THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE COURT'S ORIGINAL JURISDICTION

PLANNED PARENTHOOD SOUTH ATLANTIC, GREENVILLE WOMEN'S CLINIC, KATHERINE FARRIS, M.D., and TERRY BUFFKIN, M.D.,
Petitioners,

vs. CASE NO. 2022-1062

STATE OF SOUTH CAROLINA, ALAN WILSON, EDWARD SIMMER, ANNE G. COOK, STEPHEN I. SCHABEL, RONALD JANUCHOWSKI, GEORGE S. DILTS, DION FRANGA, RICHARD HOWELL, THERESA MILLS-FLOYD, JENNIFER R. ROOT, CHRISTOPHER C. WRIGHT, SCARLETT A. WILSON, BYRON E. GIPSON, WILLIAM WALTER WILKINS III,
Respondents, and

G. MURRELL SMITH, JR., THOMAS C. ALEXANDER, HENRY McMASTER,
Respondents-Intervenors.

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS AND RESPONDENTS-INTERVENORS

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Dated: October 5, 2022

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INTEREST OF *AMICUS CURIAE*

The American Center for Law & Justice ("ACLJ"), *amicus curiae*, is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. Counsel for the ACLJ have presented expert testimony before State and federal legislative bodies, and have presented oral argument, represented parties, and submitted *amicus curiae* briefs before the Supreme Court of the United States and numerous State and federal courts in cases involving a variety of issues, including those dealing with abortion and constitutional law. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Whitmer v. Linderman*, No. 164256 (Mich. Sup. Ct. 2022); *Oklahoma Call for Reprod. Justice v. O'Connor*, No. 120543 (Okla. Sup. Ct. 2022).

The ACLJ submits this brief on behalf of itself and over 127,000 of its supporters (including more than 1,900 in South Carolina) who promote the sanctity of life and have an interest in the provisions of the South Carolina Constitution being followed.

The ACLJ's important decades-long role in precedential cases involving abortion is perhaps best illustrated by the *Dobbs* Court's citation and reliance upon two cases argued by the ACLJ at the United States Supreme Court: *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *Hill v. Colorado*, 530 U.S. 703 (2000). The *Dobbs* majority cited *Bray* in support of its pivotal finding that the "goal of preventing abortion" does not constitute "'invidiously discriminatory animus' against women," *Dobbs*, 142 S. Ct. at 2246 (quoting *Bray*, 506 U.S. at 273–74), and *Hill*, as just one of a host of cases demonstrating how the Court's abortion

jurisprudence led to the distortion of numerous background legal principles in other areas of the law, including those involving the First Amendment. *Id*. at 2276.

INTRODUCTION AND SUMMARY OF ARGUMENT

By challenging Senate Bill 1, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) ("S.B. 1"),[1]/ which bans abortion around six weeks of pregnancy but includes exceptions, Petitioners are asking this Court to create a new abortion right in the South Carolina Constitution. Never before has this Court determined that such a right exists. For example, in *State v. Hutto*, 252 S.C. 36, 165 S.E.2d 72 (1968), this Court affirmed a conviction for violation of the pre-*Roe* anti-abortion law (S.C. Code Ann. § 16-83) without mention of a constitutional right to abortion. And, post-*Roe*, this Court said it was "forced to agree" that, in light of *Roe*, Section 16-83 was unconstitutional based on a federal constitutional, *not* a State constitutional, right to abortion. *State v. Lawrence*, 261 S.C. 18, 20-22, 198 S.E.2d 253, 254-55 (1973). This Court should not now find a right to abortion when one does not exist in the South Carolina Constitution.[2]/

Abortion implicates many significant interests—including those of the unborn child who may be killed, the child's parents, the government, and the public—and it also "presents a profound moral issue on which Americans hold sharply conflicting views." *Dobbs*, 142 S. Ct. at 2240. The basic premise of Petitioners' lawsuit, however, is that the South Carolina Constitution gives one group of human beings (pregnant women) a "right" to have other separate, unique, living human

[1]/ "South Carolina Fetal Heartbeat & Protection From Abortion Act," S.C. Code Ann. §§ 44-41-610 to -740.

[2]/ As this Court noted in a different context, "the silence of the constitution on the ability of the people to enact laws by referendum does not constitute an implied grant of that right." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 645, 528 S.E.2d 647, 652 (1999). The same holds true concerning the constitution's silence regarding an abortion right.

beings (unborn children) intentionally killed, and neither the public nor the legislative branch of government has much, if any, say in the matter.

The question of when and whether the law should authorize, or at least excuse, the intentional killing of a living human being is *never* a primarily *private* question. To the contrary, both the public and the government clearly have *compelling* interests at stake whenever human life is being taken, regardless of whether the circumstance entails abortion, capital punishment, murder, the use of lethal force by individuals asserting defense of self or others, deaths caused in military operations, suicide, or euthanasia. The fact that a particular killing impacts the individuals involved in a more direct way than it impacts the general public does *not* render Legislatures powerless to carefully weigh the competing interests at stake and set policies that reflect the values of the public.

More generally, State Legislatures have ample room to regulate conduct where one's exercise of a purported right directly harms others. The policy arguments raised by Petitioners should be presented *to the proper audience*: the Legislature, and the public at large. The amendment to the State Constitution proposed by Petitioners would need to occur, if it occurs at all, *through the constitutional amendment process*, not through the amendment-by-litigation strategy that this lawsuit represents. *See, e.g.,* S.C. Const. art. XVI. This Court should reject Petitioners' request to effectively destroy the rightful authority of the Legislature to weigh the various significant interests at play and determine abortion policy. *See Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 641, 528 S.E.2d 647, 647-50 (1999) (noting that the South Carolina Constitution requires the Legislature to enact laws); *accord* S.C. Const. art. III, § 1.

ARGUMENT

I. Petitioners' position is contrary to the separation of powers ensured by the South Carolina Constitution.

By effectively asking this Court to strip the South Carolina Legislature (and ultimately the public) of its authority to make abortion policy, this lawsuit raises significant separation of powers concerns that extend well beyond the issue of abortion. *See Sojourner T v. Edwards*, 974 F.2d 27, 31-32 (5th Cir. 1992) (Garza, J., concurring specially) ("In essence, *Casey* is not about abortion; it is about power."); *Smith v. Planned Parenthood S. Atl. & Greenville Women's Clinic*, 2022 S.C. LEXIS 95, at *4 (Aug. 17, 2022) ("A long-recognized principle is that the will of the people is reflected in the legislative enactments of the people's elected representatives.").

Every judge-made or judge-expanded right shifts power away from the political branches, thereby diminishing the right of the people to exercise their voting power to decide or influence important policy questions. Courts "'should be extremely reluctant to breathe still further substantive content'" into constitutional provisions "'so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.'" *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (citation omitted).

A court must proceed with great caution where, as here, a purported fundamental liberty that greatly restricts legislative authority is claimed to exist, "lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent,

place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' . . . lest the [law] be subtly transformed into the policy preferences of the members of this Court.").

The United States Supreme Court's admonishment (in a case that did not involve abortion) applies here:

> The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. . . . [This] is inconsistent with the underlying premises of a responsible, functioning democracy. . . . It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 312-13 (2014) (plurality).

A central theme of the *Dobbs* decision—also applicable here—was the significant harm that *Roe*, *Planned Parenthood of Se. Penna. v. Casey*, 505 U.S. 833 (1992), and their progeny had done to federalism, the separation of powers, and the public's voting rights, which are concerns that go well beyond the issue of abortion policy. The Court acknowledged that *Roe* "represented the 'exercise of raw judicial power'" and "abruptly ended" the State Legislatures' process of reviewing and modifying abortion laws. *Dobbs*, 142 S. Ct. at 2241. Whereas *Roe* improperly took legislative authority away, the Court recognized in *Dobbs* that it "has neither *the authority* nor the expertise to adjudicate" disputes over the pros and cons of abortion-related policies. *Id.* at 2277 (emphasis added).

The *Dobbs* Court noted that its decision restored abortion policymaking authority *to the State Legislatures*:

> [T]he people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." . . . Our Nation's historical understanding of ordered liberty does

> not prevent *the people's elected representatives* from deciding how abortion should be regulated. . . .
>
> [T]he authority to regulate abortion must be returned *to the people and their elected representatives*.

Id. at 2257, 2279 (emphasis added); *Smith*, 2022 S.C. LEXIS 95, at *4 (noting that owing to *Dobbs* "[t]he public policy issue of abortion has been returned to the people of the respective states.").

Prior to *Dobbs*, numerous opinions of individual Supreme Court Justices and other courts and judges raised similar concerns about the improper usurpation of legislative authority.[3]/ It would be a significant defeat for the separation of powers and the rule of law if, shortly after the State Legislatures had their authority to determine abortion policy rightly restored to them after a half-century, State courts usurped that authority. This Court should reject Petitioners' request to do so.

II. The court-created right that Petitioners seek would improperly short-circuit the democratic process.

Roe's evisceration of the public's right to influence abortion policy through their elected officials "sparked a national controversy that has embittered our political culture for a half century." *Dobbs*, 142 S. Ct. at 2241. *Dobbs* emphasized the disruptive impact that *Roe*'s improper short-circuiting of the democratic process had across the country:

> [W]ielding nothing but "raw judicial power," the [*Roe*] Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily

[3]/ *See, e.g., Casey*, 505 U.S. at 979, 987 (Scalia, J., concurring in part and dissenting in part) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. . . . [T]he joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 8th Cir. 2015) (noting that abortion policymaking "is better left to the states. . . . 'To substitute its own preference to that of the legislature in this area is *not* the proper role of a court.'") (citation omitted; emphasis in original).

> declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*.

Id. at 2265 (citations omitted).

Petitioners similarly ask this Court to exceed its constitutional authority and exercise raw judicial power by creating a constitutional abortion right. When courts improperly constitutionalize important matters of legislative policy, thereby making the judiciary the ultimate policy-making body, they exceed their authority. Asking a court to purport to "objectively assign weight to . . . [the] imponderable values" implicated by abortion would facilitate "judicial arbitrariness," destroy predictability, and would require the court "to act as legislators, not judges, and would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" *June Med. Servs.*, 140 S. Ct. at 2135-36 (Roberts, C.J., concurring) (citation omitted). This Court should decline Petitioners' invitation to superimpose its own value judgments upon the South Carolina Constitution.

III. The State Constitution does not give abortion providers a unique privilege to engage in practices that the Legislature deems to be unethical or harmful.

State Legislatures have broad discretion to regulate the medical profession, including to "protect[] the integrity and ethics of the medical profession." *Glucksberg*, 521 U.S. at 731; *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (same). Abortion providers have no special exemption from that legislative authority; "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163; *see also Thornburgh*, 476 U.S. at 802-04 (White, J., dissenting).

Roe and *Casey*, however, improperly made the United States Supreme Court "the country's '*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality) (citation omitted). The diminishment of legislative authority to decide whether particular medical or scientific practices that raise ethical concerns or injure human beings should be prohibited, inhibits the public's ability to ensure that the individuals working in those fields do not exceed the bounds of ethics and human decency. This Court should reject Petitioners' attempt to have this Court improperly take on the role of the State's medical board with respect to abortion policy.

Additionally, *Roe* and *Casey* stifled meaningful debate about "medical and scientific advances" by "render[ing] basic abortion policy beyond the power of our legislative bodies." *Stenehjem*, 795 F.3d at 774 (citation omitted). As one judge explained, "[h]ard and social science will of course progress even though the Supreme Court averts its eyes. . . . That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer. . . ." *McCorvey v. Hill*, 385 F.3d 846, 852-53 (5th Cir. 2004) (Jones, J., concurring). This Court should decline to usurp the Legislature's broad authority to review and update State abortion policy in light of new research and technological advancements.

Moreover, by stripping Legislatures of their authority, *Roe* and *Casey* effectively ushered in an era of abortion provider self-regulation, with disastrous consequences. For instance, one abortion-related lawsuit produced extensive evidence that:

- "women are often herded through their procedures with little or no medical or emotional counseling,"
- "what counseling is received is heavily biased in favor of having an abortion,"

- women "are rushed through the process, and exposed -- without sufficient warning -- to health risks ranging from unsanitary clinic conditions to physical and psychological damage,"

- countless women seek post-abortion counseling for "the emotional, physical, and psychological symptoms" they experienced after the abortion, and

- in some instances, "both abortion counselors and physicians worked on commission and aggressively followed a script to encourage prompt election of the procedure."

Id. at 850-51 & n.8.

The evidence in the *McCorvey* case included "about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision," and "[s]tudies by scientists . . . [that] suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions." *Id.*; *Stenehjem*, 795 F.3d at 775 (same); *Gonzales*, 550 U.S. at 159 ("[S]ome women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow."). This Court should leave legislative oversight of the medical profession (including abortion practice) fully intact by rejecting Petitioners' claims.

IV. The South Carolina Legislature and the public have the power to decide that unborn human beings, like human beings that have already been born, are worthy of legal protection and basic dignity.

Throughout history, there has been a recurring debate over the controversial position that the extent to which a living human being should be entitled to legal protection and basic dignity is dependent upon his or her medical conditions, expected quality of life, potential to contribute to society, etc. *See, e.g., Glucksberg*, 521 U.S. at 729. It is well established, however, that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life." *Cruzan v. Dir.,*

Mo. Dep't of Health, 497 U.S. 261, 282 (1990); *Glucksberg*, 521 U.S. at 729 ("[The State] . . . insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law."). For instance, a State Legislature has substantial leeway to ensure that the lives of human beings that have a disability or terminal condition are no less valued than the lives of others. *Glucksberg*, 521 U.S. at 731-32. The task of weighing the "unquestionably important and legitimate" interests at play when the lives of these individuals are at risk is a quintessentially legislative task. *Id.* at 735. The State has, and may pursue through legislation, "a legitimate and substantial interest in preserving and promoting fetal life."[4]/ *Gonzales*, 550 U.S. at 145; *see also Dobbs*, 142 S. Ct. at 2284 (the State's "legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability") (citations omitted).

By contrast, a court-created abortion "right" wrongfully enshrines the court's own subjective theory of life—including the point at which living human beings become entitled to basic dignity and legal protection—into constitutional law. As the *Dobbs* Court noted:

> The dissent . . . would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "theory of life."

Id. at 2261.

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[4]/ "[T]he State of South Carolina has legitimate interests from the outset of the pregnancy in protecting the health of the pregnant woman and the life of the unborn child who may be born." "South Carolina Fetal Health & Protection from Abortion Act," 2021 Act No. 1, § 2.

More generally, the State clearly has significant interests at stake when *one* person makes medical decisions that may harm *another* person; this includes decisions that parents make concerning a child. *Cruzan*, 497 U.S. at 287 n.12 (emphasis added) ("[T]he choice made by a competent person to refuse medical treatment, and the choice made *for an incompetent person by someone else* to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class."); *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting) ("[P]arents have a fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents."). The type of abortion "right" asserted here is fundamentally different from the kind of freedoms that are actually protected by the federal and State constitutions because "[a]bortion is a unique act" that entails the intentional killing of living human beings. *Dobbs*, 142 S. Ct. at 2277; *id.* at 2258.

CONCLUSION

Whether, and the extent to which, abortion should be permitted in South Carolina is a policy question reserved for the Legislature and the people. Petitioners' claims should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served the Brief of the American Center for Law & Justice, *Amicus Curiae*, in Support of Respondents and Respondents-Intervenors to the following counsel for the parties on October 5, 2022, via email under Paragraph(d) of Order Re: Methods of Electronic Filing and Service Under Rule 262, SCACR, Appellate Case No. 2020-447:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with South Carolina Appellate Court Rules 213 and 267.

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