seeking to enforce several of EMTALA's "reasonableness" standards against an Oklahoma hospital—a double move that indicts their claim that Tennessee's similar "reasonableness" standards are too vague to be understood.[22]

3. Plaintiffs' remaining vagueness arguments also lack merit. After-the-fact adjudication does not create vagueness, as any adjudication is by definition "concerned with the determination of past and present rights and liabilities." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring). It is adjudicators' role to "work out the uncertainties that lurk at every statute's periphery." *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019); *accord State v. Baxter*, No. W2012-00361-CCA-R3CD, 2013 WL 1197867, at *5 (Tenn. Crim. App. Mar. 25, 2013). Plaintiffs give no good reason to upset this settled understanding, nor explain how requiring after-the-fact assessments of subjective good faith would address their vagueness concerns.

Nor are the listed medical emergencies unconstitutional. The phrase "necessary to prevent the death of the pregnant woman" and "serious risk of substantial and irreversible impairment of a major bodily function" each applies to a set of "core circumstances" a person of ordinary intelligence would understand. *Planned Parenthood Great Nw.*, 522 P.3d at 1207. The phrases recur in many "medical emergency" definitions past and present—including the statute upheld in *Casey* and some 20 state statutes now on the books. *See supra* p. 25 & n.15. And here too, the medical exception's language tracks various EMTALA provisions. *See* 42 U.S.C. § 1395dd(e)(1)(A)(ii)-(iii) ("serious impairment to bodily functions" and "serious dysfunction of any bodily organ or part"). This "common experience"

[22] *See Statton v. OU Medicine, Inc.*, Admin. Compl. ¶¶ 6, 44, 46, 47 (filed Sept. 12, 2023), https://tinyurl.com/rb2jpzx2.

confirms the listed medical conditions' constitutionality. *State v. Netto*, 486 S.W.2d 725, 730 (Tenn. 1972). Certainly, the statute's coverage of two discrete scenarios is clearer than Plaintiffs' seven-condition alternative. Plaintiffs' problem is not that the covered emergencies are unclear, but that they are too few. But vagueness doctrine does not constitutionalize Plaintiffs' preferred policies.

## V. This Court Cannot Grant Plaintiffs' Requested Relief.

Plaintiffs ask for a declaration that would (1) replace the medical exception's objective standard with one requiring subjective good faith and (2) dramatically expand the covered medical emergencies. *See* Compl. Prayer for Relief (A)-(D). Courts may not arrogate legislative power in this fashion, as the State's severability statute confirms by requiring targeted remedies. Tenn. Code Ann. § 1-3-110. Specifically, courts are to sever only the "objectionable features of [a challenged] statute" while leaving "the remainder . . . valid and enforceable." *Willeford v. Klepper*, 597 S.W.3d 454, 470-71 (Tenn. 2020). Thus, even if this Court declares some of the statute unlawful, it must leave the rewrite to lawmakers.

Further, Plaintiffs are not entitled to their requested injunction. A century-old rule holds "that courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional." *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 752 (Tenn. 2006). This Court is a court of equity, Tenn. Code Ann. § 16-11-101; *see J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 631 (1909), and the challenged law creates a "criminal" offense, Compl. ¶ 15. Plaintiffs thus cannot obtain an injunction against all criminal enforcement of the abortion statute. Moreover, courts do not "enjoin … laws themselves," *Whole Woman's Health*, 141 S. Ct. at 2495, or "erase" statutes from the books, *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring) (quoting Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1016-17 (2018)). Much less may courts issue injunctions that create new statutory standards from whole cloth.

## CONCLUSION

For these reasons, this Court should dismiss the Complaint in its entirety.

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I further certify that, pursuant to the Court's order of October 10, 2023, a courtesy copy of the foregoing was served by electronic mail to:

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