THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2023-CP-40-002745

APPELLATE CASE NO. 2023-000856

PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and its physicians and staff; KATHERINE FARRIS, M.D., on behalf of herself and her patients; GREENVILLE WOMEN'S CLINIC, on behalf of itself, its patients, and its physicians and staff; and TERRY L. BUFFKIN, M.D., on behalf of himself and his patients, Respondents,

v.

STATE OF SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; STEPHEN I. SCHABEL, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; RONALD JANUCHOWSKI, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; DION FRANGA, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in his official capacity as a Member of the South Carolina Board of Medical Examiners; THERESA MILLS-FLOYD, in her official capacity as a Member of the South Carolina Board of Medical Examiners; JENNIFER R. ROOT, in her official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SAMUEL H. McNUTT, in his official capacity as Chairperson of the South Carolina Board of Nursing; SALLIE BETH TODD, in her official capacity as Vice Chairperson of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as Secretary of the South Carolina Board of Nursing; JONELLA DAVIS, in her official capacity as a Member of the South Carolina Board of Nursing; KELLI GARBER, in her official capacity as a Member of the South Carolina Board of Nursing; LINDSEY K. MITCHAM, in her official capacity as a Member of the South Carolina Board of Nursing; REBECCA MORRISON, in her official capacity as a Member of the South Carolina Board of

Nursing; KAY SWISHER, in her official capacity as a Member of the South Carolina Board of Nursing; ROBERT J. WOLFF, in his official capacity as a Member of the South Carolina Board of Nursing; SCARLETT A. WILSON, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and WILLIAM WALTER WILKINS III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit, Defendants,

and

HENRY McMASTER, in his official capacity as Governor of the State of South Carolina; G. MURRELL SMITH, JR., in his official capacity as Speaker of the South Carolina House of Representatives; and THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate, Intervenors-Defendants,

Of whom HENRY McMASTER, in his official capacity as Governor of the State of South Carolina; G. MURRELL SMITH, JR., in his official capacity as Speaker of the South Carolina House of Representatives; THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate; STATE OF SOUTH CAROLINA; and ALAN WILSON, in his official capacity as Attorney General of South Carolina, are Appellants.

RESPONDENTS' OPPOSITION TO APPELLANTS' EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS

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Five months ago today, this Court struck down a ban on abortion after approximately six weeks of pregnancy as an unconstitutional violation of the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. *See generally Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023), *reh'g denied* (Feb. 8, 2023) (hereinafter "*Planned Parenthood I*"). Despite this, the General Assembly passed, and Governor Henry McMaster signed, a law nearly identical to the one that this Court found unconstitutional. Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) (hereinafter "S.B. 474" or the "Act"). Respondents, the last remaining outpatient abortion providers in South Carolina, immediately filed suit and sought emergency relief to enjoin enforcement of S.B. 474 and preserve the status quo as it has existed for nearly half a century. The Court of Common Pleas for the Fifth Judicial Circuit entered a preliminary injunction on May 26, 2023. Order Granting Prelim. Inj., *Planned Parenthood S. Atl. v. State*, No. 2023-CP-40-02745 (5th Jud. Cir. May 26, 2023) (the "PI Order"), App'x to Emergency Mot. to Transfer and Pet. for Writ of Supersedeas ("Pet. App.") at 1–7.

The State of South Carolina, Governor McMaster, Attorney General Alan Wilson, Speaker of the South Carolina House of Representatives G. Murrell Smith, Jr., and President of the South Carolina Senate Thomas C. Alexander ("Appellants") now seek to circumvent appellate procedure by requesting a writ of supersedeas from this Court to stay the injunction entered by the Circuit Court. They further purport to appeal the case directly to this Court and request that the Court expedite briefing or take this matter in its original jurisdiction—though they have filed no such petition. This Court should deny Appellants' requests, which have been made in blatant disregard of the South Carolina Code as well as the Appellate Court Rules. Respondents further request that this Court refuse the State's appeal for lack of jurisdiction and transfer to the Court of Appeals consistent with the South Carolina Appellate Court Rules.

If the Court determines to retain this appeal, the Court should order further briefing to allow Respondents to present fully why this Court should deny Appellants' request for a writ of supersedeas. This matter is controlled by this Court's own precedent because *Planned Parenthood I* squarely addressed the issues raised here, finding that a ban on abortion after approximately six weeks of pregnancy is an unconstitutional invasion of South Carolinians' right to privacy. The injunction entered by the Circuit Court maintains the decades-long status quo regarding access to abortion in South Carolina and prevents the irreparable harm that would occur to Respondents and their patients if that status quo is disregarded and the Act is allowed to take effect, outlawing the vast majority of abortions in South Carolina.

FACTUAL AND PROCEDURAL BACKGROUND

I. S.B. 474'S REQUIREMENTS AND IMPACTS ON RESPONDENTS AND PATIENTS

S.B. 474 imposes nearly identical restrictions on abortion in South Carolina as Senate Bill 1, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) ("S.B. 1"), both banning abortion after roughly six weeks of pregnancy as measured from the first day of the last menstrual period ("LMP"). S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-630(B)) (the "Six-Week Ban"). Like S.B. 1, the Six-Week Ban provides that "no person shall perform or induce an abortion" where a "fetal heartbeat has been detected." *Id.*; *see also* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(A)). While the term "fetal heartbeat" is medically inaccurate, embryonic cardiac activity may be detected by transvaginal ultrasound as early as six weeks LMP (and sometimes sooner). Decl. of Katherine Farris, M.D. in Supp. of Pls.' Emergency Mot. for a TRO ("Farris Decl.") ¶¶ 7–8, 25, Pet. App. at 105–06, 109–10. S.B. 474 also includes ultrasound, recordkeeping, reporting, and written notice requirements substantially similar to those imposed by S.B. 1 that are closely intertwined with the operation of the Six-Week Ban. *See, e.g.*, S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-630, 44-41-640(B)–(C), 44-41-650(B), 44-41-660(B)).

Like S.B. 1, the Six-Week Ban contains only a few narrow exceptions: (1) to save the life of the pregnant patient or prevent certain types of substantial physical impairment of a major bodily function (the "Death or Substantial Injury Exception") but expressly excluding any psychological conditions, emotional conditions, or suicidality of the pregnant person; (2) in cases of a fetal diagnosis that is "incompatible" with sustained life after birth (the "Fatal Fetal Anomaly Exception"); and (3) where the pregnancy is the result of rape or incest and is reported to law enforcement (the "Reported Rape Exception"). S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-610(9) (defining "[m]edical emergency"), 44-41-650, 44-41-660; adding S.C. Code Ann. §§ 44-41-640(A)–(C)); *see also* S.B. 1, § 3 (adding S.C. Code Ann. §§ 44-41-690(A), 44-41-660(A) (permitting abortions where there is a "medical emergency"), 44-41-610(8) (defining "medical emergency"), 44-41-680(B)(4) (fetal anomaly exception), 44-41-680(C) (reported rape exception)); S.C. Code Ann. § 44-41-430 (defining "[f]etal anomaly" as incorporated into S.B. 1, which is identical to definition of "[f]atal fetal anomaly" in S.B. 474). Notably, S.B. 474 is an even more egregious intrusion into the right to privacy than S.B. 1 because the time limit for abortions under the Reported Rape Exception is only 12 weeks LMP under S.B. 474 as compared to 22 weeks LMP under S.B. 1. *Compare* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-650(A)) *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(B)).

Anyone violating the Six-Week Ban is subject to severe penalties, including a felony offense that carries a $10,000 criminal fine and up to two years in prison, revocation of professional licensure, and civil damages. S.B. 474, § 2 (adding S.C. Code Ann. §§ 44-41-630(B), 44-41-640(B), 44-41-650(C), 44-41-660(C); amending S.C. Code Ann. §§ 44-41-680, 44-41-690)).

If the Act were now permitted to take effect, Respondents and their staff would be forced to turn away South Carolinians in need of abortions who have a "fetal heartbeat" as defined in the Act, except for those who meet one of the very narrow exceptions. Farris Decl. ¶¶ 13, 51–54, Pet.

App. at 107, 118–19; Decl. of Terry L. Buffkin, M.D. in Supp. of Pls.' Emergency Mot. for a TRO ("Buffkin Decl.") ¶¶ 10–11, 31, Pet. App. at 142, 146–47. Many patients do not know they are pregnant by this time, and this would bar the vast majority of abortions in South Carolina. Farris Decl. ¶¶ 32–37, Pet. App. at 112–13; Buffkin Decl. ¶¶ 23–28, Pet. App. at 145–46; *see also Planned Parenthood I*, 438 S.C. at 195; 882 S.E.2d at 774 ("This is before many women . . . even know they are pregnant."). That is because someone with a regular menstrual cycle would already be four weeks LMP at the time they miss their period, leaving them only two weeks to access abortion, and because many patients do not have regular menstrual cycles, leaving them even less, and in many cases no, time to access abortion. Farris Decl. ¶¶ 33–38, 53, Pet. App. at 112–13, 118–19; *see also Planned Parenthood I*, 438 S.C. at 276, 882 S.E.2d at 817–18 (Few, J., concurring in the judgment) (explaining that S.B. 1 actually barred abortion four weeks after fertilization). For the vast majority of patients, therefore, the only option would be to remain pregnant until they are able to travel out of state to access critical, time-sensitive abortion care, at great cost to themselves and their families; to carry to term and give birth against their will; or to attempt to self-manage their abortions outside the medical system. *See, e.g.*, Farris Decl. ¶¶ 14, 55, 75, Pet. App. at 107, 119, 128–29.

II. PROCEDURAL BACKGROUND

S.B. 474 took immediate effect when Governor McMaster signed it into law on the morning of May 25, 2023. Respondents filed suit in the Court of Common Pleas for the Fifth Judicial Circuit immediately thereafter and sought a temporary restraining order to enjoin the enforcement of S.B. 474. Also on May 25, Governor McMaster, President Alexander, and Speaker Smith sought to intervene, to which Respondents consented, and the Governor opposed Respondents' motion for a temporary restraining order. Judge Clifton Newman held a hearing on May 26 and entered a preliminary injunction the same day, finding that Respondents had "stated

sufficient likelihood of success" based on *Planned Parenthood I* and that without relief, "[Respondents] and their patients seeking abortion would be irreparably harmed." PI Order ¶¶ 6, 8, Pet. App. at 5.

Following entry of the PI Order, the State of South Carolina, Governor McMaster, Attorney General Wilson, President Alexander, and Speaker Smith filed the instant Notice of Appeal and Emergency Petition for Writ of Supersedeas with this Court, requesting an expedited briefing schedule, or, in the alternative, to transfer the case to the Supreme Court's original jurisdiction docket. To date, Appellants have not filed anything in the Court of Appeals.

ARGUMENT

I. THIS APPEAL IS NOT PROPERLY BEFORE THIS COURT.

While interlocutory orders granting an injunction are appealable under the South Carolina Appellate Court Rules, Appellants flouted proper procedure in appealing directly to this Court. "In all cases within the jurisdiction of the [Court of Appeals] . . . , the notice of appeal *must be filed with the court of appeals* in the manner provided by the South Carolina Appellate Court Rules." S.C. Code Ann. § 14-8-260 (emphasis added). Appeals of orders from circuit courts, such as the Court of Common Pleas for the Fifth Judicial Circuit, are within the jurisdiction of the Court of Appeals. *Id.* § 14-200(a). And while there are some exceptions to this general jurisdictional rule for an appeal as "of right directly to the Supreme Court," an appeal of an injunction does not fall within any of these exceptions. *Id.* § 14-8-200(b).[1]

To date, Appellants have failed to file a notice of appeal, nor any of the required accompanying documents, with the Court of Appeals in accordance with Appellate Court Rule 203. *See* Rule 203(d), SCACR (explaining that in cases other than enumerated exceptions, which

[1] While this case involves a challenge to the constitutionality of a state law, there is no final judgment. *See* Rule 203(d)(1)(A)(ii), SCACR.

this case does not meet, "notice of appeal shall be filed with the clerk of the lower court and the Clerk of the Court of Appeals"). Appellants' filing of a notice of appeal with this Court purportedly pursuant to S.C. Code Ann. § 14-3-330(4) cannot meet this mandatory statutory requirement. *See* Notice of Appeal; Emergency Pet. for Writ of Supersedeas ("Br.") at 8.[2]

Although there are procedures for this Court to certify a case for review before disposition of an appeal by the Court of Appeals, those procedures have not been followed here. In addition to the exceptions identified in S.C. Code Ann. § 14-8-200(a), "[i]n any case *pending before the court of appeals*, the Supreme Court may in its discretion, on motion of any party to the case, on request by the court of appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the court of appeals." S.C. Code Ann. § 14-8-210(b) (emphasis added); Rule 204(b), SCACR. "Certification is appropriate where the case involves an issue of significant public interest or a legal principle of major importance, or in other cases the court considers appropriate." S.C. Code Ann. § 14-8-210(b); *accord* Rule 204(b), SCACR.[3]

[2] While S.C. Code Ann. § 14-3-330(4) provides that "[t]he Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal . . . [a]n interlocutory order or decree in a court of common pleas granting . . . an injunction," this does not mean that a party appealing a preliminary injunction can bypass the Court of Appeals. This statute was last updated in 1991, shortly after the Court of Appeals began operating, before Supreme Court review became discretionary, and when the Court of Appeals still "received all its cases on assignment from the Supreme Court, where appeals continued to be filed and docketed." *Guide to the Courts, Chapter 4 - South Carolina Court of Appeals*, S.C. Bar, https://www.scbar.org/public/students-educators/supreme-court-institute/guide-to-the-courts/guide-to-the-courts-chapter-4/ (last visited June 5, 2023); The Hon. Jasper M. Cureton, *Coming of Age: The South Carolina Court of Appeals*, S.C. Jud. Branch, https://www.sccourts.org/appeals/history.cfm (last visited June 5, 2023). The act amending S.C. Code Ann. § 14-3-330 in 1991 also provided that "[i]n event of conflict between any provision of the South Carolina Appellate Court Rules and any other statutory provisions as to appellate procedure . . . the provision of the rules shall control." Senate Bill 843, 109th Gen. Assemb., Reg. Sess. (S.C. 1991), § 5. Thus, Rule 203(d), which provides that an appeal must first be filed in the Court of Appeals, controls.

[3] For the reasons explained below, *infra* at 11–12, while an abortion ban is undoubtedly a matter of "significant public interest," the minor differences between S.B. 474 and S.B. 1 are not. Moreover, because this Court addressed the constitutionality of a ban on abortion after

However, for such procedures to apply, there must be a case already pending before the Court of Appeals. Here, there is none.

Accordingly, this case is not properly before this Court. It should, therefore, be dismissed, or at a minimum, transferred to the Court of Appeals. *See* S.C. Code Ann. § 14-8-260 ("In the event the Supreme Court determines that a notice of appeal should have been filed with the court of appeals, it shall issue an order transferring the case to the court of appeals."); Rule 204(a), SCACR (similar).

II. THE PETITION FOR WRIT OF SUPERSEDEAS IS NOT PROPERLY BEFORE THE SUPREME COURT.

In addition to the State's attempts to bypass the Court of Appeals, Appellants failed to properly petition for a writ of supersedeas to stay the Circuit Court's injunction pending appeal. Rule 241(d)(3), SCACR. First, just as this Court does not have jurisdiction over this appeal, it does not have jurisdiction over the petition for a writ of supersedeas. *See* Rule 241(d)(2), SCACR ("After the lower court or administrative tribunal has ruled, any party may petition the appellate court *where the appeal is pending* or an individual judge or justice for review of this order."); *cf. State v. Cooper*, 342 S.C. 389, 398, 536 S.E.2d 870, 875–76 (2000) (discussing authority of Court of Appeals to rule on issues related to a stay). And even if this Court had jurisdiction over the writ, a party seeking a writ of supersedeas must meet the requirements of Rule 241(d)(3)–(5), SCACR.

Rule 241(d)(3), SCACR, provides that "[a] person seeking an order . . . granting a writ of supersedeas must file a written petition verified by the client. . . a certified copy of the order . . . and a copy of the notice of appeal with its proof of service." Here, in contravention of the Appellate Court Rules, Appellants ask this Court for a writ of supersedeas without a verified written petition. It is this Court's "bounden duty . . . to enforce the mandatory requirements which the General

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approximately six weeks of pregnancy just five months ago, this case does not involve "a legal principle of major importance."

Assembly has prescribed as conditions upon which the privilege of appeal may be exercised by a party litigant." *Rylee v. Marett*, 121 S.C. 366, 113 S.E. 483, 487 (1922). As Appellants have not complied with this requirement of appellate procedure, the Court should deny this writ outright, rather than allow the State to proceed as if it had properly petitioned.

Even if jurisdiction lay before this court and Appellants had properly moved for a writ of supersedeas, a stay of the preliminary injunction is not warranted here. Appellants have not shown that the Circuit Court's injunction would cause "an irreparable injury or the miscarriage of justice." Br. at 9 (quoting *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912)). The injunction does not create a miscarriage of justice, as Appellants are unlikely to succeed on the merits. *See infra* at 12–15. Appellants will not suffer irreparable harm by the preservation of the status quo, while Respondents will face immediate, irreparable harm if the preliminary injunction is stayed. Pls.' Mem. in Supp. of Their Emergency Mot. for a TRO, Pet. App. at 91–100; PI Order ¶¶ 6, 9–10, Pet. App. at 5–6. This Court recognized the value in preserving the status quo in blocking enforcement of S.B. 1 during the pendency of *Planned Parenthood I*. *Smith v. Planned Parenthood S. Atl.*, No. 2022-001005, 2022 WL 3478531 (S.C. Aug. 17, 2022); *cf. Matter of Decker*, 322 S.C. 212, 214, 471 S.E.2d 459, 461 (1995) (A writ of supersedeas staying appellant's incarceration while appeal proceeded was appropriate where appellant's defenses presented novel constitutional and statutory questions. Here, no such novelty exists as the Supreme Court has already addressed the constitutional questions in *Planned Parenthood I*.). Appellants argue that the State would be harmed by its inability to enforce the statute during the pendency of the lower court proceedings because the State has a "profound interest in seeing [] law . . . respected and enforced." Br. at 15. But this argument, taken to its logical conclusion, would mean that *any* preliminary injunction blocking enforcement of a state statute should be immediately stayed, rendering such relief meaningless.

III. THE PETITION FOR ORIGINAL ACTION IS NOT PROPERLY BEFORE THE SUPREME COURT, AND THERE ARE NO GROUNDS WARRANTING ORIGINAL JURISDICTION.

Appellants request this Court to, in the alternative, accept this matter in its original jurisdiction under Rule 245, SCACR. Br. at 20. But Appellants have also failed to follow the procedural requirements for petition for original jurisdiction set forth in Rule 245(c), SCACR. They have not filed a petition, "a complaint setting forth the claim for relief," or "a notice advising each respondent he has twenty[] days from the date of service to file a return to the petition." Rule 245(c), SCACR. This Court should decline to accept this matter in its original jurisdiction due to these procedural defects alone.

Even if this Court were to overlook Appellants' failure to follow proper procedure, an exercise of the Court's original jurisdiction is not warranted here. This Court will consider matters in its original jurisdiction when they cannot be determined by a lower court in the first instance without material prejudice to the parties. Rule 245(a), SCACR. Absent material prejudice, original jurisdiction is appropriate "[o]nly when there is an *extraordinary* reason such as questions of significant public interest or an emergency." *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (emphasis added); S.C. Code Ann. § 14-8-210(b). Without "grounds warranting" original jurisdiction, this Court declines to take original actions, as it "is and should primarily be concerned with appellate matters." *Mod. Fin. Co. v. Hicks*, 235 S.C. 212, 215, 110 S.E.2d 859, 860 (1959). Appellants do not—and cannot—show that this matter is of significant public interest or an emergency.

First, the public interest involved in this "high-profile" case—namely, the question of whether banning abortion after approximately six weeks of pregnancy violates rights protected by the South Carolina Constitution—was addressed by this Court in *Planned Parenthood I* just five months ago. Unlike *Planned Parenthood I*, where this Court did grant original jurisdiction, this is

now not a novel issue. *See Smith v. Planned Parenthood S. Atl.*, 2022 WL 3478531. While abortion is undoubtedly a matter of public interest, this matter—to the extent it involves any new question at all—raises the narrower question of whether the minor semantic and technical differences between S.B. 1 and S.B. 474 merit a different result than *Planned Parenthood I*. Indeed, as the Circuit Court found, S.B. 474 is a "nearly identical law." PI Order ¶ 12, Pet. App. at 6.

Second, the Circuit Court's order granting a preliminary injunction simply does not present an emergency. There is no extraordinary reason suggesting "the need for prompt resolution." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014). Abortion after six weeks of pregnancy has been legal in South Carolina for decades, and this Court maintained that status quo in *Planned Parenthood I* (first by issuing a temporary injunction and then by declaring S.B. 1 unlawful). This case is simply not like those in which this Court has exercised its original jurisdiction to resolve novel issues or facts that require prompt action—such as matters involving the outcomes of democratic elections or time-sensitive questions of public health. *See, e.g.*, *Creswick v. Univ. of S.C.*, 434 S.C. 77, 79–80, 862 S.E.2d 706, 707 (2021) (accepting original jurisdiction to decide whether a proviso of a state appropriations bill prohibited a universal mask mandate at university in response to a COVID-19 pandemic that "must be decided before classes resume this week"); *Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 209–10, 863 S.E.2d 456, 458 (2021) (exercising original jurisdiction to consider legislation concerning facemasks in public schools during the COVID-19 pandemic); *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 270-71, 844 S.E.2d 390, 391 (2020) (accepting a case in original jurisdiction to determine whether South Carolina registered voters could vote by absentee ballot in the 2020 primary and general election because of COVID-19); *S.C. Pub. Int. Found. v. Lucas*, 416 S.C. 269, 271, 786 S.E.2d 124, 126 (2016) (finding that the public interest required exercise of original jurisdiction when the matter could impact the State's

ability to meet its time-sensitive fiscal obligations); *Mitchell v. Spartanburg Cnty. Legis. Delegation*, 385 S.C. 621, 622, 685 S.E.2d 812, 813 (2009) (finding an issue of great public interest presented by the question of whether a simple majority vote is appropriate for the election of officers to a legislative delegation in South Carolina). This case does not present similar grounds warranting this Court's exercise of original jurisdiction. This Court should, therefore, decline to hear this case in its original jurisdiction.

Finally, in *Planned Parenthood I*, this Court did not simply "accept" a transfer of the case directly from the Circuit Court. Although the Honorable Casey Manning stated his preference that the Supreme Court consider the issuance of an injunction of S.B. 1, all parties recognized that there is no procedure (appellate or civil) for the Circuit Court to *sua sponte* direct this Court to take up any matter. Instead, the parties filed procedurally proper competing petitions for original jurisdiction with proposed complaints to be duly considered by this Court. Furthermore, at that time, there was no controlling decision regarding a ban on abortion after approximately six weeks of pregnancy, so this Court agreed to hear the case in its original jurisdiction. In stark contrast, the Court has now ruled that such a ban is unconstitutional as a matter of law, and there is no reason, other than Appellants' purely politically-motivated ones, for this Court to revisit this exact decision.

Appellants are well aware that this Court takes up appellate matters on a discretionary basis as contrasted to a mandatory basis in the Court of Appeals. Appellants' attempt to game appellate procedure makes sense when one considers that this Court would be well within its authority to eventually deny certiorari from the Court of Appeals (had Appellants filed their Notice of Appeal there) because this case fits none of this Court's traditional criteria for granting certiorari.

IV. RESPONDENTS ARE LIKELY TO SUCCEED ON THE MERITS.

Should the Court determine that, despite Appellants' numerous procedural deficiencies, it will entertain their request for relief, Respondents reserve their right to respond to the substance of Appellants' Petition for Writ of Supersedeas as well as any Petition for Original Jurisdiction and respectfully request that the Court order additional briefing before ruling on the Petition. And despite Appellants' request for expedited briefing, such expedition is not warranted. The preliminary injunction entered below maintains the status quo that has existed for decades and which was recently kept in place by this Court. And the seriousness of the issues in this case deserves ample time for counsel and the Court to consider them.

In any event, Respondents are likely to succeed on the merits of their claims because *Planned Parenthood I* is dispositive of this case. Contrary to Appellants' claims, the Court's ruling in that case was clear: a ban on abortion after approximately six weeks of pregnancy, before many people even know they are pregnant, entirely forecloses the opportunity for most South Carolinians to get an abortion and thus unreasonably violates the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. *E.g.*, *Planned Parenthood I*, 438 S.C. at 217, 882 S.E.2d at 786 (Any gestational-age based restriction on abortion "must afford a woman sufficient time to determine she is pregnant and to take reasonable steps to terminate that pregnancy. Six weeks is, quite simply, not a reasonable period of time for these two things to occur, and therefore the Act violates our state Constitution's prohibition against unreasonable invasions of privacy."); *see also Planned Parenthood I*, 438 S.C. at 290, 882 S.E.2d at 825 (Few, J., concurring in the judgment) (calling a ban on abortion at six weeks of pregnancy "as a matter of law[,] . . . an unreasonable intrusion into a pregnant woman's right of privacy"). Because S.B. 474 is materially identical to S.B. 1, it too violates the right to privacy guaranteed by article I, section 10.

That someone *might hypothetically* know they are pregnant before six weeks LMP based on a pregnancy test does nothing to change the Supreme Court's analysis. Pregnancy tests work no differently now than they did in January when this Court invalidated S.B. 1 or in 2021 when S.B. 1 was passed. Respondents put forward ample evidence below as to the myriad reasons why most South Carolinians seeking abortions do not know they are pregnant at six weeks LMP. Farris Decl. ¶¶ 33–37, Pet. App. at 112–13; Buffkin Decl. ¶¶ 24–28, Pet. App. at 145–46. The *vast majority* of abortions in South Carolina occur after the limits that S.B. 474 seeks to impose. Farris Decl. ¶¶ 32, 51, Pet. App. at 112, 118; Buffkin Decl. ¶¶ 23, 29, Pet. App. at 145–46.

S.B. 474 does not cure S.B. 1's constitutional defects, contrary to Appellants' claims. First, the new law's finding that "[t]he State of South Carolina has a *compelling interest* from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child" does not change the constitutional analysis. S.B. 474, § 1(3) (emphasis added); *accord* S.B. 1, § 2(7) ("[T]he State of South Carolina has *legitimate interests* from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the unborn child who may be born[.]") (emphasis added). Nor does the fact that S.B. 474 defines "[u]nborn child" with almost identical language to how S.B.1 defined "[h]uman fetus." *Compare* S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-610(14)) (defining "[u]nborn child" as "an individual organism of the species homo sapiens from conception until live birth.") *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-610(6)) (defining "[h]uman fetus" as "an individual organism of the species homo sapiens from fertilization until live birth").[4] *Planned Parenthood I* made clear that S.B. 1 was unconstitutional because it failed to provide South Carolinians a *reasonable period* of time to get an abortion. S.B. 474 suffers from precisely the same defect.

[4] While S.B. 474 uses the term "conception" where S.B. 1 uses "fertilization," the Act equates the two, rendering any distinction meaningless. *See* S.B. 474, § 6 (amending S.C. Code Ann. § 44-41-10(g)) (defining "[c]onception").

Nor did the ruling in *Planned Parenthood I* turn on the issue of "informed consent" or any related legislative finding. Even if that now-eliminated legislative finding mattered, the principle of "informed consent" is baked into the Six-Week Ban itself, just like it was in S.B. 1. Notably, S.B. 474 provides that except as provided for in the Act's exceptions, "no person shall perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's fetal heartbeat has been detected in accordance with [South Carolina's existing informed consent statute]." S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)) (emphasis added); *see also* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-620) ("An abortion may not be performed or induced without the *voluntary and informed written consent* of the pregnant woman or, in the case of incapacity to consent, the voluntary and informed written consent of her court-appointed guardian, and without compliance with the provisions of [the existing informed consent statute]." (emphasis added)); Br. at 3–4 (noting centrality of informed consent provisions). S.B. 474 also amends South Carolina's pre-existing informed consent statute, S.C. Code Ann. § 44-41-330(A). *See* S.B. 474, § 10 (amending S.C. Code Ann. § 44-41-330(A)). The elimination of the legislative finding does not change that the Six-Week Ban—like S.B. 1—is interwoven with the State's requirements it believes are necessary to obtain informed consent when a patient chooses abortion.

Finally, the Court should not overrule *Planned Parenthood I* mere months after it issued its ruling. Even though the holding was presented in three opinions with varying reasoning, the Court's ruling in that case was clear: a ban on abortion after approximately six weeks of pregnancy does not pass constitutional muster.

CONCLUSION

For the foregoing procedural and substantive reasons, the Court should dismiss Appellants' appeal and decline to consider Appellants' request for a writ of supersedeas. In the alternative, the

Court should deny Appellants' petition for a writ of supersedeas or otherwise transfer the appeal and the request to the Court of Appeals. If this Court exercises jurisdiction over Appellants' requests, it should deny their request for an expedited briefing schedule and set a briefing schedule that gives Plaintiffs ample time to respond more fully on the merits.

Respectfully submitted,

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Dated: June 5, 2023