No. 21-1369

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,
Plaintiffs-Appellees,
v.
ALAN WILSON, in his official capacity as Attorney General of South Carolina, et al.,
Defendants-Appellants,
and
HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, et al.,
Intervenors-Appellants,
and
ANNE G. COOK, et al.,
Defendants.

On Appeal from the United States District Court
for the District of South Carolina
Case No. 21-cv-00508

BRIEF OF 21 STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are the States of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, and West Virginia. Most of these States have provisions like South Carolina's that the panel held were inseverable from the fetal-heartbeat regulation plaintiffs challenged. The panel thought "[t]hese provisions … make little sense without the ban." Op.13. This is news to amici. At least 24 States require an abortion provider to offer to display the image from an ultrasound so the pregnant mother can view it. At least 16 States require abortion providers to make the fetal heartbeat audible for the pregnant mother if she would like to hear it. At least 12 States require an ultrasound before an abortion takes place. We know these laws *can* stand apart from the lone provision plaintiffs challenged because they *do* stand apart in these other States. Amici offer this brief to show the error in the panel's severability analysis.

SUMMARY OF ARGUMENT

The panel's severability analysis got one thing right. It correctly recognized that severability is a matter of state law. Op.12. Then things took a wrong turn, first as the panel reviewed for abuse of discretion this "pure question of law," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2208 (2020), and then as the panel itself applied the

[1] This brief is filed under Federal Rule of Appellate Procedure 29(b)(2).

wrong legal standard to conclude that the unchallenged provisions could not be severed because they were "plainly intended to facilitate" the challenged provision. Op.13. The Court should grant rehearing en banc to correct these fundamental errors that conflict with precedent of the Supreme Court, this Court, and the South Carolina Supreme Court, and intrude unnecessarily on the sovereignty of South Carolina to decide for itself whether the unchallenged, lawful provisions of the Act are "capable of being executed in accordance with the Legislative intent, independent of the rejected portion." *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 301 (4th Cir. 2009) (quoting *Joytime Distribs. & Amusement Co. v. South Carolina*, 528 S.E.2d 647, 654 (S.C. 1999)). Both the intent of the General Assembly and the ability of the unchallenged provisions to stand alone are clear. Accordingly, so is the panel's error.

ARGUMENT

South Carolina law poses two primary questions for determining whether an offending provision is severable from the rest of the statute. First, can it "fairly be presumed that the legislature would have passed [the non-offending portions] independent of that which conflicts with the constitution"? *In re DNA Ex Post Facto Issues*, 561 F.3d at 301 (quoting *Joytime*, 528 S.E.2d at 654). Second, is "the residue of an Act, *sans* that portion found to be unconstitutional, … capable of being executed in accordance with the Legislative intent, independent of the rejected portion"? *Id.* The panel misapplied settled law when it answered both questions in the negative.

I. The Panel's Severability Holding Violates Settled Precedent By Ignoring The Stated Intent Of The General Assembly.

Begin with legislative intent. The South Carolina Supreme Court instructs that "[t]he best evidence of intent is in the statute itself." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 694 S.E.2d 525, 530 (S.C. 2010). So it is here:

> If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, then such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Act §7; App.88.

It is hard to imagine what else the General Assembly could have said to get its intent across that it would have passed the Act's other provisions even if one were "declared to be unconstitutional." Indeed, the Court's job is made easy when "[t]he legislature's abortion laws include … a provision that could not be clearer in its message that the legislature 'would have passed [every aspect of the law] irrespective of the fact that any one or more provision … be declared unconstitutional.'" *Leavitt v. Jane L.*, 518 U.S. 137, 140 (1996) (alterations in original).

This didn't stop the panel. Rather than relying on the General Assembly's clear voice that it "would prefer" the court to "use a scalpel rather than a bulldozer

in curing" any constitutional defect, *Seila Law*, 140 S. Ct. at 2210-11, the panel purported to rely on legislative intent to *invalidate* the entire Act. In so doing, the panel repeatedly substituted its own vision of the Act for that of the General Assembly's. It found that "the entirety of the statute was *designed* to carry out the ban." Op.13 (emphasis added). It said the Act's disclosure and reporting requirements were "*intended* to facilitate the Act's 'fetal heartbeat' abortion ban." *Id.* (emphasis added). And it concluded that the unchallenged provisions "make little sense without the ban." *Id.* Yet even the language the panel used indicates that it got the analysis wrong. Designed and intended by whom? And who determines whether a lawful provision "makes sense"? When examining these quintessentially *legislative* questions, a reviewing court should look to see what the *legislature* has to say about them.

Had the panel done that, it would have learned quite a bit. In Section 2, the General Assembly reported that "a fetal heartbeat is a key medical predictor that an unborn human individual will reach live birth." Act §2(5). Accordingly, it determined that, "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." *Id.* §2(8). The Assembly enacted several provisions to realize these findings (and then declared it would enact these provisions all the same even if another provision were declared unconstitutional). These unchallenged provisions include:

- Patient disclosure of ultrasound and image display. Before conducting an abortion, the provider must "perform an obstetric ultrasound on the pregnant woman," "display the ultrasound images so that the pregnant woman may view the images," and "record a written medical description of the ultrasound images of the unborn child's fetal heartbeat." Act §3.

- Patient disclosure of fetal heartbeat. "If a pregnancy is at least eight weeks after fertilization, then the abortion provider … shall tell the woman that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear and shall ask the woman if she would like to hear the heartbeat," and if so, "make the fetal heartbeat of the unborn child audible." Act §3.

- Patient disclosure of statistical viability. "The physician shall further inform the pregnant woman, to the best of the physician's knowledge, of the statistical probability, absent an induced abortion, of bringing the human fetus possessing a detectable fetal heartbeat to term based on the gestational age of the human fetus." Act §5.

- Cause of action for women. The Act creates a cause of action for women "on whom an abortion was performed or induced in violation of" the Act or preexisting abortion regulations. Act §3.

- Reporting Requirements. The Act requires abortion providers to report abortions to the State "indicate from whom consent was obtained, circumstances waiving consent, and, if an exception [to check for a heartbeat] was exercised … which exception the physician relied upon in performing or inducing the abortion." Act §6.

Given these legislative findings that directly and logically led the General Assembly to enact the unchallenged provisions—not to mention the severability clause by which the Assembly "declar[ed] that it would have passed" every "word" of the Act independent of the challenged provision, Act §7—the panel contravened this

Court's precedent when it determined that the Assembly intended the Act *not* to be severable.

II. Laws From Other States Demonstrate That The Act's Unchallenged Provisions Are "Capable Of Being Executed In Accordance With The Legislative Intent, Independent Of The Rejected Portion."

The panel continued its error in the second part of the severability analysis—determining whether the remainder of the Act is "capable of being executed in accordance with the Legislative intent, independent of the rejected portion." *In re DNA Ex Post Facto Issues*, 561 F.3d at 301 (quoting *Joytime*, 528 S.E.2d at 654). Though its reasoning was light (consisting of just one paragraph), the panel seemed to conclude that the unchallenged provisions could not stand alone because "the entirety of the statute was designed to carry out the ban." Op.13.

Even if true, the panel's determination answers the wrong question. Under Supreme Court precedent, the question is not whether the separate provisions are in some way related to each other (of course they are), but whether the lawful provisions are "so interdependent that the remainder of the statute cannot function effectively without the invalidated provision." *Leavitt*, 518 U.S. at 141. Contra the district court's reasoning, affirmed by the panel, references to shared definitions do not make the Act's various provisions "so intertwined" that they fall like dominoes if one is found invalid. App.298-99. The unchallenged provisions in this case have undeniable independent utility.

Indeed, save for simply labeling the Act's various provisions as "closely intertwined" with the challenged regulation, App.26, the plaintiffs did not directly challenge any of the Act's other requirements. That was understandable. Similar disclosure provisions are routinely upheld because States have a "legitimate purpose [in] reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992). Such provisions are also routinely preserved by courts that sever related provisions found unconstitutional. *E.g.*, *Falls Church Med. Ctr., LLC v. Oliver*, 412 F. Supp. 3d 668, 685-86, 705 (E.D. Va. 2019) (invalidating certain abortion regulations but upholding "the remainder of the regulations at issue … which were not shown to be otherwise unduly burdensome"); *Edwards v. Beck*, 8 F. Supp. 3d 1091, 1101 (E.D. Ark. 2014) (upholding "testing and disclosure requirements" after invalidating heartbeat restriction on abortion), *aff'd*, 786 F.3d 1113 (8th Cir. 2015).

This history confirms what the South Carolina General Assembly said in its severability clause—that most of the Act can stand even if one provision falls. In fact, while the panel thought the other provisions "make little sense without the ban," Op.13, many States have enacted laws with provisions like South Carolina's. These laws either did not include any sort of abortion prohibition or included one that a court then severed from the remaining provisions. For example:

- At least 12 States require an abortion provider to perform an ultrasound before conducting an abortion. *See* Ala. Code §26-23A-4; Ariz. Rev. Stat. Ann. §36-2156; Ark. Code Ann. §20-16-602 (as amended by 2021 Arkansas Laws Act 498 (S.B. 85)); Fla. Stat. Ann. §390.0111; Ind. Code §16-34-2-1.1; Iowa Code Ann. §146A.1; Ky. Rev. Stat. Ann. §311.727; La. Stat. Ann. 40:1061.10; Miss. Code Ann. §41-41-3; Tenn. Code Ann. §39-15-215; Tex. Health & Safety Code Ann. §171.012; Wis. Stat. Ann. §253.10.[2]

- At least 24 States require the abortion provider to display the image from any ultrasound that is performed or offer the pregnant woman the opportunity to view the sonogram.[3] *See* Ala. Code §26-23A-4(b)(4); Ariz. Rev. Stat. Ann. §36-2156(A)(1); Ark. Code Ann. §20-16-602 (as amended by 2021 Arkansas Laws Act 498 (S.B. 85)); Fla. Stat. Ann. §390.0111; Ga. Code Ann. §31-9A-3; Idaho Code §18-609; Ind. Code §16-34-2-1.1; Iowa Code Ann. §146A.1; Kan. Stat. Ann. §65-6709; Ky. Rev. Stat. Ann. §311.727; La. Stat. Ann. 40:1061.10; Mich. Comp. Laws Ann. §333.17015; Miss. Code Ann. §41-41-34; Mo. Ann. Stat. §188.027; Neb. Rev. Stat. §28-327(3); N.D. Cent. Code §14-02.1-04; Ohio Rev. Code Ann. §2317.56; S.D. Codified Laws §34-23A-52; Tenn. Code Ann. §39-15-215; Tex. Health & Safety Code Ann. §171.012; Utah Code Ann. §76-7-305; W. Va. Code §16-2I-2; Wis. Stat. Ann. §253.10; Wyo. Stat. Ann. §35-6-119.

- At least 16 States require the abortion provider to make the fetal heartbeat audible for the pregnant woman or offer to do so if an ultrasound is performed and a heartbeat detected. *See* Ariz. Rev. Stat. Ann. §36-2156(A)(1); Ga. Code Ann. §31-9A-3; Ind. Code §16-34-2-1.1; Iowa

[2] In addition, at least two States have mandatory ultrasound provisions that have been enjoined either as part of broader challenges or because the provision went beyond the requirements imposed by other States. *See* N.C. Gen. Stat. Ann. §90-21.85; 63 Okla. Stat. Ann. §1-738.3d.

[3] States differ in their exact wording of these laws. This grouping consists of four slightly different forms: (1) laws requiring the provider to display the sonogram so the pregnant woman may view it; (2) laws requiring the provider to display the sonogram if an ultrasound is performed; (3) laws requiring the provider to offer the pregnant woman an opportunity to view the sonogram; and (4) laws requiring the provider to offer the pregnant woman an opportunity to view the sonogram if an ultrasound is performed.

Code Ann. §146A.1; Kan. Stat. Ann. §65-6709; Ky. Rev. Stat. Ann. §311.727; La. Stat. Ann. 40:1061.10; Miss. Code Ann. §41-41-34; Mo. Ann. Stat. §188.027; N.D. Cent. Code §14-02.1-04; Ohio Rev. Code Ann. §2919.192; S.D. Codified Laws §34-23A-52; Tenn. Code Ann. §39-15-215; Tex. Health & Safety Code Ann. §171.012; Wis. Stat. Ann. §253.10; Wyo. Stat. Ann. §35-6-119.

- At least 10 States specify that an abortion provider can be held liable to the mother for violating informed consent requirements. *See* Ala. Code §26-23A-10; Ariz. Rev. Stat. Ann. §36-2153; Ark. Code Ann. §20-16-1710; Kan. Stat. Ann. §65-6724; Ky. Rev. Stat. Ann. §311.7709; La. Stat. Ann. §40:1061.17; Minn. Stat. Ann. §145.4247; N.C. Gen. Stat. Ann. §90-21.88; N.D. Cent. Code Ann. §14-02.1-03.2; Tex. Health & Safety Code §171.207.

- All told, at least 28 States have informed-consent laws requiring the abortion provider to give the mother specific information before performing an abortion. *See* Ala. Code §26-23A-4; Ariz. Rev. Stat. §36-2153; Ark. Code §20-16-1703; Fla. Stat. §390.0111(3); Ga. Code §31-9A-3; Idaho Code §18-609; Ind. Code §16-34-2-1.1; Iowa Code §146A.1; Kan. Stat. §65-6709; Ky. Rev. Stat. §311.725; La. Stat. Ann. §40:1061.17; Mich. Comp. Laws §333.17015; Minn. Stat. §145.4242; Miss. Code §41-41-33; Mo. Stat. §188.027; Neb. Rev. Stat. §28-327; N.C. Gen. Stat. §90-21.82; N.D. Cent. Code Ann. §14-02.1-03; Ohio Rev. Code Ann. §2317.56; Okla. Stat. tit. 63, §1-738.2; 18 Pa. Stat. & Cons. Stat. §3205; S.D. Codified Laws §34-23A-10.1; Tenn. Code §39-15-202; Tex. Health & Safety Code §171.012; Utah Code §76-7-305; Va. Code §18.2-76; W. Va. Code §16-2I-2; Wis. Stat. §253.10.

Again, it is easy to see why these laws have independent value: In the words of the General Assembly, they help a pregnant woman "make an informed choice about whether to continue a pregnancy." Act §2(5). "States are free to enact [such] laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Casey*, 505 U.S. at 873. The existence of these laws in other States also demonstrate that most of the Act's provisions are "capable

of being executed in accordance with the Legislative intent, independent of the rejected portion." *In re DNA Ex Post Facto Issues*, 561 F.3d at 301 (quoting *Joytime*, 528 S.E.2d at 654). The panel erred by holding otherwise.

CONCLUSION

This Court should grant rehearing en banc.

Dated: March 15, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(b)(4). This brief contains 2592 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, pursuant to Fed. R. App. P. 32(g)(1), this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: March 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System, which will serve an electronic copy on all registered counsel of record.

Dated: March 15, 2022

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