September 10, 2021

ATTORNEY GENERAL RAOUL FILES BRIEF OPPOSING SOUTH CAROLINA ABORTION LAW

Raoul, 20 Attorneys General Argue South Carolina's "Fetal Heartbeat" Abortion Regulations Detrimental to Women's Health Care

Chicago — Attorney General Kwame Raoul, as part of a coalition of 21 attorneys general, filed an amicus brief in Planned Parenthood South Atlantic v. Wilson, arguing that South Carolina's "fetal heartbeat" abortion regulations are detrimental to women's health care as a whole, and that a lower court's ruling blocking the law should be upheld. Additionally, Raoul and the coalition argue that the collective impact of numerous states across the country enacting restrictive abortion laws, or eliminating access to abortions, harms health care nationwide.

"South Carolina's law prevents women from accessing essential medical care, potentially resulting in permanent long-term health impacts or even fatalities," Raoul said. "The restrictive laws being enacted by states like South Carolina do not stop abortions. They jeopardize women's lives by making it more difficult to receive safe abortions. Women have the right to make their own decisions about abortion care in consultation with their health care providers, and I will continue to oppose measures that deprive them of that right."

In February 2021, South Carolina passed the South Carolina Fetal Heartbeat and Protection from Abortion Act that prohibits abortions upon the detection of an embryonic or fetal heartbeat, effectively banning abortion after six weeks. Immediately following the law's passage, Planned Parenthood South Atlantic filed a lawsuit seeking a temporary injunction, which the federal district court granted.

In the amicus brief, Raoul and the coalition argue that access to safe and legal abortion is an essential component of women's health care and that restrictive abortion laws, like the South Carolina Fetal Heartbeat and Protection from Abortion Act, lead to worsened health outcomes for women. Raoul and the coalition also argue that laws banning abortion after the detection of a fetal heartbeat have harmful spillover effects on miscarriage treatment and other health care needs.

Additionally, Raoul and the attorneys general argue that the restrictions the law places on women could impact residents of neighboring states as well as those states' health care systems, explaining, "South Carolina's restrictive abortion laws will cause its citizens to seek abortion care in [neighboring states], potentially straining their healthcare systems." Raoul and the attorneys general also write that numerous states across the country have passed similar legislation, and that if access to safe and lawful abortions were banned in large geographic portions of the country, it would create "abortion deserts" in which access to abortion care may be unobtainable for many people due to the obstacles created by the sheer distance from lawful abortion care.

Joining Raoul in filing the amicus brief are the attorneys general of California, Colorado, Connecticut, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington.

No. 21-1369

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its patients, and its physicians and staff, *et al.*,
Plaintiffs-Appellees,

v.

ALAN WILSON, in his official capacity as Attorney General of South Carolina, *et al.*,
Defendants-Appellants.

Appeal from the U.S. District Court for the District of South Carolina at Columbia

BRIEF FOR AMICI CURIAE STATES OF VIRGINIA, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE

The Amici States—Virginia, California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia—submit this brief in support of plaintiffs-appellees pursuant to Federal Rule of Appellate Procedure 29(a)(2).

In February 2021, South Carolina passed the South Carolina Fetal Heartbeat and Protection from Abortion Act (the Act or the Fetal Heartbeat Act), which prohibits abortions upon detection of embryonic or fetal "cardiac activity," effectively banning abortion after six weeks from the pregnant person's last menstrual period.[1]

[1] South Carolina Fetal Heartbeat and Protection from Abortion Act, 2021 S.C. Acts No. 1, § 3. The Act defines "fetal heartbeat" to include any "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." Fetal Heartbeat Act § 3, S.C. Code Ann. § 44-41-610(3). The Act also includes new mandatory ultrasound, disclosure, recordkeeping, reporting, and written-notice requirements that are closely intertwined with the operation of the prohibition on abortion after detection of cardiac activity. *Id.* § 3, S.C. Code Ann. §§ 44-41-630, -640, -650; *id.* § 4, S.C. Code Ann. § 44-41-460(A); *id.* § 5, S.C. Code Ann. § 44-41-330(A)(1)(b); *id.* § 6, S.C. Code Ann. § 44-41-60.

Amici States support plaintiffs-appellees' challenge to the Act, and, more generally, support ensuring access to safe and legal abortions. While plaintiffs-appellees address the specific legal arguments raised by defendants-appellants, Amici States write to provide the Court with a broader perspective about the impact of the law at issue here and similar statutes elsewhere.

Although the Act purports to promote the interests of "the health of the pregnant woman,"[2] it eliminates access to safe and legal abortions, which leads to worse health outcomes for pregnant people and negatively impacts healthcare overall. And such legislation cannot be viewed in a vacuum. The effects of the law are not confined to limits on particular procedures in a single state: history shows that people will cross states lines to receive proper care.[3] As a result, South Carolina's restrictive abortion laws will cause many of its citizens to seek abortion care in Amici States—potentially straining their

[2] Fetal Heartbeat Act § 2.

[3] David Crary, *Abortions declining in nearly all states*, Associated Press (June 7, 2015), https://apnews.com/article/0aae4e73500142e5b8745d681c7de270.

healthcare systems.[4] In light of similarly restrictive legislation being passed across the country,[5] the collective impact of such laws harms healthcare on a nationwide scale.

ARGUMENT

Just this past year, the Supreme Court once again reaffirmed the principle that a State may not prohibit a woman from deciding to terminate a pregnancy before viability. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020); see also *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a [s]tate may not prohibit any woman from making the ultimate decision to terminate her pregnancy." (quotation marks and citation omitted)); *Planned Parenthood v. Casey*,

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[4] See *Norton v. Ashcroft*, 298 F.3d 547, 558 (6th Cir. 2002) (citing Congressional findings that "patients must often travel interstate to obtain reproductive health services").

[5] From January 1, 2021 through July 7, 2021 a total of nineteen states have enacted ninety-seven restrictions on abortion, including twelve partial or total bans. Emma Batha, *U.S. states making 2021 moves on abortion rights and access*, Thomson Reuters Found. (Sept. 1, 2021), https://news.trust.org/item/20201231112641-qfynt/; see also Emily Wax-Thibodeaux & Ariana Eunjung Cha, *How Mississippi may be the state to topple nearly 50 years of abortion rights in America*, Wash. Post (Aug. 24, 2021), https://www.washingtonpost.com/nation/interactive/2021/mississippi-abortion-law/ (map illustrating states that currently ban or restrict abortions and those that will ban all or nearly abortions all if *Roe v. Wade* is overturned).

505 U.S. 833, 846 (1992). The Act, however, prohibits almost all abortions upon detection of embryonic or fetal "cardiac activity," which occurs as early as six weeks of pregnancy or sooner, far before viability.[6] Under the Supreme Court's precedents, the Act is blatantly unconstitutional. Pre-viability bans on abortion do much more than just place obstacles in front of people trying to obtain abortion care. They harm healthcare overall by creating serious spillover effects that make it more difficult to obtain proper care for other needs, such as miscarriages and ectopic pregnancies. Amici States highlight those effects.

[6] JA 44, 54; see *ACOG Opposes Fetal Heartbeat Legislation Restricting Women's Legal Right to Abortion*, Am. Coll. of Obstetricians & Gynecologists (Jan. 18, 2017), https://www.acog.org/news/news-releases/2017/01/acog-opposes-fetal-heartbeat-legislation-restricting-womens-legal-right-to-abortion (stating that legislation "banning abortion after the detection of the fetal heartbeat, which occurs as early as six weeks gestation," would "ban[] abortion long before the point of viability"). Even South Carolina law statutorily defines viability well after six weeks of pregnancy. See S.C. Code Ann. § 44-41-10(l) (stating that there is "a legal presumption" that "viability occurs no sooner than the twenty-fourth week of pregnancy").

I. The Act harms women's healthcare as a whole

The Act is among those state laws that, although enacted under the guise of protecting women's health, actually undermines healthcare. As Judge Posner observed, those "passionately opposed to abortion . . . seek[] to discourage abortions by making it more difficult for women to obtain them. They may do this in the name of protecting the health of women who have abortions, yet . . . the specific measures they support may do little or nothing for health, but rather strew impediments to abortion." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920–21 (7th Cir. 2015). The same is true here.

In attempting to justify the Act, South Carolina's General reasoned that "a fetal heartbeat is a key medical predictor that an unborn human individual will reach live birth" and that "in order to make an informed choice about whether to continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat."[7] But the Act does not assure an "informed choice."

[7] Fetal Heartbeat Act § 2.

Once a "heartbeat" is detected, the Act eliminates the ability for the pregnant person to make *any* choice. That is, as soon as a person is informed of the "presence of a fetal heartbeat," they are deprived of the "choice about whether to continue a pregnancy." Fetal Heartbeat Act § 2. The state interest that the Act supposedly serves ("informed choice") is, therefore, entirely hollow.

The Act fails to account for the health, overall well-being, and autonomy of the pregnant person.[8] And entirely apart from failing to

[8] The Act is in line with broader efforts to stigmatize abortion with rhetoric that abortion care is not a form of healthcare. See, *e.g.*, *Abortion is NOT Healthcare*, Am. Life League (Aug. 26, 2019), https://www.all.org/abortion-is-not-healthcare/ (contending that "[a]bortion is not healthcare."); Rachel Guy, *A Wolf in Sheep's Clothing: ACOG's Not-So-Hidden Agenda*, Ga. Life All. (July 18, 2019), https://georgialifealliance.com/a-wolf-in-sheeps-clothing-acogs-not-so-hidden-agenda/ (claiming that "[a]bortion is not medical care."); *Exposing the Lie: Abortion is not Medical Care*, Life Legal Def. Found. (2013), https://lifelegaldefensefoundation.org/exposing-the-lie/amp/ (same); Letter from Mike Braun et al., U.S. Senator, to Secretary Steven Mnuchin, Sec'y of Treasury (Aug. 12, 2020), https://www.rubio.senate.gov/public/_cache/files/9e016e50-f66d-4201-ada7-00bb1c9e4661/18BEAAC7F25DCBF575705D4BDCEFE85B.081220-treasury-letter-final-0.pdf (asserting that "[a]bortion is not health care" and arguing that the IRS "should not consider abortions (except when the mother's life is physically endangered) to be medical care"); Letter from Marjorie Dannenfelser et al., President Susan B. Anthony List, to Secretary Alex Azar, Sec'y of Health and Hum. Servs. (Mar. 24, 2020), https://s27319.pcdn.co/wp-content/uploads/2020/03/LETTER-Pro-Life-Concerns-

promote its asserted interests, South Carolina's law—like other pre-viability bans on abortion—jeopardizes the health of women, including those who do not seek abortion services.

A. Access to safe and legal abortion is an essential component of women's healthcare and restrictive abortion laws lead to worse health outcomes for women

"Women in the United States have long lagged behind their counterparts in other high-income countries in terms of access to health care and health status."[9] In a recent study ranking eleven countries on women's health, the United States came in dead last, finishing behind Australia, Canada, France, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom. *Id.* On the maternal mortality rate—measuring maternal deaths for every 100,000 live births among women ages 15 to 49—the United States registered at

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During-Coronavirus-Crisis-FINAL.pdf (referring to abortion care as "elective" and defining abortion not as a medical need but as an "industry").

[9] Munira Z. Gunja et al., *What Is the Status of Women's Health and Health Care in the U.S. Compared to Ten Other Countries?*, The Commonwealth Fund at 1 (Dec. 2018), https://www.commonwealthfund.org/sites/default/files/2018-12/Gunja_status_womens_health_sb.pdf.

14 deaths (more than three times higher than the lowest ratio of 4 deaths for Sweden). *Id.* at 5. Safe, legal abortion is an essential component of comprehensive healthcare, and ensuring access to abortion care is important in improving women's healthcare in the United States.

1. Overwhelming scientific evidence establishes that restrictive abortion laws—like the one challenged in this case—not only lead to worse health outcomes for women, but also fail to lower abortion rates.[10] People who are denied access to safe and legal abortions are more likely to experience a host of negative consequences as compared to those who receive abortion services, such as an increased likelihood of certain mental health conditions or illnesses, serious pregnancy complications, and interpersonal violence.[11]

"[C]omplications from an abortion are both rare and rarely

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[10] *Unintended Pregnancy and Abortion Worldwide*, Guttmacher Inst. (Mar. 2018), https://www.guttmacher.org/sites/default/files/factsheet/fb_iaw.pdf.

[11] *The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study*, Advancing New Standards in Reprod. Health (Apr. 16, 2020), https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf.

dangerous." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015); accord *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) (Ginsburg, J., concurring). Indeed, a person is *fourteen times* more likely to die during childbirth than from an abortion.[12] Even for someone who is otherwise healthy and has an uncomplicated pregnancy, being forced to carry that pregnancy to term and give birth poses serious medical risks with both short- and long-term consequences for the patient's physical health and mental and emotional wellbeing. For someone with a medical condition caused or exacerbated by pregnancy, these risks are increased. For example, those forced to carry a pregnancy to term risk postpartum hemorrhage and preeclampsia.[13] Another consequence of prohibiting abortion access is that people who have pregnancies too close together face an increased risk of premature birth, low birth weight, congenital disorders, and

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[12] Elizabeth Raymond & David Grimes, *The comparative safety of legal induced abortion and childbirth in the United States*, 119 Obstetrics & Gynecology 215 (Feb. 2012), https://pubmed.ncbi.nlm.nih.gov/22270271/.

[13] Caitlin Gerdts, et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, Women's Health Issues (2016), https://www.sciencedirect.com/science/article/pii/S1049386715001589.

schizophrenia.[14] For people experiencing intimate partner violence who are denied access to an abortion, unwanted pregnancies can exacerbate the risk of violence and further tether pregnant persons to their abusers.[15]

Those who must travel from their home state to access abortion care will have to pay for and arrange transportation, childcare, and time off from work. Because the majority of patients who receive abortions live at or below 200% of the federal poverty level,[16] these financial and other costs may be insurmountable or require them to forgo other basic needs for themselves and their families.[17] Even those

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[14] *Family planning: Get the facts about pregnancy spacing*, Mayo Clinic, https://www.mayoclinic.org/healthy-lifestyle/getting- pregnant/in-depth/family-planning/art-20044072.

[15] Sarah C.M. Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, BMC Medicine (Sept. 29, 2014), https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-014-0144-z.

[16] Committee on Health Care for Underserved Women, *Increasing Access to Abortion*, Committee Opinion No. 815, Am. Coll. of Obstetricians & Gynecologists (Dec. 2020), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/12/increasing-access-to-abortion.

[17] Six in ten women having an abortion are already mothers. Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between*

able to secure funds and make arrangements to travel outside their home state for care will often be delayed in obtaining care, and although abortion is very safe at all stages, the risks increase as the pregnancy advances.[18]

2. The Act fails to recognize that whether fetal cardiac activity could actually result in a viable pregnancy is a medical determination, that "may vary with each pregnancy and is a matter for the judgment of the responsible health care provider" along with their patient.[19] By banning abortions before a fetus reaches the point of viability, the Act strips medical providers of the ability to determine with their patients

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2000 and 2008 and Lifetime Incidence of Abortion, 117 Obstetrics & Gynecology 1358, 1362 (2011); National Women's Law Center, *Fact Sheet: The Hyde Amendment Creates An Unacceptable Barrier To Women Getting Abortions* (July 2015), https://nwlc.org/wp-content/uploads/2015/08/the_hyde_amendment_creates_an_unacceptable_barrier.pdf.

[18] Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 Persps. on Sexual and Reprod. Health 95, 95 (June 2017), https://www.guttmacher.org/journals/psrh/2017/04/barriers-abortion-care-and-their-consequences-patients-traveling-services.

[19] *Abortion Policy*, Am. Coll. of Obstetricians & Gynecologists (reaffirmed November 2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/abortion-policy.

the best course of treatment and thereby denies individuals access to the most appropriate medical care. Laws, like the Act, that "prohibit health care providers from following current evidence-based protocols for medical abortion disregard scientific progress and prevent providers from offering patients the best available care."[20]

B. Laws banning abortion after the detection of fetal cardiac activity have harmful spillover effects on miscarriage treatment and other healthcare needs

Amici States endeavor in various ways to promote access to proper healthcare and provide a range of reproductive choices. For example, a majority of states have extended healthcare to millions of women by expanding Medicaid coverage.[21] Amici states likewise dedicate

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[20] *Abortion Policy*, Am. Coll. of Obstetricians & Gynecologists (reaffirmed November 2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/abortion-policy. "Likewise, the state and federal laws that prohibit specific surgical abortion procedures disrupt the evolution of surgical technique and prevent physicians from providing the best or most appropriate care for some patients." *Id.*

[21] See *Status of State Action on the Medicaid Expansion Decision*, Kaiser Family Found. (Aug. 10, 2021), https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

resources to developing and funding programs that provide access to a variety of diverse healthcare, education, and counseling services that improve women's healthcare outcomes.[22]

Laws like the one challenged here, in contrast, affirmatively harm, rather than promote, the healthcare of those seeking an abortion. And the harm they cause extends well beyond those in need of abortion care. As one commentator has noted, "many types of abortion restrictions have unintended consequences that impede the provision of basic healthcare for women."[23] Two examples are miscarriage care and treatment of ectopic pregnancies.

1. From a medical standpoint, an "abortion" is not a single procedure. The medical term "abortion" often encompasses spontaneous pregnancy loss (what people refer to in vernacular English as a

[22] See Br. for Amici Curiae States of California et al. in Support of Appellees & Affirmance at 14–34, *Jackson Women's Health Org. v. Dobbs*, No. 19-60455, Doc. 00515146117 (5th Cir. Oct. 4, 2019), 2019 WL 5099416 (describing state initiatives to promote women's health).

[23] Maya Manian, *The Consequences of Abortion Restrictions for Women's Healthcare*, 71 Wash. & Lee L. Rev. 1317, 1336 (2014).

"miscarriage").[24] From a patient-treatment standpoint, medical procedures commonly called "abortions" are identical to the medical procedures used for a patient who has had a miscarriage. *Id.* In fact, "[a]lmost all of the methods used to manage miscarriages and stillbirths are identical to those used" in abortions. *Id.* Pregnancy loss is thus often conflated with induced abortions. *Id.*

Legislation aimed at abortion can have profound negative consequences on treatment of pregnancy loss.[25] Restrictions on abortion may limit a medical provider's ability to manage pregnancy loss. Patients may have limited or no treatment options, and medical providers might be hesitant to provide care, even if not prohibited, for fear of being investigated to prove the treatment was lawful.

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[24] Gabriela Weigel et al., *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws*, Kaiser Family Found., Women's Health Policy (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/ ("Medical providers often refer to miscarriages as spontaneous abortions, or by its subcategories including missed, incomplete and inevitable abortions[.]"); *id.* ("[T]erms like 'induced miscarriage' have been used to imply intent to end pregnancy, while 'spontaneous abortion' is a medical term for a miscarriage").

[25] Weigel, *supra* note 24.

a. Because "[a]lmost all of the methods used to manage miscarriages and stillbirths are identical to those used in" abortions, the "clinical training necessary to safely manage a patient experiencing a pregnancy loss" is essentially the same as the training needed to perform abortions.[26] And medical residents in states with restrictive abortion laws may not receive the necessary training and caseload to become proficient in these skills.[27] In addition, research shows that patients experiencing miscarriage, "even long before viability, may face serious risks to their health" because of antiabortion policies at hospitals.[28]

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[26] *Id.*

[27] *Abortion Training in US Obstetrics and Gynecology Residency Programs*, 219 Am. J. Obstetrics & Gynecology 86.e1, 86.e5 (Apr. 12, 2018), https://www.ajog.org/article/S0002-9378(18)30292-8/fulltext (finding that residents at programs with abortion training were much more likely to receive fuller training in treatment for miscarriage than those with optional or no abortion training); Vanessa Dalton et al., *Treatment of Early Pregnancy Failure: Does Induced Abortion Training Affect Later Practices?*, Am. J. Obstetrics & Gynecology (Mar. 17, 2011) (concluding that physicians with abortion training were more likely to provide in-office treatment of miscarriage procedures as compared to physicians without abortion training).

[28] Manian, *supra* note 23.

Laws that prohibit abortion upon detection of fetal cardiac activity will also restrict treatment options available for individuals experiencing pregnancy loss because fetal cardiac activity can be present even during a miscarriage.[29] For example, under the Act, a patient with a pre-viable fetus "may have a completely dilated cervix (meaning the pregnancy loss is inevitable) and be bleeding significantly, but [be] denied surgical management until the fetus no longer [has cardiac activity] or until the situation is life threatening."[30]

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[29] Weigel, *supra* note 24; Lori Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 Am. J. Pub. Health (Oct. 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458/ ("According to the generally accepted standards of care in miscarriage management, abortion is medically indicated under certain circumstances in the presence of fetal heart tones. Such cases include first-trimester septic or inevitable miscarriage, previable premature rupture of membranes and chorioamnionitis, and situations in which continuation of the pregnancy significantly threatens the life or health of the woman.").

[30] Weigel, *supra* note 24. The Act's narrow exceptions—for (1) rape or incest before 20 weeks, S.C. Code Ann. § 44-41-680(B)(1)–(2); (2) a fetal anomaly, meaning that "the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth," *id.* §§ 44-41-680(B)(4), 44-41-430(5); or (3) to "prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function of the pregnant woman," *id.* §§ 44-41-680(B)(3), 44-41-690(A)—may not apply to miscarriage management in many situations.

In short, abortion restrictions may cause medical providers to shy away from using the same medical techniques for pregnancy-loss management out of fear of potential legal ramifications.[31] These impacts on treatment for pregnancy loss are sweeping. Pregnancy loss is extremely common, occurring in an estimated 30% of pregnancies.[32] There are approximately one million miscarriages per year in the United States,[33] and "[a] significant portion of women will experience a pregnancy loss in their lifetime."[34] Abortion restrictions like the Act may therefore impact large numbers of people who never need or seek

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[31] Weigel, *supra* note 24 ("Bans on D&Es and D&Xs for abortion may [] cause providers to shy away from their use even for pregnancy loss management; providers may be fearful to provide these services due to perceived legal ramifications and may become less practiced and proficient in D&E procedures over time, even when performed for pregnancy loss. For stillbirths, the alternative to surgical management is induction of labor with medications; this has been shown to be less safe for the mother than D&Es and often requires a multi-day hospitalization.").

[32] Weigel, *supra* note 24; Fetal Heartbeat Act § 2(1) (acknowledging that "as many as thirty percent of natural pregnancies end in spontaneous miscarriage").

[33] Marian F. MacDorman et al., *Fetal and Perinatal Mortality: United States, 2013*, 64 Nat'l Vital Stat. Rep. 1, 1 (Jul. 23, 2015), https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_08.pdf.

[34] Weigel, *supra* note 24.

abortion care.

2. Abortion restrictions may also impede proper treatment of ectopic pregnancies.[35] In the United States, 2% of pregnancies are ectopic, and ectopic pregnancy is a common cause of maternal death early in pregnancy.[36] In the case of an ectopic pregnancy, as the pregnancy grows, the fallopian tube can rupture, causing major internal bleeding, which can be a life-threatening emergency that requires immediate surgery.[37]

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[35] "Ectopic pregnancy is the implantation of the blastocyte outside of the endometrium of the uterus, most often in the fallopian tubes." Ismail Cepni et al., *An alternative treatment option in tubal ectopic pregnancies with fetal heartbeat: aspiration of the embryo followed by single-dose methotrexate administration*, 96 Fertility & Sterility 79, 79 (May 20, 2011), https://www.fertstert.org/article/S0015-0282(11)00691-1/fulltext.

[36] *Current Trends Ectopic Pregnancy—United States, 1990–1992*, Centers for Disease Control & Prevention (Jan. 27, 1995) https://www.cdc.gov/mmwr/preview/mmwrhtml/00035709.htm; Willem M. Ankum, *Diagnosing suspected ectopic pregnancy* (Nov. 18, 2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1118995/; see also Cepni et al., *supra* note 35 ("The incidence of ectopic pregnancy has increased sixfold in the last 25 years.").

[37] *Frequently Asked Questions*, Am. Coll. of Obstetrics & Gynecology, https://www.acog.org/womens-health/faqs/ectopic-pregnancy?utm_source=redirect&utm_medium=web&utm_campaign=otn (last visited Sept. 8, 2021).

For some ectopic pregnancies, fetal cardiac activity can be detected in the fallopian tube.[38] The Act sets forth no explicit exception for treatment of ectopic pregnancies.[39] To be sure, the Act's exception "to prevent the death of the pregnant woman or to prevent the serious risk of a substantial and irreversible impairment of a major bodily function of the pregnant woman" might well apply in the context of ectopic pregnancy. S.C. Code Ann. § 44-41-680(B)(3) (setting forth an exception for a "physician [] acting in accordance with Section 44-41-690"); S.C. Code Ann. § 44-41-690(A) (permitting medical procedures to prevent pregnant women's death or irreversible injury). But physicians concerned about liability under the Act may still hesitate to treat a patient where fetal cardiac activity can be detected.[40]

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[38] Cepni, et al., *supra* note 35.

[39] The Act's exception for a "medical emergency" applies when the condition "so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of her pregnancy to avert her death without first determining whether there is a detectable fetal heartbeat or for which the delay necessary to determine whether there is a detectable fetal heartbeat will create serious risk of a substantial and irreversible physical impairment of a major bodily function." S.C. Code Ann. § 44-41-610(8). The Act says nothing of a situation where fetal cardiac activity is detected.

[40] Weigel, *supra* note 24; Freedman, *supra* note 29.

3. Beyond the impact on treatment of pregnancy loss and ectopic pregnancies, laws like the one at issue here have other profound and harmful chilling effects on people in need of medical treatment. There is "a long history in the U.S. in which some pregnant people have been criminalized for pregnancy loss, and there are ways in which abortion restrictions may have unintended consequences on pregnancy loss management."[41] For example, people experiencing pregnancy loss or in need of urgent pregnancy-related care "may be deterred from seeking medical care, particularly in places hostile to abortion."[42] Even with laws like this one that do not impose criminal penalties on people who receive abortion services, patients may still reasonably fear

[41] Weigel, *supra* note 24.

[42] *Id.*; Brittany Moore, et al., *The economics of abortion and its links with stigma: A secondary analysis from a scoping review on the economics of abortion*, 16 PLoS One 1, 2 (Feb. 18, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7891754/pdf/pone.0246238.pdf ("Community-based stigma may contribute to delays in accessing safe abortion care as well as the choice to use unsafe methods to terminate a pregnancy.").

becoming the subject of an investigation to assess whether those services were performed in violation of the Act.[43]

Additionally, mandated reporting requirements, like those contained in the Act, disrupt patient-provider confidentiality, and may result in some women delaying seeking care until they are in emergency situations.[44] For example, if a physician performs an abortion based on the Act's narrow exceptions for rape or incest before 20 weeks, S.C. Ann. Code § 44-41-680(B)(1)–(2), the Act requires the physician to "report the allegation of rape or incest to the sheriff in the county in which the abortion was performed," within twenty-four hours of the abortion, and the report must "include the name and contact information of the

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[43] See Weigel, *supra* note 24. Indeed, hospital workers who suspected that patients intended to end their pregnancy have even called the police on patients. *Id.* The National Advocates for Pregnant Women have identified 413 cases in which a woman's pregnancy was a necessary factor in an arrest or attempted arrest; sixty-eight of these cases involved miscarriage, stillbirth, or infant death, and the overwhelming majority of cases involved people with low incomes and people of color. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005*, 38 J. Health Pol. Pol'y & L. 299, 299–301, 321 (2013), https://read.dukeupress.edu/jhppl/article/38/2/299/13533/Arrests-of-and-Forced-Interventions-on-Pregnant.

[44] Weigel, *supra* note 24.

pregnant woman making the allegation," S.C. Code Ann. 44-41-680(C). Situations involving rape and incest, however, are extremely sensitive, and the Act's reporting requirement applies regardless of the patient's age and even over their objection. See *id.*

These and other damaging spillover effects should not be ignored.

II. The collective impact of numerous states simultaneously enacting laws restricting or eliminating access to abortions harms healthcare nationwide

The substantial reduction in the availability of abortion services in one state can cause people to seek services in other states, thereby potentially limiting the regulatory choices available in the other states and burdening their healthcare systems.[45]

This potential impact is more than merely theoretical. Numerous states across the country have enacted similarly restrictive or more

[45] Sarah McCammon, *After Texas Abortion Ban, Clinics In Other Southwest States See Influx Of Patients*, NPR (Apr. 17, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/17/837153529/after-texas-abortion-ban-clinics-in-neighboring-states-see-influx-of-patients.

restrictive legislation than South Carolina's Act.[46] Indeed, Texas, Idaho, Tennessee, Georgia, and Oklahoma have joined South Carolina in passing legislation banning abortion as early as six weeks.[47] Mississippi bans abortion after fifteen weeks of pregnancy, and Louisiana passed a similar ban.[48] Arkansas and Oklahoma enacted near-total bans on all abortions except in medical emergencies, making no exceptions for cases of rape or incest.[49] Texas law also provides no exception for survivors of rape or incest.[50] In anticipation of potential

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[46] From January 1, 2021 through July 7, 2021 a total of nineteen states have enacted ninety-four restrictions on abortion, including twelve partial or total bans. Batha, *supra* note 5.

[47] *Id.*; see also Ann E. Marimow, *Lawsuit targets Texas abortion law deputizing citizens to enforce six-week ban*, Wash. Post (July 13, 2021), https://www.washingtonpost.com/politics/courts_law/texas-abortion-lawsuit/2021/07/13/e0cee10c-e33c-11eb-b722-89ea0dde7771_story.html; Caroline Kelly, *Judges block six-week abortion bans in Georgia and Tennessee*, CNN (July 13, 2020), https://www.cnn.com/2020/07/13/politics/abortion-bans-block-georgia-tennessee/index.html.

[48] Batha, *supra* note 5.

[49] Caroline Kelly & Rebekah Riess, *Federal judge blocks Arkansas' near-total abortion ban*, CNN (July 20, 2021), https://www.cnn.com/2021/07/20/politics/arkansas-abortion-law-blocked/index.html.

[50] Julia Zorthian, *In Texas, Rape Crisis Centers Struggle to Respond to New Abortion Law*, Time (Sept. 5, 2021), https://time.com/6095405/texas-abortion-law-rape-crisis-centers/.

legal challenges, Oklahoma also passed an alternative law banning abortion after the detection of fetal cardiac activity—and subjects doctors performing an abortion after such point to criminal liability for homicide.[51] Twelve states—Kentucky, Tennessee, Mississippi, Louisiana, Texas, Arkansas, Oklahoma, Missouri, North Dakota, South Dakota, Idaho, and Utah—passed "trigger" laws with stringent abortion restrictions that could go into effect immediately, or soon after, any Supreme Court decision overturning *Roe v. Wade*.[52]

Like many of the other states that have passed near or total bans on abortion, South Carolina's citizens already have very limited access

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[51] Caroline Kelly, *Oklahoma governor signs near-total abortion ban into law*, CNN (Apr. 26, 2021), https://www.cnn.com/2021/04/26/politics/abortion-ban-oklahoma/index.html; see also Sean Murphy, *Oklahoma governor signs 3 anti-abortion bills into law*, AP News (Apr. 26, 2021), https://apnews.com/article/health-business-oklahoma-abortion-2a3aa04b5e463be0a769805db70337e0.

[52] Emily Wax-Thibodeaux & Ariana Eunjung Cha, *How Mississippi may be the state to topple nearly 50 years of abortion rights in America*, Wash. Post (Aug. 24, 2021), https://www.washingtonpost.com/nation/interactive/2021/mississippi-abortion-law/; *State Bans on Abortion Throughout Pregnancy*, Guttmacher Inst. (Sept. 1, 2021), https://www.guttmacher.org/print/state-policy/explore/state-policies-later-abortions.

to clinics that provide abortion services.[53] If access to safe and lawful abortions were further banned in large geographic portions of the country, it would create vast "abortion deserts" in which access to abortion care may be unobtainable for many people due to the obstacles created by the sheer distance from lawful abortion care.[54] The inevitable result is that some individuals will be forced to carry pregnancies to term.

Amici States—many of whom support and subsidize a range of reproductive healthcare services—stand ready and willing to provide such services to those in need. If, however, some jurisdictions are permitted to flout constitutional protections for abortion, certain States

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[53] Ninety-three percent of South Carolina counties had no clinics that provided abortions, and seventy-one percent of South Carolina women lived in those counties. *State Facts About Abortion: South Carolina*, Guttmacher Inst. (Jan. 2021), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-south-carolina (discussing 2017 data); Molly Hennessy-Fiske, *Crossing the "abortion desert": Women increasingly travel out of their states for the procedure*, Los Angeles Times (June 2, 2016), http://www.latimes.com/nation/la-na-adv-abortion-traveler-20160530-snap-story.html.

[54] *Id.*; see also Sarah Varney, *Restrictive abortion laws across the South mean more people are traveling to find safe services*, Oregon Pub. Broad. (Aug. 2, 2021), https://www.opb.org/article/2021/08/02/long-waits-drives-abortion-restrictions-us-south/.

can reasonably expect a significant or even sudden influx of out-of-state patients in need of medical care. Such increases, especially when sudden, could strain these States' healthcare systems, reduce available care, and diminish reproductive choices of residents and non-residents alike.

CONCLUSION

This Court should affirm the judgement of the district court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because it contains 4,954 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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