STATE OF SOUTH CAROLINA RICHLAND COUNTY PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and physicians and staff, *et al*., Plaintiffs, v. SOUTH CAROLINA, *et al*, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2022CP4003569 **Response to Emergency Motion**

Defendants State of South Carolina, Attorney General Alan Wilson, Solicitor William Walter Wilkins, III (collectively "the State") hereby submit the following response to Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.[1] Plaintiffs in this case seek the extraordinary relief of an injunction based on novel—and meritless—claims. Because Plaintiffs fail to establish the required elements for a temporary injunction, this Court should deny Plaintiffs' Motion.

Background

I. The Heartbeat Bill

On February 18, 2021, South Carolina enacted the South Carolina Fetal Heartbeat and Protection from Abortion Act (the "Heartbeat Bill"). 2021 Act No. 1, S. 1, 2021–2022 Gen.

[1] The State submits this memorandum in response to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. In submitting this memorandum, the State reserves its right to later file a Motion to Dismiss and/or Answer within the time allowed by the South Carolina Rules of Civil Procedure. Given the accelerated briefing timeline requested by Plaintiffs, the State also reserves the right to submit a supplemental memorandum or surreply on any topics raised by Plaintiffs' Complaint or Motion or any topics raised at a hearing.

Assemb., 124th Sess. (S.C. 2021). Two of the main purposes of the Heartbeat Bill are to protect unborn life and to protect maternal health. *See* 2021 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 Heartbeat Bill seeks to effectuate these dual purposes through multiple substantive provisions. With respect to the protection of unborn life, Section 3 of the Act limits when a provider of abortion services may perform an abortion. Under that provision, once a fetal heartbeat has been detected, an abortion provider is 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, S.C. Code Ann. § 44-41-660.

With respect to the protection of maternal health, the Heartbeat Bill provides for several exceptions to this general rule prohibiting abortions. These exceptions apply to pregnancies that involve rape, incest, or fetal anomalies. Act No. 1, § 3, § 44-41-680. Additionally, the Heartbeat Bill permits an abortion provider to perform an abortion when the abortion is required "to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function of the pregnant woman." Act No. 1, § 3, S.C. Code Ann. § 44-41-690. Finally, the Heartbeat Bill includes provisions requiring an abortion provider to perform an ultrasound prior to performing an abortion. Act No. 1, § 3, S.C. Code Ann. §§ 44-41-630. This provision is designed in part to ensure that pregnant women may be able to "make an informed choice about whether to continue a pregnancy." Act No. 1, § 2.

Additionally, the Heartbeat Bill contains a severability clause, which provides for the following:

> If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, then such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Act No. 1, § 7.

The Heartbeat Bill is merely one part of a large regulatory scheme governing abortions in South Carolina. *See* Act No. 1, § 3, S.C. Code Ann. § 44-41-710 ("This article must not be construed to repeal, by implication or otherwise, Section 44-41-20 or any otherwise applicable provision of South Carolina law regulating or restricting abortion.") As discussed below, since at least the 1800s, South Carolina has regulated abortions through its legislative process.

II. Plaintiffs' Federal Challenge

On the same day the Heartbeat Bill was enacted, a group of plaintiffs filed suit in the United States District Court for the District of South Carolina and sought a preliminary injunction halting its enforcement. *See Planned Parenthood South Atlantic v. Wilson*, 26 F.4th 600, 607 (4th Cir. 2022). The plaintiffs in the federal case are nearly identical to the Plaintiffs in this case. The federal case was brought by Planned Parenthood South Atlantic, the Greenville Women's Clinic, and Dr. Terry L. Buffkin. *See id*. Plaintiffs in the federal case alleged a single claim against the State defendants—a violation of substantive due process rights under the Fourteenth Amendment of the United States Constitution. *See* First Amended Complaint for Declaratory and Injunctive Relief,

Planned Parenthood South Atlantic v. Wilson, 2021 WL 5103286. Plaintiffs did not assert any state claims in their complaint or amended complaint.

The District Court granted a preliminary injunction on March 19, 2021. *Planned Parenthood South Atlantic v. Wilson*, 527 F.Supp.3d 801, 817 (D.S.C. 2021). In doing so, the District Court enjoined the Heartbeat Bill in its entirety—refusing to apply the bill's severability clause. *Id*. at 814. The State defendants then filed an appeal to the United States Court of Appeals for the Fourth Circuit, which ultimately affirmed the District Court's decision on February 22, 2022. *See Planned Parenthood South Atlantic,* 26 F.4th at 606. That case is still before the Fourth Circuit with a Motion to Vacate and Motion for Reconsideration still pending. In the meantime, the District Court has stayed the preliminary injunction in light of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022).

III. *Dobbs v. Jackson Women's Health Organization*

In *Dobbs*, the United States Supreme Court announced a sea change in abortion and privacy jurisprudence. The Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, holding that the Federal Constitution provides no right to an abortion. *Dobbs*, 142 S.Ct. at 2242 ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

In reaching this holding, the Court noted that for "the first 185 years after the adoption of the Constitution, each state was permitted to address this issue in accordance with the views of its own citizens." *Id*. at 2240. The opinion contains an appendix which notes that South Carolina had a statute criminalizing abortion in 1868—the year the Fourteenth Amendment was adopted. *Id*. at 2285.

Applying its holding, the Court upheld the State of Mississippi's fifteen-week ban on abortion, applying rational basis review. *Id*. at 2283. Under rational basis review, the Court concluded that the Mississippi legislature's interests in protecting the life of the unborn were legitimate interests that provided a rational basis for its abortion law. *Id*. at 2284.

At the conclusion of its opinion, the Court expressly returned the authority to regulate or prohibit abortion to the states, holding: "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *Id*. at 2284.

Argument

In order to be granted a temporary restraining order or temporary injunction, Plaintiffs must establish: (1) they will likely succeed on the merits of the litigation; (2) they would suffer irreparable harm if the injunction is not granted; and (3) there is no other adequate remedy at law. *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 131, 603 S.E.2d 905, 907 (2004). If Plaintiffs fail to establish any of these three elements, they are not entitled to injunctive relief. *See Compton v. S.C. Dep't of Corrections*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (describing required elements of injunctive relief).

I. Plaintiffs are not likely to succeed on the merits of their claims.[2]

To be granted a temporary restraining order or temporary injunction, Plaintiffs must demonstrate that they will likely succeed on the merits of the litigation. *See Scratch Golf Co.*, 361

[2] As noted above, the State reserves its right to file a Motion to Dismiss. Thus, although the State's response primarily focuses on the substantive merits of Plaintiffs' claims, Plaintiffs may also lack standing to bring their claims and/or be precluded from bring their claims in light of the federal litigation.

S.C. at 121, 603 S.E.2d at 908. If a legal issue is unsettled or in doubt, temporary injunctive relief is generally inappropriate. *See 43A* C.J.S. Injunctions § 53 ("It is broadly stated that a preliminary injunction will not issue if the right that the complainant seeks to have protected is in doubt or unsettled . . . . Thus, temporary injunctive relief on a motion cannot be granted when the right to the final relief sought is not conclusively established.").

Here, Plaintiffs boldly assert that "multiple provisions of the South Carolina Constitution" bar the State of South Carolina from enforcing the Heartbeat Bill. Plaintiffs' assertion is completely unfounded and is unsupported by the South Carolina Constitution or binding case law. As a result, Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their claims.[3]

A. The Heartbeat Bill does not violate the South Carolina Constitution.

In their Motion, Plaintiffs generally allege that the Heartbeat Bill violates two separate provisions of the South Carolina Constitution: (1) the right to privacy and (2) the equal protection guarantee.[4] As explained below, the Heartbeat Bill does not violate either provision.

[3] And even if this Court thinks the South Carolina Constitution *might* provide a right to abortion—a point which the State does not concede—temporary injunctive relief is nevertheless still inappropriate. As noted above, a temporary injunction is inappropriate where the right a plaintiff seeks to have protected is in doubt or is not conclusively established. Indeed, Plaintiffs cannot even establish a prima facie case under any of their theories.

[4] Plaintiffs do not appear to raise a substantive due process or vagueness argument—or any additional arguments—in their Motion. However, Plaintiffs do invoke the Due Process Clause in their Complaint. Still reserving its right to fully respond to Plaintiffs' Complaint (including a potential motion to dismiss), the State denies that the South Carolina Constitution's Due Process Clause provides for a right to abortion. The history and traditions of South Carolina do not support a right to abortion. Indeed, since at least the 1800s, South Carolina has statutorily adopted "strict" prohibitions against abortion. *See* 1 S.C. Jur. Abortion § 8. The State also denies that the Heartbeat Bill is unconstitutionally vague, as it provides fair notice and proper standards for adjudication. *See City of Beaufort v. Baker*, 315 S.C. 146, 432 S.E.2d 470 (1993).

At the outset, the State notes that when the validity of a law is questions, "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).

(1) The Heartbeat Bill does not violate the South Carolina Constitution's right to privacy.

> Article I, Section 10 of the South Carolina Constitution 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. The guarantee against an "unreasonable invasion of privacy" was added in 1971 when an amendment to the section was ratified as Article I, Section 10.

This guarantee does not provide for a constitutional right to abortion.[5] Both the text and history of Section 10 support this conclusion. Significantly, it is worth emphasizing that no South Carolina court has ever held that Section 10's language encompasses a right to obtain an abortion.

As an initial matter, the text of Section 10 contains no reference to abortion. Further, the placement of the prohibition against an "unreasonable invasion of privacy" in the section prohibiting unreasonable searches and seizures suggests that any privacy right in the state constitution should be generally understood in that limited context. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal* Texts 167 (2012) (explaining that "the whole-text

[5] At times, Plaintiffs attempt to characterize their claim as brought pursuant to a "right to bodily integrity" under the South Carolina Constitution. Plaintiffs' Motion at 25. However, Plaintiffs clearly contend that this right to "bodily integrity" necessarily includes a right to abortion. *See* Plaintiffs' Motion at 21. Therefore, for ease of reference, the State's Response characterizes Plaintiffs' claims as brought pursuant to an alleged right to abortion under the South Carolina Constitution. In any event, for the reasons outlined above, the State also denies that Section 10 provides a right to "bodily integrity" that encompasses abortion.

canon" requires consideration of "the entire text, in view of its structure" and "logical relation of its many parts").

The history of Section 10 conclusively demonstrates that the section does not provide a right to abortion. As recognized by now Chief Justice Beatty, the right to privacy must be construed to give effect to the original understanding of the drafters of the section. *See State v. Counts*, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) ("Furthermore, we believe this decision does not exceed the bounds of our judicial authority as conferred by the drafters of the right-to-privacy provision. In fact, our ruling effectuates the intent of the Legislature to afford heightened protection against intrusions into a citizen's home."). The judicial power is thus necessarily constrained by that original understanding. *See id*.

Since its adoption in 1971, no one—not the drafters of the provision, not legislators, and not members of the judiciary—has understood Section 10 to confer a state constitutional right to abortion. Beginning with drafters of the provision, Section 10 was amended in 1971 at the 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). 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. **(Exhibit A)**. 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 follow: "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 Revision Committee, "September 15, 1967 Minutes of Committee Meeting," *Minutes, August 25, 1966 to October 7, 1967*, 62. (**Exhibit B**).

This conclusion is reinforced by correspondence between Daniel McLeod, South Carolina's Attorney General at the time, and Robert H. Stoudemire, the Staff Consultant and Research Director of the West Committee. In their correspondence, General McLeod recommended Section 10's "general phraseology." S.C.A.G. Op. dated Oct. 2, 1967 (1967 WL 12658). Specifically, he proposed the Committee consider the use of the phrase "protection against unreasonable invasion of the individual's right of privacy." *Id.* In doing, he expressly stated that the proposed amendment related "to interception of communication which is generally done by electronic means." S.C.A.G. Op. dated Oct. 2, 1967 (1967 WL 12658). *Id*.

Plaintiffs misleadingly cite the West Committee's notes to suggest that the West Committee intended Section 10 to "develop as society did." Plaintiffs' Motion at 20. However, such an assertion is disingenuous at best. The West Committee did envision a role for the courts

in defining the right to privacy, but that role was expressly limited to defining the types of electronic surveillance devices covered by the section. Specifically, the West Committee stated in full:

> In addition, the Committee recommends that the citizen be given constitution protection from an unreasonable invasion of privacy by the State. This additional statement is designed to protect the citizen from improper use of electronic devices, computer banks, etc. Since it is almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement on policy, leaving the details to be regulated by law and court decisions.

Final Report, at 15. Read in the proper context, the West Committee only intended for courts to play a limited role in defining the scope of the right to privacy with respect to electronic surveillance.

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 *Roe v. Wade* was not yet decided in 1971, and any purported right to privacy in the Federal Constitution was not yet understood to extend to the right to obtain an abortion. *See Roe v. Wade*, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L.Ed.2d 147 (1973). Given that the United States Supreme Court had not yet recognized abortion as a component of privacy rights, it is difficult—if not impossible—to argue that the West Committee intended South Carolina's privacy protections to extend to abortion rights.

Abortion was also illegal in South Carolina in 1971, and 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*). Not only was there no discussion by the West Committee of a purported right to abortion, there was no public discussion of the purported right whatsoever. As reported by *The State* newspape*r*, the proposed change "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. 2, 1970) (**Exhibit C**). 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) (**Exhibit D**). 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) (**Exhibit E**) (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).

To paraphrase a commentary on another state's right to privacy, if the amendment did actually include a right to abortion within the right to privacy, this would be the case of a dog that didn't bark. In some situations, silence speaks volumes. *See* John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685, 714 (1991) ("[T]here is absolutely no evidence—in the documents and

minutes of the Committee on Bill of Rights and Elections, in the transcripts of the plenary debates of the full convention, in newspapers or in the other materials distributed to the voters during the ratification campaign—of any recognition or explicit discussion by anyone of the possibility that section 5 might be construed to independently protect any rights to reproductive autonomy in general or to abortions in particular. . . . Like the silence of Sherlock Holmes' dog that did not bark, this lack of debate may speak volumes.").

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 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*."). Most recently, the General Assembly enacted the challenged Heartbeat Bill, which generally limits abortions after a fetal heartbeat is detected. This pattern of legislative practice strongly suggests that the General Assembly never understood Section 10 to limit its authority to regulate abortion. The judiciary is limited and bound by this pattern of legislative action. *See Counts*, 413 S.C. at 172, 776 S.E.2d at 70 (noting that the judiciary is bound to effectuate the intent of the Legislature).

Finally, with respect to the judiciary, no South Carolina court has ever interpreted Section 10 to confer a constitutional right to abortion. Although the South Carolina Supreme Court has recognized that Section 10 confers "an express right to privacy," this right to privacy has only been recognized in certain limited contexts. Specifically, the Court has generally only recognized the

right in the contexts of police searches and seizures. *See Counts*, 413 S.C. at 167 (collecting cases and summarizing invasion of privacy jurisprudence). The South Carolina Supreme Court has simply never recognized that the right to privacy includes the right to obtain an abortion. In fact, in one of the only times the South Carolina Supreme Court has addressed a state abortion regulation, the Court did so on the basis of an alleged federal right to abortion—not on any alleged right found in the state constitution. *See State v. Lawrence*, 261 S.C. 18, 198 S.E.2d 253 (1973).

To support their argument, Plaintiffs largely rely on a single South Carolina Supreme Court decision—*Singleton v. State*, 313 S.C. 75, 437 S.E.2d 61 (1993). In *Singleton*, the South Carolina Supreme Court held that Section 10 "would be violated if the State were to sanction forced medication solely to facilitate an execution." 313 S.C. at 89, 437 S.E.2d at 61. The holding did not address—and did not purport to address—abortion or any other private medical procedure.

The limited nature of *Singleton*'s holding is evident when the facts of the *Singleton* case are considered. In that case, the State sought to forcibly administer medication to a death row inmate who was found to be incompetent. The State hoped the medication would render the inmate competent and thus eligible for execution. With these facts in mind, the Court's holding is strikingly limited with the Court finding "that justice can never be served by forcing medication on an incompetent inmate for the sole purpose of getting him well enough to execute." 313 S.C. at 90, 437 S.E.2d at 62.

Significantly, courts in South Carolina have also recognized limitations to the right to privacy in the years following the *Singleton* decision. As noted above, now Chief Justice Beatty suggested that the right to privacy is necessarily limited by the original understanding of the drafters of Section 10 and by legislative action. *See Counts*, 413 S.C. at 172. Most recently, a South Carolina federal district court distinguished the holding in *Singleton* and held that

vaccination mandates for public employees do not "implicate the South Carolina right to privacy." *Bauer v. Summey*, 568 F.Supp.3d 573, 591 (D.S.C. 2021). In doing so, the court narrowly construed *Singleton*, noting that the plaintiffs "are not imprisoned and being forced to receive medication against their will." *Id*.

Commentators have likewise acknowledged the limitations of the *Singleton* decision. One commentator explained that the legislative history of Section 10 weighed against the *Singleton* Court's conclusion:

> In *Singleton*, the court expanded the right of privacy into a personal choice, based on the similarity of South Carolina and Louisiana's privacy provisions, without discussing the legislative history. A look at this history may suggest that the drafters did not intend to expand the privacy scope in an autonomous sense. The recorded minutes contain comments supporting the broad privacy language; however, committee members made these comments in discussions about electronic surveillance. Arguably, the committee members supported the broad language only to address possible search and seizure privacy situations implicated by new technology, not to expand the right of privacy into other substantive areas, such as forced medication of prisoners.

Constance Boken, *Expounding the State Constitution: The Substantive Right of Privacy in South Carolina*, 46 S.C. L. REV. 191, 202 (1994).

Perhaps acknowledging the lack of clear South Carolina authority on point, Plaintiffs encourage this Court to look to other jurisdictions to find a right to abortion in the South Carolina constitution. Although the State does not concede the relevance of these authorities, it notes that other courts from around the country have concluded that their state constitutions do not protect the right to obtain an abortion. *See Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, --- N.W.2d ----, 2022 WL 2182983 (Iowa 2022) ("[T]he Iowa Constitution is not the source of a fundamental right to an abortion necessitating a strict scrutiny standard of review for regulations affecting that right.").

In summary, Article I, Section 10 of the South Carolina Constitution does not provide for a constitutional right to abortion. Plaintiffs' argument to the contrary is meritless and finds no support in the text and history of Section 10 or in any South Carolina case law.[6]

(2) The Heartbeat Bill does not violate the South Carolina Constitution's equal protection guarantee.

Article I, Section 3 of the South Carolina Constitution provides the following: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art I, § 3. The equal protection clause of the South Carolina Constitution generally requires state law to treat "all similarly situated persons alike." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 147, 568 S.E.2d 338, 351 (2002).

However, the equal protection clause does not prohibit all classifications of people. On the contrary, the clause "only forbids 'irrational and unjustified classifications.'" *Luckabaugh*, 351 S.C. at 147, 568 S.E.2d at 351 (quoting *South Carolina Pub. Serv. Auth. V. Citizens & Southern Nat'l Bank*, 300 S.C. 142, 164, 386 S.E.2d 775, 786 (1989). If a challenge law employs a "suspect classification," the challenged law is reviewed under strict scrutiny or in some cases, intermediate scrutiny. *See id*. Suspect classifications generally include classifications based on "race, alienage, national origin, sex or illegitimacy." 351 at 148, 568 S.E.2d at 351. Otherwise, the challenged law is reviewed under the rational basis test. *Id*.

[6] Alternatively, even if this Court concludes that South Carolina's right to privacy includes a right to abortion, the Heartbeat Bill survives a strict scrutiny analysis. As discussed below, the State has a compelling interest in protecting human life. The Heartbeat Bill is narrowly tailored to achieve that purpose.

Under the rational basis test, a classification will survive a challenge "when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." *Bodman v. State*, 403 S.C. 60, 70, 742 S.E.2d 363, 368 (2013). The rational basis test gives "great deference" to a legislative enactment of the General Assembly. *Id*. In order to prevail under the rational basis test, a plaintiff must "negate every conceivable basis which might support" a legislative classification. *Lee v. S.C. Dep't of Natural Res.*, 339 S.C. 462, 470 n.4, 530 SE.2d 112, 115 n.4 (2000). The legislative classification "will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it." *Foster v. S.C. Dep't of Hwys. & Pub. Transp.*, 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992).

In interpreting the equal protection clause of the South Carolina Constitution, federal decisions interpreting the equal protection clause of the United States Constitution are given great weight. *See In re Hearing Before Joint Legislative Comm. of House & Senate Created by Joint Resol. No. 622*, 187 S.C. 1, 196 S.E. 164, 169 (1938) (holding that decisions of the United States Supreme Court as to fundamental constitutional rights are highly persuasive).

Here, Plaintiffs appear to allege that the law violates the equal protection guarantee in two ways: (1) by discriminating against a class of pregnant people who seek to terminate their pregnancy and (2) by imposing gender-based classification.

With respect to their first argument, Plaintiffs' purported class definitions find little support under South Carolina law. No South Carolina court has ever recognized pregnant people who seek

to terminate their pregnancy as a protected class that warrants heightened scrutiny.[7] As a result, the rational basis test should apply. *See Luckabaugh*, 351 S.C. at 148, 568 S.E.2d at 351.

Under rational basis review, the Heartbeat Bill is plainly constitutional because it seeks to promote a compelling and legitimate state interest in protecting unborn human life. As the South Carolina Supreme Court recognized in *Whitner v. State*, 328 S.C. 1, 17–18, 492 S.E.2d 777, 785–86 (1998), "the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling. The United States Supreme Court in *Casey* recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but throughout the expectant mother's pregnancy." In the criminal context, the South Carolina Supreme Court has repeatedly recognized the State's unique interest in protecting unborn life. *See McKnight*, 378 S.C. at 54, 661 S.E.2d at 364 (recognizing "the General Assembly's legitimate interest in the protection of unborn children, separate and distinct from its interest in the health of expectant mothers and their own unborn children.")

In *Dobbs*, the United States Supreme Court also emphasized states' legitimate interest in protecting unborn life. The Court explained:

> A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

[7] Plaintiffs' proposed class may not even be similarly situated for purposes of an equal protection analysis. *See Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013).

Dobbs, 142 S.Ct. at 2284. In other contexts, the United States Supreme Court has also recognized that states may reasonably express a preference for childbirth over abortion. *See Poelker v. Doe*, 432 U.S. 519, 521 S.Ct. 2391, 53 L.Ed.2d 528 (1977).

In this case, the Heartbeat Bill plainly bears a reasonable relationship to the State's interest in promoting human life. *See* Act No. 1, § 2. Both the South Carolina Supreme Court and the United States Supreme Court have clearly recognized a state's compelling and legitimate interest in protecting unborn life. Plaintiffs' argument to the contrary lacks any merit. *See Dobbs*, 142 S.Ct. at 2284; *Whitner,* 328 S.C. at 17–18, 492 S.E.2d at 785–86; *see also McKnight*, 378 S.C. at 54, 661 S.E.2d at 364.

Further, the Heartbeat Bill advances other legitimate and compelling interests. The Heartbeat Bill identifies a variety of interests it seeks to protect. Specifically, the Bill provides the following:

> The General Assembly hereby finds, according to contemporary medical research, all of the following:
> (1) as many as thirty percent of natural pregnancies end in spontaneous miscarriage;
> (2) fewer than five percent of all natural pregnancies end in spontaneous miscarriage after the detection of a fetal heartbeat;
> (3) over ninety percent of in vitro pregnancies survive the first trimester if a fetal heartbeat is detected;
> (4) nearly ninety percent of in vitro pregnancies do not survive the first trimester if a fetal heartbeat is not detected;
> (5) a fetal heartbeat is a key medical predictor that an unborn human individual will reach live birth;
> (6) a fetal heartbeat begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;
> (7) 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; and
> (8) 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.

Act No. 1, § 2. Any of these purposes could provide a basis upon which to uphold the law.

Perhaps recognizing the flaw in their argument, Plaintiffs argue that strict scrutiny should apply because the purported class of pregnant people are attempting to exercise a fundamental right under the South Carolina constitution—purportedly under a right to bodily integrity. However, for the reasons discussed above, the South Carolina Constitution does not provide for a right to an abortion under the guise of bodily integrity or privacy. On this point, Plaintiffs' argument assumes its own conclusion and must be rejected.

With respect to Plaintiffs' second argument, Plaintiffs attempt to argue that the Heartbeat Bill is unconstitutional as an impermissible gender-based classification. Plaintiffs' Motion at 26. As an initial matter, this theory of discrimination has been resoundingly rejected. Courts have repeatedly recognized that laws regulating abortion do not discriminate on the basis of sex. As explained by the United States Supreme Court in *Dobbs*, "[n]either *Roe* nor *Casey* saw fit to invoke [the Equal Protection Clause], and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Dobbs*, 142 S.Ct. at 2245. In this respect, Plaintiffs' argument does not even get off the ground for the purposes of an equal protection clause analysis.

Nevertheless, assuming arguendo that the Heartbeat Bill could constitute a gender-based classification, Plaintiffs' argument ignores the fact that gender-based classifications are appropriate under the South Carolina Constitution "where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *State v. Wright*, 349 S.C. 310, 313, 563 S.E.2d 311, 313 (2002). Courts from across the country have recognized that men and women are not similarly situated for purposes of an equal protection analysis. *See Planned Parenthood of the Heartland, Inc.*, 2022 WL 2182983 (holding that women are not

similarly situated to men with respect to pregnancy). Thus, any purported classification under South Carolina law is necessarily appropriate.

In short, the Heartbeat Bill should withstand an equal protection challenge under any of Plaintiffs' theories—regardless of the level of scrutiny applied by this Court. As *Dobbs* and South Carolina case law makes clear, the State has a compelling interest in protecting unborn life. The Heartbeat Bill serves that interest and is narrowly tailored to that purpose. Further, the Heartbeat Bill advances other compelling and legitimate state interests—such as maternal health—and is narrowly tailored to achieve those purposes.

B. The Death or Permanent Injury Exception does not violate the South Carolina Constitution.

Plaintiffs' argument regarding the Death or Permanent Injury Exception fails for many of the same reasons as outlined above. In advancing this argument, Plaintiffs appear to argue that the South Carolina Constitution guarantees a right to privacy that encompasses a right to "bodily integrity." Plaintiffs' Motion at 30. However, for the same reasons discussed above, Section 10 does not contain a "right to bodily integrity" that encompasses the right to abortion. The privacy right recognized in *Singleton* was categorically different from the privacy right asserted here.

Plaintiffs somewhat conclusorily allege that the Death or Permanent Injury Exception also violates the equal protection clause but offer little substantive argument as to the alleged suspect classification or the alleged discrimination against similar situated individuals. Plaintiffs appear to argue that the exception violates the equal protection clause because it distinguishes serious and severe physical injuries from injuries that are less serious or severe. If so, such an allegation must fail as a matter of law because the defined classes are definitionally "not similarly situated." *See Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013) (noting that the equal protection clause does not prohibit "different treatment of people in different circumstances under

the law."). In any event, the exception would survive any form of judicial review, as it clearly and plainly relates to the compelling and legitimate state interests in protecting maternal health and the life of the unborn. The exception is also narrowly tailored and reasonable related to those purposes.

C. The Rape Exception does not violate the South Carolina Constitution.

Plaintiffs' argument regarding the Rape Exception also fails for these same reasons. Here, Plaintiffs argue that Section 10 provides a constitutional right to "informational privacy," but fail to delineate the scope of that right or any of its parameters. Tellingly, Plaintiffs cite no South Carolina case law to support this purported right to "informational privacy." As explained above, Section 10 was ratified based on concerns about improper electronic surveillance by government officials. However, Plaintiffs cite no authority to support the proposition that Section 10's constitutional protections against electronic surveillance extend to the regulation of abortion or private medical procedures generally.

As outlined above, South Carolina has a long history of regulating abortion, including regulations that require the disclosure or non-disclosure of certain medical information. *See*, *e.g.*, S.C. Code Ann. § 44-41-31 (imposing consent requirement upon minors seeking an abortion).

Even if this Court concludes that Section 10 provides for a right to "informational privacy" in this specific context, the disclosure requirement is objectively reasonable because it promotes the State's compelling and legitimate interests in maternal health and the life of the unborn child.[8] The disclosure requirement is narrowly tailored and reasonably related to those purposes as it seeks to balance the health and safety interests of the mother and the unborn child.

[8] As Plaintiffs themselves appear to concede, the State also has an interest in investigating crimes and the enforcement of its own criminal code.

Plaintiffs' attempt to allege an equal protection claim also fails. To the extent Plaintiffs argue that the exception's disclosure requirement discriminates on the basis of the type of medical procedure performed, Plaintiffs' argument lacks merit, and the exception survives under the rational basis test—or any level of scrutiny. As an initial matter, in advancing this argument, Plaintiffs fail to acknowledge the difference in kind between an abortion and other medical procedures. An abortion is categorically different from other medical procedures in the sense that it involves the termination of unborn human life. *See Harris v. McRae*, 448 U.S. 297, 325, 100 S.Ct. 2671, 2692, 65 L.Ed.2d 784 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.").

Given this reality, different treatment is necessarily appropriate and does not offend the equal protection clause. *See Town of Hollywood*, 403 S.C. at 480, 744 S.E.2d at 168. In any event, as noted above, the exception survives judicial review because it promotes compelling and legitimate state interests in maternal health and protecting the life of the unborn. The exception is narrowly tailored and relates to those purposes.

Plaintiffs' arguments concerning purported gender stereotyping are meritless and without foundation, ascribing improper discriminatory animus to the State without any basis. In any event, the challenge would survive even intermediate review because it promotes a compelling state interest in protecting maternal health while balancing its compelling interest in protecting the life of the unborn.[9]

[9] If this Court concludes that either exception is unconstitutional—a point which the State does not concede—those exceptions could be severed from the Heartbeat Bill, and the remainder of the bill could go into effect. The same would be true if any other provision was declared unconstitutional.

II. Plaintiffs fail to establish irreparable harm.

In addition to showing a likelihood of success on the merits, Plaintiffs must also establish that they will suffer irreparable harm if the TRO or injunction is not granted. In support of their argument on this point, Plaintiffs in part argue they will suffer irreparable harm because the Heartbeat Bill violates the South Carolina Constitution. Plaintiffs' Motion at 9. Here again, Plaintiffs assume their own conclusion. While an alleged violation of an established constitutional right can be evidence of irreparable harm, an alleged violation of an alleged or speculative constitutional right is not. *See Justice v. West Virginia AFL-CIO*, 246 W.Va. 205, 866 S.E.2d 613, 628 (2021) (rejecting plaintiffs' claim of irreparable harm where plaintiffs fail to show a violation of established constitutional rights).

Plaintiffs also argue that they may demonstrate irreparable harm on the basis of alleged third party injuries—citing alleged injuries to "South Carolinians" generally. However, third party injuries are not a proper basis upon which to find irreparable harm. *See 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.")

However, even if that Court considers those third party injuries, there is reason to think Plaintiffs overstate the extent of those injuries. In the separate federal litigation over the Heartbeat Bill, 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." (Skop Report ¶ 8, attached hereto as **Exhibit F**).

Plaintiffs' irreparable harm argument is also significantly undercut by the fact that Plaintiffs waited years to bring a state constitutional challenge to the Heartbeat Bill. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (holding that a period of delay may indicate an absence of the kind of irreparable harm required to support a preliminary injunction). Indeed, this appears to be the first challenge to any South Carolina abortion regulation under the South Carolina Constitution's right to privacy since it was ratified in 1971.

Plaintiffs objectively could have brought their state constitutional claims long before now. As an initial matter, Plaintiffs could have brought claims when the Heartbeat Bill was initially enacted in 2021. If not then, Plaintiffs certainly could have attempted to bring their claims last July when the district court in the federal case held that case in abeyance"[i]n light of the U.S. Supreme Court's recent decision to consider the question whether 'all pre-viability prohibitions on elective abortions are unconstitutional.'" *Planned Parenthood South Atlantic v. Wilson*, No. 3:21-cv-00508 (D.S.C. July 13, 2021). Instead, Plaintiffs waited almost three weeks following the *Dobbs* decision to bring their claims.

Additionally, this Court may properly consider and weigh harm to the State in considering whether to grant injunctive relief. *See Hunnicutt v. Rickenbacker*, 268 S.C. 511, 515-16, 234 S.E.2d 887, 889 (1977) ("The issuance of a mandatory injunction depends upon the equities between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted. Where a great injury will be done to the defendant, with very little if any [benefit] to the plaintiff, the courts will deny equitable relief.").

Here, the State will suffer irreparable harm if the injunctive relief is granted for at least two reasons. First, the State will suffer a sovereign injury because the injunction will prevent the State from enforcing its own legal code. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*,

458 U.S. 592, 601, 102 S.Ct. 3269, 3265, 73 L.Ed.2d 995 (1982) (recognizing a state's sovereign power to enforce its own legal code). Second, and relatedly, because the injunctive relief will prevent the State from enforcing the Heartbeat Bill, the purposes of the Heartbeat Bill will be frustrated. As a result, unborn life will be afforded less protection in the state.

Because Plaintiffs overstate the threat of irreparable harm and because the State will suffer irreparable harm as a result of the proposed injunction, this Court should deny Plaintiffs' Motion.

III. Plaintiffs have other adequate remedies at law.

As a third element, Plaintiffs must also demonstrate that they have no other adequate remedy at law. *See Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 908. Here, Plaintiffs do have an adequate remedy at law because a person prosecuted under the Heartbeat Bill could raise his constitutional claim as a defense to prosecution. *See Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006).

IV. The status quo ante favors the State.

Finally, it is worth emphasizing that the general purpose of a preliminary injunction is to preserve the status quo ante. See *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) ("A preliminary injunction should issue only if necessary to preserve the status quo ante . . . ."). Injunctive relief in this case would not serve to maintain the status quo ante. As noted above, since at least the 1800s, abortion has been heavily regulated in South Carolina. Although those regulations have been curtailed by federal courts interpreting the Federal Constitution, no legislature or court has seen fit to limit those regulations on the basis of the South Carolina Constitution. Following the *Dobbs* decision, the status quo returned to state regulation of abortion.

Consequently, an injunction in this case would significantly disrupt the history, tradition, and policy of abortion regulation in our State. By issuing an injunction, this Court would remove from the people the question of when and how to regulate the abortion procedure. Such a ruling would be disruptive to the democratic process and to our system of separation of powers. *See Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) ("[W]e must defer to the will of the legislature as expressed in the Act. If the policy balance struck by the legislature in [the] Act is to be changed, that prerogative lies exclusively within the province of the Legislative Branch."). In *Dobbs*, the United States Supreme Court determined that it was improper for the federal judiciary to arrogate the authority of the states to regulate and prohibit abortion. *Dobbs*, 142 S.Ct. at 2284. As a result, the Court returned the power to regulate abortion to the "people and their elected representatives." *Id*. This Court should do the same.

Conclusion

Because Plaintiffs have failed to establish the necessary elements for injunctive relief, this Court should deny Plaintiffs' Emergency Motion.

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July 20, 2022