THE STATE OF SOUTH CAROLINA
In the Supreme Court

Planned Parenthood South Atlantic; Greenville Women's Clinic; Katherine Farris, M.D.; and Terry Buffkin, M.D., Petitioners,

v.

State of South Carolina; Alan McCrory Wilson, in his official capacity as Attorney General of the State of South Carolina; Edward Simmer, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; Anne G. Cook, in her official capacity as President of the South Carolina Board of Medical Examiners; Stephen I. Schabel, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; Ronald Januchowski, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; George S. Dilts, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Dion Franga, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Richard Howell, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Theresa Mills-Floyd, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Jennifer R. Root, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Christopher C. Wright, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Scarlett Anne 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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p2

G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives; Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; and Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, Respondents-Intervenors.

Appellate Case No. 2022-001062

IN THE COURT'S ORIGINAL JURISDICTION

Opinion No. 28127
Heard October 19, 2022 – Filed January 5, 2023

RELIEF GRANTED

M. Malissa Burnette, Kathleen McColl McDaniel, and Grant Burnette LeFever, of Burnette Shutt & McDaniel, PA, of Columbia, for Petitioners.

Julia A. Murray and Hannah Swanson, of Washington, DC; for Petitioners Planned Parenthood South Atlantic and Katherine Farris, M.D.

Genevieve Scott and Astrid Ackerman, of New York, NY; for Petitioner Greenville Women's Clinic and Terry Buffkin, M.D.

Jacquelyn S. Dickman, Ashley Caroline Biggers, and William Marshall Taylor, Jr., of Columbia, for Respondent Edward Simmer, in his official capacity as Director of the South Carolina Department of Health and Environmental Control.

Samuel Darryl Harms, III, of Greenville, for Amicus Curiae Elliot Institute.

Henry Wilkins Frampton, IV, and Denise M. Harle, of Leesburg, VA; for Amici Curiae American Association of Pro-Life Obstetricians and Gynecologists and Dr. Christine Hemphill.

Larry Shawn Sullivan, of Sullivan Law Group, LLC, of Myrtle Beach, and John G. Knepper, of Law Office of John G. Knepper, LLC, of Cheyenne, WY; for Amicus Curiae Alliance for Hippocratic Medicine.

JUSTICE HEARN: Today we consider whether The Fetal Heartbeat and Protection from Abortion Act ("the Act") violates a woman's constitutional right to privacy, as guaranteed in article I, section 10 of the South Carolina Constitution. We hold that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable, and implicates a woman's right to privacy. While this right is not absolute, and must be balanced against the State's interest in protecting unborn life, this Act, which severely limits—and in many instances completely forecloses—abortion, is an unreasonable restriction upon a woman's right to privacy and is therefore unconstitutional.[1]

FACTUAL/PROCEDURAL BACKGROUND

In 2021, the General Assembly passed the Act, which prohibits an abortion after around six weeks gestation. *See* S.C. Code Ann. § 44-41-680 (Supp. 2022). This is before many women—excluding those who are trying to become pregnant and are therefore closely monitoring their menstrual cycles—even know they are pregnant. *See* Amici Curiae Br. of Am. Coll. of Obstetricians & Gynecologists, et. al. The Act requires physicians to scan for "cardiac activity…within the gestational

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[1] As a point of clarity, today a majority of this Court—Chief Justice Beatty, Justice Few, and myself—agrees the Act violates our state's constitutional right to privacy. There are two dissents: Justice Kittredge, while believing that our state's right to privacy is broader than searches and seizures, does not find it implicated here. Justice James believes article I, section 10 only applies within the search and seizure context. While each member of the Court has written an opinion, this is considered the lead opinion.

41-450(A) (2018)). As justification for this restriction on a woman's opportunity to have an abortion, *Roe* itself—as referenced above—recognized a state's "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162, 93 S. Ct. at 731, 35 L. Ed. 2d at 182. The twenty-week bill specifically recites this interest as a "compelling state interest in protecting the lives of unborn children from the stage of viability." S.C. Code Ann. § 44-41-420(13) (2018). Separate from and in addition to that interest, the twenty-week bill also recites "a compelling state interest in protecting the lives of unborn children from the stage at which . . . they are capable of feeling pain." § 44-41-420(12). In pursuit of these interests, the General Assembly imposed the twenty-week ban on abortion.

Unlike the 1974 Act, however, the "twenty-week bill" was highly controversial. Many South Carolina citizens contended then and contend now that the restrictions the 2016 Act placed on a woman's opportunity to have an abortion are unreasonable. Nevertheless, from a legal standpoint, even though we recognize the political views of others may be different, this Court recognizes that the law provides no basis for overriding the legislative policy determination underlying the "twenty-week bill." In other words, the twenty-week restriction on a woman's opportunity to have an abortion is not—as a matter of law—an unreasonable invasion of privacy.

As these examples illustrate, we may not find the Fetal Heartbeat Act violates article I, section 10 unless we find its restrictions on a pregnant woman's opportunity to have an abortion are—as a matter of law—an unreasonable invasion of her privacy.

V.

This brings me to the 2021 Fetal Heartbeat Act, or "six-week bill." In enacting the legislation, the 124th General Assembly necessarily considered the evidence it deemed important and balanced the State's important interests against any countervailing interests that may exist.

A. State Interests

First, it is important to stress what is not a State interest that justifies the "six-week bill." For years, a minority of the General Assembly attempted to enact legislation banning abortion altogether. *See, e.g.*, S. 129, 121st Gen. Assemb., Reg. Sess. (S.C. 2015). Those "personhood bills"—based on what would have become a legislative finding that human life begins at conception[53]—consistently failed to gain majority

[53] S. 129 of 2015, for example, would have added a new section to Title 1 of the Code—"Administration of the Government"—providing, "The right to life for each

support.[54] This year, the House of Representatives passed a near-total ban on abortion. *See* H. 5399, H.R. Journal, 124th Leg. Sess., at ____ (S.C. Aug. 30, 2022). Like its predecessors, H. 5399—had it passed the Senate—would have been based on the finding, "It is undisputed that the life of every human being begins at

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born and preborn human being vests at fertilization." S. 129, 121st Gen. Assemb., Reg. Sess. (S.C. 2015).

[54] *See, e.g.*, S. 1335, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (proposed but not adopted legislation adding a new section to Title 16—"Criminal Code"—providing, "The right to life for each born and preborn human being is inherent and unalienable beginning at fertilization"); H. 5401, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (proposed but not adopted legislation adding a new section to Title 16—Criminal Code—providing, "The General Assembly finds that a human being is a person at fertilization"); S. 381, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); H. 3568, 124th Gen. Assemb., Reg. Sess. (2021) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); ~~H. 3289~~, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a unique person, a distinct person . . . from fertilization forward, and therefore asserts a compelling state interest in the protection of the rights to life, due process, and equal protection, from fertilization forward"); H. 3920, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); ~~S. 485~~, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization, and . . . asserts a compelling state interest in the protection of the rights to life, due process and equal protection, from fertilization forward"); S. 217, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017) (proposed but not adopted legislation adding a new section to Title 1 providing, "The General Assembly finds that a human being is a person at fertilization"); H. 3530, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017) (proposed but not adopted legislation adding a new section to Title 1 providing, "The right to life for each born and preborn human being vests at fertilization").

conception." H. 5399, § 2(4). Had H. 5399 become law, the State may have had a good argument there is no countervailing interest that could render unreasonable the State's use of a total ban on abortion to protect human life from the point of conception. In other words, if the State were to pass a total ban on abortion—despite a complete invasion of a pregnant woman's right to privacy—the privacy invasion might be reasonable under article I, section 10, because "human life" has no countervailing interest; human life simply must be preserved. But the General Assembly failed to pass the personhood bills, and this year the Senate refused to pass H. 5399. S. Journal, 124th Leg. Sess., at ____ (S.C. Oct. 18, 2022). Thus, despite consistent efforts, there is no legislative policy determination that human life—"personhood"—begins at conception, and there is no such State interest that justifies enacting the six-week bill.

There are—of course—other important State interests advanced by the six-week bill. Certainly, the restrictions on a woman's opportunity for an abortion contained in the six-week bill advance the State's legitimate interest—as acknowledged in *Roe*—in "protecting the potentiality of human life." 410 U.S. at 162, 93 S. Ct. at 731, 35 L. Ed. 2d at 182. As it did in the 2016 twenty-week bill, the General Assembly specifically recited this interest in the six-week bill, stating, "South Carolina has legitimate interests from the outset of a pregnancy in protecting . . . the life of the unborn child who may be born." Fetal Heartbeat Act, sec. 2(7), 2021 S.C. Acts at 3. These interests are advanced by the simple fact that—given the shorter time frame for choosing to continue a pregnancy under the six-week bill—fewer women will make the choice to not continue a pregnancy.[55] By reducing the number of women who choose to have an abortion, the six-week bill advances these legitimate State interests.

B. Countervailing Interests

The State interests advanced by the six-week bill, however—unlike the State interest that might have justified a total ban—are not absolute. Rather, they necessarily contemplate countervailing interests, such as a woman's right to privacy. The six-

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[55] *See* Margot Sanger-Katz & Claire Cain Miller, *Legal Abortions Fell Around 6 Percent in Two Months After End of Roe*, N.Y. TIMES: THE UPSHOT (Oct. 30, 2022), https://www.nytimes.com/2022/10/30/upshot/legal-abortions-fall-roe.html ("In states with bans and restrictions, there were about 22,000 fewer abortions in July and August, compared with the baseline of April, before the decision.").

week bill itself identifies another countervailing interest: "informed choice." The General Assembly provided the following in the "legislative findings" section of the bill,

> The General Assembly hereby finds, according to contemporary medical research, . . . :
>
> . . .
>
> (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.

2021 S.C. Acts at 3.[56]

With the General Assembly's codification of a woman's right "to make an informed choice about whether to continue a pregnancy" as a countervailing interest, the six-week ban on abortion raises several concerns. First, in an apparent effort to advance this interest of "informed choice," the General Assembly included in the six-week bill what is now codified at section 44-41-640 of the South Carolina Code (Supp. 2022), which provides,

> If a pregnancy is at least eight weeks after fertilization, then the abortion provider who is to perform or induce an abortion . . . 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 . . . make the fetal heartbeat of the unborn child audible for the pregnant woman to hear.

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[56] The legislative findings section of the 2021 six-week bill was not codified, unlike the legislative findings of the 2016 Pain-Capable Act, which are codified at section 44-41-420 of the South Carolina Code (2018). The 2021 findings are included in an "Editor's Note" to the codification of the Fetal Heartbeat Act. S.C. Code Ann., tit. 44, ch. 41, art. 6 editor's note (Supp. 2022).

This requirement that the abortion provider give the pregnant woman an opportunity to hear the fetal heartbeat makes no apparent sense because if the pregnant woman can hear the fetal heartbeat, then her opportunity to "make an informed choice" has already expired. Thus, it is difficult to understand how the General Assembly's recited interest of "informed choice" is advanced by the six-week bill.

The second concern is how much time a woman actually has to make such a choice. This concern is heightened by the fact the common name "six-week bill" can be misleading. The 2016 "Pain-Capable Act"—twenty-week bill—prohibits an abortion at the point in time the General Assembly found an unborn child is capable of feeling pain. This point in time is generally thought to be twenty weeks "post-fertilization." *See* § 44-41-420(11) (finding "there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty weeks after fertilization"). Thus, the operative section of the twenty-week bill provides, "No person shall perform . . . an abortion upon a woman when it has been determined . . . that the probable post-fertilization age of the woman's unborn child is twenty or more weeks." § 44-41-450(A). The important point is the line in the twenty-week bill after which no abortion may take place is drawn from fertilization.

In the so-called six-week bill, however, the actual line is not drawn from fertilization but is determined according to "whether the human fetus the pregnant woman is carrying has a detectable fetal heartbeat." S.C. Code Ann. § 44-41-650(A) (Supp. 2022).[57] Because this point in time is generally thought to be six weeks after a woman's last menstrual period, the Fetal Heartbeat Act has been commonly referred to as the "six-week bill." If the common name of the Fetal Heartbeat Act were constructed in the same way as the common name "twenty-week bill"—by length of time post-fertilization—the Fetal Heartbeat Act would be named the "four-week bill," as it is generally thought there is a detectable heartbeat at four weeks post-

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[57] Justice Hearn and Chief Justice Beatty address what they contend is a misuse of terms in the Fetal Heartbeat Act, particularly the term "fetal heartbeat." This does not concern me. Regardless of the term used, the Fetal Heartbeat Act—particularly subsection 44-41-610(3)—identifies a circumstance that medical professionals can recognize with certainty. The disagreement over what to call that circumstance is not significant.

fertilization. *See* (Resp't Att'y General Br. 6).[58] In considering the General Assembly's focus on "informed choice about whether to continue a pregnancy," therefore, *and* in considering a woman's right of privacy, it is important to understand that under the six-week bill, a pregnant woman's choice must be made—and carried out—within *four* weeks of the time she becomes pregnant.

Although the Fetal Heartbeat Act recognizes the interest of "informed choice," a woman's interest in choice is not dependent on this portion of the Act. The choice of whether to continue a pregnancy or to have an abortion is an inherently private matter that implicates article I, section 10. The General Assembly's codification of "informed choice" as an interest to be valued here simply recognizes this obvious fact that abortion is a private choice. The article I, section 10 right of privacy, therefore, in this context, includes choice.

C. Balancing of Interests

Once the competing interests have been identified, they must be balanced. *See Hooper*, 334 S.C. at 293-95, 513 S.E.2d at 364-66 (explaining article I, section 10 privacy interests are "not absolute" but must be balanced against the State's interests). This necessity of balancing interests may shed light on a comment I made in subsection V.A., which might otherwise have seemed counterintuitive. I remarked that "if the State were to pass a total ban on abortion—despite a complete invasion of a pregnant woman's right to privacy—the privacy invasion might be reasonable under article I, section 10." Justice Kittredge explains this well in his dissent when he points out that when the State criminalizes rape and child abuse—crimes which usually occur in private—the associated invasion of privacy is reasonable, and thus, there is no article I, section 10 issue. This is true because when the applicable privacy interests are balanced against the State's compelling interest in preventing crime, the balancing clearly supports the criminalization of private actions. Similarly, if the General Assembly were to make the policy determination that human life begins at conception—that a newly-conceived fetus is in fact a person entitled to all the rights due to persons already born—then the hypothetical

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[58] The Attorney General's brief states the six-week bill "allows an abortion prior to the detection of a fetal heartbeat (which can be detected at approximately six weeks) to occur." To support this point, the Attorney General cites an affidavit from its expert stating, "Cardiac activity . . . can be detected . . . 4-5 weeks post-conception." (J.A. at 305).

balancing of that compelling interest against the privacy interests implicated by a total ban on abortion may come out in favor of the State's action. In this case, however, the interests to be balanced are different, and the balancing is not hypothetical. The State's interest in "protecting . . . the life of the unborn child" must be balanced against the countervailing interests of privacy and meaningful choice. This balancing should begin in the General Assembly. *See S.C. Dep't of Soc. Servs. v. Gamble*, 337 S.C. 428, 434-35, 523 S.E.2d 477, 480 (Ct. App. 1999) (studying the constitutionality of a statute, reciting the competing interests, and finding the statute constitutional because, "The statute at issue balances these rights").[59]

D. Fact-Dependent Policy

I now turn to a somewhat unique circumstance we face in the analysis of the constitutionality of the Fetal Heartbeat Act. Whether a pregnant woman is given an opportunity to make a meaningful choice and whether the invasion of her privacy by restricting her opportunity for an abortion is unreasonable each depend on the answer to one particular factual question: Can a pregnant woman even know she is pregnant in time to engage in a meaningful decision-making process and—if her choice is to not continue the pregnancy—make the necessary arrangements to carry out an abortion? On one hand, it would be difficult to argue the Fetal Heartbeat Act is an unreasonable invasion of a pregnant woman's privacy if almost all women know they are pregnant in time to give the question sufficient deliberation and prayer necessary to making a meaningful choice; to have meaningful discussions with family,

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[59] I appreciate Justice Kittredge's affirmation of our privacy rights, but he misses a key point. His analysis is applicable only to an unwritten privacy interest arising through substantive due process, as was the issue in the federal cases he discusses. He overlooks the fact the State constitution has a written privacy right. He incorrectly contends the mere existence of legitimate State interests automatically overrides any countervailing interest unless a countervailing interest is a "deeply rooted" right "implicit in the concept of ordered liberty." While his contention is valid under the theory of substantive due process, it is incorrect under article I, section 10. Thus, the majority of Justice Kittridge's discussion really has nothing to do with this case. Under article I, section 10, the competing interests must be balanced, and if the State interest does not justify denying the countervailing interest, the privacy invasion is unreasonable. Of course, the article I, section 10 balancing must begin in the General Assembly, and we may reject its policy judgment only if we find the invasion of privacy is unreasonable as a matter of law.

more strict than a rational relationship test, *see Luckabaugh*, 351 S.C. at 139-40, 148, 568 S.E.2d at 346-47, 351, it is certainly not a "strict scrutiny" analysis.

Second, the State and the dissenting Justices argue the article I, section 10, "unreasonable invasions of privacy" provision does not encompass a "right to abortion." I wholeheartedly agree. With my vote the argument holds a majority position. However, the argument is not on point. The question before us is whether the Fetal Heartbeat Act violates a pregnant woman's right to "privacy." By not enacting a total ban on abortion, the State thereby preserved its longstanding statutory "opportunity" for abortion.[65] When the State seeks to regulate or restrict that opportunity—as it is undoubtedly entitled to do—the restrictions implicate a pregnant woman's privacy interests. Under article I, section 10, the State may not unreasonably invade those privacy interests. The right at issue here is "privacy."[66]

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[65] The State argues that until 1970 all abortion was illegal in South Carolina—a common law and then statutory total ban. Justices Kittredge and Hearn contend abortion was illegal historically only after "quickening." Regardless of who is correct, it was the General Assembly that enacted a statutory right to abortion in 1970, although in very limited circumstances. Act No. 821, 1970 S.C. Acts 1892, 1892-93. In 1974—in response to *Roe*—the General Assembly enacted an expansive statutory right to abortion, making any abortion legal up to the end of the second trimester of pregnancy. Act No. 1215, 1974 S.C. Acts 2837, 2838-39. That statutory right to—or opportunity for—abortion is actually still the law. *See* § 44-41-20(a)-(b).

[66] As I explained in section II, article I, section 10 is clear that it includes all forms of privacy. The dissent's suggestion in this case—that Justice Black's dissent in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), informs us on the scope of the right of privacy under article I, section 10—takes Justice Black's comments largely out of context. To the extent they do relate to this case, however, Justice Black's comments support my position the term privacy is "broad but clear." Justice Black's argument was that by substituting the word "privacy" for the words actually used in the Bill of Rights, the Court could (1) limit, as he hypothesizes, the Fourth Amendment to instances in which "property . . . [is] seized privately and by stealth," 381 U.S. at 509, 85 S. Ct. at 1695, 14 L. Ed. 2d at 530 (Black, J., dissenting), or (2) expand, as he accuses the *Griswold* majority of doing, the freedom of speech protection of the First Amendment to all forms of privacy. The root of Justice Black's criticism of the *Griswold* majority is that by defining the scope of First Amendment protections according to what the *Griswold* majority calls "the zone of privacy created by several fundamental constitutional