No. 21-1369

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,
Plaintiffs-Appellees,
v.
ALAN WILSON, in his official capacity as Attorney General of South Carolina, et al.,
Defendants-Appellants,
and
HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, et al.,
Intervenors-Appellants,
and
ANNE G. COOK, et al.,
Defendants.

On Appeal from the United States District Court
for the District of South Carolina
Case No. 21-cv-00508

BRIEF OF 20 STATES AS *AMICI CURIAE* IN SUPPORT OF SOUTH CAROLINA APPELLANTS

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
edmund.lacour@AlabamaAG.gov

STEVE MARSHALL
Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

A. Barrett Bowdre
Deputy Solicitor General

Counsel for Amici Curiae

[Additional counsel listed on signature page]

CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

INTERESTS OF AMICI CURIAE[1]

Amici curiae are the States of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, and West Virginia. Most of these States have in place laws similar to the South Carolina laws the district court enjoined. For though the plaintiffs challenged only South Carolina's regulation concerning abortions after a fetal heartbeat is detected, the district court enjoined many other laws as well. For instance, though at least 24 States require an abortion provider to—at minimum—offer to display the image from an ultrasound so the pregnant mother can view it, the district court enjoined South Carolina's ultrasound disclosure law. Same for South Carolina's requirement that abortion providers make the fetal heartbeat audible for the pregnant mother if she would like to hear it—a law that at least 16 other States have also enacted. And same for South Carolina's requirement that an ultrasound be performed before an abortion is conducted—a requirement shared by at least 12 other States. The amici States offer this brief to show the error in the district court's severability analysis and to defend the independent value of the abortion regulations the district court needlessly enjoined.

[1] This brief is filed under Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF THE ARGUMENT

The opinion below is riddled with errors. Without even conducting a third-party standing analysis, the court wrongly allowed abortion providers to "stand in the shoes" of pregnant mothers to challenge a law giving the mothers a cause of action *against the providers*, thus dramatically expanding third-party standing to an area with an obvious conflict of interest. *Compare* App. 287-88 *with Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). Likewise, the court erroneously found that the plaintiffs were likely to prevail on the merits of their challenge, even though the court never conducted an undue-burden analysis as required by the Supreme Court. *Compare* App. 290-92 *with Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992). Then it unnecessarily enjoined the entirety of the South Carolina Fetal Heartbeat and Protection from Abortion Act, even though the plaintiffs had challenged just one provision of the Act, the General Assembly had included a crystal-clear severability clause, and the rest of the Act could easily be enforced if the challenged provision alone were enjoined. *See* App. 297-99.

All these errors merit reversal. But at minimum the Court should correct the district court's severability ruling. First, the ruling misapplies South Carolina law, substituting the district court's opinion of the Act's purpose for the stated reasoning of the General Assembly, and then finding that the majority of the Act's provisions lack independent utility even though many States have similar requirements that

stand apart from the challenged provision. Second, the ruling treads on South Carolina's sovereign ability to decide for itself the purposes of its legislation; violates Article III's case-or-controversy requirement by purporting to invalidate provisions of the Act no one challenged; and aggrandizes the judicial power by treating the court's injunction of the challenged provision as erasing it entirely so the whole Act collapses. These errors should be reversed.

ARGUMENT

The district court's severability analysis got one thing right. It correctly recognized that severability is a matter of state law. App. 298; *see Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) ("Severability is of course a matter of state law."). "Under South Carolina law, 'the test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. When the residue of an Act, *sans* that portion found to be unconstitutional, is capable of being executed in accordance with the legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional provision.'" *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 301 (4th Cir. 2009) (cleaned up) (quoting *Joytime Distribs. & Amusement Co. v. South Carolina*, 528 S.E.2d 647, 654 (S.C. 1999)).

The court below went off the rails when it purported to apply this test. Instead of deferring to the best available evidence concerning legislative intent—the General Assembly's own words in the severability clause it enacted—the court substituted its own ideas concerning what the legislature must have intended. And instead of following "the 'normal rule'" of "partial, rather than facial, invalidation," *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)), the court enjoined the Act in its entirety, reasoning that "[t]he only purpose of th[e] mandatory ultrasound provision" was to ban abortions of unborn children with heartbeats, App. 299. That would be news not only to the South Carolina General Assembly, but to many other state legislatures that have enacted similar ultrasound requirements without South Carolina's additional regulation.

More fundamentally, the district court's misapplication of state law is not confined to a dispute about the meaning of South Carolina law. Rather, when the court ignored the General Assembly's voice and enjoined the entirety of the Act, it also ignored principles of federalism, separation of powers, and Article III standing that all counsel against such judicial overreach. For not only did the court ride roughshod over a separate sovereign in our federal system, but it "use[d] its remedial" judicial "powers to circumvent the intent of the legislature," *Ayotte*, 546 U.S. at 330 (citation omitted), treated its injunction as erasing parts of the Act such that other sections

referencing the unenforceable provision also fell, and enjoined portions of the Act that no one challenged. These are serious violations of the judicial duty that should be corrected by this Court.

I. As Laws From Other States Demonstrate, The Act's Unchallenged Provisions Are "Capable Of Being Executed In Accordance With The Legislative Intent, Independent Of The Rejected Portion."

South Carolina law poses two primary questions when it comes to determining whether an offending provision is severable from the rest of the statute. First, may it "fairly be presumed that the legislature would have passed [the non-offending portions] independent of that which conflicts with the constitution"? *In re DNA Ex Post Facto Issues*, 561 F.3d at 301 (quoting *Joytime Distribs. & Amusement Co.*, 528 S.E.2d at 654). Second, is "the residue of an Act, *sans* that portion found to be unconstitutional, … capable of being executed in accordance with the [l]egislative intent, independent of the rejected portion"? *Id.* In this case, the answer to both questions is "yes."

Start with legislative intent. The South Carolina Supreme Court instructs that "[t]he best evidence of intent is in the statute itself." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 694 S.E.2d 525, 530 (S.C. 2010). "Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting *Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000)). "If a statute's 'terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular

sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense.'" *Id.* (quoting *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 60 S.E.2d 682, 684 (S.C. 1950)).

Here, the legislative intent could not be any clearer. It appears on the face of the Act itself:

> If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, then such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Act § 7; App. 88.

It is hard to imagine what else the General Assembly could have said to get across its intent that it would have passed the Act's other provisions "irrespective of the fact" that another provision "may be declared to be unconstitutional, invalid, or otherwise ineffective." As the Supreme Court has instructed, "there is no need to resort to conjecture" when "[t]he legislature's abortion laws include … a provision that could not be clearer in its message that the legislature 'would have passed [every aspect of the law] irrespective of the fact that any one or more provision … be declared unconstitutional.'" *Leavitt*, 518 U.S. at 140 (alterations in original).

Perhaps because the General Assembly's intent was so clear, the district court

largely skipped over it and proceeded directly to deciding whether the unchallenged portions of the Act were "capable of being executed in accordance with the [l]egislative intent, independent of the rejected portion." *In re DNA Ex Post Facto Issues*, 561 F.3d at 301 (quoting *Joytime Distribs. & Amusement Co.*, 528 S.E.2d at 654). Remarkably, despite the Act's wide reach, the court found that "[t]he only purpose of th[e] mandatory ultrasound provision … is to facilitate" the challenged regulation concerning abortions after a fetal heartbeat has been detected. App. 299. Because that was so, the court reasoned, the other sections of the Act also had to be enjoined; they were "unable to stand by themselves" since they "reference[d] the words 'fetal heartbeat'" or "other provisions of Section 3." *Id.*

As discussed below, this mode of severability analysis violates just about every rule of severability analysis there is. But it also fails on its own terms. The court's conclusion that the "only purpose" of an ultrasound disclosure provision is to prohibit abortions of unborn children with heartbeats is contradicted by the Act itself—and when determining the "purpose" of a law, it is the *legislature's* intent that matters. It is also belied by the experience of other States, many of which have passed laws with similar provisions that easily stand unpaired from any law resembling the challenged regulation.

As for the Act's purpose, recall what else the General Assembly intended the Act to do. In Section 2 of the Act, the General Assembly found that "a fetal heartbeat

is a key medical predictor that an unborn human individual will reach live birth." Act § 2(5). Accordingly, the Assembly found that, "in order to make an informed choice about whether to continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat." *Id.* § 2(8). The Assembly then enacted a number of operative provisions to realize these findings—and expressly declared that it would have enacted these provisions even if another provision were declared unconstitutional. These unchallenged provisions include:

- Patient disclosure of ultrasound and image display. Before an abortion, the provider must "perform an obstetric ultrasound on the pregnant woman, using whichever method the physician and pregnant woman agree is best under the circumstances," "display the ultrasound images so that the pregnant woman may view the images," and "record a written medical description of the ultrasound images of the unborn child's fetal heartbeat, if present and viewable." Act § 3 (S.C. Code § 44-41-630).

- Patient disclosure of fetal heartbeat. "If a pregnancy is at least eight weeks after fertilization, then the abortion provider … shall tell the woman that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear and shall ask the woman if she would like to hear the heartbeat," and if so, "make the fetal heartbeat of the unborn child audible." Act § 3 (S.C. Code § 44-41-640).

- Patient disclosure of statistical viability. "The physician shall further inform the pregnant woman, to the best of the physician's knowledge, of the statistical probability, absent an induced abortion, of bringing the human fetus possessing a detectable fetal heartbeat to term based on the gestational age of the human fetus." Act § 5 (S.C. § 44-41-330(A)(1)(b)).

- Cause of action for women. The Act creates a cause of action for women "on whom an abortion was performed or induced in violation of" the Act or preexisting abortion regulations. Act § 3 (S.C. Code § 44-41-740).

- Reporting Requirements. "Any abortion performed in this State must be reported by the performing physician on the standard form for reporting abortions to the State Registrar, Department of Health and Environmental Control, within seven days after the abortion is performed. The names of the patient and physician may not be reported on the form or otherwise disclosed to the State Registrar. The form must indicate from whom consent was obtained, circumstances waiving consent, and, if an exception was exercised pursuant to Section 44-41-660, which exception the physician relied upon in performing or inducing the abortion." Act § 6 (S.C. Code § 44-41-60).

Save for calling these provisions "closely intertwined" with the challenged regulation, App. 26, the plaintiffs did not directly challenge any of these requirements. That was understandable. Similar disclosure provisions are routinely upheld because, as the Supreme Court has recognized, States have a "legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882; *see EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 430 (6th Cir. 2019) (rejecting challenge to Kentucky's ultrasound requirement because "[t]he information conveyed by an ultrasound image, its description, and the audible beating fetal heart gives a patient greater knowledge of the unborn life inside her"), *cert. denied sub nom. EMW Women's Surgical Ctr., P.S.C. v. Meier*, 140 S. Ct. 655 (2019); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*,

667 F.3d 570, 574 (5th Cir. 2012) ("[I]nformed consent laws that do not impose an undue burden on the women's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures.").[2] Such provisions are also routinely preserved by courts that sever related provisions found unconstitutional. *E.g.*, *Falls Church Med. Ctr., LLC v. Oliver*, 412 F. Supp. 3d 668, 685-86, 705 (E.D. Va. 2019) (invalidating certain abortion regulations but upholding "the remainder of the regulations at issue … which were not shown to be otherwise unduly burdensome"); *Edwards v. Beck*, 8 F. Supp. 3d 1091, 1101 (E.D. Ark. 2014) (upholding "testing and disclosure requirements" after invalidating heartbeat restriction on abortion), *aff'd*, 786 F.3d 1113 (8th Cir. 2015); *cf. Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1293-94 (M.D. Ala. 2017) (severing invalid provisions where doing so would "not cause the statute to be meaningless").

This history confirms what the South Carolina General Assembly said in its severability clause—that most of the Act can stand even if one provision falls. Indeed, contra the district court's blindered view that the "only purpose" of passing an Act like South Carolina's is to regulate abortion once a fetal heartbeat is detected, States have enacted many laws with provisions similar to South Carolina's. These

[2] *But see Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014) (upholding First Amendment challenge to North Carolina's ultrasound requirement, which mandated that the provider display and describe the sonogram even if the woman did not wish to view it or hear the provider's description); *cf. EMW Women's Surgical Ctr.*, 920 F.3d at 435-36 (noting that "*Stuart*'s basis for applying heightened scrutiny is called into question by [subsequent] Supreme Court precedent" in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018)).

laws either did not include any sort of abortion prohibition or included one that a court then severed from the remaining provisions. For example:

- At least 12 States require an abortion provider to perform an ultrasound before conducting an abortion. *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. Ann. § 36-2156; Ark. Code Ann. § 20-16-602 (as amended by 2021 Arkansas Laws Act 498 (S.B. 85)); Fla. Stat. Ann. § 390.0111; Ind. Code § 16-34-2-1.1; Iowa Code Ann. § 146A.1; Ky. Rev. Stat. Ann. § 311.727; La. Stat. Ann. 40:1061.10; Miss. Code Ann. § 41-41-3; Tenn. Code Ann. § 39-15-215; Tex. Health & Safety Code Ann. § 171.012; Wis. Stat. Ann. § 253.10.[3]

- At least 24 States require the abortion provider to display the image from any ultrasound that is performed or offer the pregnant woman the opportunity to view the sonogram.[4] *See* Ala. Code § 26-23A-4(b)(4); Ariz. Rev. Stat. Ann. § 36-2156(A)(1); Ark. Code Ann. § 20-16-602 (as amended by 2021 Arkansas Laws Act 498 (S.B. 85)); Fla. Stat. Ann. § 390.0111; Ga. Code Ann. § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code Ann. § 146A.1; Kan. Stat. Ann. § 65-6709; Ky. Rev. Stat. Ann. § 311.727; La. Stat. Ann. 40:1061.10; Mich. Comp. Laws Ann. § 333.17015; Miss. Code Ann. § 41-41-34; Mo. Ann. Stat. § 188.027; Neb. Rev. Stat. § 28-327(3); N.D. Cent. Code § 14-02.1-04; Ohio Rev. Code Ann. § 2317.56; S.D. Codified Laws § 34-23A-52; Tenn. Code Ann. § 39-15-215; Tex. Health & Safety Code Ann. § 171.012; Utah Code Ann. § 76-7-305; W. Va. Code § 16-2I-2; Wis. Stat. Ann. § 253.10; Wyo. Stat. Ann. § 35-6-119.

- At least 16 States require the abortion provider to make the fetal heart-beat audible for the pregnant woman or offer to do so if an ultrasound is performed and a heartbeat detected. *See* Ariz. Rev. Stat. Ann. § 36-

[3] In addition, at least two States have mandatory ultrasound provisions that have been enjoined either as part of broader challenges or because the provision went beyond the requirements imposed by other States. *See* N.C. Gen. Stat. Ann. § 90-21.85; 63 Okl. Stat. Ann. § 1-738.3d.

[4] States differ in their exact wording of these laws. This grouping consists of four slightly different forms: (1) laws requiring the provider to display the sonogram so the pregnant woman may view it; (2) laws requiring the provider to display the sonogram if an ultrasound is performed; (3) laws requiring the provider to offer the pregnant woman an opportunity to view the sonogram; and (4) laws requiring the provider to offer the pregnant woman an opportunity to view the sonogram if an ultrasound is performed.

2156(A)(1); Ga. Code Ann. § 31-9A-3; Ind. Code § 16-34-2-1.1; Iowa Code Ann. § 146A.1; Kan. Stat. Ann. § 65-6709; Ky. Rev. Stat. Ann. § 311.727; La. Stat. Ann. 40:1061.10; Miss. Code Ann. § 41-41-34; Mo. Ann. Stat. § 188.027; N.D. Cent. Code § 14-02.1-04; Ohio Rev. Code Ann. § 2919.192; S.D. Codified Laws § 34-23A-52; Tenn. Code Ann. § 39-15-215; Tex. Health & Safety Code Ann. § 171.012; Wis. Stat. Ann. § 253.10; Wyo. Stat. Ann. § 35-6-119.

- At least 10 States specify that an abortion provider can be held liable to the mother for violating informed consent requirements. *See* Ala. Code § 26-23A-10; Ariz. Rev. Stat. Ann. § 36-2153; Ark. Code Ann. § 20-16-1710; Kan. Stat. Ann. § 65-6724; Ky. Rev. Stat. Ann. § 311.7709; La. Stat. Ann. § 40:1061.17; Minn. Stat. Ann. § 145.4247; N.C. Gen. Stat. Ann. § 90-21.88; N.D. Cent. Code Ann. § 14-02.1-03.2; Tex. Health & Safety Code § 171.207.

- All told, at least 28 States have informed-consent laws requiring the abortion provider to give the mother specific information before performing an abortion. *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2153; Ark. Code § 20-16-1703; Fla. Stat. § 390.0111(3); Ga. Code § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. § 65-6709; Ky. Rev. Stat. § 311.725; La. Stat. Ann. § 40:1061.17; Mich. Comp. Laws § 333.17015; Minn. Stat. § 145.4242; Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327; N.C. Gen. Stat. § 90-21.82; N.D. Cent. Code Ann. § 14-02.1-03; Ohio Rev. Code Ann. § 2317.56; Okla. Stat. tit. 63, § 1-738.2; 18 Pa. Stat. & Cons. Stat. § 3205; S.D. Codified Laws § 34-23A-10.1; Tenn. Code § 39-15-202; Tex. Health & Safety Code § 171.012; Utah Code § 76-7-305; Va. Code § 18.2-76; W. Va. Code § 16-2I-2; Wis. Stat. § 253.10.

Again, it is easy to see why these sorts of laws have independent value apart from other abortion regulations: In the South Carolina General Assembly's words, they help a pregnant woman "make an informed choice about whether to continue a pregnancy." Act. § 2(5). "States are free to enact [such] laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting

meaning." *Casey*, 505 U.S. at 873; *see Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007) ("The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know…."). The existence of these laws in other states also demonstrate that the vast majority of the Act's provisions are "capable of being executed in accordance with the [l]egislative intent, independent of the rejected portion." *In re DNA Ex Post Facto Issues*, 561 F.3d at 301 (quoting *Joytime Distribs. & Amusement Co.*, 528 S.E.2d at 654). The district court erred by holding otherwise.

II. The District Court's Severability Analysis Violates Principles Of Separation Of Powers, Federalism, And Article III.

The district court's severability analysis fails for more fundamental reasons as well. "[S]everability is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government"—or, as in this case, a separate sovereign. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 896 F.3d 539, 550 (D.C. Cir. 2018). The Supreme Court thus recognizes a "presumption of severability," noting that severability "reflects the confined role of the Judiciary in our system of separated powers." *Barr v. Am. Ass'n of Political Consultants, Inc*, 140 S. Ct. 2335, 2350 (2020); *see Ayotte*, 546 U.S. at 329 ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that 'a ruling of

unconstitutionality frustrates the intent of the elected representatives of the people.'" (cleaned up) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984))). The presumption "avoid[s] judicial policymaking or de facto judicial legislation in determining just how much of the remainder of a statute should be invalidated." *Am. Ass'n of Political Consultants*, 140 S. Ct. at 2351.

This presumption makes sense for at least two reasons. For one, when properly applied, it comports with Article III's case-or-controversy requirement, providing plaintiffs relief only as to the challenged provisions that (at least in other cases) do them harm. *See Ayotte*, 546 U.S. at 329 (Because "it is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another," the "normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact" (cleaned up and citations omitted)); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (Standing "is not dispensed in gross.").

For another, the presumption comports with the judicial power, which is "to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), not to re-write laws passed by the legislature in a more favorable way. "[S]uch editorial freedom … belongs to the Legislature, not the Judiciary." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010). Thus, courts have "the negative power to disregard an unconstitutional enactment," *Massachusetts v. Mellon*, 262 U.S. 447,

488 (1923), and may enjoin enforcement of unconstitutional provisions, *see Ex parte Young*, 209 U.S. 123, 155-56 (1908), but in so doing they do not "make even an unconstitutional statute disappear," *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) (citation omitted). *See also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021) (plurality op.) ("In a case that presents a conflict between the Constitution and a statute, we give 'full effect' to the Constitution and to whatever portions of the statute are 'not repugnant' to the Constitution, effectively severing the unconstitutional portion of the statute." (citation omitted)).

When applied to the case at hand, these principles illuminate the various errors committed by the district court. First, and as discussed above, the court paid scant attention to the General Assembly's intent in Section 7 of the Act that—in the Supreme Court's more colorful language—it "would prefer" the court to "use a scalpel rather than a bulldozer in curing" any constitutional defect in the Act. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2210 (2020); *see* Act § 7. This was error.

Second, the court invalidated provisions of the Act *that no one challenged*. Plaintiffs challenged just one provision of the Act in their Amended Complaint: the regulation generally prohibiting any person from "perform[ing], induc[ing], or attempt[ing] to perform or induce an abortion" where the "fetal heartbeat has been detected." App. 26. Though they asked the court to declare the entire Act "unconstitutional under the Fourteenth Amendment to the U.S. Constitution," App. 34, they

did not directly challenge any other provision of the Act. Nor did they allege that any other provision harmed them (or the women they purported to represent), much less that it harmed them in an unconstitutional manner. *Cf. In re Gee*, 941 F.3d 153, 161-65 (5th Cir. 2019) (noting that Article III does not allow plaintiffs to challenge "legal provisions that do not appear to do anything," provisions that "appear incapable of injuring" the plaintiffs, provisions that "theoretically *could* apply to [the plaintiffs]—but without any allegation that they *would*," or provisions that "benefit rather than harm women seeking abortions"). Yet the court below enjoined the entirety of the Act all the same. This also was error.

Third, the district court dispensed standing in gross, enjoining the State Defendants from enforcing the Act's private cause of action even though, by definition, the cause of action is not enforced by the State Defendants. Plaintiffs' injury—if any—is instead "'fairly traceable' only to the private civil litigants who may seek damages under the Act and thereby enforce the statute." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). That also means it is "not likely that [such] injury would be 'redressed by a favorable decision'" against Defendants. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)); *see Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) ("[P]laintiffs lack standing to contest the statutes authorizing private rights of action, not only because the defendants cannot cause

the plaintiffs injury by enforcing the private-action statutes, but also because any potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against the public prosecutors."); *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc) (holding that state officials in their official capacity "cannot prevent purely private litigants from filing and prosecuting a cause of action"). Yet again, the district court could not be bothered by such Article III trivialities. That was error.

Fourth, the district court found that the Act's provisions were "so intertwined" and "mutually dependent" "so as to preclude severability." App. 299. Why? Because provisions other than the challenged one "reference[] the words 'fetal heartbeat' as it is defined in Section 44-41-610(3), or other provisions of Section 3." *Id.* This reasoning requires a bit of unpacking. Section 44-41-610 is the Act's definitions section, subsection (3) of which defines the phrase "fetal heartbeat." Section 44-41-680 is the challenged provision, which uses the defined phrase "fetal heartbeat." It appears, then, that the district court treated severability as a form of disease tracking: that the definitions section became tainted because it included a term used by the challenged provision, and that the other provisions of the Act became tainted in turn as they referenced terms from the now-defunct definitions section. *See* App. 298-99. What no one told the district court, apparently, is that what may work for Covid containment may not work for severability analysis.

As the Supreme Court has explained, mere "references" do not make the Act's provisions intertwined "in any relevant sense—*i.e.*, in the sense of being so interdependent that the remainder of the statute cannot function effectively without the invalidated provision, or in the sense that the invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other provisions of the statute." *Leavitt*, 518 U.S. at 141. Of course, the Act "does incorporate by reference" various provisions and definitions "instead of repeating them verbatim, but this drafting device can hardly be thought to establish such 'interdependence' that" one part of the Act "becomes 'purposeless' when [another part] is unenforceable." *Id.* at 142. "To the contrary," the unchallenged provisions of the Act "set[] out in straightforward and self-operative fashion" their various patient disclosure and reporting requirements and the cause of action afforded to pregnant women who suffer at the hands of the abortion providers who now purport to sue on their behalf.

Moreover, the district court's contact-tracing approach to severability fundamentally misunderstands the judicial task. Because "federal courts have no authority to erase a duly enacted law from the statute books," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (citation omitted), an unchallenged provision should not be enjoined simply because it references part of the Act that is enjoined—much less because it references a definition section that the challenged provision

also uses. The enjoined part of the Act still exists, even if it cannot be enforced; the injunction does not "blot[] out" the challenged provision, so references to it remain valid. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 937 (2018). Accordingly, what matters is whether the unchallenged provisions can still lawfully function if the challenged provision is *enjoined*—not if it doesn't exist, and not if (as the district court reasoned) every other provision that in any way touches, references, or is referenced by the challenged provision doesn't exist. As demonstrated above, the Act's other provisions—its requirements to make the sonogram and the audio of the fetal heartbeat available to patients; its mandate to providers to disclose the statistical viability of the fetus; its cause of action for women on whom an abortion was unlawfully performed; and its reporting requirements—all function whether or not the challenged provision can be enforced. The district court's holding otherwise was error and should be reversed.

CONCLUSION

This Court should reverse the decision below.

Dated: July 13, 2021

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

A. Barrett Bowdre
Deputy Solicitor General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Additional counsel for amici curiae listed on next page

ADDITIONAL COUNSEL

TREG R. TAYLOR
Attorney General of Alaska

LESLIE RUTLEDGE
Attorney General of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia

LAWRENCE G. WASDEN
Attorney General of Idaho

THEODORE E. ROKITA
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

DANIEL CAMERON
Attorney General of Kentucky

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

DOUG PETERSON
Attorney General of Nebraska

WAYNE STENEHJEM
Attorney General of North Dakota

DAVE YOST
Attorney General of Ohio

DAWN CASH
Acting Attorney General of Oklahoma

HERBERT SLATERY III
Attorney General of Tennessee

KEN PAXTON
Attorney General of Texas

SEAN D. REYES
Attorney General of Utah

PATRICK MORRISEY
Attorney General of West Virginia

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i). This brief contains 5,175 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, pursuant to Fed. R. App. P. 32(g)(1), this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: July 13, 2021

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System, which will serve an electronic copy on all registered counsel of record.

Dated: July 13, 2021

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for Amici Curiae