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.

REPLY BRIEF OF GOVERNOR McMASTER

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Much like the federal "Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022), a majority of this Court has recognized that article I, section 10 of the South Carolina Constitution "does not encompass a 'right to abortion,'" *Planned Parenthood S. Atl. v. State* ("*PPSA I*"), 438 S.C. 188, 287–88, 882 S.E.2d 770, 823–24 (2023) (Controlling Opinion). Although three members of the Court, albeit based on diverging rationales, took issue with the 2021 Act, the 2023 Act is distinct, having been enacted in response to the Court's concerns. The 2023 Act is constitutional, and nothing Respondents argue compels a different conclusion.

As an initial matter, Respondents' entire argument is built on their misreading of *PPSA I*. This Court's decision did not, as Respondents wishfully assert, hold—much less preemptively decide—that any fetal heartbeat law is per se unconstitutional. Rather, Justice Few's Controlling Opinion concluded only that the 2021 Act was unconstitutional. The General Assembly was free to exercise its plenary authority to pass legislation regulating abortions in a manner consistent with the Controlling Opinion. Respondents therefore cannot use *PPSA I*'s declaration on the 2021 Act as a shield from future regulations or a sword to attack the 2023 Act.

Once *PPSA I* is properly understood, Respondents' remaining arguments fall apart. The 2023 Act resolves all of the issues the Court found with the 2021 Act. Respondents try to minimize the differences between the 2021 Act and the 2023 Act, but this Court has recognized that it "cannot ignore" the change of even a single "word" in a statute. *State v. Taylor*, 436 S.C. 28, 35, 870 S.E.2d 168, 172 (2022). The changes here are important. They clarify the State's compelling interest in protecting unborn life, and they address the Controlling Opinion's "informed choice" concern regarding the 2021 Act—as does CDC data and Respondents' admission that some women "can know" they are pregnant and obtain an abortion before a fetal heartbeat is detected. *PPSA I*,

438 S.C. at 278, 882 S.E.2d at 819; *see* App. 107, 145.

These changes are sufficient to reverse the circuit court's preliminary injunction order, but they are not the only reason to do so. Under this Court's framework for interpreting splintered decisions, *PPSA I* cannot be "considered as precedent[]" because it lacks a rationale that a majority of the Court joined. *Moseley v. Am. Nat. Ins. Co.*, 167 S.C. 112, 166 S.E. 94, 96 (1932). Instead, *PPSA I* "establish[ed] the law only as to th[at] particular case," *id.*, leaving the General Assembly free to legislate in response to that decision. Respondents have no response to this longstanding law, so they try to brush it aside. But they can't do that. For all their emphasis in their brief on the importance of precedent, *Moseley* is precedent they cannot avoid.

Nor do Respondents have a persuasive response on either the *stare decisis* factors or their irreparable harm obstacle. As for *stare decisis*, Respondents do not want to substantively engage with the reasoning of *PPSA I*, and their arguments about consistency with prior case law, reliance interests, and guidance for future decisions fall flat. When they finally get to irreparable harm in a single footnote on the last page of their brief, they again try to skip past the issue with a few cursory arguments. That attempt fails: *PPSA I* said nothing about this issue, and this Court's decisions leave no doubt that Respondents must show their own irreparable harm to obtain injunctive relief.

I. Respondents overread *PPSA I*.

A correct understanding of *PPSA I* is essential to analyzing the issues here. Throughout their brief, Respondents repeatedly contend that *PPSA I* held that legislation imposing "a ban on abortion after approximately six weeks of pregnancy violated the constitutional right to privacy." *E.g.*, Resp. Br. 21. That is incorrect. The actual result of *PPSA I* was not nearly so sweeping, and the scope of the Court's narrow judgment did not extend beyond the facts of that case or into the future so as to forever prohibit the State from regulating abortions after the detection of a heartbeat.

Three Justices in *PPSA I* voted that the 2021 Act was unconstitutional under article I, section 10. Justice Hearn concluded that the "constitutional right to privacy extends to a woman's decision to have an abortion." 438 S.C. at 216, 882 S.E.2d at 785 (Lead Opinion). The 2021 Act, she determined, "violate[d]" that provision. *Id.* at 217, 882 S.E.2d at 786. Chief Justice Beatty "concur[red] with Justice Hearn's lead opinion regarding the right to privacy." *Id.* at 218, 882 S.E.2d at 786 (Beatty, C.J., concurring).

The third vote against the 2021 Act came from Justice Few, but on much narrower grounds. He did not find a constitutional right to abortion in article I, section 10; in fact, he expressly disclaimed any such right. *Id.* at 287, 882 S.E.2d at 823 (Controlling Opinion) ("[T]he State and the dissenting Justices argue the article I, section 10, 'unreasonable invasions of privacy' provision does not encompass a 'right to abortion.' I wholeheartedly agree."). With that vote, three Justices concluded that the State Constitution does *not* include a right to abortion. *Id.* ("With my vote the argument holds a majority position."). Lest there somehow still be any doubt, Justice Few explained that he "d[id] not concur in Justice Hearn's or Chief Justice Beatty's analysis of the article I, section 10 question," but only "concur[red] with them in result." *Id.* at 259, 882 S.E.2d at 808.

Nor did Justice Few purport to establish a sweeping rule that fetal heartbeat laws are per se unconstitutional. Rather, he found the 2021 Act was "arbitrary" because, despite a finding about "informed choice," 2021 S.C. Acts No. 1, § 2(8), "the General Assembly did not consider this necessary factual question." 438 S.C. at 284, 882 S.E.2d at 822. He ultimately made his specific conclusion crystal clear: "I vote to find the Fetal Heartbeat Act unconstitutional because the General Assembly's failure to consider the necessary factual question as a predicate to its policy judgment was arbitrary, as I have explained." *Id.* at 285, 882 S.E.2d at 822. That's a far cry from,

as Respondents try to frame it, "a six-week law is unconstitutional."[1]

It's black-letter law that "[w]hen there is no majority opinion, the narrower holding controls." *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). This Court has just recently applied this principle. *See Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church*, ___ S.C. ___, ___ S.E.2d ___, No. 2020-000986, 2022 WL 3560664, at *20 (S.C. Aug. 17, 2022) (James, J., concurring) (recognizing that the narrowest rationale for the result—that "a real property trust was created by a Parish if the Parish expressly acceded to the Dennis Canon"—was the legal rule that controlled the Court's 2017 decision).

In trying to avoid this principle, Respondents misconstrue this Court's cases, conflating the *result* in a particular case with the case's *legal rule* that applies in the future. *See* Resp. Br. 22. In *Protestant Episcopal Church*, the narrowest rationale from the 2017 decision (from the Chief Justice) that supported the result (that neutral principles of law determine whether a trust was created) controlled the case on remand and on the second appeal. The rationales of Justice Kittredge and Acting Justice Toal (which also applied neutral principles of law) were broader, as they would have ended the case in 2017 without need for further proceedings. Thus, a parish-by-parish analysis was necessary when that case returned to this Court. And in the case cited in the footnote in *State v. Smith*, 428 S.C. 417, 421 n.4, 836 S.E.2d 348, 350 n.4 (2019)—*Aiken v. Byars*—the Court reached a particular result because Justice Pleicones agreed in a brief opinion with two other Justices (Beatty and Hearn) about juveniles sentenced to life in prison, but did so

[1] As the Governor explained in his opening brief, the 2023 Act is not a "six-week" law, with some random point in pregnancy picked for abortion regulation. The 2023 Act is, in fact, a fetal heartbeat law, which is based on an identifiable moment and an excellent predictor of a child's live birth. *See* 2023 S.C. Acts No. 70, §§ 1(2), 1(3).

based on state law, rather than federal law, *see* 410 S.C. 534, 546, 765 S.E.2d 572, 578 (2014) (Pleicones, J., concurring in the judgment). This Court does not yet appear to have addressed whether the different legal bases in *Aiken* were of any legal significance, so *Aiken* does not help Respondents' argument here about how to interpret fractured decisions.

Applying the *Marks* rule in this instance is simple, and it illustrates why it is the operative rule. Justice Few's opinion concurring in the judgment is the narrowest of the three opinions that concluded the 2021 Act was unconstitutional. Unlike Justice Hearn and Chief Justice Beatty, who found that "[s]ix weeks is, quite simply, not a reasonable period" for generally prohibiting abortions, 438 S.C. at 217, 882 S.E.2d at 786 (Lead Opinion), Justice Few's opinion did not say that *any* fetal heartbeat law is necessarily unconstitutional. Rather, his opinion held that *the specific* fetal heartbeat law before the Court was unconstitutional. *See id.* at 285, 882 S.E.2d at 822 (Controlling Opinion). That makes his opinion the controlling one.

That said, even if the Court were to agree with Respondents about the rule for interpreting fractured decisions, Respondents are still wrong about the meaning of *PPSA I*. Justice Few did not agree with "Justice Hearn's or Chief Justice Beatty's analysis of the article I, section 10 question." *Id.* at 259, 882 S.E.2d at 808. Thus, the only "individual principle[] endorsed by the majority of the Justices," Resp. Br. 22, is that the 2021 Act was unconstitutional under article I, section 10. Nothing more.[2] *See Snipes v. Davis*, 131 S.C. 298, 127 S.E. 447, 451 (1925) ("The opinion of the court undoubtedly fixed the law of that particular case but for the reason that two of the justices

[2] For this reason, Respondents' amalgamation of quotes from *PPSA I* is of little import to this case. *See* Resp. Br. 27–32. Rather than focusing on the legal rule from Justice Few's Controlling Opinion, they compile a self-serving collection of greatest hits and advance it as if that curated clippings of quotations formed a majority opinion in *PPSA I*. In doing so, Respondents actually cite Justice Hearn's opinion more than Justice Few's, and they combine to cite Justice Hearn and Chief Justice Beatty almost twice as much as they cite Justice Few.

concurred in the result and two dissented, it cannot be considered as binding upon subsequent litigation.").

With this correct understanding of *PPSA I*, Respondents' contention that Appellants should be collaterally estopped from making the arguments they do in this case can be rejected. *See* Resp. Br. 23–26. Their argument is premised on their misguided position that *PPSA I* "determined that *a* law banning abortion after six weeks of pregnancy was unreasonable as a matter of law." Resp. Br. 24 (emphasis added). *PPSA I* did address "a" law, but it was the 2021 Act specifically. The 2023 Act is a new law, and this Court has not yet passed upon its constitutionality. *See State v. Ramsey*, 409 S.C. 206, 213 n.2, 762 S.E.2d 15, 19 n.2 (2014) (recognizing that the General Assembly may legislate prospectively in response to judicial decisions); *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 153 n.8, 886 S.E.2d 228, 234 n.8 (2023) ("If our effort to discern legislative intent is not correct, the legislature may, of course, amend the statute to clearly provide for a private right of action.").

II. The 2023 Act resolves the issues the Court found with the 2021 Act.

Respondents strain to cast the 2023 Act as a carbon copy of the 2021 Act, calling the 2023 Act "identical in all material respects" to the 2021 Act. Resp. Br. 1. It's no surprise they want to downplay the changes the General Assembly made: Those changes were adopted specifically to address the issues that the Controlling Opinion found in the 2021 Act.

In light of the Controlling Opinion, the General Assembly retained its authority to legislate on abortion in a way that was not "arbitrary." 438 S.C. at 284, 882 S.E.2d at 822. And that's exactly what the General Assembly did in the 2023 Act. The General Assembly's decision to do so should be no surprise: Abortion remains one of society's most high-profile issues, and this Court has

recognized that the General Assembly may act "in direct response" to a judicial decision.[3] *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 25, 736 S.E.2d 651, 656 (2012).

A. The 2023 Act confirms the State's compelling interest in unborn life.

Respondents call the change from the 2021 Act's finding of a "legitimate interest" to the 2023 Act's finding of a "compelling interest" in protecting unborn life a "minor semantic change." Resp. Br. 39. Hardly. As the Chief Justice commented in *PPSA I*, "words matter." 438 S.C. at 220, 882 S.E.2d at 787 (Beatty, C.J., concurring). Even changing a single "word" has consequences. *See Taylor*, 436 S.C. at 35, 870 S.E.2d at 172 ("we cannot ignore" that "the General Assembly chose to change the word 'include' to 'show'" when amending the DUI-video-recording statute).

In this case, the changed word is significant. A "'compelling' interest" is "a 'paramount' interest[or] an interest 'of the highest order.'" *Swanner v. Anchorage Equal Rts. Comm'n*, 513 U.S. 979, 982 (1994) (Thomas, J., dissenting from denial of certiorari). A "legitimate state interest," on the other hand, can be shown by a "low" "quantum of evidence." *Thompson v. Hebdon*, 140 S. Ct. 348, 349 (2019) (per curiam). The Court should acknowledge the General Assembly's new declaration of the State's interest and recognize the change the legislature has expressed on this point. *Cf. Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law.").

What's missing from Respondents' argument on this issue is any attempt to demonstrate why the General Assembly's expression of the State's compelling interest could be incorrect. Instead, Respondents merely fall back on their same mistaken argument, insisting *PPSA I* already

[3] Respondents concede the 2023 Act resolves any inconsistencies in state law about when abortions may be performed, *see* Resp. Br. 41, so there's no need to revisit that issue, *see* Gov. Br. 14–15.

addressed this question. *See* Resp. Br. 40. The Controlling Opinion, however, actually recognized that there can be a compelling interest: "'human life' has no countervailing interest." 438 S.C. at 273, 882 S.E.2d at 816. The Controlling Opinion said only that the 2021 Act did not express such an interest because it was not a personhood law. *See id.*

Respondents attempt to jump on the fact that the 2023 Act is also not a personhood law, *see* Resp. Br. 41, but two responses thwart that effort. One, that the General Assembly did not prohibit all abortions with the 2023 Act is of no legal significance. Aside from the fact that Respondents cannot credibly take issue with the General Assembly only prohibiting some, but not all, abortions, "[t]here is no requirement that the Legislature attack all aspects of a problem and the fact that it has chosen to address itself to only one [part of an issue] renders the Act no less valid." *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 230–31, 246 S.E.2d 869, 875 (1978).[4] The 2023 Act is a legislative compromise—something that happens all the time in the give-and-take of the legislative process on significant issues. *See* Gov. Br. 16–17.

Two, the 2023 Act expresses the State's strong interest in human life that the Controlling Opinion said the 2021 Act did not. The 2023 Act finds a compelling interest in the life of the unborn child, and the Act defines "unborn child" as "an individual organism of the species homo sapiens from conception until live birth." 2023 Act, § 2 (S.C. Code Ann. § 44-41-610(14)). A homo sapiens is, of course, a person. *See* Merriam Webster, *Homo sapiens* (2023), https://tinyurl.com/4n4bmj4f ("humankind"). The 2023 Act therefore defines an unborn child to be a person from conception. In this way, the 2023 Act is similar to provisions of the personhood bills cited by the Controlling Opinion as something that would show how seriously the State takes

[4] *Bauer* was significant to the Controlling Opinion's analysis in *PPSA I* about legislative findings. *See* 438 S.C. at 279, 882 S.E.2d at 819. Just as *Bauer* carried weight there, *Bauer*'s additional instruction about legislative action should do the same here.

its interest in unborn life. *See* 438 S.C. at 273 n.54, 882 S.E.2d at 816 n.54 (citing multiple unenacted bills providing "The General Assembly finds that a human being is a person at fertilization").

Even assuming, for the sake of argument, that the unborn child were somehow not a "person" when a fetal heartbeat is first detected, we still know that the "amorphous collection of cells" described by the Chief Justice will become—and can only become (whenever one might decide that happens, whether during pregnancy, at birth, or perhaps even after birth)—a human being. 438 S.C. at 218, 222, 882 S.E.2d at 786, 788 (Beatty, C.J., concurring). No one has ever suggested otherwise. And no one could credibly contend that this "collection of cells" could become anything other than a person. Further, Respondents have never disputed the strong predictive value that the "flutter of electrical impulses" has for a live birth. *Id.*

These points confirm what the United States Supreme Court recognized more than three decades ago: "The State's interest, if compelling after viability, is equally compelling before viability." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989) (cleaned up). Viability, after all, is not constitutionally significant, and it "mistake[s] a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 924 (1973). At every stage, the unborn child has her own DNA and is a distinct being, yet is helpless to help herself, and the law has long sought to protect people who cannot protect themselves. *See, e.g.*, 1698 S.C. Acts No. 159, § 4 (providing funds to care for "sick and lame seamen"); 1811 S.C. Acts No. 1989 (providing for the education of certain orphans in the Orphan House of Charleston); 1993 S.C. Acts No. 110 (S.C. Code Ann. § 43-35-5 *et seq.*) (Omnibus Adult Protection Act). Respondents offer nothing about either why the State's interest in protecting unborn children is not compelling from conception or when they believe the State's interest becomes compelling.

B. There is no "informed choice" problem with the 2023 Act.

Respondents launch three primary attacks about informed choice. They claim that the provisions of the 2023 Act still involve unspoken elements of informed choice. They take issue with the General Assembly's legislative history and findings. And they challenge the factual conclusion that a woman can learn of her pregnancy and obtain an abortion before a fetal heartbeat can be detected. None of these assaults on the 2023 Act can succeed.

First, Respondents begin by conflating the 2023 Act's requirement of "informed consent" with the 2021 Act's finding of "informed choice." Resp. Br. 34. The "informed choice" in the 2021 Act was "about whether to continue a pregnancy." 2021 Act, § 2(8). The "informed consent" in the 2023 Act is about consent to the procedure itself. For example, a woman must be told about the nature and risks of an abortion and the probable gestational age of her child, and she must be allowed to view an ultrasound if she wants to do so before proceeding. *See* 2023 Act, § 10 (S.C. Code Ann. § 44-41-330(A)). Requiring informed consent is common in medical procedures. *See, e.g.*, S.C. Code Ann. Regs. 81-96(F)(2).

It makes sense that, as part of that consent, a woman has to be informed of a fetal heartbeat. That heartbeat would (unless an exception applied) prohibit the physician from carrying out the abortion, and the woman would have to be advised. In this way, informing the pregnant woman of the fetal heartbeat is no different than, under the Pain-Capable Unborn Child Act, telling the pregnant woman that her unborn child is far enough along in development to feel pain and therefore an abortion may not be performed. *See* S.C. Code Ann. §§ 44-41-440, -450.

The requirement to inform a pregnant woman about a fetal heartbeat serves another purpose. Some pregnant women can obtain an abortion after a fetal heartbeat, if an exception applies. After hearing her child's heartbeat, a woman might decide not to abort her child, even if

the 2023 Act permitted her to do so. *Cf. Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("some women come to regret their choice to abort the infant life they once created and sustained").

Second, Respondents criticize the legislative record. *See* Resp. Br. 37–39. Respondents initially insist that the Court shouldn't look to the legislative record at all. The Governor agrees that legislative history isn't necessary here—the Court can (and should) look to the plain language of the 2023 Act to uphold the constitutionality of that law. *See Powell v. Keel*, 433 S.C. 457, 470, 860 S.E.2d 344, 351 (2021) (legislative history is not necessary for an unambiguous statute).

But the Controlling Opinion thought the legislative history mattered in evaluating the 2021 Act, so the Governor's reference to legislative history was intended to address that perspective in the context of the 2023 Act. In analyzing the legislative history, Respondents are incorrect that statements of individual legislators cannot be considered. *See* Resp. Br. 37. This Court has explained that it "may not look to the opinions of legislators or others concerned in the enactment of the law—*expressed subsequent to enactment*—to ascertain the intent of the legislature." *Creswick v. Univ. of S.C.*, 434 S.C. 77, 83, 862 S.E.2d 706, 709 (2021) (per curiam) (emphasis added) (cited at Resp. Br. 36).

Turning to that record, Respondents unsurprisingly don't like the sources cited by some legislators because they may be pro-life. *See* Resp. Br. 39. But it is also unsurprising that the General Assembly looked to groups that shared the State's interest in protecting unborn life, and there is nothing wrong with that. In addition to offering numerous citations to their own website as support for their preferred (but rejected) policy alternatives, Respondents' own arguments are replete with cites from pro-abortion groups, which conflict with information from pro-life groups. This dispute between pro-life and pro-abortion groups is to be expected (just as the amicus briefs disagree here).

These scientific disputes are for the General Assembly—not the courts—to resolve. *See Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 219–20, 863 S.E.2d 456, 463 (2021) ("this Court is not called upon to declare what the 'right science' is or to declare whether the proviso reflects either sound public health policy or a complete lack of common sense on the part of the General Assembly"). Trying to grade the process the General Assembly used to resolve a debate would be in tension with the constitutional separation of powers and doctrines like the enrolled-bill rule, which require that the Court show "respect for a co-equal and independent department of government." *Med. Soc. of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 278, 513 S.E.2d 352, 357 (1999); *see also, e.g.*, *Smith v. Tiffany*, 419 S.C. 548, 560, 799 S.E.2d 479, 485 (2017) (deciding a case "with respect for the legislature's prerogative"). This Court reviews the result of the legislature's work, not how the legislature did its work (or its research). And when that work is on a subject as hotly debated as abortion, it is critical that the Court give the legislature's decision deference, lest the Court become a "superlegislature" that substitutes its evaluation of the question for the General Assembly's. *Richland Cnty. Sch. Dist. 2 v. Lucas*, 434 S.C. 299, 306, 862 S.E.2d 920, 924 (2021) (per curiam).

Third, Respondents criticize the factual conclusion that women can learn of their pregnancy and decide to obtain an abortion before a fetal heartbeat is detected. *See* Resp. Br. 35–36. For example, they blame the Governor for "cherry-pick[ing]" quotes form their website. Resp. Br. 35 n.44. The quotes are not misleading. Rather, they simply highlight facts that confirm women are able to determine that they are pregnant before a fetal heartbeat can be detected.

More troublingly, Respondents ignore their own declarations, which confirm the Governor's argument that a woman "can know" she is pregnant before a fetal heartbeat is able to be heard. *PPSA I*, 438 S.C. at 278, 882 S.E.2d at 819 (Controlling Opinion). Dr. Farris's

declaration admits that a woman "could reasonably expect to learn that she is pregnant . . . . roughly two weeks" before a fetal heartbeat might be detected. App. 118. And Dr. Buffkin notes that at least a quarter of his patients seek an abortion before six weeks. App. 145.

To be sure, Respondents then try to insist that these two weeks are not sufficient time for women to obtain an abortion. *See* Resp. Br. 35–36. But there are multiple flaws in their argument. In the first place, experience proves that, in these two weeks, women can both learn they are pregnant and obtain an abortion. The CDC's most recent report shows that over 45% of abortions nationwide occur at or before six weeks of pregnancy. *See* Ctrs. for Disease Control & Prevention, *Abortion Surveillance – United States, 2020*, Table 10 (Nov. 23, 2022), https://tinyurl.com/ywd6k3r2. Thus, despite Respondents' claim that "the *vast majority* of" women cannot obtain an abortion under the 2023 Act, Resp. Br. 2 (emphasis in original), the time the Act provides was sufficient for at least 45% of all women nationwide who obtained an abortion.

In the second, Respondents' timing concerns are in tension with their assertion that "[d]ecisions related to having a family are some of the most personal that South Carolinians will ever make." App. 11. If the decision to have (or not to have) a child is so monumental, and if the 2023 Act takes effect, presumably women will have greater incentive both to determine if they are pregnant and to seek an abortion in a timely manner if they do not want to have a child. Respondents disregard how the 2023 Act incentivizes changes to behavior. *See Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992); *see also King v. Oxford*, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984) ("It is the policy of the courts . . . to discourage . . . inattention to one's own interests. A party must avail himself of the knowledge or means of knowledge open to him.").

And in the third, Respondents' argument ignores the outcome-determinative fact that

they've asserted a facial challenge. *See* App. 64–65. Their facial challenge requires them to "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) (emphasis added). Thus, if even a single woman could obtain an abortion before a fetal heartbeat is detected, a "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). Both the CDC data and Respondents' own statements leave no doubt that at least some women can obtain an abortion before a fetal heartbeat is detected. *See* App. 107 (Farris); App. 145 (Buffkin). Thus, Respondents' facial challenge fails as a matter of law.

III. *PPSA I* does not control the result in this case.

A. Respondents have no rebuttal to the fact that *PPSA I* is not "precedent."

Respondents spend surprisingly little time trying to rebut the Governor's explanation that under *State v. Goodwin*, 81 S.C. 419, 62 S.E. 1100 (1908), *Moseley v. American National Insurance Co.*, *State v. Campbell*, 242 S.C. 64, 129 S.E.2d 902 (1963), and *State v. Walker*, 252 S.C. 325, 166 S.E.2d 209 (1969), *PPSA I* is not a "precedent" that binds this Court here because no rationale commanded a majority of the Court, *see* Gov. Br. 22–23. They offer only two passing arguments, neither of which is persuasive.

In the first place, they try to quickly overcome these cases by pointing to their interpretation of *PPSA I* and what they say are "the positions shared by at least three Justices*."* Resp. Br. 23. Yet as explained already, the only "position" three Justices shared was that the 2021 Act was unconstitutional. *See* 438 S.C. at 259, 882 S.E.2d at 808 ("While I do not concur in Justice Hearn's or Chief Justice Beatty's analysis of the article I, section 10 question, I concur with them in result."). *PPSA I* is a fractured decision without a single rationale shared by a majority of the Court, and nothing Respondents say can change that critical point.

And in the second, they note that in *Walker* and *Moseley* the Court did not overrule earlier decisions but distinguished them. *See* Resp. Br. 45 n.52. That's true, but it's also irrelevant. The legal rule that a fractured decision does not bind the Court in future cases is still good law. Respondents never ask this Court to overrule that legal rule and adopt a new framework for how to treat splintered decisions.

B. All of the *stare decisis* factors favor overruling *PPSA I*.

Respondents' attempts to counter the Governor's *stare decisis* analysis fall flat. They start with precedent, claiming that *PPSA I* "built on thirty years of precedent" in light of *Singleton*. Resp. Br. 44. Yet they offer no response to the five distinctions the Governor explained make *Singleton* inapplicable to abortion. *See* Gov. Br. 34–35. Neither do Respondents explain how any of the "cases recognizing the right to privacy before adoption of article I, section 10" shed any light on what South Carolinians understood article I, section 10 to mean and how those cases supposedly connect abortion to this constitutional provision. Resp. Br. 44. And in saying *PPSA I* "upheld the status quo as it had existed for nearly half a century," *id.* at 45, Respondents turn a blind eye to the fact that *Roe* both was foisted on the State and came *after* article I, section 10 was adopted. The State's begrudging compliance with an incorrect (and since-repudiated) "exercise of raw judicial power," *Roe v. Wade*, 410 U.S. 179, 222 (1973) (White, J., dissenting), does not count against the State or inform the interpretation of a preexisting state constitutional provision.

Respondents then revert to insisting that *PPSA I* provides a clear rule. *See* Resp. Br. 45. Yet again, their arguments illustrate again their rose-colored reading of the Court's ruling. *PPSA I* did not hold that "a ban on abortion after approximately six weeks of pregnancy is an unreasonable invasion of the constitutional guarantee of the right to privacy." Resp. Br. 45. *PPSA I*'s lack of a majority decision distinguishes the case from cases like *State v. Four Video Slot*

Machines, in which two Justices "concur[red]" in the majority opinion. 317 S.C. 397, 400, 453 S.E.2d 896, 898 (1995) (cited in *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996), which is cited at Resp. Br. 45); *see also Chamblee v. Tribble*, 23 S.C. 70, 79 (1885) (cited at Resp. Br. 45) (discussing two decisions in which a majority of Justices joined an opinion).

Respondents turn to the Pandora's Box issue. *See* Resp. Br. 46. They say that Alaska has not seen challenges to laws on physician-assisted suicide, prostitution, bigamy, or drug use since it found a state constitutional right to abortion. Maybe Alaska hasn't yet. That is not, however, responsive to how such claims (or "rights") would be legally distinct. "Reasonableness" is far from "a limiting principle." *Id.* "Reasonableness" still leaves courts with the "I know it when I see it" rule, without centuries of precedent (as in tort cases) for how to analyze these potential new claims. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Next, Respondents take up the reliance factor, arguing that overruling *PPSA I* "would have an immediate effect on South Carolinians who rely on access to abortion." Resp. Br. 47. Their argument again overreads the scope of *PPSA I* and is nothing more than a generalized one that amounts to the "novel and intangible form of reliance" about the impact of abortion on women's lives generally that the United States Supreme Court has rejected. *Dobbs*, 142 S. Ct. at 2277. They do not point to any particular person, including among the more than 1,000 women on whom Respondents claim they couldn't perform an abortion while the 2021 Act was temporarily in effect, who engaged in sexual activity in reliance on the ability to access abortion at a particular stage of pregnancy.

Also missing from their argument is anything about Respondents' *own* reliance interest. They do not say that they will leave South Carolina if the 2023 Act takes effect, and the article

they cite does not discuss South Carolina. *See* Resp. Br. 48 n.55.

Respondents' last *stare decisis* appeal is about changed facts and law. *See id.* at 48. As for the law, they never engage with the fact that *State v. German*, ___ S.C. ___, ___ S.E.2d ___, No. 2018-002090, 2023 WL 3129475, at *10 (S.C. Apr. 5, 2023), relied on the West Committee. If the West Committee really has "no relevance when interpreting our constitution," 438 S.C. at 230, 882 S.E.2 at 793 (Beatty, C.J., concurring), then there was no reason for the Court to cite the Committee's work in *German*. But the Court did, so there's already conflict in this Court's decisions a mere three months after *PPSA I* was issued.

As for what is happening in other States, that does matter here. (When convenient, Respondents look to other States too. *See, e.g.*, Resp. Br. 19 & n.35.) There is no historical support for thinking that the drafters or the voters intended for article I, section 10 to turn South Carolina into an abortion-destination State. Yet that is what has happened. The General Assembly passed, and the Governor signed, the 2023 Act in recognition of and to remedy, to use Respondents' words, the "real-world effects" of this Court's decision in *PPSA I*. Resp. Br. 47.

One final *stare decisis* point: Respondents criticize Appellants for revisiting the history of article I, section 10 and the State's regulation of abortion. *See, e.g.*, *id.* at 1, 33 n.43, 48. That the Governor detailed this history again makes sense, in light of the *stare decisis* framework and the fact that "the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." *Dobbs*, 142 S. Ct. at 2265. Respondents do not, for whatever reason, ever offer any substantive response to those arguments. They don't try to blunt the fact that the General Assembly that enacted the 1970 abortion law was the same General Assembly that put the proposed article I, section 10 language on the ballot. *See* Gov. Br. 18–19. Nor do they explain how any voters could have thought article I, section 10 spoke to the "opportunity" to have an abortion.

See id. at 19, 23–26. Nor do they engage with *State v. Steadman*, 214 S.C. 1, 51 S.E.2d 91 (1948), and its recognition that abortion was criminal at every stage of pregnancy (unless an exception applied) before article I, section 10 was adopted. *See* Gov. Br. 17–18.

C. *PPSA I* does not make the 2023 Act void *ab initio*.

Respondents briefly argue that the 2023 Act is void *ab initio* because *PPSA I* "was already binding precedent establishing that a ban on abortion after approximately six weeks LMP is an unconstitutional violation of privacy." Resp. Br. 42–43.

For at least two reasons, that argument can be summarily rejected (as three Justices did with a similar argument regarding the 2021 Act in *PPSA I*, *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.)). *First*, Respondents' argument is, once again, premised on their overreading of *PPSA I*. That decision addressed the 2021 Act only, not all fetal heartbeat laws. *See supra* Part I.

Second, reading this doctrine as broadly as Respondents do is both contrary to precedent and illogical. This Court has rejected novel expansions of "the general principles expressed in *Atkinson*[*v. Southern Express Co.*, 94 S.C. 444, 78 S.E. 516 (1913)]" as "inadequate to resolve" different issues. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 374, 601 S.E.2d 342, 346 (2004). On top of being inconsistent with precedent, expanding the doctrine as far as Respondents demand would make it nearly impossible for courts to revisit their precedents.

IV. Respondents have not established that they face any irreparable harm.

This case has understandably focused primarily on the merits of the 2023 Act. But this appeal does come from a preliminary injunction, and irreparable harm is a required element of that relief. *See, e.g.*, *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). The Court should hold Respondents to that standard and avoid the type of aberration in the law

that federal courts unwisely created for half a century in abortion cases. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in part and dissenting in part) ("The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.").

Respondents have not carried their burden on irreparable harm. In fact, they do not even really try to do so, relegating their three short arguments to a footnote at the end of their brief. *See* Resp. Br. 50 n.56. *First*, they say *PPSA I* is dispositive of this question, but they are wrong. *PPSA I* uses "irreparable" a single time, and then only in a quote from *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *See* 438 S.C. at 201, 882 S.E.2d at 777 (Lead Opinion). And the State Respondents did not brief the issue in *PPSA I*. When an issue is neither "raised in briefs or argument nor discussed in the opinion of the Court," "the case is not a binding precedent on [that] point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

Second, Respondents confuse standing with irreparable harm. There's a good argument that Respondents lack standing to assert the rights of potential patients (while seeking to deprive those patients of information and a cause of action against Respondents), but that's not the argument the Governor made at this stage. He made an irreparable harm argument, based on Respondents' request for injunctive relief. This Court has required a plaintiff to "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). Respondents do not attempt in their brief to establish their own irreparable harm.

Third, Respondents insist *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003), is "plainly distinguishable" because it involved a "formerly pregnant person," rather than "health

care providers" asserting the privacy rights of others, Resp. Br. 50 n.56. Respondents do not, however, explain why that distinction matters. Nor do they explain why pregnant women cannot assert their own privacy rights. *See* Gov. Br. 47 (collecting nine United States Supreme Court abortion cases in which pregnant women asserted challenges on their own behalf).

CONCLUSION

The Court should reverse the preliminary injunction order.

Respectfully submitted,

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