In the Supreme Court of South Carolina

APPEAL FROM RICHLAND COUNTY

Honorable Daniel Coble, Circuit Court Judge
Appellate Case No. 2024-000997
Case No. 2024-CP-40-00762

Planned Parenthood South Atlantic, et al.,..... Appellants,

v.

Alan Wilson, et al.,..... Appellees.

BRIEF OF *AMICI CURIAE* ACLU & ACLU OF SOUTH CAROLINA

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The American Civil Liberties Union (ACLU) and ACLU of South Carolina (ACLU-SC) are nonpartisan nonprofit organizations that advocate for civil rights and civil liberties in South Carolina and across the nation. As part of that mission, the ACLU and ACLU-SC are committed to protecting the individual rights that enable access to reproductive health care, including abortion. The ACLU and ACLU-SC are also dedicated to ensuring that the State's laws are consistently interpreted and applied such that an ordinary person can ably discern what conduct is required and proscribed under the law. Each interest is implicated here.

STATEMENT OF ISSUES

I. Did the Circuit Court err in concluding that the 2023 Fetal Heartbeat Act forbids most abortions after 6 weeks of pregnancy, as measured from the first day of the last menstrual period ("LMP")?[1]

INTRODUCTION

In arguing that the 2023 "Fetal Heartbeat Act" (the Act) should be interpreted to prohibit abortions performed after 6 weeks LMP, the Attorney General and Governor make two arguments that *amici curiae* consider dangerous enough to warrant specific rebuke.

First, Respondents urge the Court to abandon its text-first approach to statutory interpretation in favor of a freewheeling inquiry into legislative intent. This not only flagrantly disregards the Court's precedent, but it also ignores the dangerous consequences of using extratextual evidence—as Respondents attempt here—to materially augment the reach of a penal statute.

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[1] The Parties' briefs do not consistently articulate the issues on appeal. This brief focuses solely on the statutory interpretation issue.

This case provides an acute example for why such an approach must be rejected. The Act does not prohibit abortions upon the detection of a "heartbeat," but upon detection of a "*fetal* heartbeat." Given that the Act does not separately define the term 'fetal,' medical professionals are left to use the plain meaning of the word. And given that the plain meaning of 'fetal' unquestionably *excludes* embryos, the text of the Act cannot impose a so-called "6-week ban" because no fetus exists at that stage in pregnancy, only an embryo. If the Court were to follow Respondents' wishes and use legislative history and other extratextual materials to augment the reach of the Act, it would deny ordinary people "fair notice" of the Act's proscriptions and would create an unfair expectation that citizens must trudge through the annals of House and Senate reports simply to determine whether their conduct is prohibited by law.

Second, Respondents wrongly invoke the prior arguments of Petitioners' counsel as evidence that the Act imposes a 6-week ban, even insinuating that it is somehow improper that Planned Parenthood's arguments have changed over time. Again, this position bucks norms that the Court must respect. Petitioners' counsel, like Respondents' counsel, have consistently taken the positions that best suit their client's case, in light of the specific claims and questions before the court. In *Planned Parenthood II*, for example, attorneys for Planned Parenthood challenged the constitutionality of the ban on behalf of their clients—who, as evidenced by Respondents' position in this case, faced the risk of serious criminal penalties for providing abortions after 6 weeks LMP—and their patients. And it was the Attorney General, Speaker of the House, and President of the Senate who attempted to defend the constitutionality of that ban on the grounds that, *inter alia*, "a fetal heartbeat may not be detected as late as nine to ten weeks of pregnancy." Importantly though, in upholding the statute, this Court in *Planned Parenthood II*

declined to resolve this particular issue. Now that the question of *when* the ban applies is squarely before this Court, it is neither surprising nor untoward that both parties arrive with amended arguments. To fault a party or its attorneys for presenting new arguments, even when contrary to prior arguments that did not prevail, distracts from the merits of the statutory analysis presented by this case and would put the Court crosswise with our profession's expectation of zealous advocacy.

STANDARD OF REVIEW

The Court reviews the lower court's decision regarding statutory interpretation *de novo*. *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 838 (2021); *see also In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008) ("In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.").

ARGUMENT

I. The State's rejection of textualism to enhance criminal liability creates serious due process problems, both here and in future cases.

"It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question." *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). This is true even when the result "might [be] contrary to the Act's goal." *Jolly v. Fisher Controls Int'l, LLC*, — S.E.2d —, 2024 WL 3882708, at *11 (Aug. 21, 2024) (Kittredge, C.J., dissenting) (discussing *Smith v. Tiffany*). "If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court *must* apply the statute according to its literal meaning." *Creswick v. Univ. of S.C.*, 434 S.C. 77,

81, 862 S.E.2d 706, 708 (2021) (emphasis added); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). Under the Court's cases, extratextual evidence only enters the analysis "where the language of an act gives rise to doubt or uncertainty." *Creswick*, 434 S.C. at 81–82, 862 S.E.2d at 708; *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) (noting that "[t]he text of a statute is . . . the best evidence of the legislative intent or will").

The Governor and Attorney General ignore these rules, relying instead on a freewheeling extratextual search for their preferred policy outcome. The Attorney General, for his part, says he agrees with Petitioner that the Act is unambiguous, *see* Att. Gen. Br. at 17 ("no genuine ambiguity exists"), but then searches for the plain meaning of the text through "popular press accounts . . . of the 2023 Act" and evidence that "the General Assembly understood fetal heartbeat to refer to embryonic cardiac activity," *id.* at 12–15. The Governor takes a bolder tack, choosing to openly reject this Court's precedent and argue that textual ambiguity plays *no role* in statutory analysis. Gov. Br. at 8 n.2 ("The ultimate question is what the General Assembly intended . . . Ambiguity is therefore not some special part of the analysis."). But if the Governor's argument had even a whisper of life, the Court snuffed it this month. *See Eidson v. S.C. Dept. of Ed.*, — S.E.2d —, 2024 WL 4141893, at *13 (S.C. Sept. 11, 2024) ("[I]n considering the meaning of a text, a court should not consider materials outside the text unless the text is ambiguous.").

Amici write not merely to point out that the Attorney General and Governor are wrong on the law, but also to highlight the wisdom of the Court's text-first methodology—especially when broadening the reach of penal statutes.

A. The words of the Act convey a clear and definite meaning to medical providers.

The purpose of the Act is to prevent certain (but not all) abortions. To that end, the Act imposes felony criminal penalties on healthcare providers who "perform or induce" abortions that are prohibited by the Act. *See* S.C. Code Ann. §§ 44-41-630(B), -640, -650, -660. To avoid prosecution, healthcare providers—individuals versed in medical terminology—must be able to read and understand the conduct proscribed by the Act.

The Act does not prohibit abortions performed after a specific number of weeks, but upon the detection of a "fetal heartbeat."[2] Within the Act, the term 'fetal heartbeat' is defined to mean "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." S.C. Code § 44-41-610(6). Heartbeat, then, is defined by the Act to mean "cardiac activity," which is marked by "steady and repetitive rhythmic contraction." *Id.* But the Act is not concerned with any heartbeat—it is explicitly tied to the detection of a *fetal* heartbeat. Indeed, each of the sixteen times the term 'heartbeat' is used in the Act, it is modified by the word 'fetal.' As Petitioners say, there can be no 'fetal heartbeat' without a fetus. Pet'r Initial Br. at 1–2.

The 2023 Act does not define 'fetal' or 'fetus.' The 2021 Act—which was struck down in *Planned Parenthood I*—misdefined the term 'human fetus' to mean "an individual organism of the species homo sapiens from fertilization until live birth." S.C. Code § 44-41-610 (2021); *see Planned Parenthood S. Atl. v. State*, 438

[2] Unlike its general prohibition on abortion, the 2023 Act's exceptions *are* keyed to gestational age, expressed in weeks. *See* S.C. Code Ann. § 44-41-650(A) (permitting abortions resulting from rape and incest so long as the "probable gestational age" is "not more than twelve weeks"); *see also* S.C. Code Ann. § 44-41-610(7) (defining "gestational age" based on the first day of a person's last menstrual period).

S.C. 188, 196 n.2, 882 S.E.2d 770, 774 n.2 (2023) (noting that "the terminology in the Act are inconsistent with medical science"). The 2023 Act contains no such definition, and the Court should not import a definition from an older, unconstitutional Act to contort the meaning of a commonly understood term.[3] *See Hodges v. Rainey*, 341 S.C. 79, 87–88, 533 S.E.2d 578, 582 (2000) ("[T]his Court should not completely disregard the text of an unambiguous statute based on an alleged conflict with an earlier statute."). Because 'fetal' is not separately defined by the Act, "the Court must interpret it in accordance with its usual and customary meaning." *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 646, 689 S.E.2d 638, 641 (Ct. App. 2010); *see also Eidson*, 2024 WL 4141893, at *6 (using Webster's Dictionary to uncover the "plain and popular meaning of 'direct benefit'").

Dictionaries, medical literature, and the testimony of *both* sides' experts confirm that 'fetal' has a common, definite meaning that unambiguously precludes the Act's application at 6 weeks LMP. According to Merriam-Webster, fetal means "of, or relating to, being a fetus," *Fetal*, Merriam-Webster.com (last visited Sept. 4, 2024), and a fetus is "a developing human from usually *two months after conception to birth*," *Fetus*, Merriam-Webster.com (last visited Sept. 4, 2024) (emphasis added). Pregnancy is commonly measured from the first day of a woman's last menstrual period and, indeed, that is the same definition adopted by the ban. *See* S.C. Code § 44-41-610(7) (defining "gestational age" based on the first day of a person's last menstrual period). Conception is equivalent to fertilization of an egg, *see* S.C. Code

[3] As the Governor argued in *Planned Parenthood II* regarding changes between the 2021 and 2023 Acts, "even changing a single word has consequences." Gov. Reply Br., 2023 WL 4488998, *7 (June 23, 2023) (arguing that the 2023 Act's invocation of a "compelling interest" was more than a "minor semantic change" from the 2021 Act's assertion of a "legitimate interest") (citing *State v. Taylor*, 436 S.C. 28, 35, 870 S.E.2d 168, 172 (2022))).

Ann. § 44-41-10(g), and fertilization occurs roughly two weeks after the first day of a person's last menstrual period, *see* Pet'r Br. at 6; *accord* S.C. Code Ann. Regs. § 61-12.101(S). Accordingly, this definition of fetus corresponds to 8 weeks (2 months) *plus* two weeks of pregnancy LMP, unambiguously ruling out classification of a 6-week LMP pregnancy as involving a 'fetus.'

As far as *amici* can tell, all dictionaries agree that a 6-week-LMP pregnancy is *not* a fetus.[4] Rather, dictionaries consistently classify a pregnancy at that stage as involving an embryo.[5] These dictionary definitions align with the terminology used by every medical expert engaged in the case below. *See, e.g.*, R. p. 255, ¶ 15 (State's expert) ("The electrical impulses that can be detected by ultrasound at 6 weeks LMP correspond directly with these contractions of the *embryonic* heart."

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[4] *See, e.g.*, *Fetus*, Dictionary of Cancer Terms, NIH National Cancer Institute (available at: https://www.cancer.gov/publications/dictionaries/cancer-terms/def/fetus) (defining fetus as "[a]n unborn offspring that develops and grows inside the uterus (womb) of humans and other mammals. In humans, *the fetal period begins at 9 weeks after fertilization* [i.e., 11 weeks LMP] of an egg by a sperm and ends at the time of birth." (emphasis added)); *Fetus*, Black's Law Dictionary (12th ed. 2024) ("A developing but unborn mammal, esp. *in the latter stages of development*." (emphasis added)); *Fetus*, Dictionary.com (last visited Sept. 6, 2024) (defining fetus as "the young of an animal in the womb or egg, especially in the later stages of development when the body structures are in the recognizable form of its kind, in humans *after the end of the second month of gestation*." (emphasis added)); *see also Gestate*, Dictionary.com (last visited Sept. 25, 2024) (making clear that gestation in this dictionary refers to the "period from conception to delivery").

[5] *See, e.g.*, *Embryo*, Merriam-Webster.com (last visited Sept. 4, 2024) (defining "embryo" as "the developing human individual from time of implantation to the end of the eighth week after conception" [i.e., 10 or more weeks LMP]); *Embryo*, Black's Law Dictionary (12th ed. 2024) ("A developing but unborn or unhatched animal; esp., an unborn human from conception until the development of organs (i.e., *until about the eighth week of pregnancy*" [or tenth week LMP] (emphasis added); *Embryo*, Dictionary.com (last visited Sept. 6, 2024) (defining embryo as "the young of a viviparous animal, especially of a mammal, in the early stages of development within the womb, in humans *up to the end of the second month*" and "[c]ompar[ing] fetus," which imports post-conception dating, or 10 weeks LMP (emphasis added)).

(emphasis added)). Att. Gen. Br. at 13–15. Respondents have cited no evidence to the contrary.

In short, the plain language of the Act tells medical providers—individuals especially aware of the difference between an embryo and a fetus—that abortions are prohibited upon the detection of a *fetal* heartbeat. Conversely, the Act tells medical providers any abortions performed *before* the detection of a fetal heartbeat—including all embryonic abortions—are permissible and will not result in criminal penalties.

B. Using extratextual evidence to augment the reach of a penal statute unconstitutionally denies the public fair notice.

By arguing that "fetal heartbeat" should be interpreted to include rhythmic electrical impulses in a 6-week-old *embryo*, the Governor and Attorney General urge the Court to construe the Act—which carries felony criminal penalties, S.C. Code § 44-41-630(B)—to penalize more conduct than is prohibited by the plain language of the Act. Aside from breaking from this Court's precedent, the State's position also produces unconstitutional results.

It is a well-settled maxim that citizens are "presumed to know the law," *Ahrens v. State*, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011), and that "ignorance of the law is no excuse," *S.C. Wildlife & Marine Res. Dept. v. Kunkle*, 287 S.C. 177, 178, 336 S.E.2d 468, 469 (1985). The law can fairly impose these expectations because the federal Due Process Clause requires that laws provide fair notice and be "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). The demand of fair notice is "[p]erhaps the most basic of due process's customary protections." *Sessions v. Dimaya*, 584 U.S. 148, 177 (2018) (citing *Connally v. General Contr. Co.*, 269 U.S. 385, 391 (1929)). Fair notice ensures that

"no individual [is] forced to speculate, at peril of indictment, [about] whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979).

This is one of the reasons, as Justice Kagan famously quipped, that "we are all textualists now."[6] By starting (and, where possible, ending) with the text of a statute, courts can ensure ordinary citizens retain fair notice of what the law commands and proscribes. *See, e.g.*, Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 542 (2009) ("Textualism's emphasis on the primacy of the statutory text . . . suggest[s] . . . that laws are legitimately enforced when their subjects have fair notice of them."). This guarantees the public a fair opportunity to conform their behavior to the law's requirements. As scholars have long observed, "textualism appeals to the rule-of-law value that citizens ought to be able to read the statute books and know their rights and duties." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 340 (1990). Justice Thomas made this very point last term in his *Loper Bright* concurrence, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2285 (2024) (Thomas, J., concurring) ("[T]extualism serves as an essential guardian of the due process promise of fair notice."), as did Justice Gorsuch during his confirmation hearings for the Supreme Court of the United States, *see Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 458, 131 (Mar. 23, 2017) (explaining that that you must begin with the text because of due process and fair notice considerations).

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[6] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015) (available at: https://www.youtube.com/watch?v=dpEtszFT0Tg).

This case underscores the danger of importing extratextual evidence to broaden the reach of a penal statute. An ordinary medical professional in South Carolina may (and, based on dictionaries and medical literature, *should*) read and apply the definition of "fetal heartbeat" in the Act to the exclusion of "embryonic cardiac activity." *Supra*. Yet under the State's interpretive framework, they will face prosecution and potential imprisonment if they haven't been reading the Senate reports for evidence that 'fetal' might actually include a 6-week-old embryo. Such a result is demonstrably unfair, is utterly condemned by the Due Process Clause, and would set a dangerous precedent for the interpretation of other penal statutes.

II. Arguments made by counsel in prior cases are not evidence, much less evidence of legislative intent.

Everyone knows that "[t]he arguments of counsel are not evidence." *Owens v. Stirling*, 438 S.C. 352, 359, 882 S.E.2d 858, 862 (2023). Despite that, the Attorney General and Governor both lean heavily on Planned Parenthood's previous litigation statements as evidence that the 2023 Act can now be enforced starting at 6 weeks LMP. The Attorney General, for example, repeatedly chides Planned Parenthood for calling the 2023 Act a 6-week ban in earlier proceedings and even accuses Planned Parenthood, as if improper, of "devis[ing] [its argument] for the specific purpose of this litigation." Att. Gen. Br. at 7. The Governor goes even further, dedicating an entire section of his brief about the narrow question of statutory interpretation to "Planned Parenthood's previous statements." Gov. Br. at 20–21 (argument heading).

Left unsaid, of course, is that the State's own arguments on this point have also changed. Today, the State insists that as the Act prohibits most abortions starting at 6 weeks LMP. But only last year, in *Planned Parenthood II*, the Speaker

of the House, the President of the Senate, the State, the Attorney General, and Solicitor Wilkins together emphasized that "[a]lthough the 2023 Act has been labeled a 'six-week ban,' *a fetal heartbeat may not be detected as late as nine to ten weeks* of pregnancy." *Planned Parenthood S. Atl. v. Wilson*, No. 2023-000896, State Br. at 12 (June 14, 2023) (emphasis added). The Governor is equally guilty. In federal litigation about the 2021 Act, the Governor disputed Planned Parenthood's argument that a fetal heartbeat could be detected at 6 weeks, suggesting instead that a fetal heartbeat might not be detectable until "*between thirteen to fifteen weeks* of gestational age." *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-cv-00508-MGL, ECF 48-1 at 29 n.5 (Mar. 2, 2021) (emphasis added).

So, what do these prior arguments tell us about the plain meaning of the Act? Nothing. Lawyers must (and hopefully, do) make the best arguments available to their clients. And in those prior cases, it was entirely appropriate for Planned Parenthood's counsel to take the position that the ban was unconstitutional because it could prohibit nearly all abortions starting at 6 weeks LMP—indeed, that is *exactly* what the State asks this Court to hold in this case. But once this Court upheld the constitutionality of the ban more broadly, and left open the specific question of when in pregnancy it could be enforced, the plain meaning of the ban's operative prohibition came to the fore. Now that it has, the Court itself benefits from the parties' zealous advocacy. *See, e.g.*, *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) (noting that the appointment of counsel can "sharpen[] the issues in the case" and "assist[] in a just determination.").

Of course, there are rare circumstances in which the doctrine of judicial estoppel "prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215–16, 592 S.E.2d 629, 631–32

(2004). This Court has made clear this doctrine applies only in a narrow set of circumstances, when "the party taking the position" was "successful" and "received some benefit" from the position and "the inconsistency" is "part of an intentional effort to mislead the court. *Id.* As these limits make clear, judicial estoppel "should be applied sparingly." *Id.* at 216. Absent judicial estoppel, attorneys are free—indeed, required—to take the position that best suits their client's case.

Accordingly, lawyers for Planned Parenthood can, with integrity, stand before the Court and argue that "fetal heartbeat" under the challenged statute cannot occur until after approximately 9 weeks LMP.

CONCLUSION

In sum: If the General Assembly wanted to enact a "6-week ban," then they should've done so. Options for doing so abound. The legislature could have tethered the Act's general prohibitions to a specific number of weeks, as they chose to do elsewhere in the Act. *See* S.C. Code § 44-41-650(A). Or the legislature could have, as it did in the 2021 Act, acted as "its own lexicographer" and "define[d] 'fetal' to include anything related to an unborn child." Gov. Br. at 12. Or it could have simply used the word 'embryo' or 'embryonic' to modify heartbeat, rather than 'fetal'—a word that excludes the period of development before 9 weeks. But with the legislature having chosen none of these options, it's not the Court's job to rewrite the statute. The Court cannot assume that such an Act would have passed the General Assembly, and using extratextual evidence to broaden the Act would create unfair legal liability for medical providers who are entitled to "fair notice" of what the law commands and prohibits.

Amici encourage the Court to reject Respondents' invitation to adopt new methods of statutory interpretation, give no weight to Planned Parenthood's arguments in prior cases, and apply the plain meaning of the Act.

Respectfully submitted

Date: October 3, 2024

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