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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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*.

RECORD ON APPEAL – VOLUME II OF II

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY	)	
	)	CASE NO.: 2024-CP-40-00762
	)	
PLANNED PARENTHOOD	)	
SOUTH ATLANTIC, on behalf of itself,	)	
its patients, and physicians and staff,	)	
<i>et al.</i> ,	)	
	)	Motion to Dismiss and Response
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTH CAROLINA, <i>et al.</i> ,	)	
	)	
Defendants.	)	

Defendants State of South Carolina and Attorney General Alan Wilson (the “State”) hereby submit the following Motion to Dismiss and Response to Plaintiffs’ Motion for a Preliminary Injunction.

Plaintiff Planned Parenthood South Atlantic (“Planned Parenthood”) has brought five legal actions challenging South Carolina’s abortion laws in the past three years. All five of those actions challenged laws that generally prohibited abortion following the detection of a fetal heartbeat. In many of these previous legal actions, Plaintiff Planned Parenthood argued that the challenged laws prohibited abortion after the detection of “fetal or embryonic cardiac activity”—which Planned Parenthood insisted could occur “as early as approximately six weeks of pregnancy.”¹ Indeed,

¹ Plaintiffs describe such activity as “embryonic electrical activity.” For purposes of this brief, the State refers to this time period as “embryonic cardiac activity” or “cardiac activity,” recognizing that this activity encompasses the “electrical impulses generated by the cardiac conduction system” of the unborn child. *See* Expert Report of Ingrid Skop, M.D. at ¶ 15. As explained extensively in Dr. Skop’s expert report (attached as **Exhibit A**), these electrical impulses cause muscular contracts

Plaintiffs admit as much in Paragraph 54 of their Complaint. *See* Complaint at ¶ 54 (“PPSAT and Dr. Farris previously assumed that the term ‘fetal heartbeat’ included not just a ‘heartbeat’ once a heart has formed, but also embryonic electrical activity present before development of the cardiovascular system.”).

Plaintiffs now profess uncertainty as to the meaning of South Carolina’s abortion laws, contending that the definition of “fetal heartbeat” in Act No. 90, 2023 S.C. Acts (the “2023 Act”) is somehow ambiguous or vague. In doing so, they take the unprecedented step of asking this Court for an injunction that would effectively rewrite the 2023 Act according to their own preferences. The State respectfully requests that this Court reject this argument and dismiss Plaintiffs’ Complaint. Alternatively, the State requests that this Court deny Plaintiffs’ motion for a preliminary injunction.

BACKGROUND

The 2023 Act defines fetal heartbeat to mean “cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac.” 2023 Act, § 2, S.C. Code Ann. § 44-41-610(6). At the time of the law’s adoption, everyone—including legislators, the public, and the judiciary—treated the 2023 Act as a ban on abortion following the detection of embryonic cardiac activity—which occurs at approximately six weeks of pregnancy. In fact, four separate courts—including the South Carolina Supreme Court, a South Carolina Circuit Court, the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the District

to “propel oxygen-carrying blood cells throughout the embryo’s body beginning in the 6th week of gestation. These rhythmic contractions are not haphazard, but regular and repetitive, and if the heartbeat were to cease, the unborn child would die. The blood flow that can be detected by ultrasound at 6 weeks LMP corresponds directly with these contractions of the embryonic heart (i.e., heartbeats).” *Id.*

of South Carolina—treated the 2023 Act—or an identical definition in a previous law—as a ban on abortion following embryonic cardiac activity.

As explained below, this interpretation is consistent with the statute’s text, clear legislative history, and medical science.

ARGUMENT

I. This Court Should Dismiss Plaintiffs’ Complaint.

As an initial matter, this Court should dismiss Plaintiffs’ Complaint because Plaintiffs’ claims are precluded by the Supreme Court’s decision in *Planned Parenthood South Atlantic v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023) (“*Planned Parenthood II*”). Alternatively, this Court should dismiss Plaintiff’s Complaint because Plaintiffs lack standing, and Plaintiff Taylor Shelton’s claims are now moot.²

A. Plaintiffs’ Claims are Precluded by *Planned Parenthood II*.

Plaintiffs’ claims are precluded by the South Carolina Supreme Court’s decision in *Planned Parenthood II*. In *Planned Parenthood II*, the South Carolina Supreme Court left open a narrow possibility that a future litigant might be able to bring an “as-applied” constitutional challenge to the meaning of fetal heartbeat.

Despite Plaintiffs’ characterization of their Complaint as an as-applied challenge, Plaintiffs plainly seek facial relief. *See State v. German*, 439 S.C. 449, 466, 887 S.E.2d 912, 921 (2023) (describing a facial challenge as “an attack on a statute itself as opposed to a particular application”) (quoting *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015)). Plaintiffs’ Complaint asks this Court to construe the statute generally as applied to all individuals in South

² These arguments also demonstrate why Plaintiffs are not likely to succeed on the merits of their claims and why an injunction is inappropriate in this case. *See Davis v. Richard County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007).

Carolina and seeks broad remedies. Further, Plaintiffs' Memorandum in Support of Their Motion for a Preliminary Injunction expressly acknowledges that Plaintiffs seek broad relief that can only be characterized as facial. *See* Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction at 2 (asking this Court to issue a declaratory judgment with respect to the operation of the statute generally); *see also id.* at 26 ("Plaintiffs respectfully request that the Court issue a preliminary injunction, prohibiting all Defendants and their officers, employees, servants, agents, appointees, or successors from administering, preparing for, enforcing, or giving 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 heart has formed (after approximately nine weeks LMP), including through any future enforcement actions based on abortions performed during the pendency of an injunction."). Such relief is inappropriate in light of *Planned Parenthood II*'s narrow language.

B. Plaintiffs Lack Standing.

If Plaintiffs' claims are not precluded by *Planned Parenthood II*, Plaintiffs lack standing to assert these claims, and their claims should be dismissed. This is likely true for at least three reasons. First, and as a more general matter, Plaintiffs Planned Parenthood and Katherine Farris lack standing to assert claims on behalf of their patients.³ The South Carolina Supreme Court has long held that a plaintiff cannot seek the invalidity of an act on the ground that it somehow impairs the rights of others. *See Curtis v. State*, 345 S.C. 557, 576, 549 S.E.2d 591, 601 (2001). This is even true in the context of abortion. *See State v. McKnight*, 352 S.C. 635, 651, 576 S.E.2d 168,

³ Of course, Plaintiffs Planned Parenthood and Katherine Farris do not have a right to perform abortion services free of government regulation. *See Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000) ("No authority exists to support a conclusion that abortion clinics or abortion providers have a fundamental liberty interest in performing abortions free from governmental regulation.")

176 (2003) (“McKnight asserts several policy reasons why women should not be placed in the position of fearing prosecution for conduct engaged in while pregnant (e.g., choosing abortion over pregnancy, foregoing medical care, etc.). While she raises a number of legitimate concerns, she is in reality attempting to assert the privacy rights of other pregnant women, something she does not have standing to do.”).

Other courts from around the country have recently dismissed claims from abortion providers on similar grounds. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 659 (Ky. 2023) (“Based on the foregoing, we cannot hold that the abortion providers in this case have demonstrated that granting them third-party standing to assert the rights of their patients is appropriate.”).

Second, Plaintiffs Planned Parenthood and Katherine Farris lack standing to assert an as-applied claim. An as-applied challenge is a challenge to the application of a statute in the particular context in which a plaintiff has acted, or proposes to act. *See Doe v. State*, 421 S.C. 490, 503, 808 S.E.2d 807, 813 (2017). Such a challenge necessarily involves identifying a specific plaintiff and a specific set of circumstances. *See id.* With respect to Planned Parenthood and Katherine Farris, Plaintiffs’ Complaint fails to make this threshold showing, and as a result, those plaintiffs lack standing to assert an as-applied claim. *See Free Speech Coal., Inc. v. Att’y Gen. United States*, 974 F.3d 408, 422 (3d Cir. 2020) (“[A]s-applied claims require individualized inquiry, and the two associations therefore lack standing to bring those claims on behalf of their members.”).

Third, Plaintiff Taylor Shelton lacks standing for multiple reasons. Plaintiffs’ Complaint and Motion for a Preliminary Injunction reveal that Plaintiff Taylor Shelton obtained an abortion in September 2023 in North Carolina. *See Plaintiffs’ Memorandum in Support of Their Motion for Preliminary Injunction* at 23. In her affidavit submitted in support of the motion, she does not

allege that she was actually denied access to abortion by any medical doctor in South Carolina pursuant to the 2023 Act. Instead, she alleges that she was unable to get an appointment at certain clinics and then voluntarily sought an abortion in another state. Such voluntary actions do not constitute an injury that is traceable to the actions of the defendants. *See Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).

Plaintiff Shelton also lacks standing because her alleged injury is not redressable. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020) (describing the elements of constitutional standing, including the requirement that it must be likely that any purported injury will be redressed by a favorable decision). That is, even if Plaintiff Shelton was injured by the actions of the Defendants, no favorable decision from this Court can redress Plaintiff Shelton's purported injury.

As a final point, all Plaintiffs lack standing to assert a vagueness claim because, by their own admission, the statute clearly applies to their conduct. *See S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014) ("Thus, when raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague as applied to his own conduct, regardless of its potentially vague application to others.").

C. Plaintiff Taylor Shelton's Claims Are Moot.

Alternatively, Plaintiff Taylor Shelton's claims are moot because she obtained an abortion. As a result, her claims do not represent an active case or controversy and are, therefore, moot. *See Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973) ("There remains no actual controversy between the parties. We have held that this Court will not pass on moot and academic questions or make an adjudication where there remains no actual

controversy. A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy.”).

II. Injunctive Relief Should Be Denied.

As an initial matter, it is worth emphasizing that the South Carolina Supreme Court has already denied injunctive relief on this very issue in a separate action. *See Order, South Carolina Supreme Court* (Nov. 14, 2023) (“Petitioners have filed a petition for original jurisdiction asking the Court to determine the meaning of the term ‘fetal heartbeat’ as used in the 2023 version of the Fetal Heartbeat and Protection from Abortion Act (the Act). Petitioners further ask the Court to enjoin the enforcement of the Act. We deny the request for 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.”). The Supreme Court’s initial denial of injunctive relief, at a minimum, cautions against awarding injunctive relief here.

In any event, Plaintiffs have failed to make the requisite showing to obtain a preliminary injunction. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010) (“A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.”).

A. Plaintiffs Are Not Likely to Succeed on the Merits.

Injunctive relief should be denied because Plaintiffs’ claims lack merit. As outlined above, Plaintiffs are not likely to succeed on the merits because their claims are precluded, they lack standing, and their claims are moot. *See Davis*, 372 S.C. at 499, 642 S.E.2d at 741.

But even if this Court concludes that Plaintiffs' claims are not precluded and that Plaintiffs have standing and their claims are not moot, Plaintiffs are not likely to succeed on the merits of their statutory interpretation or vagueness claims. The 2023 Act is a general prohibition on abortion after the detection of embryonic cardiac activity. Basic principles of statutory interpretation support this conclusion.

Beginning with its text, the 2023 Act generally prohibits abortion after the detection of a fetal heartbeat. The act defines fetal heartbeat to mean "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." 2023 Act, § 2, S.C. Code Ann. § 44-41-610(6). The act defines gestational sac to mean "the structure that comprises the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy." 2023 Act, § 2, S.C. Code Ann. § 44-41-610(8). Cardiac activity is undefined.

Although cardiac activity is undefined in the act, the plain and ordinary meaning of the term should control. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). It is well documented that cardiac activity can be detected by ultrasound at an identifiable moment in time in a pregnancy—at approximately six weeks of pregnancy. *See Skop Report* at ¶ 15. Courts from around the country—including courts in South Carolina—have made findings to this effect. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021); *see also Planned Parenthood S. Atl. v. Wilson*, 26 F.4th 600, 606 (4th Cir. 2022), *vacated*, No. 21-1369, 2022 WL 2900658 (4th Cir. July 21, 2022).

And Planned Parenthood itself has consistently maintained that abortion prohibitions following the detection of cardiac activity mean prohibitions at or around six weeks of pregnancy. As noted above, Plaintiffs Planned Parenthood and Katherine Farris alleged as much in a complaint

filed last year. *See* Complaint at ¶ 58, *Planned Parenthood South Atlantic v. State*, No. 2023-CP-40-002745 (S.C.Com.Pl. May 25, 2023) (noting that fetal heartbeat “covers not just a ‘heartbeat’ in the lay sense, but also early electrical activity present before development of the cardiovascular system. Such cardiac activity may be detected by ultrasound as early as six weeks of pregnancy LMP (and sometimes sooner).”)

Indeed, nearly every publicly available source that discussed the 2023 Act explained the act’s operation as a general prohibition on abortion following approximately six weeks of pregnancy. *See, e.g.*, Sydney Kashiwagi, “South Carolina governor signs 6-week abortion bill into law,” CNN (May 25, 2023), available at <https://www.cnn.com/2023/05/25/politics/south-carolina-abortion-ban-bill/index.html> (“Senate Bill 474, known as the ‘Fetal Heartbeat and Protection from Abortion Act,’ bans most abortions after early cardiac activity can be detected in a fetus or embryo, commonly as early as six weeks into pregnancy . . .”).

Finally, it is worth emphasizing that the only courts that have addressed this issue—namely the meaning of an identical statutory definition of fetal heartbeat—have interpreted fetal heartbeat to mean embryonic cardiac activity, which is detectable at approximately six weeks of pregnancy. *See Planned Parenthood South Atlantic v. Wilson*, 520 F.Supp.3d 823, 825–26 (D.S.C. 2021) (“Yet the Act expressly bars the provision of nearly all abortions in South Carolina upon detection of embryonic or fetal ‘cardiac activity,’ which may occur as early as six weeks of pregnancy, or even sooner.”). Indeed, the South Carolina Supreme Court itself has previously defined fetal heartbeat to mean cardiac activity, which it has found to occur at approximately six weeks of pregnancy. *See Planned Parenthood South Atlantic v. State*, v. State, 438 S.C. 188, 196, 882 S.E.2d 770, 774 (2023) (explaining the operation of an identical definition contained in the 2021 Act); *see also* 438

S.C. at 217, 882 S.E.2d at 786 (describing the 2021 Act's operation of banning abortion after six weeks of pregnancy).

And the only other court to address this exact definition concluded that the law's definition of fetal heartbeat means "fetal or embryonic 'cardiac activity.'" *See Planned Parenthood South Atlantic v. State*, No. 2023-CP-40-002745 (S.C.Com.Pl. May 26, 2023) ("On May 23, 2023, the South Carolina Legislature adopted the Act, which Governor Henry McMaster signed on May 25, 2023, immediately banning abortion after the detection of fetal or embryonic 'cardiac activity' which is typically six weeks (S.B. 474, § 2 (adding S.C. Code Ann. §44-41-630(B) (the 'Six-Week Ban')) with only narrow exceptions.").

Significantly, this interpretation of fetal heartbeat is consistent with legislative intent. As the South Carolina Supreme Court has made repeatedly clear, the "cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). A statute "must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id.* Indeed, legislative intent is of such importance that a court "would reject the ordinary meaning of the words used in a statute however plain it may be, when to accept such meaning would defeat the plain legislative intent." *Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 815 (1942).

With respect to the 2023 Act, the intent of the General Assembly is unmistakable. The General Assembly intended to generally prohibit abortion following the detection of embryonic cardiac activity—which often occurs around 6 to 7 weeks of pregnancy. *See* 2023 Senate Journal, February 9, 2023, <https://tinyurl.com/59k29x8a> ("According, to the American Pregnancy Association the heartbeat of an unborn child can be detected between 6 ½ to 7 weeks of pregnancy

though it is possible, though much less likely, that a heartbeat can be detected a week earlier -- about 5 ½ weeks.”) Legislative supporters and opponents of the act both agreed that the act effectively prohibited abortion at this point in time. *See id* (describing the 2023 Act as a “six-week ban on abortion”).

Plaintiffs make much out of the clause following cardiac activity—“or the steady and repetitive rhythmic contraction of the fetal heart.” 2023 Act, § 2, S.C. Code Ann. § 44-41-610(6). According to Plaintiffs, this clause defines cardiac activity to mean a fetal heart has formed according to the parameters of Plaintiffs’ preferred expert. *See* Plaintiffs’ Memorandum in Support of Their Motion for Preliminary Injunction at 15. This argument should be rejected for multiple reasons.

First, and as discussed above, Plaintiffs’ argument is contrary to the clear intent of the legislature. There is nothing in the legislative history of the act to suggest that anyone in the legislature intended for the act to only apply at nine weeks of pregnancy. Instead, the act’s legislative history is replete with discussions of the act’s application at or around six weeks—or at the time of detectable cardiac activity. For this reason alone, this Court could reject Plaintiffs’ argument. *See Greenville Baseball*, 200 S.C. 363, 20 S.E.2d at 815.⁴

⁴ This Court is required to consider legislative intent for at least three reasons. First, and as noted above, “the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible.” *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). To effectuate this rule, courts must generally give statutes a “practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *Id.* Second, in applying the ordinary and popular meaning of a statute, courts must apply the ordinary and popular meaning of the statute as used by those who “framed and adopted” the statute. *See City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881). Stated differently, this Court must consider what the General Assembly thought the statute’s words meant. Third, if this Court concludes that the statute is somehow ambiguous, it may also look to legislative intent. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). All three of these principles of statutory interpretation provide a separate and independent basis for this Court to consider the intent of the General Assembly.

Second, the text of the clause can readily be interpreted to be consistent with a ban on abortions following embryonic cardiac activity. This is true for at least three separate reasons. First, “fetal heart” is a variation of a defined term in the statute—namely “fetal heartbeat.” And any variation of that term should be given the same definition. *See Steele v. State*, 22 S.W.3d 550, 554 (Tex. Ct. App. 2000) (“The code’s definition . . . applies to each of that word’s grammatical variations . . .”). Thus, “fetal heart” should be interpreted to mean cardiac activity within the unborn child’s cardiac system.

Second, fetal heart should be interpreted to be consistent with other definitions within the 2023 Act. The act uses the word “fetus” to refer to the unborn child at any stage of development, even an embryo. For example, the definition of “Fatal fetal anomaly” includes anomalies found in the “unborn child,” S.C. Code Ann. § 44-41-610(5), and “unborn child” is defined to be “an individual organism of the species homo sapiens *from conception until live birth*,” S.C. Code Ann. § 44-41-610(14) (emphasis added).

Third, and as explained extensively in Dr. Skop’s report, Plaintiffs’ purported definition of fetal heart is medically inaccurate. A “fetal heart” has actually developed by the time embryonic cardiac activity is detected. *See Skop Report* at ¶ 18 (“The science is clear: An embryo’s heart is beating steadily, repetitively, and rhythmically—and functioning as a heart should, circulating oxygen-rich blood throughout the preborn body—by the time the heartbeat can be detected around 6 weeks LMP.”). As Dr. Skop explained in her report:

While it is true, as Dr. Crockett stated, that the four chambers of the heart are not developed until the ninth week LMP, there is no medical consensus that a functioning blood-circulating embryonic heart does not begin to exist until it develops all four chambers. In fact, a “heart” is defined as an organ which “continuously pumps oxygen and nutrient-rich blood throughout your body to sustain life.” Or as Dr. Crockett states in her Declaration, “[t]he human heart is the primary organ of the circulatory system, serving to *pump blood throughout the body*.” Crockett Dec. at ¶ 12 (emphasis added). This is precisely what an embryonic

heart does even before the time it can be detected by ultrasound technology. As Dr. Crockett acknowledges, “the organ will begin to transmit electrical impulses which causes cellular contractions on approximately day 21 of development; *blood begins to circulate* in the embryo on days 24-25 of development (5 weeks LMP).” *Id.* at ¶ 27 (emphasis added). As a board-certified obstetrician practicing over thirty years, I can attest this heartbeat can usually be detected by around 6 weeks LMP. The ultrasound doppler reflects the movement of blood within the contracting heart, that is, the embryonic “heartbeat.”

Id. at ¶ 12-13. She explained further:

The key question in confirming the presence of cardiac activity is not, “When is the heart developmentally complete?” but, “When does it perform the function of a heart?” Although the embryonic heart has not yet reached its final shape, electrical impulses generated by the cardiac conduction system cause muscular contractions to propel oxygen-carrying blood cells throughout the embryo’s body beginning in the 6th week of gestation. These rhythmic contractions are not haphazard, but regular and repetitive, and if the heartbeat were to cease, the unborn child would die. The blood flow that can be detected by ultrasound at 6 weeks LPM corresponds directly with these contractions of the embryonic heart (i.e., heartbeats).

Id. at ¶ 15.⁵

Plaintiffs’ constitutional avoidance argument carries no weight in interpreting the statute because the South Carolina Supreme Court squarely foreclosed this argument in *Planned Parenthood II*, holding that the law was constitutional under article I, section 10. 440 S.C. at 485, 892 S.E.2d at 132; *see also* 440 S.C. at 486, 892 S.E.2d at 133 (Few, J, concurring) (acknowledging that the 2023 Act and the prior law ban most abortions at the “same point in time”).

Plaintiffs’ alternative argument regarding vagueness is without merit. As noted above, Plaintiffs lack standing to assert this type of vagueness challenge because their own conduct is clearly proscribed by the statute. *See Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001)

⁵ While the State strongly contests the accuracy of Plaintiffs’ experts, this Court need not necessarily resolve the scientific question of when a true fetal heart is formed. Instead, this Court could—and should—be guided by the clear intent of the legislature and conclude that fetal heartbeat means embryonic cardiac activity.

(“One to whose conduct the law clearly applies does not have standing to challenge it for vagueness.”).

In any event, Plaintiffs’ vagueness claim must fail on its merits. A law is unconstitutionally vague only if “a person of ordinary common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598. To survive a vagueness challenge, a law need only provide definite warning as to prohibited conduct when “measured by common understanding and practices.” 345 S.C. at 572, 549 S.E.2d at 599.

As measured by common understanding and practice, it is clear that the 2023 Act is constitutional. Since its enactment, everyone—including Plaintiffs—has agreed upon the meaning of the act, recognizing its general restriction on abortion after approximately six weeks of pregnancy. Indeed, Plaintiffs Planned Parenthood and Katherine Farris have filed lawsuits over this precise meaning. In such circumstances, no one can reasonably argue that Plaintiffs have been left to “guess as to its meaning.”

B. Plaintiffs Have Not Established Irreparable Harm.

Injunctive relief should also be denied because Plaintiffs have failed to establish irreparable harm. As a general matter, Plaintiffs Planned Parenthood and Katherine Farris cannot invoke harm suffered by third parties to support their claim for injunctive relief. *See Cameron., P.S.C.*, 664 S.W.3d at 660. The alleged interference with Plaintiffs’ medical practice is an insufficient basis to grant injunctive relief. *See id* (“Further, the personal harm asserted by the abortion providers, the harm to their business, is not considered an irreparable injury for the purposes [of] issuing a temporary injunction.”). And by her own admission, Plaintiff Taylor Shelton was able to obtain an abortion, undercutting any notion that she will experience immediate, irreparable harm if the injunction is not granted. *See Compton v. S.C. Dep’t of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639,

642 (2011) (noting that a plaintiff must show that she will suffer “immediate, irreparable harm without the injunction”).

C. The Status Quo Favors the State.

Finally, it is worth emphasizing that the status quo favors the State. As noted above, the South Carolina Supreme Court previously upheld the constitutionality of the 2023 Act. And if that were not enough, every statute is presumed constitutional. *See Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (“All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.”).

CONCLUSION

For nearly three years, Plaintiff Planned Parenthood insisted that the 2023 Act—or a similar definition in a separate law—banned most abortions in South Carolina once cardiac activity was detected or at approximately six weeks of pregnancy. Planned Parenthood made public representations to this effect, and it filed lawsuits attesting to this fact.

Planned Parenthood was not alone in its belief. Indeed, everyone—the General Assembly, the judiciary, and the public—recognized that the definition contained in these laws generally prohibited abortion at this point in time.

Only after the South Carolina Supreme Court’s decision in *Planned Parenthood II* did Planned Parenthood change course, at first arguing that the law applied at approximately 17-20 weeks of pregnancy and then shifting course to arguing that the law applied at approximately 9 weeks of pregnancy.

Plaintiffs now ask this Court to adopt its preferred—and novel—interpretation of the 2023 Act. This Court should decline to do so. It should dismiss Plaintiffs’ Complaint and/or deny their request for a preliminary injunction.

Respectfully submitted,

s/Thomas T. Hydrick

Alan Wilson
Attorney General
Robert D. Cook
Solicitor General
S.C. Bar No. 1373
J. Emory Smith, Jr.
Deputy Solicitor General
S.C. Bar No. 5262
Thomas T. Hydrick
Assistant Deputy Solicitor General
S.C. Bar No. 103198
Joseph D. Spate
Assistant Deputy Solicitor General
S.C. Bar No. 103734

March 4, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY	)	
	)	CASE NO.: 2024-CP-40-00762
	)	
PLANNED PARENTHOOD	)	
SOUTH ATLANTIC, on behalf of itself,	)	
its patients, and physicians and staff,	)	
<i>et al.</i> ,	)	
	)	EXPERT REPORT OF
Plaintiffs,	)	INGRID SKOP, M.D.
	)	
v.	)	
	)	
SOUTH CAROLINA, <i>et al.</i> ,	)	
	)	
Defendants.	)	

I, Ingrid Skop, M.D., state that I am at least 18 years of age, and I am competent to testify.

1. Since 1998, I have been a board-certified obstetrician and gynecologist. I received a Bachelor of Science degree in physiology from Oklahoma State University, and a Doctor of Medicine degree from Washington University School of Medicine. I completed a residency in obstetrics and gynecology at the University of Texas Health Science Center at San Antonio. I served as a practicing obstetrician/gynecologist in San Antonio for thirty years and I have delivered over five thousand babies in my career. I have extensive experience caring for women with complicated and/or unplanned pregnancies and their unborn children. Currently, I serve as Vice President and Director of Medical Affairs at the Charlotte Lozier Institute. I also work part-time as an obstetric hospitalist for OB Hospitalist Group. A copy of my C.V. is attached to this report as Appendix A.

2. I have been asked to provide expert witness testimony concerning the development of the fetal heart and the nature of the fetal heartbeat. In formulating the opinions expressed in this

report, I have relied upon my years of experience in research and clinical practice, and numerous sources referenced in my testimony.

3. As part of my preparation of this report, I have reviewed the following materials, in addition to the references cited in my report:

- a. "South Carolina Fetal Heartbeat and Protection from Abortion Act of 2023" (the "Act");
- b. Plaintiffs' Complaint for Declaratory and Injunctive Relief, dated February 5, 2024;
- c. Plaintiffs' Motion for a Preliminary Injunction and Supporting Memorandum dated February 5, 2024; and
- d. Declarations of Katherine Farris, M.D.; Taylor Shelton; and Amy Crockett, M.D. (which are exhibits to Plaintiffs' Memorandum in Support of Motion for a Preliminary Injunction).

4. In their Complaint in *Planned Parenthood South Atlantic, et al. v. South Carolina et al.*, Civil Action No. 2024-CP-40-00762, Plaintiffs argue that the Court should construe the definition of "cardiac activity" in the Act as "the point when a heart has formed, which is after approximately nine weeks [Last Menstrual Period] LMP, consistent with the medical consensus." Compl. at ¶ 7.

5. In support of this nine-week standard, Plaintiffs set forth a declaration from Dr. Amy Crockett, which states "the medical consensus is that the four main components of a heart (four chambers, walls, valves, and conduction system) are formed after approximately 9 weeks LMP." Crockett Dec. at ¶ 32. Dr. Crockett also declared that cardiac muscle 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" *Id.* at ¶ 31.

6. Contrary to Plaintiffs' assertion, however, the 9-week LMP measure for determining the existence of a human cardiac activity does not enjoy "medical consensus." In fact, Plaintiffs' own Complaint and the sources it cites do not consistently apply the 9-week measure. *See, e.g.*, Compl. at ¶ 77 ("[T]he development of the four major components of a heart—the four chambers, the walls separating them, the valves connecting them, and the conduction system—cannot occur until after approximately *nine* weeks LMP.") (emphasis added); *see also* Compl. at ¶ 86 ("At approximately *ten* weeks LMP, cardiac septation is completed, meaning that systemic and pulmonary circulation have completely separated and the four chambers of the heart have formed.") (emphasis added).

7. Instead, as more fully discussed below, there is medical consensus that the organ identified here as the embryonic heart contracts to circulate blood throughout the embryo around 5-6 weeks LMP. Although the heart has not reached its final shape or size at this point, the heart has undoubtedly formed, albeit at an early stage of development, and is functioning as required. Otherwise, oxygenated blood would not circulate and the embryonic human would die.

8. The embryonic heart starts beating around 22-23 days after conception (approximately 5-6 weeks LMP).¹ The heart is the embryo's first functioning organ, because the embryo's survival requires cardiac contractions to propel circulation of oxygen-carrying blood. Passive oxygen diffusion that sustained the embryo earlier in gestation becomes insufficient to support his continued life as he increases in size and complexity.² By 24 days after conception (or

¹ Tan CMJ, Lewandowski AJ, *The Transitional Heart: From Early Embryonic and Fetal Development to Neonatal Life*, FETAL DIAGN THER., 2020;47:373-386, <https://pubmed.ncbi.nlm.nih.gov/31533099/>.

² Sadler TW, *Langman's Medical Embryology*, 14th ed. (Philadelphia: Wolters Kluwer, 2019), <https://meded.lwwhealthlibrary.com/book.aspx?bookid=2487>.

approximately 6 weeks LMP), the regular heartbeat can be measured using transvaginal ultrasound technology in most viable pregnancies.³

9. In their Complaint, Plaintiffs state that “[a]fter approximately six weeks LMP, an ultrasound will show a flicker within the embryo. The flicker is cardiac cells, or cardiomyocytes, which have special characteristics that promote the conduction and contraction of the cell tissue.” Compl. at ¶ 81. This “conduction and contraction” of “cardiac cells” is simply a scientific description of what is commonly known as a “heartbeat”.

10. Over the next four weeks, the average heart rate rises from 110 beats per minute at the beginning of 6 weeks gestation to 173 beats per minute at the end of 9 weeks gestation.⁴ In fact, researchers have found that the presence of a heartbeat at 6-8 weeks indicates that the baby has a very high chance of surviving until childbirth.⁵

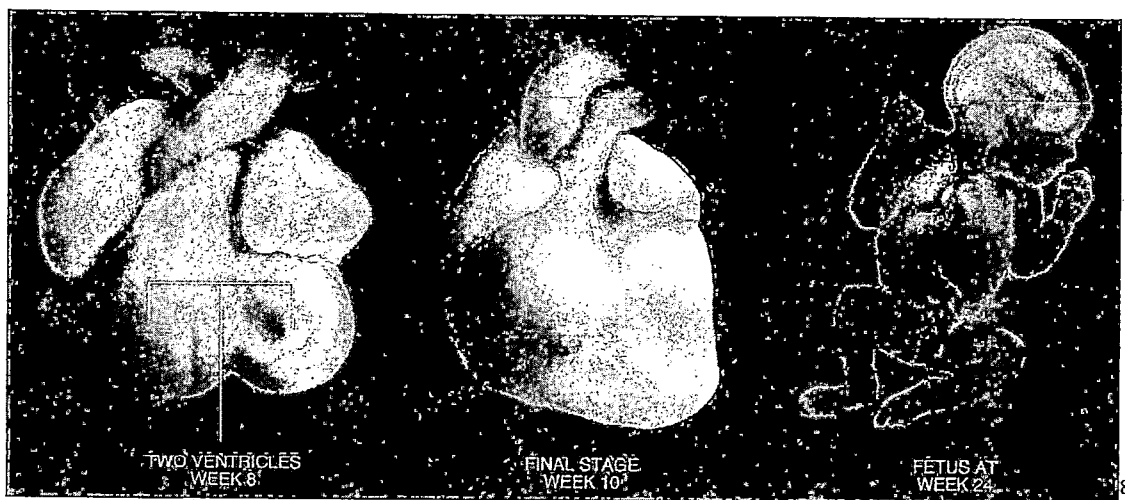
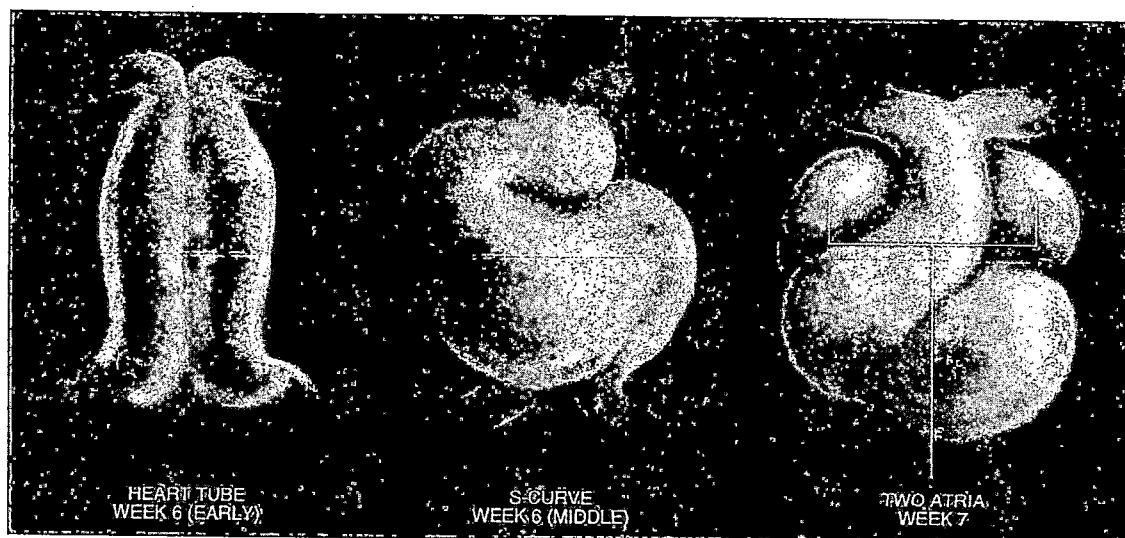
11. The heart starts as two tubes, which fuse together and fold during the sixth week, forming an s-curve. In the seventh week, two sections become the atria, and in the eighth week the ventricles form. The heart reaches its final shape by the tenth week, with two atria, two ventricles, and circulatory blood vessels, although these blood vessels mostly bypass the liver and lungs to help the embryo get oxygenated blood from the umbilical cord to the rest of the body.⁶ See below for illustrations of the development of the preborn heart:

³ Tezuka N, et al., *Embryonic Heart Rates: Development in Early First Trimester and Clinical Evaluation*, GYNECOL OBSTET INVEST., 1991;32(4):210-212, <https://pubmed.ncbi.nlm.nih.gov/1778511/>.

⁴ Papaioannou GI, Syngelaki A, Poon LC, et al., *Normal Ranges of Embryonic Length, Embryonic Heart Rate, Gestational Sac Diameter and Yolk Sac Diameter at 6-10 Weeks*, FETAL DIAGN AND THER., 2010;28(4):207-219, <https://pubmed.ncbi.nlm.nih.gov/20847544/>.

⁵ Hyer JS, et al., *Predictive Value of the Presence of an Embryonic Heartbeat for Live Birth: Comparison of Women With and Without Recurrent Pregnancy Loss*, FERTIL STERIL., 2004;82:1369, <https://pubmed.ncbi.nlm.nih.gov/15533362/>.

⁶ Buijtendijk MFJ, Barnett P, van den Hoff MJB, *Development of the human heart*, AM J MED GENET PART C., 2020;184C:7-22, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7078965/>.



12. While it is true, as Dr. Crockett stated, that the four chambers of the heart are not developed until the ninth week LMP, there is no medical consensus that a functioning blood-circulating embryonic heart does not begin to exist until it develops all four chambers.

⁷ *Highlights of the Early Human Heart*, CHARLOTTE LOZIER INSTITUTE <https://lozierinstitute.org/dive-deeper/highlights-of-the-early-heart/> (accessed Feb. 6, 2024).

⁸ *Id.*

13. In fact, a “heart” is defined as an organ which “continuously pumps oxygen and nutrient-rich blood throughout your body to sustain life.”⁹ Or as Dr. Crockett states in her Declaration, “[t]he human heart is the primary organ of the circulatory system, serving to *pump blood throughout the body*.” Crockett Dec. at ¶ 12 (emphasis added). This is precisely what an embryonic heart does even before the time it can be detected by ultrasound technology. As Dr. Crockett acknowledges, “the organ will begin to transmit electrical impulses which causes cellular contractions on approximately day 21 of development; *blood begins to circulate* in the embryo on days 24–25 of development (5 weeks LMP).” *Id.* at ¶ 27 (emphasis added).

14. As a board-certified obstetrician practicing over thirty years, I can attest this heartbeat can usually be detected by around 6 weeks LMP. The ultrasound doppler reflects the movement of blood within the contracting heart, that is, the embryonic “heartbeat.”

15. The key question in confirming the presence of cardiac activity is not, “When is the heart developmentally complete?” but, “When does it perform the function of a heart?” Although the embryonic heart has not yet reached its final shape, electrical impulses generated by the cardiac conduction system cause muscular contractions to propel oxygen-carrying blood cells throughout the embryo’s body beginning in the 6th week of gestation. These rhythmic contractions are not haphazard, but regular and repetitive, and if the heartbeat were to cease, the unborn child would die. The blood flow that can be detected by ultrasound at 6 weeks LMP corresponds directly with these contractions of the embryonic heart (i.e., heartbeats).

⁹ *Anatomy and Circulation of the Heart*, WEBMD, <https://www.webmd.com/heart-disease/high-cholesterol-healthy-heart> (accessed Feb. 6, 2024).

16. Additionally, some children with congenital heart defects do not ever form a four-chambered heart or fail to develop the normal cardiac valves.¹⁰ No one would allege that these children do not have a “heartbeat.”

17. As a general matter, if a body part functions at an early stage of development, it is widely considered to remain that body part, even though its appearance and structure may change over time. For example, a newborn child’s mouth is ordinarily called a mouth before primary (baby) teeth or even permanent (adult) teeth erupt from the child’s gums, even though teeth are present in human mouths for most of the human lifespan.¹¹ Or consider the brain, which develops in three phases, the second of which spans from mid-gestation throughout 2 years postnatally.¹² No one doubts that a brain has formed in a one-year-old child simply because the brain has not yet reached the third and final phase of brain development. In the same way, a blood-circulating embryonic heart exists and is functional at an early stage of development even though it has not reached its final shape. As Dr. Crockett acknowledges in her Declaration, “the heart continues to develop throughout the remainder of pregnancy (a full[-]term pregnancy goes to approximately 40 weeks LMP) and even into the newborn period.” Crockett Dec. at ¶ 36.

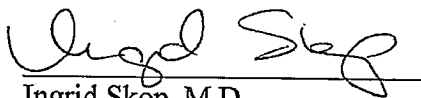
¹⁰ *Facts about Hypoplastic Left Heart Syndrome*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/heartdefects/hlhs.html#:~:text=Hypoplastic%20left%20heart%20syndrome%20affects,formed%20or%20is%20very%20small> (accessed Feb. 6, 2024).

¹¹ *Anatomy and Development of the Mouth and Teeth*, JOHNS HOPKINS MEDICINE <https://www.hopkinsmedicine.org/health/wellness-and-prevention/anatomy-and-development-of-the-mouth-and-teeth> (discussing stages of human mouth and teeth development).

¹² Budday, S., Steinmann, P., Kuhl, E., *Physical Biology of Human Brain Development*, FRONT. CELL. NEUROSCI., Vol. 9, Jul. 8, 2015, <https://www.frontiersin.org/articles/10.3389/fncel.2015.00257/full>

18. The science is clear: An embryo's heart is beating steadily, repetitively, and rhythmically—and functioning as a heart should, circulating oxygen-rich blood throughout the preborn body—by the time the heartbeat can be detected around 6 weeks LMP.

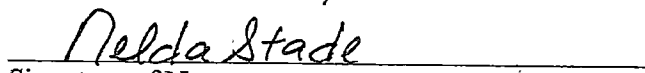
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.


Ingrid Skop, M.D.

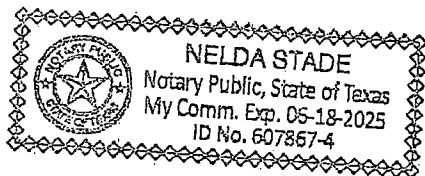
February 8, 2024

Subscribed and sworn before me this

8 day of February, 20 24


Signature of Notary

My Commission expires 6-18, 20 25



Appendix A to Skop Report

Ingrid Skop, M.D.

2800 Shirlington Road, Suite 1200
Arlington, VA 22206
210-274-0777 (cell)
202-223-8073 (office)
iskop@lozierinstitute.org

Work Experience:

- Vice President of Medical Affairs, Charlotte Lozier Institute
March 2023-Current.
- Senior Fellow and Director of Medical Affairs, Charlotte Lozier Institute
April 2022-March 2023.
- Obstetric Hospitalist, OB Hospitalist Group
April 2022-Current.
- Hospital Appointment, Baptist Hospital System, San Antonio, TX
July 1996-Current.
- Partner, Northeast OB/GYN Associates
July 1998-March 2022.
- Employed physician, Northeast OB/GYN Associates
July 1996-June 1998.
- Chairman, Department of OB/GYN, Northeast Baptist Hospital
2003-2005.

Board Certification and Licensure:

- Texas Medical License J4524, 1992-Current.
- Board Certified, American Board of Obstetrics and Gynecology, 1998-Current.
- Fellow, American College of Obstetrics and Gynecology, 1998-Current.

Education:

- Obstetrics and Gynecology Postdoctoral Training:
University of Texas Health Sciences Center at San Antonio. July 1992-1996.
Chief Resident. July 1995-June 1996.
- Medical Doctorate:
Washington University School of Medicine. August 1988-May 1992.
- Bachelor of Science, Physiology:
Oklahoma State University. August 1984-May 1988.

Publications/Presentations/Professional (past six years)

- Reviewer for peer-reviewed journals:
 - Annals of Internal Medicine 2022-current
 - Issues in Law and Medicine 2021-current
- Studnicki J, Longbons T, Reardon D, Fisher J, Harrison D, Skop I, et al. *The enduring association of a first pregnancy abortion with subsequent pregnancy outcomes: A longitudinal cohort study.* Health Services Research and Managerial Epidemiology. 2022;9:1-9.

- Skop I. *Chemical abortion: Risks posed by changes in supervision*. Journal of the American Association of Physicians and Surgeons. 2022;27(2):56-61.
- Studnicki J, Longbons T, Harrison D, Skop I, et al. *A post hoc exploratory analysis: Induced abortion complications mistaken for miscarriage in the emergency room are a risk factor for hospitalization*. Health Services Research and Managerial Epidemiology. 2022;9:1-4.
- Studnicki J, Harrison D, Longbons T, Skop I, et al. *Longitudinal cohort study of emergency room utilization following mifepristone chemical and surgical abortions, 1999-2015*. Health Services Research and Managerial Epidemiology. 2021;8:1-11.
- National Institute of Health Fetal Tissue Research Ethics Advisory Board, member. 2020.
- Marmion P, Skop I. *Induced abortion and the increased risk of maternal mortality*. Linacre Quarterly. 2020;87(3):302-310.
- Skop I. *Medical abortion: What physicians need to know*. Journal of the American Association of Physicians and Surgeons. 2019;24(4):109-113.
- Studnicki J, Reardon D, Harrison D, Fisher J, Skop I. *Improving the metrics and data reporting for maternal mortality: A challenge for public health surveillance and effective prevention*. Online Journal of Public Health Informatics. 2019;11(2):E17.
- Skop I. *Abortion safety: At home and abroad*. Issues in Law and Medicine. 2019;34(1):43-75.
- Studnicki J, Longbons T, Fisher J, Harrison D, Skop I, Mackinnon S. *Doctors who perform abortions: Their characteristics and patterns of holding and using hospital privileges*. Health Services Research and Managerial Epidemiology. 2019;6:1-8.
- "Complications and mortality from abortion." Oral presentation at the United Nations Global Commission on the Status of Women. March 2018.
- Texas Women's Healthcare Coalition, member. 2016-2019.
- San Antonio Maternal Morbidity and Mortality Task Force. 2016-2019.

Expert Witness Testimony:

- Cox v Texas written expert witness testimony, December 2023.
- South Carolina written expert witness testimony, September 2023.
- Zurawski v Texas oral expert witness testimony. July 2023.
- Louisiana written legislative testimony. May 2023.
- U.S. Senate Committee on the Judiciary invited oral and written legislative testimony. April 26, 2023.
- Wyoming written legislative testimony. March 2023.
- West Virginia written legislative testimony. February 2023.
- Nebraska oral and written legislative testimony. February 2023.
- Georgia written litigation testimony and trial testimony case #2022-CV-367796. HB 481: Living infants' fairness and equality act. August 2022.
- Florida written litigation testimony, deposition and trial testimony case #2022-CA-912. HB 5: An act relating to reducing fetal and infant mortality. June 2022.
- Ohio written litigation testimony. SB 260: An act to amend...and enact...regarding abortion inducing drugs. May 2022.
- Kentucky oral legislative testimony. December 2021.
- U.S. House Oversight Committee invited oral legislative testimony. September 2021.
- Oklahoma written litigation testimony. SB 778: An act relating to OK abortion inducing drugs risk protocol act, SB 779: An act creating the OK abortion inducing drugs certification program act, HB 1904: An act relating to public health. September 2021.
- Texas oral legislative testimony. March 2021.

- South Carolina written legislative testimony. SB 1: South Carolina fetal heartbeat and protection from abortion act. February 2021.
- Montana oral and written legislative and litigation testimony. HB 136: An act adopting the MT pain capable unborn child protection act, HB 140: An act requiring...ultrasound. January 2021.
- Utah written litigation testimony and deposition. HB 136: An act...enacts and modifies provisions relating to abortion. 2020.
- Georgia written legislative testimony. HB 481: Living infants' fairness and equality act. 2020.
- Expert witness for the defense in medical malpractice lawsuit: Mary Ann De La Garza v. Carolina Praderio, M.D., Cause No. 2015DCV-3922-H (347th Judicial District Court). 2018.
- Vermont written legislative testimony. 2018.
- Texas oral legislative testimony. June 2013.

Charitable Organizations:

- Save the Storks Medical Advisory Board 2023-current.
- Involved for Life Medical Advisory Board 2022-current.
- Impact San Antonio Women's Charitable Organization, founding member. 2004-Current.
- The Source Houston and Austin, medical director. 2021-2022.
- The Source Texas, board member. 2019-2022.
- AWC Clinics, ob/gyn medical director. 2020-Current.
- Any Woman Can, board member. 2015-2022.
- Any Woman Can, board chairman. 2018-2022.
- American Association of Pro-Life Obstetricians and Gynecologists, board member. 2018-2020.
- The Contraceptive Initiative, founding member and chairman. 2015-2019.
- Healthy Futures of Texas, board member. 2016-2019.
- Keystone School, board member. 2014-2015.
- Keystone School, Parent Teacher Organization president. 2014-2015.
- San Antonio AIDS Foundation, medical volunteer. 2012-2016.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
	)	
PLANNED PARENTHOOD SOUTH	)	CASE NO. 2024-CP-40-0762
ATLANTIC, on behalf of itself, its	)	
patients, and its physicians and staff, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	MOTION TO DISMISS AND RESPONSE
	)	OF DEFENDANT DIRECTOR SIMMER
vs.	)	
	)	
STATE OF SOUTH CAROLINA, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

Defendant Edward Simmer, in his official capacity as Director of the South Carolina Department of Health and Environmental Control, hereby submits the following Motion to Dismiss, pursuant to Rule 12(b)(6), SCRCP.

LEGAL STANDARD

A motion to dismiss should be granted whenever a complaint “fail[s] to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRCP. When “the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss.” *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

“The remedy of an injunction is a drastic one and ought to be applied with caution.” *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). “An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation.” *Allegro, Inc. v. Scully*, 400 S.C. 33, 45, 733 S.E.2d 114, 121 (Ct. App.

2012). A plaintiff “must establish three elements” to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. *Compton v. S.C. Dep’t of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Whether to grant a preliminary injunction is in a trial court’s discretion. *Id.*

ARGUMENT

I. Plaintiffs’ Claims are Precluded by Planned Parenthood II.

Plaintiffs’ claims are precluded by the Supreme Court’s decision in *Planned Parenthood South Atlantic v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023) (“*Planned Parenthood II*”). In support, Defendant Simmer adopts and incorporates herein the arguments of the Defendants State of South Carolina and Attorney General Alan Wilson (the “State”) set forth in Section I.A. of the State’s Motion to Dismiss and Response, filed March 4, 2024, regarding preclusion. *See* Motion to Dismiss and Response, Section I.A., pp. 3-4.

II. Plaintiffs Lack Standing.

Plaintiffs lack standing to bring this action. In support, Defendant Simmer adopts and incorporates herein the arguments of the State set forth in Section I.B. of the State’s Motion to Dismiss and Response, filed March 4, 2024, with respect to standing. *See* Motion to Dismiss and Response, Section I.B., pp. 4-6.

III. Plaintiff Taylor Shelton’s Claims are Moot.

Plaintiff Taylor Shelton’s claims are moot. In support, Defendant Simmer adopts and incorporates herein the arguments of the State set forth in Section I.C. of the State’s Motion to Dismiss and Response, filed March 4, 2024, with respect to mootness. *See* Motion to Dismiss and Response, Section I.C., pp. 6-7.

IV. Plaintiffs' Request for Injunctive Relief should be Denied.

Plaintiffs are not entitled to a preliminary injunction because Plaintiffs have failed to state a claim for which relief can be granted for the three grounds set forth above. First, Plaintiffs' filings are precluded by *Planned Parenthood II*. Second, Plaintiffs lack standing. Third, Plaintiff Taylor Shelton's claims are moot.

Additionally, Plaintiffs are not entitled to a preliminary injunction because Plaintiffs have failed to allege any irreparable harm by Defendant Simmer. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010) (“A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.”). Plaintiffs have failed to make the requisite showing to obtain a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint and/or deny Plaintiffs' request for injunctive relief.

[Signature on following page]

Respectfully submitted,

s/Ashley C. Biggers

W. Marshall Taylor, Jr. (SC Bar No. 16646)

General Counsel

Jacquelyn S. Dickman (SC Bar No. 01681)

Deputy General Counsel

Ashley C. Biggers (SC Bar No. 17225)

Chief Counsel for Healthcare Quality

South Carolina Department of Health and
Environmental Control

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April 5, 2024

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

PLANNED PARENTHOOD SOUTH
ATLANTIC, on behalf of itself, its patients,
and physicians and staff, *et al.*,
Plaintiffs,

v.

SOUTH CAROLINA, *et al.*,
Defendants.

IN THE COURT OF COMMON
PLEAS FOR THE FIFTH
JUDICIAL CIRCUIT

C/A No.: 2024-CP-40-00762

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR
PRELIMINARY INJUNCTION AND
IN OPPOSITION TO
DEFENDANTS' MOTIONS TO
DISMISS**

INTRODUCTION

Plaintiffs' as-applied challenge to the definition of "[f]etal heartbeat" in Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) ("S.B. 474" or the "Act"), arrives in this Court by special invitation. In *Planned Parenthood South Atlantic v. State*, the South Carolina Supreme Court expressly encouraged Plaintiffs to mount an as-applied challenge to the meaning of "[f]etal heartbeat" as that term is used in S.B. 474, framing the invitation as follows:

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.

440 S.C. 465, 474 n.4, 892 S.E.2d 121, 126 n.4 (2023), *reh'g denied* (Aug. 29, 2023) ("*Planned Parenthood II*").¹

¹ See also Order Denying Rehearing, *Planned Parenthood II* (Aug. 29, 2023) (Beatty, J., dissenting) ("[N]othing prevents Respondents from expeditiously filing a new complaint asserting an as-applied challenge."); Order Denying Pet. for Original Jurisdiction, *Planned Parenthood S. Atl. v. State*, No. 2023-001449 (S.C. Nov. 14, 2023) ("The petition for original jurisdiction is otherwise denied without prejudice to Petitioners' right to file an as-applied action in the circuit court.").

This suit seeks an answer to the question posed by the Supreme Court: whether those South Carolinians with pregnancies where a heart has not yet formed (which happens after approximately nine weeks of pregnancy) but where there is detectable embryonic electrical activity (which happens after approximately six weeks of pregnancy) may access abortion services in this state. Defendants² feign incredulity that Plaintiffs accepted the Supreme Court's invitation. Their responses accuse Plaintiffs of creating their legal arguments from whole cloth and hiding that they previously interpreted the statute differently. *See* Pls.' Mem. in Supp. of Their Mot. for Prelim. Inj. ("Br.") at 1 (acknowledging previous interpretation). Neither effort to avoid the question posed by the Supreme Court should succeed.

Defendants waste paper reciting Planned Parenthood South Atlantic's ("PPSAT's") statements from past litigation while virtually ignoring the starting point for statutory interpretation: the text itself. It is black letter law that the text is the best indicator of legislative intent. The words and the structure of the Act, read together and harmonized, answer the question presented: "cardiac activity" and "the steady and repetitive rhythmic contraction of the fetal heart" (the "Clause") refer to one period in pregnancy. That period is discernible only once a heart has formed; after all, you cannot have a *heartbeat* without a *heart*. Should the Court disagree, however,

² Plaintiffs have sued the State of South Carolina; Attorney General Alan Wilson; Director of the Department of Health and Environmental Control ("DHEC") Edward Simmer; the individual members of the Boards of Medical Examiners and Nursing; Ninth Judicial Circuit Solicitor Scarlett A. Wilson; and Fifth Judicial Circuit Solicitor Byron E. Gipson, and Governor Henry McMaster intervened as a defendant. The Governor filed a Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Gov. Br."), and the State and Attorney General (together, the "Attorney General") filed a Motion to Dismiss and Response ("AG Br."). Director Simmer largely adopts the Attorney General positions in his Motion to Dismiss and Response, so Plaintiffs do not separately address his brief. Director Simmer asserts that Plaintiffs have not alleged any irreparable harm by him but does not challenge his role in enforcing S.B. 474 reporting and licensing provisions. *See* Compl. for Declaratory & Injunctive Relief ¶ 15. Plaintiffs entered into a stipulation of non-enforcement pending outcome of this case with Solicitor Gipson, and the Members of the Boards of Medical Examiners and Nursing and Solicitor Wilson have yet to respond to Plaintiffs' Complaint.

and find the statute ambiguous, the Court should avoid constitutional infirmity by construing “heartbeat” to refer to the point in pregnancy after which a heart has been formed, or find this portion of the statute unconstitutionally vague. Thus, for multiple reasons, Plaintiffs are likely to succeed on the merits of their challenge.

Defendants’ procedural attacks are a smokescreen for the weakness of their legal arguments. Abortion providers indisputably have third-party standing to bring claims on behalf of their patients, and for this reason, the Court need not reach Defendants’ arguments related to the justiciability of Taylor Shelton’s claims. Finally, Plaintiffs meet all of the requirements for a preliminary injunction. Most significantly, absent relief from the Court, Plaintiffs are being forced to turn away people seeking abortions whose pregnancies are between approximately six and nine weeks LMP. Each of these patients suffers irreparable harm.

STATEMENT OF FACTS

At a high level, Plaintiffs and Defendants agree on the material facts of this case. They agree that S.B. 474 bans abortion in South Carolina if a “*fetal heartbeat* has been detected” by ultrasound. S.B. 474, § 2 (adding S.C. Code § 44-41-630(B)) (emphasis added); Gov. Br. at 3. They agree that the organ that will become the heart is merely two tubular structures that begin to “loop” at approximately six weeks as dated from a patient’s last menstrual period (“LMP”). *Compare* Decl. of Amy Crockett, M.D., in Supp. of Pls.’ Mot. for Prelim. Inj. (“Crockett Decl.”) ¶ 27 with Expert Report of Ingrid Skop, M.D. (“Skop Decl.”) ¶ 11. They agree that this structure begins to circulate blood as a result of electrical impulses around five to six weeks LMP. *Compare* Crockett Decl. ¶ 27 (five weeks) with Skop Decl. ¶ 7 (five to six weeks).³ They agree that this

³ Significantly, the source Dr. Skop cites for the proposition that what she calls the “embryonic heart” around this time refers to “the primitive heart tube,” not *the heart*. See Skop Decl. ¶ 8 (citing Cheryl Mei Jun Tan & Adam James Lewandowski, *The Transitional Heart: From Early Embryonic and Fetal Development to Neonatal Life*, 47 *Fetal Diagnosis & Therapy* 373 (2020)).

early electrical activity will first be visible on an ultrasound after approximately six weeks LMP. *Compare* Decl. of Katherine Farris, M.D. in Supp. of Pls.' Mot. for Prelim. Inj. ("Farris Decl.") ¶ 9 and Crockett Decl. ¶ 27 (noting that the ability to detect embryonic electrical activity depends on characteristics of the pregnant person as well as the ultrasound technology) *with* Skop Decl. ¶¶ 8, 14. And they agree that the four chambers of the heart do not develop until after approximately nine weeks LMP and that septation is completed at approximately ten weeks LMP. *Compare* Crockett Decl. ¶¶ 24, 29–30, 32 *with* Skop. Decl. ¶¶ 11–12.⁴

Notably, Defendants do not contest the Act's grave consequences for people seeking abortion in South Carolina. They do not contest that roughly 75% of people seeking abortions in South Carolina are being turned away, or that about 86% of those people had pregnancies that were nine weeks LMP or less. Br. at 10–11. They do not contest that each of these patients was forced to travel out of state to obtain an abortion, seek abortion outside the medical system, or carry a pregnancy to term against their will. Farris Decl. ¶ 16. And they do not contest that these harms continue each day uncertainty remains about when S.B. 474 begins to ban abortion.

Perhaps most importantly, while Plaintiffs and Defendants agree on the material medical facts, they disagree about the application of those facts to the statutory language. *See* AG Br. at 13 n.5. As a result, this case comes down to a question of statutory interpretation: based on S.B. 474's definition of "[f]etal heartbeat," at what point in pregnancy does the Act begin to ban abortion?

ARGUMENT

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*

⁴ Dr. Skop asserts that Plaintiffs "do not consistently apply the 9-week measure." Skop Decl. ¶ 6. But as Plaintiffs previously explained, they "use the term 'after approximately nine weeks LMP' as a *conservative* estimate of when the heart has formed, acknowledging that heart development can continue to ten weeks LMP This is particularly true given that developmental processes can vary." Br. at 9 n.5 (citing Crockett Decl. ¶¶ 27, 30).

Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). And in addressing a motion to dismiss pursuant to Rule 12(b)(6), SCRC, “[i]f the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal . . . is improper.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Because the second prong of the preliminary injunction standard and the motion to dismiss standard both relate to the merits of the case, and because this case presents an issue of statutory interpretation, the Court can evaluate the merits in ruling on both Plaintiffs’ Motion for Preliminary Injunction and Defendants’ Motions for Dismiss. The Court should rule in Plaintiffs’ favor, granting their Motion for Preliminary Injunction and denying the Motions to Dismiss.

I. The Text and Structure of S.B. 474 Are the Best Evidence of Legislative Intent and Demonstrate That S.B. 474 Only Bans Abortion Once a Heart Forms.

Plaintiffs agree that “[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). But unlike the Governor, Gov. Br. at 1, 7, they do not selectively quote *Rainey* and omit the source of that intent: “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)); *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.”). Here, the text of the whole of S.B. 474 demonstrates that the Act bans abortion only once the major components of a heart have formed. For that reason, Plaintiffs are likely to succeed on the merits of their claims.

A. The Plain Meaning of the Statute Indicates That the Clause Defines “[C]ardiac [A]ctivity.”

S.B. 474 bans abortion once a “fetal heartbeat has been detected,” S.B. 474, § 2 (adding S.C. Code § 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.* (adding S.C. Code § 44-41-610(6)). Plaintiffs explained the significance of the commas in the definition in their opening brief by invoking rules of grammar supporting the interpretation that “the steady and repetitive rhythmic contraction of the fetal heart” explains the meaning of “cardiac activity.” Br. at 13–15. The grammatical approach is fully consistent with the punctuation canon of statutory construction, which instructs that “[n]o intelligent construction of a text can ignore its punctuation.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 23 Punctuation Canon (2012). A disregard of the commas surrounding the Clause 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).⁵

Each of these words must have meaning. Br. at 14 (citing *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010)). Thus, as Justice James noted at oral argument in *Planned Parenthood II*, the Clause requires that there be (1) “a heart, which is four chambers,” and that the detected activity be (2) steady, (3) repetitive, and (4) rhythmic. Oral Argument Video 0:10:25–0:10:50, No. 2023-000896. As Dr. Crockett explains, these four elements are only present after approximately nine weeks LMP. Crockett Decl. ¶ 32; *see also* Farris Decl. ¶ 10. By contrast, Dr.

⁵ While it may be true that punctuation is not controlling in all instances of statutory interpretation, it “cannot properly be said to be without any force.” *Caston v. Brock*, 14 S.C. 104, 107–08 (1880). For example, the Governor cites to Justice Few’s concurrence in *Commissioners of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 833 S.E.2d 834 (2019); Justice Few noted that “the absence of a comma to set off [a] clause *is significant*.” *Id.* 428 S.C. at 219, 833 S.E.2d at 839. Here, it is the presence of commas—also first raised by Justice Few—that is significant.

Skop's declaration offers opinions unsupported by medical facts or literature, including that embryonic electrical activity is steady, repetitive, and rhythmic as early as the sixth week of gestation. Skop Decl. ¶¶ 15, 18 (citing no authority for this proposition).⁶ Nor does Dr. Skop disclose her previous acknowledgment that her medical opinions have been judicially deemed out of line with "mainstream medical organizations,"⁷ though she is being offered as an expert on the medical consensus in this case. In the absence of any material factual dispute, 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 Plaintiffs' expert declarations. *Id.* ¶ 15.

B. The Structure of S.B. 474 Confirms That It Applies Only Once a Heart Has Formed.

The Governor acknowledges that the Court must read S.B. 474 "as a whole," Gov. Br. at 14, yet elides a key additional component confirming Plaintiffs' interpretation of the Act. In enacting S.B. 474, the General Assembly's found that "[c]ardiac activity begins at a biologically

⁶ *Contra* Crockett Decl. ¶ 31 ("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, 874–75 (2005); Robert G. Gourdie et al., *Development of the Cardiac Pacemaking and Conduction System*, 69 *Birth Defects Resch.*, Part C *Embryo Today*: Revs. 46, 46–57 (2003))).

⁷ *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*, No. SC2022-1050, No. SC2022-1127 (Fla. Apr. 1, 2024). Dr. Skop discloses expert testimony in other litigation but does not disclose 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 one of those cases, she testified that she is "not really a good researcher" and that all of her publications may include plagiarism. Dep. Ingrid Skop, M.D., at 120:25–121:7 & 257:20–259:24, *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). The "research" performed by the Charlotte Lozier Institute, with which she is affiliated, has also been roundly criticized. *Retraction Notice*, 11 *Health Servs. Resch. & Managerial Epidemiology* 1 (2024). This includes one study co-authored by Dr. Skop that is still listed on her CV in support of her expert qualifications despite the fact that it has now been retracted. *Id.*

identifiable moment in time, normally *when the fetal heart is formed* in the gestational 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. Bank of Greensboro*, 252 N.C. 595, 611, 114 S.E.2d 688, 700 (1960). 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 heart is the key to understanding when “[c]ardiac activity” begins. In other words, the General Assembly determined that you cannot have a “heartbeat” without a heart.⁸ Second, because the General Assembly found that “[c]ardiac activity” begins at a “biologically identifiable moment in time,” S.B. 474, § 1(2), any indication of what constitutes 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, within the gestational sac,” *id.*, § 2 (adding S.C. Code Ann. § 44-41-610(6)), must define “cardiac activity” in the definition of “[f]etal heartbeat.” These points occur after approximately nine weeks LMP. Crockett Decl. ¶ 32. To read the statute otherwise would render these provisions surplusage.

Instead, Defendants grasp for straws, arguing that the definitions of “[u]nborn child” and “[f]atal fetal anomaly” are instructive for when the Act begins to apply. AG Br. at 12. They are not. Presumably, Defendants are attempting to reconcile the fact that, in the medical community, the developing organism is not referred to as a “fetus” until after ten weeks LMP. Farris Decl. ¶ 36. But this bears no relation to why the Act should be interpreted to apply only after the major

⁸ See *Cardiac*, Am. Heritage Dictionary (2022), <https://www.ahdictionary.com/word/search.html?q=cardiac> (“Of, near, or relating to the heart.”). In proposing that the General Assembly actually meant “fetal heart” and “fetal heartbeat” to have the same definition, AG Br. at 12, Defendants seem to agree with the common sense proposition that you cannot have a heartbeat without a heart. They also stray from the guiding principle that the text, as written, controls statutory interpretation—not what Defendants wish the text would have said.

components of a heart have formed. After all, at nine weeks LMP, the developing organism is still considered an embryo. *Id.*

Plaintiffs agree with Defendants that the Act's prohibitions apply once a "fetal heartbeat has been *detected*." S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-630(B)) (emphasis added); *see also* Gov. Br. at 16.⁹ But contrary to Defendants' argument, Plaintiffs do not insist that the major components of the heart must be detectable via ultrasound for the Act's ban to apply. Instead, they justifiably rely on the statutory definition of "[f]etal heartbeat," the legislative finding regarding when "cardiac activity" begins, and the common sense proposition that no heartbeat exists without a heart.¹⁰

C. Legislative Intent Does Not Supersede the Clear Text of the Act.

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). Defendants ignore the Act's text in favor of three categories of extraneous information: (1) statements from individual members of the General Assembly, (2) statements from the parties to this litigation made after the passage of the Act, and (3) dicta from various cases where courts have not directly interpreted the material provision. However, "the plain language of the statute cannot be contravened[,]" even where the statutory language may frustrate these extratextual indications of legislative intent. *State v.*

⁹ It bears repeating that in addition to performing an ultrasound to see if the "heartbeat" can be detected, a provider must inform the patient of their right to "hear" the "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 audible. Farris Decl. ¶ 9.

¹⁰ Defendants' reliance on cherry picked, out-of-context statements from the American College of Obstetricians and Gynecologists or a prior version of the Planned Parenthood Federation of America website are equally off base. At any rate, neither supports the position that, from a medical perspective, "the steady and repetitive rhythmic contraction of the fetal heart" can occur prior to the heart's formation. Gov. Br. at 17.

Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345–46 (Ct. App. 2002) (citing *Scholtec v. Est. of Reeves*, 327 S.C. 551, 559–60, 490 S.E.2d 603, 607–08 (Ct. App. 1997)).

At any rate, these extraneous sources offer no support for Defendants’ position. First, while Defendants argue that this Court should look to statements of individual members of the General Assembly to divine legislative intent, AG Br. at 11 n.4; Gov. Br. at 7–10, any statutory interpretation must determine “not the intent of the individual members,” but “the intent of *the legislature*.” *Creswick*, 434 S.C. at 84, 862 S.E.2d at 709 (citing *Cummings v. Mikelson*, 495 N.W.2d 493, 499 n.7 (S.D. 1993)) (emphasis added); *see also Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348 n.7, 549 S.E.2d 243, 247 n.7 (2001) (“Under South Carolina law, neither a drafter nor a legislator can testify as to legislative intent.” (citing *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813 (1942))). Even if the text of the Act were ambiguous, the intentions of individual legislators are not entitled to probative weight that could outweigh the evidence of legislative intent embodied in S.B. 474’s language, including the General Assembly’s findings. *See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) (“The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.”).

Second, statements of parties to this litigation—none of whom were involved in the passage of the Act—have no bearing on the intent of the legislature. *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 5–6, 532 S.E.2d 868, 871 (2000) (explaining that private parties’ interpretation, even when adopted by an executive agency, “cannot validly be viewed as expressing anything about legislative intent”); *see also State v. Hudson*, 336 S.C. 237, 244, 519 S.E.2d 577,

580 (Ct. App. 1999) (“Even with the approval of a judge, the parties to a lawsuit cannot determine the extent of judicial power under a statute.”).

Lastly, stray statements in dicta from courts interpreting other statutes, with different language, have no bearing on the issue before this Court. The South Carolina Supreme Court left unresolved the question of when in pregnancy the Act bans abortion, and no court has yet interpreted the definition of “[f]etal heartbeat” in S.B. 474. Defendants’ reliance on dicta in *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023) (“*Planned Parenthood I*”), is also misplaced. In that case, unlike here, the parties *assumed* that law applied after approximately six weeks. *See id.*, 438 S.C. at 221, 882 S.E.2d at 788 (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, as-applied analysis of the definition of “[f]etal heartbeat.” Thus, Defendants’ arguments related to legislative intent should not change the Court’s analysis of at what point in pregnancy the Act begins to ban abortion.

II. Alternatively, the Court Should Avoid Potential Constitutional Infirmary by Interpreting the Act to Apply Once a Heart Is Formed or Find That It Is Unconstitutionally Vague.

Alternatively, if the Court finds that the statutory language is ambiguous, it should either construe the Act to avoid constitutional infirmity or find that it is unconstitutionally vague; either theory likely entitles Plaintiffs to a declaratory judgment that the Act bans abortion only after the formation of a heart. Thus, Plaintiffs seek a preliminary injunction enjoining the Act’s application prior to formation of a heart, which occurs after approximately nine weeks LMP.

A. The Court Should Construe the Act to Apply Once a Heart Is Formed to Avoid Potentially Constitutional Infirmary.

Defendants do not squarely address Plaintiffs’ constitutional avoidance argument and misconstrue Plaintiffs’ discussion of *Planned Parenthood I*. *See* Gov. Br. at 19–21; AG Br. at 13. While the South Carolina Supreme Court held in *Planned Parenthood II* that *Planned Parenthood*

I did “not dictate the constitutionality” of the Act based on changes from an earlier so-called “heartbeat” ban, *Planned Parenthood I* is still good law, is instructive as to the scope of South Carolina’s privacy protections, is binding on this Court, and must be read in tandem with *Planned Parenthood II*. Both cases confirm that under Article I, Section 10, the General Assembly cannot pass laws that *unreasonably* invade South Carolinians’ privacy. Because construing S.B. 474 as a ban on abortion when only embryonic electrical activity is detectable is an unreasonable violation of the right to privacy, Br. at 17–20, this Court should construe it as a ban only after a heart has formed. *See Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009) (“Where 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.”).

Construing the Act to ban abortion as early as approximately six weeks LMP presents serious constitutional questions. As the data demonstrates and as Ms. Shelton’s experience illustrates, a ban on abortion this early in pregnancy precludes the vast majority of pregnant people from obtaining an abortion in South Carolina. This sweeping prohibition violates the right to privacy under the South Carolina Constitution. Br. at 17–20. Thus, the Court should construe the Act to apply only after a heart has formed, after approximately nine weeks LMP.

While Plaintiffs maintain that the latter is the best interpretation of S.B. 474, the Court need not agree in order to construe the ban to apply after the later point in pregnancy. “Under the canon of constitutional avoidance, the interpretation of the statute need not be the best reading, so long as it’s ‘fairly possible.’” *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001)). That reasoning can be applied here as well.

B. The Act Is Unconstitutionally Vague.

Since the Supreme Court's decision in *Planned Parenthood II*, PPSAT and Dr. Farris have been forced to guess when the Act begins to prohibit abortions, Farris Decl. ¶ 8, because the Supreme Court did not settle the issue. 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*, e.g., *State v. Sullivan*, 362 S.C. 373, 376, 608 S.E.2d 422, 424 (2005). The Attorney General argues that to survive a vagueness challenge, "a law need only provide definite warning as to prohibited conduct when 'measured by common understanding and practices.'" AG Br. at 14 (quoting *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 599 (2001)). But there is no "common understanding" here; even if the *best* interpretation of the statutory language is that it applies only once a heart has formed, Plaintiffs still lack adequate clarity as to when S.B. 474's abortion ban begins to apply.

The Governor claims that Plaintiffs confuse vagueness with ambiguity, Gov. Br. at 15, but he confuses principles of statutory interpretation with the more stringent requirements of due process. As South Carolina courts have long recognized, "[t]he concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971). The Governor offers that "state officials have consistently interpreted [S.B. 474] as regulating abortion from approximately six weeks," as though this cures any specter of vagueness. Gov. Br. at 15. But state officials' interpretations are entirely irrelevant to a vagueness inquiry. *See, e.g., Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 535 n.6, 737 S.E.2d 830, 838 n.6 (2012) ("A statute's constitutionality is judged on an objective, not subjective, basis." (citing *City of Greenville v. Bane*, 390 S.C. 303, 308, 702 S.E.2d 112, 114 (2010))). The central question is whether the statutory language provides sufficient guidance such that state officials *must*

necessarily interpret the statute consistently so as to guard against arbitrary enforcement. Br. at 23 (quoting *Chimento*, 401 S.C. at 541, 737 S.E.2d at 842). There is nothing in the statutory language barring a state official from reading the Act as prohibiting abortion after approximately nine weeks, or after approximately six weeks—therein lies the threat to Plaintiffs’ due process rights to fair notice.

The threat posed to Plaintiffs’ liberty interests is especially acute where, as here, there are criminal penalties for violating a vague law. The Governor suggests that the rule of lenity has no application here because courts may only apply it if ambiguity remains “*after* a court has exhausted the usual tools of statutory construction.” Gov. Br. at 14. However, South Carolina courts are bound to apply the rule of lenity whenever “legislation is penal in nature and must therefore be strictly construed.” *Jacoby v. S.C. State Bd. of Naturopathic Exam’rs*, 219 S.C. 66, 94–95, 64 S.E.2d 138, 151 (1951). The rule of lenity is appropriately invoked when courts engage in statutory interpretation of penal statutes as part of the analysis to resolve ambiguity and need not be invoked as a last resort. *See, e.g., State v. S. Farm Bureau Life Ins. Co.*, 265 S.C. 402, 413, 219 S.E.2d 80, 85 (1975); *Carolina Reo Motor Co. v. Moorer*, 148 S.C. 260, 146 S.E. 6, 8 (1928); *Roberts v. Gaskins*, 327 S.C. 478, 489–90, 486 S.E.2d 771, 777 (Ct. App 1997). Thus, the rule of lenity applies here, and any ambiguity must be resolved in Plaintiffs’ favor.

III. Plaintiffs Have Standing, and Ms. Shelton’s Claim Is Not Moot.

Defendants resort to attacks on Plaintiffs’ standing to bring suit is equally unavailing. It is well established that abortion providers have third party standing to bring claims on behalf of their patients. Because Dr. Farris and PPSAT have standing, the Court need not address the justiciability of Taylor Shelton’s claims. However, if it is inclined to do so, Ms. Shelton has standing under the public interest exception, and her claims are not moot because they are capable of repetition yet evading review.

A. PPSAT and Dr. Farris Have Third-Party Standing.

While it is true that, as a general matter, “a plaintiff cannot seek the invalidity of an act on the ground that it somehow impairs the rights of others,” AG Br. at 4, courts “generally permit[] plaintiffs to assert third-party rights in cases where the ‘enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 318 (2020), *abrogated on other grounds by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)). And courts “have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.” *Id.* (collecting cases); *see also Planned Parenthood S. Atl. v. Wilson*, 26 F.4th 600, 608 (4th Cir. 2022), *vacated on other grounds*, No. 21-1369, 2022 WL 2900658 (4th Cir. July 21, 2022) (recognizing third-party standing in challenge to earlier South Carolina “heartbeat” ban). This is true in both facial and as-applied challenges. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 602 (2016), *as revised* (June 27, 2016), and *abrogated on other grounds by Dobbs*, 597 U.S. 215; *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014).¹¹ The U.S. Supreme Court’s ruling in *Dobbs* did not change this analysis. Indeed, as standing is a prerequisite for the Court to reach the substance of a party’s claims, the Court impliedly found that the abortion provider-plaintiff had standing by addressing the merits of the constitutional claims in *Dobbs*. This is equally true in South Carolina where the Supreme Court addressed the merits of abortion providers’ constitutional claims in *Planned Parenthood I* and *II*.

South Carolina follows federal third-party standing doctrine. For example, in *Quality Towing, Inc. v. City of Myrtle Beach*, the South Carolina Supreme Court recognized that “vendors

¹¹ Defendants cite *Free Speech Coalition, Inc. v. Att’y Gen. United States*, 974 F.3d 408, 420 (3d Cir. 2020), for the proposition that Plaintiffs lack standing to assert an as-applied challenge. But that case involved associational, not third-party, standing.

and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.” 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000);¹² see also *Opternative, Inc. v. S.C. Bd. of Med. Exam’rs*, 433 S.C. 405, 859 S.E.2d 263 (Ct. App. 2021), *reh’g denied* (July 1, 2021) (relying on *Quality Towing* rule for challenge by optometrists to law that restricted access to their services).

Defendants assert that “courts from around the country” have found that abortion providers lack standing to bring claims on behalf of their patients. AG Br. at 5. This is a gross exaggeration. *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 664 S.W.3d 633 (Ky. 2023), which they cite, is the *only* state supreme court decision since *Dobbs* finding that abortion providers lacked standing.

Defendants’ other cited cases do not dictate otherwise. In *Curtis*, 345 S.C. 557, 549 S.E.2d 591, a seller of urine and urine test substitution kits challenged the constitutionality of a statute criminalizing the sale of urine with the intent to defraud a drug screening test. But that plaintiff did not meet the requisite criteria to establish third-party standing, including “‘a close relationship with the person who possesses the right’ and ‘a hindrance to the possessor’s ability to protect his own interests.’” *Planned Parenthood S. Atl. v. Wilson*, 26 F.4th at 608 (quoting *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 215 (4th Cir. 2020)). *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003), is also inapposite because it involved a formerly pregnant person—not health care providers—attempting to assert the privacy rights of other pregnant people.¹³

In addition to third-party standing, PPSAT and Dr. Farris also assert personal harms. Courts recognize that abortion providers “have first-party standing to challenge laws limiting abortion when . . . penalties for violation of the laws are visited on the doctors.” *Planned Parenthood of*

¹² Significantly, *Quality Towing* relied on *Craig v. Boren*, 429 U.S. 190 (1976), a seminal federal third-party standing case used to support third-party standing of abortion providers.

¹³ Taylor Shelton brings claims on her own behalf, not on behalf of others.

Wis., Inc. v. Van Hollen, 738 F.3d 786, 795 (7th Cir. 2013) (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973), *abrogated on other grounds by Dobbs*, 597 U.S. 215). Moreover, in asserting their alternative vagueness claim, they assert their own due process harms. It is unclear at what point in pregnancy the Act applies and thus at what point penalties for violating the law attach. Does it apply to abortions that PPSAT and Dr. Farris would provide between approximately six and nine weeks LMP, prior to formation of a heart? This fundamental lack of clarity affords standing to assert a vagueness claim.

B. The Court Need Not Address Whether Taylor Shelton Has Standing or Whether Her Claims Are Moot.

Under U.S. Supreme Court precedent, if one plaintiff demonstrates standing, the Court need not analyze whether a second plaintiff separately has standing where the relief sought is the same relief as the first plaintiff. *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439–40 (2017) (“[W]hen there are multiple plaintiffs[, a]t least one plaintiff must have standing to seek each form of relief requested in the complaint.”); see *Town of Hilton Head Island v. Coal. of Expressway Opponents*, 307 S.C. 449, 453, 415 S.E.2d 801, 804 (1992) (allowing case to proceed where town had standing without addressing standing of taxpayers and others). Furthermore, the “one good plaintiff” rule addresses questions of justiciability in general. *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 778 (4th Cir. 2023) (where two plaintiffs had standing, the court “need not consider whether the other plaintiffs have standing *or if their claims are otherwise justiciable*” (emphasis added)).¹⁴ In this case, because Taylor Shelton seeks the same relief as PPSAT and Dr. Farris, the Court need not separately analyze whether she has standing or whether her claims are moot.

¹⁴ See *Sloan v. Greenville County*, 356 S.C. 531, 547, 590 S.E.2d 338, 346 (Ct. App. 2003) (“The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing.”)

C. Ms. Shelton Has Standing, and Her Claims Are Not Moot.

If the Court decides to address Ms. Shelton's standing and whether her claims are moot, it should find that her claims are justiciable. To state the obvious, Ms. Shelton could again find herself in the same circumstances she was last fall: pregnant and unable to get an abortion in South Carolina before approximately six weeks LMP.¹⁵

In South Carolina, "standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). The South Carolina Supreme Court has recognized that "[i]t is hard to conceive of any greater societal interest than" public health and welfare. *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Abortion is an important public health issue, and as such, Ms. Shelton has standing. *See Planned Parenthood I*, 438 S.C. at 330, 882 S.E.2d at 846 (Kittredge, J., dissenting) ("Abortion presents an important moral and policy issue.").¹⁶

That the public interest exception should apply here is apparent when considering the capable of repetition, yet evading review exception to the mootness doctrine. South Carolina recognizes this exception where "the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996).¹⁷ Courts have long held that this exception applies in the context of pregnancy and abortion because the length of a pregnancy is too short for a court to fully adjudicate related

¹⁵ The Governor's attempt to shift blame from Defendants to abortion providers for Ms. Shelton's inability to access abortion is unavailing. Gov. Br. at 20–21. S.B. 474 makes it all but impossible to access abortion in South Carolina, where the State makes it deliberately difficult for patients to access, and for health care workers to provide, abortion. Her story shows how cruel and unrealistic it is to cut off access to care at six weeks LMP.

¹⁶ PPSAT and Dr. Farris have public interest standing for the same reason.

¹⁷ For the same reason the public interest exception to standing applies here, this Court should waive any mootness concerns. *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596 (recognizing exception to mootness doctrine "in matters of important public interest").

claims—and an abortion makes that period even shorter. *E.g., Roe v. Wade*, 410 U.S. 113, 125 (1973), *overruled on other grounds by Dobbs*, 597 U.S. 215 (“Pregnancy provides a classic justification for a conclusion of nonmootness.”).¹⁸ This is particularly true here where the Act bans abortion very early in pregnancy. Thus, Ms. Shelton’s claims are not moot.

IV. The Court Should Grant Injunctive Relief.

Plaintiffs are entitled to preliminary injunctive relief because (1) as explained above, they are likely to succeed on the merits; (2) they would continue to suffer irreparable harm; and (3) they have no adequate remedy at law. *Poynter*, 387 S.C. at 586–87, 694 S.E.2d at 17. That the Act has been in effect for a short period of time does not change this analysis.

A. Plaintiffs Are Suffering, and Will Continue to Suffer, Irreparable Harm Absent a Preliminary Injunction.

Defendants attempt to bootstrap a standing analysis into the irreparable harm analysis in asserting that PPSAT and Dr. Farris cannot invoke their patients’ harms to support their claim for injunctive relief. AG Br. at 14; Gov. Br. at 21–22.¹⁹ *Cameron*, the Kentucky case holding that abortion providers lack standing, is truly an outlier; just as it is not grounds to defeat standing, it is not a basis to deny a preliminary injunction. And just as *McKnight* is irrelevant to the standing inquiry, *supra* at 16–17, it is also irrelevant to the determination of irreparable harm. In *Planned Parenthood I*, the South Carolina Supreme Court granted a preliminary injunction to abortion providers-plaintiffs, *Smith v. Planned Parenthood S. Atl.*, No. 2022-001005, 2022 WL 3478531 (S.C. Aug. 17, 2022), and in *Planned Parenthood II*, it did not disturb the trial court’s grant of a preliminary injunction based on claims brought by abortion providers. Order Denying Pet. for

¹⁸ This also underscores the importance of finding third-party standing for Dr. Farris and PPSAT.

¹⁹ The Governor also asserts that PPSAT cannot assert harm based on threats to its business posed by the Act. Gov. Br. at 22. Notably, the Governor cites the annual report of Planned Parenthood Federation of America for this proposition; this is a separate organization from PPSAT and does not provide health care.

Supersedeas, No. 2023-000856 (S.C. June 6, 2023). Beyond this, Defendants do not refute the very real harms that Plaintiffs and their patients now face as a result of the uncertainty of when S.B. 474 begins to ban abortion. Most significantly, PPSAT and Dr. Farris are being forced to turn away patients who, like Taylor Shelton, are pregnant with detectable embryonic electrical activity absent a formed heart. PPSAT and Dr. Farris are also threatened in their own rights with criminal penalties, licensure sanctions, reputational harms, and interference with the ability to provide medical care for their patients. Each of these harms is irreparable.

B. Analysis of the Status Quo Favors an Injunction.

Courts typically issue preliminary injunctions to preserve the status quo. Here, enjoining the Act as applied to pregnancies with detectable embryonic electrical activity but without a formed heart would not actually disrupt the status quo. At present, no court has addressed when the Act begins to ban abortions; Plaintiffs have just taken the more conservative approach of assuming that it applies after approximately six weeks LMP to avoid the Act's severe penalties.

Furthermore, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).²⁰ Thus, to the extent the Court considers the status quo as abortion being banned after approximately six weeks LMP, this should not prevail and thereby eliminate the significance of Plaintiffs' irreparable harm and likelihood of success on the merits.²¹ Lastly, in seeking a preliminary injunction, Plaintiffs

²⁰ Indeed, courts often enjoin enforcement of laws (including abortion restrictions) that have long been in effect where plaintiffs have established a likelihood of success on the merits and irreparable harm. *E.g.*, *Weems v. State*, 440 P.3d 4 (Mont. 2019); *Brown v. Buhman*, 947 F.Supp.2d 1170, 1234 (D. Utah 2013), *vacated on other grounds*, 822 F.3d 1151 (10th Cir. 2016) (declaring unconstitutional Utah criminal law, enforced since 1973, making it a crime to "purport[] to marry" more than one person or to cohabit with someone other than a spouse).

²¹ Defendants assert that the public interest and balancing of equities weigh against an injunction.

seek to restore a piece of the status quo as it has existed for decades: access to first trimester abortion in South Carolina. For fifty years, abortion was legal in South Carolina; it has only begun to be restricted early in pregnancy in the past several months.

C. Relief Requested

Plaintiffs request an injunction barring the enforcement of the Act before a heart has formed, which is after approximately nine weeks LMP. S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-610(6)). However, Defendants take issue with the “expansive” scope of Plaintiffs’ requested relief. AG Br. at 3–4. In a similar vein Defendants question whether Plaintiffs are bringing an as-applied challenge or attempting to mount a covert facial challenge. Though the distinction between facial and as-applied challenges can be fluid, the difference “is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court.” *Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017). Plaintiffs do not argue that the Act is invalid in its entirety, but as applied to pregnancies where a heart has not yet formed. Holding a statute unconstitutional as-applied “prevent[s] its future application in a similar context, but not to render it utterly inoperative.” *Id.*, 421 S.C. at 503, 808 S.E.2d at 814. Thus, the reach of the relief requested is determined by the statutory language, not Plaintiffs’ preferences. Recognizing that *Planned Parenthood II* addressed the constitutionality of S.B. 474’s abortion ban, Plaintiffs’ requested relief would leave the Act operative in its application to pregnancies where a heart has formed, after approximately nine weeks LMP, and appropriately delimited to Plaintiffs’ harms.

But “the ‘balancing the equities’ requirement is neither necessary nor appropriate in a preliminary injunction case, where the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion.” *Poynter*, 387 S.C. at 587, 694 S.E.2d at 17. However, to the extent the Court is inclined to consider the equities, they clearly cut in Plaintiffs’ favor. Every day Plaintiffs go without relief, PPSAT and Dr. Farris are forced to turn away South Carolinians seeking abortions with grave consequences for each patient’s bodily autonomy, dignity, and health.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction enjoining S.B. 474's enforcement in a manner that would prohibit abortions before a heart has formed (after approximately nine weeks LMP), and deny Defendants' motions to dismiss.

Respectfully submitted,

/s/Kathleen McDaniel

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Dated: April 24, 2024

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action 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; and TAYLOR SHELTON,

Plaintiffs,

v.

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; 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

**GOVERNOR MCMASTER'S
REPLY IN SUPPORT OF
MOTION TO DISMISS**

Carolina Board of Nursing; TAMARA DAY, 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 Ninth Judicial Circuit; and BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's Fifth Judicial Circuit,

Defendants,

and

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

Intervenor-Defendant.

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REPLY

For all the myriad arguments Plaintiffs offer to try to change the meaning of a law that has worked exactly as the General Assembly intended for the past eight months (and for Plaintiffs conveniently changing their reading of that law), this case comes down to a single question: At what point in pregnancy did the General Assembly intend to protect unborn life (absent a statutory exception applying) in the 2023 Fetal Heartbeat Act? That question allows the Court to get to the heart of the matter and to “ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

On that critical question, Plaintiffs tellingly try to brush aside the uniform statements of every legislator who addressed it: The 2023 Act protects unborn life from approximately six weeks of pregnancy. Instead, they proffer only strained textual arguments that cannot be reconciled with long-established interpretive canons like punctuation cannot override legislative intent, *see, e.g., Caston v. Brock*, 14 S.C. 104, 107 (1880), and a legislature “can be its own lexicographer,” *Tesla Inc. v. Del. Div. of Motor Vehicles*, 297 A.3d 625, 632 (Del. 2023); *see also Berkeley Cnty. Sch. Dist. v. S.C. Dep’t of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009).

What’s also telling is what Plaintiffs don’t deny in their Response. Their proposed (re)interpretation would open the floodgates to abortion in South Carolina again. Indeed, they embrace that fact, as they lament that they turn away about 75% of women seeking abortions in this State and that more than five in six of those women are nine weeks or less into their pregnancy. *See Resp. 4*. For a legislature that consistently talked about “six weeks,” it’s implausible—to put it mildly—to now insist that the General Assembly intended merely to protect fewer than one out of six unborn children.

I. The 2023 Act protects unborn life from approximately six weeks of pregnancy.

A. Legislative intent is clear.

Plaintiffs accuse the Governor of “selectively quot[ing]” *Hodges v. Rainey* for the “cardinal rule” of statutory construction, Resp. 5, but it’s Plaintiffs who attempt to whistle-by South Carolina’s rules for interpreting statutes. To be sure, the text of a statute matters a great deal, but—as the Governor already explained, and as Plaintiffs continue to ignore—the “cardinal rule,” *Rainey*, 341 S.C. at 85, 533 S.E.2d at 581, the “ultimate goal,” *City of Rock Hill v. Harris*, 391 S.C. 149, 153, 705 S.E.2d 53, 55 (2011), the “great leading rule,” *Kecheley v. Cheer*, 15 S.C.L. 397, 399 (S.C. App. L. & Eq. 1827), and the “primary function,” *State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 671 (1993), of statutory interpretation is to “ascertain and effectuate the intent of the legislature,” *Rainey*, 341 S.C. at 85, 533 S.E.2d at 581. Words or phrases are not read in isolation, but instead, statutory text “must be construed in context and in light of the intended purpose of the statute.” *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

Here, it is hard to fathom a more uniform, unequivocal record of legislative intent. Plaintiffs have not identified a single instance in which any legislator thought the 2023 Act meant anything other than six weeks, nor can they explain how much of the legislative debate (such as the exchange between Senators Senn and Matthews, *see* Gov. Br. 8) makes any sense if the General Assembly’s intent was nine weeks.

Instead, Plaintiffs try to downplay this record as “statements of individual members of the General Assembly.” Resp. 10. But, for at least two reasons, the cases they cite do not support their argument. In the first place, Plaintiffs misread these cases. The cases involve “*subsequently* expressed opinions of individual legislators as to the intent of the legislature,” *Creswick v. Univ.*

of S.C., 434 S.C. 77, 83, 862 S.E.2d 706, 709 (2021) (emphasis added) (cited at Resp. 10), or the “testimony” of a single member, *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348 n.7, 549 S.E.2d 243, 247 n.7 (2001) (cited at Resp. 10). Neither is true here.

In the second place (and more fundamentally), Plaintiffs’ argument is incompatible with South Carolina’s cardinal rule of statutory interpretation. If the judicial mission is ascertaining and effectuating legislative intent, what the members of the General Assembly said *while debating the law* must be relevant to the judicial inquiry. When every legislator who spoke on the topic (both for and against the bill) expressed the same understanding of the bill’s meaning and intended effect, Plaintiffs cannot point to two commas to say the legislature meant something other than what all of these legislators said. *See* Gov. Br. 13–14 (collecting cases).

Plaintiffs also try to downplay what they have said about the meaning of the definition of “fetal heartbeat,” accusing the Governor of “wast[ing] paper” by pointing out PPSA’s 300-plus statements in earlier litigation calling this definition a “Six-Week Ban.” Resp. 2; *see also id.* at 10–11. No matter what Plaintiffs now say, they can’t escape the fact that they coined the term “Six-Week Ban” in describing the 2021 Act (which had the same definition of “fetal heartbeat” as the 2023 Act). *See* Compl. ¶ 39, *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-cv-508 (D.S.C. Feb. 18, 2021), ECF No. 1. Or the fact that they kept the moniker “Six-Week Ban” when challenging the 2023 Act. *See* Compl. ¶ 57, *Planned Parenthood S. Atl. v. State*, No. 2023-CP-40-2745 (S.C. Comm. Pls. May 25, 2023).

Their use of “Six-Week Ban” so many times is relevant here because it undercuts their textual argument in this case. After all, if the statutory text is as “[c]lear” as Plaintiffs now insist, Resp. 9, why did Plaintiffs call the 2023 Act a “Six-Week Ban” until now?

B. Plaintiffs' textual and structural arguments are unconvincing.

Plaintiffs' post-hoc pivot to avoid the clear legislative record cannot withstand scrutiny. *First*, their only response to the Governor's long list of cases establishing that punctuation cannot be used to overcome clear legislative intent, *see* Gov. Br. 13–14, is that Justice Few recognized in *Commissioners of Pub. Works of the City of Laurens v. City of Fountain Inn* that commas (or their absence) can be “significant,” Resp. 6 n.9 (citing 428 S.C. 209, 219, 833 S.E.2d 834, 839 (2019) (Few, J., concurring)). That does nothing, however, to show why the commas in the 2023 Act are significant to make the definition of “fetal heartbeat” mean approximately nine weeks of pregnancy instead of six.

Second, Plaintiffs take a statement from Justice James during oral argument in *Planned Parenthood II* and treat it as the definitive word on the meaning of “fetal heartbeat.” *See* Resp. 6. As an initial matter, in that statement, Justice James appears to be describing ACOG's amicus brief (a brief that Plaintiffs seek to downplay now, given that ACOG says a fetal heartbeat cannot be detected until 17–20 weeks—long after Plaintiffs' nine-week mark). But in any event, Plaintiffs want to have it both ways in invoking this statement from Justice James. Just five pages later in their Response, they try to keep the Court from paying attention to all of the Supreme Court Justices in *Planned Parenthood I* calling the 2021 Act a “six-week” law because the Supreme Court had not “conducted a textual, as-applied analysis so the definition of ‘fetal heartbeat.’” Resp. 11 (cleaned up). But neither had Justice James done so in asking his question during the argument in *Planned Parenthood II*.

Third, Plaintiffs try to superimpose their expert's proffered explanation of fetal development onto the statutory definition of “fetal heartbeat.” *See* Resp. 6–7. Yet they ignore the fact that legislature can define terms as it wishes. *See Berkeley Cnty. Sch. Dist.*, 383 S.C. at 345,

679 S.E.2d at 919. In other words, even if Plaintiffs' experts (or even all doctors) call an unborn child an "embryo" instead of a "fetus" at six weeks, the General Assembly is free to define a "fetal heartbeat" as what Plaintiffs' experts generically characterize as "cardiac activity."

Buttressing the conclusion that our General Assembly intended the 2023 Act to protect unborn life from approximately six weeks is the fact that other States have passed similar heartbeat laws that also apply from about six weeks. Courts have uniformly recognized that those laws start protecting unborn life from about six weeks. *See, e.g., Whole Woman's Health v. Jackson*, 595 U.S. 30, 58 (2021) (Roberts, C.J., concurring in part and dissenting in part) (the Texas Heartbeat Act "ban[s] abortions after roughly six weeks of pregnancy"); *MKB Mgmt. Corp. v. Wrigley*, 343 F.R.D. 68, 69 (D.N.D. 2022) ("The North Dakota statute resulted in a strict ban on abortions at a time when a 'heartbeat' has been detected . . . [and] essentially bann[ed] all abortions as early as six weeks of pregnancy . . ."); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 799 (S.D. Ohio 2019) ("In a nutshell, [Ohio's Heartbeat Protection Act] bans abortion care at and after approximately six weeks in pregnancy."); *Planned Parenthood of Sw. & Cent. Fla. v. Florida*, ___ So.3d ___, No. SC2022-1050, 2024 WL 1363525, at *28 (Fla. Apr. 1, 2024) (Labarga, J., dissenting) (Florida's "Heartbeat Protection Act . . . bans abortions beyond the gestational age of six weeks"); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, No. 22-2036, 2023 WL 4635932, at *1 (Iowa June 16, 2023) (Waterman, J.) (Iowa's "'fetal heartbeat bill[]' would prohibit most abortions at about six weeks of pregnancy"); *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 642 (Ky. 2023) ("fetal cardiac activity is detectable around six weeks post-conception"). Nothing in the legislative record in South Carolina even hints that the General Assembly intended for our fetal heartbeat law to be so radically different from every other fetal heartbeat act across the country.

Fourth, Plaintiffs turn to the legislative finding about cardiac activity beginning at an identifiable moment. *See* Resp. 7–8. Plaintiffs are correct that the definition of fetal heartbeat refers to a single moment, but they have not established and cannot compellingly show that that moment is at approximately nine weeks. In short, what they insist is that “formed” in the legislative finding, 2023 S.C. Acts No. 70, § 1(2), really means “fully formed,” and the fetal heart, they say, is not fully formed until nine weeks.

But that position is inconsistent with the text. “Formed” means “to take form” or “come into existence.” *Merriam-Webster* (2024), <https://tinyurl.com/57kpb7ma>. The definition does not require something to be completely formed to be formed. Indeed, a search of the South Carolina Code reveals as much, as in another statute, the General Assembly has used “fully formed.” S.C. Code Ann. § 50-5-15(39) (defining “peeler crab”). If Plaintiffs were right, “fully” would be superfluous here, but that would violate the well-established rule that “every word” in a statute should be given effect. *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599, 601 (1914) (cited in *State v. Taylor*, 436 S.C. 28, 35, 870 S.E.2d 168, 172 (2022)).

Plaintiffs’ argument is also inconsistent with logic. The heart begins to form at five to six weeks of pregnancy. Plaintiffs admit that an “organ” is developing by “approximately six weeks.” Resp. 3. They don’t want to call it a “heart” here, but that’s exactly what it is. Even Plaintiffs are not so brazen as to suggest that “organ” will ever be anything other than a heart. And Planned Parenthood’s own website confirms as much, recognizing that the “cardiac activity” that exists is from “the earliest stages of the *heart* developing.” Planned Parenthood, *What happens in the second month of pregnancy?* (last visited Apr. 24, 2024), <https://tinyurl.com/53axutaf> (emphasis added). And this “activity” is what the 2023 Act protects—no matter how much Plaintiffs wish it did not.

II. The 2023 Act is otherwise constitutionally sound.

A. There is no constitutional question to avoid.

As a fallback to their statutory argument, Plaintiffs invoke the doctrine of constitutional avoidance, urging the Court to adopt their nine-week interpretation because, they say, the six-week interpretation would amount to an unreasonable invasion of privacy because it “precludes the vast majority of pregnant [women] from obtaining an abortion.” Resp. 12. Constitutional avoidance is relevant only when “a statute is susceptible to more than one construction.” *State v. Pittman*, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007) (emphasis omitted). When, on the other hand, a “statute has only one meaning,” a court “cannot apply an alternate interpretation.” *Id.* Plaintiffs’ nine-week interpretation is inconsistent with the undisputed legislative record and embracing it would require a contorted reading of the text. It is therefore not an alternative construction the Court could adopt.

And in any event, there is no constitutional problem with protecting unborn life at approximately six weeks of pregnancy. The Governor explained as much in *Planned Parenthood II*: Before article I, section 10’s Privacy Clause was enacted in the 1970s, South Carolina law did not permit abortions except in cases of rape, incest, fetal anomaly, and the life of the mother, so there was no generally established “right” to abortion, and nothing in the history of the Privacy Clause’s adoption shows any understanding that that provision was relevant to abortion. *See* Br. of Gov. McMaster 23–29, *Planned Parenthood S. Atl. v. State*, No. 2023-000896 (S.C. June 14, 2023). Plaintiffs’ argument on constitutional avoidance is nothing more than a belated, backdoor attempt to revive their facial challenge from *Planned Parenthood II*.

B. The 2023 Act is not vague.

Plaintiffs then turn to vagueness. *See* Resp. 13–14. They criticize the Governor for pointing out that they have actually raised an ambiguity question, but that’s all Plaintiffs have done: Proffer

two competing readings of the 2023 Act, and say, “we don’t know which is right.” That’s a classic case of ambiguity, which “is rarely intentional.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 32 (2012). Vagueness, by contrast, “is often intentional” because a provision seeks “to cover a multitude of situations that cannot practically be spelled out in detail.” *Id.* at 32–33. The 2023 Act does not fit that latter description, as it deals with specific situations about protecting the life of the unborn.

Whatever the appropriate term is for Plaintiffs’ challenge, their challenge only makes sense if they have proffered a credible interpretation of the 2023 Act’s definition of “fetal heartbeat” as a nine-week rule. As already discussed, *see supra* Part I, they have not done so. Nor does the rule of lenity come into play here. Plaintiffs may have cited older case law about strictly construing penal statutes, but our Supreme Court’s more recent discussion of that rule makes clear that it applies only when there is “a *genuine* ambiguity.” *Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009). Or as Justice Kavanaugh has put it, “because a court must exhaust all the tools of statutory interpretation before resorting to the rule of lenity, and because a court that does so often determines the best reading of the statute, the rule of lenity rarely if ever comes into play.” *Wooden v. United States*, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring).

But in any event, even the cases that Plaintiffs cite on this argument don’t support their position. Consider *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), on which they rely heavily. *See* Resp. 13–14. In *Chimento*, the Supreme Court recognized that it “could [interpret the challenged statute] here and uphold” the result below. 401 S.C. at 534, 737 S.E.2d at 838. So the Court here could interpret the 2023 Act and everyone—state officials and Plaintiffs—will know exactly what it means. Thus, there is no basis to hold that the 2023 Act is unconstitutional (which, despite Plaintiffs’ protestations, sounds a lot like their preferred result in

a facial challenge), particularly given the Act's "presumption of constitutionality." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014).

CONCLUSION

The Court should grant Governor McMaster's Motion to Dismiss.

Respectfully submitted,

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Counsel for Governor McMaster

May 1, 2024
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNT OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and physicians and staff, <i>et al.</i> , Plaintiffs,	Case No. 2024-CP-40-0762 <u>ANSWER</u>
vs. STATE OF SOUTH CAROLINA, <i>et al.</i> , Defendants.	

Defendants Anne G. Cook, M.D., Stephen I. Schabel, M.D., George S. Dilts, M.D., Dion Franga, M.D., Richard Howell, M.D., Robert Kosciusko, M.D., Theresa Mills-Floyd, M.D., Jennifer R. Root, M.D., Christopher C. Wright, M.D., all members of the South Carolina Board of Medical Examiners, and Samuel H. McNutt, Sallie Beth Todd, Tamara Day, Kelli Garber, Lindsey K. Mitcham, Rebecca Morrison, Kay Swisher, Robert J Wolff, all members of the South Carolina Board of Nursing, by and through the undersigned counsel, hereby answer the Plaintiff's Complaint in the above-captioned action as set forth below:

1. Paragraphs 1 and 2 of the Complaint do not require a response from these Defendants.
2. Answering Paragraph 3 of the Complaint, Defendants admit, upon information and belief, the allegations set forth therein.
3. Answering Paragraph 4 of the Complaint, Defendants are without sufficient information and knowledge to form a belief as to the allegations set forth therein and therefore deny the same.

4. Answering Paragraph 5 of the Complaint, Defendants are without sufficient information and knowledge to form a belief as to the allegations set forth therein and therefore deny the same.

5. Answering Paragraph 6 of the Complaint, Defendants are without sufficient information and knowledge to form a belief as to the allegations set forth therein and therefore deny the same.

6. Paragraphs 7 and 8 of the Complaint do not require a response from these Defendants.

7. Answering Paragraphs 9 through 15, the Defendants admit, upon information and belief, the allegations set forth therein.

8. Answering Paragraph 16 of the Complaint, the Defendants admit the allegations set forth therein.

9. Answering Paragraph 17 of the Complaint, the Defendants deny that Dr. Stephen I. Schabel is the Vice President of the Board of Medical Examiners but admit the remaining allegations set forth therein.

10. Answering Paragraphs 18 through 24 of the Complaint, the Defendants admit the allegations set forth therein.

11. Answering Paragraph 25 of the Complaint, the Defendants deny that Samuel H. McNutt is the Chairperson of the South Carolina Board of Nursing, having been elected as Vice-Chair at the most recent election of officers. The Defendants admit the remaining allegations set forth therein.

12. Answering Paragraph 26 of the Complaint, the Defendants deny that Sallie Beth Todd is the Vice-Chair of the South Carolina Board of Nursing, having been elected as Chairperson at the most recent election of officers. The Defendants admit the remaining allegations set forth therein.

13. Answering Paragraphs 27 through 29 of the Complaint, the Defendants admit the allegations set forth therein.

14. Answering Paragraph 30, the Defendants deny the allegations set forth therein, as Defendant Rebecca Morrison is no longer a member of the South Carolina Board of Nursing.

14. Answering Paragraphs 31 through 34 of the Complaint, the Defendants admit, upon information and belief, the allegations set forth therein.

15. Answering Paragraphs 35 through 36 of the Complaint, the Defendants admit, upon information and belief, the allegations set forth therein.

16. Answering Paragraphs 37 through Paragraphs 44 of the Complaint, the Defendants admit, upon information and belief, the allegations set forth therein.

17. Answering Paragraph 38, the Defendants admit the statutory language cited therein, but deny the remaining allegations set forth therein.

18. Answering Paragraphs 39 through 56 of the Complaint, the Defendants aver that no response is required, as the statutes and procedural history, including the South Carolina Supreme Court's opinion in Case No. 2023-CP-40-002745 speak for themselves. However, to the extent these paragraphs contain subjective characterizations used by Plaintiffs, Defendants deny those portions of the complaint where such characterizations are used.

19. Answering Paragraph 57 through Paragraph 112 of the Complaint, the Defendants are without sufficient information and knowledge as to the allegations set forth therein and therefore deny the same.

20. Paragraph 113 of the Complaint does not require a response from these Defendants.

21. Paragraph 114 of the Complaint is a recitation of the law and therefore does not require a response from these Defendants.

22. Answering Paragraph 115 and 116 of the Complaint, the Defendants are without sufficient information and knowledge to form a belief as the allegations set forth therein and therefore denies these allegations.

23. Paragraph 117 of the Complaint does not require a response from these Defendants.

24. Answering Paragraphs 118 through 124 of the Complaint, the Defendants are without sufficient information and knowledge to form a belief as to the allegations set forth therein and therefore deny these allegations.

AFFIRMATIVE DEFENSES

25. By way of a second defense, the Defendants assert by way of an affirmative defense, that the Plaintiffs have failed to state a cause of action under Rule 12(b)(6), SCRCP.

26. By way of a third, defense, the Defendants assert by way of an affirmative defense, that the Plaintiffs' claims are barred by the doctrines of standing, mootness, and lack of irreparable harm as to these Defendants.

27. Defendants hereby reserve the right to amend their Answer and to plead additional affirmative defenses as the evidence may support.

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint and/or deny Plaintiffs' request for injunctive relief.

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Day, Kelli Garber, Lindsey K. Mitcham, Rebecca
Morrison, Kay Swisher, Robert J Wolff

May 1, 2024

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2024-CP-40-0762

Planned Parenthood of South
Atlantic, et al.,

Plaintiffs,

vs.

State of South Carolina,
et al.,

Defendants,

Henry McMaster, in his official
capacity as Governor of the
State of South Carolina,

Intervener Defendant.

Transcript of Record

May 2, 2024
Columbia, South Carolina

B E F O R E:

The Honorable Daniel Coble, Judge

A P P E A R A N C E S:

Kyla Eastling, Esquire
Attorney for the Plaintiffs

Thomas T. Hydrick, Esquire
Attorney for Defendant State of South Carolina

William Grayson Lambert, Esquire
Attorney for Intervener Defendant Henry McMaster,
in His Official Capacity as Governor

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter
Certified Verbatim Reporter - Master
Certificate of Merit

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
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No exhibits introduced.

1 THE COURT: All right, good morning, ladies and
2 gentlemen. We are here. All right, this is *Planned*
3 *Parenthood South Atlantic, et al., v. South Carolina*. The
4 caption number I have is 2024-CP-40-00762.

5 All right, before we get started, we have the
6 governor's motion to intervene.

7 MR. LAMBERT: Yes, Judge. We moved to intervene. The
8 plaintiffs were kind enough to consent to that, and we ask
9 that you grant it so that we can participate in everything
10 going forward.

11 THE COURT: All right, anything from plaintiffs on
12 that?

13 MS. EASTLING: No.

14 THE COURT: All right. We'll grant that motion.

15 MR. LAMBERT: Thank you, Judge.

16 THE COURT: All right, happy to hear from plaintiffs
17 on this case.

18 (A PAUSE.)

19 MS. EASTLING: Good morning, Your Honor, and may it
20 please the court? My name is Kyla Eastling, and I
21 represent plaintiffs Planned Parenthood South Atlantic, Dr.
22 Farris, and Taylor Shelton. We are here today because the
23 South Carolina Supreme Court invited us to file an
24 as-applied challenge to resolve the meaning of fetal
25 heartbeat as used in South Carolina's abortion ban SB474.

1 The court itself first raised this question but did not
2 resolve it in the *Planned Parenthood II* decision, and we
3 filed this case to seek a clarifying construction of the
4 ban and injunctive relief blocking enforcement of the ban
5 before the point in pregnancy when a heart is formed, which
6 is after approximately nine weeks' gestation.

7 We are seeking a preliminary injunction and we meet
8 all of the criteria for one. First, the plaintiffs here
9 are suffering irreparable harm. Second, we are likely to
10 succeed on the merits of our claim. And third, we do not
11 have an adequate remedy at law. I will first address the
12 merits before returning to irreparable harm and the
13 inadequate remedy at law.

14 So with respect to the merits, the definition of a
15 fetal heartbeat in SB474 must be read to apply to the point
16 in pregnancy when a heart has formed after approximately
17 nine weeks' gestation for three reasons. First, this
18 reading is consistent with the text and structure of the
19 act read together and harmonized. The act bans abortion if
20 a so-called fetal heartbeat has been detected via
21 ultrasound. It defines fetal heartbeat as:

22 Cardiac activity, or the steady and repetitive
23 rhythmic contraction of the fetal heart, within
24 the gestational sac.

25 Construing the act to apply after approximately nine

1 weeks' gestation gives meaning to each of these elements in
2 the definition of fetal heartbeat and is consistent with
3 the medical consensus on fetal cardiac development.

4 Further, the General Assembly found that cardiac
5 activity begins at a, quote, biologically identifiable
6 moment in time. That moment is when the heart is formed
7 after approximately nine weeks of pregnancy. To put it
8 simply, you can't have a heartbeat before you have a heart.

9 Second, if this court disagrees with this
10 interpretation and finds the text of the act ambiguous, the
11 SB474 is unconstitutionally vague. If this is the case,
12 the rule of lenity determines that any ambiguity be
13 resolved against the state because the act is penal in
14 nature.

15 Third, if this court finds that the text of the act is
16 ambiguous, construing the act as applying only after a
17 heart has formed avoids a serious constitutional question.
18 Justice Few first raised this question of the meaning of
19 fetal heartbeat at oral argument in *Planned Parenthood II*,
20 asking whether the clause separated by commas or the steady
21 and repetitive rhythmic contraction of the fetal heart may
22 define the term cardiac activity. Then in its opinion, the
23 majority in *Planned Parenthood II* said that it was leaving
24 for another day in an as-applied constitutional challenge
25 whether the definition of fetal heartbeat referred to one

1 point in time during pregnancy or two separate points in
2 time. The Supreme Court, therefore, recognized that this
3 is an unresolved question. Here, we are respectfully
4 seeking an answer to resolve the issue.

5 So, the first reason that SB474 should apply only
6 after nine weeks of pregnancy is the text itself. Again,
7 the act itself defines fetal heartbeat as, quote, cardiac
8 activity -- comma -- or the steady and repetitive rhythmic
9 contraction of the fetal heart -- comma -- within the
10 gestational sac. This text is the best indicator of
11 legislative intent. Here the words and structure of the
12 act make clear that the cardiac activity and the clause the
13 steady and repetitive rhythmic contraction of the fetal
14 heart within the gestational sac referred to a singular
15 point in time, which is once the heart has formed after
16 approximately nine weeks' gestation.

17 To understand the terms in these texts, it is helpful
18 to understand the relevant medicine. The parties share a
19 common understanding of fetal cardiac development. A heart
20 is an organ made of muscle and is powered by electrical
21 impulses, and a heart beat occurs when the chambers of the
22 heart contract and pump blood to the lungs and the rest of
23 the body. Dr. Crockett, Dr. Skop, and the South Carolina
24 Department of Health and Environmental Control all agree
25 that at six weeks of pregnancy, there is detectable

1 electric activity from the embryonic structures that will
2 eventually develop into the heart. At six weeks, these
3 cells appear in a tube-like shape that begins folding in
4 upon itself, and there is also general agreement that from
5 six to ten weeks of pregnancy the chamber's natural
6 pacemakers and conduction systems of the heart are
7 developed. The parties agree that the main components of
8 the heart which are the four chambers -- the walls, the
9 valves, and the conduction system -- all form by nine to
10 ten weeks of pregnancy.

11 So, returning to the text with this in mind, with
12 regard to the definition of fetal heartbeat, the court must
13 give meaning to every element of this definition, and in
14 the text of the statute establishes four distinct elements.
15 First, the existence of a heart; and contractions produced
16 by the heart that are, second, steady; third, rhythmic; and
17 fourth, repetitive. For the reasons Dr. Crockett explains
18 in her declaration, the earliest these elements could be
19 present is after nine weeks of pregnancy. Construing the
20 act of apply after nine weeks would give effect to each
21 word in the statutory definition and is consistent with
22 these four elements.

23 This understanding also gives proper effect to the
24 commas in the definition, which is consistent with both the
25 punctuation of statutory -- or punctuation canon of

1 statutory interpretation as well as the rules of grammar.

2 And this reading is further confirmed by the text and
3 structure of the act as a whole. One portion of SB474 is
4 particularly important here, and that is the General
5 Assembly's finding that, quote, Cardiac activity begins at
6 a biologically identifiable moment in time, normally when
7 the fetal heart is formed in the gestational sac, end
8 quote.

9 This finding answers the Supreme Court's question as
10 to whether the definition contemplates one moment or two.
11 The biologically identifiable moment in time is a single
12 moment in pregnancy, and that moment is when a heart has
13 formed, which is approximately after nine weeks of
14 pregnancy. Again, you cannot have a heartbeat unless you
15 have a heart.

16 The second reason the act should apply after only nine
17 weeks is that if this court disagrees with our
18 interpretation and finds the act's language ambiguous, then
19 it is unconstitutionally vague. It deprives Planned
20 Parenthood and Dr. Farris of fair notice and its constitu
21 -- and their constitutionally required due process. The
22 court should apply the rule of lenity, and any ambiguity
23 must be strictly construed against the state.

24 With the threat of civil and criminal penalties,
25 Planned Parenthood and Dr. Farris have been forced to guess

1 when the act begins to prohibit abortions. The Supreme
2 Court of South Carolina itself did not settle this issue of
3 statutory interpretation. So, in the absence of a binding
4 interpretation of the statute, doctors have had to take the
5 most cautious approach.

6 Third and finally, if this court finds the act's
7 language ambiguous, then it should adopt the construction
8 that avoids serious constitutional issues. Under *Planned*
9 *Parenthood I* and *Planned Parenthood II*, laws that
10 unreasonably invade South Carolinians' privacy violate the
11 South Carolina Constitution. In *Planned Parenthood II*, the
12 court ruled that the act did not facially violate the
13 constitution because it was not invalid in every
14 application, but did not rule that an act that bans
15 abortion as early as six weeks is constitutional.
16 Construing the act as banning abortion as early as six
17 weeks of pregnancy poses serious constitutional questions
18 as with so little time to recognize pregnancy and then seek
19 abortion care, the vast majority of pregnant people who
20 want an abortion in South Carolina would be unable to
21 obtain it in the state.

22 Under the canon of constitutional avoidance, this
23 court should adopt plaintiffs' interpretation of the act to
24 avoid these serious constitutional questions, and these
25 questions relate to the serious irreparable harms that we

1 have asserted in support of our motion for preliminary
2 injunction. These are harms that defendants do not
3 dispute, and irreparable harm is the second requirement for
4 a preliminary injunction.

5 Since the Supreme Court ruled that SB474 was
6 constitutional and raised this uncertainty while leaving it
7 unresolved, Planned Parenthood and Dr. Farris have had no
8 choice but to take the most conservative approach and
9 presume that SB474 bans abortion after approximately six
10 weeks of gestation. So, what this means for patients is
11 that if they are more than six weeks pregnant, they cannot
12 get an abortion in South Carolina, and this is true even
13 for patients who are very early in pregnancy, so early that
14 there is no steady, repetitive, or rhythmic contraction of
15 the fetal heart yet.

16 This was true for plaintiff Taylor Shelton, who
17 recognized her pregnancy a few days after her missed period
18 but who still could not access abortion in this state
19 before six weeks of pregnancy. Patients like Ms. Shelton
20 who are denied abortions in South Carolina are forced to
21 travel out of state, if they are able, attempt to manage
22 their abortions outside of the medical system, or carry a
23 pregnancy to term against their will. For these reasons, a
24 preliminary injunction is warranted.

25 Turning briefly to defendants' motion to dismiss, I'd

1 like to address plaintiffs' standing and make clear that
2 plaintiffs have standing for several reasons. First, the
3 South Carolina Supreme Court did not question abortion
4 provider standing in *Planned Parenthood I* or *Planned*
5 *Parenthood II*, and this is consistent with federal
6 third-party standing doctrine which has long recognized
7 that abortion providers can invoke the right of their
8 patients when challenging abortion-related regulations, and
9 South Carolina follows federal third-party standing
10 doctrine.

11 Second, Dr. Farris and Planned Parenthood have
12 first-party standing as providers directly harmed by the
13 act, including because of the civil and criminal penalties
14 that they face. Because Dr. Farris and Planned Parenthood
15 both have standing, this court does not need to reach
16 justiciability of Ms. Shelton's claims. However, if this
17 court is inclined to reach these questions, Ms. Shelton has
18 standing under the public interest exception as this case
19 presents a public health issue of great public importance,
20 and her claims are not moot because they are capable of
21 repetition yet evading review.

22 In sum, plaintiffs are likely to succeed on the merits
23 of our case. So, this court should enter a preliminary
24 injunction and deny the defendants' motion to dismiss. The
25 court should issue a preliminary injunction blocking the

1 enforcement of the act before the point in pregnancy where
2 a heart has formed, which is after approximately nine weeks
3 of pregnancy.

4 If the court has no questions for me at this time, I
5 will reserve the remainder of my time for rebuttal.

6 THE COURT: Well, let me just ask you this. You
7 discuss the right to privacy. What is the right to privacy
8 today in South Carolina in light of *Planned Parenthood I*
9 and then *Planned Parenthood II*? I mean, they briefly
10 discuss it, and Chief Justice Kittredge -- Justice
11 Kittredge acknowledges that they're not bound by *Planned*
12 *Parenthood I* necessarily, but for purposes of unity, they
13 kind of just don't really discuss it. So, what is the
14 right to privacy today? Is it *Planned Parenthood I*? Is it
15 something different?

16 MS. EASTLING: It is under *Planned Parenthood I* and
17 *Planned Parenthood II*. Both speak to what the right to
18 privacy is now in South Carolina. And what it is is that
19 there is no unreasonable violation of privacy that can
20 happen and be constitutional. So, it's still a question of
21 reasonableness, and the difference was that the South
22 Carolina Supreme Court found that SB474 was not invalid on
23 its face as in applied in every situation. It was not
24 invalid in any situation, but it left open the statutory
25 interpretation question. So, it didn't, in fact, say that

1 at six weeks that's a constitutional invasion of privacy.
2 It was that the act on its face does not violate the right
3 to privacy in every instance.

4 THE COURT: Okay. All right, thank you.

5 MS. EASTLING: Thank you, Your Honor.

6 THE COURT: We'll hear from the defendant at this
7 point.

8 MR. LAMBERT: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. LAMBERT: May it please the court? I'm Grayson
11 Lambert on behalf of the governor. Want to take this
12 largely in three parts. First, I want to talk about what
13 does the 2023 act's definition of fetal heartbeat mean
14 under South Carolina's rules of statutory construction.
15 Second, I want to turn to why the plaintiffs'
16 interpretation of the statute is incorrect, looking over
17 the arguments they raised. And third, I want to end with
18 some of the other points for the preliminary injunction.

19 So starting up front, our Supreme Court has said over
20 and over again for two centuries that the cardinal rule of
21 interpreting a statute is to ascertain and effectuate the
22 intent of the legislature. Whatever other canon of
23 interpretation exists, they are all subservient to that
24 cardinal rule in this state. And I am not aware of any
25 legislative record that presents a clearer evidence of what

1 that intent is. Every instance we can find when someone in
2 the General Assembly debating the 2023 act referred to the
3 timing of it, it was talked about as a six-week act.
4 That's the supporters and the opponents, and we've laid
5 that out in our motion to dismiss in pages 7 to 10, but
6 here are just a couple of highlights.

7 Senator Massey on the senate floor referred to it as
8 six to seven weeks. Representative Brittain, house
9 committee, referred to it as six weeks. Representative
10 Bamberg on the floor said: The very crux of this piece of
11 legislation surrounds time and it's a six-week ban.
12 Representative Bauer on the floor said:

13 The General Assembly passed an act which
14 prohibits an abortion after around the six week
15 gestation, which is what we are here discussing
16 again..

17 Everyone of the General Assembly understood that this
18 law was protecting unborn life from approximately six weeks
19 of pregnancy, and that didn't surprise anyone because
20 everyone not only during that legislative debate but
21 leading up to it understood this language to mean that same
22 thing.

23 So, for example, the 2021 act used the exact same
24 definition of fetal heartbeat, and every justice in *Planned*
25 *Parenthood I* who referred to timing -- was all of them but

1 Justice James -- referred to it as a six-week law, a
2 six-week ban. My friends on the other side in both *Planned*
3 *Parenthood I* and *Planned Parenthood II* said more than 300
4 times in court filings this was a capital S, capital W,
5 capital B, six-week ban.

6 They try to, to say that's not relevant here, but it's
7 relevant for this reason, Your Honor. If the act and its
8 text is as clear as they now say, why could they have
9 called it a six-week ban 300 times? That's not possible
10 the text is clearly nine weeks as they say.

11 But it's not just South Carolina that talks about a
12 fetal heartbeat law applying at approximately six weeks.
13 Every other state that has adopted a fetal heartbeat law
14 and seen it challenged has had their courts discuss in
15 context of six weeks. That's Florida, Iowa, Kentucky,
16 North Dakota, Ohio, and Texas. All have had heartbeat
17 bills talked about as a six-week law.

18 In sum, Your Honor, there is no evidence in the
19 legislative record that anyone intended for this act to
20 protect unborn life at a point other than six weeks when
21 what my friends on the other side call cardiac activity is
22 first detectable.

23 So, I want to turn now to some of the structural and
24 textual arguments that the plaintiffs have made, and let's
25 start with this text. They, they make a big deal in the

1 finding about the word formed. This is the point in time
2 when we agree that there is one point when the act begins
3 to protect life. We just think the plaintiffs have the
4 wrong point, that they look to the word formed and, and
5 take that to mean the heart is fully formed. But that's
6 not what the word formed means in its dictionary
7 definition, and that's not what it means elsewhere in the
8 South Carolina code.

9 So, if you go to Section 50-5-15, subsection 39,
10 that's a definition, an entirely separate statute, but the
11 General Assembly uses the phrase fully formed. If formed
12 is a -- is a term in a statute, has to mean fully formed,
13 that fully there in Title 50 is superfluous, but that goes
14 against another rule of interpretation, which is every word
15 in the statute must be given effect.

16 Their argument on, on formed, I think, is also
17 inconsistent with, with a bit of logic. They admit in
18 their response to our motion to dismiss at page 3 what they
19 call an organ is beginning to form at five weeks. We all
20 know exactly what that is. That is and can only be the
21 heart. It may not be fully formed yet, but it is -- it has
22 begun to form. It has taken its initial shape. There is
23 that tube that begins to form over, as they were
24 describing, but it's there. It is emitting what they call
25 cardiac activity and, in fact, cardiac activity is even a

1 term that's used in the definition of fetal heartbeat
2 within the act. And I would note here that even the
3 national Planned Parenthood's own website says that the
4 early stages of the heart have begin to form at five weeks
5 and there's this cardiac activity.

6 Next as to this idea of medical consensus and embryo
7 and fetus, a couple of points, Your Honor. One is that the
8 General Assembly can be its own lexicographer; the General
9 Assembly can define terms as it wishes and it understands
10 them to be. So, if the General Assembly's understanding of
11 fetal heartbeat is this six-week mark we've been talking
12 about, it doesn't matter what the plaintiffs' expert says
13 it -- the plaintiffs' expert thinks it is. It matters what
14 the General Assembly intended for it to be.

15 The other piece of this in terms of definitional
16 issues, Your Honor, my friends on the other side make a big
17 deal that medically speaking, it's an embryo until ten
18 weeks and it's a fetus after ten weeks, and it's medical
19 terms true enough. But the definition in the act talks
20 about fetal heartbeat, and they're offering you a nine-week
21 limit. So by their own logic, it seems inconsistent that
22 the fetal heartbeat could be a nine-week rule rather than
23 ten-plus. So, I don't understand how my friends can
24 reconcile the definition being fetal heartbeat with what
25 they've earlier said isn't even a fetus. I think that's,

1 that's a tension in their argument that they -- that they
2 can't wrestle out.

3 To some of their other points when you get beyond the
4 text, Judge Coble, constitutional avoidance, the, the rule
5 of lenity and vagueness, I want to start with
6 constitutional avoidance. That's an issue only if you
7 think they proffered a, a credible or plausible reading of
8 this statute. I think for reasons I've just discussed they
9 haven't done that. But I think that the constitutional
10 avoidance question truly is a backdoor attempt to get back
11 to the facial challenge that a law protecting unborn life
12 from approximately six weeks is just unconstitutional.

13 The Supreme Court rejected a facial challenge, and I
14 think for the reasons we lay out in *Planned Parenthood II*.
15 There is not a record to support that. I mean, just very
16 briefly, before Roe took this issue away from the states,
17 South Carolina prohibited all abortions except for rape,
18 incest, fetal anomaly, or the life of the mother. So,
19 there was no general right to some elective abortion in
20 South Carolina before Roe. And then if you look at the,
21 the record of the West committee, no one discussed the
22 privacy provision in Article 1, Section 10.

23 THE COURT: But that argument you're making now is
24 what Justice James said in *Planned Parenthood I*. He said
25 there was no -- search and seizure applied to, from that

1 attorney general's opinion, to the medical-type records and
2 not right to privacy. But now in *Planned Parenthood II*,
3 Justice Kittredge made it clear that there is a right of
4 privacy, but they're not going to go any further than that,
5 just to say that *Singleton* or *Singletary* applied to bodily
6 autonomy so that there is right to privacy, not a right to
7 an abortion.

8 MR. LAMBERT: Right, Judge Coble. So, I think a
9 couple of thoughts in response to that. One, yes, I think
10 Justice James in *Planned Parenthood I* would have read
11 Article 1, Section 10 most narrowly. I think what Justice
12 Kittredge said in *Planned Parenthood I*, if I'm remembering
13 correctly, is that he didn't see the need to revisit
14 *Singleton*, which was the 1993 case about forced medication
15 for carrying out executions. *Planned Parenthood II* is, I
16 recall the majority saying, that this, this may -- we have
17 held that this extends beyond the search and seizure
18 context. We don't need to revisit that today because no
19 one in *Planned Parenthood II* asked the Supreme Court to
20 overrule *Singleton*. And I think at the podium I actually
21 disclaimed at least in one of those cases that we were
22 asking the court to do that because it wasn't necessary for
23 us to prevail there.

24 I, I think my point in this in the constitutional
25 avoidance, Judge Coble, is a simpler one, which is they're

1 trying to reallocate a facial challenge that they've lost
2 and for which I don't think there's a robust historical
3 record as to the original understanding of Article 1,
4 Section 10. I don't think you need to get into that today
5 in denying the motion for a preliminary injunction and
6 granting the motion to dismiss. I under -- I think -- more
7 responding to the constitutional avoidance question.

8 As for the rule of lenity, my friends on the other
9 side in their response rely heavily on older cases from our
10 Supreme Court talking about construing penal statutes
11 narrowly. And those cases exist, but the more recent
12 pronouncements from our Supreme Court talk about the rule
13 of lenity applying but only if there is a genuine ambiguity
14 that requires the court to engage in a statutory
15 construction analysis. I think the, the quote from Justice
16 Cavanaugh in our reply is instructive there where he says
17 that rarely does this rule come into play because generally
18 a court can discern the meaning of a statute by applying
19 the, the applicable canons of construction.

20 Finally, Your Honor, sort of on that same point as to
21 vagueness, I, I do, I -- we continue to disagree, my
22 friends on the other side and I, as to whether this is a
23 vagueness issue or an ambiguity question. We think it's an
24 ambiguity one because there are two proffered readings and
25 the party asking -- the court will decide which it is. I

1 think Scalia and Garner's book on *Reading Law* is, is
2 helpful here when they say, you know, ambiguity is
3 typically unintentional and, and proffers you toward a
4 dichotomy there. Ambigu -- or, excuse me, vagueness is
5 often intentional because you're trying to cover a broad
6 swath of potential applications, and you can't to begin to
7 write a law that discreetly covers everything you want it
8 to cover.

9 I think the ambiguity one, that leaves the court
10 trying to reconcile what is the meaning of the statute.
11 That's something courts do all the time without having to
12 declare that a law is unconstitutional. So, I think to the
13 extent you think there is some construction to do beyond
14 what the legislative intent shows you, I think the canons
15 of construction give you the ability to do that without
16 holding that any part of this law is unconstitutional.

17 THE COURT: When you mentioned -- both sides mentioned
18 Scalia and Garner and all that, but as to your point,
19 Scalia and Gorsuch, I seem to remember they hate
20 legislative intent, legislative dialogue, anything they
21 said, as a textualist, put in the statute. What you say in
22 subcommittee meetings, all those, they don't care about
23 that. They want it, as a textualist, they want -- I mean,
24 is there -- do you disagree or am I misremembering ---

25 MR. LAMBERT: No, I ---

1 THE COURT: --- Scalia and Gorsuch?

2 MR. LAMBERT: --- think you're right about Scalia and
3 Justice Gorsuch, Justice Thomas, the whole line of federal
4 jurists, but I think that's the key distinction. The
5 judges who, who focus on that and who routinely look to the
6 text as, as the thing by which they are guided and bound
7 are in the federal system where the US Supreme Court has
8 said this is what's going to control. I, I think here in
9 South Carolina, our Supreme Court has continued to say the
10 cardinal rule is to ascertain and effectuate the intent of
11 the General Assembly.

12 There is, I'm sure, a discussion to be had on the
13 methodological merits of textualism versus legislative
14 intent. I don't think today in this courtroom is the place
15 to have that debate. The Supreme Court has given us our
16 instruction for how we interpret the statutes. Until the
17 Supreme Court on Gervais Street changes its mind to say
18 that legislative intent is not the cardinal rule, the
19 primary rule -- we, we've got the whole list of, in our
20 brief, of the things they call this thing. This is
21 paramount. That's what's got to guide us. I think that's
22 why I started where I did, which is the entire legislative
23 record here tells you the same thing.

24 And what we're not giving you, Judge Coble, and I do
25 think this point is very important. We're not giving you

1 an after-the-fact statement that legislators said to a
2 reporter; we're not trying to put a senator on the witness
3 stand to tell you what he understood when he was voting.
4 We are looking at the legislative record itself. And if
5 South Carolina's rule of statutory construction is going to
6 be the legislative intent, what the General Assembly said
7 while debating that law on the floor has to be relevant to
8 that analysis.

9 I'm not saying the text is not -- the text matters a
10 great deal. Certainly we've argued plenty of cases and
11 focused on the text, and we focus on the text again here
12 because that text is entirely consistent with the
13 legislative intent and understanding.

14 If you don't have any more questions on the
15 methodological question, I did want to hit one more point
16 on the injunction piece, and, and that's this simple one.
17 Our Supreme Court has said multiple times that a
18 preliminary injunction should be issued only if necessary
19 to preserve the status quo. I think *Poynter* from 2010 is
20 often the case cited for that, but it -- but it's a common
21 rule for, for preliminary injunctions.

22 My friends on the other side admit in their complaint
23 that the current situation is that the law is applying and
24 protecting unborn life from six weeks. I don't think you
25 can grant them the injunction they want without violating

1 the Supreme Court's mandate from *Poynter* of preserving the
2 status quo. I don't think they have a particularly strong
3 response on that point that the law has now been in effect
4 for the past eight months.

5 Briefly on irreparable harm, Your Honor, you need to
6 look at who is being harmed and who is asking for relief.
7 Our Supreme Court has made clear that you can obtain a
8 preliminary injunction for harm you will suffer. The harm
9 here is not to the patients of Planned Parenthood or Dr.
10 Farris.

11 Excuse me. Let me step back, Judge. The claimed harm
12 is to the patients of Dr. Farris and Planned Parenthood,
13 but Planned Parenthood and Dr. Farris cannot assert their
14 patients' harms to get a preliminary injunction under state
15 law. If a patient wanted to come and bring that, then a
16 patient could. There is an individual plaintiff here, but
17 that individual plaintiff actually undercuts a preliminary
18 injunction. Ms. Shelton was, based on the complaint, aware
19 that she was pregnant in time to obtain an abortion under
20 South Carolina law. She didn't get one for whatever reason
21 because apparently she couldn't get an appointment with
22 plaintiffs' clinics, but that's not a fault of state law.
23 That's whatever issues were going on with scheduling at the
24 particular time she had. So, I do think it's important
25 who's seeking relief and what relief they're seeking.

1 The injunction that the plaintiffs ask for is
2 effectively a statewide injunction on the law. That
3 doesn't fit, one, with an as-applied challenge and, two,
4 that doesn't fit with the equity jurisdiction of courts.
5 The US Supreme Court just, oh, about two and a half weeks
6 ago now in a case out of Idaho, it's Labrador v. something.
7 It was granting a motion to stay part of an injunction to
8 a, a law that had been challenged in Idaho. There's a
9 wonderfully rich discussion from Justice Gorsuch, joined by
10 Justice Alito and Thomas, about the scope of injunctive
11 relief and how it applies only to the parties and to the --
12 and to the extent necessary to give them relief from the
13 irreparable harm they're facing, having shown a likelihood
14 of success on the merits.

15 Enjoining the 2023 act statewide such that it cannot
16 apply before approximately nine weeks of a pregnancy is far
17 beyond an as-applied challenge and what, what the court's
18 scope of equitable relief would be.

19 I'm happy to answer any questions if you have it,
20 Judge. I think that covers both the PI motion and the, the
21 merits of our motion to dismiss.

22 One last thing if I may for the record? If you decide
23 to grant the preliminary injunction, and for all the
24 reasons we've talked about I urge you not to, but if you
25 do, we ask that you stay it under Rule 62 and under

1 Appellate Rule 241 pending appeal.

2 THE COURT: Let me ask you this, which I don't think
3 you addressed the reason we're essentially here, the issue
4 about the definition. Is it one point in time or two
5 points in time? And I think that came with Mr. Hydrick
6 last year or so. We had commas, no commas, the word or,
7 what does it mean. What is your response to Ms. Eastling's
8 discussion?

9 MR. LAMBERT: Sure. So, let, let's start with where
10 we agree, and this act refers to one point in time. If the
11 act referred to two points, Your Honor, I don't think it
12 makes a lot of sense because where does the act actually
13 begin to protect unborn life, the first moment or the
14 second?

15 I think everyone agrees it's one point in time. So,
16 what that means is what is that point? And, and I've
17 talked a lot about the, the legislative intent and what
18 they understood this to be, but I want to take a few
19 minutes here on the text itself and show how that intent is
20 consistent with the text of the statute, the definition of
21 fetal heartbeat.

22 So, you have to have cardiac activity. Well, that
23 one's easy, Judge, because my friends on the other side say
24 cardiac activity exists at five or six weeks. They say
25 it's not a heartbeat, but they, they call it cardiac

1 activity. So, I think that one fits with six weeks.

2 And then you have the steady, rhythmic -- steady and
3 repetitive rhythmic contraction of fetal heart. This gets
4 down to what you think the fetal heart is. I mean, if you
5 think the fetal heart has to be a fully formed organ, well,
6 I mean, they're saying it's nine weeks. They're saying it
7 could be ten weeks. I'm still not entirely clear why
8 they're picking nine weeks instead of ten or eleven other
9 than the fact they recognize getting later is probably a
10 harder hill for them to climb, and going to nine weeks is
11 going to let them do 86 percent of the abortions they're
12 currently not doing with the 2023 act applying at six
13 weeks.

14 But if you're looking at the fetal heart being the
15 organ that they admit begins developing at five weeks,
16 there is that organ. It is -- and this is -- I want to be
17 careful with the medical term because I'm not the doctor
18 here or in my family, but the -- that is beginning to, to
19 operate such that it is emitting the electrical impulses
20 that make that familiar whoosh, whoosh, whoosh sound on the
21 ultrasound to be detected, and that's what the General
22 Assembly kept talking about because that's, as they noted
23 in debating the, the 2021 act, is 95 predictive of a live
24 birth.

25 And then that's why this line is drawn where it is,

1 Your Honor. They didn't just pick a random number of weeks
2 and say six. The General Assembly picked this point where
3 you get this cardiac activity because more than 95 percent
4 of unborn children will make it to live birth if that
5 heartbeat's detected. It's a very logical and rational
6 line rather than just picking a number of weeks and saying,
7 well, we can get enough votes for ten but we can't get
8 enough votes for twelve or eight or fourteen. I mean, this
9 is based on medical science where this line is drawn.

10 The General Assembly all understood that's where it
11 was going, that it was this cardiac activity, that the
12 organ was, was beginning to form. They gave a definition
13 to that. It's the same definition that they used in 2021
14 that everyone had understood for two cases to mean,
15 approximately six weeks. It doesn't mean anything else.
16 It means that one moment in time, and the text is
17 consistent with the intent. The law has been applying for
18 the last eight months in this state exactly as the
19 legislature intended, and it's having the exact affect the
20 legislature intended it to, is it protects unborn life
21 across South Carolina.

22 THE COURT: All right.

23 MR. LAMBERT: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. HYDRICK: Thomas Hydrick for the state and the

1 attorney general, Your Honor, and I'll, I'll try to be
2 brief because we share many of the points that Mr. Lambert
3 raised.

4 But I'd really like to dig in I think on is an
5 interesting question that you raised to Mr. Lambert about
6 the text and what is the relationship specifically between
7 the text of this statute and intent of the General Assembly
8 because we agree with Mr. Lambert. The intent of the
9 General Assembly is unmistakably clear in this case. They
10 intended to generally ban abortion at about six weeks of
11 pregnancy when cardiac activity is first detected when that
12 heart, which is the first organ to develop, is functioning,
13 as Dr. Skop described.

14 Now, the plaintiffs' challenge, which really is
15 basically just a question of statutory interpretation, what
16 they're trying to say is, well, we're not necessarily
17 disagreeing about what the record shows. We're not
18 necessarily disagreeing about what legislators debated, but
19 what we're saying is we think that text of the statute is
20 somehow in tension with that intent.

21 So in response to that, I have really two responses to
22 Your Honor. The first which I think Mr. Lambert said which
23 is correct is, one, under South Carolina law, if you think
24 the intent of the General Assembly is clear, you can, in
25 fact, disregard text, and that's the Greenville baseball

1 case that's cited in our brief, but we actually don't think
2 that you need to do that in this case, and we think that's
3 because textualism properly understood actually supports
4 our position. And I think that's why the statutory
5 interpretation principle that plaintiff evoked here, I
6 think they're unfortunately mistaken. I think they
7 somewhat misapplied because they look at this phrase that
8 offsets cardiac activity, and they seek to apply the
9 definition that's favored by their expert, but that's not
10 what South Carolina case law actually -- that's not what
11 South ---

12 THE COURT: Speak that way ---

13 MR. HYDRICK: Sorry.

14 THE COURT: --- so she can hear you.

15 MR. HYDRICK: That's not what South Carolina case law
16 actually requires because we know that when we look at the
17 case -- when we look at the text of the statute, we're
18 meant to apply the ordinary and popular meaning of the
19 statute, and that doesn't mean the ordinary and popular
20 meaning of what I think it means. It doesn't mean what
21 their expert thinks it means or necessarily what our expert
22 thinks it means, although we certainly have expert
23 testimony today. What we're supposed to look at is what
24 the people who adopted the statute -- so, the ordinary and
25 popular meaning as understood by the people who adopted the

1 relevant provision, and that's South Carolina Supreme Court
2 case law. That's the *City of Charleston v. Oliver*. The
3 cite to that is 16 SC 47.

4 So in this case, the intent analysis actually merges
5 with the textual analysis not because we're looking at the
6 legislative history to find something that's not there, but
7 because that informs the language used. That gives us
8 context for the language used. And as Mr. Lambert pointed
9 out, the evidence is overwhelming on that point. We have
10 the statement and the legislative debate. We have press
11 coverage from that time. We can even actually look at
12 plaintiffs' own papers they filed in this litigation. And
13 if you look at footnote 4 of their preliminary injunction
14 motion, they concede that there are doctors who refer to
15 this point in time as a fetal heartbeat which I think, as
16 they point out, necessarily presupposes a fetal heart.

17 I think what's also important and that I do think you
18 can properly take judicial notice of is this statute also
19 didn't occur in a vacuum. This is the statute that the
20 state adopted that many other states in the country -- it's
21 fetal heartbeat legislation. I think 2013 was the first
22 time the state adopted that. I think it was South Dakota,
23 if I'm correct, but if you look at all these other states,
24 including Mississippi which was the *Dobbs* case, every court
25 has construed that to be cardiac activity meaning

1 approximately six weeks.

2 So, I think our argument is, one, like Mr. Lambert
3 said, the intent is clear. That's what we think you need
4 to go with, but we actually don't think the intent and the
5 text is necessarily in tension to the extent plaintiffs
6 point it out to be.

7 So, a couple reasons why I think their textual
8 analysis is also wrong. If we're instructed by the state
9 Supreme Court to look at the ordinary and popular meaning
10 of these words, well, I think plaintiffs probably have to
11 concede that their definition is neither ordinary nor
12 popular. It was not espoused at any point in the
13 litigation up until about two months ago when this
14 complaint was filed. And, in fact, when they made their
15 original filing with the Supreme Court in the fall, they
16 used a different metric. I think it was about seventeen to
17 twenty weeks there. So, if we're really trying to
18 understand what is the ordinary and popular meaning of
19 these words, it's almost certainly not nine weeks.

20 THE COURT: But, see, what we're kind of doing now, so
21 if we're looking -- we're going from the textualist
22 argument to an originalist argument, and then as a trial
23 judge, as a judge, I avoid policy decisions. I call balls
24 and strikes, so I'm not going to put my own policy
25 preferences, but I'm also not going to use the -- I mean,

1 we use the original true -- we want a true originalist
2 definition. But if it's kind of the judge then gets to
3 decide what was the ordinary, popular meaning, what was the
4 textual meaning, do -- I've got to start saying, well, what
5 did the attorneys -- what did -- they used this, so I think
6 I'll use that in my interpretation. Everyone's using these
7 different analyses, so all of a sudden we're going from the
8 original intent of the legislature to my understanding of
9 the original intent of legislature as an individual judge,
10 and that's not my philosophy, you know.

11 I'm simply balls and strikes. What was -- what is on
12 the paper? What is the intent of the legislature? So, how
13 far -- can I go outside of the text with the intent? Am I
14 coming up with my own definition because that's what I'm
15 avoiding.

16 MR. HYDRICK: No. No, Your Honor. I think you're
17 quite right. We're not asking you to consider what you
18 deem to be the ordinary and popular definition of those
19 terms. We're saying what did the legislature intend to be
20 the definition of those terms. And so I think if you were
21 to side with plaintiffs in this case, I think you'd be
22 doing unfortunately just that. I think you'd be saying I
23 prefer their definition, and that is what I believe to be
24 the correct definition in imposing that.

25 I think you're exactly right. The correct inquiry for

1 the court is always what did the legislature intend when
2 they were crafting this language, and so for all the
3 reasons Mr. Lambert suggested, I think that the text is
4 totally consistent with this idea of a six-week ban. But,
5 but in terms of why the plaintiffs' theory, I think, is
6 wrong, that's one reason. I think that's their preferred
7 definition.

8 But two, I think that you have to consider that, as
9 Mr. Lambert pointed out, it sort of again collapses under
10 the weight of its own logic. I think he pointed out that
11 if we are going to go with a hyper technical definition,
12 plaintiffs' preferred approach, a fetal heart simply
13 doesn't exist, according to their definition, at nine weeks
14 because they would argue a fetus is not the proper term for
15 the unborn child until ten weeks. So, I think even on its
16 own logic, this nine week idea collapses in on itself.

17 As a final point, I simply reemphasize to you Dr.
18 Skop's declaration, I think, is important. I think you
19 don't necessarily need to rely on that; I think intent is
20 clear outside of that. But Dr. Skop is very clear that at
21 six weeks of pregnancy, an unborn child has a functioning
22 heart at that point in time. It is performing the
23 necessary function of circulating oxygen throughout its
24 body without which that unborn child could not live.
25 That's why the legislature made a policy determination as

1 this point in time that's so important, and that's why they
2 made the determination that unborn children should be
3 protected at that point in time.

4 Your Honor, just in closing, really quick on standing,
5 I think. The main point that I would emphasis to you from
6 our standing arguments is I think that there is a very
7 important legal distinction between what is an as-applied
8 challenge and what is a facial challenge. And I do not
9 disagree with plaintiffs that there was a door left open
10 for an as-applied challenge. However, I don't think that
11 that is this case.

12 I'd refer you to the case of *Doe v. State*, 421 SC 490.
13 That goes into a lot of detail about what an as-applies
14 challenge look like, what does a facial challenge looks
15 like. As applied are very individualized. They're very
16 fact dependent, and most significantly -- and I think Mr.
17 Lambert made this point as well -- they do not seek a broad
18 class ruling with the entire state, and that's precisely
19 what plaintiffs have sought here. And that's why we would
20 argue that it's an improper facial challenge that should be
21 dismissed for that reason.

22 THE COURT: What would the facial challenge -- they
23 were invited to do a facial -- as-applied challenge. What
24 would that look like?

25 MR. HYDRICK: So, I think an as-applied challenge

1 would probably involve a specific plaintiff with a specific
2 set of facts that is a live case or controversy, which is
3 what I think we do not have here. And so I think they made
4 an argument about first-party standing, whether a clinic
5 would potentially bring that. I think they need a lot more
6 factual development before they can actually show that
7 here.

8 I also point out I don't think every abortion provider
9 in the state is actually a party to this case. So, even if
10 they are seeking relief in this case, it would be improper
11 to grant that to all the clinics operating in the state.

12 But beyond that, Your Honor, I just reiterate the
13 point again I think there's an attempt in this case to
14 suggest the text and intent are in conflict. We think they
15 are very reconcilable. We think the intent of the General
16 Assembly is really unmistakable.

17 THE COURT: All right. Thank you.

18 MR. HYDRICK: Thank you, Your Honor.

19 MS. EASTLING: Your Honor.

20 THE COURT: Yes, ma'am.

21 MS. EASTLING: So, defendants came and talked a lot
22 about what the definition of fetal heartbeat means and
23 referring repeatedly to the cardinal rule that statutory
24 interpretation is aiming to ascertain legislative intent if
25 it can be found in the text of the statute. Like you said,

1 it's balls and strikes. You cannot extend beyond the plain
2 language of the text.

3 The text is the best authority for legislative intent
4 because when you're searching for legislative intent, you
5 are not looking for the intent of individual legislators,
6 for the public, or for plaintiffs for that matter. You're
7 looking for the intent of the legislature, writ large, that
8 is codified in the text, and that is because it is the
9 court's provision to engage in statutory interpretation of
10 the text, not to apply what your understanding of the
11 legislative intent was from the media or the language that
12 you heard at the time.

13 Additionally, the text itself doesn't support a six
14 weeks reading because that would render the clause
15 superfluous. It would mean that the steady and repetitive
16 rhythmic contraction of the fetal heart means nothing, and
17 defendants don't speak to that because they couldn't. You
18 can't reconcile that with what they are calling cardiac
19 activity because at six weeks of pregnancy, not only is
20 there not a fetal heart, but there is no steady,
21 repetitive, or rhythmic contraction of the fetal heart. It
22 is a tube-like shape that is forming, folding in on itself
23 and it beginning to emit asynchronous electrical impulses.
24 It is not steady, it is not repetitive, and it is not
25 rhythmic, and that is because for those elements to be met,

1 you need to reach the point in fetal cardiac development
2 where the conduction system and the natural pacemakers are
3 formed because those two form the biological function of
4 creating a steady and repetitive rhythmic heartbeat.

5 So, we are not saying that you need a fully formed
6 heart. We don't think that the text says that. We think
7 that the text says that you need a heart that is formed
8 sufficiently to have a steady and repetitive rhythmic
9 contraction, and that is at about nine to ten weeks.

10 THE COURT: Well, let me ask you this. The definition
11 this all revolves around means cardiac activity which is
12 then, I guess everyone agrees, further defined by commas,
13 but it all goes back to cardiac activity. And from the
14 Skop and Farris affidavits, it's kind of two definitions.
15 There's a lot of medical language. So, if I or the court
16 is not exactly sure what cardiac activity, what is -- where
17 do I go to to find that out? Do I go back to the
18 affidavits of the medicals I have in this case? Do I try
19 to ascertain the original understanding and intent of the
20 legislature about what they meant? Or do I just say it's
21 not clear? Throw it out.

22 MS. EASTLING: So, the term cardiac activity is
23 defined by the clause: Or the steady and repetitive
24 rhythmic contraction of the fetal heart. If it wasn't
25 that, then it couldn't be referring to one point in

1 pregnancy, which the findings make clear. It is one point
2 in pregnancy that this act begins to ban abortion. And the
3 steady and repetitive rhythmic contractions don't happen as
4 early as six weeks, so cardiac activity can't happen as
5 early as six weeks because there is no requisite
6 characteristics that the legislature, legislature itself
7 said that is necessary for the ban to take place.

8 And this also relevant to our parties' previous
9 statements on the six-week ban, calling it a six-week ban.
10 Number one, we at the time thought that our facial
11 challenge was strong for *Planned Parenthood II*. We had
12 just received the decision for *Planned Parenthood I*. We
13 thought it was a strong facial challenge, and we had to
14 file an emergency case to get relief immediately. So, we
15 put forward a facial challenge. The court ultimately
16 disagreed with us on that point, but at oral argument they
17 asked us our position because all the parties had assumed,
18 yes, that it had applied at six weeks. Because of the
19 serious criminal penalties, we had to take a conservative
20 approach. We said that at oral argument in *Planned*
21 *Parenthood I*. It's consistent with our position here that
22 we had to assume the most conservative understanding
23 because of the serious penalties that come with violating
24 the ban.

25 After the court prompted us to reconsider whether or

1 not it is, in fact, a six-week ban, we returned and took a
2 very close look at the text, including the findings and the
3 structure. We consulted with our medical experts, and we
4 returned finding that nine weeks is the best reading of the
5 statute because not only the definition that the
6 legislature put forth but the facts of fetal cardiac
7 development. There is no heart at six weeks; there is no
8 heartbeat at six weeks. There is steady and repetitive
9 rhythmic contraction at six weeks.

10 THE COURT: But what did -- earlier you said there's a
11 biologically defining moment. You've described that as
12 nine weeks. What is happening at six weeks where Planned
13 Parenthood, everyone decided something happened, so we
14 don't know if the statute, if it applies here. Why the six
15 weeks?

16 MS. EASTLING: At six weeks, there is asynchronous
17 electrical impulses that are happening here and there.
18 They are not in a steady and repetitive beat, and so there
19 are electrical impulses that at six weeks are detectable by
20 ultrasound, but they would not detect a steady and
21 repetitive rhythmic contraction of a fetal heart at six
22 weeks.

23 THE COURT: Is that what Skop says?

24 MS. EASTLING: So, Dr. Skop does disagree on the point
25 of asynchronicity but importantly doesn't site any studies

1 or any actual sources for that point, and she does not
2 disagree that at six weeks there is no chambers to the
3 heart. There is no walls, valves, or conduction system.
4 That's no natural pacemakers developed, and all those
5 things are necessary to meet the six week -- or the
6 definition of fetal heartbeat that the legislature put in
7 the test.

8 So, we might disagree here and there on terminologies,
9 but, in fact, we agree on the majority of our medical
10 consensus. And the medical consensus is that at six weeks,
11 there can be detectable electric activity, but it is not
12 steady, repetitive, or rhythmic.

13 THE COURT: But so there seem to be two -- Skop says
14 six weeks. Farris says nine to ten weeks. If that's what
15 cardiac activity mean -- you know, if it's -- cardiac
16 activity is not -- fetal heartbeat in the definition
17 section is cardiac activity. It's not in the definition
18 section. So, we have to take another further layer, and it
19 is -- have the commas. But if I'm looking and I pull up
20 these two affidavits and I say, well, it's one or the
21 other, is my job not then to go say, okay, what did they
22 mean when they passed this law? Was it the nine weeks, the
23 six weeks? Obviously if I can't figure that out, then
24 that's an issue, but is the first step before that to say
25 what did they -- what was the original understanding and

1 intent of this cardiac activity? Was it six weeks, was it
2 the nine weeks, and if that is my job, what do I look to?

3 MS. EASTLING: You look to the findings, first of all,
4 of the statute that say that it is one moment in time
5 because that makes clear that the clause has to define
6 cardiac activity because the or in that case means
7 something akin to. In other words, it's elaborating on
8 what the definition is. Otherwise, again, that would
9 render the laws superfluous, and that doesn't square with
10 the textualist argument that, in fact, you have to give
11 meaning to every part of the statute.

12 And so the findings indicate that it's one point in
13 time, which means that cardiac activity and the steady and
14 repetitive rhythmic contraction of the fetal heart have to
15 be the same moment in time. And, again, there is no steady
16 and repetitive rhythmic contraction of the fetal heart at
17 six weeks, and Dr. Skop agrees that that kind of -- the
18 biological developments that are necessary for those steady
19 and repetitive rhythmic contractions are not formed until
20 nine to ten weeks at the earliest.

21 So, we say nine weeks because it's a conservative
22 estimate for how early that could happen, but pregnancy and
23 fetal development is individualized. It's different
24 depending on each pregnant person, each body, and their
25 medical history, and so we're giving a conservative

1 estimate of when it could be met, when the biological
2 effects of fetal development could meet the factors that
3 the legislature set that are needed to be met to be cardiac
4 activity.

5 I would also like to discuss how defendants raised
6 that every other state has engaged in interpretation. None
7 of those states have heartbeat bans that have the commas
8 that are within this definition, within SB474. They don't
9 have the commas that offset the clause, and that is
10 important because there are many states that have passed
11 similar laws, and this is the only one in the country that
12 has those commas, and that makes them even more
13 significant.

14 It makes it even more significant that the legislature
15 in looking to sister states' texts decided to make a change
16 to either limit or expand what they thought the ban would
17 apply to, and here it clearly -- those commas mean, in
18 addition to the finding that it has to be one moment, and
19 that means that the or must mean something akin to. In
20 other words, must define the term cardiac activity, and so
21 it must be at around nine weeks of pregnancy.

22 We want to return to the fact that as defendants say,
23 the legislature can be its own lexicographer, and we
24 completely agree with that, and here they laid out four
25 elements that are needed to be met for cardiac activity to

1 be present. Defendants don't make any meaning of those
2 four elements. They don't give meaning to it because they
3 couldn't because it's irreconcilable with a six-week
4 interpretation because at six weeks, again, there is no
5 cardiac activity as defined in the statute.

6 And that also goes to their argument that our argument
7 somehow collapses because of the difference between fetus
8 and embryo as used in the statute. We completely concede
9 that the legislature can decide how they want to define
10 terms that have medical understandings. What's relevant is
11 how the legislature defines them for how we enforce the
12 law. And so they defined fetus as including what is
13 typically understood as an embryo in medical science, but
14 they also defined cardiac activity, and that in itself is
15 what is key here.

16 We are not making an argument about whether or not is
17 it an embryo or a fetus. The legislature says it's a fetus
18 at that point. Okay, but they also say that it needs
19 steady and repetitive rhythmic contractions in order for
20 there to be cardiac activity, and so that means that
21 regardless of whether it's a fetus or an embryo, that
22 doesn't happen until, at the earliest, nine weeks.

23 THE COURT: When does the fetus -- I mean, this is
24 more of a medical question, but the word fetus, when is
25 that timeframe?

1 MS. EASTLING: After ten weeks of pregnancy, Your
2 Honor.

3 THE COURT: After nine, nine weeks?

4 MS. EASTLING: Yes.

5 THE COURT: So, then the definition of fetal heartbeat
6 uses the word fetal heart.

7 MS. EASTLING: Yes.

8 THE COURT: And I know the experts have kind of said,
9 well, what does that mean? Can that exist under that
10 definition?

11 MS. EASTLING: So, under the medical understanding of
12 what a fetus is, no, but that's not the relevant definition
13 here. The relevant definition is how the legislature
14 refers to what they call the unborn child, which includes a
15 fetus in the earlier stages where a doctor would normally
16 call it an embryo at that point, but doctors are not the
17 ones making the law.

18 We're trying to understand it, and the legislature
19 said that a fetus includes before ten weeks, and they have
20 every right to do that. They can be their own
21 lexicographer. They can say what the medicine -- or what
22 their medical definition is, and here they did. They said
23 that it includes the earlier stages of pregnancy which
24 would normally be referred to as an embryo, but that's not
25 actually material to when -- what point in time the ban

1 sets in in pregnancy. Does a fetal heart need to be formed
2 at that point? Yes, fetal heart seems to presuppose that
3 it is a fetus, which would be after ten weeks. But, again,
4 because the legislature already defined fetus to include
5 what is an embryo, it can be either. And it really isn't
6 material because the key is heartbeat, and they defined
7 heartbeat as the cardiac activity and the clause. And so
8 we're not arguing about the, the sort of medical terms, how
9 they are used in public parlance. We're arguing about the
10 text and what the legislature said that it means.

11 I also want to return to our argument on
12 constitutional avoidance. So, defendants argue that we are
13 trying to backdoor into a facial challenge. I want to make
14 very clear we are not facially challenging SB474; we are
15 not challenging *Planned Parenthood II*. We completely
16 concede that the court found that SB474 was sufficiently
17 facially invalid -- or facially valid, but we are not the
18 ones ignoring footnote 4 of that decision where they
19 explicitly invited us to bring this as-applied challenge to
20 figure out the statutory definition to engage in statutory
21 construction to determine what the uncertainty on the face
22 of the definition of fetal heartbeat meant, and here we are
23 seeking a binding interpretation of that statute.

24 We are here with a declaratory judgment act. What we
25 want is for the court to issue a binding interpretation

1 that can guide our plaintiffs' conduct to make sure that
2 they understand and have fair notice, and so that they are
3 not only warned what conduct is prohibited, but also so
4 that prosecutors and other enforcement officials can't
5 decide what it means because there's nothing in the text
6 that says it has to be at six weeks. And we believe that
7 the text says it has to be at nine weeks. But as of right
8 now, with no binding interpretation, we have to assume the
9 most conservative position, which is assuming that it
10 applies as early as six weeks.

11 And this is relevant to the actual constitutional
12 challenge in that we are not asking, we are not
13 relitigating *Planned Parenthood II*. We're not asking you
14 to declare that the act is unconstitutional. We are not
15 even asking you to declare that it's unconstitutional as
16 applied to six weeks of pregnancy. Our constitutional
17 avoidance argument is based on a cannon of statutory
18 construction, and what that is, if after engaging in the
19 regular tools of statutory construction you find that there
20 is still ambiguity remaining in the text, then if there are
21 two possible interpretations, you adopt one that does not
22 pose serious constitutional questions. And again, *Planned*
23 *Parenthood II* did not close the door to this serious
24 constitutional question as to whether as early as six weeks
25 is a reasonable invasion of privacy. That is still an open

1 door. We are asking instead for you to interpret the
2 language. We want to know what the statute says.

3 THE COURT: Now, I thought the final argument, though,
4 from plaintiffs is to declare that six-week ban is
5 unconstitutional as an unreasonable invasion of privacy.
6 So, assuming I rule completely in favor of the state and
7 find the six weeks and that's what it is, there is the
8 argument from plaintiffs that that would be -- six weeks is
9 too short a notice, and it's an unreasonable invasion of
10 privacy as applied to Ms. Shelton.

11 MS. EASTLING: Yes. So, that is as applied to Ms.
12 Shelton's case. Here our main argument is our declaratory
13 judgment claim, which is us asking for what the statute --
14 asking for a binding construction. And so that doesn't
15 require you to rule on the actual constitutionality on the
16 face of the statute. What we're asking is for the meaning
17 on the face of the statute which we lack and which the
18 Supreme Court first pointed out is not clear on the face of
19 the text at first glance. But again our argument is that
20 when you do a close reading of the text, as is required
21 under the canons of statutory interpretation in this state,
22 you have to conclude that it must apply, at the earliest,
23 at nine weeks of pregnancy because otherwise the biology
24 just doesn't meet the statutory definition that the
25 legislature set out.

1 Returning to our argument on the rule of lenity which
2 is similar because both the rule of lenity and
3 constitutional avoidance are canons that you apply only
4 after you have found that there is ambiguity in the
5 statute. If you've applied all the rules of statutory
6 construction and are unable to come to a conclusion that it
7 is clear what the statute means in the plain language of
8 the text, then those canons come in and at that point, the
9 rule of lenity does mandate that any ambiguity be resolved
10 against the state.

11 That is not only in older cases. That is a case as
12 recently as 2012, if I can remember off the top of my head,
13 where the Supreme Court engaged in statutory interpretation
14 and found that the rule of lenity, the last sort of
15 element, that when you go through the elements of statutory
16 interpretation, you look for intent as it is embodied in
17 the text, and then at the end if there's any ambiguity
18 remaining and it is a penal statute, it must be construed
19 strictly against the state because it is not the
20 judiciary's province to extend a statute beyond its text to
21 criminalize conduct because of a serious liberty interest.

22 THE COURT: Is that argument cut, though, if I say
23 it's six weeks or nine weeks, then there is no issue as
24 opposed to notice for any prosecutions, any criminal acts?
25 I mean, you know if the court says it's six weeks, then

1 it's six weeks. Is that argument cut off if I find it's
2 six weeks or nine weeks?

3 MS. EASTLING: Yes, Your Honor, because you would find
4 that there isn't any ambiguity in the text at that point.
5 We think that that is irreconcilable with the text because
6 the text clearly contemplates it being at nine weeks and
7 can't be at six weeks because of what we've discussed
8 previously, and so if -- but if you do find that you think
9 six weeks is the best reading of the text, then there is no
10 ambiguity at that point, and so these other arguments come
11 into play.

12 And that also goes to the difference between vagueness
13 and ambiguity that defendants brought up. So again,
14 ambiguity is a question of statutory interpretation. Is
15 there a way that you could engage with tools of
16 construction to figure out how a statute applies to an
17 instance that isn't clearly described in the text? It can
18 be, you know, using a word that might mean two things, but
19 the text makes clear that it means one thing.

20 For example here, cardiac activity. Vagueness is
21 about fairness notice. It's about due process. It's about
22 whether or not plaintiffs can reasonably understand what
23 conduct is criminalized as well as understand that it will
24 not be enforced arbitrarily, and so that is not about
25 ambiguity. Of course, they can overlap sometimes, but

1 there can be a non-ambiguous statute that is vague because
2 the meaning is clear, but its impact on fair notice is not
3 clear.

4 This also goes to our argument about -- or our
5 requested relief. Again, we do ask for in this instance a
6 preliminary injunction saying that we are likely to succeed
7 on the merits, and then enjoining enforcement prior to nine
8 weeks when there's no fetal heart. However, again our
9 ultimate claim is declaratory judgment. We are asking for
10 what the statute means.

11 That is inherently broad because it is asking for the
12 meaning on the face of the statute. But, in fact, this is
13 a narrow as-applied challenge because we're looking at this
14 subset of pregnancies where embryonic electrical activity
15 has begun, which is around five to six weeks, but where no
16 fetal heart has yet formed, which is around nine weeks.

17 So, it's really only those few weeks of pregnancies
18 where we are asking if there are -- is a pregnancy that
19 presents in the clinic that does not have steady and
20 repetitive rhythmic contractions of the fetal heart,
21 meaning that is before nine weeks of pregnancy before those
22 could biologically possibly exist, then can our doctors
23 perform the abortion. And that is a smaller subset of
24 these certain pregnancies, and that is why this is an
25 as-applied challenge.

1 We are not, again, challenging the face of the statute
2 after that point where the fetal heart has formed; the ban
3 would still be in place. We agree that after nine weeks,
4 the ban is in effect and our doctors are prohibited from
5 providing abortions at that point. So, much of the statute
6 would remain in effect. We are just asking for this narrow
7 window where there isn't a fetal heart but there is
8 embryonic activity, can our doctors perform abortions under
9 the statute.

10 I would also like to turn to the defendants' arguments
11 about our harms. They seem to collapse standing and
12 irreparable harm in their argument because, like as we
13 argued, we do have third-party standing to assert the
14 rights of our patients. And that means with regards to the
15 preliminary injunction standard, the harms to our patients
16 are very relevant as to whether or not there is irreparable
17 harm here. And again, they don't actually dispute the
18 irreparable harm that is happening.

19 So, if you, we believe, correctly find we have
20 third-party standing because there is no South Carolina
21 case that says that they don't follow the third-party
22 standing rule of the government -- or of the federal
23 government, which is unbroken, including in *Dobbs* -- they
24 did not overrule third-party standing for abortion
25 providers, and so South Carolina follows that law and,

1 therefore, our plaintiffs have a right to assert the harms
2 of their patients. But even if not, they do have
3 first-party standing, as we argue, and they are harmed by
4 the lack of fair notice that this statute grants them, and
5 that is a constitutional right which is a serious and
6 irreparable harm.

7 I would also like to direct the court to Ms. Shelton,
8 our plaintiff who is here with us today. This is not a
9 case where -- this is a case where Ms. Shelton was denied
10 care precisely because of this act. She recognized her
11 pregnancy very early. She had an intrauterine device
12 already in that was found to be defective by her doctor a
13 few weeks prior, and even still she was unable to access
14 abortion in South Carolina. She had less than two weeks
15 from the moment that she discovered her pregnancy to access
16 an abortion appointment.

17 What doctor can you see in less than two weeks to
18 receive a procedure that is similar? It is really
19 difficult to go and see your doctor, especially when
20 there's only three abortion providers in the state,
21 especially at a time when people are scrambling to get
22 appointments because they know that currently we're
23 interpreting it as a six-week ban, and so they need to get
24 in quickly. And the fact of the matter is that there are
25 too many patients trying to access abortion before that

1 deadline. And if Ms. Shelton were to be seen, some other
2 patient would have had to be pushed out of line.

3 THE COURT: This line of argument, though, goes
4 directly to two things. Either to it's a bad law based on
5 policy, which is not my job. That not my job at all, or it
6 goes to it's unconstitutional as an unreasonable invasion
7 of privacy, which would be my job.

8 Now if that is the issue, the policy issues are down
9 the street at the General Assembly. As to the if it's an
10 unconstitutional invasion of privacy, that's a separate
11 matter which we would need to address, and that was my
12 first question to you. What is the law of privacy based on
13 South Carolina's amendment as of today in light of *Planned*
14 *Parenthood I*, *Planned Parenthood II*, and *Singleton*? That's
15 a separate issue.

16 MS. EASTLING: Right. I agree, Your Honor. It is a
17 separate issue, and here we agree with you that *Singleton*
18 and *Planned Parenthood I* and *Planned Parenthood II* did not
19 disturb the doctrine that an unreasonable invasion of
20 privacy is unconstitutional, and there is a privacy right
21 to some degree of bodily autonomy and ability to make your
22 own medical decisions. It is unclear because of *Planned*
23 *Parenthood*'s two facial decisions exactly where that line
24 crosses from unreasonable to reasonable, and that is why
25 our constitutional avoidance argument is not asking you to

1 make a final decision on that. It is just about whether or
2 not a serious question is raised as to whether or not six
3 weeks is constitutional time for the state to ban
4 abortions.

5 I would just briefly like to return to the scope of
6 our injunctive relief. Again, because we are ultimately
7 seeking declaratory judgment, we are asking for what the
8 law means on its face. That is so that our doctors can
9 adjust their conduct accordingly and treat their patients
10 as they hope to under the statute. Again, we are not
11 challenging the facial validity of the statute; we are not
12 asking for you to bar enforcement in every case. We are
13 asking for enforcement to be barred before the point at
14 which a fetal heart is formed because that is the point
15 that the legislature said was necessary for this ban to
16 start.

17 If you have no further questions?

18 THE COURT: Not at this time. Thank you.

19 Well, before y'all speak, let's take a fifteen minute
20 break, fifteen minutes.

21 (OFF THE RECORD.)

22 THE COURT: All right, Mr. Lambert.

23 MR. LAMBERT: May it please the court, Your Honor? We
24 have covered a lot of ground this morning, and I have just
25 three brief points as we begin to conclude. The first one

1 goes to the scope of what we're here about.

2 The complaint is two claims for declaratory relief and
3 vagueness. It doesn't bring a challenge to, to -- about
4 privacy, Article 1, Section 10. Want to make sure we're
5 focused on what the case is before us and that it doesn't
6 grow through the scope of the preliminary injunction.

7 Second, my, my point is to methodology. At one point
8 to my friend on the other side, you asked am I supposed to
9 ask what did they mean, referring to the General Assembly.
10 I think that's exactly the right question because that gets
11 to the cardinal rule, and I think the questions that have
12 been asked in a lot of -- a lot of form get to how do you
13 figure that out. So, here are a couple thoughts on that
14 that are hopefully helpful.

15 One, of course, is the text. What does the statute
16 say? The second is what did legislators say when they were
17 debating it? I want to be really precise here, Your Honor.
18 I'm not talking about, as Justice Scalia once put it in
19 legislative history, looking over a crowd in search of your
20 friends. I'm talking about looking at the entire record as
21 a whole and seeing what the body said as a debate. There
22 are hours and hours of footage from subcommittees and
23 committee floor debates, and if you watch that, you see a
24 consistent legislative understanding of the record. That's
25 why the legislative history matters here.

1 Next, I think you can look at the context in which the
2 act was passed. The 2023 act was passed not long after
3 Planned Parenthood won, and in the shadow of that decision
4 and in the discussions about that being what the Supreme
5 Court termed and what the petitioners there termed a
6 six-week ban, that was the context in which -- in which
7 this was being discussed. And I think, Your Honor, it's
8 fair to say you could look to anything else you thought was
9 useful to shed light on what the legislature as a whole
10 intended this to mean.

11 I think when you undertake that analysis, it will all
12 go to show you that this was understood to mean by the
13 legislature, which is what matters, as well as everybody
14 else, that this law protects unborn life from six weeks of
15 pregnancy.

16 Lastly, Your Honor, a point that goes to the merits.
17 You had some questions to my friend on the other side about
18 the competing affidavits of Dr. Skop and Dr. Farris. I
19 think the good news for the court here is the court doesn't
20 have to get into weighing those affidavits because the
21 General Assembly's already done that. When the General
22 Assembly legislates, it has plenary authority to legislate
23 and regulate subject to constitutional provisions. So, the
24 legislature could hear the testimony of people like Dr.
25 Farris and people like Dr. Skop, and the legislature could

1 decide what it thought it meant.

2 So, just on that point Dr. Skop, paragraph 15 of her
3 declaration, says:

4 These rhythmic contractions are not haphazard but
5 regular and repetitive and if the heartbeat were
6 to cease, the unborn child would die.

7 My friends on the other side may disagree with that.
8 The legislature did not. They were free to agree with that
9 view of fetal cardiac development. It is on that view that
10 they enacted this definition and this law and they
11 protected unborn life at six weeks. That's why we think
12 you should deny the motion for preliminary injunction.
13 It's why you should grant the motion to dismiss, Your
14 Honor.

15 Stat -- interpreting a statute is a question of law.
16 There's no discovery that's needed in this case; there's no
17 trial that's needed. This is a legal question. You can
18 and should dispose of it right now and dismiss these cases
19 so that the law can continue in effect -- into effect as it
20 has been and as the General Assembly intended.

21 THE COURT: Is there any argument, though -- and maybe
22 this will be for plaintiffs' counsel -- about the
23 constitutionality in light of the right to privacy, or is
24 this merely a declaratory judgment or injunctive relief?

25 MR. LAMBERT: Taking them at their word and at their

1 complaint, Your Honor, this is not a constitutional
2 challenge. It doesn't raise the privacy question. They
3 have raised a statutory interpretation claim: what does
4 this mean.

5 If, if you and then if the courts beyond this one
6 decide that six weeks is, in fact, what the General
7 Assembly intended, the, the facial challenge to that's been
8 upheld. If there's an as-applied challenge to a six-week
9 rule from a plaintiff who is seven weeks pregnant or eight
10 weeks pregnant and says if -- it can't constitutionally
11 mean six weeks in my case, that's a lawsuit to be brought
12 later. That's not the lawsuit that's here today, and
13 that's not the lawsuit with which the court needs to
14 concern itself.

15 THE COURT: All right. Thank you.

16 MR. LAMBERT: Thank you, Judge.

17 MR. HYDRICK: Nothing further for Your Honor.

18 THE COURT: All right. Thank you.

19 MS. EASTLING: I just have one brief point, Your
20 Honor, which is returning to what my friend on the other
21 side just told you about methodology in terms of statutory
22 interpretation.

23 Again, the cardinal rule of statutory interpretation
24 is to discern and give effect to the intent of the
25 legislature if discoverable in the text of the statute. If

1 you find that it is not discoverable in the text of the
2 statute, then the statute is ambiguous. Only when you have
3 engaged in the tools of statutory interpretation and are
4 unable to construe the statute based on its plain meaning,
5 only then can you look outside the border of the statute.
6 That includes legislative history. That includes
7 statements of individual legislatures -- legislators, and
8 it is important because that is very clearly the rules of
9 statutory construction in this state, which is that you can
10 only look to external sources if you find that there is
11 ambiguity in the statute.

12 Again, there is no ambiguity in the statute. It
13 applies after approximately nine weeks of pregnancy, and so
14 looking beyond the text is not necessary here because you
15 can discern the intent of the legislature when you read the
16 whole act.

17 Plaintiffs would be happy to submit a proposed order
18 granting a preliminary injunction and denying the motion to
19 dismiss, Your Honor.

20 THE COURT: All right. Thank you.

21 Anything further from defense?

22 MR. LAMBERT: Nothing, Your Honor.

23 THE COURT: All right. Well, thank you to both sides.
24 I'm going to take this matter under advisement. I
25 appreciate the professionalism from both sides. I know

1 this is a serious and very important issue for all those
2 involved. I'm going to work expeditiously to write my own
3 order. It's a heavy decision to make, but I'm going to try
4 to do it as quickly as I can for the parties, to give y'all
5 something to have, okay? So, I want to thank you all for
6 being here. I'll have something to you hopefully in the
7 next few weeks.

8 Court is adjourned.

9 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 2ND DAY OF MAY, 2024.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JULY 2ND, 2024

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel McLeod Coble, Circuit Court Judge

Case No. 2024-CP-40-00762

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; 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; 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; 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,

Respondents,

v.

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.

NOTICE OF APPEAL

Planned Parenthood South Atlantic, Dr. Katherine Farris, and Taylor Shelton appeal an Order, dated May 16, 2024, denying Appellants' Motion for Preliminary Injunction, dated February 5, 2024. A copy of the order appealed is attached as **Exhibit 1**. Appellants received notice of the denial of their Motion for Preliminary Injunction on May 16, 2024.

s/Kathleen McDaniel

M. Malissa Burnette (SC Bar No. 1038)

Kathleen McDaniel (SC Bar No. 74826)

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June 12, 2024

Columbia, South Carolina