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

Honorable Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000997

Case No. 2024-CP-40-00762

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; TAYLOR SHELTON,.....*Appellants*,

v.

SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Interim Director of the South Carolina Department of Public Health; ANNE G. COOK, in her official capacity as President 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; MARCELO HOCHMAN, 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; MARY J. RICHARDSON, 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; SALLIE BETH TODD, in her official capacity as Chairperson of the South Carolina Board of Nursing; SAMUEL H. McNUTT, in his official capacity as Vice Chairperson of the South Carolina Board of Nursing; BRIDGET A. ENOS, in her official capacity as a Member of the South Carolina Board of Nursing; BRIDGET J. HOLDER, in her official capacity as a Member of the South Carolina Board of Nursing; LESLIE M. LYERLY, in her official capacity as a Member of the South Carolina Board of Nursing; MELISSA MAY-ENGEL, 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; FRANCES C. PAGETT, in her official capacity as a Member of the South Carolina Board of Nursing; JOHN J. WHITCOMB, in his 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 Ninth Judicial Circuit; and BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's Fifth Judicial Circuit,.....*Appellees,*

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina,.....*Intervenor-Appellee.*

BRIEF OF APPELLANTS

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INTRODUCTION

In *Planned Parenthood South Atlantic v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023), *reh'g denied* (Aug. 29, 2023) ("*Planned Parenthood II*"), this Court ruled that Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) ("S.B. 474" or the "Act"), a ban on abortion after the detection of a so-called "fetal heartbeat," does not violate the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. In the present case, filed at the invitation of this Court,[1] Appellants raise only a narrow question of statutory interpretation left open by this Court in *Planned Parenthood II*: at what point in pregnancy does a "[f]etal heartbeat" as defined in the Act occur? *Planned Parenthood II*, 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4.

Careful parsing of the plain text of the Act permits only one answer. Under the Act's definitions, a "[f]etal heartbeat" can only be present after approximately nine weeks of pregnancy because "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac," S.B. 474, § 2(6) (amending S.C. Code Ann. § 44-41-610(6)), does not occur until then. The Act also says that "[c]ardiac activity begins . . . when the fetal heart is formed in the gestational sac." *Id.*, § 1(2). While embryonic electrical activity is detectable after approximately six weeks of pregnancy, a heart does not form until later in pregnancy, after approximately nine weeks. Nor is that electrical activity steady, repetitive, and rhythmic until after approximately nine weeks. And it is uncontroverted that there is no "fetus" until after nine weeks of pregnancy, as at six weeks there is only an embryo. Without a fetus or a heart, there cannot be

[1] *Planned Parenthood II*, 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4 ("We leave for another day (in an as-applied constitutional challenge) . . . ."); Order, *Planned Parenthood II* (Aug. 29, 2023) (denying rehearing) (Beatty, C.J., dissenting) ("[N]othing prevents Respondents from expeditiously filing a new complaint asserting an as-applied challenge . . . ."); Order, *Planned Parenthood S. Atl. v. State*, No. 2023-001449 (S.C. Sup. Ct. Nov. 14, 2023) (denying petition for original jurisdiction and injunctive relief) ("The petition for original jurisdiction is otherwise denied without prejudice to Petitioners' right to file an as-applied action in the circuit court.").

a "[f]etal heartbeat" under the Act's definitions. This interpretation of the words selected by the General Assembly is true to the text and refutes the Circuit Court's conclusion that the statute is ambiguous.

Should the Court determine, however, that S.B. 474 is ambiguous, multiple canons of construction, including that of constitutional doubt and the rule of lenity, all lead to the conclusion that the Act applies only after a fetal heart has formed and its cardiac activity is steady, repetitive, and rhythmic. In the alternative, the Act is unconstitutionally vague, and this Court should adopt a limiting construction of it as applying only after approximately nine weeks of pregnancy.

Appellants thus request that this Court reverse the Circuit Court's ruling and enter a preliminary injunction preventing the Act's application to South Carolinians, like Taylor Shelton, with pregnancies from approximately six through nine weeks. Absent this relief, each person denied an abortion despite the absence of a fetal heartbeat as defined by the Act suffers irreparable harm, and collectively, this denial of abortion access to patients at the earliest stages of pregnancy, constitutes a public health crisis in South Carolina.

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in determining that S.B. 474 is ambiguous?

II. If the text and structure of S.B. 474 are ambiguous, did the Circuit Court err in resolving that ambiguity by considering statements of individual legislators and this Court's dicta as sources of legislative intent in lieu of applying the canons of construction?

III. Did the Circuit Court err in finding that S.B. 474 is not unconstitutionally vague?

IV. Have Appellants satisfied the remaining preliminary injunction factors?

STATEMENT OF THE CASE

I. S.B. 474 Bans Abortion After a "Fetal Heartbeat" Is Detected.

S.B. 474 provides, with a few extremely narrow exceptions[2] inapplicable here, that "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." S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)) (emphasis added). The Act defines "[f]etal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." *Id.* (amending S.C. Code Ann. § 44-41-610(6)). When enacting S.B. 474, the General Assembly specifically found: "Cardiac activity begins at a biologically identifiable moment in time, normally *when the fetal heart is formed* in the gestational sac." *Id.*, § 1(2) (emphasis added).

Anyone who performs an abortion in violation of the Act is subject to severe criminal, civil, and licensure penalties. Violation of the statute is a felony offense punishable by a $10,000 criminal fine, up to two years in prison, and revocation of professional licensure. *Id.*, § 2 (amending S.C. Code Ann. §§ 44-41-630(B), 44-41-640(B), 44-41-650(C), 44-41-660(C), 44-41-690).

II. Relevant Legislative and Litigation History

S.B. 474 took immediate effect when Governor McMaster signed it into law on the morning of May 25, 2023. South Carolina abortion providers, including Planned Parenthood South Atlantic and Dr. Katherine Farris, filed suit in the Richland County Court of Common Pleas the same day and were granted a preliminary injunction on May 26, 2023. Thereafter the Supreme Court accepted the case.

[2] *See* S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-640 (medical emergency), 44-41-610(9) (defining "[m]edical emergency")), 44-41-650 (rape or incest), 44-41-660 (fatal fetal condition)).

At oral argument in *Planned Parenthood II*, 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. However, in upholding the constitutionality of S.B. 474, this Court expressly reserved answering Justice Few's question "for another day." *Planned Parenthood II*, 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4; *see also id.*, 440 S.C. at 497, 892 S.E.2d at 139 (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."). This Court denied plaintiffs' petition for rehearing. Order, *Planned Parenthood II* (Aug. 29, 2023). The same plaintiffs then filed a petition for original jurisdiction with this Court on September 14, 2023, again seeking to answer the unresolved question of statutory interpretation. This Court denied the petition for original jurisdiction and injunction. Order, *Planned Parenthood S. Atl.*, No. 2023-001449 (Nov. 14, 2023).

On February 5, 2024, Appellants Planned Parenthood South Atlantic ("PPSAT"), Dr. Katherine Farris, and Taylor Shelton filed this case in the Richland County Court of Common Pleas to address the statutory construction question identified by the Supreme Court and requested a preliminary injunction to block enforcement of S.B. 474 through approximately nine weeks of pregnancy. Following oral argument, the Circuit Court denied Appellants' Motion; Appellants appealed; and the Supreme Court certified this case for review. Order (June 20, 2024).

III. Access to Abortion Under Prior South Carolina Law

Appellants PPSAT and Dr. Farris provide sexual and reproductive health services, including abortion, in South Carolina. R. p. 114 ¶ 23. PPSAT runs two of the only three clinics in the state that provide abortion services to the public, in Columbia and Charleston. *Id.* at 114–16 ¶¶ 22, 28–29. They previously provided abortions through the end of the first trimester, which corresponds to fourteen weeks of pregnancy as measured from the first day of the last menstrual

period ("LMP"). S.C. Code Ann. § 44-41-10(i); S.C. Code Ann. Regs. 61-12.101(S)(4); App at 115–16 ¶¶ 25, 28–29.

Although patients generally obtain an abortion as soon as they are able, historically the vast majority of patients who seek abortions in South Carolina have been at least six weeks pregnant by the time they do so. App at 120 ¶ 46, 129 ¶ 70. Many of PPSAT and Dr. Farris's patients seeking abortions do not know they are pregnant before six weeks LMP. *Id.* at 121–23, ¶¶ 47–53. Even those who do may face logistical challenges in arranging an abortion appointment. *Id.* at 125 ¶ 57, 127 ¶ 64. Many South Carolinians struggle to pay for an abortion, including because many forms of insurance do not cover abortion care or the associated travel and childcare costs. *Id.* at 126–27 ¶¶ 61–62, 64, 131 ¶ 78. Others are unable to take time off work. *Id.* at 126 ¶ 61. The difficulty of obtaining an abortion before six weeks LMP is especially pronounced in marginalized communities in South Carolina, including those living in poverty and Black and Hispanic women. *Id.* at 125–26 ¶¶ 60–61. Since the Act went into effect, the vast majority of PPSAT and Dr. Farris's patients have been unable to access abortion in South Carolina. *Id.* at 112 ¶ 15, 130 ¶ 75.

IV. Detection and Dating of Early Pregnancy and Development of the Cardiovascular System

A. Detection and Dating of Early Pregnancy

Because the Act bans abortion at the earliest stages of pregnancy, Appellants briefly discuss pregnancy dating and the timing of ovulation, fertilization, and implantation. Pregnancies are commonly dated starting from the first day of a person's last menstrual period ("LMP"), which is typically about two weeks (if not longer) prior to ovulation. *Id.* at 119 ¶ 41.

Pregnancy begins if and when an embryo implants in the uterine lining, a process that usually begins about six days after fertilization and takes roughly three to four days to complete. *Id.* ¶ 42. Implantation triggers the release of pregnancy hormones, preventing the uterine lining

from shedding and stopping the person's period. *Id.* A person with a highly regular, four week cycle would already be at least four weeks LMP when they could first realize their period is late. *Id.* at 121 ¶ 47. For someone with a longer or irregular menstrual cycle, the gestational age may be well beyond four weeks LMP by the time they could first realize they have missed their period. *See id.* at 121–22 ¶¶ 49–50. While a missed period may prompt someone to take a pregnancy test, someone with no reason to suspect a pregnancy is unlikely to do so. *See id.* at 121 ¶ 48.

On average, people do not know they are pregnant until between five and six weeks LMP. *Id.* at 122 ¶ 52. People are likely to be delayed in realizing that they are pregnant if they are using hormonal birth control, have long or irregular menstrual cycles, are younger, are living in or close to poverty, are less educated, or are breastfeeding. *Id*. at 122–23 ¶¶ 52–53.

A developing pregnancy is referred to as an "embryo" in the field of medicine through approximately nine weeks LMP, after which it becomes a "fetus." *Id.* at 112 ¶ 11. Appellees' expert, Dr. Ingrid Skop, agrees, as she refers to the developing organism as an "embryo" at six weeks LMP. *See, e.g.*, *id.* at 255 ¶ 15 ("embryonic heart"), 257 ¶ 18 ("[a]n embryo's heart").

B. Gestational Development of the Cardiovascular System

The human heart has four major components: four chambers, the walls separating them, the valves connecting them, and the conduction system. *Id.* at 156 ¶ 20. A heart is made of muscles, and electrical impulses cause the muscles to contract and send blood throughout the body. *Id.* at 154 ¶¶ 13–14. A heartbeat occurs when the heart muscles contract. *Id.* at 155 ¶ 17. The sound of a heartbeat—whether in a fully developed adult heart or in a developing fetal heart—is produced by the closing of the valves connecting the heart's chambers. *Id.* Thus, to have a heartbeat, a heart must have four chambers—which all experts in this case, as well as DHEC, agree cannot occur until after approximately nine weeks of pregnancy. *Id.* at 111 ¶ 10, 118 ¶ 36 (Farris), 157 ¶ 24,

158–59 ¶¶ 29–30, 32 (Crockett), 253–54 ¶¶ 11–12 (Skop recognizing that four chambers form at approximately ten weeks LMP).[3]

The earliest primitive cells that will develop into the heart aggregate around two tubular structures around about five weeks LMP. R. pp. 157 ¶ 27 (Crockett), 253 ¶ 11 (Skop). Cardiac muscle cells begin contracting asynchronously around this time and become visible as a "flicker" on ultrasound after approximately six weeks LMP, or in some cases as early as partway through the fifth week LMP. *Id*. at 115 ¶ 27 (Farris), 158–59 ¶¶ 27, 31 (Crockett); *see id*. at 252–53 ¶ 8 (Skop). These electrical impulses constitute early embryonic electrical activity. At this early stage of pregnancy, however, the electrical activity is not organized into a coordinated heartbeat and will not be until after the development of the pacemaker and conduction system—after approximately nine weeks LMP. *Id*. at 159 ¶¶ 31–32. In other words, any embryonic electrical activity visible at this point, while "repetitive," is neither "steady" nor "rhythmic." *See* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(6)). The term "heartbeat" is a misnomer because a cardiovascular system has yet to develop at this point. R. p. 110 ¶ 7.[4] Dr. Skop agrees that embryonic electrical activity begins around five to six weeks LMP, but contends, in contravention of the medical consensus and without citation, that embryonic electrical activity is steady, repetitive, and rhythmic at these early stages. *Id*. at 255 ¶ 15, 257 ¶ 18. As discussed *infra* at 13–16, this Court should discredit Dr. Skop's testimony.

From approximately six through nine weeks LMP, the chambers, walls, and valves of the developing organ will continue to form, R. pp. 158–59 ¶¶ 28–30 (Crockett), 253 ¶ 11 (Skop), and

[3] S.C. Dep't of Health & Env't Control ("DHEC"), *Embryonic & Fetal Development*, https://scdhec.gov/sites/default/files/Library/ML-017049.pdf (last visited July 26, 2024).

[4] Furthermore, this early embryonic electrical activity cannot be heard as a heartbeat can. Instead, at this early gestational age, it is the ultrasound machine itself that converts these electrical impulses into sound. R. p. 158 ¶ 27.

the medical consensus is that the four main components of a heart (four chambers, walls, valves, and conduction system) are formed after approximately nine weeks LMP. *Id*. at 111 ¶ 10 (Farris), 153 ¶ 11, 158–59 ¶¶ 30, 32 (Crockett); *see id*. at 253–54 ¶¶ 11–12 (Skop).[5] The South Carolina Department of Health and Environmental Control agrees, stating that "the basic parts of . . . the heart [have] formed" by nine to ten weeks LMP.[6] In other words, it is only after approximately nine weeks LMP that a fetal heart has formed.

Appellants use the term "after approximately nine weeks LMP" as a conservative estimate of when the fetal heart has formed and its cardiac activity is steady and rhythmic, acknowledging that heart development can continue through ten weeks LMP, consistent with the State's materials. *See id*. at 158–59 ¶ 30 (noting that cardiac septation is completed at approximately ten weeks LMP). Referring to the gestational age "after approximately nine weeks LMP" means up to and including nine weeks, six days LMP. It thus measures until the point at which an embryo becomes a fetus at ten weeks LMP.

V. Since Going into Effect, S.B. 474 Has Negatively Affected South Carolina Physicians and Public Health.

Since going into effect, the Act has negatively impacted PPSAT, its staff and physicians, including Dr. Farris, and its patients, including Ms. Shelton. Because of uncertainty as to when S.B. 474's abortion ban begins to apply, the Circuit Court's interpretation of the Act and denial of a preliminary injunction, and the harsh penalties the Act imposes, PPSAT and Dr. Farris have had no choice but to stop providing abortions as soon as embryonic electrical activity can be detected by ultrasound—after approximately six weeks LMP (and sometimes sooner).

[5] Physicians and scientists may use different verbiage in talking about cardiac development at different stages of pregnancy. For example, some may use the term "heartbeat" to refer to early embryonic electrical activity. *Id.* at 159 ¶ 32. This case concerns the definition of "[f]etal heartbeat" as defined in the Act.

[6] DHEC, *supra* note 3 at 6.

As a result, PPSAT has been forced to turn away the vast majority of patients seeking abortions. From August 23, 2023, when the Act went into effect, until January 31, 2024, out of 1,209 patients who made abortion appointments at its South Carolina health centers, PPSAT was able to provide only 303 abortions in South Carolina. *Id.* at 130 ¶ 75. In other words, PPSAT turned away approximately 75% of patients seeking abortions at their South Carolina clinics—and that does not even count the patients who did not schedule abortion appointments because they knew they were likely past six weeks LMP. *Id.* Of the 906 patients turned away, 778 (about 86%) had pregnancies that were nine weeks LMP or less. *Id.*[7] Compared to the same period the prior year, PPSAT was able to provide less than 17% of the abortions it did before the Act went into effect. *Id.*

Appellant Taylor Shelton is among those who did not ultimately schedule an abortion appointment. Ms. Shelton learned that she was pregnant on September 7, 2023, shortly after the Act went into effect. *Id*. at 186 ¶ 4. She was shocked she was pregnant because she had an intrauterine device ("IUD") in place and had confirmed with her gynecologist about a week earlier that the contraceptive device was still effective. *Id.* at 186–87 ¶ 5. Ms. Shelton has regular menstrual cycles, which she tracks, so she noticed quickly that she had missed her period. *Id.* at 186 ¶ 4. Two days after her missed period, she took two home pregnancy tests, both of which confirmed that she was pregnant. *Id.* Ms. Shelton was certain that she was not ready to have a child and that she wanted to have an abortion as soon as possible. *Id.* at 187 ¶ 6. Despite recognizing her

[7] PPSAT's experience is consistent with a Guttmacher Institute report, which found that in the month after the Act went into effect, abortions decreased by 79%, from 750 statewide in August 2023, to 160 in September 2023. Kimya Forouzan, et al., *The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, Guttmacher Inst., https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care?utm_source=Guttmacher+Email+Alerts&utm_campaign=9096c1e61d-December+provision+study&utm_medium=email&utm_term=0_-b00c00d20f-%5BLIST_EMAIL_ID%5D (Dec. 7, 2023).

pregnancy very early and quickly deciding that abortion was the right choice for her, Ms. Shelton was unable to schedule an appointment with one of the abortion providers in South Carolina before her pregnancy would have reached six weeks LMP. *Id.* ¶ 8. Instead, she was forced to travel out of state to get an abortion, ultimately making three trips to North Carolina—including one to a deceptive anti-abortion center—driving a total of twenty hours. *Id.* at 187–88 ¶¶ 10–12, 189 ¶¶ 15–16.[8] Ms. Shelton had the support of her loved ones and the resources to travel out of state and to pay for an abortion. *Id.* at 189 ¶ 17. On September 23, 2023 at PPSAT's Wilmington, North Carolina health center, Ms. Shelton had an aspiration abortion when she was roughly six weeks, four days LMP. *Id.* ¶ 16. If there was a legally binding interpretation that the Act applied only after approximately nine weeks LMP, rather than at six weeks LMP, Ms. Shelton would have been able to access abortion in South Carolina.

If the Court construes the Act—in accordance with its plain text—to apply only once a fetal heart has formed and its cardiac activity is steady and rhythmic (after approximately nine weeks LMP), many more South Carolinians seeking abortions will be able to obtain one in state. And for many South Carolinians who lack the support and resources to travel out of state, this will be the difference between being able to obtain an early, lawful abortion and being forced to continue a pregnancy against their will. Because the Circuit Court denied Appellants' Motion for a Preliminary Injunction, Appellants and South Carolinians seeking abortion suffer harm each and every day.

STANDARD OF REVIEW

"The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the decision of the trial court is unsupported by

[8] North Carolina imposes a seventy-two-hour waiting period on patients seeking abortion and requires at least two health center visits. *See* N.C. Gen. Stat. Ann. §§ 90-21.82, 90-21.83A.

the evidence or controlled by an error of law." *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) (citations omitted). "Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); *In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008) ("In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.").

Actions for declaratory judgment seeking injunctive relief are equitable in nature. *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001). In such cases, "the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *Id.* (quoting *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001)).

A preliminary injunction is warranted where (1) the plaintiff would suffer irreparable harm; (2) it has a likelihood of success on the merits; and (3) there is no adequate remedy at law. *Poynter Invs., Inc.*, 387 S.C. at 586–87, 694 S.E.2d at 17. A "plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). A "reasonable question as to the existence of such a right" is sufficient. *Id.*

ARGUMENT

Because Appellants meet each preliminary injunction factor, the Circuit Court erred in denying their Motion for a Preliminary Injunction. First, the Circuit Court erred in finding that S.B. 474 is ambiguous. To the contrary, the plain text of the Act indicates that it bans abortion only once a fetal heart has formed and the detectable cardiac activity is steady, repetitive, and

rhythmic. The record establishes that this cannot occur until after approximately nine weeks LMP because, prior to that stage of gestational development, there is neither a fetal heart nor a steady or rhythmic heartbeat.

But even if the Court concludes that S.B. 474 is ambiguous, it must reject the Circuit Court's interpretive methodology. The Circuit Court erred by finding legislative intent in the cherry-picked statements of individual legislators rather than by applying the canons of construction. Furthermore, the Circuit Court misread this Court's prior opinions as holding that S.B. 474 must be understood as a six-week ban. Properly applied, canons of construction including the punctuation and grammar canons, the rule of lenity, and the canon of constitutional doubt, support Appellants' interpretation of the plain text of the Act. This Court should hold that S.B. 474 bans abortion only once a fetal heart has formed and cardiac activity is steady, repetitive, and rhythmic—events that occur only after approximately nine weeks LMP.

Alternatively, if this Court finds the statutory language to be ambiguous, it should conclude that constitutional vagueness principles limit its application to the period of pregnancy after approximately nine weeks LMP.

I. Cardiac Activity Is Only Steady, Repetitive, and Rhythmic, and a Fetal Heart Has Only Formed, After Approximately Nine Weeks of Pregnancy.

In equitable cases like this, "the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. at 645, 557 S.E.2d at 672 (quoting *Wiedemann*, 344 S.C. at 236, 542 S.E.2d at 753). Here, the Court should find that a fetal heart forms only after approximately nine weeks LMP; any cardiac activity is steady and rhythmic only after approximately nine weeks LMP; and the developing pregnancy does not become a "fetus" until after nine weeks LMP.

Dr. Amy Crockett, a highly regarded maternal-fetal medicine specialist with over fifteen years of experience practicing in South Carolina and a former chair of the South Carolina section of the American College of Obstetrics and Gynecology, relies on her extensive experience and cites medical sources in discussing the development of the cardiovascular system. As detailed *supra* at 6–8, Drs. Crockett and Farris explain that four key developmental steps must occur before a "fetal heartbeat" as defined in the Act can occur. First, while the developing organ that will become the heart begins to transmit electrical impulses between five and six weeks LMP, at this early stage of pregnancy, the contractions are asynchronous rather than "steady" or "rhythmic." *See* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(6)); *supra* at 6–8. Second, the sound of a heartbeat is the closing of the valves connecting the heart's chambers, and thus, to have a heartbeat, a heart must have four chambers—which all experts in this case, as well as DHEC, agree cannot occur until after approximately nine weeks LMP. *Supra* at 6–8. Third, a heart does not form until after approximately nine weeks LMP. *See* S.B. 474, § 1(2) ("Cardiac activity begins . . . when the fetal heart is formed"); *supra* at 6–8. And fourth, to have a *fetal* heartbeat, there must be a fetus, and the developing pregnancy does not become a fetus until after nine weeks LMP. *Supra* at 6–8.

The Court should credit Dr. Crockett's testimony over Dr. Skop's as accurately presenting the medical consensus at each turn. First, Dr. Skop's assertion that embryonic electrical activity is steady, repetitive, and rhythmic as early as the sixth week of gestation is unsupported by medical facts or literature. R. pp. 255 ¶ 15, 257 ¶ 18 (citing no authority for this proposition).[9] Second, Dr.

[9] *Contra* R. p. 159 ¶ 31 (Crockett) ("These cells are not organized into coordinated heartbeat until after the development of the four chambers of the heart and the natural pacemakers and the conduction pathways within the heart are fully formed . . . ." (citing J. Boullin & J. M. Morgan, *The Development of Cardiac Rhythm*, 91 Heart 874 (2005); Robert G. Gourdie et al., *Development of the Cardiac Pacemaking and Conduction System*, 69 Birth Defects Rsch., Part C Embryo Today: Revs. 46 (2003))).

Skop's conclusory statement that a "heartbeat" occurs as early as six weeks LMP again cites no sources and omits entirely the biological function of the heart's chambers and valves in a heartbeat. *Id*. at 253 ¶ 9; *contra id*. at 155 ¶ 17 (Crockett) (explaining the mechanics of a heartbeat, including the chambers, valves, and pacemaker and conduction systems). Third, Dr. Skop concedes that Dr. Crockett's testimony regarding the formation of the heart's major components is medically accurate. *Id*. at 253–54 ¶¶ 11–12. And fourth, Dr. Skop concedes that at six weeks LMP, the developing organism is still considered an embryo. *E.g.*, *id.* at 252 ¶ 7 ("embryonic heart").

This Court should also decline to credit Dr. Skop's unsupported testimony because she does not disclose her previous acknowledgment that her medical opinions have been judicially deemed out of line with "mainstream, medical organizations," *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022 CA 912, 2022 WL 2436704, at *13 (Fla. Cir. Ct. July 05, 2022), *rev'd on other grounds*, 344 So.3d 637 (Fla. Dist. Ct. App. 2022), *aff'd*, 384 So.3d 67 (Fla. 2024), though she is being offered as an expert on the medical consensus in this case. While she discloses expert testimony in other litigation, Dr. Skop does not reveal the fact that her testimony in one of those cases was rejected by the court based on her admissions that her testimony was "inaccurate and overstated," relied on outdated data, and that "her views on abortion safety [were] out of step with mainstream, medical organizations." *Id.* Furthermore, in another case, she testified that she is "not really a good researcher" and that all of her publications may include plagiarism.[10] Her affiliation with the Charlotte Lozier Institute, which claims to "lead[] the pro-life movement with groundbreaking scientific, statistical, and medical research," is also evidence of bias.[11] The

[10] Dep. Ingrid Skop, M.D., at 120:25–121:7 & 257:20–259:19, *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah Sept. 2, 2020), available at https://www.aclu.org/documents/FDAvAHM-amicusbriefsources (at 1–9).

[11] *About Lozier Institute*, https://lozierinstitute.org/about/ (last visited July 26, 2024). Dr. Skop's CV also discloses that she is a current or former board member of other pro-life organizations including the American Association of Pro-Life Obstetricians and Gynecologists, Save the Storks,

"research" performed by the Charlotte Lozier Institute has been roundly criticized.[12] This includes one study co-authored by Dr. Skop that is listed on her CV in support of her expert qualifications, despite the fact that it has now been retracted. *Id.*; R. p. 260. Moreover, Dr. Skop offers her own statutory interpretation (a topic on which she is not an expert), rather than providing any medical or scientific evidence controverting Appellants' expert declarations. R. p. 255 ¶ 15; *see also Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) ("In general, expert testimony on issues of law is inadmissible.").

The Circuit Court abused its discretion by admitting Dr. Skop's testimony without probing its reliability. *See State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law."). The trial court must play a "'gatekeeping' role regarding the admission of expert testimony[]" and ensure that the requirements of South Carolina Rules of Evidence 403 and 702 are met. *State v. Phillips*, 430 S.C. 319, 334, 844 S.E.2d 651, 658 (2020). This includes screening the testimony for reliability based on four factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999); *see also State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022) (Hill, J.) ("In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the

Involved for Life, and anti-abortion centers The Source and AWC Clinics (formerly Any Woman Can). R. p. 261.

[12] *Retraction Notice*, 11 Health Servs. Rsch. & Managerial Epidemiology 1 (2024).

substance of the expert's testimony is reliable."). Here, where Dr. Skop provides no "factual and scientific basis" for her testimony, *Phillips*, 430 S.C. at 335, 844 S.E.2d at 659, it is unreliable. This Court has held that when an expert offers "only general descriptions" of the basis for a scientific opinion in lieu of "a meaningful explanation," her testimony should be excluded. *Id.*, 430 S.C. at 337, 844 S.E.2d at 660. The Circuit Court thus committed an error of law by entirely failing to assess the reliability of Dr. Skop's testimony and because its ruling is unsupported by the evidence.

This Court is in an equivalent position to the Circuit Court to enter findings of fact and credit Dr. Crockett over Dr. Skop. The Circuit Court did not conduct an evidentiary hearing and relied on the same written record that is now before this Court. *Cf. Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) (explaining that while the Supreme Court may make its own findings in equitable cases, master-in-equity "who saw and heard the witnesses . . . was in a better position to evaluate their credibility").

II. S.B. 474 Unambiguously Bans Abortion After Approximately Nine Weeks of Pregnancy.

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); *see also Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017) ("Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning."). The text is primary because "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Even where the resulting interpretation "may be an unintended consequence of statutory language . . . the plain language of the statute cannot be contravened," as "public policy

must emanate from the legislature." *State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002); *see also State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 623 (2011) (Courts "are bound to give effect to the expressed intent of the legislature." (citation omitted)). If the plain text of the statute is ambiguous, the Court then "construe[s] the terms of the statute according to settled rules of construction." *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001).

Here, the text of S.B. 474 demonstrates that the Act bans abortion only once a fetal heart has formed and cardiac activity is steady, repetitive, and rhythmic. For that reason alone, Appellants are likely to succeed on the merits of their claims, and the Circuit Court erred in denying a preliminary injunction. However, if the Court finds that the text of S.B. 474 is ambiguous, it should apply the punctuation and grammar canons, the rule of lenity, and the constitutional doubt canon, all of which indicate that S.B. 474 does not ban abortion until after approximately nine weeks LMP.[13]

A. The Definition of "Fetal [H]eartbeat" Requires that "[C]ardiac [A]ctivity" Be Steady, Repetitive, and Rhythmic, Which Occurs Only After Approximately Nine Weeks.

When interpreting a statute, this Court "abide[s] by the plain meaning" of its words. *Jacobs*, 393 S.C. at 587, 713 S.E.2d at 622. Each word must be given meaning. *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))). This means that no word or clause may be ignored or excised.

[13] It is only after approximately nine weeks LMP that (1) cardiac activity is steady, repetitive, and rhythmic; (2) there is a heartbeat; (3) a fetal heart has formed; and (4) there is a fetus, rather than an embryo. *Supra* at 6–8.

S.B. 474 bans abortion once a "fetal heartbeat has been detected," S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)), and defines "[f]etal heartbeat" to "mean[] cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." *Id.* (amending S.C. Code Ann. § 44-41-610(6)). To give effect to each word in the statutory definition, as Justice James noted at oral argument in *Planned Parenthood II*, there must be (1) "a heart, which is four chambers," and the detected activity must be (2) steady, (3) repetitive, and (4) rhythmic. Oral Argument Video at 10:25–10:50 (No. 2023-000896), https://media.sccourts.org/videos/2023-000896.mp4 ("Oral Argument Video"). Any construction of the statute must give meaning to each of these four elements.

As Dr. Crockett explained in her declaration, these four elements are only present after approximately nine weeks LMP. R. p. 159 ¶ 32; *see also id*. at 111 ¶ 10. First, Drs. Crockett and Skop concur with DHEC that the four chambers of a heart do not form until after approximately nine weeks LMP. *Supra* at 6–8; R. p. 254 ¶ 12. Furthermore, while there is repetitive detectable embryonic electrical activity after approximately six weeks LMP, that activity is not steady[14] or rhythmic[15] until after approximately nine weeks LMP. *Supra* at 6–8. This is because the pacemaker and conduction systems, which are necessary for a steady and rhythmic coordinated heartbeat, have not yet formed. R. p. 159 ¶ 31. Thus, construing S.B. 474 as a ban on abortion after early embryonic electrical activity can be detected would deprive the Clause ("the steady and repetitive rhythmic contraction of the fetal heart") "of all independent effect," contrary to the surplusage canon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26

[14] *See Steady*, Am. Heritage Dictionary (2022), https://www.ahdictionary.com/word/search.html?q=steady ("Free or almost free from change, variation, or fluctuation; uniform.").

[15] *See Rhythm*, Am. Heritage Dictionary (2022), https://www.ahdictionary.com/word/search.html?q=rhythm ("The patterned, recurring alternations of contrasting elements of sound or speech.").

Surplusage Canon (2012). Interpreting the language of S.B. 474 as banning abortion after approximately nine weeks LMP avoids rendering any of the statutory language superfluous.

B. The General Assembly Unambiguously Chose to Ban Abortion After a Fetal Heartbeat Can Be Detected.

The plain text of S.B. 474 unambiguously bans abortion only after the detection of a "*fetal* heartbeat." Throughout the Act—titled *Fetal* Heartbeat and Protection from Abortion Act—the General Assembly repeatedly emphasized that the presence of a *fetal* heart or "heartbeat" is the key medical marker. *E.g.*, S.B. 474, §§ 1(1) ("A *fetal* heartbeat is a key medical predictor . . .") (emphasis added), 1(2) ("when the *fetal* heart is formed") (emphasis added), 2(6) (amending S.C. Code Ann. § 44-41-610(6), definition of "*[f]etal* heartbeat" containing "*fetal* heart") (emphasis added), 10(A)(1)(e) (amending S.C. Code Ann. § 44-41-330(A), requiring provider to inform patient about "detectable *fetal* heartbeat" and probability "of bringing the human *fetus* possessing a detectable *fetal* heartbeat to term based on the gestational age of the human *fetus*") (emphasis added). The meaning of this language is clear on its face. By using the specific terms fetal and fetus—rather than embryonic or embryo—the General Assembly's chosen language expresses an unambiguous intention to ban abortion only after approximately nine weeks LMP. *See Tiffany*, 419 S.C. at 556–60, 799 S.E.2d at 483–85 (concluding that the General Assembly's selection of the words "defendant" or "defendants" rather than "potential tortfeasors" was deliberate and revealed the policy determination of the statute to limit the apportionment of fault to defendants); *Hardee v. McDowell*, 372 S.C. 413, 419, 642 S.E.2d 632, 636 (Ct. App. 2007), *aff'd as modified*, 381 S.C. 445, 673 S.E.2d 813 (2009) (holding that "[i]f the state legislature had intended [a particular result], it could have drafted the statute to reflect that intent" and citing *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 413, 618 S.E.2d 909, 914 (2005) for that proposition that courts should "consider [the] legislature's options in wording a statute when interpreting the statute").

The medicine supports reading the Act as written. At six weeks LMP, it is uncontested that the organism is an embryo, not a fetus. The development and formation of the heart continues to ten weeks LMP—the point at which an embryo becomes a *fetus*. R. pp. 111–12 ¶¶ 10–11. For example, cardiac septation—meaning that the chambers of the heart have fully divided—is completed at approximately ten weeks LMP. *Id.* at 158–59 ¶ 30. The valves—the opening and closing of which comprise a heartbeat—also form by ten weeks LMP. *Id*. at 155 ¶ 17, 158 ¶ 29. Dr. Skop concedes that the term "embryo" describes the developing organism at six weeks LMP by exclusively using the terms embryo and *embryonic*, rather than fetus or *fetal*, throughout her declaration. *See, e.g., id*. at 252–53 ¶¶ 7–8, 254–55 ¶¶ 12–13, 15, 257 ¶ 18. The record unambiguously shows that the words "fetal" and "embryo" are not interchangeable and have different meanings.

The General Assembly is well aware of this medical distinction and knows how to use the term embryo when it intends to refer to embryonic stages of development. For example, the General Assembly has specifically used the term embryo, including in the abortion code, when it has intended to refer to the embryonic stage of development. *E.g.*, S.C. Code Ann. §§ 44-41-320, 44-41-340; *see also* Scalia & Garner, § 25 Presumption of Consistent Usage ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.").

Finally, many other so-called "heartbeat" bans in sister states use the term "embryonic" in addition to "fetal."[16] In looking at a state statute that "is virtually a verbatim copy of a statute of a

[16] Ark. Code Ann. § 20-16-1302(2) (2020) (defining "[f]etus" to include "the embryonic stage of development"); Ky. Rev. Stat. Ann. § 311.7701(5) (2019) (same); Ohio Rev. Code § 2919.19(A)(5) (2019) (same); Ga. Code Ann. § 1-2-1(e)(1) (2022) ("'Detectable human heartbeat' means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac."); Idaho Code Ann. § 18-8801(2) (2022) ("'Fetal heartbeat' means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal

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; *see also Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 437 S.C. 640, 644, 880 S.E.2d 476, 478 (2022), *reh'g denied* (Dec. 13, 2022) ("Other states have unique statutory language that yields different results."). Thus, the Court should presume that the omission of the term "embryonic" in South Carolina's version of a "fetal heartbeat" ban is intended to be materially different from the otherwise similar laws enacted in other jurisdictions.

This Court must give effect to the operative term *fetal*, while noting the General Assembly's choice not to use the term embryonic, and thus find that S.B. 474 operates only to ban abortion during the fetal stage of development. Accordingly, it should reject Appellees' construction of the Act as a ban on abortion after approximately six weeks LMP.

C. The Whole of the Act Confirms That S.B. 474 Bans Abortion After Approximately Nine Weeks of Pregnancy.

The definition of "[f]etal heartbeat" must be read in conjunction with the whole of the Act. *See Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (Courts must 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)). While the Circuit Court began its analysis with the definition of "[f]etal heartbeat," it erred by looking to non-textual evidence of legislative intent rather than examining the text and findings of the Act.

In enacting S.B. 474, 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

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heart within the gestational sac."); Okla. Stat. tit. 63, § 1-745.13(3) (2012) ("'Embryonic or fetal heartbeat' means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the embryonic or fetal heart"); La. Stat. Ann. § 14:87.1(23) (2022) (defining "[p]regant" as the "female reproductive condition of having a developing embryo or fetus in the uterus which commences at fertilization and implantation.").

sac." S.B. 474, § 1(2) (emphasis added). Legislative findings are entitled to "weight in construing [a] statute." *Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 611 (1960); *see also Ranucci v. Crain*, 409 S.C. 493, 501, 763 S.E.2d 189, 193 (2014) (consulting legislative findings for guidance on how to construe whole statute harmoniously); *cf. Planned Parenthood II*, 440 S.C. at 474–75, 892 S.E.2d at 127 (citing importance of legislative findings of S.B. 474).

The General Assembly's finding that cardiac activity occurs only when "the fetal heart is formed" is highly instructive for two reasons. First, it confirms that the formation of the fetal heart is the key to understanding when "cardiac activity" begins. In other words, the General Assembly determined that you cannot have a "heartbeat" without a heart.[17]

Second, because the General Assembly found that "[c]ardiac activity" begins at "*a* biologically identifiable *moment* in time," S.B. 474, § 1(2) (emphasis added), the first evidence of a "heartbeat" must be traced to a single moment: when a heart forms. This means "the steady and repetitive rhythmic contraction of the fetal heart," *id.*, § 2 (amending S.C. Code Ann. § 44-41-610(6)), must describe "cardiac activity" in the definition of "[f]etal heartbeat." This point occurs after approximately nine weeks LMP. R. p. 159 ¶ 32. To read the statute otherwise would either render these provisions surplusage or conflict with the General Assembly's intent to ban abortion beginning at a single moment in time, not two. This Court should therefore interpret the singular point in time as the moment at which the chambers of the heart have formed, rather than the time at which early embryonic electrical impulses, which are neither steady nor rhythmic, can be detected.

[17] *See Cardiac*, Am. Heritage Dictionary (2022), https://www.ahdictionary.com/word/search.html?q=cardiac ("Of, near, or relating to the heart.").

This interpretation of "fetal heartbeat" is also consistent with the Act's requirement that a provider inform the patient of their right to "hear the unborn child's fetal heartbeat." S.B. 474, § 10 (amending S.C. Code Ann. § 44-41-330(A)). When embryonic electrical activity can first be "detected," this activity is not truly audible. Rather, a heartbeat cannot be heard until later in pregnancy. R. p. 111 ¶ 9.

The Circuit Court should have ended its analysis here because the text and the legislative findings are clear on their face. No further inquiry into legislative intent was necessary or appropriate because the General Assembly speaks through the words it chooses in a statute.

III. If the Court Determines S.B. 474 Is Ambiguous, It Should Apply the Canons of Construction Rather Than Search for Legislative Intent Outside the Text.

A. The Circuit Court Erred by Looking for Legislative Intent Outside the Plain Language of the Statute.

It is only "[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent" that courts may "search for that intent beyond the borders of the act itself." *Creswick v. Univ. of S.C.*, 434 S.C. 77, 82, 862 S.E.2d 706, 708 (2021); *see also Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) ("Legislative intent . . . is to be determined from the language employed; legislative history only can be resorted to for the purpose of solving doubt, not for the purpose of creating it."). For the reasons explained above, the language of S.B. 474 is unambiguous. Thus, the Circuit Court should not have considered other purported sources of legislative intent. R. pp. 16–21. But even if this Court finds the text ambiguous, it must nevertheless conclude that the Circuit Court erred by relying on two categories of extraneous information: selected statements from individual members of the General Assembly and dicta from this Court's prior cases that did not directly interpret the provisions now at issue. Neither source offers a legally legitimate framework for interpreting the Act.

1. Statements of Individual Legislators

First, the Circuit Court erred by citing statements of individual legislators made on the floor during the legislative process as reliable evidence of legislative intent. *Id*. at 17–18. While South Carolina courts may properly consider legislative history when interpreting ambiguous statutory language, the "quintessential rule of statutory construction is to identify the intent of *the Legislature* in promulgating a specific statute." *SCANA Corp. v. S.C. Dep't of Revenue*, 384 S.C. 388, 393, 683 S.E.2d 468, 470 (2009) (emphasis added); *see also Creswick*, 434 S.C. at 84, 862 S.E.2d at 709 (Any statutory interpretation must determine "not the intent of the individual members," but "the intent of *the legislature*." (citing *Cummings v. Mikelson*, 495 N.W.2d 493, 499 n.7 (S.D. 1993)) (emphasis added)).

Long-settled principles of statutory interpretation counsel against considering the testimony of legislators as competent evidence of legislative intent under South Carolina law:

> The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself, and the rule that the intention of the Legislature is the primary consideration in the construction of a statute does not permit the courts to consider statements made by the author of a bill or by those interested in its passage, or by members of the Legislature adopting the bill, showing the meaning or effect of the language used in the bill as understood by the person or persons making such statements.

Ocean Forest Co. v. Woodside, 184 S.C. 428, 192 S.E. 413, 419 (1937); *see also Tallevast v. Kaminski*, 146 S.C. 225, 143 S.E. 796, 799 (1928) ("[R]esort cannot be had to the opinions of legislators or of others concerned in the enactment of the law for the purpose of ascertaining the intent of the legislature."); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1260 (4th Cir. 1989) ("[T]estimony of legislators is not evidence of legislative intent under South Carolina law."); Scalia & Garner, § 66 The False Notion That Committee Reports and Floor Speeches Are Worthwhile Aids in Statutory Construction.

Instead, the Court "may inquire into the history of the legislation, as disclosed by the records of the two houses." *Moore v. Waters*, 148 S.C. 326, 146 S.E. 92, 92–93 (1928); *see also Timmons*, 254 S.C. at 402, 175 S.E.2d at 817 (noting that a Court may properly look at legislative history to determine legislative intent). These records may include the history of past amendments that supplemented or repealed key portions of the statute, *Powell v. Keel*, 433 S.C. 457, 470–71, 860 S.E.2d 344, 351 (2021) (amendment supplementing statute); *State Farm Mut. Auto Ins. Co. v. Richardson*, 313 S.C. 58, 60–61, 437 S.E.2d 43, 45 (1993) (amendment repealing portion of statute); reports from committees appointed to make findings and recommendations, *Mullis v. Celanese Corp. of Am.*, 234 S.C. 380, 390, 108 S.E.2d 547, 551 (1959); and references to statutes that involve the same subject matter and should be read in *pari materia*, *Ranucci*, 409 S.C. at 501, 763 S.E.2d at 193.

In passing S.B. 474, the General Assembly considered, but did not adopt, two definitions that would have expanded the definition of "[f]etal heartbeat" to include *embryonic* electrical activity. H.R. Journal 65, 125th Sess. (S.C. 2023) (Amendment No. 26 proposing to define "[f]etal heartbeat" as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac"); H.R. Journal 65 (Amendment No. 588). In other words, the General Assembly specifically rejected a more expansive definition of "[f]etal heartbeat," akin to what Appellees propose here. *Cf. Wade*, 348 S.C. at 229–30, 559 S.E.2d at 588–89 (discussing relevance of amendment to legislative intent); *Doe v. State*, 421 S.C. 490, 499 n.6, 808 S.E.2d 807, 811 n.6 (2017) (looking at "the historical evolution of the statute at issue," including amendments thereto). Legislatures are presumed to regard proposed changes to the language of a statute as being significant. *See* 73 Am. Jur. 2d *Statutes* § 115. The Court should thus reject an interpretation

of the Act that applies its abortion ban to the *embryonic* stage of development and instead construe it to apply only after approximately nine weeks LMP.

Instead of considering these proper sources of legislative history, the Circuit Court relied on an assemblage of individual legislators' statements supplied to the court by Appellees. R. pp. 17–18, 214–217. "There is a general acquiescence in the doctrine that the statements and opinions of the legislators uttered in debates . . . in the State Legislature are not appropriate sources of information from which to discover the meaning of the language of a statute passed by such body." *Tallevast*, 143 S.E. at 799 (citing 25 R.C. L. 1037, 1038). Selecting statements from individual members of the legislature to determine legislative intent "is like looking into a crowd and seeing your friends." *S. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n*, 297 S.C. 492, 494, n.1, 377 S.E.2d 358, 360 (Ct. App. 1989). The Circuit Court improperly determined the meaning of S.B. 474 by relying on the speeches of individual members of the legislative body.

2. Nor Is This Court's Obiter Dictum Evidence of Legislative Intent.

The Circuit Court further erred by characterizing dicta from previous cases involving the Act or the earlier "heartbeat" ban as binding precedent on the construction of the language at issue in this case. R. pp. 19–20. In the previous cases, the parties *assumed* that a "heartbeat" ban applied after approximately six weeks LMP. *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 221, 882 S.E.2d 770, 788 (2023), *reh'g denied* (Feb. 8, 2023) ("*Planned Parenthood I*") (Beatty, C.J., concurring) ("[T]he parties indicate it is their understanding that the law was intended to target gestation of six weeks or more."). Neither the Court nor the parties conducted a textual analysis of the Act or its predecessor in *Planned Parenthood I* or *II*.

This is the first case squarely presenting the question of what the definition of "[f]etal heartbeat" in S.B. 474 means. In referencing the decisions of the previous cases as "judicial precedent" determining the intent of the General Assembly, R. pp. 20–21, the Circuit Court

disregarded that this Court expressly left unresolved the question of when in pregnancy the Act bans abortion. *Planned Parenthood II*, 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4. Moreover, this Court's recapitulations of the parties' previously expressed assumptions regarding S.B. 474 cannot provide post-hoc evidence of the intent of the General Assembly at the time of passage. Thus, neither individual legislator statements nor dicta from this Court's prior cases were appropriate for the Circuit Court's consideration to determine the intent of the General Assembly, and the Circuit Court's reliance on these sources was improper.

B. If the Court Finds That the Text of S.B. 474 Is Ambiguous, the Rules of Statutory Interpretation Instruct That S.B. 474 Bans Abortion Only After Approximately Nine Weeks of Pregnancy.

If this Court determines that S.B. 474 is ambiguous, it must construe the statute by applying long-established canons of construction. Here, four interpretative rules are particularly relevant: the punctuation and grammar canons, the rule of lenity, and the constitutional doubt canon. Each indicates that S.B. 474 bans abortion only after approximately nine weeks LMP.

1. The Punctuation and Grammar Canons

The punctuation in S.B. 474 and the rules of grammar indicate that the Act bans abortion only after a fetal heart has formed and cardiac activity is steady, repetitive, and rhythmic. Courts must "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); *see also* 73 Am. Jur. 2d *Statutes* § 123 ("It is presumed that the legislature in phrasing a statute knows the ordinary rules of grammar and that the grammatical reading of a statute gives its correct sense. An interpretation is to be avoided which is contrary to the grammatical construction of the statute." (footnotes omitted)). Further, the punctuation canon instructs that "[n]o intelligent construction of a text can ignore its punctuation." Scalia & Garner, § 23 Punctuation Canon. Employing these canons in harmony instructs that the commas

surrounding the Clause ("cardiac activity**,** or the steady and repetitive rhythmic contraction of the fetal heart**,** within the gestational sac") (emphasis added), clarify that S.B. 474 is properly interpreted as applying only after nine weeks LMP.

Just as the Court should not disregard any word in the Act, it should not disregard the commas because doing so would "have a material effect upon the construction" of S.B. 474. *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))). The most natural reading of S.B. 474 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*, Grammarly, https://www.grammarly.com/blog/appositive (last visited July 29, 2024). Here, offsetting the Clause by commas indicates that it elaborates on the meaning of "cardiac activity" and could be omitted. Put in plain terms, the commas signal that the definition of "[f]etal heartbeat" should be read as "cardiac activity, or, *in other words*, the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." *See* Oral Argument Video at 10:01–04 (Justice James) ("When you expound, you explain."); *State v. Ramsey*, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993) (explaining that the term "or" "may be employed as a coordinate conjunction introducing a synonymous word or phrase, or it may join different terms expressing the same idea or thing"). If the definitional clause could be omitted, it would render the

terms "steady" and "rhythmic" superfluous; instead, the Clause must be given meaning in interpreting S.B. 474.

2. The Rule of Lenity Requires That the Statute Be Narrowly Construed.

South Carolina courts have long held that statutes which are penal in nature are "enacted under the police power of the state, and accordingly, are to be strictly construed, the application thereof being limited to the letter of the statute." *State v. S. Farm Bureau Life Ins. Co.*, 265 S.C. 402, 413, 219 S.E.2d 80, 85 (1975) (Bussey, J., dissenting). Thus, if this Court finds that S.B. 474 is ambiguous, any ambiguity must be strictly construed against the State. *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."). Strict construction of penal statutes requires that courts cannot extend the conduct that is reached by the statute by implication. *Roberts v. Gaskins*, 327 S.C. 478, 490, 486 S.E.2d 771, 777 (Ct. App. 1997); *see also Carolina Reo Motor Co. v. Moorer*, 148 S.C. 260, 146 S.E. 6, 8 (1928) (Blease, J., concurring) ("[W]here there is substantial doubt as to the construction of a legislative enactment with respect to a tax or license, such doubt must be resolved against the government.").

S.B. 474 is penal in nature, as violating the Act can result in a deprivation of liberty for up to two years, a fine of ten thousand dollars, or both. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)). Further, S.B. 474 is a regulatory statute enacted under the police power of the state and therefore penal in nature. *See S. Farm Bureau Life Ins. Co.*, 265 S.C. at 413, 219 S.E.2d at 85 (Bussey, J., dissenting). If this Court finds S.B. 474 ambiguous, the rule of lenity compels that any ambiguity must be resolved in Appellants' favor, "the application thereof being limited to the letter of the statute." *Id.*

3. Applying the Constitutional Doubt Canon, the Court Should Construe the Act to Apply Only After Approximately Nine Weeks.

The constitutional doubt canon provides that "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009); *accord Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331, 333–34 (1977); *United Student Aid Funds, Inc. v. S.C. Dep't of Health & Env't Control*, 349 S.C. 162, 168, 561 S.E.2d 650, 653 (Ct. App. 2002), *aff'd*, 356 S.C. 266, 588 S.E.2d 599 (2003). "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 739 (1995)). Applying the constitutional doubt canon respects the separation of powers because it is based on "a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature." Scalia & Garner, § 38 Constitutional-Doubt Canon.

Because interpreting S.B. 474 to apply at six weeks LMP would present serious constitutional questions, the Court should interpret S.B. 474 to apply only after approximately nine weeks LMP. *See United States v. Simms*, 914 F.3d 229, 255–56 (4th Cir. 2019) ("[T]he Supreme Court and lower courts have applied the doctrine of constitutional avoidance to adopt a '*narrowing* construction' that avoids constitutional concerns that would arise were the statute construed more broadly." (quoting *Skilling v. United States*, 561 U.S. 358, 406 n.40, 409 n.43 (2010) (cleaned up))).

In *Planned Parenthood II*, this Court held that the South Carolina Constitution does not protect a fundamental right to abortion. However, it assumed that article I, section 10's privacy protections "extend to bodily autonomy and integrity," *id.*, 440 S.C. at 481, 892 S.E.2d at 130, and

observed that S.B. 474 "infringes on a woman's right of privacy and bodily autonomy," *id.*, 440 S.C. at 483, 892 S.E.2d at 131. The Court noted that article I, section 10 protects only against *unreasonable* privacy infringements and rejected the plaintiffs' facial challenge to the Act because it is not unreasonable in all applications. *Id.* In so doing, it highlighted "the legislature's new focus on contraceptives and early pregnancy testing" as a critical distinction between S.B. 474 and Senate Bill 1, 124th Gen. Assemb., Reg. Sess. (S.C. 2021), which this Court found constitutional. *Id.*, 440 S.C. at 477, 892 S.E.2d at 128; *see also id.*, 440 S.C. at 491, 892 S.E.2d at 135 (Few, J., concurring) (identifying the Act's "changes that are designed to approach the idea of choice in terms of promoting active family planning" as "[t]he most impactful"). As Justice Few explained in his concurrence, the Act emphasizes access to contraceptives, emergency contraception, and early pregnancy testing as critical to the General Assembly's conceptualization of "choice" as allowed by S.B. 474's early abortion ban. *Id.*, 440 S.C. at 491–94, 892 S.E.2d at 135–37 (Few, J., concurring). The ultimate question of when an invasion of privacy and bodily autonomy becomes unreasonable was not resolved by either *Planned Parenthood I* or *II*.

To the degree this Court concludes that the Act is ambiguous, it should construe the Act to avoid grave and doubtful questions as to whether a ban on abortion from approximately six through nine weeks LMP violates the South Carolina Constitution because a six week LMP cut-off occurs too early in pregnancy to provide a "choice" for patients to obtain an abortion regardless of their use of contraception and pregnancy testing. *See id.*, 440 S.C. at 492, 892 S.E.2d at 136 (Few, J., concurring) (quoting the Attorney General's brief for the proposition that "[t]he timeline for a meaningful opportunity to make a decision begins prior to pregnancy").

Ms. Shelton's experience is demonstrative. She used one of the most effective forms of long acting reversible contraception, *see* R. pp. 122–23 ¶ 53 (discussing efficacy of IUDs),

confirmed her contraceptive device's efficacy with her doctor, tracked her period, and used a home pregnancy test promptly after her missed period. *Id.* at 186–87 ¶¶ 4–5. In taking these steps, Ms. Shelton acted in accordance with S.B. 474's emphasis on active family planning.[18] But despite her early recognition of her pregnancy and the resources to travel and pay for an abortion, Ms. Shelton was not able to obtain an abortion in South Carolina before six weeks LMP. *See id.* at 187 ¶ 8, 189 ¶¶ 16–17. Her inability to access abortion in South Carolina demonstrates that a ban on abortion at the earliest stages of pregnancy—through nine weeks LMP—presents grave doubts as to whether it is an unreasonable invasion of privacy.

These potential unreasonable and thus unconstitutional invasions of privacy for South Carolinians with pregnancies from approximately six through nine weeks LMP can be avoided by construing the Act to ban abortion only after a fetal heart has formed and any cardiac activity is steady, repetitive, and rhythmic. To avoid this potential constitutional infirmity as applied to future patients who are unable to access abortion in South Carolina before approximately six weeks LMP, the Court should interpret S.B. 474 as a ban on abortion only after approximately nine weeks LMP.

In addition to avoiding a serious question of constitutionality under South Carolina's privacy clause, Appellants' proposed interpretation of S.B. 474 to apply after approximately nine weeks LMP avoids a construction of the law that may offend South Carolinians' constitutional due process rights, as discussed further below.

[18] People using many forms of hormonal contraceptives may not get a period at all. R. p. 122 ¶ 53. Furthermore, because people often use contraceptives for the purpose of preventing pregnancy, they are less likely to assume they are pregnant if they have a late period. *Id.* Thus, contraceptive use is actually associated with *delayed* recognition of pregnancy. *Id.* That Ms. Shelton recognized she might be pregnant so shortly after her missed period makes her an outlier.

IV. Alternatively, if Ambiguous, the Act Is Unconstitutionally Vague.

Alternatively, if this Court finds the statutory language ambiguous, then S.B. 474 is unconstitutionally vague as applied to pregnancies where a fetal heart has not yet formed and where cardiac activity is not steady or rhythmic. 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 due process guarantee "requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)); *see also Curtis*, 345 S.C. at 571–72, 549 S.E.2d at 598 ("The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies."). This notice requirement is embodied in the void-for-vagueness doctrine, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. 509, 529, 846 S.E.2d 861, 871 (2020) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). If people "of common intelligence must necessarily guess as to [a law's] meaning and differ as to its application," the law is unconstitutionally vague. *Toussaint v. State Bd. of Med. Exam'rs*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991); *see also State v. Sullivan*, 362 S.C. 373, 376, 608 S.E.2d 422, 424 (2005).

In enacting S.B. 474, the General Assembly repeatedly referred to the detection of a "*fetal* heartbeat" and the existence of a "*fetal* heart" as key to determining the biologically identifiable moment in time when the Act bans abortions. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B) and S.C. Code Ann. § 44-41-610(6)) (emphasis added). Accordingly, since the Supreme Court's decision in *Planned Parenthood II*, PPSAT and Dr. Farris have been forced to assume that the Act prohibits abortion at the earliest possible point, as doctors lack clarity as to when in

pregnancy S.B. 474 bans abortions. R. p. 111 ¶ 8. It is uncontested that at six weeks LMP, the developing organism is considered an embryo, not a fetus. *See id.* at 112 ¶ 11, 252 ¶¶ 7–8, 254–55 ¶¶ 12–13, 15, 257 ¶ 18. The General Assembly is also well aware of this medical distinction and has used the terms distinctly in previous legislation. *See, e.g.*, S.C. Code Ann. § 44-41-320(2).

A *fetal* heart does not exist at six weeks LMP because no fetus exists at six weeks LMP. Interpreting the Act as banning abortions as early as six weeks LMP ignores the word "fetal," as any cardiac activity at that early point of pregnancy is *embryonic*. Accordingly, one doctor could reasonably read "fetal" as modifying "cardiac activity" such that it only applies beginning at ten weeks LMP. Another could view the General Assembly's use of "fetal" as a medically inaccurate shorthand for "fetal *or* embryonic" and interpret the Act as banning abortion as early as six weeks LMP. The language of S.B. 474 could thus mean two vastly different things to different doctors.

That S.B. 474 is unconstitutionally vague is further evident when looking at the question this Court did not previously resolve. *See Planned Parenthood II*, 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4 (whether definition of "'fetal heartbeat' . . . refers to one period of time during a pregnancy or two separate periods of time"). The definition of "[f]etal heartbeat" contains the use of the term "or," suggesting that "cardiac activity" and "the steady and repetitive rhythmic contraction of the fetal heart" refer to two distinct moments in embryonic development. *See Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both."). In other words, as Justice Few posed as one option at oral argument in *Planned Parenthood II*, under this reading, the Clause supplements rather than defines "cardiac activity." Oral Argument Video at 7:45–8:11. This interpretation renders the Act unconstitutionally vague—or as Justice Few said, results in "a gigantic hole of ambiguity." *Id.* at 9:10–18. It creates a conflict

between the legislative finding that "[c]ardiac activity begins at *a* biologically identifiable moment in time," S.B. 474, § 1(2) (emphasis added), and the definition of "[f]etal heartbeat." While the legislative finding refers to a single point in time, the definition of "[f]etal heartbeat" under this interpretation points to two different points in time. When two provisions of a penal law are irreconcilable, the Court should resolve the conflict against the State. Scalia & Garner, § 29 Irreconcilability Canon ("If irreconcilability occurs with penal provisions, the result should favor the accused.").[19]

Beyond providing "sufficient notice of the conduct prohibited," to survive a vagueness challenge, a "statute must also not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737 S.E.2d 830, 842 (2012). If S.B. 474 is not construed to apply after approximately nine weeks of pregnancy, then it is susceptible to unconstitutional arbitrary enforcement to the extent that it provides insufficient guidance or limitations to entities seeking to enforce the Act. For example, the Solicitor for the Ninth Judicial Circuit might interpret the Act to prohibit abortion after the detection of embryonic electrical activity but where a fetal heart has not yet formed, and thus bring charges related to an abortion provided to a patient who is seven weeks pregnant at PPSAT's Charleston health center, while the Solicitor for the Fifth Judicial Circuit might decline to bring charges for the same abortion if it had been provided at its Columbia clinic. Nothing in the statutory language itself bars a state official from reading the Act as prohibiting abortion after approximately nine weeks LMP, or after approximately six weeks—therein lies the threat to Appellants' due process rights to fair notice. *See Town of Sullivan's Island v. Murray*, 435 S.C. 22, 30, 864 S.E.2d

[19] In the alternative, the Court may strike both provisions. *Id.* Striking the definition of "[f]etal heartbeat," which is central to the Act's operation, would necessarily render S.B. 474 unconstitutionally vague.

909, 913 (Ct. App. 2021), *aff'd*, 439 S.C. 352, 887 S.E.2d 533 (2023) (holding statute unconstitutionally vague where "prohibited act was not determined by the language of the law itself, but instead by a decision of a government employee").

V. Appellants Satisfy the Remaining Preliminary Injunction Factors.

A. Appellants Will Suffer Irreparable Harm Absent a Preliminary Injunction.

"[W]hether a wrong is irreparable" is a question that is "not decided by narrow and artificial rules," but instead determined based on the facts of the case. *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 16 (1939); *see also Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36–37 (Ct. App. 2005). "The Courts proceed realistically if the threatened wrong involves actual damage; the mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction." *Kirk*, 4 S.E.2d at 16.

1. The Act Is Irreparably Harming PPSAT's Physicians and Staff.

PPSAT's physicians, including Dr. Farris, and staff are irreparably injured by the lack of clarity regarding when the Act's prohibition applies. The Act interferes with the ability of PPSAT—and its physicians, including Dr. Farris, and staff—to provide medical care consistent with their medical judgment and in support of patient wellbeing. *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016) (recognizing physicians' "right to practice medicine in the best interests of their patients"). PPSAT, Dr. Farris, and staff also face reputational harm and harm to their professional licenses from the threat of severe criminal and licensing penalties posed by the Act. These harms, too, are irreparable. *Peek*, 367 S.C. at 455, 626 S.E.2d at 37 (holding that a physician's "loss of professional practice and career" was an irreparable harm); *Levine*, 367 S.C. at 465 n.3, 626 S.E.2d at 42 n.3. The State does not contest these harms.

2. The Act Is Irreparably Harming PPSAT's Patients, Including Taylor Shelton.

S.B. 474 causes grave harm by forcing PPSAT and Dr. Farris to turn away the vast majority of South Carolinians seeking abortions. PPSAT and Dr. Farris have seen and will continue to see many patients seeking abortion services who have pregnancies with detectable embryonic electrical activity. While some of those will have pregnancies where a fetal heart has formed and where cardiac activity is steady, repetitive, and rhythmic, many will not. Those with pregnancies, like Ms. Shelton, from approximately six through nine weeks LMP are being turned away at great personal cost due to the legal limbo created by the Act. A truer reading of the Act would allow them to access care. They are being forced to carry their pregnancies to term against their will, with all of the physical, emotional, and financial costs that entails; self manage their abortions outside the health care system; or travel out of state to obtain care, often at great cost and delay. Each of these impacts constitutes irreparable harm to PPSAT and Dr. Farris's patients at a very early stage of pregnancy—where asynchronous embryonic electrical activity may be detected, but there is no formed fetal heart. *See, e.g.*, *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) ("A disruption or denial of . . . patients' health care cannot be undone after a trial on the merits." (internal quotations omitted)); *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (irreparable harm where individuals would experience complications and other adverse effects due to delayed medical treatment); *Banks v. Booth*, 468 F. Supp. 3d 101, 123 (D.D.C. 2020) (same).

In the absence of clarification, PPSAT and Dr. Farris must continue to construe the Act as a six week LMP ban, and S.B. 474 will continue to bar the vast majority of abortions in South Carolina. By contrast, the majority of patients seeking abortions at PPSAT's health centers would likely be able to obtain abortions if S.B. 474 were determined to ban abortion after the point when

a fetal heart has formed and cardiac activity is steady, repetitive, and rhythmic, after approximately nine weeks LMP.

The Act threatens severe, actual, and irreparable damage to South Carolinians' lives and livelihood—harms that are more than sufficient to justify entry of injunctive relief. *See Kirk*, 4 S.E.2d at 16.

VI. The Act's Potential Constitutional Violations Are Irreparable Harms.

Construing S.B. 474 to apply at six weeks LMP may violate South Carolinians' right to privacy. *Supra* Part III.B.3. And to the extent that the Act's definition of "[f]etal heartbeat" is vague, PPSAT, Dr. Farris, and staff are also suffering irreparable harm because their constitutional due process rights are being obstructed. Generally, when a plaintiff has demonstrated a loss of a constitutional right, no further showing of irreparable injury is required. *E.g.*, *B. P. J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 357 (S.D. W. Va. 2021) ("When a party has shown a likelihood of a constitutional violation, the party has shown an irreparable harm."); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) ("The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right."); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 2022) (collecting cases).

A. Appellants Have No Adequate Remedy at Law.

"Equitable relief is generally available only where there is no adequate remedy at law." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate remedy' at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* (citing 27A Am. Jur. 2d *Equity* § 94 (1966)). No damages award could compensate Appellants and PPSAT's patients for the harms inflicted by S.B. 474. Nor could such a remedy compensate PPSAT, Dr.

Farris, and staff for injury to their rights and interests under the threatened application of S.B. 474, a criminal law. *See De Treville v. Groover*, 219 S.C. 313, 328, 65 S.E.2d 232, 239 (1951); *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973). In the absence of equitable relief from this Court, Appellants do not have an adequate remedy at law to prevent Appellees from enforcing the Act prior to the formation of a heart.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the Circuit Court's decision and issue a preliminary injunction, prohibiting all Appellees and their officers, employees, servants, agents, appointees, or successors from administering, preparing for, or enforcing S.B. 474 and any other South Carolina statute or regulation that could be understood to give effect to S.B. 474, in a manner that would prohibit abortions before a fetal heart has formed and before cardiac activity is steady, repetitive, and rhythmic (through approximately nine weeks LMP), including through any future enforcement actions based on abortions performed during the pendency of an injunction. Appellants respectfully request that the Court waive any security under S.C. R. Civ. P. 65(c), in light of the constitutional interests at stake and PPSAT and Dr. Farris's critical role in providing medical services to South Carolinians who might otherwise not have access to these services.

Respectfully submitted,

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Dated: August 1, 2024