THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE COURT'S ORIGINAL JURISDICTION

PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and its physicians and staff; KATHERINE FARRIS, M.D., on behalf of herself and her patients; GREENVILLE WOMEN'S CLINIC, on behalf of itself, its patients, and its physicians and staff; and TERRY L. BUFFKIN, M.D., on behalf of himself and his patients……..*Petitioners*,

v.

STATE OF SOUTH CAROLINA; ALAN WILSON, in his official capacity as Attorney General of South Carolina; EDWARD SIMMER, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; ANNE G. COOK, in her official capacity as President of the South Carolina Board of Medical Examiners; STEPHEN I. SCHABEL, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; RONALD JANUCHOWSKI, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; GEORGE S. DILTS, in his official capacity as a Member of the South Carolina Board of Medical Examiners; DION FRANGA, in his official capacity as a Member of the South Carolina Board of Medical Examiners; RICHARD HOWELL, in his official capacity as a Member of the South Carolina Board of Medical Examiners; ROBERT KOSCIUSKO, in his official capacity as a Member of the South Carolina Board of Medical Examiners; THERESA MILLS-FLOYD, in her official capacity as a Member of the South Carolina Board of Medical Examiners; JENNIFER R. ROOT, in her official capacity as a Member of the South Carolina Board of Medical Examiners; CHRISTOPHER C. WRIGHT, in his official capacity as a Member of the South Carolina Board of Medical Examiners; SAMUEL H. McNUTT, in his official capacity as Chairperson of the South Carolina Board of Nursing; SALLIE BETH TODD, in her official capacity as Vice Chairperson of the South Carolina Board of Nursing; TAMARA DAY, in her official capacity as Secretary of the South Carolina Board of Nursing; JONELLA DAVIS, in her official capacity as a Member of the South Carolina Board of Nursing; KELLI GARBER, in her official capacity as a Member of the South Carolina Board of Nursing; LINDSEY K. MITCHAM, in her official capacity as a Member of the South Carolina Board of Nursing; REBECCA MORRISON, in her official capacity as a Member of the South Carolina Board of Nursing; KAY SWISHER, in her official capacity as a Member of the South Carolina Board of Nursing; ROBERT J. WOLFF, in his official capacity as a Member of the South Carolina Board of Nursing; SCARLETT A. WILSON, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; BYRON E. GIPSON, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and WILLIAM WALTER WILKINS III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit…….*Respondents*,

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PETITION FOR ORIGINAL JURISDICTION,
EXPEDITED DISPOSITION, AND EMERGENCY INJUNCTIVE RELIEF

Irreparable Harm Is Ongoing and Will Continue Unless Emergency Relief Is Granted

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Dated: September 14, 2023

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INTRODUCTION

Three weeks ago, this Court ruled that Senate Bill 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023) ("S.B. 474" or the "Act"), a ban on abortion after the detection of so-called "fetal heartbeat," does not violate the right to privacy guaranteed by article I, section 10 of the South Carolina Constitution. *See generally Planned Parenthood S. Atl. v. State*, No. 2023-000896, 2023 WL 5420648 (S.C. Aug. 23, 2023), *reh'g denied* (Aug. 29, 2023) ("*Planned Parenthood II*"). In this case, Petitioners—the last remaining outpatient abortion providers in South Carolina and their physicians—raise only a narrow question left open by the Court in *Planned Parenthood II*: to what point in pregnancy does the statutory definition of "fetal heartbeat" refer? *Id.* at *2 n.4.

The Act defines "[f]etal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-610(6)). It also says that "[c]ardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac." *Id.*, § 1(2). While embryonic electrical activity is detectable after approximately six weeks of pregnancy as dated from a patient's last menstrual period ("LMP"),[1] a heart does not form until later in pregnancy, after approximately nine weeks LMP.

While the parties treated S.B. 474 as a ban on abortion after the detection of embryonic electrical activity, this Court recognized that might well not be so because the Act's plain language and rules of grammar indicate that the clause separated by commas—"or the steady and repetitive rhythmic contraction of the fetal heart" (the "Clause")—is meant to define "cardiac activity," such that "[f]etal heartbeat" refers to a single point in pregnancy, after a heart has formed. This is also consistent with the General Assembly's finding that cardiac activity begins only once a heart has

[1] It is standard medical practice to date pregnancy using "gestational age," or the number of weeks and days since the first day of the patient's last menstrual period.

formed. *Id.* Despite this, because of the heavy penalties S.B. 474 imposes, including imprisonment and loss of licensure, Petitioners have no choice but to presume that the Act's abortion ban applies after approximately six weeks LMP rather than risk legal liability. As a result, since the Act went into effect, Petitioners have been forced to turn away the vast majority of patients seeking abortions in South Carolina, including those between approximately six and nine weeks LMP.

Petitioners thus bring this action on their own behalf as well as on behalf of their patients whose pregnancies have detectable embryonic electrical activity but where a heart has not yet formed; in other words, Petitioners seek as-applied relief on behalf of South Carolinians seeking abortions whose pregnancies are between approximately six and nine weeks LMP. Petitioners ask this Court to accept this case in its original jurisdiction and issue a declaratory judgment that, consistent with the plain language of the Act: (1) "cardiac activity" is modified by "the steady and repetitive rhythmic contraction of the fetal heart" such that the two phrases refer to one point in time during pregnancy, and (2) the relevant point in time addressed by the Act is the point when a heart has formed, which is after approximately nine weeks LMP, consistent with the medical consensus. *Id.*, § 2 (adding S.C. Code Ann. § 44-41-610(6)). In the alternative, the definition of "[f]etal heartbeat" is unconstitutionally vague, and the Court should construe it to refer to the point in pregnancy after which a heart has formed.

This Court should accept this case in its original jurisdiction because interpretation of S.B. 474 is a question of significant public interest, Petitioners and their patients will suffer material prejudice unless the Court does so, and this case presents an urgent public health question. Indeed, this Court has twice before accepted such jurisdiction to consider this law and Senate Bill 1, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) ("S.B. 1"), an earlier ban on abortion after the detection of a so-called "fetal heartbeat." Further, due to the ongoing and irreparable harm Petitioners and their patients are currently experiencing, Petitioners further ask that the Court enter an emergency

injunction blocking enforcement of S.B. 474 between approximately six and nine weeks LMP for the duration of this litigation. **Petitioners respectfully ask the Court to grant injunctive relief expeditiously without further briefing given that this issue has been separately briefed through Petitioners' Motion for Rehearing in *Planned Parenthood II*.** Resp'ts' Pet. for Reh'g, *Planned Parenthood II*.[2]

FACTUAL BACKGROUND

I. S.B. 474 BANS ABORTION AFTER A "FETAL HEARTBEAT" IS DETECTED.

This Court is familiar with the intricacies of S.B. 474 and the procedural history of *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023), *reh'g denied* (Feb. 8, 2023) ("*Planned Parenthood I*"), and *Planned Parenthood II*. However, Petitioners will repeat key aspects of S.B. 474. The Act provides that, with extremely narrow exceptions for grave health threats,[3] fatal fetal conditions, and cases of rape or incest that have been reported to law enforcement regardless of the survivor's wishes, "no person shall perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's *fetal heartbeat* has been detected." S.B. 474, § 2 (adding S.C. Code § 44-41-630(B)) (emphasis added). The Act defines "[f]etal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." *Id.* (adding S.C. Code § 44-41-610(6)). Furthermore, in enacting S.B. 474, the General Assembly found: "Cardiac

[2] In the alternative, this Court has the authority to reduce the time for a return to a motion, pursuant to Rule 263(b), SCACR. If the Court believes a return from Respondents is needed, Petitioners request that this Court order Respondents to file any such return by 5:00 pm, September 21, 2023.

[3] *See* S.B. 474, § 2 (adding S.C. Code Ann. § 44-41-640(A)–(C) ("It is not a violation of Section 44-41-630 if an abortion is performed or induced on a pregnant woman due to a medical emergency or is performed 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, not including psychological or emotional conditions, of the pregnant woman."); S.C. Code Ann. § 44-41-610(9) (defining "[m]edical emergency")) (the "Death or Permanent Injury Exception").

activity begins at a biologically identifiable moment in time, normally *when the fetal heart is formed* in the gestational sac." *Id.*, § 1(2) (emphasis added).

At oral argument in *Planned Parenthood II*, Justice Few asked whether "the steady and repetitive rhythmic contraction of the fetal heart" (the "Clause") was intended to define or supplement the term "cardiac activity" based on the commas surrounding the Clause. However, in its ruling, the Court did not answer that question definitively, instead leaving the question "for another day." *Planned Parenthood II*, 2023 WL 5420648, at *2 n.4. While Petitioners sought rehearing to clarify the answer, the Court denied their petition for rehearing. Order, Aug. 29, 2023, *Planned Parenthood II* (denying rehearing).

II. DEVELOPMENT OF THE CARDIOVASCULAR SYSTEM

Because the Act identifies the formation of a heart and the presence of a "heartbeat" as its key developmental milestones, it is important to understand the essential features of a human heart and how the cardiovascular system develops.

The human heart has four major components: four chambers, the walls separating them, the valves connecting them, and the conduction system. Decl. of Amy Crockett, M.D., in Supp. of Pet'rs' Pet. for Original Jurisdiction, Expedited Disposition, & Emergency Injunctive Relief ("Crockett Decl.") ¶ 20. A heart is made of muscles, and electrical impulses cause the muscles to contract and send blood throughout the body. *Id.* ¶¶ 13–14. A heartbeat occurs when the heart muscles contract. *Id.* ¶ 17. The sound of a heartbeat is the valves—which are like doors between the heart's chambers—closing during these contractions. *Id.*

During pregnancy, the earliest primitive cells which will become the heart aggregate around two tubular structures around about five weeks LMP. At this point, the developing organ is a straight tube. *Id.* ¶ 27. The tube will begin to "loop," or fold in on itself, which is the first step in forming the chambers of a heart. *Id.* It is also around this time that the developing organ begins

to transmit electrical impulses. *Id.* These electrical impulses are asynchronously contracting cardiac muscle cells and become visible as a "flicker" on ultrasound after approximately six weeks LMP. *Id.* ¶¶ 27, 31. At this time, these cells are not organized into a coordinated heartbeat and will not be until after the development of the conduction system. *Id.* ¶ 31. In other words, the embryonic electrical activity that is visible at this point is neither "steady" nor "rhythmic." *See* S.B. 474, § 2 (adding S.C. Code § 44-41-610(6)). Furthermore, this early embryonic electrical activity cannot actually be heard in the way a heartbeat can. Instead, it is the ultrasound machine itself that converts these electrical impulses into sound. Crockett Decl. ¶ 27. From approximately six to ten weeks LMP, the chambers, walls, and valves of the developing organ will continue to form. *Id.* ¶¶ 28–30. It is thus after approximately nine weeks LMP that what physicians consider a "heart" has formed. *Id.* ¶ 11, 30, 32.[4] The South Carolina Department of Health and Environmental Control agrees, stating that "[t]he heart starts to form the normal four chambers" at 7–8 weeks LMP and that the heart forms by 9–10 weeks LMP.[5] S.C. Dep't of Health & Env't Control, *Embryonic & Fetal Development*, https://scdhec.gov/sites/default/files/Library/ML-017049.pdf (last visited Sept. 12, 2023).[6]

[4] Physicians and scientists may use different verbiage in talking about cardiac development. For example, some may use the term "heartbeat" to refer to early embryonic electrical activity. However, the medical consensus is that the four main components of a heart (four chambers, walls, valves, and conduction system) form after approximately nine weeks LMP. Crockett Decl. ¶ 32.

[5] Petitioners use the term "after approximately nine weeks LMP" as a conservative estimate of when the heart has formed, acknowledging that heart development can continue to ten weeks LMP, consistent with the State's materials. *See* Crockett Decl. ¶ 30 (noting that cardiac septation is completed at approximately ten weeks LMP). This is particularly true given that developmental processes can vary. *Cf., e.g., id.* ¶ 27 (noting range of dates for certain parts of cardiac development).

[6] In their petition for rehearing in *Planned Parenthood II*, Petitioners cited an amicus brief submitted by the American College of Obstetricians and Gynecologists, the American Medical Association, and the Society for Maternal-Fetal Medicine for the proposition that "a true fetal heartbeat exists only after the chambers of the heart have been developed *and can be detected via ultrasound*, which typically occurs around 17–20 weeks' gestation [(LMP)]." Br. of Amici Curiae Am. Coll. of Obstetricians and Gynecologists et al. in Supp. of Planned Parenthood S. Atl. et al. at 10, *Planned Parenthood II* (emphasis added). After consulting with experts, Petitioners

III. SINCE GOING INTO EFFECT, S.B. 474 HAS HAD AN IMMEDIATE EFFECT ON SOUTH CAROLINA PHYSICIANS AND PUBLIC HEALTH.

The Act has had an immediate effect on Petitioners, their physicians and staff, and patients since going into effect on August 23, 2023. Because of the uncertainty surrounding the point at which S.B. 474's abortion ban begins to apply and the harsh penalties the Act imposes on anyone violating it, Petitioners have had no choice but to stop providing abortions as soon as embryonic electrical activity can be detected via ultrasound—after approximately six weeks LMP (and sometimes sooner).

As a result, Petitioners have been forced to turn away the vast majority of patients seeking abortions. From when the Act went into effect on August 23 until September 8, 2023 (sixteen days), PPSAT has provided only twelve abortions in South Carolina, despite the fact that 135 patients have come to its health centers seeking abortions. Decl. of Katherine Farris, M.D., in Supp. of Pet'rs' Pet. for Original Jurisdiction, Expedited Disposition, & Emergency Injunctive Relief ("Farris Decl.") ¶ 63. In other words, PPSAT turned away approximately 91% of people seeking abortions at their South Carolina clinics. Of the 123 patients turned away, seventy-one (or about 58% of those unable to obtain abortions) had pregnancies that were nine weeks LMP or less. *Id.* Many more South Carolinians likely did not schedule abortion appointments with PPSAT because they learned of South Carolina's new ban on abortion early in pregnancy. By comparison, in the sixteen days before the Act went into effect, PPSAT provided 194 abortions. *Id.* Put differently, over the same period of time, PPSAT was able to provide just 7% of abortions it did before the abortion ban went into effect.

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understand that a heart forms earlier than that, but that an ultrasound will not be able to detect the essential features of a heart until later. Crockett Decl. ¶ 30. Some highly sophisticated technology will be able to detect the four chambers of the heart as early as twelve weeks (typically performed for patients with high-risk pregnancies), and an echocardiogram (also for patients with high-risk pregnancies) performed at 18–20 weeks LMP allows for an even more detailed visualization of the heart. *Id.* ¶¶ 34–35.

Greenville Women's Clinic too has seen dramatic effects since the Act went into effect. It has seen a significantly lower volume of patients in the three weeks the Act has been in effect compared to its usual practice. Decl. of Terry L. Buffkin, M.D., in Supp. of Pet'rs' Pet. for Original Jurisdiction, Expedited Disposition, & Emergency Injunctive Relief ("Buffkin Decl.") ¶¶ 29–30. The number of abortions it has provided during this time decreased by approximately 80% as compared to the number of abortions it provided during the same amount of time immediately preceding the Court's August 23 decision. *Id.* ¶ 30. Greenville Women's Clinic updated its website to notify patients of the changed status of the law, and many patients were likely deterred from coming into the clinic after reading news of the decision. *Id.* Still, it has been forced to turn away approximately half of the patients who have come in for abortion care due to detectable embryonic electrical activity since the Act went into effect on August 23. *Id.* ¶ 29.

Based on PPSAT and Greenville Women's Clinic's experiences, if the Act were construed to apply only once a heart has formed (after approximately nine weeks LMP), many more South Carolinians seeking abortions would be able to obtain one.

While S.B. 474 targets abortion care specifically, it is also negatively affecting pregnancy and miscarriage care, as well as other forms of healthcare in the State. The Act's Death or Permanent Injury Exception is very narrow, and many medical providers are afraid to provide care to patients experiencing pregnancy complications, miscarriages, or even other conditions that use medications used in abortion care because of the Act's severe criminal and civil penalties. Decl. of N. Dawn Bingham, M.D., MPH, FACOG in Supp. of Pet'rs' Pet. for Original Jurisdiction, Expedited Disposition, & Emergency Injunctive Relief ("Bingham Decl.") ¶¶ 14–19. This fear leads them to delay or deny care to pregnant South Carolinians. *Id.* ¶ 14. While physicians are reluctant to provide abortion or miscarriage care pursuant to the Death or Permanent Injury

Exception, they would be able to provide such care to more patients if the Act were construed to apply only after a heart has formed—after approximately nine weeks LMP. *Id.* ¶ 15.

STANDARD OF REVIEW

When appropriate, the Court will consider matters in its original jurisdiction when they cannot be considered by a lower court first without material prejudice to the rights of the parties. Rule 245(a), SCACR. "Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction." *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

GROUNDS FOR GRANTING THE PETITION

This Court should conclude that this matter warrants original jurisdiction for three reasons. First, interpretation of S.B. 474 is a question of significant public interest. Second, Petitioners will suffer material prejudice unless the Court accepts this case in its original jurisdiction. Third, this case presents an urgent public health question.

I. AS THIS COURT HAS RECOGNIZED, ABORTION IS A MATTER OF ENORMOUS PUBLIC IMPORT.

The Court should accept this case in its original jurisdiction because it involves "a question of significant public interest" that the Court itself has raised. Rule 245(a), SCACR. The Court has recognized that abortion is a matter of enormous public import twice in the past thirteen months by granting original jurisdiction in *Planned Parenthood I* and *II*. Order, June 6, 2023, *Planned Parenthood II* (denying petition for supersedeas and accepting case in original jurisdiction); *Smith v. Planned Parenthood S. Atl.*, No. 2022-001005, 2022 WL 3478531, at *1 (S.C. Aug. 17, 2022); *Planned Parenthood II*, 2023 WL 5420648, at *16 (Beatty, C.J., dissenting) (recognizing the decision to hear such cases "in this Court's original jurisdiction twice in one year"). This case is no less significant and thus fits squarely within this Court's original-jurisdiction jurisprudence. The point at which the Act bans abortion is a matter of intense public interest and implicates

matters of statutory interpretation identified by the Court itself as important. *See Planned Parenthood II*, 2023 WL 5420648, at *2 n.4. The volume of coverage of the Act and the Court's ruling in *Planned Parenthood II* by South Carolina news outlets (not to mention national ones) in the past three weeks serves as further evidence that this is a matter of public concern.[7] The Court has also recognized twice in the past three years that questions of statutory interpretation relating to public health laws are of public import such that the exercise of original jurisdiction is warranted. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 81, 862 S.E.2d 706, 708 (2021) (original jurisdiction case involving interpretation of COVID-19 mask mandates "involv[ing] solely a question of statutory interpretation"); *Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 210, 863 S.E.2d 456, 458 (2021) (similar). Furthermore, access to abortion implicates significant public health concerns, as discussed further below.

II. A LOWER COURT CANNOT FIRST ADDRESS THIS MATTER WITHOUT MATERIAL PREJUDICE TO PETITIONERS AND THEIR PATIENTS.

Waiting for this case to further ripen through review by a lower court forecloses the prospect of granting meaningful relief for hundreds, if not thousands, of South Carolinians. Perhaps for the same reasons this case is a matter of significant public importance, lower courts have shown their reticence to adjudicate matters concerning abortion. While the circuit court ultimately granted a preliminary injunction in *Planned Parenthood II*, it indicated its view that issues involving abortion bans should be resolved by this Court in its original jurisdiction. Tr. of

[7] *See, e.g.*, *Editorial: How to limit the misery SC abortion ban can cause*, Post & Courier (Aug. 24, 2023), https://www.postandcourier.com/opinion/editorials/editorial-how-to-limit-the-misery-sc-abortion-ban-can-cause/article_06dc7760-4286-11ee-a6a4-07ade99b9398.html; N. Dawn Bingham, *Commentary: Abortion ban is harmful to SC residents*, Post & Courier (Aug. 29, 2023), https://www.postandcourier.com/opinion/commentary/commentary-abortion-ban-is-harmful-to-sc-residents/article_ee546a8a-465a-11ee-b09f-b77a0e810516.html; Seanna Adcox, *SC's 5 female Statehouse senators renew long-shot call for ballot question on abortion*, Post & Courier (Aug. 26, 2023), https://www.postandcourier.com/politics/scs-5-female-statehouse-senators-renew-long-shot-call-for-ballot-question-on-abortion/article_498a2134-4358-11ee-9a54-b771dae70e44.html.

Record, *Planned Parenthood S. Atl. v. State*, No. 2023-CP-40-002745, 2023 WL 3735109 (May 26, 2023) 32:5–10 ("[I]t's my view that this is a matter that must be addressed by the Supreme Court considering the Supreme Court has previously determined that it's a matter that they should consider in its -- in their original jurisdiction."), 33:13–15 ("I'm going to grant the petition for an injunction and order the matter transferred to the Supreme Court for its review."). And in *Planned Parenthood I*, the circuit court refused to consider the merits of a motion for temporary restraining order and preliminary injunction, stayed further proceedings until this Court's resolution of a pending original jurisdiction petition, and attempted to transfer its own case to this Court. This risk is particularly acute given the Court's implication that it would resolve this statutory interpretation question "another day." *Planned Parenthood II*, 2023 WL 5420648, at *2 n.4.

Thus, unless the Court accepts this case in its original jurisdiction, Petitioners are likely to suffer "material prejudice to the[ir] rights." Rule 245(a), SCACR. Petitioners may enter the legal limbo they did in the period between when they filed their motion for a temporary restraining order and preliminary injunction in the circuit court in *Planned Parenthood I* and when this Court intervened to accept the matter in its original jurisdiction. This uncertainty will have the effect of serving as a de facto ban on abortions between six and nine weeks LMP, harming Petitioners and their patients, as further detailed below.

III. EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION IS NECESSARY TO ADDRESS AN ONGOING PUBLIC HEALTH EMERGENCY.

While the legality of abortion in South Carolina has been actively debated since the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, the Court's ruling in *Planned Parenthood II* injected new uncertainty into the landscape and blocked vital health care. Specifically, the Court raised the issue of, but declined to determine, at what point in pregnancy S.B. 474 bans abortion. Facing the possibility of imprisonment and loss of licensure, physicians

have been left with no choice but to assume that the Act's prohibitions apply upon the earliest detection of embryonic electrical activity.

Petitioners are suffering ongoing harms as a result. They can no longer provide care to their patients consistent with their ethical duties as physicians and with their patients' wishes. Should they follow the more medically accurate and grammatically logical interpretation of the Act, they will live with the uncertainty of arrest, prosecution, imprisonment, and loss of their livelihoods. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005) (holding that a physician's "loss of professional practice and career" was an irreparable harm); *Levine v. Spartanburg Reg'l Servs. Dist.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) (same).

This State saw the effect of physician uncertainty during the fifty-one days S.B. 1 was in effect last year. Farris Decl. ¶ 66. When physicians and other health care providers are forced to second guess their professional judgment, South Carolinians suffer ripple effects across the full spectrum of pregnancy care and even in other areas of medicine. Bingham Decl. ¶¶ 14–23. Given the ambiguity in when the Act's prohibition applies—and the fact that an abortion ban is now in effect—the results are likely to be even more catastrophic than those suffered last year.

While Petitioners assert harms in their own right, South Carolinians will suffer the greatest harms. As it stands, this State's residents are being forced to live with the consequences of the uncertainty regarding when the Act's prohibition on abortion begins to apply. If they are among the minority of people seeking abortions who learn of their pregnancies at the very earliest stages of pregnancy—before embryonic electrical activity can be detected—they will likely be forced to make the decision of whether to have an abortion as quickly as possible, perhaps having to forego the opportunity to consult with partners, family members, and spiritual advisors. *See Planned Parenthood I*, 438 S.C. at 268, 882 S.E.2d at 813 (Few, J., concurring in the judgment). And should

the Act's ban begin to apply upon the detection of embryonic electrical activity rather than after the formation of a heart, a greater number of South Carolinians will be forced to carry their pregnancies to term against their will with the associated dignity and medical risks, travel out of state to get an abortion if they are able, or terminate their pregnancies outside of the medical system.

These threats to physicians and the resulting harms to South Carolinians are "special grounds of emergency," Rule 245(a), SCACR, such that the Court should exercise its original jurisdiction in this case. All of these harms will continue unless this Court intervenes. Without an emergency order blocking the Act's enforcement and this Court's acceptance of the instant petition to exercise its original jurisdiction, Petitioners and their patients will be substantially prejudiced and irreparably harmed.

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Emergency relief blocking Respondents from enforcing S.B. 474 before the development of a heart is consistent with principles of statutory interpretation and is necessary to protect the rights of Petitioners and their patients while this Court considers whether to grant the instant petition and during any merits proceedings that may follow. Such relief is consistent with past practice. *See, e.g.*, *Smith*, 2022 WL 3478531, at *1; *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014); *Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *holding modified on other grounds by S.C. Pub. Int. Found. v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016). Emergency injunctive relief is warranted where (1) the movants would suffer irreparable harm; (2) they have a likelihood of success on the merits; and (3) there is no adequate remedy at law. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). A movant "is not required to prove an absolute legal right."

AJG Holdings, LLC v. Dunn, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). A "reasonable question as to the existence of such a right" is sufficient. *Id.*

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Petitioners are likely to succeed on the merits of their Declaratory Judgment Act and alternate vagueness claims because the grammatically correct and scientifically accurate way to interpret the definition of "[f]etal heartbeat" is that the Clause and "cardiac activity" refer to one point in time, which is when the heart has formed. In the alternative, if the Court finds that the statutory language is ambiguous, it should construe the definition consistently with the accepted medical understanding of when a heart has formed, and thus when a heartbeat exists.

A. The Clause and "[C]ardiac [A]ctivity" Refer to One Point in Time.

1. The Plain Meaning of the Statute Indicates That the Clause Defines "Cardiac Activity."

When engaging in statutory interpretation, this Court "abide[s] by the plain meaning of the words of a statute." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). It must also "apply the ordinary rules of grammar and common usage to ascertain the meaning of a statute, and . . . should examine the grammatical structure of a clause or sentence that is at issue." 82 C.J.S. *Statutes* § 410 (citations omitted); *see also* 73 Am. Jur. 2d *Statutes* § 123 ("It is presumed that the legislature in phrasing a statute knows the ordinary rules of grammar and that the grammatical reading of a statute gives its correct sense. An interpretation is to be avoided which is contrary to the grammatical construction of the statute.") (footnotes omitted). While keeping these instructions in mind, the Court should also heed to the "well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant." *Jacobs*, 393 S.C. at 587, 713 S.E.2d at 623 (citing *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)).

It was this Court itself that first raised, without resolving, "the anomaly appearing on the face of the legislation," *Planned Parenthood II*, 2023 WL 5420648, at *15 (Beatty, C.J., dissenting), and it should now ensure that the commas surrounding the Clause have meaning and are not rendered superfluous. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Jackson v. S.C. Tax Comm'n*, 192 S.C. 350, 6 S.E.2d 745, 746 (1940) ("While punctuation in a statute is not controlling, it cannot be ignored where there is no patent ambiguity, and where the punctuation gives meaning and effect to the language used. Especially is this true where a disregard of the punctuation as found in the statute will have a material effect upon the construction thereof." (citing *Caston v. Brock*, 14 S.C. 104 (1880))).

Indeed, the most natural reading is that the commas offset the Clause so as to explain the meaning of "cardiac activity." "Commas are often used in statutes to set off expressions that provide additional but nonessential information about a noun or pronoun immediately preceding; such expressions serve to further identify or explain the word they refer to." 82 C.J.S. *Statutes* § 413; *cf.* Catherine Traffis, *Appositives—What They Are and How to Use Them*, Grammarly, https://www.grammarly.com/blog/appositive (last accessed Sept. 12, 2023). Here, offsetting the Clause by commas indicates that the Clause is additional information descriptive of "cardiac activity" and could be omitted.

While this definitional clause could be omitted, without such an explanation, the term "cardiac activity" would then be ambiguous because the Act does not follow the consensus in the medical community that a heart forms after approximately nine weeks LMP. *See* Crockett Decl. ¶¶ 24, 32. The Court should thus construe the Clause to define "cardiac activity" consistent with medical consensus, specifically looking to its inclusion of the term "fetal heart." Medically, a

heartbeat exists only after a heart containing the major components—four chambers, walls, valves, and conduction system—has formed. *See id.* Furthermore, from a medical perspective, there is no "steady and repetitive rhythmic contraction" at the time embryonic electrical activity can first be detected. *See id.* ¶ 31 (noting that "cells are not organized into coordinated heartbeat" until later).

2. The Whole of S.B. 474 Confirms That "Cardiac Activity" Begins When a Heart Has Formed.

Moreover, the definition of "fetal heartbeat" should be read in conjunction with the whole of the Act. *See Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (courts should consider "the language of the statute as a whole." (quoting *Mid–State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). Here, the General Assembly found that "[c]ardiac activity begins at a biologically identifiable moment in time, normally when the *fetal heart is formed* in the gestational sac." S.B. 474, § 1(2) (emphasis added). Thus, the Court should interpret the Act to give effect to the General Assembly's finding that it intended the definition to apply to a singular point in time in pregnancy, which is when the heart has formed, after approximately nine weeks LMP. The General Assembly focused on the formation of a heart is consistent with the medical understanding that a heartbeat exists only once a heart does—when four chambers, walls, the major valves, and conduction system have formed. *See* Crockett Decl. ¶¶ 24, 30, 32. The State itself confirms this medical understanding in its materials on embryonic and fetal development.[8] The Court should therefore interpret the singular point in time to mean the period at which the chambers of the heart have formed, rather than the time at which electrical impulses can be detected.[9]

[8] S.C. Dep't of Health & Env't Control, *Embryonic & Fetal Development*, https://scdhec.gov/sites/default/files/Library/ML-017049.pdf (last visited Sept. 12, 2023).

[9] To the extent Respondents argue that the abortion ban applies after approximately six weeks based on legislative intent, their expressions of legislative intent related to S.B. 474 have shifted at various points. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result *demonstrably at odds* with the

This interpretation of "fetal heartbeat" is also consistent with the Act's requirement that a provider inform the patient of their right to "hear the unborn child's fetal heartbeat." S.B. 474, § 10 (amending S.C. Code Ann. § 44-41-330(A)). When embryonic electrical activity can first be detected, this activity cannot be made audible. Rather, a heartbeat cannot be heard until after approximately ten weeks LMP. Farris Decl. ¶ 9.

3. Proposed Amendments and Prior Proposed "Heartbeat Bans" Also Support This Interpretation.

That these commas have meaning is further bolstered by looking at proposed amendments to S.B. 474 as well as at earlier versions of so-called fetal heartbeat bans introduced in the General Assembly. *See Doe v. State*, 421 S.C. 490, 499 n.6, 808 S.E.2d 807, 811 n.6 (2017) (looking at "the historical evolution of the statute at issue"). During debate on S.B. 474, Representative Whitmore proposed an alternative definition of "[f]etal heartbeat": "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac." H.R. Journal 65, 125th Sess. (S.C. 2023) (Amendment No. 26 rejected). The lack of commas indicates that, should the amendment have been adopted, abortion would be prohibited upon the detection of either "*embryonic or* fetal cardiac activity" *or* upon the detection of "the steady and repetitive rhythmic contraction of the heart within the gestational sac." In other words, Amendment 26 refers to multiple points in pregnancy, rather than one "biologically identifiable moment in time." S.B. 474, § 1(2). Similarly, Representatives King and Bamberg proposed amending the definition of "[f]etal heartbeat" to mean "embryonic or fetal cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." H.R. Journal 65

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intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (alteration in original) (emphasis added)). And this plain meaning comports with the State's assertion in *Planned Parenthood II* that "a fetal heartbeat may not be detected [until] as late as nine to ten weeks of pregnancy." Br. of the Speaker of the House, the President of the Senate, the State, the Att'y Gen. and Solicitor Wilkins at 12, *Planned Parenthood II*.

(Amendment No. 588 rejected). The commas in this amendment indicate that "the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac," as in the final version of S.B. 474, is meant to define "embryonic or fetal cardiac activity." However, in both rejected amendments, the inclusion of the term "embryonic" implies that the ban was meant to apply earlier—at some point during the period when the developing organism is still considered an embryo. Legislatures are presumed to regard proposed changes to the language of a statute as being significant. *See* 73 Am. Jur. 2d *Statutes* § 115. Here, the inclusion of commas in the final version of S.B. 474, as compared to Amendment 26, means that the Clause is definitional. So too must the exclusion of the term "embryonic," as compared to Amendments 26 and 588, be interpreted as significant, such that S.B. 474's abortion ban does not apply at the earlier point in pregnancy.

S.B. 1 and S.B. 474 contain identical definitions of "[f]etal heartbeat." *Compare* S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-610(6)), *with* S.B. 1, § 3 (adding S.C. Code Ann. § 44-41-610(3)). By contrast, S.B. 32 and H.B. 3020, both so-called fetal heartbeat bans introduced in 2018, define "[f]etal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." Senate Bill 32, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019), § 2 (amending S.C. Code § 44-41-610(3)); House Bill 3020, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019), § 2 (same). Again, the Court must assume that the addition of commas in S.B. 1 and S.B. 474, as compared to these earlier versions, is significant, *see* 73 Am. Jur. 2d *Statutes* § 115; 82 C.J.S. *Statutes* § 460 (alteration of language in statutes of the same subject is assumed to "indicate an intent to change the object of the legislation"), such that the Clause is meant to define "cardiac activity." Furthermore, neither previously-introduced ban contained a legislative finding linking a "fetal heartbeat" with the formation of a heart. In other words, they did not reference a single "biologically identifiable moment in time" or formation of the heart. *See* S.B. 474, § 1(2).

4. "Heartbeat Bans" in Other States Are Distinguishable.

"Heartbeat bans" in sister states that have been assumed to prohibit abortion once embryonic electrical activity is detectable also suggest that the Court should interpret the commas in the Act's "[f]etal heartbeat" definition to have meaning. As Justice Few noted at oral argument in *Planned Parenthood II*, a Texas law contains an otherwise identical definition but excludes commas. *See* Tex. Health & Safety Code § 171.201(1) ("'Fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."). Each state that adopts an otherwise identical or nearly identical definition omits commas.[10] In looking at a state statute that "is virtually a verbatim copy of a statute of a sister state, . . . [a]ll changes in words and phrasing will be presumed deliberately made with the purpose of limiting, qualifying, or enlarging the adopted law." 82 C.J.S. *Statutes* § 469. Thus, the Court should presume that the addition of commas in South Carolina's version of a "fetal heartbeat" ban is intended to be construed differently than the laws enacted in other jurisdictions.

[10] Ohio Rev. Code § 2919.19(A)(4), enjoined by *Preterm-Cleveland v. Yost*, No. A2203203, 2022 WL 16137799 (Ohio Com. Pl. Oct. 12, 2022) (same); Miss. Code § 41-41-34.1(a) (same); Okla. Stat. tit. 63, § 1-745.32(1) (same); Ky. Rev. Stat. § 311.7701(4) (same); La. Stat. Ann. § 14:87.1(11) (same); *see also* Tenn. Code Ann. § 39-15-216(a)(2) ("'Fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the heart of an unborn child."); Idaho Code Ann. § 18-8801(2) ("'Fetal heartbeat' means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."); Ga. Code Ann. § 1-2-1(e)(1) ("'Detectable human heartbeat' means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac."); *but cf.* Iowa Code Ann. § 146E.1 (excluding the word "or" entirely in definition of "[f]etal heartbeat," which it defines as "cardiac activity, the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac"), enjoined by *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE089066, 2023 WL 4624963 (Dist. Ct. Iowa July 17, 2023). A 2013 Arkansas law, which defined "[h]eartbeat" identically to Iowa, banned abortion after the detection of a "fetal heartbeat" where the pregnancy was more than fourteen weeks LMP. *See* Ark. Code Ann. § 20-16-1302(3), enjoined by *Edwards v. Beck*, 8 F. Supp. 3d 1091 (E.D. Ark. 2014), *aff'd*, 786 F.3d 1113 (8th Cir. 2015). A 2012 Oklahoma biased counseling law defined "[e]mbryonic or fetal heartbeat" using the similar language to Idaho. Okla. Stat. tit. 63, § 1-745.13.

B. In the Alternative, if the Court Finds that "Fetal Heartbeat" is Ambiguous, It Should Construe the Definition Consistently with the Medical Definition.

In the alternative, if the Court finds that the statutory language is ambiguous, it is unconstitutionally vague. The South Carolina Constitution's Due Process Clause states that no person "shall . . . be deprived of life, liberty, or property without due process of law." S.C. Const. art. I, § 3. The due process guarantee requires "requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)); *see also Curtis v. State*, 345 S.C. 557, 571–72, 549 S.E.2d 591, 598 (2001) ("The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies."). This notice requirement is embodied in the void-for-vagueness doctrine, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. 509, 529, 846 S.E.2d 861, 871 (2020) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). If people "of common intelligence must necessarily guess as to [a law's] meaning and differ as to its application," the law is unconstitutionally vague. *Toussaint v. State Bd. of Med. Exam'rs*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991); *see also, e.g.*, *State v. Sullivan*, 362 S.C. 373, 376, 608 S.E.2d 422, 424 (2005). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis*, 345 S.C. at 569–70, 549 S.E.2d at 597 (quoting *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 749 (1995)).

The constitutional standard for vagueness is especially stringent when applied to criminal statutes because they carry the extreme consequence of the deprivation of an individual's liberty. *See Planned Parenthood I*, 438 S.C. at 245–46, 882 S.E.2d at 801 (Beatty, C.J., concurring). That is the case here given the Act's severe criminal penalties. Violation of the prohibition is a felony,

accompanied by a fine of ten thousand dollars, imprisonment up to two years, or both. S.B. 474, § 2 (amending S.C. Code Ann. § 44-41-630(B)). But the Due Process Clause mandates that "no [one] shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737 S.E.2d 830, 842 (2012) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

Moreover, South Carolina courts have long recognized the rule of lenity—the principle that penal statutes are to be strictly construed against the State—because they carry the extreme consequence of the deprivation of an individual's liberty. *See, e.g.*, *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017) ("This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor.").

Petitioners' physicians, under threat of civil and criminal penalties, cannot reasonably ascertain what conduct is prohibited if the meaning of "fetal heartbeat" can either "refer[] to one period of time during a pregnancy or two separate periods of time." *Planned Parenthood II*, 2023 WL 5420648, at *2 n.4. If this Court itself cannot resolve the doubt about the scope of the law, the remaining ambiguity clearly violates Petitioners' right to fair notice. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) ("No one may be required at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") (citation omitted)).

To find that the only operative term defining a "fetal heartbeat" is "cardiac activity" would be to walk "into a giant hole of ambiguity," as Justice Few noted at oral argument. While the most natural and grammatically correct way to read the definition of "[f]etal heartbeat" is that the Clause defines "cardiac activity," the Court pointed to multiple possible ways to interpret the definition. Consistent with the rule of lenity, this ambiguity should be resolved in favor of Petitioners, and the Court should construe to allow the broadest ability of Petitioners to provide care. In other

words, it should interpret "fetal heartbeat" consistently with the accepted medical understanding: that a heartbeat exists only once a heart has formed, after approximately nine weeks LMP. *See* Crockett Decl. ¶¶ 24, 32.

Beyond providing "sufficient notice of the conduct prohibited," to survive a vagueness challenge, a "statute must also not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement." *Chimento*, 401 S.C. at 541, 737 S.E.2d at 842. "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*, 401 S.C. at 542, 737 S.E.2d at 842–43 (quoting *Kolender*, 461 U.S. at 358) (cleaned up). S.B. 474 is also unconstitutionally vague to the extent that it provides insufficient guidance to entities seeking to enforce the law. For example, the Solicitor for the 13th Judicial Circuit might interpret the Act to prohibit abortion after the detection of embryonic electrical activity but where a heart has not yet formed and thus bring charges related to an abortion performed at Greenville Women's Clinic, while the Solicitor for the 5th Judicial Circuit might decline to bring charges for the same abortion if it had been performed at PPSAT's Columbia clinic.

II. UNLESS THE ACT IS CONSTRUED TO APPLY ONLY ONCE A HEART HAS FORMED, PETITIONERS AND THEIR PATIENTS WILL CONTINUE TO SUFFER IRREPARABLE HARM.

"[W]hether a wrong is irreparable" is a question that is "not decided by narrow and artificial rules," but instead determined based on the facts of the case. *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939); *see also Peek*, 367 S.C. 450, 626 S.E.2d 34. "The Courts proceed realistically if the threatened wrong involves actual damage; the mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction." *Kirk*, 191 S.C. at 211, 4 S.E.2d at 16.

A. The Act Is Irreparably Harming Petitioners and Their Staff.

Petitioners and their physicians and staff are being irreparably injured by the lack of clarity of when the Act's prohibition applies. The Act interferes with the ability of Petitioners—and their physicians and staff—to provide medical care consistent with their medical judgment and in support of patient wellbeing. *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016) (recognizing physicians' "right to practice medicine in the best interests of their patients"). Petitioners and their physicians and staff will also face reputational harm and harm to their professional licenses from the threat of severe criminal and licensing penalties posed by the Act. These harms too are irreparable. *Peek*, 367 S.C. at 455, 626 S.E.2d at 37 (holding that a physician's "loss of professional practice and career" was an irreparable harm); *Levine*, 367 S.C. at 465 n.3, 626 S.E.2d at 42 n.3 (same).

And to the extent that the Act's definition of "[f]etal heartbeat" is vague, Petitioners and their staff are also suffering irreparable harm because their constitutional due process rights are being obstructed. Generally, when a plaintiff has demonstrated a loss of a constitutional right, no further showing of irreparable injury is required. *E.g.*, *B. P. J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 357 (S.D. W. Va. 2021) ("When a party has shown a likelihood of a constitutional violation, the party has shown an irreparable harm."); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) ("The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right."); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 2022) (collecting cases).

B. The Act Is Irreparably Harming Petitioners' Patients.

S.B. 474 is already causing grave harm by forcing Petitioners to turn away the vast majority of South Carolinians seeking abortions. Petitioners expect to see many patients who are seeking

abortion services during the remainder of this week; most of these South Carolinians will have pregnancies with detectable embryonic electrical activity. While some of those will have pregnancies where a heart has formed, many will not. Those whose pregnancies fall between approximately six and nine weeks LMP are being turned away at great personal cost due to the legal limbo created by an Act that under the better reading would allow them to access care. They are being forced to carry their pregnancies to term against their will, with all of the physical, emotional, and financial costs that entails; self-manage their abortions outside the health care system; or travel out of state to obtain care, often at great cost and delay. Each of these impacts constitutes irreparable harm to Petitioners' patients who are pregnant with detectable embryonic electrical activity but without a formed heart. *See, e.g.*, *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018) ("A disruption or denial of . . . patients' health care cannot be undone after a trial on the merits." (internal quotations omitted)); *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (irreparable harm where individuals would experience complications and other adverse effects due to delayed medical treatment); *Banks v. Booth*, 468 F. Supp. 3d 101, 123 (D.D.C. 2020) (same).

If construed as a six week ban, S.B. 474 will continue to bar the vast majority of abortions in South Carolina. By contrast, over half of patients seeking abortions at Petitioners' health centers would likely be able to obtain abortions if S.B. 474 were determined to ban abortion after the point when a heart has formed, after approximately nine weeks LMP.

This is consistent with Petitioners' experience during the time S.B. 1 was in effect from June 27 until August 17, 2022. During that time, Petitioners—who provided the majority of abortions performed in South Carolina—were forced to turn away people seeking this vital health care. PPSAT was compelled to cancel 490 scheduled abortions and turn away 513 pregnant South

Carolinians seeking abortions, while GWC had to turn away the vast majority of patients. Farris Decl. ¶ 66; Buffkin Decl. ¶ 29.

The Act threatens severe, actual, and irreparable damage to South Carolinians' lives and livelihood—harms that are more than sufficient to justify entry of injunctive relief. *See Kirk*, 191 S.C. at 211, 4 S.E.2d at 16.

III. PETITIONERS DO NOT HAVE AN ADEQUATE REMEDY AT LAW.

"Equitable relief is generally available only where there is no adequate remedy at law." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate remedy' at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* (citing 27 Am. Jur. 2d *Equity* § 94 (1966)). No damages award could compensate Petitioners and their patients for the harms inflicted by S.B. 474. Nor could such a remedy compensate Petitioners and their physicians and staff for injury to their rights and interests under the threatened application of S.B. 474, a criminal law. *See De Treville v. Groover*, 219 S.C. 313, 328, 65 S.E.2d 232, 239 (1951); *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973). In the absence of equitable relief from this Court, Petitioners do not have an adequate remedy at law to prevent Respondents from enforcing the Act prior to the formation of a heart.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court:

1. Issue a temporary injunction prohibiting all Respondents and their officers, employees, servants, agents, appointees, or successors from administering, preparing for, enforcing, or giving enforcing S.B. 474 and any other South Carolina statute or regulation that could be understood to give effect to S.B. 474, in a manner that would prohibit abortions before a

heart has formed (after approximately nine weeks LMP), while the Court considers whether to grant this petition and, should the petition be granted, for the duration of proceedings in this Court;

2. Grant this petition along with leave for Petitioners to file their proposed complaint; and

3. Expedite further briefing on the petition (if necessary) and a decision.

Respectfully submitted,

/s/ *M. Malissa Burnette*

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* Applications for admission *pro hac vice* forthcoming

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