No. 21-1369

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC; GREENVILLE WOMEN'S CLINIC; DR. TERRY L. BUFFKIN,

Plaintiffs-Appellees,

v.

ALAN WILSON, in his official capacity as Attorney General of South Carolina; WILLIAM WALTER WILKINS III, in his official capacity as Solicitor for South Carolina's 13th Judicial District,

Defendants-Appellants,

HENRY MCMASTER, in his official capacity as Governor of South Carolina; JAMES H. LUCAS, in his official capacity as Speaker of the South Carolina House of Representatives,

Intervenors-Appellants,

ANNE G. COOK, et al.,

Defendants.

On Appeal from the United States District Court for the District of South Carolina
Civil Action No. 3:20-cv-00508 (Hon. Mary Geiger Lewis)

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

(For Appearances See Inside Cover)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1369 Caption: Planned Parenthood South Atlantic, et al. v. Alan Wilson, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Planned Parenthood South Atlantic
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Julie A. Murray Date: September 1, 2021

Counsel for: Planned Parenthood South Atlantic

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Signature: s/Alexandra S. Thompson Date: September 1, 2021

Counsel for: Greenville Women's Clinic and Terry L. Buffkin, M.D.

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No. 21-1369 Caption: Planned Parenthood South Atlantic, et al. v. Alan Wilson, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Terry L. Buffkin, M.D.
(name of party/amicus)

who is Appellee, makes the following disclosure:
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Signature: s/Alexandra S. Thompson Date: September 1, 2021

Counsel for: Greenville Women's Clinic and Terry L. Buffkin, M.D.

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INTRODUCTION

This winter, the South Carolina General Assembly adopted Senate Bill 1, which bans abortion after roughly six weeks of pregnancy—before many people even know they are pregnant. In addition to the Six-Week Ban, Senate Bill 1 ("SB 1" or "the Act") includes an ultrasound requirement, reporting and recordkeeping requirements, a civil enforcement mechanism, and other supporting provisions, each of which is designed to facilitate or compel compliance with the Six-Week Ban. The district court entered a preliminary injunction against SB 1, faithfully applying decades of Supreme Court precedent and observing that "[t]his case does not present a close call." JA302.

On appeal, the South Carolina government defendants and intervenors ("State Officials") do not contest the district court's conclusion that the Six-Week Ban violates the federal constitutional right to end a pregnancy before viability under decades of clearly established precedent. Instead, they challenge Plaintiffs-Appellees' third-party standing, their ability to state a third-party claim under 42 U.S.C. § 1983, and their entitlement to an injunction against SB 1 in full.

These arguments are meritless. As *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), reaffirmed just last year, abortion providers like Plaintiffs-Appellees, who operate the only remaining clinics providing abortion in South Carolina, have third-party standing on behalf of their patients to challenge laws like

SB 1 that directly regulate their conduct and violate their patients' federal constitutional rights.

State Officials' separate contention that Section 1983 cannot be invoked in third-party standing cases like this one was forfeited at the preliminary-injunction stage and instead raised and rejected only on a motion to dismiss not before the Court. Accordingly, the Court lacks jurisdiction under 28 U.S.C. § 1292(a)(1) to consider this argument, which is, in any event, foreclosed by Section 1983's text, history, and binding caselaw.

Finally, the district court correctly enjoined SB 1 in its entirety rather than attempt to sever the patently unconstitutional Six-Week Ban from SB 1's other provisions. State Officials' argument to the contrary is based on a misreading of SB 1 and a misinterpretation of state severability law and SB 1's own severability clause.[1]

Notably, State Officials do not dispute the district court's finding that, absent preliminary relief, the "vast majority" of people seeking abortion in South Carolina will be denied access to this constitutionally protected health care, an irreparable

[1] Plaintiffs-Appellees' Fed. R. App. P. 28(f) addendum includes the copy of SB 1 attached to their complaint, which distinguishes between pre-existing law and SB 1's additions. State Officials' reproduction of SB 1 in their own addendum does not do so. Plaintiffs-Appellees' addendum also includes copies of key South Carolina statutory provisions as they appeared before amendment by SB 1.

injury that will "be harshest for [those] patients with low incomes, patients of color, and patients who live in rural areas." The Court should affirm the district court's well-reasoned opinion preventing this clear harm.

JURISDICTIONAL STATEMENT

The district court exercised subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction to consider the preliminary-injunction order under 28 U.S.C. § 1292(a)(1). Its appellate jurisdiction does not extend to consideration of the question whether Plaintiffs-Appellees state a claim under Section 1983. Although State Officials raise that issue on appeal, it was resolved not in the preliminary-injunction order on review by this Court, but in the district court's denial of Intervenor-Appellant Governor Henry McMaster's motion to dismiss. *See* JA192–99. The denial of the motion to dismiss is neither a final order, 28 U.S.C. § 1291, nor an appealable interlocutory or collateral order, *id.* § 1292; Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949). Accordingly, it is not within the scope of this Court's review. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 282 (4th Cir. 1983); *Turner v. Anne Arundel 89. Det. Ctr.*, 699 F. App'x 207, 208 (4th Cir. 2017) (per curiam).

STATEMENT OF ISSUES

I. Whether the district court erred in holding that Plaintiffs-Appellees have third-party standing to challenge SB 1's Six-Week Ban, which directly

threatens them with criminal and civil penalties and violates their patients' federal constitutional right to decide whether to have an abortion before viability.

II. Whether the Court has jurisdiction to consider State Officials' argument that 42 U.S.C. § 1983 does not permit claims based on third-party standing, where State Officials failed to raise that argument at the preliminary-injunction stage and the district court rejected it only in a separate, non-appealable order denying a motion to dismiss.

III. Whether, if this Court answers Issue II in the affirmative, Plaintiffs-Appellees are likely to prevail on the issue of whether they have a statutory cause of action under Section 1983 to vindicate the constitutional rights of their patients, consistent with decades of binding precedent.

IV. Whether the district court abused its discretion by enjoining SB 1 in its entirety, where it determined that, under South Carolina law, provisions that facilitate or enforce the unconstitutional Six-Week Ban are not severable from the Ban itself.

STATEMENT OF CASE

I. Access to Abortion Under Prior South Carolina Law

Plaintiffs-Appellees Planned Parenthood South Atlantic ("PPSAT") and Greenville Women's Clinic, P.A. ("GWC") are health care providers in South

Carolina that offer sexual and reproductive health services, including abortion. JA53 ¶¶ 17–18; JA41–42 ¶¶ 2–3. PPSAT operates health centers in Columbia and Charleston, JA53 ¶ 17, and GWC operates a clinic in Greenville, JA41 ¶ 2. These are the only clinics in the state that provide abortion services to the public. JA55 ¶ 25; JA43–44 ¶ 12. 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 of pregnancy as measured from the first day of a pregnant person's last menstrual period ("LMP"), *id.* § 44-41-10(i); S.C. Code Ann. Regs. 61-12.101(S)(4); JA55 ¶ 24; JA42–43 ¶ 7. Plaintiff-Appellee Terry L. Buffkin, M.D., is a board-certified physician licensed to practice medicine in South Carolina who works at GWC, and a co-owner of the clinic. JA41 ¶¶ 1–2.

PPSAT, GWC, and Dr. Buffkin (collectively, the "Providers") perform abortions in South Carolina only in the first trimester of pregnancy. The first trimester of pregnancy is well before the point of fetal viability, which is generally understood as the point when a fetus has a reasonable likelihood of sustained life after birth, with or without artificial support. JA54 ¶ 20; JA44 ¶ 14; *see also* JA290 (crediting evidence that "viability is 'medically impossible' at six weeks of pregnancy, or at any time in the first trimester of pregnancy, when Plaintiffs provide abortion services in South Carolina"). South Carolina law has long banned the performance of nearly all post-viability 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).[2]

Although people generally obtain an abortion as soon as they are able, the majority of patients who obtain abortions in South Carolina are at least six weeks LMP by the time of the abortion. JA57 ¶ 31; JA43 ¶ 8; JA293. In 2020, for example, only four percent of PPSAT's patients obtained abortions before six weeks LMP. JA57 ¶ 31; JA293.

Obtaining an abortion before six weeks LMP is impossible or extremely difficult for most patients. Even patients who detect their pregnancy very early are unlikely to access abortion before six weeks LMP due to the financial and logistical burdens of paying for an abortion, missing work, arranging travel, and finding childcare. JA60 ¶ 40. Patients whose pregnancies are the result of sexual assault or who are experiencing interpersonal violence often require more time to access abortion as a result of ongoing physical and emotional trauma. JA62 ¶ 45. Moreover, many patients do not know they are pregnant until at or after six weeks LMP. The first clear symptom of pregnancy is often a missed period, which for someone with

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[2] Indeed, South Carolina has banned even previability abortions beginning at 20 weeks post-fertilization (22 weeks LMP), *see* S.C. Code Ann. § 44-41-450, a restriction that to date has not been challenged in court and which does not affect the Providers' current abortion services.

a regular, four-week menstrual cycle would not occur until four weeks LMP, and over-the-counter pregnancy tests often cannot detect pregnancy until at least four weeks LMP. JA57 ¶¶ 31–32; JA45 ¶ 18. Patients may also have irregular menstrual cycles or experience bleeding during early pregnancy, a common occurrence that is frequently and easily mistaken for a period. JA57–58 ¶¶ 33–35; JA46 ¶¶ 19–20. Other patients may not develop or recognize symptoms of early pregnancy. JA58 ¶ 35; JA46 ¶¶ 19–21.

Patients are also unlikely to obtain an abortion by six weeks LMP because of legal barriers that South Carolina has already imposed on people seeking abortion. South Carolina prohibits the use of telehealth for medication abortion, a safe and effective abortion method involving two medications taken to end an early pregnancy in a process similar to miscarriage. JA62 ¶ 44; JA43 ¶ 11; S.C. Code Ann. § 44-47-37(C)(6). Moreover, South Carolina typically requires patients 16 years old or younger to obtain written parental authorization for an abortion. Without such authorization, a patient must get a court order to obtain care, *see* S.C. Code Ann. §§ 44-41-31, -32, -33, which South Carolina law expressly recognizes could take three days, *see id.* § 44-41-32(5), not including time for appeal. South Carolina also has a mandatory-delay law: Patients must have access, at least 24 hours in advance of an abortion, to certain state-mandated information designed to discourage the patient's abortion decision. *Id.* § 44-41-330.

South Carolina also already strictly regulates the information that health care providers must give patients before an abortion. State-mandated materials, which are available online, include contact information for "crisis pregnancy centers" that are opposed to abortion and that offer free ultrasounds; information on resources related to prenatal care, childbirth, and neonatal care; and information regarding "the probable anatomical and physiological characteristics of the embryo or fetus at two-week gestational increments." *Id.* § 44-41-340(A)(2). Moreover, an abortion patient who receives an ultrasound must be told of her "right to view the ultrasound image at her request during or after the ultrasound procedure," and she must wait at least sixty minutes after the ultrasound before having an abortion, regardless of her decisional certainty. *Id.* § 44-41-330(A)(1)(a).

II. The South Carolina Legislature's Adoption of SB 1

In February 2021, the South Carolina Legislature passed SB 1, the "South Carolina Fetal Heartbeat and Protection from Abortion Act." SB 1 imposes dramatic changes to South Carolina law by banning abortion at roughly six weeks LMP and by adopting new ultrasound, mandatory disclosure, recordkeeping, reporting, and written notice requirements that support the operation of the Six-Week Ban.

A. The Six-Week Ban

The Six-Week Ban provides 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)). 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. JA50 ¶ 5; *see also* JA105 ¶ 22 (expert testimony describing "pulsations of a tube-like structure that will eventually develop into a four-chambered heart"). Such cardiac activity may be detected by transvaginal ultrasound at six weeks LMP, and sometimes sooner. JA50–51 ¶ 6; JA54–55 ¶ 23. Early in pregnancy, this activity appears on an ultrasound as a visual flicker and would not be audible. JA50–51 ¶ 6; JA54–55 ¶ 23; JA291.

As defined by SB 1, a "fetal heartbeat" need not occur in a fetus to trigger the Six-Week Ban's prohibition on abortion. In the medical field, the developing organism during pregnancy is most accurately termed an "embryo" until at least ten weeks LMP; the term "fetus" is used after that time. JA50 ¶ 5; *see also* JA105 ¶ 22. Despite this accepted distinction, SB 1 defines "human fetus" to include an "individual organism of the species homo sapiens from fertilization [of an egg] until live birth." SB 1, § 3 (adding S.C. Code Ann. § 44-41-610(6)).

The Six-Week Ban contains only narrow exceptions: (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), and adding S.C. Code Ann. § 44-41-690). 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 Six-Week Ban could result in revocation of a doctor's medical license and a clinic's license to provide abortion. S.C. Code Ann. §§ 40-47-110(A), (B)(2); 44-41-70; 44-41-75(A). The Act also creates a civil cause of action that authorizes a patient on whom an abortion was performed in violation of the Six-Week 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).

Despite imposing the Six-Week Ban, SB 1 leaves in place South Carolina's existing legal presumption that "viability occurs no sooner than the twenty-fourth week of pregnancy," S.C. Code Ann. § 44-41-10(*l*), and the prohibition on nearly all post-viability abortions, *id.* § 44-41-450. On its own terms, therefore, the Six Week Ban's sole effect is to prohibit previability abortion.

B. The Interrelated Provisions of SB 1

In addition to the Six-Week Ban, SB 1 includes a number of supporting provisions. Section 3 of SB 1, which contains the Ban, also includes definitions that facilitate the Ban and apply only to material in SB 1; penalties for violations of the Ban; and exceptions to those penalties. SB 1, § 3 (adding S.C. Code Ann. §§ 44-41-610; -680(B), (C), (D); -690; -700; -740). Section 3 also requires abortion providers to perform an ultrasound and to "record a written medical description of the ultrasound images of the . . . fetal heartbeat, if present and viewable." *Id.* (adding S.C. Code Ann. § 44-41-630); *see also id.* (adding S.C. Code Ann. § 44-41-650) (stating that the ultrasound is necessary to determine "whether the human fetus . . . has a detectable fetal heartbeat").

Section 3 also provides that, in the course of an ultrasound to detect a fetal heartbeat, the health care professional "shall," except in a medical emergency,

"display the ultrasound images so that the pregnant woman may view" them. *Id.* (adding S.C. Code Ann. §§ 44-41-630, -660). The mandatory display applies without regard to whether patients wish to view the ultrasound images, and nothing prevents patients from averting their eyes. As noted above, even before SB 1's enactment, South Carolina already required abortion providers to tell patients who received ultrasounds that they had a right to view the images. S.C. Code Ann. § 44-41-330(A)(1) (2010). SB 1's Section 3 further includes a requirement that abortion providers ask certain patients whether they would like to hear "the embryonic or fetal heartbeat," and to make these heart tones audible upon request. SB 1, § 3 (adding S.C. Code Ann. § 44-41-640).

Sections 4, 5, and 6 include SB 1's other mandates. Section 4 requires the abortion provider to report to the state Department of Health and Environmental Control ("DHEC"), for any abortion performed, the results of the "fetal heartbeat testing" required by Section 3 and whether the abortion was medically necessary such that an exception to the Six-Week Ban would apply. *Id.* § 4 (amending S.C. Code Ann. § 44-41-460(A)). Section 6 requires abortion providers to report to DHEC whether they relied on SB 1's medical-emergency exception to provide an abortion without first performing an ultrasound to detect a "fetal heartbeat." *Id.* § 6 (amending S.C. Code Ann. § 44-41-60). These reporting requirements are in addition to those already applicable under prior law, including a requirement that,

for abortions at or after 22 weeks LMP, abortion providers indicate whether the "reason for the abortion was a medical emergency." S.C. Code Ann. § 44-41-460(A)(5).[3] Thus, the only function of the reporting requirements in Sections 4 and 6 is to facilitate the medical-emergency exception to the Six-Week Ban, not the pre-existing reporting requirement for medical emergencies excepted under South Carolina's ban on abortions at or after 22 weeks LMP.

Section 5 requires abortion providers who have "determined [under Section 3]" that there is "a detectable fetal heartbeat," as defined in Section 3, to inform the patient of that finding and of the "statistical probability, absent an induced abortion," of carrying the pregnancy to term. *Id.*, § 5 (amending S.C. Code Ann. § 44-41-330(A)(1)). SB 1's remaining provisions are technical in nature: the Act's title (Section 1), legislative findings (Section 2), a severability clause (Section 7), a statement regarding impact on pending enforcement actions (Section 8), and the Act's effective date (Section 9).

III. The Providers' Lawsuit

On February 18, 2021, shortly after the South Carolina General Assembly passed SB 1, the Providers filed suit under 42 U.S.C. § 1983 and sought a temporary

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[3] A copy of the DHEC reporting form, which is required for all abortions performed in South Carolina, is available at https://scdhec.gov/sites/default/files/docs/Health/docs/Abortion/D-3172%20sample.pdf.

restraining order ("TRO") and preliminary injunctive relief. They named as defendants those state officials who would be charged with enforcing SB 1: the Attorney General; the Director of the South Carolina DHEC; members of the South Carolina Board of Medical Examiners ("BME"); and local prosecutors in the counties where the Providers have clinics. The Providers argued that the Six-Week Ban squarely violates the Fourteenth Amendment rights of their patients by barring abortion before viability. JA291. They submitted extensive evidence showing that SB 1 would immediately impose irreparable harm, including evidence that they would be forced to turn away 76 patients in need of abortion in just the two days that followed. JA46 ¶ 23; JA67 ¶ 60.

Although Governor Henry McMaster had not yet signed SB 1 when the Providers filed suit, the Act expressly provided that it—and its criminal penalties—would take effect immediately upon signature. SB 1, § 9. The Governor urged the Legislature to adopt the bill and vowed to sign it "immediately."[4] He signed SB 1 at a public ceremony barely three hours after the Providers filed suit. At that time, the Providers filed a notice with the district court confirming that SB 1 had been signed and taken effect. Pls.' Notice of Signing of Senate Bill 1, *Planned Parenthood S. Atl. v. Wilson*, No. 3:20-cv-00508-MGL (Feb. 18, 2021), ECF No. 6.

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[4] *See, e.g.*, Gov. Henry McMaster, State of the State Address, Jan. 13, 2021 ("Send me the heartbeat bill and I will immediately sign it into law.").

On February 19, 2021, after hearing argument and reviewing briefing from all parties, the district court blocked enforcement of SB 1 in a TRO, which it later extended. JA74–79, JA98. While the TRO was in effect, Governor McMaster and James H. Lucas, Speaker of the South Carolina House of Representatives, moved to intervene as defendants by right and through permissive intervention. JA150–57. The Providers opposed those intervention motions, including on the ground that the intervenors had no role in enforcing SB 1, and therefore lacked standing in this Section 1983 case to defend it. Pls.' Consolidated Resp. in Opp'n to Governor McMaster's & Speaker Lucas's Mots. to Intervene 12–14, *Wilson*, No. 3:20-cv-00508-MGL (Mar. 3, 2021), ECF No. 57. On March 9, 2021, the district court granted the intervention motions on permissive grounds, and therefore did not resolve the Providers' contention that the Governor and Speaker lack Article III standing to defend SB 1 and therefore have no right to assert any argument not joined by the original defendants. JA157.

IV. The District Court's Entry of a Preliminary Injunction and Subsequent Activity

On March 19, 2021, following briefing and argument, the district court granted the Providers' motion for a preliminary injunction. JA282–303. The court first rejected a contention asserted only by Governor McMaster that the Providers lacked third-party standing to challenge SB 1 on behalf of their patients. The court explained that *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020),

foreclosed the Governor's argument. The court observed that, like the abortion providers whose third-party standing was confirmed by the plurality and concurrence in *June Medical Services*, the Providers asserted the constitutional rights of their patients and challenged a law that subjected them to criminal and other penalties. JA287–89. They, therefore, had prudential standing to sue.

The district court also rejected the Governor's contention that it lacked jurisdiction to enter a preliminary injunction because the Providers had filed suit before the Governor signed SB 1. As the district court explained, even if the Governor's jurisdictional theory were correct—a proposition vigorously disputed by the Providers—the Providers had subsequently filed an amended complaint alleging that SB 1 had, in fact, been signed. JA287; *see also* JA16–34. As the district court held, this amended complaint indisputably became the operative version and would have cured any purported jurisdictional defect. JA287; *see also* Gov. McMaster's Reply in Supp. of Mot. to Dissolve TRO at 3, *Wilson*, No. 3:20-cv-00508-MGL (Mar. 11, 2021), ECF No. 70 (recognizing amended pleading supersedes original).

The district court held that the Providers were likely to succeed on their claim that SB 1 is unconstitutional. JA290–91. It emphasized the "deferen[ce]" required to "the General Assembly's judgment" and indicated that it began its analysis with a presumption that SB 1 was constitutional. JA300. However, as the court explained, "[t]his case does not present a close call," JA302, because under *Roe v. Wade*, 410

U.S. 113 (1973), and its progeny, a pregnant person has a constitutional right to terminate a pregnancy before viability. JA289–92; *see also* JA291 (citing cases around the country that "universally invalidated laws" banning previability abortion). The court relied on South Carolina's own 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 LMP, when embryonic cardiac activity is first detectable, and when SB 1's Six-Week Ban would prohibit nearly all abortions. JA290.

The court also faithfully applied the other preliminary-injunction factors and concluded that they weighed in the Providers' favor. JA292–96. In particular, the court credited extensive evidence that SB 1 would irreparably harm the Providers' patients. As it explained, to "avoid the Act's effects," the Providers would "be forced to stop providing abortion services to the vast majority of their patients," and the impact of SB 1 would be "harshest" for "patients with low incomes, patients of color, and patients who live in rural areas." JA293. "Roughly half [of the Providers'] abortion patients in South Carolina health centers are Black, and in 2020, those health centers provided abortion services to patients residing in all but three South Carolina counties." JA293–94. The district court also emphasized that patients denied an abortion because of SB 1 "would suffer a range of other financial, physical, mental, and emotional harms," all of which would be irreparable. JA294.

Finally, the district court examined the scope of appropriate relief. It analyzed SB 1's text provision-by-provision, took stock of the Act's severability clause, and considered the Act's structure and purpose. First, the district court examined "the provisions of Section 3 [of the Act] that serve alongside [the Six-Week Ban]"—specifically, the ultrasound requirement, the definitions provision, the penalty provision, and provisions establishing limited exceptions to that penalty provision—and concluded that those provisions are "unable to stand by themselves" and are "so intertwined with [the Six-Week Ban] so as to preclude severability" under South Carolina law. JA296–99. Next, the district court turned to the provisions of Sections 4, 5, and 6 of the Act and determined that each of those provisions was "mutually dependent on Section 3." JA299. Accordingly, the district court enjoined the Act in full. On April 2, 2021, Governor McMaster, Speaker Lucas, Attorney General Wilson, and Solicitor Wilkins filed a notice of appeal from the preliminary injunction order. JA304–06.

Five days after entry of the preliminary injunction, on March 24, 2021, Governor McMaster moved to dismiss the Providers' first amended complaint. In that motion, the Governor asserted for the first time that the Providers failed to state a cognizable claim under Section 1983 because the statute's text does not permit a claimant to bring a cause of action to vindicate the rights of third parties. Governor McMaster's Mem. of Law in Supp. of Mot. to Dismiss 11–19, *Wilson*, No. 3:20-cv-

00508-MGL (Mar. 24, 2021), ECF No. 79-1. In an order issued while this appeal was pending, the district court rejected this argument and denied the motion to dismiss. JA192–99.

On July 13, 2021, the district court entered an order holding all further district court proceedings in abeyance pending the Supreme Court's resolution of *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. Review in that case, which involves a Mississippi law banning abortion starting at 15 weeks of pregnancy, was granted to address the question "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Writ of Cert. at 1, *Dobbs*, No. 19-1392 (petition for cert. granted June 15, 2020).

SUMMARY OF ARGUMENT

On appeal, State Officials do not take issue with the district court's core holding at the preliminary-injunction stage: The Six-Week Ban is blatantly unconstitutional under nearly fifty years of Supreme Court precedent. JA289–92. Instead, they make three other arguments attacking the district court's order, each of which should be rejected.

First, the district court correctly concluded that the Providers have third-party standing on behalf of patients to assert their sole claim in this case, and that standing inquiry is not, in any event, jurisdictional. State Officials' argument to the contrary is based on a mistaken reading of the Supreme Court's decision in *June Medical*

Services L.L.C. v. Russo, 140 S. Ct. 2103 (2020), which, as several federal courts have held, resolves the third-party standing analysis in the Providers' favor. SB 1 directly regulates the Providers' conduct and threatens them with criminal and other sanctions for providing abortions prohibited by the Act, and its enforcement will violate the federal constitutional rights of the Providers' abortion patients. Under these circumstances, it is black-letter law that the Providers have third-party standing.

Second, State Officials' radical contention that Section 1983 cannot be invoked in third-party standing cases is not within the scope of this Court's interlocutory appellate review because it was forfeited at the preliminary-injunction stage in district court and was not addressed in the preliminary-injunction order under review. In any event, even if the Court reaches this argument, the Providers clearly have a cognizable claim under 42 U.S.C. § 1983 on behalf of their patients. State Officials' contrary contention rests on a mistaken understanding of that statute's text, ignores its purpose and history, and would slam the courthouse doors to a wide swath of Section 1983 plaintiffs, including, but not limited to, abortion providers who have for decades brought suit to vindicate their patients' rights.

Third, the district court correctly held that the patently unconstitutional Six-Week Ban is not severable from SB 1's other provisions. Each of those other provisions exists only to facilitate or enforce the Six-Week Ban and is therefore not

severable under South Carolina law. To argue otherwise, State Officials misstate the district court's rationale and point to SB 1's severability clause as the beginning and end of the severability analysis. But South Carolina law, which governs the question whether SB 1 is severable, makes clear that while a severability clause provides evidence of legislative intent, it is not an "inexorable command." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924)), *cited in S.C. Tax Comm'n v. United Oil Marketers, Inc.*, 412 S.E.2d 402, 405 (S.C. 1991). In any event, SB 1's severability clause expressly recognizes that, where a court holds a provision unconstitutional or invalid, such a holding may render other provisions "ineffective." SB 1, § 7. Here, the district court considered SB 1's severability clause and whether the residual portions of SB 1 were capable of execution without the rejected portion. This Court should affirm its correct conclusion that they are not.

STANDARD OF REVIEW

The Court "review[s] for abuse of discretion [a] district court's preliminary injunction decision." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (citing *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011)). It reviews a "district court's factual findings for clear error" and "its legal conclusions de novo." *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (citing *Dewhurst*, 649 F.3d at 290). There is no abuse of discretion where a district

court applied the "correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles pertinent to the underlying dispute." *Centro Tepeyac*, 722 F.3d at 192.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE PROVIDERS HAVE THIRD-PARTY STANDING

Despite SB 1's direct regulation of the Providers' conduct, State Officials contend that the Providers do not have third-party standing to challenge SB 1 on behalf of patients whose constitutional rights would be violated by the Act's enforcement. Br. for Appellants (hereinafter "State Officials' Br.") 16–30. The district court's rejection of this argument should be affirmed.

The district court correctly held that the Providers have third-party standing under bedrock precedent. As it recognized, "the Supreme Court has long established that abortion providers have standing to assert their patients' rights," and may "sue on their own behalf when challenged legislation or regulations operate directly against them." JA288 (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion), and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976)). Here, the Providers bring this action to assert the constitutional rights of their patients and to challenge a law that subjects the Providers to felony criminal and other penalties. JA289. Accordingly, they fall squarely within the precedent on which the district court relied.

As the district court recognized, JA288–89, *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), controls this case. *June Medical Services* involved a challenge by abortion providers to a regulation of abortion that directly governed their conduct and violated their patients' constitutional abortion right. Five justices agreed that abortion providers have third-party standing to bring claims on behalf of patients in these circumstances. *Id.* at 2117–20 (plurality opinion); *id.* at 2139 n.4 (Roberts, C.J., concurring) ("For the reasons the plurality explains, *ante*, at 2117–2120, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.").

Contrary to State Officials' suggestion, State Officials' Br. 18, 25–30, this third-party standing doctrine is not unique to abortion providers. Decades of jurisprudence both in and outside the abortion context recognize that plaintiffs have standing to argue that "enforcement of [a] challenged restriction against [them] would result indirectly in the violation of third parties' rights." *June Medical Services*, 140 S. Ct. at 2118–19 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)). In these circumstances, abortion providers and other litigants relying on third-party standing are, in fact, "the obvious claimant" and "the least awkward challenger" because they are the party upon whom the challenged statute imposes "legal duties and disabilities." *Id.* at 2119 (quoting *Craig v. Boren*, 429 U.S. 190, 196–97 (1976)); *see also, e.g.*, *id.* (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)

(abortion providers); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraceptive distributors); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (same); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (same)).

This Court has faithfully applied this "long line of precedent" in numerous cases, and it should do so here as well. *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 215–16 (4th Cir. 2020), *as amended* (Aug. 31, 2020) (recognizing a gun vendor's third-party standing to bring a Second Amendment challenge regardless of whether its potential customers were hindered in bringing their own claims and collecting cases); *see also, e.g.*, *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 194 n.16 (4th Cir. 2000) (concluding that because a South Carolina regulation "applie[d] to first trimester abortion providers, the plaintiffs"—including GWC, a plaintiff here—"[had] standing to challenge the constitutionality of the regulation").

State Officials raise several objections to the Providers' third-party standing, but none is availing. First, State Officials maintain that this Court should disregard as non-binding dicta the Supreme Court's latest affirmation of third-party standing for abortion providers in *June Medical Services*. State Officials' Br. 27 & n.4. They misread that decision. While the Supreme Court held in *June Medical Services* that the third-party standing argument raised belatedly by the state was a prudential consideration that had been waived, it held in the alternative that third-party standing was clearly established. *June Med. Servs.*, 140 S. Ct. at 2117–20 (plurality opinion);

id. at 2139 n.4 (Roberts, C.J., concurring) (joining the plurality's third-party standing analysis). "[W]here a decision rests on two or more grounds, none can be relegated to the category of" dicta. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (citing *United States v. Title Ins. & Trust Co*., 265 U.S. 472, 486 (1924); *Commonwealth of Massachusetts v. United States*, 333 U.S. 611, 623 (1948)); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). Accordingly, both the waiver and merits determinations in *June Medical Services* as to third-party standing are holdings of the Supreme Court. For this reason, numerous federal courts have already applied the Supreme Court's merits holding in *June Medical Services* regarding third-party standing.[5]

Second, State Officials are wrong to suggest that abortion providers threatened with criminal and civil liability from an abortion restriction must *also* establish a close relationship with patients and a hindrance to those patients' ability to bring suit in order to have third-party standing. The State of Louisiana raised these

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[5] *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 428 (6th Cir. 2020); *Planned Parenthood of Tenn. & N. Miss. v. Slatery*, No. 3:20-CV-00740, 2021 WL 765606, at *11 (M.D. Tenn. Feb. 26, 2021); *Hopkins v. Jegley*, 510 F. Supp. 3d 638, 701–02 (E.D. Ark. 2021), *appeal filed*, No. 21-1068 (8th Cir. Jan. 11, 2021); *Whole Woman's Health All. v. Hill*, 493 F. Supp. 3d 694, 707 (S.D. Ind. 2020), *order clarified sub nom. Whole Woman's Health All. v. Rokita*, No. 1:18-cv-01904-SEB-MJD, 2021 WL 252721 (S.D. Ind. Jan. 26, 2021); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1321 (N.D. Ga. 2020), *appeal filed*, No. 20-13024 (11th Cir. Aug. 11, 2020).

very arguments before the Supreme Court in *June Medical Services*—as did the State of South Carolina in an *amici curiae* brief signed by Appellant Attorney General Wilson. *See* Conditional Cross-Pet. at 14–21, *Gee v. June Med. Servs.*, 140 S. Ct. 2103 (2020) (No. 18-1460), 2019 WL 2241856 (arguing that previous courts have been wrong to assume that abortion providers meet these criteria and forgo a case-by-case analysis of the "closeness" and "hindrance" requirements); Br. for States as *Amici Curiae* in Supp. of Resp't Dr. Rebekah Gee at 3–8, *June Med. Servs. v. Gee*, 140 S. Ct. 2103 (2020) (No. 18-1323, 18-1460), 2020 WL 92191 (same). The Supreme Court conclusively rejected these contentions. *June Med. Servs.*, 140 S. Ct. at 2119 (finding standing because of the interdependent relationship between abortion providers targeted by the law and their patients (citing *Craig*, 429 U.S. at 195, 197, and *Singleton*, 428 U.S. at 117)).

None of the cases cited by State Officials holds otherwise. In *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002), for example, this Court denied third-party standing to a doctor who brought an Americans with Disabilities Act claim on behalf of patients, where the doctor challenged a hospital policy that did not directly operate against her and she could not demonstrate that patients were hindered in bringing their own claims. *Id.* at 214–15. Accordingly, the plaintiff in *Freilich* attempted to raise claims that redressed another's injury but *not* her own—in other words, the challenged restriction did *not* directly regulate the litigant. This

was also true in each of the other cases State Officials cite. *See* State Officials' Br. 28.[6] In contrast, SB 1 regulates the Providers directly, and its application to them infringes on their patients' constitutional rights.

Third, State Officials' contention that the Providers lack third-party standing because they and their patients purportedly have a conflict of interest, State Officials' Br. 18–25, was similarly rejected in *June Medical Services*, *see* 140 S. Ct. at 2119. As the Court there explained, it is "a common feature of cases in which we have found third-party standing" that a state law purportedly protects a third party whose rights the law violates. *Id.* Accordingly, State Officials' dubious view that SB 1 is in patients' best interests, despite violating their constitutional rights, has no bearing on whether the Providers may bring their claim. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–87 (1992) (holding that physicians had standing to raise the constitutional rights of their patients in challenge to, *inter alia*, biased counseling requirement); *June Med. Servs.*, 140 S. Ct. at 2120

[6] *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (noting father's alleged "standing derive[d] *entirely* from his relationship with his daughter" (emphasis added)); *Kowalski*, 543 U.S. at 130 (distinguishing class of cases where "this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights" (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975))).

(collecting other third-party challenges to abortion restrictions alleged to protect patients' health and safety).

This "common feature" is not limited to abortion cases. As the Supreme Court explained in *June Medical Services*, outside the abortion context, courts have found third-party standing even where a purported conflict of interest exists. *Id.* at 2119–20. It noted, for example, that in *Craig v. Boren*, 429 U.S. 190 (1976), the state defended a law regulating alcohol on the ground that it protected "public health and safety," *June Med. Servs.*, 140 S. Ct. at 2119—in particular, that it protected young men from being "killed or injured in traffic accidents," *Craig*, 429 U.S. at 200–01. The Supreme Court also pointed to *U.S. Department of Labor v. Triplett*, 494 U.S. 715 (1990), in which the attorney-fee rule challenged by a lawyer was "designed to protect [lawyers' clients] from their 'improvident contracts, in the interest not only of themselves and their families but of the public.'" *Id.* at 2119–20 (*quoting Yeiser v. Dysart*, 267 U.S. 540, 541 (1925)); *see also, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 709 (1997) (reaching the merits of a challenge to an assisted-suicide ban, where the plaintiffs were physicians who asserted third-party standing to vindicate their patients' Fourteenth Amendment rights).

State Officials' suggestion that the purported conflict of interest here is nevertheless unique is equally unavailing. As an initial matter, State Officials do not assert a conflict of interest between the Providers and their patients with respect to

the Six-Week Ban. Instead they claim a conflict of interest based on *other* portions of SB 1 that the district court held non-severable, and even then fundamentally mischaracterize what those provisions do. *Compare, e.g.*, State Officials' Br. 23 (claiming that the Providers seek to deny patients the "option" to "see the ultrasound"), *with supra* p. 11 (discussing preexisting requirement to offer patients an opportunity to view ultrasound images).

Nothing about the Act's provision of civil remedies to patients, State Officials' Br. 22–24, sets this case apart from established precedent, either. Providing for a private right of action, in addition to criminal prosecution and civil licensing enforcement, is not a new feature of laws challenged by abortion providers. *See, e.g.*, *Casey*, 505 U.S. at 907 (appendix to plurality opinion) (setting forth private right of action in one of the challenged biased-counseling statutes) (quoting 18 Pa.Cons.Stat. § 3208(a)(1) (1990)); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 917, 942 (9th Cir. 2004) (same) (quoting Idaho Code §§ 18–609A(3)). Federal courts have found third-party standing in such cases as well. *See, e.g.*, *Karlin v. Foust*, 188 F.3d 446, 456 & n.5 (7th Cir. 1999) (recognizing that physicians and clinics had standing to raise claims on behalf of patients in challenge to abortion statute that created a private right of action for patients against plaintiffs); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 799, 803 n.6 (S.D. Ohio 2019) (same); *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1262, 1264 (E.D. Ark.

2019) (same), *aff'd in part, dismissing appeal as moot in part*, 984 F.3d 682 (8th Cir. 2021). And for good reason: if a state legislature could insulate a law from third-party challenge simply by including a private right of action, countless constitutional violations would evade review.

Put simply, the Providers' third-party standing to challenge SB 1 "is not open to question," *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998) (citing *Danforth*, 428 U.S. at 62; *Bolton*, 410 U.S. at 188–89), as reaffirmed by the Supreme Court just last year. The district court's holding should be affirmed.

II. STATE OFFICIALS' SECTION 1983 STATUTORY ARGUMENT IS NOT REVIEWABLE ON APPEAL AND IS MERITLESS

A. State Officials forfeited this argument at the preliminary-injunction stage, and the Court lacks jurisdiction to consider it on appeal.

State Officials contend that the Providers lack "statutory standing" to pursue a Section 1983 claim on behalf of their patients in need of previability abortion. As State Officials effectively concede, this argument is more properly understood as a matter of statutory *construction*, since it does not implicate the district court's subject-matter jurisdiction to enter the preliminary injunction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). Rather, what State Officials call "statutory standing" is actually a doctrine that asks whether

plaintiffs have "a cause of action" under the statute they invoke—in this case, Section 1983. State Officials' Br. 30 (quoting *Lexmark*, 572 U.S. at 128 & n.4).

State Officials never raised this Section 1983 statutory argument in opposition to the Providers' motion for preliminary relief. Rather, Governor McMaster raised the argument for the first time in his motion to dismiss, filed five days *after* the district court entered the preliminary injunction that is the sole order under review. JA304–06.

In a remarkable footnote, State Officials now imply that the district court reached this issue in its preliminary-injunction order. They provide a quote that they portray as the "district court's explanation" for rejecting the Section 1983 statutory argument, but they do not make clear that the quote appeared in the district court's later order denying the Governor's motion to dismiss. State Officials' Br. 30 n.5. That order is, of course, not subject to appeal as of right. *See President & Dirs. of Georgetown Coll. v. Madden*, 660 F.2d 91, 96–97 (4th Cir. 1981).

Notwithstanding State Officials' misleading citation, the district court did not address this argument at the preliminary-injunction stage because no one asked it to. Nor did the district court have an independent obligation to consider this non-jurisdictional issue out of the gate. *See Day v. McDonough*, 547 U.S. 198, 205 (2006). This Court should reject State Officials' brazen attempt to expand the scope

of its appellate jurisdiction to include review of an entirely separate district court order that is not itself appealable.

B. If this Court reaches State Officials' Section 1983 statutory argument, it should reject it as meritless.

Even if this Court were to reach State Officials' forfeited argument, statutory text, history, and decades of settled precedent all squarely support the Providers' ability to seek relief under 42 U.S.C. § 1983. To argue otherwise, State Officials lean heavily on flimsy constructions of Section 1983 and cherry-picked language from inapposite cases and law review articles. Section 1983's broad remedial purpose and volumes of cases authorizing plaintiffs to assert such claims on behalf of third parties conclusively refute State Officials' argument.

1. The text and history of Section 1983 authorize claims on behalf of third parties.

Section 1983 provides that state actors who are responsible for "the deprivation of any rights . . . secured by the [federal] Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. State Officials contend that Section 1983's text, therefore, allows only "the party injured" to bring a cause of action that challenges state action. State Officials' Br. 31–32. But on its face, Section 1983 does not limit *who* may bring suit, and instead prescribes *to whom* a state actor will be liable. Despite State Officials' equivocation, the statutory language "shall be liable

to the party injured" is not the textual equivalent of "the party injured shall have a cause of action."

Even taken at face value, however, State Officials' textual argument would still permit injured parties to bring their Section 1983 cause of action through a third-party plaintiff. Here, the Providers' patients are among the "injured" parties to whom State Officials "shall be liable." And because Section 1983 claims are subject to the standard third-party standing analysis, the Providers—having satisfied the requirements for third-party standing, *see supra* Part I—may bring suit under Section 1983 to ensure that the courts provide a remedy for the deprivation of those injured patients' constitutional rights. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 793–94 (7th Cir. 2013) (rejecting argument that abortion-provider plaintiff with third-party standing could not assert Section 1983 claims to vindicate rights of patients); *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207–08 (6th Cir. 2011) (conducting third-party standing analysis to determine whether teachers could bring Section 1983 claims on behalf of their students); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum. Servs*., 293 F.3d 472, 478 (8th Cir. 2002) (expressly recognizing that medical providers with third-party standing to assert patients' rights have a cause of action under Section 1983 to assert those rights).

State Officials' cramped interpretation of Section 1983 is also inconsistent with the understanding of that statute at the time of its enactment. Passed as part of the Ku Klux Klan Act in 1871, Section 1983 was intended to be "liberally and beneficently construed" to give "the largest latitude consistent with the words employed." *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 684 (1978) (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)); *see also id*. at 685 n.45 ("[T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used." (quoting Cong. Globe, 42d Cong., 1st Sess., App. 216–17 (1871))).

Notably, Congress has amended Section 1983 multiple times since its initial passage in 1871 without changing the phrase "liable to the party injured," even after courts—including the U.S. Supreme Court—permitted litigants to bring Section 1983 claims to vindicate the rights of third parties, as surveyed in detail below. *See, e.g.*, Pub. L. 96-170, § 1, 93 Stat. 1284 (1979); Pub. L. 104-317, Tit. III, § 309(c), 110 Stat. 3853 (1996). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Were the prevailing judicial interpretation of Section 1983 incorrect, Congress surely would have taken these opportunities to override it.

2. Decades of settled precedent authorize Section 1983 claims asserting the constitutional rights of third parties.

Federal courts have for four decades recognized third-party standing in suits for declaratory and injunctive relief brought under Section 1983, both in cases involving abortion providers and in other contexts. Section 1983 claims are, in fact, where the issue of third-party standing most frequently arises. For instance, in *Craig v. Boren*, the Supreme Court permitted a beer vendor to assert the Fourteenth Amendment rights of prospective male customers in the vendor's Section 1983 challenge to a gender-based restriction on the sale of "nonintoxicating" beer. 429 U.S. at 191–93; *see also, e.g.*, *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 818–19 (1977) (foster parents on behalf of their foster children); *Carey*, 431 U.S. at 683–84 (distributor of contraceptives on behalf of potential customers); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (would-be gun store on behalf of potential customers), *cert. denied*, 138 S. Ct. 1988 (2018); *Ezell v. City of Chi.*, 651 F.3d 684, 696 (7th Cir. 2011) (supplier of firing-range facilities on behalf of potential customers).

Time and again, this Court has adjudicated cases where abortion providers brought third-party Section 1983 claims on behalf of patients. *See Bryant v. Woodall*, 1 F.4th 280, 283–84 (4th Cir. 2021); *Stuart v. Camnitz*, 774 F.3d 238, 243 (4th Cir. 2014); *Greenville Women's Clinic*, 222 F.3d at 159; *Manning v. Hunt*, 119 F.3d 254, 258 (4th Cir. 1997). And as the Seventh Circuit has recognized in rejecting the same

arguments made by State Officials here,[7] "the cases are legion that allow an abortion provider, such as [the Providers], to sue to enjoin as violations of federal law (hence litigable under 42 U.S.C. § 1983) state laws that restrict abortion." *Van Hollen*, 738 F.3d at 794; *see also, e.g.*, *June Med. Servs.*, 140 S. Ct. at 2117–20 (plurality opinion); *id*. at 2139 n.4 (Roberts, C.J., concurring); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 324–25 (2006); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 752 (1986), *overruled on other grounds by Casey*, 505 U.S. at 882; *Singleton*, 428 U.S. at 113–18 (physicians on behalf of themselves and their patients); *Danforth*, 428 U.S. at 62–63 (clinics and physicians on behalf of themselves and their patients); *Bolton*, 410 U.S. at 188 (same); *Edwards v. Beck*, 786 F.3d 1113, 1119 (8th Cir. 2015) (same); *Wasden*, 376 F.3d at 914 n.3 (same); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (same); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d. 127, 131 (3d Cir. 2000) (same). Were State Officials' Section 1983 theory correct, all of these cases would have been barred.

State Officials ignore these decisions and others in asserting that the "[Supreme] Court has *always* interpreted § 1983 as providing a cause of action only

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[7] *See* Br. & Required Short App'x of Defendants-Appellants at *16–24, *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013) (No. 13-2726), 2013 WL 5424897.

to parties who *themselves* suffered a deprivation of legal rights." State Officials' Br. 36 (first emphasis added). But even the cases they cite demonstrate that is not true. Several of their authorities, for example, hold that under certain circumstances a decedent's Section 1983 claim survives his death and may be the basis for an action by a third-party plaintiff. *See* State Officials' Br. at 31, 33, 34–35 (citing, *e.g.*, *Andrews v. Neer*, 253 F.3d 1052, 1056, 1058 (8th Cir. 2001); *Jaco v. Bloechle*, 739 F.2d 239, 241–42, 245 (6th Cir. 1984); *Claybrook v. Birchwell*, 199 F.3d 350, 357–58 & nn.7, 9 (6th Cir. 2000)). These holdings, in turn, rest on *Robertson v. Wegmann*, in which the Supreme Court cleared the way for plaintiffs to bring Section 1983 claims on behalf of deceased injured parties, at least where the applicable state law permits it and that state law is not itself inconsistent with federal law. 436 U.S. 584, 588–90 (1978). If the plain text of Section 1983 limited the cause of action to the "party injured," as State Officials claim, *Robertson* would have held that Section 1983 *itself* bars third parties from bringing Section 1983 claims on behalf of a deceased injured party.

Remarkably, State Officials cite *no* case holding that a plaintiff with third-party standing is nevertheless barred from asserting the third party's rights under Section 1983. Instead, State Officials attempt to support their novel Section 1983 theory by pointing to cases stating that "[a] section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else." State

Officials' Br. at 30, 32–33 & n.6 (citing and quoting *Howerton v. Fletcher*, 213 F.3d 171, 173 (4th Cir. 2000) (quoting *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990)); *Inmates v. Owens*, 561 F.2d 560, 562–63 (4th Cir. 1977); *English v. Powell*, 592 F.2d 727, 730 (4th Cir. 1979)). While *Howerton*, *Inmates*, and *English* were brought under Section 1983, none involved claims brought on behalf of third parties, so the decisions have no bearing on whether plaintiffs who have established third-party standing can bring claims under Section 1983 to vindicate third-party rights.

Indeed, while State Officials dismiss the Providers' reliance on Section 1983 cases asserting constitutional claims on behalf of third parties where the court did not expressly "consider or analyze" whether Section 1983 authorized relief in this posture, State Officials' Br. at 38–39, State Officials themselves rely *entirely* on Section 1983 cases in which this issue was never raised or considered. For example, in *Rizzo v. Goode*, 423 U.S. 362 (1976), the Supreme Court rejected the plaintiffs' police-misconduct claim on the grounds that officers who had actually caused harm were not named defendants in the litigation, and the plaintiffs had failed to show direct harm to themselves, relying instead on speculation as to what some small, unnamed group of officers might do to them in the future. *Id*. at 372–73. Neither that case nor any of the others cited by State Officials stands for the proposition that a plaintiff with third-party standing is precluded from seeking prospective relief under Section 1983. *See, e.g.*, State Officials' Br. at 36–37 and cases cited therein.

It is true, as those cases and the nonbinding district-court and out-of-circuit decisions cited in State Officials' brief suggest, *see* State Officials' Br. 32–35 & n. 6, that Section 1983 generally does not provide a cause of action for plaintiffs asserting constitutional injury to *themselves* arising from harms suffered by others. But nothing in the cited decisions disturbs the decades of precedent authorizing abortion providers to assert *patients*' constitutional claims in Section 1983 actions. *See supra* pp. 38–39.

Lacking precedential support for their statutory argument, State Officials turn to a handful of secondary sources. *See* State Officials' Br. 35–36. But none of those sources asserts that Section 1983 bars claims on behalf of third parties. *See, e.g.*, Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983*, § 5:12 & n.5 (4th ed. 2020) (recognizing third-party-standing exception to the general prudential standing rule "that plaintiffs ordinarily may assert only their own constitutional claims").

Accordingly, even if State Officials' Section 1983 statutory argument were properly before this Court—and it is not—it should be rejected under long-settled precedent establishing that a Section 1983 claim is cognizable to vindicate the rights of third parties.

III. THE DISTRICT COURT CORRECTLY HELD THAT SB 1 IS NOT SEVERABLE

State Officials contend that the district court erred in preliminarily enjoining SB 1 in full. In their view, unless the Providers claimed that every provision—indeed, every word—of SB 1 were independently unconstitutional, the district court was required to rewrite the South Carolina Code. That position is neither consistent with South Carolina's severability standard nor required by the severability clause on which State Officials mistakenly rely.

As the district court recognized, under South Carolina law, 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." JA298 (quoting *Joytime Distribs. & Amusement Co. v. State*, 528 S.E.2d 647, 654 (S.C. 1999)); *accord Env't'l Tech. Council v. Sierra Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996).

The district court faithfully applied this standard here. In a four-page discussion, the district court recognized SB 1's severability clause as an indicator of legislative intent. JA297. It then analyzed statutory structure and purpose, ultimately concluding that other portions of SB 1 were not "wholly independent" of the Six-Week Ban, and therefore could not be severed. *See* JA298–99 (quoting *Joytime Distribs.*, 528 S.E.2d at 654). The district court's application of the legal standard in

this regard was correct and consistent with South Carolina law. *See, e.g.*, *Joytime Distribs.*, 528 S.E.2d at 654–55 (assessing both a severability clause and statutory structure); *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 alone "would render the remaining provisions incomplete," so provision must be struck in its entirety).

Each of State Officials' arguments to the contrary is unavailing.

A. The district court's severability analysis is supported by SB 1's severability clause.

As the district court recognized, SB 1 contains a severability clause. That clause provides in full:

> *[1]* If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, *[2]* 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, *[3]* 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.

SB 1, § 7 (numerals added). State Officials claim that this provision "unambiguous[ly]" requires leaving in place "everything" in SB 1 that the Providers did not directly challenge as unconstitutional, State Officials' Br. 43, and they contend that the district court erred in looking beyond this text to SB 1's structure and purpose.

1. As an initial matter, State Officials are simply wrong to contend that SB 1's severability clause is dispositive here. Where a statute like SB 1 contains a severability clause, this evidence of legislative intent "is an aid merely; not an inexorable command." *Carter*, 298 U.S. at 313 (quoting *Dorchy*, 264 U.S. at 290); *accord Whole Woman's Health*, 136 S. Ct. at 2319 (awarding facial relief against an abortion restriction and emphasizing that legislatures cannot "immunize their statutes" from such relief through severability clauses); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292–93 (4th Cir. 2020) (affirming injunction against "entire" federal regulation despite severability clause providing that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect" (internal quotation marks omitted)), *cert. granted sub nom. Cochran v. Mayor & City Council of Baltimore*, 141 S. Ct. 1369 (Feb. 22, 2021), *cert. dismissed sub nom. Becerra v. Mayor & City Council of Baltimore*, 141 S. Ct. 2170 (May 17, 2021); *see also United Oil Marketers, Inc.*, 412

S.E.2d at 405 (citing *Carter* for language regarding the impact of a severability clause under South Carolina law).

For example, in *Joytime Distributors*, a case on which State Officials heavily rely, the South Carolina Supreme Court analyzed the impact of a severability provision very similar to the clause in SB 1. But it also looked beyond that clause to statutory structure, asking whether the "residue of [the] Act" was "capable of being executed in accordance with" legislative intent, "independent of the rejected portion." *Joytime Distribs.*, 528 S.E.2d at 654 (quoting *Dean v. Timmerman*, 106 S.E.2d 665, 669 (S.C. 1959)).

Likewise, in *Sloan v. Wilkins*, 608 S.E.2d 579 (S.C. 2005), the South Carolina Supreme Court considered whether to sever a law that violated a constitutional provision requiring each legislative act to relate to only one subject. *Id.* at 583. Although the statute at issue included a severability clause identical to SB 1's (but for a stray "then" in the latter), the state supreme court looked not only to this clause but also to the "underlying purpose" of the statute before severing some portions and keeping others. *Id.* at 584. The court later abrogated *Sloan* in *American Petroleum Institute v. S.C. Department of Revenue*, holding that the appropriate remedy for violations of the single-subject rule—which is designed to deter legislative log-rolling—is to invalidate the offending act in full. *See* 677 S.E.2d 16, 19 (S.C. 2009), *holding modified as to appropriations laws by S.C. Pub. Int. Found. v. Lucas*, 786

S.E.2d 124 (S.C. 2016). But *Sloan* nevertheless confirms that, under South Carolina law, SB 1's severability provision does not require courts to ignore statutory purpose and other indicia of legislative intent.

2. In any event, SB 1's severability clause confirms, rather than refutes, the district court's approach. The clause makes clear that a court may "h[o]ld" some portion of SB 1 "unconstitutional or invalid" *and* "declare[]" "*other sections*" to be "ineffective." SB 1, § 7 (emphasis added). Although the Act does not define "ineffective," its use of the series "unconstitutional, invalid, *or otherwise ineffective*" confirms that the term encompasses more than provisions that are unconstitutional or invalid. *Id.*; *see also Soliman v. Gonzales*, 419 F.3d 276, 283 (4th Cir. 2005) (explaining that where the legislature "has utilized distinct terms within the same statute," courts must "endeavor to give different meanings to those different terms").

The most obvious example of an "ineffective" statutory provision is one that is not severable from neighboring provisions held unconstitutional or invalid under otherwise applicable South Carolina law. *Compare* "Ineffective," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/ineffective (last visited Aug. 25, 2021) (defining "ineffective" to connote a situation in which something is "not capable of performing . . . as expected"), *with Joytime Distribs.*, 528 S.E.2d at 654 (explaining that severability depends on whether the "residue of the Act" is

"capable of being executed" "independent of the rejected portion" (quoting *Dean*, 106 S.E.2d at 669)).

Thus, even looking only to the Act's severability clause, as State Officials urge, the district court's severability analysis was entirely proper.

3. Nothing in *Leavitt v. Jane L.*, 518 U.S. 137 (1996) (per curiam), a case that State Officials describe as "on all fours with this" one, requires a different result. State Officials' Br. 45–46. *Leavitt* involved a challenge to two provisions banning previability abortion in a single statute, one provision applicable to abortions before 20 weeks of gestation (equivalent to 22 weeks LMP), and another to abortions at and after 20 weeks. 518 U.S. at 137–38. The Tenth Circuit held unconstitutional the abortion ban applicable earlier in pregnancy, while enjoining the later ban only on the ground that it was not severable. *Id.* The Supreme Court ultimately reversed and remanded for consideration of the later ban's constitutionality, pointing to the law's severability provision and faulting the court of appeals for assuming the Utah Legislature intended "to forgo all regulation of abortion unless it could obtain total regulation of abortion." *Id.* at 142. Thus, in *Leavitt*, it was possible for one portion of the statute to operate independently from the other provisions, whereas here, the supporting provisions all enforce or facilitate the Six-Week Ban. In any event, as

Leavitt recognizes, severability of a state statute is a question of *state* law, and it did not involve the application of South Carolina law. *Id.* at 139.[8]

B. The district court correctly concluded that SB 1 Sections 3 through 6 are not severable from the Six-Week Ban.

Any review of the district court's severability analysis must start with the understanding that the Providers are likely to succeed on their constitutional challenge to the Six-Week Ban, a conclusion that State Officials do not challenge on appeal. And although State Officials accuse the district court of improperly enjoining severable provisions of SB 1, even a cursory review of the statute makes clear that those provisions are inextricably intertwined with the Ban.

1. The Six-Week Ban cannot be excised from Section 3 of the Act.

The most obvious portions of SB 1 that cannot be severed are those that appear alongside the Six-Week Ban in Section 3 of the Act. For example, Section 3 creates a new S.C. Code Ann. § 44-41-690, which operates as an exception to the Six-Week Ban, *see* SB 1, § 3, such that the two provisions must rise or fall together. The same is equally true of new S.C. Code Ann. § 44-41-700, another carveout in Section 3 from the Six-Week Ban's prohibition. State Officials decline to mention these

[8] Although State Officials also rely on *MKB Management Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), which involved a ban on abortion upon detection of cardiac activity, the Eighth Circuit in fact "decline[d] to consider" severability because the state had not raised the issue. *Id.* at 776 n.6.

provisions, instead focusing only on other narrow portions of Section 3, but the outcome for all is the same: they fall with the Six-Week Ban.

First, State Officials argue that the district court should have left in place portions of Section 3 mandating that abortion providers conduct an ultrasound before every abortion; display the results of that ultrasound; document in the patient's medical record a description of cardiac activity, if detectable; and offer patients whose pregnancies are at least ten weeks LMP the option to hear cardiac tones. SB 1, § 3 (adding S.C. Code Ann. §§ 44-41-630, -640). State Officials contend that these requirements can operate independently from the Six-Week Ban because they serve an informational purpose for patients and doctors. State Officials' Br. 47–48; *accord* Br. of Amici Alabama, *et al*. in Supp. of Appellants (hereinafter "State Amici Br.") 5–13, ECF No. 34-1.

State Officials' effort to slice and dice the Act in this way should be rejected. As the district court held, the only purpose served by these provisions is to facilitate the Six-Week Ban, which—as non-intervening State Officials concede—can be carried out only "in accordance with the ultrasound requirements of § 44-41-630" added by Section 3. Suppl. Return of Att'y Gen. & Solicitor Wilkins in Opp'n to Mot. for Prelim. Inj. (hereinafter "AG Suppl. Opp'n") 2, *Wilson,* No. 3:20-cv-00508-MGL (Mar. 2, 2021), ECF No. 44. The Providers already provide ultrasounds whenever medically indicated. JA42–43 ¶ 7; JA54 ¶ 22. They are already required

by preexisting state law to offer the patient the opportunity to view those ultrasounds. S.C. Code Ann. § 44-41-330(A)(2). And the Providers already give patients information and answer any questions that patients deem relevant to their decision-making. *See id.* § 44-41-330(B).

Against that background, the new disclosure and recordkeeping requirements of Section 3 cannot possibly serve an informational purpose. Requiring providers to display an ultrasound image in view of the patient, but permitting the patient to avert their eyes, refutes State Officials' argument that the forced display facilitates informed consent. *See Stuart*, 774 F.3d at 252–53 (holding that where a "woman does not receive . . . information," it "cannot inform her [abortion] decision"). Likewise, forcing a provider to document in a patient's record a "medical description" of the cardiac activity, if detectable, serves no informational purpose because Section 3 does not require that this "description" be provided to the patient.

State Officials also argue that the district court erred in finding that Section 3's private right of action is not severable from the Six-Week Ban. State Officials' Br. 49–50. They are wrong. That portion, to be codified at S.C. Code Ann. § 44-41-740, creates new civil liability for a violation of the Six-Week Ban and the related cardiac-activity disclosure requirement to be codified at S.C. Code Ann. § 44-41-330(A)(1)(b), *see* SB 1, § 3 (adding § 44-41-740(A)), and then specifies a single set of penalties applicable to these violations, *id.* (adding § 44-41-740(B)). As the non-

intervening State Officials conceded in the district court, this provision would "not be operative" if the ban were enjoined. AG Suppl. Opp'n 15 n.3, *Wilson*, No. 3:20-cv-00508-MGL. The district court, therefore, properly concluded that without the Six-Week Ban, the rest of Section 3 was ineffective and should be preliminarily enjoined.

2. The other sections of SB 1 must also fall.

Even beyond Section 3 of the Act, SB 1's remaining provisions are not severable from the Six-Week Ban. Section 5 of the Act, for example, requires that if a physician detects cardiac activity on the ultrasound, the physician must disclose to the patient "that the human fetus . . . has a fetal heartbeat," and provide the "statistical probability, absent an induced abortion, of bringing the human fetus possessing a detectable fetal heartbeat to term." SB 1, § 5 (adding S.C. Code Ann. § 44-41-330(A)(1)(b)). As discussed above, the detection of such activity by ultrasound is done to facilitate the Six-Week Ban, *see* SB 1, § 3 (adding S.C. Code Ann. § 44-41-630), and—as non-intervening State Officials concede—this provision works in tandem with the ban, *see* AG Suppl. Opp'n 2; *SisterSong*, 472 F. Supp. 3d at 1324, 1326 (holding that statutory sections not directly challenged were not severable because they were intended to serve the law's overall purpose "to ban or de facto ban abortion").

Although State Officials defend these disclosure requirements as furthering the State's interest in a patient's informed consent, these disclosures are part and parcel of the Six-Week Ban. An abortion provider who determines that detectable cardiac activity bars a patient's abortion under the Ban must necessarily tell that patient the basis on which the State has foreclosed her care. And if the Six-Week Ban itself is inoperative, telling a patient the likelihood that she will carry a pregnancy to term makes no sense when she has presented for an abortion.

Similarly, the reporting requirements in Sections 4 and 6 of SB 1 serve as a means for enforcing the exceptions to the Six-Week Ban. They require that physicians (1) document contemporaneously the grounds for an exception they rely on to provide an abortion otherwise prohibited by the Ban, and (2) report to the state their reliance on that exception. *See* SB 1, §§ 4, 6 (amending S.C. Code Ann. §§ 44-41-60, -460(A)). State Officials only vaguely describe these requirements, stating, for example, that Section 4 adds "certain information" to an abortion provider's reporting obligations, and pointing to reporting requirements that have been upheld as standalone provisions. State Officials' Br. 44 (citing *Greenville Women's Clinic*, 222 F.3d at 169–72). But the question is *what* information SB 1 requires. Unlike South Carolina's preexisting reporting obligations, Sections 4 and 6 involve exceptions permitting abortions otherwise prohibited by SB 1. Once the unconstitutional Six-Week Ban is enjoined, these exceptions and the related

reporting of them are necessarily "ineffective." SB 1, § 7. Because these enforcement requirements are not "capable of being executed . . . independent of" the Six-Week Ban, *Joytime Distribs.*, 528 S.E.2d at 654, the district court properly enjoined them all.

Ameur v. Gates, 759 F.3d 317 (4th Cir. 2014), is not to the contrary. The litigant in *Ameur* asked this Court to hold that the Supreme Court's decision in a previous case, which struck down a companion provision and "did not address severability" at all, had effectively rendered the operative provision invalid by association under the federal severability standard. *Id*. at 323, 324, 330. This Court concluded that the surviving provision could operate independently even though one of its phrases made *grammatical* sense only by reference to language in the invalidated provision. *Id*. at 330. Here, by contrast, the district court applied South Carolina law to determine the severability of a reporting requirement that assumes—and makes *operational* sense only if—the unconstitutional Six-Week Ban is in force. It did not err in doing so.

C. State Officials' theory conflating the preliminary injunction standard and severability should be rejected.

As discussed above, the district court faithfully applied the preliminary-injunction factors. JA289–96. State Officials contend, however, that the district court

was required to perform that same analysis for each provision of SB 1 that it concluded was not severable from the Six-Week Ban.

State Officials misunderstand the nature of severability, which goes not to the merits of a litigant's claim (and by extension, at the preliminary-injunction stage, the litigant's likelihood of success on those merits), but to the scope of appropriate relief. *See, e.g.*, *Thomas v. Cooper River Park*, 471 S.E.2d 170, 172 n.3 (S.C. 1996) (characterizing severability determination as a "judicial remedy"); *In re Gee*, 941 F.3d 153, 173 (5th Cir. 2019) (non-precedential denial of writ of mandamus) ("Severability obviously governs the remedy after the finding of a constitutional violation; it plays no part in finding a constitutional violation.").

None of the authorities that State Officials cite supports their attempt to blur these distinct concepts: for example, Federal Rule of Civil Procedure 52(a)(2) and *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017), simply recite the familiar standards for granting preliminary relief as to the challenged government or private action.

Furthermore, conflating the preliminary-injunction factors and severability, as State Officials do, is unworkable. A court cannot consider a plaintiff's likelihood of success on the merits with respect to a provision that the litigant did not, in fact, challenge *on the merits*. State Officials do not address that issue. If accepted, State Officials' position would turn the concept of severability on its head, forcing courts

to leave in place statutory provisions that they have already determined are not "capable of being executed in accordance with Legislative intent, independent of the rejected portion." *Dean*, 106 S.E.2d at 669. This Court should reject State Officials' argument, which is not supported by law.

* * *

As the Supreme Court and this Court 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*, 546 U.S. at 330). "This would, to some extent, substitute the judicial for the legislative department of the government." *Id.* (quoting *Ayotte*, 546 U.S. at 330).

Although State Officials contend that the district court "improperly redline[d]" SB 1, State Officials' Br. 50; *see also* State Amici Br. 13–15, the opposite is in fact true. Where, as here, a legislature passes a plainly unconstitutional statute, "[a] severability clause is not grounds for a court to 'devise a judicial remedy that . . . entail[s] quintessentially legislative work,'" *Whole Woman's Health*, 136 S. Ct. at 2319 (quoting *Ayotte*, 546 U.S. at 329)), and the district court was correct not to step in with a red pen and attempt to salvage the unworkable shell that remained.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of a preliminary injunction.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument. This case implicates an important federal right and a challenge to a federal-court injunction, the dissolution of which would cause immediate and irreparable harm to Plaintiffs-Appellees and their South Carolina abortion patients.

Respectfully submitted,

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Dated: September 1, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Plaintiffs-Appellees certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,823 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(ii) complies with the typeface and TYPE style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared using Microsoft Office Word 2016 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: September 1, 2021

/s/ Julie A. Murray
Julie A. Murray

ADDENDUM OF PROVISIONS INVOLVED

South Carolina General Assembly
124th Session, 2021-2022

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Bill 1

~~Indicates Matter Stricken~~
Indicates New Matter

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COMMITTEE REPORT

February 10, 2021

S. 1

Introduced by Senators Grooms, Verdin, Kimbrell, Garrett, Martin, Shealy, Climer, Corbin, Cromer, Rice, Adams, Hembree, Gambrell, Loftis and Campsen

S. Printed 2/10/21--H.

Read the first time February 2, 2021.

THE COMMITTEE ON JUDICIARY

To whom was referred a Bill (S. 1) to enact the "South Carolina Fetal Heartbeat and Protection from Abortion Act"; to amend Chapter 41, Title 44 of the 1976 code, etc., respectfully

REPORT:

That they have duly and carefully considered the same and recommend that the same do pass:

CHRIS MURPHY for Committee.

A BILL

TO ENACT THE "SOUTH CAROLINA FETAL HEARTBEAT AND PROTECTION FROM ABORTION ACT"; TO AMEND CHAPTER 41, TITLE 44 OF THE 1976 CODE, RELATING TO ABORTIONS, BY ADDING ARTICLE 6, TO REQUIRE TESTING FOR A DETECTABLE FETAL HEARTBEAT BEFORE AN ABORTION IS PERFORMED ON A PREGNANT WOMAN, TO PROHIBIT THE PERFORMANCE OF AN ABORTION IF A FETAL HEARTBEAT IS DETECTED, TO PROVIDE MEDICAL EMERGENCY EXCEPTIONS, TO REQUIRE CERTAIN DOCUMENTATION AND RECORDKEEPING BY PHYSICIANS PERFORMING ABORTIONS, TO CREATE A CIVIL ACTION FOR A PREGNANT WOMAN UPON WHOM AN ABORTION IS PERFORMED, TO CREATE CRIMINAL PENALTIES, AND FOR OTHER

PURPOSES; TO AMEND SECTION 44-41-460(A) OF THE 1976 CODE, RELATING TO THE REQUIRED REPORTING OF ABORTION DATA TO THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, TO ADD REPORTING OF FETAL HEARTBEAT TESTING AND PATIENT MEDICAL CONDITION DATA; AND TO AMEND SECTION 44-41-330(A)(1) OF THE 1976 CODE, RELATING TO A PREGNANT WOMAN'S RIGHT TO KNOW CERTAIN INFORMATION, TO REQUIRE NOTIFICATION OF THE DETECTION OF A FETAL HEARTBEAT.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act shall be known and may be cited as the "South Carolina Fetal Heartbeat and Protection from Abortion Act".

SECTION 2. The General Assembly hereby finds, according to contemporary medical research, all of the following:

(1) as many as thirty percent of natural pregnancies end in spontaneous miscarriage;

(2) fewer than five percent of all natural pregnancies end in spontaneous miscarriage after the detection of a fetal heartbeat;

(3) over ninety percent of in vitro pregnancies survive the first trimester if a fetal heartbeat is detected;

(4) nearly ninety percent of in vitro pregnancies do not survive the first trimester if a fetal heartbeat is not detected;

(5) a fetal heartbeat is a key medical predictor that an unborn human individual will reach live birth;

(6) a fetal heartbeat begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;

(7) the State of South Carolina has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the unborn child who may be born; and

(8) in order to make an informed choice about whether to continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat.

SECTION 3. Chapter 41, Title 44 of the 1976 Code is amended by adding:

"ARTICLE 6

Fetal Heartbeat and Protection from Abortion

Section 44-41-610. As used in this article:

(1) 'Conception' means fertilization.

(2) 'Contraceptive' means a drug, device, or chemical that prevents conception.

(3) 'Fetal heartbeat' means cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac.

(4) 'Gestational age' means the age of an unborn human individual as calculated from the first day of the last menstrual period of a pregnant woman.

(5) 'Gestational sac' means the structure that comprises the extraembryonic membranes that envelop the human fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

(6) 'Human fetus' or 'unborn child' each means an individual organism of the species homo sapiens from fertilization until live birth.

(7) 'Intrauterine pregnancy' means a pregnancy in which a human fetus is attached to the placenta within the uterus of a pregnant woman.

(8) 'Medical emergency' means a condition that, by any reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of her pregnancy to avert her death without first determining whether there is a detectable fetal heartbeat or for which the delay necessary to determine whether there is a detectable fetal heartbeat will create serious risk of a substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. A condition must not be considered a medical emergency if based on a claim or diagnosis that a woman will engage in conduct that she intends to result in her death or in a substantial and irreversible physical impairment of a major bodily function.

(9) 'Physician' means any person licensed to practice medicine and surgery, or osteopathic medicine and surgery, in this State.

(10) 'Reasonable medical judgment' means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(11) 'Spontaneous miscarriage' means the natural or accidental termination of a pregnancy and the expulsion of the human fetus, typically caused by genetic defects in the human fetus or physical abnormalities in the pregnant woman.

Section 44-41-620. (A) A court judgment or order suspending enforcement of any provision of this chapter is not to be regarded as tantamount to repeal of that provision.

(B) If the United States Supreme Court issues a decision overruling Roe v. Wade, 410 U.S. 113 (1973), any other court issues an order or judgment restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, or an amendment is ratified to the Constitution of the United States restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, then the Attorney General may apply to the pertinent state or federal court for either or both of the following:

(1) a declaration that any one or more of the statutory provisions specified in subsection (A) are constitutional; or

(2) a judgment or order lifting an injunction against the enforcement of any one or more of the statutory provisions specified in subsection (A).

(C) If the Attorney General fails to apply for relief pursuant to subsection (B) within a thirty-day period after an event described in that subsection occurs, then any solicitor may apply to the appropriate state or federal court for such relief.

Section 44-41-630. An abortion provider who is to perform or induce an abortion, a certified technician, or another agent of the abortion provider who is competent in ultrasonography shall:

(1) perform an obstetric ultrasound on the pregnant woman, using whichever method the physician and pregnant woman agree is best under the circumstances;

(2) during the performance of the ultrasound, display the ultrasound images so that the pregnant woman may view the images; and

(3) record a written medical description of the ultrasound images of the unborn child's fetal heartbeat, if present and viewable.

Section 44-41-640. If a pregnancy is at least eight weeks after fertilization, then the abortion provider who is to perform or induce an abortion, or an agent of the abortion provider, shall tell the woman that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear and shall ask the woman if she would like to hear the heartbeat. If the woman would like to hear the heartbeat, then the abortion provider shall, using whichever method the physician and patient agree is best under the circumstances, make the fetal heartbeat of the unborn child audible for the pregnant woman to hear.

Section 44-41-650. (A) Except as provided in Section 44-41-660, no person shall perform, induce, or attempt to perform or induce an abortion on a pregnant woman before a physician determines in accordance with Section 44-41-630 whether the human fetus the pregnant woman is carrying has a detectable fetal heartbeat.

(B) A person who violates subsection (A) is guilty of a felony and, upon conviction, must be fined ten thousand dollars, imprisoned not more than two years, or both.

Section 44-41-660. (A) Section 44-41-650 does not apply to a physician who performs or induces an abortion if the physician determines according to standard medical practice that a medical emergency exists that prevents compliance with the section.

(B) A physician who performs or induces an abortion on a pregnant woman based on the exception in subsection (A) shall make written notations in the pregnant woman's medical records of the following:

(1) the physician's belief that a medical emergency necessitating the abortion existed;

(2) the medical condition of the pregnant woman that assertedly prevented compliance with Section 44-41-650; and

(3) the medical rationale to support the physician's conclusion that the pregnant woman's medical condition necessitated the immediate abortion of her pregnancy to avert her death.

(C) For at least seven years from the date the notations are made, the physician shall maintain in his own records a copy of the notations.

Section 44-41-670. A physician is not in violation of Section 44-41-650 if the physician acts in accordance with Section 44-41-630 and the method used to test for the presence of a fetal heartbeat does not reveal a fetal heartbeat.

Section 44-41-680. (A) Except as provided in subsection (B), no person shall perform, induce, or attempt 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 and whose fetal heartbeat has been detected in accordance with Section 44-41-630.

(B) A physician may perform, induce, or attempt to perform or induce an abortion on a pregnant woman after a fetal heartbeat has been detected in accordance with Section 44-41-630 only if:

(1) the pregnancy is the result of rape, and the probable post-fertilization age of the fetus is fewer than twenty weeks;

(2) the pregnancy is the result of incest, and the probable post-fertilization age of the fetus is fewer than twenty weeks;

(3) the physician is acting in accordance with Section 44-41-690; or

(4) there exists a fetal anomaly, as defined in Section 44-41-430.

(C) A physician who performs or induces an abortion on a pregnant woman based on the exception in either subsection (B)(1) or (2) must report the allegation of rape or incest to the sheriff in the county in which the abortion was performed. The report must be made no later than twenty-four hours after performing or inducing the abortion, may be made orally or otherwise, and shall include the name and contact information of the pregnant woman making the allegation. Prior to performing or inducing an abortion, a physician who performs or induces an abortion based upon an allegation of rape or incest must notify the pregnant woman that the physician will report the allegation of rape or incest to the sheriff. The physician shall make written notations in the pregnant woman's medical records that the abortion was performed pursuant to the applicable exception, that the doctor timely notified the sheriff of the allegation of rape or incest, and that the woman was notified prior to the abortion that the physician would notify the sheriff of the allegation of rape or incest.

(D) A person who violates subsection (A) is guilty of a felony and, upon conviction, must be fined ten thousand dollars, imprisoned not more than two years, or both.

Section 44-41-690. (A) Section 44-41-680 does not apply to a physician who performs a medical procedure that, by any reasonable medical judgment, is designed or intended 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.

(B) A physician who performs a medical procedure as described in subsection (A) shall declare, in a written document, that the medical procedure was necessary, by reasonable medical judgment, to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible physical impairment of a major bodily function of the pregnant woman. In the document, the physician shall specify the pregnant woman's medical condition that the medical procedure was asserted to address and the medical rationale for the physician's conclusion that the medical procedure was necessary 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.

(C) A physician who performs a medical procedure as described in subsection (A) shall place the written document required by subsection (B) in the pregnant woman's medical records. For at least seven years from the date the document is created, the physician shall maintain a copy of the document in his own records.

Section 44-41-700. A physician is not in violation of Section 44-41-680 if the physician acts in accordance with Section 44-41-630 and the method used to test for the presence of a fetal heartbeat does not reveal a fetal heartbeat.

Section 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. 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.

Section 44-41-720. Nothing in this article prohibits the sale, use, prescription, or administration of a drug, device, or chemical that is designed for contraceptive purposes.

Section 44-41-730. A pregnant woman on whom an abortion is performed or induced in violation of this article may not be criminally prosecuted for violating any of the provisions of this article or for attempting to commit, conspiring to commit, or acting complicitly in committing a violation of any of the provisions of the

article and is not subject to a civil or criminal penalty based on the abortion being performed or induced in violation of any of the provisions of this article.

Section 44-41-740. (A) A woman who meets any one or more of the following criteria may file a civil action in a court of competent jurisdiction:

(1) a woman on whom an abortion was performed or induced in violation of this article; or

(2) a woman on whom an abortion was performed or induced who was not given the information provided in Section 44-41-330.

(B) A woman who prevails in an action filed pursuant to subsection (A) shall receive the following from the person who committed the act or acts described in subsection (A):

(1) damages in an amount equal to ten thousand dollars or an amount determined by the trier of fact after consideration of the evidence; and

(2) court costs and reasonable attorney's fees.

(C) If the defendant in an action filed pursuant to subsection (A) prevails and the court finds that the commencement of the action constitutes frivolous conduct and that the defendant was adversely affected by the frivolous conduct, then the court shall award reasonable attorney's fees to the defendant, provided, however, that a conclusion of frivolousness cannot rest upon the unconstitutionality of the provision that was allegedly violated."

SECTION 4. Section 44-41-460(A) of the 1976 Code is amended by adding appropriately numbered new items at the end to read:

"( ) The information related to fetal heartbeat testing required pursuant to Sections 44-41-630, 44-41-660, and 44-41-690, as applicable.

( ) Whether the reason for the abortion was to preserve the health of the pregnant woman and, if so, the medical condition that the abortion was asserted to address and the medical rationale for the conclusion that an abortion was necessary to address that condition. If the reason for the abortion was other than to preserve the health of the pregnant woman, then the report must specify that maternal health was not the purpose of the abortion. This information must also be placed in the pregnant woman's medical records and maintained for at least seven years thereafter."

SECTION 5. Section 44-41-330(A)(1) of the 1976 Code is amended to read:

"(1)(a) The woman must be informed by the physician who is to perform the abortion or by an allied health professional working in conjunction with the physician of the procedure to be involved and by the physician who is to perform the abortion of the probable gestational age of the embryo or fetus at the time the abortion is to be performed. If an ultrasound is performed, an abortion may not be performed sooner than sixty minutes following completion of the ultrasound. The physician who is to perform the abortion or an allied health professional working in conjunction with the physician must inform the woman before the ultrasound procedure of her right to view the ultrasound image at her request during or after the ultrasound procedure.

(b) If the physician who intends to perform or induce an abortion on a pregnant woman has determined pursuant to Section 44-41-630 that the human fetus the pregnant woman is carrying has a detectable fetal heartbeat, then that physician shall inform the pregnant woman in writing that the human fetus the pregnant woman is carrying has a fetal heartbeat. The physician shall further inform the pregnant woman, to the best of the physician's knowledge, of the statistical probability, absent an induced abortion, of bringing the human fetus possessing a detectable fetal heartbeat to term based on the gestational age of the human fetus or, if the director of the department has specified statistical probability information, shall provide to the pregnant woman that

information. The department may promulgate regulations that specify information regarding the statistical probability of bringing an unborn child possessing a detectable fetal heartbeat to term based on the gestational age of the unborn child. Any regulations must be based on available medical evidence."

SECTION 6. Section 44-41-60 of the 1976 Code is amended to read:

"Section 44-41-60. Any abortion performed in this State must be reported by the performing physician on the standard form for reporting abortions to the State Registrar, Department of Health and Environmental Control, within seven days after the abortion is performed. The names of the patient and physician may not be reported on the form or otherwise disclosed to the State Registrar. The form must indicate from whom consent was obtained, ~~or~~ circumstances waiving consent, and, if an exception was exercised pursuant to Section 44-41-660, which exception the physician relied upon in performing or inducing the abortion."

SECTION 7. 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.

SECTION 8. The repeal or amendment by this act of any law, whether temporary, permanent, civil, or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 9. This act takes effect upon approval by the Governor.

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S.C. Code Ann. Section 44-41-10(i), (*l*). Definitions.

As used in this chapter:

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(i) "First trimester of pregnancy" means the first twelve weeks of pregnancy commencing with conception rather than computed on the basis of the menstrual cycle.

[. . .]

(l) "Viability" means that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty-fourth week of pregnancy.

HISTORY: 1962 Code Section 32-681; 1974 (58) 2837; 1990 Act No. 341, Sections 2, 3; 1995 Act No. 1, Section 2.

S.C. Code Ann. Section 44-41-60. Abortions must be reported.

Any abortion performed in this State must be reported by the performing physician on the standard form for reporting abortions to the state registrar, Department of Health and Environmental Control, within seven days after the abortion is performed. The names of the patient and physician may not be reported on the form or otherwise disclosed to the state registrar. The form must indicate from whom consent was obtained or circumstances waiving consent.

HISTORY: 1975 (59) 187; 1978 Act No. 587 Section 4; 1990 Act No. 341, Section 5; 1995 Act No. 1, Section 12.

S.C. Code Ann. Section 44-41-330. Conditions for performance; information requirements; waiting period; minors or mentally incompetent persons; retention of records.

(A) Except in the case of a medical emergency and in addition to any other consent required by the laws of this State, no abortion may be performed or induced unless the following conditions have been satisfied:

(1) The woman must be informed by the physician who is to perform the abortion or by an allied health professional working in conjunction with the physician of the procedure to be involved and by the physician who is to perform the abortion of the probable gestational age of the embryo or fetus at the time the abortion is to be performed. If an ultrasound is performed, an abortion may not be performed sooner than sixty minutes following completion of the ultrasound. The physician who is to perform the abortion or an allied health professional working in conjunction with the physician must inform the woman before the ultrasound procedure of her right to view the ultrasound image at her request during or after the ultrasound procedure.

(2) The woman must be presented by the physician who is to perform the abortion or by an allied health professional working in conjunction with the physician a written form containing the following statement: "You have the right to review printed materials prepared by the State of South Carolina which describe fetal development, list agencies which offer alternatives to abortion, and describe medical assistance benefits which may be available for prenatal care, childbirth, and neonatal care. You have the right to view your ultrasound image." This form must be signed and dated by both the physician who is to perform the procedure and the pregnant woman upon whom the procedure is to be performed.

(3) The woman must certify in writing, before the abortion, that the information described in item (1) of this subsection has been furnished her, and that she has been informed of her opportunity to review the information referred to in item (2) of this subsection.

(4) Before performing the abortion, the physician who is to perform or induce the abortion must determine that the written certification prescribed by item (3) of this subsection or the certification required by subsection (D) has been signed. This subsection does not apply in the case where an abortion is performed pursuant to a court order.

(B) Nothing herein limits the information provided by the physician who is to perform the abortion or allied health professional to the person upon whom the abortion procedure is to be performed.

(C) No abortion may be performed sooner than twenty-four hours after the woman receives the written materials and certifies this fact to the physician or the physician's agent.

(D) If the clinic or other facility where the abortion is to be performed or induced mails the printed materials described in Section 44-41-340 to the woman upon whom the abortion is to be performed or induced or if the woman obtains the information at the county health department and if the woman verifies in writing, before the abortion, that the printed materials were received by her more than twenty-four hours before the abortion is scheduled to be performed or induced, that the information described in item (A)(1) has been provided to her, and that she has been informed of her opportunity to review the information referred to in item (A)(2), then the waiting period required pursuant to subsection (C) does not apply.

(E) In the event the person upon whom the abortion is to be performed or induced is an unemancipated minor, as defined in Section 44-41-10, the information described in Section 44-41-330(A)(1) and (2) must be furnished and offered respectively to a parent of the minor, a legal guardian of the minor, a grandparent of the minor, or any person who has been standing in loco parentis to the minor for a period of not less than sixty days. The parent, legal guardian, grandparent, or person who has been standing in loco parentis, as appropriate, must make the certification required by Section 44-41-330(A)(3). In the event the person upon whom the abortion is to be performed is under adjudication of mental incompetency by a court of competent jurisdiction, the information must be furnished and offered respectively to her spouse or a legal guardian if she is

married; if she is not married, from one parent or a legal guardian. The spouse, legal guardian, or parent, as appropriate, must make the certification required by Section 44-41-330(A)(3). This subsection does not apply in the case of an abortion performed pursuant to a court order.

(F) A clinic or other facility must maintain, for three years after the abortion is performed or induced, the woman's written verification that the information was so provided and the printed materials were so offered. In the case of an unemancipated minor or mentally incompetent person, the clinic or other facility is required to maintain a copy of the court order or the medical records and written consent for three years after the procedure is performed.

(G) This section does not apply if a clinic or other facility where abortions are performed or induced does not have, through no fault of the clinic or facility and if the clinic or facility can demonstrate through written evidence the unavailability of the materials described in Section 44-41-340.

HISTORY: 1995 Act No. 1, Section 8; 2008 Act No. 222, Section 1, eff May 14, 2008; 2010 Act No. 268, Section 1, eff June 24, 2010.

S.C. Code Ann. Section 44-41-430(5). Definitions.

For the purposes of this article:

[. . .]

(5) "Fetal anomaly" means that, in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth.

HISTORY: 2016 Act No. 183 (H.3114), Section 1, eff May 25, 2016.

S.C. Code Ann. Section 44-41-450. Abortion prohibited when probable post-fertilization age of unborn child is twenty or more weeks; exceptions.

(A) No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable post-fertilization age of the woman's unborn child is twenty or more weeks, except in the case of fetal anomaly, or in reasonable medical judgment, she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such greater risk must be considered to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(B) When an abortion upon a woman whose unborn child has been determined to have a probable post-fertilization age of twenty or more weeks is not prohibited by subsection (A), the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No such greater risk must be considered to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

HISTORY: 2016 Act No. 183 (H.3114), Section 1, eff May 25, 2016.

S.C. Code Ann. Section 44-41-460(A). Report of abortion performed pursuant to Section 44-41-450.

(A) Any abortion performed in this State pursuant to Section 44-41-450 must be reported by the licensed facility on the standard form for reporting abortions to the state registrar, Department of Health and Environmental Control, within seven days after the abortion is performed. The names of the patient and physician may not be reported on the form or otherwise disclosed to the state registrar. The form must indicate from whom consent was obtained or circumstances waiving consent and must include:

(1) Post-fertilization age:

(a) if a determination of probable post-fertilization age was made, whether ultrasound was employed in making the determination, and the week of probable post-fertilization age determined; or

(b) if a determination of probable post-fertilization age was not made, the basis of the determination that a medical emergency existed.

(2) Method of abortion, of which the following was employed:

(a) medication abortion such as, but not limited to, mifepristone/misoprostol or methotrexate/misoprostol;

(b) manual vacuum aspiration;

(c) electrical vacuum aspiration;

(d) dilation and evacuation;

(e) combined induction abortion and dilation and evacuation;

(f) induction abortion with prostaglandins;

(g) induction abortion with intra-amniotic instillation such as, but not limited to, saline or urea;

(h) induction abortion; and

(i) intact dilation and extraction (partial-birth).

(3) Whether an intrafetal injection was used in an attempt to induce fetal demise such as, but not limited to, intrafetal potassium chloride or digoxin.

(4) Age of the patient.

(5) If the probable post-fertilization age was determined to be twenty or more weeks, whether the reason for the abortion was a medical emergency or fetal anomaly, and if the reason was a medical emergency, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

(6) If the probable post-fertilization age was determined to be twenty or more weeks, whether or not the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods.

HISTORY: 2016 Act No. 183 (H.3114), Section 1, eff May 25, 2016.