THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE COURT'S ORIGINAL JURISDICTION

Appellate Case No. 2022-001062

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*.

BRIEF OF RESPONDENTS STATE, ATTORNEY GENERAL AND SOLICITOR WILKINS

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INTRODUCTION

Since at least the 1800s, the State of South Carolina has regulated access to abortion. Over centuries, legislators and voters have worked in good faith to set appropriate limits on access to abortion. Most recently in 2021, the South Carolina General Assembly enacted the South Carolina Fetal Heartbeat and Protection from Abortion Act (the "Heartbeat Bill"), which purports to further regulate access to abortion.

In 1973, the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) disrupted this democratic process and arrogated to itself the authority to arbitrarily define the scope of abortion rights for the entire nation. Earlier this year, the Supreme Court overruled *Roe*, declaring it to be "egregiously wrong from the start." *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2243 (2022). The Court held that the federal constitution confers no right to abortion and expressly returned "the authority to regulate abortion" to the "people and their elected representatives." *Dobbs*, 142 S.Ct. at 2279.

Petitioners now seek yet again to disrupt the democratic process of our State and ask this Court to arrogate to itself the authority to define the scope of abortion access in South Carolina. In doing so, Petitioners ask this Court to enjoin the enforcement of the Heartbeat Bill on the basis of novel state constitutional claims—claims which find no support in the text or history of the South Carolina Constitution.

This Court should reject Petitioners' novel arguments and leave policy decisions on abortion where they belong—with the people and their elected representatives. *See* S.C. Const. art. 1, § 8; *see also Smith v. Tiffany*, 419 S.C. 548, 565, 799 S.E.2d 479, 488 (2017) ("We are a court, not a legislative body. That a court may disagree with a legislative body's policy decisions or believe a perceived 'more fair' outcome exists is of no moment.").

STATEMENT OF ISSUES

1. Whether the Heartbeat Bill violates various provisions of the South Carolina Constitution, including Article I, Section 10 and Article I, Section 3?

2. Whether the Heartbeat Bill's exceptions violate various provisions of the South Carolina Constitution, including Article I, Section 10 and Article I, Section 3?

3. Whether the Heartbeat Bill is valid following the *Dobbs* decision?

4. Whether the Heartbeat Bill is severable?

STATEMENT OF THE CASE

I. Petitioners' 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 Petitioners 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, although they certainly could have.

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. *Id*. at 814. The State defendants then filed an appeal to the United States Court of Appeals for the Fourth Circuit, which subsequently affirmed the district

court's decision on February 22, 2022. *See Planned Parenthood South Atlantic*, 26 F.4th at 606.

Following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2243 (2022), the Fourth Circuit vacated the preliminary injunction and remanded the case to the District Court for further proceedings. *See Planned Parenthood South Atlantic v. Wilson*, No. 21-1369, 2022 WL 2900658 (4th Cir. 2022). On remand, the district court dismissed the case without prejudice. *See Planned Parenthood South Atlantic v. Wilson*, No. 3:21-00508-MGL, 2022 WL 2905496 (D.S.C. 2022).

II. *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. Some states permitted abortions; others, such as South Carolina, did not. The opinion's appendix notes that South Carolina had a statute criminalizing abortion in the late 1800s—the same time frame in which 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.

III. Petitioners' Original Jurisdiction Action

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

On August 17, 2022, this Court granted Petitioners' petition for original jurisdiction. In doing so, this Court temporarily enjoined the enforcement of the Heartbeat Bill but offered "no opinion on the likelihood of success on the merits" of any of Petitioners' claims.

STATEMENT OF THE FACTS

I. Abortion Regulation in South Carolina

Abortion has been heavily regulated in South Caroline since at least the 1800s. South Carolina enacted its first anti-abortion statute in 1883. *See* 1 S.C. Jur. Abortion § 8. That statute generally outlawed abortion in South Carolina but included certain exceptions to preserve the woman's life or the life of her child. *See id*.

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

This Court determined that South Carolina's existing abortion law was unconstitutional in 1973 in light of the United States Supreme Court's decision in *Roe*. *See State v. Lawrence*, 261

S.C. 18, 22, 198 S.E.2d 253, 25 (1973) ("Even with the liberalization of [the abortion law], the statute falls to the ruling of the United States Supreme Court."). In doing so, this Court did not address or even mention the possibility of a state constitutional right to abortion—even though the purported basis of such a right had just been incorporated as Article I, Section 10.

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

Since that time, the South Carolina General Assembly has enacted further restrictions and regulations governing abortion in South Carolina. At no time, until now, has it been suggested that these restrictions and regulations contravene the state constitution.

II. The Heartbeat Bill

On February 18, 2021, South Carolina enacted the Heartbeat Bill. Act No. 1, 2021 S.C. Acts. Two of the main purposes of the Heartbeat Bill are to protect unborn life and to protect maternal health. *See* Act No. 1, § 2 ("The General Assembly hereby finds, according to contemporary medical research . . . the State of South Carolina has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the unborn child who may be born . . . .").

The 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. This prohibition is thus not an absolute ban on abortion, but allows an abortion prior to the detection of a fetal heartbeat (which can be detected at approximately six weeks) to occur. J.A. 305.

Moreover, 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, S.C. Code Ann. § 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.

Significantly, 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.") These additional laws and regulations cover a wide variety of topics, including consent requirements and state regulatory reporting requirements.

STANDARD OF REVIEW

The State emphasizes two fundamental and foundational points of constitutional law that must be considered as part of the standard of review in evaluating Petitioners' claims. Both points inform the basic principle that this Court must not sit as "super-legislature" to judge the wisdom or desirability of legislative policy determinations. *See Samson v. Greenville Hosp. System*, 295 S.C. 359, 367, 368 S.E.2d 665, 669 (1988).

First, the State emphasizes that the power of our state legislature is plenary, meaning that our General Assembly may enact any laws not expressly prohibited by the state or federal constitutions. *See City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011); *see also Tiffany*, 419 S.C. at 559, 799 S.E.2d at 485.

Second, the State emphasizes this Court is generally reluctant to find a statute unconstitutional. *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002). When the validity of a statute is questioned, "it is a cardinal principle that courts will presume the legislative act to be constitutionally valid, and every intendment will be indulged in favor of the act's validity by the courts*." Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 472 (1988). If possible, this Court will construe a statute so as to render it valid. *Harris*, 391 S.C. at 154, 705 S.E.2d at 55. The statute will be declared unconstitutional only if

there is no room for "reasonable doubt" as to its validity. *Id*. Petitioners bear the burden of demonstrating the unconstitutionality of the statute. *See Knotts*, 348 S.C. at 6, 558 S.E.2d at 513.

SUMMARY OF THE ARGUMENT

The South Carolina General Assembly possesses plenary power to enact any law not prohibited by the state or federal constitutions. *Harris*, 391 S.C. at 154, 705 S.E.2d at 55. In 2021, the General Assembly exercised its plenary power by enacting the Heartbeat Bill, which reasonably set abortion restrictions in our State. No provision of the South Carolina Constitution prevented the General Assembly from doing so.

I. The Heartbeat Bill is constitutional. The Heartbeat Bill does not violate Article I, Section 10 of the South Carolina Constitution. Both the text and history of Article I, Section 10 confirm that the section confers no right to abortion. As this Court itself has recognized, the "drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." *State v. Forrester*, 343 S.C. 637, 647, 41 S.E.2d 837, 842 (2001). The drafters of Article I, Section 10, the voters who approved that section, and the General Assembly which adopted and ratified that section simply did not intend for that provision to relate to abortion in any way.

Nor does the Heartbeat Bill violate Article I, Section 3 of the South Carolina Constitution. The Heartbeat Bill does not offend the equal protection clause, the privileges and immunities clause, or the due process clause of Article I, Section 3. As a general matter, each of these constitutional provisions were present throughout the time abortion was illegal in this State, and no one suggested that any of these provisions allowed abortion by constitutional fiat. With respect to Petitioner's equal protection arguments, the Heartbeat Bill does not limit the exercise of any fundamental rights recognized by the state constitution and does not discriminate on the basis of

sex, gender, or any other suspect category. With respect to Petitioners' due process arguments, Petitioners fail to state a vagueness claim. Additionally, the Heartbeat Bill does not violate substantive due process.

Even if this Court concludes that the Heartbeat Bill somehow implicates a constitutionally protected right, the bill survives any level of judicial scrutiny because it is a reasonable restriction on the purported right to abortion and because it is narrowly tailored to advance a variety of compelling government interests.

II. The Heartbeat Bill's exceptions are constitutional. The challenged two exceptions—the Death or Permanent Injury Exception and the Reported Rape Exception—comply with both Article I, Section 10 and Article I, Section 3. Both exceptions survive any form of judicial scrutiny.

III. The Heartbeat Bill is valid. The void ab initio doctrine is inapplicable in this case. The Heartbeat Bill was never adjudicated to be invalid, and even if it could have been, the bill was revived by the United States Supreme Court's decision in *Dobbs*.

IV. The Heartbeat Bill is severable. Even if this Court concludes that a provision of the Heartbeat Bill is unconstitutional, this Court is bound to sever that provision and allow the remainder of the law to go into effect in light of clear legislative intent.

ARGUMENT

I. The Heartbeat Bill Is Constitutional.

A. The Heartbeat Bill does not violate Article I, Section 10.

(1) *The text and history of Article I, Section 10 do not support a right to abortion.*

In interpreting Article I, Section 10, this Court is bound to construe the section in light of the intent of the provision's framers and the people who adopted it. *See State v. Long*, 406 S.C.

511, 514, 753 S.E.2d 425, 26 (2014); *Miller v. Farr*, 243 S.C. 342, 133 S.E.2d 838, 841 (1963) (the intent of the framers of a constitutional provision and the people who adopted it determine the meaning of the provision). In discerning this intent, this Court must examine the text and history of Section 10. *See Long*, 406 S.C. at 514, 753 S.E.2d at 26; *Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d 375, 377 (1960) (noting that "the history of the times in which the amendment was framed, the object sought to be accomplished, and the legislative interpretation" of a provision provide courts with guidance as to the intent of the framers of a provision).

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

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

S.C. Const. art I, § 10.

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

In search of a textual hook, Petitioners suggest that Section 10's protection against "unreasonable invasions of privacy" necessarily encompasses a right to abortion. S.C. Const. art I, § 10. In making this argument, Petitioners propose a definition of privacy that is "extremely broad" and contains "no outer parameters." Petitioners Br. at 11. As explained below, this argument finds no support in Section 10's text or history. Further, this Court has previously

rejected the idea that the right to privacy is somehow unbounded. *See State v. Counts*, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) (acknowledging the "bounds" of "judicial authority" that are "conferred by the drafters" of the privacy provision).

Petitioners point to a few alleged "textual guideposts" to support this claim. However, a close examination of these alleged guideposts demonstrates their lack of persuasive value. First, Petitioners argue that because Section 10 guarantees against both unreasonable searches and seizure and unreasonable invasions of privacy, the privacy component of Section 10 must have an independent meaning. Taking that argument as true, it nonetheless does not logically follow that the independent meaning of the privacy clause supports a right to abortion. At most, it simply stands for the proposition that the privacy clause of Section 10 must mean something separate and apart from the search and seizure clause.

Second, invoking the surplusage canon of construction, Petitioners argue that the word person in Section 10 must be given an independent meaning. Again, taking that argument as true, it does not lead to the logical or historically supportable conclusion that Section 10 encompasses a right to abortion; it merely stands for the proposition that the guarantee against "unreasonable invasions of privacy" extends to a person.

Despite Petitioners argument to the contrary, a careful examination of Section 10's text reveals that the section's guarantee against "unreasonable invasions of privacy" does not encompass a right to abortion. As an initial matter, the placement of the privacy clause in the section prohibiting unreasonable searches and seizures strongly suggests that the privacy right should be generally understood in that limited context. *See Forrester,* 343 S.C. 645, 541 S.E.2d at 841 (treating the privacy provision as related to the search and seizure provision); *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (explaining that

"the whole-text canon" requires consideration of "the entire text, in view of its structure" and "logical relation of its many parts"). This placement strongly undercuts Petitioners' argument that the privacy right contained in Section 10 is somehow unbounded.

Even more importantly, the language used in the privacy provision does not mean a right to abortion. As Petitioners acknowledge, in determining the meaning of the phrase "unreasonable invasions of privacy," this Court is bound to apply the "ordinary and popular meaning of the words used." *See Long*, 406 S.C. at 514, 753 S.E.2d at 426. However, Petitioners miss an important point in this analysis. In applying the ordinary meaning of these words, this Court must look to how those words and phrases were used "by those who framed and those who adopted the constitution." *City of Charleston v. Oliver*, 16 S.C. 47, 52, (1881) ("[W]e must necessarily give to those words the sense in which they are generally used by those who framed and those who adopted the constitution, unless there is something in that instrument showing that the words in question were used in a different sense."). This Court in *Counts* expressly recognized the application of this principle in the context of interpreting the privacy provision, noting that the Court's interpretation of Section 10 necessarily may "not exceed the bounds of [the Court's] . . . judicial authority as conferred by the drafters of right-to-privacy provision." 413 S.C. at 172, 776 S.E.2d at 70.

Stated differently, in defining the meaning of the phrase "unreasonable invasions of privacy," this Court may not apply its own—or even a contemporarily popular—definition of those words. Under its own precedent, this Court is bound to apply the meaning used by those who framed and adopted Section 10's language regarding "unreasonable invasions of privacy." This obligation is entirely consistent with this Court's responsibility to give effect to the intent of the framers and the people who adopted a given constitutional provision. *See Long*, 406 S.C. at 514,

753 S.E.2d at 426.[1]

The history of Article I, Section 10 resoundingly supports the conclusion that Section 10's protection against "invasions of privacy" does not guarantee a constitutional right to abortion. Since its adoption in 1971, no one—not the drafters of the provision, not legislators, not the public, 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; J.A. 265. 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

[1] In this respect, the textual and historical analysis of Section 10 merges, as any interpretation of the text of Section 10 must be informed by the historical meaning of the relevant textual phrase. In the past several decades, some jurists and legal scholars have termed this method of interpretation "originalism"—or it more recent variant "public meaning originalism." However, this method of interpretation has been the law in South Carolina since at least the 1800s. *See Oliver*, 16 S.C. at 52.

intend or understand the provision to extend any further. It certainly did not define privacy to mean a 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." J.A. 267.

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).

Turning to the legislature, since Section 10 was ratified, the South Carolina General Assembly has repeatedly acted to regulate and limit abortions in South Carolina. In doing so, the General Assembly has never acknowledged or recognized that Section 10 imposes any limitations on its ability to regulate abortion. First, in 1974, the General Assembly enacted S.C. Code § 44-41-20, which "rigidly adopted" the Roe trimester scheme. *See* 1 S.C. Jur. Abortion § 9; *see also McKnight*, 378 S.C. at 53, 661 S.E.2d at 364. 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). There is thus simply no indication that the legislature understood "unreasonable invasions of privacy" to mean a right to abortion. All evidence, including the fact that abortion remained illegal in South Carolina following the adoption of Article I, Section 10, points to the contrary.

Finally, turning to the public, there is no evidence to suggest that the voters who approved Section 10 understood the section to encompass a right to abortion. In the lead up to the public vote on Section 10, *The State* newspaper reported that the section was intended to "protect individuals from indiscriminate wire-tapping, eavesdropping, or surveillance by electronic devices." J.A. 928. The editorial noted that law enforcement "still would be enabled to conduct such surveillance, but only through compliance with proper legal procedures." J.A. 928. In a more detailed report for *The State*, reporter Edward D. Harrill described the purpose of Section 10 as follows:

> 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.

J.A. 925; *see also* J.A. 930 (describing the purpose of Section 10 as protecting against improper use of bugging devices and data banks).

A variety of commentators and legal experts have recognized the limited scope of Section 10. As explained by William Shepard McAninch, the distinguished author of the seminal work on South Carolina criminal law—The Criminal Law of South Carolina, Section 10 was "intended to

afford additional protection against government snooping" and was enacted in response to a new federal wiretap law. J.A. 923; *see also* Constance Boken, *Expounding the State Constitution: The Substantive Right of Privacy in South Carolina*, 46 S.C. L. Rev. 191, 202 (1994).

Petitioners have no real answer to this clear weight of authority. Instead, Petitioners misleadingly cite the minutes of the West Committee to suggest that the "drafters of the right to privacy expected that right to evolve more broadly over time through judicial interpretation." Petitioners Br. at 14.

However, the referenced discussion from the West Committee minutes plainly related to concerns about improper government surveillance. And these same minutes indicate that the committee only rejected narrower language regarding electronic surveillance because of concerns about the development of technology—not privacy rights generally. *See* J.A. 468 ("Mr. Stoudemire: Because I don't think we can say 'electronic' because who knows, ten years from now it might not be electronic. As Dan points in his letter, you got computer. I don't think is quite electronic."); *see also* J.A. 466–7 (rejecting a narrower use of the word communications because of concerns about data processing banks).

Petitioners also suggest that because litigation surrounding abortion was pending in 1969 and 1970, the drafters of Section 10 and South Carolina voters must have intended for the phrase "unreasonable invasions of privacy" to extend to abortion. However, there is no evidence to suggest that the committee members—much less voters—were aware of those decisions. Indeed, the only decision cited by Petitioners in support of this argument was actually issued approximately three months after the West Committee submitted its final report. *See* Final Report at 1 (issued June 1969); *see also People v. Belous*, 458 P.2d 194 (Sept. 5, 1969).

Finally, Petitioners argue that because certain individuals in South Carolina were illegally

performing abortions in the 1970s, the West Committee, the legislature, and voters must have somehow intended to provide for a right to abortion in Article I, Section 10. Such argument plainly lacks merit and is in no way dispositive of the intent of the majority of South Carolina voters.

(2) *This Court's precedent does not support a right to abortion.*

Although this 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). As this Court explained in *State v. Forrester*, 343 S.C. 637, 647, 41 S.E.2d 837, 842 (2001), the "drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches."

No South Carolina court—including this Court—has ever held that the right to privacy includes the right to obtain an abortion. In fact, in one of the only times this 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, Petitioners largely rely on a single decision from this Court—*Singleton v. State*, 313 S.C. 75, 437 S.E.2d 61 (1993).[2] In *Singleton*, this 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. *Singleton* is distinguishable and not controlling here

[2] Petitioners also rely on *Hughes v. State*, 367 S.C. 389, 626 S.E.2d 805 (2006) to support their privacy claim. However, the discussion of any privacy right in *Hughes* is confined to a single footnote. Further, *Hughes* confirms the limited nature of the holding in *Singleton*. *See Hughes*, 367 S.C. at 398 n.2, 626 S.E.2d at 810 n.2 (noting in dicta that an inmate's right to be free from unwanted medical intrusions is rooted in the state constitutional right to privacy and the Fourteenth Amendment's Due Process clause).

for at least two reasons.

First, *Singleton* is factually distinguishable. The Court in *Singleton* addressed a narrow and limited set of facts. 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.

Second, the legal reasoning of *Singleton* is distinguishable. The holding in *Singleton* did not address—and did not purport to address—abortion, forced continuation of pregnancy, or any other private medical procedure. Rather, *Singleton* addressed the exceedingly narrow issue of the forced medication of death row inmates. This distinction between forced medication of a prisoner and the creation of a constitutional right of a woman to choose abortion is compelling—particularly so because abortion implicates the rights of the unborn child.

Further, the authority upon which *Singleton* relied has been significantly eroded. In *Singleton*, this Court relied on both precedent from the United States Supreme Court and persuasive authority from the State of Louisiana in concluding that "an inmate can only receive forced medication where the inmate is dangerous to himself or to others, and then only when it is in the inmates' best medical interest." 313 S.C. at 89, 437 S.E.2d at 61; *see also Hughes v. State*, 367 S.C. 389, 398 n.2, 626 S.E.2d 805, 810 n.2 (2006) (noting that the inmate's right recognized in *Singleton* was grounded in the state right to privacy and the Fourteenth Amendment's Due Process clause). Specifically, this Court cited United States Supreme Court precedent regarding substantive due process. This precedent and persuasive authority is inapplicable in this case. With

respect to the Supreme Court precedent, the Court in *Dobbs* expressly rejected the notion that the Due Process Clause protects a purported right to abortion. *See Dobbs*, 142 S.Ct. at 2242.

With respect to the Louisiana authority, the Louisiana Supreme Court has never held that its state constitutional privacy provision encompasses a right to abortion. Indeed, there are compelling reasons to think that the privacy provision in the Louisiana Constitution was not intended to encompass a right to abortion. *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.").[3]

In the years following the *Singleton* decision, courts in South Carolina have also recognized limitations to the right to privacy. As noted above, this Court 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

[3] Only two years ago, Louisiana voters overwhelming approved an amendment to their state constitution, expressly clarifying that Louisiana's Declaration of Rights does not protect a right to abortion. *See* La. Const. Ann. art. I, § 20.1 ("To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.").

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, Petitioners 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*, 975 N.W.2d 710, 716, 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.").

Additionally, any persuasive value of those decisions has been significantly undermined following the Supreme Court's decision in *Dobbs*. Many of the state cases that previously found a state constitutional right to abortion expressly relied upon *Roe* and its related privacy underpinnings. However, *Dobbs* disclaimed a federal right to abortion and clarified that the Court's

previous holdings were not rooted in a putative privacy interest. *See Dobbs*, 142 S.C.t. at 2271 ("When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process clause.").

(3) *The Heartbeat Bill survives any level of scrutiny or review.*

Even if this Court were to conclude that Article I, Section 10 encompasses a right to abortion, the Heartbeat Bill would withstand any level of scrutiny or review.

As a threshold matter, Petitioners apply the wrong standard of review. Despite Petitioners' conclusory statement to the contrary, the strict scrutiny standard would not apply if this Court were to conclude that Section 10 includes a right to abortion. Instead, this Court would simply seek to determine whether the Heartbeat Bill is a "reasonable" invasion of any purported privacy interests.

Petitioners cite this Court's decision in *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 68 S.E.2d 338 (2002) in support of the argument that strict scrutiny should apply. However, *Luckabaugh* is readily distinguishable. Luckabaugh applied strict scrutiny to a substantive due process claim brought under both the United States and South Carolina Constitutions. In doing so, this Court noted that it only applied strict scrutiny because of the federal claim at issue; it expressly noted that it would ordinarily apply rational basis review to a state constitutional claim. 351 S.C. at 140 n.7, 568 S.E.2d at 347 n.7 ("We are mindful when reviewing a challenge to a state statute under the South Carolina Constitution we apply the rational basis test. However, we do not separately address the constitutionality of the Act under that standard because we find it is constitutional under the more stringent strict scrutiny analysis required by the United States Constitution.") (internal citation omitted). *Luckabaugh* did not purport to hold that strict scrutiny applies to a claim brought under Article I, Section 10.

Rather than apply strict scrutiny, this Court would analyze whether the Heartbeat Bill is a "reasonable" invasion of any purported privacy interest in abortion. *See State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) ("The focus in the state constitution is on whether the invasion of privacy is reasonable . . . ."); *see also State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490 at 494 (2009) (noting that the "ultimate touchstone" of the Fourth Amendment is reasonableness); *Forrester*, 343 S.C. at 651, 541 S.E.2d at 844 (Burnett, J., concurring and dissenting) ("Like the protections offered by the Fourth Amendment, the privacy protections in the state constitution are textually based on reasonableness."). Put differently, this Court would seek to determine whether the Heartbeat Bill is arbitrary. *See State v. Jones*, 435 S.C. 138, 866 S.E.2d 558 (2021).

The Heartbeat Bill easily passes constitutional muster under this framework, as it unquestionably presents a reasonable restriction on any purported right to abortion. The Heartbeat Bill carefully balances a variety of considerations, including considerations related to the protection of unborn life, maternal health, and abortion access. By its own terms, the Heartbeat Bill ensures access to abortion, allowing elective abortions up until a fetal heartbeat is detected and allowing abortions after that point in certain circumstances. As Dr. Skop explained in her expert report in the federal litigation, "there is no doubt that the vast majority of women have sufficient time to obtain an abortion prior to the point of a detectable heartbeat." J.A. 304.

The bill also allows abortion after a fetal heartbeat is detected in cases that involve rape, incest, or fetal anomalies. Act No. 1, § 3, S.C. Code Ann. § 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. As explained below, this exception imposes an objective medical standard that enables physicians to perform abortions when the mother's life or health is seriously threatened. Under a reasonableness or rational basis approach, the bill must survive review even if these exceptions are somehow underinclusive or overinclusive. *See SPUR at Williams Brice Owners Ass'n, Inc. Lalla*, 415 S.C. 72, 88, 781 S.E.2d 115, 123 (Ct. App. 2015).

The further restrictions on abortion access are plainly reasonable in light of the State's legitimate and compelling interest in protecting the life of the unborn. By restricting elective abortions after a fetal heartbeat is detected, the State is advancing a compelling interest in the protection of unborn life. As Dr. Skop explained in her expert reported prepared in the federal litigation, this prohibition is a "reasonable judgment consistent with medical approaches to human life." J.A. 303. In explaining the reasonableness of this judgment in light of medical principles, Dr. Skop stated:

> There are other medically sound reasons to use [the milestone of a detectable fetal heartbeat]. Although spontaneous pregnancy losses (miscarriages) are estimated to occur in 10-15% of clinically recognized pregnancies, losses after cardiac motion has been detected are rare, estimate at 2-3%. Thus, the fetal human being who has progressed in development to the point that a functioning cardiovascular system can be detected can reasonably be expected to reach birth and entry into human society unless an external action causes his demise. The state can reasonably conclude that these are human lives worthy of the state's protection.

J.A. 303–04; *see also* Act No. 1, § 2(2) (noting that fewer than five percent of all natural pregnancies end in spontaneous miscarriage after the detection of a fetal heartbeat); Act No. 1, § 2(5) (noting that a fetal heartbeat is a key medical predictor that an unborn human individual will reach live birth).

These restrictions are also reasonable in light of other state interests. As explained below, the bill's restrictions on later term abortions promote maternal health because the risks associated with abortion increase as the age of the unborn child increases. The bill also provides women with

vital medical information about their pregnancy and their unborn children. *See* Act No. 1, § 2(8) (noting that 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."). Additionally, by imposing a general time limitation on the abortion procedure, the bill not only generally protects unborn life but works towards the mitigation of fetal pain. *See Dobbs*, 142 S.Ct. at 2284. Finally, through various sections, the bill also seeks to regulate the practice of medicine and preserve the integrity of the medical profession. *See id*.

However, even if Petitioners are correct about the applicable standard of review, the Heartbeat Bill survives a strict scrutiny analysis. To survive a strict scrutiny analysis, the Heartbeat Bill must (1) meet a compelling state interest and (2) be narrowly tailored. *Luckabaugh*, 351 S.C. at 141, 568 S.E.2d at 347.

The Heartbeat Bill promotes several compelling state interests, including the protection of unborn life and the protection of maternal health. As Dr. Skop explained in her expert report, the bill makes a reasonable judgment consistent with medical science that unborn human life should be protected. *See* J.A. 303–04. Dr. Skop further explained why the detection of a fetal heartbeat is a reasonable point at which to protect such life. *See* J.A. 303–04; *see also* Act No. 1, § 2.

This Court has repeatedly recognized that the State has a legitimate and compelling interest in protecting unborn human life. *See McKnight v. State*, 378 S.C. 33, 54, 661 S.E.2d 354, 364 (2008) (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."). As explained by this Court 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."

Most recently, the Supreme Court in *Dobbs* explained that states have profound interests in protecting unborn life at all stages of development:

> 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 . . . .

Dobbs, 142 S.Ct. at 2284. The Court also made clear that states have a profound interest in protecting maternal health. *See id*. ("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."). [4]

With respect to maternal health, it is now widely accepted that the risks associated with abortion increase as the gestational age of the unborn child progresses. *See*, *e.g.*, *Planned Parenthood Minnesota, North Dakota, South Dakota v. Noem*, 584 F.Supp.3d 759, 768 (D.S.D.) (noting that the parties agree that the risks that accompany abortion increase with gestational age); *Whole Woman's Health Alliance v. Hill*, 493 F.Supp.3d 694, 712 (S.D. Ind. 2020) (noting that there is no dispute between the parties that the risks associated with certain abortions increase with gestational age); *see also* Clark Forsythe*, The Medical Assumption at the Foundation of Roe v. Wade & Its Implications for Women's Health,* 29 ISSUES L. & MED. 183, 201 (2014) (collecting

[4] 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).

medical authorities and rejecting the proposition that abortion is safer than childbirth). By limiting access to abortion after the detection of a fetal heartbeat, the Heartbeat Bill reasonably seeks to protect women from the increased medical risks associated with abortion.

Additionally, the bill promotes maternal health and maternal well-being generally by providing women with vital medical information about their pregnancy. *See* Act No. 1, § 2(8). The provision of this type of information is compelling state interest. *See Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1057 (D.S.D. 2011) ("There is a compelling state interest . . . in informing a woman of truthful, relevant, and non-misleading information about abortion, alternatives to abortion, and pregnancy assistance. . . . [T]here is no dispute that these goals constitute a compelling state interest.").

The Heartbeat Bill is narrowly tailored to promote these compelling interests. Petitioners' argument to the contrary lacks merit for multiple reasons. First, the fundamental premise of Petitioners' argument is mistaken. Petitioners insist that the State does not have a compelling interest in the life of the unborn. *See* Petitioners' Brief at 24. However, this argument is squarely foreclosed by precedent from this Court and the United States Supreme Court. *See Dobbs*, 142 S.Ct. at 2284; *see also McKnight*, 378 S.C. at 54, 661 S.E.2d at 364; *Whitner*, 328 S.C. at 17–18, 492 S.E.2d at 785–86. Such an argument is also contrary to the General Assembly's own findings on the subject. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795, 106 S. Ct. 2169, 2197, 90 L. Ed. 2d 779 (1986), *overruled by Planned Parenthood of Se. Pennsylvania v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (White, J., dissenting) ("[I]f a state legislature asserts an interest in protecting fetal life, I can see no satisfactory basis for denying that it is compelling.").

Second, despite Petitioners' conclusory statement to the contrary, no other "steps" would

be as effective at advancing the State's compelling interest in the protection of unborn life. The Heartbeat Bill's restrictions on abortion following the detection of a fetal heartbeat are narrowly designed to advance and optimize the preservation of unborn life. *See* Act No. 1, § 2 (describing birth rates following detection of fetal heartbeat).

B. The Heartbeat Bill does not violate Article I, Section 3.

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." *Luckabaugh*, 351 S.C. at 147, 568 S.E.2d at 351. 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*.

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). Put succinctly, rational basis review is a "steep hill to climb." *Bodman*, 403 S.C. at 70, 742 S.E.2d at 368.

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).

Petitioners argue that the Heartbeat Bill imposes three discriminatory classifications: (1) the Heartbeat Bill discriminates on the basis of sex; (2) the Heartbeat Bill discriminates between pregnant women who seek abortion and pregnant women who seek to carry their pregnancies to term; and (3) the Heartbeat Bill discriminates between women seeking abortions allowed under the bill and women seeking abortions disallowed under the bill. Petitioners Br. at 25–26.

Petitioners make an initial circular argument that heightened scrutiny should apply to these classifications because the Heartbeat Bill affects the exercise of a fundamental right—namely a right ot obtain an abortion—and because the bill violates the "privileges and immunities" clause of Article I, Section 3. Both arguments fail as a matter of law. For the reasons discussed above, there is no right abortion in Article I, Section 10, and as will be discussed below, abortion is not a

fundamental right under the state substantive due process clause.

Petitioners' argument regarding the "privileges and immunities" clause also fails.[5] As this Court has recognized, the privileges and immunities clause "was intended to prevent retaliation [against citizens of other states] and promote federalism." *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 496, 316 S.E.2d 386, 388 (1984). There is no authority—legal or historical—to suggest that the clause provides for a right to abortion. Indeed, both the equal protection clause and the privileges and immunities clause were present when previous abortion laws were enacted. No historic or legal authority suggests that those provisions guaranteed a right to abortion, and no historic or legal authority suggests that the framers of those provisions understood them to confer a right to abortion.

Turning to the alleged classifications, Petitioners first allege that the Heartbeat Bill imposes an impermissible gender-based classification. 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, Petitioners' argument does not even get off the ground.

Assuming arguendo that the Heartbeat Bill could constitute a gender-based classification, Petitioners' 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

[5] Petitioners' argument on this point is not developed and is therefore abandoned or forfeited. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 13, 514 (1994) (holding that an issue was abandoned when the party failed to provide arguments or supporting authority for an assertion).

sexes are not similarly situated in certain circumstances." *State v. Wright*, 349 S.C. 310, 313, 563 S.E.2d 311, 313 (2002). This Court has, in fact, recognized that men and women are not similarly situated with respect to pregnancy. *See Griffin v. Warden, C.C.I*, 277 S.C. 288, 291, 286 S.E.2d 145, 147 (1982) (rejecting a challenge to a gender-based classification in a criminal statute because the statute realistically reflected the facts that the sexes are not similarly and that "virtually all of the harmful consequence of teenage pregnancy fall on the female."). Courts from across the country have likewise recognized that men and women are not similarly situated for purposes of an equal protection analysis. *See Reynolds ex rel State*, 975 N.W.2d at 743 (holding that women are "undeniably not" similarly situated to men with respect to pregnancy).

Further, the Heartbeat Bill survives intermediate scrutiny because it bears a fair and substantial relationship to legitimate state ends by protecting unborn life and protecting maternal health. *See Griffin*, 277 S.C. at 291, 286 S.E.2d at 147. To the extent Petitioners urge this Court to revisit its prior holdings regarding intermediate scrutiny of gender- or sex-based classifications, Petitioners' argument finds no support in case law from this State or from the United States Supreme Court. *See Griffin*, 277 S.C. at 291, 286 S.E.2d at 147; *see also Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 41, 457 (1976) (applying intermediate scrutiny to gender-based classification).

Petitioners' argument that the Heartbeat Bill is somehow based on outdated or unwarranted generalizations between the sexes finds no support in the bill's text or history. On the contrary, the bill merely realistically reflects that the two sexes are not similarly situated with respect to pregnancy. *See Griffin*, 277 S.C. at 291, 286 S.E.2d at 147. The Heartbeat Bill is readily distinguishable from laws that have been invalidated on the grounds of impermissible gender stereotyping. *See In Interest of Joseph T.*, 312 S.C. 15, 16, 430 S.E.2d 523, 524 (1993) (holding unconstitutional a statute that distinguished between males and females on the grounds that women

needed special protection because of "rough talk" due to their perceived "special sensitivities").

Petitioners' second and third putative discriminatory classifications find little to no support in South Carolina law and invoke no "suspect classifications." As a result, the rational basis test should apply. *See Luckabaugh*, 351 S.C. at 148, 568 S.E.2d at 351. Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether a legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. *Joseph v. South Carolina Department of Labor, Licensing and Regulation*, 417 S.C. 436, 451, 790 S.E.2d 763, 771 (2016).

With respect to the second and third elements of the test, the initial determination of the reasonableness of a classification rests with the legislature. *See Samson*, 295 S.C. at 367, 368 S.E.2d at 669. This Court may not set aside this classification unless it is "plainly arbitrary." *Id*. Additionally, it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *See Lee v. South Carolina Dep't of Natural Resources*, 339 S.C. 462, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000). Finally, a classification does not need to completely achieve its purpose to withstand constitutional scrutiny. *Bodman*, 403 S.C. at 70, 742 S.E.2d at 368.

As an initial matter, Petitioners' putative classes are arguably not similarly situated by Petitioners' own definitions. *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."). By definition, a woman who seeks to carry her pregnancy to term and a woman who seeks an abortion are different from one another in a material way. *See Floyd*, 403 S.C. at 482, 744 S.E.2d at 169. Likewise, by definition, a woman whose

pregnancy was caused by rape and a woman whose pregnancy was caused by voluntary consent are materially different from one another. *See id*. Given these material differences, the State may reasonably treat these women differently.

Further, even if members of the class are similarly situated, the members of the classes are not treated differently. To the extent Petitioners allege two separate classes, both classes consistent entirely of pregnant women, and all pregnant women in both putative classes are treated precisely the same. They may obtain an abortion under the parameters of the Heartbeat Bill.

Assuming arguendo that the classes are similarly situated and that they are treated differently, the legislature has a rational basis for any disparate treatment, and the disparate treatment bears a rational relationship to legitimate government purposes. With respect to Petitioner's second putative discriminatory classification, by treating women who wish to carry their pregnancies to term and women who wish to obtain an abortion differently, the State is necessarily advancing its interest in promoting unborn life. The above-referenced legislative findings and Dr. Skop's report illustrate the reasonableness of the Heartbeat Bill's approach in this respect. *See* J.A. 303–04; *see also* Act No. 1, § 2.

Also as referenced above, the bill reasonably advances other legitimate and compelling government interests, including the protection of maternal health, the provision of medical information to the mother, the mitigation of fetal pain, and the regulation of the practice of medicine. *See Dobbs*, 142 S.Ct. at 2284; *see also Daugaard*, 799 F. Supp. 2d at 1057 (finding that there is a compelling state interest in informing a woman of truthful and relevant information about abortion, alternatives to abortion, and pregnancy assistances).

With respect to Petitioner's third putative discriminatory classification, by treating women who are able to obtain an abortion under the bill differently from those who are not able to obtain

an abortion under the bill, the State has made reasonable determinations about the scope of abortion access in South Carolina. In doing so, the State has reasonably balanced compelling (and at times, competing) interests, including interests in the protection of the life of the unborn, the protection of maternal health, and the promotion of individual and public safety. *See* Act No. 1, § 2 (describing the findings of the General Assembly, which were based upon contemporary medical research).

As discussed extensively above, the State has a reasonable basis to generally limit abortion access following the detection of a fetal heartbeat because such limits protect the life of the unborn and protect maternal health. The State also has a reasonable basis for including the various exceptions in the Heartbeat Bill because the circumstances surrounding those exceptions present particularly unique medical, moral, social, and ethical concerns. *See Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 *(*2003) (discussing the various and legitimate state interests at stake in rape and incest exceptions). Those exceptions promote and carefully balance legitimate state interests in maternal health, unborn life, and public safety.

With regard to the Reported Rape Exception specifically, as discussed in greater detail below, the exception promotes important state interests in the life of the unborn child, the health of the mother, and individual and public safety. Consistent with those purposes, the State may reasonably distinguish between women who report their rapes and women who do not in limiting access to abortion.

C. <u>The Heartbeat Bill is not vague.</u>

A vagueness challenge brought under Article I, Section 3 rests on "the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *See Curtis v. State*, 345 S.C 557, 571, 549 S.E.2d 591, 598 (2001). To survive a vagueness

challenge, "all the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *Curtis*, 345 S.C. at 572, 549 S.E.2d at 599. A facial vagueness challenge to a statute is the most difficult challenge to mount successfully because the challenger must should that the law is incapable of any valid application. *See In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 n.3 (2006); *City of Aiken v. Smith*, No. 2015-MO-001, 2015 WL 164188, at *1 (2015) (citing cases for the proposition that a facial vagueness challenge is the most difficult challenge to mount successfully).

Petitioners' sole vagueness argument relates to S.C. Code § 44-41-710, which provides that the Heartbeat Bill does not repeal "any otherwise applicable provision of South Carolina law regulating or restricting abortion." According to Petitioners, that section of the Heartbeat Bill creates a conflict between the bill and prior South Carolina law, rendering the bill void for vagueness. This argument should be rejected for multiple reasons.

First, as a threshold matter, Petitioners arguably fail to state a vagueness claim. Petitioners present an "unusual vagueness argument," namely that a putative conflict in laws creates a vagueness problem. *See David v. Tennessee Dep't of Corrections*, No. M2017—2301-COA-R3-CV, 2018 WL 5618116 (Tenn. Ct. App. 2018). Courts from around the country have rejected this type of vagueness argument. *See Wiese v. Becerra*, 306 F.Supp.3d 1190, 1200 (E.D. Cal. 2018) ("[P]laintiffs do not cite, and the court is unaware of, any case that has held an enactment to be void for vagueness because it conflicts with another enactment and it is not clear which enactment controls."); *see also Karlin v. Foust*, 188 F.3d 446, 469 (7th Cir. 1999) (concluding that a possible conflict in law does not create a vagueness problem).

Second, Petitioners fail to demonstrate that they have standing to assert a facial vagueness

challenge.[6] To assert a facial vagueness challenge, Petitioners must demonstrate that the Heartbeat Bill does not clearly apply to their conduct. *See State v. Neuman*, 384 S.C. 395, 403, 683 S.E.2d 268, 272 (2008) ("One to whose conduct the law clearly applies does not have standing to challenge it for vagueness."). Petitioners have not alleged—and have not demonstrated—that it or any of its members are impacted by S.C. Code § 44-41-710. In fact, they have alleged precisely the opposite—namely that its members seek to engage in conduct that is clearly proscribed by the Heartbeat Bill.

Third, S.C. Code § 44-41-710 is not vague. The full text of that section provides the following:

> 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. An abortion that complies with this article but violates the provisions of Section 44-41-20 or any otherwise applicable provision of South Carolina law must be considered unlawful as provided in such provision. An abortion that complies with the provisions of Section 44-41-20 or any otherwise applicable provision of South Carolina law regulating or restricting abortion but violates this article must be considered unlawful as provided in this article. If some or all of the provisions of this article are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of South Carolina law regulating or restricting abortion must be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

S.C. Code § 44-41-710. As measured by common understanding and practices, the effect of S.C. Code § 44-41-710 is clear. The section plainly provides that an abortion performed in violation of the Heartbeat Bill is considered unlawful. The section further provides that if an abortion complies with the Heartbeat Bill but also violates an existing abortion regulation or restriction, that abortion is also unlawful. Such an approach makes good sense given the variety of abortion restrictions in

[6] Any as-applied vagueness claim must also necessarily fail for this same reason. *See Centaur, Inc. v. Richland County*, 301 S.C. 374, 382, 392 S.E.2d 165, 170 (1990).

place under South Carolina law, including parental consent requirements—which the Heartbeat Bill simply does not purport to address. *See*, *e.g.*, S.C. Code § 44-41-31 (proving for consent requirements for abortions performed on minors).[7]

Significantly, this type of provision is not unique to the Heartbeat Bill or abortion generally and is used in other complex regulatory contexts. For example, the legislature included a similar provision in enacting the Gambling Cruise Act in 2005. *See Catawba Indian Nation v. State*, 407 S.C. 526, 535, 756 S.E.2d 900, 905 (2014). In doing so, the legislature merely sought to clarify that the new law did not purport to undo any other existing regulations on the same topic. *See* S.C. Code § 3-11-400 (noting that the provisions of the chapter must not be construed to "repeal or modify any other provision of law relating to gambling, or an existing county or municipal ordinance regulating or prohibiting gambling or gambling vessels); *see also City of Spartanburg v. Blalock*, 223 S.C. 252, 263, 75 S.E.2d 361, 366 (1953) (describing similar statutory provision in the context of waterworks system).

Tellingly, aside from their legal conclusions, Petitioners provide no evidence to support their vagueness claim. In the absence of such evidence, this Court simply cannot conclude that S.C. Code § 44-41-710 renders the Heartbeat Bill vague.

Fourth, S.C. Code § 44-41-710 is not vague in all its applications. As noted above, there are many circumstances in which a physician or other healthcare professional will be obligated to comply with both the Heartbeat Bill and preexisting laws on abortion. For example, any abortion performed on a minor must comply with both the Heartbeat Bill and any other existing regulations—such as the consent requirement. Further cutting against a finding of vagueness in all

[7] The section also provides that if the Heartbeat Bill were to be enjoined, all other laws regulating abortion in South Carolina would remain in force. This type of provision is also common, particularly in the complex regulatory contexts like abortion and healthcare generally.

circumstances, there are also scenarios in which conduct would be clearly prohibited by both the Heartbeat Bill and preexisting South Carolina abortion laws. For example, an abortion performed in the third trimester without any applicable exceptions would violate any South Carolina law on abortion.

Fifth, and as explained below, S.C. Code § 44-41-710 is severable. Even if this Court were to conclude that S.C. Code § 44-41-710 is vague, the proper remedy is to sever that provision from the Heartbeat Bill and allow the remainder of the bill to go into effect. *See Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 650, 528 S.E.2d 647, 656 (1999) (finding a severability clause as evidence of legislative intent and giving effect to that intent).

In a somewhat similar vein, to the extent this Court views S.C. Code § 44-41-710 as creating a conflict of laws problem—and not a vagueness problem—the proper recourse is to allow the Heartbeat Bill to go into effect. *See City of Newberry v. Public Service Comm'n of South Carolina*, 287 S.C. 404, 407, 339 S.E.2d 124, 126 (1986) ("The case law of this State is clear that when there is a conflict between statutory provisions, the later enacted legislation prevails."). In advancing this argument, the State does not concede that such a conflict exists.

D. The Heartbeat Bill does not violate substantive due process.

The substantive due process guarantee of Article I, Section 3 ensures that legislation that deprives a person of "life, liberty, or property" has a rational basis. *See Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 346. To survive judicial scrutiny a law need only be "reasonably designed to accomplish its purposes." *Powell v. Keel*, 433 S.C. 457, 465, 860 S.E.2d 344, 348 (2021). Unless a law implicates a fundamental right, this Court may not scrutinize reasonable measures. *Walker v. South Carolina Dep't of Highways and Public Transp.*, 320 S.C. 496, 500, 466 S.E.2d 346, 348 (1995).

As an initial matter, Petitioners' argument fails because abortion is not a recognized liberty interest protected by Article I, Section 3. No South Carolina Court has ever held that abortion is a protected liberty interest, and there is nothing in the history or traditions of South Carolina to suggest otherwise. Indeed, abortion has been heavily regulated in South Carolina since at least the 1800s.

To the extent this Court looks to United States Supreme Court for guidance in interpreting the scope of liberty interests, the *Dobbs* decision squarely forecloses any argument that abortion is a protected liberty interest or fundamental right. *See In re Hearing*, 187 S.C. 1, 196 S.E. at 169 (holding that decisions of the United States Supreme Court as to fundamental constitutional rights are highly persuasive). In *Dobbs*, the Supreme Court expressly held no right to abortion is implicitly protected by the United States Constitution, including the due process clause. *See Dobbs*, 142 S.Ct. at 2242.

Assuming arguendo that abortion is somehow protected by the due process clause of Article I, Section 3, rational basis review applies. *See Luckabaugh*, 351 S.C. at 140 n.7, 568 S.E.2d at 347 n.7 ("We are mindful when reviewing a challenge to a state statute under the South Carolina Constitution we apply the rational basis test."). South Carolina precedent is clear on this point. *See R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000) (holding that the standard for substantive due process challenges to state statutes is whether the statute bears any reasonable relationship to any legitimate government interest). Thus, to the extent Petitioners intend to challenge this precedent, they must overcome a series of decisions and the corresponding hurdle of stare decisis. *See State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 44, 446 (1996) (explaining that stare decisis provides a "quality of justice" resulting from certainty and stability).

As described elsewhere, the Heartbeat Bill plainly survives rational basis scrutiny—or any other heightened form of scrutiny—because it is reasonably designed (and narrowly tailored) to accomplish its purposes of protecting unborn life, protecting maternal health, regulating the medical profession, and promoting public safety.

II. The Heartbeat Bill's Exceptions Are Constitutional.

A. The Death or Permanent Injury Exception is Constitutional.

Petitioners appear to argue that the Death or Permanent Injury Exception is unconstitutional for four reasons: (1) the exception violates a right to bodily integrity allegedly found in Article I, Section 10; (2) the exception violates the equal protection clause of Article I, Section 3; (3) the exception violates substantive due process; and (4) the exception is unconstitutionally vague. This Court should reject all four arguments for many of the same reasons as outlined above.

First, Petitioners argue that the Death or Permanent Injury Exception unreasonably intrudes intro pregnant women's private medical decisions, thereby impinging on their rights to bodily integrity or autonomy. However, as discussed at length above, Article I, Section 10 does not provide for a right to bodily integrity autonomy in the context of abortion. *See Forrester*, 343 S.C. at 647, 41 S.E.2d at 842. There is simply nothing in the text or history of Article I, Section 10 to suggest otherwise.

Second, Petitioners argue that the Death or Permanent Injury Exception violates equal protection by distinguishing between patients with serious and severe physical injuries and patients with less severe or non-physical injuries. This equal protection argument likely fails at the outset because the two classes are necessarily not similarly situated. *See Town of Hollywood*, 403 S.C. at 480, 744 S.E.2d at 168. By Petitioners own definition, patients with serious and sever

physical injuries are necessarily different from patients with less severe or non-physical injuries.

But even if this Court were to conclude that those patients are similarly situated for an equal protection analysis, there is a rational basis for any disparate treatment. Specifically, the State reasonably concluded that an abortion may be necessary if a mother's life is in danger or if her health is seriously threatened. In doing so, the State reasonably balanced the need to protect both the life of the unborn child and the life of the mother. In limiting access to abortion in other medical circumstances, the State reasonably chose to prioritize protecting the life of the unborn child over other medical considerations.

Third, Petitioners argue that the Death or Permanent Injury Exception violates substantive due process and possibly the privileges and immunities clause. However, as discussed above, there is simply no historical evidence or case law to support the argument that the due process clause or the privileges and immunities clause supports a right to abortion. To the extent there could be such a right in those clauses, the Heartbeat Bill withstands scrutiny as reasonable.

Fourth, Petitioners argue that the Death or Permanent Injury Exception is unconstitutionally vague and possibly overbroad.[8] As an initial matter, Petitioners have failed to establish standing to bring this challenge. *See Neuman*, 384 S.C. at 403, 683 S.E.2d at 272. Petitioners have not alleged and have provided no evidence to suggest that they themselves have sought to perform an abortion under this exception. While Petitioners point to news articles that are purportedly related to the application of the exception, Petitioners have failed to show that the Heartbeat Bill is vague as applied to their own conduct. *See South Carolina Dep't of Social*

[8] Petitioners do not expressly invoke the legal concept of overbreadth, and therefore, they have arguably forfeited or abandoned this argument. *See McLean*, 314 S.C. at 363, 444 S.E.2d at 514. Regardless, for the reasons discussed herein, the Heartbeat Bill does not reach or chill any constitutionally protected conduct. *See*, *e.g.*, *In re Anonymous Member of South Carolina Bar*, 392 S.C. 328, 337, 709 S.E.2d 6333, 638 (2011) (noting that the challenged provision did not reach a substantial amount of protected speech).

Services v. Michelle G., 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014). The failure to make this showing dooms either a facial or as-applied vagueness challenge.

But even if Petitioners do have standing to assert this type of vagueness claim, they have failed to show that the Death or Permanent Injury Exception is actually vague or is vague in all its applications. The exception employs ordinary terms "which find adequate interpretation in common usage and understanding." *See Michelle G.*, 407 S.C. at 507, 757 S.E.2d at 393. Specifically, the exception references a physician's exercise of "any reasonable medical judgment" in determining whether a medical procedure is necessary to prevent "death" or "the serious risk of a substantial and irreversible impairment of a major bodily function of the pregnant woman." *See* S.C. Code § 44-41-690.

Courts from across the country have concluded that this type of "reasonable medical judgment" standard is not unconstitutionally vague. *See*, *e.g.*, *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1996) (rejecting a vagueness challenge to a Wisconsin abortion law that required physicians to exercise "reasonable medical judgment" to determine whether a medical emergency existed before performing an abortion). In doing so, these courts have held that these types of objective standards provide sufficient fair warning to physicians and fair standards for adjudication. *See Karlin*, 188 F.3d at 464. The mere possibility of disagreement between physicians about the possible application of the exception is an insufficient reason to conclude that the exception is unconstitutionally vague. *See id*.

Further, this standard undercuts any argument that the exception does not adequately protect patients' health or that the exception creates problematic standards for physicians to apply. *See* J.A. 337. This type of exception is exceedingly common in abortion regulations and has been found to apply to a variety of life-threatening medical conditions, including ectopic pregnancies.

See, *e.g.*, *Britell v. United States*, 150 F.Supp.2d 211, 225 (D. Mass. 2001) (concluding that an ectopic pregnancy would fall with a federal statute's life of the mother exception).

B. The Reported Rape Exception is Constitutional.

Petitioners appear to argue that the Reported Rape Exception is unconstitutional for two reasons: (1) the exception violates Article I, Section 10; and (2) the exception violates the equal protection clause.

In addition to violating the purported rights to bodily integrity and autonomy, Petitioners argue that the Reported Rape Exception also violates a right to informational privacy found in Article I, Section 10. Specifically, Petitioners alleged that the disclosure requirement—which mandates that a physician report an allegation of rape or incest to the sheriff in the county in which the abortion is performed—violates patients' privacy rights in their own medical information. This argument fails for multiple reasons. First, there is nothing in the history of Article I, Section 10 to suggest that the section was intended to extend to this type of privacy concern. *See Forrester*, 343 S.C. at 647, 41 S.E.2d at 842. There is simply no evidence to suggest that the West Committee, the General Assembly, or the public viewed Section 10 as applying to this type of reporting situation.

Second, any disclosure in these circumstances is purely voluntary in nature. Specifically, the bill provides that prior to performing the abortion based on the rape or incest exception, the physician "must notify the pregnant woman that the physician will report the allegation of rape or incest to the sheriff." S.C. Code § 44-41-680. A voluntary disclosure of this kind does not offend Article I, Section 10. *See Shane v. Parish of Jefferson*, 209 So.3d 726, 741 (2015) ("However, the right to privacy, like other personal rights, may be lost in many ways, by express or implied waiver, consent, or by a course of conduct that prevents its assertion.").

Third, even if this Court concludes that Section 10 provides for a right to information privacy of this kind and that the disclosure of this information actually violates Section 10, the State's restriction on this right is reasonable because it promotes a variety of compelling state interests, including the protection of the life of the unborn, the protection of maternal health, the protection of victims of crimes, and the enforcement of the criminal code. Such reporting requirements have been upheld in other regulatory contexts surrounding abortion. *See*, *e.g.*, *Fischer v. Com., Dep't of Pub. Welfare*, 116 Pa. Cmwlth. 437, 450, 543 A.2d 177, 183 (1988) (refusing to enjoin rape reporting requirement on grounds that requirement is a "new attempt by the legislature to attack the perpetrators of a most heinous crime.").[9] In a different legal context, the Fourth Circuit upheld a reporting requirement on the grounds that it was necessary to the enforcement of the criminal code and that it afforded protection to victims of crimes. *See Manning v. Hunt*, 119 F.3d 254, 273 (4th Cir. 1997) (noting that a reporting requirement is beneficial to minor victims and that an invalidation of such a requirement affords protection to rapists and perpetrators of incest).

Petitioners also argue that the Reported Rape Exception violates the equal protection clause because the reporting requirement applies to abortion but not to other medical procedures. 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

[9] In addition to the enforcement of the criminal code, the *Fischer* court acknowledged other important state interests in the reporting requirement. *See Fischer*, 116 Pa. Cmwlth. At 450, 543 A.2d at 183. Given the various state interests at stake, it is not surprising that these types of reporting requirements are common in the context of abortion regulation.

termination of a potential life."). Given this reality, different treatment does not offend the equal protection clause because the classes are not similarly situated. *See Town of Hollywood*, 403 S.C. at 480, 744 S.E.2d at 168.

But even if an abortion is similarly situated to other medical procedures, Petitioners ignore the fact that other medical procedures are not treated differently. In a variety of other medical contexts, South Carolina law impose reporting requirements on physicians and other medical personnel. *See* S.C. Code § 63-7-310 (mandating physicians and others to report child abuse or neglect discovered in the court of treatment); *see also* S.C. Code § 16-3-1072 (mandating physicians and others to report gunshot wounds to sheriff's department). These separate reporting requirements demonstrate that the requirement found in the Heartbeat Bill is in no way linked to gender stereotypes but is instead motivated by a concern for patient safety. On the contrary, these reporting requirements serve a vital law enforcement purpose and seek to promote not only the safety of the individual but also the safety of the public more generally. *See Doe v. Marion*, 373 S.C. 390, 398, 645 S.E.2d 245, 249 (2007) (finding that the purpose of a reporting statute is to protect the public).

In any event, the Reported Rape Exception survives rational basis review under the equal protection clause. Under rational basis review, a challenged law may withstand scrutiny even if it is "underinclusive or overinclusive, so long as the classification is not arbitrary." *Lalla*, 415 S.C. at 88, 781 S.E.2d at 123. The classification in Heartbeat Bill is necessarily not arbitrary given the unique nature of the abortion procedure, which involves treatment by a medical professional that necessarily raises questions regarding the formation of human life.

Further, the exception reasonably promotes a variety of government interests, including the protection of unborn life, the protection of maternal health, and the protection of crime victims

and the public generally. S*ee Fischer*, 116 Pa. Cmwlth. At 450, 543 A.2d at 183.[10]

III. The Heartbeat Bill Is Valid.

As emphasized above, the Heartbeat Bill is plainly valid under a long line of precedent from this Court and the United States Supreme Court. As this Court itself recognized in its August 17, 2022 order, the legislature has plenary authority to legislate and make public policy decisions, subject only to constraints imposed by the United States Constitution and the South Carolina Constitution. As referenced above, any such legislation is entitled to a strong presumption of validity.

Petitioners' argument to the contrary, which invokes the *void ab initio* doctrine, must be rejected for at least three reasons. First, the doctrine is simply inapplicable in this case because the Heartbeat Bill was never adjudicated to be unconstitutional. Instead, a federal district court issued a preliminary injunction against the enforcement of the statute. *See Planned Parenthood South Atlantic v. Wilson*, 527 F.Supp.3d 801 (D.S.C. 2021). That preliminary injunction was subsequently vacated by the Fourth Circuit. *See Planned Parenthood South Atlantic v. Wilson*, No. 21-1369, 2022 WL 2900658 (4th Cir. 2022). The Heartbeat Bill was thus never actually adjudicated to be unconstitutional.

Second, the United States Supreme Court's decision in *Dobbs* precludes any finding that the Heartbeat Bill is *void ab initio*. In *Dobbs*, the United States Supreme Court expressly held that *Roe* was "egregiously wrong from the start." *Dobbs*, 142 S.Ct. at 2243. *Roe* (or its progeny) thus could not be a basis for rendering the Heartbeat Bill unconstitutionally void at the time of its enactment.

But even if *Roe* did somehow void the Heartbeat Bill at the time of its enactment, the *Dobbs*

[10] Sheriffs can, of course, share information with other law enforcement personnel where appropriate.

decision revived the Heartbeat Bill. When a law is initially held to unconstitutional but then later determined to be constitutional, the law is valid and in effect. *See Legal Tender Cases*, 79 U.S. 457, 553 (1870) ("[W]e hold the acts of Congress constitutional as applied to contracts made either before or after the passage."); *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. App. 1952) ("There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require re-enactment by the legislature in order to restore its operative force.").

In the context of abortion laws, a variety of commentators have observed that previously enjoined abortion laws would become enforceable if *Roe* and its progeny were overruled by the Supreme Court. *See*, *e.g.,* Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in A Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 615 (2007) ("Once an overruling of Roe v. Wade lifted the bar to enforcement, previously enacted state laws forbidding abortion would regain their vitality as soon as any judicial injunctions that now bar their enforcement were lifted."); David M. Smolin, *Abortion Legislation After Webster v. Reproductive Health Services: Model Statutes and Commentaries*, 20 CUMB. L. REV. 71, 91 (1990) ("Thus, it would appear that abortion-restrictive laws, whether passed before Roe or since, will automatically revive if Roe is ever reversed.").

Third, the case law cited by Petitioners for this argument is readily distinguishable. Petitioners largely rely on two South Carolina cases to support their argument on this point—*Swicegood v. Thompson*, 435 S.C. 63, 865 S.E.2d 775 (2021) and *Atkinson v. S. Express Co.*, 94 S.C. 444, 78 S.E. 516 (1913). However, neither case controls in these circumstances as neither case addresses the situation in which a court overrules its own precedent to find a statute constitutional. As this Court recognized in *White v. J.M. Brown Amusement Co., Inc*., 360 S.C.

366, 374, 601 S.E.2d 342, 346 (2004), the narrow issue in *Atkinson* was the determination of the parties' present rights and duties in light of an unconstitutional statute. The decision simply did not purport to address the status of those right and duties in the eventuality that the statute would later be found to be constitutional.

IV. The Heartbeat Bill Is Severable.

Finally, if this Court concludes for whatever reason that a provision of the Heartbeat Bill is unconstitutional, that provision is severable. As this Court explained in *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999), the "test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." If the remaining portions of the challenged act can be executed in accordance with legislative intent, the remaining ports of the act should not be stricken. *Joytime*, 338 S.C. at 649, 528 S.E.2d at 654. In making a severability determination, this Court will look to any severability clause which may be contained in the challenged act. *See id; see also Leavitt v. Jane L.*, 518 U.S. 137, 144, 116 S.Ct. 2068, 2072 (1996) (applying text of severability clause of state abortion law).

The Heartbeat Bill contains a robust severability clause. Specifically, Section 7 of the bill provides 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. This severability clause lends strong support to a finding that the legislature intended the various sections of the Heartbeat Bill to be severable. *See Joytime*, 338 S.C. at 650, 528 S.E.2d at 655. As a result, even if this Court invalidates a section of the bill, the remainder of the bill should be allowed to go into effect.

CONCLUSION

Abortion regulation is a deeply divisive policy issue. Individuals on both sides of this debate have strongly held and sincere beliefs about the proper scope of such regulation. These individuals and their elected representatives should be able to honestly and openly debate this issue through our democratic process.

This Court should not deprive the people and their representatives of the opportunity to do so. There is no right to abortion in the South Carolina Constitution, and in the absence of such a constitutional provision, basic principles of separation of powers demand that this Court honor the legislature's policy determination on this issue. *See Tiffany*, 419 S.C. at 559, 799 S.E.2d at 485 ("[A]bsent a constitutional prohibition, where the General Assembly has spoken and established policy, separation of powers demands that courts honor the legislative policy determination.").

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