THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Daniel M. 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; and 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 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 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 .... Respondents,

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina.. Intervenor–Respondent.

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S.C. Senate, Video of Floor Proceedings (Feb. 8, 2023) 16

S.C. Senate, Video of Floor Proceedings (Feb. 9, 2023) 16

Other Authorities

Devyani Chhetri, *SC Senate Passes Six-Week Abortion Ban. New Litigation Expected after Gov. Signs into Law*, Greenville News (May 24, 2023) 22

Howard C. Joyce, *A Treatise of the Law Relating to Injunctions* (1909) 28

James High, *A Treatise on the Law of Injunctions* (1880) 28

Javon L. Harris, *SC Senate Votes to Send 6-Week Abortion Ban Bill to Governor. Court Challenge Coming*, The State (May 24, 2023) 22

Mary Green, *Governor Signs Six-Week Abortion Ban into Effect in SC; Lawsuit Immediately Filed*, WCSC (May 25, 2023).. 21

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Nadine El-Bawab, *South Carolina 6-Week Abortion Ban Signed into Law, Providers File Lawsuit*, ABC News (May 25, 2023)... 21

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Planned Parenthood, *South Carolina Supreme Court Allows Six-Week Abortion Ban to Go into Effect* (Aug. 24, 2023)... 21

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Russ McKinney, *SC House Passes 6-Week Abortion Bill*, S.C. Public Radio (May 19, 2023) ... 22

S.C. Dep't of Health and Envtl. Control, *A Public Report Providing Statistics Compiled from All Abortions Reported to DHEC: August 23–December 31, 2023* 33

Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017).. 29

South Carolina Advances Six-Week Abortion Ban, Reuters (May 17, 2023).............................. 22

Sydney Kashiwage & Rebekah Riess, *South Carolina Governor Signs 6-Week Abortion Bill into Law*, CNN (May 25, 2023) 22

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William Kerr, *A Treatise on the Law and Practice of Injunctions in Equity* (1867).................... 28

STATEMENT OF THE ISSUES

I. Whether the circuit court correctly concluded that the 2023 Fetal Heartbeat Act protects unborn life from approximately six weeks of pregnancy, when an unborn child's cardiac activity can first be detected.

II. Whether the Court should overrule *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010), and return to the traditional rule that a court must balance the equities when deciding whether to grant injunctive relief.

INTRODUCTION

The circuit court aptly summarized this case: "[I]t is clear beyond a shadow of a doubt that the General Assembly intended, and the public understood, that the time frame of the [2023 Fetal Heartbeat] Act would begin around the six-week mark." (R. p. 30.) This indisputable fact is critical because "[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). Yet this interpretative North Star tellingly appears nowhere in Appellants' brief.

Applying this rule here is straightforward. In this case, everything—the statutory text, statements from legislators during committee hearings and floor debates, this Court's decision in *Planned Parenthood I*, hundreds of assertions from Planned Parenthood, media coverage, and fetal heartbeat laws across the country—supports the circuit court's conclusion. In fact, until Appellants' reinterpretation post-*Planned Parenthood II*, there does not appear to be *anyone* who ever claimed that the 2023 Act's definition of "fetal heartbeat" meant "approximately nine weeks of pregnancy." App'ts' Br. 1. Because this six-week mark is "the intent of the legislature," *Rainey*, 341 S.C. at 85, 533 S.E.2d at 581, the circuit court correctly denied Appellants' preliminary injunction motion.

On top of the merits, there are more reasons to affirm the circuit court. One is that

Appellants failed to show that they would suffer any irreparable harm without an injunction. Planned Parenthood and Dr. Farris face no harm from complying with the law and not performing abortions after the initial detection of cardiac activity while this litigation progresses. And the facts here prove that women can know, despite the protestations in *Planned Parenthood I* and *Planned Parenthood II*, that they are pregnant before the 2023 Act's protection of unborn life applies (if the contrary assertion is, in fact, constitutionally or statutorily relevant).

Another reason to affirm is that the equities do not favor an injunction. Just over a decade ago, this Court abandoned the long-standing rule that granting injunctive relief requires weighing the equities. *See Poynter*, 387 S.C. at 587, 694 S.E.2d at 17. That decision is wrong as a matter of history, constitutional structure, practical concern, and logic. The Court should therefore take this opportunity to reconsider *Poynter* and overrule it. And when the equities are balanced, the State's interests in protecting life and having its duly enacted laws enforced far outweigh any concerns that Appellants could invoke.

STATEMENT OF THE CASE

A. The 2023 Act

Planned Parenthood II rejected a facial challenge to the 2023 Act. *See Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023). Although this latest lawsuit features, in Appellants' own words, "a narrow question," App'ts' Br. 1, raising only the definition of "fetal heartbeat," the relief requested is similarly expansive in scope to the relief sought in *Planned Parenthood II*.

The 2023 Act defines "fetal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." 2023 S.C. Acts No. 70, § 2 (S.C. Code Ann. § 44-41-610(6)). The Act recognizes that a "fetal heartbeat is a key medical

predictor that an unborn child will reach live birth." *Id.* § 1(1).

Before any abortion may be performed, the abortionist must inform a woman if a fetal heartbeat exists and tell her of "her right to view the live ultrasound images and hear the unborn child's fetal heartbeat." *Id.* § 10 (S.C. Code Ann. § 44-41-330(A)(1)(b)). If that heartbeat exists, "no person shall perform or induce an abortion" unless one of the Act's exceptions for rape, incest, fatal fetal anomaly, or maternal health applies. *Id.* § 2 (S.C. Code Ann. § 44-41-630(B)).

B. *Planned Parenthood II*

In a facial challenge to the 2023 Act, those plaintiffs (who included Planned Parenthood and Dr. Farris) never questioned the meaning of "fetal heartbeat." In fact, they labeled the prohibition on abortions "where a 'fetal heartbeat has been detected,' or roughly *six weeks* LMP," as the "Six-Week Ban," Br. of Resp'ts 5, *Planned Parenthood II*, No. 2023-000896 (S.C. June 20, 2023) (emphasis added) (quoting 2023 Act, § 2 (S.C. Code Ann. § 44-41-630(B)), and they proceeded to use that term 22 more times in their merits brief alone, *see generally* Br. of Resp'ts, *Planned Parenthood II*, No. 2023-000896 (S.C. June 20, 2023).

At oral argument, Justice Few, after reciting the Act's definition of "fetal heartbeat," questioned counsel for the Attorney General:

> Those commas may or may not have great significance. Do you think that the phrase that is within the commas, the parenthetical within the commas, is actually a phrase that the legislature intended to define the term "cardiac activity" or to supplement the term "cardiac activity"? In other words, the question that I'm asking you is simply is "fetal heartbeat" defined simply as "any cardiac activity" or is it defined as "the steady and repetitive rhythmic contraction of the fetal heart"?

Oral Argument Video 0:07:10–0:08:10, *Planned Parenthood II*, No. 2023-000896 (S.C.) (Few, J.).

The Court ultimately "le[ft] 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." *Planned Parenthood II*, 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4. Chief Justice Beatty later suggested that those plaintiffs file a new lawsuit on this question. *See* Order 3, *Planned Parenthood II*, No. 2023-000896 (S.C. Aug. 29, 2023) (Beatty, C.J., dissenting from denial of rehearing).

C. The circuit court denies injunctive relief in Appellants' new lawsuit

Appellants took up Chief Justice Beatty's invitation and filed this lawsuit. They asked the circuit court to declare that the 2023 Act's use of "fetal heartbeat" means "the point when the heart is formed, which is approximately after nine weeks LMP," either because the plain language requires as much or because the statute is ambiguous and should be construed against the State. (R. pp. 68–70.) They sought a preliminary injunction to prevent state officials from enforcing the law "as applied to abortions performed on patients whose pregnancies have detectable embryonic activity but where a heart has not formed yet." (R. p. 74.)

The circuit court denied Appellants' motion. That court rejected the idea that the case presents "a binary choice between six and nine weeks" but said that this case poses "a binary choice between six weeks and nothing." (R. p. 6.) According to the circuit court, the definition of "fetal heartbeat" "is in fact ambiguous" because it "does not convey a definite meaning on its face." (R. pp. 15–16.)

Still, the General Assembly left "no doubt as to what [it] meant when it passed the Act." (R. p. 17.) The circuit court could not "locate one instance of legislative history indicating a time frame of any other period other than the six-week mark, much less nine weeks." (R. p. 17.) To interpret the Act to mean any other point in pregnancy, the lower court explained, "would fly in

the face of statutory interpretation and constitutional requirements." (R. p. 19.) The court went on to reject Appellants' vagueness argument, explaining that no one "ha[d] to guess at when the" law begins protecting unborn life. (R. p. 28.)

Appellants appealed.[1] (R. p. 368.)

STANDARD OF REVIEW

A preliminary injunction requires a party to show that "(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." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). The decision to grant this relief is in the circuit court's discretion, *id.*, which the circuit court abuses only when it makes an error of law or makes factual findings without support, *State v. McCarty*, 437 S.C. 355, 365, 878 S.E.2d 902, 908 (2022).

ARGUMENT

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

Because "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 held that Appellants were not likely to succeed on the merits. It therefore denied their motion for a preliminary injunction. That conclusion is correct.

A. The 2023 Act refers to one point in time, not two.

In *Planned Parenthood II*, this Court "le[ft] for another day" whether the statutory definition of "fetal heartbeat" "refers to one period of time during a pregnancy or two separate periods of time." 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4. This case squarely presents that

[1] Both the Governor and the State moved to dismiss. (R. pp. 205, 234.) The circuit court did not rule on those motions in denying Appellants' motion for a preliminary injunction (R. pp. 3–30), and those motions remain pending.

question.

The 2023 Act's definition of "fetal heartbeat" refers to one period only. Logic compels this conclusion. The 2023 Act declares that "[c]ardiac activity begins at *a biologically identifiable moment in time*." 2023 Act, § 1(2) (emphasis added). That is a singular proposition. Fetal heartbeat is then defined based on "cardiac activity." *Id.* § 2 (S.C. Code Ann. § 44-41-610(6)). And the Act protects unborn life based on the detection of that cardiac activity. *Id.* (S.C. Code Ann. § 44-41-630(B)).

This statutory structure makes sense only if "fetal heartbeat" refers to one moment. That is the moment at which unborn life is statutorily protected and taking it (absent a statutory exception) is unlawful. One moment is knowable to all, and it makes the law readily understandable and consistently enforceable.

Interpreting "fetal heartbeat" to mean two moments creates unnecessary and unsolvable problems. Would unborn life be protected from the earlier time or only from the later? Would the 2023 Act's criminal penalties be triggered by performing an abortion after the earlier time or only after the later? Interpreting the Act to mean "two separate periods of time" would therefore create the type of vagueness problems that Appellants have tried to inject into the 2023 Act. *See* App'ts' Br. 34. At the very least, such an interpretation would make one of those two times superfluous in the statute. *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (rule against superfluity).

This Court has repeatedly, and for good reason, refused to read statutes in ways that invent constitutional problems. "Constitutional constructions of statutes are not only judicially preferred," but in fact, "they are mandated," so "a possible constitutional construction must prevail over an unconstitutional interpretation." *State v. McGrier*, 378 S.C. 320, 329, 663 S.E.2d 15, 19 (2008).

The 2023 Act's definition of "fetal heartbeat" therefore applies to a single moment in time.

So compelling is this conclusion that the parties and the circuit court all agree on it. *See* (R. pp. 5–6; R. p. 70 (complaint seeking an interpretation that the 2023 Act's "prohibition on abortions only applies to one period of time"); R. p. 312, lines 9–11 (Appellants' counsel asserting that "the definition" "is a single moment in pregnancy")); App'ts' Br. 22 ("a single moment").

B. That point is six weeks.

With the question of "one moment or two" answered, the only remaining question is what that one moment is.

This State has "well-established rules" for interpreting statutes. *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014). The "cardinal rule of statutory construction" in South Carolina "is to ascertain and effectuate the intent of the legislature." *Rainey*, 341 S.C. at 85, 533 S.E.2d at 581. Giving effect to the General Assembly's intent is the "ultimate goal," *City of Rock Hill v. Harris*, 391 S.C. 149, 153, 705 S.E.2d 53, 55 (2011), and the "primary function," *State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 671 (1993), of reading statutes. And it has been the "great leading rule" of statutory interpretation in South Carolina for centuries. *Kecheley v. Cheer*, 15 S.C.L. 397, 399 (S.C. App. L. & Eq. 1827).

Ascertaining that intent begins with the statutory text. *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). The 2023 Act is clear (and so everyone agrees, *e.g.*, App'ts' Br. 22) that it protects unborn life after the detection of a "fetal heartbeat." 2023 Act, § 2 (S.C. Code Ann. § 44-41-630(B)). The dispute centers on what "fetal heartbeat" means.

That a court must focus on the meaning of one particular statutory term should be no surprise. Even words that seemingly have an obvious meaning can result in years of litigation and divide appellate courts. For instance, the U.S. Supreme Court once divided 6–3 over whether

exchanging a gun for drugs was the "use" of the gun in a drug trafficking crime. *See Smith v. United States*, 508 U.S. 223 (1993) (analyzing 18 U.S.C. § 924(c)(1)). Five years later, the U.S. Supreme Court split over whether "carries" in that same statute stretches far enough to include a gun in the glove box of a defendant's vehicle. *See Muscarello v. United States*, 524 U.S. 125 (*1998).* Similarly, this Court split over the definition of "user" in section 15-73-10 about the liability of a seller for a defective product. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 781 S.E.2d 548 (2015). Whatever the disputed statutory term, the Court's task is always to determine what the General Assembly intended that term to mean.[2] *See Rainey*, 341 S.C. at 85, 533 S.E.2d at 581.

When a question of statutory interpretation turns on the meaning of a particular word or phrase, the analysis must focus on what the General Assembly intended that word or phrase to mean. *See, e.g.*, *Lawing*, 415 S.C. at 221, 781 S.E.2d at 554 (relying on the General Assembly's incorporation of the Restatement of Torts (Second) to decide the meaning of "user"). In this endeavor, it is essential to keep in mind that a legislature "can be its own lexicographer." *Tesla Inc. v. Del. Div. of Motor Vehicles*, 297 A.3d 625, 632 (Del. 2023); *see also Iowa v. Thomas*, 275 N.W.2d 422, 423 (Iowa 1979); *Theophelis v. Lansing Gen. Hosp.*, 424 N.W.2d 478, 495 (Mich. 1988). Sometimes the General Assembly defines a term in a statute; other times the General

[2] Thus, the circuit court's emphasis on whether the 2023 Act is ambiguous frames the case in a less-than-helpful way. (*See, e.g.*, R. p. 16 ("fetal heartbeat" is "not clear and unambiguous" because the term "does not convey a definite meaning on its face").) The ultimate question is what the General Assembly intended "fetal heartbeat" to mean. The statutory text is, of course, a critical part of that inquiry, and in many cases, the text may be the only part of that inquiry. In other cases, however, a statutory term might not be clear without more context. Regardless of whether (or how much) context is needed to understand a statute, the judicial inquiry must focus on legislative intent. Ambiguity is therefore not some special part of the analysis. Rather, it is at most an indication of how hard the judicial task might be or what canons might be involved in interpreting the statute.

Assembly intends for a word to have its ordinary, dictionary meaning. *See Berkeley Cnty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009).

"Fetal heartbeat" has a statutory definition: "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 "cardiac activity" that forms the core of this definition "begins at a biologically identifiable moment in time." *Id.* § 1(2).

The question, then, is what "moment" the General Assembly intended this to be. Every source points to the same answer: approximately six weeks.

1. Text.

The first words of the definition of "fetal heartbeat" are "cardiac activity." "Cardiac" means "of, relating to, situated near, or acting on the heart." Merriam-Webster, *Cardiac* (2024), https://tinyurl.com/m25ek5pu. And "activity" means "the quality or state of being active," *id. Activity*, https://tinyurl.com/vdsj4u22, with "active" being defined as "producing or involving action or movement," *id. Active*, https://tinyurl.com/3c8xx5j6. The "electrical impulses" (to use Appellants' terminology, *see* App'ts' Br. 7, 13) detected around six weeks of pregnancy are action related to the heart—precisely what the statutory definition indicates.

To be sure, the parties here have disputed whether, at six weeks of pregnancy, there is a "steady and repetitive rhythmic contraction of the fetal heart," as the second part of the definition puts it. Appellants' expert insisted a heart is not fully formed until nine weeks, so a heart cannot steadily and rhythmically contract at six weeks. (R. p. 153.) The cells that "will become the heart," Appellants say, begin to "transmit electrical impulses" at about six weeks, but that's it. (R. p. 157.) Other experts, however, such as the State's, explain how an unborn child's heart has "regular and

repetitive" "rhythmic contractions" as early as six weeks.[3] (R. p. 255.)

Appellants ask this Court to "credit" their expert's testimony and "decline to credit" the testimony of the State's expert.[4] App'ts' Br. 13–14. The Court should not do so. As this Court recently explained, there is a difference between "legislative facts" and "adjudicative facts." *Owens v. Stirling*, ___ S.C. ___, ___ S.E.2d ___, No. 2022-001280, 2024 WL 3590797, at *5 n.4 (S.C. July 31, 2024). "Legislative facts," like those involved here, "are universally true or untrue." *Id.* at *5. They are not "facts about the particular event which gave rise to the lawsuit and help explain who did what, when, where, how and with what motive and intent." *Id.* at *5 n.4 (cleaned up). When reviewing a statute based on legislative facts, the Court "defer[s] to the factual findings of the General Assembly," whether those findings are "express or presumed." *Id.* at *4 (citing *Richards v. City of Columbia*, 227 S.C. 538, 560–61, 88 S.E.2d 683, 694 (1955)). Thus, even if Appellants had raised a Rule 702 challenge to the State's expert below, *cf. Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012), that would have been of little help here,

[3] As another example of competing views, consider a House Judiciary subcommittee hearing from the debate over the 2021 Act (which had the same definition of "fetal heartbeat" as the 2023 Act). There, one doctor who testified in opposition to the bill recognized that "what we're talking about here is six weeks" (a telling admission of what the bill was understood to mean), but she added that "with a fetus or an embryo that's not a heartbeat per se. There's not a four-chamber heart," calling what the ultrasound showed was "electrical activity." S.C. House Judiciary Comm., Constitutional Laws Subcomm., Video of Comm. Hearing, at 1:11:10 (Feb. 9, 2021). But later in that hearing, another doctor (who had delivered more than 2,000 babies) explained that "the human heart begins to beat around the 22nd day of life, just three weeks after conception" and that "this can be demonstrated by high-resolution intravaginal ultrasound." *Id.* at 2:27:20.

[4] In fact, the debate over the development of an unborn child's heart may be even more complicated than just the two competing views advanced here. In its amicus brief in *Planned Parenthood II*, the American College of Obstetricians and Gynecologists (which called itself "the nation's leading group of physicians providing health care to women") declared that "[a]s a matter of medical science, a true fetal heartbeat exists only after the chambers of the heart have been developed and can be detected via ultrasound, which typically occurs around 17–20 weeks' gestation." Amicus Br. of ACOG 1, 10, *Planned Parenthood II*, 2023-000896 (S.C. June 20, 2023). Appellants, with their new nine-week position, have never fully explained their recent split with ACOG on this question.

as this case does not present a typical battle-of-the-experts scenario in which this Court defers to the "circuit court findings," *Owens*, 2024 WL 3590797, at *5 (citing *Richards*, 227 S.C. at 560–61, 88 S.E.2d at 694). Indeed, deferring to the circuit court's finding rather than the General Assembly's findings would turn the courts into the "superlegislature" that they have repeatedly disclaimed being, as the Court would effectively put itself in the position of reweighing the competing evidence that the legislature considered in making policy. *E.g.*, *ArrowPointe Fed. Credit Union v. Bailey*, 438 S.C. 573, 580, 884 S.E.2d 506, 509 (2023).

Here, the Court must "presume" that the General Assembly "was aware of" the debate over fetal development. *Owens*, 2024 WL 3590797, at *13. The General Assembly has the constitutional authority and necessary tools to consider these competing views and then legislate. *Cf. Roper v. Simmons*, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) ("Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one."). The "deference" due to the General Assembly's decision on that debate "is not diminished simply because there is medical support for both sides of an issue." *Planned Parenthood II*, 440 S.C. at 475, 892 S.E.2d at 127 (internal quotation marks omitted); *see also Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (upholding the federal partial-birth abortion ban despite "both sides hav[ing] medical support for their position"). The 2023 Act reflects the General Assembly's decision to adopt the six-week view of when an unborn child's heart begins to beat, and the statutory definition of "fetal heartbeat" is textually consistent with that determination.

Appellants offer several textual arguments to try to overcome the General Assembly's resolution of when a fetal heartbeat begins, but none is availing. *First*, Appellants can get no traction from their focus on the word "fetal," when they claim that the General Assembly must

have meant not to protect unborn life during the first nine weeks of pregnancy, while that unborn child can still be called an embryo. App'ts' Br. 19–20. For one, the General Assembly "can be its own lexicographer," *Tesla Inc.*, 297 A.3d at 632, so it can define "fetal" to include anything related to an unborn child (which the 2023 Act defines as beginning at conception). For another, "fetal heartbeat" is virtually a statutory term of art now. *See infra* Part I.B.6. (discussing fetal heartbeat laws across the country). For a third, legislators in this State uniformly expressed the understanding that "fetal heartbeat" meant approximately six—not nine—weeks. *See infra* Part I.B.2. And for a fourth, even the medical profession uses "fetal" more broadly than Appellants insist. Look no further than Maternal *Fetal* Medicine, which will see a woman "throughout" her pregnancy, including when she is "just beginning" that journey. MUSC Health, *Maternal Fetal Medicine*, (last visited Aug. 28, 2024), https://tinyurl.com/3babrknu.

Second, Appellants look to the legislative finding that cardiac activity begins "when the fetal heart is formed in the gestational sac." 2023 Act, § 1(2). That finding does not say "fully formed," which is the real cornerstone of Appellants' argument on this front. *See, e.g.*, App'ts' Br. 7–8. Even Planned Parenthood's own website recognizes that a heart begins to exist between the fifth and sixth weeks of pregnancy, acknowledging that a "part of the embryo starts to show *cardiac activity*" that "sounds like a heartbeat on an ultrasound, but it's not a fully-formed heart—it's *the earliest stages of the heart developing*." Planned Parenthood, *What Happens in the Second Month of Pregnancy?* (last visited Aug. 28, 2024), https://tinyurl.com/53axutaf (emphasis added).

In any event, Appellants' argument puts more weight on the past participle ("is formed") than it can bear. "A quick survey of judicial opinions confirms that the past participle is an uncommonly flexible device," sometimes meaning "a completed event," other times "describ[ing] the present state of a thing," and still other times "refer[ring] to future events." *Bernal v. NRA*

Grp., LLC, 930 F.3d 891, 895–96 (7th Cir. 2019). "In short, there is nothing unambiguous about a past participle, at least when construed without context." *Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 901 F.3d 414, 451–52 (D.C. Cir. 2018) (Henderson, J., concurring in part). A non-abortion example drives home the flexibility of past participles: No one would say that a newborn's skull was not "formed" at birth, even though that baby's soft spot will likely not close for more than a year as the skull continues to develop. In the case of the 2023 Act, context confirms that "is formed" does not mean a fully formed heart at nine-plus weeks of pregnancy.

Third, they cite the requirement that a woman be allowed to "hear" the unborn child's heartbeat. App'ts' Br. 23 (citing S.C. Code Ann. § 44-41-330(A)). They observe that the electrical activity at six weeks isn't "truly audible" but only made so by the ultrasound. *Id.* That is asking "hear" to do too much work. The "woosh woosh woosh" of an ultrasound, familiar to so many parents, may make the cardiac activity audible. Nothing in the 2023 Act requires that the heartbeat be heard without the aid of any medical device. Thus, the six-week mark is consistent with the statutory text.

Fourth, Appellants seek to rely on the commas in the definition of "fetal heartbeat." *Id.* at 27–29. For at least two reasons, the commas do not make Appellants' nine-week theory correct. One, as discussed already, even assuming that the commas create a "definitional clause," *id.* at 28, there is evidence to support the General Assembly's conclusion that an unborn child's heart has "regular and repetitive" "rhythmic contractions" as early as six weeks. (R. p. 255.) Appellants may disagree with that six-week view, but the General Assembly was free to accept it and legislate based on it. *See Owens*, 2024 WL 3590797, at *5; *Planned Parenthood II*, 440 S.C. at 475, 892 S.E.2d at 127.

And two, Appellants' grammatical argument misses the "great wealth of authority to the

effect that punctuation is not a part of a statute, and may be disregarded in order to effect the intention of the Legislature." *Bruner v. Smith*, 188 S.C. 75, 82, 198 S.E. 184, 188 (1938); *see also Comm'rs of Pub. Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) ("In most circumstances, the presence or absence of a comma is not determinative of whether the writing is ambiguous."); *Bruner*, 188 S.C. at 82, 198 S.E. at 188 ("Punctuation is a minor, and not a controlling, element in interpretation, and Courts will disregard the punctuation of a statute, or repunctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning."); *Kitchen v. S. Ry.*, 68 S.C. 554, 567, 48 S.E. 4, 8 (1904) ("The punctuation of a statute cannot be permitted to control the construction that is required by other and more weighty considerations."); *Caston v. Brock*, 14 S.C. 104, 107 (1880) ("Punctuation is the least reliable guide to the sense of a statute, but cannot properly be said to be without any force. In itself it is ordinarily insufficient to fix the sense of a statute where that is disputable, especially where the question is one of the force of a comma . . . ."). In the face of the unambiguous legislative record from both supporters and opponents of the bill that became the 2023 Act, two commas in one definitional subsection cannot change the entire thrust of the legislation—a thrust that even Planned Parenthood and Dr. Farris have admitted is the "hallmark feature" of the Act. Br. of Resp'ts 42 n.50, *Planned Parenthood II*, 2023-000896 (S.C. June 20, 2023).

A final point on the text: Appellants give the game away on their plain-text argument in footnote 5 of their opening brief. There, they admit that "[p]hysicians and scientists may use different verbiage in talking about cardiac development at different stages of pregnancy. For example, some may use the term 'heartbeat' to refer to early embryonic electrical activity." App'ts' Br. 8 n.5. If "some" physicians and scientists use "heartbeat" to mean the cardiac activity at six

weeks, that makes the General Assembly's use of "fetal heartbeat" even more credible and undermines any plain-text argument that Appellants have made.

2. Legislative statements.

If there were any doubt about this textual analysis, a review of the legislative record removes it. Of course, using legislative history can be dangerous: It "has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotation mark omitted). But this is not such a case. Not even close. Here, the entire record points to the same conclusion. In fact, Appellants have not pointed to a single instance when any legislator ever argued that "fetal heartbeat" applied from about nine weeks.

Before getting into that record, an introductory matter warrants brief discussion. Appellants criticize the circuit court's citations of statements of individual legislators, insisting that what matters is the whole legislature's intent. *See* App'ts' Br. 24–26. This Court has rightly refused to consider the "opinions of legislators or others concerned in the enactment of the law—*expressed subsequent to enactment*—to ascertain the intent of the legislature." *Creswick v. Univ. of S.C.*, 434 S.C. 77, 83, 862 S.E.2d 706, 709 (2021) (per curiam) (emphasis added). Every statement discussed here, however, is from the debates over S. 474 (which became the 2023 Act) in the General Assembly. Those are precisely the types of statements that the Court has considered in recent years. *See, e.g.*, *Duggins v. Lucas*, 431 S.C. 115, 116, 847 S.E.2d 793, 793 (2020) (per curiam) (relying on a statement from Senators Massey and Campsen); *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 376 n.4, 718 S.E.2d 432, 438 n.4 (2011) (citing a statement from Representative Quinn). And have no doubt, if Appellants had any statements from legislators saying "nine weeks," Appellants would have trumpeted those statements in their opening brief.

During the committee hearings and the floor debates, legislators—both those supporting and opposing the bill—understood S. 474 as drawing a line around six weeks. For example, during the first debate on the Senate floor, Senator Massey, citing the American Pregnancy Association, explained that "a heartbeat can be detected between six and seven weeks." S.C. Senate, Video of Floor Proceedings, at 1:31:00 (Feb. 7, 2023) (Sen. Massey). Arguing against S. 474, Senator Senn insisted that a "six-week ban, as the Court actually started calling it and as most people call it," "was already held unconstitutional one time" in *Planned Parenthood I*. S.C. Senate, Video of Floor Proceedings, at 3:45:10 (Feb. 9, 2023) (Sen. Senn).

Particularly damning for Appellants in the Senate floor debate is an exchange between Senator Matthews and Senator Senn, both of whom opposed S. 474. Senator Matthews asked about signs of pregnancy. Senator Senn stated that only after a second missed period do some women realize they are pregnant.

Senator Matthews interjected, "How many weeks are you in at that point?"

"Eight," Senator Senn replied.

"Eight weeks," Senator Matthews echoed.

"Eight," Senator Senn repeated once more.

S.C. Senate, Video of Floor Proceedings, at 4:50:00–4:51:40 (Feb. 8, 2023) (Sens. Matthews and Senn).

This exchange is telling. Both Senators Matthews and Senn understood S. 474 as protecting unborn life from approximately six weeks. That's why "eight" weeks prompted a reaction from both Senators. If they had thought S. 474's definition of "fetal heartbeat" was aimed from approximately nine weeks, neither Senator would have had such a strong reaction to eight weeks.

Turning to the House of Representatives, the story is the same. Unsurprisingly, supporters

of the bill described it as a "six"-week law. *See, e.g.*, S.C. House Judiciary Comm., Video of Comm. Hearing Part 2, at 1:40:34 (May 9, 2023) (Rep. Brittain). But even more telling are the repeated statements from the opponents of S. 474. As one example, consider Representative Wheeler's comments and proposed amendment in subcommittee. He called S. 474 essentially the same as the 2021 Act, claiming that "six weeks is six weeks. It's the heartbeat bill." S.C. House Judiciary Comm., Constitutional Laws Subcomm., Video of Comm. Hearing, at 46:08 (May 9, 2023) (Rep. Wheeler). He later proposed an amendment to permit abortions up to eight weeks—a proposal that would have made no sense if S. 474 wasn't intended to protect life from about six weeks. *See* S.C. House Judiciary Comm., Video of Comm. Hearing Part 2, at 3:16:40–3:21:20 (May 9, 2023) (Rep. Wheeler). The Judiciary Committee rejected that amendment to extend the line to eight weeks. *Id.* at 3:38:30.

Many other opponents expressed a similar understanding of S. 474. At one point in the floor debate, Representative Bamberg declared that "the very crux of this piece of legislation surrounds time" and "it's a six-week ban." S.C. House, Video of Floor Proceedings Part 1, at 8:49:44 (May 16, 2023) (Rep. Bamberg). Representative Bauer stated that, in the 2021 Act, "the General Assembly passed the Act which prohibits an abortion after around the sixth week of gestation, which we are here discussing again" in S. 474. *Id.* at 12:28:54 (Rep. Bauer). Representative Dillard claimed the General Assembly was "now cutting off abortion—or the access to abortion—at six weeks." *Id.* at 2:35:15 (Rep. Dillard).

These were far from isolated statements. *See, e.g.*, S.C. House Judiciary Comm., Video of Comm. Hearing Part 1, at 0:13:30 (May 9, 2023) (Rep. Bernstein) (S. 474 "still ha[s] the six weeks"); S.C. House Judiciary Comm., Video of Comm. Hearing Part 2, at 0:10:58 (May 9, 2023) (Rep. Thigpen) (S. 474 prohibits abortion at "six weeks"); *id.* at 3:25:43 (Rep. Bamberg) ("six

weeks is a total abortion ban"); S.C. House, Video of Floor Proceedings Part 1, at 0:59:15 (May 16, 2023) (Rep. Wetmore) (noting the general rule of "six weeks" before discussing extending the exceptions for minors); *id.* at 3:22:40 (May 16, 2023) (Rep. Bamberg) ("at six weeks most women don't even know that they're pregnant"); *id.* at 3:31:07 (Rep. Bamberg) ("we're doing the same exact thing on this bill" as the General Assembly did in the 2021 Act, and the Supreme Court has held that "six-week ban" unconstitutional); *id.* at 7:13:17 (Rep. Bamberg) ("we've decided against our better judgment we're going to stick with a six-week ban"); *id.* at 7:28:00 (Rep. Bernstein) (S. 474 "has the gestational age as six weeks"); *id.* at 13:10:50 (Rep. Howard) (proposing an amendment to fund out-of-state abortions because of the "six-week ban"); S.C. House, Video of Floor Proceedings Part 2, at 2:16:50 (May 16, 2023) (Rep. Rose) ("this essentially amounts to a total ban because it's next to impossible for a woman to know she's pregnant at six weeks"); *id.* at 6:36:15 (Rep. Rose) (S. 474 is a "total ban" because "very little people can actually know that they're pregnant at six" weeks).

Rarely is legislative history so uniform, and the circuit court did not "cherry-pick[] statements of individual legislators." App'ts' Br. 12. Every legislator who spoke expressed the same understanding: S. 474 protected unborn life from approximately six weeks. Appellants' inability to point to a single legislator's statement that the bill would start protecting unborn life at the nine-week mark is an insurmountable hurdle, given this Court's mission to "ascertain and effectuate the intent of the legislature." *Rainey*, 341 S.C. at 85, 533 S.E.2d at 581.

Without any statements about "nine weeks," Appellants instead point to two proposed amendments to S. 474 that would have changed the definition of "fetal heartbeat." *See* App'ts' Br. 25–26. One of these amendments (No. 26) would have removed the commas from and added "embryonic" to that definition, and the other (No. 588) would have simply added "embryonic" to

it. *See* H. Journal No. 65, 125th Sess. (May 16, 2023). Appellants insist that these rejected amendments mean the General Assembly wanted S. 474 to apply at nine weeks. But Appellants do not account for the fact that the House of Representatives voted down *every single one* of the more than 900 proposed amendments other than the House Judiciary Committee amendment, which undercuts any weight that Appellants' argument might have. And if that weren't enough, Amendment No. 26 was proposed by Representative Wetmore, and Amendment No. 588 by Representative Bamberg—both of whom, during the floor debates, described S. 474 as a six-week bill.

3. The 2021 Act and *Planned Parenthood I*.

The 2023 Act uses the same definition of "fetal heartbeat" as the 2021 Act. *See* 2021 S.C. Acts No. 1, § 3. The General Assembly that enacted the 2021 Act (which had more than 140 members who also served in the General Assembly that enacted the 2023 Act) had the same understanding of the meaning of "fetal heartbeat." Indeed, legislators discussed the bill that became the 2021 Act as protecting unborn life from approximately six weeks. *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 283 n.62, 882 S.E.2d 770, 821 n.62 (2023) (Few, J., concurring in the judgment) (collecting examples).

That's also precisely how this Court understood "fetal heartbeat" when it took up a challenge to the 2021 Act. Justice Hearn called the 2021 Act a "six-week ban." *Id.* at 216, 882 S.E.2d at 785 (Hearn, J.). Chief Justice Beatty talked about it as a "six-week restriction." *Id.* at 238, 882 S.E.2d at 797 (Beatty, C.J., concurring). Justice Few observed that the 2021 Act was "commonly referred to as the 'six-week bill,'" *id.* at 257, 882 S.E.2d at 807 (Few, J., concurring in the judgment), and called the act the "six-week bill" throughout his analysis, *id.* at 272–83, 882 S.E.2d at 815–21. And in dissent, then-Justice Kittredge noted that the 2021 Act "dr[e]w[] a line

at the approximate six- to eight-week mark." *Id.* at 236, 882 S.E.2d at 844 (Kittredge, J., dissenting). Nothing suggests that "fetal heartbeat" took on a different meaning between *Planned Parenthood I* and the passage of the 2023 Act.

Appellants seek to avoid all of this judicial history by insisting the parties in *Planned Parenthood I* "assumed" it was a six-week law and this Court didn't decide as much. App'ts' Br. 26. That's an implausible reading of *Planned Parenthood I*, to put it mildly. Every Justice there who spoke about time confidently did so as six weeks. Even if *Planned Parenthood I* is not binding precedent on the meaning of "fetal heartbeat," the dozens of references to six weeks is a strong indication of how this Court understood that term—an understanding shared by the parties and supported by the legislative history of the 2021 Act.

4. Planned Parenthood's previous statements.

From the beginning of the fetal heartbeat debate, Planned Parenthood has (well, at least until now) consistently expressed its understanding that a "fetal heartbeat" under both the 2021 Act and 2023 Act exists from about six weeks.

Early on, during a Senate subcommittee hearing on the 2021 Act, a Planned Parenthood spokeswoman opposed the bill, claiming it would "ban abortion as early as six weeks." S.C. Senate Medical Affairs Subcommittee, Video of Comm. Hearing, at 1:40:08 (Jan. 14, 2021). Then, throughout the litigation on the 2021 Act and 2023 Act, Planned Parenthood used the term "Six-Week Ban" more than 300 times in its court filings. Far from being a lawyerly turn of phrase, the plaintiffs' own affidavits in *Planned Parenthood II* took the same view on the meaning of "fetal heartbeat" in the 2023 Act. Dr. Farris explained that "as [she] understand[s] the Act, it prohibits abortion any time after identification of embryonic or fetal cardiac activity," and that "[b]ased on [her] medical experience and expertise, that activity may be detected by vaginal ultrasound as early

as *six weeks of pregnancy* (LMP)." App. 105, *Planned Parenthood II*, No. 2023-000896 (S.C. June 14, 2023) (emphasis added); *see also id.* at 143 (sworn statement of another plaintiff-abortionist explaining that "embryonic or fetal cardiac activity" can be detected "as early as 6 weeks"). Finally, in its public statements, Planned Parenthood repeatedly attacked the 2023 Act as a six-week law. *See* Planned Parenthood, *South Carolina Supreme Court Allows Six-Week Abortion Ban to Go into Effect* (Aug. 24, 2023), https://tinyurl.com/mr3wrrfy; Planned Parenthood, *South Carolina Abortion Providers File New State Court Challenge to Six-Week Abortion Ban* (May 25, 2023), https://tinyurl.com/2dmmdmwm.

Only after losing their facial challenge to the 2023 Act and seizing upon footnote 4 in *Planned Parenthood II* have Appellants expressed any doubt as to the meaning of "fetal heartbeat." What Planned Parenthood understood "fetal heartbeat" to mean during *Planned Parenthood II* (before it had every incentive to reinterpret that term) is more telling of that term's meaning than Planned Parenthood's latest litigation position.

Or put another way, if the General Assembly's intent was that a "'fetal heartbeat' can only be present after approximately nine weeks of pregnancy" and if the "plain text" is "unambiguous[]," App'ts' Br. 1, 19, why did (or, really, how could have) Planned Parenthood repeatedly and consistently call the 2023 Act a "six-week ban" in *Planned Parenthood II*?

5. Media reports.

When the Governor signed the 2023 Act into law, media coverage was widespread. These reports—one after another—all called the law a "six-week" provision. *See, e.g.*, Mary Green, *Governor Signs Six-Week Abortion Ban into Effect in SC; Lawsuit Immediately Filed*, WCSC (May 25, 2023), https://tinyurl.com/2x3jysd5; Nadine El-Bawab, *South Carolina 6-Week Abortion Ban Signed into Law, Providers File Lawsuit*, ABC News (May 25, 2023),

https://tinyurl.com/k5pkc2vd; Sydney Kashiwage & Rebekah Riess, *South Carolina Governor Signs 6-Week Abortion Bill into Law*, CNN (May 25, 2023), https://tinyurl.com/3p3rjr7j; Javon L. Harris, *SC Senate Votes to Send 6-Week Abortion Ban Bill to Governor. Court Challenge Coming*, The State (May 24, 2023), https://tinyurl.com/3eaufd56; Devyani Chhetri, *SC Senate Passes Six-Week Abortion Ban. New Litigation Expected after Gov. Signs into Law*, Greenville News (May 24, 2023), https://tinyurl.com/3rswua75; Russ McKinney, *SC House Passes 6-Week Abortion Bill*, S.C. Public Radio (May 19, 2023), https://tinyurl.com/muc24rs2; *South Carolina Advances Six-Week Abortion Ban*, Reuters (May 17, 2023), https://tinyurl.com/2p6a6h2d.

These reports, while on their own not dispositive of legislative intent, are nevertheless more evidence to add to the already-heavy side of the scale when determining what "fetal heartbeat" means—particularly given that the lack of any news report calling the law a "nine-week ban."

6. Fetal heartbeat laws nationwide.

A fetal heartbeat law is not unique to South Carolina. At least three other States (Florida, Georgia, and Iowa) currently have a heartbeat law, and others have previously had one.

Unsurprisingly, other States have had their heartbeat laws challenged. When courts have discussed these laws, they have consistently described them as 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 . . . ."); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1344 (N.D. Ga. 2019) (recounting the plaintiffs' allegations that the law prohibited abortions after six weeks);

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."); *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549, 551 (S.D. Miss. 2019) (the challenged law "bans abortions in Mississippi after a fetal heartbeat is detected, which is as early as 6 weeks lmp"); *Georgia v. SisterSong Women of Color Reprod. Just. Collective*, 894 S.E.2d 1, 18 (Ga. 2023) (Ellington, J., dissenting) ("the parties agree" that the Georgia law protects unborn life "at approximately 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"). No part of 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.

Appellants try to point out that other States' heartbeat laws are different because they use "embryonic" in addition to "fetal." *See* App'ts' Br. 20–21 & n.16. True, some States do that. But not all other States. Texas's fetal heartbeat law defines "fetal heartbeat" like South Carolina's law does (but without the commas), and that statute does separately define "fetus." *See* Tex. Health & Safety Code Ann. § 171.201(1). Even so, the timing implication of that law has been understood exactly as the circuit court interpreted the 2023 Act. *See Whole Woman's Health*, 595 U.S. at 58.

* * *

Whatever source the Court looks to for ascertaining the General Assembly's intent, the conclusion is the same. "Fetal heartbeat" means the cardiac activity that begins at approximately six weeks of pregnancy, so it is from that moment that the 2023 Act protects unborn life.

C. Appellants' remaining arguments to the contrary lack merit.

Faced with this overwhelming record, Appellants offer various other arguments in support of their nine-week theory. None has merit.

First, Appellants cite the rule of lenity. *See* App'ts' Br. 29. Appellants may have cited older case law about strictly construing penal statutes, but this Court's more recent discussions of that rule make 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). Put another way, "even though penal statutes are to be strictly construed, the canons of construction certainly allow the court to consider the statute as a whole and to interpret its words in light of the context." *State v. Dawkins*, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002) (cleaned up). "[B]ecause 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).

Given everything just discussed about the meaning of "fetal heartbeat," *see supra* Part I.B., there cannot be a genuine ambiguity in what the General Assembly intended the 2023 Act to mean. But even if the 2023 Act were somehow ambiguous, this Court may still "construe[] the statute so as to answer [Appellants'] vagueness challenge." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 534, 737 S.E.2d 830, 838 (2012). The Court can interpret the 2023 Act and resolve any ambiguity without having to resort to the rule of lenity.

Plus, the underlying purpose of the rule of lenity is not triggered here. That rule seeks to prevent unfair punishment resulting from a lack of notice. *See United States v. Kozminski*, 487 U.S. 931, 952 (1988). This isn't a concern here, as no one is now facing any prosecution under the 2023 Act. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-630(B)) (violation is a felony punishable by

up to two years in prison and $10,000 fine).

Second, Appellants invite the Court to invoke the canon of constitutional avoidance, as they claim that a six-week interpretation raises "serious constitutional questions." App'ts' Br. 30. The Court should decline that invitation, which is simply a reprisal of the facial claim from *Planned Parenthood II*. It belies all of the briefing and argument to claim that *Planned Parenthood II* had nothing to do with six weeks. Footnote 4 there left open only whether "fetal heartbeat" "refers to one period of time during a pregnancy or two separate periods of time." 440 S.C. at 474 n.4, 892 S.E.2d at 126 n.4. The Court did not explicitly leave open whether one of those potential time periods was, in fact, six weeks.

Third, Appellants fall back on their vagueness argument. *See* App'ts' Br. 33–36. This argument is really just a repacking of their arguments about "fetal" and "embryonic" with the addition of what amounts to "no one can be sure if this statute means six weeks or nine weeks." Even if the 2023 Act requires some judicial interpretation, that interpretation can come here and provide any clarity that's needed. *See Chimento*, 401 S.C. at 534, 737 S.E.2d at 838. Whatever discretion a prosecutor might later exercise in determining whether to bring charges is a separate question from what the 2023 Act means—a question that can and should be answered here. *Cf. State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (discussing the broad scope of prosecutorial discretion).

II. Appellants will not suffer irreparable harm without an injunction.

No Appellant has shown any "immediate, irreparable harm" will occur without a preliminary injunction. *Compton*, 392 S.C. at 366, 709 S.E.2d at 642.

Start with Planned Parenthood and Dr. Farris. They are not suffering any harm from not performing abortions between six and nine weeks right now. They don't have—and don't claim—

a constitutional right to perform those abortions. *E.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910 (6th Cir. 2019) (en banc) (doctors "do not have a due process right to perform abortions"). So at most, they are merely losing the money from not performing the hundreds of abortions per month that they were carrying out before August 2023, but the loss of money is not an irreparable harm. *See, e.g.*, *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017); *cf. McCorvey v. Hill*, 385 F.3d 846, 851 (5th Cir. 2004) ("women are often herded through their procedures with little or no medical or emotional counseling").

Nor do Planned Parenthood and Dr. Farris face any immediate harm related to state-issued licenses. *See* App'ts' Br. 36. They have not even alleged a complete loss of their practice, as they admit they are still performing abortions before six weeks (as well as presumably providing other, non-abortion services). (*See* R. p. 63); *cf. Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455–56, 626 S.E.2d 34, 37 (Ct. App. 2005) ("the *complete* loss of a professional practice can be an irreparable harm" (emphasis added)). They may—consistent with actions that no state official has challenged under the 2023 Act—continue performing abortions before approximately six weeks while this litigation progresses toward final judgment without any threat to their state-issued licenses. A preliminary injunction is therefore unnecessary for Planned Parenthood or Dr. Farris to maintain the status quo while the case is pending. *Compare* (R. p. 63 (admitting that Planned Parenthood is not performing abortions after six weeks)), *with Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569 (2021) ("The purpose of an injunction is to preserve the status quo").

Turn now to Shelton. For at least three reasons, she likewise faces no irreparable harm without a preliminary injunction. In the first place, the 2023 Act did not preclude her from knowing she was pregnant and contacting Planned Parenthood. Shelton says she learned of her pregnancy

at four-and-a-half weeks. (R. p. 187.) That she was "unable to get an appointment with one of the abortion providers in South Carolina before [her] pregnancy would have reached six weeks," (R. p. 187), is not the fault of the 2023 Act, but instead of Planned Parenthood, which, for whatever reason, could not schedule an appointment that quickly.

In the second, Shelton never actually says in her declaration that her unborn child had a heartbeat when she aborted that child at "roughly six weeks and four days," (R. p. 189), even though Planned Parenthood in North Carolina would have had to perform an ultrasound on Shelton, *see* N.C. Gen. Stat. Ann. § 90-21.85(a). So on this Record, the 2023 Act did not prohibit her from having an abortion in this State.

And in the third, neither being pregnant nor having a child is an irreparable harm under the 2023 Act. South Carolina has specifically refused to recognize the tort of wrongful life, nor has the State adopted wrongful birth or wrongful pregnancy, recognizing the inherent, indefinable value of human life. *See Willis v. Wu*, 362 S.C. 146, 607 S.E.2d 63 (2004). To be sure, pregnancy is not always easy, and certainly raising a child presents daily challenges. But as a matter of law, those challenges are not irreparable harms in the context of this case. Pregnancy ends, and if a mother did not want to raise her child, she may give the child up for adoption. *See* S.C. Code Ann. § 64-9-310(A). Thus, a generalized finding of irreparable harm is unjustifiable.

To the extent that the threats from a particular pregnancy to that woman's life are so serious that she cannot remain pregnant without "death" or "serious risk of a substantial and irreversible impairment of a major bodily function," the Act already provides an exception for that pregnant woman who would face an irreparable harm from her pregnancy. 2023 Act, § 2 (S.C. Code Ann. § 44-41-640(A)). Thus, the Act obviates any need for injunctive relief, especially in the generalized way that Appellants seek.

III. The equities favor leaving the 2023 Act in effect.

A. An injunction should consider the equities.

A little over a decade ago, this Court held that "balancing the equities" "is neither necessary nor appropriate in a preliminary injunction case." *Poynter*, 387 S.C. at 587, 694 S.E.2d at 17. The Court should take this opportunity to overrule that holding. *Cf. McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) ("[S]tare decisis is not an inexorable command.").

1. *Poynter* is historically, structurally, practically, and logically incorrect.

A primary consideration of stare decisis is the soundness of the previous decision. *See e.g.*, *id.* ("There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment."). Here, four considerations reveal the flaws in *Poynter*'s holding.

First, historical principles of equity warrant overruling *Poynter*. An injunction is an "equitable" remedy. *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014). It is no surprise then that courts have long weighed the equities when determining whether injunctive relief is warranted. *See, e.g.*, *Jones v. Massey*, 14 S.C. 292, 310 (1880); *Secombe v. Steele*, 61 U.S. (20 How.) 94, 107 (1857); *accord* William Kerr, *A Treatise on the Law and Practice of Injunctions in Equity* 209–10 (1867) (no interlocutory injunction when the burden on the defendant if it were granted would be greater than the harm to the plaintiff if it were not); James High, *A Treatise on the Law of Injunctions* 10 (1880) (a preliminary injunction considers "the relative convenience and inconvenience which may result to the parties"); 1 Howard C. Joyce, *A Treatise of the Law Relating to Injunctions* 51 (1909) ("The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction."). Indeed, even before it was necessarily framed as a balancing inquiry, courts still considered the burden on a defendant of granting an injunction.

See, e.g., *Hills v. Universitat. Oxon.*, 23 E.R. 467, 467 (Eng. Ct. of Chancery 1684) (considering the relative hardship on the parties in deciding whether to issue an injunction to prohibit the printing of Bibles by the University of Oxford). And still today, both federal courts and many state courts continue to weigh the equities in determining whether to grant injunctive relief. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Hampton Island Founders, LLC v. Liberty Cap., LLC*, 658 S.E.2d 619, 624 (Ga. 2008); *Holmes v. Moore*, 840 S.E.2d 244, 265 (N.C. Ct. App. 2020).

The historical argument for maintaining the equitable analysis is even stronger in a case like this when the defendant is a public official or the State itself. Traditionally, the sovereign could not be enjoined. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 425 (2017); 3 William Blackstone, *Commentaries on the Laws of England* 428 (1768). Eventually, South Carolina courts began to permit suits for injunctive relief against public entities and officials, but those cases never suggested that other traditional equitable principles did not apply. *See, e.g.*, *Riley v. Town of Greenwood*, 72 S.C. 90, 96, 51 S.E. 532, 534 (1905); *Auditor v. Treasurer*, 4 S.C. 311, 313–14 (1873). Meanwhile, injunctions against public officials eventually became more commonplace in federal court after the adoption of *Ex Parte Young*'s "fiction" that a suit for prospective relief against a public official is not a suit against the State in violation of the Eleventh Amendment. *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002). Yet even so, federal courts still balance the equities when facing suits for injunctive relief against public officials. *See, e.g.*, *Ramirez v. Collier*, 595 U.S. 411, 433–34 (2022).

Second, constitutional structure justifies overruling *Poynter*. The "legislative power" "is vested in" the General Assembly. S.C. Const. art. III, § 1. Thus, "[d]eterminations of public policy are chiefly within the province of the legislature, whose authority on these matters [the courts]

must respect." *ArrowPointe*, 438 S.C. at 580, 884 S.E.2d at 509 (internal quotation mark omitted). When the General Assembly exercises that authority, a court "must . . . assume[]" the "good faith of the General Assembly." *O'Shields v. Caldwell*, 207 S.C. 194, 223, 35 S.E.2d 184, 195 (1945) (Oxner, J., dissenting in part); *see also Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1235 (2024) (emphasizing the presumption of legislative good faith).

With these principles in mind, turn to what a preliminary injunction is: a "drastic" remedy. *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). The extraordinary nature of this remedy is even greater when a public official is enjoined. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). This injury follows from the unelected (by the People, at least) branch prohibiting a public official from carrying out his legislatively prescribed duties. Before taking the dramatic step of enjoining that public official, a court should consider the equities and the effect of the injunction on the public. Not doing so wrongly (even if only temporarily) disregards the General Assembly's preeminent role in setting the State's public policy.

Third, practical concerns about litigation trends support overruling *Poynter*. On both the state and national levels, plaintiffs are now quick to sue over major government initiatives, often seeking preliminary injunctive relief to block a new law or action from taking effect. *See, e.g.*, *Brannon v. McMaster*, 434 S.C. 386, 864 S.E.2d 548 (2021) (seeking an injunction to require the Governor to reenroll in a federal COVID unemployment benefits program); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (seeking an injunction to stop President Biden's plan to unilaterally cancel $430 billion in student-loan debt). As these cases become more common, courts should carefully

consider not only the scope of any relief, *cf. Trump v. Hawaii*, 585 U.S. 667, 713–21 (2018) (Thomas, J., concurring) (addressing the problems with jurisdiction-wide injunctions), but also the standard for issuing such relief. Government (like private parties) often has "very weighty" arguments on the equities, *Ohio v. Env't Prot. Agency*, 144 S. Ct. 2040, 2052 (2024), and courts should be able (if not obligated) to consider those arguments.

Fourth, logic dictates overruling *Poynter*. At the end of its decision, the *Poynter* Court claimed that "the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test." 387 S.C. at 587, 694 S.E.2d at 17. But that cannot be so. Irreparable harm focuses on the plaintiff: "the plaintiff must establish that . . . *he* would suffer irreparable harm if the injunction is not granted." *Greenville Bistro, LLC*, 435 S.C. at 160, 866 S.E.2d at 569–70 (emphasis added). This factor does not consider what harm the injunction might cause to the defendant. In the same way, the inadequate-remedy-at-law factor looks at whether "he" (that is, the plaintiff) has such a remedy, again without considering the defendant's options. *Compton*, 392 S.C. at 366, 709 S.E.2d at 642. The equities of an injunction are therefore not part of the existing analysis under South Carolina law.

Another, even simpler, logical argument reinforces this result. An injunction is an *equitable* remedy. *See Lambries*, 409 S.C. at 7, 760 S.E.2d at 788. (That's a point even Appellants concede. *See* App'ts' Br. 11). An injunction should therefore account for the *equities*. Not doing so abandons the very nature of this relief.

2. Other stare decisis factors support overruling *Poynter*.

Other stare decisis factors can be considered more quickly. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (collecting stare decisis factors from Supreme Court caselaw). None of them justifies standing by *Poynter*'s flawed holding.

Reliance. No one has any substantial reliance interests in *Poynter*. Each case involving whether to grant injunctive relief is its own "case" before the courts. S.C. Const. art. V, § 11 (giving circuit courts jurisdiction over "civil . . . cases"). No one presumably plans to seek or oppose equitable relief pre-litigation by thinking "this plan is likely to succeed because the court must ignore the equities involved." *Cf. Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (noting the necessarily diminished reliance interests in cases "involving procedural and evidentiary rules"). Finally, because *Poynter* involves only the standard for injunctive relief, there is no body of case law, administrative regulations, or economic planning that has built on that decision.

Age of the precedent. *Poynter* is relatively new, decided only 14 years ago. That is a blink of an eye compared to the hundreds of years that South Carolina courts have been granting the equitable relief of injunctions. *See, e.g.*, *Stuart v. Carson's Ex'r*, 1 S.C. Eq. 500 (S.C. Ch. 1796); *cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (treating the Court's 40-year-old *Chevon* decision as new compared to *Marbury*).

Workability. Prohibiting a court from considering the equities is one approach to injunctive relief, but it's not the only one. It is, however, the one that keeps a court from accounting for all potentially significant facts. *Cf. Livingstain v. Columbia Banking & Tr. Co.*, 81 S.C. 244, 253, 62 S.E. 249, 253 (1908) ("The court of equity looks through the form to the substance, takes into account all the circumstances, and from all the facts determines the nature of the transaction and the rights of the parties." (Woods, J., dissenting)). Including all of the equities in the calculus is just as workable as not accounting for them, and it is more likely to yield a just result because the court has not had to turn a blind eye to anything. *Cf.* 3 Blackstone, *Commentaries*, at 429 ("equity is synonymous to justice").

B. The equities here cut against an injunction.

Two considerations weigh heavily against an injunction here. First, this case is literally a matter of life and death. The equities, unsurprisingly, favor life.

On one side of the ledger, there is life. "Basic to our culture is the precept that life is precious. As a society therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence." *Willis*, 362 S.C. at 158, 607 S.E.2d at 69. Not enjoining the 2023 Act means that unborn children are protected precisely as the General Assembly intended them to be protected. By contrast, enjoining the 2023 Act would result in Planned Parenthood performing about 86% of the abortions they have had to stop performing since *Planned Parenthood II* was decided. (*See* R. p. 63.) Or to put it a different way, thousands of young children would not be alive today if the circuit court had enjoined the 2023 Act just a few months ago. *See* S.C. Dep't of Health and Envtl. Control, *A Public Report Providing Statistics Compiled from All Abortions Reported to DHEC: August 23–December 31, 2023*, https://tinyurl.com/ta4w7uzb (Table 12 showing a drop of 800–1,000 abortions per month after the 2023 Act took effect in August 2023).

On the other side of the ledger, Appellants can offer no more than being unable to perform abortions or, in Shelton's case, theoretically facing the 2023 Act if she becomes pregnant again. There is, of course, no constitutional right to perform an abortion, *see, e.g.*, *Planned Parenthood of Greater Ohio*, 917 F.3d at 912, and Appellants have not claimed such a right.

For her part, Shelton's arguments are confined to after-the-fact complaints about the unavailability of abortion appointments and related inconveniences. Aside from the fact that she is no longer pregnant, no injunction would right these perceived past wrongs.

A second consideration in weighing the equities is the lawmaking process. The State has a

profound interest in seeing its law—passed by overwhelming majorities of the People's representatives and signed by the Governor—respected and enforced. *See Planned Parenthood II*, 440 S.C. at 476, 892 S.E.2d at 127 (laws are presumed constitutional); *accord Maryland*, 567 U.S. at 1303. True, the courts play a vital role in our system of government; courts must "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But they do not write the law or invent rights, and courts must be wary of exercising the judicial power to enjoin enforcement of a law approved by the People's representatives after vigorous debate—particularly when that law has been held facially constitutional already. *See Planned Parenthood II*, 440 S.C. at 485, 892 S.E.2d at 132.

CONCLUSION

The Court should affirm the circuit court's denial of the preliminary injunction motion. Because the 2023 Act protects unborn life from approximately six weeks of pregnancy, Appellants' claims ultimately fail as a matter of law, and the Court should remand the case with instructions to enter judgment for Respondents.

Respectfully submitted,

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