The Supreme Court of South Carolina

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; Henry McMaster, in his official capacity as Governor of the State of South Carolina; and Alan Wilson, in his official capacity as Attorney General of the State of South Carolina, Petitioners,

v.

Planned Parenthood South Atlantic and Greenville Women's Clinic, Respondents.

Appellate Case No. 2022-001005

and

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

v.

State of South Carolina; Alan 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 A. Wilson, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; Byron E. Gipson, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and William Walter Wilkins III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit, Respondents,

&

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 McMaster, in his official capacity as Governor of the State of South Carolina, Respondents-Intervenors.

Appellate Case No. 2022-001062

ORDER

In 1973, the United States Supreme Court recognized in the Constitution a woman's right to an abortion as a matter of privacy. *See Roe v. Wade*, 410 U.S. 113, 153–54 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The South Carolina legislature responded in 1974 by essentially codifying the *Roe* framework. *See* Act No. 1215, 1974 S.C. Acts 2837 (codified as amended in scattered sections of S.C. Code Ann. §§ 44-41-10 to -80) (2018)).[1] In

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[1] The amendments to Article 1 of Chapter 41 were primarily in response to case

2021, the Fetal Heartbeat and Protection from Abortion Act (the Act) was enacted. *See* S.C. Code Ann. §§ 44-41-610 to -740 (Supp. 2021). Section 44-41-710 of the Act provides that its enactment "must not be construed to repeal, by implication or otherwise, Section 44-41-20 [(the codification of *Roe*)] or any otherwise applicable provision of South Carolina law regulating or restricting abortion." It necessarily follows that the codification of *Roe* in section 44-41-20 remains part of the public policy of this state, notwithstanding the recent Act. This legislative history, combined with the result in *Dobbs*, brings us to the current dispute in the Court's original jurisdiction.

Petitioners in both of the above-captioned matters ask this Court to decide a declaratory judgment action in our original jurisdiction. We grant the petition for original jurisdiction filed by Planned Parenthood South Atlantic; Greenville Women's Clinic; Katherine Farris, M.D.; and Terry Buffkin, M.D. (Providers) challenging the constitutionality of the Act. We deny the petition for original jurisdiction filed by 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; Henry McMaster, in his official capacity as Governor of the State of South Carolina; and Alan Wilson, in his official capacity as Attorney General of the State of South Carolina.[2]

Providers also request temporary injunctions in both actions to enjoin enforcement of the Act to preserve the status quo pending resolution of the declaratory judgment action by this Court. We grant a temporary injunction.

"The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation." *Greenville Bistro, L.L.C. v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569 (2021) (quoting *AJG Holdings, L.L.C. v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009)). A party seeking a temporary injunction must establish three elements to receive

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law impacting the *Roe* abortion framework. Our legislature made a point of ensuring that any amendment regarding the regulation of abortions would not act as a "repeal, by implication or otherwise," of "Section 44-41-20 or any otherwise applicable provision of South Carolina law regulating or restricting abortion." S.C. Code Ann. § 44-41-480 (2018).

[2] The original jurisdiction petition filed by these Petitioners is not necessary to fully address the parties' respective positions. The denial of that petition avoids administrative redundancy.

this relief: (1) immediate, irreparable harm if the injunction is not granted; (2) a likelihood of success on the merits; and (3) no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011); *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). In evaluating whether a party is entitled to a temporary injunction, the Court "must examine the merits of the underlying case only to the extent necessary to determine whether the [party] has made a sufficient prima facie showing of entitlement to relief." *Compton*, 392 S.C. at 367, 709 S.E.2d at 642.

We have carefully considered these factors and are persuaded the proper course of action is to maintain the status quo, as explained below. We offer no opinion on the likelihood of success on the merits. To the extent we address the merits, we acknowledge an arguably close question is presented, which further supports the need to maintain the status quo by granting a temporary injunction. Our decision to do so is primarily guided by the codification of *Roe* as reflected in section 44-41-20.

Although we temporarily enjoin the enforcement of the Act, we nevertheless recognize the plenary authority of the legislature to legislate and make public policy decisions, subject only to constraints imposed by the United States Constitution and the South Carolina Constitution. *See Pinckney v. Peeler*, 434 S.C. 272, 285, 862 S.E.2d 906, 913 (2021) (recognizing "the fundamental, firmly-established principle that 'in the General Assembly rests plenary legislative power, limited only by the constitutions, State and Federal.'" (quoting *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947))). Because *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] have been overruled, there is no right to an abortion under the federal constitution. *Dobbs*, 142 S. Ct. at 2242 ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

The public policy issue of abortion has been returned to the people of the respective states. *Id.* at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 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." (internal quotation marks omitted)). At this preliminary stage, we are unable to determine with finality the constitutionality of the Act under our state's constitutional prohibition against unreasonable invasions of privacy. *See* S.C.

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[3] 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

Const. art. I, § 10.

A long-recognized principle is that the will of the people is reflected in the legislative enactments of the people's elected representatives. That principle may be a fiction at times, but it is nevertheless a principle that is maintained for self-evident laudable reasons. The South Carolina General Assembly codified the *Roe* decision in 1974. *See* Act No. 1215 (codified as amended in scattered sections of S.C. Code Ann. §§ 44-41-10 to -80).[4] As noted above, when ratifying the current Act in 2021, the General Assembly elected to retain its codification of the *Roe* framework. *See* S.C. Code Ann. § 44-41-710.

In granting the injunction temporarily enjoining enforcement of the Act, we do not judicially engraft the *Roe* decision into our state constitution. We merely maintain the status quo by adhering to that part of our state's public policy set forth in section 44-41-10, *et seq*. There are two additional factors weighing in favor of injunctive relief to preserve the status quo. First, the legislature's clear intent to retain the 1974 statutory scheme adopting the *Roe* framework alongside the Act arguably creates a conflict in the law. Second, the Act is unusual in the sense that its validity depended on a future act, that is, the overruling of *Roe*. The Act anticipated that litigation would result and provides that the State, through the Attorney General, is empowered to "apply to the pertinent state or federal court" to uphold the Act. *See* S.C. Code Ann. § 44-41-620.

Within ten days of this order, the parties shall agree on matters to be included in an Appendix. Providers shall serve their brief on each Respondent and Respondent-Intervenor within twenty days of the date of the agreement on the Appendix. At the same time, Providers shall file eleven copies of their brief and eleven copies of the Appendix with this Court, along with proof of service, with one copy of the brief and one copy of the Appendix filed unbound. Respondents and Respondents-Intervenors shall, within twenty days after service of Providers' brief and the Appendix, serve Providers with their briefs and file with this Court eleven copies of their briefs, along with proof of service, with one copy of the brief filed unbound. Any reply brief shall be served and filed in the same manner as above within five days after service of Respondents' and Respondents-Intervenors' briefs.

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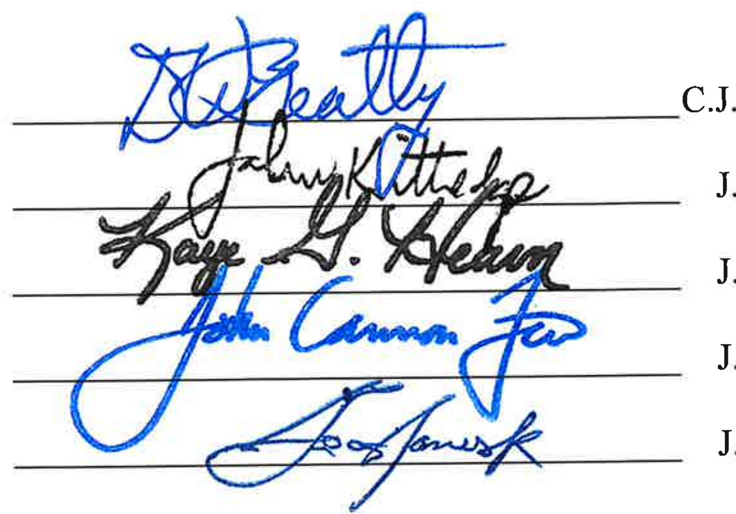
[4] The 1974 Act, titled in part "An Act to Provide for Legal Abortions Under Certain Conditions," followed this Court's decision in *State v. Lawrence*, 261 S.C. 18, 198 S.E.2d 253 (1973), recognizing the need for new legislation in response to *Roe*.



C.J.

J.

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Columbia, South Carolina
August 17, 2022

cc:
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