Case No. 20-5969

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, *et al.,*	:	
Plaintiffs-Appellees,	:	On Appeal from the United States District Court for the Middle District of Tennessee
v.	:	District Court Case No. 3:20-cv-00501
HERBERT H. SLATERY, III, *et al.,*	:	
Defendants-Appellants.	:	

BRIEF OF *AMICI CURIAE* KENTUCKY AND OHIO IN SUPPORT OF THE DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

STATEMENT OF *AMICI* INTEREST

Kentucky and Ohio, like Tennessee, have laws that prohibit doctors from knowingly performing eugenic abortions. *See* Ky. Rev. Stat. Ann. §311.731; Ohio Rev. Code §2919.10. These laws serve important state interests: eradicating discrimination based on genetic traits; protecting patients "from coercive healthcare practices that encourage" trait-selective abortions; and preserving "the integrity and ethics of the medical profession by preventing doctors from becoming witting participants" in eugenic abortions. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021) (*en banc*). Barely five months ago, this Court rejected a due-process challenge to Ohio's law. *Id.* Nonetheless, the panel majority in this case held that Tennessee's "nearly identical" law violated the Due Process Clause. Op.63 (Thapar, J., concurring in part and dissenting in part). The panel majority rested its ruling on a theory so farfetched that no party or judge in Ohio's case ever bothered to raise it. The majority's decision is wrong. It casts doubt on Ohio and Kentucky laws regarding eugenic abortions. And it calls into question the constitutionality of the many criminal laws that require the government to prove that the defendant knew "the motivations underlying the action of *another* person." Op.25 (majority) (quotation omitted). For these reasons, Kentucky and Ohio urge the Court to rehear this case *en banc* and correct the panel's mistaken ruling.

ARGUMENT

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

In April of this year, the *en banc* Court rejected a constitutional challenge to Ohio's Anti-Discrimination Law, Ohio Rev. Code §2919.10(B). *See Preterm*, 994 F.3d 512. That law prohibits doctors from performing abortions *if* they have "knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of" a Down syndrome diagnosis or indication. Ohio Rev. Code §2919.10(B). The plaintiffs in *Preterm* argued that the law violated the Constitution. More accurately, they argued that the law ran afoul of Supreme Court decisions that interpret the Constitution as conferring a right to an abortion. The *en banc* Court rejected that argument. It acknowledged the binding cases that forbid the States from prohibiting pre-viability elective abortions. 994 F.3d at 523–24. But Ohio's law, the Court said, does not run afoul of the rule these cases announce. Why? Because of the law's "knowledge" element. In the *en banc* majority's words, the law forbids a doctor from performing an abortion only if he "*knows* the woman's specific reason and that her reason is: the forthcoming child will have Down syndrome and, because of that, she does not want it." *Id.* at 521–22. Because the law leaves women free to obtain an abortion from a

doctor who lacks the requisite knowledge, it does "not prohibit" anyone "from choosing or obtaining an abortion." *Id.* at 521.

No one in *Preterm* suggested that Ohio's law, by making liability turn on knowledge of a patient's reasons for obtaining an abortion, was unconstitutionally vague. That includes the judges who wrote or joined the *en banc* dissenting opinion raising what they regarded as potential First Amendment problems with Ohio's law. *See id.*, at 550–51 (Cole, C.J., dissenting). No one raised the argument because it is wrong. A law is unconstitutionally vague only if it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citation omitted). While it might be hard to *prove* what a physician subjectively knows about a patient's reason for aborting, everyone understands what it means to "know" another person's reasons. And far from being "standardless," laws keyed to another's knowledge are commonplace and applied with ease in courts across the country. *See* Op. 69 (Thapar, J., concurring in part and dissenting in part); *see also below* 4–5.

The panel majority effectively overruled *Preterm*. Whereas *Preterm* held that the knowledge requirement in Ohio's Anti-Discrimination Law *saved* the law from being held unconstitutional, the panel majority held that the nearly identical knowledge requirement in Tennessee's anti-discrimination law made the law

unconstitutional. In particular, the majority said that the knowledge requirement made the provision unconstitutionally vague. In other words, the same element that led the *en banc* Court to uphold Ohio's law in *Preterm* led the panel majority to strike down Tennessee's law in this case.

Panels have "no authority" to "functionally overrule" binding precedent. *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020). The full Court should take this case *en banc* to reiterate and preserve that rule.

2. In addition to functionally overruling *Preterm*, the panel majority's decision warps the vagueness doctrine in a way that will, if allowed to stand, cast doubt on innumerable criminal laws and criminal convictions.

As best the *amici* States can tell, the panel majority's vagueness analysis rests on three of the law's features. *First*, the majority stressed that Tennessee's law requires proof that a doctor "know[s] the motivations underlying the action of *another* person." Op.25 (quotation omitted). But again, while it might be hard to *prove* knowledge in this context, there is nothing vague about the law's meaning—no one struggles to understand what "conduct" the law "punishes." *Johnson*, 576 U.S. at 595. And indeed, laws that prohibit doing certain things with knowledge of another person's motives are commonplace. Consider aiding-and-abetting law. To win a conviction for aiding drug distribution, the prosecution must prove that the

defendant knew another person "possessed [drugs] *with the intent to distribute*." *United States v. Bailey*, 61 F. App'x 233, 237 (6th Cir. 2003) (emphasis added). Needing to prove that defendants have the requisite knowledge makes aiding-and-abetting prosecutions hard to win. But it does not make aiding-and-abetting laws unconstitutionally vague. The panel majority's opinion casts doubt on the constitutionality of these laws, however, along with numerous other laws that require the government to prove knowledge of another's state of mind. *See, e.g.*, Ky. Rev. Stat. §514.050; Ky. Rev. Stat. §526.040.

The panel majority's analysis of the "knowledge" element, in addition to losing sight of the vagueness doctrine's scope, overlooks the doctrine's function. The majority seemed to think that the difficulty of proving knowledge under Tennessee's law made the statute vague. Op.25. The problem with vague laws, however, is that they make it *too easy* to win a conviction; they empower "prosecutors … to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). So the Tennessee law's knowledge requirement, by making it harder to win a conviction, advances the purposes the vagueness doctrine exists to serve.

Second, the panel majority expressed confusion about the meaning of the phrase "because of." Op.25–26. It is impossible to understand why. "Because of" often "incorporates the simple and traditional standard of but-for causation."

Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739 (2020) (internal quotation marks omitted); *see also University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009). "Scores of federal and state statutes," including "hundreds of criminal laws," use this very standard of causation. Op.37 (Thapar, J., concurring in part and dissenting in part) (capitalization altered). Here, Tennessee argued that its statute used "because of" in this traditional sense. And the panel majority *accepted* that interpretation. Op.25. Nonetheless, it said that this well-understood, often-used phrase contributed to the vagueness problem. The majority suggested that the law is vague because the doctor must decide whether he (1) "know[s] the motivations underlying the action of another person," (2) "while simultaneously evaluating whether the decision is 'because of' that subjective knowledge." *Id.* (italics and quotation marks omitted) The first of these points—knowledge of the patient's subjective motivation—is not a problem for the reasons already addressed. And the second point is just a restatement of the first: to know a patient's subjective motive for acting *is* to know whether the patient acted on that motive.

Third, the panel majority mistakenly understood the vagueness doctrine as turning on questions of fact. According to the majority, "the district court made the factual determination" that doctors do not know "whether 'knowing' that an

abortion is sought 'because of' a banned reason means that the reason must 'be the only reason, the main reason, one of many reasons, or simply a factor that the individual considered.'" Op.24. "Determining the meaning of a statute or regulation, of course, presents a classic legal question." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring). And many cases treat the meaning of the statutory phrase "because of" as a question of law. *See, e.g.*, *Bostock*, 140 S. Ct. at 1739–43 (civil rights law); *United States v. Miller*, 767 F.3d 585, 594 (6th Cir. 2014) (hate-crime law); *City of Gordon v. Ruse*, 268 Neb. 686, 691 (2004) (cost statute). Courts may not manufacture void-for-vagueness concerns by letting self-imposed confusion about a law's meaning substitute for the judicial obligation to say what the law is.

All told, the panel majority's vagueness doctrine is not the Supreme Court's vagueness doctrine. If the majority had applied the traditional test—if it had asked whether Tennessee's law "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement," *Johnson*, 576 U.S. at 595—it would have had no choice but to uphold that law. Instead of applying that test, the majority crafted a new test—one that casts doubt on innumerable state and federal laws. A decision with such far-reaching implications deserves the full Court's attention.

3. Most troubling of all, the panel's decision threatens to kneecap the States' efforts at "preventing abortion from becoming a tool of modern-day eugenics." *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring); *see also Preterm*, 994 F.3d at 538–39 (Griffin, J., concurring); *id.* at 541 (Bush, J., concurring). There is no longer any doubt that a troubling number of medical professionals charged with caring for expectant mothers will pressure their patients to abort if the unborn child exhibits traits—like Down syndrome—that those professionals naïvely regard as undesirable. *Id.* at 518 (emphasis added). And in America, *two-thirds* of children diagnosed with Down syndrome in utero are aborted. *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring). How is it that "we—civilized people—are retreating to the haven of our Constitution to justify" this? *Richmond Med. Ctr. For Women v. Herring*, 570 F.3d 165, 183 (4th Cir. 2009) (Wilkinson, J., concurring). "Surely centuries hence, people will look back on this … practice done in the name of fundamental law by a society of high achievement" and "shudder." *Id.*

The panel's decision limits the means by which the American people—the inhabitants of the greatest democracy in the history of the world—may address a pressing moral and societal issue through democratic means. And it does so in a way that is directly at odds with this Court's own precedent. If all that does not justify *en*

banc review, nothing does. The People deserve to have a say on this immensely important issue. *See Preterm*, 994 F.3d at 535–36 (Sutton, J., concurring).

CONCLUSION

The Court should review this case *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume for an *amicus* brief supporting an *en banc* Petitioner and contains 1,881 words. *See* Fed. R. App. P. 32(a)(7)(B)(i), 29(a)(5).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2021, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
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