No. 2023-000856

The Supreme Court of the State of South Carolina

PLANNED PARENTHOOD SOUTH ATLANTIC, ET AL.,
RESPONDENTS,

v.

STATE OF SOUTH CAROLINA, ET AL.,
APPELLANTS.

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
HON. CLIFTON NEWMAN, CIRCUIT COURT JUDGE

BRIEF OF AMERICAN COLLEGE OF PEDIATRICIANS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The American College of Pediatricians is a national organization of pediatricians and other health care professionals dedicated to the health and well-being of children. Of particular importance to the College is the sanctity of human life from conception to natural death.

STATEMENT OF ISSUES

Whether the South Carolina Constitution provides a right to pre-viability elective abortions.

STATEMENT OF THE CASE

Amicus adopts the Appellants' statement of the case.

INTRODUCTION

The South Carolina Constitution is silent about a right to abortion. Thus, like the United States Constitution, it is neutral on this contentious issue. And "[b]ecause the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring). South Carolinians have spoken through their representatives. Planned Parenthood's demand that its preferences—its belief that pre-viability life has no value—be imposed on the People should be rejected.

The United States Supreme Court tried to impose a judicial vision of abortion-on-demand for nearly 50 years, to disastrous results. It struggled to identify the constitutional basis of such a right, veering from privacy in *Roe v. Wade*, 410 U.S. 113, 154 (1973), to autonomy and mysteries of life in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). It could not decide the parameters of such a right, careening from trimesters in *Roe* to viability in *Casey*. It could not identify why viability mattered but in purely "circular" fashion. *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J., concurring in judgment). It could not provide a workable standard to adjudicate any right to abortion. *Id.* at 2272 (majority op.). It adopted an abortion right that put the United States in the dubious company of a handful of countries hostile to basic human rights, "among them China and North Korea." *Id.* at 2312 (Roberts, C.J.). Its invented abortion right distorted vast swaths of the law,

including "[s]tatutory interpretation, the rules of civil procedure, the standards for appellate review of legislative factfinding, and the First Amendment." *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 451 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part). And its constitutional rule—that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability" (*Casey*, 505 U.S. at 879)—precipitated the deaths of more than 63 million unborn children in America.

This Court has now started down the treacherous path that the U.S. Supreme Court abandoned. Its fractured previous decision invented a right to elective abortion, provided no workable standard to adjudicate this new right, irrationally discounted the State's interest in protecting life, and distorted other legal doctrines—including the rules of civil procedure, the preliminary injunction standard, burdens of proof, statutory interpretation, and severability. The Court should not continue down this path.

Naturally, Planned Parenthood wants this Court to continue to resolve one of the most contentious questions of our time as a matter of constitutional law: whether an unborn child deserves legal protection. And they want this Court to hold that unborn life—at least before some arbitrary point of viability, which is unknowable, circumstance-dependent, and always changing—cannot be protected. They claim that the South Carolina Constitution enshrines their belief that pre-viability life

deserves *no* protection.

Unsurprisingly, Planned Parenthood's extraordinary ideological view has never prevailed in our legislative process. Abortionists will continue pressing that view in the court of public opinion. But this Court should not countenance Planned Parenthood's strained effort to invoke constitutional provisions that have nothing to do with abortion to take away the ability of the People to protect unborn life. The South Carolina Constitution does not impose Planned Parenthood's moral perspective on all South Carolinians. The Court too should be neutral.

Fortunately, upholding South Carolina's law would not require the Court to decide when life begins. The General Assembly determined that unborn life is worthy of legal protection. This legislative determination is consistent with the scientific evidence now available. "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). At five weeks' gestation (just three weeks after conception), the unborn child's heart starts beating. By six weeks, brain waves are detectable. By seven weeks, the child can move and starts to develop sensory receptors. By ten weeks, multiple organs begin to function, and the child has the neural circuitry for spinal reflex, an early response to pain. By twelve weeks, the child can open and close fingers and sense stimulation from the outside world. And medical interventions after fifteen weeks (other than abortion) use

analgesia to prevent suffering. At this point of pregnancy, abortionists must rip the child "piece by piece" from the womb. *Gonzales*, 550 U.S. at 136.

To uphold the Act would not require this Court to consider the implications of this fact; the People have already done so through their elected representatives, and they decided that pre-viability life is worth protecting. This Court's previous decision, by contrast, "impose[d] on the [P]eople a particular theory about when the rights of personhood begin." *Dobbs*, 142 S. Ct. at 2261. The two-Justice plurality of this Court reasoned that the People could not protect a child whose heart is beating because "the fetus's interest has historically been recognized much later than six weeks." *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 215, 882 S.E.2d 770, 785 (2023) (opinion of Hearn, J.) ("*PPSA*"). Apart from being inaccurate, this holding would constrain the People's ability to protect life based on outdated, incorrect views about fetal development. And the Court's decision threatens to substitute the judiciary's views about unborn life for the People's.

As with many controversial issues, the issue of abortion is not decided by the Constitution. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Dobbs*, 142 S. Ct. at 2243 (cleaned up). The People's representatives "can do what [this Court] can't: listen to the community, create fact-specific rules with appropriate exceptions, gather more evidence, and

update their laws if things don't work properly." *Slatery*, 14 F.4th at 462 (Thapar, J., concurring in judgment in part and dissenting in part). This Court should overrule its prior decision and uphold the Act.

ARGUMENT

I. The People's decision to protect unborn life reflects scientific fact.

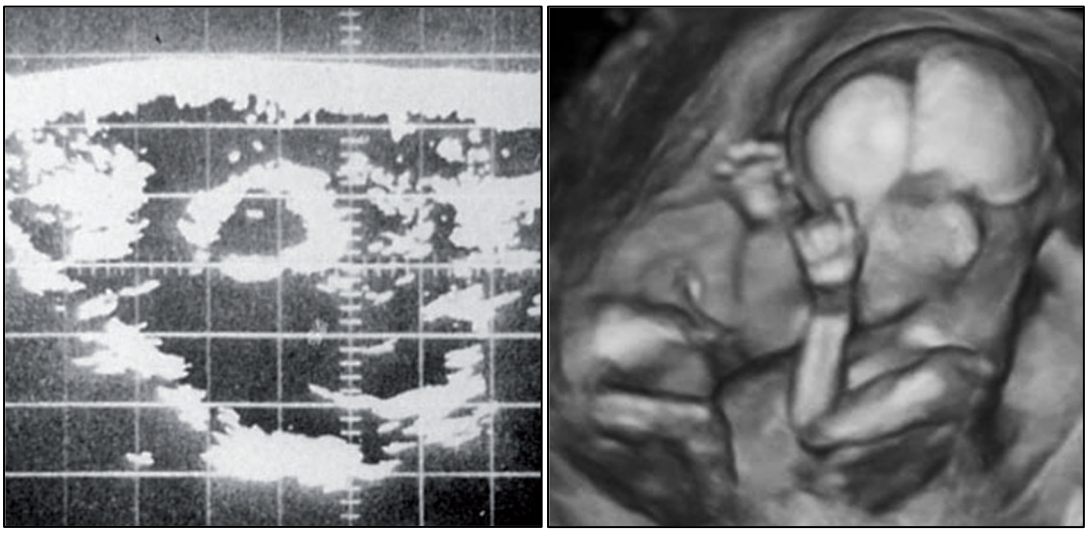
Scientific knowledge both underscores the legitimacy of the General Assembly's decisions here and undermines any argument for a constitutional right to abortion. Medical advancements have produced scientific evidence that makes clear today what the Supreme Court in *Roe* and the supposed "historical[]"[1] understandings relied on two Justices of this Court could not appreciate: the human fetus is a living being from conception and can move, smile, and feel pain in the womb.

When the Court decided *Roe* in 1973, scientific knowledge about fetal development was limited, with fetology only recognized as a new field of science that same year.[2] Indeed, the Court had been told that "in early pregnancy" "embryonic development has scarcely begun." Brief for Appellant 20, *Roe*, 1971 WL 128054. Thus, "[a]s to the question 'when life begins,' the *Roe* majority maintained that 'at that point in the development of man's knowledge,' it was 'not in a position to speculate.'" *Slatery*, 14 F.4th at 450 (Thapar, J.) (quoting *Roe*, 410 U.S. at 159). The

[1] *PPSA*, 438 S.C. at 215, 882 S.E.2d at 785 (opinion of Hearn, J.).
[2] Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* 113 (2011).

Court purported to rely on what it considered to be "the well-known facts of fetal development" to conclude that a pre-viability "fetus, at most, represents only the potentiality of life." *Roe*, 410 U.S. at 156, 162.

Only in the late 1970s—years after *Roe*—did the use of ultrasound machines expand.[3] Unlike the prototypes in limited use in 1973, routine ultrasounds can now provide high-definition four-dimensional images in real time that reveal the fetus to be much more developed than the Court in *Roe* could have known. Reflecting these advances in medical knowledge, ultrasound imagery available at the time of *Roe* looked much different from the imagery available today, as shown by these fifteen-week ultrasounds from 1973 and today[4]:



[3] Malcolm Nicholson & John E.E. Fleming, *Imaging and Imagining the Fetus: The Development of Obstetric Ultrasound* 232 (2013).
[4] Stuart Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, 5 FVV-ObGyn 217 (2013); Kristen J. Gough, *Second Trimester Ultrasound Pictures* (Dec. 5, 2019), https://perma.cc/J2NV-GT6M.

Now we know that "[f]rom fertilization, an embryo (and later, fetus) is alive and possesses its unique DNA."[5] The fusion of the oocyte and the sperm create the zygote "in less than a single second."[6] In a "biological sense," "the embryo or fetus is whole, separate, unique and living" from conception. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc).

During the fifth week, "[t]he cardiovascular system is the first major system to function in the embryo," with the heart and vascular system appearing in the middle of the week.[7] By the end of the fifth week, "blood is circulating and the heart begins to beat on the 21st or 22nd day" after conception.[8] By six weeks, "[t]he embryonic heartbeat can be detected" via transvaginal ultrasound.[9] After detection of a fetal heartbeat—and absent an abortion—the overwhelming majority of unborn children will now survive to birth.[10] Also during the sixth week, the child's nervous

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[5] *Slatery*, 14 F.4th at 450 (Thapar, J.) (citing Enrica Bianchi et al., *Juno Is the Egg Izumo Receptor and Is Essential for Mammalian Fertilization*, 508 Nature 483, 483 (2014)).

[6] Am. Coll. of Pediatricians, *When Human Life Begins* (Mar. 2017), https://perma.cc/Z9W5-UN9T; *see also* Ulyana Vjugina & Janice P. Evans, *New Insights into the Molecular Basis of Mammalian Sperm-Egg Membrane Interactions*, 13 Frontiers Bioscience 462, 462–76 (2008); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective* 5 (2008).

[7] Keith L. Moore et al., *The Developing Human E-Book: Clinically Oriented Embryology* 8945 (Kindle ed. 2020).

[8] *Id.* at 2662.

[9] *Id.* at 2755; *accord* WebArchive, Planned Parenthood, *What Happens in the Second Month of Pregnancy?* (July 25, 2022), https://tinyurl.com/2jvsvh34.

[10] Joe Leigh Simpson, *Low Fetal Loss Rates After Ultrasound Proved-Viability in First Trimester*, 258 J. Am. Med. Ass'n 2555, 2555–57 (1987).

system is developing, with the brain already "patterned" at this early stage.[11] The earliest neurons are generated in the region of the brain responsible for thinking, memory, and other higher functions.[12]

At seven weeks, cutaneous sensory receptors, which permit prenatal pain perception, begin to develop.[13] The unborn child also starts to move.[14] During the seventh week, "the growth of the head exceeds that of other regions" largely because of "the rapid development of the brain" and facial features.[15] At eight weeks, essential organs and systems have started to form, including the child's kidneys, liver, and lungs.[16] At nine weeks, the child's ears, eyes, teeth, and external genitalia are forming.[17] At ten weeks, vital organs begin to function, and the child's hair and nails begin to form.[18]

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[11] Thomas W. Sadler, *Langman's Medical Embryology* 72 (14th ed. 2019); *see generally id.* at 59–95.
[12] *See, e.g.*, Irina Bystron et al., *Tangential Networks of Precocious Neurons and Early Axonal Outgrowth in the Embryonic Human Forebrain*, 25 J. Neuroscience 2781, 2788 (2005)
[13] Kanwaljeet S. Anand & Paul R. Hickey, Special Article, *Pain and Its Effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321, 1322 (1987).
[14] Alessandra Pionetelli, *Development of Normal Fetal Movements: The First 25 Weeks of Gestation* 98, 110 (2010).
[15] Keith L. Moore et al., *The Developing Human: Clinically Oriented Embryology* 65–84.e1 (11th ed. 2020).
[16] *See* Sadler, *supra* note 11, at 72–95.
[17] *See id.*
[18] *See id.* at 106–127; Moore et al., *supra* note 15, at 65–84.e1; Johns Hopkins Med., *The First Trimester*, https://perma.cc/8N6H-M6CN.

Meanwhile, the peripheral pain receptors begin forming around seven weeks[19] and "the first evidence for an intact nociceptive system in the fetus emerges at about 8 weeks . . . [when] touching the perioral region will result in movement away."[20] Nociception—or the nervous system's processing of noxious stimuli—"causes physiologic stress, which in turn causes increases in catecholamines, cortisol and other stress hormones."[21] Starting around ten weeks, the earliest connections between neurons constituting the subcortical-frontal pathways—the circuitry of the brain that is involved in a wide range of psychological and emotional experiences, including pain perception—are established.[22]

At the time of *Roe*, "the medical consensus was that babies do not feel pain."[23] Only during the late 1980s and early 1990s did any of the initial scientific evidence for prenatal pain begin to emerge.[24] Today, the "evidence for the subconscious incorporation of pain into neurological development and plasticity is

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[19] Linda A. Hatfield, *Neonatal pain: What's age got to do with it?*, Surgical Neurology International S479, S481 (2014).
[20] Stuart W. G. Derbyshire, *Foetal Pain?*, Best Practice & Research Clincal Obstetrics and Gynaecology 647 (2010).
[21] Curtis L. Lowery et al., *Neurodevelopmental Changes of Fetal Pain*, 31 Seminars Perinatology 275, 275 (2007).
[22] Lana Vasung et al., *Development of Axonal Pathways in the Human Fetal Fronto-Limbic Brain: Histochemical Characterization and Diffusion Tensor Imaging*, 217 J. Anatomy 400, 400–03 (2010).
[23] Am. Coll. of Pediatricians, *Fetal Pain: What is the Scientific Evidence?* (Jan. 2021), https://perma.cc/JM3T-XQV8.
[24] *Id.*

incontrovertible."[25] Updated reviews of prenatal pain consistently acknowledge: by ten to twelve weeks, a fetus develops neural circuitry capable of detecting and responding to pain.[26] Even more sophisticated reactions occur as the unborn child develops further.[27] And new developments—including videos of reactions—demonstrate behavioral evidence strengthening the conclusion that fetuses are capable of experiencing pain in the womb.[28]

As early as ten or eleven weeks, the fetus shows awareness of his or her environment.[29] Studies of twins, for example, show that by ten to eleven weeks, twins engage in "inter-twin contact."[30] The fetus also begins to perform "breathing movements" that "increase progressively" as he or she develops in the womb.[31]

At eleven weeks, the unborn child's diaphragm is developing.[32] The child has

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[25] Lowery et al., *supra* note 21, at 275.
[26] *See, e.g.*, Carlo V. Bellieni & Giuseppe Buonocore, *Is Fetal Pain a Real Evidence?*, 25 J. Maternal-Fetal & Neonatal Med. 1203, 1203–08 (2012); Richard Rokyta, *Fetal Pain*, 29 Neuroendocrinology Letters 807, 807–14 (2008).
[27] *See* Royal Coll. of Obstetricians & Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice* 5, 7 (Mar. 2010), https://perma.cc/4V84-TEMC; Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. Am. Med. Ass'n 947, 948–49 (2005).
[28] *See* Lisandra Stein Bernardes et al., *Acute Pain Facial Expressions in 23-Week Fetus*, *Ultrasound Obstetrics & Gynecology* (June 2021), https://perma.cc/V8BU-PZK4. A video accompanying this article showing facial reactions can be accessed at https://tinyurl.com/5yyuhvw4.
[29] Umberto Castiello et al., *Wired to Be Social: The Ontogeny of Human Interaction*, 5 PLOS One, Oct. 2017, e13199, at 1, 9.
[30] *Id.*
[31] Pionetelli, *supra* note 14, at 40.
[32] *Id.* at 31.

hands and feet, ears, open nasal passages on the tip of the nose, and a tongue.[33] "[A]n unborn child visibly takes on the human form in all relevant aspects by 12 weeks' gestation." *Slatery*, 14 F.4th at 450 (Thapar, J) (cleaned up). Moreover, by twelve weeks, the parts of the central nervous system leading from peripheral nerves to the brain are sufficiently connected to permit the peripheral pain receptors to detect painful stimuli.[34] Thus, the unborn "baby develops sensitivity to external stimuli and to pain much earlier than was believed" when *Roe* and *Casey* were decided. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (cleaned up).

Unborn Child at Thirteen Weeks[35]

[33] Moore et al., *supra* note 15, 1–9.e1; Prachi Jain & Manu Rathee, *Embryology, Tongue* (last updated Aug. 11, 2020), https://perma.cc/FCP4-7788.
[34] Slobodan Sekulic et al., *Appearance of Fetal Pain Could Be Associated with Maturation of the Mesodiencephalic Structures*, 9 J. Pain Rsch. 1031, 1034–35 (2016).
[35] Moore et al., *supra* note 15, at 85–98.e1.

At thirteen weeks, the bone structure is forming in the child's arms and legs,[36] and the intestines are in place within his or her abdomen.[37] By fifteen weeks, "the fetus is extremely sensitive to painful stimuli," and physicians (other than abortionists) take this fact "into account when performing invasive medical procedures on the fetus."[38] Even more neural circuitry for pain detection and transmission develops between sixteen and twenty weeks, including spinothalamic fibers, which are responsible for the transmission of pain from the periphery to the thalamus.[39] By eighteen weeks, painful stimuli will cause the baby *in utero* to exhibit stress-induced hormonal responses.[40] Studies show that "the fetus reacts to intrahepatic vein needling with vigorous body and breathing movements."[41] The fetus also reacts to such stimuli with "hormonal stress responses" "independent of those of the mother."[42]

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[36] Mayo Clinic, *Pregnancy Week by Week: Fetal Development: The 2nd Trimester* (June 30, 2020), https://perma.cc/M7PA-6T9A.
[37] Mayo Clinic, *Pregnancy Week by Week: Fetal Development: The 1st Trimester* (June 30, 2020), https://perma.cc/D7JW-H6YW.
[38] Sekulic et al., *supra* note 34, at 1036.
[39] Ritu Gupta et al., *Fetal Surgery and Anesthetic Implications*, 8 Continuing Educ. Anesthesia, Critical Care & Pain 71, 74 (2008).
[40] Stuart W. G. Derbyshire, *Can Fetuses Feel Pain?*, 332 Brit. Med. J. 909, 910 (2006).
[41] Xenophon Giannakoulopoulos et al., *Fetal Plasma Cortisol and b-endorphin Response to Intrauterine Needling*, 344 Lancet 77, 77–78 (1994).
[42] Rachel Gitau et al., *Fetal Hypothalamic-Pituitary-Adrenal Stress Responses to Invasive Procedures are Independent of Maternal Responses*, 86 J. Clinical Endocrinology & Metabolism 104, 104 (2001).

These recent discoveries have led scientists to conclude that "the human fetus can feel pain when it undergoes surgical interventions and direct analgesia must be provided to it."[43] For this reason, updated consensus among anesthesiologists is to "administer adequate fetal anesthesia in all invasive maternal-fetal procedures to inhibit the humoral stress response, decrease fetal movement, and blunt any perception of pain."[44] As one group of scholars explains, "the fetus is extremely sensitive to painful stimuli," and "[i]t is necessary to apply adequate analgesia to prevent the suffering of the fetus."[45] Other scholars agree with this assessment.[46]

Based on outdated evidence, some have argued that fetal perception of pain requires connections to the cerebral cortex and the need for conscious awareness.[47] Neither is true. From an anatomic standpoint, substantial evidence demonstrates that *sub*cortical structures are sufficient for pain perception.[48] Proving the point are adults with cortical injuries who can still feel pain[49] and infants whose brains are

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[43] Carlo V. Bellieni, *Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress*, 89 Pediatrics Rsch. 1612, 1612 (2021).
[44] Debnath Chatterjee, *Anesthesia for Maternal-Fetal Interventions*, 132 Anesthesia & Analgesia 1164, 1167 (2021); Sekulic et al., *supra* note 34, at 1036.
[45] Sekulic et al., *supra* note 34, at 1036.
[46] *See, e.g.*, Carlo V. Bellieni et al., *Use of Fetal Analgesia During Prenatal Surgery*, 26 J. Maternal-Fetal Neonatal Med. 90, 94 (2013).
[47] Lee, *supra* note 27.
[48] *See* Stuart W. G. Derbyshire et al., *Reconsidering Fetal Pain*, 46 J. Med. Ethics 3 (2020); Lowery et al., *supra* note 21; Roland Brusseau, *Developmental Perspectives: Is the Fetus Conscious?*, 46 Int'l Anesthesiology Clinics 11 (2008); Sampsa Vanhatalo, *Fetal Pain?*, 22 Brain & Development 145 (2000).
[49] Brusseau, *supra* note 48.

abnormal or did not form (*e.g.*, anencephaly or hydrocephalus), yet they maintain the ability react to painful stimulation.[50]

Conscious awareness as shown by the ability to verbally describe one's pain is no longer part of the updated and often quoted International Association for the Study of Pain definition of pain.[51] Adults in a coma cannot describe or complain about pain, but no one denies that painful procedures affect them. A fetus also cannot describe pain, but in response to painful stimulation they have measurable increases in their stress hormones[52] and documented facial changes.[53] Both before and after birth, babies much younger than 24 weeks are capable of an unreflective, yet very real response to pain.[54]

Thus, in every other medical practice at this stage of fetal development, physicians recognize the need to protect the unborn child in the womb and prioritize the child's health, even when making treatment plans for the child's mother.[55] By contrast, abortionists use no analgesia as they "dismember the fetus" "limb from limb"

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[50] Sekulic et al., *supra* note 34.
[51] Srinivasa N. Raja et al., *The Revised International Association for the Study of Pain Definition of Pain*, 161 Pain 1976 (2020).
[52] Gitau et al., *supra* note 42.
[53] Bernardes et al., *supra* note 28.
[54] Derbyshire et al., *supra* note 48.
[55] *See, e.g.*, Ryan M. Antiel et al., *Weighing the Social and Ethical Considerations of Maternal-Fetal Surgery*, 140 Pediatrics, Dec. 2017, e20170608, at 1, 3–4.

until the fetus "bleeds to death." *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting).

At fifteen weeks, unborn children kick their legs and move their arms.[56] And by sixteen weeks, the child's eyes are moving side-to-side, and they can perceive light.[57] Between seventeen and eighteen weeks, the unborn child's fingers and toes each develop their own unique prints.[58] By eighteen weeks, the child can hear his or her mother's voice, and the child can yawn.[59] The nervous system is also developing the circuitry for all five senses.

At twenty weeks, the sex-specific reproductive organs have developed enough to permit identification of the child's sex by ultrasound, and girls have eggs in their ovaries.[60] Around this time, "facial expressions begin to appear consistently, including 'negative emotions.'"[61] These movements "require the involvement and coordination of more than one muscle."[62]

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[56] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 15*, https://perma.cc/62JP-CXL3.
[57] Mayo Clinic, *supra* note 36.
[58] Johns Hopkins Med., *The Second Trimester*, https://perma.cc/M7WA-6PC5.
[59] *Id.*; *see also* Cleveland Clinic, *Fetal Development: Stages of Growth* (last updated Apr. 16, 2020), https://perma.cc/YG92-KRH4.
[60] *See, e.g.*, Kavita Narang et al., *Developmental Genetics of the Female Reproductive Tract*, *in Human Reproductive and Prenatal Genetics* 129, 132, 135 (Peter C. K. Leung & Jie Qiao eds., 2019).
[61] Pionetelli, *supra* note 14, at 80.
[62] *Id.*

At twenty-one weeks, the physical and neurological development of the unborn child is sufficiently mature that, in some cases, the child can survive childbirth.[63] This is far earlier than was true in 1973, 1989, or 1992. *See Casey*, 505 U.S. at 860. At twenty-two weeks, the child's senses are improving.[64] The child's ability to detect external light can be observed.

According to a 2015 publication, between 23% and 60% of infants born at twenty-two weeks who receive active hospital treatment survive,[65] many without immediate or long-term neurologic impairment.[66] A 2019 publication showed that survival at some institutions increased to 78% at 22–23 weeks gestation, with 64% having no or mild neurodevelopmental impairment at 18 to 22 months follow-up.[67]

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[63] *See* Kaashif A. Ahmad et al., *Two-Year Neurodevelopmental Outcome of an Infant Born at 21 Weeks' 4 Days' Gestation*, 140 Pediatrics, Dec. 2017, e20170103, at 1–2, https://perma.cc/D9UR-KHDU.

[64] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 22*, https://perma.cc/7VR8-2LFX.

[65] Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 New Eng. J. Med. 1801, 1804 (2015); Katrin Mehler et al., *Survival Among Infants Born at 22 or 23 Weeks' Gestation Following Active Prenatal and Postnatal Care*, 170 J. Am. Med. Ass'n Pediatrics 671, 675 (2016).

[66] *See, e.g.*, Noelle Younge et al., *Survival and Neurodevelopmental Outcomes Among Periviable Infants*, 376 New Eng. J. Med. 617, 622, 627 (2017) (describing study showing "an increase in the rate of survival without neurodevelopmental impairment from 2000 through 2011"); Antti Holsti et al., *Two-Thirds of Adolescents who Received Active Perinatal Care After Extremely Preterm Birth Had Mild or No Disabilities*, 105 Acta Paediatrica 1288, 1296 (2016) (similar).

[67] Patricia L. Watkins et al., *Outcomes at 18 to 22 Months of Corrected Age for Infants Born at 22 to 25 Weeks of Gestation in a Center Practicing Active Management*, 217 J. Pediatrics 52 (2019).

In a large study that combined several databases, it was shown that "[t]he birth hospital contributed equally as much to prediction of survival as gestational age."[68] Thus, imposing particular values on "viability" "create[s] facts": "A policy that limits treatment for infants born at 24 weeks' gestation will lead to [comparatively] low survival rates for those infants. Those [comparatively] low survival rates will seem to justify and validate the policy, even if the true causal relationship runs in the other direction."[69]

At twenty-three weeks, the child's skin tone changes color as his or her capillaries form and blood fills them under the skin.[70] At twenty-four weeks, the baby's face is nearly fully formed, with eyelashes, eyebrows, and hair clearly visible. The unborn child can indisputably feel substantial pain at this point.

II. Barring the People from protecting unborn life would perpetuate a departure from the judicial role under the South Carolina Constitution.

As shown above, the General Assembly's judgment that pre-viability life deserves legal protection is amply supported by scientific fact. The question, then, is whether anything in the South Carolina Constitution forbids this conclusion and *mandates* that the State permit the unlimited taking of pre-viability life. It does not.

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[68] Matthew A. Rysavy et al., *Assessment of an Updated Neonatal Research Network Extremely Preterm Birth Outcome Model in the Vermont Oxford Network*, 174 JAMA Pediatrics 1, 1 (2020).
[69] John D. Lantos & William Meadow, *Variation in the Treatment of Infants Born at the Borderline of Viability*, 123 Pediatrics 1588, 1589 (2009).
[70] Cleveland Clinic, *supra* note 59.

As Appellants show, the long history of abortion restrictions in South Carolina and the correct understanding of the privacy clause contradict a supposed right to elective abortion. No matter what the privacy clause entails, however, the previous opinions of this Court wrongly imposed outdated views about unborn life.

Each opinion invalidating South Carolina's prior law was founded at some level on a substitution of judicial views about unborn life for the informed view of the People. The plurality opinion for two Justices invoked several judicial precedents to argue that "because the fetus's interest has historically been recognized much later than six weeks, it cannot displace the pregnant woman's interest at this early stage." *PPSA*, 438 S.C. at 215, 882 S.E.2d at 785 (opinion of Hearn, J.). The plurality relied on "quickening," making the sweeping claim "that in South Carolina, and indeed in all common law jurisdictions," "the fetus's own interest" does not "emerge[]" until "quickening." *Id.*, 438 S.C. at 213, 882 S.E.2d at 783.

First, the plurality's historical account is incorrect. "[T]he common law did not condone even prequickening abortions." *Dobbs*, 142 S. Ct. at 2250. And South Carolina law has long protected unborn life, before and after quickening. Respondents have not disputed that the very first codification of abortion as a crime in South Carolina made abortion before quickening a misdemeanor. *See* 1883 S.C. Acts No. 354. On the plurality's own explanation of the privacy clause—that it "was not created out of whole cloth in 1971, but instead was recognized as having always

existed" (*PPSA*, 438 S.C. at 199–200, 882 S.E.2d at 776 (cleaned up))—this long history of prohibiting pre-quickening abortions precludes reading the privacy clause to guarantee a right to such abortions. The plurality also ignored that the reason for the "more severe" punishment for postquickening abortions was likely an evidentiary one—medical knowledge and technology then was not as advanced. *Dobbs*, 142 S. Ct. at 2251–53.

More fundamentally, the plurality made no attempt to explain why "quickening"—"the first felt movement of the fetus in the womb," *id.* at 2249—makes sense either as a constitutional line or as a scientific line for when an unborn boy or girl has value. Why would a mother's unique ability to detect her child's movement, or a child's likelihood of moving in certain ways at a particular time, dictate the child's worth? One study found that boys tend to kick more in the womb[71]; why would the South Carolina Constitution permit greater protection to boys than girls via the quickening rule? The plurality ventured no explanations. Instead, it tied the People's ability to protect life to an incorrect understanding of an antiquated evidentiary rule. But in the plurality's words, when "declaring whether a legislative act is constitutional," this Court should not "blind[] [itself] to everything that has transpired."

[71] C. Almli, *Human fetal and neonatal movement patterns*, 38 Developmental Psychobiology 252 (2001).

PPSA, 438 S.C. at 204, 882 S.E.2d at 779. The Act is consistent with what we now know about early fetal development.

Next, the opinion concurring in the judgment claimed that because the State has not adopted separate "personhood" bills, "there is no legislative policy determination that human life—'personhood'—begins at conception, and there is no such State interest that justifies enacting the six-week bill." *Id.*, 438 S.C. at 273, 882 S.E.2d at 816 (opinion of Few, J.). Though the opinion acknowledged that the State still has an interest in "protecting the potentiality of human life" after a heartbeat is detected, it insisted that this interest is no longer "absolute" and "necessarily contemplate[s] countervailing interests, such as a woman's right to privacy." *Id.*, 438 S.C. at 273–74, 882 S.E.2d at 816. *Then*, the opinion purported to "balance[]" various interests. *Id.*, 438 S.C. at 276, 882 S.E.2d at 818. But, the opinion says, "if the General Assembly were to make the policy determination that human life begins at conception—that a newly-conceived fetus is in fact a person entitled to all the rights due to persons already born—then the hypothetical balancing of that compelling interest against the privacy interests implicated by a total ban on abortion may come out in favor of the State's action." *Id.*, 438 S.C. at 277, 882 S.E.2d at 818.

The opinion's logic is difficult to grasp. Put aside that the General Assembly in fact made the "legislative policy determination that human life" "begins at conception." *Id.*, 438 S.C. at 273, 882 S.E.2d at 816; *see* S.B. 1, § 3 (defining "unborn

child" as "an individual organism of the species homo sapiens from fertilization until live birth"); *see also* S.B. 474, § 2 (from conception). Put aside too the lack of any evidence suggesting that, by adopting the privacy clause, the People thought that they were giving the judiciary *carte blanche* to write "balanced" public policy in this State: that would be a clause "that ate the rule of law." *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting). Ignore the impossibility of objectively balancing in any judicially administrable way a "fair chance to get an abortion" with an unborn life. Finally, put aside the opinion's apparent conclusion that restrictions on abortions after a heartbeat is detected are more "unreasonable" than an outright ban on abortion with no exceptions. Apparently, no state or country agrees with this policy balancing: few (if any) civilized places in the world have complete from-conception abortion restrictions with no exceptions, or complete abortion freedom until the moment of birth. *See Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J., concurring in the judgment).

Even on its own terms, the concurrence in the judgment does not explain why or when the State would have an "absolute" interest in protecting life such that judges need not "contemplate countervailing interests." *PPSA*, 438 S.C. at 274, 882 S.E.2d at 816. The opinion asserted that the State cannot have an "absolute" interest at the child's heartbeat. Why not? If a State can have an "absolute" interest at conception, why can it not have an "absolute" interest at the child's heartbeat? If a State

can have an "absolute" interest at quickening, viability, or birth, why can it not have an "absolute" interest at the child's heartbeat? Given that the absence of a heartbeat is used to determine death, *e.g.*, S.C. Code Ann. § 44-43-460, why cannot its presence be a marker of life? If a State restricted abortion starting at conception but had the typical exceptions, would the opinion deem the interest in fetal life insufficiently "absolute"? Given that essentially all civilized places in the world regulate abortions only to *some* extent, did the opinion think that all existing regimes are "unreasonable"? The opinion contrasted the law with the State's criminalization of "child abuse," *PPSA*, 438 S.C. at 277, 882 S.E.2d at 818, but that crime is not punishable by the death penalty; is the State's interest therefore not "absolute"? Is the State's interest in protecting born life insufficiently "absolute" because it has gradations of murder laws, and sometimes *permits* the killing of another? Does the opinion think it irrational for the People to view unborn life as increasingly worthy of legal protection as the life develops (a rather common position[72])? The opinion answers none of these questions, improperly balancing away the State's compelling interest in

[72] Not only did the lead opinion seem to take this position (as well as *Roe* and the laws of practically all states and countries), but many others have taken it too. *E.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring) ("I should think it obvious that the State's interest in the protection of an embryo . . . increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part) (same).

protecting life and the General Assembly's evidence-based determination that children with a beating heart deserve legal protection.

Last, the concurring opinion dismissed the unborn child as "an amorphous collection of cells" and the heartbeat as "a flutter of electrical impulses." *PPSA*, 438 S.C. at 218, 222, 882 S.E.2d at 786, 788 (Beatty, C.J., concurring). The concurrence declared the early heartbeat not "a true heartbeat." *Id.*, 438 S.C. at 222, 882 S.E.2d at 788. Finding disagreement over the "theoretical and religious question" on when life becomes worth protecting, the concurring opinion therefore announced its own answer: "It is unreasonable for the state to assert that it has a compelling interest in the protection of a quarter-inch-long amorphous collection of cells." *Id.*, 438 S.C. at 224, 238, 882 S.E.2d at 790, 797; *see id.*, 438 S.C. at 217–18, 882 S.E.2d at 786 ("I take judicial notice of the fact that at six weeks of pregnancy there is no fetus, baby, or child").

But that "amorphous collection of cells" is—as even Respondents do not dispute—a living, unique human being. And this Court has no objective metric by which to hold that the People *may not* protect the rapidly-growing little boy or girl. The concurrence did not identify when the State's interest in protecting life becomes compelling, merely noting that *Roe* held that "after viability a state has an interest in preserving fetal life possible outside of the womb," and that "quickening has been a historical basis at which the state may ban or criminalize abortion procedures." *Id.*,

438 S.C. at 237, 882 S.E.2d at 796. As shown, that is an inaccurate understanding of quickening, and it does not explain why that line would be constitutionally required. And the concurrence made no effort to defend the viability line as a constitutional rule. The "circular assertion" of the viability rule "is and always has been completely unreasoned." *Dobbs*, 142 S. Ct. at 2311–12 (Roberts, C.J.). Viability is an irredeemably arbitrary line for courts to decide that life is worth protecting. *Id.* at 2269–70 (majority opinion). Viability depends on the technology available, the quality of medical care, and the health of the fetus and his or her mother. *Id.* A viability rule might mean that a 23-week-old boy is "worthy" of protecting but a 23-week-old girl is not, just because boys develop more quickly in utero.[73] That is not a judicially neutral line.

As for Planned Parenthood's recently-invented[74] canard that the early heartbeat is not "real," Johns Hopkins Medicine has explained that by six weeks, "[t]he heart is beating."[75] Of course the heart is not fully formed at this point, but the significance of a heartbeat in indicating life has never depended on a perfectly-formed,

[73] Johan G. Eriksson et al., *Boys Live Dangerously in the Womb*, 22 Am. J. Human Biology 330, 330 (2010).
[74] *See* WebArchive, *supra* note 9.
[75] *The First Trimester*, *supra* note 18.

complete human heart. In fact, insights enabled by up-to-date imaging demonstrate the early valveless heart's ability to act as a pump.[76]

Even after the heart has essentially developed—by around nine weeks—Doppler monitors continue to produce sounds based on cardiac motion, not "the actual sound of the fetus's heart beating."[77] But it is still a heartbeat, no matter how Planned Parenthood and the American College of Obstetricians and Gynecologists try to obscure that reality. Tellingly, Planned Parenthood does not contest that the law applies based on the presence of "cardiac activity," S.B. 474, § 2, or suggest that the cardiac movement captured by ultrasound is *not* "cardiac activity." Further, studies "suggest that postnatal human hearts grow by both hypertrophy and cardiomyocyte proliferation in the first two decades after birth"[78]; surely this fact could not justify a constitutional protection for ending the life of two-year-olds. And again, the fundamental point is that the People have already considered the evidence, and this Court has no authority to substitute its view for theirs.

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[76] Shang Wang & Irina V. Larina, *Following the Beat: Imaging the Valveless Pumping Function in the Early Embryonic Heart*, 9 J. of Cardiovascular Dev. & Disease 267 (2022).

[77] Jessica McDonald, *When Are Heartbeats Audible During Pregnancy?*, FactCheck.org (July 26, 2019), https://www.factcheck.org/2019/07/when-are-heartbeats-audible-during-pregnancy/.

[78] Nivedhitha Velayutham et al., *Postnatal Cardiac Development and Regenerative Potential in Large Mammals*, 40 Pediatric Cardiology 1345 (2019).

In sum, even as this Court's previous opinions purported to update the Constitution enacted by the People with a novel conception of privacy as encompassing ending another's life, they denied the People the right to take the lessons of modern science and medicine and act through their representatives to protect living human beings in the womb. That doubly inverts our constitutional scheme of government, which assigns responsibility for updating our law to the political branches. *See State v. Moorer*, 152 S.C. 455, 530–31, 150 S.E. 269, 295 (1929) (explaining that ours is "a government of laws, not of men").

Judges are entitled to their personal opinions about when life is worthy of protection. For instance, in an interview apparently given while petitions for rehearing were pending in the previous case, one Justice of this Court said, "I am not an abortion-on-demand person," "[b]ut I do think there should be *reasonable* restrictions."[79] But nothing in the Constitution gives judges a right to impose their personal views on the People under the guise of second-guessing the State's compelling interest in protecting living, unique human beings. As shown, science cannot account for the views expressed in this Court's prior decision. Science teaches that the fetus is a unique human from the moment of conception and capable of pain in the early stages of pregnancy. There is no neutral way to balance away the value of

[79] Lisa Rab, *'I Feel Like We're Backing Up, Instead of Moving Forward*,*'* Politico Magazine (Feb. 14, 2023), https://www.politico.com/news/magazine/2023/02/14/supreme-court-abortion-south-carolina-00081526 (emphasis added).

this unborn life. Such an effort constitutes a sheer imposition of Planned Parenthood's beliefs on the People.

CONCLUSION

Following *PPSA* would not only perpetuate a grievous departure from the judiciary's proper role in our system of government, but it would also contribute to the demise of countless unborn children. As shown, those children are unique human beings who rapidly develop, and the People's decision to protect them accords with science. This Court should uphold the Act. *See Casey*, 505 U.S. at 1002 (Scalia, J., concurring in the judgment in part and dissenting in part) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCAR, I, Christopher E. Mills, an attorney, certify that the foregoing complies with the length and formatting requirements of Rules 211 and 267, SCAR.

Dated: June 13, 2023

s/ Christopher Mills
Christopher E. Mills