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S.C. SUPREME COURT

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

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Daniel Coble, Circuit Court Judge

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Appellate Case No. 2024-000997

Case No. 2024-CP-40-00762

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PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and its physicians and staff; KATHERINE FARRIS, M.D., on behalf of herself and her patients; 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.*

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**BRIEF OF APPELLEES STATE OF SOUTH CAROLINA AND ATTORNEY GENERAL ALAN WILSON**

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## INTRODUCTION

For nearly two hundred years, South Carolina courts have recognized that the "polestar" in statutory construction is the intent of the General Assembly. *See Ansel v. Means*, 171 S.C. 432, 436, 172 S.E. 434 (1934); *see also State v. Cunningham,* 29 S.C.L. 246, 253 (S.C. App. L. 1843) (noting that the statute must be construed "so as to promote the intent of the Legislature" even if it requires the court to "transpose words and even parts of sentences" within the statute). This Court has regularly recited and reaffirmed this foundational principle of statutory construction. *See Brooks v. Benore Logistics Systems, Inc.*, 442 S.C. 462, 477, 900 S.E.2d 436, 444 (2024) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

With respect to the 2023 Act No. 70, Senate Bill 474, 125th General Assembly, Special Session) ("2023 Act"), the intent of the General Assembly is clear: the General Assembly intended the 2023 Act to prohibit most abortions at a single point in time once cardiac activity is detectable at approximately six weeks of pregnancy.[1]

And despite Appellants' arguments to the contrary, the text of the 2023 Act does not contradict that intent, nor does it compel a different result. On the contrary, multiple principles of statutory construction support the conclusion that the 2023 Act generally prohibits abortion after that point in time.

This Court should affirm the Circuit Court's denial of a preliminary injunction and declare what even Appellants vigorously maintained until recently: that the 2023 Act generally prohibits

[1] Appellants now describe such activity as "embryonic electrical activity." For purposes of this brief, the State refers to this activity 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. (R. p. 255, ¶ 15). References to pregnancy refer to the gestational age of the unborn child.

abortions in South Carolina at a single point in time once cardiac activity is detectable at approximately six weeks of pregnancy.

## STATEMENT OF ISSUES

I. Did the Circuit Court clearly err in its statutory analysis of the 2023 Act?

II. Did the Circuit Court clearly err in its vagueness analysis?

III. Have the Appellants satisfied the elements for injunctive relief?

## STATEMENT OF THE CASE

### I. The 2023 Act

South Carolina enacted the 2023 Act on May 25, 2023. Subject to certain exceptions, the 2023 Act prohibits a person from performing or inducing "an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's fetal heartbeat has been detected in accordance with Section 44-41-330(A)." *See* 2023 Act, § 2, S.C. Code Ann. § 44-41-630(B).

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).

The legislative history of the 2023 Act uniformly—and unambiguously—suggests that the General Assembly intended and understood this definition to apply to a single point in time at approximately six weeks of pregnancy. *See*, *e.g.*, Senate Journal, Gen. Assemb., 125th Session (Feb. 9, 2023), available at https://tinyurl.com/59k29x8a; *see also* S.C. Senate, Video of Floor Proceedings (May 23, 2023), available at available at https://tinyurl.com/48tdxztm. S.C. Senate, Video of Floor Proceedings (Feb. 9, 2023), available at https://tinyurl.com/48tdxztm; S.C. House, Video of Floor Proceedings Part 1 (May 16, 2023), available at https://tinyurl.com/48tdxztm; S.C.

House, Video of Floor Proceedings Part 2 (May 16, 2023), available at https://tinyurl.com/3keb3de4.[2]

## II. Litigation History

Appellants filed suit on February 5, 2024 to seek an answer to "a narrow question" of statutory interpretation left open by this Court's decision in *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023), *reh'g denied* (Aug. 29, 2023) ("*Planned Parenthood II*"). (R. p. 39, ¶ 1). In their complaint, Appellants sought declaratory and injunctive relief that would construe the 2023 Act's definition of "fetal heartbeat" to confirm that "(1) 'cardiac activity' is modified by 'the steady and repetitive rhythmic contraction of the fetal heart' such that the two phrases refer to one point in time during pregnancy, and (2) the relevant point in time addressed by the Act is the point when a heart has formed, which is after approximately nine weeks LMP, consistent with the medical consensus." (R. p. 39, ¶ 7). Appellants' argument that a fetal heart has not formed until nine weeks of pregnancy is novel and, by Appellants' own admission, was developed specifically for purposes of this litigation. (R. pp. 110–111).

As an alternative argument, Appellants sought a construction of the 2023 Act to cure a potential vagueness problem. (R. p. 70). According to Appellants, the 2023 Act posed a potential

[2] Throughout these debates, legislators consistently refer to the 2023 Act as a six-week ban. For ease of reference for the Court, the following timestamps provide a representative—but not exhaustive—list of references to the Act as a six-week ban from the floor debates in both chambers: S.C. House, Video of Floor Proceedings Part 1 (May 16, 2023) (1:46:00; 2:35:16; 3:31:03; 3:32;30; 7:13:18; 7:28:00; 8:49:46); S.C. Senate, Video of Floor Proceedings (May 23, 2023) (2:40:36; 3:10:05; 3:53:58; 4:12:32; 4:16:18; 4:25:18; 4:33:53; 4:38;53; 5:08;34; 5:18:12; 5:19:38; 5:21:48). As noted below, the Circuit Court also highlighted other references in the legislative record to a "six-week time frame." (R. p. 17). The Governor also collected additional references to the legislative record in his Motion to Dismiss. (R. pp. 214–217). The legislative record of the 2023 Act is clear and unambiguous on this point—the legislature treated the 2023 Act as a six-week prohibition on most abortions.

vagueness problem because "it could be read as prohibiting abortion at two different points in pregnancy." (R. p. 70, ¶ 121).

Appellants moved for a preliminary injunction on the same day. (R. p. 73). The Circuit Court denied Appellants' motion for a preliminary injunction, concluding that "it is clear beyond a shadow of a doubt that the General Assembly intended, and the public understood, that the time frame of the Act would begin around the six-week mark." (R. p. 30). The Circuit Court also concluded that the 2023 Act was not unconstitutionally vague. (R. p. 29).

Appellants filed a timely notice of appeal. This Court subsequently certified this case for review.

## III. The Development of the Unborn Child's Cardiovascular System

As explained by, Dr. Ingrid Skop, a board-certified obstetrician and gynecologist, Appellants' nine-week theory of cardiovascular development "does not enjoy 'medical consensus.'" (R. p. 252, ¶ 6). In fact, "there is no medical consensus that a functioning blood-circulating embryonic heart does not begin to exist until it develops all four chambers." (R. p. 254, ¶ 12).

Instead, "there is medical consensus" that an unborn child's heart "contracts to circulate blood throughout the embryo" around 5-6 weeks of pregnancy. (R. p. 525, ¶ 7). While "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." *Id*..

At this point in time, "electric impulses generated by the cardiac conduction system cause muscular contractions to propel oxygen-carrying blood cells throughout the embryo's body . . . . These rhythmic contractions are not haphazard, but regular and repetitive, and if the heartbeat were to cease, the unborn child would die." (R. p. 255, ¶ 15). The "blood flow that can be detected by

ultrasound" at this time "corresponds directly with these contractions of the embryonic heart (i.e., heartbeats)." (*Id*.).

In short, 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 they time the heartbeat can be detected around 6 weeks" of pregnancy." (R. p. 257, ¶ 18).

## STANDARD OF REVIEW

"Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous." *Compton v. S.C. Dep't of Corr*., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). The Circuit Court's determination regarding the Appellants' likelihood of success is also reviewed for clear error. *See Compton*, 392 S.C. at 368, 709 S.E.2d at 643.

## ARGUMENT

The Circuit Court properly denied Appellants' Motion for a Preliminary Injunction. Appellants have failed to establish the requisite three elements to receive such relief. *See Compton*, 392 S.C. at 366, 709 S.E.2d at 642 ("[T]he applicant must establish three elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law."). With respect to their likelihood of success on the merits specifically, Appellants have failed to establish that the 2023 Act is a nine-week abortion ban and have failed to establish that the act is unconstitutionally vague.

### I. The 2023 Act Generally Prohibits Abortion After Approximately Six Weeks of Pregnancy.

At the time the 2023 Act was enacted, everyone—including Appellants—treated the 2023 Act as a ban on abortion following the detection of embryonic cardiac activity—which occurs at

approximately six weeks of pregnancy. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021) (describing cardiac activity as occurring at approximately six weeks of pregnancy); *see also* Complaint, *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… [and] may be detected by ultrasound as early as six weeks of pregnancy LMP (and sometimes sooner."). In fact, four separate courts—including this 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 of South Carolina—treated the 2023 Act—or an identical definition in a previous law—as a six-week abortion ban.

This is no doubt in part because the intent of the General Assembly in passing the 2023 Act was clear. By enacting the 2023 Act, the General Assembly intended to impose a prohibition on most abortions after six 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"). And nearly all contemporaneous press coverage from the time described the act as a "six-week" ban. *See*, *e.g.*, Sydney Kashiwagi, "South Carolina governor signs 6-week abortion bill into law," CNN (May 25, 2023), available at https://tinyurl.com/2vdbnrva ("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 . . . .").

Appellants now argue that the General Assembly actually passed a law that banned abortion at approximately *nine* weeks of pregnancy, despite its professed intention to do otherwise. To support this argument, Appellants cite to the text of the 2023 Act, contending that the text "unambiguously" prohibits abortion after approximately nine weeks of pregnancy.

At the outset, it is worth emphasizing the novelty of Appellants' nine-week metric, which has only recently been devised for the specific purpose of this litigation. This nine-week metric represents a significant departure from Appellants' positions in prior litigation. As noted above, when Appellants first challenged the Act, they argued that it prohibited most abortions at six weeks of pregnancy and premised their legal claims on this argument. *See* Complaint, *Planned Parenthood South Atlantic v. State*, No. 2023-CP-40-002745 (S.C.Com.Pl. May 25, 2023). After this Court's decision in *Planned Parenthood II*, Appellants pivoted from the six-week metric to argue that the 2023 Act was a *17 to 20-week* prohibition on abortion. In doing so, Appellants cited to a purported "medical consensus" regarding when a fetal heartbeat first occurs. *See* Respondents' Petition for Rehearing at 5, *Planned Parenthood S. Atl. v. State*, No. 2023-000856 (S.C. 2023) (asking this Court to construe the 2023 Act to be consistent with the "medical consensus" that a "true fetal heartbeat" does not exist until 17-20 weeks of pregnancy). Only after their Petition for Rehearing was denied by this Court did they begin offering nine weeks as the new "medical consensus."

In any event, Appellants' argument violates several basic principles of statutory construction and collapses under its own internal logic. This Court should reject Appellants' attempt to impose their preferred—and novel—statutory construction on the State. Instead, this Court should adhere to its usual rules of statutory construction by recognizing the clear legislative intent of the 2023 Act.

### A. Legislative Intent and Statutory Construction

It is widely considered axiomatic that the "first rule" of statutory construction is to discern the "intention of the legislative body." *See Home Bldg. & Loan Ass'n v. City of Spartanburg*, 185 S.C. 313, 194 S.E. 139, 142 (1937). This principle has long been recognized in South Carolina and is ultimately rooted in separation of powers concerns. *See Creech v. S.C. Pub. Serv. Auth*., 200 S.C. 127, 20 S.E.2d 645, 652 (1942) ("It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature.").

As has often been noted, the best evidence of legislative intent is the text of a statute. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. If a statute's text is unambiguous, under the plain meaning rule, "it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id*.

To properly apply the plain meaning rule, courts must look to the ordinary and popular meaning of the words as used by those who enacted the statute. *City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881). In other words, this Court must not apply its own conception of the "ordinary and popular meaning" of the words, or even the "abstract" or "technical" meaning of the words, but instead must seek to give the "words the sense in which they [were] used by those who" enacted the statute. *Id*.

In support of that proposition, this Court quoted Chief Justice John Marshall's opinion in *Ogden v. Saunders*, 25 U.S. 213, 332 (1827): "the intention of the instrument must prevail" and

the "intention must be collected from its words," which should be "understood in that sense in which they are generally used by those for whom the instrument was adopted." 16 S.C. at 52.

Thus, legislative history and other contemporaneous historical sources, which may be evidence of legislative intent, are relevant to any textual analysis under the plain meaning rule because they necessarily inform a court's understanding of the "sense in which [the words] are generally used by those for whom" the statute was adopted. *Id*.

And any proper application of the rule must also reflect the separation of powers concerns that principally animate the rule. Courts primarily adopted the rule out of respect for separation of powers and out of a concern for circumventing or frustrating legislative intent. *See Creech*, 200 S.C. 127, 20 S.E.2d at 652 ("The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws.").

Critically, however, in order to effectuate legislative intent, courts have been willing to depart from a mechanical or adamantine application of the rule. *See Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("The real purpose and intent of the lawmakers will prevail over the literal import of the words."). In fact, this Court has gone as far as to suggest that it may "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).

In explaining the rationale behind such an approach, this Court observed the following:

> It often happens that the true intention of the Legislature, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can be accomplished only by departure from the literal interpretation of the language used. Hence, Courts are not always confined to the literal meaning of a statute; *the real purpose and intent of the lawmakers will prevail over the literal import of the words*.

*Greenville Baseball*, 200 S.C. 363, 20 S.E.2d at 815 (emphasis added).

In addition to rejecting the meaning of words used, a court is "at liberty to transpose words and even parts of sentences" in order to effectuate the legislature's plain intent. *See State v. Cunningham*, 29 S.C.L. 246, 254 (1843). In *State v. Cunningham*, 29 S.C.L. 246, 254 (1843), the court both transposed words and added commas to a clause in a statute in order to "sustain[] the purposes of the Act," to ensure the clause was "not at war with grammatical construction," and to apply the "precise popular meaning." *Id*. Somewhat relatedly, this Court has explained that punctuation "may be disregarded in order to effect the intention of the Legislature." *Bruner v. Smith*, 188 S.C. 75, 198 S.E. 184, 188 (1938).

At first glance, these two lines of cases—those applying the plain meaning rule and those departing from it—appear to be in tension. But in reality, the two lines harmonize in advancing legislative intent.

In explaining how a relaxation of the plain meaning rule may be appropriate in some circumstances, this Court in *Creech* distinguished between a court's attempt to advance legislative intent and a court's attempt to circumvent it:

> There is a marked distinction between *liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning*, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is *a legitimate and recognized rule of construction*, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

*Creech*, 200 S.C. 127, 20 S.E.2d at 652 (emphasis added).

Moving beyond the plain meaning rule, if a court concludes that a statute's text is ambiguous, it may look to "legislative history in order to effectuate the purpose of the statute." *Limehouse v. Hulsey*, 404 S.C. 93, 106, 744 S.E.2d 566, 573 (2013). It may also resort to other

canons of statutory construction. *See Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 753 (1999).

In short, the intent of the legislature is relevant to nearly every aspect of statutory construction.

**B. The 2023 Act**

This case is somewhat unique in that the intent of the General Assembly in this case is clear. The General Assembly intended to generally prohibit most abortions once cardiac activity is detectable at approximately six weeks of pregnancy.

The legislative history of the act is uniform and unambiguous in describing the act as a six-week ban. And tellingly, both proponents and opponents of the act described it and treated it as such. As noted above, legislators consistently referred to the Act as a six-week ban in both floor debates and committee debates. *See*, *e.g.*, Senate Journal, Gen. Assemb., 125th Session (Feb. 9, 2023), available at https://tinyurl.com/59k29x8a; *see also* S.C. Senate, Video of Floor Proceedings (May 23, 2023), available at available at https://tinyurl.com/48tdxztm. S.C. Senate, Video of Floor Proceedings (Feb. 9, 2023), available at https://tinyurl.com/48tdxztm; S.C. House, Video of Floor Proceedings Part 1 (May 16, 2023), available at https://tinyurl.com/48tdxztm; S.C. House, Video of Floor Proceedings Part 2 (May 16, 2023), available at https://tinyurl.com/3keb3de4.

The Circuit Court made findings regarding this history, collectively citing over twenty references to the act as a six-week ban in the legislative history. (R. pp. 17–18). And despite Appellants' argument to the contrary, these pre-enactment statements are relevant evidence of legislative intent. *See Kennedy v. S.C. Ret. Sys*., 345 S.C. 339, 350 n.12, 549 S.E.2d 243, 248 n.12 (2001) (examining floor debates and discussion pertaining to the amendment); *see also Wehle v.*

*Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 408, 611 S.E.2d 240, 247 (2005) (looking to presence or absence of floor debate as indicative of legislative intent).

Further, the Circuit Court noted that it could not "locate one instance of legislative history indicating a time frame of any other than the six-week mark, much less nine weeks." (R. p. 17). The absence of such legislative history is also powerful evidence of legislative intent. *See Kennedy v. S.C. Ret. Sys*., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) ("The most powerful indication of legislative intent is the lack of legislative history and debate which accompanied the adoption of [the statute].").

This clear legislative intent may be enough to settle and end this case. *See Greenville Baseball*, 200 S.C. 363, 20 S.E.2d at 815; *see also Bruner*, 188 S.C. 75, 198 S.E. at 188.

But regardless of whatever statutory analysis this Court engages in, the answer is the same: this Court's statutory analysis must be guided by the General Assembly's intent to generally prohibit abortion after six weeks of pregnancy.

**1. Plain Meaning Rule**

Beginning with a plain meaning analysis, 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).[3]

Although cardiac activity is undefined in the act, it does have a clear and definite meaning. Cardiac activity begins at an identifiable moment in time during pregnancy—at approximately six weeks. (R. pp. 250–257). Courts from around the country—including courts in South Carolina—

[3] 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).

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).

Even more importantly, however, the General Assembly understood the phrase cardiac activity to have this exact meaning. And as previously discussed, it is the General Assembly's understanding of the meaning of the word that matters—not a court's understanding or a technical understanding. *See Oliver*, 16 S.C. at 52.

The clause following cardiac activity, "or the steady and repetitive rhythmic contraction of the fetal heart," refers to the same point in time—approximately six weeks of pregnancy. This is true for at least three 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 . . . ."). Relatedly, the definition of "[f]atal 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). Thus, "fetal heart" should be interpreted to mean the unborn child's cardiac system.

*Second*, even if this Court declines to apply that definition, the ordinary and popular meaning of the term, as understood by the General Assembly, should control. As noted above, the General Assembly understood fetal heartbeat to refer to embryonic cardiac activity.

Popular press accounts confirm this understanding of the popular meaning of the 2023 Act. *See Patterson v. State*, 2021 UT 52, ¶ 134, 504 P.3d 92, 121 (2023) (looking to contemporary

newspaper articles to determine the original public meaning of the text); Grant Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J.L. & SOC. CHANGE 237, 252 (2013) (describing the press as "often a strong indicator of public meaning."). A wide range of news outlets described the 2023 Act as a six-week abortion ban. For example, *The New York Times* described the act as such in a May 2023 news story. *See* Kate Zernike and Ava Sasani*, "*South Carolina Senate Passes 6-Week Abortion Ban," *The New York Times* (May 23, 2023), available at https://tinyurl.com/mrrrydwa.

*Third*, and to the extent medical opinion is relevant, Dr. Skop's report states that "fetal heart" has a different plain meaning in the medical community than Appellants suggest.[4] In her declaration, Dr. Skop notes that a "fetal heart" forms by six weeks of pregnancy and that the unborn child's heart contracts steadily, repetitively, and rhythmically at that time. (R. p. 257, ¶ 18) ("The science is clear: An embryo's heart is beating steadily, repetitively, and rhythmically—and functioning as a heart to circulate oxygen-rich blood throughout the preborn body—by the time the heartbeat can be detected around 6 weeks LMP.").

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 9th week LMP, there is no medical consensus that a heart only exists when it has 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." This is precisely what an embryonic heart does from even before the time it can be detected by ultrasound technology. As a board-certified obstetrician

[4] The State contests Appellants' description of Dr. Skop's reliability. Dr. Skop has been cited by and relied upon by courts from around the country. *See, e.g., All. for Hippocratic Med. v. U.S. Food & Drug Admin*., 78 F.4th 210, 222 (5th Cir.). Further, the issues of reliability and admissibility of Dr. Skop's report are not properly before this Court on the appeal of a denial of a preliminary injunction motion. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."). In any event, as explained herein, principles of statutory construction compel the conclusion that the 2023 Act is a general prohibition on abortion even absent Dr. Skop's declaration.

> practicing over thirty years, I can attest this heartbeat can usually be detected around 6-weeks LMP. The doppler reflects the movement of blood within the contracting heart, that is, the embryonic "heartbeat."

(R. pp. 254–255, ¶¶ 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 electrical impulses that can be detected by ultrasound at 6 weeks LPM correspond directly with these contractions of the embryonic heart (i.e., heartbeat).

(R. p. 255, ¶ 15).

Appellants themselves appear to agree at least in part with Dr. Skop, conceding that physicians and scientists may use the term heartbeat differently than they do. (R. p. 90 n.4) ("Physicians and scientist may use different verbiage in talking about cardiac development at different stages of pregnancy. For example, some may use the term 'heartbeat' to refer to early embryonic electrical activity. However, the medical consensus is that the four main components of the hear (four chambers, walls, valves, and conduction system) form after approximately nine weeks LMP."). This concession highlights the distinction between the ordinary and popular meaning of the term fetal heartbeat and the purportedly technical meaning Appellants now advance. *See City of Charleston*, 16 S.C. at 52.

**2. Legislative Intent**

Moving beyond the plain meaning rule, if this Court concludes that the Act's definition of fetal heartbeat is ambiguous, it may consider legislative intent to conclude that the act generally prohibits abortion at approximately six weeks of pregnancy. *See Limehouse*, 404 S.C. at 106, 744 S.E.2d at 573; *see also Kennedy*, 345 S.C. at 348, 549 S.E.2d at 247 ("Therefore, since the plain

language of the statute lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly. Where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself.").

This Court previously explained:

> As has been well said, "in interpreting an ambiguous statute the question is what the words meant to those using them, and to ascertain this the courts should examine the statute in the light of the history of its enactment, the contemporary history of the conditions and situation of the people, the economic and sociological policy of the state, its Constitution and laws, and all other matters of common knowledge within the limits of their jurisdiction."

*Crescent Mfg. Co. v. Tax Comm'n,* 129 S.C. 480, 124 S.E. 761, 767 (1924) (quoting 25 R.C.L. 1029, § 265).

And as discussed above, and as the Circuit Court properly concluded, the legislative history of the 2023 Act uniformly suggests that the General Assembly intended to generally prohibit abortions after six weeks of pregnancy. (R. pp. 17–18).

**3. Other Canons**

Further, the "whole text" canon supports the proposition that the 2023 Act is generally a six-week prohibition on most abortions. *See S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991) ("Clearly, words in a statute must be construed in context."). As discussed above, another provision of the 2023 Act uses the term fetus or fetal to refer to an unborn child at any stage of development. *See* S.C. Code Ann. § 44-41-610(5) (defining fatal fetal anomaly). This provision indicates that the General Assembly intended to use the word "fetus" or "fetal" to refer to the unborn child generally. Consequently, fetal heartbeat would be defined as cardiac activity, or the steady and repetitive rhythmic contraction of the unborn child's heart, within the gestational sac. As explained by Dr. Skop in her

report, the unborn child's heart first forms at approximately six weeks of pregnancy and performs the function of a heart at that point in time. (R. p. 255, ¶ 15)

The legislative finding that "[c]ardiac activity begins at a biological identifiable moment in time, normally when the fetal heart is formed in the gestational sac" does not compel a contrary result. *See* 2023 Act, § 1(2). First, the words used in the legislative finding must be given their ordinary and popular meaning as used by the General Assembly. *See Oliver*, 16 S.C. at 52. And as discussed above, the General Assembly understood both "fetal heart" and "fetal heartbeat" to refer to cardiac activity at approximately six weeks of pregnancy. Second, and as just explained, the whole text cannon indicates that a reference to "fetal heart" should be construed to mean the unborn child's heart. Consequently, the legislative finding merely reinforces the argument that the General Assembly intended to prohibit most abortions at a single point in time once cardiac activity is detectable at approximately six weeks of pregnancy.[5]

The rule of lenity does not lead to a different result. Because no "genuine ambiguity" exists after this Court applies its usual rules of statutory construction. *See Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009). For the reasons discussed above, multiple rules of statutory construction lead to the same unambiguous answer: the 2023 Act generally prohibits most abortions at a single point in time once cardiac activity is detectable at approximately six weeks of pregnancy.

[5] The Act's definition of "gestational sac" is consistent with this interpretation, defined as "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, 2023 Act, § 2, S.C. Code Ann. § 44-41-610(8).

Nor does the constitutional doubt canon lend support to Appellant's theory, as this Court has already upheld the constitutionality of the 2023 Act. *See Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023), *reh'g denied* (Aug. 29, 2023).

Despite all of this, Appellants insist that a true fetal heartbeat only occurs after nine weeks of pregnancy, citing their own declarants' understanding of "medical consensus." (R. p. 41, ¶ 7); *see* Appellants' Brief at 17–18. This is, according to Appellants, largely because the General Assembly deliberately chose to use the terms fetus or fetal in the Act. Appellants' Brief at 18.

But Appellants' argument contradicts itself. While Appellants insist that a true fetal heartbeat does not occur until nine weeks of pregnancy, they also maintain that an embryo does not become a fetus until approximately ten weeks of pregnancy. (R. p. 112, ¶ 11) (noting that the term fetus is not used until after ten weeks of pregnancy); *see* Appellants' Brief at 20. Thus, their nine-week fetal heartbeat argument, purportedly based on "medical consensus," contains an internal contradiction, as according to their own definitions, it would be medically inaccurate to refer to an unborn child as a fetus at nine weeks of pregnancy. This contradiction is reason enough alone to reject Appellants' definitional arguments.

Given the foregoing, this Court should reject Appellants' novel nine-week theory and declare that the 2023 Act's definition of "fetal heartbeat" refers to a single moment in time once cardiac activity is detectable at approximately six weeks of pregnancy.

## II. The 2023 Act is Constitutional.

Appellants also argue that the 2023 Act is unconstitutionally vague because "it could be read as prohibiting abortion at two different points in pregnancy." (R. p. 70, ¶ 121). As an initial matter, Appellants likely lack standing to assert this type of vagueness challenge because their own conduct is clearly proscribed by the statute. (R. p. 112, ¶ 14) (noting that Appellant Farris treated

the act as applying at one moment in time); *see Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001) ("One to whose conduct the law clearly applies does not have standing to challenge it for vagueness.").

Nevertheless, Appellants' 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 Appellants until recently—have agreed that the act generally bans abortions after six weeks. Indeed, Appellants filed a lawsuit premised on this precise meaning. In such circumstances, no one can reasonably argue that Appellants have been left to "guess as to its meaning."

And as the Circuit Court observed, Appellants do not dispute that the Act applies at a single moment in time. They merely dispute *when* that moment in time occurs. As a result, any vagueness challenge asserting that the law may prohibit abortion at two different points in pregnancy must necessarily fail. (R. pp. 28–29). For similar reasons, the irreconcilability canon is also inapplicable.

## III. Injunctive Relief is not Warranted.

Finally, injunctive relief is not warranted here because Appellants have failed to establish the requisite three elements to receive such relief. *See Compton*, 392 S.C. at 366, 709 S.E.2d at 642 ("[T]he applicant must establish three elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law.").

For the reasons discussed above, Appellants have failed to establish a likelihood of success on the merits. Again, the intent of the General Assembly has been clearly established: when cardiac activity is detected at approximately six weeks, abortions are banned (absent statutory exceptions).. Appellants' nine-week theory finds no support in the legislative history of the 2023 Act. Moreover, it is contradictory and self-defeating. And because the 2023 Act prohibits abortions at a single point in time, it is not unconstitutionally vague.

As a general matter, Appellants have failed to establish irreparable harm. Appellants 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."); *see also Cameron v. EMW Women's Surgical Ctr.*, P.S.C., 664 S.W.3d 633, 660 (Ky. 2023) ("[T]he 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."). Additionally, Appellants may not rely on the alleged irreparable harm to third parties. *See Cameron*., 664 S.W.3d at 660.

Appellants also arguably have an adequate remedy at law because an individual plaintiff seeking an abortion could bring a proper as-applied challenge to the 2023 Act. *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)).

Finally, it is worth noting that the status quo favors the State. *See Compton*, 392 S.C. at 366, 709 S.E.2d at 642 (describing the purpose of a preliminary injunction in part as "preserv[ing]

the status quo). The 2023 Act has been in effect for over one year in South Carolina, and it is consistent with South Carolina's long history of abortion regulation.

## CONCLUSION

As Appellants acknowledged in their Complaint, this appeal represents a narrow question of statutory interpretation. That question is readily resolved by the clear intent of the General Assembly. In enacting the 2023 Act, the General Assembly intended to prohibit most abortions at a single point in time once cardiac activity is detectable at approximately six weeks of pregnancy. This Court should construe the 2023 Act's definition of "fetal heartbeat" to be consistent with that intent and should affirm the Circuit Court's decision.

Respectfully submitted,

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