No. _____

In the

Supreme Court of Georgia

State of Georgia,

Defendant-Petitioner,

v.

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

Plaintiff-Respondents.

On Application for Writ of Supersedeas to the
Superior Court of Fulton County
Case No. 2022CV367796

EMERGENCY PETITION FOR SUPERSEDEAS

Christopher M. Carr 112505
Attorney General

Stephen J. Petrany 718981
Solicitor General

Ross W. Bergethon 054321
Principal Deputy Solicitor 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

In 2019, Georgia's elected representatives passed the Living Infants Fairness and Equality (LIFE) Act to protect unborn children, a "class of living, distinct persons." 2019 Ga. Laws 234, § 2. The LIFE Act reflects the view that both mothers and their unborn children should be supported and that abortion, a lethal operation that ends the life of an unborn human, is only rarely appropriate. Accordingly, the LIFE Act prohibits post-fetal-heartbeat abortions, subject to exceptions such as medical emergencies, medical futility, rape, or incest. O.C.G.A. § 16-12-141(a), (b).

Litigation ensued, and now for the second (and final) time in that litigation, this Court is called upon to affirm basic constitutional principles. Last year, this Court rejected the superior court's holding that, because the legislature enacted the LIFE Act before the U.S. Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), the LIFE Act was somehow "void ab initio." *See State v. SisterSong Women of Color Reprod. Justice Collective*, 317 Ga. 528, 544 (2023) (*SisterSong I*). The superior court has now held on remand that the LIFE Act is unconstitutional on the merits of the state constitutional challenge. *See* Ex. B, Final Order.

Just as it did two years ago, this Court should stay the superior court's ruling during the appeal. As before, the factors this Court examines before issuing a stay support the State. *Green Bull Ga. Partners, LLC v. Register*, 301 Ga. 472, 473–74 (2017). As before, these issues remain politically and morally controversial but *legally* simple. As before, the LIFE Act is constitutionally sound and it is not a close question. And as before, the

superior court's injunction causes the State irreparable harm every moment it stands.

First, the State is likely to succeed on the merits. Georgia's Constitution has nothing to say about abortion, as the superior court acknowledged. Order at 10. It does not mention the term, even though the most recent Georgia Constitution dates to 1983, hardly a time when Georgians were unaware of the legal and political controversies surrounding abortion. And Georgia has *always* prohibited elective abortions, from the time of the common law to the present day, with only the *Roe* era standing as a (federally forced) exception. In those centuries of prohibition the people enacted at least half a dozen constitutions yet *none* of them so much as hint that the State's consistent anti-abortion laws were problematic. Undeterred, the superior court purports to have located a right to abortion arising from the "right to privacy" and right to equal protection. These theories are barely colorable.

There is no "privacy right" to abortion. Order at 9. The (atextual) state constitutional right to privacy includes, at most, 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 and emphasis added). Yet Georgia's elected representatives passed the LIFE Act precisely to protect "other individuals," *id.*—namely, "unborn children," 2019 Ga. Laws 234, § 2. There is nothing legally private about ending the life of an unborn child. The superior court did not even deny that a fetus is a living human being, nor could it. But the superior court nevertheless declared a right to abortion, on the basis of its own *ipse dixit* policy determinations. *See,*

e.g., Order at 13 (holding that, prior to the LIFE Act, Georgia law "struck the proper balance between the women's right … and the fetus's right"). This Court is all but certain to reverse this barely veiled judicial policymaking.

Likewise, Georgia's Equal Protection Clause is no barrier to the LIFE Act. 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. Order at 19. True enough, the LIFE Act allows for abortions in cases where it will protect the physical health of the mother, but when it comes to mental health, the legislature reasonably decided that ending an unborn life is never a justifiable treatment solution. That was a perfectly legal choice. Women with psychiatric maladies are not "similarly situated" to women with physical maladies where abortion is necessary to avoid grave harm. *City of Atlanta v. Watson*, 267 Ga. 185, 187 (1996). At the very least, the legislature could have rationally determined as much. Here again, this Court is all but certain to reverse.

Second, the balance of equities and public interest strongly favor a stay. *See Green Bull*, 301 Ga. at 473. The State suffers significant and irreparable harm every moment that the LIFE Act is enjoined. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). And, of course, aborted fetuses do not spring back to life if an injunction is overturned. No potential or even perceived harm to Plaintiffs—medical providers and activists—is comparable to that interest. The LIFE Act,

enacted by the people's representatives, has been in force for almost two years now. It protects unborn children and does so while protecting women's health and supporting families. There is no reason to suddenly let it lapse now.

In sum, the superior court's new order is just as erroneous as its first. Though rife with political arguments, irrelevant (and erroneous) legal tangents, and *ad hominem* attacks, the superior court's opinion never comes close to identifying a genuine constitutional flaw in the LIFE Act. And the equities remain in the State's favor. The Court should stay the superior court's order, and if the Court needs time to review the emergency filings, it should issue an administrative stay while it considers this petition.

JURISDICTION

The superior court issued a declaratory judgment and permanent injunction against the LIFE Act's enforcement on September 30, 2024. *See* Order. That decision was directly appealable under O.C.G.A. § 5-6-34(a)(4), and this Court has exclusive appellate jurisdiction because the case calls into question the constitutionality of a statute, Ga. Const. art. VI, § VI, ¶ II.

STATEMENT

A. The LIFE Act

In 2019, Georgia enacted 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." *Id.* § 2. Accordingly, the LIFE Act broadly protects the unborn and supports pregnant mothers and families.

The law limits the practice of elective abortion. Section 4 of the LIFE 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), (b)).

But the LIFE Act does not prohibit every termination of a pregnancy, even post-fetal-heartbeat. For instance, operations to remove "ectopic pregnanc[ies]" or the remains of a "spontaneous abortion" are not "considered … abortion[s]" at all. *Id.* § 16-12-141(a)(1). And abortion is not prohibited in situations where, in a physician's "reasonable medical judgment," there exists a "medical emergency" or "[m]edical[] futil[ity]"; nor is abortion prohibited up to 20 weeks' gestation where the "pregnancy is the result of rape or incest." *Id.* § 16-12-141(b). A "medical emergency" is defined as "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," but it does not include "diagnos[es] or claim[s] of a mental or emotional condition." *Id.* § 16-12-141(a)(3).

The LIFE Act also provides a number of 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).

The rest of the LIFE Act promotes the dignity and well-being of unborn children and ensures support for their families. For instance, Section 3 defines an unborn human being 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). And 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).

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 in the wake of *Dobbs*. *Id.* at 1324. A week after the Eleventh Circuit issued its opinion, many of the federal plaintiffs (a group of medical providers and activists) filed suit in state court.

Plaintiffs filed suit in Fulton County Superior Court, seeking to invalidate Sections 4, 10, and 11 of the LIFE Act, as well as O.C.G.A. § 16-12-141(f), under Georgia law. The complaint attacked the LIFE Act on four grounds. First, Plaintiffs argued that the LIFE Act was void *ab initio* because it supposedly conflicted with federal precedent when enacted. Second, Plaintiffs insisted that the Georgia Constitution includes a "privacy"-based right to abortion. Third, they argued that the LIFE Act violates Georgia's

Equal Protection Clause (without offering a theory as to how). Finally, Plaintiffs challenged O.C.G.A. § 16-12-141(f)—which provides that abortion-related "[h]ealth records shall be available to the district attorney"—as also violative of the Georgia Constitution's privacy right. *See generally* Doc. 3, Verified Complaint.

Soon thereafter, the State moved to dismiss the suit in its entirety, and Plaintiffs moved for partial judgment on the pleadings, relying on their theory that the LIFE Act was void *ab initio*. Although these dueling dispositive motions were outstanding, the superior court nevertheless held a two-day "trial" on the LIFE Act, without specifying what the trial was supposed to be about (much less allowing time for discovery, summary judgment practice, etc.).

In November 2022, two-and-a-half weeks after the trial concluded, the superior court issued an order on the "void ab initio" argument. *See SisterSong I*, 317 Ga. at 530. The superior court held that even if a law is valid, it is unconstitutional if it was enacted during a period where a now-overruled case might have suggested it is unconstitutional. *Id.* This Court then stayed that order and ultimately reversed it, holding that "a written constitution itself has a meaning that is fixed upon ratification and cannot change absent a constitutional amendment." *Id.* at 531, 533. When courts change their interpretations, previously ineffective legislation does not need to be reenacted. *See id.* at 535. This Court remanded to the superior court to rule on the merits issues. *Id.* at 544.

Almost a full year later, the superior court again permanently enjoined the LIFE Act. *See* Order. The superior court first castigated this Court for its decision in *SisterSong I*, asserting that the Court had "abandoned decades of precedent" for the "falsely modest precept" that "the Court is not the source of the Constitution's meaning." Order at 2 & 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. Order at 9–16. And it held in the alternative that the LIFE Act's differential treatment of physical maladies and mental impairments was unconstitutional under equal protection principles. Order at 16–19. Finally, the court held unconstitutional O.C.G.A. § 16-12-141(f), which provides 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." *See* Order at 22.

REASONS FOR STAYING THE INJUNCTION

The "most important" consideration in deciding whether to stay an injunction pending appeal is the "likelihood that the appellant will prevail." *Green Bull*, 301 Ga. at 474. But even if the appellant presents only a "substantial case on the merits," a stay is still warranted when the "other equities weigh strongly in favor of a stay" pending appeal. *Id.* Equitable considerations include "the extent to which the applicant will suffer irreparable harm in the absence of a stay or injunction, the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and the public interest." *Id.* at 473 (citation omitted).

Each consideration supports a stay. This Court is likely to reverse the superior court's order. The harm to the State and the public is significant and irreparable, as unborn children are at risk every day that the injunction continues. This Court granted a stay in nearly identical circumstances two years ago, and it should do the same here.[1]

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

It is unfathomable that the people of Georgia who enacted the 1983 Constitution were unaware of abortion or disputes about its legality, morality, and so forth. Yet the 1983 Constitution does not so much as 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). 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 the right to privacy and equal protection. Both attempts fail, many times over.

A. Georgia's right to privacy does not encompass abortion.

The superior court held that, under Georgia's "right to privacy," the LIFE Act fails. That was fundamental error. As even the superior court acknowledged, Georgia's right to privacy 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); *see* Order at 9. Because abortion always harms a

[1] The State did not first seek a stay with the superior court as it would be futile. S. Ct. R. 9. The issue is too urgent for the State to wait for a denial from the superior court.

"third party," it is not protected by any right to privacy implied in the Due Process Clause. *See State v. McAfee*, 259 Ga. 579, 580 (1989). And if there were otherwise any doubt, Georgia's statutory and constitutional history confirms that the Constitution does not include a right to abortion. Abortion has been prohibited in Georgia, without fail, for centuries. In that time, Georgia has *repeatedly* enacted new state constitutions, never once suggesting that any provision somehow prohibited restrictions on abortion.

1. The superior court relies on this Court's few cases addressing a state constitutional "right to privacy" but virtually skips the question whether abortion is "private" at all. When deciding a right to privacy claim, courts must first determine if the plaintiff's "behavior falls within the area protected by the right of privacy." *Powell*, 270 Ga. at 332. If it does, the next question is "whether the government's infringement upon that right is constitutionally sanctioned." *Id.* at 332–33. Abortion does not fall within the Georgia Constitution's privacy protection because it is not "private," as a threshold legal matter.

Georgia's right to privacy has always been a qualified right "to be let alone." *Pavesich*, 122 Ga. at 197. For example, Georgia's early privacy cases recognized a right to be free from unwanted publicity. This Court first recognized a right to privacy in a case involving the unauthorized use of the plaintiff's photograph. *See id.* at 215–16. Later cases discussing the privacy right involved using the plaintiff's name, *see Tanner-Brice Co. v. Sims*, 174 Ga. 13 (1931), and the publication of pictures of a deceased, malformed child, *see Bazemore v. Savannah Hosp.*, 171 Ga. 257 (1930). This early form of the

right to privacy was a right of private parties against each other, not a right against the State.

Only once has this Court held that the right to privacy prohibits the *State* from criminalizing certain conduct. *Powell*, 270 Ga. at 332. In *Powell*—which the superior court briefly cited but never describes—the Court held that the right to privacy protects "private, unforced, non-commercial acts of sexual intimacy 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.

But, as *Powell*'s (many) caveats make clear, the right to privacy was "very much restricted from the beginning." *Davis v. Gen. Fin. & Thrift Corp.*, 80 Ga. App. 708, 710 (1950). The right to be left alone works both ways: a person may not "invade the rights of his neighbor, or violate public law or policy," based on an alleged right to privacy. *Pavesich*, 122 Ga. at 195. The right to privacy thus assumes that "private" acts do not harm anyone else. *Powell*, 270 Ga. at 330. So while the right to privacy might prevent the State from forcing food, *Zant v. Prevatte*, 248 Ga. 832, 833 (1982), or a ventilator, *McAfee*, 259 Ga. at 580, on an individual to prevent harm to *that individual*, it does not extend to situations where a person's activity affects or harms another. This explains why the State can criminalize, e.g., non-consensual

sexual activity, even if it is done in private. *Odett v. State*, 273 Ga. 353, 354 (2001). 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).

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." Order at 11. 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 *does* affect a third party, there is no privacy right because it is not a private act.

That basic point resolves this question because there is no serious dispute that abortion harms another party. The State need not overcome any right to privacy because an abortion "interfere[es] with the rights of other individuals [and] of the public." *Powell*, 270 Ga. at 330. Put another way, abortion is *not* conduct that "[every] person whose intellect is in a normal condition" considers private. *Id.* at 332.

Nowhere does the superior court question that unborn children are unique human beings. Nor could it, 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).[2] In fact, Planned Parenthood has itself submitted affidavits from experts elsewhere, 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)). Nowhere in the record here is there any evidence that the General Assembly could not determine that the unborn are, in fact, human beings.

For that matter, Georgia courts have also long held that "a child is to be considered as *in being*, from the time of its conception, where it will be for the

---

[2] *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 individual will be born from the fusion of two cells, one of which leaves the organism in which it was produced to exert its function within a different organism."); Keith L. Moore et al., *The Developing Human: Clinically Oriented Embryology* 1 (11th ed. 2020) ("Human development is a continuous process that begins when an oocyte (ovum) from a female is fertilized by a sperm (spermatozoon) from a male to form a single-celled zygote.").

benefit of such child to be so considered." *Morrow v. Scott*, 7 Ga. 535, 537 (1849). Thus, for instance, a child can inherit, even though he or she is still in the womb. *Id.* And a child can recover for "alleged tortious injuries" no matter "[a]t what particular moment after conception, or at what particular period of the prenatal existence of the child the injury was inflicted." *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504 (1956). So the LIFE Act's finding that unborn children are a class of "living, distinct persons," 2019 Ga. Laws 234, § 2, is part of a long line of Georgia authorities extending legal protection to unborn children.

Unable to contravene the General Assembly's finding that unborn children are human beings, the superior court changes the subject. The order asserts that a fetus is dependent on her mother and cannot survive on her own until roughly 22 weeks into pregnancy. Order at 12. 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. This 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 right as opposed to a fetus. 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.

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). Abortion is and has been a highly contentious issue for decades, yet never have the people of Georgia amended their constitution to so much as mention it. That a single superior court judge has strong policy views on the subject does not transform abortion into an issue of privacy.

2. To the extent there were otherwise any question, the history of abortion regulation in Georgia confirms that abortion is an issue for the legislature, not the courts. Abortion has *always* been a presumptively unlawful act in Georgia, save for the era of *Roe*, and Georgia repeatedly enacted new state constitutions throughout the many years of abortion prohibition. There is no way to understand these constitutions as suddenly, silently, making Georgia's consistent abortion laws unconstitutional.

As an initial matter, at common law, abortion was unlawful. Although there is not space for a full historical recounting here, the U.S. Supreme Court in *Dobbs* explained as much in great detail, with little dispute even from the dissenters. "[A]lthough common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, *none* endorsed the practice." *Dobbs*, 597 U.S. at 245 (emphasis added). Abortion after "quickening" (usually understood as felt fetal movement) was generally considered *homicide* at common law,[3] but even pre-

[3] The "eminent common-law authorities (Blackstone, Coke, Hale, and the like), … *all* describe abortion after quickening as criminal." *Dobbs*, 597 U.S.

quickening abortions were considered unlawful, whether or not subject to homicide penalties.[4]

Then, in 1876, Georgia codified these restrictions. Act of Feb. 25, 1876, §§ 1–3, 1876 Ga. Laws 113, 113 (repealed 1968), https://perma.cc/9PBJ-USZZ. The legislature retained the "quickening" distinction, but again, only for the purposes of the relevant punishment. All abortions, save those necessary for the life of the mother, were prohibited. Post-quickening, abortion was considered homicidal. Ga. Code of 1882 § 4337(a) (repealed 1968), https://perma.cc/H5V8-MEQZ (Part IV, p. 1143). Pre-quickening, performing an abortion was instead a misdemeanor. Ga. Code of 1882 §§ 4310, 4337(c) (repealed 1968), https://perma.cc/H5V8-MEQZ (Part IV, p. 1143). For a century afterward, Georgia maintained these prohibitions, only breaking stride after *Roe*.

And while Georgia was statutorily prohibiting all elective abortions, it also ratified new constitutions repeatedly. Ga. Code of 1873 § 426 (Supp. 1878) (repealed 1968), https://perma.cc/4NFX-4CQY (Ch. 49, p. 87). Each of these constitutions—ratified in 1877, 1945, 1976, and 1983—included

---

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 either "murder" or "great misprision." 3 Edward Coke, *Institutes of the Laws of England* 50–51 (London, M. Flesher 1644).

[4] For example, 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. *Dobbs*, 597 U.S. at 243–44 (citations omitted).

identical due process clauses. Ga. Const. of 1877, art. I, § 1, ¶ III; Ga. Const. of 1945, art. I, § 1, ¶ III; Ga. Const. of 1976, art. I, § 1, ¶ I; Ga. Const. of 1983, art. I, § 1, ¶ I. Meanwhile, the abortion statute of 1876 was recodified, without substantive changes, in 1895, 1910, and 1933. Ga. Code of 1895 §§ 81–82 (repealed 1968), https://perma.cc/ZAM8-VYFE (vol. 3, p. 33); Ga. Code. of 1910 §§ 81–82 (repealed 1968), https://perma.cc/Z5PW-RTSV (vol. 2, p. 17–18); Ga. Code of 1933 §§ 26-1101 to -1102 (repealed 1968), https://perma.cc/U34D-PBQ4 (p. 755). And in 1968, the General Assembly again outlawed all abortion, while providing for expanded exceptions for life, health, fetal defect, and rape. Act of Apr. 10, 1968, § 1, 1968 Ga. Laws 1260, 1277–80, (repealed 1973), https://perma.cc/XA8T-YNLY.

This history is dispositive because "constitutional text should be interpreted consistent with the common law that preceded it." *Elliott v. State*, 305 Ga. 179, 184 (2019). So when Georgia's 1861 Constitution first guaranteed that "[n]o citizen shall be deprived of life, liberty or property, except by due process of law," Ga. Const. of 1861, art. I, ¶ 4, the "original public meaning" of the 1861 Constitution would not have included protection for abortion or anything like it. *See Elliott*, 305 Ga. at 184. Likewise, where "a constitutional provision … has been readopted without material change in multiple constitutions," courts assume its meaning does not change from the earlier understanding. *Id* at 184. That is especially true where the State is repeatedly legislating on the subject without any indication that it lacks the power to do so.

The superior court's contrary holding would mean either that prohibitions on abortion have been unlawful since 1861 or that, somewhere in the long history of Georgia constitutions, the law changed without any change in the relevant constitutional text. That makes no sense, and even the superior court impliedly acknowledges that Georgia constitutions did not prohibit abortion restrictions as a historical matter. *E.g.*, Order at 10–11 n.16.

Instead, the superior court reveals that its holding is really a judicial *update* to the Constitution. *Id.* Attacking originalism and textualism with a number of oft-rebutted canards, the superior court suggests that the only reason the Due Process Clause applies to, for example, women, is because of judicial updating. *Id.* This follows from the superior court's insistence (already rejected by this Court) that courts *make* the Constitution rather than interpret it. *Id.* at 2 n.2. The superior court could not have been clearer: in its view, its duty was to protect liberty "as we learn its meaning," such that courts must reject the "received legal stricture" when "new insight reveals discord" with the Georgia Constitution's "central protections." *Id.* at 24 (citation omitted).

None of this is right, and this Court has been clear—including in this specific case—that it is for "the people" to amend their Constitution. *SisterSong I*, 317 Ga. at 533. The Fulton County Superior Court's "new insight" is not a basis for rule by judicial fiat.

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

The superior court's equal protection theory fares no better. "The Georgia equal protection clause, which is construed to be consistent with its federal counterpart, 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, because it had already held that abortion is a fundamental right, it doubled down and held that equal protection also prohibits limitations on abortion before viability. Order at 17–18. But it acknowledged that if it were wrong about its privacy theory (which it is), this equal protection theory would also fail. *Id.* at 18 n.25. So this theory goes nowhere.

The superior court's second theory is 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." *Id.* at 18–19. This theory also fails.

As best as can be gleaned, the superior court agreed that rational basis review applies (since there is no suspect class) but held there is no rational basis for this distinction. The order never attempts to explain how "women with mental health emergencies" is a suspect class. *Id.* at 18. The sum total of

its analysis is 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.* at 18–19.

To the contrary, 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. Other interventions can address such maladies. It does not diminish these issues to acknowledge that they are *different* issues with *different* treatment options. Indeed, despite there being plenty of evidence submitted on these issues, the superior court does not even purport to identify a situation where an abortion would be the only appropriate treatment for a psychiatric malady.

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 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. The superior court's argument implies that these situations are the same, but the General Assembly need not agree.

Psychiatric health is no less important than physical health, but that doesn't mean the General Assembly must treat psychiatric ailments identically to physical ailments. 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.

C. The LIFE Act would satisfy any level of judicial scrutiny, anyway.

Even if 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 the 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." Order at 12 n.18 (quotation omitted).

That should have resolved the inquiry because prohibiting abortion is not just narrowly tailored but the *only* means to protect that 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. Nor does the LIFE Act sweep in any other protected conduct, because it prohibits only acts which unnecessarily harm otherwise healthy third parties. For example, it does not prohibit operations to remove "ectopic pregnanc[ies]," the remains of a "spontaneous abortion," or when the pregnancy is "medically futile." O.C.G.A. § 16-12-141(a)(1), (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). So the LIFE Act serves a compelling interest and does so in the least restrictive way possible. That should be the end of it.

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. Order at 13. But that does not answer the legal question. All agree that the State has a *compelling* interest in protecting prenatal life. The only question that remains is whether the State chose a narrowly tailored (or even least-restrictive) means, a question the superior court declined to answer. The order is again long on *ipse dixit* policy arguments—the court repeatedly opines on how the viability line "struck the proper balance" and cites sources such as The Handmaid's Tale, *id.* at 13–14—but short on legal analysis. What possible 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 recognized that "[w]e struggle mightily" with the question when abortion should be permissible, *id.* at 7, but rather than leave the question to elected legislators, the court imposed its own decision. Decrying the legislature's fetal heartbeat line as "political" and "arbitrary," *id.* at 13 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 will almost certainly hold as much.

* * *

There is not sufficient room to address *all* of the superior court's footnotes and digressions in this petition, nor should it matter, as they are largely irrelevant political commentary. But the error of a few can illustrate the error of many others.

For example, the superior court opined that "[a]s medical science defines it, a true human heartbeat requires an actual four-chambered heart, … which does not develop until 17-20 weeks of gestation." Order at 8 n.12. Even Planned Parenthood, a Plaintiff here, has acknowledged that is false: "[A] heart forms earlier than that, but … an ultrasound will not be able to *detect* the essential features of a heart until later." Petition for Emergency Injunctive Relief at 5 n.6, *Planned Parenthood S. Atl. v. State*, 440 S.C. 465 (2023) (No. 28174) (emphasis added).

Likewise, the superior court's declaration that it is "generally men" who enforce and defend pro-life laws—in a footnote where the court argues that pro-life laws are equivalent to slavery—is false, wholly unsupported, and telling. Order at 15 n.21. It is false because women have been leading the pro-life movement from the beginning.[5] It is wholly unsupported because

[5] *See, e.g.*, Janice Nimura, *The Way Americans Remember the Blackwell Sisters Shortchanges Their Legacy*, Smithsonian Magazine (Jan. 6, 2021), https://www.smithsonianmag.com/history/way-americans-remember-blackwell-sisters-shortchanges-their-incredible-legacy-180976672/ (discussing the nation's first female doctor, Elizabeth Blackwell); Serrin Foster, *The rewritten ERA would enshrine a right to abortion*, Washington Examiner (Feb. 10, 2020), https://www.washingtonexaminer.com/op-

there is nothing in this record to address that question. For that matter, the superior court's own cited poll shows very little difference in male and female views on abortion. *See id.* Finally, it is telling because the superior court apparently decided to form its own mistaken view, outside of litigation, and then, without giving anyone a chance to rebut, rely on that view in issuing its opinion.

There is no doubt that abortion is a controversial political question—the tenor and rhetoric of the superior court opinion confirm as much—but Georgia's Constitution leaves those questions up to the people and their elected representatives. At the very least, the State has "a substantial case on the merits." *Green Bull*, 301 Ga. at 474 (quotation omitted). And that is more than enough to warrant a stay pending appeal when "the other equities weigh strongly in favor of a stay," which they do. *Id.*[6]

---

eds/2765181/the-rewritten-era-would-enshrine-a-right-to-abortion/ (suffragist Alice Paul); Feminists For Life, *About Us*, https://www.feministsforlife.org/about-us/ (last visited Oct. 1, 2024); Secular Pro-Life, *Meet the Team*, https://secularprolife.org/team/ (last visited Oct. 1, 2024); March for Life, *About Us*, https://marchforlife.org/about-the-march-for-life/ (last visited Oct. 1, 2024); National Right to Life, *Leadership Team*, https://nrlc.org/leadership-team/ (last visited Oct. 1, 2024); Pro-Black Pro-Life, *Our Founder*, https://problackprolife.com/meet-cherilyn/ (last visited Oct. 1, 2024).

[6] The superior court also held facially unconstitutional O.C.G.A. § 16-12-141(f), which provides that health records relating to abortion "shall be available" to the district attorney. Order at 22–24. That holding, too, was erroneous. Whatever privacy right *patients* have over their health records, Plaintiffs here are activists and providers; they cannot assert others' rights. *E.g., Sims v. State,* 243 Ga. 83, 85 (1979). Moreover, the subsection is not *facially* unconstitutional, since it cannot be invalid in all its applications. *Ga. Dep't of Hum. Servs. v. Steiner*, 303 Ga. 890, 899 (2018). There is more

II. The equities weigh heavily in the State's favor.

On equities, little has changed since this Court stayed a similarly erroneous order two years ago. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers); *see also Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). The State's interest remains especially strong where it seeks to protect its most vulnerable population.

As before, every day that illegal abortions continue is another day that the lives of tiny, unique individuals are ended. There are toddlers alive today because this Court stayed the superior court's previous order. Whether one agrees with the General Assembly's legislative judgments or not, those are the stakes for the State. And the "[f]rustration of … statutes and prerogatives [is] not in the public interest." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) (quotation omitted).

Plaintiffs, on the other hand, will not suffer much harm from a stay. The superior court itself impliedly determined that Plaintiffs are unlikely to be seriously harmed, otherwise it would not have waited nearly a year after remand to issue its short opinion. *Cf. Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("[D]elay … militates against a finding of irreparable harm.").

---

to be said on the superior court's errors here, but in the interests of efficiency and expedition that should be sufficient.

As in "most cases," a stay pending resolution of this appeal is appropriate. *Green Bull*, 301 Ga. at 475.

CONCLUSION

The Court should grant this petition for supersedeas and issue an administrative stay while it considers the petition.

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

Respectfully submitted.

/s/ *Stephen J. Petrany*

Christopher M. Carr 112505
Attorney General

Stephen J. Petrany 718981
Solicitor General

Ross W. Bergethon 054321
Deputy Solicitor 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 October 2, 2024, I served this petition by email prior to filing, addressed as follows:

Julia Blackburn Stone
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 Isaacson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, Georgia 30357
newulonu@acluga.org

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

Exhibit A

Notice of Appeal

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Sistersong Women of Color Reproductive Justice Collective, et al., *Plaintiffs*, v. State of Georgia, *Defendant*.	Case No. 2022CV367796

NOTICE OF APPEAL

Defendant State of Georgia hereby appeals to the Supreme Court of Georgia from this Court's September 30, 2024 order granting a permanent injunction.

The clerk will please transmit the entire record of the case. Defendant also designates the transcripts of the motions hearing held on August 8, 2022 and the bench trial held on October 24–25, 2022 for inclusion in the record on appeal.

The Court's grant of a permanent injunction is directly appealable under O.C.G.A. § 5-6-34(a)(4). The Supreme Court has exclusive appellate jurisdiction because the case involves a challenge to the constitutionality of a state law. Ga. Const. Art. VI, § VI, ¶ 1.

Respectfully submitted.

/s/ *Stephen J. Petrany*
Christopher M. Carr 112505
Attorney General
Stephen J. Petrany 718981
Solicitor General
Ross W. Bergethon 054321
Principal Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334
Telephone: (404) 458-3408
spetrany@law.ga.gov
Counsel for State of Georgia

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2024, I served this amended notice of appeal by email and first-class mail, addressed as follows.

Julia Blackburn Stone
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 Isaacson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, Georgia 30357
newulonu@acluga.org

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

Exhibit B

September 30, 2024 Order

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, on behalf of itself and its members *et al.*, Plaintiffs v. STATE OF GEORGIA, Defendant	)	CIVIL ACTION 2022CV367796

FINAL ORDER

Plaintiffs seek a judgment declaring certain provisions of the Living Infants Fairness and Equality Act[1] unconstitutional -- and a permanent injunction prohibiting their enforcement. On 24-25 October 2022, the Court conducted a bench trial during which the parties presented evidence in support of their opposing positions. Pending at the time of the trial were a motion to dismiss filed by the State and a motion for partial judgment on the pleadings filed by Plaintiffs. On 15 November 2022, the Court entered an Order granting in part the motion for partial judgment on the pleadings, finding that several challenged provisions of the LIFE Act were void *ab initio* because they were unconstitutional when passed. The State promptly appealed and the Supreme Court stayed this Court's ruling while it considered the merits of the void *ab initio* decision. On 24 October 2023, the Supreme Court issued its final opinion in which it reversed this Court's

[1] 2019 Ga. Laws Act 234 (H.B. 481), hereinafter the LIFE Act.

ruling, abandoned decades of its own precedent,[2] and remanded the case for a ruling on the merits of Plaintiffs' constitutional claims. *State v. SisterSong Women of Color Reprod. Justice Collective*, 317 Ga. 528 (2023).

Plaintiffs' Claims

In Count I of their complaint, Plaintiffs seek a declaratory judgment that (a) our State Constitution's protections for liberty and privacy include a right to abortion and (b) various provisions of the LIFE Act violate Plaintiffs' patients' and members' rights to liberty, privacy, and equal protection. (Count I also requests an interlocutory injunction and temporary restraining order, which Plaintiffs further pressed in an emergency motion filed contemporaneously with their complaint. This Court dismissed that motion for lack

[2] The fundament upon which the majority rested its opinion -- the falsely modest precept that "the Court is not the source of the Constitution's meaning" -- guaranteed the outcome but misstates judicial (and political) reality. *State v. SisterSong Women of Color Reprod. Justice Collective*, 317 Ga. 528, 533 (2023). *Of course* the Constitution means what it means; such circularity tells us nothing. Ultimately, the Constitution means only what the courts tell us, and the Supreme Courts of the States and the Nation have the controlling voices in that discussion. Unsurprisingly (one would think), this results in *different* meanings being prescribed to the *same* words, phrases, and provisions as different minds and sensibilities take their turn discerning that meaning. In other words, the meaning of the Constitution is no more fixed than is the composition of the majority in the highest courts of the land -- especially when formerly bedrock principles such as *stare decisis* appear to be on the wane. Given that less majestic but undeniable reality, the more logical approach to assessing whether a legislative enactment is void at the time of its passage is to rely on the *then*-controlling Constitutional interpretations. *See, e.g., Strickland v. Newton County*, 244 Ga. 54, 55 (1979) ("The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted."); *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617 (1953) ("The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body; and if it is unconstitutional then, it is forever void."). Otherwise, "ghost" laws from years or decades past, enacted by legislators long since voted out of office, can spring to life when our ever-changing politics yields a new majority on our high courts, a majority which in turn imparts a new meaning to a supposedly unchanged and unchanging Constitution. But here we are.

of subject matter jurisdiction in an Order dated 15 August 2022, finding that Superior Courts may not enjoin allegedly unconstitutional laws or acts until after declaratory relief has been afforded.) Plaintiffs correspondingly seek a permanent injunction in Count II, prohibiting the State and its many agents from enforcing Sections 4, 10, and 11 of the LIFE Act as well as O.C.G.A. § 16-12-141(f) as amended by the LIFE Act.[3]

Plaintiffs' Patients' and Members' Rights
(a/k/a Women's Rights)

Plaintiffs[4] assert their patients and members enjoy liberty, privacy, and equal protection rights under the State Constitution that are violated by the challenged portions

[3] Plaintiffs challenge O.C.G.A. § 16-12-141(f) in both its amended and original, pre-LIFE Act form.

[4] Plaintiffs are "a coalition of Georgia-based obstetrician-gynecologists[,] reproductive health centers, and membership groups committed to reproductive freedom and justice." (Complaint at 6). Their ranks include six corporate and three individual reproductive health care providers; an advocacy group opposing "institutional policies, systems, and cultural practices that limit the reproductive lives of marginalized people" (*Id.* at 7); and a non-profit organization that "assists medical students and residents to maintain and expand access to abortion and family planning training" (*Id.* at 12). All Plaintiffs sue on their own behalf as well as on behalf of their patients and/or members. All Plaintiffs possess individual or organizational standing to sue on their own behalf, as they adequately allege in their complaint "(1) an injury in fact, (2) a causal connection between the injury and the alleged wrong, and (3) the likelihood that the injury will be redressed with a favorable decision." *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 382 (2022); *see also Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 435–36 (2007) (medical providers have standing to raise the constitutional rights of their patients). And, insofar as the alleged injury to the corporate or organizational Plaintiffs is uncertain or unclear -- which it is not -- the Court also finds that those Plaintiffs further possess *associational* standing to sue on behalf of their patients and/or members, as they have additionally sufficiently shown that their "members would otherwise have standing to sue in their own right; the interests the association seeks to protect are germane to the association's purpose; and neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members." *Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 279 Ga. 22, 24 (2005); *but see Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, 315 Ga. 39, 66 n.24 (2022) (questioning whether the federal concept of associational standing has properly been incorporated into Georgia constitutional standing jurisprudence).

of the LIFE Act. Plaintiffs' liberty right is established in Article I, Section I, Paragraph I of the Constitution. Their right to equal protection of the laws is similarly plainly set forth in the Constitution at Article I, Section I, Paragraph II. The more elusive and amorphous right to privacy has "a long and distinguished history" in our State, but it is a history based on judicial interpretation and application of the constitutional right to liberty, rather than on some explicit constitutional language about privacy.[5] *Powell v. State*, 270 Ga. 327, 329 (1998). Regardless of its indirect constitutional provenance, in Georgia, "privacy is considered a fundamental constitutional right." *King v. State*, 272 Ga. 788, 789 (2000) (*King I*).

The LIFE Act

On 4 April 2019, the Georgia Legislature passed H.B. 481, entitled the "Living Infants Fairness and Equality (LIFE) Act." Governor Kemp signed it on 7 May 2019 and it took effect -- or at least the constitutional portions of it did -- on 1 January 2020.[6] The

[5] In this way, Georgia is not unique. Most state constitutions do not contain an express right to privacy, although Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington have all enshrined the right. ALASKA CONST. art.1, § 22; ARIZ. CONST. art. 2, § 8; CAL. CONST. art. 1, § l; FLA. CONST. art. 1, § 12; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; and WASH. CONST. art. I, § 7. Where Georgia *is* unique is its position as the "pioneer in the realm of the right of privacy," as our Supreme Court was the first in the land to recognize a constitutional right to privacy. *Powell v. State*, 270 Ga. 327, 329 (1998) (referring to *Pavesich v. New England Life Ins.*, 122 Ga. 190 (1905)).

[6] The Act enjoyed only a very brief initial tour of duty as the law of Georgia. On 13 July 2020, a federal District Court judge enjoined the State from enforcing H.B. 481 "in its entirety," finding, unsurprisingly, that it was fundamentally inconsistent with then-controlling federal constitutional law a/k/a *Roe v. Wade* and its progeny. *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297,

LIFE Act consists of sixteen sections, only three of which Plaintiffs challenge as infringing on their rights (or their members' rights): Sections 4, 10, and 11. Section 4 of the LIFE Act amended O.C.G.A. § 16-12-141 to, among other things, criminalize abortions occurring after the embryo generates a "detectable human heartbeat",[7] a development which both sides in this litigation agree typically occurs around six weeks after the mother's last menstrual period.[8] Section 10 amended O.C.G.A. § 31-9B-2, concerning a physician's obligations when performing abortions, to require doctors to make "a determination of the presence of a detectable human heartbeat … of an unborn child" before performing any abortion (absent a medical emergency or a medically futile pregnancy).[9] Finally, Section 11 amended O.C.G.A. § 31-9B-3 to add a requirement that any physician who performs an abortion after detecting a fetal heartbeat must report to the Department of Public Health the exception to the ban imposed by Section 4 of the Act that applied to justify the otherwise illegal procedure. The Act wrought other statutory changes

---

1328 (N.D. Ga. 2020), *rev'd and vacated sub nom. SisterSong Women of Color Reprod. Justice Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022).

[7] This statutory threshold for life is more particularly defined as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac." O.C.G.A. § 16-12-141(a)(2).

[8] Section 4 also added several exceptions to the post-embryonic heartbeat abortion ban -- to include certain non-mental health medical emergencies and rape or incest (but only if a police report is filed) -- and expanded prosecutors' access to women's health records to both the circuit in which the procedure occurred and the circuit in which the woman who underwent the procedure resides.

[9] The Court has already found that Section 10 passes constitutional muster; Plaintiffs are denied their requested relief as to that provision. *See* 15 November 2022 Order at 7-8.

as well, all consistent with its policy theme that unborn children are "natural persons," but its fundamental alteration to Georgia law was its extreme narrowing of the window of time within which women have the legal ability to end a pregnancy from roughly twenty weeks (*i.e.*, viability) down to a mere six weeks, a point at which many -- if not most -- women are completely unaware or at best unsure if they are pregnant.

The Issue

Whether one couches it as liberty or privacy (or even equal protection), this dispute is fundamentally about the extent of a woman's right to control what happens to and within her body. The baseline rule is clear: a legally competent person has absolute authority over her body and should brook no governmental interference in what she does -- and does not do -- in terms of health, hygiene, and the like.[10] *Cruzan v. Director, MDH*, 497 U.S. 261, 269 (1990) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body"). Unsurprisingly, the manner in which Georgia's courts have interpreted and applied these provisions of the State Constitution (and the rights flowing from them) firmly supports such a position. Gluttony and self-deprivation are both constitutionally protected lifestyles. People are free to tattoo or pierce any and every square inch of their skin. And, ordinarily, one can pursue -- or refuse -- medical care, elective or

[10] There is the vaccine exception, wherein the government can condition some receipt of benefit (such as public education or Medicaid/Medicare coverage) on the administration of vaccines or other preventative medicine -- or outright mandate the treatment through a valid exercise of state police power. *See, e.g., Biden v. Missouri,* 595 U.S. 87 (2022); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

essential.

But here, in this case and this debate, there is one more important fact -- the pregnancy -- that changes the constitutional analysis. At some point, the pregnancy acquires its own rights that deserve protection, protection that can conflict with the mother's exercise of her rights. We struggle mightily -- and not always peaceably -- with determining when that point arrives. For some, that moment is conception: when sperm fertilizes egg and a zygote is formed -- a single cell with a unique combination of DNA drawn from each parent -- a new life begins, a life vested with all the protections our Constitution affords living human beings. *See, e.g., LePage v. Ctr. for Reprod. Med., P.C.*, --- So. 3d. ---, SC-2022-0515, 2024 WL 656591 at *16 (Ala. Feb. 16, 2024) ("We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness.") (Parker, C.J., concurring). For many others, including Georgians until the LIFE Act was passed, that tipping point is viability, when the fetus -- now fully formed -- can survive outside the mother. *See, e.g.,* Conn. Gen. Stat. Ann. § 19a-602(a) ("The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the patient"); 775 Ill. Comp. Stat. Ann. 55/1-25; Me. Rev. Stat. tit. 22, § 1598.

Our Legislature -- or at least the Legislature as it was composed back in 2019 -- has, through the now-resurrected LIFE Act, offered yet another perspective: life begins with the

establishment of a pre-fetal circulatory system.[11] That point, according to the LIFE Act, is when embryo and mother become co-equal, enjoying the same rights under the Constitution.[12] Thus in Georgia today a pregnancy that persists beyond the detection of this initial heartbeat -- that is, a post-embryonic cardiac activity pregnancy (PECAP) -- may not be terminated unless one of several narrow exceptions applies. Indeed, anyone performing or facilitating a non-exempt PECAP termination is, under the LIFE Act, guilty of a felony offense.[13] O.C.G.A. § 16-12-140. And *that* creates the issue to be decided here: how to balance the rights of a not-yet-viable fetus against the rights of the only person in this great wide world who can -- by choice or by legislative imposition -- maintain that

---

[11] This pre-fetal circulatory system would not be readily recognizable as such to most. The "heart" is a tiny cluster of cells that periodically pulse, pushing blood through the quarter-inch embryo that still sports a vestigial tail.

[12] The arbitrariness of this delineation -- designating the embryonic "heartbeat" as the start of life -- was highlighted by the medical evidence presented at trial. As medical science defines it, a true human heartbeat requires an actual four-chambered heart, something which does not develop until 17-20 weeks of gestation, a time far closer to viability than the start of rudimentary blood circulation in week six.

[13] To be clear, both pregnant women *and* medical professionals can be criminally liable under this statutory scheme. O.C.G.A. § 16-12-140(a) defines the offense of "criminal abortion" as follows: "A person commits the offense of criminal abortion when, in violation of Code Section 16-12-141, he or she administers any medicine, drugs, or other substance whatever to any woman or when he or she uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion." Thus, a pregnant woman who administers to herself "medicine, drugs, or other substance" that she has procured on her own, in an effort to end her pregnancy at, say, eight weeks -- when she first learned that she was pregnant but after the embryonic heartbeat had commenced -- is subject to prosecution as readily as a doctor at SisterSong who did the same. And there is no limitation in O.C.G.A. § 16-12-140 that would prevent a zealous prosecutor from pursuing charges against the woman as a party to or co-conspirator in the crime that she helped her medical provider commit.

pregnancy until it is viable?[14]

Liberty/Privacy Right

Plaintiffs in stating their claim properly invoke the very first provision of our State's Constitution: "No person shall be deprived of life, liberty, or property except by due process of law." 1983 Georgia Constitution, Art. I, Sec. I, Par. I. From this language springs Georgians' right to privacy -- or, as the Court in *Pavesich* more aptly put it, our "liberty of privacy." *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 72 (1905). It is a fundamental right "recognized as having a value so essential to individual liberty in our society that its infringement merits careful scrutiny by the courts." *King I*, 272 Ga. at 789 (punctuation and citation omitted). It is also much broader than its federal counterpart: "the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive that the right of privacy protected by the U.S. Constitution." *Powell*, 270 Ga. at 330. It is not an absolute right, however: Georgians enjoy their right "to be let alone" only so long as they are not interfering with the rights of other individuals or of the public. *Pavesich*, 50 S.E. at 71.

The State argues that Plaintiffs' privacy right claim fails at the starting gate for two reasons. First, the State asserts that the right to privacy has never included the right to have

[14] Remarkably, this appears to be an issue of first impression in Georgia. Because of prior controlling federal precedent (*Roe v. Wade*, 410 U.S. 113 (1973), and its progeny), our state courts have not been called upon to address this tension directly, other than in references that are essentially dicta, such as the observation that "Georgia itself cannot unduly interfere with a woman's constitutional right to obtain an abortion." *Etkind v. Suarez*, 271 Ga. 352, 354 (1999).

an abortion.[15] While this is true on a tritely literalistic level -- the word "abortion" is indeed nowhere to be found in the Georgia Constitution -- that position misstates the question: does a Georgian's right to liberty of privacy encompass the right to make personal healthcare decisions? Plainly it does.[16] *See, e.g., State v. McAfee*, 259 Ga. 579 (1989);

---

[15] Except of course for the many decades of apparent supreme judicial confusion that the State refers to vaguely derisively as "the era of *Roe.*"

[16] This Court says "plainly" because the Georgia Supreme Court has repeatedly interpreted and applied the State Constitution as such. But that right -- the right to make personal healthcare decisions, to exercise dominion over one's body -- is not obvious, in a "plain" sense. Indeed, the constitutional language from which it springs -- Article I, Section I, Paragraph I of the present Georgia Constitution -- enshrines only the rights to life, liberty, and property. From this core trio of rights various related fundamental rights are necessarily and continuously extrapolated as constitutional questions arise. The interpretive challenge for the courts is in understanding what is encompassed in the concept of liberty. Originalists and textualists insist that courts rely on the provision's "original public meaning," that is, the meaning the provision had at the time of the Constitution's ratification. *Elliott v. State*, 305 Ga. 179, 181 (2019); *Lathrop v. Deal*, 301 Ga. 408, 440 (2017) ("we must seek to ascertain the way in which the text most reasonably would have been understood at the time of its adoption"). For many provisions, that means our current Constitution, ratified in 1982. Georgia, however, is not just the Peach State, it is also the Land of Constitutional Fecundity: we have had not one or two but *ten* different constitutions. So textualism requires a journey further back in time if the present constitutional language in question was imported from a previous version. And that is the case here: that right to liberty dates back to the State's fifth constitution, ratified in 1861 -- the final antebellum constitution. Article I, Paragraph IV, of the 1861 Constitution first staked out the protections of life, liberty, and property for the citizens of Georgia. Given the presumption of continuity afforded to unchanged provisions of subsequent constitutions, adherents of textualism look to the "original public meaning" of liberty back in 1861. *Session v. State*, 316 Ga. 179, 192 (2023); *Ammons v. State*, 315 Ga. 149, 163 (2022) (proper constitutional exegesis "requires careful attention to not only the language of the clause in question, but also its broader legal and historical context, which are the primary determinants of a text's meaning"). The obvious problem with this interpretive approach -- and the flaw in the confusing assertion that "when a court engages in judicial review, the court does not supply the Constitution with a meaning the Constitution does not already have, but instead attempts to discern the meaning of the Constitution through interpretation," *SisterSong*, 317 Ga. at 533 -- is that the Plaintiffs whose rights are at issue in this litigation had no (or very limited) rights when the constitutional provision was adopted. "Liberty" for white women in Georgia in 1861 did not encompass the right to vote (and thus to ratify the State's new constitution). And of course liberty did not exist at all for Black women in Georgia in 1861. Thus, any rooting around for original public meaning from that era would yield a myopic white male perspective on an issue of greatest salience to women, including women of color; certainly that is not what

Zant v. Prevatte, 248 Ga. 832 (1982). Second, the State argues that because any termination of a pregnancy necessarily interferes with the rights of "another," *i.e.*, the fetus[17], the woman's privacy right must yield. But such interference does not mean the discussion is closed. It means instead that the respective rights must be balanced against each other.

Even here the State insists the calculus is simple and the answer clear: the fetal right to life must always trump the woman's right to make her own decisions as to her health and well-being, as what could be more fundamental than the right to life? Setting aside the very real scenarios in which continuing the pregnancy *does* threaten the woman's right to life, the State's "life" versus "liberty" juxtaposition is simply not apt, for the LIFE Act

---

constitutional interpretation of any legitimate stripe ought to do. *See Access Independent Health Services, Inc., D/B/A Red River Women's Clinic et al. v. Drew H. Wrigley et al.,* at ¶ 40, Docket 08-2022-CV-01608 (N.D. Dist. Ct. Sept 12, 2024) ("this Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the laws at that time, likely would not have recognized the interests at issue in this case because, at that time, women were not treated as full and equal citizens. The reality is that 'individuals' did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests."). If we fast forward to the *same* language in our current Constitution, ratified in 1982 -- at a time when liberty and privacy in fact and in law included the right of a woman to make her own reproductive health choices up to the point of viability -- then we have an original public meaning that incorporates precisely the rights Plaintiffs are now asserting. But remember: "Although the meaning of a constitutional provision does not alter over time, judicial interpretations of that meaning sometimes do." *SisterSong*, 317 Ga. at 533 n.10. So liberty will apparently mean what it has always meant since 1861; courts may just "interpret" that meaning in different ways as the composition of those courts changes.

[17] The Court is purposefully and for simplicity's sake using the term "fetus" loosely here to refer to the early stage of pregnancy. To be clear, the record established at trial is that the pregnancy remains a tiny ungendered embryo until the ninth week, nearly a month after the LIFE Act's prohibition has taken hold.

criminalizes a woman's deeply personal and private decision to end a pregnancy at a time when her fetus cannot enjoy any legislatively bestowed right to life *independent of the woman carrying it*. Put differently, the uncontroverted evidence from the trial of this case is that a pre-viability fetus survives only through the woman choosing -- or being forced by law -- to carry it at least to the 22nd or 23rd week of her pregnancy. Unlike a newborn baby or a catatonic elder, both of whom our society should and does support if family and friends have stepped back from their expected roles as caregivers, for a pre-viability fetus there is no one else who can assume that woman's role and keep the pregnancy alive and healthy during those five long months.

Because the LIFE Act infringes upon a woman's fundamental rights to make her own healthcare choices and to decide what happens to her body, with her body, and in her body, the Act must serve a compelling state interest and be narrowly tailored to achieve that end. *State v. Jackson*, 269 Ga. 308, 310 (1998). The Act fails the second[18] half of that two-part test: there is nothing narrow about a law so blunt that it forces a woman to allow a fetus grow inside her for months after she has made the difficult and deeply personal decision not to bring the pregnancy to term. Indeed, as the trial testimony made clear, the Act's prohibitions against certain healthcare choices take effect before most women even know they are pregnant and so before they can begin to contemplate whether having a child

[18] The LIFE Act readily satisfies the first half of the test, as "respect for and preservation of prenatal life at all stages of development" is a legitimate and compelling state interest. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022).

is safe and sustainable for the mother and, if relevant, for her family. While the State's interest in protecting "unborn" life is compelling, until that life can be sustained *by the State* -- and not solely by the woman compelled by the Act to do the State's work -- the balance of rights favors the woman.[19]

Before the LIFE Act, Georgia law required a woman to carry to term any fetus that was viable, that had become something that -- or more accurately *someone* who -- could survive independently of the woman. That struck the proper balance between the woman's right of "liberty of privacy" and the fetus's right to life outside the womb. Ending the pregnancy at that point would be ending a life that our community collectively can and would otherwise preserve; no one person should have the power to terminate that. Pre-viability, however, the best intentions and desires of society do not control, as *only* the pregnant woman can fulfill that role of life support for those many weeks and months. The question, then, is whether she should now be forced by the State via the LIFE Act to do so? She should not. Women are not some piece of collectively owned community property the disposition of which is decided by majority vote. Forcing a woman to carry an unwanted,

---

[19] There is also something awkwardly arbitrary about the LIFE Act's six week dividing line, an arbitrariness that only highlights the wisdom and practicality of viability as the proper separation point between a woman's right to choose and society's right to intervene. The State was unable to articulate why a four- or five-week-old unborn child's life was not worth enough to protect by way of a statutory ban on *all* pregnancy terminations, regardless of fetal age. A five-week-old pregnancy is no more viable that a nine-week-old, but women are free to end such pregnancies (if they can detect them). Similarly, the State could not articulate how the life created by a sexual assault was worth less than one that was consensually conceived. Those embryos and fetuses did not choose their creation story; they should be equally worthy of statutory protection if the State's focus truly is on "Living Infant *Fairness*." It appears instead that the State has seized upon a point in gestation that has political salience, rather than medical or moral salience.

not-yet-viable fetus to term violates her constitutional rights to liberty and privacy, even taking into consideration whatever bundle of rights the not-yet-viable fetus may have.[20]

Fortunately, the record before the Court is that the majority of pregnancies involve women who sought to get pregnant, who want to fulfill that role of life-giver with that pregnancy, and who need no legislative prod to do so. But the record is no less clear that for many women, their pregnancy was unintended, unexpected, and often unknown until well after the embryonic heartbeat began. Yet that's too late under the LIFE Act's strictures: these women are now forbidden from undoing that life-altering change of circumstances -- before they even knew the change had occurred.

For these women, the liberty of privacy means that they alone should choose whether they serve as human incubators for the five months leading up to viability. It is not for a legislator, a judge, or a Commander from *The Handmaid's Tale* to tell these women what to do with their bodies during this period when the fetus cannot survive

---

[20] A related construct employed by courts in other jurisdictions that have wrestled with balancing the rights of the mother with the rights of her fetus is the concept of the right to bodily integrity -- a correlative right to the right to privacy. *See, e.g., Planned Parenthood of Michigan v. Attorney General of the State of Michigan*, 2022 WL 7076177, at *7 (Mich.Ct.Cl. 2022) ("The right to bodily integrity encompasses the freedom to decide how one will use her own body, a right independent of that of privacy generally."). The right to bodily integrity is referenced in Georgia caselaw only fleetingly and when it is, it is typically in discussions contrasting "public" rights with "private" rights. *See, e.g., Kennestone Hosp., Inc. v. Emory Univ.*, 318 Ga. 169, 178 (2024) ("Private rights … traditionally [have] been understood to refer to an individual's common law rights in property and bodily integrity…"). Insofar as Georgia law does recognize a right to bodily integrity, that right too is infringed by the LIFE Act. Forcing a woman to carry to term an unwanted pregnancy -- with the many concomitant physical, hormonal, and emotional changes involved -- plainly constitutes "an invasion of bodily integrity [which] implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013), quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985).

outside the womb any more so than society could -- or should -- force them to serve as a human tissue bank or to give up a kidney for the benefit of another.[21],[22] Considering the compelling record evidence about the physical, mental, and emotional impact of unwanted pregnancies on the women who are forced by law to carry them to term (as well as on their other living children), the Court finds that, until the pregnancy is viable, a woman's right to make decisions about her body and her health remains private and protected, *i.e.*, remains

---

[21] There is an uncomfortable and usually unspoken subtext of involuntary servitude swirling about this debate, symbolically illustrated by the composition of the legal teams in this case. It is generally men who promote and defend laws like the LIFE Act, the effect of which is to require *only* women -- and, given the socio-economic and demographic evidence presented at trial, primarily poor women, which means in Georgia primarily black and brown women -- to engage in compulsory labor, *i.e.*, the carrying of a pregnancy to term at the Government's behest. *See Public Opinion on Abortion*, Pew Research Center, https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/#views-on-abortion-1995-2024 (last visited 29 September 2024). (The trial record also showed that wealthier women -- which statistically means white women -- are much more able to travel from Georgia to jurisdictions in which pre-viability pregnancies can be ended without fear of criminal prosecution.) While the Court does not find that the LIFE Act violates the state and federal constitutional prohibitions against involuntary servitude (*see, e.g.*, Ga. Const. at Article I, Section I, Paragraph XXII), it is important to acknowledge the degree to which such laws compel a subset of our society to, against their will, labor for what the Legislature has decided is the betterment of society. This is eerily reminiscent of earlier times about which insufficient discussion is had when reviewing the "history" of laws surrounding reproductive rights in the United States. *See, e.g.,* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 The University of Chicago Legal Forum 191 (2022).

[22] There is also an argument that the LIFE Act -- or at least Section 4 of it -- is a sweeping bill of attainder, prohibited by Article I, Section 1, Paragraph X of the Georgia Constitution. "A bill of attainder is a 'legislative act, no matter what its form, that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.'" *Cook v. Smith*, 288 Ga. 409, 413 (2010), quoting *United States v. Lovett*, 328 U.S. 303, 315 (1946) (punctuation omitted). Punishment in this context includes "[t]he deprivation of any rights, civil or political." *Fulton v. Baker*, 261 Ga. 710, 712 (1991), quoting *United States v. Brown*, 381 U.S. 437, 442 (1965). Pregnant women who seek PECAP terminations are easily ascertainable members of the group of all pregnant women. The LIFE Act deprives them of civil rights (liberty, privacy, bodily autonomy, etc.) by way of legislative fiat rather than judicial trial. Indeed, if these women find themselves in a "judicial trial" court in connection with the LIFE Act, it is because they are criminal defendants facing felony prosecution.

her business and her business alone. When someone other than the pregnant woman is able to sustain the fetus, then -- and only then -- should those other voices have a say in the discussion about the decisions the pregnant woman makes concerning her body and what is growing within it.[23]

Equal Protection

"The Equal Protection Clause of the Georgia Constitution … requires that the State treat similarly situated individuals in a similar manner." *Jackson v. Raffensperger*, 308 Ga. 736, 741 (2020) (punctuation and citation omitted).[24] Put conversely, the Equal Protection Clause "prohibit[s] the state from creating a classification which arbitrarily divides similarly situated citizens into different classes and treats them differently." *Stegall v. Leader Nat. Ins. Co.*, 256 Ga. 765, 766 (1987). It is Plaintiffs' burden to establish that they are "similarly situated to members of a class who are treated differently" than Plaintiffs are under the terms of the LIFE Act. *Walker v. Cromartie*, 287 Ga. 511, 512 (2010); *see also Georgia Dep't of Human Res. v. Sweat*, 276 Ga. 627, 630 (2003) ("It is fundamental that no equal protection violation exists unless legislation treats similarly-situated individuals differently."). A statute challenged on equal protection grounds

---

[23] *See Preterm-Cleveland v. Yost*, 2022 WL 16137799, (Ohio Com.Pl. 2022) (finding that Ohio's "heartbeat" law banning most pregnancy terminations after a detectable embryonic heartbeat violated "the fundamental right to privacy, procreation, bodily integrity and freedom of choice in health care decision making").

[24] That clause reads: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." 1983 Georgia Constitution, Art. I, Sec. I, Par. II.

> 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. If neither a suspect class nor a fundamental right is affected by the statute, the statute need only bear a rational relationship to some legitimate state purpose.

Drew v. State, 285 Ga. 848, 850 (2009) (punctuation and citations omitted). Here, the rights involved -- liberty, privacy, bodily integrity, etc. -- are all fundamental, so the challenged portions of the LIFE Act must survive strict scrutiny if, in their application, they have a differential impact on similarly situated individuals. Under strict scrutiny review, differential treatment "can be justified only when it is sufficiently related to a compelling state interest." *Nicely v. State*, 291 Ga. 788, 792 (2012).

Plaintiffs posit two classes, the members of each of which they contend are impermissibly segregated and treated differently under the LIFE Act. The first consists of all pregnant women. That is, Plaintiffs argue that the LIFE Act treats pregnant women who choose to carry their pregnancies to term differently than pregnant women who seek to end their pregnancies before viability. Under the LIFE Act, women who elect to proceed with their pregnancy do not have their healthcare choices made for them by the State. However, under that same set of laws, women who would otherwise elect to have a PECAP termination encounter unwanted and unwarranted State interference with their most intimate and personal decisions about what to do with their health, their bodies, and their families. This is, at heart, simply another way of framing the "liberty of privacy" discussion from above. Either women in Georgia are, prior to fetal viability, free to make personal healthcare decisions about the condition of their bodies without State interference

or they are not. If they are, then the LIFE Act impermissibly and arbitrarily impedes the exercise of that fundamental right by some members of a class and not others.[25]

The second class Plaintiffs identify is women who, because of a medical emergency, seek relief from the LIFE Act's restrictions on their personal healthcare choices. As explained above in n.8, Section 4 of the LIFE Act allows for several exceptions to its ban on PECAP terminations; one of these is "medical emergencies." The Act defines a "medical emergency" to be "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). Specifically *excluded* from the definition of medical emergency are diagnoses of "mental or emotional" conditions, to include a diagnosis that the pregnant woman will engage in self-harm if forced to proceed with the pregnancy. *Id.* It is this divide that Plaintiffs challenge with their second equal protection claim: treating pregnant women with mental health emergencies differently than women with physical health emergencies. The Court agrees that this (mis)treatment of women with diagnosed mental health emergencies violates the Equal Protection Clause of the Georgia Constitution: there is no basis --

---

[25] If a higher court determines that women in Georgia do not enjoy such a fundamental right before fetal viability then, as discussed, "the most lenient level of judicial review—rational basis—applies." *Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 83 (2023) (citation omitted). "And because statutes are presumed to be constitutional, the party challenging the law must negate every conceivable basis that might support it." *Id.* at 84. Put conversely, the State need only show a rational relationship to a legitimate state purpose to overcome the equal protection challenge, which here it has done. A law that reduces the number of PECAP terminations in Georgia is rationally related to the legitimate state interest described in *Dobbs*: "respect for and preservation of prenatal life at all stages of development".

rational, compelling, or sensical -- to distinguish between diagnosed medical emergencies involving the brain (an essential human organ if ever there was one) versus the heart or the lungs or the liver -- *all* of which can result in serious bodily harm or death to the mother. A law that saves a mother from a potentially fatal pregnancy when the risk is purely physical but which fates her to death or serious injury or disability if the risk is "mental or emotional" is patently unconstitutional and violative of the equal protection rights of pregnant women suffering from acute mental health issues.[26, 27]

---

[26] This statutory language effectively codifies a pernicious and persistent discrimination against people suffering from mental illnesses, categorizing (and stigmatizing) them as somehow not being truly sick or in need of care. "If it's not bleeding, it's not serious."

[27] It became apparent during the trial (as it has in jurisdictions elsewhere with similarly worded medical exceptions) that the medical emergency exception to the PECAP termination ban is susceptible to a vagueness challenge. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Johnson v. Athens-Clarke Cnty.*, 272 Ga. 384, 385 (2000), quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). The first half of the statutory definition of medical emergency is plain: the pregnancy may be terminated if failure to do so will kill the woman. The second half eluded any consistent definition from the various medical professionals who testified or offered affidavits. Is a woman's left eye alone a major bodily function? Would the risk of losing the vision in only one eye as a result of being forced to bring to term a pregnancy be reason enough to authorize the medical emergency exception? Or would a total loss of sight be required? Are our eyes even a "major bodily function," as opposed to the circulatory system or respiratory system? According to several experts, uncertainty as to what level of medical intervention is legally permissible and when it might safely (from a legal perspective) be afforded to the pregnant patient -- that is, how "substantial" must the "impairment" be to whatever a "major bodily function" is? -- will result in pain, suffering, and, ultimately, tragedy (and concomitantly a denial of due process). But, as our constitutional vagueness law stands now, until a pregnant woman (or her doctor) is thrust into that untenable situation, thereby by yielding an "as-applied" challenge, the issue will remain unaddressed. *See Smallwood v. State*, 310 Ga. 445, 447 (2020), quoting *Daddario v. State*, 307 Ga. 179, 188 (2019) ("vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand").

The Rape or Incest Exception

Along with the medical emergency exception, the LIFE Act authorizes relief from its ban on PECAP terminations in the case of rape or incest. Specifically, O.C.G.A. § 16-12-141(b)(2) permits a PECAP termination if the probable gestational age of the fetus is 20 weeks or less (*i.e.*, is not yet viable) "and the pregnancy is the result of rape or incest in which an official police report has been filed alleging the offense of rape or incest." This enactment takes a fairly common[28] exception to bans on pregnancy terminations and adds a peculiarly cynical proviso that suggests the Legislature was somehow concerned that women would lie about their father having sex with them in order to obtain a needed medical procedure. Plaintiffs challenge this reporting requirement as placing an impermissible burden on the exercise of a fundamental right as well as being an improper intrusion into the privacy of the victim of sexual predation.

The debate over O.C.G.A. § 16-12-141(b)(2) is moot if, as Plaintiffs argue and as this Court has found, the bundle of rights comprising the concept of liberty (privacy, bodily autonomy, etc.) includes a woman's right to make her own healthcare choices about a pre-viability pregnancy. In such a world -- *see, e.g.*, California, Connecticut, Illinois, Minnesota, New York, Oregon, etc. -- the victim of rape or incest need not share her trauma with the local sheriff, the chief of police, or anyone else should she seek to end her

[28] *See, e.g.*, Ind. Code Ann. § 16-34-2-1(a)(2) (no law enforcement reporting requirement); Neb. Rev. Stat. Ann. § 71-6915(3)(b) (same); N.C. Gen. Stat. Ann. § 90-21.81B (same); S.C. Code Ann. § 44-41-650 (requires physician but not patient to report sexual assault).

pregnancy before viability. Rather, it would be a decision left to the victim and her medical provider, just like any other important medical procedure the woman might seek: private and personal.

On the other hand, if the Court is mistaken and women in Georgia are not free to control what happens to and within their bodies after embryonic cardiac activity has begun but before a fetus is viable, then the reporting requirement imposed by O.C.G.A. § 16-12-141(b)(2) stands. While that requirement imposes a burden on women seeking to invoke the rape/incest exception to PECAP terminations, there is a (minimally) rational basis for the burden: ensuring that no one is unlawfully exploiting the exception. If the State is going to exclude a category of persons (*i.e.*, victims of rape or incest) from the reach of a criminal statute, surely it is entitled to set the conditions for such an exclusion. While it is not difficult to posit real-life scenarios in which the reporting requirement could render the exception useless,[29] the Court does not find that the burden imposed is unconstitutional *if* Section 4 of the LIFE Act is found to be constitutional. It is not a ban or a bar, but a burden,

[29] Take, for example, a pregnant twelve-year-old who was raped by her mother's live-in boyfriend (who is the primary source of financial support for the household). Under the LIFE Act, she cannot end the pre-viability pregnancy unless she tells the police all about what happened. What might seem like common sense to someone not living the life of that twelve-year-old girl -- call the police and get that child molester locked up! -- could be much more complicated for the girl (and her mother). Perhaps the boyfriend has threatened them and they are choosing to remain silent but alive. Perhaps mother and daughter fled that fraught situation but are not convinced they would remain safe if the authorities got involved. Perhaps the boyfriend's parents have promised to support the girl and her mother if they do not report the crime. For victims young and old beset by fear and/or economic vulnerability, the reporting requirement of the LIFE Act's rape and incest exception could prove insurmountable.

a burden the Legislature was empowered to impose.[30]

O.C.G.A. § 16-12-141(f)

Subsection (f) of O.C.G.A. § 16-12-141 instructs that "Health 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." That's it. No definition of "health records." No explanation of the means by which the district attorney obtains such records: warrant, subpoena, demand letter, e-mail? And no mention of any notice to be provided to the "woman" whose "health records" have been made "available." Given this language, Plaintiffs contend that the provision unconstitutionally violates their patients' right to privacy by empowering prosecutors to obtain personal medical information without sufficient process. Plaintiffs are correct.

As this Court noted in an earlier Order, there is a strong vein of constitutional jurisprudence protecting personal medical records. *See, e.g., King I*, 272 Ga. at 790 ("Because Georgia recognizes an even broader concept of privacy [than the right of privacy afforded by the Federal Constitution], the personal medical records of this state's citizens clearly are protected by that right as guaranteed by our constitution."). For a provision like

[30] Importantly, the reporting requirement is not mandatory. In that way, it is less burdensome than other valid laws involving the reporting of suspected criminal activity. For example, public educators must report crimes committed by students at school (O.C.G.A. § 20-2-1184) and a broad swath of caregivers from podiatrists to dentists to family therapists must report the suspected abuse of minors (O.C.G.A. § 19-7-5). Failure to report under these statutory schemes is grounds for misdemeanor prosecution. The LIFE Act's reporting requirement in contrast is merely a condition precedent to receiving an exclusion from a criminal statute.

subsection (f) to survive the strict scrutiny it must receive -- because it impinges upon a patient's right to privacy -- it must further a compelling State interest and be narrowly drawn to achieve that interest. *Powell*, 270 Ga. at 333 & n. 5. While law enforcement and public safety are both recognized compelling State interests, *King v. State*, 276 Ga. 126, 128 (2003) (*King II*), this provision's scope is anything but narrow: purportedly focused on abortion, the statute empowers a prosecutor to obtain *all* "health records" of a patient.

Indeed, counsel for the State struggled to defend subsection (f) in court, acknowledging that there were "weird issues" around it. If by "weird" counsel meant "constitutional" then the Court agrees. One of these "issues" is the fact that the law does not define "health records" and so is unconstitutionally overbroad. Can the district attorney get the *entire* medical history of the woman? Nothing in the statute appears to prohibit that. If the abortion was part of a larger medical intervention, are records concerning the other procedures disclosed? The statute is silent. Indeed, the statute does not even limit the district attorney to obtaining health records from medical facilities; consistent with the plain[31] language of the provision, the district attorney apparently could dispatch an investigator to "the woman's" home to demand immediate and complete access to the health records she possesses.

This leads into the "weird" issue of lack of process required to obtain these "health

[31] "If the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end." *Golden v. Floyd Healthcare Mgmt., Inc.*, --- Ga. ---, 904 S.E.2d 359, 364 (2024) (punctuation and citation omitted).

records." Subsection (f) is directive: "Health records *shall be available* to the district attorney…" (emphasis added). But we know that such records are private and enjoy constitutional and statutory protections. Indeed, O.C.G.A. § 24-12-1(a) shields patient medical information from disclosure by doctors, hospitals, and health care facilities unless "authorized or required by law, statute, or lawful regulation" or upon issuance of an "appropriate court order or subpoena".[32] O.C.G.A. 16-12-141(f) -- a statute -- appears to require the disclosure of "health records" to district attorneys, thereby obviating the need for any process under O.C.G.A. § 24-12-1(a). That does not square with *King I* or *King II* and is fatal to the provision as written. There is nothing so urgent or important to the State about the medical records of women who end pregnancies that the privacy rights of those women -- and the Fourth Amendment protections that attach to those rights -- can be bulldozed away by statutory enactment.

Conclusion

> The authors of our Constitutions, state and federal,
>
> > entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell v. Hodges, 576 U.S. 644, 664 (2015). Plaintiffs have made such a claim and this Court has addressed it. A review of our higher courts' interpretations of "liberty"

---

[32] Building on its holdings in *King I* and *King II*, the Supreme Court recently held in *Gates v. State*, 317 Ga. 889 (2023), that, under O.C.G.A. § 24-12-1, prosecutors seeking patient medical records from a hospital or other care facility must obtain a search warrant; a subpoena or mere court order is insufficient.

demonstrates that liberty in Georgia includes in its meaning, in its protections, and in its bundle of rights the power of a woman to control her own body, to decide what happens to it and in it, and to reject state interference with her healthcare choices. That power is not, however, unlimited. When a fetus growing inside a woman reaches viability, when society can assume care and responsibility for that separate life, then -- and only then -- may society intervene. An arbitrary six-week ban on PECAP terminations is inconsistent with these rights and the proper balance that a viability rule establishes between a woman's rights of liberty and privacy and society's interest in protecting and caring for unborn infants.

Accordingly, Section 4 of the LIFE Act is hereby DECLARED unconstitutional.[33] The State and all its agents, to include any County, Municipal, or other local authority, are once again ENJOINED from seeking to enforce in any manner the LIFE Act's PECAP termination ban in Georgia. Because Section 4 is stricken and thus its amendments to O.C.G.A. § 16-12-141 are gone, Section 11 necessarily fails as well, as a woman does not require a legislatively bestowed exception to pursue a pre-viability PECAP termination. Finally, O.C.G.A. 16-12-141(f) is DECLARED unconstitutional. It, too, shall not be enforced by the State or any of its agents.

The law of Georgia reverts to what was (and remains) constitutional in this State at

---

[33] The Court has addressed Plaintiffs' equal protection challenges in this Order as well. However, those conclusions are mooted by the re-affirmation that, in Georgia, women's rights to liberty and privacy guarantee their freedom to make personal, private healthcare choices until a fetus reaches viability. Should a higher court divine a different, more restrictive meaning of liberty for the over five million women of Georgia, then this Court's ruling that the medical emergency exception that excludes mental health emergencies violates some Georgians' right to the equal protection of law must also be considered.

the time of the LIFE Act's passage.[34, 35]

SO ORDERED this 30th day of September 2024.

JUDGE ROBERT C.I. MCBURNEY
Superior Court of Fulton County

[34] As noted in the Court's 15 November 2022 Order, there is one statutory oddity created by this outcome. The prior (and now effective) version of O.C.G.A. § 16-12-141 requires a physician, before performing an abortion, to determine the "probable gestational age" of the fetus in accordance with O.C.G.A. § 31-9B-2. O.C.G.A. § 16-12-141(c)(1). However, as mentioned, Section 10 of the LIFE Act, which remains in place, supplanted references to "probable gestational age" in O.C.G.A. § 31-9B-2 with "presence of a detectable human heartbeat." That is the measure doctors must now take per O.C.G.A. § 31-9B-2, whereas O.C.G.A. § 16-12-141 once again requires doctors to determine gestational age. Until it is corrected, this statutory cross-reference will be somewhat nonsensical, but it does not make the overarching statutory framework regulating pregnancy terminations unworkable, impracticable, or unconstitutional. Physicians will simply need to make *both* determinations (and share both with their patients -- which, from the record established in this case, appears to be standard medical practice anyway).

[35] A recycled note on severability: the LIFE Act is severable -- at least in the manner it is being severed here (*i.e.*, Sections 4 and 11 excised from the remainder) -- for at least two reasons. First, the Act says so: H.B. 481 contained a severance provision (Section 14) invoking O.C.G.A. § 1-1-3, the Georgia Code's severability provision. That statute asserts that a "declaration or adjudication" such as that set forth in this Order finding one part of a legislative enactment unconstitutional "shall not affect the remaining portions of … such Act … which shall remain of full force and effect as if such portion so declared or adjudged invalid or unconstitutional were not originally a part of … such Act…." However, while "the presence of a severability clause ... reverses the usual presumption that the legislature intends the Act to be an entirety, and creates an opposite presumption of separability[,] the severability clause does not change the rule that in order for one part of [an Act] to be upheld as severable when another is stricken as unconstitutional, they must not be mutually dependent on one another." *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 275 (2006) (punctuation and citation omitted). Here they are not. While all operative provisions of H.B. 481 spring from the common policy theme espoused in paragraph (6) of Section 2 of the Act (recognizing unborn children as natural persons), these provisions are not mutually dependent upon one another (other than Sections 4 and 11). Rather, they amend different statutory schemes to reflect the Legislature's determination that unborn children should enjoy the same rights and protections as the "born" do.