THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000997

Case No. 2024-CP-40-00762

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

v.

SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Interim Director of the South Carolina Department of Public Health; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; MARCELO HOCHMAN, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in his official capacity as a Member of the South Carolina Board of Medical Examiners; THERESA MILLS-FLOYD, in her official capacity as a Member of the South Carolina Board of Medical Examiners; MARY J. RICHARDSON, in her official capacity as a Member of the South Carolina Board of Medical Examiners; JENNIFER R. ROOT, in her official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SALLIE BETH TODD, in her official capacity as Chairperson of the South Carolina Board of Nursing; SAMUEL H. McNUTT, in his official capacity as Vice Chairperson of the South Carolina Board of Nursing; BRIDGET A. ENOS, in her official capacity as a Member of the South Carolina Board of Nursing; BRIDGET J. HOLDER, in her official capacity as a Member of the South Carolina Board of Nursing; LESLIE M. LYERLY, in her official capacity as a Member of the South Carolina Board of Nursing; MELISSA MAY-ENGEL, in her official capacity as a Member of the South Carolina Board of Nursing; LINDSEY K. MITCHAM, in her official capacity as a Member of the South Carolina Board of Nursing; FRANCES C. PAGETT, in her official capacity as a Member of the South Carolina Board of Nursing; JOHN J. WHITCOMB, in his official capacity as a Member of the South Carolina Board of Nursing; ROBERT J WOLFF, in his official capacity as a Member of the South Carolina Board of Nursing; SCARLETT A. WILSON, in her official capacity as Solicitor

for South Carolina's Ninth Judicial Circuit; and BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's Fifth Judicial Circuit,.....*Appellees,*

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

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INTRODUCTION

At its core, this case presents two important issues under South Carolina law: (1) what is the proper methodology to apply when interpreting a statute, and (2) applying this methodology, at what point in pregnancy does a "[f]etal heartbeat" as defined in Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) ("S.B. 474" or the "Act"), occur.

The parties agree and South Carolina law makes clear that statutory interpretation must start with the text—the best source of legislative intent. But rather than carefully parsing the text of the Act, Appellees[1] urge this Court to discount its clear language and to instead look to extratextual sources to understand its meaning. Appellees' approach invites judicial speculation regarding legislative intent built on random statements made by legislators in the heat of battle, risking that judges will substitute their own policy preferences for those expressed by the Legislature. Commitment to the statutory text is not merely a matter of history or prudence; it constitutes a bedrock principle of separation of powers. That is why this Court has iterated and reiterated that if the text of a statute is unambiguous, that is where a court's inquiry must end.

Applying this standard methodology to S.B. 474, the Court must conclude that a "[f]etal heartbeat" is present only after approximately nine weeks of pregnancy because "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac," S.B. 474, § 2(6) (amending S.C. Code Ann. § 44-41-610(6)), does not occur until then. While the parties may disagree about what constitutes a formed fetal heart and when its contractions are steady and rhythmic, one key fact in this case is uncontroverted: it is only after nine weeks of pregnancy that the developing pregnancy becomes a fetus. Prior to this point, there is no fetus—only an embryo.

[1] The State of South Carolina and Attorney General Alan Wilson (together, the "Attorney General") submitted one brief together ("AG Br.") and Governor Henry McMaster (the "Governor") submitted another ("Gov. Br.").

Both common sense and the statutory text dictate that until there is a fetus, there can be no fetal heartbeat. Appellees' attempts to escape this conclusion ask this Court to substitute policy preferences for the clear text of the Act.

Should this Court determine, however, that S.B. 474 is ambiguous, Appellees' characterizations of the General Assembly's intent cannot simply supplant the text of the Act. And Appellees all but ignore that the canon of constitutional doubt and the rule of lenity tip the balance in Appellants' favor. In the alternative, the Act is unconstitutionally vague, and this Court should adopt a limiting construction of it as applying only after approximately nine weeks of pregnancy.

For these reasons, Appellants are likely to succeed on the merits. Beyond that, they satisfy the remaining factors for a preliminary injunction under existing South Carolina law. This Court should decline the Governor's invitation to use this case to supply an additional factor that has never been part of this test. It should thus reverse the Circuit Court's ruling and enter a preliminary injunction preventing the Act's application to South Carolinians, like Taylor Shelton, with pregnancies from approximately six through nine weeks.

STATEMENT OF THE CASE

Appellees do not dispute several important facts. They do not dispute that the human heart has four major components: (1) four chambers, (2) the walls separating them, (3) the valves connecting them, and (4) the conduction system. Opening Br. 6. They do not dispute that these components are only present in a developing heart after approximately nine weeks of pregnancy as measured from the first day of the last menstrual period ("LMP"). *Id.* 6–7. Nor do they dispute that a heartbeat occurs when the chambers of the heart contract, or that the sound of a heartbeat is produced by the closing of the valves connecting the heart's chambers. *Id.*; R. p. 155 ¶ 17. And they do not dispute that a developing pregnancy is referred to as an "embryo" in the field of medicine through nine weeks LMP, after which it becomes a "fetus." Opening Br. 6.

ARGUMENT

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

The parties agree on one important point: "cardiac activity" and "the steady and repetitive rhythmic contraction of the fetal heart" (the "Clause") refer to a single moment in time, rather than two, based on the legislative finding that "[c]ardiac activity begins at *a* biologically identifiable moment in time, normally when the *fetal heart is formed* in the gestational sac." S.B. 474, § 1(2) (emphasis added); *see Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 474 n.4, 892 S.E.2d 121, 126 n.4 (2023), *reh'g denied* (Aug. 29, 2023) ("*Planned Parenthood II*"); Opening Br. 22–23; Gov. Br. 6; AG Br. 12. This means that the Clause must define "cardiac activity." Opening Br. 34–35. It also means that the Clause directly connects "cardiac activity" with the formation of the "fetal heart." Despite this common understanding, the parties disagree about when this single moment occurs. The statutory text, interpreted through principled methods, dictates that it is after approximately nine weeks LMP.

A. Appellees' Statutory Interpretation Methodology Conflicts with South Carolina Law.

Appellees give lip service to the axiom that legislative intent is a guiding principle of statutory interpretation and that ascertaining the General Assembly's intent starts with the statutory text. *See* Opening Br. 16–17; Gov. Br. 7; AG Br. 8. But only Appellants apply this rule in a principled manner.

For example, by the Attorney General's account, applying the plain meaning rule requires analyzing "legislative history and other contemporaneous historical sources" before looking at the text itself. AG Br. 8–9. Similarly, the Governor asserts that this Court should look for "context"

outside the text rather than reconciling the language and structure of the text itself. Gov. Br. 8 n.2.[2] The Governor's approach ignores this Court's clear precedent that "[a]bsent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017); *see also Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute."). The General Assembly "can be its own lexicographer," Gov. Br. at 8 (quoting *Tesla Inc. v. Del. Div. of Motor Vehicles*, 297 A.3d 625, 632 (Del. 2023) (internal quotations omitted)), and that is precisely what it did here by defining "[f]etal heartbeat." The Court must look to that definition and give effect to each word within it. Opening Br. 17.

At bottom, the Attorney General argues that the Court should distort or bypass the plain language of the Act to avoid the conclusion that there is no "[f]etal heartbeat," as defined by the Act, at six weeks LMP. The Attorney General rests much of his argument on old and outdated case law representing an obsolete—even if not formally rejected—method of statutory interpretation granting courts unfettered discretion to rewrite statutes. AG Br. 8–10.[3] More recently, this Court has been clear: "While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute." *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582. After all, it is not the province of the courts to legislate:

> 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

[2] The Governor's proposed methodology conflates the search for meaning of an ambiguous statute with the initial analysis and interpretation of statutory language. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24 Whole-Text Canon (2012) ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

[3] Because the Attorney General's "methodology" is not limited by the text, the only limit to it is a court's subjective determination of legislative intent.

> intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature *as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret.*

Creech v. S.C. Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645, 652 (1942) (emphasis added). Thus, the Court only interprets statutes "in accord with legislative intent despite contrary literal meaning" when the clear "conflict with the overall intent of the statute" rises to the level of "absurd results." *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582; *see also State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("plainly absurd"). Interpreting the Act as Appellants propose produces no absurd result, but rather a result Appellees dislike from a policy perspective: the Fetal Heartbeat and Protection from Abortion Act bans abortion upon the detection of a "fetal heartbeat."

The Attorney General suggests that this Court routinely rewrites statutory text. Not even *Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813 (1942), supports such a conclusion. There, the Court reached the unexceptional conclusion that the phrase "Army Forts, Naval or Marine bases" included army "air bases." *Id.*, 200 S.C. 363, 20 S.E.2d at 815. Here, by contrast, Appellees' interpretation would strike a critical clause of the Act altogether and entirely ignore the term "fetal," which appears throughout the Act, including its title.

B. *Owens v. Stirling* Is a Distraction from the Textual Interpretation of the Act.

Appellees attempt to steer this Court in an improper interpretive direction by raising the dichotomy between legislative and adjudicative facts discussed in *Owens v. Stirling*, No. 2022-001280, 2024 WL 3590797, at *5 (S.C. July 31, 2024), *reh'g denied* (Aug. 16, 2024). *Owens* is inapposite for two reasons. First, "[a]s to factual questions on which the *constitutionality* of the legislation may depend, [courts] defer to the factual findings of the General Assembly." *Id.* at *4 (emphasis added); *see also id.* at *5 n.4 ("Legislative facts are the factual grounds on which judges base their opinions when deciding upon the *constitutional* validity of a statute." (quoting Rule 201,

SCRE note) (internal quotations and alterations omitted) (emphasis added)). While *Owens* involved a challenge to the *constitutionality* of a statute under article I, section 15 of the South Carolina Constitution, this case concerns a question of *statutory interpretation*. Thus, the distinction between legislative and adjudicative facts does not apply here. In interpreting S.B. 474, to import Appellees' version of the presumed legislative facts[4] is to supplant the statutory text with Dr. Skop's testimony. Furthermore, Appellants advance no "facts" in contradiction to those found by the Legislature. Second, the Circuit Court made no "factual findings" in this case. Its holding that the statutory language is ambiguous is a legal conclusion, not a factual finding.

Owens is a distraction introduced by the Governor as an effort to avoid the obvious and inescapable meaning of the word selected by the General Assembly: a developing pregnancy is only considered a "fetus" after nine weeks LMP.

C. S.B. 474's Text Instructs That It Bans Abortion Only After Approximately Nine Weeks LMP.

Turning to the text itself, there are two primary reasons why the Act should be interpreted as applying only after approximately nine weeks LMP. First, to have a *fetal* heartbeat, there must be a fetus. Appellees have no persuasive answer to the undisputed fact that the developing pregnancy does not become a fetus until after nine weeks LMP. Opening Br. 6. Second, a fetal heart does not form until after approximately nine weeks LMP. *See* S.B. 474, § 1(2) ("Cardiac

[4] They must be presumed here as the General Assembly considered no testimony from physicians, scientists, or other experts in considering the Act. However, to the extent that the General Assembly should be presumed to be aware of "the debate over fetal development," Gov. Br. 11, it should be assumed to understand the distinction between a fetus and an embryo. This distinction was raised in *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 218, 882 S.E.2d 770, 786 (2023) ("*Planned Parenthood I*") (Beatty, C.J., concurring) ("[A]t six weeks of pregnancy there is no fetus."), and two amendments to S.B. 474 proposing to expand the definition of "[f]etal heartbeat" to also include *embryonic* cardiac activity were rejected. Opening Br. 25–26.

activity begins . . . when the fetal heart is formed"); Opening Br. 6–8. Appellees' additional attempts to undermine a textual interpretation of S.B. 474 are unavailing.

1. A *Fetal* Heartbeat Requires a Fetus.

Appellees do not dispute that it is only after nine weeks LMP that the developing pregnancy is considered a *fetus*, rather than an embryo. The plain language of "fetal heartbeat" means there must be a fetus.

Any uncertainty about the meaning of the term "fetal" or "fetus" should be resolved using traditional methods of statutory interpretation. While the plain meaning rule ordinarily applies to undefined statutory terms, *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998), when defining technical terms, courts typically consult technical sources, such as experts in the relevant field. *See* Scalia & Garner, § 6 Ordinary-Meaning Canon ("Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected[.]"); *Cantey v. Clarendon County*, 101 S.C. 141, 143, 85 S.E. 228, 229 (1915) ("It is a well–settled rule of construction that technical words or phrases used in a statute . . . shall have their technical meaning, unless a contrary intention appears.").

The Governor argues that the General Assembly "can define 'fetal' to include anything related to an unborn child." Gov. Br. 12. The General Assembly has the power to define a statutory term, but this is not what it did here. The Act does not define "fetal" or "fetus," and only defines "[f]etal heartbeat" with reference to the "fetal heart." The Governor asserts that because the Act defines "[u]nborn child" as beginning at conception, the Court can disregard the repeated use of "fetal" every time the Act refers to a "heartbeat." *Id.* This defies the *sin qua non* of statutory interpretation: that each word must be given meaning. *See Sweat*, 386 S.C. at 351, 688 S.E.2d at 575. The General Assembly is free to define terms as it pleases, but the Act never says "unborn child's heartbeat," *contra* AG Br. 16 (falsely claiming that "[f]etal heartbeat" is "defined as cardiac

activity, or the steady and repetitive rhythmic contraction of the *unborn child*'s heart within the gestational sac" (emphasis added)); it says "*fetal* heartbeat." Comparing S.B. 474 to its predecessor is illuminating in this regard. Senate Bill 1, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) ("S.B. 1"), defined "'[h]uman fetus' or 'unborn child'" as beginning at conception. *Id.*, § 3 (amending S.C. Code Ann. § 44-41-610(6)). S.B. 474 omits "[h]uman fetus" from this otherwise identical definition. As this Court noted, S.B. 474 is "materially different" from S.B. 1. *See Planned Parenthood II*, 440 S.C. at 477, 892 S.E.2d at 128.

The Attorney General attempts to avoid confronting the accepted meaning of the word "fetus" by arguing that because a different definitional subsection of S.B. 474 defines "[f]atal fetal anomaly" to include "the unborn child," the definition of "[f]etal heartbeat" also refers to any stage of development. AG Br. 13, 16–17. But the definition of "[f]etal heartbeat" does not contain the term "unborn child." S.B. 474, § 2(6) (amending S.C. Code Ann. § 44-41-610(6)). Had the General Assembly wanted to define the term "[f]etal heartbeat" in the manner urged by the Attorney General, it could have done so, for example, by simply inserting the term "unborn child," defining "[f]etal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the unborn child's fetal heart, within the gestational sac."[5]

The Attorney General misunderstands the medicine in claiming an inconsistency between Appellants' positions that a "fetal heartbeat" exists only after approximately nine weeks of

[5] The Attorney General also claims that the definition of "[g]estational sac," which contains the terms "unborn child" and "after the fourth week of pregnancy," supports his position. AG Br. 17 n.5. Yet again, the definition of "[f]etal heartbeat" does not contain the term "unborn child." And the General Assembly's use of a specific gestational age in the definition of "[g]estational sac" shows that when it wants to reference a particular gestational age, it knows how to do so. *See* S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-610(8) (definition of "[g]estational sac), 44-41-650(A) (banning abortion at "twelve weeks" in cases of rape or incest)). The definition of "[f]etal heartbeat" is devoid of a gestational age reference, contravening the notion that the General Assembly intended to substitute the term "fetus" with "unborn child."

pregnancy and that an embryo does not become a fetus until ten weeks LMP. AG Br. 18. As Appellants previously explained, "after approximately nine weeks LMP" means up to and including nine weeks, six days LMP. It thus measures until the point at which an embryo becomes a fetus at ten weeks LMP. Opening Br. 8. There is no contradiction between these two positions.

The Governor claims that "'fetal heartbeat' is virtually a statutory term of art," ignoring the fact that other states' "heartbeat" bans materially differ from South Carolina's. Gov Br. 22–23; Opening Br. 20–21 & n.16. For example, Georgia's "heartbeat" definition includes "embryonic or fetal cardiac activity." Opening Br. 20 n.16. Florida's law, also cited by the Governor, while called the "Heartbeat Protection Act," actually bans abortion at six weeks LMP, not upon the detection of a so-called "heartbeat." Fla. Stat. § 390.0111(1) (2024).

Beyond these unavailing textual arguments, the Governor relies on extratextual sources to assert that "fetal," as used in S.B. 474, does not actually mean "fetal." Grasping at straws, he claims that because the specialty of maternal-fetal medicine ("MFM") includes the term "fetal," the word "fetal" means at any point during pregnancy. Gov. Br. 12. Surely Dr. Crockett, an MFM specialist, would understand when a pregnancy becomes a fetus. She, Dr. Farris, and Dr. Skop all consistently use the term "embryo" or "embryonic" to describe the early stages of pregnancy, including six weeks LMP. *E.g.*, R. pp. 112 ¶ 11 (Farris); 157 ¶ 27 (Crockett); 252–53 ¶¶ 7–8, 254–55 ¶¶ 12–13 & 15, 257 ¶ 18 (Skop).[6]

2. No Fetal Heart Is Formed at Six Weeks LMP.

Appellees seek to distance themselves from the legislative finding that "[c]ardiac activity begins . . . when the *fetal heart is formed* in the gestational sac." S.B. 474, § 1(2) (emphasis added). Perhaps this is because Dr. Skop and the Department of Health and Environmental Control agree

[6] Appellees ignore the fact that elsewhere in South Carolina law, the General Assembly uses the word "embryo." Opening Br. 20.

with Appellants' experts that the major components of the heart—the four chambers, the valves, and the conduction system—have not formed until after approximately nine weeks LMP. Opening Br. 6–8, 13, 18. Appellants are not suggesting that a fetal heart must be "fully formed" to constitute a heart, contrary to the Governor's suggestion; it is undisputed that the heart continues to form throughout pregnancy. *See* R. pp. 157 ¶ 24, 160 ¶ 36. But a heart is an organ that has these main components. *Id.* at 156 ¶ 20. And, remarkably, the Attorney General misquotes Dr. Skop as saying a "fetal heart" forms by six weeks LMP. AG Br. 14. Dr. Skop says no such thing; she does not say anywhere that a "fetal" heart is formed at six weeks LMP but pointedly speaks only of an "embryonic heart." *See* R. pp. 252 ¶ 7, 255 ¶¶ 14–15, 257 ¶ 18.

Without the medicine on his side, the Governor resorts to strained textual interpretation, asserting that the General Assembly's use of a past participle ("is formed") renders the statute ambiguous. Gov. Br. 12–13. Not so. As with any statutory text, the past participle must be read in context. *See* Opening Br. 21–23. "Cardiac activity *begins*" uses present tense indicating that "is formed" must take on the past tense. Indeed, the concurring opinion in *Utility Solid Waste Activities Group v. Environmental Protection Agency*, cited by the Governor, concluded that when illuminated in context, the past participle at issue referred to an act that "took place at some prior time." 901 F.3d 414, 440 (D.C. Cir. 2018) (Henderson, J., concurring in part); *see also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40–41 (2008) (calling the interpretation "that a past participle indicates past or completed action" "the better one").

3. Appellees' Remaining Attempts to Avoid the Clear Meaning of "Fetal Heartbeat" Carry No Weight.

For the reasons explained in Appellants' Opening Brief, "cardiac activity" is only steady and rhythmic after approximately nine weeks LMP. Opening Br. 17–19. Contrary to Appellee's argument, Dr. Skop cannot be credited, *infra* § IV, and the Court should disregard her suggestion

that "cardiac activity" is steady and rhythmic at approximately six weeks LMP. However, even if the Court credits Dr. Skop's testimony, Appellants must still prevail because Dr. Skop (and Appellees) have no response to the fact that there is no fetus and no formed *fetal* heart at six weeks LMP. *Supra* § I.C.1–2. Furthermore, Appellees ignore the plain meaning of steady and rhythmic. Opening Br. 18. The Attorney General also claims that "cardiac activity" is undefined in the Act, ignoring that "the steady repetitive and rhythmic contraction of the fetal heart" (the "Clause") must define "cardiac activity." Opening Br. 28. Otherwise, the Clause would be superfluous. *Id.* 34–35.

The Attorney General also argues that "fetal heart" and "fetal heartbeat" mean the same thing, AG Br. 13, 17, which would also render the Clause superfluous, and does nothing to explain why this means the Act must be a six week LMP ban. Appellants' position, however, is consistent with the common sense proposition that you cannot have a fetal heartbeat without a fetal heart, both of which are only present after approximately nine weeks LMP.

Finally, Appellees ignore one more common sense proposition: to have a fetal *heartbeat*, there must be a heartbeat. "A heartbeat occurs when the chambers of the heart contract." R. p. 155 ¶ 17 (further explaining what a heartbeat is). The uncontroverted facts here—scientific and medical facts that are universally true—indicate that the chambers of the heart only form after approximately nine weeks LMP. Dr. Skop offers no explanation of what a heartbeat is in her declaration.[7]

[7] The Governor seeks to rewrite the Act to depart from its plain language when he argues that its requirement to offer the pregnant person an opportunity to "hear" the "fetal heartbeat" does not actually require the fetal heartbeat to be audible. Gov. Br. 13. But the Act does not say "hear the unborn child's fetal heartbeat *via a sound produced by an ultrasound machine*." *See* S.B. 474, § 10 (amending S.C. Code Ann. § 44-41-330(A)(1)(b)).

After interpreting the plain language of the Act, the answer is clear: S.B. 474 bans abortion only after approximately nine weeks LMP. The Court need not go any further and consider extratextual sources.

II. If the Court Determines S.B. 474 Is Ambiguous, the Text and the Canons of Construction Point the Way to Legislative Intent.

While Appellants maintain that S.B. 474 is unambiguous, if the Court disagrees, it should apply a principled approach to any extratextual information it considers and remain grounded in the text.

A. Appellees Inflate the Importance of Extratextual Evidence of Legislative Intent.

Appellees rely heavily on several types of extratextual information: (1) statements from individual members of the General Assembly, (2) statements from the parties to this litigation made before the filing of the instant case, (3) dicta from various cases where courts have not directly interpreted the material statutory provision, and (4) media coverage. These sources cannot supplant the plain language of the statute or undermine what the text makes clear: the General Assembly chose to ban abortion after a "fetal heartbeat" can be detected, not after six weeks LMP.

First, under South Carolina law, statements made by individual legislators are not principal sources for determining the intent of the *Legislature*. *Creswick v. Univ. of S.C.*, 434 S.C. 77, 84, 862 S.E.2d 706, 709 (2021). Appellees provide *no cases* where a South Carolina court has relied on individual legislators' statements as primary sources of legislative intent. Courts may "consider the legislative history in order to effectuate the purpose of the statute" but may not resort to statements of individual legislators to *determine* the purpose of a statute in the first instance. *Limehouse v. Hulsey*, 404 S.C. 93, 106, 744 S.E.2d 566, 573 (2013).[8]

[8] Appellees stretch the meaning of the cases they cite. *See Wehle v. S.C. Ret. Sys.* 363 S.C. 394, 400, 611 S.E.2d 240, 242 (2005) (first examining the title of the bill to determine the legislative

Appellees suggest that this Court should depart from its normal tools of statutory interpretation because the statements provided are made by "both proponents and opponents of the act," and because the legislative history is "uniform." AG Br. 11; Gov. Br. 18. Neither of these assessments finds purchase in the case law or addresses the text itself, which is "the best evidence of the legislative intent or will." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010); *see also Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011))).

Second, neither statements from the parties to this litigation nor media coverage bear on the intent of the General Assembly as codified in the Act. *See Myrtle Beach Hosp., Inc.*v. *City of Myrtle Beach*, 341 S.C. 1, 5–6, 532 S.E.2d 868, 871 (2000); *State v. Hudson*, 336 S.C. 237, 243–44, 519 S.E.2d 577, 580 (Ct. App. 1999).

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purpose, applying required strict construction, and only thereafter considering legislative history); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 345, 350, 549 S.E.2d 243, 246, 248 (2001) (first examining the plain language of the act to determine whether the General Assembly's intent in amending a statute, then examining legislative history after concluding that "[t]he plain language of the title gives no indication or notice" of intent to change policy); *Crescent Mfg. Co. v. Tax. Comm'n*, 129 S.C. 480, 124 S.E. 761, 763, 764, 767 (1924) (first engaging in a careful reading of the act as a whole to determine "the clearly expressed intention of the Legislature" within the four corners of the act, then considering rules of strict construction, and only invoking legislative history to "dissipate" any remaining doubt as to the intent); *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 221, 781 S.E.2d 548, 554 (2015) (relying on an act's express reference to extratextual sources "as the legislative intent of this chapter," rather than legislative history); *Duggins v. Lucas*, 431 S.C. 115, 847 S.E.2d 793 (2020) (dismissing a case because a newly enacted law provided the relief requested by the plaintiffs, and referencing the statement by Senators and the Governor's signing as context); *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 374, 718 S.E.2d 432, 436 (2011) (seeking to discern legislative intent "from all lawful enactments of the General Assembly—the statutory scheme and budget provisos," and citing a House Journal statement from representative in a footnote in response to dissenting opinion).

Lastly, Appellee's reliance on dicta from *Planned Parenthood I* and *II* as a source of legislative intent is an exercise in avoidance. Opening Br. 26–27. This logic is even more true for the dicta of courts in other states that did not conduct statutory analyses of laws that differ from S.B. 474. *See supra* at 9; Opening Br. 20 n.16; Gov. Br. 22–23.

B. The Canons of Construction Require the Court to Construe the Act as Banning Abortion After Approximately Nine Weeks LMP.

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

1. The Punctuation and Grammar Canons

Appellants explained the significance of the commas in the definition in their opening brief by invoking rules of grammar and the punctuation canon supporting the interpretation that "the steady and repetitive rhythmic contraction of the fetal heart" explains the meaning of "cardiac activity." Opening Br. 27–29. The Governor cites *Caston v. Brock*, also cited by Appellants, for the proposition that punctuation on its own, including a comma, is "ordinarily insufficient to fix the sense of a statute where that is disputable." 14 S.C. 104, 107 (1880). The Governor misstates Appellants' argument. Appellants have not suggested that commas alone dictate that the Act should be construed as applying after approximately nine weeks LMP. Rather, the punctuation and grammar canons are additional nails in the coffin of Appellees' proposed interpretation. As the *Caston* court recognized, punctuation "cannot properly be said to be without any force." *Id.* There, commas offsetting two clauses led "to the conclusion that each of these clauses is an independent member of the sentence, having each distinct and independent effect upon the precedent general declaration." *Id.* at 108. So too here: the commas give the Clause independent meaning by

indicating that the Clause defines "cardiac activity." The Governor also cites Justice Few's concurrence in *Commissioners of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 833 S.E.2d 834 (2019); but there, Justice Few noted that "the absence of a comma to set off . . . [a] clause *is significant*." *Id.*, 428 S.C. at 219, 833 S.E.2d at 839 (emphasis added). Here, it is the *presence* of commas—also first raised by Justice Few—that is significant.

2. The Rule of Lenity

The parties agree that if this Court finds the statutory language unambiguous, the rule of lenity does not come into play. However, when a "genuine ambiguity" exists after employing the tools of statutory interpretation, penal statutes must be strictly construed. AG Br. 17; Gov Br. 24. If this Court finds the Act ambiguous after considering the statute as a whole, the remaining ambiguity must be strictly construed against the State. Opening Br. 29.

The Governor argues that "the underlying purpose of the rule of lenity" is "to prevent unfair punishment resulting from a lack of notice." Gov. Br. 24. But "[a]nother foundation of the rule of lenity is the separation of powers"; if the General Assembly "believes [a court's] interpretation expands or is otherwise contrary to the scope it intended [a statute] and its harsh penalty scheme to have, it can amend the statute." *State v. Miles*, 421 S.C. 154, 165, 805 S.E.2d 204, 210 (Ct. App. 2017). The rule of lenity ensures that courts do not extend penal statutes by implication when they engage in statutory interpretation.

3. The Canon of Constitutional Doubt

Appellees do not dispute that "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009). Nor do they directly contest that a ban on abortion at six weeks LMP would present serious constitutional questions. That much is beyond reproach as this Court has closely

evaluated the constitutionality of "fetal heartbeat" abortion bans twice in the past two years, each time coming out on different sides of the debate.

Appellees instead claim that *Planned Parenthood II* resolved the question of the point of pregnancy at which the Act begins to ban abortion. Not so. The term "six weeks" appears *nowhere* in the Court's ruling—just as it does not appear in the text of S.B. 474. It is true that *Planned Parenthood II* did not explicitly state, "We leave for another day when in pregnancy S.B. 474 begins to ban abortion." However, contrary to the Governor's suggestion, Gov. Br. 25, this Court did not leave open only whether "cardiac activity" and the Clause refer "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. Rather, the Court left for another day "the meaning of 'fetal heartbeat'" altogether. *Id.* These are not two separate issues but one central question necessary to understand when in pregnancy the Act begins to ban abortion. *Planned Parenthood II* held only that S.B. 474 does not facially violate the South Carolina Constitution. Opening Br. 31.

In short, this case presents a narrow, interpretive question in an as-applied challenge, and if the Court deems the Act ambiguous, it should construe the Act to avoid the grave and doubtful constitutional questions that would be presented by an abortion ban from approximately six through nine weeks LMP.

III. In the Alternative, the Act is Unconstitutionally Vague, and the Court Should Limit Its Application.

Due to the threat of criminal prosecution and imprisonment, PPSAT and Dr. Farris have been forced to assume that the Act prohibits abortion at the earliest possible point in pregnancy. R. p. 111 ¶ 8. If this Court finds the Act ambiguous, the lack of clarity produced by the definition of "[f]etal heartbeat" threatens Appellants' due process rights because it is unconstitutionally vague. None of Appellees' arguments resolve the problem posed by this indeterminacy.

The vagueness doctrine is aimed at both "sufficient notice of conduct prohibited" and "arbitrary and discriminatory enforcement." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737 S.E.2d 830, 842 (2012). Appellants made clear in their opening brief that the Act poses unconstitutional vagueness concerns for two reasons: first, because persons of ordinary intelligence could interpret the act as banning abortion at two different moments in time, Opening Br. 33–35; and second, because the Act does not provide sufficient guidance or limitations to those charged with enforcement, *id.* 35–36.

If this Court finds the definition of "[f]etal heartbeat" ambiguous, then the terms of the Act do not convey what is proscribed "when measured by common understanding and practices," *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014) (quoting *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 599 (2001)), because no fetus exists at six weeks LMP. Opening Br. 34. Moreover, the definition of "fetal heartbeat" can be read as referring to two separate points in time while the legislative findings indicate the Act bans abortion at a single point in time. *Id.* 34–35. The Governor concedes that leaving the question open as to whether the Act bans abortion at two separate periods of time creates exactly the vagueness concerns Appellants have outlined. Gov. Br. 6. Nevertheless, the Governor asserts that even if the Act "requires some judicial interpretation, that interpretation can come here and provide any clarity that's needed." *Id.* 25. This proposal does not address that constitutional vagueness arises when the tools of construction are insufficient to provide clarity to meet due process standards. In the absence of binding statutory construction, Appellants' remain in a "gigantic hole of ambiguity." Oral Argument Video at 9:10–18, *Planned Parenthood II* (No. 2023-000896), https://media.sccourts.org/videos/2023-000896.mp4 ("Oral Argument Video").

The Attorney General does not dispute that the Act is susceptible to being interpreted at two separate moments in time, instead misrepresenting that Appellants' conservative interpretation—taken because of the Act's severe penalties—amounts to a concession that the Act can only be read as applying at approximately six weeks LMP. AG Br. 18–19. The Attorney General further muddies the waters by arguing that Appellants lack standing to bring a vagueness challenge because their conduct is "clearly proscribed by the statute." AG Br. 18. But what conduct is proscribed is determined by *when* in pregnancy the Act begins to ban abortion. For example, it remains an open question as to whether providing an abortion at seven weeks LMP constitutes a violation of the Act.

Furthermore, the statutory language does not appropriately guide enforcement because a state official could read the Act as applying after approximately nine weeks LMP or as early as six weeks LMP, leaving the ultimate decision of what conduct is prohibited to a government employee. The Attorney General entirely ignores this point, while the Governor raises the broad scope of prosecutorial discretion as resolving the threat of arbitrary and discriminatory enforcement. Gov. Br. 25. This is malapropos. Whatever the scope of prosecutorial discretion, constitutionally rooted due process limitations constrain prosecutorial action. Arbitrary and discriminatory enforcement is problematic precisely because it falls outside of the prosecutor's proper scope of discretion. *See Town of Sullivan's Island v. Murray*, 435 S.C. 22, 30, 864 S.E.2d 909, 913 (Ct. App. 2021), *aff'd*, 439 S.C. 352, 887 S.E.2d 533 (2023); *Dubin v. United States*, 599 U.S. 110, 131 (2023) ("To rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor." (quoting *Marinello v. United States*, 584 U.S. 1, 11 (2018) (alteration omitted))).

IV. Appellees' Attempt to Bolster Dr. Skop Fails.

In considering the medical and scientific facts of pregnancy development, this Court should credit Drs. Crockett and Farris over Dr. Skop. Opening Br. 13–16. Simply put, Dr. Skop cannot be trusted to weigh in on the medical consensus as her views are "out of step with mainstream, medical organizations." *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022 CA 912, 2022 WL 2436704, at *13 (Fla. Cir. Ct. July 05, 2022), *rev'd on other grounds*, 344 So.3d 637 (Fla. Dist. Ct. App. 2022), *aff'd*, 384 So.3d 67 (Fla. 2024). The Attorney General cites a single case—omitting that the case was subsequently overturned from his citation—for the proposition that "Dr. Skop has been cited by and relied upon by courts from around the country." AG Br. 14 n.4 (citing *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210 (5th Cir. 2023), ***rev'd and remanded*** *sub nom. Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367 (2024)). Furthermore, her study was retracted after the Fifth Circuit's ruling in that case. Opening Br. 15. By contrast, Appellees make no attempt to impeach the testimony of Drs. Crockett and Farris or to challenge the medicine in their reports, because they cannot. Drs. Crockett and Farris undoubtedly represent sound medical expertise on these issues.[9]

Even if the Court declines to enter the findings Appellants request, Opening Br. 12–14, and credits Dr. Skop, Appellants must prevail because it is undisputed that the developing pregnancy

[9] The Governor attempts to inject ambiguity where there is scientific clarity by going outside the record of this case. In a *Planned Parenthood II* amicus brief, the American College of Obstetricians and Gynecologists, the American Medical Association, and the Society for Maternal-Fetal Medicine for the proposition that "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 [LMP]." Br. of Amici Curiae Am. Coll. of Obstetricians and Gynecologists et al. in Supp. of Planned Parenthood S. Atl. et al. at 10, *Planned Parenthood II*, No. 2023-000856 (S.C. June 20, 2023) (emphasis added). After consulting with experts, Appellants understand that many pregnant patients will have an anatomy scan performed at around this time (18–20 weeks LMP) and that at this point, an echocardiogram can provide a detailed visualization of the fetal heart. R. p. 160 ¶¶ 34–35.

is only considered a "fetus" after nine weeks LMP. Dr. Skop agrees, and as explained *supra* § I.C.1, this alone is fatal to Appellants' construction of the Act. That all experts agree that there is no formed fetal heart at six weeks LMP also means that S.B. 474 can only be construed to apply after approximately nine weeks LMP. *Supra* § I.C.2.

V. Appellants Satisfy the Remaining Preliminary Injunction Factors.

A. Appellants Are Suffering Irreparable Harm.

PPSAT and Dr. Farris are being forced to turn away patients who, like Taylor Shelton, are pregnant with detectable embryonic electrical activity but without a "fetal heartbeat" as defined by the Act. The Governor's dismissive and gratuitous assertion that "neither being pregnant nor having a child is an irreparable harm" is cruel and completely disregards the realities of pregnancy and childbirth, as well as the unmistakably grave harms South Carolinians have been suffering since S.B. 474 took effect. Appellants have provided a mountain of evidence—none of which Appellees refute—on the physical, emotional, financial, and dignitary harms of forced pregnancy and parenthood. R. pp. 129–45 ¶¶ 71–111. Delayed or denied medical care is an irreparable harm. Opening Br. 37–38.[10]

The harms PPSAT and Dr. Farris are suffering arise not based on a constitutional right to perform abortions or a loss of money. Rather, they are unable to provide medical care they specialize in providing consistent with their medical judgment and in support of patient wellbeing. *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016) (recognizing physicians' "right to practice medicine in the best interests of their

[10] That South Carolina does not recognize the tort of wrongful life is irrelevant to the irreparable harm analysis; irreparable harm is not determined by whether the harm also supports a cognizable tort claim.

patients").[11] Appellees do not contest that PPSAT, Dr. Farris, and its staff face reputational harm and harm to their professional licenses from the threat of severe criminal and licensing penalties posed by the Act. Without explanation, the Governor claims they do not face immediate harm to their state-issued licenses. But if Dr. Farris were to perform an abortion on a patient who was seven weeks LMP, for example, she would face immediate revocation of her South Carolina medical license—not to mention incarceration. S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-630(B), 44-41-640(B), 44-41-650(C), 44-41-660(C), 44-41-690). That PPSAT and Dr. Farris have taken a conservative position of providing abortion only to approximately six weeks LMP to avoid this immediate harm evidences chilled conduct, not the lack of threat of immediate harm.

PPSAT and Dr. Farris also bring suit on behalf of their patients, like Taylor Shelton, who face their own irreparable harms. The Attorney General cites *Cameron v. EMW Women's Surgical Center, P.S.C.*, 664 S.W.3d 633 (Ky. 2023), for the proposition that a plaintiff may not rely on harm to third parties when seeking a preliminary injunction. *Cameron*, the *only* state supreme court decision since *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), finding that abortion providers lacked standing, is an outlier and does not change the analysis in this case. In *Planned Parenthood I*, the South Carolina Supreme Court granted a preliminary injunction to abortion providers-plaintiffs, *Smith v. Planned Parenthood S. Atl.*, No. 2022-001005, 2022 WL 3478531 (S.C. Aug. 17, 2022), and in *Planned Parenthood II*, it did not disturb the trial court's

[11] Under *Levine v. Spartanburg Regional Services District, Inc.*, 367 S.C. 458, 465 n.3, 626 S.E.2d 38, 42 n.3 (Ct. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010), "loss of a business or business goodwill" need not be "complete" to constitute irreparable harm.

grant of a preliminary injunction based on claims brought by abortion providers. Order Den. Pet. for Supersedeas, No. 2023-000856 (S.C. June 6, 2023).

The Governor's attempt to shift blame from Appellees to abortion providers for Ms. Shelton's inability to access abortion is also unavailing. Gov. Br. 26–27. Interpreted as banning abortion at approximately six weeks LMP, S.B. 474 makes it all but impossible to access abortion in South Carolina, where the State has already made it deliberately difficult for patients to access, and for health care workers to provide, abortion. Her story shows how cruel and unrealistic it is to cut off access to care at six weeks LMP.

Lastly, Appellees do not dispute that the due process violations posed by the Act's vagueness constitute irreparable harm. Opening Br. 38.

B. A Preliminary Injunction Would Restore the Status Quo.

Courts typically issue preliminary injunctions to preserve the status quo. Here, enjoining the Act as applied to pregnancies with detectable embryonic electrical activity but without a fetal heartbeat would not disrupt the status quo. Until the Circuit Court denied Appellants' motion for preliminary injunction, no court had addressed when the Act begins to ban abortions; Appellants have just taken the more conservative approach of assuming that it applies at approximately six weeks LMP to avoid the Act's severe penalties.

Furthermore, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury. . . . The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).[12] Thus, to the

[12] Indeed, courts often enjoin enforcement of laws (including abortion restrictions) that have long been in effect where plaintiffs have established a likelihood of success on the merits and irreparable harm. *E.g.*, *Weems v. State*, 440 P.3d 4 (Mont. 2019); *Brown v. Buhman*, 947 F.Supp.2d 1170, 1234 (D. Utah 2013), *vacated on other grounds*, 822 F.3d 1151 (10th Cir. 2016) (declaring

extent the Court considers the status quo as abortion being banned at approximately six weeks LMP, this should not prevail and thereby eliminate the significance of Appellants' irreparable harm and likelihood of success on the merits. Lastly, in seeking a preliminary injunction, Appellants seek to partially restore the status quo as it existed for decades until recently: access to first trimester abortion in South Carolina. For fifty years, abortion was legal in South Carolina; it has only begun to be restricted early in pregnancy in the few months between the Court's ruling in *Planned Parenthood II* and when Appellants filed the instant case.

C. Appellants Have No Adequate Remedy at Law.

For the reasons stated in Appellants' Opening Brief, they have no adequate remedy at law. Opening Br. 38–39. When the Attorney General asserts that an individual plaintiff could bring an as-applied challenge to the Act, he ignores Ms. Shelton's presence in this case, as well as Dr. Farris and PPSAT's assertion of as-applied claims.

VI. This Court Should Not Overrule *Poynter*.

This Court should not overrule *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). In its ordinary course, this Court follows its own precedents. *See State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 505, 66 S.E.2d 33, 41 (1951). This practice recognizes the important public purposes of *stare decisis*, including "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." *Gamble v. United States*, 587 U.S. 678, 691 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

unconstitutional Utah criminal law, enforced since 1973, making it a crime to "purport[] to marry" more than one person or to cohabitate with someone other than a spouse).

At the outset, the Governor significantly mischaracterizes *Poynter* as eliminating the requirement that courts "balanc[e] the equities" when considering whether to grant a preliminary injunction. Gov. Br. 28–32. Instead, *Poynter* merely corrected the error committed by the Court of Appeals, which had improperly added a balancing requirement to the traditional preliminary injunction test. *Poynter*, 387 S.C. at 587, 694 S.E.2d at 17. As the Supreme Court noted, "[t]he authority cited [by the Court of Appeals] for the balancing requirement . . . did not involve a request for injunctive relief." *Id.*

The proper test long predates *Poynter*. *E.g.*, *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *Roach v. Combined Util. Comm'n of City of Easley*, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct. App. 1986) (collecting older cases). The Governor cites not even a single South Carolina Supreme Court case that included "balancing the equities" as a factor in the preliminary injunction test, whether two hundred years old or two years old.

The policy concerns raised by the Governor do not change the analysis. For example, the separation of powers arguments throughout the merits sections of Appellees' briefs are evidence that the likelihood of success on merits prong of the preliminary injunction test does not ignore the General Assembly's plenary authority. As the Court observed in *Poynter*, "the 'balancing the equities' requirement is neither necessary nor appropriate in a preliminary injunction case, where the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion." 387 S.C. at 587, 694 S.E.2d at 17. Applied here, this reasoning instructs that the standard preliminary injunction analysis accounts for "policy" concerns such as honoring legislative intent by a demonstration of likely success on the merits.

To the extent, however, that the Court is inclined to disregard its precedent and inject uncertainty and instability into the law, *see State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996), the equities clearly cut in Appellants' favor. Every day Appellants go without relief, PPSAT and Dr. Farris are forced to turn away South Carolinians seeking abortions with grave consequences for each patient's bodily autonomy, dignity, and health.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the Circuit Court's decision and issue a preliminary injunction.

Respectfully submitted,

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** Admission pro hac vice granted*

Dated: September 9, 2024

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Sep 09 2024

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-000997

Case No. 2024-CP-40-00762

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

v.

SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Interim Director of the South Carolina Department of Public Health; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; MARCELO HOCHMAN, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in his official capacity as a Member of the South Carolina Board of Medical Examiners; THERESA MILLS-FLOYD, in her official capacity as a Member of the South Carolina Board of Medical Examiners; MARY J. RICHARDSON, in her official capacity as a Member of the South Carolina Board of Medical Examiners; JENNIFER R. ROOT, in her official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SALLIE BETH TODD, in her official capacity as Chairperson of the South Carolina Board of Nursing; SAMUEL H. McNUTT, in his official capacity as Vice Chairperson of the South Carolina Board of Nursing; BRIDGET A. ENOS, in her official capacity as a Member of the South Carolina Board of Nursing; BRIDGET J. HOLDER, in her official capacity as a Member of the South Carolina Board of Nursing; LESLIE M. LYERLY, in her official capacity as a Member of the South Carolina Board of Nursing; MELISSA MAY-ENGEL, in her official capacity as a Member of the South Carolina Board of Nursing; LINDSEY K. MITCHAM, in her official capacity as a Member of the South Carolina Board of Nursing; FRANCES C. PAGETT, in her official capacity as a Member of the South Carolina Board of Nursing; JOHN J. WHITCOMB, in his official capacity as a Member of the South Carolina Board of Nursing; ROBERT J WOLFF, in his official capacity as a Member of the South Carolina Board of Nursing; SCARLETT A. WILSON, in her official capacity as Solicitor

for South Carolina's Ninth Judicial Circuit; and BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's Fifth Judicial Circuit,.....*Appellees*,

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

CERTIFICATE OF SERVICE

I certify that this *Reply Brief of Appellants* was served on counsel of record on September 9, 2024, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

/s/ Kathleen McDaniel
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