IN THE
Supreme Court of Georgia

No. S25A0300

STATE OF GEORGIA, Appellant, v. SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, et al., Appellees.	Appeal from the Superior Court of Fulton County, Case No. 2022CV367796, The Honorable Robert C.I. McBurney, Judge.

BRIEF OF INDIANA, FLORIDA, AND 17 OTHER STATES AS AMICI CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICI STATES

In *Roe v. Wade*, the U.S. Supreme Court held that the right to abortion falls within a general "right of privacy." 410 U.S. 113, 152–54 (1973). That ruling was "egregiously wrong from the start." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). Abortion has never been "'private' in the ordinary usage of that word." *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting). It is, as Judge Henry Friendly said, "the antithesis of privacy."[1] Far from a hidden thought whispered in the confines of the home, the effects of abortion ripple throughout society, from the women who endure it, to the medical staff who perform it, to the unborn lives extinguished by it.

Yet Appellees invoke Georgia's general right of privacy in an attempt to revive *Roe* in Georgia. Amici States—Indiana, Florida, Alabama, Alaska, Arkansas, Idaho, Iowa, Louisiana, Kansas, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming—have a strong interest in defeating that bid to "short-circuit[]" Georgia's "democratic process" by invalidating an abortion law enacted by "the people's elected representatives." *Dobbs*, 597 U.S. at 232, 269. Like other States, amici have enacted laws regulating abortion and have experienced the benefits of allowing "legislative bodies" to "draw lines that accommodate" the "competing

[1] A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J.L. & Pub. Pol'y 1035, 1038 (2006).

interests" that abortion presents. *Id.* at 274. Given that experience, amici States are firmly committed to ensuring that citizens nationwide may decide for themselves how to regulate abortion. Even more, amici have a substantial interest in the proper development of both privacy and equal-protection jurisprudence. Amici submit this brief to ensure that those constitutional principles are not construed to eclipse the will of the people.

SUMMARY OF ARGUMENT

The elected representatives of the people of Georgia enacted the LIFE Act, which generally bars providers from performing abortions after the unborn child develops a detectable heartbeat. *See* O.C.G.A. § 16-12-141(b). That law violates neither Georgia's right to privacy nor its Equal Protection Clause.

I.A. "The right of privacy has a long and distinguished history in Georgia." *Powell v. State*, 270 Ga. 327, 329 (1998). This Court was the first "court of last resort" to recognize a constitutional "right of privacy." *Id.*; *see Pavesich v. New England Life Ins.*, 122 Ga. 190, 50 S.E. 68 (1905). But in the years since, Georgia's privacy right has strayed from its traditional roots. As first conceived, Georgia's right protected citizens from invasions of *informational* privacy by other citizens, like the unlicensed publication of a photograph. *See Pavesich*, 50 S.E. at 74–78. Yet without analysis, this Court has more recently extended the privacy right to protect personal decision-making from government interference. *See Powell*, 270 Ga. at 331–32. The Court should realign the privacy right with its historical, information-based roots and hold that it does not preclude Georgia's people from restricting medical providers from performing abortions.

I.B. In any event, this Court's current privacy precedent provides a clear path to upholding Georgia's statute. From its earliest philosophical conception

to its incorporation into Georgia jurisprudence, the right to privacy has always stopped short of protecting acts that harm others—something that abortion indisputably does.

I.C. Construing Georgia's privacy right as silent on abortion also respects the limits of judicial review and the will of the voters. The failed state of the law after *Roe* teaches that courts are ill-suited to navigate the complex medical, moral, and philosophical issues that abortion implicates. Only "the people and their elected representatives" can decide how to regulate abortion in their States, exactly as Georgia's people have done here. *Dobbs*, 597 U.S. at 292.

II.A. Given that the people's elected representatives are charged with deciding whether and when to regulate abortion, their policy choices are subject only to rational-basis review. The Legislature had a rational basis for deciding to prohibit most abortions after detection of a fetal heartbeat while allowing otherwise unlawful abortions in the case of true medical emergencies.

The trial court declared it irrational for the Legislature to authorize abortions for medical emergencies but not mental-health problems. But rather than ask whether abortion ought to be available for mental or emotional issues, the court should have simply asked whether there is "any conceivable" reason for the Legislature's choice. *Harper v. State*, 292 Ga. 557, 560–61 (2013).

II.B. The trial court's unsupported assertion that there is "no basis—rational, compelling, or sensical"—for distinguishing between mental-health issues and other conditions blinks reality. Even supporters of abortion have conceded that abortion does not treat any mental-health condition and that offering abortion as a solution for psychiatric conditions would be unethical. Far from showing abortion to alleviate mental distress, the medical evidence shows that abortion is associated with *worse* mental-health outcomes.

II.C. A robust legal tradition stands behind the LIFE Act's recognition that emergent threats to physical health raise different policy considerations than alleged risks to mental or emotional stability. Criminal and tort law both consistently distinguish between physical and mental harms. Disability law, too, recognizes that physical and mental diagnoses may be treated differently. The trial court's view of rational basis would wipe out whole bodies of law.

ARGUMENT

I. Georgia's Right to Privacy Does Not Extend to Abortion.

In the wake of *Dobbs*, state courts nationwide have declined to strike down abortion laws for conflict with a general right to privacy. *See, e.g.*, *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 88 (Fla. 2024); *Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121, 132 (S.C. 2023). This Court should follow that path here. As originally conceived, Georgia's right to

privacy covers only informational privacy, not the right to make certain decisions (like having an abortion). Even if the right extended to decision-making, it would not cover acts that harm others, which abortion no doubt does. And construing Georgia's Constitution as silent on abortion best respects the roles and core competencies of Georgia's judicial and legislative branches.

A. As originally understood, Georgia's right to privacy covers only informational privacy, not autonomy-based activities like abortion.

Over a century ago, this Court construed Georgia's Due Process Clause to encompass a general "right of privacy," also known as the right "to be let alone." *Pavesich*, 50 S.E. at 71, 78. Since then, it has affixed the "right of personal privacy" label to "two very different" kinds of rights. *Dobbs*, 597 U.S. at 273. Traditionally, the Court has understood the privacy right to protect informational privacy: the right to seclusion from the public, to be free from unwarranted surveillance, to avoid public disclosure of personal facts, and so on. *See Pavesich*, 50 S.E. at 71, 79–81. But more recently, this Court has drawn upon cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), to extend the privacy right to cover decisional autonomy as well—"the right to make and implement important personal decisions without governmental interference." *Dobbs*, 597 U.S. at 273; *see Powell*, 270 Ga. at 331–32; *State v. McAfee*, 259 Ga. 579, 580

(1989). The Court should correct that "questionable leap of logic"[2] and return Georgia's privacy right to its original, information-based roots. At the least, it should decline to extend the privacy right to abortion. In either event, the Court should uphold the LIFE Act.

Georgia's right of privacy stems from the "liberty" guarantee in Georgia's Due Process Clause. *See Powell*, 270 Ga. at 331–32 (citing *Pavesich*, 122 Ga. 190). Because the right flows from constitutional text, the "primary determinant[]" of the right's scope is the "broader legal and historical context" in which the Due Process Clause was ratified. *Ammons v. State*, 315 Ga. 149, 163 (2022). The clause was first ratified in 1861 and has not meaningfully changed since. *Compare* Ga. Const. of 1861, Art. I, ¶ 4, *with* Ga. Const., Art. I, § 1, ¶ I. So this Court "presume[s]" that the clause retains the "original public meaning" from the 1861 enactment. *Elliott v. State*, 305 Ga. 179, 184–87 (2019).

Context from that period makes clear that Georgia's right to privacy is limited to informational privacy. The origins of that right trace to the seminal 1890 law-review article, *The Right to Privacy*, by Samuel Warren and Louis Brandeis. 4 Harv. L. Rev. 193; *see Pavesich*, 50 S.E. at 74 (relying heavily on

[2] Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 Rutgers L.J. 971, 988 (2006).

the article). Prompted by both media attacks on Warren's family[3] and other tales of the "press intruding into private affairs and publishing personal information," 37 Rutgers L.J. at 989, the article posited a "right to be let alone" and free from "intrusion upon the domestic circle." 4 Harv. L. Rev. at 195–96. That right, however, "had little to do with the autonomy of an individual to make decisions . . . free from government control." 37 Rutgers L.J. at 990. It described a "different sort of privacy"—one "directed to keeping personal information from being exposed to the public, rather than to keeping decision-making within the control of an individual." *Id.*; *see* 4 Harv. L. Rev. at 195–96. To Warren and Brandeis, the "right to be let alone" merely safeguarded against the publication of private facts. 4 Harv. L. Rev. at 195–96; *see Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 80 n.13 (Fla. 2024) (drawing that conclusion about *The Right to Privacy*).

That informational view of "privacy" tracked the predominant understanding of the term in the 19th century. In 1865, Webster's defined "privacy" as "[a] state of being in retirement from the company or observation of others;

[3] Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy"*, 2008 Mich. State L. Rev. 35, 42 (2008) (examining the historical evidence in detail and "conclud[ing]" that "ample coverage of the Warrens from 1883 to 1890, regaling readers with breathless accounts of their weddings, social gatherings, and funerals" "very plausibly could explain Warren's evident desire in 'The Right to Privacy' to rein in the press through new tort protection for personal privacy").

secrecy. A place of seclusion from company or observation; retreat; solitude; retirement. . . . Concealment of what is said or done."[4] It similarly defined "private" as "[s]equestered from company or observation; secret; secluded; as, a private room or apartment."[5] Other dictionaries from the era also shared that thread: They defined privacy to connote secrecy and seclusion, not decisional autonomy.[6]

Legal authorities from the time period confirm that understanding. The vast majority of privacy cases in the 19th and early 20th centuries involved only the disclosure of secret or sensitive information. *See Pavesich*, 50 S.E. at

[4] *Privacy*, *An American Dictionary of the English Language* (1865).

[5] *Id.*

[6] *Privacy, A Popular and Complete English Dictionary* (1848) (defining "privacy" as a "state of being in retirement from the company or observation of others; secrecy. A place of seclusion from company or observation; retreat; solitude; retirement"); *id.* (defining "private" as "[s]equestered from company or observation; secret; secluded. Not publicly known; not open. . . . Individual; personal; in contradistinction from *public*. *In private*, secretly; not openly or publicly"); *Privacy, Dictionary of the English Language* (1860) (defining "privacy" as a "[s]tate of being private or secret; secrecy. A place of seclusion; retirement; retreat. . . . *Privacy* is opposed to *publicity*; *solitude* is the state of being alone. . . . Living in *privacy* or in the *solitude* of an island, in *retirement* from business or from public life, in a *retreat* from the cares of life, and in *seclusion* from the world"); *id.* (defining "private" as "not public or general; . . . personal. . . . Privy; not open; secret; apart").

74–78 (surveying historical privacy precedents, all of which involved information-based injuries).[7] Indeed, informational privacy was the cornerstone of the most famous privacy case of the 1920s—*Olmstead v. United States*, a wiretapping case—in which Justice Brandeis argued that "the right to be let alone" swept broadly enough to block "disclosure in court of what is whispered in the closet." 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). And by 1939, the First Restatement of Torts recognized that the tort of "Interference with Privacy" occurred when a person "unreasonably and seriously interfere[d] with another's interest *in not having his affairs known to others or his likeness exhibited to the public*." Restatement (First) of Torts § 867 (1939) (emphasis added).

Given that chorus, it is no surprise that this Court's original privacy precedents involved informational harms. In the first American case recognizing a "legal right to be let alone," this Court held that the right permitted a

[7] *See also Itzkovitch v. Whitaker*, 39 So. 499, 500 (La. 1905) (upholding order enjoining publication of photograph because "[e]very one who does not violate the law can insist upon being let alone (the right of privacy)"); *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929) ("The right of privacy may be defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone."); *Cason v. Baskin*, 20 So. 2d 243, 248–49 (Fla. 1944) (defendant's publication of personal details about plaintiff's life gave rise to claim for invasion of "right to be let alone" and free from "public gaze" (citing Warren & Brandeis)); *cf. also Henry v. Cherry & Webb*, 73 A. 97, 100 (R.I. 1909) (declining to recognize right to be let alone but defining it as a right "to live a life of seclusion").

damages suit against a newspaper for publicizing a plaintiff's photograph without permission. *Pavesich*, 50 S.E. at 71, 79–81. But much like Warren's and Brandeis's conception of the privacy right, the "*Pavesich* image of privacy was concerned with the right of an individual to keep personal matters away from public scrutiny and had little to do with the right of individual autonomy from government control." 37 Rutgers L.J. at 988. To the *Pavesich* Court, the "right to be let alone" principally empowered citizens to decide whether "to live a life of seclusion" or "a life of publicity." 50 S.E. at 70. This Court's decisions following *Pavesich* also mirrored that understanding, applying the Due Process Clause's privacy protections to information- and seclusion-based injuries. *See, e.g.*, *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194, 196 (1930) (involving a private damages suit for publication of likeness); *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819, 822–23 (1931) (involving a private injunction suit for use of surname as a trade name).

More recently, this Court has extended the right to be let alone to protect certain decisions from governmental—rather than private—interference, like refusing medical treatment, *see Zant v. Prevatte*, 248 Ga. 832, 833 (1982), or engaging in same-sex relations, *see Powell*, 270 Ga. at 332–33. But that "leap of logic" is more than "questionable." 37 Rutgers L.J. at 988, 993–94. *Pavesich*'s language and subject matter focused "solely [on] the capacity of an individual

to keep personal matters private," and "[i]t is quite a leap from that sort of privacy to the kind of privacy directed to personal autonomy." *Id.* at 994; *see Dobbs*, 597 U.S. at 273 (criticizing cases that "conflated" informational privacy and decisional autonomy because those concepts are "very different"); s*ee also Planned Parenthood*, 384 So. 3d at 81–82 (discussing the difference between information privacy and decisional autonomy, and noting that "it would require an analytical leap to say that the public would have instinctively associated 'the right to be let alone and free from governmental interference into one's private life' with abortion").

Worse yet, this Court's justification for that leap was "exceedingly weak." *Dobbs*, 597 U.S. at 278. Its opinions engaged with none of the historical and contextual points raised above; they simply *declared* that Georgia's privacy right protects decision-making from governmental interference, *see Zant*, 248 Ga. at 833, and then cited those declarations as precedent in future cases, *see Powell*, 270 Ga. at 331–32. The Court should not defer to unreasoned judicial policymaking and instead should return the privacy right to its original understanding. *See Cook v. State*, 313 Ga. 471, 486 (2022) ("[T]he soundness of the reasoning of the relevant precedent is the most important factor in the stare decisis analysis."); *see also Planned Parenthood*, 384 So. 3d at 76 n.10 (disregarding recent Florida cases applying the privacy right to abortion because

they "did not provide additional doctrinal justifications" and merely rested on earlier ill-reasoned precedent).

All told, decisional autonomy "is not at all what most people mean by privacy," which instead concerns "my freedom from official intrusion into my home, my person, my papers, my telephone." *Planned Parenthood*, 384 So. 3d at 82 (quoting Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1424 (1974)). And that original conception of privacy has no "possible relevance to the abortion issue." *Dobbs*, 597 U.S. at 273. "A transaction resulting in an [abortion] operation," after all, is "not 'private' in the ordinary usage of that word." *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting). The procedure typically occurs in front of a "retinue" of medical professionals, making it "the antithesis of privacy." 29 Harv. J.L. & Pub. Pol'y at 1038, 1057 (quoting Judge Henry Friendly's draft opinion in *Hall v. Lefkowitz*). And Georgia's restrictions on abortion operate against medical professionals licensed by the State. *See* O.C.G.A. § 16-12-140(a). The Court should thus reject Plaintiffs' efforts to shoehorn abortion within Georgia's general privacy right.

B. Even if Georgia's privacy right extends to decisional autonomy, it does not cover acts that harm others, like abortion.

Whatever Georgia's right of privacy protects, the public still would not have understood it to safeguard *abortion*. Abortion is "critically different from

any other" putative decisional right because it "destroys" what even proponents of abortion call "potential life." *Dobbs*, 597 U.S. at 231, 256. Yet that unavoidable truth runs headlong into a core tenet of privacy jurisprudence: The general right to privacy does not shield acts that harm others. *See Pavesich*, 50 S.E. at 70.

History buttresses that rule. Though most famously introduced by Warren and Brandeis, the right to be let alone first derived from the philosophy of John Stuart Mill. *See* 37 Rutgers L.J. at 992; *e.g.*, *State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969) (drawing from Mill in defining Florida's "right to be let alone"). Mill championed a broad view of personal "liberty," arguing that governments generally may not regulate people, even if for their "own good." John S. Mill, *On Liberty* 21–22 (London, Longman, Green 3d ed. 1864). But Mill's libertarian view of governance had a critical exception: State "power [could] be rightfully exercised over any member of a civilized community . . . to prevent harm to others." *Id.* at 22. To Mill, thwarting harm was the very "purpose" of government. *Id.* So in his view, a person's "liberty" to be let alone could not preclude the government from regulating "conduct" that "produce[d] evil to some one else." *Id.*

That "harm principle" has long defined the otherwise murky boundaries of the general right to privacy. *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232,

1240 (11th Cir. 2004). Soon after Mill published *On Liberty*, Judge Cooley asserted in his treatise that "individuals possessed a right to be let alone . . . so long as they were not injuring another nor attempting to injure another." John Stemberger & Jacob Phillips, *Watergate, Wiretapping, and Wire Transfers: The True Origin of Florida's Privacy Right*, 53 Cumb. L. Rev. 1, 31 (2022) (cleaned up). Warren and Brandeis incorporated that qualification in their proposed right, applying it only when one "employ[s] himself in private in a manner very harmless" and "innocent." 4 Harv. L. Rev. at 202 n.1; *id.* at 201 n.1 (note: article contains multiple footnote 1s). This Court followed that course in the earliest explicit adoption of the privacy right, holding that "[a]n individual has a right to enjoy life . . . provided that in such enjoyment he does not invade the rights of his neighbor." *Pavesich*, 50 S.E. at 70; *see also Powell*, 270 Ga. at 329–30. Other courts, too, have followed this Court in holding that the general right to privacy does not license harm to others.[8]

Abortion does just that. It "is fraught with consequences for others." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality op.). Most of all, it harms the "life or potential life that is aborted," *id.*, much

[8] *See, e.g.*, *Planned Parenthood*, 384 So. 3d at 81; *State v. Duchow*, 749 N.W.2d 913, 924 (Wis. 2008); *People v. Scott*, 593 N.E.2d 1328, 1337 (N.Y. 1992); *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 793 (Cal. Ct. App. 1981); *Harris v. State*, 457 P.2d 638, 644, 647 (Alaska 1969).

like when "a gun . . . discharge[s] into another person's body," *id.* at 952 (Rehnquist, C.J., dissenting) (cleaned up); *see Dobbs*, 597 U.S. at 231, 256; *see also* Opening Br. 26 (explaining that Georgia law recognizes that a child is "*in being*, from the time of its conception"). One simply "cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus." *Casey*, 505 U.S. at 951–52 (Rehnquist, C.J., dissenting).

Nor is unborn life the only casualty. Abortion also harms the woman who must both endure the risks of the procedure and "live with the implications of her decision," *Casey*, 505 U.S. at 852 (plurality op.); the ethical repute of "the persons who perform and assist in the procedure," *id.*; and "the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life," *id.* Indeed, even *Roe* acknowledged that abortion unavoidably harms. 410 U.S. at 154 ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.").

The harm principle therefore provides a straightforward and narrow rationale to uphold Georgia's law. Even in its most capacious form, the right to be let alone allows one "to live as one will, so long as that will does not interfere

with the rights of another or of the public." *Powell*, 270 Ga. at 329 (quoting *Pavesich*, 50 S.E. at 70). Because abortion does exactly that, it falls beyond Georgia's privacy right.

C. Constitutional silence on abortion respects both the democratic process and the limits of judicial review.

There is a final reason to reject the view that Georgia's privacy right extends to abortion: A general right of privacy offers no workable standards for courts to resolve the hard questions that abortion raises, and judicial efforts to fit abortion into privacy would undermine the will of the voters. *See Commonwealth Inv. Co. v. Frye*, 219 Ga. 498, 499 (1963).

Regulating abortion calls for drawing difficult lines. Legislators must consider a host of factors, like protecting unborn life, safeguarding women's health, preventing fetal pain, and respecting personal autonomy. Balancing those factors, they must decide which abortion procedures to allow and which to prohibit, whether to require waiting periods before an abortion (and how long those periods should be), and what standards govern those involved in providing abortions. Those matters raise a panoply of factual issues, a host of hard judgments, and a complex balancing of competing interests.

"Courts are ill-equipped to make such fundamental[] legislative and administrative policy decisions[.]" *Woodruff v. Ga. State Univ.*, 251 Ga. 232, 233 (1983) (citation omitted). The judiciary lacks the electoral mandate, factfinding

capabilities, ability to adjust course, and democratic legitimacy that legislative bodies possess. *See June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 348–49 (2020) (Roberts, C.J., concurring in judgment). Even more, "[t]here is no plausible sense in which [a court] could objectively assign weight to [the] imponderable values" that abortion implicates, "and no meaningful way to compare them if there were." *Id.* at 348. Efforts to fit abortion within any judicial test "result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" *Id.* at 349 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)).

The messy state of the law after *Roe* proves the point. *Roe*'s "most important rule" was "that States cannot protect fetal life prior to 'viability.'" *Dobbs*, 597 U.S. at 270. Yet nothing in a general right of privacy—or even in the notion of "liberty"—provides a basis for drawing a line at viability, or at any other point in pregnancy. Nor was the viability conundrum the only problem. In the world of *Roe*, courts divided over "the legality of parental notification rules," the propriety of "bans on certain [abortion] procedures," "when an increase in the time needed to reach a clinic" violated the right to abortion, "whether a State may regulate abortions performed because of the fetus's race,

sex, or disability," and more. *Dobbs*, 597 U.S. at 284–85. As those disagreements show, courts cannot resolve the hard questions that abortion raises with nothing "outside themselves to guide their decision." *June Med. Servs.*, 591 U.S. at 426 (Gorsuch, J., dissenting).

By contrast, the Legislature has "the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018). "[T]heir superior fact-finding capabilities" make legislators "better able to make the necessary judgments" on evolving medical practices "than [the] [c]ourts." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting); *see Gonzales v. Carhart*, 550 U.S. 124, 162 (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."). That is why *Dobbs* recognized that only "the people and their elected representatives" can untangle the Gordian knot that abortion presents. 597 U.S. at 292; *see Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 865 (1986) ("The ordering of competing social policies is a quintessentially legislative function."); *Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw. Alaska, Ind. Ky., Inc.*, 211 N.E.3d 957,

980 (Ind. 2023) (only a "legislative body with representatives . . . constantly answerable to their constituents" can "balance[] the irreconcilable interests").

Here, Georgia's people and elected representatives determined that banning abortion after development of a detectable heartbeat was the best course for their State. "[P]olicy decisions such as those [are best] left to the Legislative Branch." *Cook*, 313 Ga. at 498 n.19. This Court should not unwind the people's choice by "amend[ing]" Georgia's constitutional right of privacy to enshrine a right to abortion. *State v. SisterSong Women of Color Reprod. Justice Collective*, 317 Ga. 528, 534–35 (2023).

II. Georgia's Equal Protection Clause Does Not Require the State to Treat Distinct Conditions Identically.

If this Court holds there is no right to abortion, it follows that Georgia may regulate abortion to protect prenatal life and maternal health—just as it regulates other types of medical interventions. *See Taylor v. Devereux Found.*, 316 Ga. 44, 83 (2023) ("If neither a suspect class nor a fundamental right is implicated [by a regulation], the most lenient level of judicial review—rational basis—applies." (citation omitted)). The trial court conceded that Georgia has a rational basis for the LIFE Act's general prohibition on abortion after detection of a fetal heartbeat. Order 18 n.25. It also did not dispute that Georgia has a rational basis for making an exception for "medical emergencies." O.C.G.A. § 16-12-141(b)(1). But the trial court faulted Georgia policymakers

for "*exclud[ing]* from the definition of medical emergency . . . 'mental or emotional' conditions," and declared 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." Order 18–19.

The trial court could not be more wrong. As state laws across the country reflect, there are rational reasons to permit abortion for medical emergencies but not emotional or mental conditions. *See, e.g.*, Ind. Code § 16-34-2-0.5; Ky. Rev. Stats. § 311.772(4)(a); La. Rev. Stats. § 40:1061.F.; Utah Code § 76-7-302(2)(b)(i)(A)–(B). Regrettably, medical emergencies sometimes arise that may require ending a pregnancy. But abortion is not a "treatment" for *any* psychiatric diagnosis. What evidence there is demonstrates that abortion is associated with *worse* mental-health outcomes. More broadly, it is common for the law to distinguish between conditions that threaten bodily harm and those that may contribute to mental distress. Applied consistently, the trial court's reasoning would mean that a host of laws cannot survive the least searching scrutiny.

A. The trial court misapprehended rational-basis review.

In evaluating the LIFE Act, the trial court stumbled out of the gate. On rational-basis review, a court is only supposed to ask "if, under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship

to a legitimate end of government." *Harper*, 292 Ga. at 560–61. That is a forgiving standard. Rational-basis review classifications may be "overinclusive or underinclusive." *State v. Holland*, 308 Ga. 412, 415 n.7 (2020) (citation omitted). So the mere fact that the trial court thought the rationale behind the exception for medical emergencies might justify abortion for other conditions does not render the LIFE Act invalid. *See Bunn v. State*, 291 Ga. 183, 191 (2012) ("[T]he legislature may address a problem one step at a time, or even select one phase of one field and apply a remedy there, neglecting the others, without violating equal protection" (cleaned up)).

Under rational-basis review, moreover, "not every provision in a law must share a single objective." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109 (2003). So even if the trial court were correct to delve into the rationale behind the Legislature's exception for emergencies, the Legislature need only have *some* plausible basis for making different rules for situations posing emergent threats to physical health and for those that supposedly affect mental or emotional wellbeing. Simply to state that proposition is to prove it. No doctor would say that a patient suffering from depression and one suffering from sepsis have identical conditions. Each faces a distinct condition that requires a particular treatment. The law does not require Georgia to pretend that

all conditions women may face during pregnancy are the same. The trial court erred in presuming otherwise.

B. The scientific evidence shows that abortion is not a "treatment" for any mental conditions.

Making matters worse, the trial court did not attempt to justify its bald pronouncement that there is "no basis—rational, compelling, or sensical—to distinguish between diagnosed medical emergencies" involving physical health and those that (allegedly) impact mental or emotional stability. Order 18–19. It merely assumed that these conditions are identical in every respect and that abortion treats both. Order 19. But abortion is simply not a treatment for mental-health conditions, as even abortion advocates have been forced to admit. In fact, the evidence suggests that abortion threatens mental health.

Consider a recent ruling from Indiana. After a three-day trial, the trial court sustained a medical-emergency exception similar to Georgia's (despite holding Indiana's law unconstitutional at an earlier stage of the case). The court observed that Planned Parenthood's own experts could not identify a "single mental health concern that must be treated with abortion." Order Denying Motion for Permanent Injunction at 40, *Planned Parenthood Great Nw. Haw., Alaska, Ind., Ky., Inc. v. Members of the Med. Licensing Bd. of Ind.*, No. 53C06-2208-PL-001756 (Ind. Cir. Ct. Sept. 11, 2024) ("*Planned Parenthood* Order"). In fact, Planned Parenthood's "own expert testified that the treatment

for acute mental health concerns (like suicidal ideation) is 'acute psychiatric treatment,' not abortion." *Id.* The expert, the court observed, "never proactively recommends abortion as a treatment for mental health issues," and "can't be sure that a person's mental health situation would have been different if she had had an abortion." *Id.* (cleaned up).[9]

In finding that abortion does not treat mental-health concerns, the trial court did not break any new ground. In the Indiana trial, Planned Parenthood's expert admitted that she could not cite a single "academic, scholarly authority" for the proposition that an abortion mitigates mental-health conditions. Tr. of Evidence Volume 3 at 43:17–20, *Planned Parenthood Great Nw. Haw., Alaska, Ind., Ky., Inc. v. Individual Members of the Med. Licensing Bd. of Ind.*, Appellate No. 24A-PL-02467 (Ind. Cir. Ct. Dec. 5, 2024). As the trial court put it, the "current scientific consensus is that abortion is not a direct treatment for mental health conditions." *Planned Parenthood* Order at 29.

And in a recent challenge by the United States to an Idaho law regulating abortion, the United States conceded that abortion "is not the accepted

[9] The trial court also rejected arguments that Indiana's medical-emergency provision was unconstitutionally vague, observing that state abortion regulations have used similar language since 1993 and that physicians have proven themselves able to understand and apply the language. *See Planned Parenthood* Order at 43–44.

standard of practice to treat any mental health emergency." Tr. of Oral Argument at 79:2–5, *Moyle v. United States*, 603 U.S. ___, 144 S. Ct. 2015 (2024) (No. 23-726); *see id.* at 78:8–11 ("when a woman comes in with some grave mental health emergency, if she happens to be pregnant, it would be incredibly unethical to terminate her pregnancy"). That's because abortion "wouldn't do anything to address the underlying brain chemistry issue that's causing the . . . mental health emergency." *Id.* at 78:1–5.

The consensus that abortion does not treat mental-health conditions is reason enough for Georgia lawmakers to exclude those conditions from the State's "medical emergency" exception. Yet it's not the only reason. Georgia lawmakers also could rationally decide abortion isn't the solution for mental-health crises because a wealth of scientific research suggests that abortion is associated with worse mental-health outcomes for some women. Take a 2011 meta-analysis that quantitatively synthesized twenty-two studies with over 800,000 combined participants from between 1995 and 2009 on abortion and subsequent mental-health outcomes. Priscilla K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995–2009*, 199 Brit. J. of Psychiatry 180, 180 (2011), https://tinyurl.com/sja3daum. That analysis reported that "[w]omen who had undergone an abortion experienced an 81% increased risk of mental health problems." *Id.* "[A]bortion," the

analysis observed, "is associated with significantly higher risks of mental health problems compared with carrying a pregnancy to term." *Id.* at 183–84.

The 2011 Coleman analysis does not stand alone. In 2013, another group of authors set out to disprove the Coleman analysis and hypothesized that "abortion *reduces* rates of mental health problems in women having unwanted or unintended pregnancy." David M. Fergusson et al., *Does Abortion reduce the mental health risks of unwanted or unintended pregnancy? A reappraisal of the evidence*, 47 Australian & N.Z. J. of Psychiatry 819, 819 (2013) (emphasis added). Yet after looking at the literature, the authors were forced to conclude that "[t]here is *no* available evidence to suggest the abortion has therapeutic effects in reducing the mental health risks of unwanted or unintended pregnancy." *Id.* (emphasis added). In fact, they reported, "[t]here is suggestive evidence that abortion may be associated with small to moderate increases in risks of some mental health problems." *Id.*

Other studies offer a grimmer perspective: a Finnish review of nationwide health records revealed that "[t]he suicide rate after an abortion was three times the general suicide rate and six times that associated with birth." Mike Gissler et al., *Suicides after Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 BMJ 1431, 1433 (1996), https://tinyurl.com/mykpuxsa. The study's authors concluded that the "data clearly show[s] that women who have

experienced an abortion have an increased risk of suicide, which should be taken into account in the prevention of such deaths." *Id.* at 1434. And in 2016, a study examined several thousand American women to "determine the extent of increased risk, if any, associated with exposure to induced abortion." Donald Paul Sullins, *Abortion, Substance Abuse and Mental Health in Early Adulthood: Thirteen-Year Longitudinal Evidence from the United States*, 4 SAGE Open Med. 1, 1 (2016), https://tinyurl.com/4fkd7y2u. It "confirm[ed] previous findings from Norway and New Zealand that, unlike other pregnancy outcomes, abortion is consistently associated with a moderate increase of mental health disorders." *Id.* And it reported that, the more abortions a woman undergoes, the worse her mental health. *See id.* at 8. This "reinforc[es] the view that distress is associated with the abortions themselves, and not merely with accompanying conditions that may also be associated with the propensity to have an abortion." *Id.* at 8–9.

Although some may quibble with one study or another, there is no doubt that the Georgia Legislature at least had a "conceivable basis" for crafting the medical-emergency exception as it did. *See Taylor*, 316 Ga. at 83–85 (citation omitted). It had ample basis for concluding that abortion does not treat any mental or emotional problem and thus that there is no basis for classifying abortion as an emergency treatment for such problems. As even advocates for

abortion have conceded, a woman confronting a severe mental-health condition needs "'acute psychiatric treatment,' not abortion." *Planned Parenthood* Order at 40 (quoting Planned Parenthood expert). Recommending abortion instead would be "incredibly unethical." Tr. of Oral Argument at 78:10, *Moyle v. United States*, 144 S. Ct. 2015 (2024) (No. 23-726).

C. The LIFE Act makes a common distinction.

Carried to its logical conclusion, the trial court's refusal to acknowledge any difference between physical and mental health would be devastating not just to the LIFE Act, but to other time-honored laws that make similar distinctions. The ubiquity of both civil and criminal laws making the distinction that the trial court rejected underscores how far the court strayed.

Torts is one area in which the law regularly sees a difference between threats to physical health and mental wellbeing. For example, tort law provides separate causes of action for persons suffering physical injuries and those claiming only mental or emotional distress. *Compare* Restatement (Second) of Torts § 13 (Am. L. Inst. 1965) (battery: a harmful or offensive *contact* with another) *with id.* § 46 (outrageous conduct causing severe *emotional distress*). These two actions have different elements that must be proven and each provides recovery for a distinct kind of harm. The differences do not stop there;

tort law privileges the use of physical force "to defend [one]self against unprivileged harmful or offensive contact or other bodily harm." *Id.* § 63(1). Similarly, a person may use deadly physical force in response to "conduct threaten[ing] him with death or serious bodily harm or ravishment." *Id.* § 65 cmt. c. But it denies the privilege to use force in self-defense to someone who claims to be suffering severe emotional distress. *See id.* §§ 63–65. That's because responding to emotional or mental disturbance with physical violence is not "proportionate to the danger threatened." *See id.* § 63 cmt. j.

Criminal law reflects the same principle. It permits "threatening or using force against another when" it "is necessary [for an individual] to defend himself or herself . . . against such other's imminent use of unlawful force." O.C.G.A. § 16-3-21(a). But someone merely claiming to feel anxious cannot use force. Cases involving deadly force drive the point home. A person may use deadly force in self-defense if he "reasonably believes that such force is necessary to prevent death or great bodily injury." *Id.* As courts have recognized, however, "mental anguish" is not equivalent to "'great bodily harm'; therefore, its alleged infliction does not justify killing the inflictor." *Chancellor v. State*, 165 Ga. App. 365, 366 (1983); *cf. York v. State*, 226 Ga. 281, 281 (1970) ("Provocation by threats will in no case be sufficient to free the person killing from

the crime of murder . . . when the killing is done solely for the purpose of resenting the provocation . . . ." (citations omitted)). Verbal abuse, however severe its impact on the recipient's emotional or mental state, cannot privilege a homicide. *See Nguyen v. State*, 234 Ga. App. 185, 186 (1998).

Other examples of the law distinguishing between mental and physical states abound. For example, the Americans with Disabilities Act authorizes different long-term disability benefits for mental and physical disabilities—something that accords with a "historic and nearly universal" insurance practice. *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 148–49 (2d Cir. 2000) (collecting cases); *see E.E.O.C. v. CAN Ins.*, 96 F.3d 1039, 1044 (7th Cir. 1996) (noting that Congress rejected an amendment that "would have required parity of coverage for mental and physical conditions"). Part of the reason for treating those conditions differently is that there is a greater risk of someone being inaccurately diagnosed with a mental condition compared to a physical one because mental diagnoses require "professional judgment rather than formulaic assessments." Sheldon Danziger et al., *Mental Illness, Work, and Income Support Programs*, 166 Am. J. Psychiatry 398, 400 (2009), https://tinyurl.com/4wc6ary4.

As these examples illustrate, the Legislature that enacted the LIFE Act was not the first to recognize that physical and mental conditions present

unique policy considerations. Yet if the trial court is to be believed, any law that does not treat mental and physical conditions as identical cannot pass even the lowest level of scrutiny. The Court should uphold the LIFE Act's recognition that, while abortion may sometimes be warranted for true medical emergencies that pose grave risks to physical wellbeing, abortion is not an appropriate medical response to mental and emotional distress.

CONCLUSION

The trial court's order should be reversed.

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

Respectfully submitted,

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