**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

RECEIVED

**Aug 24 2023**

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' PETITION FOR REHEARING

---

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents hereby file this Petition for Rehearing on Opinion No. 28174, which was filed on August 23, 2023. Respondents respectfully request rehearing on the basis that this Court "overlooked," Rule 221(a), SCACR, the critical question of the meaning of "fetal heartbeat," expressly stating that it was leaving the question "for another day." Op. at 7 n.4; *see also* Op. at 29 (Beatty, C.J., dissenting) ("[I]t does not resolve the anomaly appearing on the face of the legislation regarding the timing of the 'fetal heartbeat' ban.").

As this Court is well aware, Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) (hereinafter "S.B. 474" or the "Act"), bans abortions, subject to extremely limited exceptions, upon the detection of a so-called "fetal heartbeat." It defines "fetal heartbeat" as "cardiac activity, *or* the

steady and repetitive rhythmic contraction of the *fetal heart*, within the gestational sac." S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(6) (emphasis added). At oral argument, Justice Few asked whether "the steady and repetitive rhythmic contraction of the fetal heart" (the "Clause") was intended to define or supplement the term "cardiac activity" based on the commas surrounding the clause.

In its ruling yesterday, this Court did not answer that question definitively, instead leaving the question "for another day." Op. at 7 n.4. But that failure to answer this question leaves Respondents—the only abortion providers in the state—in an untenable position. Faced with the specter of the severe criminal and civil penalties the Act imposes on anyone performing an abortion in violation of the ban, in the hours since the Court issued its ruling, Respondents had no choice but to stop providing abortion services to South Carolinians whose pregnancies have progressed past approximately six weeks.[1] South Carolina has already seen the devastation that a ban on abortion after approximately six weeks will wreak on the public health of this state. App. at 43–45 ¶¶ 114–18; App. at 118, 120 ¶¶ 51, 57. And this is occurring again now as Planned Parenthood South Atlantic and Greenville Women's Clinic were forced to turn away dozens of abortion patients immediately after the Court's ruling.

Given the ambiguity in the definition of "fetal heartbeat" identified by the Court, Respondents seek rehearing to request that the Court construe the definition now, rather than save this urgent question for a later date. Specifically, Respondents request that the Court confirm that: (1) "cardiac activity" and "the steady and repetitive rhythmic contraction of the fetal heart" refer to one point in time during pregnancy, and (2) the relevant point in time addressed by the Act is the point when "the chambers of the heart have been developed and can be detected via

[1] It is standard medical practice to date pregnancy using "gestational age," or the number of weeks and days since the first day of the patient's last menstrual period ("LMP"). App. at 141 ¶ 7 n.1.

ultrasound," consistent with the medical consensus, Br. of Amicus Curiae Am. Coll. of Obstetricians and Gynecologists, et al. ("ACOG Br.") at 10.

## I. Under the Plain Meaning of the Act, the Clause and "[C]ardiac [A]ctivity" Refer to One Point in Time.

When engaging in statutory interpretation, this Court "abide[s] by the plain meaning of the words of a statute." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). It must also "apply the ordinary rules of grammar and common usage to ascertain the meaning of a statute, and . . . should examine the grammatical structure of a clause or sentence that is at issue." 82 C.J.S. *Statutes* § 410 (citations omitted). While keeping these instructions in mind, the Court should also heed to the "well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant." *Jacobs*, 393 S.C. at 587, 713 S.E.2d at 623 (citing *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)).

It was this Court itself that first raised, without resolving, "the anomaly appearing on the face of the legislation," Op. at 29 (Beatty, C.J., dissenting), and it should now ensure that the commas surrounding the Clause have meaning and are not rendered superfluous. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Jackson v. S.C. Tax Comm'n*, 192 S.C. 350, 6 S.E.2d 745, 746 (1940) ("While punctuation in a statute is not controlling, it cannot be ignored where there is no patent ambiguity, and where the punctuation gives meaning and effect to the language used. Especially is this true where a disregard of the punctuation as found in the statute will have a material effect upon the construction thereof." (citing *Caston v. Brock*, 14 S.C. 104 (1880))).

Indeed, the most natural reading is that the commas offset the Clause so as to explain the meaning of "cardiac activity." "Commas are often used in statutes to set off expressions that provide additional but nonessential information about a noun or pronoun immediately preceding; such expressions serve to further identify or explain the word they refer to." 82 C.J.S. *Statutes* § 413; *cf.* Catherine Traffis, *Appositives—What They Are and How to Use Them*, https://www.grammarly.com/blog/appositive (last accessed Aug. 24, 2023). Here, offsetting the Clause by commas indicates that the Clause is additional information descriptive of "cardiac activity" and could be omitted.

While this definitional clause could be omitted, without such an explanation, the term "cardiac activity" would be ambiguous because the Act does not follow the consensus in the medical community. *See* ACOG Br. at 10; App. at 105 ¶ 7. The Court should thus construe the Clause to define "cardiac activity" consistent with medical consensus, specifically looking to its inclusion of the term "fetal heart." "As a matter of medical science, a true fetal heartbeat exists only after the chambers of the heart have been developed and can be detected via ultrasound." ACOG Br. at 10.[2]

That these commas have meaning is further bolstered by looking to the so-called fetal heartbeat bans in sister states that have been assumed to prohibit abortion once embryonic cardiac activity is detectable. As Justice Few noted, a Texas law contains an otherwise identical definition but excludes commas. *See* Tex. Health & Safety Code § 171.201(1) ("'Fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."). Each state that adopts an otherwise identical definition omits commas. Ohio Rev. Code § 2919.19(A)(4), enjoined by *Preterm-Cleveland v. Yost*, No. A2203203, 2022 WL

[2] This typically occurs around 17–20 weeks LMP. ACOG Br. at 10.

16137799 (Ohio Com. Pl. Oct. 12, 2022) (same); Miss. Code § 41-41-34.1(a) (same); Okla. Stat. tit. 63, § 1-745.32(1) (same); Ky. Rev. Stat. § 311.7701(4) (same); La. Stat. Ann. § 14:87.1(11) (same).[3] In looking at a state statute that "is virtually a verbatim copy of a statute of a sister state, . . . [a]ll changes in words and phrasing will be presumed deliberately made with the purpose of limiting, qualifying, or enlarging the adopted law." 82 C.J.S. *Statutes* § 469. Thus, the Court should presume that the addition of commas in South Carolina's version of a fetal heartbeat ban is intended to be construed differently than the laws enacted in other jurisdictions.

Finally, the definition of "fetal heartbeat" should be read in conjunction with the whole of the Act. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (courts should consider "the language of the statute as a whole." (quoting *Mid–State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). Here, the General Assembly found that "[c]ardiac activity begins at a biologically identifiable moment in time, normally when the *fetal heart* is formed in the gestational sac." S.B. 474, § 1(2) (emphasis added). Thus, the Court should interpret the Act to give effect to the General Assembly's finding that it intended the definition to apply to a singular point in time in pregnancy, not two different points in time. As with the definition of "fetal heartbeat," the General Assembly has focused on the formation of a fetal heart. The Court should therefore interpret the singular point in time to mean the period at which the chambers of the fetal heart have formed and can be detected, rather than the time at which electrical impulses can be detected.

[3] *See also* Idaho Stat. § 18-8801(2) ("'Fetal heartbeat' means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.").

## II. In the Alternative, if the Court Finds that "Fetal Heartbeat" is Ambiguous, It Should Construe the Definition Consistently with the Medical Definition.

In the alternative, if the Court finds that the statutory language is ambiguous, this ambiguity should be resolved in favor of Respondents, and the Court should construe "fetal heartbeat" consistently with the accepted medical definition: when "the chambers of the heart have been developed and can be detected via ultrasound." ACOG Br. at 10. "A possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis v. State*, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001) (quoting *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 749 (1995)).

The South Carolina Constitution's Due Process Clause states that no person "shall . . . be deprived of life, liberty, or property without due process of law." S.C. Const. art. I, § 3. The constitutional requirement of fair notice underlies the void-for-vagueness doctrine, which is "the practical criterion of fair notice to whom the law applies." *Curtis*, 345 S.C. at 571–72, 549 S.E.2d at 598. To find that the only operative term defining a "fetal heartbeat" is "cardiac activity" would be to "walk into a giant hole of ambiguity," as Justice Few noted at oral argument.

Moreover, South Carolina courts have long recognized the rule of lenity—the principle that penal statutes are to be strictly construed against the State—because they carry the extreme consequence of the deprivation of an individual's liberty. *See, e.g.*, *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017) ("This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor.").

S.B. 474 generally prohibits an abortion after the detection of a fetal heartbeat, subject to narrow exceptions, and imposes severe criminal penalties on physicians. Violation of the prohibition is a felony, accompanied by a fine of ten thousand dollars, imprisonment up to two years, or both. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)). To the degree that the

Court finds the definition of "fetal heartbeat" vague, the rule of lenity mandates that any ambiguities be resolved in favor of Respondents. Respondents' physicians, under threat of civil and criminal penalties, cannot reasonably ascertain what conduct is prohibited if the meaning of "fetal heartbeat" can either "refer[] to one period of time during a pregnancy or two separate periods of time." Op. at 7 n.4. If this Court itself cannot resolve the doubt about the scope of the law, the remaining ambiguity clearly violates Respondents' right to fair notice. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) ("No one may be required at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") (citation omitted)).

## III. Relief Requested

Respondents respectfully request that the Court grant the Petition for Rehearing to clarify that S.B 474's prohibition on abortions after the detection of a "fetal heartbeat" applies only to one period of time: after the chambers of the fetal heart have been developed and once a "true fetal heartbeat," ACOG Br. at 10, can be detected. Given the severe public health consequences of S.B. 474 and the fact that Respondents expect to see dozens of abortion patients this week—and indeed, hundreds in the coming weeks—Respondents further request that the Court enter an emergency temporary restraining order while this Petition for Rehearing is pending.

In the alternative, if the Court is inclined to deny the Petition for Rehearing, Respondents request that the Court exercise its original jurisdiction to consider an as-applied challenge to the scope of the definition of "fetal heartbeat" and order full briefing on a motion for preliminary injunction in order to provide an opportunity to further develop a factual record. *See* Op at 7 n.4 ("We leave for another day (in an as-applied constitutional challenge) the meaning of 'fetal heartbeat' and whether the statutory definition—'cardiac activity, or the steady and repetitive

rhythmic contraction of the fetal heart, within the gestational sac'—refers to one period of time during a pregnancy or two separate periods of time."); *see also* Op. at 9 ("Here, Planned Parenthood alleges the 2023 Act is facially unconstitutional. With a facial challenge, Planned Parenthood must demonstrate the 2023 Act is unconstitutional 'in all its applications.' . . . We therefore go no further than necessary in exploring the constitutionality of the 2023 Act and issuing our decision.) (citations omitted)).

Respectfully submitted,

/s/ *M. Malissa Burnette*
M. Malissa Burnette (SC Bar No. 1038)
Kathleen McDaniel (SC Bar No. 74826)
Grant Burnette LeFever (SC Bar No. 103807)
Burnette Shutt & McDaniel, PA
P.O. Box 1929
Columbia, SC 29202
(803) 904-7913
mburnette@burnetteshutt.law
kmcdaniel@burnetteshutt.law
glefever@burnetteshutt.law

*Attorneys for Respondents*

Catherine Peyton Humphreville*
Kyla Eastling*
Planned Parenthood Federation of America
123 William Street
New York, NY 10038
(212) 965-7000
catherine.humphreville@ppfa.org
kyla.eastling@ppfa.org

*Attorneys for Respondents Planned Parenthood South Atlantic and Dr. Katherine Farris*

Caroline Sacerdote*
Jasmine Yunus*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3646
csacerdote@reprorights.org
jyunus@reprorights.org

*Attorney for Respondents Greenville Women's Clinic and Dr. Terry L. Buffkin*

* Admitted *pro hac vice*

Dated: August 24, 2023