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 Clifton Newman, Circuit Court Judge

Appellate Case No. 2023-000896

Case No. 2023-CP-40-02745

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; GREENVILLE WOMEN'S CLINIC, on behalf of itself, its patients, and its physicians and staff; and TERRY L. BUFFKIN, M.D., on behalf of himself and his patients, ... Respondents,

v.

STATE OF SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; STEPHEN I. SCHABEL, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; RONALD JANUCHOWSKI, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; DION FRANGA, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in his official capacity as a Member of the South Carolina Board of Medical Examiners; THERESA MILLS-FLOYD, in her official capacity as a Member of the South Carolina Board of Medical Examiners; JENNIFER R. ROOT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SAMUEL H. MCNUTT, in his official capacity as Chairperson of the South Carolina Board of Nursing; SALLIE BETH TODD, in her official capacity as a Member of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as a Member of the South Carolina Board of Nursing; JONELLA DAVIS, in her official capacity as a Member of the South Carolina Board of Nursing; KELLI GARBER, in her official capacity as a Member of the South Carolina Board of Nursing; LINDSEY K. MITCHAM, in her official capacity as a Member of the South Carolina Board of Nursing; REBECCA MORRISON, in her official capacity as a Member of

the South Carolina Board of Nursing; KAY SWISHER, in her official capacity as a Member of the South Carolina Board of Nursing; ROBERT J. WOLFF, in his official capacity as a Member of the South Carolina Board of Nursing; SCARLETT A. WILSON, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and WILLIAM WALTER WILKINS III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit, ... Defendants,

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; G. MURRELL SMITH, JR., in his official capacity as Speaker of the South Carolina House of Representatives; THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate, ...Intervenor–Defendants,

Of whom HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; G. MURRELL SMITH, JR., in his official capacity as Speaker of the South Carolina House of Representatives; THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate; STATE OF SOUTH CAROLINA; and ALAN WILSON, in his official capacity as Attorney General of South Carolina, are the ..... Appellants.

BRIEF OF GOVERNOR McMASTER

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INTRODUCTION

In *Planned Parenthood South Atlantic v. State* ("*PPSA I*"), the "majority position" of this Court was that "the article I, section 10, 'unreasonable invasions of privacy' provision does not encompass a 'right to abortion.'" 438 S.C. 188, 287, 882 S.E.2d 770, 823 (2023) (Few, J., concurring in the judgment). Nevertheless, the Court—in three separate opinions and over two dissents—concluded that the Fetal Heartbeat and Protection from Abortion Act of 2021, 2021 S.C. Acts No. 1 ("2021 Act"), was unconstitutional. As the narrowest opinion, Justice Few's concurrence was the controlling opinion under the *Marks* rule.

In response to that opinion, the General Assembly carefully crafted new abortion legislation. *See* 2023 S.C. Acts No. 70 ("2023 Act"); *see also Bowman v. State*, 422 S.C. 19, 37, 809 S.E.2d 232, 242 (2018) (recognizing the General Assembly may enact legislation in response to judicial decisions). The 2023 Act rectifies each of the three specific issues that Justice Few found with the 2021 Act. *One*, state law no longer contains any contradictions about when abortion is permitted, as the 2023 Act repealed the *Roe* trimester framework. *Two*, the 2023 Act makes clear

that the State has a compelling interest from the moment of conception in protecting the life of the unborn child. *Three*, unlike the 2021 Act, the 2023 Act does not include "informed choice" as a legislative finding. And to the extent article I, section 10 requires any "informed choice" analysis, the history of abortion regulation in South Carolina and the adoption of article I, section 10 make clear that the 2023 Act provides all that might be required. Even if that history is not sufficient, Planned Parenthood's own website leaves no doubt that a woman "*can* know" she is pregnant before a fetal heartbeat can be heard. *PPSA I*, 438 S.C. at 278, 882 S.E.2d at 819 (emphasis added).

If somehow the Court does not find the 2023 Act distinguishable from the 2021 Act and concludes that *PPSA I* should be "considered as precedent[]" despite lacking a rationale to which a majority of the Court subscribed, *Moseley v. Am. Nat. Ins. Co.*, 167 S.C. 112, 166 S.E. 94, 96 (1932), the Court should overrule *PPSA I*. In overruling *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court observed that "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). Respectfully, those criticisms apply with equal force to *PPSA I*.

As for the reasoning, *PPSA I* suffers from multiple major flaws. One is that, to the extent Justice Hearn's Lead Opinion has any precedential value, that opinion essentially threw out two centuries of precedent for how to interpret the South Carolina Constitution. Instead of looking to the robust historical record to determine how the framers and people understood article I, section 10 at the time it was adopted, the Lead Opinion manufactured a path to a constitutional right to abortion by putting its own gloss on constitutional terms. *Compare State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014) (the Constitution is "construed in light of the intent of its framers and the people who adopted it"), *with PPSA I*, 438 S.C. at 204, 882 S.E.2d at 779 (Lead Opinion)

("We cannot relegate our role of declaring whether a legislative act is constitutional by blinding ourselves to everything that has transpired since the amendment was adopted."). This unrestrained approach to constitutional interpretation is not only at odds with longstanding South Carolina law, but it would also transmogrify the Court into the "superlegislature" the Court has disclaimed being. *Richland Cnty. Sch. Dist. 2 v. Lucas*, 434 S.C. 299, 306, 862 S.E.2d 920, 924 (2021) (per curiam).

A second is that Justice Few's Controlling Opinion misapprehended the State's history of abortion regulation by insisting South Carolina has had a "longstanding statutory 'opportunity' for abortion." 438 S.C. at 287, 882 S.E.2d at 824 (Controlling Opinion). When article I, section 10 was enacted, abortion was prohibited at any stage of pregnancy, unless an exception for maternal health, rape, incest, or fatal fetal anomaly applied. *See* 1970 S.C. Acts No. 821. This Court's decision in *State v. Steadman* ("*Steadman I*") leaves no doubt that abortion was virtually always a crime in South Carolina before *Roe*: All that varied was whether it was a felony or a misdemeanor. 214 S.C. 1, 8–9, 51 S.E.2d 91, 93–94 (1948). The only time South Carolina law has provided some general "opportunity" for abortion was during the half century that the United States Supreme Court had "arrogated th[e] authority" to force the State to provide such an opportunity, *Dobbs*, 142 S. Ct. at 2284, all the while South Carolina still sought ways to protect unborn life. The State's compliance with the Supreme Court's since-repudiated conclusion in *Roe* cannot count against the State, much less convert a statutory provision into a constitutional right or control the meaning of the preexisting constitutional language in article I, section 10.

And a third is that by failing to provide any workable legal rule for the scope of article I, section 10, *PPSA I*'s result opened Pandora's Box to previously unthinkable, yet now seemingly indistinguishable "privacy" claims on subjects like physician-assisted suicide, prostitution, drug use, and bigamy. By treating article I, section 10 as encompassing "all forms of privacy" but not

offering any definition for what "privacy" is, the Controlling Opinion provides minimal guidance for future cases involving these other issues. *PPSA I*, 438 S.C. at 259, 882 S.E.2d at 808; *cf. id.* at 195, 882 S.E.2d at 774 (Lead Opinion) (offering no guidance by claiming abortion is protected because it "rests upon the utmost personal and private considerations imaginable").

Turning to the consequences of *PPSA I*, two of them are particularly severe. The first is the harm to our structure of government. The General Assembly enjoys "plenary legislative power, limited only by the constitutions, State and Federal." *Pinckney v. Peeler*, 434 S.C. 272, 285, 862 S.E.2d 906, 913 (2021). The federal "Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." *Dobbs*, 142 S. Ct. at 2284. And for all the express rights the State Constitution guarantees,[1] this social compact is silent on abortion. By judicially imposing such a constitutional right (particularly without any consensus on its scope), this Court commandeered a power that the people had granted to another, coequal—albeit representative—branch of government. The people reserve the right to change their representatives in each election, so that their representatives share the people's policy preferences. The people's representatives maintain the power to amend South Carolina law to account for "everything that has transpired." The people did not grant the courts the authority to amend the Constitution for them.

The second consequence is that the number of abortions performed every month in South Carolina has skyrocketed in the past year, as the State has witnessed a more than fifteenfold increase in out-of-state women seeking abortions in South Carolina and observed the total number of abortions in the State double to 1,000 abortions per month (or more than 33 abortions every

[1] *E.g.*, S.C. Const. art. I, § 2 (free speech); *id.* (religious freedom); *id.* (freedom of the press); *id.* art. I, § 10 (freedom from unreasonable searches and seizures); *id.* art. I, § 13(A) (taking of private property); *id.* art. I, § 14 (jury trials); *id.* art. I, § 15 (protection from cruel or unusual punishment); *id.* art. I, § 20 (right to keep and bear arms); *id.* art. I, § 25 (right to hunt and fish); *id.* art. II, § 1 (secret ballot).

single day). *See* S.C. Dep't Health & Envtl. Control, *Provisional Abortion Data 2022-2023*, https://tinyurl.com/3ze3mnum. In the circuit court, Respondents advertised that they wanted an injunction so that they could perform more than 100 abortions just that coming weekend. App. 193–94. Even if the 2023 Act would not have prohibited all of these abortions (as Respondents acknowledged, App. 193–94), with an injunction in place that permits women to obtain abortions for any reason (or for no reason) for more than half of pregnancy, abortion remains a relative free-for-all in South Carolina as compared to other States in the Southeast and other nations. *See Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J., concurring in the judgment) ("Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks").

Thus, to the extent *PPSA I* has precedential effect or provides governing principles, once its flaws are corrected, concluding that the 2023 Act is constitutional is straightforward. The General Assembly employed its plenary power to pass the 2023 Act, and nothing in the Constitution limited the General Assembly's power to regulate abortion as it has done. The 2023 Act is therefore constitutional.

Either path the Court chooses—distinguishing the 2023 Act from the 2021 Act or overruling *PPSA I* (if necessary)—leads to the same result: Respondents are *un*likely to prevail on the merits. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) ("likelihood of success on the merits" is a required element for a preliminary injunction). Thus, they were not entitled to a preliminary injunction.

Nor were Respondents entitled to that injunction in light of the lack of irreparable harm to themselves. This Court has plainly stated that a plaintiff cannot pursue a claim based on "the privacy rights of other pregnant women." *State v. McKnight*, 352 S.C. 635, 651, 576 S.E.2d 168, 176 (2003). Yet despite this black-letter law, harm to others was the focus on Respondents'

irreparable harm argument (and indeed the crux of their entire Complaint). Respondents offered nothing compelling when it came to their own harm.

To be sure, this case—much like the debates surrounding the 2023 Act in the General Assembly—has generated significant public attention. The Court should, as the United States Supreme Court did in *Dobbs*, ignore such distractions and apply well-settled legal principles.

For example, this Court has frequently distinguished one case from earlier decisions. *See, e.g.*, *Adams v. McMaster*, 432 S.C. 225, 242, 851 S.E.2d 703, 711 (2020); *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). Determining whether one case is enough like an earlier case that the earlier case controls is the quintessential work of courts. And it is particularly important when the General Assembly has enacted legislation in response to an earlier decision. *See, e.g.*, *State v. Ramsey*, 409 S.C. 206, 212–13 & n.2, 762 S.E.2d 15, 18–19 & n.2 (2014) (discussing the impact of legislation on a prior decision).

Similarly, this Court has regularly applied the *stare decisis* factors to overrule earlier decisions. *See, e.g.*, *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 33–32, 778 S.E.2d 888, 895 (2015); *McLeod v. Starnes*, 396 S.C. 647, 662, 723 S.E.2d 198, 207 (2012). That *PPSA I* is recent does not counsel otherwise. Some decisions are simply wrong, and they should be "overruled at the earliest opportunity." *Dobbs*, 142 S. Ct. at 2265. *PPSA I* is such a decision.

Ultimately, the primary check on the General Assembly's regulation of abortion is the ballot box. *Cf.* S.C. Const. art. I, § 5 (Free and Open Elections Clause). Upholding the constitutionality of the 2023 Act protects the separation of powers that is foundational to our system to government. *See id.* art. I, § 8. It is up to the voters to have the final say on the 2023 Act at the next general election—just as abortion was a hotly debated issue in the 2022 general election that came between the 2021 and 2023 Acts.

Both on the merits and irreparable harm, the circuit court's decision to grant the injunction is based on legal errors. The circuit court's order should be reversed.

STATEMENT OF THE CASE

A. The 2023 Act

1. Legislative findings

In response to *PPSA I*, the General Assembly carefully considered new legislation to regulate abortions that would account for the Court's concerns. In passing the 2023 Act, the General Assembly made three findings. First, a "fetal heartbeat is a key medical predictor that an unborn child will reach live birth." 2023 Act, § 1(1). Second, "[c]ardiac activity begins at a biologically identifiable moment in time." *Id.* § 1(2). Third, the State "has a compelling interest from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child." *Id.* § 1(3).

To appreciate these findings, understanding certain terms is critical. "Fetal heartbeat" is defined as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." *Id.* § 2 (S.C. Code Ann. § 44-41-610(6)). And "unborn child" is an individual organism of the species homo sapiens from conception until live birth." *Id.* § 2 (S.C. Code Ann. § 44-41-610(14)).

2. General prohibition on abortions after fetal heartbeat

On a most basic level, the 2023 Act generally prohibits, with certain exceptions, abortions after a fetal heartbeat is detected, and in no circumstance may an abortion be performed without a woman's consent. *Id.* § 2 (S.C. Code Ann. § 44-41-620). Getting into the specifics, before proceeding with an abortion, the physician must perform an ultrasound, display the images to the pregnant woman if she wants to see them, and record a written medical description of the

ultrasound (noting the presence of a fetal heartbeat, if one exists). *Id.* § 2 (S.C. Code Ann. § 44-41-630(A)).

If a fetal heartbeat is detected, "no person shall perform or induce an abortion" unless a statutory exception applies. *Id.* § 2 (S.C. Code Ann. § 44-41-630(B)). Violating this prohibition is a felony, punishable by up to two years in prison and a $10,000 fine. *Id.* § 2 (S.C. Code Ann. § 44-41-630(B)). In addition to criminal penalties, a physician or medical professional who violates the Act may lose his license. *Id.* § 2 (S.C. Code Ann. § 44-41-690).

3. Exceptions to prohibition on abortions after fetal heartbeat

i. Life and health of the mother

One exception is for a "medical emergency" or if the abortion "is performed to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman." *Id.* § 2 (S.C. Code Ann. § 44-41-640(A)); *id.* § 2 (S.C. Code Ann. § 44-41-640(C)(1)). Still, a physician must, "to the extent that it does not risk the death of the pregnant woman or the serious risk of a substantial and irreversible physical impairment of a major bodily function of the pregnant woman," try to save the unborn child during such a procedure. *Id.* § 2 (S.C. Code Ann. § 44-41-640(B)(3)).

A medical emergency is a defined statutory term, meaning "in reasonable medical judgment, a condition exists that has complicated the pregnant woman's medical condition and necessitates an abortion to prevent death or serious risk of a substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions." *Id.* § 2 (S.C. Code Ann. § 44-41-610(9)). The 2023 Act includes a list of conditions that are "presumed" to satisfy this exception, including (as a few examples) ectopic pregnancy, severe

preeclampsia, and uterine rupture. *Id.* § 2 (S.C. Code Ann. § 44-41-640(C)(2)).

A physician who performs an abortion based on this exception must document in the woman's medical record his belief that the emergency existed, what the medical condition was, and the "medical rationale" that supported the physician's conclusion that the exception applied. *Id.* § 2 (S.C. Code Ann. § 44-41-640(B)(2)). The physician must keep these records for seven years. *Id.* § 2 (S.C. Code Ann. § 44-41-640(B)(4)(a)). Violating this provision is a felony punishable by up to two years in prison and up to a $10,000 fine, *id.* § 2 (S.C. Code Ann. § 44-41-640(B)(4)(b)), and the maximum fine may go up to $50,000 for an entity that does not preserve records, *id.* § 2 (S.C. Code Ann. § 44-41-640(B)(4)(c)).

ii. Rape and incest

Two similar exceptions to the general prohibition on abortion after a fetal heartbeat is detected are for rape and incest, as long as the unborn child is not yet 12 weeks "probable gestational age." *Id.* § 2 (S.C. Code Ann. § 44-41-650(A)). The 2023 Act defines "gestational age" as "the age of an unborn child as calculated from the first day of the last menstrual period of a pregnant woman." *Id.* § 2 (S.C. Code Ann. § 44-41-610(7)).

If performing an abortion under either of these exceptions, before proceeding with the abortion, a physician must inform the woman that the alleged rape or incest will be reported to law enforcement, and the physician must make that report to the sheriff within 24 hours. *Id.* § 2 (S.C. Code Ann. § 44-41-650(B)). The physician must document the abortion, the exception, and the report in the woman's medical records. *Id.*

A violation of this provision is a felony and punishable by up to two years in prison and a $10,000 fine. *Id.* § 2 (S.C. Code Ann. § 44-41-650(C)).

iii. Fatal fetal anomaly

Another exception is for fatal fetal anomalies. *Id.* § 2 (S.C. Code Ann. § 44-41-660(A)). Such an anomaly is one that, "in reasonable medical judgment," means "the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth." *Id.* § 2 (S.C. Code Ann. § 44-41-610(5)).

Similar to the exception for the life or health of the mother, a physician who performs an abortion under this exception must document in the "presence" of the anomaly, the "nature" of the anomaly, and the "medical rationale" that supported the physician's conclusion that the exception applied. *Id.* § 2 (S.C. Code Ann. § 44-41-660(B)(1)). These records must be kept for seven years. *Id.* § 2 (S.C. Code Ann. § 44-41-660(B)(2)). Violating this provision is a felony punishable by up to two years in prison and up to a $10,000 fine. *Id.* § 2 (S.C. Code Ann. § 44-41-660(C)). The maximum fine again increases to up to $50,000 for an entity that does not preserve records. *Id.* § 2 (S.C. Code Ann. § 44-41-660(D)).

4. Other provisions

The 2023 Act includes additional provisions that change and clarify South Carolina law, many of which further distinguish the 2023 Act from the 2021 Act. For one, the 2023 Act expressly confirms that a pregnant woman may *not* be criminally prosecuted if an abortion is performed on her. *Id.* § 2 (S.C. Code Ann. § 44-41-670); *see also id.* § 9 (repealing S.C. Code Ann. § 44-41-80(b)).

For another, the 2023 Act confirms that it is not a violation of the Act "to use, sell, or administer a contraceptive measure, drug, chemical, or device," as long as the contraceptive "is not used, sold, prescribed or administered to cause or induce an abortion." *Id.* § 2 (S.C. Code Ann.

§ 44-41-640(E)). The Act also requires every individual and group health plan in the State to cover contraceptives, *id.* § 5 (S.C. Code Ann. § 38-71-146), and requires the State Health Plan and the Public Employees Benefit Authority to cover contraceptives for dependents, *id.* § 11.

The 2023 Act gives a woman a statutory cause of action against a physician who performs, induces, or coerces an abortion in violation of the Act. *Id.* § 2 (S.C. Code Ann. § 44-41-680(B)). On top of actual and punitive damages, she is also entitled to statutory damages of $10,000 per violation. *Id.* The 2023 Act additionally permits the parent of a minor, the solicitor, and the attorney general to obtain injunctive relief against someone who violates the Act. *Id.* § 2 (S.C. Code Ann. § 44-41-680(C)).

The 2023 Act prohibits public funds from being used in abortion-related ways. For one, the State Health Insurance Plan cannot fund abortions other than those that fall under one of the statutory exceptions. *Id.* § 3 (S.C. Code Ann. § 44-41-90(A)). For another, no state or local funds may be used to purchase fetal tissue obtained from an abortion. *Id.* § 3 (S.C. Code Ann. § 44-41-90(B)). And for a third, no state funds may be used, even indirectly, by Planned Parenthood for abortion services. *Id.* § 3 (S.C. Code Ann. § 44-41-90(C)).

Another addition to state law in the 2023 Act is the requirement that a father must begin making child support payments from "the date of conception." *Id.* § 4 (S.C. Code Ann. § 63-17-325(A)). The father must also pay half of the mother's pregnancy expenses, including any insurance premiums not paid by an employer. *Id.* § 4 (S.C. Code Ann. § 63-17-325(A)(2)). The father must pay "the full cost" of any expenses for mental health counseling arising from rape or incest, if that was how the mother became pregnant. *Id.* § 4 (S.C. Code Ann. § 63-17-325(B)). If paternity is contested, a father's obligations under the 2023 Act are retroactive, subject to the applicable interest rate for money judgments. *Id.* § 4 (S.C. Code Ann. § 63-17-325(C)).

Other provisions in the 2023 Act update related parts of Title 44. For instance, there are amended definitions in Chapter 41 of that Title, *id.* § 6 (S.C. Code Ann. § 44-41-10), updated requirements for reporting to DHEC, *id.* § 7 (S.C. Code Ann. § 44-41-60), revised authority for DHEC regulations, *id.* § 8 (S.C. Code Ann. § 44-41-70(b)), and updated information that must be provided to a woman before an abortion is performed on her, *id.* § 10 (S.C. Code Ann. § 44-41-330(A)). Finally, the 2023 Act also repealed the prior codification of the *Roe* trimester framework, S.C. Code Ann. § 44-41-20, and the Pain-Capable Unborn Child Act, S.C. Code Ann. § 44-41-410 *et seq.*, though the latter provision is restored if a court enjoins the 2023 Act, 2023 Act, § 13.

B. Procedural history

On May 25, less than an hour after the Governor signed the 2023 Act into law, Respondents sued in circuit court, asserting 17 claims that challenged the Act's constitutionality. App. 8–66. With their complaint, they sought an emergency temporary restraining order based solely on their privacy claims. App. 67–102. The circuit court held a brief hearing the following day, at which it admitted that it had "not been following critically the debate on this issue in the Supreme Court[and] the opinion of the Supreme Court" in *PPSA I*. App. 208. The circuit court granted Respondents a preliminary injunction. App. 6.

The circuit court declined to stay its injunction pending appeal when asked at the end of the May 26, 2023 hearing. *See* App. 220; Rule 241, SCACR. Appellants immediately appealed and sought a writ of supersedeas to stay the circuit court's injunction pending appeal. This Court denied that petition, but it accepted this matter for final resolution and expedited briefing.

STANDARD OF REVIEW

A preliminary injunction requires a party to show that "(1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3)

he has no adequate remedy at law." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). The decision to grant this relief is in the circuit court's discretion, *id.*, which the circuit court abuses when it makes an error of law or makes factual findings without support, *State v. McCarty*, 437 S.C. 355, 365, 878 S.E.2d 902, 908 (2022).

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). The Court "begins with a presumption of constitutionality." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). And the Court must, "if possible," interpret a statute "to render [it] valid." *Id.* Only when a statute's "repugnance to the Constitution is clear and beyond a reasonable doubt" can it be declared unconstitutional. *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597.

For a facial challenge like Respondents bring here, the party challenging the statute must "show the legislation at issue is unconstitutional in all its applications." *State v. Legg*, 416 S.C. 9, 13–14, 785 S.E.2d 369, 371 (2016). In other words, that party "must establish that no set of circumstances exists under which the statute would be valid." *Doe v. State*, 421 S.C. 490, 502–03, 808 S.E.2d 807, 813 (2017) (cleaned up). Therefore, this type of challenge is understandably "the most difficult to mount successfully." *Legg*, 416 S.C. at 13, 785 S.E.2d at 371 (cleaned up).

ARGUMENT

Although this case comes to the Court on appeal from a preliminary injunction, many of the critical issues here are legal ones—and ones that the circuit court got wrong. The correct answers to these questions are dispositive of this appeal: The 2023 Act is constitutional, so the circuit court abused its discretion in entering the preliminary injunction based on Respondents' "privacy" claims, which were the only ones on which they sought this relief.

I. The 2023 Act is distinguishable from the 2021 Act.

The circuit court called the 2023 Act "nearly identical" to the 2021 Act. App. 6. Respondents said the 2023 Act "duplicates" the 2021 Act. App. 90. The circuit court's simplistic summary and Respondents' self-serving characterization of the 2023 Act overlook critical differences in these two Acts. Of course, as the narrowest opinion, Justice Few's concurrence in *PPSA I* controls. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (cleaned up)). The 2023 Act addresses the three specific concerns about the 2021 Act from *PPSA I*'s Controlling Opinion. These distinctions are therefore critical, as they confirm that the 2023 Act is constitutional, even under *PPSA I*.

A. The 2023 Act resolves the conflicts in state law over abortion regulation.

One issue with the 2021 Act was the potential conflict between that law and other parts of Chapter 41 of Title 44. The Controlling Opinion pointed out that section 44-41-20 (the codification of the *Roe* trimester framework, *see* 1974 S.C. Acts No. 1215) was "actually still the law." 438 S.C. at 288 n.65, 882 S.E.2d at 824 n.65. To the extent that was a concern, it is not any longer. The 2023 Act explicitly repeals section 44-41-20. *See* 2023 Act, § 13(A).

It's not only the *Roe* framework that's been repealed. The 2023 Act also repealed the Pain-Capable Unborn Child Act, S.C. Code Ann. § 44-41-410 *et seq. See* 2023 Act, § 13(B). Notably, the General Assembly presciently caveated this repeal, providing that if (as happened here) the 2023 Act is enjoined, the Pain-Capable Unborn Child Act remains in effect. *See id.* Otherwise, there would be no limitation on when abortions could be performed in this State right now.

With both of these repeals, state law is unambiguous: Subject to the exceptions in the 2023

Act, abortion is prohibited after a fetal heartbeat is detected.

B. The 2023 Act makes clear that the State has a compelling interest in life from the moment of conception.

Another issue in the 2021 Act was the fact that "there [was] no legislative policy determination that human life—'personhood'—begins at conception." 438 S.C. at 273, 882 S.E.2d at 816. The Controlling Opinion reasoned that this omission weakened the State's interest in prohibiting abortions after a fetal heartbeat was detected under the 2021 Act.

Granted, the 2023 Act is not a personhood law that generally prohibits abortion from conception, as the 1970 abortion law that was in effect when article I, section 10 was adopted did. *See* 1970 S.C. Acts No. 821. But the 2023 Act does make explicit the General Assembly's expression of the State's interest in protecting life from conception: The State "has a compelling interest from the outset of a woman's pregnancy in protecting . . . the life of the unborn child." 2023 Act, § 1 (3). The 2023 Act then defines an "unborn child" as "an individual organism of the species homo sapiens *from conception* until live birth." *Id.* § 2 (S.C. Code Ann. § 44-41-610(14)) (emphasis added). This particular finding was not in the 2021 Act, which expressed only "legitimate interest" in the life of the unborn child. 2021 Act, § 2(7). The 2023 Act therefore represents a new, stronger expression of the State's interest since *PPSA I* was decided that goes directly to this personhood question raised in the Controlling Opinion.

The 2023 Act further confirms the State's interest in unborn life because it does not include "who may be born" after "unborn child," as the 2021 Act did. *Compare* 2023 Act, § 1(3), *with* 2021 Act, § 2(7). There is thus no longer any conditional language in the State's expression of its interest. South Carolina's compelling interest in life exists from conception.

Protecting life is an interest that is well grounded in law and history. About two decades before the Lords Proprietors founded Carolina, Sir Edward Coke noted the "precious regard the

Law hath of the life of man." Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 56 (1648 ed.). More than a century later, life was the first of Jefferson's great triumvirate in the Declaration of Independence: People are "endowed by their Creator with certain unalienable Rights, that among these are *Life*, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added). In the years between those two famous expressions, John Locke similarly put life first in his list of people's rights. *See* John Locke, *The Second Treatise of Government* § 6 (1689), reprinted in *Political Writings of John Locke* 264 (David Wootton ed. 1993) ("life, health, liberty, or possessions").

More recently, this Court has recognized that "[b]asic to our culture is the precept that life is precious." *Willis v. Wu*, 362 S.C. 146, 158, 607 S.E.2d 63, 69 (2004) (quoting *Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984)); *see also, e.g.*, *Phillips v. United States*, 508 F. Supp. 537, 543 (D.S.C. 1980) ("One of the most deeply held beliefs of our society is that life . . . is more precious than nonlife."). Justice Few agreed with this notion in *PPSA I*, observing that "'human life' has no countervailing interest." 438 S.C. at 273, 882 S.E.2d at 816.

Given this long history of the paramount importance of life, it should be no surprise that the General Assembly has again sought to protect life in the 2023 Act and has endeavored to account for this Court's concerns. That the General Assembly did not draw a bright line of "no abortions ever, given our interest in life" is of no import to the constitutional analysis. *Cf. PPSA I*, 438 S.C. at 277, 882 S.E.2d at 818 ("a total ban" may be constitutional). Legislation is often a "hard-fought compromise." *Pinckney*, 434 S.C. at 293, 862 S.E.2d at 917. A bill typically involves a "legislative battle among interest groups, [legislators], and the [executive]," and "[d]issatisfaction . . . is often the cost of [such] legislative compromise." *Barnhart v. Sigmon Coal*

Co., 534 U.S. 438, 461 (2002). "Compromise is essential to . . . major . . . legislation," and "confidence" that the courts "will enforce such compromises is essential to their creation." *Thornburg v. Gingles*, 478 U.S. 30, 105 (1986) (O'Connor, J., concurring). Such compromise is what the 2023 Act represents.

C. The 2023 Act addresses the issue of "informed choice" from the 2021 Act.

The Controlling Opinion counted "informed choice" as a "countervailing interest" to the State's interest in protecting life, based on an express finding in the 2021 Act. 438 S.C. at 274, 882 S.E.2d at 816 (quoting 2021 Act, § 2(8)). The 2023 Act does not include any such finding about "informed choice." *Compare* 2023 Act, § 1, *with* 2021 Act, § 2(8). This new legislative declaration of policy therefore differs significantly from the 2021 Act and removes "informed choice" from the policy calculus.

A consequence of this change is that none of the Controlling Opinion's lengthy discussion about legislative findings, *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955), and *Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 246 S.E.2d 869 (1978), has any bearing on the analysis of the 2023 Act. *See* 438 S.C. at 278–83, 882 S.E.2d at 818–21. Because "informed choice" is not a finding in the 2023 Act, there was no requirement in the legislative process for any testimony, any evidence, any debates—anything—on the subject of "informed choice."

To the extent the Controlling Opinion grounded the need for "informed choice" in article I, section 10 instead of in the legislative findings, that does not change the conclusion that the 2023 Act is constitutional for two distinct reasons. *First*, the historical record confirms that article I, section 10 does not include some broad right of "informed choice" past the point in pregnancy when an unborn child develops a fetal heartbeat. Start with *Steadman I*. There, this Court explained

that one provision of the Code (S.C. Criminal Code § 1112 (1942)) made it a felony to perform an abortion after quickening if the mother or child died as a result. 214 S.C. at 8–9, 51 S.E.2d at 93. Another provision (S.C. Criminal Code § 1113 (1942)) made it a misdemeanor to perform an abortion "in the early stages of pregnancy and prior to the time when it could be said that [a woman] was 'quick with child.'" 214 S.C. at 9, 51 S.E.2d at 93. In other words, a century and a half ago, the General Assembly criminalized performing an abortion at any time in pregnancy (unless a statutory exception applied). All that varied was the classification of the crime and the severity of the punishment. *Cf. State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950) ("*Steadman II*") (affirming a conviction under section 1113 after a retrial following *Steadman I*).

Two further observations about *Steadman I*: In the first place, to the extent that *Steadman I* is correct about the historical meaning of "quickening" as when a women "felt the child alive," 214 S.C. at 7, 51 S.E.2d at 93, then the 1883 act deliberately criminalized *more* than the common law had. That shows that South Carolina's history is even more protective of unborn life than the common law had been, according to this Court's explanation of the common law. *Cf.* S.C. Code Ann. § 14-1-50 (the common law remains in effect unless altered by statute).

And in the second, even when the State added additional exceptions in 1970 to the general prohibition on abortion, *see* 1970 S.C. Acts No. 821, the State did not change the general prohibition on abortion, either before or after quickening, *see* S.C. Code §§ 16-82, 16-83 (1962) (previously codified at S.C. Criminal Code §§ 1112, 1113 (1942)). So if there was any question of what the State wanted to do about unborn life after *Steadman I*, the 1970 act confirmed that the State wanted to protect unborn life at all its stages.

The 1970 abortion law is important for another reason: The same General Assembly that enacted the 1970 abortion law also put the "unreasonable invasions of privacy" provision on the

ballot. *See* 1970 S.C. Acts No. 1268. It is inconceivable that the same legislators who passed the 1970 abortion law then would have implicitly proposed constitutional language intended to make that abortion law unconstitutional. Put another way, "[t]he framers of th[e] Constitution were aware" of the 1970 law, and "[i]f there had been any intention to change" the law, "it would have been clearly expressed in the Constitution." *Powers v. State Educ. Fin. Comm'n*, 222 S.C. 433, 441–42, 73 S.E.2d 456, 459 (1952).

As for the people, *see Long*, 406 S.C. at 514, 753 S.E.2d at 426 (the law is what "the citizenry and the General Assembly have worked to create"), although the ballot question in 1970 did not have a detailed description of the privacy provision, "the 'citizenry' who voted to approve the 'unreasonable invasions of privacy' provision" could not possibly have believed that provision was intended to address abortion or that it silently encompassed any "informed choice" for abortion, particularly not beyond the limited exceptions already in state law. *PPSA I*, 438 S.C. at 262, 882 S.E.2d at 810. For almost a century, the longstanding law and practice in this State was to permit abortion only to save the life of the mother or child. Then, the year before article I, section 10 took effect, the State authorized other statutory exceptions to the prohibition on abortion, but those exceptions were limited to maternal health, rape, incest, and fetal anomaly. In other words, the people had no basis to conceive of article I, section 10 as creating any right to "informed choice" for abortion, and nothing in state law provided any pregnant woman the right to obtain an abortion for any reason at any stage of pregnancy.

Certainly *Roe* didn't provide a basis for such a right. *Roe* was decided in January 1973, more than two years after the voters approved article I, section 10 and more than 20 months after the General Assembly ratified that provision. *See* 1971 S.C. Acts No. 276. In other words, *Roe* is irrelevant to the meaning of article I, section 10.

Second, and moving beyond the historical record, as the Controlling Opinion put it, the "one particular factual question" on "informed choice" was when "a pregnant woman *can* know of her pregnancy." 438 S.C. at 278, 882 S.E.2d at 818–19 (emphasis added); *see also id.* at 278, 882 S.E.2d at 818 ("Can a pregnant woman even know she is pregnant"); *id.* at 282, 882 S.E.2d at 821 ("can know"); *id.* at 283, 882 S.E.2d at 821 ("can know").

The Court need look no further than Planned Parenthood's own website for the answer: Women *can* know they are pregnant early in pregnancy. Planned Parenthood tells women they "can take a pregnancy test any time after" their "period is late." Planned Parenthood, *Pregnancy Tests*, https://tinyurl.com/2jxpzzdd (last visited May 19, 2023). But with "[m]any pregnancy tests," a woman can actually take them "a few days before" her period. *Id.* That's because the levels of the hormone human chorionic gonadotropin, or hCG, begin to rise six to ten days after conception. Cleveland Clinic, *Pregnancy Tests*, https://tinyurl.com/4apv9tb6 (last visited May 26, 2023). In any case, the tests should get an accurate result within "3 weeks after sex," Planned Parenthood, *Pregnancy Tests*, which is at least a week, if not longer, before the earliest point at which a fetal heartbeat could be detected. These tests, Planned Parenthood goes on, are "inexpensive," "available at most drug and grocery stores," and "work 99 out of 100 times." *Id.* Thus, no matter when women *do* know they are pregnant, women *can* know they are pregnant at least a week before a fetal heartbeat exists.[2]

The General Assembly considered this information when it was debating the 2023 Act.

[2] All of this is in addition to the fact that women still have the option of "emergency contraception," such as Plan B. *See* Planned Parenthood, *Emergency Contraception*, https://tinyurl.com/bdfkup4t (last visited May 19, 2023). Plan B prevents ovulation, fertilization, and implantation; it does not (like mifepristone) terminate a pregnancy if the implantation has occurred. *See* Mayo Clinic, *Morning-After Pill* (last visited May 19, 2023), https://tinyurl.com/2hkuz4fj. Plan B's "morning-after pill" is legal under the 2023 Act. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-610(4)).

The Senate looked to the Cleveland Clinic and the American Pregnancy Association to confirm when hCG becomes detectable and when a fetal heartbeat develops. *See* S. Journal No. 19, 125th Gen. Assemb. (S.C. Feb. 9, 2023) (statement of Sens. Massey, Campsen, and Grooms). In fact, according to the American Pregnancy Association, a heartbeat is usually detected "from 6 ½ - 7 weeks," so Respondents, by calling the 2023 Act a "six-week" law, have been shaving time off the window in which a woman can obtain an abortion by up to a week. Am. Pregnancy Ass'n, *Early Fetal Development* (last visited June 12, 2023), https://tinyurl.com/3vap2xwk.

Drawing on this legislative record, the 2023 Act recognizes that hCG is how pregnancy is typically detected. Hence, the 2023 Act defines "clinically diagnosable pregnancy" as "the point in time when it is possible to determine that a woman is pregnant due to the detectible presence of [hCG]." 2023 Act, § 2 (S.C. Code Ann. § 44-41-610(2)). Thus, the 2023 Act does not—as Respondents have frequently framed it—prohibit abortion after a random number of weeks. Instead, the 2023 Act draws the line at fetal heartbeat,[3] which develops at a "biologically identifiable moment in time," *id.* § 1(2), and "is a key medical predictor that an unborn child will reach live birth," *id.* § 1(1). In other words, the 2023 Act adopts a rule that is far from arbitrary. *Cf. PPSA I*, 438 S.C. at 284–85, 882 S.E.2d at 822 (concluding the 2021 Act was arbitrary because it did not consider a factual question that was, under that Act's findings, a relevant consideration).

II. The Court is not bound by *PPSA I*.

In three separate opinions and over two dissents, this Court disagreed as to the reasoning

[3] In *PPSA I*, both the Lead Opinion and the Chief Justice's concurrence took issue with the term "fetal heartbeat." *See* 438 S.C. at 197 n.2, 882 S.E.2d at 775 n.2 (Lead Opinion) ("merely an electrical flickering"); *id.* at 222, 882 S.E.2d at 788 (Beatty, C.J., concurring) ("a flutter of electrical impulses"). Putting aside the fact that even Planned Parenthood called this a heartbeat during the litigation over the 2021 Act, *see* WebArchive, Planned Parenthood, *What happens in the second month of pregnancy?* (July 25, 2022), https://tinyurl.com/2jvsvh34, no one has offered any evidence to rebut the strong correlation between this "electrical flickering" and a live birth.

and agreed only as to the result that the 2021 Act was unconstitutional. Justice Hearn believed article I, section 10 encompassed a right to abortion and the 2021 Act violated that right. 438 S.C. at 195, 882 S.E.2d at 774 (Lead Opinion). The Chief Justice agreed, contending that, at six weeks of pregnancy, the State could not protect (what he termed) "an amorphous collection of cells," no matter what correlation there is between a live birth and (again using the Chief Justice's words) "a flutter of electrical impulses." *Id.* at 218, 222, 882 S.E.2d at 786, 788 (Beatty, C.J., concurring). Justice Few took a narrower view, agreeing with the dissenting Justices that article I, section 10 "does not encompass a 'right to abortion,'" but nevertheless concluding that the 2021 Act did not give women "a meaningful opportunity" to choose an abortion, based on what he claimed was the State's "longstanding 'opportunity' for abortion." *Id.* at 287–88, 882 S.E.2d at 823–24 (Controlling Opinion). Meanwhile, Justices Kittredge and James dissented, rejecting all of these conclusions and disagreeing with each other only over whether article I, section 10 went beyond "unreasonable law enforcement use of electronic devices to search and seize information and communications." *Id.* at 330, 882 S.E.2d at 846 (James, J., dissenting).

If the Court concludes that the 2023 Act does not sufficiently address the issues identified with the 2021 Act, *PPSA I* does not control this case for two separate reasons. First, as a single, fractured decision, *PPSA I* does not constitute a "precedent" entitled to deference under this Court's *stare decisis* framework. Alternatively, if *PPSA I* does have some precedential effect, *PPSA I* should be overruled.

A. Without a single rationale for a majority of the Court, *PPSA I* is not a "precedent."

This Court has repeatedly held that when a rationale does not command a majority of the Court, the resolution of that case is not binding precedent in future cases. When an opinion does not command a majority, the "expressions in the opinion are . . . not controlling under the principle

of stare decisis." *State v. Goodwin*, 81 S.C. 419, 62 S.E. 1100, 1104 (1908). The opinion, in other words, "shall not be considered as precedent[]." *Moseley*, 167 S.C. 112, 166 S.E. at 96. Instead, the opinion "establish[es] the law only as to the particular case." *Id.*; *see also State v. Walker*, 252 S.C. 325, 327–28, 166 S.E.2d 209, 210 (1969) ("In that case two justices concurred in the main or controlling opinion, one concurred only in its result, and two justices dissented. Due to such circumstances, the value of that decision as a precedent is, at best, questionable."); *State v. Campbell*, 242 S.C. 64, 71, 129 S.E.2d 902, 905 (1963) (quoting *Moseley*).

Under these cases, the Court could (and should) start on a blank slate here in evaluating the constitutionality of the 2023 Act. That means evaluating afresh the original understanding of article I, section 10 and the State's history of abortion regulation. The result of this historical analysis is that article I, section 10 has nothing to do with abortion, so the General Assembly has plenary authority to regulate that subject, meaning the 2023 Act is constitutional.

1. Nothing in the historical record connects article I, section 10 with abortion.

Applying this Court's longstanding rule for constitutional interpretation, the limited scope of article I, section 10 is evident. When the West Committee met in September 1967 to discuss revisions to article I, "[t]he committee agreed that [the provision about searches and seizures] should remain, but that it should be revised to take care of the invasion of privacy through modern electronic devices." Committee to Make a Study of the Constitution of South Carolina, 1895, *Minutes of Committee Meeting* (Sept. 15, 1967). The entire Committee "agreed that this further protection was needed." *Id.* There was some debate among the Committee as to the precise wording of this additional protection, but there is no suggestion that anyone on the Committee thought the protection extended to abortion. *See id.* This same understanding held true a month later, when the Committee again discussed this provision. *See* Committee to Make a Study of the

Constitution of South Carolina, 1895, *Minutes of Committee Meeting* (Oct. 6, 1967). And when the Committee broached the topic of privacy again three months after that. *See* Committee to Make a Study of the Constitution of South Carolina, 1895, *Minutes of Committee Meeting* (Jan. 24, 1968); *see also* West Committee Staff Memo. on Preamble and Decl. of Rights 7–8 (citing examples from other state constitutions focused on privacy from government searches). *See generally PPSA I*, 438 S.C. at 339–45, 882 S.E.2d at 851–54 (James, J., dissenting) (discussing the West Committee records in great detail).

What's important about this history is what it shows holistically. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 595–96 (2010) (a court must take "the legislative record . . . as a whole" and "decline to give controlling weight to [an] isolated passage"). Unfortunately, "[j]udicial investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (cleaned up). Justice Few aptly recognized this struggle in *PPSA I*, pointing out that both sides could "cherry-pick[]" from the West Committee records. 438 S.C. at 266 n.49, 882 S.E.2d at 812 n.49 (Controlling Opinion). Whatever one-off lines anyone may highlight, none of those isolated quotations changes the fact that each time the West Committee discussed this privacy provision it did so in the context of electronic surveillance and government data collection.

Further supporting this conclusion is the West Committee's final report. *See* Committee to Make a Study of the Constitution of South Carolina, 1895, *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895*, at 15 (1969) ("*West Report*"). The Committee "recommend[ed] that the citizens be given" this "additional" protection, which was "designed to protect the citizen from improper use of electronic devices, computer data banks, etc. Since it is

almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement on policy, leaving the details to be regulated by law and court decisions." *Id.*

Attorney General Dan McLeod also had this focus when the West Committee asked for his opinion on the proposed language. In discussing this proposal to "expand" this constitutional provision, General McLeod described the provision as "relat[ing] to interception of communication which is generally done by electronic means." S.C. Att'y Gen. Op., 1967 WL 12658, at *1 (S.C.A.G. Oct. 2, 1967).

As the voters prepared to determine the fate of this proposed constitutional language, news reports reflected a similar understanding of the provision's scope. In an article explaining the proposed amendments, *The State* wrote, "The intent of the new provision is to protect individuals from indiscriminate wire-tapping, eavesdropping, or surveillance by electronic devices." *Expanded Bill of Rights to Be on November Ballot*, The State, Oct. 19, 1970, at 14. At the same time, "[l]aw enforcement agencies still would be enabled to conduct such surveillance, but only through compliance with proper legal procedures." *Id.*; *accord* Edward D. Harrill, *New Constitution Would Protect People Rights*, The State, Feb. 21, 1969, at 41. Then, the day after election day, *The State* noted that this approved amendment "contain[ed] two sections protecting state citizens from unreasonable invasion of privacy with 'bugging' devices or data banks." *See* William D. McDonald, *Vote Favors Amendments*, The State, Nov. 4, 1970, at 16.

True, the precise language ultimately put on the ballot differed from what the West Committee proposed. Rather than a separate sentence, *see West Report*, at 14, the General Assembly combined the "unreasonable invasions of privacy" language with the "unreasonable searches and seizure" provision, S.C. Const. art. I, § 10; *see also PPSA I*, 438 S.C. at 265, 882

S.E.2d at 812 (making much of this issue). But the key phrase—"unreasonable invasions of privacy"—is identical in both versions. Although the General Assembly may not have explained why it changed the structure of the West Committee's proposed amendment, the fact that the same language was used is a strong indication that the meaning of the words was the same, and the fact that it combined the two provisions suggests the General Assembly viewed them as related. By combining these sentences, if any change was intended, the General Assembly was narrowing the scope of this language.

When the General Assembly put its proposed article I, section 10 to the people, they approved it by a vote of more than two-to-one. *See Report of the South Carolina Election Commission for the Period Ending June 30, 1973*, at 205, 207, https://tinyurl.com/bddb4ww3. The General Assembly ratified this provision the next year. *See* 1971 S.C. Acts No. 276.

Of course, all of this—the West Committee's work, the media coverage, the legislative actions, and the people's vote—occurred while abortion at every stage of pregnancy was a crime unless an exception applied. *See* 1970 S.C. Acts No. 821. In other words, it was before *Roe*. There was thus no reason that anyone involved in these debates or voting on Election Day would have thought that "privacy" included some general right to (or even an "opportunity to have," *PPSA I*, 438 S.C. at 268, 882 S.E.2d at 813) an illegal abortion. To hold now that this provision involves abortion would disregard black-letter law about interpreting the South Carolina Constitution and create a right out of "thin air."[4] *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 664, 767 S.E.2d

[4] In *PPSA I*, Justice Kittredge explained he would not overrule the Court's earlier decisions extending article I, section 10 beyond the search-and-seizure context. *See* 438 S.C. at 316, 882 S.E.2d at 839 (Kittredge, J., dissenting). Three brief points in response. *First*, Justice Kittredge recognized that limiting the scope of article I, section 10 to that context is "defensible." *Id. Second*, none of the existing decisions undertook an in-depth analysis of the history of article I, section 10. *Cf. infra* Part II.B.2. And *third*, even if article I, section 10 is not limited to the search-and-seizure context, as Justice Kittredge compellingly demonstrated elsewhere in his dissent, that provision

157, 181 (2014) (Kittredge, J., dissenting).

2. State law has never provided any general "opportunity" for abortion.

Before *Roe* wrongly usurped the State's authority to regulate abortion, the State largely prohibited abortion. For nine decades before article I, section 10 took its current form, South Carolina criminalized abortion by statute, unless an abortion was "necessary to preserve [a mother's] life or the life of such child." 1883 S.C. Acts No. 354, § 1; *see also See* S.C. Criminal Code §§ 122, 137, 138, 139 (1893); S.C. Criminal Code §§ 122, 139, 140, 141 (1902); S.C. Criminal Code §§ 150, 170, 171, 172 (1912); S.C. Criminal Code §§ 12, 25, 26 (1922); S.C. Criminal Code §§ 1013, 1112, 1113, 1114 (1932); S.C. Criminal Code §§ 1013, 1112, 1113, 1114 (1942); S.C. Code §§ 16-82, 16-83, 16-84, 16-85 (1952); S.C. Code §§ 16-82, 16-83, 16-84, 16-85 (1962). If the woman or child died, it was a felony punishable by between five and 20 years in prison. 1883 S.C. Acts No. 354, § 1. If no one died from an attempted abortion, the punishment was up to five years in prison. *Id.* § 2.

That remained the law until 1970, when South Carolina added exceptions for maternal health, fetal anomaly, rape, and incest. *See* 1970 S.C. Acts No. 821. These exceptions did not create some general "statutory right to abortion," as the Controlling Opinion characterizes them. 438 S.C. at 288 n.65, 882 S.E.2d at 824 n.65. They were, rather, *exceptions* to a general prohibition—exceptions, no less, that, in one form or another, were part of the 2021 Act and are part of the 2023 Act. In fact, even under the "statutory right to abortion" analysis employed by the Controlling Opinion, both the 2021 and 2023 Acts provide a greater "opportunity" than the 1970 law because these more recent laws permit abortion for any reason before a fetal heartbeat is detected.

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still does not reach abortion. *See* 438 S.C. at 305–15, 882 S.E.2d at 834–38.

The State's historical treatment of abortion is consistent with centuries of law. From Henry de Bracton in the thirteenth century to Matthew Hale in the seventeenth century to William Blackstone in the eighteen century, these "eminent common-law authorities" explained that abortion after quickening was "criminal." *Dobbs*, 142 S. Ct. at 2249. Blackstone, writing just before the American Revolution, explained that life is "a right inherent by nature in every individual, and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[5] 1 W. Blackstone, *Commentaries on the Law of England* 125 (1765). Thus, if someone "by a potion, or otherwise, killeth [the quickened child] in [a mother's] womb; or if any one beat her, whereby the child dieth in her body," that was regarded as a "very heinous misdemeanor." *Id.* at 125–26. Given the early incorporation of the common law in this State, 1712 S.C. Acts No. 322, § 5, even before the General Assembly codified abortion as a crime in 1883, abortion "was already denounced by our law," *State v. Fields*, 68 S.C. 148, 46 S.E. 771, 771 (1904).

Further, these abortion restrictions were enforced. *See, e.g.*, *State v. Hutto*, 252 S.C. 36, 165 S.E.2d 72 (1968) (conviction affirmed); *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967) (conviction affirmed); *Steadman II*, 216 S.C. 579, 59 S.E.2d 168 (conviction affirmed); *State v. Evans*, 202 S.C. 463, 25 S.E.2d 492 (1943) (conviction affirmed); *State v. Parsons*, 171 S.C. 449, 172 S.E. 424 (1934) (conviction affirmed); *State v. Sharpe*, 138 S.C. 58, 135 S.E. 635 (1926) (conviction affirmed); *State v. Morrow*, 40 S.C. 221, 18 S.E. 853 (1893) (conviction affirmed). And there were other convictions that never reached this Court. For example, in 1931, one man had his sentence suspended, and a woman was pardoned for aiding an abortion. *See Statement of*

[5] What constituted quickening during Blackstone's time is debated. Perhaps it occurred at six weeks of pregnancy; perhaps at 16 or 18. *See Dobbs*, 142 S. Ct. at 2249 n.24. Either way, nothing prohibits the General Assembly from now acknowledging an interest in protecting life even earlier.

Pardons, Paroles & Commutations of Sentence Granted by Governor I.C. Blackwood 3, 52 (1931).

Even after the federal government's usurpation of the issue in *Roe*, the State still searched for ways to protect life, which undermines any suggestion that South Carolinians embraced *Roe*'s trimester framework. The State required minors to obtain parental consent or judicial approval before having an abortion. *See* 1990 S.C. Acts No. 341, § 2 (S.C. Code Ann. §§ 44-41-31, -32, -33, -34). The State mandated that any facility performing a second trimester abortion or any facility performing five or more first trimester abortions per month must register as an "abortion clinic," subject to DHEC regulation. 1995 S.C. Acts No. 1, §§ 1, 2 (S.C. Code Ann. §§ 44-41-75, -70). The State enacted the Woman's Right to Know Act, which instructed a physician performing an abortion to inform a pregnant woman of the "probable gestational age" of her baby and of her right to review printed materials from DHEC about alternatives to abortion. *See* 1995 S.C. Acts No. 1, § 8 (S.C. Code Ann. §§ 44-41-330, -340, -350). The State banned partial-birth abortions. *See* 1997 S.C. Acts No. 11, § 1 (S.C. Code Ann. § 44-41-85). The State required the physician to inform a woman that she has a "right to view the ultrasound image" and prohibited an abortion from being performed "sooner than sixty minutes following completion of the ultrasound," 2008 S.C. Acts No. 222, § 1 (S.C. Code Ann. § 44-41-330), and required a pregnant woman to receive certain written materials about abortion at least 24 hours before an abortion is performed, *see* 2010 S.C. Acts No. 268, § 1 (S.C. Code Ann. § 44-41-330). The State generally prohibited abortions after an unborn child is capable of feeling pain. *See* 2016 S.C. Acts No. 183, § 1 (S.C. Code Ann. §§ 44-41-420, -440, -450, -460, -470). And the State prohibited abortion after a fetal heartbeat was detected. *See* 2021 S.C. Acts No. 1.

B. *PPSA I* should be overruled.

Even if *PPSA I* does constitute a "precedent," it should be overruled. "[S]tare decisis is not

an inexorable command." *McLeod*, 396 S.C. at 654, 723 S.E.2d at 202. Indeed, there is "no virtue in sinning against light or persisting in palpable error," and "[t]here should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Id.*

Under the traditional *stare decisis* framework, whether a case should be overruled involves multiple considerations. The most frequently cited factors include (1) the quality of the precedent's reasoning; (2) the precedent's consistency and coherence with previous or subsequent decisions; (3) the workability of the precedent; (4) the reliance interests of those who have relied on the precedent; (5) the age of the precedent; and (6) changed law and facts since the challenged decision. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (collecting factors from Supreme Court caselaw). Here, all of these factors favor overruling *PPSA I*.

Before diving into these factors, an additional point is important to keep in mind: *Stare decisis* "is at its weakest with respect to constitutional questions because only the courts or a constitutional amendment can remedy any mistakes made." *McLeod*, 396 S.C. at 655, 723 S.E.2d at 203. *PPSA I*, of course, involved constitutional questions.

1. *PPSA I*'s reasoning is flawed.

"[T]he quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." *Dobbs*, 142 S. Ct. at 2265. *PPSA I* is poorly reasoned in multiple respects, but two stand out above the rest.

i. The Lead Opinion rewrote the rules of constitutional interpretation.

For centuries, the South Carolina Constitution has been "construed in light of the intent of its framers and the people who adopted it." *Long*, 406 S.C. at 514, 753 S.E.2d at 426. That is because, in our system of government, the constitution is what "the citizenry and the General

Assembly have worked to create." *Id.* Thus, courts must "look at the ordinary and popular meaning of the words used." *Id.* This is a longstanding rule. *See, e.g.*, *City of Rock Hill v. Harris*, 391 S.C. 149, 153, 705 S.E.2d 53, 55 (2011); *Sheppard v. City of Orangeburg*, 314 S.C. 240, 243, 442 S.E.2d 601, 603 (1994); *Shaw v. Shaw*, 256 S.C. 453, 455–56, 182 S.E.2d 865, 865 (1971); *McKenzie v. McLeod*, 251 S.C. 226, 231, 161 S.E.2d 659, 661 (1968); *McWhirter v. Bridges*, 249 S.C. 613, 621, 155 S.E.2d 897, 901 (1967); *Mungo v. Shedd*, 247 S.C. 195, 198, 146 S.E.2d 617, 618 (1966); *Miller v. Farr*, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963); *City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881); *Witsell v. City of Charleston*, 7 S.C. 88, 102 (1876); *State v. Dawson*, 21 S.C. 100, 1836 WL 1498, at *3 (S.C. App. L. 1836).

The Lead Opinion threw all of this well-established law out the window. It proudly declared that the Court "cannot relegate [its] role of declaring whether a legislative act is constitutional by blinding [itself] to everything that has transpired since the amendment was adopted." 438 S.C. at 204, 882 S.E.2d at 779 (Lead Opinion). This flies in the face of the long-held idea that the Constitution means what the framers and the people understood it to mean. *See City of Charleston*, 16 S.C. at 52 ("we must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the constitution"); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (the Constitution's "meaning is fixed according to the understandings of those who ratified it"). And it arrogates to the courts the power to essentially amend the Constitution without going through the constitutional process. *See* S.C. Const. art. XVI, § 1. By usurping the people's power in *PPSA I*, the Court violated its "duty . . . to declare the law, not to make it." *Gaud v. Walker*, 214 S.C. 451, 481, 53 S.E.2d 316, 329 (1949). In short, what the Lead Opinion did was rule "by judicial fiat," *PPSA I*, 438 S.C. at 306, 882 S.E.2d at 833 (Kittredge, J., dissenting), effectively making up constitutional

law "out of thin air," *id.* at 334, 882 S.E.2d at 849 (James, J., dissenting).

The Lead Opinion also rejected any reliance on the West Committee, claiming the West Committee notes were "irrelevant" to what article I, section 10 means, and was dismissive of its work as too reflective of "the societal landscape at that time." *Id.* at 204–05, 882 S.E.2d at 778–79 (Lead Opinion); *see also id.* at 230, 882 S.E.2 at 793 (Beatty, C.J., concurring) (the West Committee has "no relevance when interpreting our constitution"). The dissent was correct: This claim is "stunning." *Id.* at 292, 882 S.E.2d at 826 (Kittredge, J., dissenting).

As for the relevance of the West Committee, the Controlling Opinion, while ultimately not believing the West Committee's notes were relevant to the specific question in *PPSA I*, rightly recognized that the Committee's work "will certainly be important in future cases as it has been in the past" and refused to "impugn[] the work of the West Committee." *Id.* at 263 n.48, 882 S.E.2d at 811 n.48 (Controlling Opinion). Of course the West Committee's work will be relevant in the future, as it has always been strong evidence of the framers' intent and how constitutional terms were understood.[6] *See, e.g.*, *Williams v. Morris*, 320 S.C. 196, 203, 464 S.E.2d 97, 100 (1995) (citing the West Committee's Report as "evidence" regarding the legislative understanding of a constitutional provision); *cf. McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 447, 823 S.E.2d 193, 197 (Ct. App. 2018) (Hill, J.) ("The West Committee was prophetic.").

And the West Committee's work continues to be such evidence. Just three months after *PPSA I* was decided, the Court—in an opinion by the Chief Justice—favorably noted the West Committee's "inten[t]" in "drafting" article I, section 10 to support the Court's conclusion that a warrantless blood draw without consent violated the South Carolina Constitution. *State v. German*,

[6] This is not to say that the West Committee's notes should necessarily be "controlling." *State v. Forrester*, 343 S.C. 637, 647 n.7, 541 S.E.2d 837, 842 n.7 (2001). Appellants have never suggested as much. But there's a huge gap between "controlling" and "irrelevant."

___ S.C. ___, ___ S.E.2d ___, No. 2018-002090, 2023 WL 3129475, at *10 (S.C. Apr. 5, 2023); *see also id.* ("The drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches").

Turning to the attacks on the West Committee more generally (such that it had only one woman, *see PPSA I*, 438 S.C. at 204 n.8, 882 S.E.2d at 779 n.8 (Lead Opinion)), this reasoning calls into question much more than simply what the West Committee said. Taken to its logical conclusion, such an unprecedented and unprincipled theory of constitutional interpretation would call into question even the United States Constitution, given that only white, landowning men were delegates to the 1787 Convention in Philadelphia.

This shift in how the Court approaches constitutional questions should be rejected and corrected for at least two reasons. One, it was made without any attempt to justify this drastic change in the Court's jurisprudence. Two, it opens the door to results-oriented opinions that let three individuals impose on all South Carolinians their own views (if there is even a consensus in that regard) as to what the Constitution should say, thereby depriving the people of the "political power" the Constitution reserves to them alone. S.C. Const. art. I, § 1.

ii. The Controlling Opinion misinterpreted the State's history of abortion regulation.

The Controlling Opinion agreed with the two dissents that "the article I, section 10, 'unreasonable invasions of privacy' provision does not encompass a 'right to abortion,'" making that view the Court's "majority position." 438 S.C. at 287, 882 S.E.2d at 823. At least on that specific question, *PPSA I* was correct.

But a right to abortion wasn't the critical question, according to the Controlling Opinion. Instead, the question was supposedly "whether the [2021] Act violate[d] a pregnant woman's right to 'privacy.'" *Id.* The Controlling Opinion concluded the 2021 Act did so because it did not give

women "a meaningful opportunity" to choose an abortion, given what the Controlling Opinion said was the State's "longstanding 'opportunity' for abortion." *Id.* at 287–88, 882 S.E.2d at 824.

The Controlling Opinion misapprehended the State's history of abortion regulation. *See supra* Part II.A.2. This misreading of state law is significant. The idea that the State had a "longstanding" statutory option for abortion was the cornerstone of the Controlling Opinion's analysis that the 2021 Act violated article I, section 10. Once that misplaced cornerstone is removed, the analysis comes crumbling down because there is no legally cognizable privacy interest against which any state interest in protecting unborn life must be balanced. *Cf. PPSA I*, 438 S.C. at 276–77, 882 S.E.2d at 818 (Part V.C. of Controlling Opinion: "Balancing of Interests").

2. *PPSA I* is irreconcilable with the rest of state law.

Before *PPSA I*, this Court had never held that the South Carolina Constitution protects a right to abortion (as the Lead and Concurring Opinions contended) or that the regulation of abortion implicates any constitutional right to privacy (as the Controlling Opinion stated).

The Controlling Opinion (as well as the Lead Opinion) relies most heavily on *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993), for the proposition that article I, section 10's privacy clause extended beyond the search-and-seizure context. In *Singleton*, this Court "h[e]ld that the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution." *Id.* at 89, 437 S.E.2d at 61.

But *Singleton* is distinguishable on at least five grounds. *First*, abortion affects more than just one individual; it also involves the life of the unborn child. Even *Roe* acknowledged as much, observing that pregnancy "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education." 410 U.S. at 159; *see also PPSA I*, 438 S.C. at 316 n.91, 882 S.E.2d at 839 n. 91 (Kittredge, J., dissenting) ("If nothing else, *Singleton* and

the other cases mentioning article I, section 10 are distinguishable because they did not involve an interest in protecting the life of an unborn child."). *Second*, *Singleton* involved the narrow and distinguishable scenario of forced medication, which has little (if any) bearing on abortion. *Third*, the Court did not examine the history or original understanding of article I, section 10 in *Singleton*, so that case can hardly be the final word on the scope of that provision. *Fourth*, *Singleton* relied heavily on a Louisiana decision, but the Louisiana privacy provision came *after* the United States Supreme Court decided *Roe*. *See* Richard P. Bullock, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 787, 812 (1991) ("*Roe* was decided prior to the 1974 [Louisiana] constitution" that contained a privacy provision). *Fifth*, *Singleton* relied on federal case law, but federal law has long rejected the notion that abortion is based on privacy. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy").

The Controlling Opinion also invokes two other decisions (as did the Lead Opinion), but neither decision supported striking down the 2021 Act. The first decision was *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017), which involved the relationship between a criminal defendant's right to confront a witness and the privacy of mental-health records. As Justice James's dissent correctly explained, *Blackwell* focused on a statutory right of privacy and created a balancing test for whether a statutory exception to that right applies. *See PPSA I*, 438 S.C. at 347, 882 S.E.2d at 855 (James, J., dissenting). *Blackwell* says nothing about the scope of article I, section 10.

The second decision, *State v. Forrester*, asked whether a person had to be informed of the right to refuse to consent to a search. *See* 343 S.C. at 640–41, 541 S.E.2d at 839. *Forrester* was in

the context of a search and seizure, so any comments in that opinion about article I, section 10 beyond search and seizure is dicta and thus "not binding." *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232, 237 (1904); *see also K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, ___ n.4, 682 S.E.2d 252, 259 n.4 (2009) (Beatty, J.) (distinguishing a case because its language "constitute[d] dicta"). Additionally, as Justice James explained, *Forrester* took comments from a member of the West Committee out of context. *See PPSA I*, 438 S.C. at 350, 882 S.E.2d at 857.

3. *PPSA I* provides little legal guidance.

Stare decisis aims to "provide[] certainty and consistency within our judicial system." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 451, 790 S.E.2d 763, 770 (2016). To achieve those ends, a precedent must be able to "be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272. No opinion holding the 2021 Act unconstitutional can be applied in that way.

The Controlling Opinion claims that article I, section 10 "is clear as to its scope" and "includes all forms of privacy." 438 S.C. at 259, 882 S.E.2d at 808 (Controlling Opinion). But that does not answer what is—and is not—a "form of privacy." Justice Hugo Black once explained that "'[p]rivacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures." *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (quoted in *PPSA I*, 438 S.C. at 305, 882 S.E.2d at 833 (Kittredge, J., dissenting)). The Chief Justice, while disagreeing with Justice Kittredge about whether abortion falls within the meaning of privacy for purposes of article I, section 10, admitted that "the outer bounds of privacy are still debated," likewise indicating that "privacy" is ambiguous (but declining to define it). 438 S.C. at 217, 882 S.E.2d at 786 (Beatty, C.J., concurring). Despite this uncertainty

over what privacy includes, the Controlling Opinion offers no guidance on how to determine what is a "form of privacy."[7]

Many things seemingly fall within a seemingly unbounded definition of "privacy." What, for example, could be more personal than the decision to end one's own life? State law, however, currently prohibits physician-assisted suicide. *See* S.C. Code Ann. § 16-3-1090. State law also prohibits prostitution, *see* S.C. Code Ann. § 16-15-90, but the decision to have sex (whether for money or not) with another person could also fairly be considered a profoundly personal one, *cf. Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes . . . certain intimate conduct."). In the same vein, bodily autonomy can also involve what a person puts in his body, yet state law forbids recreational drug use. *See* S.C. Code Ann. § 44-53-370(d). Who to marry involves these same private considerations, but state law prohibits someone from being married to two people at the same time, even if all parties consent. *See id.* § 16-15-10.

Consider further the Controlling Opinion's agreement that prohibitions on rape and child abuse are reasonable, even though those acts "usually occur in private," because the State has a "compelling interest in preventing crime." 438 S.C. at 277, 882 S.E.2d at 818. In making this assertion, the Controlling Opinion presumably was not relying on the fact that the State's "compelling interest" in preventing rape and child abuse is because the General Assembly has criminalized those acts, given that the General Assembly also made performing an abortion prohibited by the 2021 Act to be a felony. *Compare* S.C. Code Ann. § 16-3-651(h) (defining "sexual battery"); *id.* §§ 16-3-652–16-3-654 (degrees of criminal sexual conduct); *id.* § 63-5-70 (unlawful conduct toward a child), *with* 2021 S.C. Acts No. 1, § 3 (with limited exceptions,

[7] The Lead Opinion's assertion that abortion fell within article I, section 10 because choosing whether to have an abortion "rests upon the utmost personal and private considerations imaginable" provides even less guidance. 438 S.C. at 195, 882 S.E.2d at 774 (Lead Opinion).

abortion after detection of a fetal heartbeat is a felony). Rather, the logic of the Controlling Opinion has to be that any "privacy" interest the rapist or abuser has is outweighed by the harm done to the victim. But if the harm done is the crux of the reasoning, the Controlling Opinion leaves open the possibility that other acts done in private that do not necessarily hurt someone else—consensual sex, illicit drug use, or suicide (with or without assistance)—are "forms of privacy" that the State cannot criminalize.

Nor does the Controlling Opinion fare any better with what "unreasonable" means in the context of abortion. For instance, it asserts that a general prohibition on abortion in the last trimester "was and remains noncontroversial" and is "indisputably reasonable." 438 S.C. at 270, 882 S.E.2d at 814. But the Controlling Opinion never explains *why* this invasion of "privacy" is reasonable, and it's (sadly) not uncontroversial, at least not anymore. Just last year, for example, California (already a State with minimal abortion restrictions) added a constitutional provision that prohibits "[t]he state" from "deny[ing] or interfere[ing] with an individual's reproductive freedom," "which includes their fundamental right to choose to have an abortion." Cal. Const. art. I, § 1.1. And some doctors are now even refusing to answer whether they support making abortion legal for "any reason" "up to the moment before birth." Press Release, *Democrat Witnesses Refuse to Answer Kennedy Question: "Do You Support Abortion up to the Moment of Birth?"*, Sen. John Kennedy (Apr. 26, 2023), https://tinyurl.com/59xwpcm8.

Similarly, the Controlling Opinion offers that "the law provides no basis for overriding the legislative policy determination underlying the" Pain-Capable Unborn Child Act, which was, that opinion concluded, not unreasonable "as a matter of law." 438 S.C. at 271, 882 S.E.2d at 815. But why? The Controlling Opinion does not provide an answer for why the Pain-Capable Unborn Child Act law was legally reasonable, despite the fact that the law was "highly controversial." *Id.*

None of these issues is "absurd" or "spurious." *Id.* at 229, 251 n.39, 882 S.E.2d at 792, 804 n.39 (Beatty, C.J., concurring). To the contrary, these Pandora's Box concerns are very real. Without clear legal principles to inform future decisions, *PPSA I*'s result and the diverging paths that reach it provide little more than an "I know it when I see it" rule that lacks meaningful guidance. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

4. *PPSA I* involves minimal reliance interests.

Even the United States Supreme Court in *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), recognized the limited reliance interests at play in the abortion context. "Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim." *Id.* at 856. The *Dobbs* Court echoed this point, explaining that because abortion is a typically unplanned response to an unplanned pregnancy, the "[t]raditional reliance interests" that "arise 'where advance planning of great precision is most obviously a necessity'" are not implicated. 142 S. Ct. at 2276 (quoting *Casey*, 505 U.S. at 856).

The *Dobbs* Court also compellingly dispensed with the "novel and intangible form of reliance" that *Casey* invoked about the impact of abortion on women's lives generally. *Id.* at 2277. Such a "form of reliance depends on an empirical question that is hard for anyone . . . to assess." *Id.* The "conflicting arguments" on this subject demonstrate how unrealistic it is for a court to decipher reliance interests with any meaningful precision. *Id.*; *see also Casey*, 505 U.S. at 957 (Rehnquist, C.J., concurring in part and dissenting in part) (criticizing the *Casey* plurality for citing a reliance interest on "generalized assertions about the national psyche").

Ultimately, this isn't like a contract case or a tort case, in which people have ordered their

affairs around a legal rule that has long been in place. Presumably no one *plans* to have an abortion prior to pregnancy (certainly Respondents have not presented anything to the contrary). Plus, given the private right of action a woman has against a physician who violates the 2023 Act, there is an even greater conflict that counsels against letting Respondents assert any theoretical reliance interests of pregnant women. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-680); *infra* Part IV (discussing *State v. McKnight*).

Without any cognizable reliance interest by women, Respondents are forced to focus on their own business interests. But no court has ever seriously entertained the idea that there is a constitutional right to perform (or profit from performing) abortions. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019).

5. *PPSA I* is a new, splintered, single decision.

Generally, "precedents tend to gain . . . respect with age." *Jerman*, 559 U.S. at 583 n.5. That makes sense, as the longer a precedent can withstand challenges to it, the greater force of reason and reliance it should have. *PPSA I* is not even a year old. It has not withstood a single critical review. Nor could it. *See supra* Part II.B.1. This factor therefore strongly cuts against upholding *PPSA I* based on *stare decisis*.

Further, when a case "claim[s] to stand as a leading case on the general principles of the law," one consideration is "the unanimity with which its judgment was pronounced." *State v. Williams*, 13 S.C. 546, 554 (1880). Without a unified theory, even for the three Justices that voted to strike down the 2021 Act, *PPSA I* merits little weight from a *stare decisis* perspective because there is little, if anything, beyond the actual result of the case on which three Justices agreed.

As a third strike against it, *PPSA I* is also a single decision. This Court has emphasized that "stare decisis is far more a respect for a body of decisions as opposed to a single case standing

alone." *McLeod*, 396 S.C. at 654, 723 S.E.2d at 203; *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (refusing to overrule precedent when the petitioners asked the Court "to overrule not a single case, but a long line of precedents" (cleaned up)). In fact, "[w]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of *stare decisis* alone, without regard to the grounds on which the antecedent case was adjudicated." *Williams*, 13 S.C. at 554 (quoted in *McLeod*, 396 S.C. at 654, 723 S.E.2d at 202).

Williams is instructive on this point. There, the Court was asked to reconsider a single precedent from less than five years before, which dealt with the jurisdiction of general sessions court. *See State v. Harper*, 6 S.C. 464 (1876). The *Williams* Court recognized that "*Harper* stands as authority" for holding for the appellant, but that it was nevertheless "necessary to examine the validity of the ground which the judgment in that case was rendered," as the question in *Williams* "involve[d] a construction of the constitution" and the Court "fe[lt] bound to re-consider the correctness of the conclusion" in *Harper*. 13 S.C. at 554–55. The Court ultimately reversed *Harper* and affirmed the decision below. Thus, this Court would not break new ground by overruling a single, recent precedent.

6. Law and fact have changed since *PPSA I.*

Although *PPSA I* was decided just six months ago, law and fact have changed. Starting with the law, changes across the Southeast have altered the abortion landscape. In Georgia, between oral argument and the decision in *PPSA I*, the state supreme court granted Georgia's emergency request to stay an injunction of Georgia's heartbeat law, which has protected unborn life after a fetal heartbeat is detected while that appeal is pending. *See* Order, *Georgia v. Sistersong Women of Color Reproductive Justice Collective*, S23M0358 (Ga. Nov. 23, 2022). Meanwhile, in Florida, after *PPSA I* was decided, Governor DeSantis signed into law that State's fetal heartbeat

act, which will take effect as soon as a judicial decision on a number of abortion-related questions is issued. *See* Fla. Sess. Law 2023-21. More recently in North Carolina, the General Assembly overrode the Governor's veto to enact a 12-week abortion prohibition, which is set to take effect July 1. *See* N.C. Sess. Law 2023-14.

These changes in the law have led to an evolving factual situation in South Carolina: Our State is becoming an abortion destination across the Southeast. As the State with the weakest abortion regulation in the region (at least, that is, with the 2023 Act enjoined), women from other States are coming to South Carolina (perhaps even being sent here by abortion providers in those States). That's resulted in the number of monthly abortions doubling. *See* S.C. Dep't Health & Envtl. Control, *Provisional Abortion Data 2022-2023*.

These changes are significant. Given that abortion was generally prohibited when article I, section 10 was proposed, adopted, and ratified and that South Carolina has been striving to protect unborn life ever since *Roe*, it is inconceivable that the framers or the people intended for article I, section 10 to make South Carolina a sanctuary State for abortions.

* * *

With article I, section 10 properly understood and *PPSA I* rightly overruled as a wayward (but hopefully brief) detour in this Court's jurisprudence, upholding the 2023 Act is straightforward. "The power of our state legislature is plenary," so "the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitutions." *City of Rock Hill*, 391 S.C. at 154, 705 S.E.2d at 55. In other words, the General Assembly enjoys "the sole prerogative to make policy decisions" and "to exercise discretion as to what the law will be." *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). Neither the South Carolina Constitution nor the United States Constitution guarantees a right to abortion,

so the General Assembly is free to regulate abortion as it sees fit. *See Dobbs*, 142 S. Ct. at 2284 (the "Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion"); *supra* Part II.A.1. (original understanding of article I, section 10).

III. None of Respondents' other theories has merit.

Respondents sought injunctive relief only on their privacy-based claims, and they never raised any other basis below for that relief. App. 85–91. Their privacy claims should therefore be the only basis on which the injunction possibly could be affirmed. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). But if the Court somehow were to look to the other claims on equal protection, substantive due process, vagueness, void ab initio, bill of attainder, and the Medicaid Act, *see* App. 45–65, none provides any basis for affirming the preliminary injunction.

As an initial matter, the fact that Respondents sought injunctive relief only on their privacy-based claims is revealing of their own evaluation of the case and that, like *PPSA I*, this case turns on article I, section 10. Still, even if Respondents' own lack of faith in these claims weren't enough, a cursory review of them confirms that none of those claims provides any basis for relief.

The Court has, in fact, said as much already about many of these claims. In *PPSA I*, three Justices summarily rejected any equal protection theory. *See* 438 S.C. at 259, 882 S.E.2d at 808 (Controlling Opinion); *id.* at 329, 882 S.E.2d at 846 (Kittredge, J., dissenting) (joined by James, J.). Three Justices rejected a due process theory. *See id.* at 259, 882 S.E.2d at 808 (Controlling Opinion); *id.* at 303–05, 882 S.E.2d at 832–33 (Kittredge, J., dissenting) (joined by James, J.). And a void ab initio one. *See id.* at 259, 882 S.E.2d at 808 (Controlling Opinion); *id.* at 329, 882 S.E.2d at 846 (Kittredge, J., dissenting) (joined by James, J.) ("I would summarily dismiss Petitioners'

remaining claims as manifestly without merit."). Finally, two of the three Justices who addressed the vagueness claim rejected it. *See id.* at 329, 882 S.E.2d at 846 (Kittredge, J., dissenting) (joined by James, J.).

These conclusions are sound. As for equal protection, "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics" that may warrant specific regulation, and heightened scrutiny applies only if pregnancy is a "mere pretext[]" for "invidious discrimination." *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974); *cf. PPSA I*, 438 S.C. at 223, 882 S.E.2d at 789 (Beatty, C.J., concurring) ("*Men do not get pregnant.*" (emphasis in original)). There is no such discrimination in the 2023 Act, which on its face makes clear that the focus is protecting life. The 2023 Act simply recognizes the unavoidable fact that pregnancy involves a woman carrying another life. In any event, no matter what level of scrutiny applies to the equal protection claims, the 2023 Act passes muster. The State's interest in unborn life is "compelling," 2023 Act, § 1(3), and the Act protects that life with certain exceptions that were part of the legislative compromise, having drawn logical distinctions, from the unique, horrible circumstances of rape to when the life or health of the mother is at stake to when the unborn child cannot survive after birth. Plus, the general prohibition is not based on an arbitrary number of weeks or the ever-moving, "completely unreasoned" mark of viability, *Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J., concurring in judgment); instead, it is based on a fetal heartbeat, which is identifiable and an excellent predictor of a live birth, 2023 Act, §§ 1(2), 1(3).

Respondents' due process theories are equally flawed. Substantive due process "protects only those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013). Abortion is not. *See, e.g.*, 1883 S.C. Acts No. 354; 1970 S.C. Acts No. 821; *PPSA I*, 438 S.C. at 299, 882

S.E.2d at 830 (Kittredge, J., dissenting) ("abortion has always been restricted and regulated in South Carolina; as such, abortion is not deeply rooted in our state's history").

Contrary to Respondents' claims, the exception for the life and health of the mother is not vague. Rather, it's readily discernible language that is substantially similar to language of the Pennsylvania statute upheld in *Casey*, 505 U.S. at 879–80, and the language used in other States, *see, e.g.*, Fla. Stat. Ann. § 390.01114(2)(d); Ind. Code Ann. § 16-18-2-327.9. So too with the definition of "fatal fetal anomaly." That definition uses common parlance in this context. *See, e.g.*, Ga. Code Ann. § 31-9B-1(3).

Respondents' new theories fare no better. Consider their Medicaid Act claim, which asserts that the State is violating the Medicaid Act "[b]y disallowing [Planned Parenthood] from receiving reimbursements for abortions provided to Medicaid recipients." App. 63. This is nothing more than an attempt to circumvent *Dobbs*. Under that decision, "abortion may be regulated by the States." 142 S. Ct. at 2259. But to interpret the Medicaid Act as requiring the States to permit certain people to obtain abortions would be to usurp the States' sovereignty to regulate this issue and treat Congress has having implicitly mandated that any woman eligible for Medicaid must be allowed to abort her child.

Turn next to their bill of attainder claim. App. 62. The South Carolina Constitution forbids the General Assembly from passing a bill of attainder, *see* S.C. Const. art. I, § 4, which is "a legislative act which inflicts punishment without a judicial trial," *United States v. Lovett*, 328 U.S. 303, 315 (1946). What Respondents overlook is that bills of attainder historically involve criminal penalties. *See, e.g.*, 4 W. Blackstone, *Commentaries on the Law of England* 373 (1769) (discussing how attainder involved a sentence of death); 3 J. Story, *Commentaries on the Constitution of the United States* § 1338 (1833) (discussing bills of attainder involving criminal punishment, whether

capital or not). Nothing about section 3 of the 2023 Act involves criminal law, so it cannot, by definition, be a bill of attainder. Tellingly, despite a complaint full of legal citations, Respondents included no South Carolina authority treating article I, section 4 as broadly as they invite the Court to interpret it. *See* App. 62. And if there were somehow still any question, section 3 of the 2023 Act involves the raising and spending of money, which is a quintessential legislative function. *See* S.C. Const. art. III, § 15. It does not involve anything like a "judicial function," so there is no need for the "general safeguard against legislative exercise of the judicial function" that article I, section 4 provides. *I.N.S. v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring) (discussing the federal Bill of Attainder Clause).

Ultimately, there may come a time for fuller briefing on these claims. But for now, it's sufficient to show that, even if it were procedurally possible at this stage to affirm the injunction based on these claims, there is no substantive reason to do so.

IV. Respondents did not establish irreparable harm.

The circuit court found that "[Respondents] and their physicians, staff, and patients face immediate, irreparable harm" without an injunction, in the form of "criminal penalties, professional licensure revocation, and civil liability." App. 6. There are at least two flaws in this short conclusion.

The first flaw is whose harm may be considered. As this Court has repeatedly made clear, "for a preliminary injunction to be granted, the plaintiff must establish that . . . *he* would suffer irreparable harm if the injunction is not granted." *Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569–70 (2021) (emphasis added). The irreparable harm cannot be based on the rights of others. *McKnight*, 352 S.C. at 651, 576 S.E.2d at 176 ("one cannot obtain a decision as to the invalidity of an act on the ground that it impairs the rights of others"); *Stone v.*

Salley, 244 S.C. 531, 537, 137 S.E.2d 788, 790 (1964) (a plaintiff "cannot obtain a decision as to the invalidity of [an] Act on the ground that it impairs the rights of others"); *see also Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 326 (D.D.C. 2018) ("injuries to third parties are not a basis to find irreparable harm").

With that rule in mind, it's important to remember who the Respondents are (abortion providers and their clinics) and who Respondents are not (pregnant women). Yet Respondents spent the bulk of their irreparable-harm argument below focused on pregnant women. *See* App. 93–100. This is significant because this Court has already held that a person "does not have standing" to "assert the privacy rights of other pregnant women." *McKnight*, 352 S.C. at 651, 576 S.E.2d at 176 (reaching this conclusion in response to an argument that "application of the homicide by child abuse statute to women for conduct during pregnancy violates the constitutional rights of privacy and autonomy"); *see also State v. Curtis*, 356 S.C. 622, 630, 591 S.E.2d 600, 604 (2004) ("Curtis has no standing to assert the privacy rights of" other persons). Plus, Respondents have never explained why pregnant women could not challenge the 2023 Act themselves, if they wanted. Have no doubt, pregnant women could do so, just as pregnant women have challenged abortion regulations in the past. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *Hodgson v. Minnesota*, 497 U.S. 417, 429 (1990); *H.L. v. Matheson*, 450 U.S. 398, 400 (1981); *Williams v. Zbaraz*, 448 U.S. 358, 361 (1980); *Harris v. McRae*, 448 U.S. 297, 303 (1980); *Bellotti v. Baird*, 428 U.S. 132, 137–38 (1976); *Poelker v. Doe*, 432 U.S. 519, 519 (1977); *Beal v. Doe*, 432 U.S. 438, 441–42 (1977); *Maher v. Roe*, 432 U.S. 464, 467 (1977) (all involving women seeking abortions asserting their own rights, as plaintiffs).

The fact that Respondents should not be permitted to represent the interests of pregnant women is magnified by the 2023 Act's civil cause of action for pregnant women on whom an

abortion is performed in violation of the Act. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-680). For all the distortions that abortion cases have wreaked on standing jurisprudence, Respondents still cannot point to any case outside of South Carolina in which physicians who perform abortions have been granted third-party standing to represent pregnant women who have a statutory cause of action against those same physicians.

But even if the Court were to break with its longstanding rule and permit Respondents to assert alleged harm to pregnant women, Respondents still could not prevail. Their argument ultimately boils down to the contention that these women are harmed by remaining pregnant and being "forced" to have a child. This Court, however, has rejected the tort of "wrongful life." *Willis*, 362 S.C. at 158, 607 S.E.2d at 69 ("To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious."). That tort-law decision should carry weight, given the context of *Willis*. That case was brought based on the allegation that a doctor failed to diagnose an unborn child's medical condition to give the mother "the opportunity to decide whether to terminate her pregnancy while legally allowed to do so." *Id.* at 149, 607 S.E.2d at 64. Along the same lines, this Court has not embraced the tort of "wrongful pregnancy," which undermines Respondents' claimed harm, even if that harm is limited to the fact that a woman remains pregnant. *See id.* at 152, 607 S.E.2d at 65.

A final point about harm to patients: Patients face *none* of the supposed harms—"criminal penalties, professional licensure revocation, and civil liability"—the circuit court found. App. 6. *First*, women cannot be prosecuted under the 2023 Act. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-670); *id.* § 9 (repealing S.C. Code Ann. § 44-41-80(b)). *Second*, women obtaining abortions do not have any professional license at stake. Only a physician or medical professional does. *See id.* § 2 (S.C. Code Ann. § 44-41-690). And *third*, women can assert a cause of action; one cannot be

brought against them. *See id.* § 2 (S.C. Code Ann. § 44-41-680).

The second flaw in the circuit court's conclusion on irreparable harm is what harm Respondents themselves face. Respondents claimed their harm would be not being able to care for their patients and reputational harm. *See* App. 100. But the State has a legitimate interest in regulating the medical profession, *see Dantzler v. Callison*, 230 S.C. 75, 94–95, 94 S.E.2d 177, 188 (1956), and the State regulates a wide array of medical procedures, *see, e.g.*, S.C. Code Ann. Regs. 81-96 (regulations for office-based surgery). No matter what a physician believes might be good care, that physician cannot violate state law. In this way, Respondents are no different than any other doctors who might disagree with some law regulating the practice of medicine. Because "the Legislature has broad authority, within constitutional limits, to regulate the medical and other professions," *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 477, 636 S.E.2d 598, 611 (2006), *overruled on other grounds by Joseph*, 417 S.C. 436, 790 S.E.2d 763, any disagreement with the law should be voiced to legislators, not judges. And as long as they comply with state law (as all doctors are required to, *see* S.C. Code Ann. § 40-47-110), there should be no worry of reputational harm.

CONCLUSION

The Court should reverse the preliminary injunction order.

Respectfully submitted,

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