**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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IN THE COURT'S ORIGINAL JURISDICTION
Case No. 2022-001062

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Planned Parenthood South Atlantic, Greenville Women's Clinic, Katherine Farris, M.D., and Terry L. Buffkin, M.D.....*Petitioners*,

v.

State of South Carolina; Alan Wilson, in his official capacity as Attorney General of the State 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; Theresa Mills-Floyd, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Jennifer R. Root, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Christopher C. Wright, in his official capacity as a Member of the South Carolina Board of Medical Examiners; 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.....*Respondents*,

&

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; and Henry McMaster, in his official capacity as Governor of the State of South Carolina……*Respondents-Intervenors*.

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# REPLY BRIEF OF PETITIONERS

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## TABLE OF CONTENTS

***Page(s)***

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Constitutional Provisions**



**Statututory Provisions**

**Regulations**



**Other Authorities**

## INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Court is called upon to apply the South Carolina Constitution's broad constitutional protections as written, including an express right to be free from unreasonable invasions of personal privacy. These protections apply to pregnant women seeking abortion, just as they do to all other South Carolinians, and in the face of these guarantees, Senate Bill 1 ("SB 1" or the "Act") cannot stand.

Respondents' briefing, though voluminous, repeats just a few simple refrains that do not justify SB 1. Respondents argue for narrowing constitutional constructions, particularly of article I, section 10's privacy provision. But those constructions conflict with the constitutional text and structure; this Court's precedent; and to the extent relevant, the historical record. Under Respondents' crabbed reading, South Carolina's privacy provision would be powerless against laws criminalizing the use of birth control by married couples; requiring sterilization of individuals with more than two children; or mandating the administration of experimental medical treatments. If that were correct, the privacy right would be a dead letter.

The Court should also reject Respondents' position that SB 1 be reviewed only for irrationality, with this Court simply deferring to the legislature's prerogative. This Court has the "final responsibility of construing the constitution and laws of this state, and [it] must do so without concern for political . . . opinion." *Mims Amusement Co. v. S.C. L. Enf't Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005). Given SB 1's burden on fundamental rights and its targeting of South Carolina women and their health care, strict scrutiny is required. Respondents' contrary view, if accepted, would make South Carolina the only state in the country to hold that an express privacy guarantee covering abortion requires only a rational basis for an abortion ban.

Finally, Respondents resort to scare tactics, arguing that a decision in Petitioners' favor would prevent South Carolina from regulating abortion at any point in pregnancy. That is untrue, as evidenced by the continued regulation of abortion in other states whose highest courts have for years applied strict scrutiny to abortion laws. *See* JA509–14 (chart surveying precedents and standards of scrutiny in such states). In addition, Respondents are wrong to contend that Petitioners' claims require the Court to find no interest in fetal life before birth. Rather, the Court should conclude that before viability the South Carolina Constitution leaves to pregnant women—not the government—the freedom to make this intensely personal valuation.

## ARGUMENT

### I. THE ACT CONSTITUTES AN UNREASONABLE INVASION OF PRIVACY

Article I, section 10's language, its purpose, and this Court's precedent confirm that the State's privacy guarantee applies to bodily integrity and autonomy, including with respect to abortion. Because SB 1 impermissibly invades that privacy interest, it is unconstitutional.

Respondents do not dispute that the Act would force some South Carolinians seeking abortion to instead carry a pregnancy to term, and that even those with means to travel out of state will be delayed in accessing abortion. In fact, Respondents largely ignore South Carolina women, who—for nearly fifty years—have been able to make their own decisions about their bodies and futures. Respondents also do not dispute any of the evidence demonstrating that pregnancy and childbirth cause dramatic physical and emotional changes and can result in serious health complications and even death—all "major intrusions" on bodily integrity.[1]

[1] *State v. Allen*, 277 S.C. 595, 601–03, 291 S.E.2d 459, 462–63 (1982) (Fourth Amendment case holding that forced removal of bullet from defendant's body would be a "major intrusion[]" because it was not medically necessary and risked defendant's "health, safety or life"); *see also*

Respondents instead argue that (1) the right to privacy should be limited in a manner inconsistent with its text and state precedent, (2) even if privacy encompasses a procreative right, this Court should accord less protection to that right than to other fundamental guarantees, and (3) this Court should uphold SB 1 despite an evidentiary record demonstrating that SB 1's six-week ban, far from being narrowly tailored to advance state interests, is not even rationally related to them. The Court should reject these arguments.

### A. SB 1 infringes on a privacy interest cognizable under article I, section 10.

#### *1. Article I, section 10's broad language encompasses a right to bodily integrity and decisional autonomy, including as to abortion.*

Respondents claim that article I, section 10, is silent as to—and must therefore exclude—abortion. But it is well established that rights and privileges need not be expressly enumerated to garner protection. *M'Culloch v. Maryland*, 17 U.S. 316, 406–08 (1819). Rather, the South Carolina Constitution must be able "to meet and be applied to new conditions and circumstances as they may arise," so as not to "obstruct the progress of the state." *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963).

In article I, section 10, the framers prohibited "unreasonable invasions of privacy," including to one's "person." Accordingly, the relevant question is not whether the constitution refers to "abortion," but whether the "privacy" language applies to laws infringing on bodily integrity and decisional autonomy, including the decision whether to have an abortion or to carry a pregnancy to term. It does, for at least five reasons.

First, no legislative intent to exclude coverage for abortion "is suggested by the language of" the privacy provision "or by that of the legislation" that authorized it. *Reese v. Talbert*, 237

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*State v. Perry*, 610 So. 2d 746, 758–59 (La. 1992) (describing spasms, restlessness, and rare but life-threatening complications as amounting to an invasion of one's bodily integrity).

S.C. 356, 363, 117 S.E.2d 375, 379 (1960). The South Carolina Constitution is full of provisions that expressly limit their coverage. *E.g.*, S.C. Const. art. I, § 11 (criminal jurisdiction); *id.* § 15 (bail); *id.* § 18 (suspension of writ of habeas). Article I, section 10, on the other hand, omits "any restrictive term [that] might prevent" the privacy right from "receiving a fair and just interpretation." *M'Culloch*, 17 U.S. at 407.

Second, the ordinary meaning of privacy in the early 1970s was broad enough to encompass medical decision-making and bodily integrity, even prior to *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). *See, e.g.*, American Heritage Dictionary 560 (1970) (defining "privacy" as the "condition of being secluded" and "private" as "secluded from the sight, presence, or intrusion of others"); Grosset Webster Dictionary 456 (1966) (defining "privacy" as "[s]olitude, retirement, retreat, seclusion, secrecy"); Black's Law Dictionary (11th ed. 2019) (dating "invasion of privacy by intrusion" to 1970 and describing it as "offensive intentional interference with a person's seclusion or private affairs"). The voters who approved the privacy guarantee—who not only had a summary of article I but also its text, JA878—are presumed to have understood "privacy" as to its ordinary meaning.[2]

Third, as early as 1956, this Court defined a "right to privacy" as the "right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity." *Meetze v. Assoc. Press*, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956) (relying on Samuel Warren & Louis Brandeis,

[2] Legislative intervenors suggest that the ballot's summary, which referred to searches and seizures but not privacy, somehow limits article I's scope. Br. Resp'ts-Intervenors ("Leg. Br.") 14. That approach to constitutional interpretation should be rejected. The summary merely used a short-hand to describe sections in article I. *Compare* JA878 (summary describing right to "religious worship"), *with* JA876 (text creating right to free exercise *and* prohibiting establishment of religion); *compare* JA878 (summary referring to "attainder ex post facto law"), *with* JA876 (text providing additional bar on laws "impairing the obligation of contracts").

*The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)); *see also Holloman v. Life Ins. Co.*, 192 S.C. 454, 7 S.E.2d 169, 171 (1940) (establishing invasion of privacy tort). And by 1970, there was "no doubt" of this Court's commitment, "along with a majority of the states, to the proposition that an action will lie for invasion of [the] right of privacy." *Gantt v. Universal C.I.T. Credit Corp.*, 254 S.C. 112, 117, 173 S.E.2d 658, 660 (1970). It is a "basic presumption" that the framers "ha[d] knowledge . . . of [these] judicial decisions," including the definition of a right to privacy, when they ratified similar language in the State's constitution. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). *Cf. Gantt*, 254 S.C. at 117–19, 173 S.E.2d at 660–61 (describing West Committee's privacy proposal as one of "interest" in invasion-of-privacy case that asked to what extent a creditor could contact a debtor's wife "without invading her right of privacy, or her right to be left alone").

Fourth, by the time article I, section 10 was approved and ratified, the term "privacy" had an established meaning under federal constitutional law. The framers must be presumed to have been aware of this meaning, too. For example, in 1965, in invalidating a law that criminalized the use of contraceptives, the U.S. Supreme Court recognized a "right of privacy older than the Bill of Rights," involving the "intimate relation of husband and wife and their physician's role in one aspect of that relation." *Griswold v. Connecticut*, 381 U.S. 479, 482, 486 (1965). Similarly, in 1969, that court invalidated a law that criminalized possessing obscene material in one's home, describing as "fundamental" the "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also*, *e.g.*, *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 414 (La. 1988) (collecting cases). While these federal cases had not yet recognized a right to abortion, they did extend a federal privacy right to one's body, procreative decisions, and intimate relationships.

Fifth, states with privacy provisions nearly identical to South Carolina's have determined that their language is broad enough to protect bodily integrity and decisional autonomy. *E.g.*, *Hondroulis*, 553 So. 2d at 415 (interpreting Louisiana's nearly identical state privacy clause to "establish an affirmative right to privacy impacting non-criminal areas of law," including "a right to decide whether to obtain or reject medical treatment"); *State v. Yong Shik Won*, 372 P.3d 1065, 1074 (Haw. 2015), *as corrected* (Dec. 9, 2015) (holding that a nearly identical state privacy provision "draws individual dignity and personal autonomy within its protections"); *Women of State v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (interpreting that state's nearly identical privacy provision as "encompass[ing] a woman's right to decide to terminate her pregnancy"). Recognizing that South Carolina has its own history and body of law, Br. Resp'ts ("State Br.") 20, does not overcome the persuasive value of these decisions examining nearly identical language.[3]

Similarly, although Florida's and California's constitutional privacy protections are worded somewhat differently, these provisions are still "similar" to article I, section 10, as the South Carolina Attorney General has conceded. Resp'ts' Br. *9, *Reno v. Condon*, No. 98–1464, 1999 WL 688428 (2000) (citing Cal. Const. art. I, § 1; Fla. Const. art. I, § 23). The highest courts in Florida and California have held that their privacy provisions protect a right to abortion subject to strict scrutiny. *See Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 813 (Cal. 1997); *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989); *see also* JA509–14 (surveying the twelve states in which

[3] Unlike South Carolina, Louisiana adopted a constitutional amendment in 2020 providing that "nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion." La. Const. art. I, § 20.1. Louisiana's conclusion that such an amendment was necessary only underscores the breadth of that state's—and South Carolina's—pre-existing privacy protections.

a state's highest court has recognized a state constitutional right involving abortion, along with relevant constitutional text and standard of scrutiny).

Respondents cite only one case, from Iowa, to contend that "other courts" have rejected constitutional protection for abortion. Yet Iowa does not have an express privacy provision, and *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022), did not hold that the Iowa Constitution "do[es] not protect the right to abortion." State Br. 20. Rather, *Reynolds* overruled that state's earlier precedent applying strict scrutiny, while distinguishing its constitution from state constitutions that contain an explicit protection for privacy. 975 N.W.2d at 716, 742.[4]

***2. The Court should reject crabbed alternatives to article I, section 10's broad text.***

Respondents claim that South Carolina's privacy guarantee should generally apply only in the context of searches and seizures, State Br. 11; Leg. Br. 7, only as to criminal procedure, *e.g.*, Br. Gov. McMaster ("Gov. Br.") 22, or solely as to electronic surveillance or technological advances, *id.* 13. Article I, section 10's "express language" and structure foreclose these readings. *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963).

Had the framers wished to limit article I, section 10's privacy protection to technological intrusions, *see* Leg. Br. 11, n.3, or to criminal defendants challenging warrantless searches, *id.* at 14, they could have done that. Yet article I, section 10 does not refer in any way to technology or

[4] Although Illinois has interpreted its privacy clause not to apply to abortion, it protects the abortion right through its state due process clause. *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 756, 760 (Ill. 2013). Illinois's privacy provision is distinct from South Carolina's, *see* Ill. Const. art. I, § 6, and the constitutional-convention debate over its privacy provision included an assurance from the provision's proponent that it had "nothing to do with the question of abortion," *Hope Clinic*, 991 N.E.2d at 757. The Illinois Supreme Court gave dispositive weight to this express statement of intent as to abortion. *Id.*

electronic data. *Compare, e.g.*, Mo. Const. art. I, § 15 (search-and-seizure clause addressing "access [to] electronic data or communication"); Ill. Const. art. I, § 6 (addressing "interceptions of communications by eavesdropping devices or other means"). And this State's privacy provision confers a privacy right on all "people," not just those accused of or under investigation for a crime.

Similarly, if the framers had intended to prevent unreasonable invasions of privacy only during a search or seizure, they could have said so. Yet article I, section 10 protects the "right of the people to be secure in their persons" from *both* "unreasonable searches and seizures *and* unreasonable invasions of privacy." S.C. Const. art. I, § 10 (emphasis added). The terms have separate meaning. *Ravenel v. Dekle*, 265 S.C. 364, 377, 218 S.E.2d 521, 527 (1975) ("citizen and resident" admits of "no other construction" than that each word has separate meaning).

Article I, section 10's grant to citizens of an otherwise unqualified right to be free from "unreasonable invasions of privacy" is confirmed by the titles of the legislative acts necessary to article I's adoption. *See* JA874 (Jt. Res. No. 1268 to "Prohibit Unreasonable Invasions of Privacy, To Provide For A Procedure Before Administrative Agencies And Alter the Wording of The Various Provisions In Such Article"); JA881 (same in Act to ratify amendment); *see also Joytime Distrib. & Amusement Co. v. State*, 338 S.C. 634, 647, 528 S.E. 2d 647, 655 (1999) (recognizing that the "title or caption of [an] act" may aid in its construction (citation omitted)).

***3. Precedent confirms that SB 1 infringes on a protected privacy interest.***

This Court has held that article I, section 10 "creates a distinct privacy right that applies both within and outside the search and seizure context." *State v. Forrester*, 343 S.C. 637, 644–45, 541 S.E.2d 837, 841 (2001). And in *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993), it confirmed that this right extends to matters of bodily integrity, concluding that the State could not forcibly medicate an individual to facilitate execution.

Respondents attempt to avoid this Court's precedent in several ways, none of which is convincing. First, they claim that *Singleton* should be limited to its specific facts—the "forced medication of death row inmates." State Br. 18. But nothing in *Singleton*'s rationale suggests such a limitation, and it is simply implausible that the South Carolina General Assembly and its voters intended to confer a privacy right on individuals sentenced to death while denying that same right to unincarcerated South Carolinians.

Second, while Respondents argue that *Singleton* and this Court's other privacy cases can all be cabined to the "criminal procedure" context, *Singleton* had nothing to do with the exclusion of improperly recovered evidence. *Singleton* addressed, as this case does, whether a state action is so invasive of one's personal privacy that it is unconstitutional, irrespective of what procedures are followed.

Third, without expressly calling for *Singleton*'s overruling, the State argues that "authority on which *Singleton* relied has been significantly eroded." State Br. 18. It emphasizes that *Singleton* cited Fourteenth Amendment due-process cases, and the U.S. Supreme Court's holding in *Dobbs* that there is no federal due process right to abortion. *Id.* at 19. But *Singleton* did not rely on abortion precedent, and it in no way suggests that South Carolina's constitutional protections rise and fall in lockstep with the U.S. Supreme Court's changing views.

Fourth, the legislative intervenors suggest that *Singleton* is inapplicable because it relied in part on Louisiana precedent interpreting that state's constitutional privacy provision, which, unlike South Carolina's, was adopted after *Roe*. Leg. Br. 20. But Louisiana's interpretation of its privacy provision does not depend on *Roe*, as evidenced by cases that rely heavily on precedent that pre-dates that federal decision. *See State v. Perry*, 610 So. 2d 746, 757 (La. 1992); *State v. Jackson*, 764 So. 2d 64, 71 (La. 2000); *Moresi v. State*, 567 So. 2d 1081, 1092 (La. 1990).

***4. History confirms that article I, section 10 protects bodily integrity and autonomy.***

This Court need not look beyond article I, section 10's text and established meaning to resolve Petitioners' privacy claim. But to the extent the Court considers historical background, that too supports invalidation of SB 1. *See* Pet'rs' Br. ("Opening Br.") 13–14.

***West Committee Report.*** Respondents claim that the West Committee Report limited privacy protections to recent technological advancements and government surveillance. Gov. Br. 23. To the contrary, while the Report says the provision protects against "improper use of electronic devices, computer data banks, etc.," it then emphasizes the Committee's decision to recommend "only a broad statement on policy, leaving the details to be regulated by law and court decisions." JA890.

***West Committee minutes and other materials.*** West Committee minutes and other pre-recommendation materials were not presented to the General Assembly that proposed the article I, section 10 amendment, and they were not before the voters who approved it. These committee materials, including the "minutes[,] will not be controlling of the intent behind, or interpretation of, our state constitution." *Forrester*, 343 S.C. at 647 n.7, 541 S.E.2d at 842 n.7. In any event, these materials support giving article I, section 10 a broad scope. Opening Br. 13–14. Although Respondents claim that an appendix Petitioners have cited concerns only "modern surveillance equipment," Leg. Br. 9 & n.2 (citing JA934), the full version of the appendix, *see* JA493–99, sweeps far more broadly, discussing protections for "private 'zones' of a person's life," and describing privacy claims as "staple fare of constitutional litigation for many decades," JA493. It also devotes a full paragraph to *Griswold* and its identification of a "constitutional 'right of privacy' independent of" enumerated guarantees. JA495–96. Similarly, the Attorney General's letter to Committee staff suggested broad privacy language to address disclosures of private

information *outside* the context of criminal investigations and electronic surveillance, such as tax and health records, all of which undermines Respondents' claim that article I, section 10 applies only to those areas. JA947–48, S.C.A.G. Op. dated Oct. 2, 1967.

***History of abortion regulation.*** Respondents point to what they describe as the long history of abortion regulation in South Carolina to support their view that the privacy provision cannot be understood to cover abortion. State Br. 13; *see* Gov. Br. 29–30 (urging the Court to apply "[a] history-and-tradition test"). These arguments should be rejected.

If laws that were in effect at the time of a constitutional provision's adoption or reenactment were the best evidence of the Constitution's scope, the South Carolina Legislature today would be free to reenact, for example, laws authorizing forced sterilization of "inmates of penal or charitable institutions." *E.g.*, 1962 S.C. Code Ann. § 32-671. Surely the State would not make that implausible assertion. And here, South Carolina women were shut out of government decisions affecting them well into the twentieth century, and the State's laws reflected that discrimination.[5] Those same laws should not be used today to perpetuate women's oppression through abortion restrictions. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 484, 486, 490–91 (Kan. 2019) (per curiam) (declining to "rely on historical prejudices" in analysis of abortion restriction).

In any event, Respondents' version of history is, at best, incomplete. In the mid-twentieth century, South Carolina treated abortions as felonies only after "quickening," that is, after the

[5] *E.g.*, T. Michael Boddie, *SC Waited Until 1969 to Ratify the 19th Amendment, Giving Women the Right to Vote*, Post & Courier, June 30, 2019, https://www.postandcourier.com/news/sc-waited-until-1969-to-ratify-the-19th-amendment-giving-women-the-right-to-vote/article_a5e5849e-99bd-11e9-a42c-bb2445ba6a81.html (updated Sept. 14, 2020); Clif LeBlanc, *S.C. Was Second to Last State to Allow Women Jurors*, The State, Dec. 6, 2015 (prohibition on women's jury service eliminated in 1967); H.B. 3071, 1991 Gen. Assemb., Reg. Sess. (S.C. 1991) (barring marital rape for the first time).

woman had felt fetal movement. *State v. Steadman*, 214 S.C. 1, 7, 51 S.E.2d 91, 93 (1948); *see id.* at 9, 51 S.E.2d at 94 (ruling out quickening at three months of pregnancy); *West v. McCoy*, 233 S.C. 369, 375, 105 S.E.2d 88, 91 (1958) (evidence of quickening at four and one-half months). In contrast, before quickening, an abortion was a misdemeanor because it did not result in the "death of [a] child." *Steadman*, 214 S.C. at 8. Moreover, at "common law, an abortion produced with the woman's consent[] was not a crime" at all before "quickening." *Id.* at 7. *See also* Opening Br. 15 (discussing liberalization of South Carolina abortion code in 1970s).

***Public and political environment at time of provision's adoption.*** At the time of article I, section 10's ratification, numerous cases challenging abortion restrictions on privacy grounds were already underway. Indeed, by the time of ratification, the U.S. Supreme Court was already considering *Roe v. Wade*, including the question whether an implied constitutional right to privacy encompassed abortion. *See, e.g.*, Appellants' Br. at 103, *Roe v. Wade*, No. 70-18, 1971 WL 128054 (U.S.); Amicus Br. of Nat'l Right to Life Comm., *Roe v. Wade*, No. 70-18, 1970 WL 116927 (U.S.). These cases—along with the developing body of law on a federal right to privacy—were covered in the South Carolina press. *E.g.*, Editorial, *Abortion Laws and Privacy Rights*, The Greenville News (Sept. 29, 1969), *available at* https://www.newspapers.com/image/189114184 ("Courts are beginning to consider abortion laws in relation to the right of privacy. . . . Abortion would become a matter to be decided by individual patients and their physicians."); James Reston, *Judiciary Tackles Abortion Issue: Supreme Court Test Upcoming*, The State (Nov. 16, 1969), *available at* https://www.newspapers.com/image/750254584 (quoting federal district court decision recognizing "an increasing indication in [U.S. Supreme Court] decisions" that "a woman's liberty and right of privacy extends to family, marriage and sex matters, and may well include the right to remove an unwanted child, at least in the early stages of pregnancy").

Respondents' reliance on the *absence* of cases in this State challenging abortion laws after 1971 is misplaced. South Carolina courts do not sua sponte resolve constitutional questions that are not squarely presented to them. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). *Cf. State v. Lawrence*, 261 S.C. 18, 198 S.E.2d 253 (1973) (involving appeal only under federal law where the State conceded that *Roe v. Wade* would "compel[] this Court to strike as unconstitutional many portions of the South Carolina abortion statutes," JA900).

**B. Strict scrutiny applies to Petitioners' article I, section 10 claim.**

Because SB 1 intrudes on the fundamental right to privacy, strict scrutiny applies. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140–41, 568 S.E.2d 338, 347 (2002). Under that standard, any intrusion on patients' privacy must be justified by "a compelling state interest and be narrowly tailored to effectuate that interest." *Id*. Narrow tailoring demands "no less restrictive means of achieving [the law's] purpose exist." *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 447 n.5, 746 S.E.2d 329, 336 n.5 (2013). Moreover, so long as Petitioners demonstrate an infringement, the burden under strict scrutiny shifts to the State to show the strength of its interest and the close fit between means and ends. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816, 120 S. Ct. 1878, 1888, 146 L. Ed. 2d 865 (2000). In particular, under strict scrutiny, "[w]hen a plausible, less restrictive alternative is offered . . . , it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." [6]

[6] While this Court has said that "the one who attacks the law bears the burden of showing it is unconstitutional" even under strict scrutiny, *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347 (citing *State v. Hornsby*, 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997)), this language is best understood as confirming that the ultimate burden of persuasion lies with the party challenging the statute, rather than as modifying the government's burden under strict scrutiny to show that the law is "narrowly tailored to serve a compelling state interest," *id.* at 142; 568 S.E.2d at 348. *Cf. State v. White*, 348 S.C. 532, 539, 560 S.E.2d 420, 424 (2002) (suggesting a similar way of reconciling the presumption of constitutionality with burden-shifting under rational-basis review).

Respondents claim this standard does not apply to a right-to-privacy claim, or even to state equal-protection claims involving fundamental rights. But there is no doctrinal or practical basis for this. Strict scrutiny is "a generic constitutional test capable of broad application." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1270 (2007); *see Doe v. State*, 421 S.C. 490, 505, 808 S.E.2d 807, 814 (2017). And it "has been applied by a majority of other courts that have determined their state constitutions provide a right to decide whether to continue a pregnancy." *Hodes*, 440 P.3d at 496; *see also, e.g.*, *Perry*, 610 So. 2d at 760 (concluding that only "strict judicial scrutiny is sufficiently protective of a person's right of privacy or personhood to avoid unwarranted governmental interference with his body, mind, and medical autonomy"); *Armstrong v. State*, 989 P.2d 364, 375 n.6 (Mont. 1999) (explaining how the "compelling interest" test is necessary to protect constitutional rights).

Indeed, Petitioners know of no other state that has held that only rational-basis review—or, as the State puts it, review that asks only "whether the [challenged law] is arbitrary"—applies when addressing a privacy right that encompasses abortion. State Br. 22 (citing *State v. Jones*, 435 S.C. 138, 866 S.E.2d 558 (2021)). Doing so here would make South Carolina the lone exception to the rule. The Governor's alternative suggestion that this Court apply an amorphous balancing test instead of strict scrutiny should likewise be rejected. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 385 (2006) (discussing merits of strict scrutiny); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592, 606 (1985) (discussing drawbacks of balancing).

Respondents contend that Petitioners offer no limiting principle to a right to privacy, and that application of strict scrutiny would leave the State powerless to ban post-viability abortion, or to regulate pre-viability abortion in any way. That is not true. First, Petitioners are not challenging

South Carolina's law banning abortion at 20 weeks post-fertilization, and they do not provide abortion beyond 14 weeks of pregnancy. JA163. And states that apply strict scrutiny under a state right to abortion still subject abortion providers, like other medical providers, to regulations that ensure the health and safety of their patients. *Compare* JA509–14 (chart of states protecting right to abortion), *with* JA633–34 (identifying range of abortion regulations, including in states recognizing a right to abortion).

### C. SB 1 cannot withstand any level of review, much less strict scrutiny.

As Petitioners have explained, no matter the form of review—be it strict scrutiny or some less stringent standard—SB 1 is unconstitutional. Opening Br. 22–25.

First, Respondents have failed to show that the State's interests are compelling, as strict scrutiny requires. Opening Br. 23–24. Respondents rely heavily on an asserted interest in protecting fetal life, citing *McKnight*, 378 S.C. 33, 54, 661 S.E.2d 354, 364 (2008) and *Whitner*, 328 S.C. at 17–18, 492 S.E.2d at 785–86. But both of these cases hinged on the State's interest as to *viable* fetuses and recognized that this interest is distinct from, and stronger than, any interest before viability. Respondents' reliance on *Dobbs* for this interest is likewise misplaced. As a federal constitutional decision, *Dobbs* cannot—as the State suggests—define for this Court what constitutes a compelling interest as a matter of state law. In any event, Respondents misunderstand the nature of the inquiry. The Court would not have to find, as Respondents contend, that "life before birth has *no* value." Gov. Br. 28. Rather, a decision in Petitioners' favor would mean only that before viability—and certainly at six weeks, the very earliest stage of pregnancy—that interest cannot justify the government denying women this intensely personal valuation entirely.

Respondents' other asserted interests do not justify SB 1. For example, they contend that SB 1 advances an interest in preventing fetal pain and preserving medical ethics, but those

assertions have no basis in SB 1's express purposes, and therefore cannot satisfy heightened scrutiny of any form. *Compare* JA102, *with* State Br. 24–25 (citing *Dobbs* as support). In addition, these and other asserted interests are implausible. While the State claims that SB 1 is needed to address the dangers that abortion poses for women, the record evidence establishes that abortion is safe. *Compare* JA302–05 (State's only declaration making no mention of any long-term mental or physical health risks from abortion), *with* JA170–84 (petitioner declaration discussing impact of abortion bans on physical, mental, and financial wellbeing of patients); JA196 (same); *see also* JA595–857, JA864–871; ACOG Br. 9. Similarly, the record contains no evidence whatsoever regarding fetal pain; if it did, that evidence would show that fetal pain is not possible until at least 24 weeks of pregnancy. Am. Coll. Obstetricians & Gynecologists, Facts Are Important: Gestational Development & Capacity for Pain, https://www.acog.org/advocacy/facts-are-important/gestational-development-capacity-for-pain (accessed Oct. 10, 2022). And contrary to Respondents' claims about medical ethics, the major national medical organizations confirm that abortion bans harm medical ethics by forcing health care professionals to deny comprehensive reproductive care to women against their best interest. *See* Amicus Br. Am. Coll. Obstetricians & Gynecologists et al. ("ACOG Br.") 23–27.

Second, even if State's asserted interests were compelling, the State has failed to show that SB 1 is narrowly tailored to advance them. *See Disabato*, 404 S.C. at 447 n.5, 746 S.E.2d at 336 n.5. As to the State's asserted interest in fetal life, a law cannot be narrowly tailored if the State has foregone less restrictive means of advancing its interest. Women seeking abortions often do so for financial reasons, a need to care for other children, and because of their pregnancy timing. JA165; JA196; *see also* Biggs, *Understanding Why Women Seek Abortions in the US*, JA820, 823–27. South Carolina could equally advance its interest in fetal life by taking steps to support

pregnant and parenting women, such as by ensuring access to prenatal care and adequate medical leave for childbirth. Opening Br. 24; *cf.* S.C. Code Ann. §§ 44-41-340, 330(A)(2) (recognizing relevance of public and private resources to women's abortion decisions by requiring development of state materials to inform them of aid). Instead, it has imposed a categorical ban on abortion from the earliest stages of pregnancy.

Respondents also contend that SB 1 furthers the State's interest in protecting women's health. But SB 1 in fact increases the risks to women's health and lives. This impact is demonstrated by the record evidence and the views of major national medical organizations. As these authorities explain, the converse of abortion is not a state of non-pregnancy, but remaining pregnant and giving birth, a process with far greater rates of mortality and morbidity than abortion. JA174–75; JA684–86; ACOG Br. 7–9, 16–18.[7] And for those ultimately able to obtain abortion out of state, SB 1 will cause delay that could increase their risk. JA172; *see also* Kari White et al., *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8*, Texas Pol'y Evaluation Project (2022).

Similarly, while the State may have some interest in "providing women with vital medical information about their pregnancy" to inform their decisions, State Br. 26, SB 1's six-week ban

[7] Contrary to claims by Respondents and amici, *e.g.*, Gov. Br. 28–29, these comparisons remain true even when gestational age at the time of abortion is disaggregated. The U.S. Centers for Disease Control reports an abortion-related mortality rate per 100,000 abortions: before 8 weeks of pregnancy (.3), between 9 and 13 weeks (.5), between 14 and 17 weeks (2.5), and 18 weeks and beyond (6.7). In each case, these rates are lower—and in the first trimester, far lower—than the pregnancy-related mortality rate of 8.8 deaths per 100,000 live births. Suzanne Zane et al., *Abortion-Related Mortality in the United States 1998–2010*, 126 Obst. & Gyn. 259, 264 (2015). Thus, even assuming (without evidence) that some abortion-related deaths are not detected, *see* Gov. Br. 29, the bottom line is that SB 1 does not make South Carolina women safer.

does not serve that interest. Rather, it forecloses abortion in South Carolina for the majority of pregnant women. JA170; JA195.

SB 1 also could not survive under the balancing approach suggested by the Governor. Prior to *Dobbs*, the federal courts used balancing—the "undue burden" standard—to analyze abortion regulations. Under this standard, courts uniformly held that a ban on previability abortion, and certainly at six weeks, was impermissible, as "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846, *overruled by Dobbs*, 142 S. Ct. 2228; *see also, e.g.*, *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) (six-week ban); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th Cir. 2015) (same).

Respondents' related contention that patients have sufficient time to obtain an abortion under SB 1 is wrong. They rely on a 2021 declaration by Dr. Ingrid Skop, a Texas physician who has never provided abortion and whose testimony has been excluded as not credible by at least one other court. *See Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022 CA 91, 2022 WL 24367042 (Fla. Cir. Ct. July 5, 2022), *rev'd on other grounds*, 344 So. 3d 637 (Fla. Dist. Ct. App. 2022); *see also* Pl.'s Mot. to Exclude State Defs.' Expert Testimony 4–9, *Planned Parenthood Ass'n of Utah v. Saunders*, No. 2:19-cv-00238, 2020 WL 6253408 (D. Utah Oct. 21, 2020). By contrast, Petitioners present sworn testimony explaining that, based on their experience living under SB 1 this summer, SB 1 would prevent the majority of abortions that would otherwise occur in South Carolina. JA170; *see also* JA545 (expert declaration attesting that "the vast majority of women who seek abortion are *not* aware of a confirmed pregnancy until after cardiac activity is detectable.").

## II. THE ACT VIOLATES SOUTH CAROLINA'S GUARANTEE OF EQUAL PROTECTION AND THE ENJOYMENT OF PRIVILEGES CONFERRED ON SOUTH CAROLINIANS.

### A. SB 1 discriminates between similarly situated classes based on the exercise of a fundamental right.

South Carolina's equal protection clause is concerned not only with suspect classifications, like the gender-based classification discussed below, but also with *non*-suspect classifications that implicate a fundamental right. *E.g.*, *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 365, 692 S.E.2d 910, 913 (2010); *Luckabaugh*, 351 S.C. at 140–41, 568 S.E.2d at 347. Here, SB 1 treats women seeking abortion for reasons the South Carolina General Assembly deems sympathetic differently from others, even though the medical treatment they seek, and their need for it, is the same. The Act also targets only those pregnant women who seek abortion, as opposed to those who decide to carry their pregnancies to term. Because each of these classifications burdens the exercise of a fundamental right, strict scrutiny applies. *Luckabaugh*, 351 S.C. at 140–41, 568 S.E.2d at 347.

Respondents argue that neither of these sets of comparators is similarly situated. The State asserts that "by definition, a woman whose pregnancy was caused by rape and a woman whose pregnancy was caused by voluntary consent are materially different," State Br. 31–32, but they do not say what that "material difference" is, or how it is relevant to South Carolina's purported interests, including in protecting fetal life. This fill-in-the-blank approach cannot satisfy any level of scrutiny, and particularly not the strict scrutiny applicable here. In addition, assuming otherwise identical factual circumstances, a pregnant woman who seeks an abortion and one who seeks to carry her pregnancy to term are similarly situated in *every* way except for that one seeks legal medical care and the other seeks medical care that SB 1 broadly criminalizes, thus impinging on her privacy right. The exercise of that "fundamental right to reproductive choice" cannot be the

State's basis for distinguishing between them, but that is exactly what SB 1 does. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

The Governor argues that South Carolina's equal protection clause is limited by what the 1895 "framers and people in 1895 understood the Equal Protection Clause" to cover, and that it therefore does not apply to abortion-related classifications. Gov. Br. 30–31. But that clause was revisited and retained in 1971, so its historical underpinning is far more contemporary. In any event, this Court has never required a showing that application of the right to the circumstances before it was expressly contemplated by the framers. *Supra* Part I.A.1. For good reason: were the scope of South Carolina's equal protection clause limited by the laws and circumstances of 1895, statutes banning interracial marriage, for example, would be beyond its reach. *E.g.*, 1879 S.C. Acts No. 5, § 2 (providing that partners in interracial marriage would be penalized with minimum fine of $500 or minimum term of twelve-month imprisonment). Fortunately, South Carolina's equality guarantees are not so fettered.

Respondents also protest that South Carolina's privileges and immunities clause does not provide for a right to abortion, but this misses the point. The constitutional privilege at issue here is the right to make decisions in the best interest of one's family.[8] *See Tillman v. Tillman*, 84 S.C. 552, 66 S.E. 1049 (1910).[9] If a woman decides that abortion is the right choice for her, i.e., exercises the right to determine her family composition in that way, SB 1 forbids it. JA165 (majority of women who have abortions in South Carolina are already mothers). In contrast,

[8] Respondents are wrong that Petitioners have not sufficiently raised this argument, Gov. Br. 36, as it elaborates on the fundamental-rights component of the equal-protection claim pled in their complaint and briefed at length here.

[9] The Governor reads *Tillman* to stand for the proposition that because "children have rights of maintenance and care, they necessarily have a right to life," Gov. Br. 36, but even he does not suggest that this principle applies to fetuses before birth.

pregnant women who believe that the addition of another child would strengthen their families are free to do so. SB 1 thus draws a classification based on women's exercise of a family right protected by the South Carolina Constitution. The Court need not conclude that abortion *itself* is a constitutionally protected "privilege" to so hold.

Respondents also assert that the General Assembly reasonably "chose the presence of a heartbeat to be the dividing line" for its ban because of a purported likelihood that the fetus would eventually attain viability. Leg. Br. 23–24; Gov. Br. 33–34. But SB 1 did not modify the state's "legal presumption" that "viability occurs no sooner than the twenty-fourth week of pregnancy." S.C. Code Ann. § 44-41-10(1); *see also* S.C. Code Reg. 61-12, § 101(T); JA540–43. In any event, Respondents do not meet their burden of demonstrating why sacrificing women's health and autonomy in service of a pre-viable embryo or fetus is a narrowly tailored means of furthering the State's interest in the "protection of unborn children."

Finally, even if strict scrutiny (or heightened scrutiny, *see infra*) did not apply, SB 1 fails even rational-basis review because it does not "bear[] a reasonable relationship to a[] legitimate interest of government." *R.L. Jordan Co. v. Boardman Petrol. Inc.*, 338 S.C. 475, 477–78, 527 S.E.2d 763, 765 (2000). As explained at length, the Act requires women to endure increased risks to their health and safety by undergoing a full-term pregnancy, labor, and delivery, all of which are more dangerous than abortion. JA164; JA173–75. Forcing women to stay pregnant and give birth against their will is fundamentally arbitrary and irrational because it relies on the stereotype that motherhood is a woman's natural role. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *United States v. Virginia*, 518 U.S. 515, 534 (1996).

### B. SB 1 discriminates against women.

The Act bans only care for pregnant "wom[e]n," as opposed to care sought by men. Because SB 1 relies on gender-based classifications, it is subject to (at least) intermediate scrutiny, *Moore v. Moore*, 376 S.C. 467, 482, 657 S.E.2d 743, 751 (2008); *In the Interest of Joseph T.*, 312 S.C. 15, 16, 430 S.E.2d 523, 524 (1993), which it fails. Opening Br. 28–29.

Respondents attempt to short-circuit this inquiry by pointing to language from *Dobbs* to suggest that no regulation of abortion could *ever* be a sex-based classification. *E.g.*, State Br. 29. But *Dobbs*'s offhand discussion of equal protection is dicta, as no federal—much less state—equal-protection claim was presented to the U.S. Supreme Court in that case. *Dobbs*, 142 S. Ct. at 2245–46 (addressing in a single paragraph an equal-protection theory that was raised only by "some of respondents' *amici*"). Of course, "this decision of the Supreme Court of the United States is not binding on" this Court's interpretation of the South Carolina Constitution in any event. *In Re: Hearing Before Joint Legislative Committee, Ex parte Johnson*, 187 S.C. 1, 196 S.E. 164, 169 (1938).[10] As discussed at length in Petitioners' opening brief and below, this Court's own equal-protection precedent ably resolves the issues presented here.

Respondents also deny that SB 1 contains a gender-based classification at all, claiming that SB 1 "classifies on the basis of pregnancy," not "on the basis of sex." Gov. Br. 31; State Br. 29. This blithely ignores SB 1's repeated references to "wom[e]n," a facial gender-based classification triggering intermediate scrutiny. *See Moore*, 376 S.C. at 482, 657 S.E.2d at 751. But even setting

[10] Similarly, Respondents' reliance on *Geduldig v. Aiello*, 417 U.S. 484 (1974), is unavailing, as that decision does not bind this Court and in any event has been abrogated even under federal law. *See Nev Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728–37 (2003); *United States v. Virginia*, 518 U.S. 515, 534 (1996); *see generally* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19th Amend. Special Ed. Geo. L.J. 167 (2020) (explaining how the U.S. Supreme Court abrogated *Geduldig* through equal-protection analyses in *Virginia* and *Hibbs*).

that facial classification aside, SB 1's express woman-protective purposes and devastating actual consequences for women in South Carolina make clear that SB 1 is a law *about women*.[11]

Specifically, the short- and long-term physical, economic, and professional consequences of pregnancy are perhaps the most fundamental way in which "the legal, social, and economic inferiority of women" is "create[d] or perpetuate[d]." *Hardee v. Hardee*, 355 S.C. 382, 388–89 & n.3, 585 S.E.2d 501, 504–05 & n.3 (2003) (citing *United States v. Virginia*, 518 U.S. 515, 534 (1996)); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728–37 (2003) (explaining why a federal law combatting pregnancy discrimination enforces the Fourteenth Amendment's protections against sex discrimination).[12] SB 1 thus forces women into a position of "legal, social, and economic inferiority" relative to men and violates the equal protection clause. *Hardee*, 355 S.C. at 389 n.3 (citing *Virginia*, 518 U.S. at 534).

Next, Respondents argue that even if SB 1's regulation of pregnancy is a gender-based classification, it survives intermediate scrutiny because, as a general matter, "the sexes are not similarly situated" with regard to pregnancy. State Br. 28–29 (quoting *State v. Wright*, 349 S.C.

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[11] As Petitioners noted in their opening brief, pregnant people of all gender identities seek abortion. Opening Br. 1 n.1. That SB 1 affects other pregnant people *in addition to* women does not change the fact that SB 1 is founded on impermissible stereotypes about women and has the effect of subordinating women as a class, in violation of the equal protection clause. The Governor is wrong to suggest these things are mutually exclusive. Gov. Br. 31 n.7.

[12] The physical, financial, and professional losses that result from pregnancy and childbirth are in no way addressed by a "safe-haven law" for individuals who decide to forgo parenting *after* birth. *See* Gov. Br. 36 (citing S.C. Code Ann. § 63-7-40). And the suggestion that a "safe-haven law" is an adequate alternative is woefully naive. *See* Caitlyn Byrd, *SC Safe Haven Law Lets Parents Give Up Their Babies. Will More Be Surrendered Post-Roe?*, Post & Courier, July 16, 2022 (explaining that "[f]ifty-three infants have been given up since 2009 under South Carolina's [safe-haven law], with five infants relinquished last year. . . . a fraction of the more than 6,000 abortions performed . . . in all of 2021"), https://www.postandcourier.com/politics/sc-safe-haven-law-lets-parents-give-up-their-babies-will-more-be-surrendered-post/article_cf2c95f2-031b-11ed-9531-a3ba543bdf52.html.

310, 313, 563 S.E.2d 311, 313 (2002)). But this misses the point. As discussed above, the equal protection analysis does not deny that physical differences between men and women exist as a general matter; rather, it forbids the state from *penalizing women for those differences*. Accordingly, under this Court's precedents, the sex-discrimination analysis is context-specific, asking whether a particular law's pregnancy-based classification burdens women without sufficient justification. *See In the Interest of Joseph T.*, 312 S.C. at 16, 430 S.E.2d at 524 (1993); *Griffin v. Warden, C. C. I.*, 277 S.C. 288, 286 S.E.2d 145, 147 (1982).

Respondents claim generally that SB 1 "is readily distinguishable from laws that have been invalidated on the grounds of impermissible gender stereotyping." State Br. 30. But just like the gender-based classification invalidated in *Joseph T.*, SB 1's asserted aims of "protecting the health of the pregnant woman" and ensuring that the "pregnant woman" is able "to make an informed choice about whether to continue a pregnancy," JA102—combined with SB 1's chosen means of furthering those interests by preventing women from making their own medical decisions—are "based on 'old notions' such as a belief that females should be afforded special protection." *Joseph T.*, 312 S.C. at 16, 430 S.E.2d at 524 (citing *Craig v. Boren*, 429 U.S. 190 (1976)); Opening Br. 23. For example, the language the Governor pulls from *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228 (2022), *see* Gov. Br. 35–36, is explicitly about protecting women from future regret over ending a pregnancy. The idea that women are less competent decision-makers, and should therefore be prevented from making that decision *at all*, is nothing if not an outdated, and impermissible, stereotype. *Wright*, 349 S.C. at 315–17 (Toal, C.J., concurring in result only). And South Carolina could serve its asserted interests through "more efficient[] and appropriate[]"

alternative means that do not involve foreclosing the decision entirely. *Id.*; *see* Opening Br. 24. Thus, SB 1 violates the equal protection clause.

## III. SB 1 VIOLATES SUBSTANTIVE DUE PROCESS

"The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Respondents' arguments as to this claim are unavailing. First, *Dobbs* does not prevent this Court from holding—as a matter of South Carolina law—that SB 1 violates substantive due process by usurping women's ability to decide for themselves whether to remain pregnant and have a child. Second, as explained above, the historical record refutes Respondents' claims that no one approving South Carolina's due process clause in 1970 could have understood it to protect a liberty interest in abortion. *See supra* Part I.A.4. Third, while the Court has suggested that substantive due process claims might only warrant rational basis review, *e.g.*, *R.L. Jordan Co.*, 338 S.C. at 477–78, 527, S.E.2d at 765; *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004), the Governor concedes that strict scrutiny applies if, as here, a fundamental right is implicated, Gov. Br. 37. Fourth, as explained above, SB 1 fails any level of scrutiny.

## IV. SB 1'S EXCEPTIONS TO THE ABORTION BAN LIKEWISE RENDER THE LAW UNCONSTITUTIONAL

### A. Reported Rape Exception

**1.** As to the Reported Rape Exception, Respondents claim that the right to informational privacy does not protect against the coerced disclosure of private medical information to law enforcement because "the history of Article I, Section 10" lacks explicit discussion of "this type of privacy concern." State Br. 42–43. But the constitutional text protects privacy in one's "papers and effects," which *at minimum* includes personal information (the

contents of one's "papers"). That text controls here. *See State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014). But even the historical record confirms that article I, section 10 addresses the government's collection of "massive" amounts of data about people's personal affairs, including on matters of "health and safety." JA947–48, S.C.A.G. Op. dated Oct. 2, 1967; *see also Forrester*, 343 S.C. at 647 (explaining that the West Committee "recognized that the [privacy] provision would have an impact beyond just the area of electronic surveillance").

Respondents are also wrong that any disclosure of personal information made pursuant to the Reported Rape Exception "is purely voluntary in nature," State Br. 42, because the patient's ability to access vital medical care is conditioned on it. *See* Opening Br. 34–37. If the patient does not consent to the disclosure, she is not permitted to obtain an abortion, *even though* her pregnancy resulted from rape or incest. *See* JA105 (S.C. Code Ann. § 44-41-680(C)).

**2.** Respondents point to a "variety of other medical contexts" where health care providers must comply with reporting requirements. State Br. 44. But unlike SB 1, none of these reporting requirements coerces disclosure by withholding desired care *unless* the physician makes a report. For example, S.C. Code Ann. § 63-7-310 requires health care providers, clergy members, and others to report when they have reason to believe a child has experienced abuse or neglect. But in contrast to SB 1, that statute does not criminalize those professionals if they provide the child with medical care, religious counsel, or education without making the required report. *See also* S.C. Code Ann. § 16-3-1072; *Fischer v. Com., Dep't of Pub. Welfare*, 543 A.2d 177, 178 (Pa. Cmwlth. 1988) (cited in State Br. 43) (upholding abortion reporting requirement that was a condition of state insurance coverage, not a condition of receiving the abortion itself).

**3.** Respondents likewise fail to demonstrate that the Reported Rape Exception is even reasonably related to a legitimate state interest, much less sufficient to satisfy strict scrutiny.

Respondents assert, for example, that this coerced disclosure "protects the life of the unborn," State Br. 43, but this is only true if it discourages rape victims from obtaining an abortion, a result directly at odds with the State's ostensible interest in making abortion available to survivors. Respondents also offer no explanation whatsoever for how this coerced disclosure—or intimidating sexual assault survivors into bearing the pregnancy caused by a crime—furthers "the protection of maternal health." State Br. 43, 44. Particularly given the existence of South Carolina's other reporting requirements, *e.g.*, S.C. Code Ann. § 63-7-310; *id.* § 44-41-30(D), the coerced disclosure required by the Reported Rape Exception adds nothing that helps either survivors or law enforcement. In a similar vein, the Governor attempts to justify the reporting requirement on the ground that a woman who decides not to have an abortion "remains free to make a report, if she hasn't already." Gov. Br. 44. But a woman who has an abortion also remains free to make such a report after receiving care, yet SB 1 denies her—and only her— that choice. Accordingly, the Reported Rape Exception serves only to intimidate rape survivors seeking medical care and has no rational connection to any legitimate state interest.

**B. Death or Permanent Injury Exception**

**1.** As to the Death or Permanent Injury Exception, Respondents argue that no equal-protection problem exists because "patients with serious and sever[e] physical injuries are necessarily different from patients with less severe or non-physical injuries." State Br. 39–40; *see also* Leg. Br. 24. Like Respondents' equal protection arguments discussed above, this truism fails to explain *why* the difference between those comparator groups justifies depriving one but not the other of a fundamental right. Put another way, there is no reasonable, much less narrowly tailored, relationship between a State interest in "protecting the life of the unborn," State Br. 40, and SB 1, which permits abortion for certain life-threatening physical injuries, but forbids it for life-

threatening mental illness. *See* JA103; S.C. Code. Ann. § 44-41-610(8) (specifying that abortion is unlawful even where a physician encounters "a claim or diagnosis that a woman will engage in conduct that she intends to result in her death or in a substantial and irreversible physical impairment of a major bodily function").[13]

**2.** The Death or Permanent Injury Exception also renders SB 1 vague. Physicians cannot always predict when serious, potentially life-threatening complications will occur. When a patient presents with a potentially life-threatening condition, physicians have no time to hesitate. The Death or Permanent Injury Exception forces them to guess whether a patient's medical situation suffices, with the threat of harsh criminal penalties if they guess incorrectly.[14] If left standing, SB 1 will risk patients' lives and health, as is already happening in South Carolina and around the country. *See* Opening Br. 34 n.12; ACOG Br. 18–21.

Respondents point to the Act's use of "reasonable medical judgment" as a guide for applying the exception, but SB 1 defines that term in a circular way to mean "a *medical judgment* that would be made by a *reasonably* prudent physician who is knowledgeable about the case and the treatment possibilities." S.C. Code Ann. § 44-41-610(10) (emphasis added). Moreover, the fact that the phrase "reasonable medical judgment" is used in malpractice law does not eliminate vagueness. The vagueness doctrine has a "greater tolerance of enactments with civil rather than

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[13] The Governor appears to suggest that a patient could obtain an abortion if her mental illness threatens to cause "irreversible physical impairment of a major bodily function." Gov. Br. 41 (quoting 2021 S.C. Acts No. 1, § 3). His position is refuted by S.C. Code Ann. § 44-41-610(8).

[14] Respondents claim that Petitioners lack standing to challenge this exception because they do not provide abortions covered by the Death or Permanent Injury Exception. Of course they do not under current practice, because the vagueness of this provision forces Petitioners to steer far clear of the legal line. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–63 (2014). In the absence of such vagueness, however, Petitioners could provide abortions in circumstances where a person's life or health is threatened, so long as the imminency of the threat could be managed in an outpatient setting.

criminal penalties" because "consequences of imprecision [in the civil context] are qualitatively less severe." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). SB 1, in contrast, threatens doctors and those who assist them with criminal penalties.

Respondents' reliance on *Karlin v. Foust*, 188 F.3d 446, 468 (7th Cir. 1999), is similarly misplaced. *Karlin* dealt with a non-criminal statute and recognized that statutes that impose strict *criminal* liability are more "troublesome from a constitutional standpoint" because they "impose[] criminal or quasi-criminal penalties on constitutionally protected activity." *Id.* at 467. In any event, *Karlin* does not bind this Court, and other courts have recognized that the phrase "reasonable medical judgment" may render a statute unconstitutionally vague. *See, e.g.*, *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 868-69 (S.D. Ohio 2019).

## V. THE ACT IS VOID AB INITIO

"In South Carolina, the law in effect at the time the cause of action accrued controls the parties' legal relationships and rights." *Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 397, 596 S.E.2d 42, 46–47 (2004) (quoting *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997)); *see also Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 75 S.E.2d 161, 163 (Ga. 1953) ("The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body, and if it is unconstitutional then, it is forever void." (internal citations omitted)).[15] Accordingly, to assess Petitioners' void *ab initio* argument, this Court must look to

[15] The Governor cites a handful of decisions by other state supreme courts, including *Hammond v. Clark*, 71 S.E. 479 (Ga. 1911), to argue that because "later constitutional amendments would ratify a statute" that had previously been voided by an earlier constitutional interpretation, the "same rule necessarily applies to judicial corrections of constitutional interpretation." Gov. Br. 48 n. 14. But in *Hammond*, voters ratified a constitutional amendment that specifically identified the statutes to be revived and proclaimed the statutes valid as of their date of enactment. 71 S.E. at 479–80, syllabus of the court; *id.* at 489. Applying this "rule" to "judicial corrections of constitutional interpretation" requires a significant logical leap indeed.

SB 1's legality as of its enactment on February 18, 2021—not, as Respondents suggest, the date of Petitioners' complaint, Gov. Br. 46, or as of today.

On the date of its enactment, SB 1 plainly violated the Fourteenth Amendment to the U.S. Constitution by banning abortion before viability contrary to the bright-line rule established by *Roe* and reaffirmed in *Casey*. This Court recognized as much in its order temporarily enjoining SB 1: "the Act is unusual in the sense that its validity depended on a future act, that is, the overruling of *Roe*." Order 5, Aug. 17, 2022.

Respondents argue that because SB 1 was never "adjudicated to be unconstitutional," State Br. 45, SB 1 cannot be void *ab initio* notwithstanding its obvious conflict with *Roe v. Wade* at the time of its enactment. But all that is required is for this Court to determine *in this case* whether SB 1 was unconstitutional upon enactment under the then-applicable legal rule. For example, in *Swicegood v. Thompson*, 435 S.C. 63, 865 S.E.2d 775 (2021) (per curiam), this Court held that South Carolina's ban on same-sex marriage was void *ab initio* because it violated the federal constitutional rule announced in *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015), that "same sex couples may exercise the fundamental right to marry." *Swicegood*, 435 S.C. at 65. In conducting this analysis, the Court did not ask whether some other court had *already* determined that the marriage ban violated *Obergefell*—rather, that was the job of the Court in *Swicegood* itself. *See id.*[16] So too here: this Court need ask only whether SB 1 violated federal law as of its enactment

[16] The Governor argues that this Court cannot consider SB 1's constitutionality under federal law at the time of its enactment because Petitioners have not pled federal claims in this case. Gov. Br. 47. But that was also true in *Swicegood*. *See Swicegood v. Thompson*, Appellate Case No. 2014–001109, 2016 WL 192045, at *1 (S.C. Ct. App. Jan. 13, 2016). All the same, the court of appeals and trial court directed the parties to brief the applicability of *Obergefell*, *see Swicegood v. Thompson*, 431 S.C. 130, 136, 847 S.E.2d 104, 107 (Ct. App. 2020), and this Court unanimously held that South Carolina's marriage ban was void *ab initio* under *Obergefell*.

on February 18, 2021. SB 1 clearly did, so this Court should recognize that it was void then and remains so today.

Similarly, *Dobbs* did not "revive" SB 1, as Respondents contend. The State cites the *Legal Tender Cases*, 79 U.S. 457, 553 (1870), and *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. App. 1952), along with a handful of law review articles, to illustrate the doctrine of revival, under which an enjoined law becomes enforceable without the need for legislative reenactment once a constitutional impediment to its enforcement is removed. However, South Carolina is not among the small number of states that have recognized the "revival" doctrine. *See Atkinson v. S. Express Co.*, 94 S.C. 444, 78 S.E. 516, 519 (1913) ("The removal of the constitutional objections to a statute, that rendered it null and void, does not by operation of law give it force and effect . . . ."); *cf. White v. J.M. Brown Amusement Co., Inc.*, 360 S.C. 366, 374, 601 S.E.2d 342, 346 (2004) (reaffirming *Atkinson*'s "general principles" and holding that a change in law did not revive a previously voided contract, since "parties must arrange and conduct their business affairs under the law as it presently exists, regardless of a belief or hope the law will later be changed or invalidated").[17]

Accordingly, under this Court's precedent, *Dobbs* did not revive SB 1, even by describing *Roe* as "wrong from the start." State Br. 45 (quoting *Dobbs*, 142 S. Ct. at 2243); Leg. Br. 28 (arguing that "*Roe* must be treated as if 'it never existed'"). The void *ab initio* doctrine is a function

[17] *See also* 1 Sutherland Statutory Construction § 2:7 (7th ed.) (citing *Atkinson* for the principle that "[a]mendment or repeal of the constitutional provision which rendered a statute invalid is generally held not to place the statute in force without subsequent reenactment"); *State v. Hodge*, 941 N.E.2d 768, 773 (Ohio 2010) (declining to follow *Jawish* and holding that Ohio statutes that had been invalidated under the Sixth Amendment were not revived by a United States Supreme Court decision holding that similar Oregon statutes did not violate Sixth Amendment), *superseded on other grounds by statute as recognized in State v. Bonnell*, 16 N.E.3d 659, 661 (Ohio 2014).

of state law, and in this state, the law in effect at the time the cause of action accrued controls, no matter how that law has changed in the months or years since. *Bergstrom*, 358 S.C. at 397, 596 S.E.2d at 46–47.

Respondents argue that this Court's decision in *Atkinson* is distinguishable because the issue in that case "was the determination of the parties' present rights and duties in light of an unconstitutional statute." State Br. 47. But that is precisely the issue here. And while the legislative intervenors argue that SB 1 qualifies for an exception to the void *ab initio* doctrine—because voiding SB 1 would purportedly "create widespread havoc . . . , spawn unnecessary litigation, or result in flagrant injustice," Leg. Br. 28–29 (quoting *Bergstrom*, 358 S.C. at 400, 596 S.E.2d at 48)—the opposite is true. Applying the void *ab initio* doctrine here would preserve the legal status quo of the past five decades.[18] By contrast, permitting SB 1 to displace South Carolina's 1974 codification of *Roe* would "create widespread havoc" and "result in flagrant injustice" to women and their families.

## VI. SB 1 IS VOID FOR VAGUENESS

Section 44-41-20 of the South Carolina Code codified *Roe* as the State's public policy and provided that "[a]bortion shall be a criminal act *except when performed under the following circumstances*." S.C. Code Ann. § 44-41-20 (emphasis added). Those circumstances include abortions performed throughout the first and second trimesters of pregnancy. *Id.* Section 44-41-20 thereby explicitly legalizes first- and second-trimester abortions. In contrast, SB 1 *explicitly*

[18] The legislative intervenors argue that if SB 1 is void *ab initio*, all of South Carolina's abortion laws would revert to their pre-*Roe* status. Leg. Br. 29. This makes no sense—among other things, the General Assembly codified *Roe* by statute in 1974, Act No. 1215, 1974 S.C. Acts 2837 (codified as amended in scattered sections of S.C. Code Ann. §§ 44-41-10 to -80 (2018)), and neither *Roe* nor *Dobbs* undermined its ability to do so.

*criminalizes* abortions performed after the detection of embryonic cardiac activity, which occurs in the earliest weeks of the first trimester. S.C. Code Ann. § 44-41-650(A). This conflict renders SB 1 void for vagueness. *See* Opening Br. 29–31.[19]

Respondents' counterarguments are unavailing. They assert that the "General Assembly did not express any intent . . . to retain the 1974 trimester framework as a standalone regulation that conflicts" with later abortion statutes. Gov. Br. 40. But that argument ignores the text of Section 44-41-710, which explicitly provides that SB 1 "*does not repeal, by implication or otherwise*, Section 44-41-20." S.C. Code Ann. § 44-41-710 (emphasis added). Respondents counter that other language in Section 44-41-710 clarifies which of the two statutes applies in given circumstances. In effect, Respondents read § 44-41-710 to mean that abortions that are expressly not a "criminal act" under § 44-41-20 *are* a criminal act if they are barred by SB 1's six-week ban. But this argument only adds more confusion to the mix. It cannot simultaneously be true that SB 1 "*does not repeal, by implication or otherwise*, Section 44-41-20," *and* that SB 1 makes unlawful those abortions that Section 44-41-20 expressly deems lawful.

Respondents further contend that even if SB 1 conflicts with Section 44-41-20, a statutory conflict cannot render a law void for vagueness. But South Carolina adheres to no such limiting rule, and good reason exists to reject it. *See Jansen v. State ex rel. Downing*, 137 So.2d 47, 50 (Ala. 1962); *Mundy Motor Lines v. E.I. du Pont De Nemours & Co.*, 103 S.E.2d 245, 248 (Va. 1958). Under existing law, this State's courts ask only whether a statute gives fair notice as to

[19] Contrary to the Governor's assertion, Gov. Br. 38-39, Petitioners did not waive this claim. *See* Orig. Juris. Compl. ¶¶ 119-24. In any event, Petitioners could amend their pleadings "to conform to the proof" they offer in this original jurisdiction action, a practice that is "liberally allowed when no prejudice to the opposing party will result." *Kelly v. S.C. Farm Bureau Mut. Ins. Co.*, 316 S.C. 319, 323, 450 S.E.2d 59, 61–62 (S.C. Ct. App. 1994).

conduct that is prohibited. *See, e.g.*, *City of Beaufort v. Baker*, 315 S.C. 146, 148–49, 432 S.E.2d 470, 472 (1993); *Curtis v. State*, 345 S.C. 557, 570–71, 549 S.E.2d 591, 598 (2001). SB 1 fails to provide such notice and is therefore void for vagueness.[20]

## VII. SB 1 IS NOT SEVERABLE

Respondents argue that even if SB 1's six-week ban is unconstitutional, the law's severability clause requires the remainder of the law to stay in place. That clause is relevant, but it is not dispositive. For example, in both *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647, and *Pinckney v. Peeler*, 434 S.C. 272, 862 S.E.2d 906 (2021), this Court assessed severability by referring not only to severability clauses—including one nearly identical to SB 1's—but also to statutory structure and purpose. As Petitioners have already explained, these indicia support the conclusion that SB 1 must fall in its entirety. Opening Br. 41.

Ultimately, this Court should be "wary of [a] legislature[] who would rely on [judicial] intervention" in lieu of taking care to craft constitutional statutes. *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006)). Once it has determined the six-week ban is unconstitutional, this Court should not step in with a red pen and attempt to salvage the unworkable shell that remains.

[20] The State argues that Petitioners lack standing to raise a facial vagueness challenge, citing *State v. Neuman* for the proposition that "[o]ne to whose conduct the law clearly applies does not have standing to challenge it for vagueness." 384 S.C. 395, 403, 683 S.E.2d 268, 272 (2009) (quoting *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598). But due to the conflict between Section 44-41-20 and SB 1, Petitioners' conduct does *not* necessarily fall within the prohibitions of SB 1. Petitioners and their staff will inevitably be faced with pregnant patients for whom an abortion would be lawful under Section 44-41-20 but unlawful under SB 1.

## CONCLUSION

For the foregoing reasons, this Court should grant judgment to Petitioners and enter an injunction as described in their opening brief.

Respectfully submitted,

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* *Admission pro hac vice granted in underlying proceeding*

Dated: October 12, 2022

**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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IN THE COURT'S ORIGINAL JURISDICTION
Case No. 2022-001062

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Planned Parenthood South Atlantic, Greenville Women's Clinic, Katherine Farris, M.D., and Terry L. Buffkin, M.D.....*Petitioners*,

v.

State of South Carolina; Alan Wilson, in his official capacity as Attorney General of the State 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; Theresa Mills-Floyd, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Jennifer R. Root, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Christopher C. Wright, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Scarlett A. Wilson, in her official capacity as Solicitor for South Carolina's 9th Jud. Circuit; Byron E. Gipson, in his official capacity as Solicitor for South Carolina's 5th Jud. Circuit; and William Walter Wilkins III, in his official capacity as Solicitor for South Carolina's 13th Jud. Circuit.....*Respondents*,

&

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; and Henry McMaster, in his official capacity as Governor of the State of South Carolina…….*Respondents-Intervenors*.

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## CERTIFICATE OF COMPLIANCE

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I certify that this **REPLY BRIEF OF PETITIONERS** complies with Rules 208 and 211(b), SCACR, as modified by the Court's orders of August 17, 2022, and October 10, 2022.

s/Kathleen McDaniel
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