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, SUPPORTING DEFENDANTS-APPELLANTS ON THE MERITS AND URGING REVERSAL. BRIEF 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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2. No publicly held corporation or other publicly held entity owns any portion of the ACLJ.

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: June 28, 2021

Respectfully submitted,

/s/ Walter M. Weber

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

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. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus curiae* briefs before the Supreme Court of the United States, this Court, and other courts around the country in cases involving a variety of issues, including the right to life. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). The ACLJ is dedicated, *inter alia*, to combating the injustice of denying human rights to unborn children and has filed as amicus in previous abortion cases. Over 100,000 ACLJ members have signed onto its Committee to Protect Babies and Defend Heartbeat Bills. Moreover, ACLJ attorneys have helped to draft, and

testified before state legislatures regarding, various heartbeat bills. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The South Carolina Fetal Heartbeat and Protection from Abortion Act, SB 1 (hereafter "Heartbeat Act," "Act," or "SB 1") contains many different provisions, including a robust severability provision, but the challenge by plaintiffs focused on just one provision, namely the criminal ban on post-heartbeat abortions. Yet the preliminary injunction the district court entered (Doc. 73) enjoins "the entire Act" (p. 18) under the (erroneous) premise that the different provisions are not severable. This blunderbuss approach to relief was wrong, not just as a matter of severability, but as a matter of federal subject matter jurisdiction. 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.

This Court should vacate the preliminary injunction and, if it does not reverse or vacate on the merits,[1] remand for entry of a properly tailored injunction.

[1] Whether a state may prohibit abortions prior to viability is precisely the issue before the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (U.S. cert. granted May 17, 2021). Regardless of how that case comes out, the relief the district court granted here is overbroad, indeed

(Text of footnote continued on following page.)

ARGUMENT

The district court erred by granting relief that exceeded both the scope of plaintiffs' challenge and the subject matter jurisdiction of the district court – specifically, going beyond plaintiffs' challenge to the post-heartbeat abortion ban section and instead enjoining 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). At the risk of stating the obvious, "the district court could have granted *only* the injunctive relief *requested*." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 n.9 (1949) (emphasis added). Plaintiffs took issue only with the *ban section* of the Act. This Court should therefore vacate the preliminary injunction and, if it does not reverse or vacate on the merits, remand for entry of a properly tailored injunction.

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

Federal courts are courts of limited subject matter jurisdiction. This limited nature applies as well to the relief the federal judiciary can grant. As the Supreme Court has explained:

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unconstitutionally so because it exceeds federal subject matter jurisdiction, as explained herein.

> Article III, § 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process. *Muskrat v. United States*, *supra*, 219 U.S. 346 at 356-357 [(1911)]. . . . Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).
>
> The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, [504 U.S. 555,] 560 [(1992)]. First and foremost, there must be alleged (and ultimately proven) an "injury in fact" -- a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, *supra*, at 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)). Second, there must be causation -- a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). And third, there must be redressability -- a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46; *see also Warth v. Seldin*, 422 U.S. 490, 505 (1975). This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04 (1998) (footnotes omitted). Moreover, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). As the Supreme Court has emphasized, "our 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). In particular, "[w]e have insisted . . . that a *plaintiff must demonstrate standing separately for each form of relief sought*." *Id.*

(emphasis added). Applying those constitutional norms here illustrates that the district court plainly erred in enjoining the entire Act, SB 1, rather than just the "ban" section which plaintiffs challenged.

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

A. The Heartbeat Act Has Many Provisions Independent of the "Ban".

The Heartbeat Act (full text at https://www.scstatehouse.gov/sess124_2021-2022/bills/1.htm) contains many different provisions, including a robust severability section.[2] 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. (Several of these sections are discussed in further detail *infra* §III.) For example,

- Section 1 gives the bill a title;
- Section 2 sets forth legislative findings;
- Section 4 amends state reporting law to add both reports related to fetal heartbeat testing and, separately, important epidemiological

[2] 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.

information on *all* abortions *regardless* of heartbeat testing or any post-heartbeat ban;

- Section 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;
- Section 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);
- Section 7 is the severability clause;
- Section 8 is the savings clause; and,
- Section 9 sets forth the 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 therefore quite mistaken.

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

- New Sec. 44-41-610 sets forth definitions;
- New Sec. 44-41-620 states legislative intent in the event of adverse judicial action and provides for actions to revive the statute in the event of new legal developments;
- New Sec. 44-41-630 requires that an abortion provider have an ultrasound done and permit the pregnant woman to view the images;
- New Sec. 44-41-640 requires the abortion provider to offer the pregnant woman the opportunity to hear her baby's heartbeat;
- New Sec. 44-41-650 requires the abortion provider to test for a fetal heartbeat;
- New Sec. 44-41-660 creates a medical emergency exception to the heartbeat testing requirement;
- New Sec. 44-41-670 creates an additional exception to the testing requirement in cases where no fetal heartbeat is found;
- New Sec. 44-41-710 sets forth a savings clause and rule of construction;
- New Sec. 44-41-720 explicitly exempts contraceptive devices;
- New Sec. 44-41-730 explicitly exempts pregnant woman from civil or criminal penalties; and,

- New Sec. 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*.

Again, *none* of these new sections rise or fall with the ban provision. Indeed, from the perspective of the pro-life movement, 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 as a matter of informed consent. And in any event, 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 provisions of Section 3 of the Act:

- New Sec. 44-41-680(A) (the "ban") forbids abortions when a fetal heartbeat has been detected;
- New Sec. 44-41-680(B) sets forth exceptions to the ban, including when the pregnancy resulted from rape or incest;
- New Sec. 44-41-680(C) requires abortion providers to report any rape or incest invoked as an exception to the ban;
- New Sec. 44-41-680(D) establishes the criminal penalty for violation the ban;

- New Sec. 44-41-690 sets forth a medical exception to the ban section (i.e., new Sec. 44-41-680) and specifies related recordkeeping requirements; and,
- New Sec. 44-41-700 creates an additional exception to the ban in cases where no fetal heartbeat is found.

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

B. Plaintiffs Only Challenged the Heartbeat "Ban".

The plaintiffs' complaint in this case only challenged the *ban* section. This is explicit in plaintiffs' filings. The First Amended Complaint (Doc 66), for example, 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). Moreover, when the complaint finally 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 do *mention* in the complaint that there are other provisions regarding ultrasound, informed consent, recordkeeping, and reporting which they allege 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. (In fact, these provisions do *not* depend upon the ban.) Plaintiffs also mention that SB 1 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 SB 1 does not constitute a formal legal challenge.

Lest there be any doubt, plaintiffs' memo in support of a preliminary injunction states 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),[3] 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.

The Attorney General in his opposition memo in district court properly pointed out that, even if the ban provision were adjudged likely to be unconstitutional, judicial relief should not extend beyond that ban provision. Doc. 44, pp. 14-16. Plaintiffs in response 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. Notably, with this statement, plaintiffs concede that the other portions of SB 1 are "*not* directly challenged," *id.* (emphasis added). And as to the question of independent operation, as demonstrated *supra* §II(A), the overwhelming majority of the Act's provisions are indeed plainly capable of independent operation. Plaintiffs' argument thus fails under their own

[3] This express assertion lays to rest any argument that plaintiffs sought relief against any other provisions. The 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. Plaintiffs allege no injury traceable to these other provisions. Nor do plaintiffs explain why these provisions do not have independent vitality. As shown *supra* §II(A), the bulk of the other portions of the Act clearly can operate with or without the post-heartbeat ban section.

statement of the legal standard. 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. *Supra* § II(A).[4]

III. The Preliminary Injunction far exceeded permissible relief.

While plaintiffs in this case only challenged the ban on post-heartbeat abortions, the district court issued an order purporting to enjoin the entire Act. While this was clearly an error as a matter of severability, the district court more fundamentally violated the limits on federal subject matter jurisdiction discussed above. To recapitulate, a party only has standing to challenge provisions that cause a cognizable Article III injury to that party which can be redressed by the relief sought. Plaintiffs have not alleged, much less identified, any way in which any other provisions, such as the heartbeat testing requirement, the informed consent requirements, or the requirement to report whether an abortion is being done for

[4] 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)). The district court made the same mistake in its analysis. Doc. 73 at 17-18. It is simply false to claim, as the district court did, that the "only purpose" of the ultrasound is to facilitate the ban. Contrary to the district court's narrow view, the ultrasound is also integral to the informed consent provisions which plaintiffs did not challenge.

health reasons, cause them any harm whatsoever. To the contrary, the only injury they allege is caused by the "ban" section. Since the only harm plaintiffs allege is from the ban section, judicial action against any other section redresses no injury plaintiffs claim to suffer. Hence, the district court lacked subject matter jurisdiction to grant any relief other than against the ban section.

In response, as noted above, plaintiffs claim that no other sections have any independent force. This is manifestly incorrect. Amended Sec. 44-41-460(a), for example, 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 enjoined. Indeed, neither plaintiffs nor the district court make any attempt to justify an injunction against this particular provision.

Other provisions of the new enactment, such as the mandatory **heartbeat testing and informed consent requirements**, likewise can stand independent of

the ban section and therefore should not be enjoined.[5] *See also supra* note 4. Notably, the Supreme Court has repeatedly upheld informed consent, recordkeeping, and reporting requirements, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (informed consent, recordkeeping, and reporting); *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-67, 79-81 (1976) (same). Given these precedents, it would take a far greater, and more detailed, showing by plaintiffs to mount a credible constitutional challenge to such provisions. Mere passing assertions of "intertwinement" do not suffice.

In the particular case of the **civil remedy** provision of Sec. 44-41-740, plaintiffs point to two defendants' acknowledgement in the district court that the *civil* remedy provision "would not be operative" if the *criminal* ban section is enjoined. AG & Wilkins Opp. (Doc. 44) at 15 n.3. That acknowledgement should be understood to mean that, *as a practical matter*, where binding precedent holds that a legal requirement is unconstitutional, a civil suit invoking that same

[5] 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*, No. 19-840 (U.S. June 17, 2021) (where Congress zeroed out the penalty for failure to maintain minimum insurance coverage, plaintiffs lacked standing to challenge that provision: "The problem lies in the fact that the statutory provision . . . has no means of enforcement," and hence "there is no possible Government action that is causally connected to the plaintiffs' injury," slip op. at 5).

provision will presumably fail (absent the overruling of that precedent). It must be kept in mind, though, that the state's acknowledgment cannot be leveraged into federal subject matter jurisdiction. Parties cannot concede the existence of federal subject matter jurisdiction. As the Supreme Court has held, "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). A challenge to the civil remedy section – which plaintiffs did not even make in this case – would be especially improper. Not only do plaintiffs lack standing for the reasons set forth above, but 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*. *Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005); *Hope Clinic v. Ryan*, 249 F.3d 603, 605-06 (7th Cir. 2001) (per curiam) (en banc); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc) (cited approvingly in *McBurney v. Cuccinelli*, 616 F.3d 393, 401 (4th Cir. 2010)); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341-42 (11th Cir. 1999); *1st Westco Corp. v. School Dist.,* 6 F.3d 108, 112-15 (3d Cir. 1993); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-59 (8th Cir. 2015). *Accord Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) ("The purpose of allowing suit against state officials to enjoin their

enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute"). The rationale for this rule is obvious: first, the state has no role to play in bringing private suits, and thus is not a proper party as a matter of standing, Eleventh Amendment immunity, and justiciability; second, due process prevents a court from adjudicating the rights of third parties not before the court (those who would bring the civil suits); and third, the existence and identity of future civil plaintiffs is hypothetical, speculative, and unascertainable, making a suit against them unripe. In short, 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 independent of the post-heartbeat ban, including a clear, express severability provision, rendering the district court's injunction of the entire Act wildly overbroad. Moreover, as explained above, the district court did not even have subject matter jurisdiction to go beyond the "ban" provision in the first place. This Court should 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 vacate the preliminary injunction.

Respectfully submitted,

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June 28, 2021

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(a)(5) and 32(a)(7) because it contains 3,655 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: June 28, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, 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.

Respectfully submitted,

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