No. 21-1369

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*,
Plaintiffs Appellees,
v.
ALAN WILSON, in his official capacity as
Attorney General of South Carolina, *et al.*,
Defendants Appellants.

On Appeal from Entry of Preliminary Injunction
United States District Court for the District of South Carolina, Columbia Division
Case No. 3:21-cv-00508-MGL, Hon. Mary Geiger Lewis

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC AND FILED WITH THE CONSENT OF THE PARTIES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and Circuit Rule 26.1, *amicus curiae*, the American Center for Law and Justice ("ACLJ"), makes the following disclosures:

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3. The ACLJ is unaware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.

4. This case does not arise out of a bankruptcy proceeding.

Dated: March 15, 2022

Respectfully submitted,

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CERTIFICATION PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), the American Center for Law and Justice ("ACLJ") affirms that no counsel for a party authored this brief in whole or in part and that no person other than the amicus curiae, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have presented oral argument, represented parties, and submitted *amicus curiae* briefs before the U.S. Supreme Court, this Court, and other courts around the country on a variety of issues, including the right to life. Over 102,000 ACLJ members have joined its Committee to Protect Babies and Defend Heartbeat Bills. ACLJ attorneys helped draft, and testified before state legislatures regarding, heartbeat bills. The parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Fourth Circuit panel decision leveraged a constitutional challenge against one provision of an Act into a wholesale invalidation of that legislation, in defiance of severability norms and basic jurisdictional principles. The South Carolina Fetal Heartbeat and Protection from Abortion Act, SB 1 (hereafter "Act") contains a criminal ban on post-heartbeat abortions. But the Act also contains many other

provisions, including such undeniably independent provisions as the requirement that abortion providers report whether an abortion (*regardless* of fetal heartbeat) is being done for health reasons. The plaintiffs' challenge focused on the post-heartbeat abortion ban. Yet the panel affirmed a preliminary injunction against "the entire Act" (Doc. 73, p. 18) under the manifestly erroneous premise that "the entirety of the statute was designed to carry out the ban." Panel op. at 13. This fundamental error warrants en banc rehearing.

The district court should not have granted a preliminary injunction against statutory provisions that plaintiffs neither challenged nor alleged to have caused plaintiffs any cognizable Article III injury. The panel should not have affirmed that injunction. This Court should grant rehearing en banc, vacate the preliminary injunction, and at a minimum remand for entry of a properly tailored injunction.

ARGUMENT

The district court erred by granting relief that exceeded both the scope of plaintiffs' challenge and the court's subject matter jurisdiction, namely, going beyond the challenged post-heartbeat abortion ban section to enjoin the entire Act, including such plainly independent provisions as, for example, the one requiring abortion providers to indicate, for every abortion, whether the abortion is being done for health reasons. *See* amended Sec. 44-41-460(A) (final new item added). The panel compounded that error by affirming the injunction in its entirety. "[T]he district court

could have granted only the injunctive relief requested." *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 n.9 (1949). Plaintiffs challenged only the Act's ban section. This Court should grant rehearing en banc, vacate the preliminary injunction, and remand for entry of a properly tailored preliminary injunction.

I. The U.S. Constitution limits the subject matter jurisdiction of federal courts, including as to relief.

Federal courts have limited subject matter jurisdiction. The jurisdictional limit applies as well to the relief the federal judiciary can grant. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998). "[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (internal quotation marks omitted). "We have insisted . . . that a *plaintiff must demonstrate standing separately for each form of relief sought*." *Id*. (emphasis added). Importantly, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986) (emphasis added). Applying those constitutional norms here shows the district court plainly erred in enjoining the entire Act, rather than just the "ban" section. The panel plainly erred by affirming that injunction. This Court should grant rehearing en banc.

II. The South Carolina Heartbeat Act contains many distinct provisions, but plaintiffs only challenged one, namely, the post-heartbeat abortion ban.

As the Supreme Court has said, "we try not to nullify more of a legislature's work than is necessary," *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). *Accord Ameur v. Gates*, 759 F.3d 317, 325 (4th Cir. 2014) ("presumption of severability" sets a "high hurdle"). The panel failed to adhere to this norm.

A. The Act has many provisions independent of the "ban."

The Act (full text at https://www.scstatehouse.gov/sess124_2021-2022/bills/1.htm) contains many different provisions, including a robust severability section.[1] The notion that everything in the Act somehow serves or is dependent upon the "ban" section is easily refuted. For example, Amended Sec. 44-41-460(a) adds a requirement that abortionists **report for all abortions whether the abortion is done for health reasons or not**, and *if* the abortion was done for health reasons, to explain the health rationale. This requirement has obvious epidemiological value. What proportion of abortions are done for health reasons as opposed to elective social reasons? Are physicians invoking health justifications that are flimsy or serious? If the latter, is there a maternal pregnancy health issue that warrants statewide attention? The effectiveness and value of this provision in no way depends on the operative force of the post-heartbeat ban section. Hence, there is no reason whatsoever it should be

[1] To grasp the scope and variety of the enacted provisions, it may be helpful to view (https://www.scstatehouse.gov/sess124_2021-2022/prever/1_20210210.htm) a bill version which underlines the additions of new text in Sections 5 and 6.

enjoined. Indeed, neither plaintiffs, nor the district court, nor the panel, make any attempt whatsoever to justify an injunction against this particular provision.

The insupportability of the panel's assertion that "the entirety of the statute was designed to carry out the ban," Panel op. at 13, likewise appears from examination of the full scope of the Act. The "ban" section is 44-41-680(A), contained in Section 3 of the Act. The remainder of the Act contains many sections and provisions that have independent significance, i.e., they remain functional regardless of whether the "ban" section is operative. For example, *see* Section

- 1 (title);
- 2 (legislative findings);
- 4 (amends state reporting law to add both reports related to fetal heartbeat testing and, as discussed above, important epidemiological information on *all* abortions *regardless* of heartbeat testing or any post-heartbeat ban);
- 5 (amends state informed consent law to add a new Sec. 44-41-330(A)(1)(b) (see the underlined text in the bill version) requiring additional information to be provided to the pregnant woman, a provision that functions *regardless* of whether the particular abortion is banned or not);
- 6 (amends state abortion reporting law to add at the end of Sec. 44-41-60

(see the underlined text in the bill version) the reporting of medical exceptions, *not to the ban provision* (Sec. 44-41-680), which has its own set of exceptions (Secs. 44-41-680(B) & -690), *but to the heartbeat testing provision* (see Secs. 44-41-650 & -660));

- 7 (severability clause);
- 8 (savings clause); and,
- 9 (operative date of the Act).

None of these sections rise or fall with the ban provision. The district court's holding that these sections are "mutually dependent" on the ban provision, Doc. 73 at 18, is quite mistaken, as is the panel's affirmance of that conclusion.

Meanwhile, Section 3, which contains the post-heartbeat ban, also contains a range of *other* provisions that have independent force and value. *See* new Section:

- 44-41-610 (definitions);
- 44-41-620 (legislative intent in the event of adverse judicial action; provides for actions to revive the statute in the event of new legal developments);
- 44-41-630 (requires that an abortion provider have an ultrasound done and permit the pregnant woman to view the images);
- 44-41-640 (requires the abortion provider to offer the pregnant woman the opportunity to hear her baby's heartbeat);

- 44-41-650 (requires the abortion provider to test for a fetal heartbeat);
- 44-41-660 (medical emergency exception to the heartbeat *testing* requirement);
- 44-41-670 (additional exception to the *testing* requirement in cases where no fetal heartbeat is found);
- 44-41-710 (savings clause and rule of construction);
- 44-41-720 (exempts contraceptive devices);
- 44-41-730 (exempts pregnant woman from civil or criminal penalties); and,
- 44-41-740 (authorizes civil suits by post-abortion women for any violation of the Act, *not just the ban section but any other provision, including informed consent*).

None of these sections rise or fall with the ban provision. Indeed, there is obvious value, for example, to the provisions requiring heartbeat testing and communication to the pregnant woman that her baby has a heartbeat. Such powerful information clearly has immense potential value, at least to some women, as a matter of informed consent. And whether such information ultimately sways a woman's choice or not, the obtaining and communication of such information does not depend at all upon the operative force of the separate post-heartbeat ban provision.

That leaves the following new sections of Section 3 of the Act:

- 44-41-680(A) (the "ban": forbids abortions when a fetal heartbeat has been detected);
- 44-41-680(B) (exceptions to the ban, including when the pregnancy resulted from rape or incest);
- 44-41-680(C) (requires abortion providers to report any rape or incest invoked as an exception to the ban);
- Sec. 44-41-680(D) (sets criminal penalty for violating the ban);
- 44-41-690 (medical exception to the ban section – new Sec. 44-41-680; specifies related recordkeeping requirements); and,
- Sec. 44-41-700 (exception to the ban where no fetal heartbeat is found).

These provisions thus include the ban and the provisions most closely tied to the ban.

B. Plaintiffs only challenged the heartbeat "ban."

Plaintiffs only challenged the ban section. The First Amended Complaint (Doc 66) focuses on the fact that "[t]he Act bans abortion after the detection of fetal [heartbeat]," ¶2. *See also* ¶9 ("abortions banned by SB 1"); ¶39 ("banning abortion after roughly six weeks of pregnancy LMP (the 'Six-Week Ban')"); ¶40 (focusing on Sec. 44-41-480(A)); ¶¶43-44, 49-50, 52-53, 56-58, 63 (attacking the "Six-Week Ban" and/or alleging that a six-week cutoff is burdensome). When the complaint gets to its legal claims, it offers only *one*: a "substantive due process" claim against the state "banning previability abortion upon identification of embryonic or fetal cardiac

activity, which may occur as early as six weeks LMP (or even sooner)," ¶66. That's it.

Plaintiffs *mention* in the complaint that there are other provisions regarding ultrasound, informed consent, recordkeeping, and reporting which they allege (without support) are "closely intertwined with the operation of the Six-Week Ban," ¶39, but they offer no complaint against those other provisions as such. Nor do plaintiffs even try to demonstrate how these other statutory provisions might depend, for operation, upon the ban section. (They do not.) Plaintiffs also mention that the Act requires abortion providers to do ultrasounds, but they acknowledge that plaintiffs already do them, and they offer no complaint about the new provision. First Am'd Cplt. ¶¶35-36, 42. Plaintiffs charge that the informed consent requirements are "designed to discourage" abortions, ¶42, but they offer no First Amendment or other challenge to that provision of the Act.

Notably, plaintiffs also grumble about other, previously enacted abortion statutes. ¶55. No one suggests that such grumbling constitutes a formal legal challenge justifying injunctive relief. In the same way, plaintiffs' gratuitous swiping at other provisions of the Act does not constitute a formal legal challenge.

Lest there be any doubt, plaintiffs state explicitly, "the *only* effect of an injunction would be to prevent South Carolina from enforcing its plainly unconstitutional *ban on previability abortions*." Doc. 5-1, Mem. in Support of Plffs'

Mot. for TRO & Prelim. Inj., pp. 16-17 (emphasis added),[2] Likewise, plaintiffs' motion for injunctive relief specifies in its opening paragraph only one effect of SB 1: "SB 1 bans nearly all abortions in South Carolina beginning at approximately six weeks of pregnancy and threatens abortion providers with felony criminal and other penalties for running afoul of it." Doc. 5, Plffs' Mot. for TRO & Prelim. Inj. at 1.

Plaintiffs identified the key severability question as "whether those portions of SB 1 not directly challenged are capable of operating independently." Plffs' Reply (Doc. 59) p. 1. **Plaintiffs thereby concede that the other portions of SB 1 are "not directly challenged,"** *id.* (emphasis added). And as demonstrated *supra* §II(A), at least the overwhelming majority of the Act's provisions are plainly capable of independent operation. Hence, plaintiffs' claim that, "[w]ithout the ban, the residue of SB 1 would be nothing more than a series of inoperable or unworkable provisions deprived of their common purpose," Plffs' Reply (Doc. 59), p. 12, is inaccurate, indeed indefensible.[3]

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[2] The unsupported statement in the same memo that some other provisions are "closely intertwined with the operation of the Six-Week Ban" (*id.* at 7), simply echoes the identical statement in the complaint, and does not conjure up a legal challenge.

[3] Plaintiffs note that the heartbeat testing provision facilitates the post-heartbeat *ban*. Reply (Doc. 59) p. 13. But to say the *ban* requires *testing* is not to say that the *testing* requires the *ban*. To the contrary, the heartbeat testing requirement functions independently and facilitates the informed consent aspects of the Act (*see* new Sec. 44-41-330(A)(1)(b)). *Accord Ameur*, 759 F.3d at 330 (rejecting "negat[ion] by association"). It is simply false to claim, as the district court did, Doc. 73 at 17-18, that the "only purpose" of the ultrasound is to facilitate the ban. To the contrary, the ultrasound is integral to the informed consent provisions plaintiffs do not challenge.

III. The preliminary injunction far exceeded permissible relief.

While plaintiffs only challenged the post-heartbeat abortion ban, the district court issued, and the panel affirmed, an order enjoining the entire Act. This was clearly an error as a matter of severability. More fundamentally, this order violated the limits on federal subject matter jurisdiction discussed above.[4]

Regarding the **civil remedy** provision of Sec. 44-41-740, plaintiffs face yet another jurisdictional bar. The uniform body of federal case law holds that a suit against a government body or agent cannot be used to attack a *private civil remedy*. *See* ACLJ Amicus Brief at Panel Merits Stage, p. 15. *See also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2021) (abortion providers not entitled to injunction against state attorney general where providers failed to identify "any enforcement authority the attorney general possesses" regarding the private cause of action). It is wholly out of bounds for a federal court, in an action against a government defendant, to enjoin a civil remedy provision for private parties.

* * *

The statute at issue here has multiple provisions that have value and force

[4] Even as to those few provisions in Section 3 of SB 1 that arguably are dependent on the ban section, injunctive relief is unwarranted. Any provision that becomes inoperative if the ban section is enjoined no longer has any force or effect that could injure plaintiffs. Federal courts do not have the job of enjoining futile or inoperative statutory text. *See California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (where penalty was removed, plaintiffs lacked standing to challenge provision: "The problem lies in the fact that the statutory provision . . . has no means of enforcement," so "there is no possible Government action that is causally connected to the plaintiffs' injury").

independent of the post-heartbeat ban, rendering the district court's injunction of the entire Act wildly overbroad, and the panel's affirmance of that injunction manifestly erroneous. This Court should grant rehearing en banc and at a minimum vacate the preliminary injunction to the extent it purports to enjoin anything beyond the "ban" section, Sec. 44-41-680(A).

CONCLUSION

This Court should grant rehearing en banc.

Respectfully submitted,

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March 15, 2022

CERTIFICATION PURSUANT TO FED. R. APP. P. 29 AND 32

This *amicus curiae* brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,564 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2022, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using CM/ECF, which will send notification of such filing to counsel of record.

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