No. S25A0300

In the

Supreme Court of Georgia

State of Georgia,

Defendant-Appellant,

v.

SisterSong Women of Color Reproductive Justice Collective, et al.,

Plaintiff-Appellees.

On Appeal from the Superior Court of Fulton County
Superior Court Case No. 2022CV367796

BRIEF OF THE STATE OF GEORGIA

Christopher M. Carr 112505
Attorney General

Stephen J. Petrany 718981
Solicitor General

Ross W. Bergethon 054321
Principal Deputy Solicitor General

Elijah J. O'Kelley 645519
Assistant Solicitor General

Zachary Mullinax 421415
Assistant Attorney General

Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for State of Georgia

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The subject of abortion evokes impassioned policy views, but that does not make the relevant *legal* questions difficult. Georgia's Constitution does not even mention, much less limit, the State's ability to regulate abortion—which is no surprise, since Georgia has consistently prohibited elective abortions for centuries, the only exception being the time period that *Roe v. Wade*, 410 U.S. 113 (1973), precluded pro-life laws. With *Roe* overruled, Georgia's Living Infants Fairness and Equality (LIFE) Act is plainly valid.

Yet for the second time in two years, the superior court has held the Act invalid, relying on passionate policy disagreement rather than sober legal analysis. The superior court's opinion is chock full of discussions of the "proper" policy "balance," the "wisdom" and "medical or moral salience" of the LIFE Act, attacks on the LIFE Act's supporters, reliance on fictional books, and dismissive rejections of the General Assembly's policy choices as well as the genuine constitutional interpretation required by this Court. R10-3164 n.2, 3172 n.16, 3175 n.19, 3176, 3177 n.21, 3187. But the order is shockingly thin when it comes to a legal theory that would support enjoining the LIFE Act.

Of course, the superior court (and Plaintiffs) failed to identify any legal theory to support their position because there is none. The text of Georgia's Constitution never mentions abortion, even though it was adopted in 1983, hardly a time when Georgians were unaware of the legal and political controversies surrounding abortion. And the context

and history of Georgia's Constitution confirms there is no right to abortion. Georgia has *always* prohibited elective abortions, with only the *Roe* era standing as a federally forced exception. During centuries of abortion prohibition, the people enacted at least half a dozen constitutions without ever hinting that the State's consistent pro-life laws were invalid. And during that time this Court ruled on various applications of Georgia's pro-life laws without ever suggesting they were unconstitutional. *See, e.g.*, *Sullivan v. State*, 121 Ga. 183 (1904); *Taylor v. State*, 105 Ga. 846 (1899). Regulating abortion is—and always has been—a matter the Georgia Constitution leaves to the General Assembly.

The superior court, following Plaintiffs' lead, pointed to Georgia's "right to privacy," R10-3171, but even viewing that right as broadly as possible, it does not include a right to abortion. The right to privacy is the "right 'to be let alone' so long as one [is] not interfering with the rights of other individuals or of the public." *Powell v. State*, 270 Ga. 327, 330 (1998) (quotation omitted). Yet Georgia's elected representatives passed the LIFE Act precisely to protect "other individuals," *id.*—namely, "unborn children," a "class of living, distinct individuals," 2019 Ga. Laws 234, § 2. Because the General Assembly determined that abortion harms another individual, it is not "behavior [that] falls within the area protected by the right of privacy." *Powell*, 270 Ga. at 332. It is as simple as that.

The superior court did not even contest the General Assembly's finding that an unborn fetus is a living human being worthy of protection. The court nevertheless declared a right to abortion based on its *ipse dixit* policy determination that the fetus's life just doesn't matter *enough* until it is "viable" and can be sustained outside of the mother's womb. R10-3175–78. The superior court made no effort to ground that decision in a discussion of the text or history of Georgia's Constitution. Instead, the superior court waxed poetic about perceived flaws with originalism as a method of constitutional interpretation. R10-3164 n.2, 3172 n.16. At least the superior court was honest: it expressly rejected the "original public meaning" of the Georgia Constitution, *Elliott v. State*, 305 Ga. 179, 182–83 (2019), but that meaning reveals that there is no basis—none—for limiting the General Assembly's authority on this topic.

The superior court's other erroneous theory is based on Georgia's Equal Protection Clause. The superior court held that the Act violates equal protection principles because it treats women with pregnancy-related *physical* maladies differently from women with *psychiatric* maladies. R10-3181. True enough, the LIFE Act allows abortion where it will protect the mother from death or serious physical injury, but when it comes to a mental or emotional condition, the legislature decided that ending an unborn life is never a justifiable treatment solution. That was a perfectly constitutional legislative choice. Women with psychiatric maladies are not "similarly situated," *City of Atlanta v.*

Watson, 267 Ga. 185, 187 (1996), to women with physical maladies where abortion is necessary to avoid grave physical harm. The superior court held that such a view *lacks a rational basis*, which is extraordinary. It should go without saying that treating mental and physical ailments differently in most circumstances is rational, but if anyone needed further evidence, the avowedly pro-abortion Biden Administration agrees. The United States has "emphatically disavowed the notion that an abortion is ever required as stabilizing treatment for mental health conditions. Brief for United States 26, n.5; Tr. of Oral Arg. 76–78." *Moyle v. United States*, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring). It seems only the superior court has trouble finding a rational basis for this distinction.

Lastly, the superior court also invalidated O.C.G.A. § 16-12-141, a decades-old provision that allows district attorneys to obtain abortion-related medical records. R10-3184–86. The superior court held that this provision was outlandishly broad and then proceeded to declare that, as misinterpreted, the statute violates the privacy rights of patients. But when properly understood, the provision is an ordinary oversight mechanism of a highly regulated industry—it allows district attorneys to obtain certain records to ensure that medical professionals and entities are complying with the law. It does not even implicate the privacy rights of patients, who are never the target of this regulation. Plaintiffs lack standing to challenge this provision, they would fail on the merits anyway, and at the very least, facial relief is inappropriate

where there are many constitutional applications. So here, too, the superior court erred.

All in all, the superior court relied on its own sense of "wisdom," R10-3175 n.19, as well as inflammatory rhetoric more suited to an op-ed than a legal opinion, to supplant policy decisions that the Constitution assigns to the General Assembly. As this Court did last time in this very case—where this same superior court also placed the judiciary above the General Assembly—the Court should reverse.

ENUMERATION OF ERRORS AND STATEMENT OF JURISDICTION

The Superior Court of Fulton County erroneously issued a declaratory judgment and permanent injunction against the enforcement of the LIFE Act's key provisions on September 30, 2024, on the basis that the Act violates Plaintiff-Appellees' rights to privacy and equal protection. R10-3187–88.

That decision was immediately appealable under O.C.G.A. § 5-6-34(a)(4), and the State timely filed a notice of appeal on October 1, 2024. *See* R2-1. This Court has exclusive appellate jurisdiction because the case calls into question the constitutionality of a statute. Ga. Const. of 1983, art VI, § VI, ¶ II.

STATEMENT

A. Georgia's well-established historical prohibition of abortion.

Outside the era of *Roe*, abortion has never been lawful in Georgia. From the common-law prohibition of abortion, to the 1876 statute codifying those protections, to the present day, Georgia has always sought to protect the lives of unborn children. The LIFE Act is just another step in that centuries-long history.

1. Georgia common law prohibited all abortion.

Abortion was prohibited at common law. As the U.S. Supreme Court recounted in great detail in *Dobbs*—with little dispute even from the dissenters—"although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 245 (2022). Abortion after "quickening" (usually understood as felt fetal movement) was generally considered homicide at common law, but even pre-quickening abortions were considered unlawful, whether or not subject to homicide penalties. *Id.* at 242–45.

As to post-quickening abortions, the "eminent common-law authorities (Blackstone, Coke, Hale, and the like), … *all* describe abortion … as criminal." *Id.* at 242 (citation omitted); *see also generally id.* at 242–50. Blackstone declared that abortion of a "quick" child was "'by the ancient law homicide or manslaughter' … and at least a very

'heinous misdemeanor.'" *Id.* at 243 (quoting 1 William Blackstone, *Commentaries* *129–30). Sir Edward Coke stated, as early as the seventeenth century, that such an abortion was "murder" or "great misprision." 3 Edward Coke, *Institutes of the Laws of England* 50 (London, M. Flesher 1644). By the nineteenth century, American state "courts frequently explained that the common law made abortion of a quick child a crime." *Dobbs*, 597 U.S. at 246.

Abortion was also unlawful before "quickening," even if it was not always considered homicidal. Common-law English courts declared abortion "barbarous and unnatural," "pernicious," and "against the peace of our Lady the Queen, her crown and dignity"—without making any distinction between pre- and post-quickening abortions. *Id.* at 243–44 (quotations omitted). And we know that abortion was unlawful at common law, even pre-quickening, because it was the basis for a type of common-law, felony-murder rule. *See id.* at 244. Blackstone, for instance, explained that an abortionist who accidentally kills a woman is in the same position as a murderer who shoots at one person but hits another:

> [I]f one shoots at A and misses *him*, but kills B, this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A., and B., against whom the p[o]isoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman this is murder in the person who gave it.

4 William Blackstone, *Commentaries* *200–01.[1]

Georgia's common law was the same. For one thing, "[i]n 1784, our General Assembly adopted the statutes and common law of England as of May 14, 1776, except to the extent that they were displaced by our own constitutional or statutory law." *Lathrop v. Deal*, 301 Ga. 408, 412 n.9 (2017); *see also* O.C.G.A. § 1-1-10(c)(1). And nothing in Georgia had displaced the English common law outlawing abortion. For instance, "[a]t common law, if one performed an unlawful abortion from which death resulted to the woman, the defendant was subject to indictment and trial for murder." *Biegun v. State*, 206 Ga. 618, 630 (1950).

It is no surprise, then, that in 1862, a Georgia trial court relied on logic nearly identical to Blackstone's in explaining that an abortion is unlawful, regardless of whether it was "homicidal" per se. That court articulated the well-understood common-law rule: someone can be guilty of murder "if the killing happen[s] in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being; for instance, … if a man in attempting to procure

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[1] One historical case suggests that pre-quickening abortions were not criminal under the common law. *State v. Cooper*, 22 N.J.L. 52, 58 (N.J. 1849). That decision appears to be a historical outlier, but in any event, it confirms there was no *right* to abortion at any time. *Cooper* held that pre-quickening abortion was an "evil" that could be punished by "legislative enactments." *Id.* New Jersey's legislature then did just that, prohibiting abortion by statute in the very same year. *See Dobbs*, 597 U.S. at 309.

an abortion kills the woman without intending it." *Wilson v. State*, 33 Ga. 207, 213 (1862); *see also id.* at 218.

Similarly, this Court held that the proto-felony-murder rule applied even where the mother was killed pre-quickening and without intent. *See Summerlin v. State*, 150 Ga. 173, 175–76 (1920); *see also Wilbanks v. State*, 41 Ga. App. 268, 272–73 (1930). The common-law crime of involuntary manslaughter in the commission of an unlawful act—performing an abortion—included killing the mother of an unquickened fetus during an abortion. *Summerlin*, 150 Ga. at 175–76.

Georgia cases in other contexts confirm these common-law understandings. This Court, for example, recognized the common-law rule that "a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered." *Morrow v. Scott*, 7 Ga. 535, 537 (1849). So a child "in the mother's womb, [was] supposed in law to be born, for many purposes" such as "having a legacy, or a surrender of a copyhold estate made to it," or having a guardian assigned to it. *Id.* (quoting Blackstone Commentaries 130). Thus, "the universal rule in this country" was that children could "inherit, in all cases, in like manner as if they were born in the lifetime of the intestate, and had survived him." *Id.* Similarly, at common law a child has an action for tortious injury against someone who harmed them in the womb, regardless of "what particular moment after conception" the injury occurred—"quick" or not. *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504 (1956).

2. Georgia's statutes have nearly always prohibited abortion.

In 1876, Georgia specifically codified its pro-life penal laws. (As noted, Georgia had already generally adopted the common law. *See Lathrop*, 301 Ga. at 412 n.9; O.C.G.A. § 1-1-10(c)(1).) The General Assembly statutorily outlawed all abortions except those necessary to save the life of the mother, retaining the "quickening" distinction only for purposes of the relevant punishment. *See* Ga. Code of 1882 § 4337(b)–(c) (repealed 1968), https://tinyurl.com/2jc2axzb (Part IV, p. 1143); *see also Brinkley v. State*, 253 Ga. 541, 543 (1984). Performing an abortion on "any woman pregnant with a child"—meaning a "quickened" fetus—was assault with intent to murder. Ga. Code of 1882 § 4337(b)–(c) (repealed 1968); *see also Summerlin*, 150 Ga. at 175–76. Performing an abortion on "any pregnant woman"—meaning the fetus was not "quickened"—was punishable as a misdemeanor. Ga. Code of 1882 §§ 4310, 4337(c) (repealed 1968), https://tinyurl.com/2jc2axzb (Part IV, p. 1143); *see also Biegun*, 206 Ga. at 630.

Although this law was recodified several times, it did not substantially change until 1968. At that point, the General Assembly abandoned the "quickening" dichotomy and imposed the same penalty (one to ten years' imprisonment) on the performance of an abortion at any gestational age. Act of Apr. 10, 1968, § 1, 1968 Ga. Laws 1188, 1216–19 (repealed 1973), https://perma.cc/XA8T-YNLY. The General Assembly also expanded the statute's exceptions to include protecting

the mother from death or serious physical injury and situations of severe fatal defects or rape. *Id.* § 1, 1968 Ga. Laws at 1216–17.

Only after the U.S. Supreme Court purported to identify a right to abortion in the federal constitution, *see Roe*, 410 U.S. at 164–65, did Georgia's General Assembly amend Georgia's statutes to allow for abortions in accord with *Roe*'s trimester framework, *see* Act of Apr. 13, 1973, § 1, 1973 Ga. Laws 629, 630 (repealed 2012), https://perma.cc/4MQG-Z6SH.

The Georgia General Assembly addressed abortion again in 2012. It abandoned the trimester scheme and began prohibiting abortions after 22-weeks' gestation. *See* O.C.G.A. § 16-12-141 (2012). That version of the prohibition provided exceptions for "medical[] futil[ity]" and where necessary to "[a]vert the death … or avert serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." *Id.* § 16-12-141(c)(1) (2012).

3. The LIFE Act.

The General Assembly again amended Georgia's abortion statutes in 2019, enacting the Living Infants Fairness and Equality (LIFE) Act, 2019 Ga. Laws 234. The General Assembly found that "[m]odern medical science, not available decades ago, demonstrates that unborn children are a class of living, distinct persons." LIFE Act § 2. Accordingly, the LIFE Act broadly provides protection for the unborn and support for pregnant mothers and families.

The law limits the practice of elective abortion. Section 4 of the Act prohibits "using, prescribing, or administering any instrument, substance, device, or other means with the purpose to terminate a pregnancy with knowledge that termination will, with reasonable likelihood, cause the death of an unborn child" who possesses a "detectable human heartbeat." *Id.* § 4 (codified at O.C.G.A. § 16-12-141(a)(1), (b)).

But the LIFE Act does not prohibit every pregnancy termination, even after a detectable heartbeat. Operations to remove "ectopic pregnanc[ies]" or to address a "spontaneous abortion" such as a "miscarriage or stillbirth" are not "considered … abortion[s]" at all. O.C.G.A. § 16-12-141(a)(1), (5). The Act also permits abortions up to 20 weeks' gestation where the "pregnancy is the result of rape or incest." *Id.* § 16-12-141(b).

Likewise, the LIFE Act does not prohibit abortion when a physician's "reasonable medical judgment" is "that the pregnancy is medically futile" or there is a "medical emergency." *Id.* § 16-12-141(b)(1), (3). A pregnancy is "medically futile" if "an unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth." *Id.* § 16-12-141(a)(4). And there is a "medical emergency" when there is "a condition in which an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman." O.C.G.A. § 16-12-

141(a)(3). But a medical emergency does not include "a diagnosis or claim of a mental or emotional condition." *Id.*

The LIFE Act also provides exceptions where the intention is not to produce the death of the unborn child. It is an affirmative defense if, for instance, a "physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury to or death of an unborn child." *Id.* § 16-12-141(h)(1). The same goes for nurses, pharmacists, and physician assistants. *Id.* § 16-12-141(h)(2)–(4).

Other provisions of the LIFE Act promote the dignity and well-being of unborn children and ensure support for their families. Section 3, for example, defines an unborn child as a "[n]atural person" under Georgia law. O.C.G.A. § 1-2-1(b). It requires counting unborn persons for "population based determinations." *Id.* § 1-2-1(d). Section 12 allows parents to claim tax benefits by counting unborn children with detectable heartbeats as "dependent[s]." O.C.G.A. § 48-7-26(a). Section 5 expands the child-support obligations of absent fathers to include the "direct medical and pregnancy related expenses of the mother of [an] unborn child." O.C.G.A. § 19-6-15(a.1)(2).

One last relevant point: prior to the LIFE Act, Georgia's abortion laws provided that "[h]ospital or other licensed health facility records shall be available to the district attorney of the judicial circuit in which the hospital or health facility is located." *See* LIFE Act § 4. The LIFE Act slightly amended this language to provide that "[h]ealth records"

shall be available to the district attorney where the "act of abortion occurs or the woman upon whom an abortion is performed resides." LIFE Act § 4 (codified at O.C.G.A. § 16-12-141(f)).

B. Proceedings Below

The LIFE Act was not enforceable on its effective date because a federal district court enjoined it. *SisterSong Women of Color Reprod. Justice Collective v. Governor of Ga.*, 40 F.4th 1320, 1323 (11th Cir. 2022). But the Eleventh Circuit reversed that decision after *Dobbs*. *Id.* at 1328.

A week after the Eleventh Circuit issued its opinion, many of the federal plaintiffs (activists and medical providers) filed suit in Fulton County Superior Court. Their complaint attacked the LIFE Act as void *ab initio*, violating Georgia's right to privacy, and violating Georgia's Equal Protection Clause. They also asserted that O.C.G.A. § 16-12-141(f) violates Georgia's right to privacy. *See generally* R2-4–43.

The State moved to dismiss the suit in its entirety, R5-1148, and Plaintiffs moved for partial judgment on the pleadings, relying on their theory that the LIFE Act was void *ab initio*, R5-1197. Although these dueling dispositive motions were outstanding—and neither required discovery or evidence—the superior court nevertheless held a rushed, two-day trial on the LIFE Act, over the State's objection. *See* T12, T13; R5-1335, 1338. Two-and-a-half weeks after the trial concluded, in November 2022, the superior court issued an order adopting the "void *ab initio*" argument (without relying on any evidence from the trial).

See State v. SisterSong Women of Color Reprod. Justice Collective, 317 Ga. 528, 530 (2023) (*SisterSong I*). This Court then reversed and remanded to the superior court to rule on the merits issues. *Id.* at 544.

Almost a year later, the superior court again permanently enjoined the LIFE Act—again with virtually no reliance on the "trial." *See* R10-3163–88. The superior court first castigated this Court for its decision in *SisterSong I*, asserting that the Court had "abandoned decades of its own precedent" for the "falsely modest precept" that "the Court is not the source of the Constitution's meaning." R10-3164 & n.2 (quotation omitted). It then went on to hold that Georgia's Constitution provides a right to abortion until fetal viability, based on an ill-defined theory of privacy. R10-3171–78. And it held in the alternative that the LIFE Act's differential treatment of physical maladies and mental impairments is unconstitutional under Georgia's Equal Protection Clause. R10-3178–81. Finally, the court held unconstitutional O.C.G.A. § 16-12-141(f), the health records provision, based on Georgia's right to privacy. R10-3184–86.

ARGUMENT

The superior court declared a right to abortion on the basis of privacy or equal protection concerns, but neither implicate abortion, or the LIFE Act, at all. And the LIFE Act would satisfy strict scrutiny even if it did implicate a constitutional right. As the superior court admitted, Georgia has a "compelling interest" in protecting fetal life,

and prohibiting abortion is the only way to protect that interest. Finally, the health records provision, O.C.G.A. § 16-12-141(f), when properly interpreted, does not violate anyone's right to privacy, and it does not even *implicate* Plaintiffs' right to privacy, so they lack standing to challenge it.

This Court reviews the superior court's order *de novo*, *State v. Holland*, 308 Ga. 412, 414 (2020), and it should reverse across the board.

I. The LIFE Act does not violate the Georgia Constitution because there is no constitutional right to abortion.

The history of abortion prohibition in Georgia precludes any argument that the Constitution includes a right to abortion. Georgia has prohibited abortion without fail, for centuries, and no one has ever suggested those prohibitions violate Georgia's Constitution. The 1983 Constitution, like all the constitutions before it, does not mention the word. And of course, "[d]uly enacted statutes enjoy a presumption of constitutionality." *Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 52 (2023). That should be more than sufficient to reject Plaintiffs' challenge.

The superior court ignored these points and instead concocted two theories for why Georgia's Constitution prohibits limits on abortion prior to viability, based on a due process right to "privacy" and equal protection. Both attempts fail, many times over.

A. Georgia's Due Process Clause does not provide a right to abortion.

1. "[A]ny decision about the scope of a provision of the Georgia Constitution must be rooted in the language, history, and context of that provision." *Elliott*, 305 Ga. at 188 (quotation omitted). Those considerations guide this Court in determining the "original public meaning of [a provision's] text"—the "meaning the people understood a provision to have at the time they enacted it." *Olevik v. State*, 302 Ga. 228, 235 (2017). Although the superior court disagreed—strongly, R10-3164 n.2, 3172–73 n.16—constitutional interpretation is not the free-form policy analysis the superior court applied.

When one investigates the original public meaning, there is no textual support for a right to abortion in Georgia's Constitution. Abortion is never mentioned, including in the Due Process Clause. Ga. Const. of 1983, art. I, § I, ¶ I. The superior court rejected these textual problems as "true on a tritely literalistic level," R10-3172, but there is nothing trite about constitutional rights needing to be grounded in constitutional text. This Court has, time and again, focused its constitutional interpretation on the Constitution's text and on the changes to the text (or the lack thereof). *See, e.g.*, *Elliot*, 305 Ga. 182–83; *Olevik*, 302 Ga. at 235–36; *Lathrop*, 301 Ga. at 428–29; *Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 598–99 (2014). After all, it is the text—and the text only—that the "makers" of the Constitution enact. *Olevik*, 302 Ga. at 238–39 (quotation omitted).

Of course, constitutional text must be viewed in "the broader context in which that text was enacted, including other law—constitutional, statutory, decisional, and common law alike—that forms the legal background of the constitutional provision." *Elliott*, 305 Ga. at 187 (quotation omitted). "[T]he primary determinants of a [constitutional] text's meaning" are its "broader legal and historical context." *Ammons v. State*, 315 Ga. 149, 163 (2022).

But here, context and history *eviscerate* the notion that Georgia's Constitution provides a right to abortion. The Due Process Clause first entered the Georgia Constitution in 1861, reading mostly as it does today: "No citizen shall be deprived of life, liberty or property, except by due process of law." Ga. Const. of 1861, art. I, ¶ 4. That "constitutional text should be interpreted consistent with the common law that preceded it," *Elliott*, 305 Ga. at 184 (citing *State v. Cent. of Ga. R. Co.*, 109 Ga. 716, 727–28 (1900)), and it must "be construed in the sense in which it was understood by the makers of it at the time when they made it," *Olevik*, 330 Ga. at 235–36 (quoting *Padelford, Fay & Co. v. Savannah*, 14 Ga. 438, 454 (1854)) (emphasis omitted). As explained, the common law always prohibited abortion, *see supra* at Background A.1, and Georgia's legislature had already adopted that common law in 1784, *see Lathrop*, 301 Ga. at 412 n.9. Nobody would have thought the Due Process Clause silently provided a constitutional right to engage in behavior that was unquestionably illegal.

The 1861 Constitution simply did not address abortion, and that meaning has not changed. This Court "presume[s] that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary." *Elliott*, 305 Ga. at 183. The Due Process Clause's text remains "without material change." *Id.* And there is no "indication to the contrary" to suggest that its meaning has changed as it relates to abortion. *Id.*

Rather than undermine the General Assembly's authority over abortion, the history of abortion regulation and constitutional recodification affirms, beyond peradventure, the permissibility of abortion restrictions. The General Assembly statutorily codified abortion prohibitions in 1876. *See supra* at 10. Just a year later, in 1877, the people ratified a new constitution with the same Due Process Clause and with no hint that the General Assembly could not prohibit abortion. *See* Ga. Const. of 1877, art. I, § I, ¶ III. Georgia's General Assembly continued recodifying abortion prohibitions—in 1895, 1910, and 1933[2]—and the 1945 Constitution again adopted a materially identical Due Process Clause, never suggesting a right to abortion, *see*

[2] *See* Ga. Code of 1895 vol. 3 §§ 81–82 (repealed 1968), https://tinyurl.com/yc4b53mc (vol. 3 at 33); Ga. Code. of 1910 vol. 2 §§ 81–82 (repealed 1968), https://tinyurl.com/5cxbc7y8 (vol. 2 at 17–18); Ga. Code of 1933 §§ 26-1101–1102 (repealed 1968), https://tinyurl.com/3hapvnym (Title 26 at 755).

Ga. Const. of 1945, art. I, § I, ¶ III. In all that time, both before and after the 1945 Constitution, Georgia courts consistently treated anti-abortion statutes as plainly within the General Assembly's power. *See, e.g.*, *Biegun*, 206 Ga. at 627–28, 630; *Summerlin*, 150 Ga. at 175–76; *Sullivan*, 121 Ga. at 186–87; *Taylor*, 105 Ga. at 846–47; *Wilbanks*, 41 Ga. App. at 272–73.

The 1976 and 1983 Constitutions continued with materially identical Due Process Clause language. *See* Ga. Const. of 1983, art. I, § I, ¶ I; Ga. Const. of 1976, art. I, § I, ¶ I. Although the General Assembly had by 1976 diminished Georgia's abortion restrictions in the light of *Roe*, *see supra* at 11, nothing suggests that that *legislative* decision was constitutionalized. The 1983 Constitution continued to leave abortion policy to the General Assembly. *See, e.g.*, Ga. Const. of 1983, art. III, § VI, ¶ I (granting the General Assembly the power to make all laws not unconstitutional).

Roe does not change that conclusion—there is no evidence it affected the original public meaning of the 1983 Constitution. Most obviously, *Roe* was about the U.S. Constitution; it cannot determine the meaning of Georgia's Constitution. *See Roe*, 410 U.S. at 164. It cannot even indicate a change in the general understanding of Georgia's Constitution. As this Court explained about *Miranda v. Arizona*, 384 U.S. 436 (1966), that (famous) decision did nothing to change the meaning of Georgia's self-incrimination clause because *Miranda* interpreted the U.S. Constitution, *Elliott*, 305 Ga. at 220 n.29; *see also*

Olevik, 302 Ga. at 234 n.3 (interpreting State Constitution in a "manner consistent with the Fourth Amendment does not mean that [this Court's] interpretation of [the State Constitution] must change every time the Supreme Court of the United States changes its interpretation of the Fourth Amendment"). Regardless, U.S. Supreme Court decisions have persuasive value "only to the extent that those decisions are rooted in shared history, language, and context." *Elliot*, 305 Ga. at 187. In that regard, *Roe* is valueless. *See Dobbs*, 597 U.S. at 270 (*Roe* "failed to ground its decision in text, history, or precedent").

Even the superior court conceded that Georgia constitutions did not prohibit abortion restrictions as a historical matter. *See* R10-3172–73 n.16. At bottom, the superior court engaged in a judicial *update* to the Constitution, expressly disregarding the original public meaning of Georgia's relevant constitutional provisions. *See* R10-3164 n.2, 3172–73 n.16, 3186. But courts lack power to "read into or read out that which would add to or change [the Constitution's] meaning." *Ctr. for a Sustainable Coast*, 294 Ga. at 598 (quotation omitted). And this Court has been clear—including in this *same* case, reversing this *same* superior court—that it is for "the people" to amend their Constitution. *SisterSong I*, 317 Ga. at 533 (quotation omitted). This Court should reverse the superior court's attempt to rule by judicial fiat.

2. The superior court's thin justification for ignoring text, history, and basic legal analyses was the right to "privacy." R10-3172. But Georgia's atextual right to privacy, even interpreted to the broadest

possible extent, is limited to conduct that does not "interfere with the rights of another." *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 196 (1905). The superior court rejected that oft-repeated limitation, holding that even if abortion "necessarily interferes with the rights of 'another,' *i.e.*, the fetus," that "does not mean the discussion is closed." R10-3173. To the contrary, it means precisely that: because abortion harms an innocent third party, the discussion is closed.

First things first: the right to privacy has been "very much restricted from the beginning." *Davis v. Gen. Fin. & Thrift Corp.*, 80 Ga. App. 708, 710 (1950). Georgia's right to privacy originated in *Pavesich*, where this Court reasoned that under the common law, there was a right to privacy that allowed a plaintiff to be free from unwanted publicity. 122 Ga. at 196–97. The Court drew on Louis Brandeis's famous article on the subject, which outlined a theory of common-law torts for one's private information. *Id.* at 205–06 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890)). The Court decided that Georgia's Constitution, via its protection of "liberty" in the due process clause, contained that common-law protection. *Id.* at 197.

The *Pavesich* right was one of private parties against each other, not a right against the State. *Pavesich* involved the unauthorized use of the plaintiff's photograph, *see id.* at 215–16, and later privacy cases similarly involved using the plaintiff's name, *see Tanner-Brice Co. v. Sims*, 174 Ga. 13, 17–22 (1931), and the publication of pictures of a

deceased, malformed child, *see Bazemore v. Savannah Hosp.*, 171 Ga. 257, 259 (1930). That is, the original form of the right was an actual right to *privacy* as against others, not a substantive-due-process protection against state legislation on certain topics.

Pavesich also made clear a limitation on the right to privacy that this Court would repeat throughout the century: the Court was emphatic that the right existed only as "long as [a person] was not interfering with the rights of other individuals or of the public." *Pavesich*, 122 Ga. at 197. So while the right to privacy might prevent the State from forcing food, *Zant v. Prevatte*, 248 Ga. 832, 833 (1982), or a ventilator, *State v. McAfee*, 259 Ga. 579, 580 (1989), on an individual to prevent harm to *that individual*, it does not extend to situations where a person's activity affects or harms another. The General Assembly has broad "discretion" to determine what "harmful" activity should be illegal. *Blincoe v. State*, 231 Ga. 886, 889 (1974) (no privacy right to possess illegal drugs).

Given that severe limitation, it should be unsurprising that only once has this Court held that the right to privacy prohibits the State from criminalizing certain conduct. *See Powell*, 270 Ga. at 332. In *Powell*, which the superior court mentions but never describes, this Court held that Georgia's right to privacy protects "[1] private, [2] unforced, [3] non-commercial acts [4] of sexual intimacy [5] between persons legally able to consent," because "such behavior between adults in private is recognized as a private matter by [a]ny person whose

intellect is in a normal condition." *Id.* at 332, 336 (quotation omitted). This Court therefore held Georgia's sodomy prohibition unconstitutional as applied, because it regulated "private conduct of consenting adults" that did no harm to others, and because the prohibition did not benefit the public. *Id.* at 334.

Powell is the highwater mark for this Court's expansion of the right to privacy—indeed, it is on an island by itself in this Court's jurisprudence—but *Powell* itself confirms that the right is strictly limited to actions that do not harm a third party. *See Powell*, 270 Ga. at 332–33. That is why, for example, the State can criminalize non-consensual sexual activity, even if it is done in private. *See, e.g.*, *Odett v. State*, 273 Ga. 353, 354 (2001). Such non-consensual activity "is not protected by any privacy right" at all. *Id.* It is no wonder this Court has repeatedly refused to expand *Powell* beyond its narrow facts and holding. *See, e.g.*, *Widner v. State*, 280 Ga. 675, 676–77 (2006); *Odett*, 273 Ga. at 354; *In re C.P.*, 274 Ga. 599, 600 (2001); *Howard v. State*, 272 Ga. 242, 242–43 (2000).

The superior court did not acknowledge any of this. To the contrary, it held that, even if an abortion "necessarily interferes with the rights of 'another,' *i.e.*, the fetus," that "does not mean the discussion is closed." R10-3173. According to the superior court, that just "means … that the respective rights must be balanced against each other." *Id.*

The superior court has it exactly wrong. It is *only once a privacy right applies* that courts "balance" anything. *See, e.g.*, *Powell*, 270 Ga. at 332–33 (deciding first whether a privacy right applied and then whether state action survived judicial scrutiny). When an action affects a third party, there is no privacy right because it is not a "private" act. That has to be the case, otherwise *all laws* would be subject to a privacy analysis.

That basic point resolves this issue: the State need not overcome any right to privacy because an abortion "interfere[es] with the rights of other individuals [and] of the public." *Id.* at 330. Nowhere does the superior court—or the Plaintiffs, for that matter—question that unborn children are unique human beings. Nor could they, as an empirical matter. That human life begins at conception "has been stated without explanation or citation in articles published in numerous peer-reviewed journals such as *Science*, *Nature*, and *Cell*." Steven Andrew Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36 Issues in L. & Med. 221, 225 (2021).[3] Planned Parenthood has itself submitted

[3] *See, e.g.*, Isha Raj et al., *Structural Basis of Egg Coat-Sperm Recognition at Fertilization*, 169 Cell 1315, 1315 (2017) ("Recognition between sperm and the egg surface marks the beginning of life in all sexually reproducing organisms."); Enrica Bianchi et al., *Juno is the egg Izumo receptor and is essential for mammalian fertilisation*, 508 Nature 483, 483 (2014) ("Fertilisation occurs when sperm and egg recognise each other and fuse to form a new, genetically distinct organism."); María Jiménez-Movilla et al., *Oolemma Receptors in Mammalian Molecular Fertilization: Function and New Methods of Study*, 9 Frontiers in Cell & Developmental Biology 1, 1 (2021) ("Fertilization is a key process in biology to the extent that a new

affidavits from experts in other cases, accurately stating that "to describe an embryo or fetus scientifically and factually, one would say that a living embryo or fetus in utero is a developing organism of the species Homo Sapiens." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (citation omitted); *see also, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) ("[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.… We do not understand this point to be contested by the parties." (citation omitted)). For that matter, Georgia courts have long held that "a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered." *Morrow*, 7 Ga. at 537; *see also, e.g.*, *Hornbuckle*, 212 Ga. at 504 (child can recover for "alleged tortious injuries" no matter "[a]t what particular moment after conception … the injury was inflicted"). But even if there were a debate, it would be the General Assembly's job to decide, not the judiciary's. *C.f.*, *e.g.*, *In re J.M.*, 276 Ga. 88, 89 (2003) (the State cannot criminalize certain private, non-commercial, sexual activity among consenting adults, but the General Assembly defines the age a person is "capable of consent").

The superior court order ignores all this and instead changes the subject. The order asserts that a fetus is dependent on her mother and

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individual will be born from the fusion of two cells."); Keith L. Moore et al., *The Developing Human: Clinically Oriented Embryology* 1 (11th ed. 2020).

cannot survive on her own until roughly 22 weeks into pregnancy. R10-3174. In the superior court's view, because "no one else" can assume the mother's role, that somehow means a privacy right attaches. *Id.* But the superior court never explains how this changes the legal analysis. That children depend on their mothers is not an argument that abortion does not "interfere with the rights of another." *See Pavesich*, 122 Ga. at 196. It is an argument against the moral value of unborn life or in favor of a greater moral value of a mother's preferences. But the superior court is not a court of morals, and the question it was supposed to answer is whether abortion interferes with the rights of another—which it does.

Put another way, abortion is *not* conduct that "[every] person whose intellect is in a normal condition" considers private. *Powell*, 270 Ga. at 332 (quoting *Pavesich*, 122 Ga. at 194). Indeed, it could not be: the Court based the right to privacy on the common law, *see Pavesich*, 122 Ga. at 194–95 (relying on Blackstone), so the "liberty of privacy" could not include a right to abortion, which the common law prohibited precisely because it harmed another person. *See supra* Background A.1.

To be sure, neither this Court nor any other is required to agree with the General Assembly as to the moral status of the unborn, the policy decisions inherent in the LIFE Act, or any related policy questions on this subject. But as a *legal* matter, no one can seriously maintain that abortion is recognized as a "private matter by [every]

person whose intellect is in a normal condition." *Powell*, 270 Ga. at 332 (quotation omitted). Nor can they maintain that it is beyond the General Assembly's power to prohibit it. Abortion is and has been a highly contentious issue for decades, yet never have the people of Georgia amended their constitution to address it. That a single superior court judge has strong policy views on the subject does not transform abortion into an issue of privacy.

3. Although unnecessary to the disposition of this case, it is worth examining the extraordinary and erroneous implications of the superior court's theory. The superior court held that the "liberty of privacy encompass[es] the right to make personal healthcare decisions." R10-3172. But if that means a patient has the right to obtain whatever medical procedures or medicine a patient wants, the State would have to satisfy strict scrutiny every time it regulates the practice of medicine. After all, why would a patient not have a "privacy" right to an unlicensed doctor, an experimental drug, cocaine, or anything else that the State regulates? The superior court does not say.

The practice of medicine is simply not "private" as that term is used in *Powell* or any of this Court's relevant cases. It is "commercial," and hardly considered private "by [a]ny person whose intellect is in a normal condition." *Powell*, 270 Ga. at 332. To the contrary, "[t]he regulation of health professions, for the preservation and protection of public health, is universally regarded as a duty of the State in the exercise of inherent police power." *Foster v. Ga. Bd. of Chiropractic*

Exam'rs, 257 Ga. 409, 419 (1987) (quotation omitted); *accord, e.g.*, *Cobb Cnty.-Kennestone Hosp. Auth. v. Prince*, 242 Ga. 139, 143–44 (1978); *Yeargin v. Hamilton Mem'l Hosp.*, 225 Ga. 661, 665–66 (1969); *Pearle Optical of Monroeville, Inc. v. Ga. State Bd. of Exam'rs in Optometry*, 219 Ga. 364, 371 (1963). The State regulates (or prohibits) all sorts of medicine without needing to overcome a right to privacy. *See, e.g.*, O.C.G.A. § 16-13-71 (defining "dangerous drugs"); O.C.G.A. § 16-13-25 (Schedule I illegal drugs).

The superior court mistook the outcomes in cases like *Zant* and *McAfee*, which limit the ability of the State to *force* medical care on someone for their own benefit, as supporting a right to *obtain* whatever procedures a particular person wants. R10-3172–73. These things are not the same. That the State cannot force a patient to ingest a drug does not mean a patient has a right to affirmatively obtain and ingest any drug he wants. The right the superior court sought to invent does not exist, and it would break the foundations of the regulation of medicine to hold otherwise.

B. The LIFE Act does not violate the Equal Protection Clause.

The superior court alternatively concluded that the LIFE Act violates Georgia's Equal Protection Clause. R10-3179–81. That clause "is construed to be consistent with its federal counterpart" and "requires that the State treat similarly situated individuals in a similar manner." *Watson*, 267 Ga. at 187. "When assessing equal protection

challenges, a statute is tested under a standard of strict judicial scrutiny if it either operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right." *Ambles v. State*, 259 Ga. 406, 407 (1989). Otherwise, ordinary rational basis review applies. *Harper v. State*, 292 Ga. 557, 560 (2013).

The superior court put forth two erroneous equal protection theories. First, it reasoned that the LIFE Act treats pregnant women who carry their child to term differently than pregnant women who seek abortions. R10-3179. But as the superior court conceded, that difference matters only if there is a fundamental right to pre-viability abortion in the first place. R10-3179–80 n.25. Because the superior court is wrong about the right to privacy, *see supra* at 22–29, this theory of equal protection goes nowhere.

Second, the superior court reasoned that the LIFE Act violates the Equal Protection Clause because it treats two classes of women differently: (1) women who have "physical health emergencies" that require an abortion to avoid serious harm, and (2) women who have "mental health emergencies." R10-3180–81. The superior court apparently agreed that rational basis review applies (since there is no suspect class) but held there is no rational basis for this distinction. *Id.* The sum total of its analysis was that "there is no basis—rational, compelling, or sensical—to distinguish between diagnosed medical emergencies involving the brain … versus the heart or the lungs or the liver." *Id.*

To say this aloud is to refute it. Of *course* there are rational—compelling—reasons to distinguish between physical emergencies and mental or emotional ailments. The LIFE Act expressly recognizes that an abortion might be necessary to protect the physical health of the mother. But the LIFE Act rejects the idea that an abortion is ever appropriate treatment for the psychiatric health of the mother because *other* interventions can address such maladies. It does not diminish these issues to acknowledge that they are *different* issues with *different* treatment options. Tellingly, despite there being plenty of evidence submitted on these points, the superior court does not even purport to identify a situation where an abortion would be the only appropriate treatment for a psychiatric malady. That is not surprising, as even President Biden's Administration—which is proudly pro-abortion[4]—"emphatically disavowed the notion that an abortion is ever required as stabilizing treatment for mental health conditions. Brief for United States 26, n. 5; Tr. of Oral Arg. 76–78." *Moyle*, 144 S. Ct. at 2021 (Barrett, J, concurring).

The reasonableness of the General Assembly's distinction is obvious if one were to take the scenario outside of the pregnancy context. If someone has to regrettably allow a person to die to save the life of another (like a general ordering soldiers on a dangerous rescue

[4] *See, e.g.*, FACT SHEET: Biden-Harris Administration Continues the Fight for Reproductive Freedom, (Mar. 07, 2024), https://tinyurl.com/4p6scdu9.

mission, knowing some will die), most would agree that is a reasonable moral choice. But no one would suggest that *intentionally* killing a person is an appropriate solution for the mental or psychiatric health problems of another.

It does not "stigmatiz[e]" people with mental illness as "not being truly sick or in need of care" to acknowledge that mental illness and physical maladies involve different issues with different treatment options. R10-3181 n.26. It is plainly reasonable for the General Assembly to make the determination that women with serious physical ailments (like an ectopic pregnancy) are in a different position than those with psychiatric ailments. There is no equal protection problem.

II. Even if the LIFE Act implicated a constitutional right, it would satisfy any form of scrutiny.

Assuming abortion did implicate constitutional rights—and it does not—the LIFE Act would still pass muster. Georgia has a "compelling governmental interest [in] the welfare of … children." *Phagan v. State*, 268 Ga. 272, 274 (1997) (quotation omitted). In fact, the superior court agreed, finding that "respect for and preservation of prenatal life at all stages of development is a legitimate and compelling interest." R10-3174 n.18 (quotation omitted). And prohibiting abortion is not just narrowly tailored to that interest, it is the *only* means to protect the interest. If an act would necessarily end a human life, the only way to protect the life is to stop the act, as the LIFE Act does.

The LIFE Act does not prohibit any conduct except that which unnecessarily harms healthy third parties. For example, the Act does not prohibit operations to remove "ectopic pregnanc[ies]," or the remains of a "spontaneous abortion," (meaning miscarriage or stillbirth), nor does it prohibit abortion when the pregnancy is "medically futile." O.C.G.A. § 16-12-141(a)(1)(A)–(B), (b)(3). And doctors may abort if, in their "reasonable medical judgment," it is "necessary … to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman." *Id.* § 16-12-141(a)(3), (b)(1). Plus, Georgia's abortion laws do not criminalize the mother's actions: they apply only to the provider who performs an unlawful abortion "to any woman" or "upon any woman." O.C.G.A. § 16-12-140(a); *see also Hillman v. State*, 232 Ga. App. 741, 742–43 (1998).[5] The LIFE Act carefully serves a compelling interest and does so in the least restrictive way possible. That should be the end of it.

[5] Although the parties agreed that the LIFE Act provides no liability for mothers, R3-429 n.17; R5-1189, the superior court inexplicably declared otherwise, R10-3170 n.13. The superior court was wrong. The Georgia Court of Appeals had long interpreted Georgia's abortion laws as not applying to mothers, *see Hillman*, 232 Ga. App. at 742–43, and the General Assembly used the same language to mean the same thing, *see, e.g.*, *Haley v. State*, 289 Ga. 515, 523 (2011) (Court "look[s] to [statute's] text as well as the interpretation that courts had given to the same language at the time the statute was enacted").

The superior court never explained what narrower means the State could use to protect unborn children. Instead, the court declared that, before viability, the "balance of rights favors the woman." R10-3175. But that policy judgment does not answer the *constitutional* question. All agree that the State has a compelling interest in protecting prenatal life. The only question is whether the State chose a narrowly tailored means. The superior court declined to answer that question, instead positing *ipse dixit* policy arguments about how *Roe*'s viability line "struck the proper balance." *Id.* That's not legal analysis. The question is what means, other than prohibiting the destruction of the unborn child, would constitute a more narrowly tailored law? The superior court did not say.

Although the Court need not reach this question, the discussion highlights the arbitrary nature of the superior court's rationale. The superior court declared that "[w]e struggle mightily" with the question when abortion should be permissible, R10-3169, but rather than leave the question to legislators, the court imposed its own decision. Decrying the legislature's fetal heartbeat line as "political" and "arbitrary," R10-3175 n.19, the court never acknowledged that its *own* line is political and arbitrary. The only difference is that legislatures have the capacity and authority to *make* policy decisions in gray areas, where they will inevitably seem wise to some and arbitrary to others. That is not the judiciary's role, and this Court should hold as much.

III. The health records provision is constitutional.

The superior court also enjoined § 141(f), which states that "[h]ealth records shall be available to the district attorney of the judicial circuit in which the act of abortion occurs or the woman upon whom an abortion is performed resides." This provision, which has been in place for over half a century and received only minor modifications via the LIFE Act, also survives Plaintiffs' constitutional challenge.

The superior court held the provision unconstitutional on the basis that it violates the privacy rights of patients, but that holding was wrong at least four times over. First, Plaintiffs lack standing to challenge the provision because they are activists and medical providers, not patients. Second, the superior court simply misread the provision, asserting the implausible interpretation that a district attorney "could dispatch an investigator to 'the woman's' home to demand immediate and complete access" to her medical records. R10-3185. That is wrong. Correctly interpreted, this is an anodyne provision allowing district attorneys to obtain abortion records that medical providers must *already* provide to the Department of Public Health, for the purpose of regulating the medical profession. Medical providers have no privacy rights in records of their practice. Third, even if the provision were subject to scrutiny under a right to privacy, it would pass muster as an ordinary use of the police power in service of public policy. And finally, assuming there were some applications of

the rule that are unconstitutional, that would not support a facial challenge.

1. To start, Plaintiffs lack standing to assert a challenge. Plaintiffs are a group of advocacy organizations and doctors, not patients seeking to protect the privacy of their own medical histories. Plaintiffs cannot point to any injury to *their* own interests.

The superior court did not even address standing with respect to this issue. In a footnote, it held that Plaintiffs had standing generally, but it never explained their standing to challenge § 141(f), specifically. R10-3165 n.4. Plaintiffs previously relied on *Feminist Women's Health Center v. Burgess*, 282 Ga. 433 (2007), for the notion that they have *third-party* standing to challenge § 141(f), but that is not right. For one, *Burgess* "uncritically adopted federal jurisprudence on the question of standing." *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 45 (2022). It relied only on federal standing cases. *See Burgess*, 282 Ga. at 434–35. Many of those federal standing cases are now bad law precisely because they distorted standing principles solely for abortion cases. *See Dobbs*, 597 U.S. at 286–87. Georgia law does not recognize a federal third-party standing equivalent. *See* Attorney General Br. at 8–24, *Wasserman v. Franklin County*, S23G1029 (Sept. 13, 2024). Plaintiffs' patients' rights do not give doctors standing to challenge § 141(f).

It is also worth noting that § 141(f) has been in place for nearly 60 years, and Plaintiffs cannot point to any instances of it having been used. This is not the stuff of a genuine controversy.

2. The superior court also erred on the merits, largely because it overread the reach of this provision without performing any textual analysis. The court merely quoted the provision and, apparently dismayed that § 141(f)'s contours were not immediately clear, declared, "[t]hat's it." R10-3184. Rather than look to surrounding text or statutory history, it held that the provision was so limitless that a district attorney could demand a patient's entire medical history. R10-3185. Relying on Georgia's "strong vein of constitutional jurisprudence protecting personal medical records," the Court declared the provision facially unconstitutional. R10-3182.

But read in "context," *Elliott*, 305 Ga. at 186, the statute is far narrower than the superior court held. It allows district attorneys to obtain a few state-mandated records regarding abortion, which providers already have to produce to the Department of Public Health. And because the subjects of the regulation—medical providers—have no privacy interests in the records, this oversight mechanism does not implicate any privacy guarantees.

To start, § 141(f)'s context clarifies that "health records" means certain abortion records, not *all* health records, as the superior court feared. Medical professionals must file with the Department of Public Health numerous reports and certifications documenting abortions:

they are one of the State's oversight mechanisms. Section 141 references some of those requirements, citing Title 31, Chapter 9B, "Physician's Obligation in Performance of Abortions." *See* § 16-12-141(b), (d). Chapter 9B requires doctors who identify a fetal heartbeat to extensively document the circumstances of a subsequent abortion. O.C.G.A. § 31-9B-3(a)(1)–(3). And doctors must report that information to the Department of Public Health. *Id.* § 31-9B-3(a). Various additional documentation and reporting requirements surround § 141(f). *See* O.C.G.A. § 16-12-141.1(a) (requiring report on how aborted fetus disposed of); *id.* § 16-12-141.1(c); O.C.G.A. § 31-10-19; Ga. Regs. R. 511-5-7-.01(1). Section 141(f), which specifically refers to abortion and is located in a section *about abortion*, naturally refers to those abortion-related reports.

Section 141(f)'s statutory history confirms its limited reach. Georgia first adopted the relevant documentation and reporting requirements in 1968. Ga. Laws 1968 p. 1278–79. The legislature placed the "make available" requirement—essentially today's § 141(f)—immediately after those reporting requirements. Those reports were what must be "ma[d]e available." In 2012, the legislature recodified the far-more-detailed reporting requirements in a new Chapter 9B of Title 31. Ga. Gen. Assemb., 2012 Session, H.B. 954. That Chapter clarified what "records" must be maintained and filed; it just did so in a new code section. But the "[h]ealth records" of § 141(f) are, as they always

have been, the documents necessary to ensure doctors comply with Georgia's abortion laws.

Critically, these records could not be used to prosecute the patients themselves because the statute does not provide for prosecuting of the patients themselves, contrary to the superior court's misunderstanding. *See supra* 33 n.5. Section 141(f) gives district attorneys access to records the Department of Public Health already has, for the purpose of enforcing criminal laws against medical providers. That's it.

Accordingly, § 141(f) does not implicate privacy interests at all. The Court's medical records privacy cases, *King v. State*, 272 Ga. 788 (2000) (*King I*), and *King v. State*, 276 Ga. 126 (2003) (*King II*), involved patients asserting their own right to privacy to defend *themselves*, not providers asserting a privacy right in records of their medical practice. Extending a "privacy" right to medical professionals in these circumstances would be unprecedented and fatally undermine nearly any attempt to regulate the practice of medicine (or any other profession that is required to provide records to regulatory authorities).

3. There is another problem with the superior court's holding: assuming *arguendo* that Plaintiffs had a privacy interest affected by § 141(f), the health records provision satisfies judicial scrutiny. Section 141(f) certainly "benefits the public generally," *Powell*, 270 Ga. at 334, by protecting mothers and unborn children from doctors' unlawful conduct. Georgia undoubtedly has an interest in "plac[ing] restrictions and regulations on the practice of medicine" for "the preservation of

public health." *Yeargin*, 225 Ga. at 665–66. And none can doubt "the interest of the state in protecting both the mother and the fetus from the intentional wrongdoing of a third party who can claim no right for his actions." *Brinkley*, 253 Ga. at 541. The public benefits when doctors don't perform illegal abortions.

Section 141(f) also does not "unduly oppress[] the individual," *see Powell*, 270 Ga. at 334, to pursue that end. It ensures access only to certain health records, which the State requires doctors to provide anyway, *e.g.*, § 31-9B-3(a). That is not oppressive, and certainly not to Plaintiffs. It is an ordinary use of the police power to enforce public policy and criminal laws.

4. Even if that were all wrong, the superior court still erred because Plaintiffs sought *facial* relief. R10-3187. Plaintiffs cannot "establish that no set of circumstances exists under which [§ 141(f)] would be valid," or even that it "lacks a plainly legitimate sweep." *Olevik*, 302 Ga. at 247. Assuming *King I* and *II* applied (they don't), § 141(f) would be perfectly constitutional if used to support a search warrant. *See King II*, 276 Ga. at 126. And a woman could always consent to or affirmatively seek disclosure when pursuing a civil action or supporting a criminal action against a doctor. O.C.G.A. § 16-12-141(g). In those instances, a medical provider can't transform a woman's privacy right into the *provider's* privacy right. Plaintiffs have not identified any actual, unconstitutional applications of § 141(f), and

there are plainly valid ones. That should be more than sufficient to uphold the provision against a constitutional challenge.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the superior court.

Respectfully submitted.

This submission does not exceed the word count limit imposed by Rule 20.

/s/ *Stephen J. Petrany*

Christopher M. Carr 112505
Attorney General

Stephen J. Petrany 718981
Solicitor General

Ross W. Bergethon 054321
Principal Deputy Solicitor General

Elijah J. O'Kelley 645519
Assistant Solicitor General

Zachary Mullinax 421415
Assistant Attorney General

Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for State of Georgia

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2024, I served a copy of this brief by email, addressed as follows:

Julia Blackburn Stone
Sarah Brewerton-Palmer
Katherine Wheeler Gamsey
CAPLAN COBB LLC
75 14th Street, NE, Suite 2700
Atlanta, Georgia 30309
jstone@caplancobb.com
spalmer@caplancobb.com
kgamsey@caplancobb.com

Tiana S. Mykkeltvedt
Jane D. Vincent
BONDURANT MIXSON & ELMORE LLP
1201 W. Peachtree Street NW, Suite 3900
Atlanta, Georgia 30309
mykkeltvedt@bmelaw.com
vincent@bmelaw.com
ltaylor@bmelaw.com

Jiaman ("Alice") Wang
Cici Coquillette
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, New York 10038
awang@reporights.org
ccoquillette@reporights.org

Julia Kaye
Rebecca Chan
Brigitte Amiri
Johanna Zacarias
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street, 18th Floor
New York, New York 10004
jkaye@aclu.org
rebeccac@aclu.org
bamiri@aclu.org
jzacarias@aclu.org

Cory H. Isaacson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, Georgia 30357
cisaacson@acluga.org

/s/ Stephen J. Petrany
Counsel for State of Georgia

SUPREME COURT OF GEORGIA

October 30, 2024

S25A0300. STATE v. SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, et al.

Upon consideration of the Appellant's motion for extension of time to file its brief in the above-styled case, the motion is hereby granted. The Appellee's request for a reciprocal extension is also granted.

The briefing schedule in the above-styled appeal shall be as follows. Appellant is directed to file its opening brief on or before December 9, 2024. Appellees are directed to file their response brief on or before January 17, 2025. Appellant's reply brief, if any, must be filed on or before January 27, 2025. Amicus briefs, if any, shall be filed based on these dates and in accordance with Georgia Supreme Court Rule 23.

If oral argument is requested and granted, the above-styled case will be assigned to the March 2025 calendar.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk