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

RESPONSE TO MOTION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Georgia's elected representatives passed the Living Infants Fairness and Equality (LIFE) Act, to protect "unborn children," a "class of living, distinct persons." LIFE Act, § 2, 2019 Ga. Laws 234. The LIFE Act thus prohibits post-heartbeat abortions, subject to exceptions. At the same time, the LIFE Act supports mothers and families with unborn children by, for instance, ensuring that fathers cover medical expenses surrounding pregnancy and childbirth and granting tax dependent status to the unborn. *Id.* §§ 5, 12 (codified respectively at O.C.G.A. §§ 19-6-15(a.1), 48-7-26(a)). 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 being, is appropriate only in rare instances.

Contrary to the misstatements and hyperbole of Plaintiffs, the LIFE Act does not endanger the life or health of pregnant women. Plaintiffs misconstrue the LIFE Act and exaggerate supposed conflicts between mothers and their unborn children to suggest that somehow physicians will be unable to care for the health of pregnant women. That is not true, and it is dangerous to insinuate otherwise. The LIFE Act carefully defines abortion to include only the *intentional* ending of pregnancies and unborn life. Moreover, it exempts procedures where they are necessary for the life or health of the mother. No physician in Georgia will be unable to provide care for women experiencing miscarriages or ectopic pregnancies or any rare scenario where the mother's health is at serious risk.

Nevertheless, Plaintiffs ask this Court to repeat, at the state level, the error of *Roe v. Wade*, 410 U.S. 113 (1973), a federal judicial power-grab that was "not constitutional law and g[ave] almost no sense of an obligation to try

to be." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2270 (2022) (quoting John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973)). The United States Supreme Court overruled *Roe*, and this Court should not issue Georgia's own version of that now-rejected decision. *Id.* at 2242. Georgia's Constitution, like the federal constitution, makes "no[] mention[]" of a right to abortion, because there is no such right. *Id.* at 2245. Instead, Georgia has validly prohibited abortion for centuries, with the only interruption being the erroneous era of *Roe*. Plaintiffs can, of course, try to persuade others of their views about the unborn, but that debate is a matter for the people, not the judiciary, to decide.

In any event, the Court need not even address the merits of Plaintiffs' motion for temporary relief because their motion fails for a threshold reason: Georgia has *not* waived its sovereign immunity for preliminary injunctive relief. Under the State Constitution, Georgia has waived sovereign immunity for constitutional challenges seeking "declaratory relief," and "only *after* awarding declaratory relief" may a court "enjoin" the State. Ga. Const. Art. I, § 2, ¶ V(b)(1) (emphasis added). Plaintiffs argue that they are somehow entitled to preliminary injunctive relief *before* obtaining a declaratory judgment, contradicting the plain, express language of the Constitution. Their argument makes no sense, and even if it were plausible, waivers of sovereign immunity "must be strictly construed," not broadly construed. *Sawnee Elec. Membership Corp. v. Ga. Dep't of Revenue*, 279 Ga. 22, 23 (2005). Far from being compelled by the text, Plaintiffs' theory would mean the State has waived sovereign immunity across the board in constitutional

challenges, as long as litigants include a claim for declaratory relief. That is obviously wrong.

If Plaintiffs could somehow circumvent sovereign immunity, they would still fail, because they cannot establish any of the factors necessary for preliminary relief. On the merits, Plaintiffs' arguments are barely colorable, not "substantial[ly] likel[y]" to "prevail." *Davis v. VCP S., LLC*, 297 Ga. 616, 622 (2015) (citation omitted). And their own delay in filing suit, as well as the harm to the State in enjoining its validly enacted law, show that the damage to the State and the "public interest" outweighs any vaguely alleged harm to Plaintiffs. *Id.* (citation omitted).

As to the merits, the Court must "begin with the proposition that a solemn act of the legislature is presumed to be constitutional," *State v. Davis*, 246 Ga. 761, 761 (1980), and Plaintiffs provide nothing to even challenge, much less overcome, that presumption. They first argue that, because the General Assembly enacted the LIFE Act in the era of *Roe*, it was "void *ab initio*," on the theory that the General Assembly lacked power to enact it. Not so. As the Supreme Court made clear, "*Roe* was egregiously wrong from the start." *Dobbs*, 142 S. Ct. at 2243. When the Supreme Court overruled it, "the effect is not that the former decision was bad law, but that it was *never the law*." *State v. King*, 164 Ga. App. 834, 834 (1982) (emphasis added). Even assuming that federal courts would have *wrongly* enjoined the LIFE Act under *Roe*, it was valid when enacted and remains so now.

Plaintiffs next argue that abortion is protected via Georgia's "right to privacy," but they badly misunderstand that concept. The state constitutional right to privacy includes only 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) (emphasis added). Yet abortion ends a human life. Georgia's elected representatives passed the LIFE Act to protect "unborn children." LIFE Act § 2. There is nothing private about ending the life of an unborn child. Again, Plaintiffs are free to disagree about Georgia's legislative decisions, but they cannot force their own views on the public.

Were the Court to accept Plaintiffs' invitation to create a right to abortion out of whole cloth, it would have to act as a "legislative bod[y]," not a court. *Dobbs*, 142 S. Ct. at 2268. Because the State Constitution does not even mention abortion, much less explain how it is to be regulated, this Court would have to construct an entire legislative scheme. It would have to decide when unborn life can be protected, what exceptions are allowable, what exceptions are required, what kind of restrictions are allowable, and what kind are not. Even after fifty years of engaging in this abortion policymaking, federal courts still could not identify a "line between permissible and unconstitutional restrictions" on abortion, *id.* at 2274 (citation omitted), yet Plaintiffs ask this Court to invent a new scheme, a new standard, a new *something* that will provide them a judicial victory where they have not succeeded via the democratic process. There is no cause to do so.

Finally, Plaintiffs' claims are not only meritless, they also fail to establish entitlement to any preliminary relief because they cannot show that the equities lean in their favor. Plaintiffs repeat inaccurate, hyperbolic fearmongering *ad nauseam*, but the LIFE Act endangers no one. The LIFE Act protects the health of both mothers and unborn children, and Plaintiffs' attempt to distort the Act to *create* danger should not be countenanced. Regardless, Plaintiffs are not pregnant women with any alleged health conditions. They are the same institutional actors, activists, and medical

professionals who previously sued to enjoin the LIFE Act in federal court but then waited *years* to challenge the LIFE Act under state law, despite knowing full well that the federal litigation was not guaranteed to resolve in their favor. That sort of delay is irreconcilable with Plaintiffs' rush to obtain emergency relief now.

Meanwhile, interlocutory relief *would* harm the State and the public interest. Georgia's elected representatives—i.e., representatives of the public—enacted the LIFE Act to protect unborn children. "[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 although Plaintiffs do their best to avoid dwelling on the subject, they cannot deny that the General Assembly determined that the LIFE Act was necessary to *protect unborn life*. Plaintiffs do not seriously contest that abortion ends a human life, but even if they did, the General Assembly found otherwise. Enjoining the LIFE Act would lead to the irreparable harms and loss of human life that the General Assembly specifically legislated to prevent. The Court should deny Plaintiffs' motion.

BACKGROUND

A. Georgia's historical prohibition of abortion.

Outside the era of *Roe*, abortion has *never* been lawful in Georgia—contrary to Plaintiffs' misrepresentation, *see* Plaintiffs' Motion for Interlocutory Injunction and Temporary Restraining Order ("Mem.") at 36 n.8. From the common law prohibition of abortion, to the 1876 statute

prohibiting abortion, to the present day, Georgia has always sought to protect the lives of unborn children.

1. Common law prohibition. At common law, abortion was prohibited. As the United States Supreme Court recently recounted in great detail—with little dispute coming even from the dissenters—"although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, *none* endorsed the practice." *Dobbs*, 142 S. Ct. at 2251 (emphasis added). Abortion after the "quickening" (usually understood as felt fetal movement) was universally considered *homicide* at common law, but even pre-quickening abortions were considered unlawful, whether or not subject to homicide penalties.

As to the former point, the "eminent common-law authorities (Blackstone, Coke, Hale, and the like), … *all* describe abortion after quickening as criminal." *Id.* at 2249 (citation omitted); *see also generally id.* at 2249–53. 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 2249 (quoting 1 William Blackstone, Commentaries *129–30). Sir Edward Coke declared, as early as the seventeenth century, that such an abortion was "murder" or "great misprision." 3 Edward Coke, Institutes of the Laws of England 50–51 (1644). By the nineteenth century, American state "courts frequently explained that the common law made abortion of a quick child a crime." *Dobbs*, 142 S. Ct. at 2251.

But the common law also considered abortion unlawful before the "quickening," even if it was not always considered homicidal. Common law English courts declared abortion "barbarous and unnatural," "pernicious," and "against the peace of our Lady the Queen, her crown and dignity"—

without making any distinction between pre- and post-quickening abortions. *Id.* at 2250 (citations omitted). And we know that abortion was unlawful at common law, even pre-quickening, because it was the basis for a type of common-law, felony-murder rule. Blackstone, for instance, explained that an abortionist who accidentally kills a woman is in the same position as a murderer who shoots at one person but hits another:

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

4 William Blackstone, Commentaries *201.

Georgia was no different. In 1862, a Georgia court relied on nearly identical logic in explaining that an abortion is unlawful, regardless of whether it was "homicidal" per se. In *Wilson v. State*, 33 Ga. 207, 218 (1862), a trial court explained that if someone were to "fire a gun at a bird, in the direction of [a] crowd, … yet if he killed a human being instead of the bird, under such circumstances it is murder." Likewise, "if a man in attempting to procure an abortion kills the woman without intending it … under such circumstances it is murder." *Id.* at 213. The Georgia Supreme Court has likewise held that the common-law prohibition on felony murder due to an abortion reached circumstances where the death of the mother was brought about pre-quickening, without intent. *Summerlin v. State*, 150 Ga. 173, 103 S.E. 461, 462 (1920); *see also, e.g.*, *Biegun v. State*, 206 Ga. 618, 630 (1950) ("At common law, if one performed an unlawful abortion from which death

resulted to the woman, the defendant was subject to indictment and trial for murder."); *id.* (citing *People v. Sessions*, 58 Mich. 594 (1886), as an example of such a murder, even though in that case the woman was not past four months pregnant and so not "quick").

Indeed, Georgia has long recognized that "a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered." *Morrow v. Scott*, 7 Ga. 535, 537 (1849). Thus, children could "inherit, in all cases, in like manner as if they were born in the lifetime of the intestate, and had survived him." *Id.* This was the "universal rule in this country." *Id.* Likewise, at common law a child has an action for tortious injury against someone who harmed them in the womb, regardless of "what particular moment after conception" the injury occurred. *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504 (1956).

2. Statutory prohibitions before the LIFE Act. Beginning in 1876, Georgia codified most of its anti-abortion penal laws. 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, anyone who performed an abortion was considered "guilty of an assault with intent to murder." Ga. Code § 4337(b) (1882) (repealed 1968), https://perma.cc/H5V8-MEQZ. Pre-quickening, performing an abortion was instead a misdemeanor. Ga. Code §§ 4310, 4337(c) (1882) (repealed 1968), https://perma.cc/H5V8-MEQZ.[1]

[1] The language in the statutes at the time used "any woman pregnant with a child" as a term of art to describe a woman pregnant with a "quick" child, while the term "any pregnant woman," did not distinguish between pre- and post-quickening pregnancies. *See* Ga. Code § 4337(b), (c) (1882) (repealed 1968), https://perma.cc/H5V8-MEQZ; *Summerlin*, 150 Ga. 173, 103 S.E. at 462.

Although this law was recodified several times, it did not substantially change until 1968. At that point, the General Assembly abandoned the "quickening" dichotomy and imposed the same penalty (one to ten years) on the performance of an abortion at any gestational age. Act of Apr. 10, 1968, § 1, 1968 Ga. Laws 1188, 1216–19 (repealed 1973), https://perma.cc/XA8T-YNLY. Meanwhile, the statute's exceptions were expanded: abortions could be performed where necessary to protect "the life of the pregnant woman" or to avoid "serious[] and permanent[] injur[y] [to] her health"; where the "fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect"; and where "[t]he pregnancy resulted from forcible or statutory rape." *Id.* § 1, 1968 Ga. Laws at 1216–17.

Only after the Supreme Court of the United States purported to identify a right to abortion in the federal constitution did Georgia amend its statutes to allow for abortions in accord with *Roe*'s trimester framework. Act of Apr. 13, 1973, § 1, 1973 Ga. Laws 629, 630 (repealed 2012), https://perma.cc/4MQG-Z6SH (generally prohibiting abortions after the second trimester except where the life or health of the mother is at risk). Then, in 2012, Georgia abandoned the trimester scheme and began to prohibit abortions after 22-weeks' gestation. *See* O.C.G.A. § 16-12-141 (2012). That version provided for exceptions for "medical[] futil[ity]" and where necessary to "[a]vert the death … or avert serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." *Id.* § 16-12-141(c)(1) (2012).

3. The LIFE Act. In 2019, Georgia again overhauled its abortion prohibition, enacting the Living Infants Fairness and Equality (LIFE) Act, 2019 Georgia Laws 234. The General Assembly found that "[m]odern medical

science, not available decades ago, demonstrates that unborn children are a class of living, distinct persons." LIFE Act § 2. Accordingly, the LIFE Act broadly provides for the protection of the unborn and the support of 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)(1), (b)). The LIFE Act has a number of exceptions, including situations of "medical emergency," "[m]edical[] futil[ity]," the "naturally occurring death of an unborn child," and where the "pregnancy is the result of rape or incest in which an official police report has been filed." O.C.G.A. § 16-12-141(a), (b). Likewise, 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).

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.

- Section 3 defines an unborn human being as a "[n]atural person" under Georgia law. LIFE Act § 3 (codified at O.C.G.A. § 1-2-1(b)).

It also requires counting unborn persons for "population based determinations." O.C.G.A. § 1-2-1(d).

- Section 12 allows parents to claim tax benefits by counting unborn children with detectable heartbeats as "dependent[s]." O.C.G.A. § 48-7-26(a).

- Section 5 expands the child-support obligations of absent fathers to include the "direct medical and pregnancy related expenses" of the mother of an "unborn child with a detectable human heartbeat." O.C.G.A. § 19-6-15(a.1).

- Section 6 allows parents to recover in tort actions the full value of the life of an unborn child, starting at the point of a detectable heartbeat, in cases of fetal homicide. LIFE Act § 6 (codified at O.C.G.A. § 19-7-1(c)(1)).

- Sections 7, 8, 10, and 11 update Georgia's informed consent laws and documentation requirements. Section 7 requires abortion practitioners to inform patients seeking an abortion whether the child has a detectable heartbeat. *Id.* § 7 (codified at O.C.G.A. § 31-9A-3). Section 8 directs the Georgia Department of Public Health to prepare information about the gestational development of unborn children, including the age at which a heartbeat is usually detectable. *Id.* § 8 (codified at O.C.G.A. § 31-9A-4(a)(3)). Section 10 requires abortion practitioners to record whether the unborn child has a detectable heartbeat before performing an abortion. *Id.* § 10 (codified at O.C.G.A. § 31-9B-2). Section 11 directs abortion practitioners to report that information to the Department of Public Health after they perform or try to perform an abortion. *Id.* § 11 (codified at O.C.G.A. § 31-9B-3(a)).

B. Procedural History

Plaintiffs here immediately challenged the LIFE Act in federal court, six months before the Act would go into effect. Complaint, *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, No. 1:19-cv-02973 (N.D. Ga. June 28, 2019). Relying on *Roe* and its progeny, Plaintiffs asserted that the LIFE Act's prohibitions on abortion post-fetal-heartbeat were invalid under the federal constitution. *Id.* at 3–4, 34. At the same time, Plaintiffs asserted that the

definition of "natural person" in the LIFE Act was unconstitutionally vague. *Id.* at 34–35. Although neither the prohibition of post-fetal-heartbeat abortions nor the personhood provision impacted the rest of the LIFE Act (e.g., the tax relief for pregnant mothers), and despite the LIFE Act's express severability provision, Plaintiffs requested the federal court enjoin the *entirety* of the LIFE Act. *Id.* at 36. The federal district court obliged, accepting both the *Roe*-based, substantive-due-process argument, as well as the vagueness challenge to the definition of "natural person." *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1312–14, 1317–18 (N.D. Ga. 2020). The district court enjoined the entire LIFE Act, not just the supposedly unconstitutional provisions. *Id.* at 1328.

The various State Defendants appealed that judgment, and after oral argument at the Eleventh Circuit, that court stayed the appeal pending a decision in *Dobbs*. *SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, No. 20-13024, order at 2 (11th Cir. Sept. 27, 2021). The Supreme Court then issued *Dobbs* on June 24, 2022, holding that the federal "[c]onstitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." *Dobbs*, 142 S. Ct. at 2242. Accordingly, the Supreme Court overruled *Roe* and its progeny and held that there is no federal constitutional right to an abortion. *See generally id.*

Almost a month later, the Eleventh Circuit issued its opinion in the challenge to Georgia's LIFE Act, reversing the district court across the board. *SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, No. 20-13024, 2022 WL 2824904 (11th Cir. July 20, 2022). The Eleventh Circuit explained that, because the federal constitution does not provide a right to an abortion, the LIFE Act's regulation of abortion was plainly permissible. *Id.* at

*3–4. Likewise, the definition of "natural person" (to include unborn children) was not unconstitutionally vague. *Id.* at *5.

Nearly a week after the Eleventh Circuit issued its opinion, Plaintiffs filed suit in this 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. They also moved for a TRO or preliminary injunction pending resolution of the litigation.

LEGAL STANDARD

"[E]xcept in clear and urgent cases," courts should not "resort[]" to granting interlocutory injunctions. O.C.G.A. § 9-5-8. "In deciding whether to issue an interlocutory injunction," courts consider whether "there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial," whether "the moving party will suffer irreparable injury if the injunction is not granted," and the "threatened harm that the injunction may do to the party being enjoined" and to "the public interest." *SRB Inv. Servs., LLLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 (2011) (citation omitted).

ARGUMENT

Plaintiffs' motion fails at every level. It is barred by sovereign immunity, the arguments are meritless, and the motion fails to satisfy the standard for an injunction even if the arguments had some merit.

I. The State has not waived its sovereign immunity in constitutional challenges with respect to preliminary relief.

Plaintiffs try to gloss over a critical problem with their request for preliminary relief: sovereign immunity bars the request. Plaintiffs rely on

Georgia's waiver of sovereign immunity for "actions … seeking declaratory relief" regarding laws supposedly "in violation of the laws or the Constitution of this state." Ga. Const. Art. I, § 2, ¶ V(b)(1); *see* Mem. at 23. But that constitutional provision is clear: Georgia waives its sovereign immunity for *declaratory* relief. A court may also issue an injunction, but "only *after* awarding declaratory relief," to "enforce its judgment." Ga. Const. Art. I, § 2, ¶ V(b)(1) (emphasis added).

Thus, a temporary restraining order or an interlocutory injunction are out of bounds. Only after the Court enters a declaratory judgment against the State can it consider injunctive relief. Before that time, the State has not waived immunity. That is not only the natural, obvious reading of the provision, but if there were any doubt, waivers of sovereign immunity are to be "*strictly* construed." *Sawnee*, 279 Ga. at 23 (emphasis added).

Plaintiffs fail to circumvent this problem. In their view, because the waiver applies to "*actions* … seeking declaratory relief," Ga. Const. Art. I, § 2, ¶ V(b)(1) (emphasis added), the waiver extends to *all* remedies involved in an "action" that happens to seek declaratory relief, Mem. at 23–24. Plaintiffs cite the Declaratory Judgment Act, which provides that, where litigants seek declaratory relief, Plaintiffs can also obtain all the other types of relief they can pursue in an ordinary civil action, including "damages, injunction, mandamus, or quo warranto," as well as "interlocutory extraordinary relief in substantially the manner and under the same rules applicable in equity cases." O.C.G.A. § 9-4-3.

But the question here is not what would be available to Plaintiffs in ordinary civil litigation, it is whether the State has *waived sovereign immunity* and to what extent. When the Constitution declares that it waives

immunity for actions seeking "declaratory relief," the only plausible reading is that the State's sovereign immunity is waived *for* declaratory relief. No one would write a sovereign immunity waiver specifying declaratory relief if they *really* meant "all relief plaintiffs could obtain in an action where they happen to seek a declaratory judgment." And that interpretation is certainly not a "strict[] constru[ction]," of the waiver, *Sawnee*, 279 Ga. at 23, as it would, if taken to its logical end, waive all sovereign immunity for all cases where a law is alleged to be unconstitutional, since declaratory judgment actions can include essentially all remedies.

Moreover, the rest of the constitutional text explicitly contradicts Plaintiffs' reading. The waiver declares that litigants can obtain an injunction, but only "*after*" a court has "award[ed] declaratory relief." Ga. Const. Art. I, § 2, ¶ V(b)(1) (emphasis added). Under Plaintiffs' interpretation, courts can order injunctive relief *before* a declaratory judgment, which cannot be reconciled with the words on the page. At the very least, this phrase would be surplusage, as there would be no need to specifically identify that a court can enjoin illegal acts only *after* a declaratory judgment if the court could *already* do that. *See, e.g.*, *Campaign for Accountability v. Consumer Credit Res. Found.*, 303 Ga. 828, 833 (2018) (courts read texts to avoid creating "surplusage"). Plaintiffs argue that an injunction is a "distinct" claim for relief, Mem. at 25 (citing O.C.G.A. § 9-5-1), but their argument is a non sequitur. Plaintiffs do not identify any reason the Constitution would specifically require a declaratory judgment before injunctive relief yet somehow *implicitly* authorize the opposite.

Plaintiffs erroneously analogize to a different constitutional waiver, where Georgia has waived sovereign immunity "as to any action ex contractu

for the breach of any written contract." Ga. Const. Art. I, § 2, ¶ IX(c); *see* Mem. at 24–25. In Plaintiffs' view, because that waiver extends to multiple forms of relief, so should this waiver. Mem. at 24–25. But the waiver for actions ex contractu waives sovereign immunity for a particular *substantive* claim ("ex contractu" means "out of contract," *see* David Hricik & Charles R. Adams III, Georgia Law of Torts § 1:2 (2021)) without limiting the *type* of relief available. Thus, courts have understood it to waive sovereign immunity even as to, for instance, damages. *See, e.g.*, *Dep't of Transp. v. APAC-Ga., Inc.*, 217 Ga. App. 103, 105–06 (1995). But the waiver for constitutional claims, Ga. Const. Art. I, § 2, ¶ V, specifically limits its scope to *declaratory relief*, with a further exception for injunctive relief, but only *after* the issuance of declaratory relief. The two waivers have nothing to do with one another, and Plaintiffs' argument never gets off the ground.

II. Plaintiffs are not entitled to a preliminary injunction with respect to the LIFE Act's prohibition of abortion.

Even if this Court retained the authority to grant preliminary relief, Plaintiffs establish none of the necessary factors. *See SRB Inv. Servs.*, 289 Ga. at 5. On the merits, the LIFE Act's prohibition of abortions after a fetal heartbeat is detected—subject to numerous exceptions—is plainly valid. The LIFE Act is not void *ab initio* because the General Assembly never lacked power to enact the law. Nor is there a "privacy" right to abortion under the state constitution, because abortion harms a third party. Finally, Plaintiffs cannot demonstrate the other equitable factors necessary for preliminary relief, especially given their delay in filing this lawsuit.

A. The LIFE Act is not void *ab initio*.

Plaintiffs argue that the LIFE Act is void *ab initio* "because it plainly violated the U.S. Constitution when it was passed in 2019." Mem. at 27. But the LIFE Act *was* constitutional when it was passed—the only judicial authority suggesting otherwise has been overruled as "egregiously wrong from the start." *Dobbs*, 142 S. Ct. at 2243.

When a case is overruled, "the effect is not that the former decision was bad law, but that it was *never the law*." *King*, 164 Ga. App. at 834 (emphasis added). "The overruled decision as a precedent is thereby destroyed." *Walker v. Walker*, 247 Ga. 502, 503 (1981). If a court holds "an act of the legislature unconstitutional," but then the basis for that decision is overruled, "the statute must be regarded for all purposes as having been constitutional and in force from the beginning." *Pierce v. Pierce*, 46 Ind. 86, 95 (1874); *see also Christopher v. Mungen*, 61 Fla. 513, 532 (1911) (similar); *Falconer v. Simmons*, 51 W. Va. 172, 196 (1902) (similar); Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 Mich. L. Rev. 645, 651–52 (1951), https://perma.cc/SC8H-BECF (collecting further cases).

In other words, *Roe* is not the Constitution. And with *Roe* now overruled, it is clear that Georgia *always* had the authority to enact pro-life laws. Thus, *Dobbs* made plain that the LIFE Act was—and always was—valid.

Plus, though it should not matter, the LIFE Act was specifically upheld in the only federal litigation addressing it. A federal district court enjoined the law, but while that decision was on appeal, the United States Supreme Court decided *Dobbs*, and the Eleventh Circuit decided the *SisterSong v. Kemp* appeal, reversing the earlier district court ruling in its entirety.

SisterSong, 2022 WL 2824904, at *6. Even if the LIFE Act had been enacted twenty years ago and permanently enjoined by federal courts, after *Dobbs* the State would have successfully petitioned to vacate such an injunction, and the Act could be validly enforced. *See* Fed. R. Civ. P. 60(b). Here, though, the litigation never got even that far. The LIFE Act was upheld in its entirety on *direct appeal*.

Despite all this, Plaintiffs argue that the LIFE Act is void because, when it was enacted, "court interpretations of that period" suggested that in at least some applications it was unconstitutional. Mem. at 28. That is not the relevant point. The Georgia Supreme Court has held that "[t]he time with reference to which the constitutionality of an act of the general assembly is to be determined is the date of its passage." *Jones v. McCaskill*, 112 Ga. 453, 37 S.E. 724, 725 (1900). But that refers to the *actual* validity under the Constitution, not an *erroneous* understanding of the Constitution. Each of Plaintiffs' (very old) cases involve some kind of later legislative change, not a later-reversed judicial ruling. *See id.* at 724–25 (explaining that the state legislature could not save a city charter provision that the city lacked any authority to enact by later amending a statute to exempt the charter); *see also Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617 (1953) (explaining that a Georgia law was void because it was preempted by the Sherman Act when passed, even though later statutory amendments changed the preemptive scope); *cf. also Frankel v. Cone*, 214 Ga. 733, 738 (1959) (declaring a statute facially unconstitutional and therefore void). In those cases, there was no dispute that the law *was* invalid when enacted, and the question was simply whether a later legislative change could resurrect the law. That is not the case here, where the LIFE Act has always been valid,

and it was only erroneous (and since overturned) federal judicial opinions that suggested some of its applications were unconstitutional.

Plaintiffs rely heavily on *Adams v. Adams*, 249 Ga. 477 (1982), but that case is of no help to them because it did not hold *anything* unconstitutional or void. The Court referenced some cases where it had "declared statutes to be void from their inception [because] they were contrary to the Constitution at the time of enactment." *Id.* at 479. The Court then stated that none of those cases were relevant because the statute at issue, "when adopted, was not violative of the Constitution under court interpretations of that period." *Id.* Plaintiffs take this one line (of dicta) out of context to suggest that as long as a "court interpretation[]" was arguably inconsistent with a law at the time of its enactment, the law is invalid from the start. Mem. at 28. But the *Adams* Court never said, much less held, that "court interpretations" at the time a statute is passed can render it void *ab initio* even if those interpretations are later held to be erroneous. Indeed, all *Adams held* was that a particular statute was constitutional, because it was enacted before the Fourteenth Amendment was enacted. *Adams*, 249 Ga. at 479. But even if we assume that court interpretations at the time a statute is enacted are relevant if they are still governing, nothing in *Adams* suggests that erroneous, *overruled* judicial opinions can somehow invalidate otherwise valid laws.

Such a rule would be nonsensical, not to mention unworkable. Under Plaintiffs' theory, the Mississippi statute that the United States Supreme Court upheld in *Dobbs* would itself be void *ab initio*. After all, when Mississippi passed the statute, it was allegedly unconstitutional (at least in part) under "court interpretations of that period." Mem. at 28. In fact, Plaintiffs' rule would likely deprive states of standing to appeal rulings that a

statute is unconstitutional. *See Hollingsworth v. Perry*, 570 U.S. 693, 704–05 (2013) (explaining that even "persons seeking appellate review" must establish an injury that "is likely to be redressed by a favorable judicial decision" (citations omitted)). If an appellate victory is just the "removal of constitutional objections," not a basis to "validate or revive" the statute, Mem. at 28, then prevailing on appeal would provide a state no relief; the statute would be void, regardless, so there would be no standing. That would also mean legislatures could never contest erroneous court holdings by enacting new laws, because any statute that conflicts with a prior ruling is "void" one way or the other, and so no court could ever reach the question whether its prior judicial holdings were incorrect. This Catch-22 is not the law.

Other absurdities abound in Plaintiffs' theory. To start, it would eviscerate the distinction between facial and as-applied challenges to a statute. *Catoosa County v. R.N. Talley Props., LLC*, 282 Ga. 373, 374–75 (2007). The LIFE Act is not unconstitutional (and never has been), but even under the *Roe* regime, most of it would have been ultimately held to be perfectly valid. Even assuming the LIFE Act would be unconstitutional as applied to pre-viability abortions under *Roe* and its progeny, it would still be valid insofar as it prohibited post-viability abortions (not to mention the numerous other clearly valid provisions, such as tax breaks for pregnant mothers). *See, e.g.*, *Frankel*, 214 Ga. at 738 ("This act, *being on its face* in violation of the Constitution, is void." (emphasis added)). Even when a federal case arguably conflicts with just a portion of a state law, Plaintiffs would nevertheless hold the entire law void *ab initio*. There is no support for that result anywhere, which reinforces the error of this theory.

Plaintiffs' theory is also unworkable for another reason: how many court decisions, and of what court, are sufficient to make statutes "void" when enacted? If a federal district court has enjoined a similar Alabama law, does that mean Georgia's laws on the subject are void? What if the Eleventh Circuit makes such a holding? What if the Georgia Supreme Court so holds, on a theory of federal law that the Eleventh Circuit later disagrees with? Is a decision of the Supreme Court of the United States required? What if the General Assembly passes a law after a federal court decision overrules a prior case but before that court's mandate has officially issued? Plaintiffs have no answer to these questions because their theory is bunk.

At bottom, Plaintiffs' argument reflects a fundamental misunderstanding of federal court power to review state statutes. "[F]ederal courts have no authority to erase a duly enacted law from the statute books." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (citation omitted). Rather, courts enjoin *enforcement* of statutes. *See Ex parte Young*, 209 U.S. 123, 155–56 (1908). Courts can declare that part of a statute conflicts with the Constitution, but doing so "cannot make even an unconstitutional statute disappear." *Steffel v. Thompson*, 415 U.S. 452, 469 (1974). That is why the federal district court in *SisterSong v. Kemp* "ENJOINED" the State Defendants "from enforcing H.B. 481." 472 F. Supp. 3d at 1328 (emphasis omitted). The court did not order that the law be stricken as void, nor could it (and of course, its judgment was reversed, anyway).

Federal courts issue opinions, judgments, and injunctions, but when they are later shown to be *wrong*, their erroneous opinions do not, like dead hands rising from the grave, invalidate state laws that *correctly disagreed*

with them. The federal constitution provides no right to abortion, and it never has. Georgia laws are not void simply because federal courts made errors in holding otherwise—even long persisting errors. The LIFE Act is not void.

B. The Georgia Constitution does not include a right to an abortion.

Plaintiffs' next argument fares no better, as there is no "privacy" right to an abortion under the Georgia Constitution. Plaintiffs *assume* that an abortion is a "private" matter and then argue that Georgia lacks a compelling interest in overriding that privacy interest, but they are wrong on both counts. Abortion is not protected by any privacy right, and even if it were, Georgia's interest in protecting the life of the unborn would justify the LIFE Act.

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

Georgia's right to privacy is limited to conduct that "does not interfere with the rights of another." *Pavesich v. New England Life Ins.*, 122 Ga. 190, 50 S.E. 68, 70 (1905). Because abortion always harms an "innocent third party," it is not protected by any right to privacy implied in the due process clause. *State v. McAfee*, 259 Ga. 579, 580 (1989). And if there were otherwise any doubt, Georgia's statutory and constitutional history confirms that Georgia's due process clause does not include a right to abortion. Georgia has prohibited abortion, without fail, for centuries. In that time, Georgia has *repeatedly* enacted new state constitutions, never once suggesting that any provision—including the due process clause—somehow prohibited restrictions on abortion.

a. Plaintiffs rely on the right to privacy but they skip a step: 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. Plaintiffs' argument fails at the first step. Abortion does not fall within the Georgia Constitution's privacy protection because it is simply not "private," as a legal matter.

Georgia's right to privacy began as a qualified right "to be let alone." *Pavesich*, 122 Ga. 190, 50 S.E. at 71. Georgia's early privacy cases recognized a right to be free from unwanted publicity. For example, the Georgia Supreme Court first recognized a right to privacy in a case involving the unauthorized use of the plaintiff's photograph for marketing. *See id.* at 79.[2] Later cases discussing the privacy right involved a business using the plaintiff's name without consent, *see Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819, 819 (1931), and the publication of pictures of a deceased, malformed child, *see Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194, 194 (1930).

Only once has Georgia Supreme Court held that the right to privacy prohibits the state from criminalizing certain conduct. *Powell*, 270 Ga. at 332. In *Powell*, 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

[2] *Paveisich* made no attempt to locate this right in any particular language of the Georgia Constitution. Rather, the Court held that the right was "derived from natural law." *Id.* at 70.

private matter by [a]ny person whose intellect is in a normal condition." *Id.* at 332, 336 (internal quotation mark and citation omitted). The Court held Georgia's anti-sodomy prohibition unconstitutional as-applied, because it regulated "the private conduct of consenting adults," there was no harm to others, and it did not benefit the public. *Id.* at 334.

But, as *Powell*'s 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). In particular, 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. 190, 50 S.E. at 70. The right to privacy assumes that the "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 surgery, *McAfee*, 259 Ga. at 580, onto an individual to prevent harm to *that individual*, it does not extend to situations where a person's activity affects or harms *another*, which explains why the State can criminalize, for example, non-consensual sexual activity, even if it is done in private. *E.g.*, *Odett v. State*, 273 Ga. 353, 354 (2001). The General Assembly instead has broad "discretion" to determine what "harmful" activity should be illegal. *Blincoe v. State*, 231 Ga. 886, 889 (1974) (right to privacy does not extend to right to possess illegal drugs).

b. Abortion is not a private act because abortion *always* harms an innocent party, the unborn child. Plaintiffs repeatedly and pointedly ignore that the unborn child distinguishes abortion from personal medical treatment or intimate relationships. Mem. at 35–36. But when the State acts to "preserv[e] the life of an innocent third party, such as the unborn child of a

woman," it does not violate a privacy right. *McAfee*, 259 Ga. at 580. The State need not establish that the LIFE Act satisfies strict scrutiny because an abortion "interfer[es] with the rights of other individuals [and] of the public." *Powell*, 270 Ga. at 330. Indeed, the State may act to protect the life of "unborn, living human being[s]" even when it *does* involve intrusion on the person of another. *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 247 Ga. 86, 88 (1981). In other words, abortion is *not* considered private "by [every] person whose intellect is in a normal condition." *Powell*, 270 Ga. at 332.

Nor is it meaningfully disputed that unborn children *are* human beings, from conception onward (though even if it were, that is a debate for legislatures, not courts). *See* Skop Decl. ¶¶ 4–6. To cite every authority on this point would exhaust printers—"it has been stated without explanation or citation in articles published in peer-reviewed journals such as Science, Nature, and Cell." Steven Andrew Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36 Issues in L. & Med. 221, 225 (2021).[3] In fact, Planned Parenthood has itself submitted affidavits from experts elsewhere,

[3] *See, e.g.*, Isha Raj et al., *Structural Basis of Egg Coat-Sperm Recognition at Fertilization*, 169 Cell 1315, 1315 (2017) ("Recognition between sperm and the egg surface marks the beginning of life in all sexually reproducing organisms."); Enrica Bianchi et al., *Juno is the egg Izumo receptor and is essential for mammalian fertilisation*, 508 Nature 483, 483 (2014) ("Fertilisation occurs when sperm and egg recognize each other and fuse to form a new, genetically distinct organism."); Maria Jimenez-Movilla et al., *Oolemma Receptors in Mammalian Molecular Fertilization: Function and New Methods of Study*, 9 Frontiers in Cell and Developmental Biology 1, 1 (2019) ("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.").

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* which may become a self-sustaining member of the species if no organic or environmental incident interrupts its gestation." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (emphasis added); *see also, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) ("[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. … We do not understand this point to be contested by the parties." (citation omitted)).

For that matter, Georgia courts have 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 benefit of such child to be so considered." *Morrow*, 7 Ga. at 537. Thus, for instance, a child can inherit, even though he or she was 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*, 212 Ga. at 504. So the LIFE Act's finding that unborn children are a class of "living, distinct persons" is part of a long line of Georgia authorities extending legal protection to unborn children.

Unable to rebut the General Assembly's finding, Plaintiffs try to change the subject, asserting that this new human is "entirely dependent on remaining inside the body of the pregnant person to survive; will remain so for at least four more months; and even at that distant point in the future could survive only with substantial artificial interventions." Mem. at 41 (emphasis omitted). But that is not an argument against life, it is an

argument against the *moral value* of a vulnerable life, and a flimsy one, at that. Infants, toddlers, and small children are also totally dependent on others to survive. So are many disabled persons, whether they are permanently disabled or temporarily so. Dependence on others is a common feature we all share at various points in our lives—it is not proof that a human ceases to be human. No wonder that this argument "has not found much support among philosophers and ethicists who have attempted to justify a right to abortion." *Dobbs*, 142 S. Ct. at 2269. But even if Plaintiffs had a *better* argument against the moral value of unborn life, the General Assembly need not share that view.

Simply put, abortion does not fall "within the area protected by the right of privacy." *Powell*, 270 Ga. at 332. The legislature found that unborn children are distinct, living individuals. It is well within the General Assembly's authority to make that finding and protect these children from harm.

c. The history of abortion regulation in Georgia confirms that abortion is a question for the legislature, not this Court. Abortion has *always* been an unlawful act in Georgia, save for the era of *Roe*. At common law, abortion was unlawful. In 1876, Georgia codified these restrictions. For a century afterward, Georgia maintained that prohibition, only breaking stride after *Roe*. Meanwhile, Georgia enacted constitutions in 1861, 1865, 1877, 1945, 1976, and 1983. The due process clause—which has not materially changed since "it first entered a Georgia Constitution," *Elliott v. State*, 305 Ga. 179, 183 (2019)—has never been understood to prohibit regulation of abortion. Plaintiffs' argument would require this Court to hold that, since 1861, the consistent prohibition of abortion in Georgia has been unconstitutional,

without anyone knowing it. The Court should reject Plaintiffs' attempt to conjure a constitutional right to abortion out of thin air. Put simply, even if there were any doubt, the "original public meaning" of the Constitution should carry the day. *Id.* at 181.

"[C]onstitutional text should be interpreted consistent with the common law that preceded it." *Id.* at 184. As described above, *see supra* Background § A, abortion was prohibited at common law. Even if abortion *had* been "permissible" in Georgia before the first statutory prohibitions, Mem. at 36 n.8—and it was not—there is no argument that abortion was understood as an affirmative *right*. 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.

Regardless, Georgia statutorily prohibited abortion in 1876, and then ratified new constitutions repeatedly. Ga. Code § 426 (Supp. 1878) (repealed 1968), https://perma.cc/4NFX-4CQY. Each of these constitutions—which were ratified in 1877, 1945, 1976, and 1983— included materially 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 vol. 3, §§ 81–82 (1895) (repealed 1968), https://perma.cc/ZAM8-VYFE; Ga. Code. vol. 2, §§ 81–82 (1910) (repealed 1968), https://perma.cc/Z5PW-RTSV; Ga. Code §§ 26-1101 to -1102 (1933) (repealed 1968), https://perma.cc/U34D-PBQ4. 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 1188, 1216–17, (repealed 1973) https://perma.cc/XA8T-YNLY. The General Assembly's power to criminalize abortion has thus long been taken as a given. Where, as here, "a constitutional provision … has been readopted without material change in multiple constitutions," courts assume its meaning does not change from the earlier understanding. *Elliott*, 305 Ga. at 184. If constitutional drafters intended to withdraw the General Assembly's power to criminalize abortion, they would have made that clear. But Georgia's Constitution does not (and has never) mentioned abortion, much less contain a fundamental right to it.

2. Even if the right to privacy applied to abortion, the State has a compelling interest in protecting unborn life.

Even if abortion did implicate privacy rights, the LIFE Act would still pass muster. The State has a "compelling governmental interest [in] the welfare of the children." *Phagan v. State*, 268 Ga. 272, 274 (1997). And in *Powell*, the Supreme Court held that even privacy rights can be limited if the law "benefits the public generally without unduly oppressing the individual." 270 Ga. at 334. The LIFE Act does that because it protects unborn lives in the only way possible: prohibiting abortion.

The State has a compelling interest in preserving human life. That is particularly true when the State acts to protect children from harm. *See id.* at 274; *Clark v. Wade*, 273 Ga. 587, 597 (2001); *In the Interest of J.C.*, 242 Ga. 737, 738 (1978). Georgia courts have never suggested that interest diminishes simply because the child is unborn. *See Jefferson*, 247 Ga. at 88; *McAfee*, 259 Ga. at 580. Rather, "a child is to be considered as *in being*, from

the time of its conception." *Morrow*, 7 Ga. at 537. An unborn child's inability to survive outside the womb does not diminish the interest—if anything, the state's interest in protecting life *increases* if the person is particularly vulnerable. See *In the Interest of J.C.*, 242 Ga. at 738 (explaining that the State "must protect the helpless and the innocent" (citation omitted)).

And the only means of protecting unborn lives is to prohibit acts that would end them. 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—that goes beyond even narrow tailoring. *Powell*, 270 Ga. at 333. Nor does the LIFE Act unnecessarily 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 it does not prohibit care that is medically indicated. Doctors may abort if "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).[4]

[4] Plaintiffs attempt to diminish the State's interests by arguing that cardiac electrical impulses are not a "heartbeat," but this is Orwellian doublespeak. Mem. at 11, 40. Even if the heart has not yet *fully* formed, there is cardiac activity in a developing heart. Skop Decl. ¶ 5. It is also highly likely that an unborn child will survive to birth absent affirmative interventions to take away its life. *Id.* ¶ 6; *see also, e.g.*, David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform*, 74 Ohio St. L.J. 121, 140 (2013) ("Recent medical research has determined that … once a fetus possesses cardiac activity, its chances of surviving to full term are between 95%–98%."). The General Assembly's focus on protecting unborn children from that point on is entirely reasonable.

Rather than dispute that criminalizing abortion is necessary to save unborn lives, Plaintiffs argue that three details of the LIFE Act render it overbroad. Plaintiffs object to (1) supposed limits on miscarriage care; (2) exclusion of a mother's psychiatric health from the LIFE Act's exception for maternal health; and (3) the police report requirement for the rape and incest exception. These argument extensions are no better than Plaintiffs' primary argument. They fail even assuming that a privacy right applies.

First, Plaintiffs are entirely wrong about the LIFE Act's treatment of miscarriages. They assert that physicians cannot provide "medically appropriate care for an in-progress miscarriage" until the fetus is "dead." Mem. at 48–49. That is wrong thrice over, and it is dangerous and misleading to suggest physicians cannot care for women experiencing miscarriages.[5]

To start, the LIFE Act includes within the definition of "abortion" only those acts having "the purpose to terminate a pregnancy." O.C.G.A. § 16-12-141(a)(1). But care for a miscarriage is *not* intended to end the pregnancy. Instead, the pregnancy is, sadly, ending naturally, and the relevant intent of any medical care is keep the mother healthy. Even if it is well known that such care would hasten the death of the child and the end of the pregnancy, that is not the *purpose* of the maternal care—if, at the end of it, the physician could save the pregnancy or could keep the child alive, he or she would. That is very different from elective abortions, where the *purpose* is to end a pregnancy.

[5] It is also unclear what real-life factual scenario Plaintiffs are referring to, since medical care ordinarily does not involve an abortion while the fetus remains alive. Skop Decl. ¶ 34.

Moreover, the LIFE Act provides an exception for "[m]edically futile" pregnancies, where an "unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth." *Id.* § 16-12-141(a)(4), (b)(3). If a woman is miscarrying prior to viability, by definition, the unborn child has a "congenital" condition "incompatible with sustaining life after birth," and even if medical care *were* classified as an abortion (and it would not be), it would be exempt. *Id.*

Finally, there is no liability where 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) (emphasis added). That is, even if there were any other confusion (and there should not be) the LIFE Act specifically exempts care, such as care necessary for a woman experiencing a miscarriage, which only *unintentionally* results in the death of the child.

Plaintiffs are trying to create problems where none exist. The LIFE Act does not require anyone be denied medical care for a miscarriage.

Second, the exclusion of psychiatric conditions from the exception for the mother's health does not "callously disregard[]" the health or life of the mother—instead, it is Plaintiffs ignore that there is another life at stake. Mem. at 46. The distinction between psychiatric ailments and physical ailments is not that one is less severe than the other, *id.* at 47, but that the treatment should differ because of that other life. The LIFE Act implicitly recognizes that in extraordinarily rare circumstances, 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. This distinction is obvious if one were to take the slightly different situation of a born child. If someone has to (regrettably) allow a child to die to save the life of another human being (e.g., a firefighter has to choose between rushing into one of two rooms to save the occupants of either), all would agree that is a reasonable moral choice. But no one would suggest that killing a child is an appropriate solution for the mental or psychiatric health problems of another. Yet Plaintiffs would have the law allow a physician to end the life of even a 40-weeks' gestation child to do just that. The General Assembly need not agree with that view.

Third, Plaintiffs object to the police report requirement for cases of rape and incest, Mem. at 47–48, but that is of a piece with the General Assembly's finding that abortion takes a human life. Only if one assumes otherwise would Plaintiffs' argument here make any sense. Obviously, the situation where a woman seeks an abortion based on a pregnancy arising from rape is tragic on every level. But Georgia can validly determine that if a woman wants to abort her child post-fetal-heartbeat under the relevant exception, she must provide at least some information to law enforcement—not incontrovertible proof, not any proof at all, but at least a report. Again, none of this should ultimately matter because abortion is not protected by a right to privacy in the first place. But even if it were, the LIFE Act would remain constitutional.

* * *

Plaintiffs' focus on rare scenarios reveals the weakness of their motion. They repeatedly emphasize situations of rape or medical risk to the mother, but these scenarios (which are not subject to the LIFE Act, given its exceptions) make up *very* few abortions. Skop Decl. ¶¶ 46–48. Statistics from

Florida, for instance, indicate that only .14% of abortions are due to rape, and only .95% due to serious fetal anomalies. *Id.*[6] Abortions necessary to protect the life or health of the mother are just as rare. *Id.* Yet Plaintiffs seek to enjoin the LIFE Act as a *whole*. Even if Plaintiffs were somehow correct that the LIFE Act was problematic in rare cases (and it is not), that would not remotely justify an interlocutory injunction against the entire Act, which would still be valid in the vast majority of cases. *See Ga. Dep't. of Hum. Servs. v. Steiner*, 303 Ga. 890, 899 (2018) (facial challenges must establish that *every* application of the law is invalid).

C. Plaintiffs cannot establish the remaining preliminary injunction factors.

Preliminary relief would still be inappropriate even if Plaintiffs had a strong case on the merits. To start, Plaintiffs cannot show irreparable harm. As established above, no woman is at risk of being unable to obtain medical care. Plaintiffs' assertions otherwise are just wrong. Plus, even prior to the LIFE Act, Georgia prohibited abortion past 22-weeks' gestation, with identical exceptions for the life and health of the mother as well as medical futility. O.C.G.A. § 16-12-141(c). There is no reason to believe that those long-extant exceptions suddenly became narrower or more problematic simply because abortions are prohibited from an earlier point in pregnancy. To the contrary, international studies of areas where abortion is restricted or prohibited generally show *improved* maternal health. Skop Decl. ¶¶ 42–45.

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[6] Even the pro-abortion Guttmacher Institute recognizes that abortions based on rape are highly uncommon. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persp. on Sexual & Reprod. Health 110, 113 (2005), https://perma.cc/QQ56-PQJR (finding that 1% of abortions are due to rape).

Regardless, Plaintiffs are activists and medical professionals, not patients (much less patients who happen to be pregnant, past the point of a fetal heartbeat, who want an abortion, but would not be able to obtain one under the LIFE Act). Plaintiffs' only direct harm is the supposed loss of customers and "customer goodwill." Mem. at 53.

On top of all that, Plaintiffs repeatedly delayed in seeking relief under state law, even well after it was clear that the federal litigation could or would resolve against them. The LIFE Act was enacted in 2019, yet Plaintiffs chose to sue in federal court, based only on federal law. Complaint at 1, *Kemp*, No. 1:19-cv-02973-SCJ (N.D. Ga. June 28, 2019). Even after the Eleventh Circuit stayed the appeal in the federal litigation *because of Dobbs*, Plaintiffs did not seek state court review of state law claims. *SisterSong*, No. 20-13024, order at 2 (11th Cir. Sept. 27, 2021). When the Supreme Court *issued Dobbs*, and it became patently clear that the federal injunction barring the LIFE Act was not long for this world (so clear that Plaintiffs conceded as much, *see* Appellee's Supplemental Letter Brief at 1, *SisterSong*, No. 20-13024 (11th Cir. July 15, 2022)), Plaintiffs *still* delayed, waiting a full month after *Dobbs* to file suit in state court. *See* Compl. at 39 (filed on July 26, 2022). All courts agree that "delay in seeking a preliminary injunction … militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). That is because "the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protect a plaintiff's rights before a case can be resolved on its merits." *Id.* Plaintiffs can hardly declare urgency now after they waited so long.

On the other side of the ledger, the harm to the State would be immense. "[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. But that is all the more so here, where Georgia seeks to protect its most vulnerable population. Every day that illegal abortions continue is another day that the lives of tiny, unique individuals are snuffed out, never to return. In a year's time, many of these children would be moving to solid foods, starting to crawl, and learning to babble. But that will never happen for many of them if this Court enjoins the LIFE Act. Whether one agrees with the General Assembly or not, those are the stakes for the State. The alleged loss of "customer goodwill" is not remotely comparable.

III. Plaintiffs are not entitled to a preliminary injunction against the § 16-12-141(f) recordkeeping requirements.

Plaintiffs separately challenge O.C.G.A. § 16-12-141(f), which provides that "[h]ealth records shall be available to the district attorney." But Plaintiffs are not entitled to an injunction here, either. This long-extant statutory provision allows prosecutors to access records regarding abortions. Records limited to that procedure (and relevant to criminal investigations where a physician violates the LIFE Act) are not private, and even if they were, Plaintiffs cannot assert the privacy rights of mothers not before the Court. In any event, this provision has been around for a half century; Plaintiffs cannot possibly establish that there is an urgent need to enjoin a statute in place for that long.

A. Plaintiffs cannot establish that their privacy rights are violated by § 16-12-141(f).

Section 16-12-141(f) is a "preexisting law that makes hospital and licensed health facility records concerning abortion procedures available to a

district attorney." *Lathrop v. Deal*, 301 Ga. 408, 410 (2017). It has been part of Georgia's code since 1973. *Id.* at 410 n.3. And because mothers themselves *cannot* be prosecuted for obtaining abortions—a point on which Plaintiffs and the State agree, *see* Mem. at 51 n.17—the information is useful only in regulating the medical profession, not the mother. It is, essentially, a requirement that regulated entities, performing regulated operations, provide records of those regulated operations to district attorneys upon request. That is not facially unconstitutional.

Plaintiffs rely almost entirely on *King v. State*, 272 Ga. 788, 790 (2000), for the proposition that "medical" records are private and hence subject to enhanced constitutional privacy protections. But that case is nothing like Plaintiffs' facial challenge here. In *King*, the Supreme Court held that prosecutors could not use specific, private medical records of a criminal defendant—obtained without a search warrant—to convict that specific defendant. *Id.* Plaintiffs take that broad principle and assert that it "controls" here, a non-criminal case involving a facial challenge to a statutory provision about regulation of *medicine*, not criminal conviction of patients. Mem. at 50. Plaintiffs' argument fails for at least three reasons.

First, Plaintiffs lack standing to challenge the release of such records. Plaintiffs (advocacy groups and medical professionals, not pregnant women seeking abortions) can assert only *their* privacy rights, not hypothetical parties who may or may not even *object* to this information being provided to district attorneys. *See, e.g.*, *Brown v. State*, 295 Ga. 695, 698 (2014) ("The burden is on the defendant to show that he has standing to contest the alleged violation."). The Court in *King*, for instance, held that "[p]ermitting the State unlimited access to medical records for the purposes of *prosecuting*

the patient would have the highly oppressive effect of chilling the decision of any and all Georgians to seek medical treatment." 272 Ga. at 792 (emphasis added). But that concern is not at issue here. The woman will never be charged, and if, at some point, a mother *does* object, a court can address the issue at that time, addressing *her* privacy interests, not Plaintiffs' non-existent privacy interests.

Second, this provision is not *facially* unconstitutional. To be facially unconstitutional, Plaintiffs must establish it is invalid in *all* its applications. *Steiner*, 303 Ga. at 899. But there are valid applications, even on Plaintiffs' own view. For instance, if the mother does not object, there is nothing invalid about the statute, even assuming the mother has a privacy right that would trump the State's compelling interest in law enforcement and regulation of the medical profession.

Third, as already explained above, abortion is *not* private. The General Assembly found—consistent with virtually uncontroverted biological science—that fetuses are unique, developing human beings. *See supra* Section II.A. So a privacy argument no more protects *records* of an abortion than it does the *practice* of an abortion. And to the extent that Plaintiffs argue that the records available go beyond abortion, that makes little sense of the statute, which is directed at abortion and does not suggest a broader scope. O.C.G.A. § 16-12-141(f). Even if it could be read more broadly, to the extent any such reading would implicate constitutional concerns, courts must "adopt a readily available limiting construction where necessary to avoid constitutional infirmity." *Scott v. State*, 299 Ga. 568, 574 (2016). Plaintiffs' concerns are, again, incorrect and overblown.

B. Plaintiffs cannot satisfy the equitable requirements for enjoining § 16-12-141(f).

Even if § 16-12-141(f) were arguably invalid in some applications, Plaintiffs' claim for an injunction would still fail. Again, no Plaintiff has even alleged, much less established, that *their* privacy rights are at risk of being violated. There can be no threat of "irreparable harm" when there is no apparent threat of harm. For that matter, if district attorneys *did* request records, Plaintiffs could file for emergency relief at that time; there is no need for a broad injunction *now*.

On top of that, § 16-12-141(f) has been in place for almost fifty years. *See Lathrop*, 301 Ga. at 410 n.3. Preliminary relief is supposed to be rare, not granted "except in clear and urgent cases." O.C.G.A. § 9-5-8. But it can hardly be "urgent" when Plaintiffs have sat by for a half century, never bothering to challenge this provision. Nor have matters materially changed because of the LIFE Act. Even before the LIFE Act, abortion was prohibited from 22 weeks' gestation onward—with exceptions nearly identical to the LIFE Act, including for "medically futile" pregnancies and to "[a]vert the death of the pregnant woman or avert serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." O.C.G.A. § 16-12-141(c)(1) (2012). Likewise, alleged psychiatric problems were *not* a basis for an exception. *See id.* ("No such condition shall be deemed to exist if it is based on a diagnosis or claim of a mental or emotional condition of the pregnant woman or that the pregnant woman will purposefully engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function."). Plaintiffs have identified no reason why the prohibition of *more* abortions makes this recordkeeping provision "urgent[ly]" problematic when it was not for decades

prior—one would think it is *less* urgent, since there should now be fewer records available.

On the other hand, the public interest favors continued operation of a provision that does no more than help to regulate the practice of abortion and allow district attorneys to investigate potential criminal activity. Again, "the inability to enforce its duly enacted [statutes] clearly inflicts irreparable harm on the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), and the public interest is in the publically enacted laws of Georgia being enforced, *cf., e.g.*, *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) ("[F]rustration of federal statutes and prerogatives are not in the public interest."). The Court should deny Plaintiffs' motion.

CONCLUSION

For all the reasons given above, the Court should deny Plaintiffs' motion for interlocutory injunction and temporary restraining order.

/s/ *Stephen J. Petrany*
Christopher M. Carr 112505
Attorney General
Stephen J. Petrany 718981
Solicitor General
Drew F. Waldbeser 862285
Deputy Solicitor General
Hannah N. Basta 765458
Assistant Attorney General
Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on August 4, 2022, I served this brief by filing it electronically with this Court, which constitutes service on all parties and counsel registered with the electronic filing system.

/s/ *Stephen J. Petrany*
Stephen J. Petrany