

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

**RECEIVED**

**Jun 23 2023**

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Honorable Clifton Newman, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2023-000856

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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 her 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 his 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 a Member of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as a Member 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

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, HENRY MCMASTER, in his official capacity as Governor of the State  
of South Carolina; ..... 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.

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**REPLY BRIEF OF THE SPEAKER OF THE HOUSE, THE PRESIDENT OF THE  
SENATE, THE STATE, THE ATTORNEY GENERAL AND SOLICITOR WILKINS**

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## INTRODUCTION

Although the subject matter of this litigation—abortion regulation—is controversial, the legal principles that govern this case are not. This case raises routine and basic principles of constitutional interpretation that have long been familiar to this Court. These principles include the following: the power of the General Assembly is plenary unless limited by some constitutional interpretation; this Court is bound to interpret the Constitution consistent with the intent of its framers and the people who adopted it; and all statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *See Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013); *Sheppard v. City of Orangeburg*, 314 S.C. 240, 243, 442 S.E.2d 601, 603 (1994).

A faithful application of these principles leads to only one conclusion—the 2023 Act is constitutional. In an attempt to escape this conclusion, Respondents lean heavily on this Court’s recent decision in *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023), arguing that the decision “squarely controls this case.” Br. of Respondents at 49.

While perhaps superficially appealing, this argument misses the mark because it reflects a misunderstanding or mischaracterization of both the 2023 Act and this Court’s decision in *Planned Parenthood South Atlantic*.

## ARGUMENT

### **I. Respondents mischaracterize the 2023 Act.**

As an initial matter, Respondents mischaracterize multiple aspects of the 2023 Act. First, Respondents incorrectly assert that the 2023 Act is “identical in all material respects” to the 2021 Act. Br. of Respondents at 1. As explained below, the General Assembly intentionally drafted the 2023 Act to remedy defects identified by this Court in *Planned Parenthood South Atlantic*.

Second, Respondents repeatedly characterize the 2023 Act as a six-week ban on abortion. Br. of Respondents at 3. As a technical and legal matter, this is an incorrect characterization. Subject to certain exceptions, the 2023 Act generally prohibits a person from performing or inducing “an abortion on a pregnant woman with the specific intent of cause or abetting an abortion if the unborn child’s fetal heartbeat has been detected in accordance with Section 44-41-330(A).” See 2023 Act, § 2, S.C. Code Ann. § 44-41-630(B). Fetal heartbeat is defined to mean “cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac.” See 2023 Act, § 1, S.C. Code Ann. § 44-41-610(6).

Although cardiac activity is often detected by six weeks of pregnancy, that is not always the case.<sup>1</sup> As noted in the State’s opening brief, cardiac activity can be detected as late as nine to ten weeks of pregnancy. See Jessica Silbey, *Picturing Moral Arguments in A Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds*, 16 GEO. J. GENDER & L. 593, 603 n. 58 (2015) (noting that the Ohio legislature failed to make audible the heartbeat of a nine-week-old-fetus).

This distinction is legally significant for at least two related reasons. First, as discussed below, it informs any analysis regarding a woman’s ability to make a choice to obtain an abortion under the 2023 Act. See *Planned Parenthood South Atlantic*, 438 S.C. at 257 n.42, 882 S.E.2d at 807 n.42 (Few, J., concurring in result).

Second, this distinction matters in assessing Respondents’ facial challenge to the 2023 Act. To successfully mount a facial challenge to the constitutionality of the 2023 Act, Respondents must show that the 2023 Act is “invalid in all its applications.” *Richardson on behalf of 15th Cir. Drug Enf’t Unit v. Twenty Thousand Seven Hundred Seventy-One & 00/100 Dollars*, 437 S.C. 290, 297,

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<sup>1</sup> For purposes of this discussion, six weeks of pregnancy refers to the gestational age of the unborn child.

878 S.E.2d 868, 871 (2022); *see also State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).<sup>2</sup> The burden is on Respondents to show that the 2023 Act is invalid in all of its applications. *See Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002). This is a requirement for standing to assert a facial challenge, which is jurisdictional and may be considered by this Court at any time. *See State v. Green*, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012); *see also Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60–61 (Ct. App. 2006) (“The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court.”).

Respondents have failed to meet this burden. Even if this Court chooses to apply the reasoning of Justice Few’s concurring opinion in *Planned Parenthood South Atlantic*, Respondents have failed to show that all women do not have sufficient time “to engage in a meaningful decision-making process” and to “make the necessary arrangements to carry out an abortion.” *Planned Parenthood South Atlantic*, 438 S.C. at 278, 882 S.E.2d at 818 (Few, J., concurring in result).<sup>3</sup> As a result, Respondents’ facial challenge must fail.

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<sup>2</sup> Respondents’ lawsuit is properly characterized as a facial challenge because it is “an attack on a statute itself as opposed to a particular application.” *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (“A facial challenge is an attack on a statute itself as opposed to a particular application.”).

<sup>3</sup> As explained below, the State maintains that *Planned Parenthood South Atlantic* does not bind this Court as precedent. As a result, this Court is not obligated to adhere to any of the analytical approaches outlined in those decisions.

## II. Respondents mischaracterize the effect of *Planned Parenthood South Atlantic*.

Respondents also mischaracterize the effect of the result of the *Planned Parenthood South Atlantic* opinions. First, Respondents are wrong to suggest that *Planned Parenthood South Atlantic* has any collateral estoppel effect in this case. Under South Carolina law, collateral estoppel only applies when the issue currently being litigated is the same as an issue previously decided. *See Catawba Indian Nation v. State*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014) (“We find collateral estoppel is not applicable because the issue decided in the 2005 declaratory judgment action is not the same as the issue asserted in the current action.”). The issue in this case—the constitutionality of the 2023 Act—is entirely distinct and separate from the issue in *Planned Parenthood South Atlantic*—the constitutionality of the 2021 Act. As a result, collateral estoppel does not apply. And in any event, courts are generally less inclined to permit the offensive use of collateral estoppel. *See* 31 A.L.R.3d 1044 (“The courts are more inclined to permit the defensive, than the offensive, use of the doctrine of collateral estoppel.”)

Further, the 2023 Act is entitled to a strong presumption of validity, rendering collateral estoppel inapplicable. *See Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (“All statutes are presumed constitutional and will, if possible, be construed to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.”).

And even if collateral estoppel could theoretically apply, this Court has not applied collateral estoppel in constitutional cases with similar—and even nearly identical—issues in the past. *See State ex rel. George v. City Council of Aiken*, 42 S.C. 222, 20 S.E. 221, 222 (1894) (upholding the 1893 Dispensary Act after previously invalidating the 1892 Dispensary Act).

Second, Respondents are also wrong to suggest that the *Planned Parenthood South Atlantic* decision renders the 2023 Act void ab initio. See *Planned Parenthood South Atlantic*, 438 S.C. at 259, 882 S.E.2d at 808 (Few, J., concurring in result) (“Also, there is no legal significance in the fact that the [2021 Act] was enacted before the Supreme Court decided *Dobbs* . . .”). The 2023 Act is a new law and has never been adjudicated to be unconstitutional.

### **III. *Planned Parenthood South Atlantic* does not control.**

Beyond the issue of collateral estoppel, Respondents are also wrong to suggest that *Planned Parenthood South Atlantic* somehow controls the outcome of this case. While three justices reached a single result in *Planned Parenthood South Atlantic*, those three justices did not agree on the legal reasoning to reach that result. See *Planned Parenthood South Atlantic*, 438 S.C. at 258, 882 S.E.2d at 808 (Few, J., concurring in result) (“As our five separate opinions indicate, we do not agree on the answers to the legal questions we confront, or even as to the principles of law we believe lead to those answers.”).

Consequently, under longstanding South Carolina caselaw, *Planned Parenthood South Atlantic* does not constitute a precedent, and its legal reasoning does not control the outcome of this case. See *State v. Walker*, 252 S.C. 325, 327–28, 166 S.E.2d 209 (1969) (“In that case two justices concurred in the main or controlling opinion, one concurred only in its result, and two justices dissented. Due to such circumstances, the value of that decision as precedent is, at best, questionable.”); see also *Moseley v. American Nat. Ins. Co.*, 167 S.C. 112, 166 S.E. 94, 96 (1932) (“If there were no distinguishing features in the cases, and we did not care to follow the [South Carolina Supreme Court] case, it could be said that the [South Carolina Supreme Court] Case was decided by a divided court, two justices were for affirmance, two for reversal, and the fifth justice

concurring only in the result of the main opinion. Under these conditions it has been held that such cases shall not be considered as precedents, but establish the law only as to the particular case.”<sup>4</sup>

Courts from around the country follow this approach. *See, e.g., Puckett v. State*, 834 So.2d 676, 678 (Miss. 2002) (“*Booker* is a plurality decision, and this Court has previously held that ‘normally a majority vote of all sitting judges is required to create precedent’ and that a ‘plurality vote does not create a binding result.’”) (quoting *Churchill v. Pearl River Basin Dev. Dist.*, 619 So.2d 900, 904–05 (Miss. 1993)); *CRY, Inc. v. Mill Serv., Inc.*, 536 Pa. 462, 469 n.3, 640 A.2d 372, 376 n.3 (1994) (“It is axiomatic that a plurality opinion of this court is without precedential authority . . . .”); *Osick v. Pub. Emp. Ret. Sys. of Idaho*, 122 Idaho 457, 460, 835 P.2d 1268, 1271 (1992) (“[W]here the third vote necessary to pronounce a decision is by a justice who concurs in the result only, the rationale contained in the opinion is not a decision of the Court and is not controlling in other cases.”)

Because *Planned Parenthood South Atlantic* did not establish a precedential rule of law regarding the scope of article I, section 10, this Court is bound to construe section 10 in light of the intent of the framers and the people who adopted it. *See State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 26 (2014); *Miller v. Farr*, 243 S.C. 342, 133 S.E.2d 838, 841 (1963) (the intent of the framers of a constitutional provision and the people who adopted it determine the meaning of the provision); *see also* L. Harold Levinson, *Interpreting State Constitutions By Resort to the Record*,

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<sup>4</sup> This Court’s decision in *Protestant Episcopal Church in Diocese of South Carolina v. Episcopal Church*, --- S.E.2d ---, 2022 WL 3560664 (2022) does not compel a different result for several reasons. First, that decision reflected a result in a particular case. It expressly did not purport to establish a legal principle or rule. *See* 2022 WL 3560664 at \*12 (“We decline to comment on the revocability—or on any theory of revocability—of trusts created by other churches or parishes.”). Second, the Court in that decision chose to adhere “to the votes those Justices cast in 2017.” *Id.* Importantly, it did not purport to be bound by those votes. Likewise, this Court’s decision in *Aiken v. Byars*, 410 S.C. 534, 546, 765 S.E.2d 572, 578 (2013) (Pleicones, J., concurring in result) does not control because three justices agreed on a legal principle or rule—not merely a result.

6 FLA. ST. U. L. REV. 567, 568–69 (1978) (“[T]he cases and literature on state constitutional interpretation seem to reflect a strong consensus that original intent must be ascertained and respected.”).

This has been a settled principle of South Carolina law for over one hundred years. This Court explained this principle at length in 1881 in *City of Charleston v. Oliver*:

[I]t is necessary to inquire whether a license tax is a ‘debt’ in the sense of the word as used in the clause of the constitution above cited. We do not think it is. In determining the construction of words or phrases in a constitution or statute, we are not required to confine our attention to the abstract, technical meaning of the word or words employed, but must look to their ordinary and popular meaning also. The object being to ascertain the intention of the framers of the constitution, which must be gathered from the words used, *we must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the constitution*, unless there is something in that instrument showing that the words in question were used in a different sense.

16 S.C. 47, 52 (1881) (emphasis added). This principle applies to every constitutional case before this Court. *See Heinitsh v. Floyd*, 130 S.C. 434, 126 S.E. 336, 337 (1925) (“While the Legislature, in proposing a constitutional amendment is, in many respects, not subject to the rules controlling ordinary legislative action, still, the fundamental purpose in construing an amendment is to ascertain and give effect to the intent of its framers and of the people who adopted it; and the court must keep in mind the object sought to be accomplished, and the evils sought to be remedied.”).

Given the primacy of intent in constitutional interpretation, this Court has previously held that it would “reject the ordinary meaning of the words used in a statute however plain it may be, when to accept such meaning would defeat the plain legislative intent.” *Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 815 (1942); *see also Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (“However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to

a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.”).

These rules of construction were carefully and correctly applied by this Court in *Johnson v. Collins Entertainment Co., Inc.*, 333 S.C. 96, 508 S.E.2d 575 (1998). There, the Court was required to interpret the word “lottery” in the state constitution to determine whether video poker machines were prohibited by article XVII, section 7 of the state constitution. In doing so, this Court adopted a “narrower” definition of lottery, looking to the framers’ understanding of the term and the historical understanding of the term. *See Johnson*, 333 S.C. at 103, 508 S.E.2d at 579 (“Historically, in the early 1800’s, a lottery was typically a government-sponsored means of raising revenue by selling tickets for prizes awarded by lot.”).

Here, the intent of the framers and adopters of article I, section 10 is readily discernible through the text and history of the section. Both the text and history of section 10 squarely foreclose any argument that section 10 encompasses a right to abortion or a right to informed choice in the context of abortion.

Beginning with its text, section 10 leaves little or no room to suggest that a right to abortion is included within the words used. Instead, if the provision is read in full, with all words given meaning, the text indicates that the “right of privacy” is intended to be an informational right, not a general right.

When construing the Constitution, the Court employs the same rules as when interpreting statutes. Thus, the Court must apply the plain and ordinary meaning of the words written without resorting “to subtle or forced construction to limit or expand the provision’s operation.” *J.R. Const., Inc. v. Western Carolina Regional Sewer Auth.*, 336 S.C. 162, 170-71, 519 S.E.2d 561, 565-66 (1999). Employing these rules, the Court has emphasized that it must be presumed that the

framers always chose their words carefully, and “[i]t is never to be supposed that a single word was inserted in the law of this State without the intention of thereby conveying some meaning.” *Id.* (quoting *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993)). Based upon these canons of construction, in *Western Carolina Regional Sewer District.*, the Court refused to “[r]ead Article X, Section 12 to include special purpose districts.” *Id.* So too here.

In construing article I, section 10, the Court should not focus only upon the words “unreasonable invasion of privacy” in isolation, but must read the provision in its entirety, with each word used given meaning. If these rules of interpretation are followed, article I, section 10 is given a much narrower reading than Respondents desire. It is important to note that in considering article I, section 10 for submission to the voters, the Senate amended the provision, striking certain phrases such as one related to “warrants to be issued in the execution of laws related to Health Safety and Welfare. . . .” In lieu thereof, the Senate inserted the words “and the information to be obtained” at the end of proposed Art. I, Section 10. Senate Journal, March 3, 1970 at 319 (considering S 616). The House quickly agreed to these changes. Thus, the word “privacy” must be considered together with the phrase “information to be obtained,” strongly suggesting that the framers sought to ensure informational privacy. Simply put, the bestowal of a general privacy right was never contemplated.

Commentators and scholars have recognized this textual phraseology and pointed out the narrow meaning of article 1, section 10 based thereupon. One commentator has noted that “South Carolina’s situation might be best attributable to the fact that it [article I, section 10] is more akin to the Fourth Amendment search and seizures issues than privacy in general.” Stuart, *A Local Distinction: State Education Privacy Laws for Public School Children*, 108 W.VA. L. REV. 361, 370, n. 6 (2005).

Moreover, William McAninch, a longtime law professor at the University of South Carolina, described the purpose of the insertion of these two phrases as follows:

The italicized language was added in 1971, only three years after the enactment of the federal wiretap statute, commonly known as Title III. The federal law attracted a great deal of media attention; many discussed the potential for abusive governmental snooping. In South Carolina, we responded to this concern by inserting the two phrases into our constitution. . . . Given knowledge of that existing protection, the adoption of the new language, guarding against “unreasonable invasions of privacy,” must have been intended to afford additional protection against government snooping.

William Shepard McAninch, “S.C. Considers Key Questions of Privacy vs. Security,” *The State*, WESTLAW NEWSROOM, 2002 WLNR 1734596 (Feb. 17, 2002).

Furthermore, another legal commentator, who has studied South Carolina’s constitutional right to privacy, has suggested that, when examining the legislative history of article I, section 10, “the drafters did not intend to expand the privacy scope in the autonomous sense.” Boken, *Expounding the State Constitution: The Substantive Right of Privacy in South Carolina*, 46 S.C. L. REV. 191, 201-02 (1994). Boken notes that “[t]he recorded minutes [of the West Committee] contain comments supporting the broad privacy language; however, committee members made these comments in discussions about electronic surveillance. Arguably, the committee members supported the broad language only to address possible search and seizure privacy situations implicated by new technology; not to expand the right of privacy into other substantive areas such as forced medication of prisoners.” *Id.*

Boken thus concluded that “[The text of] Article I, § 10 supports this view because the drafters also added that a warrant shall not issue without particularly describing ‘the information to be obtained.’ S.C. Const. art. I, § 10. This language *demonstrates the possible limitation of the privacy provision to only search and seizure situations involving electronic surveillance.*” *Id.*, n. 76 (emphasis added). Therefore, the text of article I, section 10, when given its meaning based

upon the complete language of the text, as amended by the framers and voters in 1970, does not purport to bestow a general right of privacy and, most certainly, not a right of abortion.

The history surrounding article I, section 10 only reinforces—and informs—this textual analysis. As outlined in the State’s opening brief, during the adoption process surrounding article I, section 10, no one imagined that section 10 authorized abortion. No public accounts of the act even hinted at as much. And the contemporaneous actions of the General Assembly and law enforcement officials overwhelmingly indicated that section 10 had no bearing on the regulation of abortion. *See Thompson v. Livingston*, 116 S.C. 412, 107 S.E. 581, 583 (1921) (“The courts of almost all of our states have adopted the rule that the legislative construction placed upon doubtful constitutional provisions is entitled to great weight and consideration, and raises a strong presumption that it is correct, and will generally be adopted by the courts.”).

And as previously noted, the General Assembly continued to impose strict criminal prohibitions against abortion. Leading up to the adoption of the new abortion law in 1970, some in the General Assembly thought the proposed 1970 law was *too lenient*. Members of the General Assembly filibustered the new law with one representative vowing to “talk against that bill as long as I can stand on my feet.” *See* Jennifer Holman Gunter, *Sex and the State: Sexual Politics in South Carolina in the 1970s*, SOUTH CAROLINA SCHOLAR COMMONS (Doctoral Dissertation) at 54, available at <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=5320&context=etd>. The law that was enacted ultimately contained strict abortion regulations, including a requirement that a woman obtain the consent of her husband before obtaining an abortion and a requirement that a woman obtain the signature of three doctors before obtaining an abortion.

At the same time this debate was occurring, the General Assembly was debating and adopting legislation to send article I, section 10 to the voters.<sup>5</sup> Surely, after the pitched legislative battle which had just transpired leading up to passage of the new abortion law, if anyone thought that article I, section 10 made abortion in South Carolina legal, it would have been brought up at that time. It was not.

Finally, it is worth noting that until *Roe* was decided in January 1973, prosecutions under South Carolina's abortion laws continued unabated. As was recognized in *State v. Lawrence*, 261 S.C. 18, 198 S.E.2d 253 (1973), “[o]n October 10, 1972, the defendant, Dr. Kenneth G. Lawrence (a licensed medical doctor specializing in obstetrics and gynecology) was tried by a jury and convicted of performing an abortion. . . .” Thus, the adoption of article I, section 10 was construed to pose no obstacle to abortion prosecution for the simple reason that no one thought the privacy protection contained therein in any way affected or related to abortions.<sup>6</sup>

#### **IV. Alternatively, the 2023 Act is permissible under *Planned Parenthood South Atlantic*.**

To the extent that this Court concludes that *Planned Parenthood South Atlantic* does control, the 2023 Act is permissible under the narrow opinion authored by Justice Few. The two central points of Justice Few's analysis were as follows: (1) the constitutionality of the 2021 Act

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<sup>5</sup> The Resolution sending article I, section 10, as amended, for a public vote was approved April 21, 1970. Following approval by the voters in November 1970, article I, section 10 was ratified by the General Assembly, prohibiting “unreasonable invasions of privacy” on May 13, 1971 by Act No. 276 of 1971.

<sup>6</sup> This interpretation of article I, section 10 also finds support in principles behind a “single subject rule.” As a general matter, “[i]n the context of amendment of a state constitution, each amendment must consist of only one subject; this requirement is known as the ‘single subject rule.’ . . . The purpose of the one general subject rule for proposed constitutional amendments is to prevent imposition upon or deceit of the public.” 16 Am. Jur. 2d Constitutional Law § 36. The voters who approved article I, section 10 would doubtlessly be shocked to learn that a court might later construe section 10 to include a right to abortion or a right to informed choice in the context of abortion.

turned on one particular factual question, and (2) the General Assembly’s failure to consider that factual question was necessarily arbitrary. *See Planned Parenthood South Atlantic*, 438 S.C. at 259, 882 S.E.2d at 808 (Few, J., concurring in result).

In enacting the 2023 Act, the General Assembly sought to address those concerns by expressly considering the factual questions posed by Justice Few in his opinion—namely “[c]an a pregnant woman even know she is pregnant in time to engage in a meaningful decision-making process and—if her choice is not to continue the pregnancy—make the necessary arrangements to carry out an abortion?” *Planned Parenthood South Atlantic*, 438 S.C. at 278, 882 S.E.2d at 818 (Few, J., concurring in result).<sup>7</sup>

In contrast to the 2021 Act, the General Assembly expressly considered this factual question in enacting the 2023 Act. As reflected by statements in the Senate Journal, the General Assembly carefully made an “inquiry as to whether a substantial percentage of women . . . know they are pregnant by that time.” *Planned Parenthood South Atlantic*, 438 S.C. at 284, 882 S.E.2d at 822 (Few, J., concurring in result). In conducting this inquiry, the General Assembly looked to medical evidence from leading sources, including the Cleveland Clinic and the American Pregnancy Association, to determine that women can know of their pregnancy within 10 to 14 days after conception. *See* 2023 Senate Journal, February 9, 2023, <https://tinyurl.com/59k29x8a>. Based on this research, the General Assembly determined that a substantial number of women have “ample time to make a decision about whether to terminate [their] pregnanc[ies].” *See id.* Those findings are generally entitled to considerable deference. *See Planned Parenthood South Atlantic*, 438 S.C. at 286, 882 S.E.2d at 823 (“These and other inquiries of fact and policy judgments must

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<sup>7</sup> As noted in the State’s opening brief, the General Assembly repealed the legislative finding regarding “informed choice” from the 2021 Act. This repeal alters the balancing of interests in the 2023 Act.

begin—and should end—in the political process of the General Assembly.”). Other speeches delivered on the floor of the General Assembly confirm that legislators considered and debated this issue.

To this end, the General Assembly adopted a definition of “clinically diagnosable pregnancy,” which incorporated a measurable method for detecting pregnancies through widely available, at-home pregnancy tests. *See* 2023 Act, § 1, S.C. Code Ann. § 44-41-610(2) (“‘Clinically diagnosable pregnancy’ means the point in time when it is possible to determine that a woman is pregnant due to the detectible presence of human chorionic gonadotropin (hCG).”). Under this definition of “clinically diagnosable pregnancy,” the vast majority of women can know if they are pregnant through widely available at-home pregnancy tests as soon as ten days after conception. This knowledge leaves women with a sufficient period of time—as determined by the General Assembly—to obtain an abortion.

There is evidence to support this conclusion. *See Richards v. City of Columbia*, 227 S.C. 538, 561, 88 S.E.2d 683, 694 (1955). As acknowledged by the General Assembly, a significant number of women in South Carolina already obtain abortions prior to the detection of a fetal heartbeat.

Statistics from the Centers for Disease Control and Prevention support this finding. According to the CDC, approximately 22.1% of abortions reported by known gestational age in South Carolina in 2020 were performed at six weeks of pregnancy (as measured by gestational age) or less. *See* Centers for Disease Control and Prevention, Abortion Surveillance—United States (2020), available at <https://tinyurl.com/mwa9nw2t>. Another 36.6% of abortions were performed at seven to nine weeks of pregnancy. *See id.* Thus, according to the CDC, approximately

58.7% of abortions in South Carolina in 2020 were performed at or prior to nine weeks of pregnancy.<sup>8</sup> *See id.*

The national statistics are even more striking. According to the CDC, approximately 45.3% of abortions reported by known gestational age in 2020 were performed at six weeks of pregnancy or less. *See id.* Another 35.6% of abortions in 2020 were performed at nine weeks of pregnancy or less—meaning a total of 80.9% of abortions were performed at or prior to nine weeks of pregnancy. *See id.*

These statistics reinforce what the General Assembly, courts, commentators, and medical practitioners have long recognized—a woman can “know she is pregnant in time to engage in a meaningful decision-making process” and “make the necessary arrangements to carry out an abortion” prior to the detection of a fetal heartbeat. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part) (“Focusing our attention on the first several weeks of pregnancy is especially appropriate because that is the period when the vast majority of abortions are actually performed.”); *see also* Jessica Silbey, *Picturing*

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<sup>8</sup> Although Respondents attempt to discredit the findings of the General Assembly on this point by criticizing DHEC’s statistical approach to measuring pregnancy, they cannot dispute the fact that other government statistics support the General Assembly’s finding on this point. And even if the General Assembly did not expressly mention those statistics in the House or Senate Journal, this Court may properly consider them for purposes of a review for arbitrariness. *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (“Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”).

Further, it is not the rule of this Court to determine what the “right science” is in a case or to declare what is “sound public health policy” in the State. *See Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 219, 863 S.E.2d 456, 463 (2021) (James, J., concurring). Instead, under Justice Few’s reasoning, this Court should only determine whether an action was “arbitrary.” So long as some evidence supports the General Assembly’s conclusion, the act should be upheld.

*Moral Arguments in A Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds*, 16 Geo. J. Gender & L. 593, 603 (2015) (“Indeed, many fetal heartbeats are indiscernible at early stages of pregnancy when most abortions are conducted.”); *see also* App. 171 (“Based on my clinical experience treating thousands of pregnant women, there is no doubt that the vast majority of women have sufficient time to obtain an abortion prior to the point of a detectable heartbeat.”).<sup>9</sup>

In keeping with this the presumption of constitutionality and this Court’s obligation to construe a statute to be valid if possible, this Court should conclude that the 2023 Act is not arbitrary. *See State v. Harrison*, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013).

### CONCLUSION

Just weeks ago, the General Assembly enacted the 2023 Act. That act is entitled to a strong presumption of validity and is in line with a long history of abortion regulation in this State. Neither article I, section 10 of the South Carolina Constitution nor this Court’s recent decision in *Planned Parenthood South Atlantic* require this Court to hold that the 2023 Act is unconstitutional.<sup>10</sup>

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<sup>9</sup> In arguing that women cannot know they are pregnant in time to obtain an abortion under the 2023 Act, Respondents primarily focus on missed periods as the first sign of pregnancy. *See* Br. of Respondents at 14. This argument overlooks the obvious fact that women are already on notice of a potential pregnancy following unprotected sex—and even sex with certain contraceptives. If women are on notice of a potential pregnancy at this time, pregnancies can be detected by “3-4 weeks gestational age,” and even as early as “5-8 days after fertilization.” App. at 171. Additionally, Respondents continue to ignore the existence of emergency contraceptives as an alternative to abortion. *See* 2023 Act, § 1, S.C. Code Ann. §§ 44-41-610(2) and 44-41-610(4).

<sup>10</sup> Respondents’ reference to their claims regarding the Medicaid Act, federal court orders, the Equal Protection Clause, and the Bill of Attainder were not fully briefed. Additionally, those claims lack merit. Just days ago, the United States Supreme Court vacated the judgment in a case cited by Respondents to support their claims. *See Kerr; Dir., SC Dep’t. of Health v. Planned Parenthood, et al.*, No. 21-1431, --- S.Ct. ----, 2023 WL 4065140 (June 20, 2023). To the extent this Court wishes to consider those claims, the State respectfully requests the opportunity to submit a supplemental brief.

Respectfully submitted,

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