South Carolina 6-week abortion ban constitutional

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By Terry A. Hurlbut August 23, 2023

This morning the Supreme Court of South Carolina ruled that State's strict 6-week abortion restriction to be constitutional.

The South Carolina case

Station WMBF-TV (Channel 32, NBC, Myrtle Beach, South Carolina) reported this morning on the decision by that State's Supreme Court. The court held that the Fetal Heartbeat Act, signed into law in May, is constitutional.

> #BREAKING: The South Carolina Supreme Court has ruled in favor of allowing one of the nation's strictest abortion bans to go into effect.
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> >> https://t.co/ox7Agmp5OP pic.twitter.com/w2tsTP6Ziy— WMBF News (@wmbfnews) August 23, 2023

NBC News' interactive abortion map has seen no update to the status of South Carolina since August 4. A State judge had enjoined the Fetal Heartbeat Act shortly after Gov. Henry McMaster (R-S.C.) signed it into law.

The ruling (*Planned Parenthood South Atlantic v. South Carolina,* case 2023-000896) is brutally simple: INJUNCTION VACATED AND ACT DECLARED CONSTITUTIONAL.

Justice John W. Kittredge delivered the opinion of the Court. WMBF-TV and other outlets made much of the Court now being an all-male Court. But from the beginning Justice Kittredge noted two key moments in time. In 2021 the Court held that the then-current Fetal Heartbeat Act was unconstitutional. Gov. McMaster signed the new version in May of this year.

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Then Justice Kittredge cites the obvious authority that has come down in-between: *Dobbs v. Jackson Women's Health Organization*. Furthermore Kittredge noted that the earlier decision (which he called *Planned Parenthood I*) "was a fragmented decision," with *five* opinions, *three* of which agreed in striking down the old law. Apparently the decision hinged on a specific phrase in South Carolina's Fourth Amendment equivalent. It protects security of the person against *unreasonable invasions of privacy* as well as unreasonable search and seizure. Today's decision says the invasion of privacy *is* reasonable – to protect the unborn child's right to live.

A powerful statement

That creates a powerful precedent, which even McMaster and his allies likely have failed to grasp. *A State Supreme Court has now recognized the unborn child as having a valid legal interest.* The next step will be a direct argument for *standing*, which a guardian ad litem will have to assert. (Furthermore the Court accepted an expansive definition of privacy strictly in the interest of a worst-case analysis.)

> In conclusion, the legislature has found that the State has a compelling interest in protecting the lives of unborn children. That finding is indisputable and one we must respect. The legislature has further determined, after vigorous debate and compromise, that its interest in protecting the unborn becomes actionable upon the detection of a fetal heartbeat via ultrasound by qualified medical personnel. It would be a rogue imposition of will by the judiciary for us to say that the legislature's determination is unreasonable as a matter of law—particularly on the record before us and in the specific context of a claim arising under the privacy provision in article I, section 10 of our state constitution.

> As a result, our judicial role in this facial challenge to the 2023 Act has come to an end. The judiciary's role is to exercise our judgment as to whether the legislative weighing of competing interests was within the range of possible, reasonable choices rationally related to promoting the legislature's legitimate interests. Having concluded that it was, we consequently defer to the legislature's gauging of the profound, competing interests at stake. Accordingly, we vacate the preliminary injunction and hold the 2023 Act is constitutional.

The decision was 4-1, with Chief Justice Donald W. Beatty dissenting. True, the Court did change its composition with the replacement of its one female member. But *Justice John Cannon Few changed his vote*. He did so, apparently, finding that the State legislature addressed a concern he had raised two years earlier. (He explains this in his concurring opinion.) So, even had the female member remained, the case would have gone the same way.

Chief Justice Beatty's dissent seems more rooted in his idea of preserving abortion now and forever than on any analysis of competing interests. Indeed he appears not to recognize the unborn child as having any actionable interest.

> … medical professionals have classified six weeks of gestation as the embryonic stage of development, not fetal, and have stated the only "cardiac activity" that could potentially exist at this point is the nascent flickering of electrical impulses from a group of inchoate cells. A "fetal heart" that is capable of "contraction," as provided in the statutory language, does not exist until later in the pregnancy, when the chambers of the heart have fully developed.

This is medical quibbling, and worthy of a dedicated abortionist in any case.

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Rumor has it that Justice Kittredge will become Chief Justice when Chief Justice Beatty retires next year.

Virginia as abortion tourist trap

Virginia, already a notorious abortion tourist trap, might become more so. South Carolina, with a six-week ban, would go into the "Banned and/or Unavailable" category by NBC's definition. Virginia is the nearest "legal/protected" State – and its Democratic Party has started to run YouTube ads with prophecies of doom should Republicans flip the State Senate this fall.