THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2023-CP-40-002745

APPELLATE CASE NO. 2023-000856

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 her official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SAMUEL H. McNUTT, in his official capacity as Chairperson of the South Carolina Board of Nursing; SALLIE BETH TODD, in her official capacity as Vice Chairperson of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as Secretary 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,

and

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; and THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate, Intervenors-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 Appellants.

BRIEF OF RESPONDENTS

/s/ *M. Malissa Burnette*
M. Malissa Burnette (SC Bar No. 1038)
Kathleen McDaniel (SC Bar No. 74826)
Grant Burnette LeFever (SC Bar No. 103807)
Burnette Shutt & McDaniel, PA
P.O. Box 1929
Columbia, SC 29202
(803) 904-7913
mburnette@burnetteshutt.law
kmcdaniel@burnetteshutt.law
glefever@burnetteshutt.law

Attorneys for Respondents

Catherine Peyton Humphreville*
Kyla Eastling*
Planned Parenthood Federation of America
123 William Street
New York, NY 10038
(212) 965-7000
catherine.humphreville@ppfa.org
kyla.eastling@ppfa.org

Attorneys for Respondents Planned Parenthood South Atlantic and Dr. Katherine Farris

Caroline Sacerdote*
Jasmine Yunus**
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3646
csacerdote@reprorights.org
jyunus@reprorights.org

Attorneys for Respondents Greenville Women's Clinic and Dr. Terry L. Buffkin

* Admitted *pro hac vice*
** Application for admission *pro hac vice* pending

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INTRODUCTION

Just five months ago, this Court struck down a ban on abortion after approximately six weeks of pregnancy, Senate Bill 1, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) (hereinafter "S.B. 1"), as an unreasonable invasion of the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. *See generally Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023), *reh'g denied* (Feb. 8, 2023) (hereinafter "*Planned Parenthood I*"). The ink on the Court's January 5, 2023, decision was barely dry when the Senate introduced a nearly identical law on February 1, Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) (hereinafter "S.B. 474" or the "Act"), again banning abortion after approximately six weeks. The General Assembly adopted S.B. 474 on May 24, 2023, and Governor Henry McMaster signed it on May 25, 2023, immediately banning constitutionally protected health care across South Carolina. One day later, in a straightforward application of *Planned Parenthood I*, the Court of Common Pleas for the Fifth Judicial Circuit entered a preliminary injunction blocking S.B. 474's enforcement. Now before this Court, Appellants seek to undo that injunction, disrupting the status quo that has existed in this State for over half a century and that this Court preserved just five months ago.

S.B. 474 is identical in all material respects to S.B. 1. Despite Appellants' assertions that cosmetic tweaks have removed S.B. 1's flaws, these changes to S.B. 474 do nothing to cure the constitutional defects of S.B. 1, as both laws ban abortion after approximately six weeks of pregnancy and thus do not provide a sufficient period of time to make the decision to have an abortion and act on it. Just as the General Assembly has recycled its six-week ban, Appellants have repurposed the same legal arguments they used in *Planned Parenthood I*. There is no reason to depart from precedent in this case, and the principle of *stare decisis* necessitates that these same arguments merit the same result. S.B. 474, like S.B. 1, is therefore an unreasonable invasion of the constitutional right to privacy. *Planned Parenthood I*, 438 S.C. at 195, 882 S.E.2d at 774; *id.*, 438

S.C. at 223–24, 882 S.E.2d at 789 (Beatty, C.J., concurring); *id.*, 438 S.C. at 268–69, 882 S.E.2d at 813–14 (Few, J., concurring in the judgment). Indeed, *Planned Parenthood I* collaterally estops Appellants from asserting otherwise. And because S.B. 474 flies in the face of this Court's ruling in *Planned Parenthood I*, it was invalid at the time of its adoption and is thus void *ab initio*.

This Court is already intimately familiar with the harms that a ban on abortion at the earliest stages of pregnancy would inflict on pregnant South Carolinians and their families. If permitted to go into effect, the Act will ban the *vast majority* of abortions in South Carolina, leaving huge numbers of women[1] without access to legal abortion in their communities, thus forcing people who are pregnant to carry that pregnancy to term and deliver against their will; to remain pregnant if and until they can travel out of state to access critical, time-sensitive abortion care, at great cost to themselves and their families; or to attempt to self-manage their abortions outside the medical system.

In particular, the Act is an attack on families with low incomes, South Carolinians of color, and rural South Carolinians, who face inequities in access to medical care and who will predictably bear the brunt of the law's cruelties. South Carolinians already face a critical shortage of reproductive health care providers, including obstetrician-gynecologists, and the rate at which South Carolinians, particularly Black South Carolinians, die from pregnancy-related causes is shockingly high even now.

[1] Plaintiffs use "woman" or "women" as a short-hand for people who are or may become pregnant, but people of many gender identities, including transgender men and gender-diverse individuals, may become pregnant and seek abortion and are also harmed by the Act. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021) ("[N]ot all persons who may become pregnant identify as female."), *reh'g en banc granted, opinion vacated on other grounds*, 22 F.4th 1346 (11th Cir. 2022), *and abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

The Act will only exacerbate these injustices unless it is enjoined. This Court's controlling precedent and the rule of law demand nothing less.

STATEMENT OF THE ISSUES

1. Does this Court's ruling in *Planned Parenthood I* collaterally estop Appellants from relitigating whether a ban on abortion after approximately six weeks of pregnancy is an unreasonable invasion of privacy as a matter of law?

2. Does a ban on abortion after approximately six weeks of pregnancy nearly identical to the one deemed unconstitutional by this Court in *Planned Parenthood I* violate the right to privacy as guaranteed by article I, section 10 of the South Carolina Constitution?

3. Is S.B. 474, which was unconstitutional as a matter of law at the time of its adoption pursuant to this Court's ruling in *Planned Parenthood I*, void *ab initio* under South Carolina law and therefore unenforceable?

4. Does a special justification exist such that this Court should depart from *stare decisis* and overrule *Planned Parenthood I*?

STATEMENT OF THE CASE

I. Legislative and Litigation History

S.B. 474 is the latest of the South Carolina General Assembly's efforts to restrict access to abortion. Relevant here, in 2021 the General Assembly passed, and Governor McMaster signed into law, S.B. 1, a ban on abortion after approximately six weeks of pregnancy. That law was enjoined by the federal courts, but following the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, it went into effect on June 27, 2022, banning abortion in South Carolina after approximately six weeks LMP.[2] By the time this Court granted a temporary

[2] It is standard medical practice to date pregnancy using "gestational age," or the number of weeks and days since the first day of the patient's last menstrual period ("LMP"). As explained in detail

injunction against S.B. 1's enforcement on August 17, 2022, the law had been in effect for 51 days. That ban did not take effect again, however, because on January 5, 2023, this Court permanently enjoined S.B. 1, finding that it impermissibly infringed upon South Carolinians' right to privacy as guaranteed in article I, section 10 of the South Carolina Constitution. Less than one month later, the Senate introduced S.B. 474, which, as passed, is virtually identical to S.B. 1.

S.B. 474 took immediate effect when Governor McMaster signed it into law on the morning of May 25, 2023. South Carolina abortion providers Planned Parenthood South Atlantic, Greenville Women's Clinic, Dr. Katherine Farris, and Dr. Terry L. Buffkin (together, "Respondents") filed suit in the Fifth Judicial Circuit the same day. Although S.B. 474 suffers from numerous constitutional problems, *see* App. at 8–66, the most glaring is its identical violation of the right to privacy found by this Court with respect to S.B. 1. Given that and the Act's immediate effective date, Respondents sought a temporary restraining order to enjoin the enforcement of S.B. 474 on that basis alone. Also on May 25, Governor McMaster, President Alexander, and Speaker Smith sought to intervene, to which Respondents consented. Judge Clifton Newman held a hearing on May 26 and, despite Respondents having only sought a temporary restraining order, entered a preliminary injunction the same day, finding that Respondents had "stated sufficient likelihood of success" based on *Planned Parenthood I* and that without relief, "[Respondents] and their patients seeking abortion care [would] be irreparably harmed." App. at 5 ¶¶ 6, 8.

Following entry of the preliminary injunction, the State of South Carolina, Attorney General Wilson, President Alexander, and Speaker Smith (together, the "AG") as well as Governor

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below, dating a pregnancy by LMP is different from dating a pregnancy by fertilization or conception, which in turn are distinct concepts from implantation—the moment at which pregnancy begins as a medical matter. *Infra* Statement of the Case, Section IV.

McMaster (together with the AG, "Appellants") appealed to this Court and sought a writ of supersedeas and for the Court to accept this case in its original jurisdiction. The Court denied the petition for a writ of supersedeas, transferred this matter to the Court for final resolution, and set an expedited briefing schedule. On June 12, 2023, Appellants sought leave to argue against precedent; the Court denied that request later that day.

II. The Act's Requirements

In all relevant respects, S.B. 474 is nearly identical to S.B. 1. Most crucially, it bans abortion where a "fetal heartbeat has been detected," or after roughly six weeks LMP (the "Six-Week Ban"). S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-630(B)).[3]

Also like S.B. 1, the Act requires a physician or other health care professional to inform the patient of their right to view an ultrasound, hear the "fetal heartbeat" if present, and have them explained, all under the guise of "informed consent." S.B. 474, § 10 (amending S.C. Code Ann. § 44-41-330(A)); *accord* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(A)).[4] This is despite the fact that, if the ultrasound detects fetal or embryonic cardiac activity, the patient is barred from having an abortion.

Anyone who performs an abortion in violation of the Six-Week Ban is subject to severe criminal, civil, and licensure penalties. Those penalties include a felony offense that carries a $10,000 criminal fine and up to two years in prison as well as revocation of professional licensure. S.B. 474, § 2 (adding S.C. Code Ann. §§ 44-41-630(B), 44-41-640(B), 44-41-650(C), 44-41-

[3] *See also* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(A)). Like S.B. 1, the Act defines and uses the phrase "[f]etal heartbeat," an identifier inconsistent with medical terminology and practice, in a way that effectively bans abortion as early as six weeks LMP (and perhaps sooner for some patients). *See* App. 105–06 ¶¶ 7–8; *compare* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(6)), *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-610(3)).

[4] *See also* S.B. 1, § 5 (amending S.C. Code Ann. § 44-41-330(A)).

660(C); amending S.C. Code Ann. § 44-41-690).[5] The provider could also be subject to a civil suit brought by the person on whom the abortion was performed, the patient's parent or guardian if they are a minor at the time of the abortion or died as a result of the abortion, a solicitor or prosecuting attorney, or the Attorney General. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-680).[6] Like S.B. 1, S.B. 474 specifies that the person receiving an abortion in violation of South Carolina's abortion laws may not be criminally prosecuted. S.B. 474, §§ 2 (amending § 44-41-670), 9 (repealing S.C. Code Ann. § 44-41-80(b)).[7]

The Act's Six-Week Ban, like its predecessor, contains only a few extremely narrow exceptions: (1) to save the life of the pregnant patient or prevent certain types of substantial and irreversible physical impairment of a major bodily function (the "Death or Permanent Injury Exception") but expressly excluding any psychological conditions, emotional conditions, or suicidality of the pregnant person; (2) in cases of a fetal diagnosis that is "incompatible" with sustained life after birth (the "Fatal Fetal Anomaly Exception"); and (3) where the pregnancy is the result of rape or incest and is reported to law enforcement (the "Reported Rape Exception")—though S.B. 474's Reported Rape Exception is limited to just twelve weeks LMP, more than two months shorter than S.B. 1's window of twenty-two weeks LMP.[8] S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-610(9) (defining "[m]edical emergency"), 44-41-650, 44-41-660; adding

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[5] *See also* S.B. 1, § 3 (adding S.C. Code Ann. §§ 44-41-650(B), 44-41-680(D)); S.C. Code Ann. §§ 40-47-110(A), 40-47-110(B)(2).

[6] *See also* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-740).

[7] *See also* S.B. 1, § 3 (adding S.C Code Ann. § 44-41-730).

[8] *Compare* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-650(A)), *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(B)(1)–(2)). S.B. 1 tied its rape and incest exceptions to the "post-fertilization" age of the fetus rather than LMP. *Compare* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(B) ("the probable post-fertilization age of the fetus is fewer than twenty weeks")), *with* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(7) (defining "'[g]estational age' . . . as calculated from the first day of the last menstrual period of a pregnant woman")). Twenty weeks post-fertilization roughly correlates to twenty-two weeks LMP. *See* App. at 13 n.2.

S.C. Code Ann. §§ 44-41-640(A)–(C)).[9] As under S.B. 1, the physician performing an abortion pursuant to one of these exceptions must document the reason an exception applies in the patient's medical records. S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-640(C)(3), 44-41-650(B), 44-41-660(B)).[10]

The Act's Death or Permanent Injury Exception, as in S.B. 1, provides only a narrow exception for a physician to perform an abortion after the detection of fetal or embryonic cardiac activity where the abortion is necessary "due to a medical emergency or . . . 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" of the pregnant person. S.B. 474, § 2 (amending S.C. Code Ann. §§ 44-41-640(A), 44-41-640(B)(1) (permitting abortions where there is a "medical emergency"), 44-41-610(9) (defining "medical emergency")). The Death or Permanent Injury Exception provides that certain medical conditions are "presumed" to fall within it without providing an explicit exception for them. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-640(C)(2)). However, many other serious health problems resulting from pregnancy are not listed in this Exception. *See* App. at 131–33 ¶¶ 83–84, 87.

S.B. 474's Death or Permanent Injury Exception also introduces a requirement not in S.B. 1: that a physician performing an abortion under it "make reasonable medical efforts under the circumstances to preserve the life" of the embryo or fetus "to the extent that it does not risk the death or physical impairment of a major bodily function of the pregnant woman, not including

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[9] *See also* S.B. 1, § 3 (adding S.C. Code Ann. §§ 44-41-690(A), 44-41-660(A) (permitting abortions where there is a "medical emergency"), 44-41-610(8) (defining "medical emergency"), 44-41-680(B)(4) (fetal anomaly exception), 44-41-680(C) (reported rape exception)); S.C. Code Ann. § 44-41-430 (defining "[f]etal anomaly" as incorporated into S.B. 1, which is identical to definition of "[f]atal fetal anomaly" in S.B. 474).

[10] *See also* S.B. 1, § 3 (adding S.C. Code Ann. §§ 44-41-660(B), 44-41-680(C), 44-41-690(C)).

psychological or emotional conditions and in a manner consistent with reasonable medical practices." S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-640(B)(3)); *see also id.* (adding S.C. Code Ann. § 44-41-640(C)(2)). For pre-viability abortions (like those provided by Respondents), this requirement could only result in harm to the pregnant person without any possible benefit to the fetus. *See* App. at 133 ¶ 86.

Of note, the Reported Rape Exception, almost identical to the one in S.B. 1, applies only if, within 24 hours of the abortion, the physician reports the rape or incest *and the patient's name and contact information* to the sheriff in the county where the abortion was performed. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-650(B)).[11] This report must occur irrespective of the patient's wishes and whether the provider has already complied with other applicable mandatory reporting laws. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-650(B)). The Exception makes no special provision for confidentiality. *See id.* Moreover, the Act's reporting requirement applies only if the patient decides to have an abortion after being told that the rape will be reported; if the patient decides not to go forward, the reporting requirement does not apply. *Id.* In this way, the Act conditions the availability of abortion—but no other kind of health care—on the public disclosure of the patient's private medical and other personal information.[12]

S.B. 474 contains three legislative findings, all of which are practically identical to legislative findings in S.B. 1: (1) "[a] fetal heartbeat is a key medical predictor that an unborn child will reach live birth," S.B. 474, § 1(1); *accord* S.B. 1, § 2(5) (referring instead to an "unborn human individual"); (2) "[c]ardiac activity begins at a biologically identifiable moment in time, normally

[11] *See also* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(C)).

[12] In addition to these exceptions, both S.B. 474 and S.B. 1 provide that they do not ban contraceptives. S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-640(E)); S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-720).

when the fetal heart is formed in the gestational sac," S.B. 474, § 1(2); *accord* S.B. 1, § 2(6) (referring instead to "a fetal heartbeat"); and (3) "[t]he State of South Carolina 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," S.B. 474, § 1(3); *accord* S.B. 1, § 2(7) (referring instead to "legitimate interests" and "the life of the unborn child who may be born"). S.B. 474 omits several additional legislative findings from S.B. 1, including S.B. 1's recognition of a person's "informed choice about whether to continue a pregnancy." *See* S.B. 1, § 2(8).

S.B. 474 includes several other slight technical differences from S.B. 1—none of which cures S.B. 1's constitutional defects. First, it repeals South Carolina's codification of the *Roe* trimester framework and the State's ban on abortion after twenty-two weeks LMP, although the Act provides that the twenty-two-week ban will be reinstated if a court enjoins S.B. 474's enforcement. S.B. 474, § 13 (repealing S.C. Code Ann. §§ 44-41-20, 44-41-410 to -480). Second, it contains minor revisions to reporting requirements to the Department of Health and Environmental Control ("DHEC") and to the authority for DHEC regulations. *Id.*, §§ 7 (amending S.C. Code Ann. § 44-41-60), 8 (amending S.C. Code Ann. § 44-41-70(b)). Third, it contains several provisions related to state funding and insurance, all of which are already mandated by existing law.[13] Finally, the Act updates South Carolina child support requirements. S.B. 474, § 4 (adding S.C. Code Ann. § 63-17-325).

[13] Specifically, S.B. 474 provides that insurance policies in South Carolina must cover contraceptives, *id.* §§ 5 (adding S.C. Code Ann. § 38-71-146), 11, something that is already required under the Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4). The Act bars the use of State funds "to purchase fetal tissue," S.B. 474, § 3 (adding S.C. Code Ann. § 44-41-90(B)), but this is also barred by federal law, *see* 42 U.S.C. § 289g-2(a). The Act also purports to prohibit the State Health Insurance Plan from covering abortions, except those performed pursuant to the Act's exceptions, S.B. 474, § 3 (adding S.C. Code Ann. § 44-41-90(a)), but South Carolina law already contains these prohibitions, S.C. Code Ann. §§ 1-1-1035, 38-71-238.

One new component of S.B. 474 deserves particular mention, as it independently violates both state and federal law. The Act provides that "[n]o state funds may, directly or indirectly, be utilized by Planned Parenthood for abortions, abortion services or procedures, or administrative functions related to abortions." *Id.*, § 3 (adding S.C. Code Ann. § 44-41-90(C)) (the "Planned Parenthood Provision"). While existing law already bars such coverage for abortions generally, S.C. Code Ann. §§ 1-1-1035, 38-71-238, the lack of exceptions to the Planned Parenthood Provision violates the Medicaid Act as well as federal court orders. *See generally Planned Parenthood S. Atl. v. Kerr*, 27 F.4th 945 (4th Cir. 2022), *pet. for cert. filed*; *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019). And this provision's express targeting of Planned Parenthood violates the Bill of Attainder Clause and the Equal Protection Clause of the South Carolina Constitution. *See Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 322–27 (M.D.N.C. 2012).

III. Access to Abortion Under Prior South Carolina Law

Respondents Planned Parenthood South Atlantic ("PPSAT"), Greenville Women's Clinic, P.A. ("GWC"), Dr. Katherine Farris, and Dr. Terry L. Buffkin are health care providers in South Carolina offering a range of family planning and reproductive health services, including well-person exams, contraception and contraceptive counseling, pregnancy testing and counseling, and medication and procedural abortion. App. at 108 ¶ 21, 140 ¶¶ 2–3. PPSAT operates health centers in Columbia and Charleston, *id.* at 108 ¶ 20, and GWC operates a clinic in Greenville, *id.* at 140 ¶ 2. Working with physicians licensed to practice medicine in South Carolina, PPSAT and GWC run the only clinics in the state that provide abortion services to the public. *Id.* at 110 ¶¶ 26–27, 143 ¶ 15. They hold state licenses for each of their clinics to perform abortions through the end of

the first trimester (fourteen weeks LMP). *See* S.C. Code Ann. §§ 44-41-10, 44-41-75(A); S.C. Code Ann. Regs. 61-12.101(S)(4); App. at 109 ¶ 23, 110 ¶ 26, 141 ¶ 7.

Although patients generally obtain an abortion as soon as they are able, the vast majority of patients who seek abortions in South Carolina are at least six weeks pregnant by the time they do so. App. at 112 ¶ 32, 145 ¶ 23. The difficulty of obtaining an abortion before six weeks LMP is especially pronounced for South Carolinians from marginalized communities, including those living in poverty and Black and Hispanic women. *Id.* at 114 ¶¶ 41–42. Respondents' patients seek abortions for a range of reasons, *id.* at 111 ¶ 30, 147–48 ¶ 35, and many do not know they are pregnant before six weeks LMP, *id.* at 112–13 ¶¶ 33–37, 145–46 ¶¶ 24–28. Even those who do may face logistical challenges in arranging an abortion appointment. *Id.* at 113 ¶ 38. Many South Carolinians struggle to pay for an abortion, including because many forms of insurance do not cover abortion as well as the associated travel and childcare costs. *Id.* at 114–16 ¶¶ 40–43, 45. Others are unable to take time off work. *Id.* at 114 ¶ 42, 116 ¶ 45. Accordingly, the vast majority of Respondents' patients would likely be unable to access abortion in South Carolina if the Act were allowed to go into effect.

IV. The Menstrual Cycle and the Early Stages of Pregnancy

Because the Act bans abortion at the earliest stages of pregnancy—and because the General Assembly fundamentally misunderstands these facts—it is important to understand the progression of a menstrual cycle and the beginning of pregnancy, in particular the timing of ovulation, fertilization, and implantation.

Menstruation is the shedding of the lining of the uterus, during which someone will experience bleeding for around two to seven days (commonly referred to as a "period").[14] While young people usually get their first period between ages ten and fifteen, some start menstruating earlier.[15] For those who menstruate, a menstrual cycle begins on the first day of the person's period and ends on the first day of their next period. Some people have fairly regular menstrual cycles, often lasting about four weeks, but a normal cycle can be as short as three weeks or longer than five weeks.[16] Some may go six to eight weeks, or even longer, without experiencing a menstrual period. App. at 112 ¶ 34. It is also very common for people to have irregular menstrual cycles that are difficult to predict because their menstrual cycle lasts a different number of days from month to month.[17]

While someone is menstruating, their body prepares to release an egg cell from one of their two ovaries. One of these eggs becomes mature each cycle, typically about one week after the start of their period. About two weeks after the start of the person's period, or halfway through their cycle, they will ovulate, releasing the egg from the ovary and through the fallopian tube towards the uterus.[18] While moving through the fallopian tube, the egg may join with a sperm cell through fertilization. If the egg cell is fertilized, it begins dividing into more cells as it moves down the

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[14] *How Do I Know if My Menstrual Cycle is Normal?*, https://www.plannedparenthood.org/learn/health-and-wellness/menstruation/how-do-i-know-if-my-menstrual-cycle-normal (last accessed June 19, 2023).

[15] *Getting Your Period: What Is a 'Normal' Menstrual Cycle for Teens and Preteens?*, https://www.uchicagomedicine.org/forefront/pediatrics-articles/getting-your-period-normal-menstrual-cycle-teens-preteens (last accessed June 19, 2023); *see also Menstruation*, https://www.plannedparenthood.org/learn/health-and-wellness/menstruation (last accessed June 19, 2023) ("Most people get their first period between ages 12 and 14, but some people get them earlier or later than that.").

[16] *How Do I Know If My Menstrual Cycle Is Normal?*, *supra* note 14; App. at 112 ¶ 33.

[17] App. at 112 ¶ 35; *see also How Do I Know If My Menstrual Cycle Is Normal?*, *supra* note 14.

[18] *Menstruation*, *supra* note 15.

fallopian tube toward the person's uterus. These cells (called a "blastocyst") typically get to the uterus about three to four days after fertilization.[19]

Pregnancy begins if and when the cells attach to the lining of the uterus—called implantation. Sometimes the cells do not implant in the uterine lining, and pregnancy does not result. If implantation does occur, it usually happens about six days after fertilization and takes roughly three to four days to complete. Implantation triggers the release of pregnancy hormones including human chorionic gonadotropin ("hCG"), preventing the lining from shedding and stopping the person's period.[20]

While implantation constitutes the beginning of pregnancy as a medical matter, the gestational age of a pregnancy is commonly measured starting from the first day of a person's last menstrual period ("LMP"), rather than from implantation. In other words, this method of dating a pregnancy starts about two to three weeks before fertilization and about three to four weeks before implantation—the point at which someone is actually pregnant.[21] Thus, a person with a highly regular, four week cycle would already be four weeks LMP when they miss their period, leaving them with only *two weeks* to realize they have missed their period (rather than just having a late period) and are pregnant and to arrange for an abortion under the Act. App. at 112 ¶ 33. For someone with a longer or irregular menstrual cycle, the gestational age could be even greater than four weeks LMP at the time they miss their period. *See id.* at 112 ¶¶ 33–34.

The developing organism in a uterus is referred to as an "embryo" in the field of medicine before approximately ten weeks of pregnancy. *Id.* at 105 ¶ 7. At the earliest stages of pregnancy

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[19] *How Pregnancy Happens*, https://www.plannedparenthood.org/learn/pregnancy/how-pregnancy-happens (last accessed June 19, 2023).
[20] *Pregnancy Tests*, https://www.plannedparenthood.org/learn/pregnancy/pregnancy-tests (last accessed June 19, 2023).
[21] *How Pregnancy Happens*, *supra* note 19.

(five to six weeks LMP), an embryo is less than a fifth of an inch long.[22] By six weeks LMP, a transvaginal ultrasound will show a flicker within the embryo, which is an electrical impulse that constitutes embryonic cardiac activity at this stage. App. at 109–10 ¶ 25. Sometimes this flicker is visible as early as partway through the fifth week LMP. *Id.* While this electrical impulse is sometimes referred to as a "heartbeat," it is detectable before the development of any cardiovascular system. *Id.* at 105 ¶ 7. After ten weeks LMP, "fetus" is the medically accurate term for the developing organism. *Id.* A full-term pregnancy typically lasts approximately 40 weeks LMP, *id.* at 109 ¶ 23, and the first trimester of pregnancy is usually considered to end after the thirteenth week of pregnancy.[23] Most pregnancy loss—miscarriage—occurs during the first trimester, as do the vast majority of abortions.[24] Roughly 15% of pregnancies end in miscarriage during the first trimester.[25]

While for some people a missed period is the first sign of pregnancy, identifying a pregnancy is not as simple as missing one's period.[26] Irregular menstrual cycles can also cause missed or late periods.[27] Irregular cycles may result from contraceptive use, age, breastfeeding, a recent miscarriage, or other common medical conditions, like diabetes.[28] For example, someone

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[22] *What Happens in the Second Month of Pregnancy?*, https://www.plannedparenthood.org/learn/pregnancy/pregnancy-month-by-month/what-happens-second-month-pregnancy (last accessed June 19, 2023).

[23] *What Happens in the Fourth Month of Pregnancy?*, https://www.plannedparenthood.org/learn/pregnancy/pregnancy-month-by-month/what-happens-fourth-month-pregnancy (last accessed June 19, 2023).

[24] App. at 112 ¶ 32; *What Happens in the Third Month of Pregnancy?*, https://www.plannedparenthood.org/learn/pregnancy/pregnancy-month-by-month/what-happens-third-month-pregnancy (last accessed June 19, 2023).

[25] *What Happens in the Third Month of Pregnancy?*, *supra* note 24.

[26] *See How Do I Know if My Menstrual Cycle Is Normal?*, *supra* note 14 ("A missed period is one of the first signs of pregnancy, but it doesn't always mean you're pregnant.").

[27] *Id.*

[28] *Id.*; App. at 112 ¶ 35.

using hormonal contraceptives may stop menstruating altogether, but the contraceptive can nonetheless fail.[29] In addition, some pregnant people experience light bleeding that occurs upon implantation and is often mistaken for a menstrual period. App. at 113 ¶ 36. Other early pregnancy symptoms can include fatigue, swollen or tender breasts, and nausea and/or vomiting. But these same symptoms may occur as premenstrual symptoms, so a person might mistake them for signs that a late period is actually coming, and not everyone experiences them in early stages of pregnancy.[30]

A missed period may prompt someone to take a pregnancy test. At-home pregnancy tests work by detecting in urine the hormone hCG, which is triggered by implantation and produced during pregnancy. When used *after* a missed period, these tests are 99% effective.[31] "But these tests only detect a pregnancy if the pregnant woman actually takes them—and for this to happen, she would have to buy and take the over-the-counter test . . . . A person is highly unlikely to do either of these things unless she actually has reason to suspect she is pregnant . . . ."[32]

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[29] *See How Do I Know if My Menstrual Cycle is Normal?*, *supra* note 14; *Hormonal IUD (Mirena)*, https://www.mayoclinic.org/tests-procedures/mirena/about/pac-20391354 (last updated Aug. 20, 2022) ("About 20 percent of women stop having periods after one year of using Mirena," a common type of intrauterine device.); *What Are the Side Effects of the Birth Control Implant?*, https://www.plannedparenthood.org/learn/birth-control/birth-control-implant-nexplanon/nexplanon-side-effects (last accessed June 19, 2023) ("1 in 3 people even stop getting their period altogether after a year on the [hormonal birth control] implant."); *Birth Control*, https://www.plannedparenthood.org/learn/birth-control (last accessed June 19, 2023) (most effective contraceptives are 99% effective but others have lower efficacy rate).

[30] App. at 113 ¶ 36; *Pregnancy Symptoms*, https://www.plannedparenthood.org/learn/pregnancy/pregnancy-symptoms (last accessed June 19, 2023) ("Many of these symptoms can also be signs of other conditions and don't always mean that you're pregnant.").

[31] *Pregnancy Symptoms*, *supra* note 30.

[32] Decl. of Mary Norton, M.D., in Supp. of Pls.' Mot. for a Prelim. Inj. ¶ 29, *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-cv-00508 (D.S.C Mar. 8, 2021), ECF No. 59-1 ("Norton Decl."). The Norton Declaration was submitted in the federal litigation related to S.B. 1 in response to the Declaration of Dr. Skop, which the AG cites in his brief here. *See* Br. of the Speaker of the House, the President of the Senate, the State, the Att'y Gen., and Solicitor Wilkins ("AG Br.") at 13.

Many people do not learn they are pregnant as soon as they miss their periods. Someone is unlikely to notice her missed period "until nearly 5 weeks LMP, or roughly a week after her period would ordinarily be due."[33] On average, people are unaware of their pregnancies until between five- and six-weeks gestation. App. at 113 ¶ 37. However, various individual characteristics are associated with later pregnancy awareness, including younger age, lower educational attainment, lower poverty-income ratios, and hormonal contraceptive use. *Id.* Similarly, those with longer or irregular menstrual cycles or who are breastfeeding may become aware of their pregnancies later. *Id.* While people who are actively trying to become pregnant may be more likely to recognize the early signs of pregnancy, leading them to take a pregnancy test, those who are *not* trying to conceive, especially those who have never been pregnant before, may not recognize early pregnancy symptoms as an indication that they are pregnant.[34]

V. The Act Will Cause Devastating Harm to Plaintiffs and Their Patients.

If the Act is permitted to go into effect, Respondents and their staff will be forced to turn away South Carolinians in need of abortions where an ultrasound detects a "fetal heartbeat" as defined in the Act, except for those who meet one of the Act's incredibly narrow exceptions. App. at 107 ¶ 13, 118–19 ¶¶ 51–54, 142 ¶¶ 10–11, 146 ¶¶ 31. Based on their experience during the 51 days S.B. 1 was in effect last summer, Respondents expect that S.B. 474 will bar the vast majority of abortions in South Carolina. *Id.* at 105–06 ¶ 8, 146 ¶ 31. During that time, PPSAT was compelled to cancel 490 scheduled abortions and turn away 513 pregnant South Carolinians seeking abortions, and GWC had to turn away the vast majority of patients. *Id.* at 118 ¶ 51, 146 ¶ 29. Respondents' patients were forced to travel out of state to access abortion care if traveling

[33] *Id.* ¶ 29
[34] Norton Decl., *supra* note 32, ¶ 30.

was financially and logistically attainable; to remain pregnant against their will; or to attempt to self-manage their abortions outside of the medical system. *Id.* at 118 ¶ 51. As with S.B. 1, the Act will disproportionately harm patients with low incomes, patients of color, and patients in rural areas. *Id.* at 118 ¶ 52.

A. The Act Will Subject South Carolinians to Forced Pregnancy.

If S.B. 474 goes into effect, South Carolinians will be forced to carry their pregnancies to term and give birth. *See id.* at 121 ¶ 58. Even an uncomplicated pregnancy challenges a person's entire physiology. *Id.* at 121 ¶ 59. However, many pregnant people also experience complications, including related to mental health. *See id.* at 121–22 ¶¶ 59–62. Some pregnant patients also face an increased risk of intimate partner violence—including homicide, a leading cause of maternal mortality. *Id.* at 122 ¶ 63.

Separate from pregnancy, labor and childbirth are themselves significant medical events with many risks. *Id.* at 122–23 ¶¶ 64–65. Between 2015 and 2019, the maternal mortality rate in South Carolina was 26.2 deaths per 100,000 live births, exceeding the national average. *Id.* at 122–23 ¶ 64. And the risk of mortality from pregnancy and childbirth is approximately fourteen times greater than for legal, pre-viability abortion. *Id.* at 110–11 ¶ 28. Pregnancy carries even higher risks of negative pregnancy and childbirth-related health outcomes for people of color. In particular, Black and Hispanic/Latina South Carolinians face heightened risks of pregnancy-related complications compared to non-Hispanic white women. *Id.* at 125 ¶ 68. Maternal mortality rates in particular are especially high among people of color in South Carolina at 42.3 deaths per 100,000 live births, 2.4 times the rate for white women in the state. *Id.* at 122–23 ¶ 64 & n.54.

If the Act goes into effect, it will lead to long-term negative impacts for people denied abortion and for their existing children. Roughly 55% of PPSAT's South Carolina patients who

have an abortion already have one or more children. *Id.* at 111 ¶ 30. Women who seek but are denied an abortion are, when compared to those who are able to access abortion, more likely to moderate their future goals and less likely to be able to exit abusive relationships. *Id.* at 128 ¶ 73. Their existing children are also more likely to suffer measurable reductions in achievement of child developmental milestones and an increased chance of living in poverty. *Id.* The economic impact of forced pregnancy, childbirth, and parenting will also have potentially exponential, negative effects on South Carolina families' financial stability, including those resulting from the high cost of pregnancy-related care and childbirth. *Id.* at 125–27 ¶¶ 69–71, 128 ¶ 73.

Beyond these physical, mental, and economic injuries, the Act will impinge on one of the most private and consequential decisions a person will make in a lifetime: whether to become or remain pregnant. *Planned Parenthood I*, 438 S.C. at 210, 882 S.E.2d at 782 ("[F]ew decisions in life are more private than the decision whether to terminate a pregnancy."). Many people determine that adding a child to their family is well worth the risks and consequences of pregnancy and childbirth. Conversely, together with their partners and with the support of other loved ones and trusted individuals, including health care providers and religious advisors, thousands of South Carolinians each year determine that abortion is the right decision for them. App. at 111 ¶ 30.

B. South Carolinians Will Be Forced to Travel Out of State to Obtain Abortions.

Although some of those forced to remain pregnant may eventually be able to obtain abortions out of state, they will also be harmed if the Act is allowed to go into effect. First, people will be forced to remain pregnant against their will, with all the attendant risks and medical consequences, until they can obtain out-of-state abortion care, likely later in pregnancy than if they had access in South Carolina. *Id.* at 120 ¶ 57. While abortion is very safe, the physical risks associated with abortion—as with pregnancy generally—increase with gestational age. *Id.*

Second, these South Carolinians will be forced to bear the additional costs and burdens associated with substantial travel. The nearest abortion providers to Respondents' clinics are in North Carolina, ranging from at least 65 miles away in the case of GWC to at least 177 miles away in the case of PPSAT's Charleston health center, and in a state with its own restrictive abortion laws. *Id.* at 119 ¶ 55 & n.46, 147 ¶ 33.[35] Under S.B. 1, some patients were delayed in their travel due to logistical and financial obstacles and could only access a more costly procedural abortion because they had exceeded the gestational age for which medication abortion is approved.[36]

C. The Act's Exceptions Will Not Alleviate The Harm Caused by the Act.

Even patients who might meet the Six-Week Ban's limited exceptions will face barriers in accessing abortions. Physicians caring for pregnant patients with rapidly worsening medical conditions—who, absent the Act, could obtain an abortion without explanation—may be forced to wait until their patients' conditions become deadly or threaten substantial impairment of a major bodily function so as to meet the Death or Permanent Injury Exception. App. at 132 ¶ 84.[37]

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[35] While there are also abortion providers in Georgia, Georgia also currently bans abortions after about six weeks LMP. Ga. Code Ann. § 16-12-141.

[36] *See, e.g.*, Jocelyn Grzeszczak & Seanna Adcox, *Explaining the Abortion Landscape in SC After the Supreme Court Made It a State Issue*, Post and Courier (Charleston) (July 16, 2022), https://www.postandcourier.com/politics/explaining-the-abortion-landscape-in-sc-after-the-supreme-court-made-it-a-state-issue/article_647d480a-0136-11ed-895e-dfaa316a0fc3.html.

[37] While S.B. 1 was in effect, patients in fact faced these delays, some with permanent consequences. *See, e.g.*, Claire Donnelly, *South Carolina OB-GYNs Are Consulting Criminal Attorneys Post*-Roe, WFAE (Sept. 8, 2022), https://www.wfae.org/health/2022-09-08/sc-ob-gyns-are-consulting-criminal-attorneys-post-roe ("We have delayed care for other patients until they developed signs that they were sick enough for everyone to feel confident that they met the legal exception definition in the law."); Becky Budds, *South Carolina OB-GYN Describes Practice Under Proposed Abortion Law*, WLTX (Sept. 9, 2022), https://www.wltx.com/article/news/politics/south-carolina-ob-gyns-proposed-abortion-law/101-ea9bd1e9-c498-4457-9370-19d719a41501 ("We've had to stop and consult attorneys and delay people's care while we tried to figure out if we were going to lose our medical license or go to jail if we provided the care that [pregnant patients] needed."); Dan Ladden-Hall, *Lawmaker Tearily Explains Teen Almost Lost Uterus Because of Abortion Law He Voted For*, Daily Beast (Aug. 17, 2022),

Significantly, the Death or Permanent Injury Exception makes no allowances for risks to patients' mental health even when they are suicidal, making the Exception even narrower—thereby placing more women in danger—than when South Carolina first liberalized its abortion laws in 1970, prior to *Roe v. Wade*. *See* S.C. Code Ann. § 16-87(1) (1970) (allowing abortion if "there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the *mental* or physical health of the woman" (emphasis added)).

Sexual assault survivors in South Carolina will be faced with choosing between abortion services and maintaining their privacy in deciding whether to come forward about the assault, a "choice" forced on no other autonomous patient in South Carolina's medical system. App. at 129–31 ¶¶ 76–81. Moreover, their opportunity to access abortion will be further curtailed by the Act's narrowed Reported Rape Exception, which only extends until 12 weeks LMP compared to the 22-week LMP period imposed by S.B. 1. *Compare* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-650(A)), *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-680(B)).

SUMMARY OF ARGUMENT

I. *Planned Parenthood I* directly resolves this case.

A. *Planned Parenthood I* collaterally estops Appellants from relitigating whether a ban on abortion after approximately six weeks LMP constitutes an unreasonable invasion of the right to privacy under article I, section 10 of the South Carolina Constitution. This issue was actually litigated between identical parties in *Planned Parenthood I*, directly determined by a valid and final judgment, and was essential to the judgment in which three Justices concurred. There are no circumstances meriting a second opportunity for Appellants to retry the issue.

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https://www.thedailybeast.com/neal-collins-south-carolina-pol-emotional-after-teen-almost-loses-uterus-due-to-abortion-law-he-voted-for.

B. Applying *Planned Parenthood I* as controlling precedent, S.B. 474 is unconstitutional. S.B. 474 replicates the unconstitutional invasions of privacy presented by S.B. 1. It presents a nearly identical intrusion on privacy as S.B. 1, and, to the extent it differs from S.B. 1, those changes cannot cure the constitutional defects of a ban on abortion after approximately six weeks LMP. The State's interests did not justify the unreasonable invasion of privacy in *Planned Parenthood I*, and they cannot justify the materially identical intrusion of privacy posed by S.B. 474.

C. *Planned Parenthood I* was binding precedent at the time S.B. 474 was enacted. Because the Act is nearly identical to S.B. 1, it was unconstitutional at the time of its adoption and is thus void *ab initio* as a matter of South Carolina law.

D. There is no special justification to warrant departing from *stare decisis* and overruling *Planned Parenthood I.*

ARGUMENT

I. Because S.B. 474 Is Materially Identical to S.B. 1, *Planned Parenthood I* Controls This Case.

Just five months ago, this Court held that a ban on abortion after approximately six weeks of pregnancy violated the constitutional right to privacy. The Court recognized South Carolinians' privacy right to medical autonomy and "that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable." *Planned Parenthood I*, 438 S.C. at 195, 882 S.E.2d at 774. The Court further held that S.B. 1's ban on abortion after approximately six weeks LMP was an unreasonable invasion of that constitutional right to privacy as a matter of law. *Id.*, 438 S.C. at 290, 882 S.E.2d at 825 (Few, J., concurring in the judgment). Despite this clear holding, the General Assembly passed S.B. 474, a law similar in all material respects to the invalidated ban, S.B. 1. The parties to this case have already litigated, and the Court has decided,

the issues central to this case in *Planned Parenthood I*. As a result, Appellants are precluded from relitigating these issues. But even if Appellants were not precluded from recycling the same arguments they made not even a year ago, a straightforward application of *Planned Parenthood I* shows that the Act violates the right to privacy guaranteed by the South Carolina Constitution. Any changes around the margins in S.B. 474 cannot cure the constitutional defects of a ban on abortion at approximately six weeks LMP.

As a threshold matter, Appellants' arguments about how to read the Court's *Planned Parenthood I* decision run off course in claiming that this Court follows the federal standard set forth in *Marks v. United States*.[38] While South Carolina courts apply the *Marks* rule in interpreting federal cases, *see, e.g.*, *State v. Key*, 431 S.C. 336, 345 n.2, 848 S.E.2d 315, 319 n.2 (2020), when discerning the holdings of decisions of *this State's courts*, they look to the individual principles endorsed by a majority of the Justices, *see Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church*, No. 2020-000986, 2022 WL 3560664, at *12–13 (S.C. Aug. 17, 2022) (counting the numbers of Justices whose separate opinions in an earlier case endorsed a particular proposition); *State v. Smith*, 428 S.C. 417, 420 n.4, 421, 836 S.E.2d 348, 349 n.4, 350 (2019) (noting that a "majority of this Court (albeit not in the lead opinion)" joined a particular interpretation). Indeed, Appellants apply this rule when it suits them—for example, relying on the agreement of a concurrence and two dissents to assert that under *Planned Parenthood I* there is no "right to abortion" protected by article I, section 10. *See, e.g.*, AG Br. at 10; Br. of Governor McMaster ("Gov. Br.") at 22. Under the federal *Marks* rule, by contrast, both in federal court and

[38] "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.'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

as applied by South Carolina courts interpreting splintered federal decisions, the positions of dissenting Justices cannot establish precedent. *See, e.g.*, *Key*, 431 S.C. at 345 n.2, 848 S.E.2d at 319 n.2; *Harkins v. Greenville County*, 340 S.C. 606, 617 n.1, 533 S.E.2d 886, 891 n.1 (2000). Correctly applied, South Carolina's rule of interpretation establishes that the holdings of *Planned Parenthood I* are the positions shared by at least three Justices. For the same reason, Appellants are also wrong to suggest that *Planned Parenthood I* "does not constitute a 'precedent'" at all. Gov. Br. at 22–23; *accord* AG Br. at 9.

A. Appellants Are Precluded from Relitigating Whether a Six-Week Ban Violates the Right to Privacy.

Planned Parenthood I not only resolves this legal dispute as on-point precedent, as discussed in detail below, it also collaterally estops Appellants from relitigating whether a "fetal heartbeat" ban is an unreasonable invasion of privacy as a matter of South Carolina law. "[W]hen an issue of fact or law is [1] actually litigated and [2] determined by a valid and final judgment, and [3] the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Catawba Indian Nation v. State*, 407 S.C. 526, 536–38, 756 S.E.2d 900 (2014) (quoting *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting Restatement (Second) of Judgments § 27)). The parties before the Court in this case are identical to the parties in *Planned Parenthood I*.[39] Each of the collateral estoppel elements is met here, and "there are no other circumstances which justify affording [Appellants] a second opportunity to retry the issue." *McPherson v. S.C. Dep't of Highways and Pub. Transp.*, 297 S.C. 303, 305, 376

[39] While Respondents additionally named the members of the South Carolina Board of Nursing in their official capacities as defendants in their complaint, these Board of Nursing members did not join the Appellants in seeking review from this Court.

S.E.2d 780, 781 (Ct. App. 1989) (citing *St. Phillip's Episcopal Church v. S.C. Alcoholic Beverage Control Comm'n*, 285 S.C. 335, 329 S.E.2d 454 (Ct. App. 1985)).

In *Planned Parenthood I*, the Court determined that a law banning abortion after approximately six weeks of pregnancy was unreasonable as a matter of law and thus violated article I, section 10's guarantee of the right to privacy. *Planned Parenthood I*, 438 S.C. at 216–17, 882 S.E.2d at 785–86; *accord id.*, 438 S.C. at 238, 882 S.E.2d at 797 (Beatty, C.J., concurring); *id.*, 438 S.C. at 271–72, 882 S.E.2d at 815 (Few, J., concurring in the judgment) ("[W]e may not find [S.B. 1] violates article I, section 10 *unless we find its restrictions on a pregnant woman's opportunity to have an abortion are—as a matter of law—an unreasonable invasion of her privacy*." (emphasis added)). While Appellants attempt to characterize *Planned Parenthood I* as a thicket of irreconcilable opinions, Gov. Br. at 21–22; AG Br. at 11, the decision's holding is clear. It is beyond dispute that a six-week ban's unreasonableness was (1) actually litigated and (2) directly determined by a valid and final judgment in *Planned Parenthood I*, and that (3) this unreasonableness was "essential to the judgment" in which three Justices concurred, striking down S.B. 1 under article I, section 10. *Catawba Indian Nation*, 407 S.C. at 536–38, 756 S.E.2d 900; *see also* Restatement (Second) of Judgments § 27 cmt. c (discussing factors relevant "to delineate the issue on which litigation is, or is not, foreclosed"); *id.* at cmt. d (explaining that an issue is "actually litigated" when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined").

There can be no question that the *Planned Parenthood I* litigation provided the parties a full and fair opportunity to litigate whether a ban on abortion after approximately six weeks LMP is an unreasonable invasion of privacy—including an invitation for further evidence and briefing on the question, which Appellants opposed. *See* 438 S.C. at 282, 882 S.E.2d at 820–21 (Few, J.,

concurring in the judgment) (describing the Court's inquiry as to supplemental briefing and studies and the AG's objection in response). And Appellants cannot meet their burden of identifying a change of circumstances in the five months since the Court decided *Planned Parenthood I* that would "justify affording [Appellants] a second opportunity to retry the issue." *McPherson*, 297 S.C. at 305, 376 S.E.2d at 781; *see also Wal-Mart Stores*, 304 S.C. at 214, 403 S.E.2d at 627 (explaining that the burden of persuasion lies with the party opposing collateral estoppel and noting that party's losing legal arguments had not changed since the prior action).[40]

As the Restatement (Second) of Judgments recognizes, "[p]reclusion ordinarily is proper if the question is one of the legal effect of a document identical in all relevant respects to another document whose effect was adjudicated in a prior action." § 27 cmt. c. S.B. 474 is "identical in all relevant respects" to S.B. 1., *infra* Section I.B.2. Appellants claim to have remedied S.B. 1's defects this time around. *E.g.*, AG Br. at 6–8, 11–15; Gov. Br. at 1–2, 14–21. But remarkably, even though the General Assembly's "arbitrary failure to even consider the extent to which [meaningful] choice is denied" was central to Justice Few's conclusion in *Planned Parenthood I* that S.B. 1 was unreasonable as a matter of law, 438 S.C. at 285 & nn.62–63, 882 S.E.2d at 822 & nn.62–63 (Few, J., concurring in the judgment), in its haste to pass another six-week ban, the General Assembly *once again* completely ignored the real-world impact of that sweeping restriction on pregnant South Carolinians. *See infra* Section I.B.2.a.

Instead of actually considering a materially identical ban's effects on the ability to make an informed decision whether to keep or end a pregnancy, the General Assembly simply removed any acknowledgement of "informed choice" from the findings of S.B. 474, mistakenly assuming

[40] Of course, a change in the composition of this Court is not "a change in circumstances" justifying relitigation of this settled issue.

that S.B. 1's substantive unconstitutionality could be cured by substituting one set of magic words for another. *See* Gov. Br. at 17 ("Because 'informed choice' is not a finding in [S.B. 474], there was no requirement in the legislative process for any testimony, any evidence, any debates—anything—on the subject of 'informed choice.'"); App. at 157 (citing removal of "informed choice" legislative finding as evidence that legislature did not decide "to provide women with the opportunity to make an informed choice").

Fortunately for the people of South Carolina, their privacy right is guaranteed by article I, section 10 of the state constitution. As Justice Few articulated in *Planned Parenthood I*, "[a]lthough [S.B. 1] recognizes the interest of 'informed choice,' *a woman's interest in choice is not dependent on this portion of the Act*. The choice of whether to continue a pregnancy or to have an abortion is an inherently private matter that implicates article I, section 10." 438 S.C. at 276, 882 S.E.2d at 818 (Few, J., concurring in the judgment) (emphasis added). Omitting a textual reference to "informed choice" in S.B. 474's findings cannot change that the legislature's disregard for that constitutional interest dooms S.B. 474 just like S.B. 1 before it.

Accordingly, Appellants may not relitigate the constitutionality of a six-week ban, and judgment for Respondents is warranted. *McPherson*, 297 S.C. at 305, 376 S.E.2d at 781; *see also Wal-Mart Stores*, 304 S.C. at 211, 213, 403 S.E.2d at 626, 627 (affirming the application of offensive collateral estoppel); *Holmes v. E. Cooper Cmty. Hosp.*, 408 S.C. 138, 154–56, 758 S.E.2d 483, 492–93 (2014) (affirming grant of summary judgment on issue preclusion grounds).

B. S.B. 474 Replicates S.B. 1's Defects and Thus Violates the Right to Privacy.

Even if the Court finds that Appellants are not precluded from relitigating the constitutionality of a ban on abortion after approximately six weeks of pregnancy, *Planned Parenthood I*'s reasoning requires that this Court strike down the Six-Week Ban as an

unreasonable invasion of the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. As discussed further below, a majority of the Court agreed that a ban on abortion after approximately six weeks of pregnancy violates that right. None of the minor changes the General Assembly made to S.B. 1 in enacting S.B. 474 could possibly resolve this constitutional concern.

1. *Planned Parenthood I* Dictates That a Ban on Abortion at the Earliest Stages of Pregnancy Violates the Right to Privacy.

In *Planned Parenthood I*, this Court held that a ban on abortion after approximately six weeks of pregnancy—S.B. 1—was an unreasonable invasion of article I, section 10's express right to privacy. Because Appellants claim that decision does not provide guidance here, it is important to review the legal principles endorsed by three members of the Court. *See Episcopal Church*, 2022 WL 3560664, at *12–13.

First, three members of the Court recognized that matters related to medical decision making and whether to become a parent implicate the right to privacy. As Justice Hearn observed, "the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable, and implicates a woman's right to privacy." *Planned Parenthood I.*, 438 S.C. at 195, 882 SE.2d at 774; *accord id.*, 438 S.C. at 276, 882 S.E.2d at 818 (Few, J., concurring in the judgment) ("The choice of whether to continue a pregnancy or to have an abortion is an inherently private matter that implicates article I, section 10."); *id.*, 438 S.C. at 217, 882 S.E.2d at 786 (Beatty, C.J., concurring) ("If the right of privacy *means anything*, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so *fundamentally* affecting a person as *the decision whether to bear or beget a child.*" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972))). The privacy interests of someone considering abortion also arise as they consult with family, friends, spiritual advisors, and medical providers. *Id.*, 438 S.C. at 267, 882 S.E.2d at 813

(Few, J., concurring in the judgment); *see also id.*, 438 S.C. at 224, 882 S.E.2d at 789 (Beatty, C.J., concurring).

In reaching its decision in *Planned Parenthood I*, the Court recognized that article I, section 10 of the South Carolina Constitution provides a broad privacy right in the text itself. That section provides that "[t]he right of the people to be *secure in their persons*, houses, papers, and effects *against . . . unreasonable invasions of privacy* shall not be violated . . . ." S.C. Const. art. I, § 10 (emphasis added). "[T]he word 'privacy'—though broad—is clear as to its scope: it includes *all forms of privacy*. . . . Thus, when used without limitation in article I, section 10, the term 'privacy' means *the full panoply of privacy rights* Americans have come to enjoy over the history of our Nation." *Planned Parenthood I*, 438 S.C. at 259–60, 882 S.E.2d at 808-09 (Few, J., concurring in the judgment).

The Court's ruling also drew on its prior precedent recognizing that the right to privacy includes the right to autonomy in medical decision making and is not limited to the search and seizure context. In *Singleton v. State*, this Court held that article I, section 10 protects a person's "right to decide what is to be done medically with one's brain and body . . . and the freedom from unwarranted physical interference with one's person." 313 S.C. 75, 88, 437 S.E.2d 53, 60 (1993). In *Planned Parenthood I*, the Court expressly reaffirmed *Singleton*, explaining that "certain instances of medical intervention implicate the right to be secure in one's person from unreasonable invasions of privacy." 438 S.C. at 206, 882 S.E.2d at 780; *see also Planned Parenthood I*, 438 S.C. at 233, 882 S.E.2d at 794 (Beatty, C.J., concurring) ("Any objective reading of *Singleton* requires a conclusion that the Court officially recognized a right to bodily autonomy encompassed in our right to privacy that is protected by article I, section 10."). Applying the logic from *Singleton* and its progeny, the Court concluded that "any medical procedures a

pregnant woman chooses to have—including an abortion—or chooses not to have—implicate her privacy interests." *Planned Parenthood I*, 438 S.C. at 269, 882 S.E.2d at 814 (Few, J., concurring in the judgment).

In addition to the text and precedent supporting a broad privacy right, the Court recognized history supporting that interpretation, including history related to intimate relationships, family, and "the decision whether to bear or beget a child." *See id.*, 438 S.C. at 199–202, 882 S.E.2d at 776–78 (quoting *Eisenstadt*, 405 U.S. at 453). While three members of the Court acknowledged the West Committee and the history surrounding the adoption of article I, section 10, the Court ultimately took a broader view of the relevant history, including "the societal landscape of the time." *Id.*, 438 S.C. at 203, 882 S.E.2d at 778. Significantly, the Court noted that the broad, unambiguous language of the constitutional provision was more telling than "cherry-pick[ed]" portions of the West Committee Notes. *See id.*, 438 S.C. at 262, 266 n.49, 882 S.E.2d at 810, 812 n.49 (Few, J., concurring in the judgment).[41] Indeed, surveying the arc of history in his substantive due process analysis, Chief Justice Beatty called "a woman's right to make her own reproductive health decisions and control her own body . . . a deeply rooted right," recognizing that reproductive autonomy as a component of liberty predates *Roe*. *Id.*, 438 S.C. at 254, 882 S.E.2d at 806.

The Court also recognized that, because the Constitution protects a privacy interest in informed reproductive choice, it matters whether South Carolinians are able to know they are pregnant at the time a law bans abortion. *See id.*, 438 S.C. at 274, 276, 278, 882 S.E.2d at 816,

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[41] *See also id.*, 438 S.C. at 202, 204, 882 S.E.2d at 778–79 (Hearn, J.) ("Cognizant of the ongoing developments and extensions of privacy law into areas such as marriage and intimacy, the authors nevertheless chose broad language, which we cannot now simply ignore by looking to discrete references to data security in the Committee notes."; "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."); *id.*, 438 S.C. at 231–32, 882 S.E.2d 770, 793 (Beatty, C.J., concurring).

818–19 (Few, J., concurring in the judgment) ("Without knowledge [of a pregnancy], . . . the choice' is an illusion—it is no choice at all."). Because S.B. 1 banned abortion at the earliest stages of pregnancy, it prohibited abortion before many people even learn of their pregnancies. *Id.*, 438 S.C. at 195; 882 S.E.2d at 774; *id.*, 438 S.C. at 223, 882 S.E.2d at 789 (Beatty, C.J., concurring) ("[A]t this early stage, a substantial number of women do not even know that they are pregnant, so there is no realistic opportunity to make a medical decision as to the (unknown) pregnancy at this point."); *id.*, 438 S.C. at 286, 882 S.E.2d at 823 (Few, J., concurring in the judgment) ("[I]t is plainly obvious a substantial percentage of women cannot learn of their pregnancy in time to make and carry out a meaningful choice under the [S.B. 1]."). [42]

In addition to learning of a pregnancy, someone seeking an abortion must come to the decision that abortion is best for them and then "take reasonable steps to terminate [the] pregnancy." *See id.*, 438 S.C. at 216–17, 882 S.E.2d at 785–86; *cf. id.*, 438 S.C. at 278, 882 S.E.2d at 819 (Few, J., concurring in the judgment) ("[I]f a substantial percentage of pregnant women cannot know of their pregnancy in time to have meaningful discussions, engage in sufficient deliberation and prayer, and then make timely arrangements to carry out an abortion, then I cannot envision a winning argument that meaningful choice exists or that the denial of that choice is not an unreasonable invasion of privacy."). And "[w]omen may face hurdles in obtaining timely medical care due to poverty, work schedules, existing childcare obligations, or other personal circumstances." *Id.*, 438 S.C. at 223, 882 S.E.2d at 789 (Beatty, C.J., concurring). "Six weeks is, quite simply, not a reasonable period of time" for someone to learn of a pregnancy, decide to have

[42] Justice Few called the question whether "a pregnant woman [can] even know she is pregnant in time to engage in a meaningful decision-making process and . . . make the necessary arrangements to carry out an abortion" central to the Court's privacy analysis and the General Assembly's failure to consider that question "arbitrary." *Id.*, 438 S.C. at 278, 284–85, 882 S.E.2d at 818, 822 (Few, J., concurring in the judgment).

an abortion, and then overcome potential logistical challenges involved in obtaining an abortion. *Id.*, 438 S.C. at 217, 882 S.E.2d at 786.

Appellants claim that this Court "offer[ed] no guidance," criticizing its analysis as "unbounded," Gov. Br. at 37, but the Court was clear: under article I, section 10, a restriction on privacy that is "unreasonable" cannot stand. *Planned Parenthood I*, 438 S.C. at 287, 882 S.E.2d at 823 (Few, J., concurring in the judgment); *see also Planned Parenthood I*, 438 S.C. at 238, 882 S.E.2d at 797 (Beatty, C.J., concurring) ("[R]easonableness provides a limiting princip[le.]"). Three Justices each applied a form of heightened scrutiny under this standard and concluded that S.B. 1 failed. *Id.*, 438 S.C. at 242, 882 S.E.2d at 799 (Beatty, C.J., concurring) (strict scrutiny applies to classifications infringing on fundamental privacy right to bodily autonomy); *accord id.* at 438 S.C. at 211, 882 S.E.2d at 782 (Hearn, J.) (because privacy is a fundamental right, strict scrutiny applies to laws infringing on that right); *id.*, 438 S.C. at 287, 882 S.E.2d at 823 (Few, J., concurring in the judgment) (calling this standard "more strict than a rational relationship test").

Finally, although this Court recognized the State's legitimate interests in maternal health and fetal life, it held that these interests could not justify the invasion of privacy posed by a ban on abortion after approximately six weeks of pregnancy. *See id.*, 438 S.C. at 211, 882 S.E.2d at 782 (recognizing the State's interest in "fetal health" and maternal health as well as "the unborn fetus's own interest"); *id.*, 438 S.C. at 236, 882 S.E.2d at 796 (Beatty, C.J., concurring) ("The state, at some point, has a legitimate interest in protecting fetal life."). Encompassed within the State's interest in maternal health, the Court observed, was its interest in informed choice. *Id.*, 438 S.C. at 213, 882 S.E.2d at 784. While S.B. 1 included a relevant legislative finding, the Court's decision did not turn on that finding. *See id.*, 438 S.C. at 274, 276, 882 S.E.2d at 816, 818 (Few, J., concurring in the judgment) ("Although [S.B. 1] recognizes the interest of 'informed choice,' *a*

woman's interest in choice is not dependent on this portion of the Act."). And because many patients do not have enough time to learn they are pregnant, "weigh [their] options], schedule an appointment [for an abortion] at one of the three clinics in the state, and comply with the mandatory waiting periods," the State's proffered interest in informed choice was not served—and South Carolinians' constitutional interest in informed choice was not honored—by a ban on abortion after approximately six weeks of pregnancy. *Id.*, 438 S.C. at 214–15, 882 S.E.2d at 784–85. In other words, a six-week ban provides "no 'choice' at all." *Id.*, 438 S.C. at 215, 882 S.E.2d at 784.

2. S.B. 474 Replicates the Unconstitutional Invasion of Privacy of S.B. 1.

Contrary to Appellants' arguments, nothing in S.B. 474 changes this constitutional analysis. The Court's ruling in *Planned Parenthood I* was clear: a ban on abortion after approximately six weeks of pregnancy, before many people even know they are pregnant, entirely forecloses the opportunity for most South Carolinians to get an abortion and thus unreasonably violates the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. *E.g.*, *id.*, 438 S.C. at 217, 882 S.E.2d at 785–86 (Any gestational-age based restriction on abortion "must afford a woman sufficient time to determine she is pregnant and to take reasonable steps to terminate that pregnancy. Six weeks is, quite simply, not a reasonable period of time for these two things to occur, and therefore the Act violates our state Constitution's prohibition against unreasonable invasions of privacy."); *see also id.*, 438 S.C. at 290, 882 S.E.2d at 825 (Few, J., concurring in the judgment) (calling a ban on abortion at six weeks of pregnancy "as a matter of law[,] . . . an unreasonable intrusion into a pregnant woman's right of privacy").

The General Assembly too was clear: in passing S.B. 474, it was reenacting the same law. S. Journal No. 19, 125th Gen. Assemb. (S.C. Feb. 9, 2023) ("S. Journal") (statement of Sens. Massey, Campsen, and Grooms) ("The court's decision in [*Planned Parenthood I*] left the General

Assembly with no choice but to take action to correct the misguided decision and *reestablish the ban on abortions after a fetal heartbeat is detected.*" (emphasis added)). This is underscored by Appellants' briefing, much of which recycles the same arguments they set forth in *Planned Parenthood I* which this Court considered and rejected.[43]

At base, Appellants identify three changes which they think should lead the Court to a different result: (1) that the Act eliminated S.B. 1's "informed choice" finding; (2) that the Act calls the State's interest in fetal life "compelling" rather than "legitimate"; and (3) that the Act repeals the state's 1974 codification of the *Roe* trimester framework. *See* Gov. Br. at 14–21; AG Br. at 14–15, 27–28. But these cosmetic differences cannot dictate a different result when the substance of the Act is identical to the one struck down five months ago.

a) "Informed Choice"

As noted above, the decision in *Planned Parenthood I* did not turn on S.B. 1's legislative finding about "informed choice." Justice Few recognized that "a woman's interest in choice is not dependent on this [legislative finding]." *Planned Parenthood I.*, 438 S.C. at 276, 882 S.E.2d at 818 (Few, J., concurring in the judgment). Rather, "[t]he General Assembly's codification of 'informed choice' as an interest to be valued here *simply recognizes this obvious fact that abortion*

[43] *Compare, e.g.*, Br. of Governor McMaster, *Planned Parenthood I*, at 17–18, *with* Gov. Br. at 23–24 (identical discussion of West Committee beginning with "When the Committee met" but adding cite to Justice James's dissent); Br. of Governor McMaster, *Planned Parenthood I*, at 18–19, *with* Gov. Br. at 25 (paragraph beginning "As the voters prepared . . ."); Br. of Governor McMaster, *Planned Parenthood I*, at 10–12, *with* Gov. Br. at 27–28 (discussion of pre-*Roe* abortion prohibitions); Br. of Resp'ts State, Att'y Gen., and Solicitor Wilkins, *Planned Parenthood I*, at 4–5, *with* AG Br. at 3–4 (near verbatim discussing of history of abortion regulation); Br. of Resp'ts State, Att'y Gen., and Solicitor Wilkins, *Planned Parenthood I*, at 9–10, *with* AG Br. at 15, 17 (discussing how to interpret article I, section 10); Br. of Resp'ts State, Att'y Gen., and Solicitor Wilkins, *Planned Parenthood I*, at 13–14, *with* AG Br. at 20–21 (identical discussion of West Committee).

is a private choice." *Id.* (emphasis added). In passing S.B. 474, the General Assembly once again disregarded that constitutional privacy interest.

Even if the elimination of that legislative finding mattered, however, the principle of "informed consent" is still baked into the Six-Week Ban itself, just like it was in S.B. 1. Notably, S.B. 474 mandates that except as provided for in the Act's exceptions, "no person shall perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's fetal heartbeat has been detected in accordance with [South Carolina's existing informed consent statute]." S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)) (emphasis added); *see also* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-620 ("An abortion may not be performed or induced without the voluntary and informed written consent of the pregnant woman or, in the case of incapacity to consent, the *voluntary and informed written consent* of her court-appointed guardian, and without compliance with the provisions of [the existing informed consent statute]." (emphasis added))); Gov. Br. at 7 (noting centrality of informed consent provisions). S.B. 474 also amends South Carolina's pre-existing informed consent statute, S.C. Code Ann. § 44-41-330(A). *See* S.B. 474, § 10 (amending S.C. Code Ann. § 44-41-330(A)). The elimination of the legislative finding therefore does not change that the Six-Week Ban—like S.B. 1—is interwoven with requirements the State believes are necessary to obtain informed consent when a patient chooses abortion. And eliminating that legislative finding certainly does not change the Court's holding that, as a constitutional matter, women must have "a meaningful opportunity to decide whether to abort or to carry the pregnancy to full term." *Planned Parenthood I*, 38 S.C. at 213, 882 S.E.2d at 784; *accord* 438 S.C. at 288, 882 S.E.2d at 824 (Few, J., concurring in the judgment).

Appellants ultimately do not seem to be making a *legal* argument about S.B. 474's treatment of "informed choice." Nor could they, as the elimination of a legislative finding cannot hold more legal significance than the reenactment of a law with the exact same functional effect as one already declared unconstitutional. Instead, they seem to be making a factual argument, claiming that "the text of the [S.B. 474] changed the beginning of the timeline for a decision concerning an abortion, or the 'actual line' as Justice Few referred to it, from the existence of a detectable fetal heartbeat in [S.B. 1] to the existence of detectable levels of a hormone, hCG, that is first produced at the onset of pregnancy." AG Br. at 12. But that someone *might hypothetically* know they are pregnant before six weeks LMP based on a pregnancy test does nothing to change the Court's analysis. Pregnancy tests have not miraculously advanced in efficacy in the five months since this Court invalidated S.B. 1 or since 2021 when S.B. 1 was passed.[44] Respondents put forward ample evidence as to the myriad reasons why most South Carolinians seeking abortions do not know they are pregnant at six weeks LMP. App. at 112–13 ¶¶ 33–37, 145–46 ¶¶ 24–28.[45] The vast majority of abortions in South Carolina occur after the limit that S.B. 474 would impose. App. at 112 ¶ 32, 118 ¶ 51, 145–46 ¶¶ 23, 29. Indeed, Appellants concede elsewhere that the earliest a pregnancy test would provide accurate results is at about five weeks LMP—just one

[44] Appellants have misleadingly cherry-picked quotes from the Planned Parenthood Federation of America and Cleveland Clinic websites regarding the efficacy of pregnancy tests prior to a missed period. *Compare* Gov. Br. at 20, *with Pregnancy Tests*, Planned Parenthood, *supra* note 20 ("Many pregnancy tests say they work a few days before a missed period, *but the results are usually less accurate then.*" (emphasis added)); Emergency Pet. for Writ of Supersedeas at 11–12, *with Pregnancy Tests*, https://my.clevelandclinic.org/health/articles/9703-pregnancy-tests (last accessed June 19, 2023) ("In many cases, you might get a positive result from an at-home test as early as 10 days after conception. *For a more accurate result, wait until after you've missed your period to take a test. Remember, if you take a test too soon, it could be negative even if you're pregnant.*" (emphasis added)).

[45] *See also* Norton Decl., *supra* note 32, ¶ 31 ("[T]he vast majority of women who seek abortion are *not* aware of a confirmed pregnancy until after cardiac activity is detectable.").

week before the Act bars abortion. Gov. Br. at 20. But even under this scenario, someone would need to overcome the barriers to suspecting they might be pregnant, obtain and take a pregnancy test, make an appointment for an abortion at one of Respondents' three clinics, and comply with the State-mandated waiting period, as well as overcome other obstacles to obtaining an abortion, including raising the necessary money and arranging childcare and time off work or school. This means that at best the State has rushed patients into their appointments, and at worst, denied them access entirely.

That S.B. 474 defines "clinically diagnosable pregnancy" to mean "the point in time when it is possible to determine that a woman is pregnant due to the detect[a]ble presence of human chorionic gonadotropin (hCG)" does not change this fact. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(2)). This superficial change effectively operates only to exclude from the definition of abortion any termination of pregnancy occurring before the presence of hCG. *See id.* (amending S.C. Code Ann. § 44-41-610(1) (definition of "[a]bortion")). But there is no evidence that people seek, and Respondents do not provide, abortions absent the confirmation of pregnancy. And this definition does nothing to change the gestational age limit imposed by S.B. 474—which is keyed to the onset of cardiac activity, not the General Assembly's definition of pregnancy—or alter the reality that most people seeking abortions do not know they are pregnant before six weeks LMP.

To the extent Justice Few's opinion turned on the General Assembly's failure to consider the question whether someone seeking an abortion can know they are pregnant before six weeks LMP, *supra* note 42, S.B. 474 does not address this concern. Appellants' claim that the General Assembly addressed this issue is based on Senate Journal records, AG Br. at 13–14; Gov. Br. at 20–21, but this Court has questioned the relevance of statements of individual legislators where a statute is clear. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 83, 862 S.E.2d 706, 709 (2021) (per

curiam); *compare Doe v. State*, 421 S.C. 490, 499 n.6, 808 S.E.2d 807, 811 n.6 (2017) (analyzing "the historical evolution of the statute at issue"), *with Doe*, 421 S.C. at 514, 808 S.E.2d at 819 (Few, J., concurring in part, dissenting in part) (advising to look to legislative history only if "the text of the statute is ambiguous"). The text of S.B. 474 is unambiguous: it bans abortion after approximately six weeks LMP and says nothing about the opportunity for someone seeking abortion to learn of their pregnancy before that point.

Nonetheless, to the extent the Court is inclined to consider the Senate Journal records, these statements are based on an inaccurate understanding of pregnancy, are not entitled to any deference, and do not address Justice Few's concerns. *See Planned Parenthood I*, 438 S.C. at 280, 882 S.E.2d at 820 (Few, J., concurring in the judgment) ("[I]f the General Assembly's factual determinations are clearly erroneous, or if there is no evidence to support them, then the policy determinations and statutory enactments based on those factual determinations are not entitled to the deference we ordinarily give them."). Significantly, the General Assembly made its "findings" without holding any committee hearings or hearing any evidence. *See* S. Journal (statement of Sen. Gustafson) ("There were no medical committee meetings to my knowledge and no opportunity for medical professionals or women to testify about additional exceptions. The few days available for floor debate in the past week were not sufficient to cover additional medical issues that might have arisen since 2021."); (statement of Sen. Senn) ("The Senate heard no evidence of why week six (or five) is not arbitrary in the new Bill when what the woman carries in her body is not even considered a fetus by medical experts at that time."); (statement of Sen. Hutto) ("The truncated legislative process -- filing a Bill one day, polling it out of its assigned committee the next and undertaking the debate the following day obviated any opportunity to consider any evidence or engage in further fact-finding in support of this edict to the women of our State. There was

absolutely no due diligence or careful deliberation given to this piece of legislation, which would render the statutory right to an abortion meaningless.").

Most glaringly, the Senators' supposed consideration of whether South Carolinians have the opportunity to learn of their pregnancies before six weeks LMP relies on DHEC data, *see* AG Br. at 28, which, as Justice Few noted, measures the number of abortions beginning at "six weeks *post-fertilization*. But this can be misleading here because six weeks after fertilization is *eight weeks after a woman's last menstrual period*, which is approximately two weeks after [S.B. 1] prevents an abortion." *Id.*, 438 S.C. at 281, 882 S.E.2d at 820 (emphasis added); S. Journal (statement of Sens. Massey, Campsen, and Grooms). In other words, the statistics the legislators (and Appellants) rely on simply do not say what the legislators say they mean.

The legislators (and Appellants) also claim that, under the Six-Week Ban, "a woman can find out that she is pregnant two weeks after conception and has another 4 ½ to 5 weeks to make her decision and have an abortion." AG Br. 13 (quoting S. Journal (statement of Sens. Massey, Campsen, and Grooms)). This fundamentally misunderstands the facts of pregnancy by conflating LMP dating, fertilization, and implantation triggering hCG production—each a distinct medical concept and chronological stage. Two weeks after conception is roughly four weeks LMP, but as explained above, someone who is not actively trying to conceive is unlikely to learn of their pregnancy this early. *Supra* at 15–16. Even if someone with a predictable four week menstrual cycle took a pregnancy test the very day after they missed their period, they would *not* have "4 ½ to 5 weeks" to obtain an abortion. Indeed, at five weeks after missing a period, they would be more than *nine weeks* LMP, well after the Six-Week Ban's prohibition applies. These errors highlight what happens when the General Assembly attempts to practice medicine.

Lastly, the Senators purported to rely on "experts in the field -- such as the Cleveland Clinic and the American Pregnancy Association." AG Br. at 14 (citing S. Journal (statement of Sens. Massey, Campsen, and Grooms)), 28. But as explained *supra* note 44, they mischaracterize the Cleveland Clinic's information. And the American Pregnancy Association, while "present[ing] all of its information and products as evidence-based and medically accurate," is actually an anti-abortion organization that "doesn't have a single medical professional listed on its staff."[46] The General Assembly cannot use junk science and cursory misrepresentations to supplant what is "plainly obvious": that "a substantial percentage of women cannot learn of their pregnancy in time to make and carry out a meaningful choice under" S.B. 474, just as they could not under S.B. 1. *Planned Parenthood I*, 438 S.C. at 286, 882 S.E.2d at 823 (Few, J., concurring in the judgment).

b) The State's Interest in Fetal Life

The changes to S.B. 474 that Appellants claim offer a "new, stronger expression" of the State's interest in fetal life, Gov. Br. at 15, are instead minor semantic changes to provisions that were also included in S.B. 1. For example, Appellants point to the legislative finding that "[t]he State of South Carolina 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," S.B. 474, § 1(3) (emphasis added), which closely tracks a finding in S.B. 1. S.B. 1, § 2(7) ("[T]he State of South Carolina has *legitimate interests* from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the unborn child who may be born[.]") (emphasis added).[47] And while the Act now

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[46] Kiera Butler, *The Disinformation Campaign Behind a Top Pregnancy Website*, Reveal (April 22, 2022), https://revealnews.org/article/disinformation-campaign-american-pregnancy-association/.

[47] The Governor asserts that the elimination of the clause "who may be born" changes the constitutional analysis. Gov. Br. at 15. But this is merely a factual observation—even absent abortion, some pregnancies will not be carried to term. *See supra* at 14 (explaining that 15% of pregnancies will result in miscarriage during the first trimester).

uses the term "[u]nborn child," it defines this term with language almost identical to S.B. 1's definition of "[h]uman fetus." *Compare* S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-610(14)) (defining "[u]nborn child" as "an individual organism of the species homo sapiens from conception until live birth."), *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-610(6)) (defining "[h]uman fetus" as "an individual organism of the species homo sapiens from fertilization until live birth").[48]

Of course, the General Assembly's legal conclusions are not binding on this Court. It is this Court's province to address the "purely legal questions" related to a ban on abortion after approximately six weeks LMP. *Cf. Planned Parenthood I*, 438 S.C. at 257–58, 882 S.E.2d at 807 (Few, J., concurring in the judgment).[49] Nothing in *Planned Parenthood I* suggests its analysis turned on the General Assembly's finding that the State's interest in fetal life was "legitimate." *See Planned Parenthood I*, 438 S.C. at 211–12, 215, 882 S.E.2d at 783, 785 (calling the State's interest in fetal life "important"). Rightly so: it is for this Court to determine the constitutionality of S.B. 474 rather than defer to the State's own characterization of its interest. Regardless of how the General Assembly describes the State's interests, it has implemented the same policy: a six-week ban. S.B. 1 was unconstitutional because it failed to provide South Carolinians a reasonable period of time to get an abortion. S.B. 474 suffers from precisely the same defect.

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[48] While S.B. 474 uses the term "conception" where S.B. 1 uses "fertilization," the Act equates the two, rendering any distinction meaningless. *See* S.B. 474, § 6 (amending S.C. Code Ann. § 44-41-10(g)) (defining "[c]onception").

[49] The AG also refers to the State's interest in fetal life as "absolute." AG Br. at 27. By this logic, a law banning all abortions without any exceptions or one making anyone who gets an abortion eligible for the death penalty might pass constitutional muster. *See* House Bill 3549, 125th Gen. Assemb., Reg. Sess. (S.C. 2023); Seanna Adcox, *SC Abortion Bill Allowing Death Penalty Grabbed Headlines. But It's Going Nowhere.*, The Post & Courier (Columbia) (Mar. 19, 2023), https://www.postandcourier.com/columbia/politics/sc-abortion-bill-allowing-death-penalty-grabbed-headlines-but-its-going-nowhere/article_bf795dfc-c40e-11ed-b0ec-eb9cabac55cc.html.

Beyond that, Appellants concede that South Carolina has not adopted "a personhood law that generally prohibits abortion from conception." Gov. Br. at 15. As an initial matter, it cannot be that a law banning all abortions does not unreasonably infringe on the right to privacy if a ban on abortion after approximately six weeks of pregnancy does. A total ban would give South Carolinians *no opportunity*—and certainly no reasonable opportunity—to obtain an abortion. Regardless, to the extent Justice Few questioned whether the legal analysis of a total ban on abortion would differ from that of a six-week ban, *id.*, 438 S.C. at 272–74, 882 S.E.2d at 815–16 (Few, J., concurring in the judgment), S.B. 474 does not resolve his concerns. Significantly, the General Assembly considered, but failed to pass, a total ban on abortion. House Bill 3774, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

c) Repeal of Previous Abortion Laws

S.B. 474's repeal of South Carolina's 1974 and 2016 abortion laws does nothing to distinguish this case from *Planned Parenthood I*. Appellants make much of this repeal, presumably because their other arguments do not hold water and because the Court's August 2022 order blocking S.B.1 related to those statutes. *See* Order Granting Prelim. Inj., *Planned Parenthood I* (Aug. 17, 2022) (No. 2022-001062). But nothing in Justice Hearn's nor Justice Few's opinion in *Planned Parenthood I* suggests that their decision to hold S.B. 1 unconstitutional turned on any conflict between S.B. 1 and these prior laws. And while Chief Justice Beatty concluded S.B. 1 was unconstitutionally vague based on these "three competing standards," his opinion cited multiple independent bases to strike down S.B. 1. *See id.*, 438 S.C. at 249, 882 S.E.2d at 803 (Beatty, C.J., concurring). This aspect of S.B. 474 thus does not change the analysis.

* * * * *

Just as the State's interests could not justify the unreasonable invasion of privacy posed by S.B. 1's six-week ban in *Planned Parenthood I*, they do not justify the intrusion on privacy posed by S.B. 474's Six-Week Ban. *Planned Parenthood I* dictates that S.B. 474 too violates the right to privacy as guaranteed by article I, section 10 of the South Carolina Constitution.[50]

C. Because S.B. 474 Violated the South Carolina Constitution at the Time It Was Enacted, It Is Void *Ab Initio*.

In light of *Planned Parenthood I*, S.B. 474 is also void *ab initio*. Under South Carolina's void *ab initio* doctrine, if a statute is unconstitutional at the time of enactment, it is deemed to have been invalid from the outset. For example, in *Swicegood v. Thompson*, this Court held that the State's statutory ban on same-sex marriage was void *ab initio* under *Obergefell v. Hodges*, 576 U.S. 644 (2015), and in turn "must be treated as though it never existed." 435 S.C. 63, 65, 865 S.E.2d 775, 776 (2021) (per curiam) (citing *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)); *see also Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 399–400, 596 S.E.2d 42, 47–48 (2004) ("Section 44-7-50, which we declared unconstitutional in 1992, was unconstitutional from the date of its enactment in 1977 and thus void *ab initio*."); *Atkinson v. S. Express Co.*, 94 S.C. 444, 452–53, 78 S.E. 516, 519 (1913); John R. Ferguson, *Criminal Offenses in South Carolina* § 14:10 (3d ed. 2021) ("A statute which is found to be unconstitutional is void *ab initio*.").

When S.B. 474 was enacted on May 25, 2023, just months after this Court struck down S.B. 1, *Planned Parenthood I* was already binding precedent establishing that a ban on abortion

[50] As Appellants appear to concede, S.B. 474's hallmark feature is to restrict abortion after approximately six weeks LMP, and thus the Act is not severable. *Pinckney v. Peeler*, 434 S.C. 272, 288, 862 S.E.2d 906, 915 (2021) (citing *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999). Despite its severance clause, the Six-Week Ban gives the Act its purpose and is foundational to the Act's structure. As with S.B. 1, without the Six-Week Ban, "it is highly dubious that . . . the [Act] as a whole would have passed." *Planned Parenthood I*, 438 S.C. at 216 n.15, 882 S.E.2d at 785 n.15.

after approximately six weeks LMP is an unconstitutional invasion of privacy. Because the Act is identical to S.B. 1 in all relevant respects, it directly conflicts with this precedent and is thus void *ab initio* as a matter of South Carolina law. Accordingly, S.B. 474 "must be treated as though it never existed" and "is, in legal contemplation, as inoperative as though it had never been passed." *Swicegood*, 435 S.C. at 65, 865 S.E.2d at 776 (citing *Norton*, 118 U.S. at 442).

D. There Is No Reason to Overturn *Planned Parenthood I.*

Perhaps because they recognize there is no credible argument that S.B. 474 does not suffer from the same constitutional infirmity as S.B. 1, Appellants also ask this Court to overrule *Planned Parenthood I.* The Court should decline this invitation.

In its ordinary course, this Court follows its own precedents, including in cases involving constitutional interpretation. *See State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 505, 66 S.E.2d 33, 41 (1951) ("Judicial followers of binding precedents, particularly those involving constitutional interpretation, upon which all in interest have the right to rely, may with honesty and propriety consider that they would have decided contrariwise had they been in their predecessors' places; but they should follow nevertheless."). This practice recognizes the important public purposes of *stare decisis*, including "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) ("*Stare decisis* exists to 'insure a quality of justice which results from certainty and stability.'" (quoting *McCall v. Batson*, 285 S.C. 243, 256, 329 S.E.2d 741, 747 (1985) (Chandler, J., concurring))). Thus, while "*stare decisis* is not an inexorable command," *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202

(2012), this Court's constitutional rulings "should not be lightly set aside," *Roddey*, 219 S.C. at 505, 66 S.E.2d at 41 (quoting *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961, 964 (1910)); *accord Gamble*, 139 S. Ct. at 1969 ("[E]ven in constitutional cases, a departure from precedent 'demands special justification.'" (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))).

No special justification warrants overturning *Planned Parenthood I* for at least four reasons. First, contrary to Appellants' assertion, Gov. Br. at 40–41; AG Br. at 29, *Planned Parenthood I* is not a single decision cut out of whole cloth. Rather, it built on thirty years of precedent recognizing privacy in medical decision making as well as cases recognizing the right to privacy before adoption of article I, section 10. *Supra* Section 1.B.1. While that decision is only five months old, this Court has already rearticulated the view that it "must closely scrutinize 'unwarranted medical intrusions' to effectuate the protection of South Carolina's right against unreasonable invasions of privacy" since its ruling in *Planned Parenthood I. State v. German*, No. 2018-002090, 2023 WL 3129475, at *11 (S.C. Apr. 5, 2023) (quoting *Singleton*, 313 S.C. at 89, 437 S.E.2d at 61). And even though single cases have less precedential value than "a body of decisions," this Court has counseled its "hesitat[ance] to revisit and reverse" even single cases "without good cause to do so." *McLeod*, 396 S.C. at 655, 723 S.E.2d at 203.

Appellants argue that the newness of *Planned Parenthood I* is reason to discount its precedential value, Gov. Br. at 40, but *Wehle v. South Carolina Retirement System*, 363 S.C. 394, 611 S.E.2d 240 (2005), undermines this argument. There, the Court declined to overturn precedent where plaintiffs commenced their case "seek[ing] to relitigate the identical issue" just "two months after [the Supreme Court] refused to rehear" the decision plaintiffs asked the Court to overturn. *Id.*, 363 S.C. at 398, 402, 611 S.E.2d at 242, 244. And although the Court overturned a decision

that was just two years old in *McLeod*, the decision it overturned departed from "thirty years of precedent." 396 S.C. at 651, 723 S.E.2d at 201. By contrast, *Planned Parenthood I* upheld the status quo as it had existed for nearly half a century. *McLeod* is further distinguishable because the party seeking to uphold the single precedent cited "no defensible reason for his [position] other than the shield erected by [the single precedent]." 396 S.C. at 658, 723 S.E.2d at 205. Here, by contrast, Respondents rely on earlier decisions by this Court, from *Singleton* to its recent ruling in *German*.[51]

Second, *Planned Parenthood I* is clear: a ban on abortion after approximately six weeks of pregnancy is an unreasonable invasion of the constitutional guarantee of the right to privacy. *Supra* Section I.B.1. Appellants argue that it is a splintered decision with flawed reasoning that provides little legal guidance. Gov. Br. at 40. Not so. That each member of the Court authored his or her own opinion does not undermine the legal import. *See One Coin-Operated Video Game Mach.*, 321 S.C. at 181, 467 S.E.2d at 446 ("That decision was a close one, with two justices dissenting, but we see no reason to revisit it today."). This Court has cautioned that, even where decisions have been "decided by a divided court, . . . it is better to yield than to overrule." *Chamblee v. Tribble*, 23 S.C. 70, 79 (1885).[52]

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[51] *See also Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 153–54 (1981) (Stevens, J., concurring) ("[W]e have a *profound obligation to give recently decided cases the strongest presumption of validity*. That presumption is supported by much more than the desire to foster an appearance of certainty and impartiality in the administration of justice, or the interest in facilitating the labors of judges. *The presumption is an essential thread in the mantle of protection that the law affords the individual.*" (emphasis added) (footnotes omitted)).

[52] In both *State v. Walker*, 252 S.C. 325, 327, 166 S.E.2d 209, 210 (1969), and *Moseley v. American National Insurance Co.*, 167 S.C. 112, 166 S.E. 94, 96 (1932), cited by Appellants, the Court did not actually overrule precedent and instead distinguished the cases at issue. By contrast, the laws at issue here and in *Planned Parenthood I* are the same in all relevant ways.

Furthermore, that Appellants take issue with the Court's reasoning does not undermine it. As explained above, *Planned Parenthood I* rests on sound principles. *Supra* Section I.B.1. *Planned Parenthood I* did not open a Pandora's Box of privacy claims, as the Governor suggests. Gov. Br. at 3, 37. Courts accept challenges as they come, and this Court can look to other states with a constitutional privacy right as proof that Appellants' parade of horribles will not follow. For example, in Alaska a state constitutional right to abortion has existed for more than 25 years, *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997), without opening the door to the assisted suicide, prostitution, bigamy, controlled substances, rape, and child abuse the Governor invokes here. *See Planned Parenthood I*, 438 S.C. at 229, 882 S.E.2d at 792 (Beatty, C.J., concurring) (calling such scenarios "highly improbable"). Should the Court strike down the Act, the State's ban on abortion at twenty weeks post-fertilization will revive. That statute is not being challenged here (and has, in fact, never been challenged). Furthermore, article I, section 10 provides that "unreasonable invasions of privacy are unlawful. Therefore, reasonableness provides a limiting principle, and the right to privacy in article I, section 10 is not absolute." *Planned Parenthood I*, 438 S.C. at 238, 882 S.E.2d at 797 (Beatty, C.J., concurring).

Third, Appellants' argument that *Planned Parenthood I* involves "limited reliance interest" could not be further from reality. Gov. Br. at 39–40. Every day for the past half century, South Carolinians have made decisions in reliance on their ability to access abortion. *Cf. Planned Parenthood I*, 438 S.C. at 254, 882 S.E.2d at 805 (Beatty, C.J., concurring). The Court should continue that status quo, protecting South Carolinians' freedom to make decisions regarding the "utmost personal and private considerations imaginable." *Id.*, 438 S.C. at 195, 882 S.E.2d at 774 (Hearn, J.).

While deeply personal, these decisions are also ones that affect South Carolinians' public lives and have profound impacts for the State as a whole. Indeed, "abortion access . . . profoundly affect[s] women's lives by determining whether, when, and under what circumstances they become mothers, outcomes which then reverberate through their lives, affecting marriage patterns, educational attainment, labor force participation, and earnings."[53] In particular, young women, women of color, and poor women are disproportionately likely to experience unplanned pregnancies and thus rely on access to abortion care.[54] The Court should consider the "real-world effects" of the Six-Week Ban, including on those whom it will impact most if allowed to go into effect, in evaluating the reliance interests arising out of *Planned Parenthood I*. *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1002–03 (Alaska 2019) (evaluating "real-world effects" of abortion restriction, including impact on "indigent Alaskan women" (citation omitted)).

South Carolinians cannot plan their private or public lives when the possibility of the law changing from "week to week" looms. *See One Coin-Operated Video Game Mach.*, 321 S.C. at 181, 467 S.E.2d at 446. Overturning *Planned Parenthood I* would have an immediate effect on South Carolinians who rely on access to abortion, including those who may be in Respondents' health centers or with appointments soon after the Court rules. While the few patients whose pregnancies are less than six weeks LMP would still be able to obtain abortion, the vast majority of patients would be denied care. This is what happened to more than 1,000 patients seeking

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[53] Caitlin Knowles Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?* (Nov. 30, 2021), https://www.brookings.edu/research/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/.

[54] *See* Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States*, 29–31 (2018), available at http://nap.edu/24950; Jessica E. Morse et al., *Reassessing Unintended Pregnancy: Toward a Patient-Centered Approach to Family Planning*, 44 Obstetrics & Gynecology Clinics of N. Am. 27, 27 (2017).

abortion care at PPSAT's South Carolina clinics during the 51 days S.B. 1 was in effect. App. at 118 ¶ 51 (noting that 513 patients were turned away and 490 patients had their appointments canceled). Moreover, upholding S.B. 474 would put South Carolina physicians in an impossible situation of not knowing if and when the Court could issue a decision overturning *Planned Parenthood I*, making abortion a felony. If allowed to go into effect permanently, S.B. 474 will have exponentially worse and catastrophic effects than S.B. 1, even beyond those who choose abortion. Indeed, faced with this level of legal uncertainty and risk, obstetrician-gynecologists and maternal-fetal medicine physicians have been leaving states with abortion bans in droves.[55]

Finally, no change in the law or facts warrants departure from *Planned Parenthood I*. The relevant law related to South Carolina's privacy right has not changed. Indeed, this Court recently affirmed the scope of that right in *State v. German*, which recognized warrantless blood draws violate the right to privacy. 2023 WL 3129475, at *10–11. And while both the Governor and the State now try to rely *German*, they are simply rehashing their old arguments about the West Committee, rather than distinguishing *German* from the instant case. *See* 2023 WL 3129475 at *10 (citing *State v. Forrester*, 343 S.C. 637, 647, 541 S.E.2d 837, 842 (2001)) (noting that the West Committee "recognized [article I, section 10] would have a far greater impact" beyond electronic surveillance). It is this Court's role to interpret the rights provided to South Carolinians by the South Carolina Constitution. The status of abortion access in other states should not alter that analysis. *See* Gov. Br. at 41–42.

For these reasons, there is no special justification to depart from precedent. In fact, that S.B. 474 is a nearly identical law to S.B. 1 means that the considerations for *stare decisis* should

[55] Julie Rovner, *Abortion Bans Drive Off Doctors and Close Clinics, Putting Other Health Care at Risk*, NPR (May 23, 2023), https://www.npr.org/sections/health-shots/2023/05/23/1177542605/abortion-bans-drive-off-doctors-and-put-other-health-care-at-risk.

be at their strongest. Instead of overruling S.B. 1, this Court should strike down S.B. 474 as an unconstitutional infringement on South Carolinians' right to privacy.

II. Respondents' Requested Disposition

Because *Planned Parenthood I* squarely controls this case, Respondents sought emergency relief in the trial court solely on their claim that S.B. 474 violates the right to privacy, just like S.B. 1 before it. App. at 67–103. But Respondents raised multiple additional claims in their complaint, and, having secured preliminary injunctive relief against S.B. 474's harms, were prepared to litigate those claims in the usual course.

A straightforward application of *Planned Parenthood I* is sufficient grounds for this Court to issue a declaratory judgment that S.B. 474 is unconstitutional under article I, section 10 and a permanent injunction prohibiting enforcement of S.B. 474. However, if the Court is inclined to vacate the preliminary injunction and/or find that S.B. 474 does not violate the right to privacy, Respondents respectfully request the opportunity to submit supplemental briefing on their additional claims, including the submission of evidence not presented in the emergency proceedings below, *see* AG Br. at 10; Rule 245(c), SCACR (providing that when sitting in its original jurisdiction, this Court "may provide for discovery, fact finding and/or a briefing schedule as necessary"), or alternatively a remand to the trial court for further litigation on those claims.

By contrast, if the Court reviews this matter as an interlocutory appeal from the preliminary injunction—as the Governor suggests it should, Gov. Br. at 49—the Court should affirm that injunction and remand. The trial court did not abuse its discretion in entering emergency injunctive relief necessary to preserve the status quo and to prevent ongoing, widespread irreparable harm to

Respondents, their patients, and communities across the state.[56] Applying on-point binding precedent, the trial court correctly found that Respondents are substantially likely to prevail on the merits and that Respondents have no adequate remedy at law. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010); *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011); *Greenville Bistro, LLC v. Greenville County*, 435 S.C. 146, 160, 866 S.E.2d 562, 569 (2021).

CONCLUSION

For the foregoing reasons, this Court should grant judgment to Respondents and permanently enjoin Appellants and their officers, employees, servants, agents, appointees, or successors from administering, preparing for, enforcing, or giving effect to S.B. 474 and any other South Carolina statute or regulation that could be understood to give effect to S.B. 474.

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[56] The Governor's assertion that this Court cannot consider harm to Respondents' patients or that Respondents have not shown direct harm fails. Gov. Br. at 48–49. *Planned Parenthood I* involved the same plaintiffs as the instant case, alleging virtually identical harms under S.B. 1, and neither the State, nor this Court, contested standing. Indeed, the Court impliedly found standing, as it is an element of subject matter jurisdiction. *See Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) (court should take notice of subject matter jurisdiction); *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) (standing presents an issue of subject matter jurisdiction). In any event, Respondents do have standing to assert claims on their own behalf and on behalf of their patients, as they are "real part[ies] in interest," *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Elec. Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999), and this issue is "of such public importance as to require resolution for future guidance," *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (recognizing standing to challenge governor's commission as officer in Air Force reserve); *see also, e.g., Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (holding that doctors had standing to challenge act funding hospital development as it "clearly impacts a profound public interest—the public health and welfare."); *Thompson v. S.C. Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (holding that the plaintiffs had standing to bring claims that were of concern to both law enforcement personnel and the public). *State v. McKnight* is plainly distinguishable as it involved a formerly pregnant person—not health care providers—attempting to assert the privacy rights of other pregnant people. 352 S.C. 635, 651, 576 S.E.2d 168, 176 (2003).

Respectfully submitted,

/s/ *M. Malissa Burnette*
M. Malissa Burnette (SC Bar No. 1038)
Kathleen McDaniel (SC Bar No. 74826)
Grant Burnette LeFever (SC Bar No. 103807)
Burnette Shutt & McDaniel, PA
P.O. Box 1929
Columbia, SC 29202
(803) 904-7913
mburnette@burnetteshutt.law
kmcdaniel@burnetteshutt.law
glefever@burnetteshutt.law

Attorneys for Respondents

Catherine Peyton Humphreville*
Kyla Eastling*
Planned Parenthood Federation of America
123 William Street
New York, NY 10038
(212) 965-7000
catherine.humphreville@ppfa.org
kyla.eastling@ppfa.org

Attorneys for Respondents Planned Parenthood South Atlantic and Dr. Katherine Farris

Caroline Sacerdote*
Jasmine Yunus**
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3646
csacerdote@reprorights.org
jyunus@reprorights.org

Attorneys for Respondents Greenville Women's Clinic and Dr. Terry L. Buffkin

* Admitted *pro hac vice*
** Application for admission *pro hac vice* pending

Dated: June 20, 2023

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2023-CP-40-002745

APPELLATE CASE NO. 2023-000856

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 her official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SAMUEL H. McNUTT, in his official capacity as Chairperson of the South Carolina Board of Nursing; SALLIE BETH TODD, in her official capacity as Vice Chairperson of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as Secretary 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,

and

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; and THOMAS C. ALEXANDER, in his official capacity as President of the South Carolina Senate, Intervenors-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 Appellants.

CERTIFICATE OF SERVICE

I certify that this *Brief of Respondents* was served on counsel of record on June 20, 2023, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

s/ Kathleen M. McDaniel
Kathleen M. McDaniel
Counsel for Respondents