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-_____

Case No. 2023-CP-40-02745

PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and its physicians and staff; KATHERINE FARRIS, M.D., on behalf of herself and her patients; GREENVILLE WOMEN'S CLINIC, on behalf of itself, its patients, and its physicians and staff; and TERRY L. BUFFKIN, M.D., on behalf of himself and his patients, ... Respondents,

v.

STATE OF SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; STEPHEN I. SCHABEL, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; RONALD JANUCHOWSKI, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; DION FRANGA, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in 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,

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

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

EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS

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Pursuant to Rules 204(b), 240(a), and 241(c), SCACR, Appellants petition this Court for a writ of supersedeas to stay the injunction entered by the circuit court on May 26, 2023, during the pendency of this appeal, or alternatively, for an expedited briefing schedule or transfer of this matter to the Court's original jurisdiction docket. In light of the relief requested, and for the reasons detailed further below, Appellants move that the Court expedite consideration of this Emergency Petition.

INTRODUCTION

In *Planned Parenthood South Atlantic v. State* ("*PPSA*"), a "majority position" of this Court held that "the article I, section 10, 'unreasonable invasions of privacy' provision does not encompass a 'right to abortion.'" 438 S.C. 188, 287, 882 S.E.2d 770, 823 (2023) (Few, J., concurring in the judgment). Nevertheless, the Court—in three separate opinions and over two dissents—held the 2021 Fetal Heartbeat Act ("2021 Act") was unconstitutional. As the narrowest opinion, Justice Few's concurrence represented the prevailing opinion under the *Marks* rule. In response to that opinion and the Court's judgment, the General Assembly carefully crafted and thoughtfully considered new legislation regulating abortion in South Carolina, and Governor McMaster promptly signed it into law. *See* 2023 S.C. Acts No. 70, S. 474, R-88 ("2023 Act"). The 2023 Act rectifies each of Justice Few's cited concerns with the 2021 Act. The 2023 Act is therefore constitutional.

Despite the 2023 Act's recent adoption, the circuit court enjoined it the day after it went into effect. In light of legislation adopted by neighboring States and others across the country following *Dobbs*, the circuit court's injunction sets aside and subserviates the General Assembly's policy determinations and makes South Carolina the southeast's "abortion-destination state." The number of abortions performed every month in South Carolina has skyrocketed in the past year, as the State has witnessed a more than fifteenfold increase in out-of-state women seeking abortions

in South Carolina and the total number of abortions in the State double to 1,000 abortions per month (or more than 33 abortions every single day). *See, e.g.*, Joseph Bustos, *Out-of-State Travelers Driving Up SC Abortion Cases as Neighboring States Pass Bans*, The State (Apr. 24, 2023), https://tinyurl.com/yshe3wwv (reporting on DHEC statistics). Leaving the injunction in place while this appeal proceeds unnecessarily ignores the State's "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(3). The impact of the injunction will be dramatic, not hyperbolic: In advocating for an injunction this morning, Respondents volunteered to the circuit court that they wanted an injunction to allow them to perform more than 100 abortions this weekend.

A writ of supersedeas is appropriate here to stay the injunction pending appeal. Most importantly, Appellants are likely to succeed on the merits. The 2023 Act resolves the issues the Court found with the 2021 Act, from removing the prior codification of the *Roe* trimester framework to clarifying the State's compelling interest in the life of the unborn child to addressing the "informed choice" concern. Yet, if somehow those and other significant distinctions are not sufficient, the Court should overrule *PPSA*, as it represents a new, single, splintered decision that is based on misapprehended arguments and untenable reasoning.

The other supersedeas factors also support a stay. Appellants will suffer irreparable harm without an injunction because the representative process is damaged every time a law adopted by the General Assembly and approved by the Governor is enjoined. Respondents—two physicians and two facilities that perform abortions—will not: They cannot legally represent the interests of pregnant women on whom they seek to perform abortions, and they face no harm themselves from complying with state law. And a stay of the injunction pending appeal will protect the lives of countless unborn children.

At the very least, the Court should expedite briefing in this case. The parties are more than capable of meeting any deadlines imposed by the Court, and expedited briefing ensures that, if Appellants are correct and the 2023 Act is constitutional, South Carolina law is enjoined for as short a time as possible.

FACTUAL BACKGROUND

A. The 2023 Act

1. Legislative findings

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

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

2. General prohibition on abortions after fetal heartbeat

On a most basic level, the 2023 Act generally prohibits, with certain exceptions outlined below, abortions after a fetal heartbeat is detected and provides that in no circumstance may an abortion be performed without a woman's consent. *Id.* § 2 (S.C. Code Ann. § 44-41-620). Getting

into the specifics, before performing an abortion, the physician performing the abortion must perform an ultrasound, display the images to the pregnant woman if she wants to see them, and record a written medical description of the ultrasound (including noting the presence of a fetal heartbeat, if one exists). *Id.* § 2 (S.C. Code Ann. § 44-41-630(A)). If a fetal heartbeat is detected, "no person shall perform or induce an abortion" unless a statutory exception applies. *Id.* § 2 (S.C. Code Ann. § 44-41-630(B)). Violating this prohibition is a felony, punishable by up to two years in prison and a $10,000 fine. *Id.* § 2 (S.C. Code Ann. § 44-41-630(B)). In addition to criminal penalties, a physician who violates the Act may lose his professional license. *Id.* § 2 (S.C. Code Ann. § 44-41-690).

3. Exceptions

i. Life and health of the mother

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

A medical emergency is a defined statutory term, meaning "in reasonable medical judgment, a condition exists that has complicated the pregnant woman's medical condition and necessitates an abortion to prevent death or serious risk of a substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions." *Id.*

§ 2 (S.C. Code Ann. § 44-41-610(9)). The 2023 Act includes a list of conditions that are "presumed" to satisfy this exception, including (as a few examples) ectopic pregnancy, severe preeclampsia, and uterine rupture. *Id.* § 2 (S.C. Code Ann. § 44-41-640(C)(2)).

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

ii. Rape and incest

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

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

A violation of this provision is a felony and punishable by up to two years in prison and a

$10,000 fine. *Id.* § 2 (S.C. Code Ann. § 44-41-650(C)).

iii. Fatal fetal anomaly

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

Similar to the exception for the life or health of the mother, a physician who performs an abortion under this exception must document in the "presence" of the anomaly, the "nature" of the anomaly, and the "medical rationale" that supported the physician's conclusion that the exception applied. *Id.* § 2 (S.C. Code Ann. § 44-41-660(B)(1)). These records must be kept for seven years. *Id.* § 2 (S.C. Code Ann. § 44-41-660(B)(2)).

Violating this provision is a felony punishable by up to two years in prison and a $10,000 fine. *Id.* § 2 (S.C. Code Ann. § 44-41-660(C)). The maximum fine increases to $50,000 for an entity that does not preserve records. *Id.* § 2 (S.C. Code Ann. § 44-41-660(D)).

4. Other provisions

The 2023 Act includes additional provisions that change and clarify South Carolina law, many of which further distinguish the 2023 Act from the 2021 Act. For one, the 2023 Act leaves no doubt that a pregnant woman may *not* be criminally prosecuted if an abortion is performed on her. *Id.* § 2 (S.C. Code Ann. § 44-41-670); *see also id.* § 9 (repealing S.C. Code Ann. § 44-41-80(b)).

For another, the 2023 Act confirms that it is not a violation of the Act "to use, sell, or administer a contraceptive measure, drug, chemical, or device," as long as the contraceptive "is

not used, sold, prescribed or administered to cause or induce an abortion." *Id.* § 2 (S.C. Code Ann. § 44-41-640(E)). The Act also requires every individual and group health plan in the State to cover contraceptives, *id.* § 5 (S.C. Code Ann. § 38-71-146), and requires the State Health Plan and the Public Employees Benefit Authority to cover contraceptives for dependents, *id.* § 11.

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

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

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

interest rate for money judgments. *Id.* § 4 (S.C. Code Ann. § 63-17-325(C)).

Other provisions in the 2023 Act update related parts of Title 44. For instance, there are amended definitions in Chapter 41 of that Title, *id.* § 6 (S.C. Code Ann. § 44-41-10), updated requirements for reporting to DHEC, *id.* § 7 (S.C. Code Ann. § 44-41-60), revised authority for DHEC regulations, *id.* § 8 (S.C. Code Ann. § 44-41-70(b)), and updated information that must be provided to a woman before an abortion is performed on her, *id.* § 10 (S.C. Code Ann. § 44-41-330(A)). Finally, the 2023 Act also repealed the prior codification of the *Roe* trimester framework, *see* S.C. Code Ann. § 44-41-20, and the Pain-Capable Unborn Child Act, *see* S.C. Code Ann. § 44-4-410 *et seq.*, though the latter repeal is undone if a court enjoins the 2023 Act. 2023 Act, § 13.

B. Procedural history

Less than an hour after the Governor signed the 2023 Act into law, Respondents sued in circuit court, asserting 17 claims that challenged the Act's constitutionality. Pet. App. 8. With their complaint, they sought an emergency temporary restraining order based solely on their privacy claims. Pet. App. 67. The circuit court granted Respondents an injunction. Pet. App. 6.

The circuit court refused to stay its injunction pending appeal when asked at the end of the May 26, 2023 hearing. *See* Rule 241(d)(1), SCACR; Rule 241(d)(4)(C), SCACR. Appellants immediately appealed, *see* S.C. Code Ann. § 14-3-330(4), and now they seek a writ of supersedeas to stay the circuit court's injunction pending appeal.

LEGAL STANDARD

An order granting an injunction is not automatically stayed by noticing an appeal. Rule 241(b)(8), SCACR; *see also* Rule 62(a), SCRCP. Nevertheless, a "party may move for an order imposing a supersedeas" to stay an injunction pending an appeal. Rule 241(c), SCACR. Unless "extraordinary circumstances make it impracticable," this relief should be sought first from the

court that entered the injunction. Rule 241(d)(1), SCACR. After that, a party may seek a writ of supersedeas from the appellate court. Rule 241(d)(2), SCACR.

To supersede an injunction pending an appeal, the party seeking to stay the injunction must clearly show that allowing the injunction to remain in effect would cause "an irreparable injury *or* the miscarriage of justice." *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912) (emphasis added); *cf. Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (a party seeking a stay pending appeal must show "(1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay").

REASONS FOR GRANTING THE PETITION

I. The Court should issue the writ.

A. Appellants are likely to prevail on appeal.

1. The 2023 Act is distinguishable from the 2021 Act and *PPSA*.

Even under *PPSA*, the 2023 Act is constitutional. Contrary to Respondents' suggestions below that the 2023 Act merely "duplicates" the 2021 Act, Pet. App. 90, the 2023 Act is different in numerous respects, at least three of which specifically address concerns raised in Justice Few's opinion in *PPSA* about the 2021 Act. Of course, as the position concurring in the judgment, Justice Few's concurrence in *PPSA* represents the prevailing opinion. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (cleaned up)).

One issue Justice Few raised with the 2021 Act was the conflict between that law and other

parts of Chapter 41 of Title 44, pointing out that section 44-41-20's trimester framework enacted the year after *Roe* was "actually still the law." 438 S.C. at 288 n.65, 882 S.E.2d at 824 n.65. To the extent this was an issue, it is not any longer. The 2023 Act explicitly repeals section 44-41-20. *See* 2023 Act, § 13(A).

Another issue cited by Justice Few was the State's lack of a personhood law, which he indicated weakened the State's interest in unborn children's life from the moment of conception. *See* 438 S.C. at 273, 882 S.E.2d at 816. To be sure, South Carolina has not adopted a personhood law that—like the 1970 abortion law, *see* 1970 S.C. Acts No. 821—generally prohibits abortion from conception. But the 2023 Act does confirm the General Assembly's expression of the State's interest in protecting life from conception. First, the 2023 Act includes a finding that the State "has a compelling interest from the outset of a woman's pregnancy in protecting . . . the life of the unborn child." 2023 Act, § 1 (3). The 2023 Act then defines an "unborn child" as "an individual organism of the species homo sapiens *from conception* until live birth." *Id.* § 2 (S.C. Code Ann. § 44-41-610(14)) (emphasis added). This finding was not in the 2021 Act, so it is a new expression of the State's interest since *PPSA* was decided that goes directly to this personhood question.

That the General Assembly did not draw a bright line of "no abortions ever, given our interest in life" is of no import to the constitutional analysis. *Cf. PPSA*, 438 S.C. at 277, 882 S.E.2d at 818 ("a total ban" may be constitutional if the General Assembly enacted a personhood bill). Legislation is often the product of a "hard-fought compromise." *Pinckney v. Peeler*, 434 S.C. 272, 293, 862 S.E.2d 906, 917 (2021). A bill typically involves a "legislative battle among interest groups, [legislators], and the [executive]," and "[d]issatisfaction . . . is often the cost of [such] legislative compromise." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002). Nevertheless, "[c]ompromise is essential to . . . major . . . legislation," and "confidence" that the courts "will

enforce such compromises is essential to their creation." *Thornburg v. Gingles*, 478 U.S. 30, 105 (1986) (O'Connor, J., concurring). Such compromise on abortion, which attempts to account for "an irreconcilable conflict" between the two sides, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2304 (2022) (Kavanaugh, J., concurring), should necessarily be expected, unless one side has so much political power that it need not compromise.

Turn next to the issue of "informed choice," which Justice Few counted as a "countervailing interest" to the State's interest in protecting life. 438 S.C. at 274, 882 S.E.2d at 816. The 2023 Act does not include any legislative finding about "informed choice." *Compare* 2023 Act, § 1, *with* 2021 S.C. Acts No. 1, § 2(8). This new policy declaration by the General Assembly therefore differs significantly from the 2021 Act and removes "informed choice" from the legislative policy calculus.

To the extent Justice Few's concerns about the 2021 Act's reference to "informed choice" were grounded in article I, section 10 instead of in the legislative findings—and even assuming for the sake of argument that article I, section 10 does require an "opportunity" for a woman to have an abortion—that does not change the conclusion that the 2023 Act is constitutional. According to Justice Few, the factual question, in his view, was when "a pregnant woman *can know* of her pregnancy." 438 S.C. at 278, 882 S.E.2d at 819 (emphasis added). Although framing the question in such a manner misapprehends the nature of a facial challenge, the Court need look no further than Planned Parenthood's own website for the answer: Women *can know* they are pregnant early in pregnancy. Planned Parenthood advises women they "can take a pregnancy test any time after" their "period is late," while also noting that "[m]any pregnancy tests say they work a few days before a missed period . . . ." Planned Parenthood, *Pregnancy Tests*, https://tinyurl.com/2jxpzzdd (last visited May 26, 2023); *see also* Cleveland Clinic, *Pregnancy Tests*,

https://tinyurl.com/4apv9tb6 (last visited May 26, 2023) (explaining that HCG levels begin to rise six to ten days after conception and a pregnancy test can be taken "as early as ten days after conception"). In any case, the tests should get an accurate result within "3 weeks after sex," Planned Parenthood, *Pregnancy Tests*, which is at least a week or more before a fetal heartbeat would be detected under Respondents' oft-cited scenario. These tests, Planned Parenthood goes on, are "inexpensive," "available at most drug and grocery stores," and "work 99 out of 100 times."[1] *Id.* Thus, no matter when women *do* know they are pregnant, women *can* know they are pregnant at least a week before a fetal heartbeat exists. Insofar as the Constitution contemplates an "informed choice," the 2023 Act satisfies any such requirement.

2. *PPSA* should be overruled.

If the Court somehow concludes the 2023 Act did not resolve the issues with the 2021 Act, the Court should overrule *PPSA*. "[S]tare decisis is not an inexorable command." *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012). It is, moreover, "at its weakest with respect to constitutional questions"—as *PPSA* was—"because only the courts or a constitutional amendment can remedy any mistakes made." *Id.* at 655, 723 S.E.2d at 203.

First, *PPSA* is a single, splintered, new decision. When a case "claim[s] to stand as a leading case on the general principles of the law," one consideration is "the unanimity with which its judgment was pronounced." *State v. Williams*, 13 S.C. 546, 554 (1880); *see also State v. Walker*, 252 S.C. 325, 327–28, 166 S.E.2d 209, 210 (1969) ("In that case two justices concurred in the

[1] All of this is in addition to the fact that women still have the option of "emergency contraception" (as Planned Parenthood calls it), such as Plan B. *See* Planned Parenthood, *Emergency Contraception*, https://tinyurl.com/bdfkup4t (last visited May 26, 2023). Plan B prevents ovulation, fertilization, and implantation; it does not like (like mifepristone) terminate a pregnancy if implantation has occurred. *See* Mayo Clinic, *Morning-After Pill* (last visited May 26, 2023), https://tinyurl.com/2hkuz4fj. The morning-after pill is legal under the 2023 Act. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-610(4)).

main or controlling opinion, one concurred only in its result, and two justices dissented. Due to such circumstances, the value of that decision as a precedent is, at best, questionable."); *Moseley v. Am. Nat. Ins. Co.*, 167 S.C. 112, 166 S.E. 94, 96 (1932) (When a case was "decided by a divided court, two justices were for affirmance, two for reversal, and the fifth justice concurred only in the result of the main opinion," "it has been held that such cases shall not be considered as precedents, but establish the law only as to the particular case.").

On top of being splintered, *PPSA* is a single decision. That matters because this Court has emphasized that "stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone." *McLeod*, 396 S.C. at 654, 723 S.E.2d at 203. Add to that the *PPSA* decision is only months old, and its weight diminishes even further. "[P]recedents tend to gain . . . respect with age." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 583 n.5 (2010).

Second, *PPSA*'s reasoning is flawed. For one, the Justice Hearn's opinion rewrote rules of constitutional interpretation, declaring that the Court "cannot relegate [its] role of declaring whether a legislative act is constitutional by blinding [itself] to everything that has transpired since the amendment was adopted." *PPSA*, 438 S.C. at 204, 882 S.E.2d at 779 (Hearn, J.). That was incompatible with the longstanding rule that the Constitution has been "construed in light of the intent of its framers and the people who adopted it." *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014); *see also City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881) ("we must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the constitution").

For another, *PPSA* opens Pandora's Box to all sorts of claims. If deciding to abort a child "rests upon the utmost personal and private considerations imaginable," *PPSA*, 438 S.C. at 195,

882 S.E.2d at 774; *see also id.* at 259, 882 S.E.2d at 808 (Few, J., concurring in the judgment) (article I, section 10 encompasses "all forms of privacy"), so too does the decision to take one's own life, *see* S.C. Code Ann. § 16-3-1090 (prohibiting physician-assisted suicide), to have sex with another person, *see* S.C. Code Ann. § 16-15-90 (prohibiting prostitution), and to consume drugs, *see* S.C. Code Ann. § 44-53-370(d) (prohibiting possession of controlled substances).

And for a third, *PPSA* misreads the State's history of abortion regulation. Justice Few reasoned that the critical question was whether the 2021 Act gave "a meaningful opportunity" to choose an abortion, in light of the State's "longstanding 'opportunity' for abortion." 438 S.C. at 287–88, 882 S.E.2d at 824. But abortion had long been generally prohibited when article I, section 10 was adopted. The 1883 act prohibited all abortions except to save the life of the mother. 1883 S.C. Acts No. 354. All abortions not to save the life of the mother were criminal; all that varied was whether the crime was a felony or misdemeanor. *See State v. Steadman*, 214 S.C. 1, 8–9, 51 S.E.2d 91, 93 (1948). All the 1970 act did was add exceptions for maternal health, fetal anomaly, rape, or incest. *See* 1970 S.C. Acts No. 821. Abortion was still generally unlawful.

Third, *PPSA* provides little legal guidance. Nowhere does Justice Hearn's opinion explain how to determine what falls within "the utmost personal and private considerations imaginable." *PPSA*, 438 S.C. at 195, 882 S.E.2d at 774 (Hearn, J.). Likewise, nowhere does Justice Few explain how to analyze what "forms of privacy" the State may be reasonably invade. *Id.* at 259, 882 S.E.2d at 808 (Few, J., concurring in the judgment). Yet "'[p]rivacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures." *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting). There must be some legal framework for analyzing privacy claims, but *PPSA* provides none.

Fourth, *PPSA* involves limited reliance interest. As the U.S. Supreme Court explained even in *Planned Parenthood of Southeast Pennsylvania v. Casey*, "[a]bortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim." 505 U.S. 833, 856 (1992); *see also Dobbs*, 142 S. Ct. at 2276 (because abortion is a typically unplanned response to an unplanned pregnancy, the "[t]raditional reliance interests" that "arise where advance planning of great precision is most obviously a necessity" are not implicated").

Once the error of *PPSA* is corrected, concluding that 2023 Act is constitutional is straightforward. The General Assembly enjoys "plenary" power when not limited by the Constitution. *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). Because the Constitution says nothing about abortion, the General Assembly is free to regulate that subject—which is precisely what the General Assembly did in the 2023 Act.

B. Appellants will be irreparably injured without a stay of the injunction.

The democratic process counsels against an injunction here. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ((cleaned up)); *see also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (same). Given the constitutional process of enacting laws, the State has a profound interest in seeing that law—passed by majorities of the people's representatives and signed by the Governor—respected and enforced. *See, e.g.*, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (*en banc*) ("[G]overnmental policies implemented through legislation or regulations developed through

presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." (internal quotation marks omitted)).

To be sure, the courts play a vital role in our system of government; courts must "say what the law is." *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163 (2014) (quoting *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 138 (1803)). But they do not write the law or craft new rights, and courts must be wary of exercising the judicial power to enjoin enforcement of a law that has been approved by the people's representatives after vigorous debate, as took place over months in the General Assembly with the 2023 Act.

C. Respondents will not suffer any harm if the injunction is stayed.

As this Court has repeatedly made clear, "for a preliminary injunction to be granted, the plaintiff must establish that . . . *he* would suffer irreparable harm if the injunction is not granted." *Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569–70 (2021) (emphasis added). The irreparable harm cannot be based on the rights of others. *State v. McKnight*, 352 S.C. 635, 651, 576 S.E.2d 168, 176 (2003) ("one cannot obtain a decision as to the invalidity of an act on the ground that it impairs the rights of others"); *Stone v. Salley*, 244 S.C. 531, 537, 137 S.E.2d 788, 790 (1964) (a plaintiff "cannot obtain a decision as to the invalidity of [an] Act on the ground that it impairs the rights of others"); *see also Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 326 (D.D.C. 2018) ("injuries to third parties are not a basis to find irreparable harm"). Logically, that same rule should apply to irreparable harm if an injunction is stayed.

With that rule in mind, it's important to remember who the Respondents are (physicians who perform abortions and their clinics) and who Respondents are not (pregnant women). Yet Respondents spent the bulk of their irreparable-harm argument focused on pregnant women. *See* Pet. App. 93–100. This is significant because this Court has already held that a person "does not

have standing" to "assert the privacy rights of other pregnant women." *McKnight*, 352 S.C. at 651, 576 S.E.2d at 176 (reaching this conclusion in response to an argument that "application of the homicide by child abuse statute to women for conduct during pregnancy violates the constitutional rights of privacy and autonomy"); *see also State v. Curtis*, 356 S.C. 622, 630, 591 S.E.2d 600, 604 (2004) ("Curtis has no standing to assert the privacy rights of" other persons). Plus, Respondents have never explained why pregnant women could not challenge the 2023 Act themselves, if they wanted. To be sure, pregnant women could do so. They have challenged abortion regulations myriad times in the past. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *Hodgson v. Minnesota*, 497 U.S. 417, 429 (1990); *H.L. v. Matheson*, 450 U.S. 398, 400 (1981); *Williams v. Zbaraz*, 448 U.S. 358, 361 (1980); *Harris v. McRae*, 448 U.S. 297, 303 (1980); *Bellotti v. Baird*, 428 U.S. 132, 137–38 (1976); *Poelker v. Doe*, 432 U.S. 519, 519 (1977); *Beal v. Doe*, 432 U.S. 438, 441–42 (1977); *Maher v. Roe*, 432 U.S. 464, 467 (1977) (all involving women seeking abortions asserting their own rights, as plaintiffs).

The fact that Respondents should not be permitted to represent the interests of pregnant women is magnified by the 2023 Act's civil cause of action for pregnant women on whom an abortion is performed in violation of the Act. *See* 2023 Act, § 2 (S.C. Code Ann. § 44-41-680). For all the distortions that abortion cases have wreaked on standing jurisprudence, Respondents still cannot point to any case in which physicians who perform abortions have been granted third-party standing to represent pregnant women who have a statutory cause of action against those same physicians.

But even if the Court were to permit Respondents to assert alleged harm to pregnant women, Respondents still could not prevail. Their argument ultimately boils down to the contention that these women are harmed by remaining pregnant and being "forced" to have a child.

This Court, however, has rejected the tort of "wrongful life." *Willis v. Wu*, 362 S.C. 146, 158, 607 S.E.2d 63, 69 (2004) ("To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious."). Although that tort context is not perfectly analogous here, it should carry weight given the context of that case: It was brought based on the allegation that a doctor failed to diagnose an unborn child's medical condition to give the mother "the opportunity to decide whether to terminate her pregnancy while legally allowed to do so." *Id.* at 149, 607 S.E.2d at 64. Along the same lines, this Court has not embraced the tort of "wrongful pregnancy," which undermines Respondents' claimed harm, even if that harm is limited to the fact that a woman remains pregnant. *See id.* at 152, 607 S.E.2d at 65.

That leaves Respondents with only their own harm, which they claim is not being able to care for their patients and reputational harm. *See* Pet. App. 100. But the State has a legitimate interest in regulating the medical profession, *see Dantzler v. Callison*, 230 S.C. 75, 94–95, 94 S.E.2d 177, 188 (1956), and the State regulates a wide array of medical procedures, *see, e.g.*, S.C. Code Ann. Regs. 81-96 (regulations for office-based surgery). No matter what a physician believes might be good care, that physician cannot violate state law. In this way, Respondents are no different than any other doctors who might disagree with the law. And as long as they comply with state law (as all doctors are required to, *see* S.C. Code Ann. § 40-47-110), there should be no worry of reputational harm.

D. Not staying this case would result in a miscarriage of justice.

Two miscarriages of justice would result from not granting a stay here. The first harkens back to the irreparable injury that Appellants would face without a stay: the harm to the democratic process and our structure of government. Abortion has been a topic of debate for decades, and it's a frequent political issue on which voters decide for whom to cast their ballot. The General

Assembly enacted the 2021 Act, which this Court held was unconstitutional. Armed with this Court's decision, the General Assembly went back to work and passed the 2023 Act, which the Governor signed into law just yesterday. *See, e.g.*, S.C. Senate, Video of Floor Proceedings, 5:13:10–5:28:40 (May 24, 2023) (debating *PPSA* and Justice Few's concurrence). Given that laws enjoy "a presumption of constitutionality," *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014), a quick injunction when the General Assembly was explicitly trying to address this Court's concern shows too little respect for a coequal branch of government and the separation of powers.

The second miscarriage of justice is allowing so many unborn children to be aborted during the pendency of this appeal. *See Willis*, 362 S.C. at 158, 607 S.E.2d at 69 ("Basic to our culture is the precept that life is precious." (quoting *Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984))). With abortions more than doubling in the State over the past year, South Carolina is now witnessing more than 1,000 abortions every month. And that number is likely to increase, in light of legislative action in surrounding States, to include North Carolina recently limiting abortions after 12 weeks of pregnancy. *See* Hannah Schoenbaum, *Abortion After 12 Weeks Banned in North Carolina After GOP Lawmakers Override Governor's Veto*, Associated Press (May 17, 2023), https://tinyurl.com/26peycm6.

II. Alternatively, the Court should expedite briefing in this case or transfer the matter to its original jurisdiction docket.

If the Court does not grant the writ, it should at least expedite the briefing schedule, for at least four reasons. One, this high-profile case should be receiving ample attention from counsel. Two, all parties have multiple counsel. Three, the parties have already briefed many of the issues raised here below or (at least to some extent) in *PPSA*. And four, if Appellants do ultimately prevail, expediting the appeal limits the time that a valid state law is enjoined and protects the lives

of unborn children in the interim. As another alternative, the Court could accept this matter in its original jurisdiction and proceed under Rule 245.

CONCLUSION

The Court should grant the Petition or, alternatively, expedite the briefing in this appeal or transfer the case to the Court's original jurisdiction docket.

Respectfully submitted,

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May 26, 2023
Columbia, South Carolina

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-_____

Case No. 2023-CP-40-02745

PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and its physicians and staff; KATHERINE FARRIS, M.D., on behalf of herself and her patients; GREENVILLE WOMEN'S CLINIC, on behalf of itself, its patients, and its physicians and staff; and TERRY L. BUFFKIN, M.D., on behalf of himself and his patients, ... Respondents,

v.

STATE OF SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; STEPHEN I. SCHABEL, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; RONALD JANUCHOWSKI, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; DION FRANGA, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in 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,

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

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

CERTIFICATE OF SERVICE

I certify that this *Emergency Motion to Transfer and Petition for Writ of Supersedeas* was served on counsel of record on May 26, 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/Wm. Grayson Lambert
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Counsel for Governor McMaster