THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE COURT'S ORIGINAL JURISDICTION

Appellate Case No. 2022-001062

Planned Parenthood South Atlantic, Greenville Women's Clinic, Katherine Farris, M.D., and Terry L. 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*.

PETITION FOR REHEARING
OF STATE, ATTORNEY GENERAL WILSON AND SOLICITOR WILKINS

Pursuant to Rule 221, SCACR, the State of South Carolina, Attorney General Alan Wilson, and Solicitor William Walter Wilkins III (the "State") petition for rehearing of this Court's decision in *Planned Parenthood South Atlantic, et al. v. South Carolina, et al.*, Op. No. 28127 (S.C. Sup. Ct. filed Jan. 5, 2023) (Adv. Sh. No. 2 at 12).

INTRODUCTION

The State respectfully suggests that a majority of this Court overlooked and misapprehended two pivotal points in concluding that The Fetal Heartbeat and Protection from Abortion Act ("the Act") violates article I, section 10 of the South Carolina Constitution.

First, a majority of the Court disregarded longstanding precedent setting forth fundamental principles of constitutional interpretation. This Court has long recognized that the "polestar" in constitutional interpretation is the "intention of the makers and adopters [of the constitution]." *Ansel v. Means*, 171 S.C. 432, 172 S.E. 434, 436 (1934) (quoting *Hockett v. State Liquor Licensing Bd.*, 91 Ohio St. 176, 110 N.E. 485, 486 (Ohio 1915)). This intention "shall be ascertained and shall control" regardless of how individual members of the Court may perceive the provision's meaning. *Ansel*, 171 S.C. 432, 172 S.E. at 436. No matter how "difficult the task," this Court is thus bound to follow what the framers "probably had in mind and mark that as the true line [of constitutionally proscribed conduct]." *McDowell v. Burnett*, 92 S.C. 469, 75 S.E. 873, 875 (1912). Regrettably, a majority of the Court has missed the mark by failing to follow these fundamental principles.

Second, a majority of the Court compounded this first error by overlooking and misapprehending clear and unmistakable evidence of the intent of article I, section 10. As explained by the State defendants, there is no mystery as to what was intended by the insertion of the prohibition against "unreasonable invasions of privacy" into the state constitution. The

historical record plainly shows that the framers and adopters of section 10 intended to expand privacy protections against various types of electronic surveillance in a manner consistent with the prohibition against unreasonable searches and seizure. Yet, a majority of this Court disregarded evidence of that original intent, instead elevating their own opaque views of privacy to constitutional status. In doing so, members of this Court concluded for the first time in the State's history that our state constitution encompasses a right to abortion. It is nearly impossible to imagine that such a conclusion was intended by those who drafted, proposed, and voted for section 10. And indeed, there is almost no historical evidence to support such a conclusion.

ARGUMENT

(1) The Court overlooked or misapprehended longstanding precedent.

Regarding the first error, a majority of the Court overlooked or misapprehended longstanding precedent regarding constitutional interpretation. Most significantly, the Court failed to recognize that a constitutional provision must be construed in light of the intent of its framers and the people who adopted it. *See Ansel*, 171 S.C. 432, 172 S.E. at 436; *see also Miller v. Farr*, 243 S.C. 342, 346, 133 S.E.2d 838, 841 (1963). The Court thus must construe a constitutional provision "in the light of the history of the times in which it was framed, and with due regard to the evil it was intended to remedy, so as to give it effective operation and suppress the mischief at which it was aimed." *Kirkland v. Allendale County*, 128 S.C. 541, 123 S.E. 648, 650 (1924). Stated differently, "[c]onstitutional amendments should be interpreted in order to effect the purpose for which they are obviously intended." *Holland v. Kilgo*, 253 S.C. 1, 5, 168 S.E.2d 569, 571 (1969).

In determining whose intent matters, this Court is "guided by the principle that both the citizenry and the General Assembly have worked to create the governing law." *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014); *see also Neel v. Shealy*, 261 S.C. 266, 273, 199 S.E.2d

542, 545 (1973) ("Hence, it is clear that this court must look to the rules generally applicable to the construction of statutes in order to determine the intent of the framers of new Article VIII, and the intent of the electorate which approved new Article VIII at the general election on November 7, 1972, and the intent of those who ratified new Article VIII."). Thus, the Court must look to the intent of framers, the General Assembly, and the public, "keeping in mind that amendments to our Constitution become effective largely through the legislative process." *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014); *see also Sheppard v. City of Orangeburg*, 314 S.C. 240, 243, 442 S.E.2d 601, 603 (1994) (""Our primary function in interpreting the constitution is to ascertain and give effect to the intention of the Legislature."). In prior cases, this Court previously recognized this principle in the specific context of section 10. *See State v. Counts*, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) ("Furthermore, we believe this decision does not exceed the bounds of our judicial authority as conferred by the drafters of the right-to-privacy provision. In fact, our ruling effectuates the intent of the Legislature to afford heightened protection against intrusions into a citizen's home.").

To ascertain and give effect to this intent, this Court is bound to apply "the ordinary and popular meaning" of the words as "used by those who framed and those who adopted the constitution." *City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881); *see also State v. Shaw*, 9 S.C. 94, 106 (1878) ("[T]he state of the public mind at the time of the adoption of the Constitution of 1868 renders us legitimate assistance in the construction and interpretation of its provisions."). Relatedly, any "contemporary legislative interpretation of an ambiguous constitutional

provision[], though not binding upon the courts, is entitled to great respect." *Johnson v. Thomason*, 236 S.C. 135, 140, 113 S.E.2d 417, 419 (1960).[1]

Under *Oliver* and its related line of cases, this Court must apply the ordinary and popular meaning of a constitutional provision as understood by those who framed and adopted the provision. *See also* Letter from James Madison to Henry Lee, June 25, 1824, *Founders Online,* NATIONAL ARCHIVE, https://founders.archives.gov/documents/Madison/04-03-02-0333 ("I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense."). Thus, this Court must necessarily be mindful of original intent because it informs the original meaning of a provision. Although a finding of ambiguity can also compel the Court to look to original intent, *see Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d

[1] The State previously emphasized these principles of statutory construction on page 12 of its brief. *See* State Brief at page 12 ("Stated differently, in defining the meaning of the phrase 'unreasonable invasions of privacy,' this Court may not apply its own—or even a contemporarily popular—definition of those words. Under its own precedent, this Court is bound to apply the meaning used by those who framed and adopted Section 10's language regarding 'unreasonable invasions of privacy.' This obligation is entirely consistent with this Court's responsibility to give effect to the intent of the framers and the people who adopted a given constitutional provision."); *see also* State Brief at page 13 n.1 ("In this respect, the textual and historical analysis of Section 10 merges, as any interpretation of the text of Section 10 must be informed by the historical meaning of the relevant textual phrase. In the past several decades, some juries and legal scholars have termed this method of interpretation 'originalism'—or it[s] more recent variant 'public meaning originalism.' However, this method of interpretation has been the law in South Carolina since at least the 1800s. *See Oliver*, 16 S.C. at 52.").

375, 376–77 (1960), *Oliver* strongly suggests that for matters of constitutional law, this Court must look to original meaning regardless of ambiguity. To the extent any members of this Court concluded that a lack of ambiguity allowed the Court to bypass questions of original intent, such a conclusion is error.

Courts from across the country also routinely apply these same rules of construction in interpreting state constitutions. *See*, *e.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013) ("Our method of interpreting and applying provisions of the Indiana Constitution is well-established, requiring a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.") (quoting *Embry v. O'Bannon*, 798 N.E.2d 157, 160 (Ind. 2003)).

These rules of construction strongly caution this Court against applying the plain and ordinary meaning of a provision in a vacuum untethered from a provision's purpose or its historical context. Indeed, this Court has previously held that it would "reject the ordinary meaning of the words used in a statute however plain it may be, when to accept such meaning would defeat the plain legislative intent." *Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 815 (1942); *see also Kiriakides v. United Artists Commc'ns, Inc*., 312 S.C. 271, 275, 440 S.E.2d 364, 366

(1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.").

These rules of construction were carefully and correctly applied by this Court in *Johnson v. Collins Entertainment Co., In*c., 333 S.C. 96, 508 S.E.2d 575 (1998). There, the Court was required to interpret the word "lottery" in the state constitution to determine whether video poker machines were prohibited by article XVII, section 7 of the state constitution. In doing so, this Court adopted a "narrower" definition of lottery, looking to the framers' understanding of the term and the historical understanding of the term. *See Johnson*, 333 S.C. at 103, 508 S.E.2d at 579 ("Historically, in the early 1800's, a lottery was typically a government-sponsored means of raising revenue by selling tickets for prizes awarded by lot.").

In their dissenting opinions, Justice Kittredge and Justice James correctly urged the Court to adhere to many of these well-established principles. *Planned Parenthood South Atlantic,* (Adv. Sh. No. 2 at 117 - Kittredge, J., dissenting) ("In the face of such ambiguity, it is bedrock law that a court must examine the origins of a constitutional provision to ascertain and give effect to the intent of its framers."); *Planned Parenthood South Atlantic* (Adv. Sh. 2 at 141 - James, J., dissenting) ("As I will explain, the scope of article I, section 10 is ambiguous, or "of doubtful import." Id. Therefore, we must consider the history of the late 1960s and early 1970s in South Carolina; the intent of the framers of article I, section 10; and the intent of the people who adopted article I, section 10.").

However, the opinions representing the majority position of the Court either overlooked this precedent or misapprehended it. In concluding that the Act violates section 10, the majority falls victim to an old but enduring temptation in the law—namely the temptation to impose one's

own views or policy preferences under the guise of constitutional interpretation. Writing over half a century ago, one legal commentator concisely described this temptation as follows:

> No one doubts that it is the function of courts to interpret statutes in the light of the purposes which the legislature had in mind in enacting the statutes. This is no more than a specific application of the principle, self-evident to all students of language, that a speaker's remarks must be interpreted in the context in which the remarks are made. But sometimes those who are called upon to interpret someone's remarks disapprove of the purpose which the speaker seemingly had in mind. The situation becomes acute when the interpreter is required to act upon the speaker's remarks. In such circumstances it is only natural for the addressee of the remarks to search for vagueness so as to be able to say, "well he really couldn't have mean this, so he must have meant this." The listener thus discards a contextually more likely interpretation for a less plausible one which better accords with his standards of good and bad.

George C. Christie, "Vagueness and Legal Language," 48 MINN. LAW REVIEW 885, 886–87 (1964).

In describing the constitutional problems associated with this approach, Justice Kittredge more recently observed the following:

> I acknowledge that to some courts and judges, the concept of "the rule of law" has expanded over time from adjudicating to legislating. In some circles, the constitution has been reduced to nothing more than a vending machine that allows a person to select constitutional "rights" that mirror personal preferences. That is not my view of the rule of law or the United States Constitution or South Carolina Constitution. While judges have a duty to strike down legislation in violation of the constitution, it is my view that judges must demonstrate restraint in the enforcement of our duty, particularly when it comes to *creating* law. Courts should not interpret the constitution in a manner that creates rights and duties out of thin air, such that one's policy preference is accorded constitutional status. Indeed, "[i]t can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature." *The Federalist No. 78,* at 579 (Alexander Hamilton) (John Hamilton ed., 1866). Such an approach is anathema to the rule of law, separation of powers, checks and balances, and indeed the very foundation on which our civil society was established.

Abbeville County School Dist. v. State, 410 S.C. 619, 664 (2014) (Kittredge, J., dissenting).[2]

[2] The State joins in and adopts the separation of powers arguments raised by the legislative leadership.

By interpreting section 10 to "better accord[] with [its own] standards of good and bad" regarding abortion, the majority thus accords its own "policy preference . . . constitutional status."[3] In doing so, the Court overlooked and misapprehended binding precedent.

(2) The Court overlooked or misapprehended the intent of article 1, section 10.

A majority of the Court committed a second error by overlooking evidence regarding the original intent—and original meaning—of article I, section 10. As amply demonstrated in the Brief of the State, the historical evidence in the record clearly and overwhelmingly demonstrates that the neither the General Assembly nor the public understood section 10 to confer a right to abortion. Indeed, until this lawsuit, there has not been the slightest suggestion whatsoever that article I, section 10 applied to abortion. *See State v. Forrester*, 343 S.C. 637, 647, 41 S.E.2d 837, 842 (2001) ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergency of new electronic technologies that increased the government's ability to conduct searches."). Instead, the historical record resoundingly demonstrates that the adopters of section 10 viewed the section solely as a limited restraint on electronic surveillance.

[3] In holding that the Act violates article I, Section 10, several justices suggested that the Act was unreasonable because it did not provide a woman with sufficient time to determine whether she is pregnant and to decide whether to continue her pregnancy. *See*, *e.g.*, *Planned Parenthood South Atlantic* (Adv. Sh. 2 at 33, 93). Aside from any error regarding constitutional interpretation, this conclusion was also error because it overlooked or misapprehended evidence in the record regarding access to abortion under the Act. As the State argued in its brief and in its response to the Court's notice regarding supplemental briefing, the Act allows access to abortion. *See* State Br. at 22; State Response at 2. As explained by a physician's expert report in the record, "for a woman who discovers pregnancy early, South Carolina law permits a window of between two to five weeks for the woman to decide on and procure an abortion. . . . Based on my professional experience, I believe there is ample time for most women to obtain an elective abortion under South Carolina law after learning they are pregnant." J.A. 305. The Court either overlooked or misapprehended this evidence. In the face of this uncontradicted evidence, the majority's conclusion that the Act is "unreasonable" offends basic principles of judicial restraint and separation of powers, amounting to both judicial lawmaking and factfinding.

First considering the General Assembly, since section 10 was ratified, "the South Carolina General Assembly has repeatedly acted to regulate and limit abortions in South Carolina. In doing so, the General Assembly has never acknowledged or recognized that [the section] imposes any limitations on its ability to regulate abortion." State Br. at 14. Accordingly, there is "thus simply no indication that [the General Assembly] understood 'unreasonable invasions of privacy' to mean a right to abortion. All evidence, including the fact that abortion remained illegal in South Carolina following the adoption of Article I, Section 10, points to the contrary." State Br. at 15.

Indeed, the only limitation on the General Assembly's authority to regulate abortion came from federal court decisions interpreting *Roe* and its progeny. *See* State Br. at 14. As one South Carolina authority has noted, it was *Roe* that "radically changed the South Carolina anti-abortion legislation." 18 S.C. Jur. Hospitals § 31; *see also* 1 S.C. Jur. Abortion § 9 ("In 1973, the United States Supreme Court radically changed the complexion of American abortion law."). And in striking down one of South Carolina's previous abortion laws, this Court invoked *Roe*—not section 10—in doing so. *See State v. Lawrence*, 261 S.C. 18, 22, 198 S.E.2d 253, 255 (1973) ("[T]he statute falls to the ruling of the United States Supreme Court.").

Turning to the public, "there is no evidence to suggest that the voters who approved Section 10 understood the section to encompass a right to abortion." State Br. at 15. Indeed, the only evidence in the record regarding public understanding clearly shows that section 10 was presented to the public as a limited privacy right with respect to electronic surveillance. State Br. at 15 ("In the lead up to the public vote on Section 10, *The State* newspaper reported that the section was intended to 'protect individuals from indiscriminate wire-tapping, eavesdropping, or surveillance by electronic devices.' J.A. 928."). Indeed, all available press accounts are uniform in this regard. *See* State Br. at 14 (collecting other contemporaneous news articles).

And to the extent this Court considers evidence outside of the record on this point—which it appears to have done—additional contemporaneous reporting only reinforces this conclusion. *See*, *e.g.*, "The Right of Privacy is Protected in S.C.," *The State* (Feb. 28, 1974) ("More than five years ago, the members of the 1966–69, Constitutional Revision Committee came to grips with the threat to privacy being posed by the proliferation of computer banks of information. As a result, the committee recommended that the Constitution of 1895 be amended to include a safeguard against the misuse of such information."). To suggest that this limited construction of section 10 was never presented to the public flies in the face of this historical record.

A majority of the Court overlooked this evidence, choosing instead to diminish the significance of the West Committee. Putting aside the fact that this Court has routinely and repeatedly cited the West Committee as evidence of the purpose of constitutional provisions, *see*, *e.g.*, *Sloan v. Sanford*, 357 S.C. 431, 436, 593 S.E.2d 470, 473 (2004), this Court's dismissal of the West Committee' significance does nothing to discount the evidence of the intent of the General Assembly and the public.

Members of the Court also misapprehend the recommendations of the West Committee itself. As the State previously argued, the Committee recommended the more general privacy language because it hoped to capture a variety of forms of electronic or government surveillance. See State Br. at 16; *see also* The Right of Privacy is Protected in S.C.," *The State* (Feb. 28, 1974) ("Realizing the difficulty of spelling out specific curbs against all of the existing and potential devices used in gathering and storing confidential information, the committee thought it best to cope with the situation by a broad statement of policy. The details could be filled in by statute as need arose and by court decision as litigation developed."). The Committee did not include this language because it intended to confer a right to abortion—or any other boundless privacy right.

In short, the historical record strongly suggests that the people who adopted section 10 did not intend for the section to provide a right to abortion. A majority of this Court overlooked this evidence or ignored it as an inconvenient truth. To do so was error.

CONCLUSION

While abortion regulation is understandably controversial, the controversy surrounding the issue should not obfuscate settled principles of constitutional law. Because a majority of the Court overlooked or misapprehended these principles, the State respectfully petitions for rehearing.

Respectfully submitted,

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