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Jun 14 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2023-000896

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 her official capacity as a Member of the South Carolina Board of Medical Examiners; THERESA MILLS-FLOYD, in her official capacity as a Member of the South Carolina Board of Medical Examiners; JENNIFER R. ROOT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SAMUEL H. MCNUTT, in his official capacity as Chairperson of the South Carolina Board of Nursing; SALLIE BETH TODD, in her official capacity as a Member of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as a Member of the South Carolina Board of Nursing; JONELLA DAVIS, in her official capacity as a Member of the South Carolina Board of Nursing; KELLI GARBER, in her official capacity as a Member of the South Carolina Board of Nursing; LINDSEY K. MITCHAM, in her official capacity as a Member of the South Carolina Board of Nursing; REBECCA MORRISON, in her official capacity as a Member of the South Carolina Board of Nursing; KAY SWISHER, in her official capacity as a Member of the South Carolina Board of Nursing; ROBERT J. WOLFF, in his official capacity as a Member of the South Carolina Board of Nursing; SCARLETT A. WILSON, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and WILLIAM

WALTER WILKINS III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit, ... Defendants,

and

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, HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; ..... 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 THE SPEAKER OF THE HOUSE, THE PRESIDENT OF THE SENATE, THE STATE, THE ATTORNEY GENERAL AND SOLICITOR WILKINS

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INTRODUCTION

"[T]here is no constitutional right to an abortion" in the South Carolina Constitution. *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 288, 882 S.E.2d 770, 824 (2023) (Few, J., concurring in result). Instead, the "authority to regulate abortion" belongs to the "people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2279 (2022).

Just a few weeks ago, the elected representatives of the people of South Carolina exercised their constitutional authority and passed 2023 Act No. 90, Senate Bill 474, 125th General Assembly, Extraordinary Session (the "2023 Act"). Subject to certain exceptions, the 2023 Act prohibits a person from performing or inducing "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 Section 44-41-330(A)." *See* 2023 Act, § 2, S.C. Code Ann. § 44-41-630(B).

In passing this law, the General Assembly expressly sought to address some of the concerns raised by members of this Court in *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023). That narrow decision does not control here, and the 2023 Act is constitutional.

In considering the constitutionality of the 2023 Act, any constitutional challenge to the Act should be measured "[a]gainst the backdrop of history, tradition, and practice. . . ." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The 2023 Act is in keeping with the longstanding practice of the General Assembly to prohibit and make criminal abortion, except in certain instances, and is thus not proscribed by article I, section 10 of the South Carolina constitution or by any other constitutional protections.

The intent of the framers of article I, section 10 must be adjudged by what could have been reasonably contemplated by them. *See Knight v. Salisbury*, 282 S.C. 565, 591, 206 S.E.2d 875,

877-78 (1974) (Home Rule Amendment). Importantly, in 1970, the General Assembly enacted restrictive anti-abortion legislation—making most abortions a crime—at the same session it sent article I, section 10 to voters.

Thus, it is "not reasonable to assume that the framers" meant to include abortion within the right of privacy. Codifying abortion as a criminal offense, while also purportedly including abortion within a constitutional right of privacy, would make no sense whatsoever. It would have been "very easy" to insert such a right within the constitutional provision, but "no such language appears and no such intent can be reasonably inferred." *Id*. Accordingly, the General Assembly did not intend to diminish or abolish its power to regulate abortion with the adoption of article I, section 10. This contemporaneous practice is highly persuasive authority as to the framers' intent. *See Heinitsh v. Floyd*, 130 S.C. 434, 126 S.E. 336, 336 (1925) ("In light of the history [of the amendment] . . . there can be no doubt [of the] … intent of the Legislature in framing, and of the people in adopting [the amendment].").

Alternatively, this Court should overrule *Planned Parenthood South Atlantic*.

STATEMENT OF ISSUES

1. Whether the 2023 Act violates article I, section 10 of the South Carolina Constitution?
2. Whether *Planned Parenthood South Atlantic* should be overruled?

STATEMENT OF THE CASE

I. Respondents' lawsuit

On May 25, 2023, Respondents Planned Parenthood South Atlantic, Greenville Women's Clinic, Katherine Farris, M.D., and Terry Buffkin, M.D. filed this lawsuit in the Court of Common Pleas for Richland County challenging the constitutionality of the 2023 Act. On the same day, Respondents filed an Emergency Motion, requesting a Temporary Restraining Order and

Preliminary Injunction. The sole basis for Respondents' Emergency Motion was their right to privacy claim, relying heavily on this Court's decision in *Planned Parenthood South Atlantic*. On May 26, 2023, the circuit court granted a preliminary injunction in this case, concluding that Respondents were likely to succeed on the merits of their privacy claim.[1] Appellants filed a timely notice of appeal, and this Court transferred the case to its docket for final resolution on June 6, 2023.

STATEMENT OF THE FACTS

I. Abortion Regulation in South Carolina Prior to the 2023 Act

Abortion has been heavily regulated in South Carolina since at least the 1800s. South Carolina enacted its first anti-abortion statute in 1883. *See* 1 S.C. Jur. Abortion § 8. That statute generally outlawed abortion in South Carolina but included certain exceptions to preserve the woman's life or the life of her child. *See id*. Under that statute, abortion was illegal throughout a woman's pregnancy. *See State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950) (affirming conviction for abortion performed prior to quickening).

In 1970, South Carolina amended this statute, adopting a law patterned after the American Law Institute's Model Penal Code. *See* 1 S.C. Jur. Abortion § 8. This new statute included new exceptions, including exceptions related to maternal health, rape, incest, and possible birth defects. *Id*.

This Court determined that South Carolina's existing abortion law was unconstitutional in 1973 in light of the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). *See State v. Lawrence*, 261 S.C. 18, 22, 198 S.E.2d 253, 25 (1973) ("Even with the liberalization of [the abortion law], the statute falls to the ruling of the United States Supreme Court."). In doing

[1] The circuit court's legal conclusions are subject to de novo review. *See Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

so, this Court did not address or even mention the possibility of a state constitutional right to abortion—even though the purported basis of such a right had just been incorporated as article I, section 10.

In 1974, South Carolina amended its abortion law to conform to the *Roe* framework. *See McKnight v. State*, 378 S.C. 33, 53, 661 S.E.2d 354, 364 (2008) ("In 1974, the General Assembly amended the criminal abortion statute to its current form in accordance with the United States Supreme Court's decision in Roe v. Wade.").

Since that time, the South Carolina General Assembly has enacted further restrictions and regulations governing abortion in South Carolina. On February 18, 2021, South Carolina enacted the 2021 Fetal Heartbeat and Protection from Abortion Act (the "2021 Act").

II. *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023)

On July 29, 2022, Respondents filed an original jurisdiction action, asking this Court to declare the 2021 Act invalid because it violates "South Carolina's right to privacy and guarantees of equal protection and substantive due process, and because [the 2021 Act] is unconstitutionally vague."

Two of the main purposes of the 2021 Act were to protect unborn life and to protect maternal health. *See* Act No. 1, § 2 ("The General Assembly hereby finds, according to contemporary medical research . . . the 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 . . . ."). The General Assembly also included a stated finding in the 2021 Act that the act was in part intended to assist a woman in making "an informed choice about whether to continue" her pregnancy. *See id*.

To accomplish these purposes, Section 3 of the 2021 Act limited when a provider of

abortion services may perform an abortion. Under that provision, once a fetal heartbeat has been detected, an abortion provider is generally prohibited from "perform[ing], induc[ing] or attempt[ing] to perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the human fetus the pregnant woman is carrying . . . ." Act No. 1, § 3. The 2021 Act included certain exceptions to this general prohibition, including exceptions related to pregnancies that involve rape, incest, fetal anomalies, or pregnancies that pose a serious risk of death or permanent injury to the pregnant woman. *Id*.

On January 5, 2023, this Court issued its decision in that case in five separate opinions. Three of the opinions concluded that the 2021 Act was unconstitutional but did so under three distinct—and at times, conflicting—legal theories. *See Planned Parenthood South Atlantic*, 438 S.C. at 258, 882 S.E.2d at 808 (Few, J., concurring in result) ("As our five separate opinions indicate, we do not agree on the answers to the legal questions we confront, or even as to the principles of law we believe lead to those answers."). In determining that the 2021 Act was unconstitutional, no one theory commanded a majority of support from this Court.

The narrowest legal opinion—authored by Justice Few—solely addressed "purely legal questions arising from Planned Parenthood's challenged to the 2021 [Act]." *Planned Parenthood South Atlantic*, 438 S.C. at 257, 882 S.E.2d at 807 (Few, J., concurring in result). Justice Few's narrow decision concluded that the 2021 Act was unconstitutional because "the General Assembly's failure to consider the necessary factual question as a predicate to its policy judgment was arbitrary . . . ." *Planned Parenthood South Atlantic*, 438 S.C. at 285, 882 S.E.2d at 822 (Few, J, concurring in result). Specifically, Justice Few faulted the General Assembly for its alleged arbitrary failure to determine whether a woman could actually exercise her "informed choice about whether to continue a pregnancy." *See* Act No. 1, § 2 ("The General Assembly hereby finds,

according to contemporary medical research . . . in order to make an informed choice about whether to continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat.").

Despite Justice Few's opinion on this narrow legal issue, a majority of this Court rejected most of Respondents' constitutional claims. A majority of this Court concluded that article I, section 10 of the South Carolina Constitution does not encompass a right to abortion. *See Planned Parenthood South Atlantic*, 438 S.C. at 287, 882 S.E2d at 824 (Few, J., concurring in result) ("With my vote the argument [that article I, section 10 does not encompass a right to abortion] holds a majority position."). A majority of this Court also concluded that Respondents' arguments regarding the Equal Protection Clause and Due Process Clause were "without merit." 438 S.C. at 259, 882 S.E.2d at 808 (Few, J., concurring in result).

III. The 2023 Act

In response to this Court's decision in *Planned Parenthood South Atlantic*, South Carolina enacted the 2023 Act on May 25, 2023. Subject to certain exceptions, the 2023 Act prohibits a person from performing or inducing "an abortion on a pregnant woman with the specific intent of cause or abetting an abortion if the unborn child's fetal heartbeat has been detected in accordance with Section 44-41-330(A)." *See* 2023 Act, § 2, S.C. Code Ann. § 44-41-630(B).

The 2023 Act contains several exceptions to this general prohibition, including exceptions for rape, incest, medical emergencies, and certain fetal anomalies.

Significantly for purposes of this case, the 2023 Act expressly changed the primary purpose underpinning the General Assembly's action and repeals Section 2 of the 2021 Act, which contained the legislative findings discussed by Justice Few in the *Planned Parenthood*

South Atlantic case.

The 2023 Act also repealed S.C. Code Ann.§§ 44-41-10 and -20, which had adopted an abortion regulatory scheme that mirrored the framework adopted by the United States Supreme Court in the now-overturned *Roe*.

STANDARD OF REVIEW

The State emphasizes two fundamental and foundational points of constitutional law that must be considered as part of the standard of review in evaluating Respondents' claims. Both points inform the basic principle that this Court must not sit as "super-legislature" to judge the wisdom or desirability of legislative policy determinations. *See Samson v. Greenville Hosp. System*, 295 S.C. 359, 367, 368 S.E.2d 665, 669 (1988); *see also Abbeville County School Dist. v. State*, 410 S.C. 619, 671, 767 S.E.2d 157, 184 (2014) (Kittredge, J., dissenting) ("Courts additionally lack the institutional capacity to address and resolve such policy matters.").

First, the power of our state legislature is plenary, meaning that our General Assembly may enact any laws not expressly prohibited by the state or federal constitutions. *See City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011); *see also Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017). Here, since a majority of the Court in the *Planned Parenthood South Atlantic* case found that there is no right to abortion in the state constitution, the General Assembly exercised its plenary authority to once again enact restrictions on the performance of abortions in the 2023 Act.

Second, this Court is generally reluctant to find a statute unconstitutional. *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002). When the validity of a statute is questioned, "it is a cardinal principle that courts will presume the legislative act to be constitutionally valid, and every intendment will be indulged in favor of the act's validity by the

courts.*" Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 472 (1988). If possible, this Court will construe a statute so as to render it valid. *Harris*, 391 S.C. at 154, 705 S.E.2d at 55. The statute will be declared unconstitutional only if there is no room for "reasonable doubt" as to its validity. *Id*. Petitioners bear the burden of demonstrating the unconstitutionality of the statute. *See Knotts*, 348 S.C. at 6, 558 S.E.2d at 513. In response to Justice Few's opinion in the *Planned Parenthood South Atlantic* case, the General Assembly carefully crafted the 2023 Act to remove any reasonable doubt by ensuring that its provisions are not arbitrary by allowing women a meaningful opportunity to make a decision about terminating a pregnancy prior to the detection of a fetal heartbeat.

SUMMARY OF THE ARGUMENT

In 2023, the South General Assembly exercised its plenary power by enacting the 2023 Act, which reasonably restricted abortion in our State. The 2023 Act was carefully drafted to respond to this Court's decision in *Planned Parenthood South Atlantic*.

I. The 2023 Act is constitutional. *Planned Parenthood South Atlantic* does not control the outcome of this case, and article I, section 10 of the South Carolina Constitution does not encompass a right to abortion nor does article I, section 10 place limits on the General Assembly's authority to regulate abortion.

II. Alternatively, *Planned Parenthood South Atlantic* should be overruled.

ARGUMENT

I. The 2023 Act is constitutional.

A. *Planned Parenthood South Atlantic* does not control.

Respondents assert that *Planned Parenthood South Atlantic* is "unmistakabl[e] binding precedent," which squarely addresses the issues raised in this case. Respondents' argument on this

point is wrong in multiple respects. First, it is incorrect to describe *Planned Parenthood South Atlantic* as a single, binding precedent. Second, it is incorrect to say that *Planned Parenthood South Atlantic* controls or "squarely addressed the issues raised here . . . ." On the contrary, the 2023 Act is a new law—entitled to a strong presumption of constitutionality—and was specifically enacted to address shortcomings identified with the 2021 Act.

First, as noted above, *Planned Parenthood South Atlantic* is a fragmented decision that consists of five separate legal opinions—with no single opinion identified as controlling. As Justice Few recognized, "[a]s our five separate opinions indicate, we do not agree on the answers to the legal questions we confront, or even as to the principles of law we believe lead to those answers." *See Planned Parenthood South Atlantic*, 438 S.C. at 258, 882 S.E.2d at 808 (Few, J., concurring in result). As a result, no one opinion can be said to establish a precedential rule of law. *See State v. Walker*, 252 S.C. 325, 328, 166 S.E.2d 209, 210 (1969) ("And where the members of the court unanimously or by a majority vote reach a decision but cannot, even by a majority, agree on the reasoning therefor no point of law is established by the decision and it cannot be a precedent covered by the stare decisi[s] rule.") (internal quotations omitted).

Significantly, no majority of the Court resolved the legal question regarding the meaning of article I, section 10's privacy provision. Justice Few expressly declined to concur in Justice Hearn or Chief Justice Beatty's analysis of the privacy provision. *See Planned Parenthood South Atlantic*, 438 S.C. at 259, 882 S.E.2d at 808 (Few, J., concurring) ("I do not concur in Justice Hearn's or Chief Justice Beatty's analysis of article I, section 10 question . . . ."). In the absence of such a holding, *Planned Parenthood South Atlantic* simply does not resolve the relevant legal question in this case—namely the scope of article I, section 10's privacy provision. *See infra*, Section I.B.

Second, even if *Planned Parenthood South Atlantic* is viewed as precedential, it is not controlling. To analyze the potential controlling effect of *Planned Parenthood South Atlantic*, it is important to be clear about the conclusions reached in its five separate opinions. Three justices expressly held that article I, section 10 does not encompass a right to abortion. *See Planned Parenthood South Atlantic*, 438 S.C. at 287, 882 S.E2d at 824 (Few, J., concurring in result) ("With my vote the argument [that article I, section 10 does not encompass a right to abortion] holds a majority position."); *see also* 438 S.C. at 287, 882 S.E2d at 824 (Few, J., concurring in result) ("[T]he State and the dissenting Justices argue the article 1, section 10, 'unreasonable invasion of privacy' provision does not encompass a 'right to abortion.' I wholeheartedly agree."); 438 S.C. at 294, 882 S.E.2d at 827 (Kittredge, J., dissenting) ("In my firm judgment, Petitioners have failed to establish that the state constitution mandates a right to abortion."); 438 S.C. at 351, 882 S.E.2d at 857 ("It is clear the framers did not intend to create a full panoply of privacy rights, much less the right to bodily autonomy or the right to have an abortion."). Three justices also agreed that Planned Parenthood's equal protection and due process arguments were without merit. *See Planned Parenthood Sout*h *Atlantic*, 438 S.C. at 259, 882 S.E.2d at 808 (Few, J., concurring in result).[2]

The narrowest opinion—authored by Justice Few—focused on alleged defects associated with the 2021 Act specifically. *See Planned Parenthood South Atlantic*, 438 S.C. at 257, 882 S.E.2d at 807 (Few, J., concurring in result) ("Today we confront purely legal questions arising from Planned Parenthood's challenge to the 2021 'South Carolina Fetal Heartbeat and Protection from Abortion Act.'"). His central objections to the 2021 Act pertained to that act's legislative

[2] Under the reasoning of these three opinions, this Court could thus dispose of Respondents' remaining claims—which were not presented to the circuit court below. To the extent this Court desires additional briefing on those remaining claims, the State will submit arguments in reply or a supplemental brief if permitted.

finding regarding a pregnant woman's ability to make an informed choice to continue her pregnancy and the General Assembly's alleged arbitrary failure to make sufficient factual findings. *See* Act No. 1, 2021 S.C. Acts, § 2. His opinion did not address—and did not purport to address—the issue of abortion regulation generally.[3]

Significantly, Justice Few's opinion would not control in this case because the 2023 Act was intentionally drafted to address his concerns regarding the 2021 Act. The 2023 Act's primary purpose is to protect unborn life and maternal health, which is a change from the 2021 Act's focus on informed choice. To achieve that purpose, the General Assembly made a policy determination concerning when abortions would no longer be permitted and made allowances for the preservation of a mother's life and health if her pregnancy has progressed past the point in time where a fetal heartbeat can be detected. And even if this Court finds that the act does not completely accomplish that purpose, this Court should still defer to the General Assembly's reasonable policy decision. *See Williamson v. Lee Optical of Oklahoma Inc.,* 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). As other courts have recognized, a prohibition on abortions after detectable human heartbeat is "rational." *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia,* 40 F.4th 1320, 1326 (11th Cir. 2022) ("Georgia's prohibition on abortions after detectable human heartbeat is rational.").

To the extent that members of this Court think the issue of informed choice should still be factored into the constitutional analysis of the 2023 Act, the act provides women with a meaningful

[3] To the extent this Court views *Planned Parenthood South Atlantic* as precedential, Justice Few's opinion would arguably be controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

opportunity to obtain an abortion prior to the detection of a fetal heartbeat. As explained below, to achieve that meaningful opportunity, the text of the 2023 Act 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 the 2021 Act to the existence of detectable levels of a hormone, hCG, that is first produced at the onset of pregnancy.[4]

As an initial matter, it is important to note that the 2023 Act generally prohibits abortion after the detection of a fetal heartbeat—not at a particular period of weeks. Although the 2023 Act has been labeled a "six-week ban," a fetal heartbeat may not be detected as late as nine to ten weeks of pregnancy. *See* Jessica Silbey*, Picturing Moral Arguments in A Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds*, 16 GEO. J. GENDER & L. 593, 603 n. 58 (2015) (noting that the Ohio legislature failed to make audible the heartbeat of a nine-week-old-fetus).

Courts, legal commentators, and medical journals have recognized that the majority of abortions are performed *prior* to the detection of a fetal heartbeat. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 569 (1989) (Steven, J., concurring in part and dissenting in part) ("Focusing our attention on the first several weeks of pregnancy is especially appropriate because that is the period when the vast majority of abortions are actually performed."); *see also* Jessica Silbey*, Picturing Moral Arguments in A Fraught Legal Arena: Fetuses, Photographic Phantoms*

[4] The timeline for a meaningful opportunity to make a decision begins prior to pregnancy. Women and men who engage in sexual intercourse are aware that pregnancy can result. It is that awareness that allows a woman to engage in family planning. A woman who does not want to become pregnant, or a woman who is undecided about pregnancy, has ample opportunity to make well-informed decisions concerning her reproductive health. Prior to sexual intercourse, a woman has a meaningful opportunity to consider contraceptives such as birth control pills or intrauterine devices. After sexual intercourse, she has up to five days to consider whether she wants to take an over-the-counter emergency contraceptive to prevent pregnancy. Her awareness of the possibility of pregnancy further affords her the opportunity to control her reproductive health after sexual intercourse by taking a common, over-the-counter pregnancy test to determine whether she is pregnant and make a decision concerning an abortion before a fetal heartbeat can be detected.

and Ultrasounds, 16 GEO. J. GENDER & L. 593, 603 (2015) ("Indeed, many fetal heartbeats are indiscernible at early stages of pregnancy when most abortions are conducted.").

In separate federal litigation over the 2021 Act, the State introduced the expert report of Dr. Ingrid Skop, a board-certified obstetrician and gynecologist. In her expert report, Dr. Skop affirmatively stated that "based on [her] clinical experience treating thousands of pregnant women, there is no doubt that the vast majority of women have sufficient time to obtain an abortion prior to the point of a detectable fetal heartbeat." (App. 171). These changes from the General Assembly confirm that women do have the opportunity to obtain an abortion under the 2023 Act, and the act is therefore necessarily not arbitrary. *See* Arbitrary, BLACK'S LAW DICTIONARY (11th ed. 2019) ("of, relating to, or involving a determination made without consideration of or regard for facts).

Perhaps most importantly, the South Carolina General Assembly explicitly considered these points in considering the 2023 Act and made various factual findings to support its policy judgment. A statement published in the Senate Journal concisely summarized these findings:

> The Senate's debate during consideration of S. 474 very clearly established that there is nothing arbitrary about banning abortions after a fetal heartbeat is detected with certain limited exceptions. In fact, we very clearly articulated the basis for making that determination and specifically addressed the fact that a pregnant woman can know within 10 to 14 days after conception whether she is pregnant. According to the Cleveland Clinic, as early as 10 days after conception (but within 14 days) a home pregnancy test will detect the presence of human chorionic gonadotropin, a special hormone that developed [sic] only upon implantation. A blood test can confirm the presence of that hormone as early as 7 to 10 days after conception. According to the American Pregnancy Association the heartbeat of an unborn child can be detected between 6 ½ to 7 weeks of pregnancy though it is possible, though much less likely, that a heartbeat can be detected a week earlier -- about 5 ½ weeks. That means that 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. It is our reasoned judgement that a month is enough time for a pregnant woman to decide whether to have an abortion and undertake the procedure to follow through with her decision.

> The Senate took into consideration the interests of the pregnant woman and balanced them against the legitimate interest of the State to protect the life of the unborn. The Senate looked to experts in the field -- such as the Cleveland Clinic and the American Pregnancy Association (among others) -- for guidance concerning the scientific understanding of the development of the unborn early in pregnancy. Finally, the Senate decided that the proper balance should be struck at the point of a fetal heartbeat -- that is, at the point where a fetal heartbeat is detectable a woman could have known that she was pregnant for a little more than a month and that she had ample time to make a decision about whether to terminate her pregnancy.

2023 Senate Journal, February 9, 2023, https://tinyurl.com/59k29x8a. These factual findings are entitled to considerable deference. *See Edens v. City of Columbia*, 228 S.C. 563, 576, 91 S.E.2d 280, 285 (1956); *Richards v. City of Columbia*, 227 S.C. 538, 560, 88 S.E.2d 683, 694 (1955).

In keeping with these findings, the 2023 Act adopts a specific definition of "clinically diagnosable pregnancy," which is defined to mean "the point in time when it is possible to determine that a woman is pregnant due to the detectible presence of human chorionic gonadotropin (hCG)." Under this definition of pregnancy, the vast majority of pregnant women have the ability to learn if they are pregnant through widely available at-home pregnancy tests. Respondents' own website admits as much, acknowledging that pregnancy tests can work as soon as ten days after conception. Planned Parenthood, "Pregnancy Tests," https://tinyurl.com/57wasma2 (last visited June 7, 2023); *see also* Cleveland Clinic, "Pregnancy Tests," https://tinyurl.com/bdesydsy (last visited June 7, 2023) ("In many cases, you might get a positive result from an at-home test as early as 10 days after conception.").

This revised definition helps answer Justice Few's central question from *Planned Parenthood South Atlantic* in the affirmative: a pregnant woman can know she is pregnant in time to engage in a meaningful opportunity to make a decision and make the necessary arrangements to carry out an abortion. *See Planned Parenthood South Atlantic*, 438 S.C. at 278, 882 S.E.2d at 818 (Few, J., concurring in result). These revisions and separate factual findings thus necessarily

render the 2023 Act non-arbitrary.

In these and other respects, the General Assembly intentionally sought to address any infirmities associated with the 2021 Act in the 2023 Act. In doing so, the General Assembly continued a long tradition of responding to this Court's decisions in good faith by addressing any infirmities associated with prior laws. *See Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011).

B. The 2023 Act does not violate article I, section 10.

As noted above, no majority of the Court in *Planned Parenthood South Atlantic* agreed on the scope of the privacy provision in article I, section 10. As a result, this Court is not bound by any rule of precedent from that case.[5]

In interpreting the privacy provision in this case, this Court is bound to construe that section in light of the intent of the provision's framers and the people who adopted it. *See State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 26 (2014); *Miller v. Farr*, 243 S.C. 342, 133 S.E.2d 838, 841 (1963) (the intent of the framers of a constitutional provision and the people who adopted it determine the meaning of the provision); *see also* L. Harold Levinson, *Interpreting State Constitutions By Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 568–69 (1978) ("[T]he cases and literature on state constitutional interpretation seem to reflect a strong consensus that original intent must be ascertained and respected.").

As this Court emphasized in *McKeown v. Carroll*, 5 S.C. 74, 79-80 (1874), a case involving the meaning of homestead exemptions as used in the State Constitution, ". . . [w]ho better than the makers can tell us what their intentions were?" According to this Court in *McKeown*, "although

[5] As noted above, to the extent this Court seeks to discern any majority holdings from that case, it is essential to remember that three justices agreed that the privacy provision does not encompass a right to abortion.

contemporary construction . . . should never be allowed to abrogate the texts, or fritter away [a constitutional provision's] obvious sense, yet when this construction is not unreasonable . . ., [and] took the form of solemn enactment, and has been acquiesced in by the courts, and rights have accrued in reliance upon it, the argument [of contemporary construction] ought to have great weight." *Id*.

Furthermore, in *McKeown*, this Court recognized the overriding significance of the framers' intent and purpose. The Court referenced the longstanding practice of the United States Supreme Court to rely heavily upon "contemporaneous exposition." *McKeown*, 5 S.C. at 80. In this regard, most recently, in *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576-77 (2014), the United States Supreme Court observed "[t]hat the First Congress provided for the appointment of chaplains only days after approving language of the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgement of religion's role in society." Thus, *Town of Greece* found past legislative practices to be compelling in construing the Establishment Clause. Similarly here and as described below, contemporaneous construction is a powerful testament that article I, section 10 was never intended to speak to abortion regulation. The Court should defer to history and tradition, not construe article I, section 10 anew.

Moreover, the Idaho Supreme Court recently did just that in a similar context. There, the Court concluded that no right to abortion existed in the Idaho Constitution. The Idaho Court, in *Planned Parenthood Great Northwest v. State of Idaho*, 522 P.2d 1122, 1148 (2023), based much of its analysis on historical tradition. In the view of the Idaho Court, abortion had long been viewed as criminal activity. Thus, the Court rejected the argument that abortion was "deeply rooted" in the history of that State. Accordingly, the abortion law was upheld as valid because "the framers and adopters of the Inalienable Rights Clause [did not] . . . implicitly intend to protect abortion as

a fundamental right." *Id*.

In discerning the framers and adopters' intent, this Court must examine the text and history of section 10. *See Long*, 406 S.C. at 514, 753 S.E.2d at 26; *Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d 375, 377 (1960) (noting that "the history of the times in which the amendment was framed, the object sought to be accomplished, and the legislative interpretation" of a provision provide courts with guidance as to the intent of the framers of a provision).

Both the section's text and history demonstrate that the section does not provide for a constitutional right to abortion. Beginning with its text, article I, section 10 provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art I, § 10.

Section 10 obviously contains no explicit reference to abortion and is thus silent on the topic. *See Grant v. Grant*, 12 S.C. 29, 31 (1879) ("[T]he constitution is wholly silent on this subject. There is, therefore, nothing in the constitution tending to deprive the legislature of full power of granting or withholding such remedy which the legislature primarily possesses.").

In search of a textual hook, Respondents argue the word privacy in section 10 should be defined to include a right to abortion. To determine the definition of privacy as used in section 10, this Court is obligated to consider the history of that section. This obligation derives from two separate principles of constitutional interpretation.

First, in defining privacy, this Court is bound to apply "the ordinary and popular meaning" of the word as "used *by those who framed and those who adopted the constitution*." *City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881) (emphasis added); *State v. Shaw*, 9 S.C. 94, 106 (1878)

("[T]he state of the public mind at the time of the adoption of the Constitution of 1868 renders us legitimate assistance in the construction and interpretation of its provisions."); *see also Georgetown Cnty. v. Davis and Floyd, Inc*., 426 S.C. 52, 57, 824 S.E.2d 471, 474 (Ct. App. 2019) ("'[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.'") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat. 1), 188, 6 L.Ed. 23 (1824)). Stated differently, in defining the word privacy, this Court may not apply its own—or even a contemporarily popular—definition of that term. Under South Carolina Supreme Court precedent, this Court is bound to apply the meaning used by those who framed and adopted section 10's language regarding "unreasonable invasions of privacy."

This obligation is entirely consistent with this Court's responsibility to give effect to the intent of the framers and the people who adopted a given constitutional provision. *See Long*, 406 S.C. at 514, 753 S.E.2d at 26 (2014); *Farr*, 243 S.C. at 133 S.E.2d at 841 (the intent of the framers of a constitutional provision and the people who adopted it determine the meaning of the provision). It is also consistent with the principle that this Court is obligated to interpret a constitutional amendment with "due regard to the evil it was intended to remedy so as to give it effective operation and suppress the mischief at which it was aimed." *Duncan v. Record Pub. Co.*, 145 S.C. 196, 143 S.E. 31, 69 (1927) (quoting *Kirkland v. Allendale County*, 128 S.C. 541, 123 S.E. 648 (1924)); *see also State v. Zimmerman*, 187 Wis. 180, 204 N.W. 803, 805 (1925) ("But the intent is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed, calling forth the framing and adopting of such instrument, and the remedy sought to be applied . . . .") (internal quotations omitted).

Second, this Court must also consider the history of section 10 if it concludes that the word privacy is "of doubtful import."[6] *See Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d 375, 376–77 (1960) ("When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of its framers and of the people who adopted it. And in attempting to attain that object, the courts may consider the history of the times in which the amendment was framed, the object sought to be accomplished, and legislative interpretation of its provisions.").[7]

The history of section 10 conclusively demonstrates that its privacy provision does not encompass a right to abortion. *See Planned Parenthood South Atlantic*, 438 S.C. at 316–17, 882 S.E.2d at 839 (Kittredge, J., dissenting) ("Given the history associated with the adoption of the privacy provision, I conclude the privacy provision does not include a right to abortion."); *Planned Parenthood South Atlantic*, 438 S.C. at 351, 882 S.E.2d at 857 (James, J., dissenting) ("It is clear the framers did not intend to create a full panoply of privacy rights, much less the right to bodily autonomy or the right to have an abortion.").

Prior to the litigation surrounding the 2021 Act, no one in South Carolina—not the drafters of the provision, not legislators, not members of the judiciary, and not the public that adopted the provision—suggested that section 10 confers a state constitutional right to abortion.

Beginning with the drafters of the provision, section 10 was amended in 1971 at the

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[6] We respectfully disagree with Justice Hearn's and Justice Few's assertion in the *Planned Parenthood of the South Atlantic* case that the phrase 'unreasonable invasions of privacy' in Article I, section 10 is unambiguous and therefore constitutional construction is unnecessary. We read the statement by this Court in *State v. Counts* that the framers of Article I, section 10 "were depending upon the state judiciary to **construct** a precise meaning of this phrase" to mean that an ambiguity exists that requires constitutional construction. 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015) (internal quote omitted) (emphasis added).

[7] And even if this Court concludes that section 10's use of the term privacy is unambiguous, it is still bound to apply the original public meaning of that term—not a contemporarily popular definition of the term. *See Oliver*, 16 S.C. at 52.

recommendation of the West Committee, which engaged in a three-year study of the South Carolina Constitution at the request of the South Carolina General Assembly. *See Adams v. McMaster*, 432 S.C. 225, 240, 851 S.E.2d 703, 710 (2020).[8] The General Assembly asked the committee to make recommendations as to whether "a series of general amendments can be proposed which will eliminate the archaic provisions of the existing Constitution and strengthen it in such other areas, so that it will provide a workable framework with proper safeguards for sound State, County and local governments." *Final Report of the Committee to Make a Study of the S.C. Const. of 1895*, at 3 (1969), https://hdl.handle.net/2027/uc1.b4181710.

Among its many recommendations, the West Committee proposed an amendment to what is now section 10 to include a "constitutional protection from an unreasonable invasion of privacy of the State." *Final Report*, at 15. In describing the purpose of this amendment, the committee noted: "[t]his additional statement is designed to protect the citizen from improper use of electronic devices, computer data banks, etc." *Id*. Significantly, improper electronic surveillance was the committee's sole concern regarding invasions of privacy. The committee simply did not intend or understand the provision to extend any further. It certainly did not intend to confer a state constitutional right to abortion.

The minutes of the West Committee also indicate that section 10's privacy right was to be narrowly construed. Those minutes provide the following: "The committee agreed that . . . [the section] should be revised to take care of the invasion of privacy through modern electronic devices. All committee members agreed that this further protection was needed." Constitutional

[8] Under binding precedent of the South Carolina Supreme Court, the work of the West Committee provides evidence of the meaning behind the 1971 constitutional amendments. *See*, *e.g.*, *Sloan v. Sanford*, 357 S.C. 431, 436–37, 593 S.E.2d 470, 473 (2004); *Diamonds v. Greenville Cnty*., 325 S.C. 154, 158–59, 480 S.E.2d 718, 720 (1997); *Hosp. Ass'n of S.C., Inc. v. Cnty. of Charleston*, 320 S.C. 219, 224–25, 464 S.E.2d 113, 117 (1995). To the extent *Planned Parenthood South Atlantic* called those decisions into question, that finding was erroneous and should be overruled.

Revision Committee, "September 15, 1967 Minutes of Committee Meeting," *Minutes, August 25, 1966 to October 7, 1967*, 62. (App. 177).

In further support of the argument that the West Committee did not intend to enshrine a right to abortion in the state constitution, it is important to note that abortion was illegal in South Carolina in 1971. It is nearly inconceivable to think that the West Committee could propose legalizing abortion via constitutional amendment without any public (or private) discussion or even outcry. *See* S.C.A.G. Op. dated Mar. 17, 1971 (concluding that abortion is illegal in South Carolina with no reference to or discussion of possible effect of section 10); *see also* 1 S.C. Jur. Abortion § 8 (describing history of anti-abortion legislation in South Carolina prior to *Roe*). In short, the idea that the West Committee could propose a constitutional amendment enshrining a right to abortion sub silentio is simply beyond belief.

Turning to the legislature, since section 10 was ratified, the South Carolina General Assembly has repeatedly acted to regulate and limit abortions in South Carolina. In doing so, the General Assembly has never acknowledged or recognized that section 10 imposes any limitations on its ability to regulate abortion. First, in 1974, the General Assembly enacted S.C. Code § 44-41-20, which "rigidly adopted" the *Roe* trimester scheme. *See* 1 S.C. Jur. Abortion § 9; *see also McKnight*, 378 S.C. at 53, 661 S.E.2d at 364 ("In 1974, the General Assembly amended the criminal abortion statute to its current form in accordance with the United States Supreme Court's decision in *Roe v. Wade*.").

Particularly striking in this case is the fact that, at the very same legislative session in 1970 in which the General Assembly approved article I, section 10 for submission to the voters, it enacted a new abortion law which continued to make most abortions illegal and subject to criminal penalties. *See* Act No. 821 of 1970 and Joint Resolution No. 1268 of 1970. The 1970 law supported

a "background of strict abortion prohibition which has been part of this State's jurisprudence since at least 1883." 1 S.C. Jur. Abortion, § 8. This demonstrates quite clearly that if the 1970 General Assembly had intended that the right to privacy in article I, section 10 would make abortions legal, there would have been little or no purpose in enacting at the same time a law continuing to make abortions illegal. Such a contradiction is highly unlikely.

It is important to remember that when a constitutional amendment and a statute are adopted at the same legislative session—such as the adoption of article I, section 10 for submission to the people and the 1970 law proscribing most abortions were—these must not be interpreted "'to indicate a contradictory legislative intent.'" *See Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 424-25 (Wis. 2006). The general rule is that such legislative enactments "are to be construed together as if parts of the same act." The more specific provision, in this case—the 1970 abortion law—is not to be deemed repealed by the more general enactment—the adoption of article I, section 10 for submission to the voters. *See Smith v. S.C. State highway Comm.*, 138 S.C. 374, 136 S.E. 467, 488 (1927). Such provisions, adopted at the same session, "are not to be construed as inconsistent" and are to be read together as one act. *Locke v. Dill*, 131 S.C. 1, 126 S.E. 747, 748 (1925). Here, the abortion prohibition of 1970 can easily be deemed an exception to article I, section 10 and not altered or contradicted thereby, leaving abortion regulation a matter within the province of the General Assembly.

In this case, the foregoing "contemporary construction" by the General Assembly at the same session in 1970—that article I, section 10 would not prohibit a total ban upon abortion, a ban on abortion after a fetal heartbeat has been detected, or create a new right of abortion—was not only reasonable, but is entirely consistent with the fact that this Court has heretofore never recognized nor suggested, a right to privacy as protecting abortion. Moreover, as noted above, the

legislative policy of protection of the unborn has "accrued" and been relied upon in this State since at least 1883. Thus, the General Assembly's construction in 1970, at the outset of article I, section 10's foundation, should greatly assist this Court in resolving the validity of the 2023 Act, by concluding that there is no unreasonable invasion of privacy in the act's enforcement. This Court should not ignore the constitutional provision's consistent and well-defined history in assessing the constitutionality of the Act. To do so would constitute a total departure from past jurisprudential practice, and would render such a construction a tremendous deviation from the constitutional provision's original intent.

With respect to the judiciary—even after the *Planned Parenthood South Atlantic* decision—no South Carolina court has ever interpreted section 10 to confer a constitutional right to abortion. Instead, South Carolina courts have repeatedly emphasized that the chief purpose of section 10 was to address concerns about electronic surveillance by the government. *See State v. German*, -- S.E.2d ---, 2023 WL 3129475, at *10 (2023) ("The drafters of our constitutional provision were concerned with the emergence of new technology enabling more invasive searches . . . ."); *see also State v. Forrester*, 343 S.C. 637, 647, 41 S.E.2d 837, 842 (2001) (noting that the "drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

The South Carolina Supreme Court's decision in *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 60 (1993) is easily distinguishable because it "did not involve an interest in protecting the life of an unborn child." *See Planned Parenthood South Atlantic*, 438 S.C. at 316 n. 91, 882 S.E.2d at 839 n. 91 (Kittredge, J., dissenting). *Singleton* also narrowly focused on an individual's interest in not being forced into a specific procedure by the State, a very different issue.

Tellingly, around the same time section 10 was adopted, the South Carolina Supreme Court considered a challenge to the State's then-existing abortion law in *State v. Lawrence*, 261 S.C. 18, 198 S.E.2d 253 (1973). In *Lawrence*, the South Carolina Supreme Court held that the challenged law was unconstitutional in light of the United States Supreme Court's decision in *Roe*. In doing so, the Court did not even mention the possibility that section 10 could be an independent source of a right to abortion.

Finally, with respect to the public, no contemporaneous accounts of section 10 even hinted at the possibility that the section would confer a state constitutional right to abortion. *See Levinson*, *Interpreting State Constitutions By Resort to the Record*, 6 FLA. ST. U. L. REV. at 569 (noting that the people's intent may be discerned through newspaper commentaries). As reported by *The State* newspape*r*, section 10 "would add protections against unreasonable invasion of privacy" and "would protect against improper use of 'bugging devises' and data banks . . . ." Edward D. Harrill, "Voters to Decide on 6 Amendments," *The State* (Oct. 25, 1970) (App. 180). In a more detailed report on the proposed amendment, *The State* reported:

> In addition to the search-and-seizure section of the constitution the special study committee has recommended that "the right of the people to be secure from unreasonable invasions of privacy shall not be violated." "This additional statement is designed," according to the committee report, "to protect the citizen from improper use of electronic devices, computer data banks, etc." Although the new provision would be vague it was deliberately recommended that way "since it is almost impossible to describe all of the devices which exist or which may be perfected in the future . . ." Details of regulation would be left to statutory laws and court decisions.

Edward D. Harrill, "New Constitution Would Protect People's Rights," *The State* (Feb. 21, 1969) (App. 183). Indeed, as abortion was debated throughout the 1970s, no one in South Carolina thought section 10 was remotely relevant to the abortion debate. Douglas Mauldin, "Crowd Hears Anti-Abortion Views," *The State* (Jan. 23, 1976) (App. 186) (describing the views of State

Representatives Theo W. Mitchell and Ralph K. Anderson and describing abortion battle as occurring at "national level" without reference to any state law issues).

It is important also to note that the question submitted to voters in 1970 with respect to article I, section 10 *only related to "searches and seizures*." Question No. 1 on the Ballot in pertinent part was "Shall the Constitution of this State be amended . . . by substituting a new Article 1 which new Article 1 shall provide for . . . searches and seizures?" *See* Joint Resolution No. 1268 of 1970; *see also Planned Parenthood South Atlantic*, 438 S.C. at 313–14, 882 S.E.2d at 838 (Kittredge, J., dissenting) ("The privacy-provision amendment was referenced by the legislature on the ballot as merely 'searches and seizures.' This characterization as 'searches and seizures' refutes any suggestion that the voters had any reason to believe that the amendment to the searches and seizures clause included a right to abortion.").

As this Court has noted, the language of the Amendment submitted to the people should describe the Amendment "'plainly, fairly and in such words that the average voter may understand its character and purpose.'" *Stackhouse v. Floyd*, 248 S.C. 183, 193, 149 S.E.2d 437, 443 (1966) (quoting *Ex Parte Tipton*, 229 S.C. 471, 476, 93 S.E.2d 640, 643 (1956)). The Court should apply the "language [that was] . . . in front of the voters. . . ." *Mesa Co. Bd. Of County Comm'rs. v. State*, 203 P.3d 519, 533-34 (Colo. 2009). The "average voter" would certainly have no way of knowing when reading the question submitted and seeing the term "searches and seizures" that such term might include a right to abortion. All of South Carolina in 1970 would have been stunned. The Court has advised of the "necessity of construing an amendatory provision with particular regard to the provision it purports to amend." *Knight v. Hollings*, 242 S.C. 1, 4-5, 129 S.E.2d 746, 747 (1963). Thus, when the "searches and seizures" provision in the State Constitution is amended, that amendment must relate to searches and seizures, not the creation of a brand new right which

had long previously been a criminal offense.

In summary, the framers and adopters of article I, section 10 never viewed abortion regulation as an "unreasonable invasion of privacy." There is not a shred of evidence otherwise. Those who drafted article I, section 10, or who voted for it either as legislators or as voters, would have considered any contention that regulating or even banning abortion is contradictory to the South Carolina Constitution as straying far afield from the Constitution's purpose. Indeed, the evidence supports the view that the framers would have been shocked at the suggestion, particularly since they banned abortion at the same time they protected any unreasonable invasion of privacy. As then Justice Rehnquist recognized, the prohibition of abortion is not even "a distant relative of the freedom from searches and seizures" and serves a "rational relation to a valid state objective" under the test of *Williamson v. Lee Optical Co*., *supra*. *See Roe v. Wade*, 410 U.S. 113, 172-74 (Rehnquist, J., dissenting). If the framers had meant to address specific situations beyond electronic surveillance, such as abortion, in the adoption of article I, section 10, such a topic would most assuredly have been debated at length in the legislative session of 1970. Instead, the General Assembly continued to make abortion a crime, while placing article I, section 10 in the Constitution's provision regulating "searches and seizures."

Thus, this case should not serve as the "unbridled expansion of the right of privacy" in the South Carolina Constitution. *See Small v. Kusper*, 513 N.E.2d 1108, 1111 (Ill. 1987) (citing *People v. Kohrig*, 498 N.E.2d 1158 (Ill. 1986). It is clear that, heretofore, as far as a woman's right to choose abortion in South Carolina is concerned, it is *Roe v. Wade* which has made abortion legal, not article I, section 10. Thus, the legislative will, and the intent of the framers, should prevail in this case.

But if this Court were to conclude that article I, section 10 encompasses an explicit right to

abortion or some other right that has the effect of limiting the General Assembly's right to regulate abortion, the 2023 Act is still constitutional because it amounts to a reasonable invasion of privacy. *See Planned Parenthood South Atlantic*, 438 S.C. at 287, 882 S.E.2d at 823 (Few, J., concurring in result) (describing the standard of review under article I, section 10 is for reasonableness); *see also State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) ("The focus in the state constitution is on whether the invasion of privacy is reasonable . . . ."); *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490 at 494 (2009) (noting that the "ultimate touchstone" of the Fourth Amendment is reasonableness); *Forrester*, 343 S.C. at 651, 541 S.E.2d at 844 (Burnett, J., concurring and dissenting) ("Like the protections offered by the Fourth Amendment, the privacy protections in the state constitution are textually based on reasonableness.").

The 2023 Act passes constitutional muster under this framework for at least two reasons. First, because of the new and distinct legislative findings in the 2023 Act, the State's interests in this case are absolute—namely 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." 2023 Act, § 1. The 2023 Act defines "unborn child" to mean "an individual organism of the species homo sapiens from conception until live birth." 2023 Act, § 2. This change alone renders the 2023 Act to be reasonable. *See Planned Parenthood South Atlantic*, 438 S.C. at 277, 882 S.E.2d at 818 (Few, J., concurring in result) ("[I]f the General Assembly were to make the policy determination that human life begins at conception . . . then the hypothetical balancing of that compelling interest against the privacy interests implicated by a total ban an abortion may come out in favor of the State's action.").

Second, to the extent this Court attempts to balance the State's interest in protecting maternal health and unborn life against a woman's interest in informed choice, the General

Assembly clearly made the requisite factual findings to support its policy judgment in this case. *See* 2023 Senate Journal, February 9, 2023, https://tinyurl.com/59k29x8a ("The Senate took into consideration the interests of the pregnant woman and balanced them against the legitimate interest of the State to protect the life of the unborn. The Senate looked to experts in the field -- such as the Cleveland Clinic and the American Pregnancy Association (among others) -- for guidance concerning the scientific understanding of the development of the unborn early in pregnancy. Finally, the Senate decided that the proper balance should be struck at the point of a fetal heartbeat -- that is, at the point where a fetal heartbeat is detectable a woman could have known that she was pregnant for a little more than a month and that she had ample time to make a decision about whether to terminate her pregnancy. There is nothing arbitrary about that. Far from it. In fact, DHEC's statistics demonstrate that a "substantial number of women" (using Justice Few's standard) know that they are pregnant and have an abortion within the first six weeks of pregnancy: in 2021 47.9% of abortions occurred during the first six weeks of pregnancy, in 2020 it was 44.5% and in 2019 it was 45.5%. Enacting S. 474 will advance the General Assembly's legitimate interest in protecting life by reducing the number of abortions in this State by a little more than half. There is nothing arbitrary about that -- there is nothing unconstitutional about that."). The generous balancing employed by the General Assembly in favor of women during the beginning of pregnancy should "come out in favor of the State's action."

II. *Planned Parenthood South Atlantic* should be overruled.

Alternatively, if members of this Court view *Planned Parenthood South Atlantic* as binding precedent that compels a particular result in this case, that decision should be overruled.

For the reasons discussed above, basic principles of stare decisis are inapplicable in this case because there is no controlling opinion in *Planned Parenthood South Atlantic*. In the absence

of a controlling opinion, *Planned Parenthood South Atlantic* does not constitute precedent. *See Walker*, 252 S.C. at 328, 166 S.E.2d at 210; *see also Johnson v. Harris*, 419 Pa. Super. 541, 553 n.3, 615 A.2d 771, 777 n.3 (1992) ("An opinion offered by one member of a three-member panel, with the remaining two judges either dissenting or concurring in the result, is of no precedential value."); *see also Greene v. Massey*, 384 So.2d 24, 27 (Fla. 1980) ("Had there simply been entered a judgment of reversal and a remand for a new trial with each of the justices concurring for the reason stated in separate opinions, then none would be bound by any opinion except that in which he joined. In that event, however, there would have been a judgment by the Court disposing of the case, but no opinion of the Court.")

But even if members of this Court view *Planned Parenthood South Atlantic* as precedent, stare decisis alone does not compel a result in this case because *Planned Parenthood South Atlantic* would be a single-precedent case. *See McLeod v. Starnes*, 396 S.C. 647, ,654, 723 S.E.2d 198, 203 (2012) ("[S]tare decisis is far more a respect for a body of decisions as opposed to a single case standing alone."); *see also State v. Williams*, 12 S.C. 546, 554–55 (1880) ("When the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regards to the grounds on which the antecedent case was adjudicated. . . . An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis.").

Stare decisis is at its weakest with respect to constitutional questions and should not be used to perpetuate error. *See Starnes*, 396 S.C. at 655, 723 S.E.2d at 203. Several of the opinions in the *Planned Parenthood South Atlantic* decision erred in their constitutional, legal, and factual analyses. These errors included overlooking or misapprehending longstanding precedent regarding constitutional interpretation. Specifically, several opinions erred by failing to recognize that a

constitutional provision must be construed in light of the intent of its framers and the people who adopted it. *See Farr*, 243 S.C. at 346, 133 S.E.2d at 841; *Ansel v. Means*, 171 S.C. 432, 172 S.E. 434, 436 (1934); *City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881). Relatedly, these errors included overlooking or misapprehending the clear original intent of article I, section 10. *See supra*, Section I.B. Finally, several opinions erred by ignoring factual issues in the record regarding the availability of abortion under South Carolina law.

CONCLUSION

In enacting the 2023 Act, the General Assembly directly responded to concerns raised by members of this Court in the *Planned Parenthood South Atlantic* decision. That decision does not control in this case, and the 2023 Act is constitutional under article I, section 10 of the South Carolina Constitution. This Court should return decisions regarding abortion regulation to the people and their elected representatives, as the framers of article I, section 10 intended.

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