UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Columbia Division)

PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and physicians and staff, *et al.*, *Plaintiffs*, v. ALAN WILSON, in his official capacity as Attorney General of South Carolina, *et al*., *Defendants*.	Case No. 3:21-cv-00508-MGL

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Dated: March 31, 2021

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INTRODUCTION AND NATURE OF THE CASE

As this Court recognized in its preliminary injunction order, "[t]his case does not present a close call." Mem. Op. & Order Granting Pls.' Mot. for a Prelim. Inj., ECF No. 73 (hereinafter "PI Order") 21. In the nearly five decades since the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), no court has upheld a law that bans abortions at a gestational age prior to viability. South Carolina's Senate Bill 1 (hereinafter "SB 1" or "the Act") bans nearly all abortions at and after approximately six weeks of pregnancy, though it is undisputed that no pregnancy is viable at six weeks. If permitted to take effect, SB 1 will criminalize almost all abortions beginning at the earliest stages of pregnancy, well before viability and before many people even know they are pregnant. It will force patients either to carry pregnancies to term or to attempt to travel out of state to obtain constitutionally protected health care banned by their own state government. And as this Court has recognized, SB 1's harsh impact will fall most heavily on "patients with low incomes, patients of color, and patients who live in rural areas." PI Order at 12 (quoting Decl. of Katherine Farris, M.D., ECF No. 5-3 (hereinafter "Farris Decl.") ¶ 47).

Without permanent injunctive relief blocking the Act's enforcement, Plaintiffs' patients will be denied their constitutional right to access safe and legal previability abortion in South Carolina. Plaintiffs, therefore, now ask this Court to grant them summary judgment and enter a permanent injunction to protect Plaintiffs' patients' health and rights.

BACKGROUND

On February 18, 2021, the South Carolina General Assembly passed SB 1, and Governor Henry McMaster signed it into law that afternoon. The Act took effect immediately upon receiving the Governor's signature. SB 1, § 9.

South Carolina law has long banned the performance of nearly all postviability abortions, *see* S.C. Code Ann. § 44-41-450, and it contains a "legal presumption" that "viability occurs no

sooner than the twenty-fourth week of pregnancy," *id.* § 44-41-10(l); *see also* S.C. Code Ann. Regs. 61-12.101(T).

While leaving these provisions in place, SB 1 mandates that "no person shall perform, induce, or attempt to perform or induce an abortion" where the "fetal heartbeat has been detected." SB 1, § 3 (adding S.C. Code Ann. § 44-41-680(A)) (the "Six-Week Ban"). It defines "fetal heartbeat" to include any "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." *Id.* (adding S.C. Code Ann. § 44-41-610(3)). The term, therefore, covers not just a "heartbeat" in the lay sense, but also early cardiac activity present before development of any cardiovascular system. And the Act defines "human fetus" to include an "individual organism of the species homo sapiens from fertilization [of an egg] until live birth." *Id.* (adding S.C. Code Ann. § 44-41-610(6)). Thus, the Act prohibits abortion after detection of the earliest embryonic cardiac activity.

SB 1 contains only narrow exceptions to the Six-Week Ban: (1) to save the life of the pregnant patient; (2) to prevent certain types of irreversible bodily impairment to the patient; (3) in cases of a fetal health condition that is "incompatible" with sustained life after birth; and (4) in some circumstances where the pregnancy is the result of rape or incest. *Id.* (adding S.C. Code Ann. § 44-41-680(B), which cross-references S.C. Code Ann. § 44-41-430(5)). The rape and incest exceptions apply only if, within 24 hours of the abortion, the physician reports the alleged rape or incest and the patient's name and contact information to the sheriff in the county where the abortion was performed, irrespective of the patient's wishes, where the alleged crime occurred, and whether the provider has already complied with other mandatory reporting laws, where applicable. *Id.* (adding S.C. Code Ann. § 44-41-680(C)).

Both the physician who performs an abortion, and the clinic in which the abortion is performed, risk severe penalties for violating the Six-Week Ban. Those penalties include a felony offense that carries a $10,000 criminal fine and up to two years in prison. *Id.* (adding S.C. Code Ann. § 44-41-680(D)); *see also* S.C. Code Ann. § 16-1-40 (accessory liability). Moreover, violation of the abortion ban could result in revocation of a doctor's medical license and a clinic's license to perform abortions. S.C. Code Ann. §§ 40-47-110(A), (B)(2); 44-41-70; 44-41-75(A). The Act also creates a new civil cause of action that authorizes a patient "on whom an abortion was performed or induced" in violation of the ban to sue the abortion provider for damages, and to recoup her court costs and attorney's fees as well. SB 1, § 3 (adding S.C. Code Ann. § 44-41-740).

The Act includes new ultrasound, mandatory disclosure, recordkeeping, reporting, and written notice requirements that this Court has recognized as closely intertwined with the operation of the abortion ban. *See, e.g.*, *id*. (adding S.C. Code Ann. §§ 44-41-640, -650); *id.* § 4 (amending S.C. Code Ann. § 44-41-460(A)); *id.* § 5 (adding S.C. Code Ann. § 44-41-330(A)(1)(b)); *id.* § 6 (amending S.C. Code Ann. § 44-41-60); *see also* PI Order 15–18 (discussing interrelationship of SB 1's provisions).

Plaintiffs filed suit on February 18, 2021, seeking a declaratory judgment and preliminary and permanent injunctive relief against SB 1 to protect their patients' access to constitutionally protected health care. On February 19, 2021, the Court entered a temporary restraining order ("TRO") blocking enforcement of the Act. On March 5, 2021, the Court extended this TRO to March 19, 2021.

On March 19, 2021, following briefing and argument, the Court granted Plaintiffs' motion for a preliminary injunction. The Court held that Plaintiffs have third-party standing to challenge

SB 1 on behalf of their patients, PI Order 6–8, and it affirmed *Roe*'s long-standing principle that a pregnant person has a right to terminate their pregnancy before viability, rejecting Defendants' argument that this principle had been "eroded" by *Gonzales v. Carhart*, 550 U.S. 124 (2007), PI Order 8–11. Citing South Carolina's legal presumption that "viability occurs no sooner than the twenty-fourth week of pregnancy," S.C. Code Ann. § 44-41-10(l), and record evidence demonstrating that viability is "medically impossible" at six weeks of pregnancy, when embryonic cardiac activity is first detectable, the Court held that Plaintiffs are likely to succeed on their claim that SB 1 is unconstitutional. PI Order 9–10 (quoting Farris Decl. ¶ 21). Finally, applying South Carolina state law, the Court concluded that the provisions of SB 1 are not severable and enjoined the Act in full. PI Order 15–18.

Given this binding law and the undisputed facts in the record, Plaintiffs now move for summary judgment on their claim that SB 1 is unconstitutional as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiffs Planned Parenthood South Atlantic ("PPSAT") and Greenville Women's Clinic, P.A. ("GWC") run the only outpatient health centers in South Carolina that provide abortion services to the public. Farris Decl. ¶ 25; Decl. of Terry L. Buffkin, M.D., ECF No. 5-2 (hereinafter "Buffkin Decl.") ¶ 12; Answer of Att'y Gen. & Solic. Wilkins, ECF No. 78 (hereinafter "AG & Wilkins Answer") ¶¶ 11, 18; Answer of Dir. Simmer to Pls.' First Am. Compl., ECF No. 84 (hereinafter "Simmer Answer") ¶¶ 9, 13.

2. PPSAT and GWC hold state licenses for each of their clinics to perform abortions through the end of the first trimester, *see* S.C. Code Ann. § 44-41-75(A), which corresponds to 14 weeks from the first day of the patient's last menstrual period ("LMP"), *id.* § 44-41-10; S.C. Code Ann. Regs. 61-12.101(S)(4); Farris Decl. ¶ 24; Buffkin Decl. ¶ 7; Simmer Answer ¶ 9.

3. Plaintiff Terry L. Buffkin, M.D., is a board-certified obstetrician-gynecologist and licensed to practice medicine in South Carolina. He is one of the physicians who provides abortions at GWC and is a co-owner of the clinic. Buffkin Decl. ¶¶ 1–2; AG & Wilkins Answer ¶ 12.

4. Fetal viability is generally understood as the point when a fetus has a reasonable likelihood of sustained survival outside the uterus, with or without artificial support. Farris Decl. ¶ 20; Buffkin Decl. ¶ 14; Decl. of Mary Norton, M.D., ECF No. 59-1 (hereinafter "Norton Decl.") ¶¶ 13, 18; *see* AG & Wilkins Answer ¶ 17; *see also Colautti v. Franklin*, 439 U.S. 379, 388 (1979) ("Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.").

5. South Carolina law establishes a "legal presumption" that "viability occurs no sooner than the twenty-fourth week of pregnancy." S.C. Code Ann. § 44-41-10(l); *see also* S.C. Code Ann. Regs. 61-12.101(T); *accord* AG & Wilkins Answer ¶ 23.

6. Because PPSAT and GWC perform abortions only in the first trimester of pregnancy, all abortions they perform are before the point of fetal viability. Norton Decl. ¶¶ 12, 18; AG & Wilkins Answer ¶ 18; *see also* Dep. of Ingrid Skop in App. of Evid. in Supp. of Pls.' Mot. to Exclude State Defs.' Expert Test. (hereinafter "Skop Dep.") 132:22–133:25, *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah), ECF No. 81-1, filed in this case as ECF No. 59-2 (testifying she has never seen an 18-week fetus survive more than one day after birth, if that).

7. On February 18, 2021, the South Carolina General Assembly passed SB 1 and Governor Henry McMaster signed SB 1 into law. AG & Wilkins Answer ¶ 22; Simmer Answer ¶

15. SB 1 took effect immediately upon receiving the Governor's signature. SB 1, § 9; AG & Wilkins Answer ¶ 22; Simmer Answer ¶¶ 2, 15.

8. SB 1 prohibits abortion after detection of fetal or embryonic cardiac activity, with extremely limited exceptions. SB 1, § 3 (adding S.C. Code Ann. §§ 44-41-680(A)–(C), -610(3), -610(6)).

9. Because embryonic cardiac activity can be detected by transvaginal ultrasound as early as six weeks LMP, Farris Decl. ¶¶ 6, 23; Norton Decl. ¶ 17; *see also* Expert Report of Dr. Ingrid Skop, ECF No. 44-2 (hereinafter "Skop Decl.") ¶ 9; AG & Wilkins Answer ¶¶ 3, 23, 24, SB 1 bans abortion starting at approximately six weeks LMP.

10. No embryo is viable at six weeks LMP. *See* Norton Decl. ¶¶ 12, 18; AG & Wilkins Answer ¶ 18; Skop Dep. 132:22–133:25; S.C. Code Ann. § 44-41-10(l); S.C. Code Ann. Regs. 61-12.101(T).

11. To avoid the threat of criminal penalties, license revocation, and civil liability under SB 1, Plaintiffs, their physicians, and staff will be forced to stop providing previability abortions to patients after the detection of embryonic or fetal cardiac activity. SB 1, § 3 (adding S.C. Code Ann. §§ 44-41-680(D), -740); *see also* S.C. Code Ann. §§ 40-47-110(A), (B)(2); 44-41-70; 44-41-75(A); 16-1-40; Farris Decl. ¶¶ 47, 50; Buffkin Decl. ¶¶ 13, 26.

12. If SB 1 takes effect, when patients with pregnancies with detectable cardiac activity seek abortions, Plaintiffs will provide care only where they can determine that one of the exceptions to the Six-Week Ban applies. Farris Decl. ¶¶ 7, 57–58; Buffkin Decl. ¶ 15.

13. In 2020, only four percent of PPSAT's patients obtained abortions before six weeks LMP. Farris Decl. ¶ 31.

ARGUMENT

Summary judgment is warranted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable [fact-finder] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

While the moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case, once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate specific, material facts that give rise to a genuine dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All evidence must be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123–24 (4th Cir. 1990). But "[o]nly disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of summary judgment." *Planned Parenthood S. Atlantic v. Baker*, 487 F. Supp. 3d 443, 446 (D.S.C. 2020). "[U]nsupported speculation is not sufficient to defeat a summary judgment motion." *Smith v. Schlage Lock Co., LLC*, 986 F.3d 482, 486 (4th Cir. 2021) (quoting *CTB, Inc. v. Hog Slat, Inc*., 954 F.3d 647, 659 (4th Cir. 2020)).

The only material facts in this case are uncontested: SB 1 "bans abortion months before any fetus could be viable," PI Order 10, and will prohibit Plaintiffs and their physicians from providing previability abortion to their patients, *id*. 12. Under decades of unbroken precedent, those facts lead to only one conclusion: SB 1 violates South Carolinians' right to decide whether to terminate a previability pregnancy. Further, permanent injunctive relief is warranted where, as here, (1) the loss of constitutional freedoms unquestionably constitutes irreparable injury; (2) monetary damages are inadequate to compensate for the loss of constitutional freedoms; (3) South Carolina is in no way harmed by the issuance of an injunction that prevents the State from enforcing an unconstitutional restriction; and (4) upholding constitutional rights serves the public

interest. *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011); *see eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006); *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975) (concluding that the denial of a right to abortion is "beyond argument" irreparable injury). The standard for a permanent injunction is similar to the standard for a preliminary injunction, and the Court found each of these factors has been met in granting the preliminary injunction. PI Order 11–14; *see Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (plurality opinion). Accordingly, Plaintiffs request that the Court grant summary judgment in their favor, declare the Act unconstitutional, and enter a permanent injunction against its enforcement.

I. SB 1's Six-Week Ban Is Unconstitutional As A Matter Of Law

Existing "Supreme Court precedent . . . controls the outcome" in this case and makes clear that SB 1 is blatantly unconstitutional. PI Order 20, 19. Nearly five decades ago, the Supreme Court struck down as unconstitutional a state criminal abortion statute proscribing all abortions except those performed to save the life of the woman. *Roe*, 410 U.S. at 166. The Court held that the Due Process Clause of the U.S. Constitution's Fourteenth Amendment protects a woman's right to decide to have an abortion, *id.* at 153–54, and, prior to viability, no State interest can justify a ban on abortion, *id.* at 163–65. Rather, the State may "proscribe" abortion only after viability—and, even then, it may not ban abortion where necessary to preserve the life or health of the pregnant patient. *Id.*

The Supreme Court has repeatedly adhered to that core holding. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe*'s "essential holding" that, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." 505 U.S. 833, 846 (1992). Although *Casey* established an "undue burden" standard, under which an abortion regulation "is invalid[] if its purpose or effect is to place a substantial

obstacle in the path of a woman seeking an abortion," *id*. at 878 (plurality opinion), the Court reaffirmed the "central holding" of *Roe v. Wade*, emphasizing that under the standard:

> Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

Id. at 879; *see also id.* at 871 (stating that any state interest is "insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions"). The Supreme Court reaffirmed this binding precedent just last year. *See June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion) (identifying *Casey* as setting forth the applicable constitutional standard); *id*. at 2135 (Roberts, C.J., concurring) ("*Casey* reaffirmed the most central principle of *Roe v. Wade*, a woman's right to terminate her pregnancy before viability" (internal citations and quotations omitted)); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" the legal principle that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (4th Cir. 2000) (describing *Casey* as reaffirming *Roe*'s "essential holding" that "a woman has a constitutional right to 'choose to have an abortion before viability'" (quoting *Casey*, 505 U.S. at 846)).

Accordingly, and as this Court recognized in preliminarily enjoining SB 1, PI Order 10–11, since *Roe*, courts considering the constitutionality of laws that ban abortions beginning at a gestational age prior to viability have "universally" invalidated those laws. *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630 (M.D.N.C. 2019) (20-week ban), *appeal pending on other grounds*, No. 19-1685 (4th Cir. June 26, 2019); *see also, e.g.*, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019) (15-week ban); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th

Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) (6-week ban); *Edwards v. Beck*, 786 F.3d 1113, 1115 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016) (12-week ban); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (equivalent of 22-week LMP ban); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014) (20-week ban); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (equivalent of 22-week LMP ban); *Sojourner T v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (ban at all gestational ages); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69 (9th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992) (ban at all gestational ages).

Notably included within this unbroken string of precedent are decisions addressing bans that, like SB 1, are tied to the detection of embryonic or fetal cardiac activity. *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1312 (N.D. Ga. 2020), *appeal filed*, No. 20-13024 (11th Cir. Aug. 11, 2020); *see also Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (affirming preliminary injunction); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (temporary restraining order); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (preliminary injunction); *Memphis Ctr. for Reprod. Health v. Slatery*, No. 3:20-CV-00501, 2020 WL 4274198, at *2 (M.D. Tenn. July 24, 2020) (preliminary injunction), *appeal filed*, No. 20-5969 (6th Cir. Aug. 24, 2020).

Under binding precedent, the Act is unquestionably unconstitutional, irrespective of any interest the State may assert to support it. *See Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 164–65. As Defendants concede and as the South Carolina Code makes clear, SB 1 plainly "proscribes abortions prior to viability." Supp. Return of Att'y Gen. & Solic. Wilkins in Opp'n to Mot. for TRO & Req. that TRO Be Dissolved 10 (hereinafter "AG Opp'n"); AG & Wilkins Answer ¶¶ 3,

12, 18, 23, 24; S.C. Code Ann. § 44-41-10(l). If SB 1 were to take effect, Plaintiffs would be subject to criminal, civil, and professional penalties for providing previability abortion to their patients unless one of the extremely limited exceptions applied. Plaintiffs' sworn testimony demonstrates that they would stop providing previability abortions to avoid these penalties. *See* Farris Decl. ¶ 31; Buffkin Decl. ¶¶ 13, 23. In turn, patients would be unable to access previability abortion in South Carolina. Under the governing law, these facts alone establish that Plaintiffs are entitled to summary judgment.

II. SB 1 Is Not Severable And Must Be Enjoined In Full

In addition to the Six-Week Ban, SB 1 includes new ultrasound, mandatory disclosure, recordkeeping, reporting, and written notice requirements. At the preliminary injunction stage, Defendants argued that if the Court concluded that the Six-Week Ban was likely unconstitutional, it should nevertheless slice and dice SB 1 so that other parts of the law remain in place. AG Opp'n 2. But as this Court has already recognized, PI Order 15–18, because those requirements are not "capable of being executed . . . independent of" the Six-Week Ban, *Joytime Distribs. & Amusement Co. v. State*, 528 S.E.2d 647, 649 (S.C. 1999), they must be permanently enjoined along with it.

While SB 1 includes a severability clause, *see* SB 1, § 7, that provision is only one indicator of legislative intent. *Joytime Distribs.*, 528 S.E.2d at 649. A severability provision "is an aid merely; not an inexorable command." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) (citation omitted); *see also S.C. Tax Comm'n v. United Oil Marketers, Inc.*, 412 S.E.2d 402, 405 (S.C. 1991) (citing *Carter* for language regarding the impact of a severability clause). Even where there is a severability clause, a court must still ask whether the "residue of the Act" is "capable of being executed in accordance with" that intent, "independent of the rejected portion." *Joytime Distribs.*, 528 S.E.2d at 649 (quoting *Dean v. Timmerman,* 106 S.E.2d 665, 669 (S.C. 1959)) (assessing both a severability clause and statutory structure); *see also, e.g.*, *Sojourner v. Town of*

St. George, 679 S.E.2d 182, 186 (S.C. 2009) (striking down as not severable provisions that were "mutually dependent" and where legislative intent appeared to be "for both provisions to operate as a cohesive procedure"); *Town of Mount Pleasant v. Chimento*, 737 S.E.2d 830, 840 (S.C. 2012) (Toal, C.J., concurring) (concluding that striking unconstitutional language only "would render the remaining provisions incomplete," so provision must be struck in its entirety); *Env't Tech. Council v. Sierra Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996) (describing South Carolina's severability standard).

Here, the Six-Week Ban gives SB 1 its purpose and is critical to SB 1's structure. In the words of its primary sponsor, the law is intended to "shut down" abortion providers in South Carolina and "strike at the heart of *Roe v. Wade*."[1] Without the ban, the residue of SB 1 would be nothing more than a series of inoperable or unworkable provisions deprived of their common purpose. *Cf. SisterSong*, 472 F. Supp. 3d at 1324–26 (permanently enjoining a law that contained a gestational-age ban and fetal "personhood" provision, even where that law contained other provisions not directly challenged).

First, the provisions appearing alongside the Six-Week Ban in Section 3 of SB 1 are inextricably intertwined with the unconstitutional ban. The "only purpose" of the mandatory ultrasound disclosure provision (to be codified as Section 44-41-630) "is to facilitate S.C. Code Ann. § 44-41-680," the Six-Week Ban. PI Order 17–18. Similarly, Section 3's definitions provision (to be codified as Section 44-41-610), heart-tone disclosure provision (to be codified as Section 44-41-640), and various penalty and exception provisions (to be codified as Sections 44-

[1] The State, *Bill sponsor, Sen. Larry Grooms, R-Berkeley, Elated as Fetal Heartbeat Bill Becomes Law*, YouTube (Feb. 18, 2021), https://www.youtube.com/watch?v=l9-bDmbIBg0; Sen. Larry Grooms (@LarryGroomsSC), Facebook (Feb. 19, 2021), https://www.facebook.com/LarryGroomsSC/.

41-650, -660, -670, -690, -700, -710, -720, -730, and -740) "are also so intertwined with Sections 44-41-630, -680, so as to preclude severability." PI Order 18.

Second, the amendments set forth in Sections 4, 5, and 6 of SB 1—adding a series of disclosure and reporting requirements related to compliance with the new Section 3 requirements and exceptions, and incorporating the term "fetal heartbeat" as newly defined by Section 3—are "mutually dependent on Section 3 of the Act," PI Order 18, and not "capable of being executed . . . independent of the rejected portion," *Joytime Distribs.*, 528 S.E.2d at 649. These sections of SB 1 are not severable and must therefore be permanently enjoined as well.

As the Supreme Court and Fourth Circuit have observed, courts must be "wary of legislatures who would rely on [judicial] intervention" in lieu of taking care to craft constitutional statutes. *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006)). Where, as here, a state legislature enacts a plainly unconstitutional Act whose very purpose is to "strike at the right" to choose abortion before viability, *Gonzales*, 550 U.S. at 157–58, the Court should strike it down in full.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment, declare that SB 1 is unconstitutional under the Fourteenth Amendment to the U.S. Constitution, and permanently enjoin Defendants, their employees, agents, successors, and all others acting in concert or participating with them from enforcing SB 1 statewide.

Respectfully submitted,

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